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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

Timothy Scott, Patricia Gilchrist, Karen Fisher, Helen Maldonado-Valtierra, John Griffin, Kenneth Rhodes, Judy Dougherty, John Kelly, Richard Walshon, Dan Koval, Jennifer Fryer, and Vince Carabba, on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

AT&T Inc., AT&T Services, Inc. and the AT&T Pension Benefit Plan,

Defendants.

Case No. 3:20-cv-07094-JD

PLAINTIFFS' SECOND SUPPLEMENTAL BRIEF IN SUPPORT OF CLASS CERTIFICATION PURSUANT TO ORDER DATED OCTOBER 25, 2024

Action Filed: October 12, 2020

Hon. James Donato

Plaintiffs respectfully submit this Second Supplemental Brief in support of their Motion for Class Certification (ECF 119), pursuant to the Court's recent Order instructing the parties to address "only the adequacy and typicality of the two newly substituted class representatives." ECF 216.

BACKGROUND

On March 28, 2024, the Court granted Plaintiffs' motion for leave to file a Third Amended Complaint adding two new class representatives, Jennifer Fryer and Vince Carabba. *See* ECF 195. These additional class representatives currently work for AT&T, have not yet retired, and were included to ensure adequate representation of the Pre-Retirement Subclass after the former representative of that subclass, Karen Fisher, retired. *See* ECF 161 at 1, 11-12.[1] In support of the motion to amend, Plaintiffs submitted declarations from Fryer and Carabba, *see* ECF 161-4 ("Fryer Decl."); ECF 161-5 ("Carabba Decl."), and explained why they are typical and adequate class representatives. *See* ECF 161 at 11-12. In response, Defendants almost entirely objected on procedural and standing grounds,[2] and did not contest the typicality or adequacy of the two new class representatives. *See* ECF 163. Defendants merely indicated that they would need discovery to ascertain whether the new class representatives were "subject to unique defenses, which would bear upon the typicality requirement of Rule 23." *Id.* at 10.

The discovery that Defendants have now undertaken has not revealed any "unique defenses" that would apply to Fryer or Carabba, and only serves to further confirm their typicality and adequacy. Accordingly, Plaintiffs respectfully request that the Court grant their motion for class certification, and appoint Fryer and Carabba as representatives of the Pre-Retirement Subclass and (together with the other named Plaintiffs) the broader Injunctive/Equitable Relief Class.

ARGUMENT

I. The Additional Class Representatives Assert Typical Claims

There is no dispute that Plaintiffs Fryer and Carabba fall within the relevant class definitions. Like other members of Injunctive/Equitable Relief Class and the Pre-Retirement Subclass, they are

[1] The Pre-Retirement Subclass, and a separate Retired Subclass, are part of a broader Injunctive/Equitable Relief Class (the "Class") that Plaintiffs have proposed. *See* ECF 179.

[2] Defendants' procedural arguments were implicitly rejected by the Court in granting the motion to amend, and their standing arguments have been extensively addressed by Plaintiffs in other briefing. *See* ECF 168 at 22-23; ECF 165 at 1-2; ECF 131 at 7-9.

participants in the AT&T Pension Plan and do not fall within one of the excluded component programs (the Mobility Program, Mobility Bargained Program, or DIRECTV Program). *See* ECF 179; *accord* Fryer Decl. ¶ 2; Carabba Decl. ¶ 2.[3] Like all members of the Pre-Retirement Subclass, they have "not commenced receiving benefits" at this time. *See* ECF 179; *accord* Fryer Decl. ¶ 4; Carabba Decl. ¶ 4. And their payments will be calculated pursuant to the tabular factors in the Plan once they elect a joint and survivor annuity ("JSA"). *See* ECF 179; ECF 194 at 1.

Defendants have previously objected that it is unclear whether Fryer and Carabba will actually elect a JSA when they retire. *See* ECF 163 at 12. However, the record demonstrates otherwise. Both Fryer and Carabba are married, and both testified that they intend to elect a JSA upon retirement so their spouse is ensured of receiving benefits in the event of their death. *See* Fryer Dep. (Bressman Decl. Ex. 1) at 10:6-11, 46:21-47:3 ("I specifically want to make sure that my husband is provided for if I were to pass before him"); *id.* at 65:2-15; Carabba Dep. (Bressman Decl. Ex. 2) at 8:19-9:6, 51:17-53:23 ("[I]f I were to pass away before her, I would like her to still have some stability and source of income coming in"). Thus, it is hardly "hypothetical and speculative" that they will elect a JSA. *See* ECF 175 at 14 (raising same argument with respect to Karen Fisher). Indeed, the fact that that Karen Fisher elected to receive a JSA after Defendants raised the same argument reaffirms that the class representatives mean what they say. *See* ECF 197 ¶ 30. Moreover, the JSA form of benefit is the *default* form of benefit, *i.e.*, benefits must be paid as a JSA for married retirees like Fryer and Carabba absent a contrary expressed intent. *See* 29 U.S.C. § 1055(a); *Urlaub v. CITGO Petroleum Corp.*, 2022 WL 523129, at *5 (N.D. Ill. Feb. 22, 2022) ("*Urlaub I*").

Regardless, the proposed class definition does not require the class representatives or absent class members to have already elected a JSA; it simply requires that they "would receive a Joint and Survivor Annuity … *upon electing* a Joint and Survivor Annuity." ECF 179 (emphasis added). Thus, the additional class representatives fall squarely within the Class and are typical of other Pre-Retirement Subclass members like themselves who have not yet made a final election. Specifically, they are forced to "choose between (1) more valuable types of pension benefits—e.g., SLAs and

[3] All non-excluded component programs in the Plan use fixed conversion factors. *See* ECF 194 at 1. Although some programs use slightly different factors, the underlying methodology is the same, and Plaintiffs' claims do not turn on individualized practices unique to any program. *See* ECF 119 at 11.

lump-sum payments—that might leave their spouses and children penniless were they to die, or (2) JSAs that were worth less." *Urlaub I*, 2022 WL 523129, at *5; *accord* ECF 161 at 11 ("[L]ike all Pre-Retirement Class members, under the AT&T Plan, Fryer and Carabba cannot choose to receive their pension benefits in the form of a JSA without having their SLA converted to a JSA using outdated and inaccurate fixed conversion factors.").[4] This is precisely the harm that led to the adoption of ERISA's actuarial equivalence requirement, and renders Fryer and Carabba not just typical, but archetypal, class representatives in this ERISA case.

The additional class representatives assert the identical claims with respect to JSA annuity conversions as the other class representatives and absent class members. *See* Fryer Decl. ¶ 3; Carabba Decl. ¶ 3. No substantive changes were made to the operative Third Amended Complaint when they were added to the pleadings. *See* ECF 161 at 1 ("substitution does not add or modify the factual allegations or legal claims"). Their deposition testimony also confirms that they understand the nature of those claims, which center on Defendants' use of outdated and inaccurate actuarial assumptions to calculate JSA benefits. *See* Fryer Dep. at 38:8-14 ("AT&T is using an outdated formula to calculate specifically joint annuities"); Carabba Dep. at 42:8-17 ("What made me decide to get involved was when I found out that the numbers being calculated for married people that are expecting to take, like, a JSA, were not in line with current numbers. So it feels like we're getting treated unfairly as far as, you know, what we're entitled to after we retire."); *id.* at 45:13-24 ("[T]he way AT&T is calculating the payment amounts for the JSA is based on outdated info from years and years ago where people -- couples weren't living as long."); *id.* at 62:8-20 (similar). Accordingly, their claims are "typical of the claims … of the class." Fed. R. Civ. P. 23(a)(3); *see also Kernan v. Metro. Life Ins. Co.*, 2023 WL 3620884, at *8 (S.D.N.Y. Mar. 17, 2023) (finding typicality established in similar actuarial equivalence case: "Typicality is satisfied because the claims arise from the same course of events: the calculation and presentation of the value of the options available to members of the Proposed Class, and whether those options complied with ERISA …").

[4] Fryer explicitly testified that this unfair and problematic choice is "impacting [her] decision" to retire. Fryer Dep. at 39:6-19.

Defendants speculate that the Plan's archaic conversion factors might perhaps ultimately benefit some members of the Pre-Retirement Subclass,[5] but such speculation does not render the claims of Fryer or Carabba atypical. As Plaintiffs' expert, Mr. Altman, has opined, the vast majority of Plan participants are disadvantaged by AT&T's outdated conversion factors, *see* ECF 168-2 at 18-19, and prior to electing benefits, there is no reason for any class member to believe that they will be the alleged unicorn that falls outside the herd. Indeed, because members of the Pre-Retirement Class will, by definition, retire in the future, the Plan's conversion factors will be especially outdated and prejudicial to them. The additional class representatives and members of the Pre-Retirement Subclass thus all have a shared interest in ensuring that ERISA's actuarial equivalence requirements are met.

Although Defendants had hoped to uncover "unique defenses" that might apply to the additional class representatives' claims, *see* ECF 163 at 10, their discovery efforts have been futile. Defendants have identified no such special defenses, and have asserted no new affirmative defenses in their Answer to the Third Amended Complaint. *Compare* ECF 198 (Answer to Third Amended Complaint) *with* ECF 125 (Answer to Second Amended Complaint). Indeed, the one affirmative defense that Defendants emphasized when opposing class certification – the statute of limitations (*see* ECF 121 at 23-25) – has no application to members of the Pre-Retirement Class, like Fryer and Carabba, who have not yet retired.[6] Accordingly, Defendants have no legitimate basis for disputing typicality.

II. The Additional Class Representatives Are Adequate

There similarly is no question that Fryer and Carabba are adequate to serve as class representatives. *See* ECF 161 at 12. The declarations that they submitted with the motion to amend demonstrate that: (1) they are familiar with the allegations in the Third Amended Complaint; (2) they understand their responsibilities as class representatives and have signed a form outlining those duties;

[5] This is not an issue for the Retired Subclass within the Class, as the Retired Subclass is explicitly defined to include only "Plan participants and their beneficiaries who are receiving a Joint and Survivor Annuity that is *less* than the value of their Single Life Annuity when converted to a Joint and Survivor Annuity using the interest rates and mortality tables set forth in 26 U.S.C. § 417(e) …" ECF 179 (emphasis added).

[6] Regardless, the statute of limitations is not a barrier to class certification for the reasons explained by Plaintiffs. *See* ECF 131 at 13-15 (citing numerous cases); *accord Urlaub v. CITGO Petroleum Corp.*, 2024 WL 2209538, at *2 (N.D. Ill. May 16, 2024) ("*Urlaub II*") (rejecting statute of limitations as a basis for opposing class certification in similar actuarial equivalence case).

(3) they are committed to prosecuting the litigation and are willing to undertake any responsibilities required of them as class representatives, including testifying at trial; and (4) they are committed to representing the interests of other class members as they would their own, and have no known conflicts of interest with other class members. Fryer Decl. & Carabba Decl. at ¶¶ 5-8 & Ex. 1.

The record of the additional class representatives' adequacy has only grown stronger since then. Among other things, they:

- participated in written discovery by responding to interrogatories and producing documents, *see* Fryer Dep. at 70:18-71:20, 74:22-75:7; Carabba Dep. at 88:22-89:10, 16:1-14;
- appeared for lengthy depositions lasting several hours, *see* Fryer Dep.; Carabba Dep.; and
- prepared with counsel in advance of their depositions, *see* Fryer Dep. at 12:17-13:21; Carabba Dep. at 11:25-13:11.

Moreover, "the deposition testimony by the [additional] named plaintiffs shows a perfectly adequate understanding of the case." *In re Facebook Biometric Info. Priv. Litig.*, 326 F.R.D. 535, 543 (N.D. Cal. 2018), *aff'd sub nom. Patel v. Facebook, Inc.*, 932 F.3d 1264 (9th Cir. 2019); *see supra* at 3. In all respects, they are not only adequate, but model, class representatives.

Although Defendants may attempt to manufacture conflicts between the additional class representatives and other class members, Plaintiffs refuted Defendants' manufactured conflicts in their prior briefing. *See* ECF 131 at 1-3. Nothing about these purported conflicts is unique to the additional class representatives, and such conflicts do not render them inadequate. Recent decisions in other ERISA "actuarial equivalence" cases confirm this. *See Kernan*, 2023 WL 3620884, at *8; *Urlaub II*, 2024 WL 2209538, at *5.[7]

CONCLUSION

The addition of the new class representatives further supports class certification here.

[7] *Kernan* was approved in *McAlister v. Metro. Life Ins. Co.*, 2023 WL 5769491, at *8-9 (S.D.N.Y. Sept. 7, 2023), and leave to appeal *Urlaub II* was denied by the Seventh Circuit. *See* Bressman Decl. Ex. 3. Although Defendants may point out that the *Urlaub* court excluded from the class definition "certain individuals whose JSA benefits were calculated using Tabular Factors," that is only because such tabular factors were *not* based on the same 1970s-era mortality assumptions as the formula applied to the bulk of the class. *See Urlaub II*, 2024 WL 2209538, at *3. Here, AT&T's conversion factors *do* incorporate antiquated mortality assumptions from the 1970s. *See* ECF 119 at 1, 4-5.

Respectfully submitted,

/s/ Kai Richter

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