UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE AOL TIME WARNER ERISA LITIGATION	)	Civil Action No. 02 CV 8853 (SWK)
THIS DOCUMENT RELATES TO: ALL ACTIONS	)	

CONSOLIDATED ERISA COMPLAINT

Plaintiffs Barbara Grant, Rita Roberts and Steven Winfield ("Plaintiffs"), on behalf of the AOL Time Warner Savings Plan (the "AOLTW Savings Plan"), the Time Warner Thrift Plan (the "AOLTW Thrift Plan") and the Time Warner Cable Savings Plan (the "TWC Savings Plan") (collectively the "Plans"), and on behalf of a class of similarly situated participants in the Plans ("Participants" or "Plan participants"), by their attorneys, allege the following for their Consolidated ERISA Complaint (the "Complaint"):

I. NATURE OF THE ACTION AND SUMMARY OF CLAIMS

1. Plaintiffs, Participants in one or more of the above-identified Plans, bring this action for Plan-wide relief on behalf of the Plans, and on behalf of a class of all Participants in the Plans for whose individual accounts the Plans held shares of the AOLTW Stock Fund (the "Stock Fund") from September 30, 2000 to the present (the "Class"). Plaintiffs bring this action on behalf of the Plans and the Class pursuant to §502 of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. §1132.

2. As more fully set forth below, Defendants breached their fiduciary duties to the Plans and the Participants, including those fiduciary duties set forth in ERISA § 404, 29 U.S.C. §1104, and Department of Labor Regulations, 29 C.F.R. § 2550. Defendants breached their fiduciary duties to the Plans and the Participants in three principal ways: (a) permitting the Plans to purchase and hold AOLTW stock when it was imprudent to do so, (b) failing to appoint and monitor proper Plan fiduciaries, (c) misrepresenting and failing to disclose material facts to the Plans and the Participants in connection with the management of Plan assets and (d) breaching their duty of loyalty. As a result of these wrongful acts, pursuant to ERISA § 409(a), 29 U.S.C. §1109(a), Defendants are personally liable to make good to the Plans the losses resulting from each such breach of fiduciary duty. Plaintiffs also seek equitable relief.

3. Plaintiffs allege these claims in four separate claims:

a. Claim 1 alleges that the Defendants breached their fiduciary duties by permitting the Plans to invest in the Stock Fund when the Stock Fund was an imprudent investment. In particular, Claim 1 alleges that it was imprudent for the Plans to invest in the Stock Fund during a period in which AOLTW lost its traditional online advertising revenue base. This advertising slowdown followed the widespread collapse of the "dot-com" internet bubble. About a third of AOLTW's internet revenues came from sales of online advertising. When the companies who purchased the lion's share of online advertising went out of business (or reined in spending), naturally AOLTW's online advertising sales dried up. As a result of the disappearance of the online advertising market, and the subsequent drop in AOLTW revenue, the value of AOLTW stock declined precipitously during the Class Period, falling from a high of $56.60 per share on May 21, 2001 to only $9.64 per share on July 25, 2002, and the value of

Fund shares declined by a corresponding amount. The Plans were particularly hard hit by this loss, because approximately 40% of the Plans' assets were invested in the AOLTW Stock Fund at year end 2000 and approximately 38% of the Plans' assets were invested in the AOLTW Stock Fund at year end 2001. Claim 1 also alleges that it was imprudent for the Plans to invest such a large percentage of Plan assets in the Stock Fund through and following Time Warner Inc. ("Time Warner")'s January 11, 2001 merger with America Online, Inc. ("America Online" or "AOL") (the "Merger").

b. Claim 2 alleges that Defendants breached their fiduciary duties by negligently making misrepresentations and failing to disclose material information necessary for Participants to make informed decisions concerning Plan assets and benefits. As detailed herein, Defendants negligently misrepresented and failed to disclose material information concerning (a) America Online's pre-Merger "roundtrip" transactions; (b) inflated reported advertising revenue through the use of "in kind" advertising; (c) the counting as revenue of AOLTW revenue which AOLTW's sales force actually earned for eBay, even though the eBay revenues were ultimately paid over to eBay and not retained by AOLTW; (d) an anticipated decline in AOL's future advertising revenue due to, among other things, customers' inabilities to fulfill their contractual obligations to AOL in light of the customers' overall financial health; (e) the negligent publication of materially inaccurate financial information from July 1, 2000 through June 30, 2002, which AOLTW recently admitted by restating its financial results for the eight quarterly periods from July 1, 2000 through June 30, 2002; (f) the risk and return characteristics of investment in the Stock Fund; and (g) direct representations to Participants concerning the financial prospects of the Stock Fund. Plaintiffs allege that these breaches caused an enormous reduction in the retirement benefits of Plan participants.

c. Claim 3 alleges that Defendants breached their fiduciary duties by failing to appoint fiduciaries with the knowledge and expertise necessary to manage Plan assets, by failing to monitor those fiduciaries properly, and by failing to provide sufficient information to Plan participants and for Plan fiduciaries to perform their duties.

d. Claim 4 alleges that officers and directors of AOLTW breached their duties of loyalty to the Plans and Participants by selling massive amounts of AOLTW stock while at the same time allowing the Plans to maintain their investments in the Fund.

II. JURISDICTION AND VENUE

4. Plaintiffs' claims arise under and pursuant to ERISA § 502, 29 USC § 1132.

5. This Court has jurisdiction over this action pursuant to ERISA § 502(e)(1), 29 U.S.C. § 1132(e)(1).

6. Venue is proper in this District pursuant to ERISA § 502(e)(2), 29 U.S.C. § 1132(e)(2), because this is the district where the Plans are administered, where the breaches took place and where one or more defendants reside or may be found.

III. THE PARTIES

A. Plaintiffs

7. Plaintiff Barbara A. Grant is a resident of the State of New York and was at all relevant times a Participant in one or more of the Plans within the meaning of ERISA § 3(7), 29 U.S.C. § 1002(7).

8. Plaintiff Rita Roberts is a resident of the State of New York and was at all relevant times a Participant in one or more of the Plans within the meaning of ERISA § 3(7), 29 U.S.C. § 1002(7).

9. Plaintiff Steven Winfield is a resident of the State of Florida and was at all relevant times a Participant in one or more of the Plans within the meaning of ERISA §3(7), 29 U.S.C. §1002(7).

B. Defendants

1. Corporate Defendants

10. Defendant AOL Time Warner is organized under the laws of Delaware and maintains its principal executive offices at 75 Rockefeller Plaza, New York, NY 10019. AOL Time Warner was formed in connection with the January 11, 2001 Merger between America Online and Time Warner. As a result of the Merger, America Online and Time Warner each became wholly owned subsidiaries of AOL Time Warner. According to its public filings, AOLTW is a fully integrated, Internet-powered media and communications company. At the time of the Merger, the Time Warner Thrift Plan and Time Warner Savings Plan became the AOL Time Warner Thrift Plan and AOL Time Warner Savings Plan, respectively. The Merger did not change the name of the Time Warner Cable Savings Plan. In the Merger, each outstanding share of Time Warner common stock was converted into 1.5 shares of AOLTW common stock.

11. Defendant Time Warner Entertainment Company, L.P. ("TWE") is the sponsor of the TWC Savings Plan.

2. Board of Director Defendants

12. Defendant Stephen M. Case ("Case") served as Chairman of the Board of Directors of AOLTW (the "Board") from the Merger until May 2003, and previously served as Chairman of the Board and Chief Executive Officer of America Online from 1995 until the Merger. On January 12, 2003, two years after the Merger, Case announced his resignation as Chairman of the Board of AOLTW, effective May 2003.

13. Defendant Gerald M. Levin ("Levin") served as the Chief Executive Officer of Time Warner before the Merger, and became the Chief Executive Officer of AOLTW after the Merger. In November 2001, ten months after the Merger, Levin unexpectedly retired from AOLTW.

14. Defendant Kenneth J. Novack ("Novack") has served as Vice Chairman of the Board since the Merger and previously served as Vice Chairman of America Online from May 1998 until the Merger.

15. Defendant Daniel F. Akerson ("Akerson") has served as a director of AOLTW since the Merger and previously served as a director of America Online from 1997 until the Merger.

16. Defendant James L. Barksdale ("Barksdale") has served as a director of AOLTW since the Merger and previously served as a director of America Online from 1999 until the Merger.

17. Defendant Frank J. Caufield ("Caufield") has served as a director of AOLTW since the Merger and previously served as a director of America Online from 1991 until the Merger.

18. Defendant Miles R. Gilburne ("Gilburne") has served as a director of AOLTW since the Merger and previously served as a director of America Online from 1999 until the Merger.

19. Defendant Robert W. Pittman ("Pittman") served as a director of AOLTW and as Co-Chief Operating Officer of the Company from the Merger until July 2002. Pittman previously served as President and Chief Operating Officer of America Online from February 1998 until the Merger.

20. Defendant Robert E. (Ted) Turner ("Turner") served as Vice Chairman of the Board from the Merger until January 2003, and previously served as Vice Chairman of Time Warner from 1996 until the Merger. On January 29, 2003, two years after the Merger, Turner announced his resignation as Vice Chairman of the Board of AOLTW, effective May 2003.

21. Defendant Richard D. Parsons ("Parsons") has served as a director of AOLTW since the Merger and as Chief Executive Officer of the Company since May 2002. Parsons previously served as President of Time Warner from February 1995 until the Merger, and as Co-Chief Operating Officer of AOLTW from the Merger until May 2002.

22. Defendant Stephen F. Bollenbach ("Bollenbach") has served as a director of AOLTW since the Merger and previously served as a director of Time Warner from 1997 until the Merger.

23. Defendant Carla A. Hills ("Hills") has served as a director of AOLTW since the Merger and previously served as a director of Time Warner from 1993 until the Merger.

24. Defendant Reuben Mark ("Mark") has served as a director of AOLTW since the Merger and previously served as a director of Time Warner from 1993 until the Merger.

25. Defendant Michael A. Miles ("Miles") has served as a director of AOLTW since the Merger and previously served as a director of Time Warner from 1995 until the Merger.

26. Defendant Franklin D. Raines ("Raines") has served as a director of AOLTW since the Merger and previously served as a director of America Online from 1998 until the Merger.

27. Defendant Francis T. Vincent, Jr. ("Vincent") has served as a director of AOLTW since the Merger and previously served as a director of Time Warner from 1993 until the Merger.

3. Senior Officer Defendants

28. Defendant J. Michael Kelly ("Kelly") served as Chief Financial Officer of America Online from June 1998 until the Merger and as Chief Financial Officer of AOLTW from the Merger until September 2002. Kelly also served on the Company's Investment Committee during the Class Period. Kelly signed a Form S-8 submission to the SEC on January 10, 2001 pursuant to which AOLTW provided AOLTW stock to the Plans.

29. Defendant Wayne H. Pace ("Pace") has served as Executive Vice President and Chief Financial Officer of AOLTW and a member of the Investment Committee since November 2001, and previously served as Vice Chairman, Chief Financial Officer and Chief Administration Officer of Turner Broadcasting System. Pace signed a Form S-8 submission to the SEC on January 29, 2003 pursuant to which AOLTW provided stock to the Plans.

30. Defendant Christopher P. Bogart ("Bogart") served as CEO of Time Warner Cable Ventures from January 2001 through 2002, and previously served as Executive Vice President, General Counsel, and Secretary of Time Warner. Bogart signed a Form S-8

submission to the SEC on January 29, 2003 pursuant to which AOLTW provided AOLTW stock to the Plans.

31. Defendant Richard J. Bressler ("Bressler") served as Executive Vice President and Chief Financial Officer of Time Warner before the Merger.

4. AOLTW Savings and Thrift Plan Administrative Committee Defendants

32. Defendant AOL Time Warner Savings Plan Administrative Committee is the Plan Administrator of that Plan. Its predecessor, the Time Warner Savings Plan Administrative Committee, was the Plan Administrator of that predecessor Plan prior to the Merger.

33. Defendant AOL Time Warner Thrift Plan Administrative Committee is the Plan Administrator of that Plan. Its predecessor, the Time Warner Thrift Plan Administrative Committee, was the Plan Administrator of that plan prior to the Merger.

34. Defendant Pascal Desroaches ("Desroaches") was a member of the Administrative Committees of the AOLTW Thrift Plan and AOLTW Savings Plan during the Class Period. DesRoaches signed a Form S-8 submission to the SEC on January 29, 2003 pursuant to which AOLTW provided stock to these Plans.

35. Defendant Peter R. Haje ("Haje") was a member of the Administrative Committees of the AOLTW Thrift Plan and AOLTW Savings Plan during the Class Period. Haje signed Form S-8 submissions to the SEC on May 25, 2000, January 10, 2001, and January 29, 2003 pursuant to which AOLTW provided AOLTW stock to these Plans.[1]

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[1]References herein to "AOLTW stock" refer to Time Warner stock when discussing time periods prior to January 11, 2001.

36. Defendant John A. LaBarca ("LaBarca") was a member of the Administrative Committees of the AOLTW Thrift Plan and AOLTW Savings Plan during the Class Period. LaBarca signed Form S-8 submissions to the SEC on May 25, 2000, January 10, 2001, and January 29, 2003 pursuant to which AOLTW provided AOLTW stock to these Plans, and also signed Forms 11-K on June 26, 2000 and June 27, 2001 as a member of these Plans' Administrative Committees.

37. Defendant Shelly D. Fischel ("Fischel") was a member of the Administrative Committees of the AOLTW Thrift Plan and AOLTW Savings Plan during the Class Period. Fischel signed a Form S-8 submission to the SEC on January 29, 2003 pursuant to which AOLTW provided AOLTW stock to these Plans, and also signed a Form 11-K on June 27, 2002 as a member of these Plans' Administrative Committees.

38. Defendant Derek Q. Johnson ("Johnson") was a member of the Administrative Committee of the AOLTW Thrift Plan and AOLTW Savings Plan during the Class Period. Johnson signed a Form S-8 submission to the SEC on January 10, 2001 pursuant to which AOLTW provided AOLTW stock to these Plans.

39. Defendant Carolyn K. McCandless ("McCandless") served as a Vice President of AOLTW and as a member of the Administrative Committee of the AOLTW Thrift Plan during the Class Period. McCandless signed a Form S-8 submission to the SEC on May 25, 1999 pursuant to which AOLTW provided AOLTW stock to this Plan, and she signed the Trust Agreement between Time Warner and Fidelity Management Trust Company on July 30, 1998.

40. Defendant R. Mackereth Ruckman ("Ruckman") was a member of the Administrative Committee of the AOLTW Thrift Plan, as well as a member of the Company's

Investment Committee, during the Class Period. Ruckman signed a Form S-8 submission to the SEC on May 25, 1999 pursuant to which AOLTW provided AOLTW stock to this Plan.

41. Defendant Andra D. Sanders ("Sanders") was a member of the Administrative Committee of the AOLTW Thrift Plan during the Class Period. Sanders signed a Form S-8 submission to the SEC on May 25, 1999 pursuant to which AOLTW provided AOLTW stock to this Plan.

42. Defendant Paul D. Williams ("Williams") was a member of the Administrative Committee of the AOLTW Thrift Plan during the Class Period. Williams signed a Form S-8 submission to the SEC on May 25, 1999 pursuant to which AOLTW provided AOLTW stock to this Plan.

5. TWC Savings Plan Administrative Committee Defendants

43. Defendant Time Warner Cable ("TWC") Savings Plan Administrative Committee is the Plan Administrator of that Plan. The members of this committee are appointed by the general partners of TWE.

44. Defendant Glenn A. Britt ("Britt") was a member of the Administrative Committee of the TWC Savings Plan during the Class Period. Britt signed Form S-8 submissions to the SEC on May 25, 1999, January 10, 2001, and January 29, 2003 pursuant to which AOLTW provided AOLTW stock to this Plan.

45. Defendant Charles W. Ellis ("Ellis") was a member of the Administrative Committee of the TWC Savings Plan during the Class Period. Ellis signed Form S-8 submissions to the SEC on May 25, 1999, January 10, 2001, and January 29, 2003 pursuant to which AOLTW provided AOLTW stock to this Plan.

46. Defendant Landel C. Hobbs ("Hobbs") served as Chief Financial Officer of TWC, and as a member of the Administrative Committee of the TWC Savings Plan during the Class Period. Hobbs signed a Form S-8 submission to the SEC on January 29, 2003 pursuant to which AOLTW provided AOLTW stock to this Plan, and also signed Form 11-K submissions to the SEC on May 17, 2002, and June 27, 2002.

47. Defendant Beth A. Wann ("Wann") was a member of the Administrative Committee of the TWC Savings Plan during the Class Period. Wann signed Form S-8 submissions to the SEC on May 25, 1999, January 10, 2001, and January 29, 2003 pursuant to which AOLTW provided AOLTW stock to this Plan.

48. Defendant Ann L. Burr ("Burr") was a member of the Administrative Committee of the TWC Savings Plan during the Class Period. Burr signed a Form S-8 submission to the SEC on January 10, 2001 pursuant to which AOLTW provided AOLTW stock to this Plan.

49. Defendant Tommy J. Harris ("Harris") served as Chief Financial Officer of TWC and as a member of the Administrative Committee of the TWC Savings Plan during the Class Period. Harris signed Form S-8 submissions to the SEC on May 25, 1999 and January 10, 2001 pursuant to which AOLTW provided AOLTW stock to this Plan, and also signed Form 11-K submissions to the SEC on June 26, 2000 and June 27, 2001.

50. Defendant Thomas M. Rutledge ("Rutledge") was a member of the Administrative Committee of the TWC Savings Plan during the Class Period. Rutledge signed Form S-8 submissions to the SEC on May 25, 1999 and January 10, 2001 pursuant to which AOLTW provided AOLTW stock to this Plan.

6. Investment Committee Defendants

51. Defendant AOLTW Investment Committee was responsible for investment of assets of the AOLTW Savings Plan, the AOLTW Thrift Plan, and the TWC Savings Plan.

52. Defendant Raymond G. Murphy ("Murphy") served as a member of the Investment Committee during the Class Period.

53. Defendant Joseph A. Ripp ("Ripp") served as a member of the Investment Committee during the Class Period.

54. Defendant Mark A. Wainger ("Wainger") served as a member of the Investment Committee during the Class Period.

55. Defendant Frederick C. Yeager ("Yeager") served as a member of the Investment Committee during the Class Period.

56. Defendants Kelly, Pace and Ruckman served as members of the Investment Committee during the Class Period.

7. Trustee Defendant

57. At all times relevant to this complaint, Defendant Fidelity Management Trust Company ("Fidelity") was a Massachusetts Trust Company with its principal place of business in Boston, Massachusetts, and served as the Trustee of the Plans.

IV. <u>CLASS ACTION ALLEGATIONS</u>

58. Plaintiffs bring this action in part as a class action pursuant to Rules 23(a) and (b)(1) and(3) of the Federal Rules of Civil Procedure on behalf of a class consisting of all Participants in the Plans for whose individual accounts the Plans held shares of the Fund from September 30, 2000 to the present. Excluded from the Class are Defendants herein, officers and

directors of AOLTW, members of their immediate families, and the heirs, successors or assigns of any of the foregoing.

59. The members of the Class are so numerous that joinder of all members is impracticable. While the exact number of Class members is unknown to Plaintiffs at this time and can only be ascertained through appropriate discovery, Plaintiffs believe there are, at a minimum, thousands of members of the Class. AOLTW's public statements represent that it had over 89,000 employees during the Class Period, and many or all of these employees were Participants in the Plans for whose account the Plans held shares of the Stock Fund.

60. Common questions of law and fact exist as to all members of the Class and predominate over any questions affecting solely individual members of the Class. Among the questions of law and fact common to the Class are:

a. whether Defendants were fiduciaries of the Plans and/or the Participants;

b. whether Defendants breached their fiduciary duties;

c. whether the Plans and the Participants were injured by such breaches; and

d. whether the Class is entitled to damages and/or injunctive relief.

61. Plaintiffs' claims are typical of the claims of the members of the Class, as Plaintiffs and members of the Class sustained injury arising out of Defendants' wrongful conduct in breaching their fiduciary duties and violating ERISA as complained of herein.

62. Plaintiffs will fairly and adequately protect the interests of the members of the Class. Plaintiffs have retained competent counsel. Plaintiffs have no interests antagonistic to or in conflict with those of the Class.

63. Prosecution of separate actions by members of the Class would create a risk of inconsistent adjudications with respect to individual members of the Class which would establish incompatible standards of conduct for Defendants, or adjudications with respect to individual members of the Class which would, as a practical matter, be dispositive of the interests of the other members not parties to the adjudications, or substantially impair or impede their ability to protect their interests.

64. A class action is superior to other available methods for the fair and efficient adjudication of the controversy since joinder of all members of the Class is impracticable. Furthermore, because the injury suffered by the individual Class members may be relatively small, the expense and burden of individual litigation makes it impracticable for the Class members individually to redress the wrongs done to them. There will be no difficulty in the management of this action as a class action.

V. DESCRIPTION OF THE PLANS

65. The Plans are employee benefit plans within the meaning of ERISA §§3(3) and 3(2)(A), 29 U.S.C. §§1002(3) and 1002(2)(A).

66. According to the "Retirement Planning Guide" provided to participants in the Plans:

> Your Plan gives you a way to save money and save on current income taxes at the same time. And by starting today and making regular contributions, your account balance can add up more quickly than you might imagine. ***The fact is, you can control your financial destiny, and your company Plan can show you the way.***

(AOLER 750, emphasis added.)[2]

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[2]Plan-related documents produced to Plaintiffs in this Consolidated ERISA Action bear the bates-prefix AOLER.

67. All assets of the Plans were held collectively in a Master Trust. As of the date of the Merger in January 2001, Plan investments in the Master Trust exceeded $4.5 billion.

68. Participants in the Plans are generally permitted to contribute up to 16% of their eligible pre-and post-tax earnings. Full-time AOLTW employees can begin contributing to the Plans after completing three months of employment.

69. The Plans provide participants with a number of different investment options, including the AOLTW Stock Fund, formerly known as the Stock Fund, which consists primarily of Company stock.

70. In the AOLTW Savings Plan, the Company matches Participants' contributions in an amount equal to two-thirds of the employee's contribution, up to 6% of the Participant's annual compensation.[3] In the AOLTW Thrift Plan, the Company matches Participant contributions in an amount equal to one-half of the employee's contribution, up to the first 6% of the Participant's annual compensation. In the TWC Savings Plan, the Company matches Participant contributions in an amount equal to two-thirds of the employee's contribution, up to 10% of the Participant's annual compensation.

71. All Company matching contributions are deposited in the Company Stock Fund. The Company explicitly encourages Plan participants to "maximiz[e] contributions" from the Company. For example, a December 2002 letter to participants in the AOLTW Savings Plan notes, "To receive the full Company match, you must contribute ***at least 6%*** of your eligible pay." (AOLER 847, emphasis in original). The December 2002 letter also explains the various "Steps To Maximizing Your Match," depending on the participant's salary and tax bracket.

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[3]Prior to January 1, 2003, Company contributions to the AOLTW Savings Plan were capped at $2000 per year (AOLER 842).

72. Company contributions resulted in Plan participants investing millions of dollars in Company stock during the Class Period. Unfortunately for Participants, the Plans restricted Participants from transferring money out of AOLTW stock as they watched the stock steadily decline during 2001 and 2002, eventually losing approximately 80% of its post-Merger value. Prior to April 1, 2002, Plan participants were generally not permitted to transfer Company contributions out of the Stock Fund until they reached the age of 50 and worked for the Company for at least 5 years. (*See, e.g.*, AOLER 1179)

73. On April 1, 2002 when AOLTW common stock was trading at approximately $23 in the midst of its rapid descent from its post-Merger high of $56.60 per share to its eventual low of $9.64 per share in July 2002, the Company changed this policy in a letter to Plan participants which stated:

> Effective immediately, you may transfer all or a portion of your account attributable to Company contributions currently held in the AOL Time Warner Inc. Stock Fund to any of the other investment options under the Plans without regard to age and service rules. This change applies to Company matching contributions....[4]
>
> * * *
>
> Future Company matching contributions to the Plans will continue to be invested automatically in the AOL Time Warner Inc. Stock Fund. However, if you choose to reallocate the investment of these contributions, you may do so at any time after they have been credited to your account....
>
> ... This change gives you greater flexibility in making investment decisions, a move that is being embraced by other companies as well. I encourage you to assess your investment mix on a regular basis to ensure that it is in line with your financial goals....

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[4]The April 1, 2002 letter allowed Plan participants to transfer "Company matching contributions as well as previously restricted Profit Sharing, TISIP and TESOP contributions," but continued to forbid the transfer of "account balances attributable to former PAYSOP or WCI ESOP plans" (AOLER 835).

(AOLER 835)

74. As of December 31, 1999, right before the Merger was announced, 57% of the Master Trust's investments – approximately $2.45 billion – were in the AOLTW Stock Fund. Between that date and June 27, 2003, AOLTW common stock has lost approximately three-quarters of its value.

75. The Company's Investment Committee monitored the performance of each of the Plans' investments, and had the ability to foreclose various investment options to Plan participants, depending on the prudence of such investments. For example, on October 3, 2002, Plan participants received a letter from the Company announcing the "Closing of the Fidelity Aggressive Growth Fund." The letter stated, in part:

> ***The AOL Time Warner Investment Committee periodically reviews the investment options available through the AOL Time Warner Savings Plan, the AOL Time Warner Thrift Plan and the TWC Savings Plan.*** As a result of a recent review, the Fidelity Aggressive Growth Fund, a mutual fund option under the Plans, will be eliminated as an available option for new contributions or transfers of existing balances as of October 15, 2002, and will be completely closed as of January 15, 2003.
>
> *Why the Change?*
> ***The Investment Committee based this decision on the poor performance of the Fidelity Aggressive Growth Fund.*** In addition, the Fidelity Aggressive Growth Fund has a higher expense ratio compared to the Aggressive Equity Growth Fund, a similar investment option that is a core fund and continues to be available under the Plans.
>
> (Emphasis added)

Over the past five years, according to published reports, the Fidelity Aggressive Growth Fund has underperformed its peers by 9%, which caused the Company's Investment Committee to close this fund to further investment by Plan participants.

76. The Investment Committee made a similar decision to foreclose investment in a poorly-performing fund on December 11, 2000, one month before the Merger, when it closed investment in the INVESCO Total Return Fund, explaining, "The Time Warner Investment Committee periodically reviews the available mutual fund options offered under the [Plans]." (AOLER 1185). This particular fund had underperformed its peers in 1999 and 2000 by 12% and 5%, respectively.

77. Notably, by comparison to AOLTW stock, the Fidelity Aggressive Growth Fund and INVESCO Total Return Fund had performed admirably. AOLTW's "Investment Options Guide" notes that the AOLTW Stock Fund's "Relevant Benchmark" is the Standard & Poor's 500 Index (the "S&P 500") (AOLER 708). Between June 2001 and June 2003, AOLTW common stock has ***underperformed the S&P 500 by approximately 50%.*** Perhaps not surprisingly, however, the Company has never advised Plan participants that investment in the AOLTW Stock Fund was an imprudent investment.

VI. DEFENDANTS WERE FIDUCIARIES

78. As more fully alleged below, at all times relevant to this Complaint, Defendants were fiduciaries of the Plans because they were so named and/or because they exercised discretionary authority or control respecting management of the Plans or management or disposition of Plan assets or had discretionary authority or responsibility in the administration of the Plans. ERISA §3(21)(A), 29 U.S.C. §1002(21)(A). In that regard, a person is a fiduciary even if a plan does not name him as such or by its terms assign fiduciary duties to him where by his conduct he engages in fiduciary activities. The test for whether a person is a fiduciary is functional and based on actual conduct. Those who have discretion over management of a plan or plan assets are fiduciaries regardless of the labels or duties assigned to them by the language of

a plan. Moreover, in order to fulfill the express remedial purpose of ERISA, the definition of "fiduciary" is to be construed broadly.

79. A fiduciary may not avoid his fiduciary responsibilities under ERISA by relying solely on the language of the plan documents. While the basic structure of a plan may be specified within limits by the plan sponsor, the fiduciary may not follow the plan document if to do so leads to an imprudent result and constitutes an abuse of discretion.

80. The Plans provide that the Committees and the Board and any person to whom the Committees delegate any power or duty are fiduciaries with the duties alleged above. Only if a fiduciary function is effectively delegated pursuant to ERISA § 405©), 29 U.S.C. § 1105©), may a named fiduciary limit the scope of its fiduciary responsibility. With respect to the fiduciary issues involved here, the Plan documents and other materials obtained by Plaintiffs to date do not indicate that any such delegation occurred, other than the delegation of certain functions to the Trustee.

81. AOLTW and TWE are the Sponsors of the Plans within the meaning of ERISA § 3(16)(B), 29 U.S.C.§ 1002(16)(B).

82. **Named Fiduciaries.** ERISA requires every plan to provide for one or more named fiduciaries, who will have "authority to control and manage the operation and administration of the plan." ERISA § 402(a)(1), 29 U.S.C. § 1102(a)(1). Instead of delegating fiduciary responsibility for the Plan to external service providers, as is permitted by ERISA, AOLTW chose instead to internalize the fiduciary function.

83. **Administrative Committee Defendants.** AOLTW and TWE designated the AOLTW Savings Plan Administrative Committee, AOLTW Thrift Plan Administrative Committee and the Time Warner Savings Plan Administrative Committee (collectively, the

"Committees") as fiduciaries of the Plans. The Committees were Administrator of the Plans within the meaning of ERISA §3 (16)(A), 29 U.S.C.§1002(16)(A) and 29 U.S.C. §1102(a) because they were so designated. They had all powers to administer unless vested elsewhere. Committee members served without compensation and at the pleasure of the AOLTW Board or TWE and, upon information and belief, were employees of AOLTW and TWE acting within the scope of their employments. The Plan documents also state:

> The Administrative Committee shall be the administrator of the Plan within the meaning of Section 3(16)(A) of ERISA and shall have all powers necessary to administer the Plan except to the extent that any such powers are vested in any other Fiduciary by the Plan or by the Administrative Committee.

84. Because of their positions as members of the Committees, the Committee Defendants (Defendants Desroaches, Haje, LaBarca, Fischel, Johnson, McCandless, Ruckman, Sanders, Williams, Britt, Ellis, Hobbs, Wann, Burr, Harris and Rutledge) are all fiduciaries of the Plans.

85. Unlike the other two Plans, the Administrative Committee of the TWC Savings Plan had the responsibility to establish the overall investment policy for the TWC Savings Plan according to the language of that Plan. It also had the responsibility to select investment options under that Plan along with, upon information and belief, the TWC Savings Plan Investment Committee. It also had the authority to appoint the Trustee and ensure that the Trustee had the knowledge, skill and expertise necessary to manage Plan assets. It also had the duty to provide to the Trustee information sufficient for it to be able to perform their duties.

86. **Investment Committee Defendants.** The Investment Committee had the responsibility to designate Investment Managers and recommend changes in the Trustee to the Board, and to take all prudent action necessary or desirable to carry out those duties. Along with

the Board, it had the responsibility to select and monitor investment options under the Plans. According to the Trust Agreement, the Investment Committee exercised its discretion to choose all of the investment options under the Plans, including the Fund. The Committee had the duty to investigate fully the investment options under the Plans, and to elicit from the other Defendants information necessary for the proper administration of the Plans sufficient to permit Participants to make proper investment decisions with respect to the investment options. The Investment Committee represented to Participants that it in fact periodically reviewed the investment options available under the Plans. The Investment Committee included senior AOLTW officers, including the Executive Vice President and Chief Financial Officer of AOLTW. Committee members, upon information and belief, were employees of AOL and TWE acting within the scopes of their employment. Because of their positions on the Investment Committee, Defendants Murphy, Ripp, Wainger, Yeager, Kelly, Pace and Ruckman are also Defendants.[5]

87. **Board Of Director Defendants.** The Board of Directors and its members had the responsibility to establish the overall investment policy for the Savings and Thrift Plans. Along with the Investment Committee, it also had the responsibility to select investment options under those Plans. It also had the authority to appoint the Committees and the Trustee and ensure that the Committees and the Trustee had the knowledge, skill and expertise necessary to manage Plan assets. In addition, as monitoring fiduciaries, the Board had an affirmative obligation to provide the Investment Committee Defendants with relevant information in their possession that they knew or should have known the members needed in order to manage the Plan and the Plan assets

[5] Though not identified in the TWC Plan, the Summary Plan Description for the TWC Plan identifies an Investment Committee.

prudently and loyally, including information pertaining to AOLTW's inappropriate and potentially unlawful practices.

88. **Trustee Defendant.** Fidelity was the Trustee for the Plans. According to the Plans, it had the power over investment of Plan assets as set forth in the Trust Agreement. According to the Trust Agreement, it was a fiduciary with respect to assets of the Plans invested in the Fund:

> Notwithstanding anything to the contrary, the Trustee shall be considered a fiduciary with respect to assets of the Participating Plans that are invested in ... the Time Warner Inc. Stock Fund.... With respect to the Time Warner Inc. Stock Fund and loans to Participants, the Trustee is directed to act in accordance with the terms of this Agreement and the Participating Plans.
>
> (AOLER 773)

89. As the Trustee, the scope of Fidelity's fiduciary responsibilities included those set out in the Trust Agreement. These duties are set out in the most general terms, and they include the duty to act solely in the interests of the participants and beneficiaries, the duty to act prudently, and the duty to diversify the Trust's assets. The Trust Agreement states:

> The Trustee shall discharge its duties with respect to the Trust solely in the interest of Participants in the applicable Participating Plan and their beneficiaries and for the exclusive purpose of providing benefits to Participants and their beneficiaries and defraying reasonable expenses of administering the applicable Participating Plan and with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims, and by diversifying the investment of each of the Fidelity Funds in accordance with the stated investment objectives (other than loans to Participants) so as to minimize the risk of large losses, unless under ERISA it is prudent not to do so.
>
> (AOLER 786)

90. The Trust Agreement also requires the Trustee to avoid acting in violation of "fiduciary duty rules," or in any way that "would be contrary to the terms of the applicable Participating Plan, this Agreement or other applicable law" (AOLER 775).

91. **De Facto Fiduciaries.** ERISA treats as a fiduciary not only persons explicitly named as fiduciaries under section 402(a)(1), but persons who in fact act as fiduciaries. ERISA makes a person (including a juridical person such as AOLTW) a fiduciary "to the extent . . . he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets . . . or . . . has any discretionary authority or discretionary responsibility in the administration of such plan." ERISA § 3(21)(A)(I), 29 U.S.C. § 1002(21)(A)(I).

92. **AOLTW controlled the other fiduciaries**. AOLTW acted as fiduciary because AOLTW itself controlled all of the fiduciary functions of the Plans, except for those effectively delegated to the Trustee. Several factors make this clear. All Defendants except the Trustee were in fact instrumentalities of AOLTW:

(a) The Administrative Committees, although named fiduciaries, were simply committees of AOLTW. The Committees were populated by AOLTW's own employees. These people acted solely in the ordinary course and scope of their employment or agency with AOLTW. They were compensated by AOLTW, not by the Plan. They acted for AOLTW just as any other employee or agent acts for AOLTW in carrying out his or her job. Ordinary principles of vicarious liability and *respondeat superior* impose on AOLTW responsibility for their actions. Not only were Committee appointees subject to removal at the pleasure of AOLTW and its CEO and/or directors, but because they were employees of AOLTW, their careers, financial livelihoods and reputations depended on their ongoing positive relationship with the Company. As a result, the appointees were influenced or controlled by the Company's tacit or explicit direction with respect to the management, investment or disposition of Plan assets.

(b) The Investment Committees were comprised exclusively of AOLTW employees, appointed and subject to removal by AOLTW's senior Financial and Human Resources officers. These people acted solely in the ordinary course and scope of their employment or agency with AOLTW. They acted for AOLTW just as any other employee or agent has acted for AOLTW in carrying out his or her job. They were compensated by AOLTW, not by the Plan. Ordinary principles of vicarious liability and *respondeat superior* impose on AOLTW responsibility for the actions of the Investment Committee Defendants. Not only were Investment Committee members subject to removal at the pleasure of AOLTW, but because they were AOLTW employees, their careers, financial livelihoods and reputations depended on their ongoing positive relationship with the Company. Moreover, they served at the pleasure of AOLTW and its Board of Directors. As a result, the Investment Committee members and their appointing officers were influenced or controlled by the Company's tacit or explicit direction with respect to the management, investment or disposition of Plan assets.

(c) The Board acted solely in the scope of its agency for AOLTW. Its members were compensated by AOLTW, not by the Plan. Ordinary principles of vicarious liability and *respondeat superior* impose on AOLTW responsibility for the actions of the Board.

93. AOLTW was in fact the ultimate decision maker with respect to *all* fiduciary functions other than those effectively delegated to the Trustee. *All* of the management and administration of the Plan was carried out by AOLTW's officers, employees, and agents in the ordinary course and scope of their employment. Although ERISA permits delegation to outside, independent fiduciaries, and although there are numerous persons and entities which serve as independent fiduciaries, AOLTW chose to exercise all the fiduciary functions, aside from those of the Trustee, itself.

94. AOLTW was thus responsible for *all* the fiduciary functions at issue here, including selection of investment options for the Plan, communications with participants, and the monitoring of other fiduciaries.

95. **Defendants made representations in a fiduciary capacity.** Fiduciaries of the Plans were required under ERISA to furnish certain information to Participants. For example, ERISA §101, 29 U.S.C. § 1021, requires that fiduciaries furnish a Summary Plan Description ("SPD") to Participants. ERISA §102, 29 U.S.C.§ 1022, provides that the SPD must apprise Participants of their rights under the Plan. The SPD for each Plan is materially identical. The SPD and all information contained or incorporated therein constitute a representation in a fiduciary capacity upon which Participants were entitled to rely in determining the identity and responsibilities of fiduciaries under the Plans and in making decisions concerning their benefits and investment and management of Plan assets allocated to their accounts. The SPD was comprised of a number of documents, including the SPD Booklet, the SPD Booklet Supplement and future supplements, and documents entitled "Updates," "Investment Options Guide," "Account Access Guide," and "Fund Performance Summary."

96. The SPD states that the Administrative Committee and Fidelity are fiduciaries for all purposes, and that the Investment Committee is a fiduciary with respect to the Plans' investment options. The SPD states that the fiduciaries have an obligation to manage the Plans prudently and in the best interests of the Participants and their beneficiaries. It also states that those fiduciaries who violate ERISA are liable for any losses they caused the Plans.

97. The SPD also serves as a prospectus for securities sold to the Plans pursuant to a Form S-8 Registration Statements (individually and collectively, "Form S-8" or "Registration Statement") pursuant to which AOLTW offered stock to the Plans and the Fund. According to the SEC's instructions for completing the Form S-8 Registration Statement, "The registrant [AOLTW] shall deliver or cause to be delivered to each participant material information regarding the plan and its operations that will enable participants to make an informed decision regarding investment in the plan," which further demonstrates that it was a representation in a fiduciary capacity. The Forms S-8 were signed by the Administrative Committee, the Board and the Senior Officers on behalf of AOLTW and the Plans. The Defendants were not required to sign the Registration Statement that was part of the SPD, but once they elected to do so, they made the representations in the SPD in a fiduciary capacity.

98. Many of Defendants' statements were incorporated by reference into the SPD and other communications, which were provided to all Plan participants and beneficiaries. The communications contained in SEC filings and annual reports were expressly incorporated by reference in the SPDs,[6] which, for example, state:

> The following documents that have been filed with the Securities Exchange Commission (the "Commission") by AOL Time Warner Inc. (File No. 1-

[6] The documents incorporated by reference are the same for each of the three Plans.

15062) pursuant to the Exchange Act and incorporated by reference in the Registration Statement related to the *Plan* are also hereby incorporated by reference in the Summary Plan Description Booklet and all other documents that constitute the prospectus describing the *Plan* (collectively, the "Prospectus"):

- AOL Time Warner's Annual Report on Form 10-K for the year ended December 31, 2001 (filing date: March 25, 2002), as amended by Form 10K/A dated March 26, 2002;

- AOL Time Warner's Current Report on Form 8-K dated January 11, 2001 (filing date: January 12, 2001), in which it is reported that the Common Stock of AOL Time Warner Inc. is deemed registered pursuant to Rule 12g-3©) under the Securities Exchange Act of 1934;

- [Plan] Annual Report on Form 11-K for the year ended December 31, 2000, filed as Exhibit 99.6 to AOL Time Warner Inc.'s Annual Report on Form 10-K for the year ended December 31, 2000, as amended by Form 10K/A dated June 25, 2001; and

- Information with respect to the Plan contained in any future supplement or appendix to this Prospectus.

99. Defendants exercised discretion in disseminating the SPD which incorporated by reference AOLTW's SEC filings to Participants which were intended to communicate to Participants information necessary for Participants to manage their retirement benefits under the Plans. The Committee was not required to cause the Plans to offer the Fund as an investment option or to disclose all SEC filings to Participants through their incorporation into Plan documents, but once it elected to do so, it made those disclosures in a fiduciary capacity.

100. During the Class Period, the Defendants signing the AOLTW'S SEC filings incorporated into the SPD did so with knowledge that the materials would be incorporated by reference in the SPD and, therefore, made those statements with the intent that they be transmitted to Plan participants.

101. For example, (I) Defendant Levin signed the Time Warner and AOL Time Warner Forms 10-K filed with the SEC on March 30, 2000, March 27, 2001, and March 25, 2002, and the registration statements, Forms S-4, filed with the SEC on February 11, 2000 and December 28, 2000; (ii) Defendant Case signed the AOL and AOL Time Warner Forms 10-K filed with the SEC on September 22, 2000, March 27, 2001, March 25, 2002, and March 28, 2003, and the quarterly financial statements, Forms 10-Q, filed with the SEC on February 14, 2000, May 15, 2000, and November 9, 2000; (iii) Defendant Kelly signed the AOL and AOL Time Warner Forms 10-K filed with the SEC on September 22, 2000 and March 27, 2001, and the quarterly financial statements, Forms 10-Q, filed with the SEC on February 14, 2000, May 15, 2000, November 9, 2000, May 15, 2001, and August 15, 2001, and the registration statements, Forms S-4, filed with the SEC on February 11, 2000 and December 28, 2000; and (iv) Defendant Pittman signed the AOL and AOL Time Warner Forms 10-K filed with the SEC on September 22, 2000 and March 25, 2002.

102. Upon information and belief, Defendants also regularly communicated with employees, including Plan participants, about AOLTW's corporate performance, future financial and business prospects, and the attractiveness of AOLTW stock, the second largest asset in the Plan. During the Class Period, the Company fostered a positive attitude toward AOLTW as a Plan investment. Management touted strong Company performance and stock benefits. Employees continually heard positive news about AOLTW's growth, were led to believe that AOLTW stock was a good investment, and that the Plan was prudently managed.

VII. FACTS DEMONSTRATING IMPRUDENCE OF INVESTMENT IN COMPANY STOCK DURING THE CLASS PERIOD

103. The Fund was an imprudent investment for the Plans. In that regard, Defendants should have known certain basic facts about the characteristics and behavior of Plan participants, well-recognized in the 401(k) literature and the trade press, concerning investment in Company stock, including that:

(a) Employees tend to interpret a match in company stock as an endorsement of the company and its stock;

(b) Out of loyalty, employees tend to invest in company stock;

(c) Employees tend to over-extrapolate from recent returns, expecting high returns to continue or increase going forward;

(d) Employees tend not to change their investment option allocations in the plan once made;

(e) No qualified retirement professional would advise rank and file employees to invest more than a modest amount of retirement savings in company stock, and many retirement professionals would advise employees to avoid investment in company stock entirely;

(f) Lower income employees tend to invest more heavily in company stock than more affluent workers, though they are at greater risk; and

(g) Even for risk-tolerant investors, the risks inherent to company stock are not commensurate with its rewards.

104. Even though Defendants should have known these facts, they did nothing to address these problems as further alleged herein.

A. Background and Overview of the AOLTW Merger

105. At the end of 1999, America Online was a high flying internet company whose stock was priced extremely high based on all historical measures. Less than a month before AOL posted its all-time stock price high of $94 per share and a market capitalization of $214 billion, AOL's primary asset was the apparent tremendous growth of its subscriber base and its perceived ability to leverage this growth into high margin online advertising revenues. On the strength of these perceived assets, AOL used its inflated shares to purchase Time Warner, a traditional media company with real media and entertainment assets and a long track record of financial success. The Merger was announced in January 2000, which began a year-long due diligence process by members of both companies' management teams. As a result of this due diligence, by the time that the Merger was completed in January 2001, Defendants should have known that AOL was a risky stock for retirement plan investments: AOL's subscriber base was shrinking, its advertising revenues were slowing, and, in sum, its purported assets were illusory. Defendants should have known that the "synergies" purportedly expected through the Merger were highly unlikely to be realized. When the truth about the Merger became known in mid-2002, AOLTW stock fell from its post-Merger high of $56.60 per share in early 2001 to $9.64 per share, and the value of Stock Fund shares similarly collapsed. Meanwhile, many Defendants cashed in their personal shares of AOLTW stock while the stock was still at artificially-elevated levels.

106. The Merger has been universally panned by the public and Defendants. *Time* magazine dubbed it "the worst deal of the century," and *Fortune* magazine has called it "one of the great train wrecks in corporate history." *The New York Times* wrote that former America Online Chairman Case "pulled off one of the sweetest deals in business history ... by managing to

acquire Time Warner with AOL's inflated shares." AOLTW's current Chairman and CEO, Richard Parsons, admitted that the Merger was "silly," and a "mistake." *The New York Times* reported that Parsons "has acknowledged that in retrospect, [defendant] Levin hurt Time Warner's shareholders by selling the company for temporarily inflated shares of AOL stock," because AOL's business was "the principal source of the collapse of our value," and he has lamented, "What were we thinking?"

B. The Business Of The Companies Before The Merger Announcement

107. Prior to the Merger, Time Warner was the world's largest media company, owning Time Magazine and a number of other prominent publications, Turner Broadcasting, including CNN, TBS and TNN, television, movie, book and music production and sales businesses, and a variety of other stable businesses. Time Warner was truly one of the flagship Blue Chip stocks in America. It was a core stock for a conservative, diversified retirement plan portfolio.

108. Prior to the Merger, America Online was the top internet service provider and one of the many stocks that rose to unprecedented heights during the internet bubble. AOL was largely dependent on advertising by dot.com companies for its survival. According to an equity analyst at Friend, Ivory & Sime, America Online correlated with Yahoo! in terms of its advertising revenue streams. Its stock was priced extremely high based on any historical measure of stock valuation. Consequently, it was not an appropriate investment for a high concentration of assets to be used to provide retirement savings as were the assets in the Plans.

109. As a consequence of these differences between AOL and Time Warner, the companies were viewed very differently by the investment community and had very different types of investors. For example, a February 2000 article in *Media Life* reported that "AOL's

shareholders are internet investors" who "don't care a whit for a company's bottom line" and "want rapid growth." Conversely, Time Warner shareholders "value their company in terms of cash flow." "Such conservative folks look aghast at a company like AOL which, while it has revenues, and even some earnings, is more like a cash sink than a cash cow." Defendants should have been aware of these differences in evaluating the prudence of investment of Plan assets in the Stock Fund and should have known that investment of a substantial amount of Plan assets in the Stock Fund at the time of and after the Merger was imprudent.

C. AOL Conduct Before The Merger Announcement

110. In the late 1990s, America Online began to focus on advertising revenue as a means to promote its growth. From 1997 through 1999, AOL's advertising revenues and subscribers steadily increased. In addition, AOL reported that its online advertising backlog – perceived as a leading indicator of potential future growth – was growing even more rapidly than AOL's revenues. AOL's apparently swelling subscriber ranks and its skyrocketing online advertising revenues painted a rosy picture of AOL's health as it began to woo Time Warner in 1999.

111. In fact, however, AOL's online advertising revenues were slowing, and its subscriber lists were dwindling. Many of the millions of dollars in AOL's early advertising commitments came from dot.com companies, many of which were faltering or failing by 1999. In addition, poor consumer response to online advertising generally, and to "pop up" advertisements in particular, posed persistent problems for AOL when it sought to justify the high rates it charged advertisers. AOL subscriber lists before the Merger announcement were also overstated in several ways, including counting non-paying free trial participants as paying subscribers and continuing to do so after their trial period had expired without the customer agreeing to become a paid subscriber, and

giving paying subscribers who tried to cancel their membership a free extension period for three to six months and continuing to count these people as paying subscribers.

112. To hide these problems, AOL engaged in improper accounting. For example, AOL entered a series of advertising transactions that lacked economic substance, wherein AOL provided the funds to its purported customers to purchase the advertising, via "barter," "swap," or "round-trip" deals. AOL also negligently failed to reveal that virtually all of its online advertising revenue backlog could be canceled at will by the customer without any significant cost to the customer, or that many of the commitments on the backlog were from companies that were substantially unlikely to honor these commitments, and that increasing numbers of online advertising customers were canceling their commitments or demanding large financial concessions in exchange for honoring them.

113. AOL also increased its promotional giveaway activities to enlist millions of trial non-paying customers, which it counted as paying subscribers even after the trial period had ended without securing any such commitment. Many subscribers who cancelled their service, and who were unwilling to remain with AOL after being granted free contract extensions, were simply not removed from AOL's paid subscriber list.

D. Facts During the Period from the Merger Announcement to Its Closing

114. On January 10, 2000, AOL and Time Warner announced an historic Merger. After this announcement, AOL and Time Warner told Plan participants that AOLTW would achieve over $40 billion in 2001 revenues, at least 30% 2001 EBITDA growth, and 25% EBITDA growth per year going forward.

115. On February 11, 2000, the Boards of Directors of AOL and Time Warner filed a Form S-4 with the SEC, which was a draft registration statement for the proposed Merger. It began with a letter from Defendants Levin and Case, Chairmen of the respective companies, which stated, in part:

> We are proposing the merger because we believe the combined strengths of our two companies will enable us to build the world's preeminent, fully integrated media and communications company. We believe that the merger will benefit the stockholders of both companies and we ask for your support in voting for the merger proposals at our special meetings.

It also included assurances that each of the boards of directors of AOL and Time Warner "believes that the merger is fair to you and in your best interest...."

116. The February 11, 2000 draft registration statement stated that the Merger would create "revenue opportunities and synergies in areas such as advertising by providing companies 'one-stop' shopping for their online as well as print and broadcast media advertising campaigns. It also stated that total EBITDA synergies would be approximately $1 billion in the first full year of operations, producing an EBITDA growth rate of approximately 30% in that first year.

117. By mid-2000, AOL executives reported that AOL's online advertising revenue had grown to more than $2 billion per year, approximately one-third of America Online's total revenue, and had become the primary source of the Company's growth. AOL stated at this time that "AOL Time Warner will be organized around its *core growth drivers* - subscription services, *advertising and commerce*, and content - to maximize the value of the company's unique combination of brands and other assets, and to drive future growth." (Emphasis added).

118. In March 2000, PurchasePro.com, Inc. ("PurchasePro") agreed to co-develop and market software with America Online, and America Online agreed to sell the software in exchange for PurchasePro performance warrants, the earning of which was contingent on the

achievement of certain performance goals (the "PurchasePro Transaction"). Contrary to GAAP, America Online negligently and improperly permitted the booking of the full value of the warrants acquired in the PurchasePro Transaction as advertising and commerce revenue even though America Online had not met the required performance goals.

119. Beginning in July 2000 (the beginning of America Online's fiscal year 2001), the online advertising market began to soften, and analysts began to voice concern regarding the strength of America Online's advertising and commerce revenues. Furthermore, by July 2000, many of America Online's dot.com advertising customers were struggling to survive.

120. By July 2000, some of the America Online Defendants held weekly emergency meetings to discuss the status of failing dot.com advertising deals. They closely monitored the status of these transactions through, among other things, detailed weekly reports on the financial health of America Online's dot.com advertisers, including how much they owed America Online, what America Online was doing to collect amounts owed, how the advertisers were responding, and how much America Online could lose if the advertisers were unable to pay their bills. A memo summarizing America Online's problems with dot.com advertisers stated that America Online faced the risk of losing $23.2 million in revenue in the first quarter of fiscal year 2001 (July 1 to September 30, 2000). By September 2000, the America Online Defendants should have known that America Online was "at risk" of losing more than $108 million in advertising revenue in 2001.

121. At or about this time, AOL began to generate advertising transactions that would create the appearance of advertising revenue, and improperly to account for advertising transactions. For example, in September 2000, America Online entered into a transaction with Veritas Software Corporation ("Veritas") pursuant to which America Online agreed to purchase

Veritas software for a payment $50 million, and Veritas agreed to purchase $20 million of advertising on America Online. Since the $50 million payment from AOL did not represent the fair value of the software sold to AOL, but rather represented an incentive for Veritas to purchase advertising on America Online, America Online essentially purchased $20 million of its own advertising revenue. America Online entered into similar types of transactions with Wembley plc and Ticketmaster at or about the same time which had the effect of improperly increasing advertising revenues.

122. At least by October 2000, the America Online Defendants should have known that America Online risked losing more than $140 million in advertising revenue in 2001 due to, *inter alia*, the shaky financial condition of many online advertisers. For example, in an interview with *The Washington Post*, published on July 18, 2002, Vice President of Finance for America Online's advertising division Robert O'Connor stated:

> Clearly, a lot of what [America Online executives] were living on was revenue that was not of the highest quality. I don't know if they're still in denial, but there were some pretty big business issues they were not willing to face. For nine months, I tried to get these guys out of denial. I tried to take the perfume off the pig.

Similarly, *Bloomberg* reported that experts said that America Online would be unable to "avoid the woes experienced by other Internet companies."

123. More significantly, on October 17, 2000, Larry Haverty, an analyst with State Street Research & Management, an affiliate of State Street Bank, one of if not the preeminent trustee for 401(k) plans such as the Plans, stated that "I think that Time Warner employees have to be thinking real seriously if they want to do this deal, given what's happened to these other Internet companies." At least as of this date, Defendants should have known that the Stock Fund would not be an appropriate investment for such a high concentration of retirement plan assets.

124. In addition to the transactions with Veritas, Wembley and Ticketmaster described above, from July 2000 to the closing of the Merger, America Online renegotiated the terms of numerous dot.com advertising contracts by accepting a fee from the advertiser in exchange for America Online's agreement to terminate the contract early. Contrary to GAAP, America Online booked all of the revenue from such renegotiated transactions, including the fee for early termination, as advertising revenue.

125. Defendants consistently made positive public statements regarding growth in its online advertising revenues throughout the period prior to the closing of the Merger. However, Defendants, because of their senior positions with the Company and because of the "due diligence" conducted in connection with the Merger, should have known that online advertising was not growing, but rather was shrinking considerably and that the accounting for advertising transactions was inappropriate. Indeed, during 2000, in connection with their review of America Online's books and records, Time Warner executives most likely paid particular attention to America Online's advertising and commerce business because Time Warner regarded advertising and commerce as a "core driver" of the Company's post-Merger growth. By the time the Merger closed on January 11, 2001, all Defendants should have been well aware that America Online had engaged in numerous accounting and revenue recognition improprieties.

126. By the time the Merger closed, all Defendants should have known that the Fund was an imprudent investment.

E. The Post Closing Period

127. The Merger closed on January 11, 2001. AOLTW issued a statement announcing the closing of the Merger, which quoted defendant Levin: "With today's closing, all our planning

and preparations over the past year start to pay off. We are hitting the ground running with a clear road map for creating value for our ... shareholders and employees."

128. After the Merger, AOL continued to enter into transactions that were not accounted for appropriately. For example, in March 2000, America Online had entered into a transaction with Bertelsmann AG, one of the equity of owners of America Online affiliate AOL Europe, giving Bertelsmann the right to "put" its interest in AOL Europe to America Online for a specified amount to be paid in cash or stock. In March 2001, Bertelsmann sought to renegotiate the agreement to require the payment to be made in cash only. AOLTW agreed to make the payment in cash, but only if Bertelsmann agreed to purchase an additional $400 million in advertising on America Online. Although GAAP required the Company to book some or all of the $400 million as a reduction in price or rebate on AOLTW's purchase of Bertelsmann's interest in AOL Europe, AOLTW improperly booked the entire $400 million as advertising revenue. By virtue of its $400 million commitment, Bertelsmann was AOLTW's largest advertising client in fiscal year 2002, accounting for approximately 20 percent of the Company's advertising and commerce revenue for that year. In its Form 10-K for fiscal year 2002, filed with the SEC on March 28, 2003, AOLTW disclosed that the SEC is investigating the Company's accounting treatment of the Bertelsmann transaction.

129. At approximately the same time it was renegotiating with Bertelsmann, AOLTW entered into a similar transaction with Vivendi Universal pursuant to which AOLTW agreed to pay Vivendi Universal $725 million in preferred shares of AOL Europe in exchange for Vivendi Universal's 55% equity interest in AOL France, plus Vivendi Universal's commitment to purchase $25 million of advertising on America Online. Although GAAP required the Company to book some or all of the $25 million as a reduction in price or rebate on AOLTW's purchase of

Vivendi Universal's interest in AOL France, AOLTW improperly booked the entire $25 million as advertising revenue.

130. On January 18, 2001, AOLTW embarked on an aggressive share-repurchase program designed to buy back $5 billion worth of "undervalued" AOLTW stock. In fact, however, within weeks of the Company's public statement that the stock was undervalued, several AOLTW insiders, including many of the defendants, began selling their own holdings of AOLTW stock, reaping millions of dollars in proceeds, as detailed below.

131. Beginning in the spring of 2001, AOLTW and Homestore.com, Inc. ("Homestore") engaged in a series of improper "triangular" transactions with, among others, Classmates Online, Inc., FX Consultants, GlobeXplorer, Inc., Investor Plus, PurchasePro, and WizShop.com, Inc., pursuant to which: (I) Homestore paid cash to these companies for products or services that had little or no value; (ii) using the funds provided by Homestore, these companies purchased advertising on Homestore's websites through AOLTW; and (iii) AOLTW then returned the funds to Homestore, minus AOLTW's advertising commissions of 50% or more. These improper triangular transactions, which had no economic substance, served solely as a device to boost Homestore's and AOLTW's advertising revenues artificially.

132. In early April 2001, AOLTW entered into a transaction with Oxygen Media, Inc. ("Oxygen") pursuant to which Oxygen agreed to spend approximately $100 million in advertising, mostly on America Online, in exchange for AOLTW's agreements to: (I) make an equity investment in Oxygen; and (ii) carry Oxygen's cable television network on most of cable television systems operated by AOLTW's Time Warner Cable division. Contrary to GAAP, AOLTW double-booked the advertising revenue from Oxygen such that the same revenue was reflected on the books of both the America Online division and the Time Warner Cable division.

133. By the spring of 2001, Defendants were well aware that AOLTW's online advertising and commerce business was in serious trouble. Nevertheless, they decided not to disclose the problems because they hoped that new revenue from Time Warner magazines and television networks could make up for the losses in online advertising. However, executives in the magazine and television divisions warned the Defendants that their projections of advertising revenue were no longer feasible.

134. On July 25, 2001, AOLTW entered into a transaction with eBay, Inc. ("eBay") pursuant to which AOLTW agreed to act as a broker to sell advertising space on eBay's website. Internal AOLTW documents stated, "AOLTW recognizes all revenue generated from eBay [advertising] inventory sales on a topline basis." Contrary to GAAP, AOLTW booked all of the advertising revenue generated for eBay as AOLTW's own revenue, even though AOLTW received none of the revenue and had no financial risk if the eBay ads were not sold.

135. In July 2001, AOLTW entered into a "swap" transaction with Qwest Communications International, Inc. ("Qwest") pursuant to which AOLTW agreed to purchase services from Qwest in exchange for Qwest's purchase of an equal amount of advertising on America Online. This transaction had no economic substance because neither AOLTW nor Qwest needed, nor intended to use, the services they purchased from each other. However, the transaction allowed AOLTW to report increased revenues.

136. Throughout 2001, AOLTW entered into similar swap transactions with, among others, Compaq and Foundry Networks, solely to make AOLTW's advertising revenues appear greater than they actually were.

137. On July 23, 2001, *Fortune* magazine published an article about AOL's accounting for online advertising transactions which should have indicated that the Stock Fund was not a prudent investment for such a substantial portion of Plan assets :

> Do AOL's Ads Add Up?
>
> Despite an ad slump, the online service reported great sales. Some critics question the numbers.
>
> The advertising market, as media executives across the country are painfully aware, has been in free fall. But if there's an ad depression going on, somebody forgot to tell the AOL division of AOL Time Warner. While rivals watch ad dollars shrivel, AOL thrives.... AOL's ad revenues would be lower were it not for what critics consider some controversial sales tactics and accounting games. These fall into two broad categories: so-called ads-for-equity deals, a barter transaction that was all the rage during the Web boom, and deals in which AOL invests in a dot-com that in turn pays AOL for advertising and marketing services.

138. On July 18 and 19, 2002, *The Washington Post* published a series of detailed articles on America Online's and AOLTW's improper advertising transactions and accounting practices which raised greater questions about the prudence of Plan investment in the Fund. The articles, which were based on, *inter alia*, interviews with current and former America Online and AOLTW employees and a review of internal America Online and AOLTW documents, revealed that:

a. Defendants' misconduct allowed America Online to exceed analysts' consensus revenue and earnings-per-share estimates for the first and second quarters of 2001 (July to December 2000), which America Online otherwise would have missed;

b. In the fall of 2000, Defendants' misconduct was motivated in part by fear that if America Online missed its revenue targets, its then-pending Merger with Time Warner might not be consummated:

> "The bubble had clearly burst, but senior management was under enormous pressure to hit the [financial] numbers and close the

> Time Warner transaction, which would diversify the revenue base and lower the risk profile of the company," said James Patti, a senior manager in AOLTW's business affairs division at the time.
>
> Patti said he told senior executives he was uncomfortable with some of the transactions pushed by his unit. Shortly after receiving a merit promotion, Patti was laid off in 2001, a move he said he believes was directly related to his refusal to participate.
>
> "I had been asked to paper many of these questionable deals and was unwilling to cooperate, making my concerns known to management," Patti said. "The layoff came exactly one week later. Ultimately, I was happy to leave the company with my integrity and professional ethics intact";

c. O'Connor, then Vice President of Finance for America Online's advertising division, told his superiors that he was concerned that the Company's improper accounting practices with regard to the eBay transaction might lead to an SEC investigation; and

d. America Online had improperly booked as advertising revenue the proceeds of the PurchasePro Transaction.

139. On July 31, 2002, AOLTW announced that the United States Department of Justice was investigating the Company with regard to its accounting practices. On August 2, 2002, AOLTW announced that the SEC had expanded its investigation to include the Company's accounting for the PurchasePro Transaction.

140. On August 14, 2002, *The Washington Post* reported:

> The former chief of America Online's business affairs unit – which crafted several unconventional advertising deals that spurred twin federal investigations – left the company late last week, a company spokesman confirmed.
>
> David M. Colburn was ousted on Friday and locked out of his office at the company's Dulles headquarters, according to sources familiar with the situation. The company would not say whether Colburn quit or was fired, nor would it discuss the reasons for his departure.
>
> Colburn's unit was in charge of negotiating and structuring many

of AOLTW's largest deals. He was involved in several advertising and commerce transactions that have led to probes into the company's accounting by the Securities and Exchange Commission and Justice Department. America Online's business affairs unit sought to generate advertising revenue by such methods as selling ads for online auctioneer eBay and booking the revenue from the sale of eBay's ad space as AOLTW's own revenue.

141. On September 9, 2002, AOLTW issued a press release which stated:

AOL Time Warner (NYSE:AOL) today announced that it has revised its 2002 business outlook for its America Online division, but reaffirmed its previously announced guidance for the Company's overall revenues and EBITDA for the full year.

Because of continued softness in America Online's advertising business, the Company said that America Online's full-year advertising and commerce revenues are tracking to $1.7 billion, with an additional 5% downside risk, and EBITDA is expected to be within a range of $1.7 billion to $1.8 billion.

142. On October 23, 2002, AOLTW issued a press release which stated:

AOL Time Warner Inc. (NYSE:AOL) today reported financial results for its third quarter ended September 30, 2002.

The Company also announced it will restate its financial results for the quarters ended September 30, 2000 through the quarter ended June 30, 2002, which will reduce, in total, revenues by $190 million and EBITDA by $97 million, as a result of the Company's previously announced internal review of certain advertising and commerce transactions at its America Online division.

* * *

Restatement of Prior Financial Information

The Company has been conducting an internal review of certain advertising and commerce transactions at the America Online division under the direction of the Company's Chief Financial Officer. In connection with this internal review, the financial results for the quarters ended September 30, 2000 through June 30, 2002 will be restated. The total impact of the adjustments will be to reduce the Company's consolidated advertising and commerce revenues by $190 million over these eight quarterly periods, with a

> corresponding reduction in EBITDA for the same time period of $97 million. For the America Online division, the impact of the adjustments will be to reduce advertising and commerce revenues by $168 million over these eight quarterly periods, with a corresponding reduction in EBITDA for that same time period of $97 million. The remaining $22 million represents a reduction in revenues from certain transactions related to the America Online division in which the advertising was delivered by other AOL Time Warner divisions.
>
> The adjustments represent approximately 1% of the America Online division's total revenues for that same two-year period, approximately 3.4% of its advertising and commerce revenues, and approximately 1.9% of its EBITDA. The largest impact of the adjustments is in the quarter ended September 30, 2000, for which advertising and commerce revenues will be reduced by $ 66 million and EBITDA will be reduced by $ 30 million. It is expected that restated financial statements for the affected periods will be filed with the Securities and Exchange Commission in the fourth quarter. The Company's financial statements for the affected periods should no longer be relied upon as a result of the announced restatement, including the audited financial statements for 2000 and 2001 contained in the Company's Annual Report on Form 10-K.

143. By restating the Company's historical financial results for the quarters ended September 30, 2000 through June 30, 2002, the Company admitted that the financial results for those periods were inaccurate when reported.

144. As of the commencement of this action, AOLTW common stock was trading at approximately $11 per share, approximately ***77% less*** than the stock's price in the days before the Merger was announced, when the Plans held approximately $2.45 billion in Company stock.

CLAIMS FOR RELIEF

CLAIM 1

IMPRUDENT INVESTMENT OF PLAN ASSETS IN THE AOLTW STOCK FUND

145. ERISA imposes extensive duties on fiduciaries which they must discharge when acting within the scope of their fiduciary responsibilities, and in some cases even outside their own sphere of responsibility. ERISA § 404(a)(l)(A), 29 U.S.C. § 1104(a)(1)(A), imposes on all fiduciaries, regardless of the scope of their responsibility, a duty of loyalty—that is, a duty to "discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and . . . for the exclusive purpose of . . . providing benefits to participants and their beneficiaries . . . ." Likewise, section 404(a)(l)(B) also imposes on all fiduciaries a duty of prudence—that is, a duty to "discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and . . . with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man, acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims . . . ."

146. A plan fiduciary's duties of loyalty and prudence also entail, for fiduciaries with responsibility for plan communications, a specific duty to disclose and inform. This duty entails: (a) a negative duty not to misinform; (b) an affirmative duty to inform when the fiduciary knows or should know that silence might be harmful; and (c) a duty to convey complete and accurate information material to the circumstances of participants and beneficiaries. This duty to disclose and inform recognizes the disparity that may exist between the training and knowledge of the fiduciaries, on the one hand, and the participants and beneficiaries, on the other. In a plan with various funds available for investment, this duty to inform and disclose includes: (a) the duty to

impart to plan participants material information of which the fiduciary has or should have knowledge that is sufficient to apprise the average plan participant of the risks associated with investing in any particular fund; and (b) the duty not to make material misrepresentations.

147. A fiduciary's duties of loyalty and prudence also entail, for fiduciaries with responsibility for Plan investments, a specific duty to conduct an independent investigation into, and continually to monitor, the merits of the investment alternatives in the plan, including employer securities, to ensure that each investment is a suitable option for the plan.

148. The fiduciary duty of loyalty also entails, for all fiduciaries, a duty to avoid conflicts of interest and to resolve them promptly when they occur.

149. No fiduciary may avoid his fiduciary responsibilities by relying solely on the language of the Plan Document.

150. Under ERISA § 405, 29 U.S.C. § 1105, all fiduciaries are also liable as co-fiduciaries whenever they participate knowingly in, or knowingly undertake to conceal, the fiduciary breach of another, if their own fiduciary breach has enabled another fiduciary to commit a breach, or if they have knowledge of a breach by such other fiduciary, unless they make reasonable efforts under the circumstances to remedy the breach. This duty applies even if the breaching fiduciary has a different area of responsibility from the co-fiduciary. For example, a fiduciary with responsibility solely for communications is liable as a co-fiduciary if he has knowledge of a breach by a fiduciary with responsibility only for the selection of investment funds.

151. Based on the forgoing, the Stock Fund was not a prudent investment throughout the Class Period, and Defendants should have terminated the Stock Fund as an investment option, prevented and halted the purchase of all Stock Fund shares by the Plans, and sold all of

the Plans' shares in the Stock Fund. Moreover, Defendants failed to consider the risks inherent in the Stock Fund, as described above, when evaluating the prudence of the Fund as a Plan investment option, as well as prudence of matching Plan Participants' contributions with Fund shares.

152. The fact that Participants selected the investments in which the Plans invested Participant account balances is no defense in this case. Fiduciaries can shift liability for imprudent investments to fiduciaries under ERISA § 404(c), 29 U.S.C. § 1104(c) only if, among other things, they meet four specific requirements:

a) they disclose in advance the intent to shift liability to Participants;

b) they ensure that Participants are not subject to undue influence;

c) they provide an adequate description of the investment objectives and risk and return characteristics of each investment option; and

d) they disclose to Participants all material information necessary for Participants to make investment decisions that they are not precluded from disclosing under other applicable law. In this regard, fiduciaries have a choice -- they can disclose all material information to Participants, including information that they are not required to disclose under the securities laws, and shift liability to Participants, or they can comply with the more limited disclosure requirement under the securities laws but remain liable for imprudent investments. 29 C.F.R. § 2550.404c-1(b)(2)(i)(B)(i) and (ii) and (c)(2)(i) and (ii).

153. Defendants failed to shift liability to Participants for imprudent investment decisions under section 404(c) because they failed to comply with the Regulations set forth above.

CLAIM 2

NEGLIGENT MISREPRESENTATIONS AND FAILURE TO DISCLOSE MATERIAL INFORMATION NECESSARY

154. Pursuant to ERISA § 404, 29 U.S.C. § 1104, Defendants have a duty to discharge their duties with respect to the Plans prudently and solely in the interests of Participants and Beneficiaries and for the exclusive purpose of providing benefits to Participants and their Beneficiaries. The duty of the fiduciary includes at least:

a. a duty not to misinform;

b. a duty to inform when the fiduciary knows or should know that silence might he harmful; and

c. a duty to convey complete and accurate information material to the circumstances of participants and beneficiaries.

155. Defendants breached these duties through negligent misrepresentations and the failure to disclose information that would have influenced the investment decisions of Plan Participants and fiduciaries, including as follows:

A. "Roundtrip" Transactions

156. During the Class Period, AOLTW systematically engaged in "roundtrip" transactions. These transactions were elaborate advertising revenue schemes relating to the purchase of goods or other items of value by AOL in combination with another party being required to make a reciprocal purchase of AOL's advertising services. These roundtrip transactions, as accounted for by AOL, provided the appearance that AOL had entered into highly profitable deals to sell advertising when, in fact, AOL had funneled the entire value of the revenue which it received directly back to the original customer, resulting in no net gain to AOL.

157. In May of 2001, the former Chief Accountant of the SEC questioned "how these types of 'roundtrip' arrangements result in revenue, and whether, in substance, they are sham transactions engineered solely to inflate the revenue line in the income statement."

B. "In Kind" Advertising Revenue

158. During the Class Period, AOL also engaged in extensive barter transactions whereby advertising space or some other item of value was traded between internet companies, with no cash involved. AOL, however, reported revenues on such "in kind" advertising whereby AOL would provide customers with advertising on its website and in return receive certain advertising services which usually consisted of rights to advertise "America Online Keyword: [________]" on a customer's product.

159. In early 2000, the Financial Accounting Standards Board ("FASB") ruled that companies could only book barter advertisement as revenue if they could compare it with a similar transaction with another company in which cash was exchanged within the previous six months.

160. AOL failed to comply with the FASB requirements and utilized improper accounting for in kind advertising transactions, resulting in the overstatement of AOL's advertising revenue. Among the entities with which AOL engaged in in kind advertising transactions which resulted in the overstatement of advertising revenue by AOL were Homestore, Inc.; Sun Microsystems, Inc.; Veritas; Software Corporation; and Bertelsmann AG.

C. Sales Revenue in Connection With eBay

161. During the Class Period, AOL entered into an agreement with online auctioneer eBay to sell ads for eBay.

162. In its Form 10-K annual report for the year ended December 31, 2001, filed with the SEC on March 25, 2002, AOL reported total revenue of $38.2 billion, including $8.5 billion in revenue from advertising and commerce. Such revenue, however, was materially overstated because AOL included in such revenue sums that AOL received in connection with selling online advertising for eBay, even though the eBay revenue was ultimately paid over to eBay and not retained by AOL.

D. Slowdown in Future Advertising Revenue Due to Financial Difficulties Being Experienced By AOL's Customers

163. During the Class Period, AOL made numerous statements to Participants regarding the supposed strength of AOL's online advertising business and the supposed "synergies" between Time Warner's old media business and AOL's internet business, including the sale of online advertising. No later than late 2000, however, it had become clear that many dot-com and other customers were in deep trouble and would likely be unable to continue to purchase online advertising from AOL. According to *The Washington Post*, AOL's internal estimates showed that it feared losing $23.2 million in revenue in the quarter ended September 30, 2000 and $108 million in ad revenue in fiscal 2001 (July 2000 to June 2001) due to the precarious circumstances of dot-com and other customers.

E. Failure to Disclose Accurate Financial Information About AOL for Eight Consecutive Fiscal Quarters

164. All of AOL's financial statements for eight consecutive fiscal quarters (July 1, 2000 to June 30, 2002) contained materially inaccurate financial information concerning AOL when those financial statements were originally published and made available to Participants. AOL has admitted that its financial statements for these eight consecutive fiscal quarters were inaccurate when originally publicized. On October 23, 2002, AOL restated its financial

statements for these eight consecutive fiscal quarters, which is indisputably an admission that the financial statements were materially inaccurate when originally publicized. Indeed, in its October 23, 2002 Form 8-K filing with the SEC, AOL not only restated the companies' advertising revenue by reducing it in the amount of $190 million, it also stated:

> As a result of the restatement announced on October 23, 2002 by AOL and AOL Time Warner Inc. (the "Company"), *the Company's financial statements for the affected periods should no longer be relied upon, including the audited financial statements for 2000 and 2001* contained in the Company's annual report on Form 10-K for the year ended December 31, 2001. (Emphasis added.)

165. The largest quarterly restatement of AOL's advertising revenue, a reduction of $66 million, was for the last publicly reported fiscal quarter prior to the consummation of the Merger that Individual Defendants wanted to be effectuated at all costs.

F. Identification of AOL's Misleading SEC Filings

166. As a result of the negligent misrepresentations and failures to disclose set forth above, the following SEC filings by AOL, which were incorporated into the disclosures made to Participants as set forth above, were materially inaccurate:

a. AOL's quarterly report on Form 10-Q for the fiscal quarter ended September 30, 2000;

b. AOL's quarterly report on Form 10-Q for the fiscal quarter and year ended December 31, 2000;

c. AOLTW's quarterly report on Form 10-Q for the fiscal quarter ended March 31, 2001;

d. AOLTW's quarterly report on Form 10-Q for the fiscal quarter ended June 30, 2001;

e. AOLTW's quarterly report on Form 10-Q for the fiscal quarter ended September 30, 2001;

f. AOLTW's quarterly report on Form 10-Q for the fiscal quarter and year ended December 31, 2001;

g. AOLTW's quarterly report on Form 10-Q for the fiscal quarter ended March 31, 2002;

h. AOLTW's quarterly report on Form 10-Q for the fiscal quarter ended June 30, 2002;

167. Each of these SEC filings by America Online and/or AOLTW, which were incorporated by reference into the disclosures made to Participants as alleged above, were materially misleading for inaccurately describing AOL's financial condition and results of operations in material respects, and in negligently misrepresenting and failing to disclose material facts concerning AOL's sham roundtrip transactions, its improper accounting for in kind advertising revenue, its improper accounting for revenue in connection with transactions with eBay, and in failing to disclose the anticipated decline in future advertising revenues due to financial difficulties being experienced by AOL's customers.

G. Each of the Defendants Should Have Known of the Misrepresentations and Omission of Material Facts

168. Each of the Defendants herein should have known of the material facts identified herein because these Defendants had, by virtue of their previously-described positions with AOL, access to information about AOL's business, operations, products, trends, markets, prospects and financial statements as to make these facts available to them in the exercise of reasonable diligence.

169. In addition, each of the defendants, by virtue of their previously-described positions with AOL, either were senior corporate executives themselves or had access to senior corporate executives through attendance at management and board of directors meetings and meetings of committees thereof, and had access to reports and other information provided to them in connection with such meetings, so as to make the material facts identified in Articles A-E of this Claim 3 available to them in the exercise of reasonable diligence. In the case of Defendants Bollenbach, Raines and Vincent, these were the members of AOL's audit committee during the Class Period and, as a result, they were specifically charged with responsibility for the accuracy and proper preparation of AOL's financial statements, which financial statements, as noted above, have been restated by AOL and therefore acknowledged to have been materially inaccurate by AOL.

170. In addition, Defendants Case, Pittman, Novack and Gilburne were each long-time senior executives and/or directors of AOL whose responsibilities specifically focused on AOL's online advertising revenue practices and operations and the accounting for online advertising revenue.

H. Defendants' Negligent Misrepresentations and Failure To Disclose The Risk And Return Characteristics Of The Stock Fund

171. The Investment Options Guide which was a part of the SPD represents that the Stock Fund is "considered a higher risk investment because, among other reasons, it primarily consists of a single security rather than a diversified portfolio of securities." This negligent misrepresentation was misleading in that it failed to disclose the far greater risks in investment in the Stock Fund, including that the Stock Fund was an imprudent investment and that the value of

Stock Fund shares was artificially inflated as a result of the negligent misrepresentations alleged above.

I. Defendants' Negligent Misrepresentations and Failure To Disclose In Direct Representations To Participants

172. Defendants made direct negligent misrepresentations to Participants concerning the financial performance and prospects of AOL and the Stock Fund. For example, Defendant Parsons sent frequent memos to Participants which negligently misrepresented the financial information alleged above.

CLAIM 3

FAILURE TO APPOINT FIDUCIARIES WITH THE KNOWLEDGE AND EXPERIENCE NECESSARY TO MANAGE PLAN ASSETS, FAILURE TO MONITOR THOSE FIDUCIARIES PROPERLY, AND FAILURE TO PROVIDE SUFFICIENT INFORMATION FOR PLAN FIDUCIARIES TO PERFORM THEIR DUTIES

173. The Board and its members breached their fiduciary duties to appoint and monitor the Committee members in the following ways:

a. They appointed only AOLTW employees who, by definition, lacked the independence necessary to make appropriate decisions;

b. They appointed Committee members who lacked the knowledge, skill and expertise to perform their responsibilities and failed to monitor their performance which permitted the Plans to make the imprudent investments as alleged above; and

c. To the extent that the Committees did not know the information alleged above concerning the imprudence of the Fund as a Plan investment, which the Directors should have known, the Directors failed to inform the Committee of the information the Committee needed to know to perform its duties;

174. As a result of their fiduciary status, the Directors had the duty to ensure that the Committee Defendants ensured that the Fund was a prudent investment. The Directors should have known that the Fund was an imprudent investment and should have required the Committee to take all of the steps necessary to protect the Plans from their massive losses.

CLAIM 4

BREACH OF THE DUTY OF LOYALTY

175. Pursuant to ERISA §404, Plan fiduciaries have a duty to discharge their duties of loyalty with respect to the Plan solely in the interests of Participants and Beneficiaries and for the exclusive purpose of providing benefits to Participants and their Beneficiaries. They must act with a "single eye" in acting in the best interests of Participants and Beneficiaries.

176. In the months before the Merger closed, many of the Defendants breached this duty of loyalty when they sold millions of shares of AOL stock at the same time that they were publicly touting their positive expectations from the Merger and failing to direct the Plans to halt their purchases of and sell all Plan investments in the Fund. In addition, as described above, in January 2001, AOLTW initiated a $5 billion share repurchase program on the publicly-stated premise that Company stock and, therefore, Fund shares, were "undervalued." Meanwhile, AOLTW insiders again sold millions of shares of Company stock at artificially inflated prices.

177. From July 24, 2000 to May 31, 2001, the following Defendants sold more than 11 million shares of America Online and AOLTW common stock at an average selling price of $49.83, reaping total proceeds of $558 million, as follows (sales prior to January 11, 2001 are of America Online common stock; sales subsequent to that date are of AOLTW common stock): (a) defendant Case sold 3 million shares of Company stock between July 24, 2000 and May 2, 2001, reaping total proceeds of $157 million; (b) defendant Novack sold 793,000 shares of Company

stock between July 24, 2000 and April 19, 2001, reaping total proceeds of $39 million; (c) defendant Turner sold 1.3 million shares of Company stock between February 15, 2001 and May 14, 2001, reaping total proceeds of $68 million; (d) defendant Parsons sold 700,000 shares of Company stock between April 20, 2001 and May 25, 2001, reaping total proceeds of $35 million; (e) defendant Akerson sold 168,000 shares of Company stock between August 28, 2000 and April 25, 2001, reaping total proceeds of $8.5 million; (f) defendant Barksdale sold 1.9 million shares of Company stock between July 24, 2000 and May 8, 2001, reaping total proceeds of $92 million; (g) defendant Caufield sold 150,000 shares of Company stock between August 25, 2000 and April 30, 2001, reaping total proceeds of $8.6 million; (h) defendant Gilburne sold 638,000 shares of Company stock between July 24, 2000 and April 25, 2001, reaping total proceeds of $33 million; (i) defendant Pittman sold 1.9 million shares of Company stock between July 24, 2000 and May 7, 2001, reaping total proceeds of $68 million; and (j) defendant Kelly sold 470,000 shares of Company stock between August 8, 2000 and April 25, 2001, reaping total proceeds of $23 million.

178. These conflicts of interest put the Defendants in the position of having to choose between their own interests as executives and stockholders, and the interests of the Plan Participants and Beneficiaries, which ERISA dictates they were obligated to prudently and loyally serve with an "eye single."

179. Defendants put their own interests ahead of those of the Plans and the participants in reaping substantial proceeds from the sale of AOLTW stock while at the same time failing to direct the Plans to halt purchases of Fund shares and sell Fund shares. As a consequence of this breach of fiduciary duty, Defendants are liable to disgorge all profits made as a result of their breaches.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray for:

A. A Declaration that the Defendants, and each of them, have breached their ERISA fiduciary duties to the Participants;

B. A Declaration that the Defendants, and each of them, are not entitled to the protection of ERISA § 404(c)(1)(B), 29 U.S.C. § 1104(c)(1)(B);

C. An Order compelling the Defendants to make good to the Plans all losses to the Plans resulting from Defendants' breaches of their fiduciary duties, including losses to the Plans resulting from imprudent investment of the Plans' assets, and to restore to the Plans all profits the Defendants made through use of the Plans' assets, and to restore to the Plans all profits which the Participants would have made if the Defendants had fulfilled their fiduciary obligations;

D. Imposition a Constructive Trust on and disgorgement of any amounts by which any Defendant was unjustly enriched at the expense of the Plans as the result of breaches of fiduciary duty;

E. An Order enjoining Defendants, and each of them, from any further violations of their ERISA fiduciary obligations;

F. Actual damages in the amount of any losses the Plans suffered, to be allocated among the Participants' individual accounts in proportion to the accounts' losses;

G. An Order that Defendants allocate the Plans' recoveries to the accounts of all Participants who had any portion of their account balances invested in the common stock of AOL maintained by the Plans in proportion to the accounts' losses attributable to the decline in the stock price of AOL;

H. An Order awarding costs pursuant to 29 U.S.C. § 1132(g);

I. An order awarding attorneys' fees pursuant to 29 U.S.C. § 1132(g) and the common fund doctrine; and

J. An Order for equitable restitution and other appropriate equitable monetary relief against the Defendants.

DATED: July 3, 2003

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Edwin J. Mills, hereby certify that on this 3rd day of July, 2003, true and correct copies of the foregoing document were served on the below-listed counsel by Federal Express overnight delivery, addressed as follows:

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