UNITED STATES DISTRICT COURT
DISTRICT OF NEW HAMPSHIRE

MARVIN OVERBY, ET AL. Plaintiffs, vs TYCO INTERNATIONAL LTD., ET AL. Defendants.	Case No. 02-CV-1357-B This Document Relates To: ERISA Actions

MEMORANDUM IN SUPPORT OF MOTION FOR CLASS CERTIFICATION

Lead Plaintiffs Marvin Overby, Edmund J. Dunne and Kay M. Jepson submit this Memorandum in support of their Motion for Class Certification. Lead Plaintiffs have moved for certification of their claims pursuant to Rule 23 of the Federal Rules of Civil Procedure. These claims are brought under § 502 of the Employee Retirement Income Security Act of 1974 ("ERISA") and were substantially sustained by this Court at the pleading stage in its recent ruling, In re Tyco Intern., Ltd. Multidistrict Litig., 2004 WL 2903889 (D.N.H. Dec. 2, 2004). Lead Plaintiffs now move to prosecute the case on a class-wide basis.

I. INTRODUCTION

This case seeks to recover for the massive losses of retirement savings suffered by tens of thousands Tyco International, Ltd. and Tyco International (U.S.), Inc. (collectively, "Tyco") employees who participated in the company's retirement savings plans (the "Plans") which imprudently invested a large part of the Plans' assets in the Tyco Stock Fund ("Fund"). Defendants were fiduciaries of the Plans who knew or should have known that the Fund was an imprudent investment because, among other reasons, the price of Tyco common stock and the Fund was artificially inflated. Defendants nevertheless continued to permit the Plans to offer the Fund as an investment option and invest Plan assets in that Fund. By doing so, Defendants breached their fiduciary duties to the Plans and Participants and are liable under ERISA for the

harm they caused.

Plaintiffs allege in two claims that Defendants were fiduciaries who breached their fiduciary duties. Claim I alleges that Defendants breached their fiduciary duties by failing to provide Participants with complete and accurate material information regarding the Fund, Tyco stock and Tyco's accounting and corporate governance improprieties. Claim II alleges that Defendants breached their fiduciary duties by offering the Fund as an investment option and by permitting the Plans to invest in the Fund when the Fund was an imprudent investment.

Plaintiffs seek relief on behalf of themselves and a class of Participants in the Plans pursuant to ERISA § 502(a)(2), 29 U.S.C. § 1132(a)(2). The proposed class ("Class") includes:

> all Participants in the Plans for whose individual accounts the Plans purchased and/or held shares of the Tyco Stock Fund at any time from August 12, 1998 to July 25, 2002 (the "Class Period")[1]

Plaintiffs' Amended Consolidated Complaint ("Complaint"), ¶ 28.[2]

The proposed class representatives are: Marvin Overby (Lead Plaintiff), Edmund J.

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[1] July 25, 2002 is the proposed Class Period end date because it is the last date on which Tyco was allegedly controlled by dishonest management and the last date that the Fund was an imprudent investment. July 25, 2004 is the date Edward Breen was chosen as Tyco's new Chief Executive Officer. The Amended Consolidated Complaint alleges that the class period extends "to the Present." To the extent required, Plaintiffs will move for leave to file a Second Amended Consolidated Complaint with a class period ending July 25, 2002.

[2] Plaintiffs' § 502(a)(2) claims are derivative in nature and are brought in a representative capacity for the benefit of the Plans as a whole. Massachusetts Mut. Life Ins. Co. v. Russell, 473 U.S. 134, 140 (1985); Varity Corp. v. Howe, 516 U.S. 489, 510 (1996). Certification of a class may therefore be unnecessary and Plaintiffs' ERISA claims may be able to proceed on behalf of the Plans without certification for classwide treatment. *E.g.* Thompson v. Avondale Indus., 2001 WL 1543497, at *2 (E.D. La. 2001); Montgomery v. Aetna Plywood,Inc., 1996 WL 189347, *3 (N.D. Ill Apr. 16, 1996). Most courts, however, have exercised discretion to certify as a class ERISA claims for plan-wide relief under § 502(a)(2). *See, e.g.,* Kayes v. Pacific Lumber Co., 51 F.3d 1449, 1461-63 (9th Cir. 1995); Furstenau v. AT&T Corp., No. 02-5409, slip op. at 2 (D. N.J. Sep. 3, 2004) ("Although § 502(a)(2) is a derivative claim, this Court will proceed to determine whether class certification is proper"); In re Amsted Indus. Inc., ERISA Litig., 263 F. Supp. 2d 1126, 1129 (N.D. Ill. 2003); Montgomery, 1996 WL 189347 at *3; see also Piazza v. EBSCO Indus., 273 F.3d 1341, 1352 (11th Cir. 2001); In re CMS Energy ERISA Litig., -- F.R.D. -- , 2004 WL 3094447 (E.D. Mich.). Class certification under Rule 23 ensures that there is a Court approved voice for the class and court involvement in case management. Consequently, Plaintiffs move that their claims be certified as a class action.

Dunne (Lead Plaintiff), Kay M. Jepson (Lead Plaintiff), John B. Gordon (named plaintiff in Gordon v. Tyco Intern., 02-cv-01361-PB), Virginia Konyn (named plaintiff in Konyn v. Tyco Intern., 02-cv-01362-PB), Gary Johnson (named plaintiff in Johnson v. Tyco Intern., 02-cv-01363-PB), Karl Peterson (named plaintiff in Peterson v. Tyco Intern., 02-cv-00460-PB), Steve Swanson (named plaintiff in Swanson v. Tyco Intern. 02-cv-00402-PB), Peter Poffenberger (participant in the Tyco Retirement Income and Savings Plan ("RSIP") I), Eugene Crouch (also a participant in RSIP I) and Karen Wade (participant in RSIP IV) (collectively, "Proposed Class Representatives").[3]

II. THE COURT SHOULD CERTIFY THE CLASS

Plaintiffs' claims are particularly well-suited for class action treatment. The claims charge the Defendants with numerous plan-wide breaches of fiduciary duty, which are exactly the kinds of claims that lie at the core of Rule 23 jurisprudence. Indeed, the Advisory Committee Notes to the 1996 Amendment to Fed. R. Civ. P. 23 (b)(1)(B) state that certification under this Rule is especially appropriate in cases charging breach of trust by a fiduciary of a large class of beneficiaries. Moreover, Congress specifically embraced the principle that ERISA claims should be brought in a representative capacity. Massachusetts Mutual Life Ins. Co. v. Russell, 473 U.S. 134, 142 n.9 (1985) (noting that Congress expressed intent that ERISA "actions for breach fiduciary duty be brought in a representative capacity on behalf of the plan as a whole"). For

[3] The Proposed Class Representatives are Participants in RSIP Plans I -V but not RSIP Plans VI and VII. Because all claims relate equally to all Plans and because there are no relevant differences in the administration of the different Plans for purposes of this litigation, the Proposed Class Representatives may represent all seven RSIP Plans and all Participants in those Plans. Forbush v. J.C. Penney Co., Inc., 994 F.2d 1101 (5th Cir. 1993) (proposed class representative could represent participants in other plans so long as the relevant issues were common to the different plans); Fallick v. Nationwide Mutual Ins. Co., 162 F.3d 410, 422 (6th Cir. 1998) (on issue of standing, "an individual in one ERISA benefit plan can represent a class of participants in numerous plans other than his own, if the gravamen of the plaintiff's challenge is to the general practices which affect all of the plans"); Alves v. Harvard Pilgrim Health Care, Inc., 204 F. Supp. 2d 198, 205 (D. Mass. 2002) ("When a single defendant offers a range of ERISA plans, an individual in one plan can represent a class of plaintiffs – including some belonging to other plans – as long as 'the gravamen of the plaintiff's challenge is to the general practices [of the defendant] which affect all of the plans'").

these reasons, courts have routinely certified classes asserting ERISA claims materially identical to the claims alleged here. *See, e.g.,* In re CMS Energy ERISA Litig., -- F.R.D. --, 2004 WL 3094447 (E.D. Mich. Dec. 27, 2004); In re WorldCom, Inc. ERISA Litig., 2004 WL 2211664 (S.D.N.Y. Oct. 4, 2004); Qwest Savings and Investment Plan ERISA Litig., No. 02-464, slip op. (D. Colo. Sep. 27, 2004); Furstenau v. AT&T Corp., No. 02-5409, slip op. (D. N.J. Sep. 2, 2004); Rankin v. Rots, 220 F.R.D. 511 (E.D. Mich. 2004); Kolar v. Rite Aid Corp., 30 Emp. Ben. Cas. 1993, 2003 WL 1257272 (E.D. Penn. 2003); In re Ikon Office Solutions, Inc., 191 F.R.D. 457 (E.D. Penn. 2000); Bunnion v. Consolidated Rail Corp., 1998 WL 372644 (E.D. Pa. 1998); Feret v. Corestates Financial Corp., 1998 WL 512933 (E.D. Pa. 1998). This Court should do the same.

A. STANDARDS GOVERNING THE ADJUDICATION OF A MOTION FOR CLASS CERTIFICATION

Class certification is a two-step analysis under Rule 23 of the Federal Rules of Civil Procedure. First, the action must meet the requirements of Fed. R. Civ. P. 23(a)(1)-(4), generally known as "numerosity," "commonality," "typicality" and "adequacy." Fed. R. Civ. P. 23(a)(1)-(4); Smilow v. S.W. Bell Mobile Sys., Inc., 323 F.3d 32, 38 (1st Cir. 2003) (*citing* Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 613 (1997)). Second, the action needs to satisfy one of the three requirements of Fed. R. Civ. P. 23(b). Bussie v. Allmerica Fin. Corp., 50 F. Supp. 2d 59, 69 (D. Mass. 1999).

The Supreme Court has recognized that "[c]lass actions serve an important function in our system of civil justice." Gulf Oil Co. v. Bernard, 452 U.S. 89, 99 (1981). Consistent with this public policy, Courts have adopted a liberal approach to class certification by requiring that "if there is to be an error made, let it be in favor and not against the maintenance of the class action." Payne v. Goodyear Tire & Rubber Co., 216 F.R.D. 21, 25 (D. Mass. 2003) (quoting Esplin v. Hirschi, 402 F.2d 94, 99 (10th Cir. 1968)). In other words, "the interests of justice require that in a doubtful case . . . , any error, if there is to be one, should be committed in favor of allowing a class action." Eisenberg v. Gagnon, 766 F.2d 770, 785 (3d Cir. 1985).

The determination of whether a class should be certified is not an inquiry into the merits of the plaintiff's case, but is limited to whether the allegations in the Complaint satisfy the requirements of Fed. R. Civ. P. 23. Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 178 (1974); Hawkins v. Comm'r of Dep't of Health & Human Servs., No. 99-143, 2004 WL 166722, at *2 (D.N.H. Jan. 23, 2004) (DiClerico, J.) ("At the certification stage, the court focuses on the requirements of Rule 23 . . . not on the merits of the plaintiffs' claims."); Priest v. Zayre Corp., 118 F.R.D. 552, 553-54 (D. Mass. 1988) ("Class certification is not an appropriate stage at which to address the merits of the lawsuit."). Rather, the resolution of Plaintiffs' motion for class certification is limited to ascertaining whether Federal Rule 23 has been satisfied. In re Ikon Office Solutions, Inc., 191 F.R.D. 457, 462 (E.D. Pa. 2000). For purposes of class certification, a court must accept the allegations in the Complaint as true. Skinner v. O'Mara, No. 00-67, 2000 WL 1507427, at *1 (D.N.H. July 25, 2000) (DiClerico, J.). Based on these principles, Plaintiffs have far exceeded their burden for class certification.

B. THE PREREQUISITES OF RULE 23(a) ARE SATISFIED

To proceed as a class action, the litigation must satisfy the four prerequisites of Rule 23(a), which provide in pertinent part:

> One or more members of a class may sue . . . as representative parties on behalf of all only if (l) the class is so numerous that joinder of all members is impracticable, (2) there are questions law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

These prerequisites, often referred to in shorthand fashion as "numerosity," "commonality," "typicality" and "adequacy," are easily satisfied here.

1. The Class Is So Numerous That Joinder Of All Members Is Impracticable

Under Rule 23(a)(1), the class must be sufficiently large so that joinder of all members is impracticable. In determining whether a proposed class meets the numerosity requirement under Fed. R. Civ. P. 23(a)(1), "courts may draw reasonable inferences from the facts presented to find the requisite numerosity." McCuin v. Secretary of Health & Human Servs., 817 F.2d 161, 167

(1st Cir. 1987) (holding that precise enumeration of the members of the class is not necessary for class certification); George Lussier Enters., Inc. v. Subaru of New England, Inc., No. 99-109, 2001 WL 920060, *3 (D.N.H. Aug. 3, 2001) (Barbadoro, C.J.) ("A court should consider both the number of members in the proposed class and their geographical distribution in determining whether the proposed class satisfies the numerosity requirement.").

Numerosity is clearly satisfied in this case. According to Tyco's filings with the Securities Exchange Commission ("SEC"), Tyco had at least 108,000 employees in the United States during the Class Period. Complaint, ¶ 28. Many if not all of these employees were Participants in one or more of the Plans. Plaintiffs do not expect Defendants will dispute this issue.

2. Common Questions of Law and Fact Exist

Rule 23(a)(2) requires that there be "questions of law ***or*** fact common to the class." (emphasis added). The "commonality" requirement is satisfied where the Complaint alleges common legal or factual issues. Priest, 118 F.R.D. at 554. Class members need not be identical, a "single common legal or factual issue can suffice." Payne, 216 F.R.D. at 25. Accordingly, this requirement is easily met. *See* Bond v. Fleet Bank (RI), N.A., 2002 WL 31500393, *4 (D.R.I. Oct. 10, 2002) (the commonality requirement is "not a particularly onerous one . . . It requires the existence of only some common issue or issues."); Lussier, 2001 WL 920060, at *5 ("Because the class need share only a single legal or factual issue at this stage of the analysis, the commonality requirement is easily satisfied."); *see also* Van West v. Midland National Life Ins. Co., 199 F.R.D. 448, 452 (D.R.I. 2001). Here, numerous common questions of law and fact exist. These questions include:

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

b. whether Defendants breached their fiduciary duties by permitting the Plans to offer the Tyco Stock Fund as an investment option for the Plans at a time when they knew or should have known that Tyco stock and the Tyco Stock Fund were not prudent investments for the Plans;

c. whether Defendants breached their fiduciary duties by causing the Tyco Stock Fund to make and maintain investments in Tyco stock when it was not prudent to do so;

d. whether the Tyco (US) Directors breached their fiduciary duties by failing to monitor the Tyco Retirement Committee Defendants so that the Plans and Participants' interests could be adequately protected;

e. whether Defendants breached their fiduciary duties by failing to provide complete and accurate information concerning the Tyco Stock Fund and the appropriateness of the Fund as a retirement investment;

f. whether the Defendants, by failing to comply with their specific fiduciary responsibilities under ERISA § 404(a)(1), 29 U.S.C. § 1104(a)(1), enabled fiduciaries to commit violations of ERISA and, with knowledge of such breaches, failed to make reasonable efforts to remedy the breaches; and

g. whether, as a result of the fiduciary breaches committed by the Defendants, the Plans and their Participants and beneficiaries suffered losses.

Complaint, ¶ 30. The Proposed Class Representatives and all class members are similarly situated in their need to establish answers to these questions. *See* In re CMS Energy ERISA Litig., 2004 WL 3094447 at *3 (class certification appropriate where common issues of imprudent investment in company stock and uniform, plan-wide failure to disclose); Rankin v. Rots, 220 F.R.D. 511 at 518 (Common questions include, among others, whether Defendants were fiduciaries of the plan and whether defendants breached their fiduciary duties; "claim for breach of the duty of prudence, clearly presents a common issue"); In re WorldCom ERISA Litig., 2004 WL 2211664 at *2 ("There are common questions of law and fact including whether Merrill Lynch and the other defendants were ERISA fiduciaries for the Plan and Predecessor Plans, whether they breached their fiduciary duties, and whether those breaches injured class members"); Furstenau v. AT&T Corp., No. 02-5409, slip op. at 4-6 ("there are several common questions of law or fact: (1) whether the defendants were fiduciaries of the Plan and/or the Participants; (2) whether the defendants breached their duties; (3) whether the Plan and the Participants were injured by such breaches; and (4) whether the class is entitled to damages and injunctive relief. Thus, plaintiffs have easily met the commonality standard"); Kolar v. Rite Aid Co., 2003 WL 1257272 at *2 ("There are also obvious questions of law or fact common to the

class" including "whether the individual defendants violated their ERISA fiduciary duties by imprudently allowing the Plans to invest in Rite Aid stock"); Babcock v. Computer Assoc., Int'l, 212 F.R.D. 126, 130 (E.D.N.Y. 2003) (Common questions include "whether the defendants failed to provide class members with the proper investment options under the Plan" and "whether the defendants failed to diversify the assets of the Plan").

3. Proposed Class Representatives' Claims Are Typical of The Claims Of The Classes

The Proposed Class Respresentatives also meet the typicality requirement of Fed. R. Civ. P. 23(a)(3), as their claims are typical of the claims of the absent Class members. To meet the typicality requirement, "[t]he question is simply whether a named plaintiff in presenting his case, will necessarily present the claims of the absent plaintiffs." Randle v. Spectran, 129 F.R.D. 386, 391 (D. Mass 1988). So long as there is a nexus between the class representative's claims and the common questions of fact or law that unite the class, typicality is satisfied. Priest, 118 F.R.D. at 555 ("With respect to typicality under Rule 23(a)(3), plaintiffs need not show substantial identity between their claims and those of absent class members, but need only show that their claims arise from the same course of conduct that gave rise to the claims of the absent members."); Lussier, 2001 WL 920060, at * 4 ("To satisfy the typicality requirement, the class representatives' injuries must arise from the same event or course of conduct as the injuries of other class members, and their claims must be based on the same legal theories.") (citation omitted). Factual differences do not render a claim atypical if the claim arises from the same event, practice or course of conduct that gives rise to the claims of the class members, and if it is based on the same legal theory. Hawkins, 2004 WL 166722, at *3 ("As long as the claims of the named plaintiffs and the class 'involve the same conduct by the defendant, typicality is established regardless of factual differences.'") (quoting Johnson v. HBO Film Mgt., Inc., 265 F.3d 178, 184 (3d Cir. 2001); Wilcox v. Petit, 117 F.R.D. 314, 318 (D. Me. 1987). Moreover, even relatively pronounced factual differences between class members will not preclude a finding

of typicality where there is a strong similarity of legal theories or where the claims of the class representatives and the class members arise from the same course of conduct by the defendant. *See* Wilcox, 117 F.R.D. at 318; Baby Neal for and by Kanter v. Casey, 43 F.3d 48, 57-58 (3d Cir. 1994). As the Court in Rankin explained, "[t]he typicality requirement is met if the plaintiff's claim arises from the same event or practice or course of conduct that gives rise to the claims of the other class members, and her or his claims are based on the same legal theory." 220 F.R.D. at 518 (quotations omitted).

The claims of the Proposed Class Representatives and the class are based on the same legal theories arising out of the same uniform, Plan-wide events and course of conduct, namely, that Defendants breached their fiduciary duties with regard to investment of Plan assets in the Fund. *See* CMS, 2004 WL 3094447 at *4; Rankin, 220 F.R.D. at 518 (finding typicality satisfied and observing that the "appropriate focus in a breach of fiduciary duty claim is the conduct of the defendants, not the plaintiffs") (quotations omitted); AT&T, No. 02-5409, slip op. at 7 ("plaintiff's claims are typical because he still has to prove the common issues noted above of whether defendants were fiduciaries and whether they breached their fiduciary duties"); McHenry v. Bell Atlantic Corp., 22 Emp. Ben. Cas. 1849, 1998 WL 512942, *4 (E.D. Pa. Aug. 19, 1998) (typicality satisfied where Defendants' alleged imprudent management of savings plan accounts in violation of fiduciary duties under ERISA deprived Plaintiffs and class members alike "of substantial investment earnings on their retirement savings accounts"). Indeed, there are no material differences among the legal theories or operative facts upon which the Participants' claims are based. Accordingly, Plaintiffs satisfy the typicality requirement.

4. Plaintiffs Will Adequately Protect The Interests Of The Class

Class representatives satisfy the "adequacy" requirement under Fed. R. Civ. P. 23(a)(4) where they (1) do not have interests that are antagonistic to the interests of the class and (2) have retained qualified counsel. *See* Key v. Gillette Co., 782 F.2d 57 (1st Cir. 1986); Kirby, 116 F.R.D. at 308; *see also* Priest, 118 F.R.D. at 556 ("Inquiries into the adequacy of representation

should focus on the named plaintiffs' ability to prosecute the action vigorously through qualified counsel and their lack of conflicting interest [*sic.*] with unnamed class members."); Sosna v. Iowa, 419 U.S. 393, 403 (1975) (factors that will satisfy Rule 23(a)(4) are the absence of potential conflicts between the class representatives and the class and the assurance that the class action will be vigorously prosecuted).

The "adequacy" test is easily met in this case. First, as discussed above with respect to the "typicality" requirement, the claims and interests of the Proposed Class Representatives are coincident with those of the other class members, and they have no interests antagonistic to those of the other class members. Indeed, the Proposed Class Representatives' claims are identical to the legal claims belonging to all Class members, and Plaintiffs and class members alike seek to prove Defendants' liability on the basis of common facts underlying those claims. Rankin, 220 F.R.D. at 520.

Moreover, as discussed in more detail below with respect to the appointment of Class Counsel, Plaintiffs have retained counsel highly experienced in this type of litigation and eminently able to conduct this litigation and protect the interests of the class. The adequacy element with respect to Class Counsel is therefore satisfied. Plaintiffs anticipate Defendants will not dispute this issue.

C. THE PREREQUISITES OF RULE 23(b)(1) ARE SATISFIED

To proceed as a class action under Rule 23(b)(1), a plaintiff must satisfy each of the requirements of Rule 23(a) and, in addition, demonstrate that the prosecution of separate actions creates the risk of "inconsistent or varying adjudications with respect to individual members of the class," (Rule 23(b)(1)(A)), or the risk of "adjudications with respect to individual members 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." Rule 23(b)(1)(B). Rule 23(b)(1)(A) considers prejudice to the Defendants whereas subsection (B) focuses on prejudice to class members. In re CMS Energy ERISA Litig., 2004 WL

3094447 at *5; In re Ikon Office Solutions Inc., 191 F.R.D. at 466.

Courts considering ERISA breach of fiduciary duty claims of this type for class certification routinely follow the reasoning of the drafters of the Federal Rules of Civil Procedure in concluding that subsection 23(b)(1)(B) is the most appropriate category for class certification. *See* Advisory Comm. Notes to 1966 Amendment of Fed. R. Civ. P. 23(b)(1)(B) (stating that certification under Rule 23(b)(1)(B) is appropriate in cases charging a breach of trust by a fiduciary to a large class of beneficiaries). As the Supreme Court explained in Ortiz v. Fibreboard, 527 U.S. 815 (1999), the risks of impairment [under Rule 23 (b)(1)(B)] may be . . . found in . . . actions charging a breach of trust by an indenture trustee or other fiduciary similarly affecting the members of a large class of beneficiaries, requiring an accounting or similar procedure to restore the subject of the trust." (quoting Advisory Committee Notes).

Representative ERISA breach of fiduciary duty cases granting class certification under subsection (b)(1) include: In re CMS Energy ERISA Litig., 2004 WL 3094447 at *6; Furstenau v. AT&T Corp., No. 02-5409, slip op. at 8-9; In re WorldCom ERISA Litig., 2004 WL 2211664 at *3; Kolar v. Rite Aide Corp., 2003 WL 1257272 (E.D. Pa. Mar. 11, 2003); Koch v. Dwyer, 2001 WL 289972 (S.D.N.Y. Mar. 23, 2001); Thomas v. SmithKline Beecham Corp., 201 F.R.D. 386, 397 (E.D. Pa. 2001); In re Ikon Office Solutions, Inc., 191 F.R.D. 457 (E.D. Pa. 2000); Bunnion v. Consolidated Rail Corp., 1998 WL 372644 (E.D. Pa. May 14, 1998); Kane v. United Independent Union Welfare Fund, 1998 WL 78985 (E.D. Pa. Feb. 24, 1998); Feret v. Corestates Fin. Corp., 1998 WL 512933 (E.D. Pa. I998); Gruby v. Brady, 838 F. Supp. 820, 827 (S.D.N.Y. 1993); Specialty Cabinets & Fixtures, Inc. v. American Equitable Life Ins. Co., 140 F.R.D. 474, 479 (S.D. Ga. 1991).

Once satisfied that subsection 23(b)(1)(B) applies, some courts have felt it unnecessary reach other potentially applicable subsections, such as 23(b)(1)(A). *E.g.*, Koch v. Dwver, 2001 WL 289972, at *5 n.2 (S.D.N.Y. Mar. 23, 2001). Other courts, however, have certified ERISA class actions under either one or both subsections of 23(b)(1). *E.g.*, Rankin, 220 F.R.D. 511 at

522 (Certifying ERISA claims under 23(b)(1)(A) and (B) because "a failure to certify could expose defendants to multiple lawsuits and risk inconsistent decisions" and "adjudication of [plaintiff's] claims will likely be dispositive of the claims of other potential class members"); CMS, 2004 WL 3094447 at *5; Kolar, 2003 WL 1257272 at *3; Ikon, 191 F.R.D. at 466.

Plaintiffs' breach of fiduciary duty claims satisfy Rule 23(b)(1)(B) because success will bring Plan-wide relief while failure would likely preclude actions by other Plan Participants. One Participant's claim would as a practical matter be dispositive of the interests of other members of the Plans because Plaintiffs' ERISA enforcement claims must be brought in a representative capacity on behalf of the Plans and the relief granted by the Court to remedy a breach of fiduciary duty would "inure[] to the plan as a whole" rather than to the individual plaintiffs. Massachusetts Mut. Life Ins. Co., 473 U.S. at 140; *see also* United Independent Union Welfare Fund, No. 97-1505; 1998 WL 78985 (E.D. Pa. Feb. 24 1998) (certifying class under Rule 23(b)(1)), *citing* Massachusetts Mut. Life Ins. Co., 473 U.S. at 140; Specialty Cabinets & Fixtures, Inc., 140 F.R.D. at 478 (same).

Accordingly, class action treatment under Rule 23(b)(1) is the best way to manage this litigation and ensure that the rights of all Plan Participants are protected. *See* CMS, 2004 WL 3094447 at *6 (failure to certify could risk inconsistent rulings concerning fiduciary status of the defendants and materiality of alleged omissions"); AT&T, No. 02-5409, slip op. at 8-9 ("Plaintiff seeks plan-wide relief, where success necessarily results in plan-wide relief and failure to prove breach of fiduciary duty would necessarily preclude actions by other plan participants."); WorldCom, 2004 WL 2211664 at *3 ("certification is only appropriate under Rule 23(b)(1)(B). Any adjudication with respect to individual members of the class will as a practical matter be dispositive of the interests of the other members of the class"); Ikon, 191 F.R.D. at 466 (recognizing the difficulty imposed by contradictory dispositions and observing that "contradictory rulings as to whether Ikon had itself acted as a fiduciary, whether the individual defendants had, in this context, acted as fiduciaries, or whether the alleged misrepresentations

were material would create difficulties in implementing such decisions")); Kolar, 2003 WL 1257272 at *3 ("Palpably, inconsistent or varying adjudications would be intolerable for the employees of the same employee benefit plans).

Alternatively, Rule 23(b)(1)(A) is also satisfied because Defendants would be exposed to the risk of multiple, inconsistent adjudications. AT&T, No. 02-5409, slip op. at 8-9 ("If this Court did not certify the class, then defendants would be exposed to multiple lawsuits and risk inconsistent decisions"); *see also* CMS, 2004 WL 3094447 at *6 (certifying class under both 23(b)(1)(A) and 23(b)(1)(B)); Rankin, 220 F.R.D. 511 at 522 (same).[4]

D. THE REQUIREMENTS OF RULE 23(g) ARE SATISFIED

Fed. R. Civ. P. 23(g) requires a court, when certifying a class, to appoint class counsel. In effect, this rule complements Rule 23(a)(4)'s requirement that counsel be adequate. In making this determination, the Court should consider the work counsel has done in identifying or investigating potential claims in the action, counsel's experience in handling class actions, other complex litigation, and claims of the type asserted in the action, counsel's knowledge of the applicable law, and the resources counsel will commit to representing the class. Rule 23(g)(1)(C)(i). In addition, the Court may consider any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class, Rule 23(g)(1)(C)(ii), and may direct potential class counsel to provide information on any subject pertinent to the appointment and to propose terms for attorney fees and nontaxable costs, Rule 23(g)(1)(C)(iii).

As the Court noted in appointing Lead Counsel in this case, Class Counsel are experienced in successfully handling class actions, and specifically class actions in relation to

[4] While Plaintiffs believe that Rule 23(b)(1) is the most appropriate basis for certification, to the extent that Defendants contest certification under this provision, these claims could also satisfy the prerequisites of Rule 23(b)(2) and 23(b)(3). However, since Rule 23(b)(1) standards are met, the class should be certified under that section. *See* Piazza v. EBSCO Indus., 273F.3d at 1352-53 (District Court abused its discretion by certifying a § 502(a)(2) class under Rule 23(b)(3) instead of 23(b)(1)).

ERISA 401(k) plans.[5] Lead Counsel have pioneered this area of the law. This depth of experience renders them highly knowledgeable of the applicable law.

Moreover, Lead Counsel have devoted significant effort to identifying and investigating the potential claims in this action. They researched and drafted the Amended Consolidated Complaint and vigorously and successfully defended against Defendants' Motions to Dismiss. They have also negotiated with Defendants numerous discovery and pretrial issues concerning the timing and scope of discovery and appropriate protective and scheduling orders. Lead Counsel have also incurred significant costs and time in reviewing many of the millions of pages of documents produced so far in discovery.

Lead Counsel are prepared to commit the resources necessary to prepare this case for trial including the appropriate use of partners, associates, paralegals and third party vendors. Lead Counsel have an excellent working relationship, which will facilitate the flexible and responsive allocation of resources. The Court therefore has sufficient information to appoint Lead Counsel as Class Counsel who will fairly and adequately represent the interests of the Class, as required by Rule 23(g)(1)(B).

III. CONCLUSION

As Plaintiffs have demonstrated, their claims satisfy the requirements of Fed. R. Civ. P. 23. Accordingly, Plaintiffs move that all claims be certified as a class under Rule 23 (b)(1).

[5] Counsel for Plaintiffs have served or are serving as Lead or Co-Lead Counsel in numerous similar ERISA cases, including In re AOL Time Warner ERISA Litig., In re American Electric Power ERISA Litig., Furstenau v. AT&T Corp., In re JDS Uniphase ERISA Litig., Reinhart v. Lucent Technologies, Inc., In re Reliant Energy ERISA Litig., In re Sprint Corporation ERISA Litig., and In re Cardinal Health ERISA Litig. Copies of updated biographies of Schatz & Nobel, P.C. and Stull Stull & Brody are attached to the Declaration of Paul Kleinman as Exhibits A and B.

DATED: January 20, 2005

BOUCHARD & KLEINMAN, P.A.

By _____
Kenneth G. Bouchard, Esq. - NH Bar #51
369 Lafayette Road
Hampton, NH 03842
(603) 926-9333

Local Counsel for ERISA Plaintiffs

SCHATZ & NOBEL, PC
Robert A. Izard
Andrew M. Schatz
Wayne T. Boulton
William Bernarduci
One Corporate Center, 17th Floor
Hartford, CT 06103
(860) 493-6292

STULL, STULL & BRODY
Edwin J. Mills, Esq.
6 East 45th Street
New York, NY 10017
(212) 687-7230

Lead Counsel for ERISA Plaintiffs