

I. INTRODUCTION

Plaintiffs Matthew T. Zilhaver and Sascha Linn respectfully submit this Memorandum of Law in support of their Motion for Class Certification and for Related Relief. In the Motion, Plaintiffs request that the Court certify the following class:

All participants in the UnitedHealth Group 401(k) Savings Plan (the “Plan”) for whose individual accounts the Plan held shares of UnitedHealth Group, Inc. common stock as part of the UnitedHealth Group Stock Fund investment option in the Plan at any time between December 21, 2005 and May 24, 2006, inclusive.

For the reasons stated herein, Plaintiffs believe that this case satisfies all of the requirements for class certification under Fed. R. Civ. P. 23(a) and (b)(1) and/or (b)(2).

Plaintiffs also move for an order certifying them as the class representatives and for an order designating their undersigned counsel as Class Counsel.

II. NATURE OF THE ACTION

During the proposed Class Period in this case, Defendant UnitedHealth Group, Inc. (“United Health” or the “Company”) sponsored the Plan, a 401(k) defined contribution retirement plan for its employees. During the Class Period, UnitedHealth and other fiduciaries of the Plan allowed Plan participants to maintain investments in Company common stock in their individual accounts under the Plan. UnitedHealth and the other fiduciaries allowed the participants to maintain their investment in Company stock without informing them of the long-standing, systematic and pervasive violations of law taking place within the senior management ranks of the Company with respect to the executive stock option practices at the Company. Indeed, instead of informing the participants about the true state of affairs with respect to the backdating of executive stock option grants, UnitedHealth

and the other Plan fiduciaries allegedly concealed this information from the participants entirely, and even went so far as to transmit a coercive communication to the participants to the effect that if participants moved their retirement savings out of Company stock and into another investment alternative available under the Plan they would not be allowed to re-invest their retirement savings in Company stock. Since the market price of Company stock in recent years has dramatically increased (the market being deceived, until recently, about the true state of affairs with respect to the executive stock option program at the Company), the coercive communication effectively resulted in participants continuously maintaining the investment of their retirement savings in Company stock until the sudden revelation of the unlawful practices at the Company caused a diminution in the value of the participants' retirement savings.

It has been noted of record in many publications, including *The Wall Street Journal* (which commenced an exposé into public companies' practices relating to the backdating executive stock options in March 2006) that more than 200 companies have not been implicated, investigated, prosecuted and/or sued for improperly backdating executive stock options to improperly award senior executives of public companies with literally billions of dollars of shareholders' money. UnitedHealth Group has become the poster child for excessive greed by senior management and a lack of institutional control to prevent overreaching by corporate insiders. Among other things, the investigation of executive stock option practices at the Company by Wilmer Cutler Pickering Hale and Dorr LLP has established unlawful, unethical and inappropriate conduct, including :

- That stock options awarded to Defendants William McGuire, Stephen J. Hemsley were likely backdated;

- That the Company's internal controls to prevent senior executives from over-reaching in the executive stock option program were inadequate;

- That the Compensation Committee at the Company, which included Defendant William G. Spears, not only failed to properly monitor executive compensation at the Company, but Spears himself had a financial relationship with Dr. McGuire that rendered him a totally inappropriate and ineffectual watchdog laboring under an impermissible conflict of interest --- which conflict Spears concealed from the Board of Directors; and

- That "management transparency with the Board and its committees on executive compensation matters are basic and critical to the integrity of option grants... [T]here were various failing in these areas"

The executive stock option scandal at UnitedHealth Group constituted a clear breach of fiduciary duties of prudence and loyalty imposed by ERISA on the fiduciaries of the Plan. According to the well pleaded allegations of the Second Amended Complaint, the fiduciaries of the Plan included:

- L. Robert Dapper, one of the two "named fiduciaries" of the Plan, who is alleged should have known about the pervasive and long-standing abuses of the executive stock option program at the Company;

- James A. Johnson, a member of the Board's Compensation Committee who was (according to the Company's Proxy Statement) "responsible for overseeing our

compensation, employee benefit and stock-based programs. The Committee also negotiates and administers our employment arrangements with our Chief Executive Officer [McGuire] and President and Operating Officer [Hemsley].” Defendant Johnson is charged with knowing about the executive stock option abuses and illegalities at the Company, or with being negligent in not knowing of such things, particularly given Defendant Johnson role in the executive stock option program (and abuses of that program) at another company, KB Homes.

- William G. Spears, as noted above, was Chairman of the Compensation Committee from 1999 to 2004, he is charged with authorizing, approving and ratifying the backdating of the executive stock options at the Company, and he is further charged with concealing the enormous conflict of interest under which he labored due to his extensive financial transactions with McGuire;

- Mary A. Munding is another Plan fiduciary and member of the Compensation Committee charged with oversight responsibility for the executive compensation properly received, and actually received, by Defendants McGuire and Hemsley. Defendant Munding is alleged to have improperly authorized, approved and ratified the unlawful practices at issue in this case. It was Defendant Munding who was publicly quoted in early 2007, long after the Wilmer Cutler report was issued, as stating: “We’re so lucky to have Bill....” “He’s brilliant.” (Complaint para. 81). A fiduciary acting with an “eye single” to the best interests of the participants would have done much more to protect the interests of the participants while hundreds of millions of dollars of shareholders’ money was being improperly paid to McGuire, and such a fiduciary would certainly not have

sung the praises of McGuire long after his improprieties were publicly acknowledged by the Company;

- Dr. McGuire, the recipient of the unlawful grants with knowledge of all pertinent facts;
- Defendant Hemsley, who was also a recipient of unlawful executive stock option grants who is alleged to have known of the pertinent facts pertaining to the grants to him and the grants to McGuire;
- The Company, which sponsored and administered the Plan and which is, with Defendant Dapper, one of the named fiduciaries of the Plan. The Company's liability is both direct, for its actions as a named fiduciary, including the transmittal to participants of summary plan descriptions, proxy statements and other written reports which concealed the improprieties within the Company, and derivative, through the doctrine of *respondeat superior*. The governing plan document makes clear that the Company's responsibilities with respect to the Plan "shall be discharged by Sponsor's [the Company's] officers." (Complaint para. 11).

According to the well pleaded allegations of the Complaint the improprieties from the implementation of the executive stock option program rendered UnitedHealth Group stock an imprudent investment for the participants' retirement savings. The improper practices described in the Complaint have resulted in substantial losses to the Plan for which the fiduciaries are personally liable under ERISA §409(a), 29 U.S.C. §1109(a). "The executive stock option scandal at UnitedHealth has resulted in senior management changes and related distractions, costs and uncertainties; a need to restate the Company's financial statements;

additional tax liabilities in amounts not yet determined; regulatory non-compliance (the inability to timely file required report with the SEC); ongoing investigations by the SEC, United States Attorneys, Minnesota regulators and the IRS, and civil suits which may cost the Company hundreds of millions of dollars. The market price of the Company's common stock, and the value of the units of the UnitedHealth Group Stock Fund held by participants, would now be substantially higher, and would have been substantially higher throughout the Class Period, but for the executive stock option scandal at the Company.” (Complaint para. 84).

As demonstrated herein, this action satisfies all of the requirements for class certification under Rule 23(a)(1)-(4) and 23(b)(1)-(2) of the Federal Rules of Civil Procedure. Indeed, since the type of claims brought by Plaintiffs under ERISA are specifically designed to provide *Plan-wide, not individual, relief*, failure to certify the proposed class might leave injured Participants or their beneficiaries without effective relief from Defendants' breaches of fiduciary duty. This action is also highly similar to other ERISA cases brought on behalf of plan participants for breaches of fiduciary duty involving the allegedly imprudent investment of 401(k) plan assets in employer stock. For all of these reasons, Plaintiffs' Motion should be granted.

III. STATEMENT OF FACTS

A. The Court is Limited in its Assessment of the Facts and the Merits of an Action When Resolving a Class Certification Motion

When resolving a motion for class certification, a court may not base its ruling on its assessment of the likelihood of success on the merits. The relevant issue is whether the

plaintiffs can satisfy the requirements of Rule 23, not whether plaintiffs have stated a cause of action or are likely to prevail on the merits. *See, e.g., In re Potash Antitrust Litig.*, 159 F.R.D. 682, 688 (D. Minn. 1995); *Jackson v. Rapps*, 132 F.R.D. 226, 230 (W.D. Mo. 1990); *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 178 (1974) (explaining that courts do not have authority to conduct a preliminary inquiry into the merits of a suit in determining whether it may be maintained as a class action). Therefore, the court should not try to decide the merits of the underlying case in deciding whether class certification is appropriate. *Elizabeth M. v. Montenez*, 458 F.3d 779, 786 (8th Cir. 2006) (“Though class certification is not the time to address the merits of the parties' claims and defenses, the “rigorous analysis” under Rule 23 must involve consideration of what the parties must prove”).¹ As stated by Judge Gottschall in *Rogers v. Baxter International, Inc.*, WL 794734, 2006 U.S. Dist. LEXIS 12926 (N.D. Ill. March 22, 2006), Rule 23’s requirements are to be applied liberally and “[d]oubts whether to grant certification generally are resolved in favor of certification.” *Id* at *6-7 (citations omitted); *see also Caroline C. v. Johnson*, 174 F.R.D. 452, 459 (D. Neb. 1996) (“Any type of civil claim, federal or state, may be maintained as a class action in federal court, and Rule 23 should be liberally construed and applied. 3B Moore's Federal Practice P 23.02[4], at 23-70 and 71 (citing *Eisen v. Carlisle & Jacquelin*, 391 F.2d 555 (2nd Cir. 1968)).”)

¹ “The preliminary inquiry at the class certification stage may require the court to resolve disputes going to the factual setting of the case, and such disputes may overlap the merits of the case. Nonetheless, such disputes may be resolved only insofar as resolution is necessary to determine the nature of the evidence that would be sufficient, if the plaintiff's general allegations were true, to make out a prima facie case for the class. The closer any dispute at the class certification stage comes to the heart of the claim, the more cautious the court should be in ensuring that it must be resolved in order to determine the nature of the evidence the plaintiff would require.” *Blades v. Monsanto Co.*, 400 F.3d 562, 567 (8th Cir. 2005) (internal citations omitted).

Further, when exercising its discretion in deciding whether or not to certify a class, courts are “mindful that the class action device is a necessary vehicle for the vindication of small claims, especially when the nature of the claim involves complex litigation.” *In re Control Data Corp. Sec. Litig.*, 116 F.R.D. 216 (D. Minn. 1986); *Vernon J. Rockler & Co. v. Graphic Enters., Inc.*, 52 F.R.D. 335, 347 (D. Minn. 1971).

B. Facts of the Case²

The Complaint alleges that the Defendants were fiduciaries of the Plan charged with the responsibility to place the interests of the participants before their own and to act prudently on behalf of the participants. The Defendants are charged with failing to fulfill the fiduciary duties of prudence and loyalty by allowing participants to maintain their retirement savings in UnitedHealth Group stock when it was not prudent to do so and by concealing important information from the participants.

First, as to the “imprudent investment” claim, it seems obvious that a fiduciary who knows about improper practices involving senior management which result in a loss of confidence in management, governmental investigations, civil suits and a material decline in the value of employer stock is obligated to do something to protect the participants from the loss that foreseeably follows when the participants are lulled into keeping their retirement savings in employer stock at a time of great risk. Here, the Plan’s fiduciaries either knew, or

² Plaintiffs incorporate herein the factual and legal allegations presented in their Second Amended Complaint (Class Action), filed on May 1, 2007 (hereinafter the “Complaint”). Paragraph 10, *et seq.* of the Complaint contains a complete list of all Defendants in this action.

should have known, about the long-standing, pervasive and unlawful practices at the Company and should, at the very least, have “sounded the alarm” so that the participants could diversify out of employer stock and into prudent, better-performing investment alternatives. Here, the fiduciaries not only failed to sound the alarm and prevent the participants from maintaining their retirement savings in Company stock, they issued or approved a coercive statement to the participants that if the participants diversified out of Company stock they would not be allowed back in. This was a clear violation of the fiduciaries’ duty of prudence, and also of the duty of loyalty and good faith owed to the participants.

The second way in which the Company and other Plan fiduciaries are alleged to have breached their fiduciary duties under ERISA is by negligently making misrepresentations and negligently failing to disclose material information necessary for Participants to make informed decisions concerning Plan assets and benefits and the appropriateness of the common stock of the Company as a Plan investment.

The third way in which Defendants breached their fiduciary duties under ERISA is that each Defendant allegedly failed to appoint fiduciaries with the knowledge and expertise necessary to manage Plan assets, failed to monitor those fiduciaries properly, and failed to provide sufficient information to Participants and for Plan fiduciaries to perform their duties.

Given the above, Defendants allegedly breached their fiduciary duties to the Plan 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. Pursuant to ERISA § 409(a), 29 U.S.C. §

1109(a), Defendants are personally liable to make good to the Plan the losses resulting from each such breach of fiduciary duty.

IV. ARGUMENT

A. Plaintiffs' Claims for Breach of Fiduciary Duty under ERISA are Uniquely Appropriate for Class Treatment.

Under ERISA § 502(a)(2), 29 U.S.C. § 1132(a)(2), any participant in or beneficiary of a plan may sue for breach of fiduciary duties. Such an action is by statutory definition brought “*in a representative capacity on behalf of the plan as a whole.*” *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 142 n.9 (1985) (emphasis added). Accordingly, only relief for the plan, sometimes referred to as plan-wide relief - not individual relief - is available under § 502(a)(2). *E.g., In re Aquila ERISA Litig.*, 237 F.R.D. 202, 208 (D. Mo. 2006). Under ERISA, a breach of fiduciary duty claim is *automatically* a representative claim. *See Kayes v. Pacific Lumber Co.*, 51 F.3d 1449, 1462 (9th Cir. 1995). Thus, if Plaintiffs are successful under § 502(a)(2) in recovering money damages on account of the Defendants' breaches of fiduciary duties, the entire recovery will flow to the Plans, to be held, allocated and ultimately distributed to Plan Participants in accordance with the requirements of the Plans and ERISA itself.

Over the years, a judicial consensus has emerged with respect to breach of fiduciary actions involving defined contribution retirement pension plans such as the Plan. The reported decisions considering alleged violations of fiduciary duties under ERISA have, almost without exception, held that class certification is appropriate under at least one

subsection of Rule 23(b), usually subsection(b)(1). Many examples are cited in the following footnote.³

B. The Proposed Class Satisfies the Requirements of the Federal Rules of Civil Procedure.

Plaintiffs seeking certification for a proposed class must satisfy four threshold requirements under Rule 23(a) of the Federal Rules of Civil Procedure: (1) “numerosity,” (2) “commonality,” (3) “typicality,” and (4) “adequacy of representation.” In addition, Plaintiffs must satisfy the requirements of one or more of the three subsections of Rule 23(b). Here, the proposed Class satisfies each of Rule 23(a)’s prerequisites. Further, the Class’ claims satisfy Rule 23(b)’s alternate requirements.

(1) Rule 23(a)

³ See, e.g., *In re Amsted Indus., Inc. ERISA Litig.*, 2002 WL 31818964, 2002 U.S. Dist. LEXIS 24144 (N.D. Ill. Dec. 16, 2002)(granting class certification in a highly analogous case to a Class of ESOP plan participants and their beneficiaries); *Amara v. Cigna Corp.*, 2002 U.S. Dist. LEXIS 25947 (D. Conn. 2002) (granting class certification in ERISA case under subsection (b)(2)); *Koch v. Dwyer*, 2001 WL 289972, at *5 (S.D.N.Y. 2001) (“Plaintiff’s action charges breach of fiduciary duty affecting the large class of participants in the Plans and Plaintiff seeks equitable relief on behalf of those participants and their beneficiaries. Accordingly, class certification is proper under Rule23(b)(1)(B)”; *In re IKON Office Solutions, Inc.*, 191 F.R.D. 457, 466 (E.D. Pa. 2000) (granting class certification under subsection (b)(1); “given the nature of an ERISA claim which authorizes plan-wide relief, there is a risk that failure to certify the class would leave future Plaintiffs without relief. . . . There is also risk of inconsistent dispositions that would prejudice the defendants”) (citations omitted); *Montgomery v. Aetna Plywood, Inc.*, 1996 WL 189347 at *5 (N.D. Ill. 1996) (granting class certification under subsection (b)(1) for claims involving alleged breach of fiduciary duty); *Atwood v. Burlington Indus. Equity, Inc.*, 164 F.R.D. 177, 179 (M.D.N.C. 1995) (granting class certification under subsection (b)(1): “An action against a fiduciary under ERISA for harm done to a retirement plan must be for the benefit of the plan as a whole, not for the gain of any one beneficiary.”); *Specialty Cabinets & Fixtures, Inc. v. American Equitable Life Ins. Co.*, 140 F.R.D. 474, 479 (S.D. Ga. 1991) (granting class certification; “Because an individual ERISA action to remedy breaches of fiduciary duty would ‘substantially impair or impede’ the ability of absent beneficiaries and participants to protect their interests, courts should certify these actions pursuant to Rule 23(b)(1)(B)).”; see also *In re Aquila ERISA Litig.*, 237 F.R.D. at 208 n.6 (“A multitude of courts have certified a class under ERISA § 502(a)(2)”; *In re Williams*, 231 F.R.D. 416; *In re Reliant Energy ERISA Litig.*, No. 02-2051, 2005 WL 2000707 (S.D. Tex. Aug. 18, 2005); *In re Syncor ERISA Litig.*, 227 F.R.D. 338 (C.D. Cal. 2005); *Summers v. UAL Corp. ESOP Comm.*, No. 03-1537, 2005 U.S. Dist. LEXIS 11745 (N.D. Ill. Feb. 17, 2005); *In re CMS Energy ERISA Litig.*, 225 F.R.D. 539 (E.D. Mich. 2004); *Elec. Data Sys. Corp. ERISA Litig.*, 224 F.R.D. 613 (E.D. Tex. 2004); *In re WorldCom, Inc. ERISA Litig.*, 2004 U.S. Dist. LEXIS 19786, No. 02-4816, 2004 WL 2211664 (S.D.N.Y. Oct. 4, 2004); *Furstenau v. AT&T Corp.*, No. 02-5409, 2004 U.S. Dist. LEXIS 27042 (D.N.J. Sept. 2, 2004); *Rankin v. Rots*, 220 F.R.D. 511 (E.D. MI. 2004); *Nelson v. IPALCO Enters., Inc.*, No. IPO2-477CHK, (E.D. Pa. Mar. 11, 2003); *Ikon*, 191 F.R.D. 457 (E.D. Pa. 2000).”

(a) Rule 23(a)(1) – “Numerosity”

Rule 23(a)(1) permits class treatment where “the class is so numerous that joinder of all members is impracticable.” Fed. R. Civ. P. 23(a)(1). “There is no numerical requirement for satisfying the numerosity requirement.” *Halbach v. Great-West Life & Annuity Ins. Co.*, 2007 U.S. Dist. LEXIS 24252 (D. Mo. 2007). As one court has explained, “[i]mpracticability does not mean ‘impossibility’ but only the difficulty or inconvenience of joining all members of the class.” *Harris v. Palm Springs Alpine Estates, Inc.*, 329 F.2d 909, 913-14 (9th Cir. 1964); *see also Alas v. Rockline Indus.*, 2006 U.S. Dist. LEXIS 67964 (D. Ark. 2006) (“While the exact number of class members need not be pleaded or proved, impracticability of joinder must be positively shown, and cannot be speculative.”).

Publicly available information concerning the Company, including the Company’s SEC filings, indicate that the Company’s common stock was held during the Class Period by at least thousands of persons (over 40,000 individuals were participants in the Plan at times relevant to this case), some of whom are the Class members in this case in that they held the UnitedHealth Group common stock in their 401(k) retirement accounts. Joinder of all of these hundreds or thousands of persons as individual party Plaintiffs would clearly be impracticable. The information in the Company’s own SEC filings is more than sufficient for a finding that the numerosity requirement of Rule 23(a)(1) is satisfied. *See, e.g., Baxter, supra* at * 7-8; *Daniels, supra* at 612; *see also Sondel v. Northwest Airlines*, 1993 U.S. Dist. LEXIS 21252, 20-21 (D. Minn. 1993) (“When considering numerosity and impracticability of joinder in deciding whether to certify a class, it is not necessary for the class representatives to either identify each particular member of the class or the exact number of

class members; instead the trial court may reasonably infer that numerosity is satisfied from the facts of the case.”) The sheer size of the prospective Class makes joinder most impracticable. The Rule’s “numerosity” requirement is therefore satisfied.

(b) Rule 23(a)(2) – “Commonality”

Rule 23(a)(2) requires that there be “questions of law or fact common to the class.” The Class proposed in this action easily meets this requirement. Commonality is satisfied if “a common issue pervades all the class members’ claims.” *Morgan v. United Parcel Service of America*, 169 F.R.D. 349, 355 (E.D.Mo. 1996). “Commonality does not require that every question of law or fact be common to every member of the class, and may be satisfied, for example, where the question of law linking the class members is substantially related to the resolution of the litigation even though the individuals are not identically situated. *Paxton v. Union Nat'l Bank*, 688 F.2d 552, 561 (8th Cir. 1982), *cert. denied*, 460 U.S. 1083, 103 S. Ct. 1772, 76 L. Ed. 2d 345 (1983) (quoting *American Finance Sys., Inc. v. Harlow*, 65 F.R.D. 94, 107 (D. Md. 1974).” *In re Am. Italian Pasta Co. Sec. Litig.*, 2007 U.S. Dist. LEXIS 21365 (D. Mo. 2007) (internal quotation marks omitted). The commonality requirement is not demanding. It “is met if a common issue pervades all class members' claims. *See Paxton*, 688 F.2d at 561. Commonality does not require that all questions of law and fact raised in litigation be common; there need only be a single issue common to all class members. *Id.*” *Guerra v. Pub. Safety Concepts*, 2007 U.S. Dist. LEXIS 13563, at *6-7 (E.D. Mo. 2007).

There are a number of common issues/questions of law and/or facts common to all Class members in this action. The overarching question of law and fact applicable to all Participants and their beneficiaries is whether the Defendants breached fiduciary duties owed

to the Plan and its participants in allowing the maintenance of investments in Company stock when Defendants knew or should of known of the scandalous and pervasive misconduct in the area of the Company’s executive stock option practices which negatively affected the prudence of Company stock as a Plan investment during the Class Period. The following common questions of law and fact (among others) exist as to all members of the Class and predominate over any questions affecting solely individual potential members:

- a. whether Defendants were fiduciaries of the Plan and/or the Participants;
- b. whether Defendants breached their fiduciary duties;
- c. whether the Plan and the Participants were injured by such breaches;
and
- d. whether the Class is entitled to damages and injunctive relief.

All of these questions are sufficient to satisfy Plaintiffs’ burden under Rule 23(a)(2) because they all address common issues of owed fiduciary responsibility to the plan participants. *See, e.g., In re Aquila ERISA Litig.*, 237 F.R.D. 202, 210-211 (W.D. Mo. 2006) (granting class certification for an alleged imprudent investment under ERISA).

(c) Rule 23(a)(3) – “Typicality”

The claims raised by Plaintiffs are “typical” of the claims of all members of the proposed Class, as required by Rule 23(a)(3). “Although they are separate requirements, commonality and typicality ‘tend to merge’ and are often discussed together.” *In re Am. Italian Pasta Co. Sec. Litig.*, 2007 U.S. Dist. LEXIS 21365, 10-11 (D. Mo. 2007). “Typicality means the plaintiff has the same or similar grievances as the members of the class who have the same or similar grievances as the plaintiff. *Alpern v. UtiliCorp United, Inc.*, 84

F. 3d 1525, 1540 (8th Cir. 1996). The burden of demonstrating typicality is fairly easy to meet so long as other class members have claims similar to the named plaintiff. *DeBoer*, 64 F. 3d at 1174. ‘Factual variations in the individual claims will not normally preclude class certification if the claim arises from the same event or course of conduct as the class claims, and gives rise to the same legal or remedial theory.’ *Alpern*, 84 F.3d at 1540.” *In re Am. Italian Pasta Co. Sec. Litig.*, 2007 U.S. Dist. LEXIS 21365 at *11-12.

Plaintiffs’ claims are clearly typical of those of the proposed Class. Plaintiffs are or were current or former employees of the Company, are or were participants of the Plan, and had a portion of their individual Plan investment portfolios invested in Company stock during the Class Period. Plaintiffs sustained injury arising out of Defendants’ wrongful conduct. Therefore, the typicality requirement of Rule 23(a)(3) is easily met here. *See generally In re Aquila ERISA Litig.,supra* (finding typicality in an ERISA § 502 class action).

(d) Rule 23(a)(4) - Adequacy of Representation

Rule 23(a)(4) mandates that the putative class representative will “fairly and adequately protect the interests of the class.” The focus here is whether “(1) the class representatives have common interests with the members of the class, and (2) whether the class representatives will vigorously prosecute the interests of the class through qualified counsel.” *In re Aquila ERISA Litig.*, 237 F.R.D. at 209.

“The adequacy of representation requirement tends to merge with the commonality and typicality criteria of Rule 23(a), ‘which serve as guideposts for determining whether maintenance of a class action is economical and whether the named plaintiff’s claim and the class claims are so interrelated that the interests of the class members will be fairly and

adequately protected in their absence.’” *In re Am. Italian Pasta Co. Sec. Litig.*, 2007 U.S. Dist. LEXIS at *21. As noted above, Plaintiffs are or were Participants of the Plan during the Class Period and suffered injury from, and are suing for, *Plan-wide* relief for identical alleged breaches of fiduciary duty on the part of Defendants. Plaintiffs seek monetary and injunctive relief that will inure to the direct benefit of the entire proposed Class. Plaintiffs’ interests are squarely in line with those of the proposed Class. Plaintiffs are therefore adequate representatives of the proposed Class. *See generally In re Aquila ERISA Litig.*, *supra* (finding typicality in an ERISA § 502 class action).

Turning to qualifications of counsel (the second “prong”), Plaintiffs have retained attorneys who are experienced, successful, and well-regarded practitioners of complex ERISA breach of fiduciary duty class actions. See Exhibits A and B hereto. Plaintiffs therefore satisfy the adequacy requirement.

(2) Rule 23(b)

It has often been noted that the additional requirements of Rule 23(b) overlap considerably with those of Rule 23(a), and with each other. *NEWBERG ON CLASS ACTIONS*, Fourth Edition § 4.01.

(a) The Proposed Class Meets the Requirements of Rule 23(b)(1).

Under Rule 23(b)(1), a class may be certified if:

- (1) the prosecution of separate actions by or against individual members of the class would create a risk of
 - (A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

- (B) 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.

Therefore, Rule 23(b)(1)(A) “considers possible prejudice to the defendants, while 23(b)(1)(B) looks to possible prejudice to the putative class members.” *In re Ikon Office Solutions, Inc. Sec. Litig.*, 191 F.R.D. 457, 466 (E.D. Pa. 2000). Certifications under both sections of Rule 23(b) are common in ERISA breach of fiduciary duty cases because of the Defendants’ alleged “unitary treatment” of the individual members of the proposed Class. *Id.* (citation omitted); *see also* Fed. R. Civ. P. 23(b)(1)(B), Advisory Comm. Notes to 1996 Amendment (stating that certification under 23(b)(1) is appropriate in cases charging breach of trust by a fiduciary to a large class of beneficiaries).

Further, the Complaint alleges breaches of fiduciary duties under ERISA. Therefore, as noted *supra*, the *only remedy available to Plan participants is plan-wide relief, including the restoration of losses to the Plan.* *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 139-40 (1985)(emphasis added). Thus, actions such the instant one for breaches of fiduciary duty under ERISA are *by law* representative actions, which, if successful, will cause Defendants to be obligated to provide relief, through the Plan, to all injured Participants. *See Montgomery v. Aetna Plywood, Inc.*, 1996 WL 189347, 1996 U.S. Dist. LEXIS 4869, *18 (N.D. Ill. 1996) (stating, in an analogous case, that:

[A] primary concern in this type of suit is to avoid inconsistent determinations. Since the relief sought is for the ESOP as a whole, multiple adjudications could produce inconsistent results placing inconsistent obligations on defendants. Certification pursuant to Rule 23(b)(1)(A) is [therefore] appropriate.).

Given the unique “group-based” relief offered under ERISA for violations of fiduciary duties owed to participants in covered benefit plans, an action such as this one is a textbook case for class treatment under Rule 23(b)(1). This basic point was elucidated concisely by the court in *In re Ikon Office Solutions, Inc. Sec. Litig.*, 191 F.R.D. 457 (E.D. Pa. 2000), a case in which some of the class claims were breaches of fiduciary duty under ERISA highly analogous to those brought in this action:

The court agrees that, given the nature of an ERISA claim which authorizes plan-wide relief, there is a risk that failure to certify the class would leave future plaintiffs without relief. . . . There is also risk of inconsistent dispositions that would prejudice the defendants: 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.

IKON, 191 F.R.D. at 466 (citing *Feret v. Corestates Fin. Corp.*, 1998 WL 512933 at *13, 1998 U.S. Dist. LEXIS 12734 (E.D. Pa. 1998)).

As noted herein, under ERISA a recovery in this case flows directly to the Plan, which in turn allocates the recovery to the individual 401(k) accounts of each Class member. *See generally In re Aquila ERISA Litig., supra*. There are aspects of this case which are necessarily class-wide, regardless of class action certification.

(b) The Proposed Class Meets the Requirements of Rule 23(b)(2).

Under Rule 23(b)(2), a class may be certified if:

[T]he party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole.

The proposed Class also satisfies the requirements of Rule 23(b)(2). As noted repeatedly *supra*, defendants' conduct (and the relief sought from the effects of it) in an ERISA breach of fiduciary duty case must apply to the class of plan participants as a whole. *See generally White v. Sundstrand Corp.*, 1999 WL 787455, 1999 U.S. Dist. LEXIS 15091, *19-20 (N.D. Ill. 1999) (certifying ERISA claims for fiduciary duty under Rule 23(b)(2)); *Kirse v. McCullough*, 2005 U.S. Dist. LEXIS 35981 (W.D. Mo. 2005) (certifying a similar ERISA action for plan-wide relief under 23(b)(2)).

If Plaintiffs prove that Defendants harmed the proposed class of Plan Participants by their breaches of fiduciary duties in the manner alleged in the Complaint, Defendants will be obliged to make the *plan* whole, and take whatever equitable actions are ordered by the Court. *See* ERISA §409(a), 29 U.S.C. § 1109(a); ERISA §§ 502(a)(2)-(3), 29 U.S.C. §§ 1132(a)(2)-(3); *see, e.g.*, Complaint, "Prayer for Relief". Upon proof of the merits of the Complaint, the recovery to the individual proposed Class members/Plan Participants, by way of refurbished and lawfully run retirement plan, "would flow directly and incidentally from that declaratory relief". *Bublitz v. E.I. du Pont de Nemours & Co.*, 202 F.R.D. 251, 259 (S.D. Iowa 2001) (certifying a Rule 23(b)(2) class in an ERISA breach of fiduciary duty action and noting that the monetary relief granted flowed directly from the declaratory relief sought by plaintiffs). Therefore, given the above, Plaintiffs' claims also allow for certification of the proposed Class under Rule 23(b)(2).

V. CONCLUSION

For the reasons stated herein, this action should be certified as a class action under Rule 23(a) and (b)(1) and/or (b)(2) of the Federal Rules of Civil Procedure on behalf of the Class defined herein. The Court should also appoint Plaintiffs Matthew T. Zilhaver and Sascha Linn as the class representatives and appoint Stull, Stull & Brody as lead counsel for the certified class and Krause & Rollins as liaison counsel for the certified class.

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