IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

SARA E. EPPARD, *et al.*,	:	
Plaintiffs,	:	Case No. 2:09-CV-234
v.	:	Judge Smith
	:	Magistrate Judge King
VIAQUEST, INC., *et al.*,	:	
Defendants.	:	

JOINT MOTION FOR CONDITIONAL CLASS CERTIFICATION

The parties hereby move this Court for certification of this case as a class action pursuant to Rule 23 of the Federal Rules of Civil Procedure, on the grounds that the four prerequisites of Rule 23(a) are met; certification is appropriate under 23(b)(1) or (b)(2); and Plaintiffs' counsel should be appointed as class counsel. This motion is based on the Memorandum set forth below, the Declaration of Attorney Danny L. Caudill (Ex. A, hereto) and the Declaration of Attorney Robert J. Beggs (Ex. B, hereto) in Support of Appointment of Class Counsel filed herewith, this Court's files and records in this case, and such other matters as may be brought before the Court at hearing.

FOR PLAINTIFFS SARA E. EPPARD AND ALEIDA M. RIVERO AND ALL PLAN PARTICIPANTS AND BENEFICIARIES:

DATED: 12/9/09

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DATED: 12/9/09

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INTRODUCTION AND SUMMARY OF ARGUMENT

This ERISA[1] action arises out of a dispute concerning the ViaQuest, Inc. Employee Benefit Plan ("the Plan"), a self-funded employee welfare benefit plan administered and

[1] The Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001, *et seq.*

managed by Defendant ViaQuest, Inc. Plaintiffs allege that Defendants are fiduciaries of the Plan, entrusted with exercising discretionary authority and control respecting management and administration of the Plan and the Plan's assets. Plaintiffs allege that Defendants failed in these duties, causing massive losses to the Plan. For their part, Defendants deny Plaintiffs' allegations.

In particular, Plaintiffs allege that Defendants (1) depleted the Plan's assets and failed to make contributions required by the Plan's terms; (2) used assets, or permitted assets to be used, to fund operations of ViaQuest, Inc. and the affiliated defendants; (3) have commingled the Plan's assets, or permitted the Plan's assets to be commingled with the respective Defendants' general assets, instead of appropriately segregating assets into the Plan's trust as required by the Plan and ERISA; (4) failed to take appropriate action to ensure that the Plan was actuarially sound; (5) failed to provide notice to Plan participants and beneficiaries that the Plan had insufficient funds to pay claims in a manner that would have permitted participants and beneficiaries to avoid harm; and (6) used Plan assets, or permitted the use of the Plan assets, for prohibited party-in-interest transactions.

Plaintiffs' claims arise under ERISA sections 502(a), 404, 406, and 409, which together empower plan participants to bring civil actions to hold plan fiduciaries personally liable to make good losses to the plan resulting from breaches of fiduciary duty. 29 U.S.C. §§1132(a)(2), 1104, 1106, 1109. All of Plaintiffs' claims focus exclusively on the conduct of the Defendants and each of Plaintiffs' claims depends on common questions of law and fact which, if proven, would result in recovery to the Plan as a whole.

The parties agree that Plaintiffs' claims present issues of fact and law that can be, and as a matter of efficiency should be, decided on a class-wide basis. Accordingly, the parties jointly ask the Court to certify a class action pursuant to Fed. R. Civ. P. 23(a), (b)(1) and/or (b)(2),

defined as follows: all Plan participants and beneficiaries, including but not limited to, current and former employees of Defendants, who are eligible for, and/or owed, benefits under the Plan. The parties demonstrate below that the class satisfies all requirements under Rule 23: (1) Plaintiffs have standing, (2) a readily identifiable class exists, (3) the four prerequisites of 23(a) are met, and (4) certification is appropriate under 23(b)(1) and/or (b)(2). Last, the parties jointly request that Plaintiffs' Counsel should be appointed as Class Counsel.

I. FACTS PERTINENT TO CLASS CERTIFICATION

Plaintiffs Sara Eppard and Aleida Rivero are former employees of Defendants who participated in the Plan. (Complaint ¶8). Defendants ViaQuest, Inc., Richard Johnson, Tyler Traucht, and Jenny Detzel are individuals and an entity alleged to have been fiduciaries of the Plan during all relevant time periods. (*Id.* ¶¶4, 31, 32, 33, 34, 45).

The Plan is a self-insured ERISA welfare plan, which offered group life, accidental death and dismemberment, medical care and dental benefits to employees of ViaQuest, Inc. and the affiliated defendants. (*Id.* ¶40). The Plan is funded through a combination of employee and employer contributions. (*Id.* ¶41). On or about March 2008, the Plan began failing to make payments to beneficiaries. (*Id.* ¶47). As a result, Plan beneficiaries and participants were subjected to collection activities by their medical providers. (*Id.* ¶49). Such collection activity continues to this day. (*Id.*).

Pursuant to ERISA Sections 502(a), 404, 406, and 409, Plaintiffs filed the instant action seeking relief including: (1) an order compelling Defendants to make good to the Plan all losses resulting from these breaches, plus interest; (2) the removal of certain individuals from positions they may currently hold as a fiduciary with respect to the Plan; (3) appointment of an independent fiduciary at Defendants' expense with authority and control over the management

and administration of the Plan; and (4) payment of Plaintiffs reasonable attorneys' fees and costs. (*Id.,* Prayer for Relief).

II. ARGUMENT

A. ERISA Section 502(a)(2) Claims are Particularly Appropriate for Class Treatment Because Participants Share a Common Interest in the Financial Integrity of the Plan.

A Section 502(a)(2) breach of fiduciary duty action, such as this one, is 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). This rule derives from the text of ERISA Section 409, which is enforced through Section 502(a)(2)[2]: "Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this title shall be personally liable to make good to such plan any losses to the plan resulting from each such breach." [3] 29 U.S.C. § 1109(a). As a result, a participant can obtain the identical relief for the plan regardless of whether it is brought in an individual capacity on behalf of the plan, or as a representative of a class of plan participants on behalf of the plan. See *Mertens v. Kaiser Steel Retirement Plan*, 744 F. Supp. 917, 921 (N.D. Cal. 1990), *aff'd sub nom. Mertens v. Black*, 948 F.2d 1105 (9th Cir. 1991) (per curiam). Thus, an absence of class certification does nothing to defeat or reduce the plan's recovery, because the relief on a Section 502(a)(2) claim is measured not by any individual's loss, but by the loss to the Plan as a whole.

[2] Section 502(a) provides that "[a] civil action may be brought . . . (2) by the Secretary [of Labor], or by a participant, beneficiary, or fiduciary for appropriate relief under section 409." 29 U.S.C. § 1132(a)(2).

[3] As the statute and cases demonstrate, the Plan is not the sum of its participants. Instead, it is a separate legal entity that owns assets (Rev. Rul. 89-52, 1989-1C.B. 110), may sue and be sued (ERISA § 502(d)(1), 29U.S.C. § 1132(d)(1)), and files tax returns (IRS Form 550).

Due to the representative nature of these actions, federal courts have overwhelmingly held that ERISA breach of fiduciary duty claims are appropriate for class action treatment.[4] As the United States Supreme Court has explained in analyzing Section 502(a)(2), the common interest shared by all four types of potential plaintiffs authorized to bring suit under this subsection "is in the financial integrity of the plan." *Russell*, 473 U.S. at 142; *see Thornton*, 692 F.2d at 1080 (explaining that claims for breach of fiduciary duty affecting plan as a whole "touch the interest of every beneficiary"); *Wright v. Bosch Trucking Co.*, Inc., 804 F. Supp. 1069, 1073 (C.D. Ill.1992) (explaining that plaintiff proceeding on behalf of the plan necessarily represents the interests of all participants.). The procedural protections of a class action ensure that this common interest is properly represented;

> In section 409 actions, plan participants and beneficiaries lack the direct right to relief typically held by class members, since the actions are brought on behalf of benefit plans. Nevertheless, they retain vital interests in those suits, since any equitable or monetary relief awarded to the plan would ultimately benefit them.

Mertens, 744 F. Supp. at 921, 924 (stating that class action "is the best means for asserting the 'common interest' of the participants or beneficiaries and the best interest of the Plan," and refusing to dismiss suit on *res judicata* grounds where prior suit was not certified as class action.).

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[4] *See, e.g., DeFelice v. U.S. Airways, Inc.*, 235 F.R.D. 70 (E.D. Va 2006); *In re Williams Co. ERISA Litig.*, 321 F.R.D. 416 (N.D. Okla. 2005); *In re Syncor ERISA Litig.*, 227 F.R.D. 338 (C.D. Cal. 2005); *In re Global Crossing Sec. ERISA Litig.*, 225 F.R.D. 436 (S.D.N.Y 2004); *Rankin v. Rots*, 220 F.R.D. 511 (E.D. Mich. 2003); *In re CMS Energy ERISA Litig.*, 225 F.R.D. 539 (E.D. Mich. 2004); *LaFlamme v. Carpenters Local #370 Pension Plan.* 212 F.R.D. 448 (N.D.N.Y. 2003); *Babcock v. Computer Assocs. Int'l, Inc.* 212 F.R.D. 126 (E.D.N.Y. 2003); *Bublitz v. E.I. DuPont de Nemours & Co.*, 202 F.R.D. 251 (S.D. Iowa 2001); *Thomas v. SmithKline Beecham Corp.*, 201 F.R.D. 386 (E.D. Pa. 2001); *In re Ikon ERISA Litig.*, 191 F.R.D. 457 (E.D. Pa. 2000); *Kolar v. Rite Aid Corp.*, Case No. 01-1129, 2003 U.S. Dist LEXIS 3646 (E.D. Pa. Mar 11, 2003) (Ex. C, hereto); *Koch v. Dwyer*, Case No. 98 Civ. 5519 RPP, 2001 U.S. Dist LEXIS 4085 (S.D.N.Y March 23, 2001) (Ex. D, hereto); *Kane v. United Indep. Union Welfare Fund*, Case No. 97-1505, 1998 U.S. Dist. LEXIS 1965 (E.D. Pa. Feb. 24, 1998) (Ex. E, hereto).

Moreover, the Advisory Committee's Notes for Rule 23 specifically state that certification under Rule 23(b)(1) is appropriate in cases charging breach of trust by a fiduciary to a large class of beneficiaries. Fed. R. Civ. P. 23(b)(1)(B) Advisory Committee's Notes (1966 Amendment).

As a matter of policy, courts strongly favor class certification of Section 502(a)(2) claims because it provides for the protection of absent plan participants, who share a common interest in their plan's claims, as well as for the protection of defendants from multiple suits on behalf of the same plan. *See Thornton v. Evans,* 692 F.2d 1064, 1080 (7th Cir. 1982) (holding that Section 502(a)(2) actions should be brought as either class actions under Rule 23 or derivative actions under Rule 23.1); *Piazza v. Ebsco Inds.*, 273 F.3d 1341, 1352 (11th Cir. 2001) (holding district court abused discretion in certifying class under Rule 23(b)(3) rather than Rule 23(b)(1), because certification under Rule 23(b)(3) would allow class members to opt out and bring multiple suits, "each asserting what is actually one claim belonging to the Plan"); *Specialty Cabinets & Fixtures, Inc. v. American Equitable Life Ins. Co.*, 140 F.R.D. 474, 478-79 (S.D. Ga. 1991) (holding class certification necessary to ensure protection of "vital interests" of absent plan participants and beneficiaries in their plan's recovery.).

Thus, although class certification has no impact on the plan's potential recovery, class certification will protect the common interest of all of the plan's participants in maximizing that recovery. Accordingly, this Court should certify this case for class action treatment under Rule 23(b)(1) or (b)(2).

B. Legal Standards Applicable to Class Certification.

This action presents a textbook example of a case appropriate for class action treatment. A class action is "peculiarly appropriate" when a case raises legal issues "common to the class as

a whole," because in such a case, Rule 23 provides an economical vehicle for a resolution of multiple common claims. *Califano v. Yamasaki*, 442 U.S. 682, 700-01 (1979). As discussed above, under this standard, ERISA breach of fiduciary duty cases are appropriate for class action treatment. *See Thornton*, 692 F.2d at 1080; *see also, e.g., IKON*, 191 F.R.D. at 462. Even 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). In deciding whether a particular case is appropriate for class action treatment, a court is not to be concerned with the merits of the action or the question of who will prevail. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 178 (1974). The *res judicata* effect accorded a certified class action is desirable without regard to the nature of the decision on the merits. *Wright v. Schock*, 742 F.2d 541, 544 (9th Cir. 1984).

To be certified as a class action, a plaintiff's claim must meet the four requirements of Rule 23(a): numerosity, commonality, typicality, and adequacy of representation. Fed. R. Civ. P. 23(a); *Kennedy v. United Healthcare of Ohio, Inc.*, 206 F.R.D. 191, 195 (S.D. Ohio 2002). In addition, the case must fit into one or more of the categories set forth in Rule 23(b). *Id.* As demonstrated below, this case meets the requirements of Rule 23(a) and (b).

Finally, the 2003 amendments to the Federal Rules created a separate inquiry into appointment of class counsel under Rule 23(g). *See* Fed. R. Civ. P. 23(g) Adv. Comm. Note. Here, Plaintiffs' counsel are well-qualified to represent the class in this ERISA action.

C. The Requirements of Rule 23(a) are Satisfied.

Each of the four basic prerequisites enumerated in Rule 23 of the Federal Rules of Civil Procedure – numerosity, commonality, typicality, and adequacy – is satisfied in this case.

1. The class is sufficiently numerous.

Rule 23(a)(1) requires that the class be "so numerous that joinder of all members is impracticable." Plaintiffs need not, however, show that the number is so large that it would be impossible to join every class member. See *Doe v. Guardian Life Ins. Co. of America*, 145 F.R.D. 466, 471 (N.D. Ill. 1992); *Harris v. Palm Springs Alpine Estates, Inc.*, 329 F.2d 909, 913-14 (9th Cir. 1964); *Robidoux v. Celani*, 987 F.2d 931, 935 (2d Cir. 1993). The numerosity requirement is satisfied in cases where the class is made up of a large group of potential plaintiffs. *See, e.g., Bittinger v. Tecumseh Prods. Co.*, 123 F.3d 877 (6th Cir. 1997) (joinder would have been impracticable for proposed class of over 1,100 individuals); *In re Lorazepam & Clorazepate Antitrust Litig.*, 202 F.R.D. 12, 26 (D.D.C. 2001) (holding that as few as 39 class members may satisfy the numerosity requirement). Not surprisingly, numerosity is generally found in an ERISA case. *See, e.g., Babcock*, 212 F.R.D. at 130. In fact, in *Rankin v. Rots*, 220 F.R.D. 511, 517 ("Kmart"), the defendants did not even bother to contest numerosity.

Here, the proposed class satisfies the numerosity requirement. As alleged in the Complaint, the Plan had in excess of four hundred participants. (Complaint ¶7). These employees would have difficulty bringing suits individually because of the complexity and cost of litigating this type of action. Moreover, joinder of such a large number of plaintiffs would be impracticable. Therefore, the first requirement of Rule 23(a) is met.

2. The claims present questions of law and fact common to the class.

Rule 23(a)(2) is satisfied where there are "questions of law or fact common to the class." "[T]he threshold for 'commonality' is not high." *Forbush v. J.C. Penny Co. Inc.*, 994 F.2d 1101, 1106 (5th Cir. 1993). "[T]here need be only a single issue common to all members of the class," the resolution of which "will advance the litigation." *In re American Medical Systems, Inc.*, 75

F.3d 1069, 1080 (6th Cir. 1996); *Sprague v. General Motors Corp.*,133 F.3d 388, 397 (6th Cir. 1998). "In general, the question of defendants' liability for ERISA violations is common to all class members because a breach of fiduciary duty affects all participants and beneficiaries." *Banyai v. Mazur*, 205 F.R.D. 160, 163 (S.D.N.Y. 2002) (citation omitted).

The Complaint identifies several common issues of law and fact at issue in this case. These include:

(a) whether Defendants acted as fiduciaries;

(b) whether Defendants breached their fiduciary duties to the Plan, Plaintiff and members of the Class by allegedly mismanaging the Plan and Plan assets;

(c) whether Defendants violated ERISA;

(d) whether the alleged breaches caused losses to the Plan; and

(e) whether Defendants must make the Plan whole for its losses pursuant to ERISA §409, 29 U.S.C. §1109.

Plaintiffs and all class members are similarly situated in their need to answer these questions. In the ERISA context, courts have repeatedly held that issues similar to the above satisfy Rule 23(a)'s commonality requirement.[5] Likewise, the commonality requirement is satisfied here.

[5] *See, e.g., Ikon*, 191 F.R.D. at 464 (finding that commonality requirement was satisfied in an ERISA breach of fiduciary duty case); *Kmart*, 220 F.R.D. at 517-18 (concluding that ERISA breach of fiduciary duty claim "clearly presents a common issue"); *CMS Energy*, 225 F.R.D. at 543 (same). *Donovan v. Estate of Fitzsimmons*, 778 F.2d 298, 305-06 (7th Cir. 1985) (same); *Unitis v. JFC Acquisition Co.*, 643 F. Supp. 454, 463 (N.D. Ill. 1986) (granting class certification because there were questions of law or fact common to the class since the entire case stemmed from defendants' conduct directed toward assets in which all plaintiffs had an interest); *Kolar*, 2003 U.S. Dist. LEXIS 3646, *2(in breach of fiduciary duty case involving prudence of investment in company stock, commonality deemed "obvious," and the court expressed "no hesitation" in certifying the class); *Syncor*, 227 F.R.D. at(finding commonality requirement satisfied where plaintiffs alleged breaches of fiduciary duty arising out of plan's investments in company stock).

3. The claims of the representative plaintiffs are typical of the claims of the class.

Rule 23(a)(3) requires that "the claims . . . of the representative parties [be] typical of the claims . . . of the class." A plaintiff's claim is typical if it "arises from the same event or practice or course of conduct that gives rise to the claims of other class members, and her or his claims are based on the same legal theory." *Little Caesar Enterprises, Inc. v. Smith,* 172 F.R.D. 236, 243 (E.D. Mich. 1997). "[T]he facts and claims of each class member do not have to be identical to support a finding of typicality." *In re Vitamins Antitrust Litig.*, 209 F.R.D. 251, 260 (D.D.C. 2002) ("As with the requirements of commonality, the facts and claims of each class member do not have to be identical to support a finding of typicality."); *Little Caesar*, 172 F.R.D. at 243. The "purpose of this requirement is to ensure that the class representatives have suffered injuries in the same general fashion as absent class members." *Vitamins,* 209 F.R.D. at 260.

Here, Plaintiffs ask this Court to appoint Sara Eppard and Aleida Rivero as class representatives. Each was a participant in the Plan throughout the class period. (Compl. ¶8). Ms. Eppard and Ms. Rivero have alleged that Defendants caused massive losses to the Plan through numerous actions, discussed above, which can generally be characterized as "mismanagement" of the Plan and Plan assets. These are Plan-wide claims that are typical of all the members of the class.

The underlying facts and claims make this case particularly appropriate for class certification since "the appropriate focus in a breach of fiduciary duty claim is the conduct of the defendants." *Ikon,*191 F.R.D. at 465 (quoted in *Kmart*, 220 F.R.D. at 519). Moreover, in a breach of fiduciary duty action alleging misconduct towards the plan, the claims of the class

members are necessarily identical in nearly all respects because all class members are members of the plan.[6]

The typicality requirement is further supported by the fact that ERISA contains unique standing and remedial provisions that allow a participant who sues for a breach of fiduciary duty to obtain plan-wide relief. ERISA § 409(a) (liability for breach of fiduciary duty is "to the plan"); ERISA § 502(a)(2) (authorizing plan participants to sue for breach of fiduciary duty under § 409(a)); *see also Kmart*, 220 F.R.D. at 519 (noting representative nature of action under ERISA § 502(a)(2)). With each class member stating the same claim and seeking the same relief, the claims asserted in this case are clearly typical for the purposes of Rule 23(a)(3).

4. Representative plaintiffs will fairly and adequately protect the interests of the class.

The fourth and final requirement of Rule 23(a)(4) requires that "the representative parties will fairly and adequately protect the interests of the class." This requirement is a two-pronged inquiry: "(1) the representative must have common interests with unnamed members of the class, and (2) it must appear that the representatives will vigorously protect the interests of the class through qualified counsel." *Senter v. General Motors Corp.*, 532 F.2d 511, 525 (6th Cir.

[6] *See, e.g., Kayes v. Pacific Lumber Co.*, 51 F.3d 1449, 1463 ("[t]here is no doubt that the named plaintiffs' claims [that ERISA fiduciaries breached their duties] are typical of the class claims"; the district court erred in concluding otherwise); *Babcock*, 212 F.R.D. at 130-31 (common conduct of ERISA fiduciaries to all plan participants satisfied typicality requirement); *LaFlamme*, 212 F.R.D. at 453-55 (N.D.N.Y. 2003) (finding typicality where all prospective class members' claims arose from the same conduct by defendants); *Koch v. Dwyer*, 2001 U.S. Dist LEXIS 4085 at *3 (finding typicality of claims where the named plaintiff was an ERISA plan participant during the class period and the plan's fiduciaries treated all participants alike); *Becher v. Long Island Lighting Co.*, 164 F.R.D. 144, 151 (E.D.N.Y. 1996) (finding typicality of claims where plaintiffs uniformly alleged that information was concealed from the class in violation of ERISA and the conduct was directed at named plaintiffs and class members alike); *Bunnion v. Consolidated Rail Corp.*, 1998 U.S. Dist. LEXIS 7727, at *7 (E.D. Pa. May 14, 1998)("Because the plaintiffs all challenge the same unlawful conduct, that is, alleged company-wide misrepresentations and omissions, the representative plaintiffs are typical of the class") (Ex. F, hereto); *Specialty Cabinets & Fixtures, Inc. v. American Equitable Life Ins. Co.*, 140 F.R.D. 474, 476 ("Plaintiffs have brought this action in part to remedy a breach of fiduciary duty, and any recovery on this claim belongs to the ERISA fund. These claims of the Plaintiffs' are identical to those of other class members.").

1976), *cert denied.* 429 U.S. 870 (1976); *Cross v. Nat'l Trust Life Ins. Co.*, 553 F.2d 1026, 1031 (6th Cir. 1977) (Rule 23(a)(4) tests "the experience and ability of counsel for plaintiffs and whether there is any antagonism between the interests of the plaintiffs and other members of the class they seek to represent."); *Ross v. Abercrombie & Fitch Co.*, 257 F.R.D. 435 (S.D. Ohio 2009). These two requirements are easily met here.

First, there is no doubt that Plaintiffs Eppard and Rivero share common interests with the unnamed members of the class. They are both former ViaQuest employees, and were participants in the Plan during the class period. (Compl. ¶8). Accordingly, the claims and interests of the Proposed Class Representatives are congruent with those of the other class members, and these Class Representatives have no interests antagonistic to those of the other class members. Indeed, the Proposed Class Representative's claims are identical to the legal claims belonging to all Class members, as the Class Representatives and Class members alike assert Defendants' liability on the basis of the common facts underlying the ERISA claims. *See, e.g., SmithKline*, 201 F.R.D. at 396 ("[B]ecause the named plaintiffs are challenging the same unlawful conduct and seeking the same relief as the rest of the class, I find that the interests of the named plaintiffs are sufficiently aligned with those of the class members to satisfy the first prong of the adequacy of representation requirement.").

Second, Plaintiffs Eppard and Rivero understand that the role of a class representative "primarily entails monitoring the litigation, keeping informed regarding the course of the litigation, assisting counsel with prosecuting the case, reviewing pleadings, responding to discovery, giving deposition testimony, and being consulted with respect to the course of the litigation." *In re Universal Service Fund Tel. Billing Practices Litig.,*, 219 F.R.D. 661, 671 (D.C. Kan. 2004). It is sufficient for purposes of an ERISA case if a Proposed Class Representative

"understand[s] that she had a retirement plan and believes that defendants failed to protect the money in the Plan" and further, that the representative "understands her obligation to assist her attorneys and testify." *Kmart*, 220 F.R.D. at 521.

Finally, as discussed in more detail below, Plaintiff and the Proposed Class Representatives have retained Class Counsel with experience in ERISA and class action cases. Thus, the requirements of Rule 23(a)(4) are easily met.

D. Certification Under Rule 23(b)(1) or (b)(2) is Appropriate.

In addition to meeting the prerequisites of Rule 23(a), a party seeking to certify a case as a class action must also satisfy one of the subdivisions under Rule 23(b)(1) or (b)(2). Courts considering ERISA breach of fiduciary duty claims for class certification have routinely found that class certification is appropriate under Rule 23(b) (usually Rules 23(b)(1)(A) and 23(b)(1)(B)). *See, e.g., Kmart*, 220 F.R.D. at 522; *CMS Energy*, 225 F.R.D. at 546; *see also* 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 breach of trust by a fiduciary to a large class of beneficiaries). Here, certification is appropriate under either Rule 23(b)(1)(A), Rule 23(b)(1)(B) and/or Rule 23(b)(2).

1. The requirements of Rule 23(b)(1) are met.

Under Rule 23(b)(1), the Court may certify a class 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 disposition of the interests of the other members not parties to the adjudications or

> substantially impair or impede their ability to protect their interests[.]

Fed. R. Civ. P. 23(b)(1).

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." *Ikon*, 191 F.R.D. at 466. Plaintiffs Eppard and Rivero's ERISA claims will, as a practical matter, adjudicate the interests of all Plan participants, making certification under Rule 23(b)(1) appropriate as it largely eliminates the potential for prejudice to all parties involved.

a. *Rule 23(b)(1)(B)*

In the context of ERISA breach of fiduciary duty claims, most courts have followed the reasoning of the Federal Rules drafters and concluded that subsection (b)(1)(B) is the most natural and appropriate basis for class certification. The Advisory Committee Note to Rule 23(b)(1)(B) emphasizes that this provision is particularly applicable where trust beneficiaries charge a breach of trust by a fiduciary:

> **The same reasoning applies to an action which charges a breach of trust by an indenture trustee or other fiduciary similarly affecting the members of a large class of security holders or other beneficiaries, and which requires an accounting or like measures to restore the subject of the trust.**

Fed. R. Civ. P. 23(b)(1)(B) Advisory Committee's Note (1966 Amendment) (emphasis added).[7]

Accordingly, courts frequently certify ERISA breach of fiduciary duty actions under Rule 23(b)(1)(B). *See, e.g.*, *Syncor*, 227 F.R.D. at 346-47 (certifying ERISA breach of fiduciary duty claim arising out of investment of plan assets under (b)(1)(B)); *Gruby*, 838 F. Supp. at 828;

[7] *See Church v.Consolidated Frieghtways, Inc.*, Case No. C-90-2290 DLJ, 1991 U.S. Dist. LEXIS 15419, *40-42 (N.D. Cal. Jun. 14, 1991) (invoking advisory committee note in certifying breach of fiduciary duty claim under (b)(1)(B)) (Ex. G, hereto); *Banyai*, 205 F.R.D. at 165 (certifying class under subsection (b)(1)(B) and invoking the Advisory Committee Notes); *Koch*, 2001 U.S. Dist. LEXIS 4085, at *14-15; *Gruby v. Brady*, 838 F. Supp. 820, 828 (holding certification is proper under subsection (b)(1)(B) because actions to remedy a breach of fiduciary duty affect all participants and beneficiaries); *Becher*, 164 F.R.D. at 153.

Becher, 164 F.R.D. at 153-54; *Kmart*, 220 F.R.D. at 523 (explaining that "adjudication of [plaintiff's] claims will likely be dispositive of the claims of other potential class members – the basis for certification under (b)(1)(B)"); *Specialty Cabinets*, 140 F.R.D. at 477-79 (holding that "[b]ecause 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)"). Because of ERISA's distinctive "representative capacity" and remedial provisions, this is a paradigmatic case for class treatment under Rule 23(b)(1)(B).

Here, the Court's adjudication of whether Defendants breached their fiduciary duties or other provisions of ERISA through mismanagement of the Plan and Plan assets will, as a practical matter, dispose of the Class members' claims in those regards. *See In re Syncor*, 227F.R.D. at 346 (certifying under (b)(1)(B) where "[i]f the primary relief is to the Plan as a whole, then adjudications with respect to individual members of the class would 'as a practical matter' alter the interests of other members of the class – if one plaintiff forces the Defendants to pay damages to the Plan, the benefit would affect everyone who has a right to disbursements under the Plan."). Moreover, this case is analogous to the situation specifically mentioned in the Advisory Committee Notes cited above: Plaintiffs charge breaches of trust by the Plan's fiduciaries that affected all of the class members. Rule 23(b)(1)(B), therefore, is a proper vehicle for certification in this case.

b. *Rule 23(b)(1)(A)*

Class certification is also appropriate under Rule 23(b)(1)(A). Although some courts deem is unnecessary to reach the other potentially-applicable subsections of Rule 23(b) (*see, e.g.*, *Koch*, 2001 U.S. Dist. LEXIS 4085, at *15, n.2; *Gruby*, 838 F.Supp. at 828)**,** other courts certify

ERISA class actions under both subsections (*See Kolar*, 2003 U.S. Dist LEXIS 3646, *9; *Thomas v. SmithKline Beecham Corp.*, 201 F.R.D. 386, 397 (E.D. Pa. 2001); *IKON*, 191 F.R.D. at 467.)

Indeed, the nature of this case – which challenges the Defendants' uniform Plan-wide conduct – makes certification under (b)(1)(A) particularly appropriate. As the court noted in *Bunnion* when discussing certification under (b)(1)(A), "[W]e see a high likelihood of similar lawsuits against defendants should this class be denied . . . . Inconsistent judgments concerning how the Plans should have been interpreted or applied would result in prejudice." *Bunnion*, 1998 U.S. Dist. LEXIS 7727, at *43; *see also Ikon*, 191 F.R.D. at 461 (finding that "[t]here 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.").

This is a classic case where "a failure to certify a class could expose defendants to multiple lawsuits and risk inconsistent decision." *Kmart*, 220 F.R.D. at 523. Thus, certification is appropriate under subsection (b)(1)(A).

2. Certification is appropriate under Rule 23(B)(2)

The proposed Class qualifies for certification under Rule 23(b)(2) because Plaintiffs allege that Defendants have "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 . . . ." Fed. R. Civ. P. 23(b)(2). This requirement "is almost automatically satisfied in actions primarily seeking injunctive relief. . . ." *Kanter v. Casey*, 43 F.3d 48, 58-59 (3d Cir. 1994). What is important under Rule 23(b)(2) is that the relief sought by the named plaintiffs benefit the entire class. *Id.* Rule 23(b)(2), like Rule 23(b)(1)(B), has been a

frequent vehicle for certification of classes in ERISA actions, including actions alleging breaches of fiduciary duty. *See, e.g., Riviera v. Patino*, 524 F. Supp. 136 at 149 (D.C. Cal. 1981) (certifying ERISA class under (b)(2), stating that "there could be no reasonable dispute" that the requirements of (b)(2) were satisfied); *Becher*, 164 F.R.D. at 153-54; *Halford v. Goodyear Tire & Rubber Co.*, 161 F.R.D. 13, 16 (W.D.N.Y. 1995); *Shultz v. Teledyne*, 657 F. Supp. 289, 295 (W.D. Pa. 1987).

As discussed in detail above, Plaintiffs' claims are based on alleged conduct by Defendants that is generally applicable to the Class as a whole. For instance, Plaintiffs allege that Defendants breached their fiduciary duties to Plan participants and caused losses to the Plan by, *inter alia*, commingling and mismanaging Plan assets. These alleged fiduciary breaches affected all of the Plan's participants and beneficiaries, thus it cannot be disputed that this conduct was "generally applicable to the class." *See, e.g., Riviera*, 524 F. Supp. at 149 (certifying ERISA class under (b)(2), stating that "there could be no reasonable dispute" that the requirements of (b)(2) were satisfied); *LaFlamme*, 212 F.R.D. at 456-57 (certifying ERISA class under (b)(2) where plaintiffs challenged defendants' conduct generally applicable to the class and sought declaratory relief that defendants had violated ERISA); *Becher*, 164 F.R.D. at 153 (certifying breach of fiduciary duty claims based on alleged misrepresentations and concealment under subsection (b)(2)); *Bunnion*, 1998 U.S. Dist. LEXIS 7727, at *46 (granting certification of (b)(2) class to assert claims under ERISA because the case "seeks to define the relationship" between plan participants and fiduciaries.)).

Plaintiffs seek declaratory and injunctive relief compelling Defendants to make the Plan whole for its losses. A determination by the Court that Defendants violated ERISA as to any of

the named Plaintiffs would necessarily imply a declaration that Defendants violated ERISA as to all class members. Accordingly, Plaintiffs' claims are properly certified under Rule 23(b)(2).

3. Plaintiffs' Counsel Should be Appointed Class Counsel

Fed. R. Civ. P. 23(g) requires that courts consider the following four factors when appointing class counsel: whether (1) counsel has investigated the class claims, (2) counsel is experienced in handling class actions and complex litigation, (3) counsel is knowledgeable regarding the applicable law, and (4) counsel will commit adequate resources to representing the class. *Stanich v. Travelers Indem. Co.*, Case No. 1:06 CV 962, 2009 U.S. Dist. LEXIS 5035, *76-8 (N.D. Ohio 2008) (Ex. H, hereto).

In this case, all of these requirements are amply met as demonstrated in the accompanying Declarations of Danny L. Caudill and Robert J. Beggs in Support of Appointment of Class Counsel.[8] As set forth therein, counsel conducted an extensive prelitigation investigation of the class claims, including obtaining and reviewing documents. (Caudill Dec., ¶ 2.) Plaintiffs' counsel have experience in both ERISA and class action litigation. (Caudill Dec., ¶5). Finally, thus far counsel has effectively and efficiently committed resources to the representation of the class, and will continue to do so.[9]

III. CONCLUSION

This case presents an ideal opportunity to use class certification to simplify and streamline judicial proceedings. As shown above, numerous courts have applied Rule 23 in the context of claims by ERISA plan participants and beneficiaries against the fiduciaries of their

[8] *Ballan v. Upjohn Co.*, 159 F.R.D. 473, 487-488 (W.D. Mich. 1994)("In the absence of a showing to the contrary, adequacy of counsel is often presumed.")

[9] *Abby v. City of Detroit*, 218 F.R.D. 544, 548 (E.D. Mich. 2003) ("***it is not the reputation built upon past practice, but rather competence displayed by present performance, which demonstrates the adequacy of counsel in a class action.")(quoting Ballan, at 487)

plans. In almost every instance, these prior courts have determined that class certification is proper under Rule 23(a) and subsections (b)(1)(B), (b)(1)(A) and/or (b)(2). This is no coincidence: the distinctive character of ERISA law invites these results.

Accordingly, the parties respectfully ask this Court to certify the proposed class under Fed. R. Civ. P. 23(a), (b)(1)(B), (b)(1)(A) and/or (b)(2), and to appoint Plaintiffs' counsel as Class Counsel under Fed. R. Civ. P. 23(g).

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DATED: 12/9/09

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