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

CHRISTOPHER D. BAILEY, THOMAS A. KRAMER, BRET COLLIER, Individually, and on behalf of all others similarly situated, and for the benefit of the Plan,	:	
Plaintiffs,	:	Case No. 2:11-CV-0554
v.	:	Judge Economus
	:	Magistrate Judge King
SEVERANCE PLAN FOR SALARIED EMPLOYEES OF UNITED STATES ENRICHMENT CORPORATION	:	
Defendants.	:	

PLAINTIFF'S MOTION FOR CLASS CERTIFICATION

Plaintiffs 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) or (b)(3); 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 CHRISTOPHER D. BAILEY, THOMAS A. KRAMER AND BRETT COLLIER AND ALL PLAN PARTICIPANTS AND BENEFICIARIES:

DATED: May 15, 2012

/s/ Danny L. Caudill
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INTRODUCTION AND SUMMARY OF ARGUMENT

This ERISA[1] action arises out of a dispute concerning the Severance Plan for Salaried Employees of United States Enrichment Corporation ("the Plan"), a self-funded employee welfare benefit plan administered and managed by Defendant United States Enrichment Corporation ("USEC").

Plaintiffs Christopher D. Bailey ("Bailey"), Thomas A. Kramer ("Kramer"), and Bret Collier ("Collier"), on behalf of themselves (collectively, "Plaintiffs") and other similarly-situated Plan participants and/or beneficiaries have claims that arise under ERISA sections 502(a), 404, 406, and 409. These sections empower plan participants to bring civil actions to enforce their rights under the terms of the Plan, ensure fiduciaries are held responsible for their actions under the Plan, and recover for the lost benefits to which they are entitled. 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.

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

I. FACTS PERTINENT TO CLASS CERTIFICATION

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.

II. ARGUMENT

A. Plaintiffs Satisfy Threshold Standing Requirement

The Plaintiff class satisfies the threshold standing requirement. To fulfill this requirement, a class representative must "allege an individual, personal injury in order to seek relief on behalf of himself or any other member of the class." *Sutton v. St. Jude Med. S.C., Inc.*, 419 F.3d 568, 570 (6th Cir. 2005). This requirement is the same when a plaintiff brings an ERISA claim. *Yost v. First Horizon Nat'l Corp.*, 2011 U.S. Dist. LEXIS 60000, at *20 (W.D. Tenn. 2011). ERISA section 502(a)(2) allows a civil action to be brought by "a participant, beneficiary or fiduciary for appropriate relief under section 409." 29 U.S.C. §1109. The Sixth Circuit has also held that a participant in a plan has standing to bring a claim under section 502(a)(2) as long as each individual plan participant demonstrates an individual injury to her interests in the plan. *Tullis v. UMB Bank, N.A.*, 515 F.3d 673, 676 (6th Cir. 2008)(citing *Harley v. Minn. Mining and Mfg. Co.*, 284 F.3d 901, 906-07 (8th Cir. 2002).

All three class representatives have suffered individual, personal injuries as a result of Defendants' actions. Plaintiff Bailey was pressured to sign a resignation letter by Defendants. Termination Statement of Christopher Bailey; Compl. ¶ 55. Defendants used this letter to avoid

paying Bailey his severance pay. The Involuntary Reduction In Force (RIF) that occurred also forced Bailey to lose the defined benefit pension plan he had previously. Compl. ¶ 36. Because of the RIF, Plaintiffs Kramer and Collier will lose many benefits at their new positions. Compl. ¶ 37. Both will lose vacation time, the opportunity to earn bonuses, and the security of a defined benefit pension plan. Compl. ¶ 36-7. (See affidavits of Plaintiffs Bailey, Kramer, and Collier attached as Exhibits C, D, and E respectively)

B. ERISA Section 502(a), 404, 406, and 409 Claims are Particularly Appropriate for Class Treatment Because Participants Share a Common Interest in Enforcing their Rights under the Plan.

Class certification of ERISA section 502(a)(2) claims provide protection for absent plan participants, who share a common interest in their plan's claims. *See Thornton v. Evans,* 692 F.2d 1064, 1080 (7th Cir. 1982) (holding that ERISA 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.).

Every prospective class member requests the court take the same action: 1. allow Plaintiffs to recover benefits due under terms of the Plan; 2. grant equitable relief under ERISA section 502; 3. permanently enjoin Defendants from further violating ERISA; 4. remove Defendants from any fiduciary positions they may hold with respect to Plan. Additionally, all

prospective class members are readily identifiable; they were all Plan members during the applicable time period. (Exhibit F).

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) or (b)(3).

C. 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., In re IKON OFFICE SOLUTIONS*, 191 F.R.D. 457, 462 (E.D. Penn. 2000). 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).

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).

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. (2003). Here, Plaintiffs' co-counsel are well-qualified to represent the class in this ERISA action.

D. <u>The Requirements of Rule 23(a) are Satisfied.</u>

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

1. The class is sufficiently numerous.

Rule 23(a)(1) requires that a class be "so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). 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).

The numerosity requirement is generally satisfied in ERISA cases. *See, e.g., Babcock v. Computer Associates Int'l*,212 F.R.D. 126, 130 (E.D. N.Y. 2003); *In re Schering Plough Corp. ERISA Litig.*, 589 F.3d 585, 596 (3d Cir. N.J. 2009). Many defendants do not even bother to contest numerosity in ERISA cases. *See, e.g., Rankin v. Rots,* 220 F.R.D. 511, 517 ("Kmart") (E.D. Mich. 2004). When numerosity is at issue, courts may examine whether a potential class has exhausted its administrative remedies. *Adams v. Anheuser-Busch Cos.*, 2012 U.S. Dist.

LEXIS 42364, at *8-9 (S.D. Ohio Mar. 28, 2012). Exhaustion of administrative remedies reduces frivolous litigation and enhances "the ability of plan trustees to expertly and efficiently manage their funds by preventing premature judicial intervention in their decision-making processes, to correct their errors, and to interpret plan provisions." *Id.* at *11. The Southern District of Ohio has held that only named plaintiffs are required to exhaust their administrative remedies to satisfy the numerosity requirement. *Id*. at *17-18.

Here, the proposed class satisfies the numerosity requirement. As alleged in the Complaint, the Plan had in excess of 500 hundred participants who will or have been terminated because of an RIF and then were or will be absorbed by Fluor-B&W Portsmouth, LLC ("FBP"). Compl. ¶6. (Exhibit F) These employees would have difficulty bringing suits individually because of the complexity and cost of litigating this type of action. Moreover, all named Plaintiffs have exhausted their administrative remedies using the appropriate appeal process. Affidavit of Bailey ¶7-9; Affidavit of Collier ¶5-8; Affidavit of Kramer ¶5-8. Each Defendant denied all three of the named Plaintiffs' appeals. Appeal Summary/Appeal Letter and Comparative Grids. (Exhibit G) The reasoning provided in the denials by each Defendant was substantially identical in each denial. Compl. ¶75. Defendants also agreed in their Reply in Support of their Motion to Dismiss The First Amended Complaint that they had treated these requests as a class-wide claim for benefits. Reply Brief p. 1-3. Any further use of the administrative appeal process would be futile here as the Defendant has explicitly stated its reasoning for denying benefits to the prospective plaintiff class.

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).

The prospective class is similarly situated to each other because they were each terminated from the same company pursuant to the same RIF; they each obtained employment at FBP under materially different and inferior terms and conditions of employment than that which they enjoyed at USEC; they were each participants of the Plan; and they were each denied benefits from the Plan. Compl. ¶ 8. The Complaint also identifies several more common issues of law and fact at issue in this case. These include:

(a) whether Defendants served 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 by purposefully acting to interfere with the class members' entitled benefits and/or rights;

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

(e) whether Defendants must make Plaintiffs whole pursuant to ERISA section 502(a)(3) under the equitable doctrine of surcharge, estoppel, or any other applicable sections of ERISA section 502; and

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

Plaintiffs and all class members are similarly situated in their need to answer these questions. Courts have repeatedly held that issues similar to the above satisfy Rule 23(a)'s commonality requirement.[2] Likewise, the commonality requirement is satisfied here.

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). Typicality ensures "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 Plaintiffs Bailey, Kramer, and Collier as class representatives. Each was a participant in the Plan throughout the class period. Compl. ¶8. Bailey, Kramer, and Collier have alleged that they were subjected to the same breaches of fiduciary duty by the same Defendants as all the members of the proposed class. The allegations that the named Plaintiffs have concern the same improper conduct that was directed at the class as a whole. These are Plan-wide claims that are typical of all the members of the class.

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[2] *See, e.g., Dalesandro v. Int'l Paper Co.*, 214 F.R.D. 473, 483 (S.D. Ohio 2003)(commonality requirement satisfied because class members share a common question of law – the interpretation of the ERISA Plan); *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 an ERISA breach of fiduciary duty claim "clearly presents a common issue"); In re *CMS Energy ERISA Litigation*, 225 F.R.D. 539, 543 (E.D. Mich. 2004) (same); *Kolar v. Rite Aid Corp.*,2003 U.S. Dist. LEXIS 3646, *2 (E.D. Penn. 1993) (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).

The claims of the class arise from the same event and course of conduct. In approximately August of 2010, the Department of Energy awarded a contract to FBP for the decontamination and decommissioning of the USEC plant. Copy of FPB/DOE Contract, Tab 5 of Severance Plan Appeals, Background Materials. As a result, USEC initiated an RIF and began to terminate its employees. Compl. ¶29. FBP began to re-employ many of these employees, including the plaintiff class, but USEC did not provide its former employees with the severance benefits they were promised under the Plan. Appeal Summary/Appeal Letter and Comparative Grids.

The claims of the class also are based on the same legal theory. Plaintiffs allege they have a claim for benefits under ERISA sections 502(a)(1) and (a)(3), they allege that Defendants breached their fiduciary duties in violation of ERISA sections 502 and 409, and they allege that Defendants interfered with their protected rights in violation of ERISA sections 502, and 510.

Plaintiffs' claims that arise from the same event and course of conduct and are based on the same legal theory have been found to meet the typicality requirement. *See In re American Medical Sys., Inc.*, 75 F.3d 1069, 1082 (6th Cir. 1996) (typicality requirement met because plaintiffs' claims based on same event and course of conduct through the sale of a mill and based on same legal theory of the plan administrator's arbitrary and capricious interpretation of the plan); *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); *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")

With each class member stating the same claim and seeking the same relief, the claims asserted in this case are typical under Rule 23(a)(3).

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

The 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. 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) (noting that the requirement uncovers conflicts of interest between named and unnamed plaintiffs). These two requirements are met here.

First, there is no doubt that Plaintiffs Bailey, Kramer, and Collier share common interests with the unnamed members of the class. They are former USEC employees and were participants in the Plan during the class period. (Compl. ¶ 152). 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. Their 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., Thomas v. SmithKline Beecham Corp.*, 201 F.R.D. 386, 396 (E.D. Pa. 2001) ("[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 Bailey, Kramer, and Collier 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, Plaintiffs have retained class counsel with experience in ERISA and class action cases. Thus, the requirements of Rule 23(a)(4) are easily met.

E. <u>Certification Under Rule 23(b)(1) or (b)(2) or (b)(3) is Appropriate.</u>

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) or (b)(3). Courts considering ERISA claims for class certification where plaintiffs seek payments in accordance with the Plan have routinely found that class certification is appropriate under Rule 23(b). *See, e.g., Kmart*, 220 F.R.D. at 522; *CMS Energy*, 225 F.R.D. at 546 (class certification granted under both Rule 23(b)(1)(A) and (b)(1)(B)); *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); *Dalesandro*, 214 F.R.D. at 484 (class certification under Rule (b)(3) proper because common questions of law predominate). Here, certification is appropriate under either Rule 23(b)(1)(A), Rule 23(b)(1)(B) and/or Rule 23(b)(2) or Rule 23(b)(3).

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 dispositive 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 Bailey, Kramer, and Collier's ERISA claims will 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)*

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).[3] Most courts have also concluded that subsection (b)(1)(B) is the most natural and appropriate basis for class certification of ERISA breach of fiduciary duty claims.[4]

Accordingly, courts frequently certify ERISA breach of fiduciary duty actions under Rule 23(b)(1)(B). *See, e.g., In re SYNCOR ERISA LITIGATION*, 227 F.R.D. 338, 346-47 (C.D. Cal. 2005) (certifying ERISA breach of fiduciary duty claim arising out of investment of plan assets under (b)(1)(B)); *Gruby v. Brady*, 838 F. Supp. 820, 828 (S.D.N.Y. 1995); *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 regarding the benefits and severance pay Plaintiffs are due will dispose of the class members' claims. *See In re Syncor*, 227 F.R.D. at 346 (certifying under

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[3] *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);

[4] *Banyai v. Mazur*, 205 F.R.D. 160, 165 (S.D.N.Y. 2002) (certifying class under subsection (b)(1)(B) and invoking the Advisory Committee Notes); *Koch*, 2001 U.S. Dist. LEXIS 4085, at *14-15; *Gruby*, 838 F. Supp. at 828 (holding certification is proper under subsection (b)(1)(B) because actions to remedy a breach of fiduciary duty affect all participants and beneficiaries)

(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 it 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; *SmithKline*, 201 F.R.D. at 397; *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 benefits 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. *See, e.g., Riviera v. Patino*, 524 F. Supp. 136, 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 by not adhering to the terms in the Plan. These alleged breaches and violations 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 cease coercive measures, and they seek to appoint an independent fiduciary to manage and administer the Plan. 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. Certification is Appropriate Under Rule 23(b)(3)

Class certification is appropriate under Rule 23(b)(3) when the court finds that "the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy." Fed.R.Civ.P. 23(b)(3). Thus, two prerequisites must be met before Rule 23(b)(3) certification is appropriate: 1. Common questions must predominate over questions that affect only individual members, and 2. Resolution as a class must be superior to any other available methods for the fair and efficient adjudication of the controversy. Fed. R. Civ. P. 23(b)(3) Adv. Comm. Note. (2003).

A Rule 23(b)(3) class is properly certifiable when common questions of law predominate over individual questions. *Dalesandro*, 214 F.R.D. at 484. When the only individual questions present are individual calculations of benefits or damages, certification under Rule 23(b)(3)

remains appropriate. *Id*. *See also Sterling v. Velsicol Chem. Corp.*, 855 F.2d 1188, 1197 (6th Cir. 1988)(holding that class certification under Rule 23(b)(3) was appropriate because the single issue distinguishing the class members was the amount, if any, of the damages that each class member sustained); *Patrick v. AK Steel Corp.*, 2008 U.S. Dist. LEXIS 104862 at * (S.D. Ohio 2008)(class certified under Rule 23(b)(3) because only individual questions were calculation of damages); *Bentley v. Honeywell Int'l, Inc.*, 223 F.R.D. 471, 487 (S.D. Ohio 2004) (many courts have recognized that potential damage award variations do not affect class certification).

Here, common questions of law predominate over individual questions. As discussed in more detail above, Plaintiffs are asking the court to determine whether Defendants breached their fiduciary duties, whether Defendants violated sections of ERISA, and whether Defendants interfered with the Plaintiffs' protected rights in violation of ERISA. The only individual question present within the class would be a determination of damages.

To determine whether resolution as a class is superior to any other available method, Rule 23(b) details four nonexhaustive factors to consider: (1) each class members' interest in individually controlling the prosecution or defense of separate actions; (2) the extent and nature of any litigation regarding the controversy that has already begun; (3) the desirability or undesirability of concentrating litigation in a particular forum; and (4) the difficulties that are likely in managing a class action. Fed. R. Civ. 23(b)(3).

Here, none of the class members has an interest in individually controlling the prosecution of separate actions because each class member has had the same course of action taken against him or her. Copy of FPB/DOE Contract, Tab 5 of Severance Plan Appeals, Background Materials. Each member was or will be terminated by USEC and has lost or will lose benefits through their employment with FBP. There is also minimal litigation that has

already occurred. Plaintiff Bailey has filed both a First and Second Amended Complaint regarding this litigation. Additionally, it is desirable and convenient for the Plaintiffs to be certified as a single class to concentrate the litigation of this matter in a single forum. The litigation concerns a single plant that is located in Portsmouth, Ohio. Compl. ¶ 6. As all the class members have an interest in completing this litigation in a timely and efficient manner, all were employed at a single plant at the time the violations occurred, and all are requesting the court to address common questions of law, the difficulties in managing the class will be low.

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.[5] As set forth therein, counsel conducted an extensive pre-litigation investigation of the class claims, including obtaining and reviewing documents, conducting thorough interviews with individuals who have knowledge of the facts relevant to this case, and engaging in conferences with Defense counsel where relevant facts were discussed in detail. (Caudill Dec., ¶ 2.) Plaintiffs' counsel has experience in both ERISA and class action litigation.

[5] *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.")

(Caudill Dec., ¶5).[6] Finally, thus far counsel has effectively and efficiently committed resources to the representation of the class and will continue to do so.[7]

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 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) or (b)(3). 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) or (b)(3) and to appoint Plaintiffs' counsel as Class Counsel under Fed. R. Civ. P. 23(g).

FOR PLAINTIFFS BAILEY, KRAMER, COLLIER, AND ALL PLAN PARTICIPANTS AND BENEFICIARIES:

DATED: May 15, 2012

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[6] This court has already found that attorneys Caudill and Beggs are adequate counsel in ERISA case *Sara E. Eppard v. Viaquest Inc., et al*; Case No. 2:09-CV-234.

[7] *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)

CERTIFICATE OF SERVICE

I hereby certify that on May 15, 2012, a copy of the foregoing PLAINTIFFS' MOTION FOR CLASS CERTIFICATION was filed electronically. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties indicated on the electronic filing receipt. All other parties will be served by regular U.S. Mail. Parties may access this filing through the Court's ECF system.

_____
Danny L. Caudill (0078859)