

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

JERRY R. SUMMERS, GEORGE T.
LENORMAND, JEFFREY D. CRITES,
LOUISE VAN RENSBURG and JAMES E.
SHAMBO, individually and on behalf of all
others similarly situated,

Plaintiffs,

v.

UAL CORPORATION ESOP COMMITTEE,
MARTY TORRES, BARRY WILSON, DOUG
WALSH, IRA LEVY, DON CLEMENTS,
CRAIG MUSA, and STATE STREET BANK &
TRUST COMPANY,

Defendants.

Case No. 03 C 1537

Hon. Samuel Der-Yeghiayan

**PLAINTIFFS' MEMORANDUM IN SUPPORT OF
MOTION FOR CLASS CERTIFICATION**

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I. INTRODUCTION

Plaintiffs respectfully move this Court for certification of the following Class pursuant to Fed. R. Civ. P. 23:

The UAL Corporation Employee Stock Ownership Plan (“Plan”) and all persons who were participants in or beneficiaries of the Plan from July 19, 2001 to the Plan’s termination in July of 2003.¹

The gravamen of Plaintiffs’ Complaint is that Defendants breached their fiduciary duties by imprudently maintaining virtually all of the Plan’s assets in UAL stock when they knew that the Company faced extraordinary financial problems and a great risk of bankruptcy. The fiduciaries’ failure to diversify out of UAL stock under these extreme circumstances caused the Plan and its participants and beneficiaries (“participants”) to lose approximately \$2 billion. This *Plan-wide* claim for breach of fiduciary duty under the Employment Retirement Security Act of 1974 (“ERISA”) § 404(a) (29 U.S.C. § 1104(a)(2)) is well-suited for certification. Not only is the focus of this case on Defendants’ conduct in allegedly breaching their fiduciary duties of prudence and loyalty, but the relief *by statutory definition* will be recovered on behalf of the Plan. Hence, a resolution of Plaintiffs’ claims will *necessarily* resolve the claims of all class members, and denying certification will engender the risk of inconsistent adjudications. Courts have routinely certified similar ERISA claims for breach of fiduciary duty for class treatment.

II. FACTS²

Plaintiffs Jerry R. Summers, George T. Lenormand, Jeffrey D. Crites, Louise Van Rensburg and James E. Shambo were participants in the UAL Corporation Employee Stock

¹ See Ex. A to Declaration of Andrew M. Volk in Support of Plaintiffs’ Motion for Class Certification (“Volk Decl.”). All “Ex.” references are to Exhibits to the Volk Decl.

² Except where otherwise indicated, references preceded by “¶” are to Plaintiffs’ Third Amended Complaint for Violation of ERISA (“Complaint”).

Ownership Plan (“UAL ESOP” or “Plan”). ¶ 18. The Plan was an ESOP within the meaning of ERISA § 407(d)(6) (29 U.S.C. § 407), and was also a qualified cash or deferred arrangement within the meaning of Internal Revenue Code § 401(k) (26 U.S.C. § 401(k)).³

The UAL ESOP was designed to invest exclusively in Company stock. Plan at 20. As of the Plan’s 1994 effective date, participants received 55% of the Company’s equity through their holdings in individual ESOP Stock Accounts within the ESOP and Supplemental ESOP. *See* Plan at 1, 7. As of August 1, 2002, the UAL ESOP held approximately 57.4 million shares of UAL stock. State Street Answer to ¶ 24 of the SAC. Plan participants could only diversify their ESOP Stock Account holdings out of UAL stock when (i) their employment ended or (ii) they became 55 and had 10 years of participation under the Plan. Plan at 35-36.

Defendant UAL Corporation ESOP Committee (“ESOP Committee”) was the “named fiduciary” within the meaning of ERISA § 402 “with respect to the management and disposition of assets held” in the Plan. Plan at 52, 55. The ESOP Committee was comprised of Defendants Marty Torres, Barry Wilson, Doug Walsh, Ira Levy, Don Clemens and Craig Musa.⁴

Defendant State Street Bank & Trust (“State Street”) was the Trustee to the Plan from its inception until at least August 29, 2002 when it was appointed Investment Manager. *See* Ex. D (Trust Agreement). State Street was the “named fiduciary” in connection with “the Initial Acquisition Loan and Additional Acquisition Loans and the use of the proceeds thereof to purchase Preferred Stock.” Plan at 52; *see also* Trust Agreement at 14. State Street attended each and every ESOP Committee Meeting. *See* Ex. D.

³ A copy of the Plan is attached as Ex. B.

⁴ *See, e.g.*, UAL-SUM 0001 (1/31/01 ESOP Minutes), Ex. C.

By July 18, 2001 (if not earlier), it was apparent that UAL was in serious financial trouble. As UAL reported in its Form 10-K for 2000, its “Outlook for 2001” was poor due to a decrease in business travel, rising fuel costs and other factors. *See* Ex. E at 27, 35-36. Then, in Q1 of 2001, UAL reported a loss of \$305 million. In its Form 10-Q for 1Q 2001, UAL predicted that this negative trend would continue and result in a loss for the full year. *See* Ex. F at 16, 18. In May of 2001, ABN-AMRO industry analysts reviewed airline operations and had a “reduce” rating on UAL stock. *See* Ex. G at 2. In late May, Moody’s downgraded UAL’s senior debt to junk bond status. *See* Ex. H. On July 18, 2001, UAL reported a \$292 million loss for 2Q 2001, and announced that it would lose money for the year. On July 19, 2001, UAL stock traded in the range of \$34.98. *See* Ex. I, L.

The events of September 11 made things even worse. On October 17, 2001, UAL CEO James Goodwin sent a letter to employees informing them that “***Before Sept. 11, we were not in a comfortable financial state, with costs exceeding revenue on a daily basis. . . . Today, we are literally hemorrhaging money. Clearly, this bleeding has to be stopped – and soon – or United will perish sometime next year.***” Ex. J. In fact, UAL hired bankruptcy lawyers shortly after 9/11. Ex. K. UAL stock traded in the range of \$16.85. Ex. L.

As Goodwin predicted, the bad news continued for UAL. In Q3 of 2001, UAL reported a loss of \$1.16 billion, or \$21.43 per share. Ex. M. UAL’s CFO, Frederick F. Brace, reported that the Company was losing about \$15 million a day, and UAL warned of substantial losses for the year. *Id.* In February of 2002, UAL announced a Q4 2001 loss of \$308 million, bringing its total loss for 2001 to an astounding \$2.1 billion. Ex. N. In April of 2002, UAL announced massive Q1 losses of \$510 million, and warned that it would report a significant second quarter loss, as well as a loss for the year. Ex. O. On July 19, 2002, UAL announced yet another large

quarterly net loss of \$392 million. Ex. P. The 2Q 2002 Form 10-Q disclosed that “[t]he Company expects to report a significant third quarter and full year loss.” Ex. Q at 25.

Overall, during the period from August 2001 to August 2002, UAL stock fell over 80%. In July 2002 alone, UAL’s share value dropped 48% following its weak second quarter reported earnings and its bleak future. Ex. R. According to CFO Brace, UAL’s precarious financial condition had prevented it from accessing the capital markets for quite some time. Thus, in announcing the Company’s 2Q 2002 results on July 19, 2002, Brace stated: “In addition to our other cash needs, we have nearly \$900 million in debt coming due near the end of the year and are concerned about our ability to refinance it.” Ex. P. In its Form 10-Q for 2Q 2002, the Company spelled out the necessity for a federal loan guarantee from the Air Transport Safety Bureau (“ATSB”), and warned of the dire consequences of the failure to get the loan guarantee. Even more significantly, the Form 10-Q for 2Q 2002 warned that the ATSB application was already in trouble because the proposed cost reductions were not deep enough to satisfy the ATSB. Ex. Q. Ultimately, on December 4, 2002, the ATSB rejected UAL’s application for that loan guarantee on the grounds that UAL’s business plan was unsound. Ex. S. The unsoundness of the UAL business plan was based on problems that had long been facing the company and were well-known to Committee members and State Street.

Throughout 2001, and up until August 20, 2002, neither the Committee nor State Street took *any* action to protect the assets of the Plan. Right up until August of 2002, the ESOP Committee minutes are devoid of *any* discussion of diversifying out of UAL stock. See Ex. C. Stunningly, while “*State Street had put United [stock] on a ‘watch list’ due to the decreasing stock price and the possible bankruptcy filing in February 2002*,” triggering monitoring by “State Street’s Fiduciary Committee” (Ex. C at UAL ESOP COM-BR. 00046-47, 00049); *State*

Street failed to reveal this fact to the ESOP Committee until August of 2002 – when the stock had lost most of its value. *Id.*

Until August 20, 2002, the Committee and its members *were not even aware of their fiduciary duties under ERISA* – and this fact was readily apparent to State Street. Indeed, when State Street finally decided to apprise the Committee of its on-going duty to consider the prudence of UAL as the exclusive investment vehicle for the ESOP, Committee Chair Barry Wilson “inquired if it was possible to diversify some shares even though the Plan documents clearly state that they can’t currently be diversified.” (Ex. C at UAL ESOP COM BR. 0047). The response from counsel (which was news to the Committee) was that they had always had a duty to do so. *Id.* Moreover, State Street was cognizant that it was “an independent fiduciary” that “would reserve the right to override the ESOP Committee’s decision” regarding whether ERISA demanded the divestiture of UAL stock. (Ex. C at UAL ESOP COM-BR 00052). Indeed, as State Street recognized, “[i]f compliance with ERISA would necessitate selling the shares, State Street has a duty to sell.” (Ex. C at UAL ESOP COM-BR 00062). However – prior to August 20, 2002 – neither the Committee nor State Street took *any* action to protect the Plan’s heavy investment in UAL shares.

Significantly, within *nine days* after State Street advised the ESOP Committee that United was on its watch list and advised the ESOP Committee of its fiduciary duties, State Street got itself appointed Investment Manager; belatedly, it then began selling the ESOP’s shares of UAL stock on September 27, 2002. *See* Ex. C at UAL ESOP COM-BR 00047-53; 58-59, 61-63; 101, 122. But this action on the part of the Defendants was too little, too late: by the time the ESOP began divesting its shares of UAL, the stock had already dropped to \$2.36 per share. *See*

Ex. T, UAL SUM 00200. Accordingly, from the beginning of the Class Period, the approximately 50 million shares of UAL in the ESOP had lost nearly two billion dollars.

III. ARGUMENT⁵

A. Claims Based on Allegations that Defendants Breached Fiduciary Duties Under ERISA are Generally Appropriate for Class Treatment

Class certification has often been granted where, as here, Plaintiffs seek relief for Plan-wide harm arising from breaches of fiduciary duty under ERISA.⁶ As the Court cogently reasoned in *White v. Sundstrand Corp.*, 1999 U.S. Dist. Lexis 15091, at *19 (N.D. Ill. Sept. 30, 1999) (citations omitted):

[T]he only relief available for violations of breach of fiduciary duty under 29 U.S.C. § 1109 is relief on behalf of the plan. . . . This is because under section 1109, a plan participant or beneficiary may bring an action to remedy a breach of fiduciary duty only in a representative capacity, for which no individual relief is available. . . . Thus, a breach of fiduciary duty claim is properly pursued as a class action. *Stanek v. AT & T*, 1998 U.S. Dist. Lexis 18717, at *13 n.4, No. 96 C 4096 (N.D. Ill. Nov. 24, 1998).

As the discussion below demonstrates, this case is no different.

B. The Proposed Class Satisfies the Requirements of Rule 23(a)

Under Rule 23(a), Plaintiffs must satisfy four threshold requirements in order to obtain class certification: (1) numerosity; (2) commonality; (3) typicality; and (4) adequacy of representation. Plaintiffs must also satisfy the requirements of one or more of the three

⁵ Copies of all unpublished authorities cited in this memorandum are provided to the Court in the accompanying Appendix of Unpublished Authorities in Support of Plaintiffs Motion for Class Certification.

⁶ See, e.g., *Moore v. Simpson*, 1997 U.S. Dist. Lexis 13791 (N.D. Ill. Sept. 5, 1997); *In re IKON Office Solutions, Inc. Sec. Litig.*, 191 F.R.D. 457, 466 (E.D. Pa. 2000); *Swody v. Harrah's New Orleans Mgmt. Co.*, 1996 U.S. Dist. Lexis 5512 (E.D. La. Apr. 22, 1996).

subsections of Rule 23(b)(3).⁷ Here, Plaintiffs satisfy Rule 23(a)'s prerequisites, and they also satisfy Rule 23(b)(1) and (3).

1. 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.” It is not necessary “to state the exact number or identity of class members as long as a good faith estimate is provided.” *Johnson v. Aronson Furniture Co.*, 1998 U.S. Dist. Lexis 14454, at *6 (N.D. Ill. Sept. 10, 1998); *Markham v. White*, 171 F.R.D. 217, 221 (N.D. Ill. 1997). All Defendants admit that, as of July 12, 1994, there were approximately 50,000 participants in the Plan. *See* State Street Answer to SAC ¶ 24; Committee Defendants’ Answer to SAC ¶ 24. And, State Street avers that as of August 1, 2002, the UAL ESOP held approximately 57.4 million shares of UAL stock. State Street Answer to SAC ¶ 24. Plaintiffs have thus provided a good faith estimate demonstrating that there are thousands of Class members. Joinder is impracticable, and numerosity is established.

2. Rule 23(a)(2) – Commonality

The proposed Class satisfies Rule 23(a)(2), which requires “questions of law or fact common to the class.” As the Seventh Circuit has explained: “The fact that there is some factual variation among the class grievances will not defeat a class action. A common nucleus of

⁷ In determining whether a class will be certified, the merits of the case are not examined, *Retired Chicago Police Ass’n v. City of Chicago*, 7 F.3d 584, 593 (7th Cir. 1993); *Palmer v. Combined Ins. Co. of Am.*, 217 F.R.D. 430, 436 (N.D. Ill. 2003), and the substantive allegations of the complaint should generally be taken as true. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177 (1974); *Heastie v. Community Bank of Greater Peoria*, 125 F.R.D. 669, 671 n.2 (N.D. Ill. 1989). “The court’s inquiry in making a class certification determination is limited to inquiring ‘into whether plaintiff is asserting a claim which, assuming its merit, will satisfy the requirements of Rule 23 as distinguished from an inquiry into the merits of plaintiffs particular individual claim.’” *McDaniel v. Universal Fid. Corp.*, 2004 U.S. Dist. Lexis 21320, at *5 (N.D. Ill. Oct. 20, 2004) (quoting *Eggleston v. Chicago Journeymen Plumbers’ Local Union No. 130, U. A.*, 657 F.2d 890, 895-96 (7th Cir. 1981)). Hence, this Court should “not say something like ‘let’s resolve the merits first and worry about the class later’ . . . or ‘I’m not going to certify a class unless I think that the plaintiffs will prevail.’” *Szabo v. Bridgeport Machs., Inc.*, 249 F.3d 672, 677 (7th Cir. 2001). Instead, the Court should rely on Plaintiffs’ allegations concerning the Rule 23 elements and the evidence presented to date and find that this case should be certified for Class treatment.

operative fact is usually enough to satisfy the commonality requirement of Rule 23(a)(2).” *Rosario v. Livaditis*, 963 F.2d 1013, 1017-18 (7th Cir. 1992) (citations omitted). Commonality does not require that all questions of fact or law be identical. *Johns v. DeLeonardis*, 145 F.R.D. 480, 482 (N.D. Ill. 1992). Rather, the commonality requirement is satisfied as long as “the class claims arise out of the same legal or remedial theory.” *Id.* at 483. As one court noted, “[c]ommonality is not a demanding requirement: It calls only for the existence of at least one issue of fact or law common to all class members.” *Meiresonne v. Marriot Corp.*, 124 F.R.D. 619, 622 (N.D. Ill. 1989); *see also Wagner v. NutraSweet Co.*, 170 F.R.D. 448, 450 (N.D. Ill. 1997) (must show at least one question is common to the class).

Common issues of fact and law permeate all of the claims brought on behalf of all class members here. The overriding questions for every class member is whether Defendants breached their fiduciary duties of prudence and loyalty by permitting and directing that the Plan’s assets be maintained in UAL stock, and whether the Plan and its participants suffered losses as a result. These are not the only common questions of law and fact,⁸ but they are sufficient to meet the commonality requirement of Rule 23(a)(2). *See, e.g., In Re Worldcom, Inc., ERISA Litig.*, 2004 U.S. Dist. Lexis 19786, at *7 (S.D.N.Y. Oct. 13, 2004) (“There are common questions of law and fact including whether Merrill Lynch and the other defendants were ERISA fiduciaries for the Plan and Predecessor Plans, whether they breached their fiduciary duties, and whether those breaches injured class members.”); *Moore v. Simpson*, 1997 U.S. Dist. Lexis 13791, at **9-10 (“All of these questions are sufficient to satisfy plaintiffs’

⁸ Other common issues include: (a) Were Defendants fiduciaries in relation to the Plan?; (b) Could Defendants override the terms of the Plan when following the terms of the Plan became imprudent?; (c) Should Defendants have continued to invest nearly all of the Plan’s assets in UAL stock; and (e) When should Defendants have taken action to protect the Plan and its participants?

burden under Rule 23(a)(2) because they all address common issues of owed fiduciary responsibility to the plan participants.”).

3. Rule 23(a)(3) – Typicality

Plaintiffs’ claims are also typical of the claims of the class members. As the Seventh Circuit holds, “[t]he question of typicality in Rule 23(a)(3) is closely related to the preceding question of commonality. . . . [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 his or her claims are based on the same legal theory.” *Rosario v. Livaditis*, 963 F.2d at 1018 (internal quotes and citations omitted). As with commonality, “[t]he typicality requirement may be satisfied even if there are factual distinctions between the claims of the named plaintiffs and those of other class members.” *De La Fuente v. Stokely-Van Camp, Inc.*, 713 F.2d 225, 232 (7th Cir. 1983). “Instead, we look to the defendant’s conduct and the plaintiff’s legal theory to satisfy Rule 23(a)(3).” *Rosario*, 963 F.2d at 1018; *Wagner v. Nutrasweet Co.*, 95 F.3d 527, 534 (7th Cir. 1996). Here, Plaintiffs’ claims are typical of those of the Class. Like all Plan participants and class members, Plaintiffs suffered losses as a result of Defendants’ breaches of fiduciary duty – and all seek to recover based upon the very same legal theories that govern all class members’ claims. *See, e.g., Moore v. Simpson*, 1997 U.S. Dist. Lexis 13791, at *11 (typicality met because “plaintiffs’ case stems from the defendants’ alleged course of conduct with respect to the Fund, in which all members of the plaintiff class have an interest”).

4. Rule 23(a)(4) – Adequacy of representation

Rule 23(a)(4) requires that the class representatives “will fairly and adequately protect the interests of the class.” To satisfy the adequacy requirement, Plaintiffs must have common interests with the class members, and must vigorously prosecute the interests of the Class

through qualified counsel. *Sosna v. Iowa*, 419 U.S. 393, 416 (1975); accord *Susman v. Lincoln American Corp.*, 561 F.2d 86, 90 (7th Cir. 1977).

Plaintiffs here all seek to establish that Defendants breached their fiduciary duties in continuing to invest the Plan's assets exclusively in UAL stock. Accordingly, there is no conflict between Plaintiffs and members of the Class as they share the same interests as members of the Class.⁹ See *Elliott v. Chicago Hous. Auth.*, 2000 U.S. Dist. Lexis 2697, *40-42 (N.D. Ill. Feb. 25, 2000). In addition, Plaintiffs have retained two firms with extensive experience in ERISA and class actions. Copies of the resumes of the Hagens Berman law firm and the Wexler Firm are attached as Exs. U and V.¹⁰ Plaintiffs therefore satisfy the adequacy requirement.

C. Plaintiffs Satisfy Rule 23(b)

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

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[.]

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 putative class members. See, e.g., *In re IKON Office Solutions, Inc.*, 191 F.R.D. at 466; *In re Worldcom, Inc.*

⁹ Declarations from each of the Class Representatives are submitted with this motion and are attached hereto as Exhibits 1-5.

¹⁰ Plaintiffs have therefore also satisfied Rule 23(g)(1)(B) and (C).

ERISA Litig., 2004 U.S. Dist. Lexis 19786, at *8 (certifying ERISA claims for breach of fiduciary duty against ESOP and 401(k) plan trustee Merrill Lynch pursuant to Rule 23(b)(1)(B) since “[a]ny adjudication with respect to individual members of the class will as a practical matter be dispositive of the interests of the other members of the class.”)¹¹

Because this action seeks damages arising from breaches of fiduciary duties under ERISA, the only remedy available to plan participants is plan-wide relief, namely, the restoration of losses to the Plan (and, derivatively, to all its participants). *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 139-40 (1985); *see* 29 U.S.C. § 1109(a) (liability for breach of fiduciary duty is “to the plan”); 29 U.S.C. § 1132(a)(2) (authorizing plan participant to sue for breach of fiduciary duty under § 409(a)). Thus, this action for breach of fiduciary duty under ERISA is **by law** a representative action, which, if successful, will impose on the Defendants certain obligations applicable to all participants in the Plan. *Gruby v. Brady*, 838 F. Supp. 820, 828 (S.D.N.Y. 1993) (quoting *Specialty Cabinets & Fixtures, Inc. v. Am. Equitable Life Ins. Co.*, 140 F.R.D. 474, 478 (S.D. Ga. 1991)) (holding that certification of class seeking relief for violations of ERISA was proper under Rule 23(b)(1)); *Koch v. Dwyer*, 2001 U.S. Dist. Lexis 4085, *14-19 (S.D.N.Y. Mar. 23, 2001) (same). As the court held in *Montgomery v. Aetna Plywood, Inc.*, 1996 U.S. Dist. Lexis 4869, at *18 (N.D. Ill. Apr. 15, 1996):

[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 upon defendants. Certification pursuant to Rule 23(b)(1)(A) is appropriate. *Becher*, 164 F.R.D. at 153; *Gruby*, 838 F. Supp. at 828; *Diduck*, 737 F. Supp. at 799.

¹¹ *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).

Hence, because of the unusual remedy provided by ERISA, this is a paradigmatic case for class treatment under Rule 23(b)(1). As the court cogently reasoned in *In re IKON Office Solutions, Inc.*, 191 F.R.D. 457 (E.D. Pa. 2000):

[G]iven 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 . . . would create difficulties in implementing such decisions.

IKON, 191 F.R.D. at 466 (citing *Feret v. CoreStates Fin. Corp.*, 1998 U.S. Dist. Lexis 12734 (E.D. Pa. Aug. 18, 1998)); *see also Bunnion v. CONRAIL*, 1998 U.S. Dist. Lexis 7727 (E.D. Pa. May 14, 1998); *Kane v. United Indep. Union Welfare Fund*, 1998 U.S. Dist. Lexis 1965 (E.D. Pa. Feb. 23, 1998); *Westman v. Textron, Inc.*, 151 F.R.D. 229, 231 (D. Conn. 1993) (certifying ERISA case under Rule 23(b)(1)(A) because “whether defendant breached its fiduciary duty is a question common to all potential cases and could, if tried in separate actions, result in wholly inconsistent adjudications”).

This Court should certify Plaintiffs’ claims under Rule 23(b)(1).¹²

2. The requirements of Rule 23(b)(3) are also met

A class may be certified under Rule 23(b)(3) when: (1) common questions “predominate over any questions affecting only individual members” (“predominance”); and (2) class resolution “is superior to other available methods for the fair and efficient adjudication of the controversy” (“superiority”). The primary consideration in assessing predominance is the proof

¹² Though certification of the Class is also appropriate under Rule 23(b)(3), this Court should certify the Class under Rule 23(b)(1). *See, e.g., Reynolds v. National Football League*, 584 F.2d 280, 284 (8th Cir. 1978) (noting that “when the choice exists between (b)(1) and (b)(3) certification, generally it is proper to proceed under (b)(1) exclusively”).

necessary to establish the class members' claims under the applicable substantive law. *Retired Chicago Police Ass'n v. City of Chicago*, 7 F.3d at 598. Where, as here, the necessary proof consists almost exclusively of Defendants' conduct, predominance is a test easily met – even if Defendants dredge up one or more allegedly “individual issues” in an effort to defeat certification. The court's decision on predominance in *Moore v. Simpson*, 1997 U.S. Dist. Lexis 13791, at *17 (emphasis added), is instructive: “***As with the commonality requirement, standardized conduct by the defendants in connection with established fiduciary principles established by ERISA are generally appropriate for class action.***” See also *Joncek v. Local 714 Int'l Bhd. Teamsters Health & Welfare Fund*, 1999 U.S. Dist. Lexis 14853, at *21 (N.D. Ill. Aug. 30, 1999).

As courts have recognized, “[c]onsiderable overlap exists between Rule 23(a)(2)'s commonality prerequisite and 23(b)(3).” *Demitropoulos v. Bank One Milwaukee, N.A.*, 915 F. Supp. 1399, 1419 (N.D. Ill. 1996). A finding of commonality will often result in a finding of predominance. *Heastie*, 125 F.R.D. at 677. Issues are considered to predominate when there is a “common nucleus of operative facts” among all the class members. *Halverson v. Convenient Food Mart, Inc.*, 69 F.R.D. 331, 335 (N.D. Ill. 1974); accord *Mejdreck v. Lockformer Co.*, 2002 U.S. Dist. Lexis 14785, at *18 (N.D. Ill. Aug. 9, 2002).¹³

In this case, the focus of the legal and factual inquiry will be on Defendants' common course of conduct. Plaintiffs allege that Defendants breached their fiduciary obligations to the

¹³ See also *Bunnion*, 1998 U.S. Dist. Lexis 7727, at *49 (quoting *Heastie*, 125 F.R.D. at 675) (To meet the predominance requirement, plaintiffs' claims need not be identical, and the “necessity of answering individual questions after answering common questions will not prevent a class action.”). “Common questions of law or fact will predominate when there is a common course of conduct that leads to injury of all the class members. . . . Under Rule 23(b)(3), this Court must determine whether the group seeking class certification seeks to remedy a common legal grievance.” *Burke v. Local 710 Pension Plan*, 2000 U.S. Dist. Lexis 5875, at *18 (N.D. Ill. Mar. 27, 2000) (citations omitted).

Class,¹⁴ and that Defendants' alleged misconduct affected all of the members of the Class similarly. Defendants' conduct presents common issues that will predominate in this litigation over any "individual issues" Defendants may attempt to create.

3. A class action is superior to other forms of adjudication

In addition to the predominance of common questions, Rule 23(b)(3) requires a finding that "a class action is superior to other available methods for the fair and efficient adjudication of the controversy." As the Court stated in *Ingram v. Corporate Receivables, Inc.*, 2003 U.S. Dist. Lexis 14389, at *14 (N.D. Ill. Aug. 18, 2003) (internal quotes and citations omitted), the relevant factors in the superiority inquiry include:

- (a) the interest of members of the class in individually controlling the prosecution or defense of separate actions;
- (b) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class;
- (c) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and
- (d) the difficulties likely to be encountered in the management of a class action.

This case meets the standards for superiority as outlined in Rule 23(b)(3).

First, every class member has an interest in proving Defendants' common course of conduct as outlined in the Complaint. It would be enormously inefficient – for both the Court and the parties – to engage in multiple trials in individual actions on the same liability issues.

Second, the number of class members is far too large, and the value of a typical claim (while hardly insubstantial) is too small for each individual class member to prosecute separate and enormously expensive actions against well-represented corporate and individual defendants.

¹⁴ This conduct includes, but is not limited to, the following: (a) Maintaining the investment of Plan assets in UAL stock when the stock carried such an extreme risk that no prudent fiduciary would have done so; (b) Failing to adequately monitor the prudence of investing in UAL stock; (c) Failing to remove or allow removal of the Plan's assets from UAL stock; and (d) Failing to deal with the irreconcilable conflict between the Committee Defendants' fiduciary obligations and their personal interests by at least appointing an independent third party to assess the prudence of UAL as an investment vehicle for the Plan's assets.

Here, a class action is the only efficient method for Plaintiffs and class members to litigate against these Defendants.

Moreover, because of the requirement of plan-wide relief in ERISA breach of fiduciary duty cases, there is no question that the class action is superior to other methods of adjudication. There simply is no basis for denying certification when all relief awarded in this case must be on behalf of the Plan as a whole. *See, e.g., La Fata v. Raytheon Co.*, 207 F.R.D. 35, 44 (E.D. Pa. 2002) (approving ERISA class under 23(b)(3) where it would “(1) prevent a multiplicity of suits that would waste judicial resources (the same basic issues would have to be relitigated), (2) avoid the risk of inconsistent judgments, and (3) enable plaintiffs with small claims to get into court”). Accordingly, certification is certainly the superior method for resolving the ERISA claims in this litigation.

Hence, if this Court does not certify Plaintiffs’ ERISA claims under Rule 23(b)(1), it should certify them under Rule 23(b)(3).

IV. CONCLUSION

For the reasons stated above, Plaintiffs respectfully request that this Court: (i) certify this case for class treatment pursuant to Fed. R. Civ. P. 23(b)(1) or, alternatively, 23(b)(3); (ii) appoint Plaintiffs as the Representative Plaintiffs of the Class; (iii) appoint the undersigned as counsel for the Class pursuant to Fed. R. Civ. P. 23(g); and (iv) grant such other and further relief as this Court may find just.

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HAGENS BERMAN LLP

By _____
Steve W. Berman
Clyde A. Platt
Andrew M. Volk
1301 Fifth Avenue, Suite 2900
Seattle, WA 98101
(206) 623-7292

Elizabeth A. Fegan
Timothy A. Scott
HAGENS BERMAN LLP
60 W. Randolph St., Suite 200
Chicago, IL 60601
(312) 762-9286

Kenneth A. Wexler
Jennifer Fountain Connolly
THE WEXLER FIRM
One North LaSalle St., Suite 2000
Chicago, IL 60602
(312) 346-2222

Attorneys for Plaintiffs