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INTRODUCTION

Defendants' opposition to plaintiffs' motion for class certification confirms that certification should be granted. Defendants cannot identify any sound reason for denying class treatment.

Defendants ignore that the Court can take full advantage of Rule 23's objectives of achieving judicial economy by certifying the liability elements of plaintiffs' breach of fiduciary duty (BOFD) claim under Fed. R. Civ. P. 23(c)(4), while leaving issues of detrimental reliance and remedial issues to be decided on an individual basis. Plaintiffs have shown that the liability elements of their BOFD claim are subject to common, class-wide proof, including plaintiffs' reliance on defendants' omissions of material fact.

In opposition to certification of plaintiffs' restoration of benefits claim, defendants' rely on a wayward misreading of the Tenth Circuit's decision in *DeBoard v. Sunshine Mining & Ref. Co.*, 208 F.3d 1228 (10th Cir. 2000), which is contrary to this Court's interpretation of the decision, plaintiffs' citations to *DeBoard* in earlier pleadings, and defendants' own previously stated understanding that the decision relates to an employer's development of early retirement plans, the identity of which does not require individualized determinations.

Having relied only on these misguided positions in opposition to certification under Rules 23(b)(2) and (b)(3), defendants provide no basis for the denial of class certification under these subsections. In addition, plaintiffs have shown that class members would be prejudiced if individual suits granted declaratory and injunctive relief in some cases, but not others, thus demonstrating sufficient "practical effect" for certification under Rule 23(b)(1)(B).

Finally, the named plaintiffs for both the ERISA counts and state-age discrimination claims satisfy Rule 23(a)(4)'s adequacy requirement. Defendants have not shown the existence of any antagonistic interests between the named plaintiffs and class members. The Third

Amended Complaint includes named plaintiffs who retired more than 30 years ago, providing class members with representatives who retired under defendants' plans from the 1970s through the 2000s. In addition, the caselaw (ignored by defendants) is clear that interests do not conflict where a class representative is not a participant in all of the plans subject to the same defendant conduct. Finally, there is absolutely no showing that the Tennessee named plaintiff (who was substituted by agreement months ago), and the Ohio and Oregon named plaintiffs cannot adequately represent the members of their respective subclasses on their age-discrimination claims.

Class treatment of plaintiffs' ERISA and state-law age discrimination claims is entirely appropriate, and the Court should certify the Class and Subclasses.¹

ARGUMENT

I. PLAINTIFFS' BOFD CLAIM SATISFIES RULE 23's COMMONALITY AND TYPICALITY REQUIREMENTS, AND THE LIABILITY ELEMENTS SHOULD BE CERTIFIED UNDER RULE 23(c)(4).

Plaintiffs have demonstrated that certification of the first three elements of their BOFD claim – fiduciary status, misrepresentation or omission made by defendants, and materiality – is proper pursuant to Rule 23(c)(4). *See* Pls. Memo at 10-16. Plaintiffs have also established that reliance on misrepresentations by fiduciaries in the form of an omission of material fact is presumed, and therefore, defendants' liability based on omissions is an issue common to the Class that does not require individualized proof. *Id.* at 16.

¹ Plaintiffs' Reply Memorandum in support of their motion for collective action under the Age Discrimination in Employment Act is filed separately.

A. Fiduciary Status, Misrepresentation or Omission Made by Defendants, and Materiality Elements of Plaintiffs' BOFD Claim.

Defendants do not dispute that Rule 23(c)(4) allows for certification of particular common issues, and do not even acknowledge plaintiffs' arguments and citations to governing caselaw which establishes that the Court can certify the BOFD liability elements of fiduciary status and material misrepresentations because they are subject to class-wide, common proof focused on defendants' conduct. Demonstrating the weakness of their opposition to certification, defendants dedicate just three sentences and cite to just two out of circuit decisions in asserting that proof of these BOFD elements requires individualized proof. Def. Memo at 8. Defendants' citations to the Ninth Circuit's decision in *Keyes v. Pac. Lumber Co.* and the Eastern District of Pennsylvania decertification opinion in *In re Unisys Corp. Retiree Med. Benefits ERISA Litig.*, do nothing to support defendants' position.

In *Keyes*, the Ninth Circuit held that BOFD claims are in fact amenable to class certification, and that individuals can be determined to be fiduciaries by the position in which they hold. *Keyes v. Pac. Lumber Co.*, 51 F.3d 1449, 1461-62 (9th Cir. 1995) ("some offices or positions ... by their very nature require persons who hold them to [perform fiduciary functions]"... and "[o]ther offices and positions should be examined to determine whether they involve the performance of any [fiduciary] functions."), quoting 29 C.F.R. § 2509.75-8 (1993). As described in plaintiffs' opening memorandum, plaintiffs will rely on defendants' policies and practices to establish whether plan administrators, benefits personnel, managers and supervisors had actual or apparent authority to provide benefits information to employees. See Pls. Memo at 12-13. Accordingly, common evidence will be used to determine which of defendants' positions included performance of the fiduciary function to convey benefits information to class members. As the court found in *Keyes*, "Persons who hold such positions will therefore be fiduciaries."

Keyes, 51 F.3d at 1462. No individualized proof will be required to establish the fiduciary status of defendants and their agents who provided plaintiffs misrepresentations about the retiree benefits.

Defendants' reliance on the decertification opinion in *In re Unisys Corp. Retiree Med. Benefits ERISA Litig.* is similarly misplaced. As noted in plaintiffs' opening memorandum, the court granted decertification only after discovery was complete due to the need to address causation issues, and had previously rejected Unisys's arguments on summary judgment that plaintiffs had failed to establish fiduciary status and material misrepresentations and omissions on a class-wide basis. *See In re Unisys Retiree Medical Benefits ERISA Litg.*, No. 93-1668, 2002 U.S. Dist. LEXIS 25737 at *7-9 (E.D. Pa. Jan. 30, 2002).

In addition, at trial of 14 "bellwether" retirees, the district court later found that based on trial testimony from corporate representatives, Unisys delegated to human resource staff and employee supervisors the function of advising employees about benefits. This was all that was necessary to determine that individuals who held these positions were fiduciaries. *See In re Unisys Corp. Retiree Medical Benefits ERISA Litig.*, 2009 U.S. App. LEXIS 19769 at *23 (3d Cir. Sept. 2, 2009) (affirming district court's finding of liability against Unisys on plaintiffs' BOFD claims). This ruling is consistent with earlier rulings by the Third Circuit and district court while the case was being litigated as a class action. *See In re Unisys Corp. Retiree Medical Benefits ERISA Litig.*, 57 F.3d 1255, 1261 (3d Cir. 1995) ("There is no question but that [the employers were] acting . . . in a fiduciary capacity when they made the material misrepresentations that support the claim for BOFD"); *In re Unisys Corp. Retiree Medical Benefits ERISA Litig.*, 957 F. Supp. 628, 645 (E.D. Pa. 1997) (finding that proof of fiduciary status had been proven on a class-wide basis).

Further, in its September 2009 affirmance of the trial court's finding of liability, the Third Circuit made clear that proving material misrepresentations did not require individualized evidence. Based on class-wide evidence obtained before decertification, the court found that "the cost and duration of retiree medical benefits is a significant factor to an employee who is contemplating whether retirement is feasible at the time," and that the record of corporate conduct demonstrated "that Unisys 'knew that the retirement decision was significant, that the cost of retiree medical benefits was significant, and that participation in a specific medical plan was considered a powerful motivation in the retirement decision,'" and that Unisys was aware that its employees were confused about the applicability of a reservation of rights clause to the retirement benefits. 2009 U.S. App. LEXIS 19769 at *28-30, *quoting* trial court's decision, *In re Unisys Retiree Medical Benefits ERISA Litg.*, No. MDL 969, 2006 WL 2822261, at *48, *51-53 (E.D. Pa. Sept. 29, 2006). Accordingly, based on this common evidence, the court found that plaintiffs had received material misrepresentations and inadequate disclosures. *Id.* at 31.

B. Reliance on Omission Element of Plaintiffs' BOFD Claim.

Defendants dedicate most of their argument on the detrimental reliance element of plaintiffs' BOFD claim, claiming that individual evidence that each plaintiff relied on the material misrepresentations must be shown, and that therefore the Court cannot grant certification on this element based on a presumption of reliance. Defs. Memo at 10-12. Again, in making this argument, defendants do not contest that under Rule 23(c)(4), the Court can certify the liability elements of plaintiffs' BOFD claim, while leaving questions of detrimental reliance (causation) and relief to be adjudicated on an individual basis. Contrary to defendants' mistaken assumptions, plaintiffs are not seeking certification of the detrimental reliance element on affirmative misrepresentations. *See* Pls. Memo at 11. As explained in plaintiffs' opening memorandum, however, class treatment is entirely proper as to defendants' inadequate

disclosures about the company's right to modify or terminate the retiree benefits under the principle of presumed reliance. Therefore, defendants' citations to decisions requiring individualized proof that plaintiffs detrimentally relied on affirmative misrepresentations are inapposite. *See* Defs. Memo at 10.

Significantly, defendants do not dispute that the Tenth Circuit has held that where, as here, a defendant has a duty to disclose material information to a plaintiff but fails to disclose this information, reliance on the omission is presumed, and no individual evidence of detrimental reliance is required. *See Grubb v. FDIC*, 868 F.2d 1151, 1163 (10th Cir. 1989) (the presumption of reliance "recognizes the unique difficulty of proving reliance on a failure to disclose material information of which the plaintiff did not know"), *citing Affiliated Ute Citizens of Utah v. United States*, 406 U.S. 128, 153-54 (1972); *see also Rosenthal v. Dean Witter Reynolds, Inc.*, 908 P.2d 1095, 1103-04 (Colo. 1995) (explaining that presumed reliance in the Supreme Court's *Affiliated Ute* decision was based upon the "relationship of trust and confidence" between a bank and its customers, "which resulted in an obligation to disclose at the time the bank withheld or omitted to state material facts"). The court stressed that in these cases, like here, where material representations are alleged to be either complete omissions or half-truths, "reliance as a practical matter is impossible to prove" and the presumption of causation is warranted. *Id.*

Defendants assert that despite the proper use of presumed reliance where one party has the duty to disclose to another, the Court should ignore this principle in the ERISA context, based on defendants' belief that it has been followed in just one ERISA case, *In re Tyco Int'l, Ltd.*, 2006 U.S. Dist. LEXIS 58278 at *26-28 (D.N.H. Aug. 15, 2006). *See* Defs. Memo at 9 ("In fact, Plaintiffs cite only one ERISA case, in *any* circuit, that has followed *Affiliated Ute*"). Defendants are mistaken.

It is widely held that the obligations of fiduciaries to participants and beneficiaries of ERISA plans are “the highest known to the law.” *See Donovan v. Bierwirth*, 680 F.2d 263, 272 n.8 (2d Cir. 1982); *In re Williams Cos. ERISA Litig.*, 271 F. Supp. 2d 1328, 1341 (N.D. Okla. 2003). As shown in plaintiffs’ opening memorandum, courts have ruled that reliance may be presumed in much weaker relationships, including that of a bank to customers or investors, and parties to a contract. Pls. Memo at 16. Therefore, it is not surprising that courts have held that reliance should be presumed in cases of inadequate disclosures by the more strict ERISA fiduciary obligation to provide complete, accurate and truthful information about benefits. BOFD cases present the prototypical scenario for presumed reliance on a fiduciary’s inadequate disclosure. *See, e.g., In re: First American Corp. ERISA Litig.*, No. 07-01357, 2008 U.S. Dist. LEXIS 83832 at *21 (C.D. Cal. July 14, 2008) (ERISA BOFD case, plaintiffs presumed to have relied on lack of information where nondisclosures by fiduciary are alleged); *Nauman v. Abbott Labs.*, No. 04-7199, 2007 U.S. Dist. LEXIS 25069 at *6 (N.D. Ill. Apr. 3, 2007) (certification granted in ERISA BOFD claim, detrimental reliance presumed); *Becher v. Long Island Lighting Co.*, 64 F. Supp. 2d 174, 181 n.1 (E.D.N.Y. 1999) (in certified ERISA and common law BOFD case arising from misrepresentations relating to consequences of withdrawals of contributions from pension plan on future benefits, court held reliance is presumed and issue of showing material omissions in communications about withdrawals was common to the Class); *see also Estate of Abraham L. Gump v. Gump*, 1 Cal. App. 4th 582 (Cal. App. 1991) (in breach of duty of trust resulting in constructive fraud, reliance on nondisclosure by fiduciary is presumed).

The decision in *Nauman* is instructive. In *Nauman*, the plaintiffs alleged that the defendant omitted material information about the future of their benefits under various Abbott benefit plans if plaintiffs accepted employment with a newly created spin-off company. 2007 U.S. Dist. LEXIS 25069 at *2-4. Like this case, the defendant asserted that plaintiffs failed to

satisfy Rule 23's commonality requirement because each plaintiff would have to establish detrimental reliance. *Id.* at *6. Citing the Supreme Court's decision in *Affiliated Ute*, the court rejected the argument that individualized proof of detrimental reliance is necessary where plaintiffs allege material omissions by an ERISA fiduciary. *Id.* ("Because plaintiffs have characterized their claims as being based on omissions, there is precedent to support the notion that reliance could be presumed"), citing *Affiliated Ute*, 406 U.S. at 153-54. The court further explained that in ERISA BOFD cases, the "appropriate focus ... is the conduct of defendants, not the plaintiffs," and by claiming that plaintiffs must demonstrate individual reliance, the argument "places too much emphasis on plaintiffs' conduct." *Id.* at *7, quoting, *inter alia*, *In re Williams*, 231 F.R.D. 416, 422 (N.D. Ok. 2005).

Consistent with this precedent, reliance on defendants' omissions concerning the retiree benefits can be presumed, and therefore presents a common question on the reliance element of their BOFD claim. Plaintiffs' BOFD claim satisfies commonality and typicality, and should be certified under Rule 23(c)(4).

II. PLAINTIFFS' CLAIM FOR RESTORATION OF BENEFITS SATISFIES RULE 23'S COMMONALITY AND TYPICALITY REQUIREMENTS.

Defendants' opposition to class certification of plaintiffs' claim for restoration of benefits under ERISA § 502(a)(1)(B), hinges on a single misguided argument: that the Tenth Circuit's decision in *DeBoard v. Sunshine Mining & Ref. Co.*, 208 F.3d 1228 (10th Cir. 2000), requires the Court to evaluate individualized communications to all plaintiffs and Class members to determine whether separate, stand-alone benefits plans were created for each employee. Therefore, according to defendants' logic, individualized determinations must be made to identify all of defendants' benefits plans, and individualized determinations about each of these

“single-employee plans” must be made to determine whether defendants breached the terms of each of these plans. Defs. Memo at 11-15.

DeBoard holds no such thing. The record in this case demonstrates that the Court and *both* parties understand that *DeBoard* requires production of documents relating to early retirement programs developed by the employer and offered to all eligible employees, which may provide vesting language different than that found in the employer’s regular retirement benefits plans. Nothing in *DeBoard* or this Court’s interpretation of this decision can be viewed as holding that “an informational letter sent to plan participants” can create hundreds or thousands of separate, individualized stand-alone benefits plans. Defendants’ willful misreading of *DeBoard* carries no weight and cannot justify denial of class certification.

In the Court’s December 2, 2008 denial of defendants’ motion to dismiss, Judge Vratil recognized that the Tenth Circuit in *DeBoard* focused on the creation of early retirement programs, and that communications to employees about early retirement programs demonstrated that the employer intended to create a new employee benefit plan with vested retiree benefits for the groups of employees who took advantage of the early retirement offer. *See* Doc. 45 at 15. Likewise, plaintiffs have always claimed that *DeBoard* required the discovery of documents related to defendants’ early retirement programs (often called “Special Early Retirement Programs,” or SERPs), to determine whether these SERPs contain vesting language, therefore enabling employees who retired under the SERPs to enforce this plan language (as opposed to the normal retirement plans’ language) as a basis for their ERISA § 502(a)(1)(B) claim. Judge Vratil clearly understood this. *See id.* (“[I]n *DeBoard*, the Tenth Circuit found that an employer’s written representations created a new ERISA plan for employees who took early retirement in reliance thereon. *See id.* at 1238. Here plaintiffs claim that to induce them to retire early, defendants represented in writing that they would receive lifetime benefits”).

Plaintiffs have never claimed that a single “individual communication” about the retiree benefits created a separate stand-alone plan applicable only to that employee. Defendants’ citations to plaintiffs’ oppositions to defendants’ now-rejected dispositive motions, and plaintiffs’ current outstanding motion to compel, prove this point. In plaintiffs’ opposition to defendants’ motion to dismiss, plaintiffs explained that under *DeBoard*, communications inducing employees to accept a Special Early Retirement Program created enforceable plans with vested benefits, and that by failing to produce documents related to these SERPs, defendants’ motion to dismiss ignored plaintiffs’ allegations that several plaintiffs and members of the Class secured benefits through participation in these plans. Doc. 21 at 14. Similarly, in plaintiffs’ opposition to defendants’ partial motion for summary judgment, plaintiffs referred to *DeBoard* as holding that documents concerning SERPs can be used to determine whether employees retiring under those plans had vested benefits. Doc. 82 at 24-25.

In plaintiffs’ memoranda in support of their Rule 56(f) motion, which was granted by the Court, plaintiffs cited *DeBoard* in support of their assertion that defendants’ production of SERP related documents was incomplete, and that under *DeBoard*, these documents must be produced before the Court could rule on a motion for summary judgment. *See* Doc. 80 at 4-5 (citing Doc. 45 and *DeBoard* for support that “benefits entitlements of employees who accepted and participated in special retirement programs which were offered by defendants from time to time may be defined or supplemented in the documents describing the terms of those programs”). Nothing in any of the Court’s holdings or plaintiffs’ arguments in this case can be viewed as seeking individual communications about the retiree benefits to determine whether defendants created single-employee retiree plans. It is clear that plaintiffs seek documents describing the SERPs under which many plaintiffs and class members retired, and that these SERPs were

developed by defendants to be offered at various times to defined groups of eligible employees, not individual employees.

In addition, defendants' argument directly contradicts the position they stated in their opposition to plaintiffs' Rule 56(f) motion. In opposing that motion, defendants stated that they had satisfied *DeBoard* by producing all of the documents related to plaintiffs' SERPs. *See* Doc. No. 90 at 8-9 n.4 (quoting the Court's December 2, 2008 decision, Doc. 45 at 25, that "*DeBoard* establishes an alternative decisional framework for claims to benefits based on participation in special early retirement programs") (emphasis added). To suit their needs in opposition to the class motion, however, defendants now do a flip-flop and assert that *DeBoard* requires individualized determinations of the existence of benefits plans which defendants cannot currently identify. The holding of *DeBoard* is clear, and defendants understood that it requires the production of documents describing early retirement programs offered to qualified employees. Plaintiffs have alleged that they and the Class retired under defendants' regular retiree benefits plans or Special Early Retirement Plans. No individualized determinations will be necessary to identify these plans. Plaintiffs and class members retired under the same plans, and allege identical claims for benefits under the uniform terms of these common plans. The claims for restoration of benefits under ERISA § 502(a)(1)(B) are ideally suited for class treatment and should be certified.

III. THE CLASS CAN BE CERTIFIED UNDER RULES 23(b)(1)(B), 23(b)(2) AND 23(b)(3).

In response to plaintiffs' demonstration that the proposed class meets the requirements of Rules 23(b)(2) and (b)(3), Pls. Memo at 24-29, defendants can only supply the Court with a terse rehash of their unfounded assertions that *DeBoard* requires individualized identification of single-employee plans and that proof of fiduciary status, material misrepresentations and

detrimental reliance requires individual determinations. Defs. Memo at 17-18. As shown in section II, *DeBoard* does not require an individualized analysis of each and every benefit communication to plan participants to determine whether a stand-alone benefit plan was created for each employee. *DeBoard* cannot be used to deny class certification.

Further, as shown in plaintiffs' opening memorandum at 10-16 and in Section I of this Reply, plaintiffs can establish the first three elements of their BOFD claim – fiduciary status, misrepresentation or omission made by defendants, and materiality – through common evidence of defendants' policies and practices. Plaintiffs have also established that reliance on misrepresentations by fiduciaries containing an omission of material fact is presumed, and therefore, is an issue common to the Class that also does not require individualized proof. Pls. Memo at 16; Section I at 5-8.

Defendants have “acted or refused to act on grounds generally applicable to the class,” and plaintiffs and the Class seek the same declaratory and injunctive relief based on identical claims under the terms of defendants' benefits plans. Consequently, Rule 23(b)(2) is satisfied.² Further, because each class member seeks relief on claims arising from the same conduct by defendants, the elements of their claims are susceptible to class-wide proof, there are no

² Defendants also wrongly assert that the elements of manageability and efficiency found under Rule 23(b)(3) are applicable under a Rule 23(b)(2) analysis. Defendants cite the Tenth Circuit's decision in *Shook I*, 386 F.3d 963 (10th Cir. 2004). However, the “manageability issues” relating to certification under Rule 23(b)(2) discussed in *Shook I* was limited to remedies. *Id.* at 973 (“courts may look to whether the Class is amenable to ‘uniform group remedies’ in assessing management of the class”); see also *Shook II*, 543 F.3d 597, 604 (10th Cir. 2008) (manageability issues under Rule 23(b)(2) relate to “the district court's “ability to provide injunctive relief to the class framed in the complaint”), quoting *Shook I*, 386 F.3d at 974. Here, declaratory and injunctive relief would be the same for all class members – reinstatement of the medical and prescription drug benefits plans, reinstatement of the level of life insurance benefits before the unlawful reductions and terminations were made, awarding the medical, prescription drug and life insurance benefits at those same levels for the lifetime of the class members, an accounting of defendants' profits and savings resulting from their violations, and other relief to remedy improper deprivation of benefits, including back-pay relief for the unlawful denial of medical, prescription drug and life insurance benefits.

disparities in the way individual class members were treated, the remedies plaintiffs seek are common to the class, and class-wide adjudication is clearly superior to individual litigation, Rule 23(b)(3) is satisfied.

Finally, defendants wrongly claim that certification under Rule 23(b)(1)(B) is inappropriate because the *stare decisis* affect of the Court's rulings is insufficient, in and of itself, to meet the Rule's requirements. Def. Memo at 19. In making this argument, defendants ignore plaintiffs' cited cases and other authority holding that in ERISA cases involving violations of plan terms or fiduciary breaches, class members would be prejudiced if individual suits granted declaratory and injunctive relief in some cases, but not others, thus making these cases particularly well suited for certification under Rule 23(b)(1)(B). *See* Pls. Memo at 22-23, *citing, inter alia, Feret v. Corestates Financial Corp.*, No. 97-6759, 1998 U.S. Dist. LEXIS 12734 at *44 (E.D. Pa. Aug. 18, 1998) ("the conflicting decisions would affect the interests of all proposed class members, as the relief sought pertains directly to the plans and contracts under which all class members are allegedly covered"); *Bunnion v. Conrail*, 1998 U.S. Dist. LEXIS 7727 at *43 (E.D. Pa. May 18, 1998) ("[I]nconsistent judgments concerning how the Plans should have been interpreted or applied would result in prejudice").

This prejudice to retirees and beneficiaries not joined in the suit is a sufficient "practical effect" to warrant certification under Rule 23(b)(1)(B). Indeed, the same treatise defendants cite in support of their argument expressly states that certification under Rule 23(b)(1)(B) is appropriate in cases, like this, alleging breach of fiduciary duty. *See* 7AA Wright, Miller & Kane, *Federal Practice and Procedure*, § 1774, 36-37 (3d ed. 2005), *citing*, 1996 Advisory Committee Note and cases holding same.³

³ Defendants' citation to *In re Dennis Greenman Sec. Litig.*, 829 F.2d 1539, 1546 (11th Cir. 1987) is not to the contrary. *Greenman* was a pure securities fraud case, and as such, did not

IV. THE ERISA NAMED PLAINTIFFS SATISFY THE ADEQUACY REQUIREMENT UNDER RULE 23(a)(4).

In asserting that the ERISA named plaintiffs cannot adequately represent the Class, defendants renew their same tired and rejected argument that named plaintiffs can only represent those retirees who retired under the same plans at the same time.⁴ Defs. Memo at 15-17. First, Magistrate Judge O’Hara recently granted plaintiffs’ motion to amend the second amended complaint to add ERISA named plaintiffs who retired as early as 1976, thereby vitiating any plausible argument by defendants that the named plaintiffs do not share the same interest and suffer the same injury as the class members because many retired before 1993, the earliest date in which the original ERISA named plaintiffs retired. *See* Doc. 107 at 3-7 (adding named plaintiffs “ensure[s] the scope of the class is properly represented... [and does not] unduly prejudice defendants when defendants have been on notice from the start that plaintiffs were seeking to bring this action as a class action on behalf of ‘[a]ll persons’ adversely affected by defendants’ actions”).

Second, as discussed in plaintiffs’ memoranda in support of their Rule 56(f) motion, their motion to amend the second amended complaint, and their currently pending motion to compel, “an individual in one ERISA benefit plan can represent a class of participants in numerous plans other than his own, if the gravamen of the plaintiffs’ challenge is to the general practices which affect all the plans.” *Fallick v. Nationwide Mutual Ins. Co.*, 162 F.3d 410, 422 (6th Cir. 1998).

involve rulings on the same plan terms or representations about benefits found here: “we note that securities fraud actions often involve cases with unique facts. Consequently, it is difficult *in this setting* to conclude that a holding would create inconsistent standards for the defendants.” *Id.* at 1545-48 & n. 8 (emphasis added).

⁴ The insincerity of a defendant’s professed concern about the adequacy of representation requirement has not been lost upon the courts. *See, e.g., Eggleston v. Chicago Journeymen Plumbers*, 657 F.2d 890, 895 (7th Cir. 1981) (“it is a bit like permitting a fox, although with a pious countenance, to take charge of the chicken house”).

Accordingly, it is widely held that the adequacy requirement is satisfied in like cases, because no antagonistic interests exist where the named plaintiffs retired under different benefits plans at different times than some members of the Class, and, as here, plaintiffs and class members all suffered the same harm as a result of the same conduct by defendants. *See, e.g., Forbush v. J.C. Penney Co.*, 994 F.2d 1101, 1106 (5th Cir. 1993) (despite named plaintiff not being covered by plans applicable to other class members, plaintiff, like here, challenged defendant's general practice affecting all plans and therefore, there is "no basis for suspecting that [the named plaintiff] will not adequately represent the interests of the Class"); *In re Enron Corp. Sec., Derivative & ERISA Litig.*, No. 01-3913, 2006 U.S. Dist. LEXIS 42145 at *59 (S.D. Tex. June 7, 2006) (adequacy satisfied even where named plaintiffs do not participate in some of the class members' plans: "as a matter of law, [the named plaintiffs] can represent the putative class members from the plan other than the one for which they are participants or beneficiaries"); *Smith v. United HealthCare Services, Inc.*, No. 00-1163, 2002 U.S. Dist. LEXIS 2140 at *13-14 (D. Minn. Feb. 5, 2002) ("no indication of conflicting goals" in case involving thousands of plans with varying plan language found in 29 states); *Groover v. Michelin North America, Inc.*, 187 F.R.D. 662, 667-70 (M.D. Ala. 1999) (no issue of antagonistic interests in case involving "multiple [collective bargaining agreements] entered into by four different companies over the course of nearly 30 years," where plaintiffs alleged that defendant's unilateral decision to reduce medical benefits harmed all members of the class); *Fox v. Massey-Ferguson, Inc.*, 172 F.R.D. 653, 660-61 (E.D. Mich. 1995) (class of 1000 members who retired under terms of various collective bargaining agreements and insurance agreements alleging vested benefits certified, named plaintiffs adequate representatives where defendant employer's decision to change

medical benefits was common to all plaintiffs and represented the major component of relief that plaintiffs sought to obtain).⁵

Furthermore, defendants do not contest that the Court has the means to later create subclasses, should the course of the litigation warrant it. *See, e.g., Diaz v. Romer*, 961 F.2d 1508, 1511 (10th Cir. 1992) (“Fed. R. Civ. P. 23(c)(4)(B) explicitly allows a court to create subclasses ‘when appropriate,’” including when conflicts are later learned in the course of discovery or even following trial); *Sibley v. Sprint Nextel Corp.*, 254 F.R.D. 662, 674-75 (D. Kan. 2008) (certifying single class with understanding that later court rulings could result in creation of subclasses).

Accordingly, the fifteen named plaintiffs will fairly and adequately protect the interests of the Class, and Rule 23(a)(4) is satisfied.

V. THE NAMED PLAINTIFFS FOR THE TENNESSEE, OHIO AND OREGON SUBCLASSES ALSO MEET THE ADEQUACY REQUIREMENT UNDER RULE 23(a)(4).

Defendants’ opposition to certification of plaintiffs’ state-law age discrimination claims is shockingly disingenuous. First, defendants claim that the Tennessee subclass cannot be certified because Mr. Sams, the named plaintiff listed on the caption at the time the motion was filed, had indicated that he wished to withdraw as a class representative. Def. Memo at 20. Defendants represent to the Court that without Mr. Sams, the subclass lacks a class representative, and consequently cannot be certified. *Id.* What the defendants do not tell the Court is that months before filing their opposition brief, they expressly agreed to the substitution

⁵ Defendants’ citations to 20 and 30 year old, non-ERISA cases can be readily distinguished. In *Monarch Asphalt Sales Co., Inc. v. Wilshire Oil Co. of Tex.*, 511 F.2d 1072, 1076-77 (10th Cir. 1975), the court found the named plaintiff for a subclass in an antitrust case inadequate because it had not purchased the product alleged to have been price-fixed, and therefore could not share interests with members of the subclass. Similarly, in *Reed v. Bowen*, 849 F.2d 1307, 1309 (10th Cir. 1988), the proposed named plaintiffs’ claims had been resolved, leaving them with no further personal financial stake in the litigation.

of Wanda Shipley to represent the Tennessee subclass, and that therefore, this subclass – by agreement of the parties – is represented by a Tennessee plaintiff who holds the same interest and suffers the same injury as the members of the subclass. *See* Doc. 89 at 1, n. 1 (defendants’ brief in opposition to plaintiffs’ motion to amend confirming parties’ agreement to substitute Shipley for Sams). In any event, Magistrate Judge O’Hara granted the substitution, and Ms. Shipley is now the named plaintiff for the Tennessee state-law age discrimination claims. Doc. 107. Defendants’ argument, no matter how misleading, is, at any rate, moot.

Second, and without citation to any authority – or any reasoning – defendants assert that because the Ohio and Oregon state-law age discrimination named plaintiffs retired between 1985 and 1999, they cannot adequately represent the interests of all of the class members in the Ohio and Oregon subclasses. Defs. Memo at 21. The adequacy requirement is satisfied where it is shown that class counsel is qualified, experienced and generally capable of serving the interests of the entire class, and that the class representatives’ interests are not antagonistic to the interests of the class. *See Rutter and Wilbanks v. Shell Oli Co.*, 314 F.3d 1180, 1187-88 (10th Cir. 2002); *Olenhouse v. Commodity Credit Corp.*, 136 F.R.D. 672, 680 (D. Kan. 1991). Defendants do not dispute that plaintiffs’ counsel is qualified to represent the Class and subclasses. Further, the fact that other class members retired at different times than the named plaintiffs, does not in any way demonstrate that their interests in vigorously pursuing this litigation conflict with the interests of the subclasses. The named plaintiffs share with their subclass the same interest in establishing that in reducing and terminating the life insurance benefits, they all suffered age discrimination. Proof that the reduction and termination of life insurance benefits caused a disparate impact based on age will be established through expert evidence that will be the same for all class members, and will not differ based on age or date at retirement. Accordingly, the Ohio and Oregon named plaintiffs do not have interests antagonistic to their subclass.

Once plaintiffs demonstrate that they are adequate representatives, the burden shifts to defendants. Absent evidence to the contrary, adequacy is presumed. *Anderson v. Merit Energy Co.*, No. 07-00916, 2008 U.S. Dist. LEXIS 47743 at *15 (D. Colo. June 19, 2008); *Neiberger v. Hawkins*, 208 F.R.D. 301, 316 (D. Colo. 2002), *citing*, 2 Herbert B. Newberg & Alba Conte, *Newberg On Class Actions*, § 7.24 (3d ed. 1992). Defendants' bald assertions that the Ohio and Oregon named plaintiffs are not adequate representatives are insufficient to meet their burden. These named plaintiffs satisfy Rule 23(a)(4)'s adequacy requirement, and the Court should certify all three state-age discrimination subclasses.

CONCLUSION

For the reasons stated here and in Plaintiffs' opening memorandum, the Court should certify this action as a class action under Rule 23(b)(1)(B) and Rule 23(b)(2). Alternatively, the case may be certified under Rule 23(b)(3).

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 20th day of October, 2009, I electronically filed the foregoing Plaintiffs' Reply Memorandum In Support Of Plaintiffs' Motion For Class Action Certification using the CM/ECF system, which will send notice of electronic filing to the following counsel for defendants:

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