IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

DONNA C. RICHARDS,	)	
	)	
Plaintiff,	)	**CASE NO.: 3:04-CV-1638 (JCH)**
	)	
v.	)	
	)	
FLEETBOSTON FINANCIAL CORP. and the FLEETBOSTON FINANCIAL PENSION PLAN,	)	**SEPTEMBER 19, 2005**
	)	
Defendants.	)	

DEFENDANTS' MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFF'S MOTION FOR CLASS CERTIFICATION

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Defendants FleetBoston Financial Corporation ("FleetBoston") and FleetBoston Financial Pension Plan (the "Plan") submit this memorandum in opposition to Plaintiff Donna Richard's Motion for Class Certification ("Motion").

INTRODUCTION

Plaintiff seeks to certify a class that consists of all individuals who as of December 31, 1996, ceased accruing benefits under the Plan's various traditional defined benefit formulas ("Traditional Formulas") and became participants in a new cash balance benefit formula ("Cash Balance Formula"). Plaintiff asks this to Court certify a "mandatory class" that would bind without exception *all* of these individuals to the remedy that Plaintiff seeks – the voiding of the Cash Balance Formula and reversion to the Traditional Formulas. Plaintiff's motion, however, suffers from two basic, fundamental problems – problems that undercut her ability to satisfy virtually every element of Rule 23(a) and (b).

First, Plaintiff's goal of having the Cash Balance Formula declared void and a reversion to the Traditional Formulas is directly antagonistic to the interests of the many putative class members who indisputably are better off under the Cash Balance Formula than they would have been had the Traditional Formulas continued. This is a case where class members will be *harmed* should Plaintiff obtain the relief she requests. There can be no greater doubt as to Plaintiff's adequacy as a class representative than the fact that the successful pursuit of her claims will result in financial detriment to other members of the putative class.

Despite this, Plaintiff's motion attempts to drag all other putative class members into this lawsuit without giving them the ability to opt out. Although Plaintiff apparently is comfortable ignoring the fact that she is wholly inadequate to represent these individuals, the Court cannot do so. Plaintiff is the only plan participant to file a lawsuit challenging the Cash Balance Formula

in the nine years since it was adopted. There is no reason to presume that the absent class members support Plaintiff's lawsuit or would elect to join the class if they had the opportunity. Because of the varying ways in which the putative class members were affected by the transition to the Cash Balance Formula, they must be allowed the opportunity to decide for themselves whether they want to challenge this formula. Binding the proposed class to one single remedy – a reversion to the Traditional Formulas – would be unconscionable and unjust.

The second flaw of Plaintiff's motion for class certification is that five of the six counts of Plaintiff's Complaint, Counts II through VI, by their very nature cannot be determined on a class-wide basis. Plaintiff seeks to certify the identical class for all six counts of her Complaint – all individuals who transferred from a Traditional Formula to the Cash Balance Formula on January 1, 1997. However, each of the claims in Counts II-VI is different, and each implicates a different group of participants within the putative class. For example, not all participants have experienced the "wear-away" effect alleged in Counts II and III. Similarly, not all participants were entitled to an ERISA § 204(h) notice (Count IV), were likely prejudiced by the allegedly inadequate SPDs (Count V), or relied on alleged misleading information (Count VI). In order to determine the appropriate class members for each claim and in order to determine liability for such class members, the Court would be required to conduct more than 25,000 individualized factual inquiries. Such a result would be contrary to the fundamental principles of judicial efficiency and economy that underlie the very purpose of the class action device.

Finally, even were this Court to certify the class Plaintiff requests, any such class must expressly exclude the more than 10,000 individuals who have ended their employment since January 1, 1997, and have received a payment of their benefits in the form of a lump-sum distribution. These 10,000-plus former Cash Balance Participants are no longer participants in

the Plan and have no entitlement to any future benefits under the Plan. Accordingly, they are not entitled to declaratory or injunctive relief, which is all that Plaintiff seeks in this lawsuit.

For these reasons, as explained more fully below, the Court should deny Plaintiff's Motion for Class Certification.

BACKGROUND

On January 1, 1997, Fleet Financial Group, Inc. ("Fleet Financial"), a predecessor bank to FleetBoston, amended its pension plan. Among other things, the amendment prospectively changed the benefit formula for some, but not all, participants from a Traditional Formula to a new Cash Balance Formula. Cmplt. ¶ 23. Under the terms of the cash balance amendment, any participant who, as of December 31, 1996, had not attained age 50 with at least 15 years of service automatically became a participant in the Cash Balance Formula, i.e., a "Cash Balance Participant."[1] More than 25,000 such individuals became Cash Balance Participants after the amendment. Declaration of Gary Sahakian (attached as Exhibit A), at ¶ 4.

Plaintiff's Complaint consists of six counts which allege violations of various provisions of the Employee Retirement Income Security Act of 1974, as amended, 29 U.S.C. § 1001, et seq. ("ERISA"). In her Complaint and Motion for Class Certification, Plaintiff defines the single class that she seeks to certify for all six counts as any and all persons who:

[1] Prior to the January 1, 1997 Plan amendment, the Cash Balance Participants had participated in a number of predecessor pension plans (hereafter, "legacy plans"), including (1) the "Fleet Financial Plan," which covered Fleet Financial employees; (2) the "Shawmut Retirement Plan," which covered Shawmut National Corporation employees prior to its merger into Fleet Financial in 1995; and (3) the "NatWest Retirement Plan," which covered NatWest Bank N.A. employees prior to its merger with Fleet Financial. These legacy plans were defined benefit plans and each had traditional defined benefit formulas that took into account different factors in calculating participants' pension benefits. See Defendants' Memorandum of Law in Support of Motion to Dismiss ("Motion to Dismiss") (Doc. 31), Ex. B at 2 and Ex. C, Spec. Sched. J, K.

(a) Are former or current Fleet employees who on December 31, 1996, were not at least age 50 with 15 years of vesting service, and

(b) Participated in the Fleet Pension Plan before January 1, 1997, and

(c) Have participated in the Fleet Pension Plan at any time since January 1, 1997.

Cmplt. ¶ 11; Memorandum in Support of Motion for Class Certification (hereafter "Pl. Br.") at 3. This group of individuals consists of those plan participants who had accrued benefits under the legacy Traditional Formulas until December 31, 1996, and who were then converted, effective January 1, 1997, to the Plan's Cash Balance Formula.

Benefits of the Cash Balance Design

FleetBoston's Cash Balance Formula provides many advantages and benefits to plan participants that were not available under the Traditional Formulas.[2] One advantage the Cash Balance Formula has is that it provides participants the opportunity to receive their pension benefits upon their termination of employment regardless of age or years of service, rather than waiting until they reach retirement age as the Traditional Formulas required. See Motion to Dismiss, Ex. B at 26-30. In addition, whenever participants begin receiving benefits, they can select either a lump-sum payment or a series of annuity payments. See id. This lump-sum option combined with the option to take an early distribution was not available under the Traditional Formulas.

The ability to receive a lump-sum distribution upon employment termination regardless of age or years of service makes the cash balance benefits more portable – and thus more beneficial to employees in today's mobile workforce – than the benefits accrued under the Traditional Formulas. See Esden v. Bank of Boston, 229 F.3d 154, 158 n.5 (2d Cir. 2000); Eaton

[2] For a detailed overview of defined benefit, defined contribution and cash balance plans, as well as a thorough explanation of the methods of accruing benefits and electing benefit distributions under the FleetBoston Plan's Cash Balance Formula, see Motion to Dismiss at 4-10.

v. Onan Corp., 117 F. Supp. 2d 812, 818 (S.D. Ind. 2000). Instead of having to wait until normal or early retirement age, participants can take their benefits upon leaving FleetBoston and invest the lump-sum amount, as they choose, to fit their own risk profile, coordinate with their other retirement planning and provide the opportunity for faster growth in the value of their retirement savings than if they were required to keep their benefits in a traditional plan. Under the Cash Balance Formula, if plan participants choose, they also can continue to take advantage of the tax deferral feature of the Plan by rolling over their distribution to an IRA or their next employer's retirement plan.

There can be no doubt as to the popularity of the lump-sum feature of FleetBoston's Cash Balance Formula. Since January 1, 1997, more than 11,000 of the 25,000-plus Cash Balance Participants that Plaintiff seeks to include in the class have ended their employment with Fleet Financial or its successors and commenced the receipt of their benefits. Of this 11,000-plus group, more than 7,000 were able to elect to receive their benefits in the form of a lump-sum payment or an annuity. Approximately 6,400 of this group of 7,000-plus selected a lump-sum distribution rather than an annuity. Ex. A, ¶ 5. In other words, more than 90% of the participants who had a choice as to which form of benefit to receive preferred to receive their benefits in the form of a lump-sum distribution.[3]

In addition to providing this lump-sum feature, the Cash Balance Formula has provided numerous participants a greater monetary benefit than the participants would have received had they continued to accrue benefits under the Traditional Formulas. See Declaration of

[3] Approximately 4,000 of the 11,000-plus participants who have commenced the distribution of pension benefits since the date of their employment separation were required to, and did, receive a lump-sum distribution upon their employment separation because the value of their benefits fell below certain threshold figures set forth in the Plan. Ex. A, ¶ 5.

Christopher Bone (attached as Exhibit B) at ¶¶ 5-9; see also Section I.A, infra. In short, and as will be discussed in greater detail below, there are many putative class members who have benefited financially from becoming Cash Balance Participants on January 1, 1997, and not remaining subject to the Traditional Formulas that Plaintiff seeks to re-impose on them.[4]

ARGUMENT

The class action device is a powerful tool that is to be granted only in those extraordinary circumstances where representative litigation is appropriate. As with all parties moving for class certification, Plaintiff bears the burden of establishing that the proposed class clearly meets each requirement of Rule 23(a) of the Federal Rules of Civil Procedure: numerosity, commonality, typicality, and adequacy of representation. Fed. R. Civ. P. 23(a); see also Morgan v. Metropolitan District Commission, 222 F.R.D. 220, 228 (D. Conn. 2004). Plaintiff also must establish that the proposed class is maintainable because it fits within one of the categories enumerated in Rule 23(b). See Walker v. Asea Brown Boveri, Inc., 214 F.R.D. 58, 62 (D. Conn. 2003).

This Court should not grant Plaintiff's Motion unless the Court is satisfied, after "rigorous analysis," that the criteria set forth in Rule 23 have been met. Vengurlekar v. Silverline, 220 F.R.D. 222, 226 (S.D.N.Y. 2003) (internal quotation and citations omitted); see also In re Visa Check/Master Money Antitrust Litigation, 280 F.3d 124, 135 (2d Cir. 2001). Plaintiff's failure to meet any one of Rule 23's requirements defeats the alleged class action. See Pecere v. Empire Blue Cross and Blue Shield, 194 F.R.D. 66, 69-70 (E.D.N.Y. 2000). In

[4] Defendants are only pointing out those benefits to plan participants that are pertinent to the issue of class certification. Cash balance plans benefit participants in other ways, and such plans also benefit the sponsoring employer in a number of ways.

attempting to establish the requirements of Rule 23, "plaintiff cannot rely solely on the allegations of the complaint, but must provide sufficient information on which the court can make a determination" on class certification. Petrolito v. Arrow Financial Svcs., 221 F.R.D. 303, 307 (D. Conn. 2004) (citing Pecere, 194 F.R.D. at 69).

Here, Plaintiff has failed to meet her burden. Her Motion does little more than recite the bare allegations of her Complaint and falls far short of proving each of the Rule 23 elements.[5]

I. PLAINTIFF HAS NOT MET HER BURDEN OF PROVING THAT THE REQUIREMENTS OF RULE 23(a) ARE SATISFIED.

A. Plaintiff Has Not Met Her Burden Of Establishing The Adequacy Requirement Of Rule 23(a)(4).

Plaintiff offers no evidence to support her claim of adequacy other than the self-serving statements in her affidavit that she is not aware of any conflicting interests. Her failure to provide any evidence on which the Court can determine whether the adequacy element has been met clearly does not meet Plaintiff's burden under Rule 23. See Morgan, 222 F.R.D. at 228.

Under the adequacy requirement of Rule 23(a)(4), a plaintiff moving for class certification must demonstrate: (1) that counsel for the prospective class is qualified, experienced, and generally able to conduct the litigation, and (2) that the named plaintiff is an

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[5] In addition, Plaintiff's Motion for Class Certification must be denied because Plaintiff has failed to state any claim upon which relief can be granted. See Tootle v. ARINC, Inc., 222 F.R.D. 88, 92 (D. Md. 2004) (concluding that plaintiff had failed to state a claim that defendant's cash balance plan was age discriminatory in violation of ERISA, and consequently denying class certification on that claim). See also Boulware v. Crossland Mortgage Corp., 291 F.3d 261, 268 n.4 (4th Cir. 2002); Petit v. Celebrity Cruises, Inc., 153 F. Supp. 2d 240, 267 (S.D.N.Y. 2001); Maywalt v. Auburn Technology, No. 94-CV-352 RSP/GJD, 1996 WL 596547, at *9 (N.D.N.Y. Oct. 15, 1996); Fischer v. Tynan, No. 90 Civ. 7587 LBS, 1993 WL 213025, at *5 (S.D.N.Y. June 16, 1993). As noted in In re Merrill Lynch & Co., Inc., 272 F. Supp. 2d 243, 255 (S.D.N.Y. 2003), "[i]t is axiomatic that a putative class representative must be able to individually state a claim against [] defendants, even though he or she purports to act on behalf of a class." For the reasons discussed in Defendants' Motion to Dismiss, Plaintiff has failed to state a claim with respect to all six counts of her Complaint.

adequate representative for the putative class. See In re Drexel Burnham Lambert Group, 960 F.2d 285, 291 (2d Cir. 1992). To be an adequate representative, the named plaintiff must not have interests that conflict with or are antagonistic to the interests of other class members. See id.; see also Amchem Prods. v. Windsor, 521 U.S. 591, 625-26 (1997) ("[t]he adequacy inquiry under Rule 23(a)(4) serves to uncover conflicts of interest between named parties and the class they seek to represent."); In re Visa, 280 F.3d at 142 (noting that Rule 23(a)(4) "requires courts to ask whether plaintiff's interests are antagonistic to the interest of other members of the class.") (internal quotations and citation omitted). Class representatives must meet the requirements of adequacy "since a judgment in a class action binds absent class members whose due process rights would be thus imperiled." Scott v. New York City Dist. Council of Carpenters Pension Plan, 224 F.R.D. 353, 355 (S.D.N.Y. 2004); see also In re American Medical Systems, Inc., 75 F.3d 1069, 1083 (6th Cir. 1996). Because of the important due process issues at stake with class certification, even potential antagonistic interests are enough to cause concern regarding adequacy of representation. See Dameron v. Sinai Hospital of Baltimore, Inc., 595 F. Supp. 1404, 1409 (D. Md. 1984).

In this case, Plaintiff cannot satisfy the adequacy requirement because her interests are in direct conflict with the interests of many members of the proposed class. The source of the conflict comes from the primary remedy Plaintiff seeks: "A declaration that the cash balance amendment to the FleetBoston Financial Pension Plan which purportedly took effect on January 1, 1997 was ineffective and that the plan in place prior thereto is still in force and effect[.]" Cmplt. Pr. for Relief ¶ 1. Plaintiff seeks this remedy for every count of her Complaint. See Plaintiff's Interrogatory Answers (attached as Exhibit C) at 12-13, 17. She seeks this remedy for all putative class members. See Plaintiff's June 30, 2005 supplement to her Interrogatory

Answers (also attached as Exhibit C) at 2, ¶ 7. If Plaintiff is successful, FleetBoston's cash balance amendment will be voided prospectively, as well as retroactively to its adoption on January 1, 1997.[6] For the reasons discussed below, many putative class members would undoubtedly oppose such an action if they were aware of it and had the opportunity to do so.

1. Many Putative Class Members Are Receiving Greater Benefits Under The Cash Balance Formula.

There are thousands of Cash Balance Participants in the class that Plaintiff seeks to certify who have received or will receive a greater benefit under the Cash Balance Formula than they would have received under the Traditional Formulas. Ex. B at ¶¶ 5-9.[7] Set forth in Exhibit B are numerous examples of individuals whose benefits actually are greater under the Cash Balance Formula, including Cash Balance Participants who were covered under the same Shawmut Traditional Formula that covered Plaintiff, as well as Cash Balance Participants who were covered under the Fleet and NatWest Traditional Formulas; individuals who were as old as 71 and as young as 22 years of age at the time the Cash Balance Formula was adopted; individuals who have retired; and individuals who are still employed with the bank and continue to accrue benefits. Ex. B at ¶ 6. For example:

- **Former Employee Who Was 52 Years Old On 1/1/97:** Participant I is a member of the putative class who commenced employment with the Bank in 1988 and accrued benefits under the legacy NatWest plan until becoming a Cash Balance Participant at age 52. After terminating employment with the Bank, Participant I selected a lump-sum benefit distribution. Participant I received more benefits under the Cash Balance Formula than he/she would have received had the NatWest Traditional Formula remained in place. Specifically, Participant I accrued a benefit valued at $126,780 under the Cash Balance Formula, but would

[6] This remedy is inappropriate under ERISA for many reasons which Defendants will not address here as that issue goes to the merits of Plaintiff's requested remedy, not to class certification.
[7] In his Declaration, Christopher Bone explained that he evaluated a subset of the 25,000-plus members of the putative class and identified nearly 2000 such individuals who have been better off under the Cash Balance Formula. He also stated that he would likely find more such individuals were all 25,000-plus putative class members evaluated. Ex. B at ¶¶ 5, 8-9.

have accrued a benefit valued in lump-sum terms at only $84,502 had he/she continued under the Traditional Formula until terminating employment.

- **Former Employee Who Was 58 Years Old On 1/1/97:** Participant C is a member of the putative class who commenced employment with the Bank in 1988 and accrued benefits under the legacy Shawmut plan until becoming a Cash Balance Participant at age 58. After terminating employment with the Bank, Participant C selected a lump-sum benefit distribution. Participant C received more benefits under the Cash Balance Formula than he/she would have received had the Shawmut Traditional Formula remained in place. Specifically, Participant C accrued a benefit valued at $20,869 under the Cash Balance Formula, but would have accrued a benefit valued in lump-sum terms at only $16,485 had he/she continued under the Traditional Formula until terminating employment.

- **Active Employee Who Was 71 Years Old On 1/1/97:** Participant F is a member of the putative class who commenced employment with the Bank in 1993 and accrued benefits under the legacy Shawmut plan until becoming a Cash Balance Participant at age 71. As of the beginning of 2005, Participant F has accrued more benefits under the Cash Balance Formula than he/she would have accrued had the legacy Shawmut plan remained in place. Specifically, Participant F has accrued a benefit valued at $17,099 under the Cash Balance Formula, but would have accrued a benefit valued in lump-sum terms at $15,320 had he/she continued under the Traditional Formula.

- **Active Employee Who Was 23 Years Old On 1/1/97:** Participant J is a member of the putative class who commenced employment with the Bank in 1995 and accrued benefits under the legacy Shawmut plan until becoming a Cash Balance Participant at age 23. As of the beginning of 2005, Participant J has accrued more benefits under the Cash Balance Formula than he/she would have accrued had the legacy Shawmut plan remained in place. Specifically, Participant J has accrued a benefit valued at $8,892 under the Cash Balance Formula, but would have accrued a benefit valued in lump-sum terms at $7,484 had he/she continued under the Traditional Formula.

- **Former Employee Who Was 50 Years Old On 1/1/97:** Participant A is a member of the putative class who commenced employment with the Bank in 1984 and accrued benefits under the legacy NatWest plan until becoming a Cash Balance Participant at age 50. After terminating employment with the Bank, Participant A selected a lump-sum benefit distribution. Participant A received more benefits under the Cash Balance Formula than he/she would have received had the NatWest Traditional Formula remained in place. Specifically, Participant A accrued a benefit valued at $63,526 under the Cash Balance Formula, but would have accrued a benefit valued in lump-sum terms at only $47,242 had he/she continued under the Traditional Formula until terminating employment.

- **Former Employee Who Was 52 Years Old On 1/1/97:** Participant B is a member of the putative class who commenced employment with the Bank in 1983 and accrued benefits under the legacy NatWest plan until becoming a Cash Balance Participant at age 52. After terminating employment with the Bank, Participant B selected a lump-sum benefit distribution. Participant B received more benefits under the Cash Balance Formula than he/she would have received had the NatWest Traditional Formula remained in place. Specifically, Participant B accrued a benefit valued at $40,695 under the Cash Balance Formula, but would have accrued a benefit valued in lump-sum terms at only $31,022 had he/she continued under the Traditional Formula until terminating employment.

- **Active Employee Who Was 28 Years Old On 1/1/97:** Participant K is a member of the putative class who commenced employment with the Bank in 1994 and accrued benefits under the legacy Shawmut plan until becoming a Cash Balance Participant at age 28. As of the beginning of 2005, Participant K has accrued more benefits under the Cash Balance Formula than he/she would have accrued had the legacy Shawmut plan remained in place. Specifically, Participant K has accrued a benefit valued at $5,538 under the Cash Balance Formula, but would have accrued a benefit valued in lump-sum terms at $5,375 had he/she continued under the Traditional Formula.

These individuals (as well as thousands more) have been better off financially under the Cash Balance Formula and, thus, would be financially harmed were Plaintiff to convince this Court to force upon them the relief that she seeks.

Indeed, Plaintiff explicitly acknowledges a financial conflict between herself and some members of the proposed class. In Paragraph 29 of her Complaint, she states that the "net effect" of the change to the Cash Balance Formula "is that younger employees' pensions relatively gain under the FleetBoston Plan's cash balance terms and older employees' pensions relatively lose." Cmplt. ¶ 29. Yet Plaintiff ignores these concerns and attempts to certify a class that includes such "younger" employees, and explicitly advocates taking away an advantageous benefit formula from this group whose interests she purports to represent. Moreover, as the examples above and in Exhibit B demonstrate, it is not only younger employees who will be harmed by the prosecution of Plaintiff's claims. There are older employees, such as Participants A, B, C, F and I in the examples above, who are better off with the Cash Balance Formula. See also Ex. B at ¶¶

6(l) and (m) (Cash Balance Participants who were 67 and 54 years of age, respectively, on January 1, 1997). They too should not be forcibly bound to Plaintiff's representation and the relief she seeks.[8]

In addition to the increased pension benefits that many participants have experienced under the Cash Balance Formula, *all* putative class members, regardless of their circumstances, have derived a significant advantage from their ability to receive their benefits in the form of a lump-sum payment upon termination of their employment. As noted above, over 90% of those participants who have commenced benefits and have had a choice of a lump-sum or annuity have already elected to receive their benefit as a lump-sum payment. Ex. A at ¶ 5. By taking their benefits as a lump-sum, participants can invest their retirement savings in a manner that suits their particular stage in life and saving goals.

If the cash balance amendment were declared ineffective, putative class members will lose this highly beneficial and popular lump-sum feature. Plaintiff does not acknowledge this significant benefit she would be taking away from the thousands of current plan participants. Nor does Plaintiff's motion contain any discussion of what will happen to the participants who have already left FleetBoston and taken a lump-sum distribution of their benefits. This presumably is because Plaintiff realizes she could not possibly adequately represent the interests of these individuals.

The relief that Plaintiff seeks – a declaration that the Cash Balance Formula is void and a reversion to the various pre-1997 Traditional Formulas – will, by its very nature, apply to *all*

[8] Further evidencing her knowledge of existing conflicts, Plaintiff specifically identified in her deposition a putative class member who was financially better off under the Cash Balance Formula than he would have been had the Traditional Formulas continued after January 1, 1997. Richards Deposition Excerpt (attached as Exhibit D), at 46-48. That individual was 64 years of age at conversion. Ex. A at ¶ 6.

putative class members. Plaintiff's Motion offers no suggestion as to what should be done with the thousands of putative class members who – should she obtain her relief – have received lump-sum distributions that they, presumably, would be obligated to return to the Plan in order to put the parties in the status quo *ex ante* position that Plaintiff advocates.

Class members, and in particular the class representative, must not have interests antagonistic to one another. See In re Joint Eastern and Southern District Asbestos Litigation, 78 F.3d 764, 778 (2d Cir. 1996). "The election of a remedy that does not benefit the entire class… and that is not the remedy that would be chosen by the entire class… creates a conflict of interest. This conflict renders the plaintiffs' representation of the class as a whole inadequate." Clay v. American Tobacco Co., 188 F.R.D. 483, 493 (S.D. Ill. 1999). The Seventh Circuit's decision in United Independent Flight Officers, Inc. v. United Air Lines, Inc., 756 F.2d 1274 (7th Cir. 1985), discusses this very point: class certification should be denied when members of the proposed class benefit from different ERISA plan formulas. In United, the Seventh Circuit upheld the denial of class certification on adequacy grounds where at least some class members would oppose the benefit changes for which the plaintiffs sued. See id. at 1284 ("differences among [class members] concerning their economic interests with regard to benefit plans represent a substantial conflict going to the subject matter of the litigation, thus rendering class certification inappropriate.") (internal quotation and citation omitted)).

The same issues are present here. Members of the putative class who have already benefited or will benefit from the Cash Benefit Formula that Plaintiff seeks to declare "ineffective" have interests adverse to Plaintiff. But if the proposed class is certified, such class members will have no choice in the matter – they will be forced to stand by as Plaintiff argues on their so-called "behalf" for changes to the Plan that they would oppose.

This is not an issue, as Plaintiff may attempt to argue, of a disparity in damages among the various class members. There is much more at stake in this case than class members benefiting in varying degrees from the sought-after relief. Nor is this a case where some class members will benefit from the Plaintiff's remedy while others will remain monetarily unaffected. Rather, because Plaintiff seeks a declaration that the cash balance amendment was ineffective and a reversion to the Traditional Formulas, this is a case where some members of the putative class will actually be harmed should Plaintiff succeed. Such a conflict goes to the very heart of Plaintiff's adequacy as a class representative.

While Plaintiff believes she was harmed when the Cash Balance Formula was adopted, her attempt to drag all other class members into this lawsuit and to certify them in a non-opt-out class is unjust. It would be improper and unconscionable to force the many putative class members who have benefited or will benefit from the cash balance amendment to join in a lawsuit that would take away these benefits. The Court cannot allow Plaintiff to sacrifice the interests of the putative class members in order to further her own. See In re Quintus Sec. Litig., 148 F. Supp. 2d 967, 970 (N.D. Cal. 2001) ("The court . . . owes a fiduciary duty to the class to ensure that the interests of every member of the class are adequately represented"); see also Key v. Gillette Co., 782 F.2d 5, 7 (1st Cir. 1986) (opining that the district court has an ongoing obligation to ensure that the class representative fairly and adequately represents the class). Participants must be allowed to decide for themselves, on an individual basis, whether they want to challenge the Cash Balance Formula. Accordingly, this Court must deny Plaintiff's Motion for Class Certification.

2. Plaintiff Is An Inadequate Representative As To Count VI For Additional Reasons.

In addition to these overriding shortcomings that apply to all six of the claims in Plaintiff's Complaint, with respect to Count VI, Plaintiff cannot possibly be certified as a class representative for the simple reason that she has absolutely no knowledge of this claim.

When asked about Count VI at her deposition, Plaintiff testified that she did not know who, as alleged in her Complaint, the "Fleet Plan Administrators" were who allegedly made misrepresentations to "retiring plan participants" by informing them only of the lesser value of the benefit they would receive under the Cash Balance Formula. Ex. D at 152; see Cmplt. ¶ 52. Plaintiff expressly deferred to her attorney for that information. Ex. D at 152. Plaintiff also had no knowledge of any "retiring plan participants" to whom these alleged misrepresentations were made. See id. She *guessed* that this count of her Complaint possibly referred to a specific individual because he was no longer employed with FleetBoston, but Plaintiff admitted she had no knowledge of what that person was or was not told about his benefits. She further admitted she had no knowledge of what any other individual was told about his or her specific benefits and admitted that she herself is not a "retiring a plan participant." Ex. D at 153-155. It is plainly apparent that the true "plaintiff" with respect to this claim is class counsel, not Ms. Richards. Under such circumstances, class certification should be denied. See Goldchip Funding Co. v. 20th Century Corp., 61 F.R.D. 592, 594-95 (M.D. Pa. 1974) ("The class is entitled to more than blind reliance upon even competent counsel by uninterested and inexperienced representatives."); Cohen v. Bloch, 507 F. Supp. 321, 325-26 (D.C.N.Y. 1980) (class representative was ill-informed of suit and thus inadequate).

B. Plaintiff Has Not Met Her Burden Of Establishing The Commonality Requirement Of Rule 23(a)(2).

The burden is on Plaintiff to demonstrate that the requirement of commonality is satisfied. See Morgan, 222 F.R.D. at 234. "The plaintiff cannot rely solely on the allegations of the complaint, but must provide sufficient information on which the court can make a determination." Id. (internal quotation and citation omitted). In her Motion, Plaintiff makes the conclusory assertion that, "[t]he only issues that have been identified in this litigation are issues common to all class members." Pl. Br. 12-13. This statement simply is not true.

To establish the commonality requirement of Rule 23(a)(2), "'[i]t is not every common question that will suffice… [because] at a sufficiently abstract level of generalization, almost any set of claims can be said to display commonality.'" Petrolito, 221 F.R.D. at 309 (quoting Sprague v. General Motors Corp., 133 F.3d 388, 397 (6th Cir. 1998)). Rather, "the court looks for 'a common issue the resolution of which will advance the litigation.'" Id. The court "should weigh the common issues with the need for individual analysis to determine whether a class action is appropriate. When a case requires extensive individualized inquiry, it will unduly burden the Court and will disserve the economy rationale that renders the class action device useful." Wiseman v First Citizens Bank & Trust Co., 212 F.R.D. 482, 486 (W.D.N.C. 2003) (internal quotation and citation omitted).

Plaintiff seeks that the same class be certified with respect to all six counts of her Complaint. Counts II through VI, however, require the Court to conduct highly individualized inquiries with respect to every class member. A brief discussion of these claims illustrates the individualized analyses they require.

1. Plaintiff's "Wear-Away" Claims In Counts II And III.

As Plaintiff herself states, both Counts II and III of her Complaint arise from what is termed the "wear-away" effect. Pl. Br. 1-2, ¶ 2. According to Plaintiff, some employees may undergo a period of time where, although their benefit under the Cash Balance Formula continues to grow, the frozen benefit they earned under the Traditional Formula remains the greater benefit. See Cmplt. ¶¶ 32, 33. In Count II, Plaintiff contends that there is no accrual of a participant's cash balance benefit during this "wear-away" period because the frozen benefit under the Traditional Formula has the greater value, and this supposedly causes "prohibited benefit forfeitures" in violation of ERISA § 203(a). See Cmplt. ¶¶ 32-34, 46 and Plaintiff's Memorandum of Law in Opposition to Defendants' Motion to Dismiss, p. 24. Similarly, in Count III, Plaintiff alleges that "[b]ecause the wear-away effect causes plan participants, including Richards, to face years where they accrue zero benefits followed by years where they accrue actual benefits, the cash balance terms violate the 'anti-backloading' rule in ERISA § 204(b)(1)(B) that requires that the value of the benefit accrued in any given year may not exceed the value of a benefit accrued in any previous year by more than 33 1/3%." Cmplt. ¶ 46.

The relevance of these claims for class certification purposes is that the Cash Balance Formula allegedly violates the "non-forfeiture" and "anti-backloading" rules of ERISA *only* when, as Plaintiff contends, a plan participant has, in fact, experienced the "wear-away" effect. See, e.g., Cmplt. ¶ 46. Establishing that the "wear-away" effect has actually occurred therefore is a necessary element of Plaintiff's (or any other putative class member's) claims in Counts II and III.

Wear-away, however, cannot be determined on a class-wide basis. In order to determine whether any given putative class member experienced wear-away, the Court would need to

compare the accrual of the frozen benefit and the cash balance benefit for each putative class member at all points in time since January 1, 1997. Among other factors, this analysis would require an individualized assessment of the particular Traditional Formula (e.g., Fleet, Shawmut, NatWest, etc.) under which the putative class member had been accruing benefits on December 31, 1996, as well as his or her age, salary, initial cash balance, years of service, pay progression since January 1, 1997, and amounts of any differences in service recorded by the Plan for purposes of vesting and benefit accrual. In addition, because the analysis must assess these factors at all points in time, the analysis must apply changing actuarial assumptions as those will differ from year-to-year. Ex. B at ¶ 17. Depending on these factors, some putative class members will have experienced the "wear-away" effect, while others will have not. Indeed, as the attached exhibit shows, many members of the putative class have not experienced the "wear-away" effect. Ex. B at ¶¶ 16-19. As set forth in the examples in Exhibit B, these include members of the putative class of various ages (including participants who were in their forties, fifties or sixties when they became Cash Balance Participants) and who had previously accrued benefits under the legacy Shawmut, legacy Fleet or legacy NatWest Traditional Formula. Ex. B at ¶¶ 16(a)-(f).

The fact that the putative class includes participants who indisputably have not experienced the "wear-away" effect – and that identifying these participants would require the Court to conduct a detailed analysis of the factors set forth above for every class member – is fatal to Plaintiff's attempt to certify a class on Counts II and III. Resolving Plaintiff's claims does not similarly resolve the claims of any other putative class member. Because of the individualized factors set forth above, even if Plaintiff could prove that she personally experienced the "wear-away" effect, it would not establish that other class members also

experienced the "wear-away" effect – and, as the facts show, many did not. Ex. B at ¶¶ 16-19. Plaintiff's claims thus fail to meet the commonality requirement and are inappropriate for class certification. See Fotta v. Trustees of the United Mine Workers of Am., 319 F.3d 612, 619 (3rd Cir. 2003), *cert. denied*, 540 U.S. 982 (2003) ("To decide whether each putative class member would be entitled to interest, the District Court would have to determine whether the Fund wrongfully withheld or wrongfully delayed payment for each class member. . . . Because both liability and the appropriate remedy must be determined for each plaintiff, no common issues of law or fact exist."); United Steelworks of Am., AFL-CIO-CLC v. Ivaco, Inc., 216 F.R.D. 693, 697-98 (N.D. Ga. 2002) (concluding that plaintiffs' claim lacked commonality because of the need for individualized analysis).

2. Plaintiff's ERISA § 204(h) And Summary Plan Description Claims In Counts IV And V.

Counts IV and V of Plaintiff's Complaint suffer from similarly fatal flaws. In Count IV, Plaintiff alleges that FleetBoston violated ERISA § 204(h) when it allegedly failed to notify Plaintiff of a significant reduction in the rate of her future benefit accrual 15 days prior to the January 1, 1997 effective date of the cash balance amendment. Cmplt. ¶ 48. To state a claim under ERISA § 204(h), a plaintiff must demonstrate: (1) that she actually suffered a significant reduction in the rate of her future benefit accrual (and thus was entitled to notice), and (2) that she was likely prejudiced by the employer's failure to give her the notice to which she was entitled. See Frommert v. Conkright, 328 F. Supp. 2d 420, 436 (W.D.N.Y. 2004) (citing Burke v. Kodak Retirement Income Plan, 336 F.3d 103, 113-14 (2d Cir. 2003), *cert. denied*, 540 U.S. 1105 (2004)); see also Colin v. Marconi Commerce Systems Employees Retirement Plan, 335 F. Supp. 2d 590, 605 (M.D.N.C. 2004) (dismissing plaintiffs' claim under another ERISA notice provision and noting that "[b]eneficiaries cannot recover under ERISA's notice provisions absent

a showing that they were harmed as a result of the notice failure."). Establishing these elements will require an individualized analysis with respect to each class member.

First, like with the "wear-away" effect, whether any putative class member suffered a significant reduction in the rate of future benefit accrual depends on a variety of factors, including the Traditional Formula under which the putative class member accrued benefits, the current age of the putative class member, and the age, years of service and salary history of the putative class member as of January 1, 1997. Ex. B. at ¶¶ 13-14. As the discussion in Section 1.A above demonstrates, there are thousands of putative class members who did not suffer any reduction in their benefit accruals but actually gained financially from becoming Cash Balance Participants. None of these putative class members was entitled to any ERISA § 204(h) notice, and they have no claim under Count IV.

Moreover, even as to any members of the putative class who may have actually experienced a significant reduction in the rate of future benefit accrual since January 1, 1997, Defendants were legally obligated under the applicable standards in 1996 to issue an ERISA §204(h) notice only if the significant reduction the putative class member experienced was reasonably expected. See Notice of Significant Reduction in the Rate of Future Benefit Accrual, 60 Fed. Reg. 64,320, 64,321-23 (Dec. 15, 1995); see also Engers v. AT&T Corp., No. 98-3660, 2001 U.S. Dist. LEXIS 25889, at *5-6 (D.N.J. June 6, 2001).[9] As explained in the attached declaration, there are thousands of putative class members who Defendants had no reason to believe would experience a significant reduction in the rate of future benefit accrual, and they therefore were not entitled to receive an ERISA § 204(h) notice. Ex. B at ¶¶ 12-15. As set

[9] The Engers decision and all other unreported decisions published on either Westlaw or Lexis are included in the accompanying documents entitled "Attachment – Unreported Decisions".

forth in the examples in Exhibit B, these include members of the putative class of various ages (including participants who were in their twenties as well as participants who were in their fifties or sixties when they became Cash Balance Participants) and who had previously accrued benefits under the legacy Shawmut, legacy Fleet or legacy NatWest Traditional Formula. Ex. B at ¶¶ 12(a)-(f). Indeed, the examples in Exhibit B demonstrate that there were many individuals who, when evaluated for purposes of ERISA § 204(h), would have been expected to experience not a reduction, but an increase anywhere from 8% to 24% in their future rate of benefit accrual with the conversion to the Cash Balance Formula. Ex. B at ¶¶ 12(a)-(d), (f).

Thus, even if Plaintiff were able to establish that she herself suffered a significant reduction in the rate of her future benefit accrual and had been entitled to an ERISA § 204(h) notice, the Court still would need to determine for each other individual class member whether a significant reduction in the rate of future benefit accrual has occurred and whether it reasonably should have been anticipated by Defendants back in 1996.

Furthermore, the Court would need to conduct an individualized analysis for each putative class member as to the second element of Plaintiff's claim in Count IV – whether each class member was likely prejudiced as a result of FleetBoston's alleged failure to give notice of its cash balance amendment. See Frommert, 328 F. Supp. 2d at 436; Colin, 335 F. Supp. 2d at 605. Whether Plaintiff and any other putative class members can demonstrate they were likely harmed is not something that can be presumed on a class-wide basis. Rather, such findings only can be made by inquiring of each class member what prejudicial effect, if any, the alleged lack of notice likely had on him or her.

Because both elements of Count IV require individualized proof, Plaintiff's claim cannot be certified under Rule 23(a)(2). See Sprague, 133 F.3d at 398 (reversing district court's

certification of class "[b]ecause each plaintiff's claim depended upon facts and circumstances peculiar to that plaintiff . . . ."); Hudson v. Delta Airlines, Inc., 90 F.3d 451, 457 (11th Cir. 1996) (affirming denial of class certification on various ERISA claims because they were "not susceptible to class-wide proof.").

Count V of Plaintiff's Complaint – that FleetBoston did not provide adequate summary plan descriptions ("SPDs") in connection with its adoption of a cash balance formula (see Cmplt. ¶ 50) – similarly requires the Court to conduct an individualized analysis into whether each putative class member was "likely prejudiced" or "likely to have been harmed" as a result of the inadequate, misleading or deficient SPDs. See Burke, 336 F.3d at 111-13. Whether or not each individual class member suffered "likely prejudice" from any allegedly deficient language is not something that can be decided on a class-wide basis. Accordingly, class certification is not appropriate.

3. Plaintiff's Breach Of Fiduciary Claim In Count VI.

In Count VI, Plaintiff alleges that

> [u]pon information and belief, because FleetBoston Plan administrators frequently inform retiring plan participants only of the value of their cash balance accounts and fail to inform them of the greater benefits they are owed under the frozen benefit derived from the Traditional Formula, FleetBoston has breached the fiduciary duty it owes to Plan participants…[.]

Cmplt. ¶ 52.[10] With this claim, Plaintiff and all other class members must establish, among other elements, that: (1) FleetBoston made material misrepresentations, and (2) they relied on those misrepresentations to their detriment. See Danis v. Cultor Food Science, Inc., 154 F. Supp. 2d

[10] This claim is based "upon information and belief" because it did not happen to Plaintiff – she is not a member of this class. That alone is grounds enough not to certify a class on this claim. See infra Section I.C.1.

247, 259 (D. Conn. 2001) (citing Ballone v. Eastman Kodak Co., 109 F.3d 117, 122, 126 (2d Cir. 1997)).

ERISA breach of fiduciary duty claims based on alleged misrepresentations are inherently unsuited for class resolution, and Plaintiff's claim is no exception. Because of the need for individualized proof of detrimental reliance, courts routinely deny class certification on claims like the one alleged by Plaintiff. See Coffin v. Bowater Inc., 228 F.R.D. 397, 409 (D. Me. 2005) (denying certification of ERISA breach of fiduciary duty claim based on alleged failures to communicate properly to plan participants and concluding that "individual issues of reliance will be probative to [the] resolution of any ERISA fiduciary duty claim[.]" (emphasis added); see also Flanagan v. Allstate Insurance Co., 223 F.R.D. 489, 495-96 (N.D. Ill. 2004), *vacated on other grounds*, In re Allstate Ins. Co., 400 F.3d 505 (7th Cir. 2005).

In Hudson, 90 F.3d at 457, the Eleventh Circuit affirmed the denial of class certification for lack of commonality where the ERISA breach of fiduciary duty claim centered around reliance by retirees on representations regarding better retirement benefits. The court concluded that the question of detrimental reliance on the allegedly false information provided to the retiring employees "would necessarily have been highly individualized." Id. In Tootle v. ARINC, Inc., 222 F.R.D. 88 (D. Md. 2004), the plaintiff, like Richards in this case, brought an ERISA breach of fiduciary duty claim in connection with the defendant's amendment of its defined benefit pension plan from a traditional benefit formula to a cash balance formula. Noting that the claims stated by the plaintiff "rel[ied] heavily on alleged omissions [], that the defendants failed to share material information with employees," the court concluded that the commonality requirement had not been satisfied because the plaintiff's burden of proving reliance would necessarily require "an individualized showing regarding each plaintiff's

acquisition of information about the new cash balance plan and his reliance on that information." Id. at 97; see also Flanagan, 223 F.R.D. at 495 (denying class certification of ERISA breach of fiduciary duty claim for lack of commonality because the trier of fact would need to examine what was said to each plaintiff before his or her departure from the company, and what effect this information had on each plaintiff); Wiseman v. First Citizens Bank & Trust Co., 215 F.R.D. 507, 510 (W.D.N.C. 2003) (affirming denial of class certification on plaintiffs' ERISA breach of fiduciary duty misrepresentation claim because the element of detrimental reliance would require an individualized analysis).

These principles apply with even greater force in this case, where Plaintiff's claim appears to be that communications made to plan participants regarding the Cash Balance Formula led them mistakenly to believe that their cash balance benefit included all the benefits that they earned from their predecessor plans, plus the cash balance pay and interest credits. There is no possible way a class could be certified on such a claim.

In order to determine whether liability exists for this claim, the Court would need to question each and every class member to determine: (1) what communications he or she received and reviewed regarding the Cash Balance Formula; (2) what these communications led him or her to believe; (3) whether he or she relied on any mistaken impressions created by these communications, and (4) how he or she was harmed by any such reliance. Making these determinations would require the Court to conduct thousands of mini-trials into each putative class member's individual circumstances. Such a task is entirely contrary to the purposes of class certification. As the above discussion regarding Counts II through VI illustrates, each of these claims inherently requires individualized analyses in order to determine liability. If the class Plaintiff proposes is certified, both the Court and the parties will be unduly burdened in

terms of time and expense in parsing through these various factual inquiries. Plaintiff's motion for class certification consequently must be denied. See Wiseman, 212 F.R.D. at 486-87. [11]

C. Plaintiff Has Not Met The Typicality Requirement Of Rule 23(a)(3).

Together with the commonality requirement, typicality serves as a guidepost for the court to determine "whether… the named plaintiff's claim and the class claims are so inter-related that the interests of the class members will be fairly and adequately protected in their absence." Morgan, 222 F.R.D. at 229 (internal quotation and citations omitted). The goal of the typicality requirement is to ensure that the interests of the class and the class representatives are aligned so that the work of the class representatives will benefit the class as a whole. See Barnes v. American Tobacco Co., Inc., 161 F.3d 127, 141 (3d Cir. 1998).

1. Plaintiff's Claims Are Not Typical Of The Class Because There Are Unique Defenses Applicable To Her That Will Be A Focus Of The Litigation.

Courts have repeatedly held that class certification is inappropriate where a putative class representative is subject to unique defenses that threaten to become the focus of the litigation. See, e.g., Baffa v. Donaldson, Lufkin & Jenrette Sec. Corp., 222 F.3d 52, 59-60 (2d Cir. 2000) (citing Gary Plastic Packaging Corp. v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 903 F.2d

[11] Plaintiff's reliance on Forbush v. J.C. Penney Pension Plan, 994 F.2d 1101, 1106 (5th Cir. 1993), for the proposition that she has satisfied the commonality requirement is misplaced. There was no issue in Forbush of whether every putative class member could satisfy the requirements necessary to establish liability on the ERISA claims in that case because the named plaintiff's proposed class definition specifically limited the class only to participants whose pension benefits had actually been or would be reduced or eliminated because of defendant's alleged unlawful conduct. 994 F.2d at 1103. By contrast, Plaintiff's proposed class in this case is a global class consisting of everyone who did not remain covered by a Traditional Formula after the Cash Balance Formula was adopted, regardless of whether those class members actually experienced the wear-away or reduction in rate of future benefit accrual that are factual predicates for the claims Plaintiff alleges. Thus, unlike in Forbush, this Court would have to conduct determinations unique to each putative class member.

176, 180 (2d Cir. 1990)); Walker, 214 F.R.D. at 64-65. Such defenses render the plaintiff both not typical under 23(a)(3) and an inadequate class representative under 23(a)(4). Gary Plastic, 903 F.2d at 180. The purpose of this rule is to protect absent class members who may suffer if their representative is preoccupied with defenses unique to her. See id.

In this case, Plaintiff is subject to several defenses that apply uniquely to her claims and threaten to become a focus of the litigation. See Motion to Dismiss §§ III and IV.C. Defendants highlight only two here. First, Plaintiff has failed to exhaust her administrative remedies under the Plan with respect to certain claims. See Motion to Dismiss § III; see also Scott, 224 F.R.D. at 354-55 (finding in a motion for class certification brought pursuant to ERISA that "determining whether [the plaintiff] has exhausted his administrative remedies would require an individualized assessment of the facts and circumstances surrounding his claim for benefits. Such an assessment constitutes a defense unique to [the plaintiff] that threatens to become the focus of the litigation."). Plaintiff cannot adequately represent a class when a significant focus of the litigation will be on the preliminary issue of whether her claims are even viable in federal court.

Second, Plaintiff lacks standing to bring Count VI of her Complaint. See Motion to Dismiss at 33-34. The claim centers around what "retiring" class members were or were not told regarding their pension benefits. Plaintiff, however, was not told anything when she was "retiring" because she has not yet retired.[12] It is well-established that a named plaintiff may only represent absent class members if she personally has standing to litigate her own claim. See e.g., Stevelman v. Alias Research, Inc., No. 5:91-CV-682, 2000 WL 888385, at *6-7 (D. Conn. June 22, 2000); Miller v. Pac. Shore Funding, 224 F. Supp. 2d 977, 996 (D. Md. 2002); cf. Engers,

[12] Plaintiff further admits that she "is not presently a retiring plan participant." Ex. D at 155.

2001 U.S. Dist. LEXIS 25889 at *12-13; cf. Novella v. Westchester County, No. 02 Civ. 2192, 2004 WL 3035405, at *3 (S.D.N.Y. Dec. 20, 2004).

Plaintiff's lack of standing is a defense unique to her that will sidetrack the litigation. See In re Initial Public Offering Securities Litigation, 227 F.R.D. 65, 120 (S.D.N.Y. 2004) ("a class representative's lack of standing… qualifies as a 'unique defense' sufficient to defeat the typicality of a proposed class representative."). Plaintiff therefore is not a typical representative of the class she seeks to represent and class certification should be denied.

2. Plaintiff's Claims Are Not Typical Because Her Interests And Alleged Injuries Are Not Aligned With Members Of The Putative Class.

Plaintiff's pursuit of her interests in this case will not benefit the class as a whole. See Barnes, 161 F.3d at 141. Contrary to Plaintiff's claim, this is not a case like Walling v. Brady, Civ. A. No. 94-410, 1995 U.S. Dist. LEXIS 10602, at *10 (D. Del. Jul. 19, 1995), in which Plaintiff has "receive[d] the same lesser benefit as others in the putative class." Pl. Br. 15. Here, members of the proposed class will be financially harmed if they are forced to return to the Traditional Formula. See Section 1.A., supra. Accordingly, Plaintiff's motion for class certification must be denied. See Clay, 188 F.R.D. at 492 (S.D. Ill. 1999) ("a plaintiff with typical claims will pursue his or her own self-interest in the litigation and in so doing, will advance the interests of the class members[.]") (internal quotation and citation omitted)).

3. Plaintiff's Claims Are Not Typical Because Establishing Her Claims Does Not Necessarily Establish The Claims Of Other Members Of The Putative Class.

The premise behind the typicality requirement has been stated simply: "as goes the claim of the named plaintiff, so go the claims of the class." Sprague, 133 F.3d at 399. As Plaintiff asserts, the typicality requirement of Rule 23(a)(3) requires that "the same unlawful conduct affects both the named plaintiff and the putative class" and that "other members of the class have

the same or similar injury" as the named plaintiff. Pl. Br. 14-15; see also General Telephone Co. of Southwest v. Falcon, 457 U.S. 147, 156 (1982) ("It is axiomatic that the class representatives must… suffer the same injury as the class members") (internal quotations and citations omitted)).

Counts II through VI of the Complaint all require the Court to examine factual issues that must be resolved independently for each class member. Many of the putative class members were not affected by the same alleged unlawful conduct and have not suffered the same or similar injury as Plaintiff. For the same reasons these factual differences destroy commonality, Plaintiff's claims are not typical of the class. See, e.g., Tootle, 222 F.R.D. at 97 (finding a lack of typicality where the element of detrimental reliance would require an individualized inquiry into the circumstances of each class member); see also Section I.B., supra.

II. PLAINTIFF HAS NOT MET HER BURDEN OF PROVING THAT THE PROPOSED CLASS CAN BE CERTIFIED UNDER RULE 23(b).

If the prerequisites of Rule 23(a) have been satisfied, a plaintiff seeking class certification must then demonstrate that the action is maintainable under one of the sections of Rule 23(b). Plaintiff has moved for class certification under Rule 23(b)(1) and (b)(2). She has not shown, and indeed cannot show, that this action is maintainable under either provision.

A. Class Certification Is Not Appropriate Under Rule 23(b)(1).

As a preliminary matter, Plaintiff's request for class certification pursuant to Rule 23(b)(1) for the first time in her Motion for Class Certification is untimely. Plaintiff's Complaint did not include a request for certification under this provision; nor has her Complaint ever been amended to include one. Accordingly, her request should be denied. See Morgan, 222 F.R.D. at 235 n. 8 (denying as untimely plaintiffs' request for Rule 23(b)(1) class certification where the complaint did not include such a request and request was raised for the first time in motion to dismiss).

Even if this Court should find Plaintiff's request for class certification under Rule 23(b)(1) to be timely, Plaintiff has not satisfied the substantive requirements of this provision. Under the two prongs of Rule 23(b)(1), class certification is appropriate if the moving party has established that "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).

Contrary to the requirements of Rule 23(b)(1)(A), there is no reason to believe separate actions might be brought regarding the claims in this action. Rule 23(b)(1)(A) requires that:

> a party seeking class certification . . . [to] establish that there is a realistic possibility that separate actions involving the same subject matter will be brought in the absence of a class action. This risk of separate actions must be substantial, and not merely hypothetical or speculative. Certification will be denied if separate adjudications are unlikely.

Moore's Federal Practice § 23.41[2] (3d Ed.).

FleetBoston's cash balance amendment went into effect on January 1, 1997. In the nearly nine years since, not a single plan beneficiary has filed a lawsuit challenging this amendment other than Plaintiff. Similarly, other than Plaintiff's Counts IV and V in this case, not one lawsuit has been filed challenging the adequacy, or lack thereof, of any ERISA § 204(h) notice or of any of the Summary Plan Descriptions that have been issued since January 1, 1997. Now, nearly nine years since every member of the putative class first became subject to the Cash Balance Formula, the possibility of additional lawsuits being filed by individual members of the

putative class – particularly in the many instances where they have no financial interests at stake – is unlikely and speculative at best.

Moreover, even if individual actions were to be brought in the absence of this class action, there is no reason to believe that any such actions would result in inconsistent outcomes, at least not with respect to all five of Counts II-VI of Plaintiff's Complaint. As discussed in Section I.B above, these claims all involve individualized determinations that will vary from class member to class member. Because of the individual inquiries involved in these claims, any differing outcomes among the putative class members would not be inconsistent; they simply would be the result of the putative class members' different factual circumstances. See Bowe Bell & Howell Co. v. Immco Employees' Ass'n, No. 03 C 8010, 2005 WL 1139645, at *5 (N.D. Ill. May 11, 2005) ("inconsistent standards for future conduct are not created [simply] because a defendant might be found liable to some plaintiffs and not others.") (internal quotation and citation omitted). Accordingly, certification under Rule 23(b)(1)(A) is not appropriate.

Similarly, these factual differences between the putative class members mean that class certification is not appropriate under Rule 23(b)(1)(B). With respect to Counts II-VI, an adjudication of one class member's claims would not be dispositive of any other class member's claim because the claims all turn individually on each class members' individual circumstances. Nor is Plaintiff's age discrimination claim (Count I) appropriate for certification under Rule 23(b)(1)(B). This is because the only possible impact of allowing this claim to proceed individually would be the *stare decisis* effect of a court ruling that FleetBoston's pension plan does not violate ERISA. However, it is well-established that "*stare decisis* alone is not a reason to grant certification under Rule 23(b)(1)(B)." Bowe, 2005 WL 1139645 at *5 (citing cases). As noted in Moore's Federal Practice,

> A majority of courts have held that the possible stare decisis effect… is insufficient to warrant certification under Rule 23(b)(1)(B). Those courts reason that stare decisis does not bind courts in subsequent cases involving other putative class members. Otherwise, Rule 23(b)(1)(B) would become a broad and unchallengeable route to class certification in many cases, an effect not intended by the drafters of the Rule.

Moore's Federal Practice § 23.42[3][b] (3d Ed.). Certification under Rule 23(b)(1)(B) is not appropriate merely because a decision in one case may establish precedent for other members of the putative class. See, e.g., Bowe, 2005 WL 1139645 at *5; In re Dennis Greenman Securities Litig., 829 F.2d 1539, 1546 (11th Cir. 1987), Vaughter v. Eastern Air Lines, Inc., 817 F.2d 685, 690 (11th Cir. 1987).

Moreover, Plaintiff's contention that a class should be certified because "the circumstances of injury are not varied within the class," Pl. Br. 19, ignores the fact that, as discussed in Section I.A above, declaratory and injunctive relief would not be appropriate for the entire putative class. Many class members have benefited from the cash balance amendment and would not want to revert back to the Traditional Formulas. See Bowe, 2005 WL 1139645 at *6 ("When, though the suit is for declaratory relief, the effect of the declaration on individual class members will vary with their particular circumstances, they should be given notice of the class action so that they can decide whether they would be better off proceeding individually.") (internal quotation and citation omitted). The Court cannot ignore the interests of these putative class members who are better off under the Cash Balance Formula: "[b]ecause class members are not provided notice or an opportunity to opt out of a class certified under 23(b)(1)(B), the rule is interpreted narrowly." Id. at *5. Typically,

> class actions certified under Rule 23(b)(1)(B) include suits to reorganize fraternal benefit societies, actions by shareholders to declare a dividend, actions charging a breach of trust by a fiduciary which similarly affects a large class of beneficiaries such that an accounting is necessary, and limited fund class actions seeking to aggregate claims against a fund which is insufficient to satisfy the claims of all the class members.

Id. (citing Ortiz v. Fibreboard Corp., 527 U.S. 815, 834 (1999)).

None of these circumstances are present in this case. While resolving Plaintiff's claims here may have a limited precedential effect, such a limited effect is not enough to allow for certification under Rule 23(b)(1)(B). Because resolution of Plaintiff's claims would be neither dispositive of the interests of the putative class members nor substantially impair or impede their ability to protect their interests, class certification under this provision is not appropriate. For all of these reasons, class certification should not be granted under 23(b)(1)(B).

B. Class Certification Is Not Appropriate Under Rule 23(b)(2).

Plaintiff alternatively seeks class certification pursuant to Rule 23(b)(2) which, like Rule 23(b)(1), does not allow for notice and an opportunity to opt out of the litigation. Rule 23(b)(2) permits certification when "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." Fed. R. Civ. P. 23(b)(2). "Class actions under Rule 23(b)(2) are proper if injunctive or declaratory relief would be appropriate for an *entire class*. The Rule may be utilized if a party's action or inaction affects an entire class seeking relief." Vengurlekar, 220 F.R.D. at 227 (emphasis added).

As discussed in Section I.A above, because of the varying ways in which participants have been affected by the cash balance amendment, the relief Plaintiff seeks – a declaration that the cash balance amendment was ineffective and that the plan in place prior thereto is still in force and effect – is *not* appropriate for the entire class. Any putative class member who has already benefited from the cash balance amendment or who will benefit from the cash balance amendment should not be forced to return to the Traditional Formula. Nor is class-wide declaratory and injunctive relief appropriate when many members of the putative class have no

claims under the various counts of Plaintiff's Complaint (see supra Section I.B.) and thus are not entitled to seek any relief under such claims.

In addition to being inappropriate, class-wide declaratory or injunctive relief in this case simply is not possible. More than 10,000 members of the putative class have terminated their employment with FleetBoston and taken a lump-sum distribution of their pension benefits. Ex. A at ¶ 5. These individuals are no longer participants in the Plan and are no longer accruing benefits. Thus, any relief solely in the form of prospective changes to the FleetBoston pension plan would be meaningless to them. Rather, the only real interest of these former participants is the possibility of obtaining monetary relief. See Morgan, 222 F.R.D. at 236. That interest is directly contrary to the standards required for certification under Rule 23(b)(2). See id.

As explained in Morgan, the "critical issue" in a Rule 23(b)(2) analysis "is whether reasonable plaintiffs would pursue [the] case if monetary recovery would not be awarded." Morgan, 222 F.R.D. at 236. For the more than 10,000 participants in this case who have already left the Plan and taken a lump-sum distribution, the answer to that question is "no." Moreover, any declaratory or injunctive relief that could be granted to the class members could be obtained by Plaintiff alone, without need for a class action. See Morgan, 222 F.R.D. at 236. As concluded in Morgan,

> [t]his would enhance efficiency by averting a potentially overwhelming and highly individualized damages phase that would threaten to convert the ostensibly unified class action into a series of mini-trials, thus defeating the likelihood that "class treatment would be efficient and manageable [and would] thereby achiev[e] an appreciable measure of judicial economy."

Id. (internal citations omitted).

In this case, in addition to declaratory and injunctive relief, Plaintiff requests that this Court determine "participant losses" caused by Defendants' unlawful cash balance terms and breaches of fiduciary duty, and that the Court award the payment of "additional benefits" to

compensate for these alleged participant losses. Pr. for Relief ¶¶ 4, 5. Plaintiff's request for monetary relief is not one that would be paid to the Plan as a whole. Rather the award of benefits that Plaintiff seeks would be paid out to the class members individually and according to those losses that each class member specifically has suffered. Determining any benefits to be awarded to the individual class members would involve individualized and complex factual determinations regarding each class members' benefit accrual and rate of future benefit accrual under both the Cash Balance Formula and the Traditional Formulas. Such determinations are not appropriate under Rule 23(b)(2), and class certification under this provision cannot be granted.

III. THE CLASS CANNOT INCLUDE FORMER PARTICIPANTS WHO RECEIVED LUMP-SUM PAYMENTS BECAUSE THEY HAVE NO RIGHT TO DECLARATORY OR INJUNCTIVE RELIEF.

Plaintiff's class definition purports to include "former . . . Fleet employees" who were employed on and for some period after December 31, 1996. This includes persons who have terminated their employment with Fleet and accepted a lump-sum payment of all pension benefits, thereby severing their connection with the Plan. There are over 10,000 former Cash Balance Participants fitting that description in the putative class.[13] Ex. A, ¶ 5.

Plaintiff seeks certification under 23(b)(2), and says this is proper because she seeks only declaratory or injunctive relief. The Prayer for Relief in the Complaint, while not a model of clarity, seems to suggest this (b)(2) designation. It seeks various declarations and injunctions, followed by a catchall claim for "other equitable and remedial relief." Pr. for Relief ¶¶ 4, 5, 9, 10.

[13] To the extent that any of these individuals has subsequently been re-hired, such individuals may have a different status with respect to this issue in the event they became participants again.

Only "a participant, beneficiary, or fiduciary" can pursue a claim for equitable relief under ERISA. 29 U.S.C. § 1132(a)(3). A former participant is a "participant" for purposes of a legal challenge only if still "eligible to receive a benefit of any type from an employee benefit plan." 29 U.S.C. § 1002(7).[14] A former participant – even one who suffered from an alleged ERISA violation – cannot pursue relief for that claimed violation if their participant status terminated prior to filing. Nechis v. Oxford Health Plans, Inc., No. 04-5100-CV, 2005 WL 2018630, at *4 (2d Cir. Aug. 24, 2005). This is especially true here, as Plaintiff seeks only declaratory or injunctive relief; remedies that are by their very nature prospective only. See Robidoux v. Celani, 987 F.2d 931, 938 (2d Cir. 1993) ("[f]or a plaintiff to have standing to request injunctive or declaratory relief, the injury alleged must be capable of being redressed through injunctive relief at that moment"); see also Impress Communications v. Unumprovident Corp., 335 F. Supp. 2d 1053, 1060 (C.D. Cal. 2003) (former participants in disability plan had no claim under ERISA to seek injunction because they "would obtain no relief" thereby).

There is no "act or acts" to be restrained or compelled by Defendants as to the 10,000-plus who have taken a lump-sum payment. FED. R. CIV. P. 65(d). Nor is there any existing legal or contractual relationship to give rise to disputed rights ripe for declaratory relief. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa. v. Int'l Wire Group, Inc., No. 02 Civ. 10338, 2003 WL 21277114, at *5 (S.D.N.Y. June 2, 2003) (because "declaratory relief is intended to operate prospectively," it is not available "where only past acts are involved"). Remedies that act only prospectively cannot address parties who have ceased to have any legal relationship. Because former Cash Balance Participants who have accepted lump-sum benefits are not "participants," and because

[14] An ex-employee can pursue a claim for benefits – as opposed to injunctive or declaratory relief – if he or she has "'a colorable claim' to vested benefits." Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 117-18 (1989). No claim of that sort is being asserted here.

the relief sought can have prospective applicability only, the former participants are not members of the class.

CONCLUSION

For each and all of the foregoing reasons, Defendants respectfully request that Plaintiff's Motion for Class Certification be denied.

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Respectf ully submitted,

DEFENDANTS FLEETBOSTON FINANCIAL CORPORATION AND FLEETBOSTON FINANCIAL PENSION PLAN

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