UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

DONNA C. RICHARDS, individually, and on behalf of others similarly situated,	:	No. 3:04CV1638 (JCH)
Plaintiff,	:	
v.	:	
FLEETBOSTON FINANCIAL CORP. and the FLEETBOSTON FINANCIAL PENSION PLAN,	:	
Defendants.	:	
	:	DECEMBER 28, 2004

PLAINTIFF'S MEMORANDUM IN SUPPORT OF MOTION FOR CLASS CERTIFICATION

I. INTRODUCTION.

The named Plaintiff, Donna C. Richards, requests that this case be certified as a class action under Rule 23(b)(1) and (b)(2) of the Federal Rules of Civil Procedure. Richards alleges that when Fleet converted its pension plan to a "cash balance pension" design on January 1, 1997, it violated ERISA in that:

1. Fleet's Plan unlawfully reduced "the rate of an employee's benefit accrual . . . because of the attainment of any age." in violation of ERISA Section 204 (b)(1)(H);

2. Fleet unlawfully conditioned employees' receipt of cash balance benefits on their giving up the retirement benefits they earned prior to the adoption

of the cash balance amendment (a conseque nce of the plan's "wear-away" effect) in violation of ERISA §203 (a) which requires benefits to be nonforfeitable, a term ERISA §3 (19) defines as "unconditional".

3. Fleet's Plan caused plan participan ts to face years where they accru e zero benefits followed by years where they accrue actual benefits, which violates the "anti-backloading" rule in ERISA §204(b)(1)(B) that says the value of the benefit accrued in any given year must not exceed the va lue of a benefit accrued in any previous year by more than 33 1/3%;

4. Fleet failed to notify plan particip ants of a significant reduction in the rate of future benefit accruals 15 days pr ior to the January 1, 1997 effective date in violation of ERISA §204 (h) which prohibi ts these kind of plan amendm ents without notice of the reduction;

5. Fleet's summary plan de scription (SPD) violated ERISA §102 and 29 C.F.R. 2520.102 by failing to explain the full import of the cash balance plan terms, including but not lim ited to faili ng to completely explain the wear-away effect and failing to explicitly explain how benefit accruals under the plan are reduced by advancing age, and;

6. Fleet breached its fiduciary duty to plan participants under ERISA §404 because Fleet failed to t ell retiring plan participants of the greater benefits they were owed under the frozen benefit derived from the Traditional Plan Terms.

II. PLAINTIFFS' CLAIM FOR CLASS ACTION STATUS.

1. The Proposed Class.

As set forth in the Complaint, the proposed class consists of any and all persons who:

(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.

The proposed class covers all participants in the Fleet Pension Plan who have been harmed by the ERISA breaches set forth above. On information and belief the proposed class covers well over 1,000 individuals.

2. The Purposes of Rule 23 class actions.

The U.S. Supreme Court in its 1997 decision in *Amchem Prods., Inc. v. Windsor* explained that the Rule 23 class action device is to be used to remedy widespread policies or practices that violate federal or state laws.[1] Rule 23 strikes a balance between the need for and efficiency of a class action and the interests of class members in pursuing their claims individually. As *Moore's Federal Practice* puts it, the class action rules aim "to promote judicial economy and efficiency by

obviating the need for multiple adjudications of the same issues." [2] Or as the Second Circuit said in *In re Drexel Burnham Lambert Group* in 1992, it is appropriate where individual adjudications would take many years and would drastically increase the legal expenses for all parties -- where joinder of all claimants would be expensive, time consuming, and logistically unfeasible.[3]

Moore's says the class action rules "afford aggrieved persons a remedy" even when "it is not economically feasible to obtain relief through . . . multiple individual damage actions." [4] The *Amchem* Court agrees:

> "[T]he very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights. A class action solves this problem by aggregating the relatively paltry individual recoveries into something worth someone's (usually an attorney's) labor."[5] The class action rules enhance access to the courts "by spreading litigation costs among numerous litigants with similar claims." [6]

3. Rule 23's structure.

According to the Second Circuit in *Drexel*: "In determining whether a class should be certified, a district court must first consider each of the factors set forth

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[1] 521 U.S. 591, 616, 117 S.Ct. 2231, 2246 (1997).
[2] See *Moore's Federal Practice,* vol. 5, sec. 23.02.
[3] 960 F.2d 285, 290 (2d Cir. 1992).
[4] See *Moore's Federal Practice*, sec. 23.02.
[5] 521 U.S. at 627, 117 S.Ct. at 2246.
[6] *Id.*; accord *Califano v. Yamasaki,* 442 U.S. 682, 700-01 (1979); *General Telephone Co. v. Falcon,* 457 U.S. 147, 155 (1982).

in Fed.R.Civ.P. 23(a)."[7] Rule 23(a) of the Federal Rules of Civil Procedure says that "one or more members of a class may sue . . . as representative parties on behalf of all" if:

(1) "the class is so numerous that joinder of all members is impracticable,"

(2) "there are questions of law or fact common to the class,"

(3) "the claims ... of the representative parties are typical of the claims ... of the class," and

(4) "the representative parties will fairly and adequately protect the interests of the class."

In 1994 the Second Circuit, in *Comer v. Cisneros*, said that Rule 23(b) also requires that a class action satisfy one of three subsections: Rule 23(b)(1), (b)(2) or (b)(3).[8] However, in 1997, the D.C. Circuit in *Eubanks v. Billington* that these three categories of class actions are not mutually exclusive, and a class may be certified under more than one category.[9] As a practical matter, the Second Circuit said in 2001 in *In re Visa Check/Mastermoney Antitrust Litig.*, "once a court has found that a class action is maintainable under any single category of Rule 23(b), there is no necessity of showing that it may also be brought under any other."[10]

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[7] 960 F.2d at 290.
[8] 37 F.3d 775, 796 (2d Cir. 1994).
[9] 110 F.3d 87, 91 (D.C. Cir. 1997).
[10] 280 F.3d 124, 145 (2d Cir. 2001).

In 1998, this Court determined in *Messier v. Southbury Training School* that there are "important procedural distinctions" between classes certified under Rule 23(b)(3) and classes certified under Rule 23(b)(1) and (2).[11] As explained by this Court in 1998 in *Flanigan v. General Electric*, certifications under Rule 23(b)(1) and (b)(2) are described as "mandatory classes" because the class member may not opt out of the action and bring separate litigation that might prejudice other class members or the defendant.[12] By contrast, as the *Messier* Court said, Rule 23(b)(3) allows class members an "absolute right to opt out" and pursue their claims individually.[13] The 1998 D.C. Circuit in *Thomas v. Albright* said the drafters of Rule 23 did not provide that absolute right for Rule 23(b)(1) and (b)(2) because the group nature of the harm alleged and the broad character of the relief sought assure that the class is relatively cohesive and homogenous.[14]

The requirements for certification under Rule 23(b)(1) and (b)(2) are different from those for Rule 23(b)(3). Rule 23(b)(1) covers cases, like this one, in which defendants are, according to *Amchem* "obliged by law," including fiduciary responsibility, "to treat the members of the class alike; while Rule 23(b)(2) focuses on cases, also like this one, where class-wide injunctive or declaratory relief may

[11] 183 FRD 350, 353 (D.Conn. 1998).
[12] 1998 U.S. Dist. LEXIS 22873, *19 (D. Conn. 1998).
[13] *Messier*, supra.
[14] 139 F.3d 227 (D.C. Cir. 1998).

be needed to remedy a generally applicable policy or practice.[15] By comparison, *Amchem* says Rule 23(b)(3) covers cases "where class action treatment [is] not as clearly called for" but where a class action could be convenient or desirable, including complex litigation for money damages, and where, under Rule 23(b)(3), the district court must find two additional factors--predominance and superiority--before certifying the class.[16]

4. Plaintiff's Claim for Certification.

In this instance, the plaintiff's action satisfies the criteria in all three subsections of Rule 23(b), but plaintiffs request certification under the first two because of the procedural complications of Rule 23(b)(3). As the Third Circuit held in *Wetzel v. Liberty Mut. Ins.*: "an action maintainable under both (b)(2) and (b)(3) should be treated under (b)(2) to enjoy its superior res judicata effect and to eliminate the procedural complications of (b)(3)."[17]

In its 1997 decision in *Marisol A. v. Guiliani*, the Second Circuit stated that in moving for class certification, plaintiffs bear the burden of demonstrating that the class satisfies the requirements of Rule 23.[18] This does not mean that plaintiffs have to prove their cases at the class certification stage. The Supreme Court in *Eisen v. Carlisle & Jacquelin* and the Second Circuit in *Caridad v. Metro-North*

[15] 521 U.S. at 614, 117 S.Ct. at 2245.
[16] *Id.*
[17] 508 F.2d 239, 253 (3d Cir.), cert. denied, 421 U.S. 1011 (1975).

Commuter R.R found that "nothing in either the language or history of Rule 23 gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action."[19] Rulings of the Second Circuit in *Shayne v. Madison Square Garden* in 1974 and the Southern District of New York in *Banyai v. Mazur* in 2002 agree that as with a motion to dismiss, the district court for class certification purposes is to accept the substantive allegations in the complaint as true.[20] The plaintiff may supplement the complaint as needed to show that the requirements of Rule 23 have been satisfied, e.g., by presenting evidence related to numerosity.

The Second Circuit said it favors a liberal construction of Rule 23 in its 1990 decision in *Gary v. Merrill Lynch.*[21] In *Marisol A.* the Court held "A district court's decision to certify a class will be overturned only if the district court abused its discretion. A reviewing court must exercise even greater deference when the district court has certified a class than when it has declined to do so."[22] Also it is clear from what the 1993 Second Circuit said in *Lundquist v. Security Pacific Auto. Fin. Svcs* that this circuit is "noticeably less deferential to the district court

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[18] 126 F.3d 372, 375 (2d Cir. 1997).
[19] *Eisan*, 417 U.S. 156, 177 (1974); *Caridad*, 191 F.3d 283, 291 (2d Cir. 1999) cert. denied, 529 U.S. 1107 (2000)(quoting *Eisan*).
[20] 491 F.2d 397, 398 (2d Cir. 1974); 205 F.R.D. 160, 163 (S.D.N.Y. 2002).
[21] 903 F.2d 176, 179 (2d Cir. 1990), cert. denied, 498 U.S. 1025 (1991).
[22] *Marisol A.*, *supra*, 126 F.3d at 375 (citations omitted).

when that court has denied class status than when it has certified a class."[23] The Third Circuit, in 1985, likewise held in *Eisenberg v. Gagnon* that "the interests of justice require that in a doubtful case . . . any error, if there is to be one, should be committed in favor of allowing a class action."[24]

Although the district court has discretion about when to determine class action status, the Second Circuit in its 2000 decision in *Philip Morris Inc. v. National Asbestos Workers Medical Fund* instructed that the district court is to make the determination "as soon as practicable" after the commencement of an action and rarely, if ever, after the decision on the merits.[25]

5. This action meets the Rule 23(a) criteria of numerosity, commonality, typicality and adequate representation.

As described below, this action satisfies the Rule 23(a) criteria of numerosity, commonality, typicality, and adequate representation.

a. Numerosity.

There is no "magic minimum number" for a class according to this Court in its 2001 decision in *Russo v. CVS Pharmacy, Inc.*[26] But according to its 1995 ruling in *Consolidated Rail Corp. v. Town of Hyde Park* and its 1993 ruling in *Robidoux v. Celani,* the Second Circuit has generally held that a class is

[23] 993 F.2d 11, 14 (2d Cir. 1993).
[24] 766 F.2d 770, 785 (3d Cir.), cert. denied, 474 U.S. 946 (1985).
[25] 214 F.3d 132, 135 (2d Cir. 2000)(per curiam).

sufficiently numerous when over 40 class members are involved; above that number, individual joinder of all members becomes "impracticable."[27] The *Robidoux* Court said "impracticable" simply means "difficult or inconvenient"; it does not mean impossible.[28] In the 1992 *Banyai* decision discussed above, the Southern District of New York said certification is appropriate when the number of class members is "sufficiently large so that joinder of all members would make litigation needlessly complicated and inefficient."[29] As this Court said in *Russo*, the court may make "common sense assumptions" about numerosity: "Precise quantification" of the size of the class is especially not required when the class is obviously far in excess of the minimum number needed to make joinder impracticable.[30]

In this instance, there should be no argument about numerosity. The complaint alleges that the proposed class exceeds 1000 individuals and given the size and history of Fleet, it is assumed that the large number of potentially affected individuals will not be disputed.

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[26] 201 F.R.D. 291 (D. Conn. 2001)(quoting *Jones v. CCH-LIS Legal Information Servs.*, 1998 U.S. Dist. LEXIS 15189 (SDNY 1998).
[27] 47 F.3d 473, 483 (2d Cir. 1995); 987 F.2d 931, 936 (2d Cir. 1993).
[28] 987 F.2d at 935.
[29] *Beryani*, *supra*, 205 F.R.D. at 163.

b. Commonality.

Litigation involving statutory requirements applicable to large groups of individuals is perfectly tailored for class action treatment because of the common legal issues. In 1994 the Third Circuit held in *Baby Neal v. Casey*: "[C]hallenges to . . . compliance with the mandates of . . . legislation" satisfy the commonality requirement "even where plaintiff beneficiaries are differently impacted by the violations."[31] *Marisol A.* says where the "statutory provisions invoked" are "properly understood" as "setting standards of conduct" that have been "violated in a manner common to the plaintiff class," class certification is appropriate.[32] More specifically, the Southern District of New York in *Banyai* observed that class actions are "well-suited to litigation brought pursuant to ERISA."[33]

According to the Second Circuit in *Marisol A* and its 1987 decision in *In re Agent Orange Prod. Liab. Litig.*, the commonality requirement is satisfied if the grievances of the named plaintiffs and the proposed class "share a common question of law or of fact" -- the emphasis is on "one" common question, not necessarily every question or element.[34] A finding of commonality does not require that all class members "share identical claims" – the Third Circuit said so in its

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[30] See, e.g., *Russo,* supra, 201 F.R.D. at 295.
[31] 43 F.3d 48, 56 (3d Cir. 1994).
[32] 126 F.3d at 377.
[33] 205 FRD at 165 (SDNY 2002).

1998 ruling in *In re Prudential Ins. Sales Practice Litig.* [35] The commonality requirement will be satisfied, according to the Third Circuit in *Baby Neal*, if the plaintiffs' grievances share "at least one" question of fact or law.[36]

In *Marisol A.*, the defendants argued that no questions of law or fact were common to the entire class because each named plaintiff challenged a different aspect of the child welfare system as part of a lawsuit seeking systemic reform.[37] The district court nevertheless identified the common question of law as "whether each child has a legal entitlement to the services of which that child has been deprived."[38] The Second Circuit held that although the class was joined together only at this "high level of abstraction," or what it called a "super-claim," the district court did not abuse its discretion in certifying the class because the plaintiffs alleged that their injuries "derive from a unitary course of conduct by a single system" -- although this was "near the boundary of the class action device," the Second Circuit held that it had not "crossed" over.[39]

Here, the plaintiff does not need to stretch the boundary at all. The only issues that have been identified in this litigation are issues common to all class

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[34] *Marisol A.*, supra, 126 F.3d at 376; *In re Agent Orange Prod. Liab. Litig.* 818 F.2d 145, 166-67 (2d Cir. 1987).
[35] 148 F.3d 283, 310 (3d Cir. 1998).
[36] *Baby Neal*, supra, 43 F.3d at 56 (citing *In re Agent Orange*, *supra*).
[37] 126 F.3d at 377.
[38] *Id.*
[39] *Id.*

members. Each member of the class will share the common legal questions of whether Fleet's cash balance plan discriminates based upon age and whether Fleet committed the other alleged disclosure violations, the anti-backloading violation, etc.

The commonality test has been applied in analogous ERISA cases. In *Forbush v. J.C. Penney Pension Plan*, J.C. Penney adopted four different versions of a pension plan with a social security offset formula during the period covered by the class definition.[40] The Fifth Circuit held that the threshold for commonality is not high and concluded that Mary Jane Forbush met the commonality requirement because she alleged that each of the four plans presented a common legal issue: Whether the overestimation of social security benefits violated ERISA's statutory rules. J.C. Penney depicted a number of individual specific-issues that could arise in that litigation.[41] But the Fifth Circuit found that the plaintiff "has framed her challenge in terms of Penney's general practice of overestimating social security benefits" -- accordingly, "the necessity for even somewhat complex individual calculations does not supply a basis for concluding that Forbush has not met the commonality requirement."[42]

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[40] 994 F.2d 1101, 1106 (5th Cir. 1993).

[41] *Id.*

[42] 994 F.2d at 1106. Injunctive relief can be fashioned to handle complex or numerous individual calculations by a variety of means, including contractors responsible to one or more of the parties, and ultimately the court. *See also Koch v. Dwyer*, 2001 WL 289972, at *3, 2001 U.S.

c. Typicality.

As the Supreme Court in its 1982 ruling in *General Telephone Co. v. Falcon* said and the Second Circuit in *Marisol, A.* said the commonality and typicality requirements tend to merge when the plaintiffs allege that a common policy has caused class wide harm, including harm to the plaintiffs.[43] According to *Marisol, A.* typicality is satisfied when "each class member's claim arises from the same course of events, and each class member makes similar legal arguments to prove the defendant's liability."[44] In *Baby Neal*, when the same unlawful conduct affects both the named plaintiffs and the putative class, the Third Circuit said the case usually satisfies the typicality requirement.[45]

For the plaintiffs' claims to be typical, the Southern District of New York in *Caridad* found, the disputed issue of law or fact must "occupy essentially the same degree of centrality to the named plaintiffs' claim as to that of other members of the proposed class."[46] The same Court in a 1991 decision in *Dura-Bilt Corp. v. Chase Manhattan Bank* expressed it another way, "the proper inquiry is whether

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Dist. LEXIS 4085, at *8-9 (S.D.N.Y. March 23, 2001) (commonality requirement met by several common questions of law and fact under ERISA).

[43] 457 U.S. 147, 157 (1982); *Marisol* A, supra, 126 F.3d at 376.

[44] 126 F.3d at 376 (quoting In re Drexel Burnham Lambert Group, 960 F.2d 285, 291 (2d Cir. 1992)).

[45] 43 F.3d at 58.

[46] supra, 191 F.3d at 293 (quoting *Krueger v. New York Tel. Co.*, 163 FRD 433, 442 (SDNY 1995)).

other members of the class have the same or similar injury" and "whether the action is based on conduct not special or unique to the named plaintiffs."[47]

Typicality is not destroyed merely by factual variations between the named plaintiffs' claims and the class they seek to represent. Named representatives do not have to be typical employees. As the *Banyai* Court said, this is especially true in cases where the claims are not connected to job responsibilities. Because this case involves the application of statutory requirements to Fleet's conduct affecting all proposed class members equally, the named plaintiff's employment setting, pay rate, supervisor, etc., are irrelevant for purposes of class certification.[48]

In this case, the named plaintiffs' claims rest on the same issues and are not dissimilar from the class in any significant respect. As the District of Delaware said in 1995 in *Walling v. Brady*, the named plaintiffs have "receive[d] the same lesser benefit as others in the putative class" – they do not "exhibit unique circumstances which will receive inordinate emphasis in the litigation and thus prevent [the common] claims from being pursued with equal vigor."[49]

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[47] 89 F.R.D. 87, 99 (SDNY 1991). *See also*, *Pecere v. Empire Blue Cross*, 194 F.R.D. 66, 72 (EDNY 2000)(class certification denied because case would be "preoccupied with defenses unique" to the named plaintiffs' physicians).

[48] See, e.g., *Banyai v. Mazur*, supra, 205 F.R.D. 164 ("absent proof to contrary" named plaintiff who was a former union officer who had gone on to become an officer in two corporations was a typical class member).

[49] 1995 U.S. Dist. LEXIS 10602, at *10 (D. Del. 1995).

d. Adequate representation.

The representative party in a class action should fairly and adequately protect the interests of the class. In the *Drexel* and *General Telephone Co.* cases discussed above, the courts said the adequacy of representation inquiry has two components: (1) whether there is a potential conflict between the named plaintiff and absent class members, and (2) whether class counsel is "qualified, experienced, and generally able to conduct the litigation."[50]

To meet the lack of conflicts test, the named representative must be part of the class and possess the same interest and suffer the same injury as the other class members, as the Supreme Court described in its 1977 decision in *East Texas Motor Freight, Inc. v. Rodriguez*.[51] Certification is not defeated by "speculative" or "hypothetical" suggestions of potential conflicts; both the Second Circuit in *In re Visa Check/Mastermoney Antitrust Litig.* and the Southern District of New York in *Gruby v. Brady* emphasized this.[52]

As explained in the *Manual for Complex Litigation*, in addition to being free of conflicts, the named representatives should understand their responsibility to vigorously pursue the litigation in the interest of the class.[53] This does not require the plaintiffs to be steeped in the intricacies of the litigation. More than 30 years

[50] *Drexel, supra*, 960 F.2d at 291; *General Telephone*, 457 U.S. 147, 157-58.
[51] 431 U.S. 395, 403 (1977).
[52] 280 F.3d 124, 145 (2d Cir. 2001);838 F. Supp. 820, 828 (S.D.N.Y. 1993).

ago, in the Supreme Court case of *Surowitz v. Hilton Hotels*, Hilton Hotels challenged whether a named representative in a shareholder derivative action could "fairly and adequately represent the interests" of all shareholders because she was a Polish immigrant with limited knowledge of English who relied on her son-in-law for explanations.[54] The Supreme Court ruled that the named representative was interested in her investment and reasonably relied on the investigation of others.[55] By the same token, this District, in its 2000 ruling in *Macarz v. Transworld Systems*, where the named plaintiff was an attorney, rejected arguments that named plaintiffs are unfit because they happen to be more sophisticated in some respects than the average class member.[56]

Here, the proposed class representative, Donna C. Richards, is an employee of Fleet and has been employed at Fleet, its predecessors, and its successor Bank of America for 32 years. She is currently a Senior Vice President for the company's Private Clients Group.[57] She is committed to having the issues set forth in the complaint decided by bringing this suit while still an active employee.[58] Richard's interests are not antagonistic to other class members, nor do they have conflicting

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[53] (3d ed. 1995), at 221.
[54] 383 U.S. 363 (1966).
[55] Id. at 371-73. *See also Koch v. Dwyer*, 2001 WL 289972, 2001 U.S. Dist. LEXIS 4085 (S.D.N.Y. March 23, 2001) (rejecting defense contention that plaintiff had an "alarming unfamiliarity with the facts").
[56] 193 F.R.D. 46, 51 (D. Conn. 2000).
[57] Declaration of Richards. Exhibit "A".

interests.[59] Like the members of the class, she is interested in a speedy, classwide resolution of these issues.[60]

Richards also has qualified counsel. Richards is represented by undersigned counsel, Thomas G. Moukawsher of Moukawsher & Walsh, LLC, Hartford, Connecticut. Undersigned counsel has represented plaintiffs in a number of single and multi-party ERISA actions, including *Caputo v. Pfizer*,[61] *Mullins v. Pfizer,*[62] and *Hudson v. General Dynamics*,[63] in this jurisdiction along with *Bins v. Exxon*,[64] and *Mathews v. Chevron*,[65] in the Ninth Circuit and *Adamczyk v. Lever Brothers*,[66] and *Beach v. Commonwealth Edison*,[67] in the Northern District of Illinois. He is currently class counsel in certified class actions pending before the District of Connecticut in *Amara v. CIGNA*[68] (discussed below), *Perry v. SBC*[69], and *Cashman v. Dolce*.[70]

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[58] *Id.*
[59] *Id.*
[60] *Id.*
[61] 267 F.3d 181,188 (2d Cir. 2001).
[62] 23 F.3d 663 (2d Cir. 1994).
[63] 118 F.2d 226 (D.Conn 2000).
[64] 220 F.3d 1042 (9th Cir. 2000)(en banc).
[65] 773 U.S. Dist. Lexis (N.D. Cal. 2002).
[66] 991 F.Supp. 931 (N.D. Ill. 1997).
[67] 2002 U.S. District Lexis, 14663 (N.D. Ill. 2002).
[68] No. 3:01-CV-2361 (DJS).
[69] No. 3:04 CV 128 (JBA).

6. The class should be certified under Rule 23(b)(1) and (b)(2) because Defendant has acted on grounds generally applicable to the proposed class.

As indicated before, this action may be certified under both Rule 23(b)(1) and (b)(2). As in *Amchem*, Rule 23(b)(1) covers cases like this one in which defendants are "obliged by law to treat class members alike."[71] The Advisory Committee Notes give the following example of litigation that is appropriate for class action treatment under Rule 23(b)(1): "an action which charges a breach of trust by a[] . . . fiduciary similarly affecting the members of a large class of . . . beneficiaries, and which requires an accounting or like measures to restore the subject of the trust."[72] Here, as contemplated in the Advisory Committee Notes, the circumstances of injury are not varied within the class. Instead, injury is based on a uniform set of facts that support invocation of the same ERISA sections on age discrimination, nonforfeitability and disclosure.

There should be no dispute that the defendants have acted or refused to act on grounds generally applicable to class members, making certification under Rule 23(b)(2) appropriate. If this case is successful, class members will receive benefits and appropriate equitable relief. While the calculation of benefits may differ based

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[70] No. 3:04CV00106(MRK).
[71] supra, 521 U.S. at 614, 117 S.Ct. at 2245.
[72] Advisory Committee Notes to 1966 Amendments to Rule 23(b)(1).

on the plan's formula, the benefits will be the result of injunctive and equitable relief common to all class members.

The Advisory Committee Notes state that Rule 23(b)(2): "is intended to reach situations where a party has taken action . . . with respect to a class, and final relief of an injunctive nature . . . settling the legality of the behavior with respect to the class as a whole is appropriate.". [73] As the Third Circuit said in *Baby Neal*: "[T]his requirement is almost automatically satisfied in actions primarily seeking injunctive relief" -- "what is important under Rule 23(b)(2) is that the relief sought by the named plaintiffs should benefit the entire class."[74]

In *Engers v. AT&T*, the District of New Jersey certified the plaintiffs' cash balance claims under Rule 23(b)(2) "inasmuch as Plaintiffs here are seeking various injunctive and declaratory relief" for statutory violations.[75] In *Forbush v. J.C. Penney*, the Fifth Circuit found that the district judge had erred in applying Rule 23(b)(2) by holding that the individualized calculations that could result from injunctive relief made the case unmanageable.[76] The Fifth Circuit directed that the

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[73] Advisory Committee Notes to 1966 Amendments to Rule 23(b)(2). The text of Rule 23(b)(2) provides that a representative party may maintain a class action if "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."

[74] *Baby Neal, supra*, 43 F.3d at 58-9.

[75] C.A. 98-3660 (D.N.J. Nov. 19, 2001). On January 30, 2002, the Third Circuit denied AT&T's petition for permission to appeal the Engers certification decision pursuant to Rule 23(f). C.A. No. 01-8045.

[76] supra, 994 F.2d at 1105.

class be certified as requested by For bush because "the question of whether common issues "predominate" over individual ones has no place in determining whether a class should be certified" under 23(b)(2).[77]

Rule 23(b)(2) classes have also been certified in a number of ERISA cases within this circuit. In 1995, in *Walsh v. Northrop Grumman Corp.* the Eastern District of New York certified a class action under R. 23(b)(2) based on a complaint that fiduciaries failed to adequately inform participants of the effect of a planned corporate merger on their pensions.[78] In 1996, the same Court, in *Becher v. Long Island Lighting*, considered a case where the plaintiffs received Plan booklets describing their retirement benefits which they claimed never explained that withdrawals of contributions would have a seriously detrimental impact on their retirement benefits.[79] The court certified the action under both Rule 23(b)(1) and (b)(2).[80] In *Devine v. Combustion Eng'g*, this Court (Cabranes, J.) certified a class of persons at a Windsor, Connecticut plant who had received misleading written communications about their retiree health benefits under all three

[77] *Id*. *See also Dameron v. Sinai Hospital of Baltimore*, 595 F. Supp. 1404, 1409 (D. Md. 1984), aff'd, 815 F.2d 975 (4th Cir. 1987) (violation of ERISA's accrual rules was appropriate for Rule 23(b)(2) certification "because defendants have acted on grounds generally applicable to the class"); *Collins v. PBGC*, 12 Empl. Ben. Cas. (BNA) 1427, 1431 (D.D.C. 1990) (interpretation of ERISA section on guarantee of vested pension benefits "fit the archetype set out by Rule 23(b)(2)").
[78] 162 FRD 440, 448 (E.D.N.Y. 1995).
[79] 164 FRD 144, 153 (E.D.N.Y. 1996).
[80] *Id*.

subsections of Rule 23(b).[81] Most recently and most importantly, in 2002, this Court (Squatrito, J.) certified a class action in a cash balance claim indistinguishable from this one in *Amara v. CIGNA.*[82] In *Amara* CIGNA's cash balance pension plan was being challenged for all the same reasons as Fleet is here. The Court considered the application of Fed. R. Civ. P. 23(b)(2) and certified the requested class, holding: "Plaintiffs' claims fall squarely within the purview of this provision because they seek injunctive relief, pursuant to ERISA, generally applicable to the entire class."[83]

Following the Fifth Circuit's decision in *Allison v. Citgo Petroleum*,[84] considerable attention has been given to the issue of whether a request for compensatory or punitive damages in addition to injunctive and declaratory relief means that Rule 23(b)(2) certification is unavailable or available only with an opt-out right. In *Robinson v. Metro-North Railroad Co.*, the Second Circuit considered *Allison* and reaffirmed that certifications of suits for injunctive relief and equitable monetary relief, such as backpay, remain appropriate under Rule 23(b)(2) without an opt-out.[85]

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[81] 760 F.Supp. 989, 996 (D. Conn. 1991).
[82] 2002 U.S. Dist. LEXIS 25947 (D. Conn. 2002)(Exhibit "B").
[83] Id. at *10.
[84] 151 F.3d 402, 414-15 (5th Cir. 1998).
[85] 267 F.3d 147, 164 and 168-69 (2d Cir. 2001). *See also Walsh v. Northrop Grumman Corp.*, *supra*, 162 FRD at 448 (relief sought was injunctive and declaratory despite defendants' "attempt

This is in short a classic Rule 23(b)(1) and (b)(2) class action: plaintiffs seek to certify a class to collectively enforce common statutory rights regarding their former employer's benefit plans. Because compensatory and punitive damages are not available under ERISA, plaintiffs seek only injunctive relief and equitable monetary relief. The Eighth Circuit felt this is "precisely what the Rule intended" as they found in *Lindquist v. Bowen* in 1987.[86] As the Fifth Circuit concluded in *Forbush*, "We are aware of the sometime abuse of the class device; but that unfortunate reality makes all the more important that we not reflexively reject its use in appropriate cases."[87]

III. Conclusion.

For all of the foregoing reasons, Richards requests that this Court certify the litigation as a class action under Rule 23(b)(1) and (b)(2) of the Federal Rules.

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to twist" the court's reference to "damages" in denying plaintiffs' motion for preliminary injunction).

[86] 633 F. Supp. 846, 861 (W.D. Mo. 1986), aff'd, 813 F.2d 884 (8th Cir. 1987).

[87] 994 F.2d at 1105.

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