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.	:	
	:	NOVEMBER 2, 2005

PLAINTIFF'S REPLY MEMORANDUM IN SUPPORT OF MOTION FOR CLASS CERTIFICATION

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I. Introduction.

Donna Richards's complaint is well-suited for class action certification. Courts permit class actions because they are efficient ways of handling claims concerning common practices or policies that affect large numbers of people. Richards is covered by pension plan language that affects thousands of other FleetBoston employees; the question is whether this common language violates various provisions of federal law. In *Amara v. CIGNA*, a virtually identical case, this Court has certified a class action on the same issues.[1] Still FleetBoston says the Court shouldn't certify a class action in this case because: (1) class actions aren't appropriate where the challenged common language doesn't hurt all of a companies' employees; (2) in it's view, lies told to large numbers of people are essentially immune from suit – they are too unwieldy to try individually and too individual to try as class actions; (3) if a class is certified it must exclude the 10,000 employees who already retired under the Plan because the Court is powerless to right any wrong done to them, and; (4) Richards is unfit because she is under-informed and because with her as class representative this case will be "overwhelmed" by defenses unique to Richards. Because remedies that help don't have to hurt, because common lies are judged on a common basis of "likely harm", because the Court can grant those who left appropriate relief, and because Richards

[1] 2002 U.S. Dist. LEXIS 25947 (D.Conn. December 20, 2002)(Exhibit 1).

is well-suited to represent this class, the company is wrong and the Court should certify this case as a class action.

II. The Class is the Right Size and Richards is a Good Representative.

Richards asks the Court to include all the cash balance plan participants in the class because they are all equally subject to the plan's terms. FleetBoston says certifying a class here would be wrong because some of its employees were helped by the conversion to a cash balance plan and therefore the class is too broad and includes people who have interests at odds with Richards's interest in receiving benefits under the traditional pension plan. FleetBoston points to the assumption – illustrated by a few examples Richards hasn't tested – that some employees who are either young or have short service can benefit from a cash balance plan even though middle-aged employees with substantial service may be badly disadvantaged.

FleetBoston's concern about the relative merit of Richards's chosen form of relief is ill-conceived. Merely because Richards asks that she be given the Traditional Benefits doesn't mean that she would insist that they be given to employees who would be disadvantaged by them. While Richards asks for Traditional Benefits as one form of relief she knows would benefit her, she also asks in the fourth paragraph of her Complaint's prayer for relief for an order to determine and provide extra benefits for participant losses and in the tenth

paragraph for other appropriate equitable and remedial relief. While it is too early to know who is advantaged and disadvantaged by allegedly illegal cash balance provisions, Richards has asked that this issue be determined as part of the lawsuit. When Richards told FleetBoston she didn't know of any different relief appropriate for other class members, she intended to reflect nothing more. That question must wait until the remedy stage of these proceedings. The remedy here may be as simple as the Court declaring the conversion ineffective for those employees injured by it, but, depending upon further inquiry into the impact of any remedy, this may not be enough. Employees apparently unharmed by the plan provisions today may prove harmed by its provisions in the future especially since all plan participants' accrual rates decrease with advancing age; yet if the court redrew the class to exclude plan participants not yet injured, those individuals would get no relief. That's why Judge Squatrito, writing for this Court in *Amara v. CIGNA*, correctly separated the common issue of whether the plan provisions violate ERISA from the more nuanced question of relief:

> CIGNA claims that providing the relief requested in the complaint on a class-wide basis may actually harm some members of the class. Specifically, CIGNA argues that provision of this relief could actually reduce benefit allocations to members of the class. If CIGNA is correct, this problem can be addressed when the court determines what remedy should be provided if plaintiff prevails on the merits of her claims. Further, this problem could also be addressed by members of the class asserting these arguments once the class has been

> certified. At any rate, certification of the class is the first step toward fashioning a solution to this problem, if the problem indeed exists.[2]

In 1986 in *Seidman, et al v. Stauffer Chemical*, Magistrate Judge Margolis, writing for this Court, also rejected a claim that damages differences among class members destroy a case's suitability as a class action:

> Likewise, the Court finds that possible individual questions on damages do not preclude class certification. As the Ninth Circuit observed in *Blackie v. Barrack*, *supra*:
>
> > [C]ourts have generally declined to consider conflicts, particularly as they regard damages, sufficient to defeat class action status at the outset, unless the conflict is apparent, imminent, and on an issue at the very heart of the suit.
>
> 524 F.2d at 909. The Court perceives no such conflict in this case where plaintiffs share an overriding common interest in establishing the existence and materiality of misrepresentations made in furtherance of an inflationary scheme to defraud. As with the issue of reliance, the Court is always free to hold separate trials on damages. *See Green v. Wolf Corp., supra*, 406 F.2d at 301; *Dura-Bilt Corp. v. Chase Manhattan Corp., supra*, 89 F.R.D. at 98.[3]

Other courts have also refused to allow differences among class members with respect to relief to prevent class certification on a common issue of whether a defendant has violated a statute. In an as yet unpublished September 25, 2005 opinion in *Simpson v. Fireman's Fund Ins. Co.*, the Northern District of California certified an ERISA class action despite the defendant's argument that current

[2] 2002 U.S. Dist. LEXIS 25947 *6-*7 (D. Conn. December 20, 2002)(Exhibit 1).
[3] 1986 U.S. Dist. LEXIS 30264, * 15 (D.Conn. January 17, 1986)(Exhibit 2).

employees had suffered no harm from a challenged employment termination policy and thus didn't have common interest with members of the proposed class terminated under the policy. [4] Quoting a prior Ninth Circuit decision, the Court confirmed that disparate remedies don't dictate denial of class certification for lack of commonality:

> "A class has sufficient commonality 'if there are questions of fact and law which are common to the class.'" *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019 (9th Cir. 1998)(quoting Fed. R. Civ. P. 23 (a)(2)). "All questions of fact and law need not be common to satisfy this rule. The existence of shared legal issues with divergent factual predicates is sufficient, as is a common core of salient facts coupled with disparate legal remedies within the class."[5]

The Court further confirmed that proposed class representatives who allege present injury can still meet the typicality test even where they seek to represent other class members without a present injury:

> "The typicality prerequisite of Rule 23 (a) is fulfilled if 'the claims or defenses of the representative parties are typical of the claims or defenses of the class.'" *Hanlon*, 150 F.3d at 1020 (quoting Fed. R. Civ. P. 23 (a)(3)). "[R]epresentative claims are 'typical' if they are reasonably co-extensive with those of absent class members; they need not be substantially identical." *Id.* In determining whether typicality is met, the focus should be "on the defendants' conduct and the plaintiff's legal theory", not the injury caused to the plaintiff. *Rosario v. Livaditis*, 963 F.2d 1013, 1018 (7th Cir. 1992). Typicality does not require that "all class members suffer the same injury as the named class representative." *Id.*[6]

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[4] *Simpson v. Fireman's Fund Ins. Co.* No. C 05-00225 CW (Order Granting Plaintiff's Motion for Class Certification) (N.D. Cal. September 27, 2005)(Exhibit 3).
[5] *Id.* at 6-7.
[6] *Id.*

Similarly, the Northern District of Illinois in its 1991 decision in *Long v. Trans World Airlines, Inc.* rejected a defendant's argument that differences among individual class members with respect to damages made a class action unwieldy.[7] The class action was brought by 3,000 flight attendants against their employer, TWA, challenging the company's refusal to provide them with designated rights letters pursuant to the Airline Deregulation Act, after plaintiffs went on strike and were not re-hired.[8] The Court granted plaintiffs' motion for class certification, rejecting defendant's argument that an abundance of individual issues with respect to damages made a class action unwieldy.[9] The Court said a number of methods were available to manage these issues.[10] The Court went on to note that "in determining the specific remedies to be afforded, a district court is 'to fashion such relief as the particular circumstances of a case may require to effect restitution.' "[11] The *Long* Court relied for its ruling on the Southern District of New York's 1971 ruling in *In re Coordinated Pretrial Proceedings in Antibiotic Antitrust Actions*[12] in which, according to *Long*, the Court:

"rejected arguments very similar to those raised here:

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[7] *Long v. Trans World Airlines, Inc.*, 761 F. Supp. 1320, 1322 (D. Ill. 1991)
[8] *Id.*
[9] *Id.*
[10] *Id.*
[11] *Id.* at 328
[12] 333 F. Supp. 278 (S.D.N.Y.), mandamus denied, 449 F.2d 119 (2d Cir. 1971)(cited in *Long*, at 761 F. Supp. At 324).

> The defendants contended that individual proof of damages at trial by the class members would require so much time and create such complexities for the parties, courts and jury that the actions would be unmanageable. On the other hand, they contended that any other method of proving this issue at trial would substantially prejudice them and violate their rights to a jury trial and due process.

333 F. Supp. at 287. The court rejected these arguments and certified the case as a class action."[13]

This Court should do the same. Even if FleetBoston can show some participants with less service or years than Richards benefit from having cash balance benefits over Traditional Benefits, this doesn't mean they will necessarily be injured if Richards wins her suit. A single class action can accommodate different forms of remedies (or no remedy) for different (or undamaged) class members without becoming unwieldy, and without creating any conflict among the class members where the proposed class representative seeks no harm to any class member.

III. Class Members Don't Have to Prove Individual Issues to Prove Liability.

FleetBoston says the Court should also deny class certification because Counts II through VI "require the Court to conduct highly individualized inquiries with respect to every class member."[14] Without citing any authority, the company says for instance that Richards can't show FleetBoston is liable for violating

[13] *Long*, 761 F. Supp. at 1325 (D. Ill. 1991).
[14] FleetBoston Brief at 16.

ERISA under Richards's wear-away allegations without examining all participants' accounts to decide if they suffer from wear away. This argument fails because Richards can show that she suffers from wear away. If the Court agrees this is illegal under ERISA, it's illegal for any participant suffering from wear away, and the Court can craft a relief order that identifies the sufferers and relief appropriate for them. FleetBoston's argument does little more than repeat its other arguments entangling the details of relief with the question whether FleetBoston's common practices violate ERISA.

FleetBoston also says that the claims about the summary plan descriptions in Counts IV and V shouldn't be certified because all class members would have to prove individually that they were "likely harmed." This Court and the Second Circuit, however, have already decided this issue against FleetBoston.

The defendants in *Amara v. CIGNA* argued that Judge Squatrito should deny class certification on the count about whether the "SPD was misleading" because each plaintiff in the over 24,000 member class would have to "make an individualized showing of detrimental reliance upon the misleading SPD provision" in order to obtain relief. In CIGNA's words:

> "if this case were certified as a class action, every one of the estimated (by Plaintiff) 25,000 class members would be called upon to

> present evidence, as to, inter alia, the extent, if any, of his or her detrimental reliance on the SPD."[15]

In ruling in favor of class certification, Judge Squatrito held that the "threshold inquiry" is "whether the SPD is misleading," which "is a legal question common to each class member." Judge Squatrito observed that the Second Circuit "ha[d] not yet decided" the issue of detrimental reliance.[16] FleetBoston's argument that each class member will individually have to prove "likely harm" fails here for the same reason the detrimental reliance argument failed to prevent class certification in *Amara* – the common question is still whether the SPD is misleading.

Magistrate Judge Margolis's ruling in *Seidman, et al v. Stauffer Chemical* is also instructive on this issue. It rejected a similar claim that the harm caused is too individualized to be managed in a class action:

> Generally, in this context, the requirement of reliance has not been a bar to a class action suit. *See, e.g., Herbst v. IT&T Corp.*, 65 F.R.D. 13, 19 (D. Conn. 1973), aff'd, 495 F.2d 1308 (2d Cir. 1974). In any event, should the issue of reliance become an element of proof, the Court could order separate trials on this particular issue. *Green v. Wolf Corp., supra*, 406 F.2d at 301; *Dura-Bilt Corp. v. Chase Manhattan Corp., supra*, 89 F.R.D. at 98.

The cases cited by Magistrate Judge Margolis are instructive too. In *Herbst v. IT&T Corp*. Judge Blumenfeld, writing for this Court in a securities case noted that individualized issues like reliance are always present in securities cases, but

[15] 2002 U.S. Dist. LEXIS 25947 (D.Conn. December 20, 2002). Opp. Br. filed June 10, 2002 at 12 (dkt. #30)(Exhibit 4) .
[16] 2002 U.S. Dist. LEXIS 25947 at *9 n.4 (Exhibit 1).

where uniform misrepresentations are involved, it is "beyond dispute" that these issues are no bar to the designation of a class action:

> "Where the activities allegedly giving rise to liability are standardized, as where uniform misrepresentations are made to all members of the group, proof of individual reliance as well as individual damages may effectively be severed and treated in subsequent proceedings…..Substantively, it may be relatively immaterial once the form of fraud] giving rise to liability is determined." 3B Moore's Federal Practice, para. 23.45(2), at 23-762-764.[17]

Judge Blumenfeld also noted that the Second Circuit in *Green v. Wolf Corp.,*[18] said that because reliance could be an issue in every securities case, the reliance argument, carried to its logical extreme, would negate every securities class action.[19] In *Affiliated Ute Citizens v. United States*, the Supreme Court solved the reliance problem in securities cases by holding reliance on a misrepresentation need not be shown, substituting an inquiry of whether "a reasonable investor" might have considered the misrepresentations important.[20]

The Second Circuit has now solved the reliance problem in ERISA SPD cases in a way similar to the way in which reliance was settled in the securities cases. As FleetBoston knows, the Second Circuit, in *Burke v. Kodak*,[21] resolved the issue by holding that plan participants can prevail in cases challenging flawed SPDs by showing "likely harm" and without proving individual reliance on

[17] 65 F.R.D. 13, 19 (D.Conn. 1973).
[18] 406 F.2d 291 (2d Cir. 1968).
[19] *Id.* at 18-19.
[20] 406 U.S. 128, 153-54 (1972).
[21] 336 F.3d 103 (2d Cir. 2003), cert. denied, 540 U.S. 1105 (2004)

inadequate disclosures in an SPD.[22] FleetBoston ignores, however, that the likely harm standard is an objective standard like the reasonable investor standard adopted for securities cases. Indeed, the Second Circuit echoed judicial concerns about the impossibility of class actions if any other approach were adopted. Specifically, in adopting the likely harm standard the Court noted that "'A rule requiring . . . detrimental reliance . . . imposes an insurmountable hardship on many plaintiffs.'"[23] The Court held that the consequences of deficient SPDs should be placed on the employers who drafted them and that obstacles like individual reliance are inconsistent with this and with ERISA's purposes.[24]

The Second Circuit found that the prejudice standard had been applied with "varying degrees of stringency." Consequently, instead of an "amorphous" prejudice standard, the Second Circuit established an objective one, requiring an "initial" showing of "likely prejudice," meaning that the participant "was *likely* to have been harmed as a result of a deficient SPD."[25] The employer can rebut by offering evidence showing that the inadequate description was "in effect a harmless error."[26] The "likely prejudice" standard thus "avoids the use of harsh

[22] 336 F.3d at 112-14.
[23] 336 F.3d at 112.
[24] *Id.* at 112-113.
[25] *Id.* (emphasis in original).
[26] *Id.* at 113.

common law principles to defeat employees' claims based on a federal law designed for their protection."[27]

Applying this standard, *Burke* decided that ERISA prohibited enforcement of an affidavit requirement for domestic partners that was contained in Kodak's Plan document but was not adequately disclosed in the SPD. Although the affidavit requirement was set out in the Plan document, and was even described in certain sections of the SPD, it was omitted from the section of the SPD describing pre-retirement survivor's benefits, which also failed to cross-reference the reader to other sections of the SPD where the requirement was described.[28] In *Burke*, the Second Circuit found likely prejudice on an objective basis, noting that because "[t]he conspicuous absence of the domestic partnership affidavit requirement in the self-contained [preretirement Survivor Income Benefits] section [of the SPD] likely led the Burkes to believe that an affidavit was unnecessary for SIB benefits."[29] The Court rejected the employer's rebuttal because it was based on "the same evidence used by the district court to find a lack of detrimental reliance," namely, the Burkes' conscious decision not to apply for Kodak's health benefits because of unrelated concerns about whether expenses from a pre-existing stroke would be covered.[30]

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[27] *Id.*
[28] *Id.* at 110-11.
[29] *Id.* at 114.
[30] *Id.* at 114.

The Western District of New York used a similarly objective test in 2004 in *Layaou v. Xerox* where the district court found that the SPD contained "no reference whatsoever" to the offset of a "phantom account," either expressly or by description of its application and effect." A participant "would not know" from the SPD "how or to what extent the benefit would be reduced." [31] The Court determined that:

> "the conspicuous absence of any reference to or explanation of the phantom offset, coupled with the annual benefit statements that had been provided to Layaou, would clearly have misled him into believing that his monthly benefit would be considerably higher than it turned out to be. That mistaken belief would likely have affected plaintiff's financial planning for his upcoming retirement, and defendants have not presented any evidence to show that plaintiff was in fact aware of the phantom account offset prior to his retirement."[32]

330 F.Supp.2d at 304. The Court concluded that "plaintiff has established "likely prejudice" as a result of the faulty SPD, and that defendants have not rebutted that showing." Id.[33]

Most recently, in 2005 in *Parry v. SBC* Communications, Judge Arterton, writing for this Court, applied the *Burke* likely harm standard in an ERISA SPD case and held that plaintiffs' showing of prejudice was "clear" where differences in

[31] 330 F.Supp.2d 297, 303 (W.D.N.Y. 2004), on remand from 238 F.3d 205 (2001)
[32] Id. at 304.
[33] Judge Larimer distinguished his earlier decision in *Frommert v. Conkright*, 328 F.Supp.2d 420 (W.D.N.Y. 2004), on the basis that Frommert's claims were not based on a faulty SPD. 330 F.S.2d at 303 n.6.

benefits were "so significant" and participants were aware of conflicting benefit "estimates." She held that the employer "has not rebutted this showing." [34]

The likely harm standard adopted in *Burke* is an objective standard similar to the reasonable investor standard the courts developed for securities cases. The misrepresentations alleged here are in communications common to all members of the class. Consequently, no individual inquiries will have to be made on the issue of likely harm. But even before the courts adopted objective standards to cover the reliance issue in misrepresentation cases, the courts still didn't deny class action status in cases of common misrepresentations, they simply bifurcated the proceedings. Accordingly, the plaintiffs' misrepresentations claims present no bar to this action being certified as a class action.

IV. Retirees Should be Included in the Class.

1. Introduction.

Retirees should be included in the class as the Complaint provides. Retirees are just as concerned as other members of the class as described in the central common issue of whether the cash balance provisions violate ERISA and whether FleetBoston deceived its employees about them. Fleet Boston's claim that the Court should determine on class certification the form of relief it can grant retirees is another instance of it putting the cart before the horse. Richards believes the

[34] 375 F. Supp. 2d 31 (D. Conn. 2005).

Court should reserve judgment on the entire relief issue until after it decides the liability issue. Nevertheless, to the extent the Court considers now whether it has the power to grant retirees injunctive or declaratory relief, it should be confident that it can. Even assuming, without conceding, that the Court could only award injunctive and declaratory relief, the Court has the power here to issue an injunction ordering changes to the plan and reinstating the retirees into the plan with rights to receive the difference between what they got under the old plan and what they are owed under the plan as reformed. This kind of injunctive relief in the form of a reinstatement was approved under ERISA §502 (a)(3) by the Supreme Court in 1996 in *Varity Corp. v. Howe*.[35]

2. Injunctive Relief.

The plaintiffs in *Varity* claimed their employer, acting in its fiduciary capacity, misled them concerning the likely future of the company's benefit plans, causing them to make an ill-informed and ultimately damaging decision regarding their employment status. The Supreme Court upheld the Eighth Circuit Court of Appeals' ruling that ERISA Section 502 (a)(3) provided individual relief to the plan participants and let stand the unchallenged form of injunctive relief crafted by the Eighth Circuit.[36] That relief consisted of a kind of reinstatement, ordering the plaintiffs' former employer to permit their participation in the company benefit

[35] 516 U.S. 489 (1996).
[36] 516 U.S at 515.

program during retirement in the face of both their departure from the company and their failure to qualify under the terms of the plan at issue.[37]

In 2004 the Ninth Circuit considered *Mathews v. Chevron*.[38] The *Mathews* plaintiffs were retiree plan participants suing a plan fiduciary for breaching its ERISA fiduciary duties by misleading them about a pending severance offer the company was considering.[39] The District Court enjoined the breaching fiduciary to instate the six prevailing plaintiffs into the severance plan at issue and to modify the plan records to put them in the position they would have been in had the breach never occurred.[40] The Ninth Circuit rejected Chevron's claim that in substance the order was nothing more than an order to pay money. The Court held that the District Court's order merely placed the plaintiffs in the position they would have been in if the breach hadn't occurred.[41] According to the Court, it was the plan terms and the parties' agreement that the plaintiffs qualified under them that provided benefits, not the Court's order.[42]

This Court has the power to grant similar injunctive relief in ERISA cases and did so in 2004 in *Broga v. Northeast Utilities* where Judge Squatrito, writing for the Court in an ERISA misrepresentation case brought by retirees, adopted the

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[37] *Howe v. Varity Corp.*, 36 F.3d 746, 754-55 (8th Cir. 1994).
[38] 362 F.3d 1172 (9th Cir. 2004).
[39] *Id*. at 1176-78.
[40] *Id*. at 1185-86.
[41] *Id*. at 1186.
[42] *Id.*

same injunctive relief as the *Mathews* Court, ordering a modification of plan records that would create an entitlement to new benefits for the retired employees.[43] FleetBoston's claim that retirees should be excluded from the class because they can't get relief is meritless.

3. Standing.

Equally meritless is FleetBoston's suggestion that the retirees have no standing to sue. The Court should ignore FleetBoston's slender discussion of this complex issue, but if it decides to take it up, it should decide it in Richards's favor.

Richards brings this action under §502 (a)(3) which authorizes a civil action to be brought by:

> (2) …a participant, beneficiary, or fiduciary for appropriate relief under section 409;
>
> (3) by a participant, beneficiary or fiduciary…to obtain other appropriate equitable relief

Under ERISA §102 (7) "participant" means:

> any employee *or former employee* of an employer…*who is or may become eligible to receive a benefit* of any type form an employee benefit plan which covers employee of such employer…

[43] 315 F. Supp. 2d 212, 256 (D.Conn. 2004). Judge Kravitz's ruling that injunctive relief wasn't appropriate in *Coan v. Kaufman* 333 F. Supp. 2d 14, 27, *appeal docketed,* No. 04-5173 (D. Conn. 2004) is distinguished by the fact that, in that case, the Court relied on the fact that the plan had terminated: "Thus, in contrast to this case, the plan into which the plaintiffs in *Varity Corp*. sought reinstatement was extant when plaintiffs filed their suit, as was the employer who administered the plan." *Id.* at 27.

Considering the definition of "particip ant" the Supreme Court, in 1989 in *Firestone Tire & Rubber Co. v. Bruch* ruled:

> (a) the definition of pa rticipant includes "former employees…who have a ***'colorable claim' to vested benefits***", and
>
> (b) an employee may demonstrate that she "may become eligible" for benefits by showing a "**colorable claim that (*1) he or she will prevail in a suit for benefits***, or that (2) eligibility requirements will be fulfilled in the future."[44]

In *Mullins v. Pfizer*[45], the Second Circuit t ook a broad view of *Firestone* at odds with the FleetBoston's view here. Mullins was a former Pfizer employee who missed his chance to participate in a vo luntary separation benefit because plan fiduciaries misled him into retir ing shortly before its adoption. [46] Judge Nevas, writing for the District of Connecticut, granted Pfizer summary judgment ruli ng, among other things, that as a former employee Mullins lacked "participant" standing.[47] On the narrow issue of Mullins' standing, the Court held Mulli ns was a participant because he was a former employee of the defendant and had a colorable claim to plan benefits under a plan c oncerning which he would have been a participant but for Pfizer's wrongdoi ng.[48] On the broader i ssue of t he basic standing question under ERISA, the Cour t adopted the broadest possible view, holding that: "the basic standing issue is whether the plaintiff is ***'within the zone of***

[44] 489 U.S. 101, 117-18 (1989).
[45] 23 F.3d 663 (2d Cir. 1994).
[46] *Id*. at 665.
[47] *Id.*
[48] *Id*. at 667-8.

interest ERISA was intended to protect'".[49] The *Mullins* Court cited a reminder from the legislative history that ERISA was supposed to remove obstacles to claims, not create them:

> The intent of the [Senate Labor and Public Welfare] Committee is to provide the full range of legal and equitable remedies available in both state and federal courts and to remove jurisdictional and procedural obstacles which in the past appear to have hampered effective enforcement of fiduciary responsibilities under state law or recovery of benefits due to participants.
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> S.Rep. No.127 (93d Cong.,2d Sess. (1974).[50]

Like other courts, the *Mullins* Court believed the alternative view led to "unjust and arbitrary" results unintended by Congress including enabling employers to defeat an employee's standing merely by keeping breaches of fiduciary duty secret until the employee receives his benefits or by "terminating benefits before the employee can file suit."[51] FleetBoston apparently hopes to defeat retirees' standing because the illegality of the plan provisions and the company's breaches of fiduciary duty didn't come to light until after they received their benefits. In *Mullins*, the Second Circuit made clear that under such a circumstance standing should be afforded.

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[49] *Id*. at 668 (quoting *Vartanian v. Monsanto*, 14 F.3d 697, 701 (1st Cir. 1994))(emphasis added).
[50] 23 F.3d at 668.
[51] *Id.* at 667; *See also Vartanian supra*; *Christopher v. Mobil Oil Corp.*, 950 F.2d 1209, 1220-23 (5th Cir.), cert. denied, __ U.S.__(1992).

The Second Circuit's 2005 decision in *Nechis v. Oxford Health Plans, Inc.*[52] requires no different result. *Nechis* holds only that a welfare plan participant loses her standing in a dispute over health insurance after losing her job because no relief the court could grant could reinstate her benefits. Unlike the pension benefits at issue here, welfare benefits such as health insurance benefits don't vest, and the plaintiff didn't and couldn't ask the Court to restore her job so she could sue; accordingly the Court denied standing.[53]

Retiree members of the class have standing and shouldn't be dropped. The Second Circuit, this Court, and many others have held that denying standing under circumstances like this frustrates the core purposes of ERISA.[54] Accordingly, the Court should reject FleetBoston's standing claim.

V. Richards is Neither Underinformed Nor Overwhelmed.

Finally, FleetBoston says that Richards is an unfit representative because she didn't answer one of the company's questions at her deposition about Count VI to its satisfaction and because the litigation will be "overwhelmed" by defenses unique to Richards. FleetBoston complains that Richards doesn't know enough

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[52] 421 F.3d 96 (2d Cir. 2005).

[53] *Id.* at 101-2.

[54] *See also, Kaufman v. Coan*, 333 F. Supp. 2d 14, 19-23 (D. Conn. 2004)(former participant's claim within the zone of interests); *Moriarity v. United Technologies Corp.* 947 F.Supp. 43, 45-46 (D.Conn. 1996)("the requirement of a colorable claim is not stringent"); *Gray v. Briggs,* 1998 U.S. Dist. LEXIS 10057 at *2 (S.D.N.Y. July 7, 1998)(Exhibit 5)(claim for larger distribution for violations is claim for vested benefits); *In re Williams*, No. 02-153 TCK (N.D.Okl. August 19, 2005)(Exhibit 6)(colorable claim includes claim for greater benefits as a remedy for ERISA violation).

about the Count VI claim that the company is misrepresenting benefits to retiring plan representatives. FleetBoston's complaint, however, boils down to an attack on Richards's uncertainty about the individual names of retirees who had their benefits misrepresented to them as referred to in Count VI. Richards named three individuals she believed may have encountered the problem, and FleetBoston knows that it has already taken the deposition of a fourth person who made this precise complaint, Peter Rogan.[55] Ms. Richards has three masters degrees and is a trust officer and senior vice president at the bank.[56] FleetBoston's half-hearted niggling over Richards's deposition is plainly inadequate to show that she is too ignorant to represent the proposed class of employees.

This case will also not be "overwhelmed" by FleetBoston's assertion that Richards hasn't exhausted her administrative remedies and the claim that she lacks standing under Count VI. First, the exhaustion issue has already been briefed as a small part of the dispute over the motion to dismiss. It can hardly be said to be overwhelming the litigation. Second, FleetBoston bullheadedly ignores Richards's obvious stake under Count VI in seeking to stop FleetBoston from misinforming retiring employees about their benefits when they seek to retire. As someone who will retire someday, she and other current employees have a vital interest in seeing that when they do they will be given accurate information.

[55] Exhibit 7 (Deposition of Donna Richards Excerpt).
[56] *Id.*

There is no evidence to suggest that either of FleetBoston's supposed defenses against Richards will overwhelm the litigation. Indeed, this Court has rejected more significant defenses as likely to overwhelm litigation in the past.[57] It should easily reject the claim under these circumstances.

VI. Conclusion.

This case is well-suited to be certified as a class action. The Complaint focuses on the legality of FleetBoston's plan and thus its claims affect all the class members in a common way. Most of FleetBoston's brief in opposition recycles the same claim about how Richards's personally desired relief won't work for all class members. Other claims are similarly focused on the issue of relief. All of the company's relief claims are premature and are, on their merits, insufficient grounds to deny class certification. FleetBoston's claim about standing ignores the ready availability of injunctive relief for current employees and retirees. Its claims about Richards personally are thin and wholly insufficient to block class action certification. Accordingly, Fleet Boston has presented no compelling reasons to deny class action certification and the Court should grant Richards's motion.

[57] *Amara v. CIGNA Corp.*, 2004 U.S. Dist. LEXIS 21116 (D. Conn. 2004)(Court refused to decertify a class on unique defense grounds where class representative had signed a release defendant claims committed her to arbitrate her claim)(Exhibit 8).

THE PLAINTIFF: Donna Richards

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CERTIFICATE OF SERVICE

I hereby certify that on November 2, 2005, a copy of foregoing PLAINTIFF'S REPLY MEMORANDUM IN SUPPORT OF MOTION FOR CLASS CERTIFICATION was filed electronically. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

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