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United States District Court, N.D. Illinois, Eastern Division.

Mary Ann BREEDLOVE, Joyce Culp, and Reba Languis, individually and on behalf of all others similarly situated, Plaintiffs,
v.
TELE–TRIP COMPANY, INC., Mutual of Omaha Insurance Company, and Mutual of Omaha Retirement Income Plan, Defendants.

No. 91 C 5702. | July 27, 1993.

Opinion

MEMORANDUM OPINION AND ORDER

LEINENWEBER, District Judge.

I. INTRODUCTION

***1** Plaintiffs, Mary Ann Breedlove ("Breedlove"), Joyce Culp ("Culp") and Reba Languis ("Languis"), brought suit against defendants, Tele–Trip Co., Inc. ("Tele–Trip"), Mutual of Omaha Insurance Company ("Mutual"), and the Mutual of Omaha Retirement Income Plan (the "Plan"). Plaintiffs sued defendants for age discrimination and are also seeking to reclaim benefits due under the term of defendants' benefit plan in accordance with Section 502(a)(1)(B) of the Employee Retirement Income Security Act ("ERISA") (29 U.S.C. § 1132(a)(1)(B)). Plaintiffs and defendants have settled the age discrimination charge, leaving only the ERISA claim.

Plaintiffs and defendants both have motions before the court. Plaintiffs seek certification of their case as a class action. Defendants oppose class certification and have moved to dismiss plaintiffs' claim for lack of subject matter jurisdiction. Defendants also seek to have Mutual and Tele–Trip dismissed as improper defendants. Defendants have styled their motions as motions to "dismiss and/or for summary judgment."

II. BACKGROUND

Tele–Trip, a wholly-owned subsidiary of Mutual, sells flight insurance and other travel related services at counters in airports throughout the United States. Since 1938, Mutual has run an employee pension plan known as the Mutual of Omaha Retirement Income Plan. The Plan provides retirement benefits for employees of participating employers. Tele–Trip is a participating employer and makes contributions to the Plan for its employees. In 1974, with the enactment of ERISA, the Plan became an ERISA pension plan.

Breedlove worked for Tele–Trip as a manager of the Chicago O'Hare airport concession from 1960 to 1990. From 1960 to 1978, she worked as an "employee" of Tele–Trip. However, in 1978 she was reclassified as an "independent operator" and worked in such capacity until she was discharged by defendant in 1990. Breedlove performed substantially the same duties as an independent operator as she did while an employee. At the time Breedlove became an independent operator, she entered into an agreement which stated that "In the relationship between the parties, the contractor, for the purpose of selling the insurance designated herein, is an independent contractor, and neither it nor its employees have any relationship to Tele–Trip whatsoever."

Culp worked for Tele–Trip as manager of the Columbus, OH airport concession from 1975 to 1990. From 1975 to 1978 she worked as an "employee" of Tele–Trip. In 1978 she was reclassified as an "independent operator" and remained as such until she was discharged in 1990. Culp performed substantially the same duties as an independent operator as she did while an employee. Like Breedlove, when Culp became an independent operator, she entered into an agreement which stated that she would act as an independent contractor and that neither she nor her employees would have any relationship to Tele–Trip whatsoever.

***2** Languis began working for Tele–Trip as a sales agent in 1963. She resigned in 1967. However, in 1975, she returned to Tele–Trip as an independent operator of the Orlando, Florida airport concession. Like Breedlove and Culp, when Languis became an independent operator she entered into an agreement which stated that she would act as an independent contractor and that neither she nor her employees would have any relationship to Tele–Trip whatsoever. In 1984, she was promoted to a management position. In 1985, Languis was made vice president in charge of field training and budget administration for the airport concessions. In 1988, Languis was made regional marketing director for the central and south regions of Tele–Trip concessions. In 1991, Languis took early retirement. Plaintiffs were re-classified as independent operators in the mid-seventies as part of a restructuring scheme whereby Tele–Trip converted its counter operations at many airports into independent operations.

During the time the three plaintiffs worked as employees, defendants treated plaintiffs as participants in the Plan and made contributions to the Plan for the employees. However, when plaintiffs worked for defendants as independent operators, defendants did not treat plaintiffs as participants in the Plan. Defendants did not give plaintiffs credit towards the pension fund for their services as independent operators, nor did defendants contribute funds to the Plan for plaintiffs while they were independent operators. After the conclusion of their employment with Tele–Trip, the three plaintiffs applied for pension benefits from the Plan. As part of their entitlement benefits from the Plan, plaintiffs requested service credit from defendants for their work as independent operators. Tele–Trip denied such credit and benefits to plaintiffs. Plaintiffs then appealed to the Plan. Consequently, each plaintiff received a letter from the Plan's administrative committee stating:

> Section 2.3(e) of the Plan provides that an "employee" for the purposes of the Plan and the coverage thereunder will "in no event ... include independent contractors, general agents or soliciting agents or employees thereof as those words are defined by the employers."

However, the Plan agreement cited in the letter was not the Plan agreement in effect during plaintiffs' service to Tele–Trip. Rather, the Plan agreement in effect during plaintiffs' service to Tele–Trip stated that an employee includes:

> any person who ... is receiving remuneration for personal services rendered to the employer ... in no event shall employees include general agents or soliciting agents as those words are defined by the employers.[1,2]

Following the denial of their appeal by the Plan, Breedlove, Culp and Languis filed suit individually against Mutual, Tele–Trip and the Plan under ERISA, which allows a civil action by a participant or beneficiary to recover benefits owed from a benefit plan. Plaintiffs argue that at all times they performed services for Tele–Trip (including when they were termed independent operators), they were employees within the meaning of that term under the Plan and under ERISA (which defines an employee under the common law agency definition), and, thus are entitled to all benefits under the Plan and ERISA available to Tele–Trip employees.

***3** Plaintiffs were among many Tele–Trip independent operators. Therefore, they seek to proceed as a class action under Federal Rules of Civil Procedure 23 ("Rule 23"). Plaintiffs seek to represent a class of all persons who have been or are being characterized as independent operators of Tele–Trip airport locations, and the employees of such independent operators, excluding the two persons currently so characterized in Minneapolis and San Francisco.[3]

III. ANALYSIS

In accordance with Fed.R.Civ.P. 23(c)(1) and the teachings of *Rutan v. Republican Party of IL,* 868 F.2d 943 (7th Cir.1989) (*aff'd in part, rev'd in part,* 110 S.Ct. 2729 (1990)), the court will first address plaintiffs' motion for class certification, and then defendants' motions to dismiss or for summary judgment. *See also Hickey v. Duffy,* 827 F.2d 234, 237 (7th Cir.1987).

A. Class Certification

Rule 23 requires a two-step procedure to determine if a case should be certified as a class action. Plaintiffs' proposed case is defined as "all persons who have been or are being characterized as independent operators of Tele–Trip airport locations, and the employees of such independent operators, excluding the two persons so characterized in Minneapolis and San Francisco." In order to have their proposed class certified, plaintiffs must first satisfy the four elements of Rule 23(a). Second, plaintiffs must show that the proposed class qualifies under one of the three subsections of Rule 23(b).

In evaluating the motion for class certification, the allegations made in support of certification are taken as true and the court does not examine the merits of the case. *Eisen v. Carlisle & Jacquelin,* 417 U.S. 156, 177–78 (1974).

B. The Certification Requirements of Rule 23(a)

Plaintiffs must make four showings in order to satisfy Rule 23(a). Plaintiffs must show that (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 or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class.

1. Numerosity

Plaintiffs' proffered class satisfies the numerosity requirement of Rule 23(a). Plaintiffs do not know the exact number of potential class members at this time because defendants have yet to reveal the number of independent operators and their employees that have worked for Tele–Trip, but estimate that between 100 to 200 independent operators and employees of independent operators have worked for Tele–Trip. However, for purposes of class certification, plaintiffs need not know the exact number of potential class members. *Harman v. LyphoMed, Inc.,* 122 F.R.D. 522, 524 (N.D.Ill.1988); *Grossman v. Waste Management,* 100 F.R.D. 781, 785 (N.D.Ill.1985). In any event, plaintiffs' estimate of a class of more than 100 members satisfies the numerosity requirement. *See Swanson v. American Consumer Ind., Inc.,* 415 F.2d 1326, 1333 n. 9 (7th Cir.1969) (a class of 40 may be sufficiently large to satisfy the numerosity requirement of 23(a)).

2. Common Questions of Law and Fact

***4** The second requirement for certification under Rule 23(a) is that there be questions of law and fact common to the class. Rule 23(a)(2), however, does not require that all questions of law or fact raised in the litigation be common. Rather, there need only be a single issue common to all members of the class. Consequently, "when the party opposing the class has engaged in some course of conduct that affects a group of persons and gives rise to a cause of action, one or more of the elements of that cause of action will be common to all the persons affected." *Edmondson v. Simon,* 86 F.R.D. 375, 380 (N.D.Ill.1980). A common question may be the standardized conduct of the defendants toward the members of the class or an across-the-board policy. *Franklin v. City of Chicago,* 102 F.R.D. 944, 949 (N.D.Ill.1984).

The common question in this litigation is whether, under the Plan and ERISA, plaintiffs were "employees" while they worked as independent operators. This determination requires an analysis of the Plan and the coverage of independent operators under ERISA.

The issue of whether the Plan was misinterpreted by Tele–Trip in its denial of benefits to independent operators is common to all potential class members.

In denying independent operators benefits under the Plan, Tele–Trip relied on the same provision of the Plan. Defendants have admitted that their interpretation of the Plan as excluding independent contractors is the reason all independent operators were denied credit for retirement benefits from the Plan. Thus, whether the Plan was misinterpreted by Tele–Trip is a common issue to all potential class members.

According to the Supreme Court, this court must use a common law test (traditional agency law) for determining who qualifies as an "employee" under ERISA. *Nationwide Mutual Ins. Co. v. Darden,* 112 S.Ct. 1344, 1348 (1992). Plaintiffs argue that determination of employee status under such a test involves questions of law and fact common to both the claims of the individual plaintiffs and the class they seek to represent. Defendants argue that such an analysis would require a "detailed, case-by-case factual inquiry ... [resulting] in a series of hundreds of fact intensive mini-trials, each designed to

determine whether any given class member was an employee or an independent contractor at any given time". Defendants' Memorandum in Opposition to Class Certification, p. 22. Such required inquiries, according to defendants, defeat commonality.

Plaintiffs, however, correctly point out that the determination of an employee's status under ERISA should be made on a "categorical" basis if possible, not a case-by-case basis. In *Darden,* the court permitted categorical judgments about the employee status of claimants with similar job descriptions. *Darden,* 12 S.Ct. at 1350. Similarly, the court should determine the employee status of independent operators under ERISA categorically, as long as Tele–Trip's treatment of the group as a whole is similar.

***5** To determine whether a hired party is an employee under common law, the court must inquire into the hiring party's right to control the "manner and means by which the product is accomplished." *Darden,* 112 S.Ct. at 1348; *N.L.R.B. v. O'Hare–Midway Limousine Svc.,* 924 F.2d 692, 694 (7th Cir.1991). Other factors relevant to the inquiry include:

> the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party.

Darden, 112 S.Ct. at 1348–49.

In their Reply Memorandum in support of their motion for class certification, plaintiffs provide a list of evidence which illustrates that Tele–Trip treated the proposed class as a whole. For example, Tele–Trip maintained a common budgeting system which controlled compensation of class members, utilized a common method of payment for class members, regularly advanced money to all independent operators, furnished identical operating manuals, and drafted standardized independent operator contracts to issue directions to independent operators. This evidence is relative to a *Darden* inquiry concerning Tele–Trip's treatment of the potential class as a whole.

Defendants argue that differences in independent operator locations make a categorical determination of "employee" status impossible. Defendants also point to a number of practices which, they contend, distinguish independent operators from each other and undermine any notion that these operators form a cohesive group. Some independent operators, for example, incorporated their businesses and others did not. A number of independent operators used trade names and others participated in contract negotiations and signed contracts directly with airports. Some independent operators sold products and services in addition to travel insurance. Defendants also note that the named plaintiffs disciplined, discharged, and evaluated their own employees. These independent operators possessed the discretion to hire the employees they needed and to set their wages. Defendants also indicate that the named plaintiffs filed tax returns claiming "self-employment" status and took tax deductions for business expenses and depreciation of capital assets used in their businesses. These facts, defendants argue, illustrate the independence of and lack of uniformity among independent operators.

Plaintiffs argue that these "differences" cited by defendants show only that Tele–Trip exercised the same right to control the class members in various ways, and that they add nothing to the present inquiry. The analysis of whether an individual is a common law employee "would not differ if ... the individual provided ... services through a personal service corporation owned by the individual." Rev. Rule 87–41 at ¶ 71, 710. Moreover, according to plaintiffs, potential class members only signed contracts where the airport demanded that such contracts be signed by independent operators. Some of the named plaintiffs stated that in such contract negotiations they were not active participants; rather Tele–Trip management actually negotiated the airport contracts, regardless of who signed them. Furthermore, although different independent operators provided services in addition to travel insurance, all services had to be approved by Tele–Trip.

***6** Thus, plaintiffs assert that defendants can only point to minor variations amongst the independent operators; variations which are to be expected in any business with various branch locations. These do not change the relationship between Tele–Trip and the potential class. Consequently, according to plaintiffs, the court can make a categorical determination as to the employee status of the potential class, and that class certification is appropriate.

The court concurs with plaintiffs. Defendants' treatment of the various "independent operators" is enough for the court to make a categorical determination as to the "employee" status of the potential class. Consequently, determination as to

whether independent operators are employees under ERISA is common to all potential class members because defendants' conduct towards members of the proposed class was generally uniform among independent operations. Although plaintiffs have not countered defendants' claims that plaintiffs filed tax returns claiming "self-employment" status, and that plaintiffs disciplined, discharged, and evaluated their own employees, all the other factors identified by plaintiffs seem to demonstrate a pattern of control exerted by defendants over plaintiffs' operation of the airport counters. Whether this pattern of control is enough to warrant a determination that plaintiffs are "employees" of Tele–Trip is not to be determined at this point in the litigation.

3. Typicality

Under Rule 23(a), the claims of the named plaintiffs of a proffered class must be typical of the claims of the other members of the proposed class.

A plaintiff's claim is typical if it arises from the same event or practice or course of conduct that gives rise to the claims of other class members and his or her claims are based on the same legal theory, regardless of factual differences that underlie individual claims. *De La Fuente v. Stokely–Van Camp, Inc.,* 713 F.2d 225, 232 (7th Cir.1983); *Edmondson v. Simon,* 86 F.R.D. at 381.

Typicality has been demonstrated in this case. As plaintiffs correctly assert:

> The claims of the named plaintiffs are identical to those of the class. They complain that they have been denied benefits under the Plan for the period in which they were characterized as "independent operators." They, like the class, are covered by and subject to the terms and conditions of the Plan, as interpreted by defendants. The appeal of each plaintiff was rejected by the Plan for identical reasons, which would be identical to those of the class.

Plaintiffs' Memorandum in Support of Class Certification, p. 11.

4. Fair and Adequate Representation

To determine if the named plaintiffs adequately represent the absentee class members' interests, the court must inquire into the adequacy of both the named plaintiffs' counsel and the representation provided in protecting the different interests of the other class members. *Sec'y of Labor v. Fitzsimmons,* 805 F.2d 682, 697 (7th Cir.1986).

***7** Plaintiffs' counsel are experienced in class litigation and have been found adequate in other class action cases. This is persuasive evidence that plaintiffs' counsel will be adequate again. *Gomez v. IL State Bd. of Ed.,* 117 F.R.D. 394, 401 (N.D.Ill.1987). Moreover, defendants do not take issue with the adequacy of plaintiffs' counsel.

Defendants do, however, take issue with the adequacy of plaintiffs' counsel to represent the alleged divergent interests of the proposed class members. A class cannot be adequately represented by named plaintiffs with interests contrary to those of the class members. *See East Texas Motor Freight System, Inc. v. Rodriguez,* 431 U.S. 395, 405 (1977). According to defendants, the named plaintiffs' interests conflict with those of three categories of potential class members: current employees of Tele–Trip, independent operators who have consciously chosen to retain their independent operator status, and current or former employees of independent operators.

According to defendants, "successful pursuit of this claim will result in additional costs to Tele–Trip in funding the Plan, thus limiting the amounts of money that otherwise might be available to Tele–Trip to cover pay increases or to improve the general benefits for its current employees." Thus, defendants argue that there is a conflict between the interests of current Tele–Trip employees, who were previously independent operators, and the remainder of the class. Defendants rely on *United Independent Flight Officers v. UAL, Inc.,* 756 F.2d 1274 (7th Cir.1985), in support of this argument. The *United Flight* court denied certification of the proposed class because of conflicts between the class representatives and the remainder of the class. According to defendants, the court denied certification because "some of the current employees feared that improvements in retirement benefits [if plaintiffs were successful] may come from the pay package." Defendants' Memorandum of Law in Opposition to Plaintiffs' Motion for Class Certification, p. 24. One plaintiff, in fact, was worried that improvements in retirement benefits might come from the pay package. *United Flight Officers v. UAL, Inc.,* 572 F.Supp. 1494, 1500 (N.D.Ill. 1498–1500). However, in truth, the court denied class certification for several other reasons as well. *Id.*

at 1498–1500. Class members in *United Flight* were from two very antagonistic pilot organizations, each seeking different retirement benefit changes, and no named plaintiff was a member of the second subclass which plaintiffs sought to have certified. In the instant case, there is no evidence that success by plaintiffs in this litigation will result in additional costs to Tele–Trip and, thus, harm current employees' benefits and salaries. Even if such a result were to come about, the benefits to current employees formerly employed as independent contractors from a successful law suit might be greater than any costs to employees in reduced employee benefits and salaries. Thus, employees may well prefer increased benefits over the status quo. In any event, class certification should not be denied by speculative suggestions of potential conflicts. *Rosario v. Livaditis,* 963 F.2d 1013, 1018–19 (7th Cir.1992), *cert. denied,* 113 S.Ct. 972 (1993). Moreover, other courts have rejected arguments similar to defendants', holding that for purposes of a class action these facts do not create a conflict. *See Probe v. State Teachers' Retirement System,* 780 F.2d 776, 781 (9th Cir.1986), *cert. denied,* 106 S.Ct. 978 (1986) (upholding class certification by concluding no conflict raised between retired teachers seeking increased benefits and currently employed teachers who will theoretically have to pay such benefits).

***8** Most importantly, whether plaintiffs proceed on an individual or on a class suit basis, the requested injunctive and declaratory relief they seek will generally benefit not only plaintiffs but other persons previously employed as independent operators. *See Probe* at 781; *Horton v. Goose Creek Independent School Dist.,* 690 F.2d 470, 487 n. 32 (5th Cir.1982), *rehearing denied,* 693 F.2d 524 (1982), *cert. denied,* 103 S.Ct. 3536 (1983) (absentee members will not be much better protected from the effect of the decision granting relief if certification denied). If, in an individual suit, an independent operator is determined by the court to be an employee under both the Plan and ERISA, any consequential injunctive and declaratory relief will, for all practical purposes, settle the issue for other independent operators.

In addition, even if a material conflict exists, the court need not necessarily deny class certification. A court may certify a class where the unnamed class plaintiffs, whose interests are antagonistic to other members of the class, are adequately represented by defendants in a class action. *Horton* 690 F.2d at 487. In addition, the court may create subclasses or exclude a sub-group from the class definition. 1 *Newberg on Class Actions,* § 3.31 (3d. Ed.1992); Fed.R.Civ.P. 23(c)(4). The class can also be certified under Rule 23(b)(3), which gives class members the opportunity to opt-out. Fed.R.Civ.P. 23(c)(2); 1 *Newberg on Class Actions,* § 3.30 (3d. Ed.1992). *Feder v. Harrington,* 52 F.R.D. 178, 182 (S.D.N.Y.1970); *Siegel v. Chicken Delight, Inc.,* 271 F.Supp. 722, 728 (N.D.Cal.1967). In addition, the court can certify the class conditionally to provide time for disagreement among class members to become clear, or the court can decertify a class if it becomes apparent that the representation is inadequate. Fed.R.Civ.P. 23(c)(1). The rules seem to indicate that courts should err in favor of certification. *Horton,* 690 F.2d at 487.

Defendants also contend that there is a conflict between the named representatives of the class and independent operators who prefer to remain as independent operators.

In 1984, Tele–Trip offered eleven independent operators the opportunity to return to being employees of Tele–Trip. Seven of those independent operators declined this offer. Defendants speculate that these independent operators prefer to remain independent operators for the greater benefits and tax deductions. In fact, defendants cite part of a letter by Mary Ann Congelio ("Congelio"), who chose to remain an independent operator, in which she states that "if the benefits of being a Counter Manager are the same as they were, then I feel it is more advantageous to the company, my staff, and myself that I remain an independent operator." According to defendants, "the relief sought by the named plaintiffs will have an unwanted detrimental impact on those individuals who plainly prefer their independent status." Consequently, the interests of independent operators who prefer independent status diverge from the interests of the named plaintiffs.

***9** Plaintiffs, however, have an affidavit by Congelio stating that she understands that in order to receive pension benefits a legal determination will have to be made that she was an employee rather than an independent operator, and that she wants pension benefits for her years as a Tele–Trip independent operator. Thus, there is at this time no evidence that a conflict exists between independent operators who chose independent status and the remainder of the class.

Defendants' third claim of conflict within the proposed class involves the interests of independent operators and the current and former employees of independent operators.

According to defendants, the named plaintiffs have conceded that the people they hired were their employees, not Tele–Trip's, and that this undermines any claim their employees might have to be considered employees of Tele–Trip. Whatever merit this argument has, it does not demonstrate a conflict.

According to the Restatement of Agency 2d, §§ 5(2), 220 Comment (1)(f), if a worker is an employee, than that worker's own employees are also subservants or employees of that same employer. If independent operators are found to be employees

of Tele–Trip, then independent operator employees will also be found employees of Tele–Trip. As plaintiffs state, "the claims of the independent operators' employees are simply derivative of the claims of the independent operators themselves."

C. The Certification Requirements of Rule 23(b)

In order for a class to be certified, the proposed class must, in addition to meeting the four requirements of Rule 23(a), fulfill at least one of the three prerequisites of Rule 23(b). *Edmondson v. Simon,* 86 F.R.D. 375, 382 (N.D.Ill.1980).

Rule 23(b)(2) provides that a class action may be maintained where 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. Several cases hold that certification of an ERISA claim is proper under Rule 23(b)(2) where monetary relief, in conjunction with injunctive relief, is sought. *Church v. Consolidated Freightways, Inc.,* 1991 WL 284083, 14 (N.D.Cal.1991); *Morgan v. Laborers Pension Trust Fund,* 81 F.R.D. 669, 681 (N.D.Cal.1979) ("[C]ourts are not precluded from certifying a class under Rule 23(b) merely because plaintiffs have included a request for monetary damages in their complaint. Rather, '[w]here the monetary relief sought is integrally related to and would directly flow from the injunctive or declaratory relief sought, 23(b)(2) status is appropriate.' "), *quoting Souza v. Scalone,* 64 F.R.D. 654 at 658 (N.D.Cal.1974), *vacated on other grounds,* 563 F.2d 385 (9th Cir.1977); *Jansen v. Greyhound Corp.,* 692 F.Supp. 1022, 1028 (N.D.Iowa 1986) (ERISA monetary relief for retroactive payment of welfare benefits will flow directly from declaratory and injunctive relief, and is secondary to the declaratory/injunctive relief requested).

***10** Plaintiffs seek a declaration that class members are covered by defendants' Plan, and an injunction ordering class members be awarded service credit under the Plan. Contrary to defendants' position, the court should not deny class certification under Rule 23(b)(2) because plaintiffs seek monetary relief through declaratory and injunctive relief. As the cases cited above hold, monetary relief in this fashion is appropriate.

The proposed class also fulfills the requirements of Rule 23(b)(3). Class certification is appropriate under Rule 23(b)(3) where "the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy." Fed.R.Civ.P. 23(b)(3). Plaintiffs' claim in this case rests on the court's interpretation of the Plan and on a categorical determination as to whether those independent operators for whom plaintiffs seek benefits were employees covered by ERISA. According to plaintiffs, these questions are common to the proposed class and predominate over questions affecting individual members. Defendants disagree because the "need to resolve the numerous, multi-faceted issues affecting individual class members so overwhelms all else that rule 23(b)(3) certification is inappropriate."

Defendants rely on *Hewitt v. Joyce Beverages of Wisc., Inc.,* 97 F.R.D. 350 (N.D.Ill.1982), *aff'd,* 721 F.2d 625 (7th Cir.1983), and *Stewart v. Waters Tan & Co.,* 1992 CUL 121545, 1992 U.S.Dist. LEXIS 7139 (N.D.Ill.1992). Those cases are dissimilar to the case at hand.

In both *Hewitt* and *Stewart,* Rule 23(b)(3) was not met because the cases turned on individual questions of reliance or expectation on the part of the class members. For example, in *Stewart,* a case about oral misrepresentation, the court asserted that finding questions of law and fact common to the class "may be problematic in an action for fraud, since the claims of each putative class member will depend upon the nature of the alleged misrepresentations, the extent to which each member relied on those misrepresentations and the reasonableness of such reliance." *Stewart,* 1992 WL 121545 at *4, 1992 U.S.Dist. LEXIS 7139 at 6. To show that the question of reliance was common to the class, the plaintiffs needed to demonstrate that the oral misrepresentations were similar in material respects. This plaintiff could not do so because the defendant tailored his pitch depending on the potential investor's level of sophistication. Thus, the oral misrepresentations lacked uniformity and the question of reliance was not common to the class. *Id.*

In *Hewitt,* an anti-trust action, the plaintiffs alleged that the defendants either coerced or entered into an implied agreement with delivery men to fix resale prices of their product. The court denied class certification for two reasons. First, the plaintiffs failed to meet the commonality requirement because there was no allegation of an uniform agreement, and because overt coercive action by the defendant "would be individualized in nature and thus not appropriately dealt with in the class action format." *Hewitt,* 97 F.R.D. at 354 n. 9. Second, the plaintiffs failed to allege adequately the existence of injury. *Id.* at 354.

***11** Consequently, the courts denied class certification in both *Stewart* and *Hewitt,* principally because questions affecting individual members predominated over any questions of law or fact common to the members of the class.

In contrast, the present case does not require a determination of individual questions of reliance or coercion. Objective criteria can be used to determine the facts necessary for determination of the case (*e.g.,* Tele–Trip's treatment of the proposed class as a whole and differences among independent operator locations).

In addition, a class action is likely superior to individual trials for the adjudication of the controversy. A class action, in contrast to individual actions, will save time and money for both parties. A class action will also prevent different courts from interpreting the Plan differently.

Plaintiffs' proposed class satisfies the four requirements of Rule 23(a) and also meets the requirements of Rule 23(b)(2). The court, therefore, grants plaintiffs' motion for class certification.

D. Defendants' Motion to Dismiss and/or Summary Judgment

Having disposed of plaintiff's motion for class certification, the court now turns its attention to defendants' motions. As previously indicated, defendants have formulated their motions as "motions to dismiss and/or for summary judgment." Both parties have filed the requisite statements in accordance with local Rule 12, and the court has relied on the documents and testimony submitted by both parties as appendices to their briefs. Consequently, defendants' motions will be considered as motions for summary judgement. Summary judgment is only appropriate where there are no disputed material issues of fact necessitating a trial. *Celotex Corp. v. Catrett,* 477 U.S. 317, 322–23, 106 S.Ct. 2548, 2552–53 (1986). No material issue of fact exists for trial if, in viewing the evidence in a light most favorable to the nonmoving party, a reasonable jury could not return a verdict in the non-movant's favor, *Anderson v. Liberty Lobby, Inc.,* 106 S.Ct. 2525 (1986). The party moving for summary judgment bears the initial burden of supporting its motion that no genuine issue of material fact exists. *Celotex,* 106 S.Ct. 2548 (1986). If that burden is met, the non-moving party must come forward with facts to rebut that showing. *Id.* at 2553.

Defendants' motions address two issues. First, defendants argue that plaintiffs are not "participants" as defined by ERISA. Consequently, defendants contend that plaintiffs lack standing to bring this claim under section 502(a)(1)(B) of ERISA, and the court lacks subject matter jurisdiction over the case. Second, defendants argue that Mutual and Tele–Trip should be dismissed from this action as they are not proper defendants under section 502(d) of ERISA.

1. Plaintiffs' Standing Under Section 502 of ERISA

Defendants argue that the true nature of plaintiffs' claim is one attacking "their exclusion from participation in the Plan during the time they served as independent operators" and, as such, contend that this claim falls outside the boundaries of section 502(a)(1)(B).

***12** Plaintiffs respond that they are entitled to benefits for the time that they were classified as "independent contractors" by defendants and that their claim falls squarely within the terms of section 502(a)(1)(B).

Section 502(a)(1)(B) provides that a civil action may be brought:

> (1) by a participant or beneficiary—
>
> (B) to recover benefits due him under the terms of his plan to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan.

The heart of defendants' contention is that plaintiffs are neither "participants" nor beneficiaries under section 502. Defendants argue that the instant case is closely analogous to *Boren v. SW Bell Telephone Co.,* 933 F.2d 891 (10th Cir.1991). In *Boren,* plaintiff, an architect, entered into a series of one-year employment contracts with defendant corporation. Plaintiff was never enrolled in defendant's benefit plan and testified that he was "aware that independent contractors were not included in the pension plan." *Boren,* 933 F.2d at 892. After his termination, plaintiff argued that he was an "employee" of the defendant corporation and entitled to pension benefits. The *Boren* court characterized the plaintiff's argument as one that "under the common law and under certain contractual provisions, he should have been enrolled and contributions should have been made in his behalf." *Id.* at 893. The *Boren* court held that this claim had been foreclosed under section 502 of ERISA by the Supreme Court in *Firestone Tire & Rubber Co. v. Bruch,* 489 U.S. 101, 117, 109 S.Ct. 948, 957 (1989).

Defendants have misapprehended plaintiffs' claim. Plaintiffs, here, are not contending that they should have been enrolled in defendants' Plan. Rather, plaintiffs maintain that they were enrolled in the Plan as employees of Tele–Trip, and that the mere alteration of their title to "independent operators" did not cause them to cease being enrolled in the Plan. Plaintiffs' claim, therefore, is one to recover benefits due under an ERISA plan.

This, however, does not resolve the standing issue presented by this case. In order to state a claim under section 502(a)(1)(B), plaintiffs must be either "participants" or "beneficiaries" under an ERISA plan. Plaintiffs contend that they were participants in the Tele–Trip plan during the entire time that they worked for Tele–Trip and, therefore, may advance their claim under section 502.

The court agrees with plaintiffs and finds that the undisputed facts as alleged by defendants do not support a finding in defendants' favor on the issue of standing.

ERISA defines a "participant" as "any employee or former employee of an employer ... who is or may become eligible to receive a benefit of any type from an employee benefit plan...." 29 U.S.C. § 1002(7).

The Supreme Court has refined this definition, declaring "In our view, the term 'participant' is naturally read to mean either 'employees in, or reasonably expected to be in, currently covered employment,' (citation omitted) or former employees who 'have ... a reasonable expectation of returning to covered employment' or who have 'a colorable claim' to vested benefits, (citation omitted)." *Firestone Tire & Rubber Co. v. Bruch,* 489 U.S. 101, 117 (1989). In the instant case, plaintiffs are former employees. As plaintiffs retired or were terminated, and there is no indication that they possess any expectations of returning to covered employment, they must have a " 'colorable claim' to vested benefits" in order to be classified as participants.

***13** However, at this stage of the litigation, plaintiffs need not convince the court that they are participants under section 502. Rather, the Seventh Circuit has stated that satisfaction of subject matter jurisdiction as articulated in *Firestone* "depends on an arguable claim, not on success." *Kennedy v. Connecticut Gen. Life Ins. Co.,* 924 F.2d 698 (7th Cir.1991).

In *Keleher v. Dominion Insulation, Inc.,* 1992 WL 252508 (4th Cir.1992), appellant claimed that he was a participant in profit-sharing and benefit plans managed by appellee and that appellee had refused to provide him with a copy of the plan in violation of ERISA. The Fourth Circuit defined the "central question on appeal" as whether the "appellant had a colorable claim to vested benefits under the plan." *Id.* at *3. In ruling that appellant did not have a colorable claim for benefits, the *Keleher* court looked to the very language of the plan noting that it "must analyze the relevant provision of the profit sharing and benefit plans at issue." *Id.* The benefit plans defined those eligible for benefits as employees employed on a full time basis. The *Keleher* court concluded that appellant was unable to fulfill this requirement because full time employment was based on hourly employment and appellant never worked on an hourly basis.

An analysis of the language of the Plan in the instant case leads us to a different result here. The Tele–Trip Plan defined a Plan participant as an "employee" who participated in the Plan in accordance with its provisions. Section 2.3(e) of the Plan in effect during the plaintiffs' service to Tele–Trip, in turn, defined "employee" as:

> Any person who, on or after the Effective Date is receiving remuneration for personal services rendered to an Employer (or would be receiving such remuneration except for an Authorized Leave of Absence). In no event shall Employees include general agents or soliciting agents as those words are defined by the Employer.

Plaintiffs appear to fulfill this definition. Plaintiffs clearly received remuneration for personal services they provided to Tele–Trip, and defendants have not alleged that plaintiffs constituted general or soliciting agents.

However, the definition of "employee" under the Tele–Trip Plan was later amended to exclude "independent contractors." It appears that this amendment did not become effective until after defendants had been terminated by Tele–Trip. Defendants, however, argue that this amendment to the Plan was merely a clarification of the existing Plan, did not alter the definition of "employee", and that the Plan had been consistently interpreted to exclude independent contractors. In addition, defendants have supplied an affidavit by Jane Meyer, an attorney for the Plan, averring that the Plan had consistently interpreted the term "employee" to exclude independent contractors. Defendants also contend that plaintiffs were informed when they became independent operators that they would not receive pension benefits for their service.

***14** Plaintiffs do not contest defendants' claim that the term "employee" has always been read to exclude independent

contractors. Plaintiffs contend that they may have been termed "independent operators" but as a matter of law they were never "independent contractors," but rather were always employees of Tele–Trip. Consequently, they argue that they were never excluded from the Plan. The court declines to reach the merit of this issue as it has not been fully responded to by defendants, nor is it necessary to do so for the purposes of this motion. As previously noted, satisfaction of subject matter jurisdiction within this Circuit "depends on an arguable claim, not on success." *Kennedy v. Connecticut Gen. Life Ins. Co.,* 924 F.2d 698, 700 (7th Cir.1991). The court finds that plaintiffs have advanced an arguable claim for "vested benefits" based on the language of the Plan in existence at the time plaintiffs were in the service of Tele–Trip and, consequently, plaintiffs have standing to bring their claim under section 502 of ERISA. Defendants' motion for summary judgment is denied.

2. Proper Defendants in This Case

Defendants also argue that defendants Mutual and Tele–Trip should be dismissed from this case as they are improper defendants in this ERISA action. Again, the court treats defendants' motion as one for summary judgment.

In determining if an employer of a sponsoring pension plan is a proper party under a section 502 action, the court must first determine whether an administrator for the pension plan has been appointed. "If so, the administrator is the proper party, not the employer, unless the employer has controlled or influenced the administrator's decisions in regard to awarding pension benefits." *In Re Robertson,* 115 B.R. 613, 621–22 (Bankr.N.D.Ill.1990), citing *Reynolds v. Bethlehem Steel Co.,* 619 F.Supp 919, 928 (D.C.Md.1984).

In the present action, a Plan administrator has been appointed. Mutual and Tele–Trip granted the Plan's Pension Committee ("Committee") the sole authority to manage and administer the Plan. The Plan gives the Committee the authority to "construe and interpret the Plan, decide questions of eligibility and determine the amount, manner and time of any payment benefits thereunder." Plan Agreement, Art. VIII, § 8.5(a). Thus, the court's determination as to whether Mutual and Tele–Trip should be dismissed as improper parties to this suit depends on whether they controlled or influenced the administrator's decisions in regard to awarding pension benefits.

"Control" refers to the power to decide whether or not benefits should be paid. *In Re Robertson,* 115 B.R. at 622. Even though a committee which administers a plan is a distinct legal entity from the sponsoring committee, it is still possible for the sponsoring company to control the plan and, thus, be held liable under ERISA. *Id.* at 623; *Reynolds,* 619 F.Supp. at 928.

Plaintiffs cite a number of facts in support of their argument that Mutual exerted control over the Plan. Mutual sent out individual annual reports for the Plan, registered the Plan with the Internal Revenue Service, prepared tax returns, filed reports with the Department of Labor, issued rules for the Plan, obtained information from employers and employees, and staffed the Committee entirely with Mutual officers who were not compensated for their services. In addition, the Committee used the same attorneys as Mutual, and denial of plaintiff's claims were made on Mutual stationery.

***15** These facts show that Mutual was heavily involved in the affairs of the Plan, but do not indicate that Mutual influenced or controlled the Committee's determination as to who received pension benefits.[4]

Plaintiffs rely on *Law v. Ernst & Young,* 956 F.2d 364 (1st Cir.1992), to support their position, but that reliance is misplaced.

In *Law,* the defendant (the sponsoring employer of ERISA plan) was held liable to pay $100.00 per day fine for failing to provide information concerning plan benefits. The court regarded the defendant as the plan administrator for purposes of the plaintiff's claim, even though the plan specifically designated a retirement committee to act as the administrator of the pension plan. The court based this determination on several factors. First, the retirement committee members were appointed by the sponsoring employer; all expenses in connection with administration of the plan were paid by the sponsoring employer; and the employer agreed to purchase liability insurance or indemnify committee members' claims against the committee in connection with their duties. The court stated that these factors alone did not show that the employer had control of the committee in regards to the claim. The court, however, found that the employer assumed control of the committee's information providing function where Law's request was processed by the employer, using employer stationery and the correspondence never once mentioned the committee. Thus, the court found that the "district court was entitled to conclude from this evidence that Arthur Young [the employer] itself was voluntarily assuming, and that it controlled, the information-providing function (at least) of the Retirement Committee." *Law* at 374.

The case at bar differs from *Law.* First, the court in *Law* found the defendant controlled the information-providing function of the committee and held it responsible for failing to perform properly such duty. The court, however, did not find that the

employer controlled the benefit disbursement function of the committee. The case at hand concerns the award and control of pension benefits, not information about those benefits. Second, in *Law,* the defendant never referred to the existence of the plan committee in its correspondence (thus, acting as though it was the administrator), while correspondence between plaintiffs and the Committee in the instant case was on Mutual stationery, and the correspondence always stated that the Committee made the determination of benefits. Consequently, the undisputed facts of this case indicate that Mutual did not influence or control the Committee's determination concerning the disbursement of pension benefits.

In addition, in *In Re Robertson,* the ERISA plan committee was composed entirely of partners from the sponsoring employer who served on the committee without compensation, and the pension withdrawal form contained the sponsoring employer's name and logo. Still, that court found such evidence insufficient to show that the employer controlled the plan in the payment of benefits. *In Re Robertson,* 115 B.R. at 623. *See also Reynolds,* 619 F.Supp. at 929 (sponsoring company did not exert "influence and control" over General Pension Board where employees of sponsoring company sat on General Pension Board and sponsoring company's medical department made initial determination of good health). Consequently, the court grants defendants' motion for summary judgment dismissing defendant, Mutual.

***16** Plaintiff's claim that Tele–Trip is a proper defendant to this action is even more tenuous. Plaintiffs allege that since the Plan is administered by Mutual, its subsidiary, Tele–Trip, also has become involved in the administration of the Plan. Plaintiffs support their assertion with evidence that Tele–Trip's Vice President and Director of Internal Operations met with Mutual employees and discussed plaintiffs' claims. Such facts, taken as undisputed for defendants have not refuted them in their memoranda, however, do not establish that Tele–Trip had any control or influence over the Committee's decision regarding the disbursement of benefits. The undisputed facts here, too, support dismissal of Tele–Trip as a defendant in this case.

IV. CONCLUSION

The court finds that plaintiffs' proposed class satisfies the class certification requirements enumerated in Rule 23 of the Fed.R.Civ.P. and, therefore, grants plaintiffs' motion to certify as a class "all persons who have been or are being characterized as independent operators of Tele–Trip airport locations, and the employees of such independent operators, excluding the two persons currently so characterized in Minneapolis and San Francisco."

The court also finds that plaintiffs have standing under section 502 of ERISA to proceed with their claim for denial of benefits due under defendants' benefit Plan and, therefore, denies defendants' motion for summary judgment on the issue of jurisdiction. The court, however, does grant defendants' motion to dismiss defendants, Mutual and Tele–Trip, finding them to be improper defendants for a section 502 action.

IT IS SO ORDERED.

Footnotes

1 Defendants admit that plaintiffs are neither general agents nor soliciting agents.

2 Defendants admit that the section of the Plan cited in the letter denying plaintiffs benefits came from an 1989 restatement of the Plan. In that restatement, section 2.3(e) was amended to exclude independent contractors and employees thereof. The restatement as not adopted by the Mutual Board of Directors until August 30, 1990, and Plan participants did not receive notice of the Plan amendments until July, 1991. Thus, the restatement, which excluded independent contractors from the Plan, was adopted after plaintiffs had left Tele–Trip.

3 Plaintiffs assert that the operators of airport facilities in San Francisco and Minneapolis are not subject to the same kinds of controls, limitations or relationship to Tele–Trip as the other independent operators.

4 According to section 8.2 of the Plan, the Committee can delegate the day-to-day operation of the Plan, including the payment or rejection of claims, to the company's Benefits Department or to such other department(s) as in their judgement would be appropriate, subject to the review and final authority of the Committee as it deems appropriate. Plaintiffs allege that the Committee did delegate decisions on the disbursement of benefits to Mutual's Benefits Department. Still, under the Plan, final authority remained with the Committee. *See Reynolds,* 619 F.Supp. at 929 (sponsoring company did not control determination of benefits where sponsoring employer's agent made initial recommendation to grant or deny benefit payment and administrative committee

made final determination).