Nos. 09-3018 & 09-3001

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

PAT BEESLEY, et al., Plaintiffs-Appellees, v. INTERNATIONAL PAPER COMPANY, et al., Defendants-Appellants.	GARY SPANO, et al., Plaintiffs-Appellees, v. THE BOEING COMPANY, et al., Defendants-Appellees.

BRIEF OF THE SECRETARY OF LABOR AS AMICUS CURIAE IN SUPPORT OF PLAINTIFFS-APPELLEES URGING AFFIRMANCE

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STATEMENT OF INTEREST

The Secretary has primary enforcement and regulatory authority for Title I of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1001, et seq. Accordingly, the Secretary seeks to ensure the proper construction of ERISA's enforcement and remedial provisions, which were enacted to safeguard the security of retirement benefits. Id. § 1001(b). These cases concern plaintiffs' claims of fiduciary breach under ERISA sections 409(a) and 502(a)(2), 29 U.S.C. §§ 1109(a) and 1132(a)(2), on behalf of various defined contribution plans. The district court granted class certification in both cases under Federal Rule of Civil Procedure 23 based, in part, on its understanding that a section 502(a)(2) claim is a claim on behalf of a plan. The Secretary has a strong interest in urging the Seventh Circuit to affirm the district court's certification as consistent with the Supreme Court's recent determination in LaRue that claims for plan losses that do not benefit every participant are nevertheless plan claims. For similar reasons, she has an interest in advancing a correct understanding of a section 502(a)(2) claim as one brought on behalf of the plan. The Secretary respectfully submits this brief pursuant to Federal Rule of Appellate Procedure 29(a).

QUESTIONS PRESENTED

1. Whether the district court correctly rejected defendants' argument that, under the Supreme Court's decision in LaRue v. DeWolff, Boberg & Assocs., Inc., 552 U.S. 248, 128 S. Ct. 1020 (2008), there are no plan claims in the context of defined contribution plans and that, as a consequence, a claim for losses under section 502(a)(2) of ERISA, 29 U.S.C. § 1132(a)(2), is merely a claim for individual participants' losses that does not lend itself to class action treatment.

2. Whether the district court correctly held that purported conflicts among plan participants do not defeat class certification under Federal Rule of Civil Procedure 23(a).

STATEMENT OF THE CASES

I. Factual Background

International Paper Company ("International Paper") sponsors two ERISA-governed 401(k) defined contribution plans ("the IP Plans") for its employees. A. 3.[1] Participants in the IP Plans contribute pre- and post-tax earnings to the Plans, which International Paper matches in varying

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1 The Beesley v. International Paper decision is cited by reference to the Beesley defendants' Short Appendix as "A." The Spano v. Boeing decision, discussed below, is cited by reference to the Spano defendants' Short Appendix as "App."

percentages. Id. The Company Stock Fund, which holds International Paper stock, is one investment option in the Plans. Id. at 4. The IP Plans' assets are held in a Master Trust, through which the services, expenses, and administrative fees of various service providers are shared. Id. at 3.

The plaintiffs in Beesley v. International Paper brought claims pursuant to ERISA sections 409(a) and 502(a)(2), 29 U.S.C. §§ 409(a), 502(a)(2), on behalf of a proposed class of participants in the IP Plans seeking to recover losses to the IP Plans allegedly stemming from breaches of fiduciary duty. A. 2. The plaintiffs allege that the IP Plans' fiduciaries breached their duties by (a) causing excessive administrative fees and expenses to be charged to the IP Plans; (b) imprudently maintaining the Company Stock Fund as an investment and forcing participants to hold company stock, even as the defendants liquidated their stock holdings in the Company's defined benefit pension plan; (c) concealing information and misleading participants regarding the fees charged and risks posed by Company Stock Fund investments; and (d) giving little or no attention to the proper management of the Plans. Id. at 4. Plaintiffs also seek remedies pursuant to section 502(a)(3), 29 U.S.C. § 1132(a)(3). Id. at 2.

The facts in Spano v. Boeing are similar. Like International Paper, Boeing sponsors an ERISA-governed 401(k) defined contribution plan ("the

Boeing Plan") for its employees. App. 3. Participants in the Boeing Plan contribute pre- and post-tax earnings to the Plans, which Boeing matches in varying percentages. Id. The Boeing Stock Fund, which holds Boeing stock, is one investment option in the Plan. Id. at 4-5. The Plan's assets are held in a Master Trust, through which the services, expenses, and administrative fees of various service providers are shared. Id. at 3-4. The Spano plaintiffs allege violations of ERISA section 409(a), 29 U.S.C. § 1109(a), and seek remedies for losses to the Boeing Plan pursuant to section 502(a)(2), 29 U.S.C. § 1132(a)(2), on behalf of a proposed class of Boeing Plan participants. App. 1. The plaintiffs allege the following fiduciary breaches by the defendants: (a) causing or allowing unreasonable fees and expenses to be charged against the Boeing Plan's assets through a combination of "Hard Dollar" payments and hidden "Revenue Sharing" transfers; (b) causing the Boeing Stock Fund to incur unnecessary fees and hold excess cash; (c) failing to disclose and/or concealing material information regarding Boeing Plan fees and expenses; and (d) selecting investment options which charged excessive management expenses and which were used to funnel excessive fees to various third parties via the

undisclosed revenue sharing program. Id. at 4-5. The Boeing plaintiffs also seek relief pursuant to section 502(a)(3), 29 U.S.C. § 1132(a)(3).[2] App. 1-2.

II. The District Court's Opinions

Both Beesley and Spano were before Chief Judge Herndon of the Southern District of Illinois. In his decisions granting class certification in Beesley and Spano, Judge Herndon recognized that "[p]laintiffs claim that the breaches occurred on a plan-wide basis, and were the result of decisions made at the plan, rather than the individual level." A. 2; App. 1-2. The Court first found that that the plaintiffs satisfied all four of the prerequisites of Federal Rule of Civil Procedure 23(a). A. 6-17; App. 7-16. The defendants did not contest, and the court agreed, that the plaintiffs met Rule 23(a)(1)'s numerosity requirement. A. 8; App. 9. Rule 23(a)(2) requires commonality in law and fact, which the defendants argued was lacking because each participant's claim should depend on their individual investment decisions. A. 8-10; App. 11. The court disagreed, finding that the plaintiffs' section 502(a)(2) claims "are derivative in nature – that is, they focus on the injury to the plan from the fiduciary's alleged breach, rather than on injury to the individualized participants . . . Therefore, variance in

[2] The Secretary takes no position on the merits of the plaintiffs' underlying fiduciary breach claims in either the Spano or Beesley litigation.

individual Plan participants' investment patterns does not undermine commonality." A. 10; see App. 10-11. The court likewise found that the plaintiffs satisfied Rule 23(a)(3)'s typicality requirement because they alleged that the defendants breached their fiduciary duties and caused injuries to the Plans as a whole. A. 11-12; App. 12-13. The defendants argued that the plaintiffs' misrepresentation claims required individual inquiries into detrimental reliance, but the court stated that typicality existed because the alleged misrepresentations occurred on a plan-wide basis. A. 13-14; App. 13-14.

The district court additionally rejected the defendants' arguments that purported intra-class conflicts precluded satisfaction of the final Rule 23(a) prerequisite for class certification, adequacy of representation. A. 15-16; App. 15-16. The Beesley defendants argued that class members who bought or sold the disputed stock on a particular day have opposing interests – the former to show to the greatest extent possible that the price was inflated and the latter to show that the price was minimally inflated by the alleged fraud. A. 15. The Spano defendants contended that the interests of the named plaintiffs, whose accounts no longer held stock in the disputed funds, were in conflict with the interests of participants who continued to hold such stock in their individual accounts. App. 15. The district court considered and

rejected both theories. Reiterating the view that "this is an action on behalf of the Plan, not for individual relief," the Beesley opinion concluded that "there is no inherent conflict between the claims of the named plaintiffs and those of the putative class." A. 16; see App. 15-16.

Turning to the criteria of Rule 23(b), the district court focused on Rule 23(b)(1)(B), which permits certification if adjudications with respect to individual class members would be dispositive of the interests of other members. A. 17-18; App. 16-17. The court determined that the plaintiffs' claims satisfied the requirements of Rule 23(b)(1)(B) because they "would, as a practical matter," completely resolve the other participants' claims. A. 18; App. 17. Moreover, the plaintiffs' actions, which asserted claims on behalf of a trust for which any recovery would ultimately be distributed to the participants and beneficiaries, were the types of suits traditionally encompassed by Rule 23(b)(1)(B). A. 18; App. 16-17.

This Court granted the Beesley and Spano defendants' petitions for interlocutory review under Rule 23(f) on August 10, 2009, and consolidated the two cases with Howell v. Motorola, Inc., 07-3837, and Lingis v. Dorazil, 09-2796, both of which have already been briefed and argued.

SUMMARY OF THE ARGUMENT

The Supreme Court has long held that participants in defined contribution plans can bring claims under sections 502(a)(2) and 409(a) on behalf of those plans to recover plan losses, and indeed that these sections of ERISA only permit recovery to the plan, not to individuals. This is because the statutory text of these sections plainly indicates that section 502(a)(2) claims are on behalf of the plan for the recovery of plan losses. Indeed, this Court has already recognized in Rogers v. Baxter International, Inc., 521 F.3d 702 (7th Cir. 2008), that section 502(a)(2) allows participants in a defined contribution plan to proceed with a class action claim on the behalf of the plan to remedy a fiduciary's breach of duty owed to the plan.

The plaintiffs in these cases allege that the fiduciary defendants breached the duties they owed to the Plans, and seek to recover any resulting losses for the benefit of those Plans. The plaintiffs do not seek – nor could they under section 502(a)(2) – relief to any individual participants or to their 401(k) accounts; rather, any recovery in this case will inure to the benefit of the Plans' trusts, in which all the assets of the defined contribution Plans are required by statute to be held. That the recovery will ultimately benefit individual participants does not change the plan nature of the plaintiffs'

section 502(a)(2) claims, as the Supreme Court and this Court have clearly recognized.

Thus, the defendants' attempts to defeat Rule 23 class certification by individualizing the plaintiffs' claims miss the mark. Because the statutory text provides that section 502(a)(2) claims focus on plan injuries, not individual harm, the individual participants' investment decisions are irrelevant. The district court quite properly focused its inquiry on whether the requirements of Rule 23(a), specifically commonality and typicality, are met where, as here, the defendants allegedly engaged in a single course of illegal conduct against the Plans, and the court correctly concluded that these requirements were met because each class member has a common interest in redressing the Plans' losses. Likewise, the court correctly held that Rule 23(b) is satisfied because resolution of the claim made by any single participant would effectively decide the claims of all other participants, and any recovery will be held in trust for subsequent allocation and distribution.

For similar reasons, the defendants also err in contending that, because of their varying investment histories, the individual plan participants have conflicting interests with regard to a recovery that preclude class certification. If accepted as a theoretical matter, this theory would not only eliminate any possibility of maintaining an ERISA class action for plan-wide

investment-related fiduciary breaches, it would logically mean that any 502(a)(2) suit by a plan participant could only assert and recover losses to that individual participant's account. But it should not be accepted. The defendants' focus on individual participant behavior and losses finds no support in the statutory language, which not surprisingly focuses on fiduciary rather than participant behavior, and expressly empowers each plan participant to sue to recover any resulting losses to ERISA plans caused by any lapses in that behavior, as both the Supreme Court and this Court have recognized.

ARGUMENT

I. The LaRue decision held that, in a defined contribution plan, losses caused by fiduciary breach and attributable to individual accounts are nevertheless plan losses that are properly asserted on behalf of the plan and remedied by a claim under ERISA sections 502(a)(2) and 409(a)

The Supreme Court in LaRue reaffirmed, as it had held in Massachusetts Mut. Life Ins. Co. v. Russell, 473 U.S. 134 (1984), that claims brought under ERISA sections 409(a) and 502(a)(2) are claims on behalf of the plan for the recovery of plan losses. LaRue, 128 S. Ct. at 1026 ("We therefore hold that although § 502(a)(2) does not provide a remedy for individual injuries distinct from plan injuries, that provision does authorize recovery for fiduciary breaches that impair the value of plan assets in a

participant's account."). The Court explained that the text of ERISA section 409 "characterizes the relevant fiduciary relationship as one 'with respect to the plan' and repeatedly identifies the 'plan' as the victim of any fiduciary breach and the recipient of any relief." Id. at 1024 (quoting Russell, 473 U.S. at 140). The Court also found support for that view in ERISA's structure and legislative history. LaRue, 128 S. Ct. at 1024-25. Indeed, while the Court's majority decision was joined by two concurrences, the entire Court agreed that section 502(a)(2) provides for suits to remedy fiduciary breaches that harm plans. See id. (Roberts, C.J., concurring) (joining the Court in rejecting the Fourth Circuit's conclusion that "the loss to LaRue's individual plan account did not permit him to 'serve as a legitimate proxy for the plan in its entirety,' thus barring him from relief under § 502(a)(2)"); see also id. at 1029 (Thomas, J., concurring) ("Because a defined contribution plan is essentially the sum of its parts, losses attributable to the account of an individual participant are necessarily 'losses to the plan' for purposes of § 409(a).").

The text of sections 502(a)(2) and 409(a) unambiguously supports a conclusion that the plaintiffs' claims are plan claims. Section 502(a)(2) states that "[a] civil action may be brought" by a participant to obtain "appropriate relief" under section 409. 29 U.S.C. § 1132(a)(2). Section

409(a) provides that "a fiduciary with respect to a plan . . . shall be personally liable to make good to such plan any losses to the plan resulting from each [fiduciary] breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary." 29 U.S.C. § 1109(a) (emphasis added). Thus, while section 409, like the statute as a whole, is designed "with an eye toward ensuring that 'the benefits authorized by the plan' are ultimately paid to participants and beneficiaries," LaRue, 128 S. Ct. at 1024 (quoting Russell, 473 U.S. at 142), "[t]he plain text of § 409(a), which uses the term 'plan' five times, leaves no doubt that § 502(a)(2) authorizes recovery only for the plan." LaRue, 128 S. Ct. at 1028 (Thomas, J., concurring).

The Seventh Circuit addressed the scope of section 502(a)(2) relief in a post-LaRue case with allegations similar to those in the instant case. See Rogers v. Baxter International, 521 F.3d 702 (7th Cir. 2008). Rogers involved a class action suit by participants in a defined-contribution plan alleging that fiduciaries violated section 409(a) by continuing to allow participants to invest in company stock that the fiduciaries purportedly knew was overvalued. Id. at 703-04. This Court concluded that the defined-contribution plan participants had alleged a valid private right of action against the fiduciaries and could proceed with their claim. Id. at 705. The

Court correctly recognized that LaRue held that sections 502(a)(2) and 409(a) permit the participants in defined contribution plans to bring suit "even though other participants are uninjured by the acts said to constitute a breach of fiduciary duty." Id.; see LaRue, 128 S. Ct. at 1024 ("the legal issue under § 502(a)(2) is the same whether [the plaintiff's] account holds 1% or 99% of the total assets in the plan"). Therefore, in affirming the district court's decision permitting the suit to proceed, this Court held "that participants in defined-contribution plans may use § 502(a)(2), and thus § 409(a), to obtain relief if losses to an account are attributable to a pension plan fiduciary's breach of a duty owed to a plan." Rogers, 521 F.3d at 705 (emphasis added).[3]

This Court's holding in Rogers "pretty much disposes of this appeal," 521 F.3d at 705, to the extent that defendants' arguments rely on a contrary

[3] Other circuits' post-LaRue decisions are in accord. See Fisher v. Penn Traffic Co., 319 Fed. Appx. 34, *35 (2d Cir. 2009) ("LaRue explained that a participant in a defined contribution plan may maintain a claim for relief under section 502(a)(2) if a fiduciary breach impaired the value of plan assets in the participant's individual account . . . Such harms are of the type contemplated by the statute's draftsmen, because they affect the plan.") (emphasis added); In re Mutual Funds Investment Litigation, 529 F.3d 207, 218 (4th Cir. 2008) (section 502(a)(2) "recovery is obtained by the plan – even if it is for injury only to a particular individual account – because the aggregation of individual accounts defines the assets of the plan.").

construction of LaRue and section 502(a)(2). The defendants' primary argument is that a claim for breach of fiduciary duty in the context of a defined contribution plan is not a claim of injury to the plan but a claim of injury to the individual class members, because each individual participant is entitled to be paid benefits only from his or her individual account. See, e.g., Beesley Defs' Br. at 17-19; Spano Defs' Br. at 20. In other words, the defendants dispute "the district court's core assumption – that ERISA section 502(a)(2) claims are nothing more than derivative actions seeking to recover plan losses." Beesley Defs' Br. at 14. Instead, the defendants claim that commonality under Rule 23(a) is lacking because each participant's claim depends on individual investment decisions. Id. at 15-16. Likewise, according to the defendants, the named plaintiffs are improper class representatives because of alleged conflicts among the class members given these different investment decisions. See Beesley Defs' Br. at 30 (arguing that "participants controlled, and were responsible for, their own decisions to invest in certain funds offered under the Plans" and that "[f]or many of these participants, their investments in these funds were perfectly prudent, when taking into account their individual circumstances").[4]

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[4] This argument additionally conflates the certification inquiry with the merits, which are not properly before the court on this 23(f) appeal.

As the district court correctly held, all of these arguments "ignore[] that Plaintiffs . . . brought this suit on behalf of the Plan under ERISA § 502(a)(2)," which "focus[es] on the injury to the plan from the fiduciary's alleged breach, rather than on injury to the individualized plan participants." A.1 Nor can the defendants' arguments overcome LaRue's explicit recognition that section "502(a)(2) does not provide a remedy for individual injuries distinct from plan injuries." LaRue, 128 S. Ct. at 1026.

This Court should likewise reject the defendants' argument that Rule 23(b)(1)(B)'s historical lineage with claims on behalf of trusts is not satisfied because of "[t]he individualized nature of plaintiffs' claims." Spano Defs' Br. at 18. The purpose of Rule 23(b)(1)(B) is to prevent individual plan participants from "practical[ly] if not technical[ly] . . . concluding the interests of the other [participants] as well, or of impairing the ability of the others to protect their own interests." Ortiz v. Fibreboard Corp., 527 U.S. 815, 833 (1999). Rule 23(b)(1)(B) is applicable here because the plaintiffs allege, on behalf of their respective plans, that the defendants engaged in a single course of illegal conduct towards those plans; resolution of such a claim by any single participant would effectively resolve similar claims of other plan participants. Moreover, "[a]mong the traditional varieties of representative suit encompassed by Rule 23(b)(1)(B) were those involving

the 'presence of property which called for distribution or management.'" 527 U.S. at 833. Accordingly, the Advisory Committee Notes to Rule 23 explain that Rule 23(b)(1)(B) "applies to an action which charges a breach of trust by an indenture trustee or other fiduciary similarly affecting the members of a large class of securities holders or other beneficiaries, and which requires an accounting or other like measure to restore the subject of the trust." It is undisputed that the plaintiffs allege that defendant fiduciaries breached duties they owed to the trust, and that any recovery in the instant litigation will necessarily be held in trust for subsequent allocation and distribution. See ERISA section 403(a), 29 U.S.C. § 1103(a) (combined assets of a defined contribution plan must be held in trust).[5] Thus, the defendants miss the mark in arguing that the allocation and distribution process somehow warrants against certification under subsection (b)(1)(B).

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[5] Many courts have certified ERISA class actions in these circumstances. As one such district court explained: "Alleged breaches by a fiduciary to a large class of beneficiaries present an especially appropriate instance for treatment under Rule 23(b)(1). See Advisory Committee Notes, Rule 23(b)(1), Fed. R. Civ. P. Indeed, given the derivative nature of suits brought pursuant to section 502(a)(2) on behalf of the Plan, 'ERISA litigation of this nature presents a paradigmatic example of a (b)(1) class.'" DiFelice v. U.S. Airways, Inc., 235 F.R.D. 70, 80 (E.D. Va. 2006) (citing cases in agreement).

The plaintiffs here brought suit under ERISA sections 409 and 502(a)(2) to recover losses allegedly suffered by the IP and Boeing Plans as a result of a number of asserted fiduciary breaches. The district court's Rule 23 rulings are therefore fully in accord with LaRue's holding that, "[w]hether a fiduciary breach diminishes plan assets payable to all participants and beneficiaries, or only to persons tied to particular individual accounts, it creates the kind of harms that concerned the draftsmen of § 409." 128 S. Ct. at 1025. Under section 409(a), the liabilities and remedies run to the "plan." 29 U.S.C. § 1109(a).

II. Given the nature of the plaintiffs' section 502(a)(2) claims, the purported conflicts based on individual investment behavior are not relevant to the Rule 23(a) analysis

The plaintiffs' claims in Beesley and Spano are brought on behalf of the defined contribution plans and have one common interest: to maximize the recovery of losses that occurred to those plans. Indeed, the Supreme Court long ago recognized in Russell that 502(a)(2) suits are on behalf of the plan and assert only plan injuries, not individual ones. 473 U.S. at 141. The defendants, however, erroneously view the plaintiffs' claims as a collection of individual participant claims and insist that individualized investment behavior creates intra-class conflicts that defeat Rule 23(a) class certification. Spano Defs' Br. at 18. This Court should join the

overwhelming majority of courts that have correctly rejected the argument that such purported conflicts prevent class certification, and should affirm the district court's ruling that, because the plaintiffs seek plan-wide relief for a plan-wide injury pursuant to section 502(a)(2), there is no inherent conflict between the participants. A. 14-16; App. 14-16.

In each of these two cases, the plaintiffs allege that the fiduciaries engaged in a common course of conduct with respect to the Plans and their participants, and that the defendants' conduct caused a loss to the Plans' trusts. If there is a recovery, it will be based upon a conclusion that the Plans' fiduciaries breached duties that they broadly owed to the Plans and their participants with respect to the stock funds at issue – not that they should have bought stock for some accounts, sold stock for others, and done nothing for still more accounts, all during the same period. If the district court determines that the defendants are liable to the Plans for their fiduciary breaches, it will order the fiduciaries to restore losses to the Plans. See, e.g., LaRue, 128 S. Ct. at 1029 (Thomas, J., concurring) ("A defined contribution plan is not merely a collection of unrelated accounts. Rather, ERISA requires a plan's combined assets to be held in trust") (citing ERISA section 403(a), 29 U.S.C. § 1103(a)). The allocation of those recovered losses will necessarily vary from participant to participant, but such allocation is

generally a simple function of the amount of stock that was held in individual accounts in accordance with the plan's terms at the time of the misconduct. This subsequent allocation of a recovery of Plan losses to individual accounts does not create conflicts that would preclude class certification, because the plaintiffs' claims seek to maximize the Plans' recoveries.[6] See LaRue, 128 S. Ct. at 1029 (Thomas, J., concurring) ("ERISA requires the assets of a defined contribution plan . . . to be allocated for bookkeeping purposes to individual accounts within the plan for the beneficial interest of the participants, whose benefits in turn depend on the allocated amounts . . . [This allocation] does not change the fact that all the assets in the plan remain plan assets.").

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[6] For the same reason, IP is mistaken in its suggestion that ERISA section 404(c), 29 U.S.C. § 1104(c), supports its arguments. The focus in this suit is not, as IP's states, "on each participant's individual circumstances." Beesley Defs' Br. at 33. Moreover, section 404(c) would not, in any event, give fiduciaries a defense to liability for their own imprudence or disloyalty in the selection or monitoring of investment options available under the plan. The individual plan participants were not responsible for the selection of fund options. Only the Plan's fiduciaries could make the selections. The terms of ERISA and the Secretary's 404(c) regulation shield plan fiduciaries only for losses "which result[] from" the participant's exercise of control, and not from losses attributable to their own fiduciary misconduct. 29 U.S.C. § 1104(c)(1)(B); 29 C.F.R. § 2550.404c-1. Under the Secretary's longstanding, contemporaneous, and uniform interpretation of her regulation, the selection of the particular funds to include as investment options in a retirement plan is the responsibility of the plan's fiduciaries, and logically precedes (and thus cannot "result[] from") a participant's decision to invest in any particular option. See, e.g., 57 Fed. Reg. 46,922 & n.27 (Oct. 13, 1992) (preamble to 404(c) regulation).

Thus, the defendants' focus on the allocation of losses is misplaced. Instead, the common injury allegedly "perpetrated on numerous persons" through a single illegal course of conduct is "an appealing situation for a class action, and it may remain so despite the need . . . for separate determination of the damages suffered by the individual within the class." Fed. R. Civ. Proc. 23 Advisory Committee's Notes; Hardy v. City Optical, Inc., 39 F.3d 765, 771 (7th Cir. 1994) ("the fact that the damages would generally be different for each member of the class [i]s not deemed an insuperable obstacle" to class certification); Premier Elec. Const. Co. v. National Elec. Contractors Ass'n, Inc., 814 F.2d 358, 366 (7th Cir. 1987) ("Different members of the class may suffer different kinds of damages, but this is a reason to establish subclasses . . . rather than increase the number of separate suits.").[7]

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[7] To the extent that the allocation of the recovery requires anything more than simple arithmetic, the issues relating to the allocation among plan participants are similar to the sort of issues commonly resolved by plan fiduciaries who must routinely balance the interests of different participants. Accordingly, they fall far short of creating an insurmountable hurdle to class certification. See, e.g., Department of Labor Field Assistance Bulletin 2006-01 (April 19, 2006) (discussing the plan fiduciary's obligations with respect to the allocation of mutual fund settlement proceeds between various plan participants' accounts); Department of Labor Field Assistance Bulletin 2003-3 (May 19, 2003) (discussing the plan fiduciary's obligations with respect to the allocation of expenses between the accounts of participants in defined contribution plans); Department of Labor Field Assistance Bulletin 2002-1

Therefore, the defendants' references to individual "optimal breach dates," Beesley Defs' Br. at 12-13, 36-37, lack legal significance because the plaintiffs' claims are filed on behalf of the IP and Boeing Plans – not individuals. In seeking to maximize the Plans recoveries, the Plans have "a single 'optimal imprudence date,' and as this lawsuit is brought on behalf of the Plan[s], individual participants' 'optimal imprudence dates' are irrelevant." DiFelice v. U.S. Airways, 235 F.R.D. 70, 79 (E.D. Va. 2006). To the extent that participants' interests with respect to the date "slightly diverge with each other, or with the Plan itself, this slight divergence is great outweighed by the shared interests in establishing liability." Id.; see In re Schering Plough, 420 F.3d 231, 234-35 (3d Cir. 2005) (permitting class action on behalf of subset of participants because defendants' breach allegedly caused great reduction in value of plan's assets).

No participant has an interest in allowing fiduciary breaches that harmed their plan to go largely unremedied – a result that would follow if one accepts the defendants' premise that each individual participant must sue separately for whatever fraction of the harm their account suffered. See Lively v. Dynegy, Inc., 2007 WL 685861, *13 (S.D. Illinois, March 2, 2007)

(September 26, 2002) (discussing the plan fiduciary's consideration of the competing interests of current and future plan participants in connection with ESOP refinancing).

(unpublished) (acceptance of such a theory would essentially "rule out the possibility of maintaining a class action under ERISA based on a fiduciary's imprudent investment decisions," and thus preclude a full recovery for a plan in a suit brought by a plan participant under section 502(a)(2)). Such a result not only would undermine ERISA's goal of protecting employee benefits from fiduciary mismanagement, but also would be inconsistent with this Court's longstanding position that "Rule 23 should be construed liberally to support its policy of favoring the maintenance of class actions." See King v. Kansas City S. Indus., Inc., 519 F.2d 20, 25-26 (7th Cir. 1975). But this result certainly does not follow from the statutory language. Instead, sections 409 and 502(a)(2) are aimed not at participant conduct, but at fiduciary conduct, and by their terms allow each and every plan participant to sue for losses to their plans that result from any lapses in such conduct.

The Fifth Circuit's decision to vacate a class certification in Langbecker v. Electronic Data Sys., 476 F.3d 299, 314-16 (5th Cir. 2007), was premised on the erroneous assumption that a class action under section 502(a)(2) is on behalf of groups of plaintiffs holding individualized claims. That assumption has since been discredited by LaRue's holding that section 502(a)(2) claims are plan claims. Moreover, the Langbecker court did not endorse the seller-purchaser conflict theory, but merely remanded back to

the district court to "more fully consider the implications" of such conflicts, as identified by the defendants' expert witness. In these cases, the district court "considered [the expert's] report" and noted that his "extensive background as an expert witness is impressive," but found that the "report does not amount to a legal conclusion regarding potential class conflicts." A. 15. For this reason, a decision affirming the district court's decisions in these cases would not conflict with the Fifth Circuit's decision in Langbecker.

Even in securities litigation, where this concept of intraclass conflict originated, most courts have rejected the argument that these sorts of supposed conflicts preclude class certification, observing that the argument "proves too much," because the purported conflicts "would exist in every large securities fraud case." See In re Intelligent Electronics, Inc. Sec. Litig., 1996 WL 67622, *5 (E.D. Pa. Feb. 13, 1996);[8] see also Lively, 2007 WL 686861, at *12-*13 (noting that the theory has been "overwhelmingly rejected" by courts in securities litigation and citing cases). Instead, in the

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[8] "Even a class period as short as one day could create both of the conflicts delineated by the defendants. Accepting these intraclass conflicts arguments at face value would prohibit the use of the class action mechanism in the vast majority of securities fraud actions. This would be an anomalous result, particularly in the Third Circuit, where class actions are considered particularly well-suited to securities fraud cases." Id.

securities context, as under ERISA, courts have recognized that common questions with respect to liability "bind class members with more force than the varying questions related to [damages] drive them apart." In re Gaming Lottery Sec. Litig., 58 F. Supp. 2d 62, 69-70 (S.D.N.Y. 1999) ("the sort of buyer-seller and equity conflicts that Defendants describe do not really make their presence felt in any phase of the case other than the determination of damages").[9] And the theory "is even less apropos in the ERISA context," Lively, 2007 WL 686861, at *12-*13, because, while the recovery itself in the securities fraud context depends on each investor's investment history, such information is irrelevant in section 502(a)(2), where the court makes a determination about fiduciary breach and resulting losses to the plan itself – with allocation occurring only after liability and the losses to the plan have been determined. This is because section 502(a)(2) actions seek relief for fiduciary breaches that cause harm to plans, as opposed to individuals; as such, the district court properly focused on the defendants' behavior with

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[9] See also Bogosian v. Gulf Oil Corp., 561 F.2d 434, 456 (3d Cir. 1977) ("it has been commonly recognized that the necessity for calculation of damages on an individual basis should not preclude class determination when the common issues which determine liability predominate"); Blackie v. Barrack, 524 F.2d 891, 908-910 (9th Cir. 1975) ("Every class member shares an overriding common interest in establishing [liability] . . . In that light, any conflicting interests in tracing fluctuations in inflation during the class period are secondary, and do not bar class litigation to advance predominantly common interests.").

respect to the Plans in determining whether class certification was appropriate in these cases.

For all these reasons, the Secretary agrees with the district court that differences in individual investment behavior among participants in a defined contribution plan are not legally relevant to class suitability. Thus, this Court should affirm the district court's conclusion that purported intraclass conflicts do not preclude class certification because claims under sections 502(a)(2) and 409(a) by participants in defined contribution plans are properly treated as claims on behalf of the plan, not individual participants.

CONCLUSION

The opinion of the district court should be affirmed on grounds consistent with the views expressed herein.

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Dated: December 14, 2009

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Dated: December 14, 2009

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