

**UNITED STATES DISTRICT COURT
DISTRICT OF NORTH DAKOTA
SOUTHEAST DIVISION**

BERNARD MCKAY, on behalf of himself,
individually, and on behalf of all others
similarly situated,

Plaintiff,

v.

GARY D. THARALDSON,

Defendant,

and

THARALDSON MOTELS, INC.
EMPLOYEE STOCK OWNERSHIP PLAN,

Nominal Defendant.

Case No: 3:08-CV-113-RRE-KKK

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

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INTRODUCTION

Plaintiff Bernard McKay respectfully submits this memorandum in support of Plaintiff's Motion for Class Certification of the following class:

All persons who were participants of the Tharaldson Motels, Inc. ("TMI"), Employee Stock Ownership Plan (the "TMI ESOP" or the "Plan") at any time from December 30, 1998 to the present and who received an allocation of Plan assets to their accounts which they did not subsequently forfeit under the terms of the Plan and the beneficiaries of such participants.¹

Plaintiff also requests his appointment as the representative for the class along with Roy Blassingame, who is also willing to serve as a representative for the class. In the event that the Court determines that the interests of the current employee participants and the former employee participants diverge in this action, Plaintiff additionally and alternatively seeks certification of the following subclasses:

The Former Employee Class

All persons who were participants in the TMI ESOP at any time from December 30, 1998 to the present and who received an allocation of Plan assets to their accounts which they did not subsequently forfeit under the terms of the Plan and who are no longer employees of TMI (or an affiliate that participates in the TMI ESOP) and the beneficiaries of such persons.

The Current Employee Class

All persons who are participants in the TMI ESOP and who are currently employed by TMI or a TMI affiliate that participates in the TMI ESOP and the beneficiaries of such persons.

In the event that the Court determines that subclasses are appropriate, Plaintiff requests appointment as the representative of the Former Employee Class and understands that Roy Blassingame is willing to serve as the representative of the Current Employee Class. This action

¹ The following persons should be excluded from the Class and the Subclasses: Defendant Gary Tharaldson, Linda Tharaldson, and any person who is or was a fiduciary of the TMI ESOP (including the TMI Board) from August 29, 2006 to the present, members of their family, their legal representatives, heirs, successors or assigns of any such excluded party.

satisfies the requirements of Rule 23 and is uniquely suited for class certification. As Plaintiff and Roy Blessingame are similarly situated and possess claims that are, in all material respects, identical to the claims of the absent class members, certification of the proposed class and/or the subclasses with these representatives is appropriate.

BACKGROUND

This action is brought on behalf of participants and beneficiaries in the Tharaldson Motels, Inc. Employee Stock Ownership Plan (the “TMI ESOP”) alleging violations of the Employee Retirement Income Security Act of 1974 (“ERISA”), 29 U.S.C. § 1001, et seq., in connection with Defendant Gary D. Tharaldson’s breaches of fiduciary duty. Compl. ¶ 1. This lawsuit alleges that from 1998 to 2007, Gary Tharaldson, who was the sole Director, President and Chief Executive Officer of Tharaldson Motels, Inc. (“TMI”), caused an affiliate of TMI to pay his ex-wife, Linda Tharaldson, nearly \$4 million in TMI assets under a settlement agreement related to their divorce in exchange for unnecessary marketing and sales consulting services which were of no value to TMI or its affiliate. *Id.* ¶¶ 1, 18-21. The lawsuit alleges that Gary Tharaldson breached his fiduciary duties under ERISA as the then-Trustee of the TMI ESOP by failing to take steps to prevent the dissipation of these assets, including, if necessary, bringing an action against himself as the President of TMI. *Id.* ¶¶ 24-29, 39.

I. FACTUAL BACKGROUND OF THE CLAIM

Gary Tharaldson and Linda Tharaldson were married from 1966 to 1978 and again from 1980 to 1984. Compl. & Answ. ¶ 16. In March 1998, Linda Tharaldson conveyed her interest in certain hotels to Gary Tharaldson in exchange for a 20 year consulting contract with Tharaldson Property Management (“TPM”), a TMI subsidiary, which would provide her \$40,000 per month purportedly for sales and marketing consulting. Compl. & Answ. ¶¶ 17-18, Ex. A. The Complaint alleges that Linda Tharaldson performed “little or no” services to TPM between 1998

and 2000 and no services to TPM after 2000. Compl. ¶¶ 19-20; *see* Ex. B at 18:5-20:16. Despite the lack of services performed, the Complaint alleges that Gary Tharaldson ensured that Linda Tharaldson continued to receive \$40,000 per month until August 2007 -- for a total of approximately \$4 million -- until her payments were terminated at the direction of North Star Trust Company, which had replaced Gary Tharaldson as Trustee. *Id.* ¶¶ 20-21; *see* Ex. B at 20:20-26:16. The Complaint alleges that these payments constituted dissipation and waste of corporate assets and provided Gary Tharaldson with an “improper personal benefit.” *Id.* ¶¶ 22, 23.

During this period, the TMI ESOP was the holder of nearly all of the common shares of TMI stock. Compl. ¶¶ 1, 24; *see Hans v. Tharaldson*, No. 05-00115, 2010 WL 1856267, *2 (D.N.D. May 7, 2010). As such, the TMI ESOP was entitled to bring an action for those breaches of fiduciary duty under North Dakota law. *Id.*; *see* N.D.C.C. § 10-19.1-85.1. As the Trustee, Gary Tharaldson had the power under the terms of the Plan and the obligation pursuant to his fiduciary duties to the TMI ESOP to take necessary steps to cease future payments and recover past payments, including by instituting an action on behalf of the TMI ESOP against himself as the sole Director and President of TMI. Compl. ¶¶ 25-27; *see* Ex. C § 9.8. Gary Tharaldson never brought such an action. Compl. ¶ 28. The Complaint alleges that his failure to bring such a lawsuit resulted in a diminution of the value of the stock held by TMI and a diminution in the value of plan participants’ accounts, including the account of Bernard McKay. *Id.* ¶ 29. As such, the Complaint alleges a single count of breach of fiduciary duty against Gary Tharaldson for failing to bring a derivative action against himself for his improper dissipation, misuse and waste of TMI assets. *Id.* ¶ 39.

II. THE RELEVANT LAW RELATING TO PLAINTIFF'S CLAIM

The Eighth Circuit has recognized that “ESOP fiduciaries ha[ve] a duty to challenge [a corporate fiduciary] breach through a derivative stockholder’s action” and that ESOP fiduciaries who fail to bring such a claim may be liable under ERISA § 502(a)(2) even if “this would require [them] to bring suit against themselves.” *Martin v. Feilen*, 965 F.2d 660, 667 (8th Cir. 1992) (quoting in part *Canale v. Yegen*, 782 F.Supp. 963, 968 (D.N.J. 1992)); *Herman v. Mercantile Bank*, 137 F.3d 584, 587-88 (8th Cir. 1998); *Blankenship v. Chamberlain*, No. 08-1168, 2010 WL 427764, *10 (E.D. Mo. Feb. 1, 2010) (applying this principle). Such a claim requires proof that (1) the fiduciary breached his fiduciary duties by failing to bring such a claim and (2) the derivative suit would have been successful. *Martin v. Feilen*, 965 F.2d at 667. Thus, the proof in such an action is focused on the conduct of the fiduciary, not the individual participants.

ARGUMENT

Rule 23(c)(1) requires the court to determine “[a]t an early practicable time” whether to certify the action as a class action. Fed. R. Civ. P. 23(c)(1); see *Paxton v. Union Nat’l Bank*, 688 F.2d 552, 558 (8th Cir. 1982). To be certified, a class must meet all of the requirements of Rule 23(a) and must satisfy one of the three subsections of Rule 23(b). *Hans*, 2010 WL 185267 at *4; see *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 614 (1997). In evaluating whether a class should be certified, a court may conduct an inquiry necessary only to determine that plaintiff’s evidence states a prima facie case, but should not make a determination on the merits. *Tussey v. ABB, Inc.*, No. 06-04305, 2007 WL 4289694, *5 (W.D. Mo. Dec. 3, 2007) (citing *Blades v. Monsanto*, 400 F.3d 562, 567 (8th Cir. 2005) and rejecting defendants’ attempt to examine the merits of the case). As Rule 23 “creates a categorical rule entitling a plaintiff whose suit meets the specified criteria to pursue his claim as a class action,” if the requirements of Rule 23 are satisfied, then a class action must be certified. *Shady Grove Orthopedic Assocs. v. Allstate Ins.*

Co., 130 S. Ct. 1431, 1437-38 (2010). This case, which seeks relief on behalf of the TMI ESOP, meets the four prerequisites of Rule 23(a), and satisfies Rule 23(b)(1) or alternatively (b)(3).

I. PLAINTIFF’S CLAIM FOR BREACH OF FIDUCIARY DUTY UNDER ERISA IS UNIQUELY APPROPRIATE FOR CLASS TREATMENT

As this Court recognized, “breach of fiduciary duty claims under ERISA § 502(a)(2) ‘are paradigmatic examples of claims appropriate for certification as a Rule 23(b)(1) class.’” *Hans*, 2010 WL 1856267 at *9 (quoting *In re Schering Plough ERISA Litig.*, 589 F.3d 585, 604 (3d Cir. 2009)). ERISA § 502(a)(2) permits a participant or beneficiary to bring a lawsuit *on behalf of the Plan* for relief under ERISA § 409. 29 U.S.C. § 1132(a)(2); see *LaRue v. DeWolf, Boberg & Assocs., Inc.*, 552 U.S. 248, 254 (2008). In turn, ERISA § 409 imposes personal liability on plan fiduciaries who breach their fiduciary duties “to make good to such plan any losses *to the plan* resulting from each such breach.” 29 U.S.C. § 1109(a) (emphasis added); *LaRue*, 522 U.S. at 254 (“[T]he text of § 409(a) ... repeatedly identifies the ‘plan’ as the victim of any fiduciary breach and *the recipient* of any relief.”) (emphasis added). “It is well settled ... that [a] suit under § 1132(a)(2) is ‘brought in a representative capacity on behalf of the plan as a whole’ and that [the] remedies [available] ‘protect the entire plan.’” *Braden v. Wal-mart Stores, Inc.*, 588 F.3d 585, 593 (8th Cir. 2009). Given the representative capacity, such suits are considered “derivative in nature.” *Graden v. Conexant Sys., Inc.*, 496 F.3d 291, 295 (3d Cir. 2007) (explaining that “suits under [502(a)(2)] are derivative in nature” because “the various parties are entitled to bring suit ... do so on behalf of the plan itself.”); *Evans v. Akers*, 534 F.3d 65, 70 n.4 (1st Cir. 2008) (“Suits brought pursuant to [ERISA § 502(a)(2)] are derivative in nature”). As a result, when a plaintiff recovers losses from a defendant, “the plan takes legal title to any recovery, which then inures to the benefit of its participants and beneficiaries.” *Id.* at 295; see *LaRue*, 552 U.S. at 263 n.* (Thomas, J. & Scalia, J. concurring) (“Of course, ... any recovery

must be paid to the plan.”); *Tullis v. UMB Bank, N.A.*, 515 F.3d 673, 682 (6th Cir. 2008) (explaining ERISA § 502(a)(2) requires “any recovery of losses ... inure to the plan before being allocated to the specific accounts affected by the alleged fiduciary breach”). As the Supreme Court confirmed that ERISA “§ 502(a)(2) does not provide a remedy for individual injuries distinct from plan injuries,” the issues raised in a claim of fiduciary breach by a participant on behalf of a plan are common to all participants of the plan. See *LaRue*, 552 U.S. at 256 (emphasis added). For this reason, “courts routinely grant class treatment in cases, such as this one, involving claims for breach of fiduciary duty under ERISA.” *Kirse v. McCullough*, No. 04-1067, 2005 WL 3302008, *2 (W.D. Mo. Dec. 5, 2005); see *In re Aquila ERISA Litig.*, 237 F.R.D. 202, 208 n.6 (W.D. Mo. 2006) (“A multitude of courts have certified a class under ERISA § 502(a)(2).”). Class certification of the claim in this case is similarly appropriate.

II. THE REQUIREMENTS OF RULE 23(A) ARE SATISFIED

A plaintiff seeking certification for a proposed class must satisfy all four threshold requirements under Rule 23(a): (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 claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class. Fed. R. Civ. P. 23(a); *Paxton v. Union Nat’l Bank*, 688 F.2d 552, 561 (8th Cir. 1982). Here, the proposed Class satisfies each of the requirements of Rule 23(a).

A. The Class Is So Numerous That Joinder Of All Members Is Impracticable

Rule 23(a)(1) permits class treatment where “the class is so numerous that joinder of all members is impracticable.” Fed. R. Civ. P. 23(a)(1). To satisfy this requirement, joinder need not be impossible. *Ark. Educ. Ass’n v. Bd. of Educ. of Portland, Ark.*, 446 F.2d 763, 765 (8th Cir. 1971) (finding class of 20 was sufficiently numerous). The Eighth Circuit has explained that

there are “[n]o arbitrary rules regarding the necessary size of classes” and that “[a] number of factors are relevant to this inquiry.” *Paxton*, 688 F.2d at 559-60 (finding district court should have certified class of 74 as sufficiently numerous).² Impracticability of joinder depends on “the particular circumstances of the case.” *Ark. Educ. Ass’n*, 446 F.2d at 765; e.g., *Beckmann v. CBS, Inc.*, 192 F.R.D. 608, 613 (D. Minn. 2000) (certifying a class of 71 persons). As this Court explained, in this Circuit numerosity is met based on the size of the class alone when there are at least 40 members. *Hans*, 2010 WL 1856267 at *5; *Robinson v. Sears, Roebuck & Co.*, 111 F. Supp. 2d 1101, 1120 (E.D. Ark. 2000) (same); see *In re Aquila*, 237 F.R.D. at 202 (same). In *Hans*, this Court recently concluded that an identical class of over 3,500 TMI ESOP participants readily met this requirement. *Hans*, 2010 WL 1856267 at *5, see also Ex. D. As such, there can be no question that the numerosity requirement is met here.

B. The Commonality Requirement Of Rule 23(a) Is Satisfied

Rule 23(a)(2) requires the existence of “questions of law or fact common to the class.” Fed. R. Civ. P. 23(a)(2) (emphasis added). “The [commonality] requirement imposes a light burden and does not require commonality on every question raised in the class action.” *Hans*, 2010 WL 1856267 at *5; see *Paxton*, 688 F.2d at 552; *DeBoer v. Mellon Mortgage Co.*, 64 F.3d 1171, 1174 (8th Cir. 1995) (“Commonality is not required on every question raised in a class action.”). In making this assessment, “the appropriate focus of the analysis is on the conduct of the defendant, not the plaintiffs.” *Hans*, 2010 WL 1856267 at *5.

Commonality may be satisfied “where the question of law linking the class members is substantially related to the resolution of the litigation even though the individuals are not

² Among the other factors that may be considered are “the nature of the action, the size of individual claims, the inconvenience of trying individual suits, and any other factor relevant to the practicability of joining all the putative class members.” *Paxton*, 688 F.2d at 559-60. These factors likewise favor class certification.

identically situated.” *Paxton*, 688 F.2d at 561. Alternatively, commonality can be met when there is a “common course of conduct” by defendant. *DeBoer*, 64 F.3d at 1174. Other district courts in this Circuit have explained that commonality is readily met in an ERISA breach of fiduciary duty case because where the central question is whether a defendant breached its fiduciary duties to the participants, defendant’s duties are owed to every member of the class. *Kirse*, 2005 WL 3302008 at *2; *In re Aquila*, 237 F.R.D. at 208 n.5 (citing other ERISA cases from inside and outside this Circuit).

In this case, the dispute concerns whether Gary Tharaldson breached his ERISA fiduciary duties as the then-Trustee of the TMI ESOP by failing to take steps to prevent dissipation of the ESOP’s assets (i.e. TMI and its affiliates), including by failing to bring a derivative action against himself in his corporate capacity as sole Director, President and CEO of TMI and by misusing corporate assets to improperly pay his ex-wife. Compl. ¶¶ 1, 24-29, 39. Similar to the common issues in *Hans* and other ERISA breach of fiduciary cases, the present case involves multiple common questions of law *and* fact which pervade all class members’ claims. Compl. ¶ 34. Indeed, all of the issues identified by the Parties in their Joint Discovery Plan are common to all members of the Class. D.E. # 24 at ¶ 2. Accordingly, Rule 23(a)(2) is readily satisfied here.

C. Plaintiff’s Claim Is Not Merely Typical Of, But Identical To The Claims Of The Absentee Class Members

Rule 23(a)(3) requires that “the *claims or defenses* of the representative parties [be] typical of the claims or defenses of the class.” Fed. R. Civ. P. 23(a)(3) (emphasis added). Typicality is “fairly easily met so long as other class members have *claims* similar to the named plaintiff.” *Alpern v. Utilcorp United, Inc.*, 84 F.3d 1525, 1540 (8th Cir. 1995) (quoting *Deboer*, 64 F.3d at 1174 (8th Cir. 1995) (finding typicality where similar claims arose out of different factual circumstances); *Paxton*, 688 F.2d at 562 (“The burden of showing typicality is not an

onerous one.”). In this Circuit, the focus of the typicality requirement is whether there are similar claims based on “the defendants’ actions” or “conduct.” *Tussey*, 2007 WL 4289694 at *7; *Sheinhartz v. Saturn Transp. Sys., Inc.*, No. 00-2489, 2002 WL 575636, at *6-7 (D. Minn. Mar. 26, 2002) (analyzing typicality of claims based on defendant’s conduct toward plaintiffs). An attempt to focus on interests rather than the actual claims does not address typicality. *Langbecker v. Elec. Data Sys. Corp.*, 476 F.3d 299, 314 (5th Cir. 2007) (finding typicality met even if adequacy not met due to intra-class conflict). Thus, even when class members have different interests, their claims may be typical. *Id.* Likewise, the fact that individual class members may receive differing amounts if the litigation is successful does not impact the typicality analysis. *DeBoer*, 64 F.3d at 1174; *Tussey*, 2007 WL 4289694 at *7 (finding that “individual participants’ varying damages are irrelevant” in ERISA case brought on behalf of the plan). Moreover, in an ERISA breach of fiduciary duty case, “the relevant losses [are] not to the individual plan participants, but to the plan.” *In re Aquila*, 237 F.R.D. at 209.

1. Plaintiff’s Claim Is Typical of the Class

The Eighth Circuit has concluded that typicality is met where the claims of all class members “stem from a single event or are based on the same legal or remedial theory.” *Paxton v. Union Nat’l Bank*, 688 F.2d 552, 562-63 (8th Cir. 1982) (emphasis added) (finding claims “rest[ing] on the same legal theory” were typical). The requirement that other members of the class have “the same or similar grievances” requires that plaintiffs identify others “who [have] been subjected to the same or similar treatment.” *Donaldson v. Pillsbury Co.*, 554 F.2d 825, 830 (8th Cir. 1977); *Paxton*, 688 F.2d at 562 (finding testimony of 6 other employees satisfied this requirement). As the Fifth Circuit explained (in a case relied upon by this Court in *Hans*), a potential intraclass conflict does not make plaintiff’s claims atypical. *Langbecker*, 476 F.3d at 314 (finding plaintiffs typical because they “allege[d] ... suffer[ing] harm” from defendants’

fiduciary breaches despite a potential conflict). Likewise, another court in this Circuit concluded that even when class members have divergent interests, such a divergence can be “outweighed by [their] shared interests in establishing [the defendant’s] liability to the Plan.” *Tussey*, 2007 WL 4289694 at *7. In this case, Plaintiff’s claim is typical of those of the other class members.

By statutory definition, an ERISA § 502(a)(2) claim is brought “on behalf of the plan” and any recovery must be paid to the Plan. *Supra* Argmt. I; *Braden*, 588 F.3d at 593; *Hans*, 2010 WL 1856267 at *6 (citing *Aquila*, 237 F.R.D. at 202). As *any participant* in the Plan is entitled to bring these *identical* claims *on behalf of the ESOP*, these claims are not merely similar, but *identical* derivative-type or representational claims. *Kirse*, 2005 WL 3302008 at *2 (finding typicality satisfied); *supra* Argmt I. In *Hans*, this Court concluded that “the legal theory and the remedy [was] identical for all members of the proposed class.” *Hans*, 2010 WL 1856267 at *6. Thus, the Court recognized that the *claims* themselves were typical.

In this case, the sole claim under ERISA § 502(a)(2) is brought on behalf of the Plan against its then-fiduciary Gary Tharaldson for any losses or profits attributable to his breach (or other relief). Compl. ¶¶ 1, 38-39. Specifically, the Complaint alleges that Gary Tharaldson breached his ERISA fiduciary duties as the then-Trustee of the TMI ESOP by failing to take steps to prevent the dissipation of the ESOP’s assets (i.e. TMI and its subsidiary), including by failing to bring a derivative action against himself as the sole Director and President of TMI for misusing corporate assets by improperly paying his ex-wife for his own obligations. Compl. ¶¶ 1, 24-29, 39. This claim requires proof that (1) Gary Tharaldson, as the fiduciary of the TMI ESOP, breached his fiduciary duties by failing to bring such a claim, and (2) the underlying derivative suit against him as President of TMI would have been successful. *See Feilen*, 965 F.2d at 667. As the claim is based on the same legal or remedial theory on behalf of the Plan,

and the proof will focus on the actions of Gary Tharaldson, not on the individual class members, Plaintiff's claim is not merely typical, but identical for all participants of the TMI ESOP. *See id.* Likewise, the remedies sought by Plaintiff are on behalf of and will be paid to the ESOP. *See* Compl. at Prayer for Relief ¶¶ A-B. Any relief will benefit the Plan and be allocated to the accounts of all the participants of the TMI ESOP according to the terms of the Plan. *See id.* ¶ C. Not only are the claims typical, but all participants – present and former employees – have an interest in recovering losses from Tharaldson's improper use of TMI assets to pay for his own personal obligations. Thus, both the claims and interests of Plaintiff are typical of the class.

2. There Are No Defenses Unique To The Proposed Class Representatives

A defense undermines typicality only if it is unique to the plaintiff and threatens to play a major role in the litigation. *Cortez v. Nebraska Beef, Inc.*, 266 F.R.D. 275, 290-91 (D. Neb. 2010). By contrast, a defense does not destroy typicality if it relates to differences in relief or the availability of certain defenses where the class claims are based on the same legal or remedial theory. *Id.* In this Circuit, “[a]n affirmative defense on which Defendant[] bear[s] the burden of proof” should not be considered on a class certification motion. *E.g., Tussey*, 2007 WL 4289694 at *7 n.6. Even if affirmative defenses are considered, Defendant's affirmative defenses do not appear unique to Plaintiff. Def. Answ. (D.E. # 15) at Affirmative Defenses 1-11.³ Thus, there are no unique defenses and Rule 23(a)(3) is satisfied.

³ The only defense which might apply to only some class members is whether they lack standing, but as explained in Plaintiff's threshold motion, there is no basis for this purported defense. D.E. # 29 at 10-12. Even so, this defense appears aimed not only at Plaintiff McKay but at *all* former employees if not all participants.

D. The Proposed Representatives And Their Counsel Will Fairly And Adequately Protect The Interests Of The Class

Rule 23(a)(4) requires that the representative parties “fairly and adequately protect the interests of the class.” Fed. R. Civ. P. 23(a)(4). The focus here is whether “(1) the class representatives have common interests with the members of the class, and (2) whether the class representatives will vigorously prosecute the interests of the class through qualified counsel.” *Paxton*, 688 F.2d at 562-63.

1. The Interests Of The Proposed Class Representative(s) Are Identical To Those Of The Absentee Members of the Class

The purpose of the adequacy requirement is to ensure that there are no “conflicts of interest between the named parties and the class they seek to represent.” *Tussey*, 2007 WL 4289694 at *8 (quoting *Amchem*, 521 U.S. at 625). So long as the plaintiffs “share the class’ interest” in procuring the relief sought and their interest is not antagonistic to the remainder of the class, the proposed class representatives are adequate representatives. *Paxton*, 688 F.2d at 562-63; *DeBoer*, 64 F.3d at 1175. In an ERISA action, the proposed class representatives and the class members share the same interests in “ensuring that [the] defendants comply with their duties and obligations and holding defendants accountable for past actions.” *Kirse*, 2005 WL 3302008, at *3 (finding adequacy requirement met in ERISA action).

In *Hans*, this Court did not conclude that the participants had different interests as a result of the relief sought in the litigation, but rather that the litigation itself (whether as a class action or not) might (1) interfere with the efficient and smooth running of TMI and (2) make a potential sale of TMI more difficult. *Hans*, 2010 WL 1856267 at *6. These same concerns are not present here. First, the size and scope of this litigation is smaller and the amount of relief is a small, known amount (i.e. \$4 million plus interest) that is unlikely to interfere with any potential sale. Second, current and former shareholders have a clear interest in recovering losses resulting

from the misuse of TMI's assets. Third, the only issue in this litigation that could conceivably impact a sale relates to Gary Tharaldson's purported indemnification, which Plaintiff has demonstrated is void under ERISA, *see* D.E. # 29 at 12-17. To the extent that the Court is concerned about potentially conflicting interests arising in the future, then the Court should appoint Roy Blassingame as an additional class representative (and his Counsel as Co-Lead Counsel for the Class) so that the Class could be readily divided into subclasses later, if the need arises. If the Court believes subclasses necessary now, the Court may resolve the conflict by certifying two subclasses – a subclass of former employees and a subclass of current employees – with separate representation. *See Hans*, 2010 WL 1856267 at *10.

2. The Proposed Representatives Have Demonstrated Their Willingness to Fulfill Their Duties To The Class and the Respective Subclass

“Class representatives need not have special understanding of the factual or legal issues in their cases.” *Jones v. NovaStar Fin., Inc.*, 257 F.R.D. 181, 192 (citing *Amchem*, 521 U.S. at 625). Particularly in complex cases like ERISA, it is unrealistic to expect a layman to have an in-depth understanding of the claims. *Id.* (citing cases and rejecting challenge to plaintiff's lack of understanding of claims in an ERISA case). Rather, it is appropriate for a class representative to consult with his attorney to understand his “legal rights and remedies.” *Tussey*, 2007 WL 4289694 at *8. The adequacy of the proposed representatives can be demonstrated by affidavit and their actions in the litigation. *Cortez*, 266 F.R.D. at 291. Here, Plaintiff McKay as well as Mr. Blassingame understand and are willing to fulfill their duties as class representatives. Declaration of Bernard McKay (“McKay Decl.”), Declaration of Roy Blassingame (“Blassingame Decl.”).⁴ Additionally, their adequacy can be judged by their actions in the *Hans* litigation.

⁴ The Blassingame Declaration is being separately filed by Mr. Blassingame's counsel.

- *Bernard McKay*: Mr. McKay asked to be appointed as a class representative early in the *Hans* litigation, produced documents, was deposed by Defendants, attended the 3-day evidentiary hearing on class certification and attended the mediation with Magistrate Judge Klein. McKay Decl. ¶ 8.
- *Roy Blassingame*: Upon learning that Defendants sought to exclude current employees from the class, Mr. Blassingame contacted Plaintiff's counsel, offered to serve as a class representative for the current employees, and used his own vacation time to attend the three day evidentiary hearing on class certification, the mediation with Magistrate Judge Klein, and the mediation with retired Judge Weinstein in California. *Hans*, 2010 WL 1856267 at *10 (observing that Mr. Blassingame was one of "the two individuals named during the evidentiary hearing" who appeared to represent the current employees); Blassingame Decl. ¶ 5. After learning that the Court had concluded that Cohen Milstein could no longer represent him, he took the initiative to retain new counsel with significant ERISA litigation experience. *Id.* ¶ 2.

Both Messrs. McKay and Blassingame are willing to make the same commitments in this case. McKay Decl. ¶ 8 & Blassingame Decl. ¶ 7. Thus, there can be no question that both Mr. McKay and Mr. Blassingame are willing to and will fulfill their duties to the rest of the class in this action.

3. Counsel Is Qualified To Prosecute This Litigation As Class Counsel

Adequacy of counsel focuses on whether plaintiff's counsel is "qualified and experienced and able to conduct the litigation." *Hans*, 2010 WL 1856267 at *7. The Third Circuit recently explained that the adoption of Rule 23(g) supplanted the traditional method of analyzing class counsel under Rule 23(a)(4). *Sheinberg v. Sorensen*, 606 F.3d 130, 132-33 (3d Cir. 2010). At a

minimum, “Rule 23(g) complements the Rule 23(a)(4) requirement[s].” *Jones*, 257 F.R.D. at 194. Thus, Plaintiff addresses these requirements together.

Adequacy of counsel may be demonstrated by its representation in the current matter and/or its representation in similar such matters. *U.S. Fidelity & Guar. Co. v. Lord*, 585 F.2d 860, 873-75 (8th Cir. 1978) (finding counsel adequate based on its vigorous prosecution of the action); *Roberts v. Source for Public Data*, No. 08-04167, 2009 WL 3837502, *5 (W.D. Mo. Nov. 17, 2009). Rule 23(g) requires the Court to appoint Class Counsel. *Sheinberg*, 606 F.3d at 133. Rule 23(g) focuses on the qualifications of plaintiff’s counsel and instructs the court to consider: (1) the work counsel has done in identifying or investigating potential claims in the action; (2) counsel’s experience in handling class actions and other complex litigation; (3) counsel’s experience in handling claims of the type asserted in the action; (4) counsel’s knowledge of the applicable law; and (5) the resources counsel will commit to representing the class, as well as any other matter pertaining to counsel’s ability to fairly and adequately represent the interests of the class. Fed. R. Civ. P. 23(g)(1)(A). Each of these considerations weighs in favor of proposed Class Counsel’s adequacy.

a. Cohen Milstein Is Qualified To Act As Class Counsel

As this Court observed based on “the work done in the [*Hans*] case . . . it cannot be seriously disputed that Plaintiffs’ attorneys [from Cohen Milstein] are fully capable of doing the work and possessed of the resources to follow through to its conclusion.” *Hans*, 2010 WL 1856267 at *7. Here, Plaintiff McKay has retained the same attorneys as in *Hans*. As set forth in its firm resume, Cohen Milstein Sellers & Toll PLLC has extensive ERISA litigation and class action experience in a variety of ERISA class actions, including those involving breach of

fiduciary duty, employer stock and ESOP transactions. Ex. E at 15-16, 28-30.⁵ Cohen Milstein also identified the claim in the present action. As a result, the requirements of Rule 23(g) and 23(a)(4) are met and the Court can be assured that the Class and/or the Former Employee Subclass will have qualified and able counsel pressing their claim as a class action.

b. Lewis Feinberg Is Qualified To Act As Class Counsel

Mr. Blassingame's counsel has extensive experience in ERISA litigation generally, and ERISA class actions and breach of fiduciary duty in particular. Declaration of Daniel Feinberg (Feinberg Decl.) ¶¶ 5-6.⁶ Lewis, Feinberg, Lee, Renaker, Jackson PC has experience litigating claims for breach of fiduciary duty involving ESOPs and other employer stock cases. *Id.* Lewis Feinberg is willing to commit resources to representing Mr. Blassingame in this litigation and have a demonstrated ability to represent classes throughout long-term class litigation. *Id.* ¶ 4. Thus, appointment of Lewis Feinberg either as Co-Lead Counsel for the Class or as counsel for a Current Employee Subclass would be appropriate (if subclasses are necessary).

c. The Court Must Appoint Class Counsel Pursuant to Rule 23(g)

Rule 23(g) requires the Court to appoint class counsel. Both Cohen Milstein and Lewis Feinberg are have significant ERISA class action experience and should be appointed as class counsel. In the event that the Court concludes that subclasses are appropriate, Cohen Milstein

⁵ The following is a list of some of the reported decisions in ERISA cases in which Cohen Milstein has been appointed class counsel: *Boos v. AT&T*, 252 F.R.D. 319 (W.D. Tex. 2008) (alleging benefit was a pension plan); *Banyai v. Mazur*, No. 00-9806, 2007 WL 959066, *1 (S.D.N.Y. Mar. 29, 2007); *Stoffels v. SBC Commc'ns, Inc.*, 238 F.R.D. 446 (W.D. Tex. 2006) (alleging benefit was pension plan); *Wagener v. SBC Pension Benefit Plan-Non Bargained Program*, 407 F.3d 395 (D.C. Cir. 2005) (alleged failure to pay promised pension benefits); *In re Williams Cos. ERISA Litig.*, 231 F.R.D. 416 (N.D. Okla. 2005) (breach of fiduciary duty); *Zhu v. Fujitsu Group 401(K) Plan*, No. 03-1148, 2005 WL 735097, *1 (N.D. Cal. Mar. 22, 2005) (alleged vesting violation); *In re Dynegy, Inc. Litig.*, 309 F. Supp. 2d 861 (S.D. Tex. 2004) (breach of fiduciary duty); *Beam v. HSBC Bank USA*, No. 02-0682, 2003 WL 22087589, at *1 (W.D.N.Y. Aug. 19, 2003) (ESOP purchase of employer stock allegedly for more than adequate consideration); *Simpson v. Fireman's Fund Ins. Co.*, 231 F.R.D. 341 (N.D. Cal. 2007) (discharge of disabled employees allegedly to interfere with their attainment of health benefits).

⁶ The Feinberg Declaration is being separately filed by Mr. Blassingame's counsel.

should be appointed as Lead Counsel for the Former Employee Class and Lewis Feinberg should be appointed as Lead Counsel for the Current Employee Class. Solberg, Stewart, Miller & Tjon should be appointed as Liaison Counsel for the Class.⁷

III. THE CLASS IS PROPERLY CERTIFIED UNDER RULE 23(B)

In addition to the four prerequisites of Rule 23(a), a case may proceed as a class action if it also satisfies one of the three alternative requirements of Rule 23(b). Fed. R. Civ. P. 23(b); *Hans*, 2010 WL 1856267 at *9. As in *Hans*, certification of this Class is appropriate under Rule 23(b)(1) or alternatively, under Rule 23(b)(3).

A. The Class Should Be Certified Under Rule 23(b)(1)

Under Rule 23(b)(1), a class may be certified if the prosecution of separate actions by or against individual members of the class would create a risk of (A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or (B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests. Fed. R. Civ. P. 23(b)(1). This Court, like other district courts in this Circuit, concluded that breach of fiduciary duty claims under ERISA § 502(a)(2) were “paradigmatic examples of claims appropriate for certification as a Rule 23(b)(1) class.” *Hans*, 2010 WL 1856267 at *9; *see Tussey*, 2007 WL 4289694 at *8 (certifying class in ERISA case under Rule 23(b)(1)(A) and (B)). Here too, certification under Rule 23(b)(1) is appropriate to ensure that the rights of all ESOP participants are protected and to avoid the risk of inconsistent verdicts.

⁷ To the extent that the Court concludes that there should be separate liaison counsel for the subclasses, the Court should appoint Mr. Blassingame’s local counsel as Liaison Counsel for a Current Employee Subclass.

1. Certification Under Rule 23(b)(1)(B) is Proper

Rule 23(b)(1)(B) applies where “*any* individual adjudication by a class member disposes of, or substantially affects, the interests of absent class members.” *Id.* (emphasis added). One of the “classic examples” that the Supreme Court identified as appropriate for class certification under Rule 23(b)(1)(B) is an “action[] charging ‘a breach of trust by [a] fiduciary similarly affecting the members of a large class’ of beneficiaries, requiring an accounting or similar procedure ‘to restore the subject of the trust.’” *Ortiz*, 527 U.S. at 834 (citing Advisory Committee’s Notes). Precisely because “plan participants may only bring suit on behalf of the Plan,” certification under Rule 23(b)(1)(B) is frequently granted in cases involving breach of fiduciary duty under ERISA. *Jones*, 257 F.R.D. at 193 (citing cases); *see Tussey*, 2007 WL 4289694 at *8-9 (certifying Rule 23(b)(1) class in ERISA fiduciary breach case); *Kirse*, 2005 WL 3302008 at *2 (same). “[G]iven the claim is ‘brought on behalf of the Plan and alleging breaches of fiduciary duty on the part of defendants that will, if true be the same with respect to every class member, Rule 23(b)(1)(B) is clearly satisfied.’” *Hans*, 2010 WL 1856267 at *9 (quoting *In re Schering Plough*, 589 F.3d at 605). As this Court also explained, a finding about whether the Trustee breached his duty and therefore owes money to the Plan “has an effect on every member of the proposed class.” *Id.* at *10.

As in *Hans*, the prosecution of this case will necessarily adjudicate the rights of the other plan participants whether they are parties to this litigation or not. The central allegation in this case is that Gary Tharaldson breached his corporate fiduciary duties by misusing approximately \$4 million of TMI’s assets to pay his ex-wife under an agreement for his own benefit and also breached his fiduciary duties as the Trustee of the TMI ESOP by failing to prevent or seek recovery for the misuse of TMI’s assets. Compl. ¶ 2. Through this litigation, a determination will have to be made whether Gary Tharaldson breached his duty to TMI and to the Plan (and all

participants), and the amount of losses caused by this breach. *Id.* ¶ 34; *Supra* Bkgd II. The result of this litigation, therefore, will determine the amount of recovery that is owed to the Plan. Once that money is paid to the Plan, additional shares will need to be allocated to the accounts of *all* the participants, regardless of whether they are formally joined as class members. *See id.* As such, this litigation will practically affect the rights of all participants. Thus, this case should be certified under Rule 23(b)(1)(B) so that all affected participants are class members.

2. Certification of a Class Under Rule 23(b)(1)(A) Is Also Proper

Certification under Rule 23(b)(1)(A) is appropriate where the suit presents “the *possibility* that adjudications of separate actions could set incompatible standards of conduct for defendant.” *Reynolds v. Nat’l Football League*, 584 F.2d 280, 284 (8th Cir. 1978) (emphasis added) (affirming certification under Rule 23(b)(1)(A) where the possibility of separate suits could create incompatible standards of conduct). Determinations in ERISA cases alleging breach of fiduciary duty on behalf of the plan would necessarily present a risk of inconsistent adjudications. *E.g.*, *In re Aquila*, 237 F.R.D. at 213 (certifying class under Rule 23(b)(1)(A) because separate actions would create the risk of inconsistent or varying adjudications). As this Court explained, “one court could find a breach of the [fiduciary] duty and another might not.” *Hans*, 2010 WL 1856267 at *10; *see Jones*, 257 F.R.D. at 194 (explaining in an ERISA action “if one court order[s] restitution to the Plan... but another order[s] differently, those orders would establish incompatible standards”); *Powell v. Nat’l Football League*, 711 F. Supp. 959, 969 (D. Minn. 1989) (explaining that the risk to avoid is that one court might grant the relief, another deny it, and a third would grant it in a materially different way).⁸ The same risk of inconsistent adjudications exists in this case.

⁸ As another court in this Circuit recently concluded, where the action challenges the legality of defendant’s action and defendant’s conduct “should be uniform for each plaintiff and the defendant,” the

The central allegations in this case are that Gary Tharaldson misused Plan assets when he caused TMI to enter into an agreement with his ex-wife, Linda Tharaldson and that he breached his duties as Trustee of the TMI ESOP by failing to prevent and/or recover the misuse of corporate assets, including by failing to file a derivative action. Compl. ¶¶ 1-2. Separate actions on this issue could readily result in a variety of different results. This Court could conclude that (1) these payments were a misuse of corporate assets, (2) failure to bring suit was a breach of Gary Tharaldson's ERISA fiduciary duties, and (3) this failure caused harm to the TMI ESOP. Another court might reach different conclusions. As recovery is sought on behalf of the TMI ESOP, the risk of attempting to comply with inconsistent adjudications would impact not only the Defendant, but also the ESOP (and its current fiduciaries) and TMI officials (as to whether they should, as Gary and Linda Tharaldson appear to claim, continue to pay Linda Tharaldson under the contract). Accordingly, certification under Rule 23(b)(1) is appropriate to avoid the possibility of inconsistent adjudications.

B. The Class Alternatively Meets The Requirements Rule 23(b)(3)

The Eighth Circuit has explained that when “the choice exists between [Rule 23](b)(1) and (b)(3) certification, generally it is proper to proceed under (b)(1) exclusively in order to avoid inconsistent adjudication or a compromise of class interests.” *Reynolds*, 584 F.2d at 284; *Jones*, 257 F.R.D. at 194 (declining to consider certification under Rule 23(b)(3) where Rule 23(b)(1) certification was appropriate). According to the leading case on this issue, “virtually every class action that meets the requirements of 23(b)(1) . . . will also meet the less severe requirements of 23(b)(3).” *Van Gemert v. Boeing Co.*, 259 F. Supp. 125, 130 (S.D.N.Y. 1966);

fact that monetary relief may be required as a result of the Court's determination does not undermine the suitability of the case to be certified under Rule 23(b)(1). *Cortez*, 266 F.R.D. at 292; *see also Morales v. Greater Omaha Packing Co.*, 266 F.R.D. 294, 303 (D. Neb. 2010).

see 2 Newberg, supra § 4:20 at 147-48 (explaining *Van Gemert* “has been uniformly endorsed”); Fed. R. Civ. P. 23(b)(1) 1966 Advisory Committee Notes (explaining Rule 23(b)(1) addresses cases in which class treatment is “clearly called for” while Rule 23(b)(3) permits certification as “may be convenient and desirable”).

1. Common Issues Predominate Because There Are No Individual Issues

As the Eighth Circuit has explained, “the nature of the evidence to prove a particular question determines” whether the common issues predominate:

[If] the members of [the] proposed class need to present evidence that varies from member to member [to make a prima facie showing of a given question], then it is an individual question. If the same evidence will suffice for each member to make a prima facie showing, then it becomes a common question.

Blades, 400 F.3d at 566 (citing *In re Visa Check/Master Money Antitrust Litig.*, 280 F.3d 124, 136-40 (2d Cir. 2001)) (explaining predominance exists when issues are subject to generalized proof affecting the class rather than particular individuals)). An ERISA fiduciary breach case “is not a “determination of personal causes of action brought by individuals.” *Brieger v. Tellabs, Inc.*, 245 F.R.D. 357 (N.D. Ill. 2007); *Aquila*, 237 F.R.D. at 210 (“It is the Plan that will prevail or not prevail in this case, not the individual Plaintiffs.”). Courts in this Circuit have repeatedly stated that “the appropriate focus in a [ERISA] breach of fiduciary duty claim” is “the conduct of the defendants, not the plaintiffs.” *In re Aquila*, 237 F.R.D. at 209. Thus, liability in this case focuses on Defendant’s conduct in connection with TMI and the TMI ESOP and not on individual class member knowledge or action.

“[C]ourts repeatedly have held that” predominance exists “even if there are individual differences in Class members’ damages.” *In re Charter Commc’ns, Inc., Secs. Litig.*, No. MDL 1506, 2005 WL 4045741, *11 (E.D. Mo. June 30, 2005); *Mehl*, 227 F.R.D. at 521-22 (finding predominance despite differences in amount of relief). In an ERISA breach of fiduciary duty

case, “individual participants’ varying damages are irrelevant” because “the plan administrator [will] determine” the allocation of relief. *Tussey*, 2007 WL 4289694 at *5, 7. In this case, any recovery will be paid to the ESOP and only thereafter allocated to their accounts under the terms of the Plan. Thus, just as there are no individual liability issues, there are no individual relief issues, and common issues clearly predominate.

2. A Class Action Is A Superior Method Of Resolving This Claim

Superiority measures whether “[a] single proceeding to address common issues [is] more efficient for the parties and the judiciary, and [to] insure consistency.” *In re Am. Ital. Pasta Co.*, No. 05-0725, 2007 WL 927745, *7 (W.D. Mo. March 26, 2007); see *Gulf Oil Co. v. Bernard*, 452 U.S. 89, 101 n.11 (1980) (“Rule 23 expresses ‘a policy in favor of having litigation in which common interests, or common questions of law or fact prevail, disposed of where feasible in a single lawsuit.’”). As another court in this District explained, a class action is superior where the alternative would consume more resources:

[I]f these claims were tried separately, the amount of repetition would be enormous. It would be manifestly inefficient to duplicate the discovery process and to hold multiple trials with juries hearing the same evidence and deciding the same issues.

Mehl, 227 F.R.D. at 522. An ERISA § 502(a)(2) claim requires the plaintiff to prove “[a] breach of [fiduciary] duty owed to the Plan.” *Rogers v. Baxter*, 521 F.3d 702, 705 (7th Cir. 2008) (emphasis added); see *Tussey*, 2007 WL 4289694 at *7 (explaining that for plaintiffs to prevail in an ERISA case, they “need only show [a fiduciary] obligation and a breach”).

A class action is the superior method of proceeding when “the sources of proof will be the same for all class members.” *Perez-Benites v. Candy Brand, LLC*, 267 F.R.D. 242, 249 (E.D. Ark. 2010). Given its representative nature, this action presents no manageability problems and should be maintained as a class action. *Supra* I & II.A.1&2. If this case is not certified as a class action, participants could bring separate suits requiring proof of the same facts about the same

transaction because none would be bound by any judgment. *See Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 805 (1985) (explaining that absent a class action, principles of *res judicata* do not apply). Thus, the most efficient method of proceeding is to resolve this issue in one single class action, rather than litigating the same claim and seeking the same discovery and proof in multiple trials in multiple jurisdictions.⁹

As a result, a class action is the preferred method of proceeding with this action. Because this case qualifies for certification under Rule 23(b)(1), it also qualifies for certification under Rule 23(b)(3).

CONCLUSION

For all the foregoing reasons, Plaintiff's motion should be granted.

Dated: July 1, 2010

Respectfully submitted,

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⁹ As Defendant requested and obtained transfer of *Hans* to this Court, he can raise no argument about the desirability of this forum. *See* D.E. # 69 in *Hans v. Tharaldson*, No. 05-00115 (D.N.D.).

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