

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF KENTUCKY
ASHLAND DIVISION**

ROBERT ADKINS, et al.,	:	Case No. 09-cv-00116-HRW
	:	
Plaintiff,	:	
	:	
v.	:	Judge Henry R. Wilhoit, Jr.
	:	
SPECIAL METALS CORPORATION, et al.,	:	
	:	Class Action
	:	
Defendants.	:	

**PLAINTIFF-PARTICIPANTS'
MOTION FOR CLASS CERTIFICATION**

The named Plaintiffs, Robert Adkins, James Smith, and Chad S. Thompson, putative class representatives move for Class Certification under FED. R. CIV. PRO. 23, for the reasons set forth in the attached memorandum of law.

Respectfully Submitted,

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Dated: February 9, 2010

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MEMORANDUM IN SUPPORT OF MOTION FOR CLASS CERTIFICATION

Plaintiffs Robert Adkins, James Smith, and Chad S. Thompson (“Plaintiffs” or “Plaintiff-Participants”), on behalf of themselves and all other persons in the proposed class, by their attorneys, submit this Memorandum in Support of Motion for Class Certification.

I. STATEMENT OF THE ISSUE TO BE DECIDED

Whether the Court should grant Plaintiff-Participants’ motion pursuant to Federal Rule of Civil Procedure 23 to certify the proposed class, consisting of approximately 1500 or more individuals whose rights to obtain health care from a funded voluntary employee benefit association named the Special Metals Retiree Benefits Trust (“Benefits Trust”) have been threatened by the Defendants’ stance that it is not required to make payments or contributions to the Benefits Trust; appoint Cook, Portune, and Logothetis, LLC as counsel for the class; and permit this class, by the Individual Plaintiffs and their counsel, to prosecute this action as a class action.

II. SUMMARY OF ARGUMENT

On December 31, 2009, the Individual Plaintiffs commenced this putative class action together with the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied

Industrial and Service Workers International Union, AFL-CIO/CLC (“USW”) (collectively, “Plaintiffs”). Plaintiffs proceed against Special Metals Corporation, Precision Castparts Corp, and Huntington Alloys Corporation, in their respective corporate capacities; and Special Metals Corporation and Huntington Alloys Corporation in their collective capacity as a residual fiduciary of the Special Metals Retiree Benefits Trust. Plaintiffs will collectively refer to Defendants, together with the predecessor corporations of Special Metals Corporation, as “Special Metals.”

Class Representatives bring this class action on behalf of themselves and the following proposed Class (collectively, the “Class Members”), and request the Court to certify the proposed class as here defined:

- (a) All former employees of SMC, HAC, or any of their predecessors who, before January 5, 2010, were represented by the USW for purposes of collective bargaining in Burnaugh, Kentucky, or Huntington, West Virginia, or Dunkirk, NY, and who have received or have satisfied the requirements to receive retiree health care benefits under the applicable collective bargaining agreements and/or under the current eligibility requirements of the governing documents of the Benefits Trust, described below (herein, “Retirees”); and
- (b) Deceased Retirees’ spouses who also received or satisfied the requirements to receive such benefits; and spouses of former employees who were represented by the USW for purposes of collective bargaining in Burnaugh, Kentucky, or Huntington, West Virginia, or Dunkirk, NY, who died during the period of their employment with SMC, HAC or any of their predecessors with such deaths occurring before January 5, 2010, and who also have received or have

satisfied the requirements to receive such benefits (herein, both categories of spouses are referred to as “Surviving Spouses”); and

(c) Dependents (including dependent spouses of living Retirees and dependent children) of either Retirees and Surviving Spouses, who also have received or satisfied the requirements to receive such benefits (herein, “Dependents”); and

(d) Persons who were, on or after January 5, 2010, employees of SMC, HAC, or any of their predecessors represented by the USW for purposes of collective bargaining in Burnaugh, Kentucky, or Huntington, West Virginia, or Dunkirk, NY, who were hired on or prior to November 1, 2008, and who because of their employment may eventually satisfy the requirements to receive such benefits (herein, “Employees”).

Compl., Dkt. #1, ¶ 26.

As detailed below – and in their Brief in Support of Joint Motion For Order Preliminarily Approving Settlement, Approving Form And Manner Of Notice, And Scheduling Hearing On The Fairness Of Settlement (“Preliminary Approval Motion”) – Plaintiffs brought this action to enforce CBAs, and labor agreements negotiated during Special Metals’ 2003 bankruptcy proceedings, under which Special Metals was to make contributions to the Benefits Trust which provides health benefits to retired members of the putative class.

A dispute has arisen about the level of funding and Defendant Companies’ obligation to make contributions to the Benefits Trust. Defendant Companies take the position, including in negotiations, that they may terminate funding at any time. Plaintiffs brought this action to resolve this dispute and to ensure the continuation and protection of retiree health care benefits.

In this motion, Plaintiffs ask the Court to certify the proposed class, as other courts have repeatedly done in similar cases involving collectively bargained retiree health benefits.

III. STATEMENT OF FACTS and PROPOSED CLASS DEFINITION

In both the Complaint (Dkt. #1) and the Preliminary Approval Motion (Dkt. #17), the parties have provided a detailed Statement of Facts, which Individual Plaintiffs incorporate here. In short, putative class members were long guaranteed retirement health benefits pursuant to CBAs negotiated between the USW and Special Metals. The Benefits Trust was formed following Special Metals' 2003 bankruptcy, and began providing benefits to retirees. In the most recent contract negotiations between the USW and Special Metals, Special Metals asserted the right to discontinue payments to the Benefits Trust. Plaintiffs have brought this action to protect the rights to retirement benefits for themselves and those similarly situated, who earned and will earn retirement benefits over decades of service with Special Metals.

Plaintiffs seek class certification pursuant to Rule 23 of the FRCP on behalf of themselves and all persons similarly situated:

- (a) All former employees of SMC, HAC, or any of their predecessors who, before January 5, 2010, were represented by the USW for purposes of collective bargaining in Burnaugh, Kentucky, or Huntington, West Virginia, or Dunkirk, NY, and who have received or have satisfied the requirements to receive retiree health care benefits under the applicable collective bargaining agreements and/or under the current eligibility requirements of the governing documents of the Benefits Trust, described below (herein, "Retirees"); and
- (b) Deceased Retirees' spouses who also received or satisfied the requirements to receive such benefits; and spouses of former employees who were

represented by the USW for purposes of collective bargaining in Burnaugh, Kentucky, or Huntington, West Virginia, or Dunkirk, NY, who died during the period of their employment with SMC, HAC or any of their predecessors with such deaths occurring before January 5, 2010, and who also have received or have satisfied the requirements to receive such benefits (herein, both categories of spouses are referred to as “Surviving Spouses”); and

(c) Dependents (including dependent spouses of living Retirees and dependent children) of either Retirees and Surviving Spouses, who also have received or satisfied the requirements to receive such benefits (herein, “Dependents”); and

(d) Persons who were, on or after January 5, 2010, employees of SMC, HAC, or any of their predecessors represented by the USW for purposes of collective bargaining in Burnaugh, Kentucky, or Huntington, West Virginia, or Dunkirk, NY, who were hired on or prior to November 1, 2008, and who because of their employment may eventually satisfy the requirements to receive such benefits (herein, “Employees”).

Compl., Dkt. #1, ¶ 26.

IV. ARGUMENT

A. The Lawsuit Meets The Class Certification Requirements Of Rule 23.

Rule 23 of the FRCP allows plaintiffs to sue on behalf of themselves and a “class” of unnamed individuals who are similarly situated. The United States Supreme Court has noted that “the class-action device saves the resources of both the courts and the parties by permitting an issue potentially affecting every [class member] to be litigated in an economical fashion under

Rule 23.” Gen. Tel. Co. of the Sw. v. Falcon, 457 U.S. 147, 155 (1982) (quoting Califano v. Yamasaki, 442 U.S. 682, 701 (1979)). Further, “[c]lass actions serve an important function in our system of civil justice” (Gulf Oil Co. v. Bernard, 452 U.S. 89, 99 (1981)), and courts have made it clear that Rule 23 should be liberally construed. Even in a “doubtful case ... any error, if there is to be one, should be committed in favor of allowing a class action.” Eisenberg v. Gagnon, 766 F.2d 770, 785 (3d Cir. 1985); Walsh v. Pittsburgh Press Co., 160 F.R.D. 527, 529 (W.D. Pa. 1994).

In deciding whether to certify a class, “the district court must first consider whether a precisely defined class exists and whether the named plaintiff is a member of the proposed class.” McGee v. East Ohio Gas Co., 200 F.R.D. 382, 387 (S.D. Ohio 2001). Plaintiff-Participants here have precisely defined the class that they seek to represent. Moreover, as shown below in the discussion of “typicality” and “commonality,” all Retirees, Spouses, and Employees are members of the class.

Next, the court should consider whether the lawsuit meets all four requirements of Rule 23(a) (numerosity, commonality, typicality, and adequacy), and at least one of the subsections of Rule 23(b). Mamula v. Satralloy, Inc., 578 F. Supp. 563, 569 (S.D. Ohio 1983) (Holschuh, J.). See also Falcon, 457 U.S. at 161; Baby Neal for and by Kanter v. Casey, 43 F.3d 48, 55-56 (3d Cir. 1994); 7A Wright, Miller & Kane, Federal Practice and Procedure: Civil 2d, § 1759 (1986) (hereinafter “Wright, Miller & Kane”). As we show below, Plaintiffs satisfy all Rule 23(a) standards and at least one of the subsections of Rule 23(b).¹

¹Applying Rule 23 standards, courts have frequently certified employee benefit cases as class actions. E.g., Mamula, supra; Walsh v. Pittsburgh Press Co., 160 F.R.D. 527, 529 (W.D. Pa. 1994); Kifafi v. Hilton Hotels Ret. Plan, 189 F.R.D. 174, 176-77 (D. D.C. 1999); Coleman v. PBGC, 196 F.R.D. 193 (D.D.C. 2000); Dameron v. Mt. Sinai Hosp. of Baltimore, 595 F. Supp. 1404, 1408 (D.Md. 1984); Kayes v. Pac. Lumber Co., 51 F.3d 1449, 1461-63 (9th Cir. 1995); Morgan v. Laborers Pension Trust, 81 F.R.D. 669 (N.D.Cal. 1979); Gruby v. Brady, 838 F. Supp. 820 (S.D.N.Y. 1993).

1. This Action Satisfies All Prerequisites Of Rule 23(a).

Plaintiff-Participants satisfy all of the prerequisites to class certification that Rule 23(a) calls for: numerosity, commonality, typicality, and adequacy of representation.

a. The class is so numerous as to make joinder impracticable.

Plaintiff-Participants satisfy the numerosity prerequisite. There is no minimum or magic number of class members required for certification; rather, numerosity goes to the impracticality of joinder of class members as parties in a single action. In re Inter-Op Hip Prosthesis Liab. Litig., 204 F.R.D. 330, 339 (N.D. Ohio 2001). Where joinder is impractical, a suit may be maintained as a class action in the interest of judicial economy and to ensure access to the judicial system. Deposit Guar. Nat'l Bank v. Roper, 445 U.S. 326, 339 (1980). Joinder need not be impossible, only impracticable, "difficult," or "inconvenient." Allen v. Leis, 204 F.R.D. 401, 406 (S.D. Ohio 2001). See also Boggs v. Divested Atomic Corp., 141 F.R.D. 58, 63 (S.D. Ohio 1991) ("Satisfaction of the numerosity requirement does not require that joinder is impossible, but only that plaintiff will suffer a strong litigational hardship or inconvenience if joinder is required.").

Although Rule 23 requires no minimum number of class members, numerosity is generally satisfied when a proposed class consists of at least 40 members. B.J. Moore & J. Kennedy, Moore's Federal Practice § 23.05[1] at 23-139 (2d ed. 1987) ("Moore") (numerosity requirement satisfied for classes of more than 40 or 45 members).² There are approximately 1500 or more individuals in the proposed class, an amount which is more than sufficient to

²See also In re Am. Med. Sys., 75 F.3d 1069, 1076 (6th Cir. 1996) (citing Afro Am. Patrolman's League v. Duck, 503 F.2d 294 (6th Cir. 1974)) ("class of 35 was sufficient"); Allen, 204 F.R.D. at 406 (citing "the 'rule of thumb' that forty plaintiffs is enough to make joinder impracticable"); In re Cincinnati Radiation Litig., 187 F.R.D. 549, 552 (S.D. Ohio 1999) (80 members); Comm. of Blind Vendors v. Dist. of Columbia, 695 F. Supp. 1234, 1242 (D. D.C. 1988) (63 members); Sperling v. Donovan, 104 F.R.D. 4, 7 (D. D.C. 1984) (46 class members); EEOC v. Printing Indus. of Metro, 92 F.R.D. 51, 53 (D. D.C. 1981) (25-30 persons); Bullick v. City of Philadelphia, 110 F.R.D. 518, 520 (E.D. Pa. 1986) (140 persons).

establish numerosity. See Mamula, 578 F. Supp. at 570 (S.D. Ohio 1983) (certifying class of 160); cases cited in footnote 2, supra.

b. Significant questions of law and fact are common to the class.

Subsection (2) of Rule 23(a) requires “questions of law or fact common to the class” before an action may be certified. Fed. R. Civ. P. 23(a)(2). This does not mean, however, that every question of law or fact must be common to each class member. Baby Neal for and by Kanter v. Casey, 43 F.3d at 56 (3d Cir. 1994); Moore ¶ 23.06[1] at 23-159-160. The commonality test “is qualitative rather than quantitative, that is, there need be only a single issue common to all members of the class.” Am. Med. Sys., 75 F.3d at 1080 (citing 1 Herbert B. Newberg & Alba Conte, Newberg on Class Actions, § 3.10, at 3-47 (3rd ed.1992)); 3B Moore ¶23.06-1 at 23-159 to 160; see also Thrope v. Ohio, 173 F.R.D. 483, 488 (S.D. Ohio 1997); American Fin. System, Inc. v. Harlow, 65 F.R.D. 94, 107 (D.Md. 1974). The commonality requirement serves the objectives of Rule 23: “the class-action device saves the resources of both the courts and the parties by permitting an issue potentially affecting every [class member] to be litigated in an economical fashion....” Califano v. Yamaski, 442 U.S. 682, 701 (1979).

To determine whether the putative class meets the commonality test, courts will ask whether “the members of the class have allegedly been affected by a general policy of the defendant, and [whether] the general policy is the focus of the litigation.” Day v. NLO, Inc., 144 F.R.D. 330, 333 (S.D. Ohio 1992) (internal quotations omitted).³ It does not matter if the case involves “non-common” questions as well. Courts have generally applied Rule 23(a)(2) liberally so that “the commonality requirement is usually found to be satisfied.” 7 Wright & Miller § 1763

³See also Mayo Sears, Roebuck & Co., 148 F.R.D. 576, 580 (S.D. Ohio 1993); Forbush v. J.C. Penney Co., 994 F.2d 1101, 1106 (5th Cir. 1990), cited approvingly in Fallick v. Nationwide Mutual Ins. Co., 162 F.3d 410 (6th Cir. 1998); Finnan v. L.F. Rothschild & Co., 726 F. Supp. 460, 465-66 (S.D.N.Y. 1989).

at 604; see also Thrope, 173 F.R.D. at 488 (in retiree health case: “[T]he common issue requirement is easily established.”).

Here, there are several common issues of law and fact. Among these are: (1) whether Plaintiffs’ claims are actionable under Section 301 of the LMRA, 29 U.S.C. § 185(a), since they allege they had vested rights under successive CBAs, which Special Metals will breach by halting contributions to the Benefits Trust; and (2) whether Plaintiffs’ claims are actionable under Sections 502(a)(1)(B) and (a)(3) of ERISA, 29 U.S.C. §§ 1132(a)(1)(B) and (a)(3), since they allege that elimination or alteration of these benefits violates the terms of an ERISA-covered plan.

These questions are “common” because all the class members are affected in the same way by Defendants’ conduct. If there were no class action, a “lawsuit filed by any member of the putative class would require resolution of the same legal issue.” Thrope, 173 F.R.D. at 488; see also Bittinger v. Tecumesh Prods. Co., 123 F.3d 877, 884 (6th Cir. 1997) (in retiree health case, claim by class members “that the original [CBA] guaranteed them lifetime, fully-funded benefits” satisfied Rule 23(a)’s commonality requirement); Hiatt v. County of Adams, 155 F.R.D. 605, 609 (S.D. Ohio 1994); Mamula, 578 F. Supp. at 570 (“[T]he plaintiffs’ claims arise solely from an act of the defendant – termination of the group insurance plans – directed toward all of the plaintiffs”.... “[T]he question of law presented in this case is common to all of the plaintiffs.”).

Special Metals’ threat to unilaterally terminate contributions to the Benefits Trust and to thereby alter benefits is part of the same course of conduct. In other words, “[t]he actions challenged in the Complaint relate to the class generally.” Hiatt v. County of Adams, 155 F.R.D. 605, 609 (S.D. Ohio 1994). The proposed class members all suffered the same injury (violation

of rights to retiree benefits under CBAs and ERISA-covered plans) and all of them are seeking the same remedy (declaration that the Benefits Trust must be funded by Defendants, and restitution). Cf. Thrope, 173 F.R.D. at 489 (“[A]ll class members seek the same relief, injunctive and declaratory relief as well as reimbursement of past fees which were allegedly unlawfully charged and collected by Defendants.”).

Moreover, courts have found the common-question requirement easily satisfied in ERISA cases, such as this one, when an employer or plan administrator reduces benefits owed to similarly situated employees or retirees. See, e.g., Mamula, 578 F. Supp. at 570. That proposed class members may have retired, or will retire, in different years or under different CBAs is not an obstacle to certification, so long as there are common questions. See, e.g., Mick v. Level Propane Gases, Inc., 203 F.R.D. 324, 331 (S.D. Ohio 2001) (“The existence of different contracts does not, however, preclude relief on a class basis when the conduct complained of centers on a common issue.”); Musto v. Am. Gen. Corp., 615 F. Supp. 1483, 1493 (M.D. Tenn. 1985) (certifying class in ERISA suit even though class members received different summary plan descriptions), rev’d on other grounds, 861 F.2d 897 (6th Cir. 1988). Cf. Weimer v. Kurz-Kasch, 773 F.2d 669, 677 (6th Cir. 1985) (“[I]t was questioned whether plaintiff Weimer was an appropriate representative to bring a class action on behalf of retirees who had belonged to the Machinists union since Weimer himself had belonged only to the Moulders union. ...this distinction may be of little practical consequence since both Kurz-Kasch and the plaintiff contend, and this court agrees, that the [CBA] between Kurz-Kasch and the Moulders is virtually identical in relevant respects to the [CBA] between Kurz-Kasch and the Machinists.”).

c. Plaintiff-Participants' claims are typical of those of the class.

“The typicality requirement ensures that the representative plaintiffs’ interests are aligned with those of the proposed class, and in pursuing their own claims, the named plaintiffs will also advance the interests of the class members.” In re Inter-Op Hip Prosthesis, 204 F.R.D. at 304 (citing Am. Med. Sys., 75 F.3d at 1081). 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 if his or her claims are based on the same legal theory.” Am. Med. Sys., 75 F.3d at 1081 (quoting 1 Newberg, supra, § 3-13, at 3-76 (footnote omitted)). “Rule 23(a)(3) requires that the claims or defenses of the representative parties [be] typical of the claims or defenses of the class. Like commonality, the test for typicality is not demanding.” Abel v. Keybank USA, No. 03 CV 524, 2004 WL 540699, at *3 (N.D. Ohio March 4, 2004) (quotations omitted).

The typicality requirement also touches upon the “adequacy” requirement, as courts will inquire whether “the representatives’ claims are similar enough to those of the class so that the representatives will adequately represent the class.” Walther v. Pension Plan for Salaried Employees of Dayton-Walther Corp., 880 F. Supp. 1170, 1178 (S.D. Ohio 1994) (citing Falcon, 457 U.S. at 152). The Sixth Circuit has explained that this requirement, “simply stated,” means that “as goes the claim of the named plaintiff[s], so goes the claims of the class.” Sprague v. GM, 133 F.3d 388, 399 (6th Cir. 1988); see also Mamula, 578 F. Supp. at 571 (“the interests of the named plaintiffs are typical of or coextensive with the interests of the other members of the class.”).

The claims of Plaintiff-Participants here are typical of the class since – as we have shown in the discussion of commonality – their claims arise from the same event or practice or course of conduct that gives rise to the claims of other class members, and their claims are based on the

same legal theory. Adkins Decl., attached as Ex. 1; Smith Decl., attached as Ex. 2; Thompson Decl., attached as Ex. 3. Clearly, Plaintiffs-Participants meet the typicality requirement.

d. Plaintiff-Participants are adequate class representatives.

The named representative must fairly and adequately protect the interests of the class. Fed. R. Civ. P. 23(a)(4). The Sixth Circuit has explained: “There are two criteria for determining whether the representation of the class will be adequate: 1) The representative must have common interests with unnamed members of the class, and 2) it must appear that the representatives will vigorously prosecute the interests of the class through qualified counsel.” Senter v. GM, 532 F.2d 511, 524-25 (6th Cir. 1976). See also Wetzel v. Liberty Mut., 508 F.2d 239, 247 (3d Cir. 1975). We discuss each of these criteria in turn.

(i) The named Plaintiffs and the members of the class share the same interests.

The issue of “common interests” is largely subsumed by the discussions of commonality and typicality. Insofar as there are questions of law and fact common to the class, and the claims of the named Plaintiffs are typical of those of other class members, it is unlikely that antagonism would be sufficient to defeat class certification. Putnam v. Davies, 169 F.R.D. 89, 94 (S.D. Ohio 1996); Eisen v. Carlisle & Jacquelin, 391 F.2d 555, 562-63 (2nd Cir. 1968), aff’d in part, 417 U.S. 156 (1974). See also Mamula, 578 F. Supp. at 571. Plaintiff-Participants have already demonstrated that they satisfy the commonality and typicality requirements, and there is nothing to suggest that they would not vigorously litigate this action on behalf of all class members.

As for conflicting or antagonistic interests between class representatives and those they seek to represent, “it is well settled that only a conflict that goes to the very subject matter of the litigation will defeat a party’s claim of representative status.” Georgia State Conference of Branches of NAACP v. State of Georgia, 99 F.R.D. 16, 34-35 (S.D. Ga. 1983). Mere

“differences in the interests of the class representatives and the other class members are not dispositive under Rule 23(a)(4). The key question is whether the interests are antagonistic.” Steiner v. Equimark Corp., 86 F.R.D. 603, 610 (W.D. Pa. 1983) (emphasis in original).

There is nothing to suggest any conflicting or antagonistic interests here. We have already demonstrated that the Plaintiff-Participants are members of the class that they seek to represent and that they have the same stake in the outcome as all other class members. They also share a mutual incentive to safeguard the benefits they were promised. Adkins Decl., attached as Ex. 1; Smith Decl., attached as Ex. 2; Thompson Decl., attached as Ex. 3.

(ii) Plaintiffs’ counsel have the experience, expertise and resources needed to prosecute this case, thus satisfying the “adequacy” component for class counsel under Rule 23(a)(4), and the criteria of Rule 23(g)(1)(C)(i).

In order to provide adequate representation, the named representative’s attorney must be qualified, experienced and generally capable of conducting the litigation. Cross v. Nat’l Trust Life, Ins., 553 F.2d 1026, 1031 (6th Cir. 1977); Mamula, 578 F. Supp. at 571. Rule 23(g)(1)(C)(i) requires this Court to consider the following factors when appointing class counsel:

- the work performed by counsel in identifying or investigating potential claims in the action;
- counsel’s experience in handling class actions, other complex litigation, and claims of the type asserted in the action;
- counsel’s knowledge of the applicable law; and
- the resources counsel will commit to representing the class.

Review of these factors show that appointing Plaintiffs’ counsel to represent the class is appropriate here. Plaintiffs’ attorneys have a wealth of experience in litigating retiree health class actions. They are thoroughly familiar with the substantive as well as procedural law

applicable – and in some areas, unique – to these cases. Mr. Cook, in particular, has substantial experience in representing plaintiffs in retiree health benefit class actions, having litigated multiple such cases during his thirty-two year legal career.⁴ See Curriculum Vitae of David M. Cook, attached as Exhibit 4. Undersigned counsel are knowledgeable in the applicable law governing the action, as Mr. Cook and his firm primarily practice in the fields of labor relations, employee benefits, and labor and employee benefits litigation. (Cook Declaration, attached as Ex. 5, ¶¶1, 3). See Prater v. Ohio Educ. Ass'n, 2008 U.S. Dist. LEXIS 88511 (S.D. Ohio June 26, 2008) (“This Court also notes that both parties have exhibited an exemplary knowledge of the law, and have capably briefed the matters before the Court. Pursuant to Rule 23(g), the Court hereby appoints David M. Cook and Cook, Fortune[sic] & Logothetis as lead counsel for the class.”).

Ms. Jennie G. Arnold is a graduate of the University of Cincinnati, College of Law where she served an Editor of the Law Review and the Human Rights Quarterly. Following graduation, Ms. Arnold clerked for a federal District Court judge, after which she joined Cook, Portune, & Logothetis, where she has spent a majority of her time litigating employee benefits cases. Much of Ms. Arnold’s employee benefits experience has come through vigorously litigating Prater v. Ohio Education Assn, 505 F.3d 437 (6th Cir. 2007), in which preliminary approval of the settlement has now been granted; and Tackett v. M & G Polymers, 561 F.3d 478 (6th Cir. 2009), in which merits discovery is now underway.

As for the other factors the court should consider in appointing class counsel, it bears noting that Plaintiff-Participants’ attorneys have already spent considerable time here identifying and investigating potential class claims. Among other things, Plaintiffs’ attorneys have reviewed

⁴Mr. Cook’s most recent retiree health benefit reported cases include (but are not limited to): Prater v. Ohio Education Ass’n, 505 F.3d 437 (6th Cir. 2007); and Tackett v. M & G Polymers, 561 F.3d 478 (6th Cir. 2009).

and analyzed CBAs, Plan documents, and actuarial reviews of the Benefits Trust's funding needs; interviewed class members; and drafted motions and briefs on behalf of Plaintiffs. In addition, counsel have and will continue to commit the resources necessary to prosecute this case. Cook Decl., Ex. 5, ¶ 6.

2. This Action Satisfies the Standard for Class Certification Under Rule 23(b).

Rule 23 requires that before an "action may be maintained as a class action," not only must the prerequisites of 23(a) be met, but the action must also satisfy one of the three subdivisions of Rule 23(b). Fed. R. Civ. P. 23(b). Having demonstrated that they meet all four Rule 23(a) requirements, Plaintiff-Participants now show that class certification is also appropriate pursuant to Rule 23(b).

a. Rules 23(b)(2) requirements are satisfied.

A class action may be maintained under Rule 23(b)(2) if "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." See also Kutschbach v. Davies, 885 F. Supp. 1079, 1086 (S.D. Ohio 1995) ("Rule 23(b)(2) is applicable when the court's equitable power is the primary form of relief sought, not when the appropriate final relief relates exclusively or predominantly to money damages.")(internal quotations and citations omitted); Probe v. State Teachers' Ret. Sys., 780 F.2d 776 (9th Cir. 1986); Mamula, 578 F. Supp. at 572 (certifying retiree health class action, and finding Rule 23(b)(2) requirements are satisfied).

As demonstrated above, Defendants have acted, and will continue to act, on grounds generally applicable to the entire putative class. They have stated that they do not believe they are required to make future payments to the Benefits Trust, thereby threatening the future health

care benefits available to Plaintiffs. Under these circumstances, a declaration requiring Defendants to fund the Benefits Trust and providing restitution for the class as a whole is appropriate. Indeed, these are the principal remedies that Plaintiff-Participants seek here.

In their Complaint, Plaintiff-Participants have requested that the Court enjoin Defendants from refusing to fund the Benefits Trust, and declare that Defendants are obligated to fund the benefits required by the CBAs by making payments to the Benefits Trust. Plainly, Plaintiffs meet the Rule 23(b)(2) requirements.

b. This action also satisfies the standard for class certification under Rule 23(b)(1).

Rule 23(b)(1) defines two related types of class actions designed to prevent prejudice to parties arising from potential multiple suits involving the same subject matter. Rule 23(b)(1) provides that an action may be maintained as a class action where:

- (1) 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 parties 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

The class satisfies the requirements of Rule 23(b)(1)(A). According to the Supreme Court, Rule 23(b)(1)(A) “takes in cases where the party is obligated by law to treat the members of the class alike . . . or where the party must treat all alike as a matter of practical necessity . . .” Amchem Prod., Inc. v. Windsor, 521 U.S. 591, 614 (1997). Courts have certified ERISA retiree health class actions under Rule 23(b)(1)(A) due to the risk of “varying adjudications” if suits

went forward individually. Ames v. Robert Bosch Corp., 2009 U.S. Dist. LEXIS 25671, at *6 (N.D. Ohio March 24, 2009), attached as Ex. 6.

B. Plaintiffs' Attorneys Should Be Appointed Class Counsel.

As noted above, Fed.R.Civ.P. 23(g) requires that in appointing class counsel, courts should examine whether counsel: (1) has investigated the class claims, (2) is experienced in handling class actions and complex litigation, (3) is knowledgeable regarding the applicable law, and (4) will commit adequate resources to representing the class. Fed. R. Civ. P. 23(g)(1)(C)(1); McCall v. Drive Fin. Serv., L.P., 236 F.R.D. 246, 255 (E.D. Pa. 2006).

As we have explained above, Plaintiffs' counsel are well qualified and easily meet the standards of Rule 23(g).

V. CONCLUSION

For the foregoing reasons, the Court should certify this case as an appropriate class action; appoint Cook, Portune, and Logothetis, LLC as class counsel; and permit this class, by Plaintiff-Participants and their counsel, to prosecute this action as a class action.

Respectfully Submitted,

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Dated: February 9, 2010

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served via the Court's ECF System upon counsel for all parties through the Court's Electronic Notification System on this 9th day of February, 2010.

s/ David M. Cook

David M. Cook