UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA

IN RE WACHOVIA CORPORATION ERISA LITIGATION	MASTER FILE: 3:09-CV-00262-MR
THIS DOCUMENT RELATES TO: All Actions	

MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR AN ORDER PRELIMINARILY APPROVING SETTLEMENT, PRELIMINARILY CERTIFYING THE SETTLEMENT CLASS AND APPOINTING CLASS COUNSEL AND LIAISON COUNSEL, APPROVING FORM AND DISSEMINATION OF CLASS NOTICE, AND SETTING A DATE AND TIME FOR THE FAIRNESS HEARING

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Plaintiffs David W. Allen, Robert M. Cominsky, Richard F. Dziak, Rose Hansen, Alan A. Hardman, Jerry R. Kelley, Jr., Denise A. Tuttle, and Todd A. Wright, respectfully move the Court for an Order: (1) preliminarily approving the Settlement; (2) preliminarily certifying the settlement class and appointing Class Counsel and Liaison Counsel; (3) approving the form and dissemination of the Class Notice ("Class Notice" and "Internet/Publication Notice," via specified websites—collectively, "Notices"); and (4) setting a date and time for the Fairness Hearing.[1]

I. PROCEDURAL AND FACTUAL BACKGROUND

A. Procedural History

After this consolidated Action was transferred, on Defendants' Motion, to the United States District Court for the Western District of North Carolina on June 18, 2009, Memorandum & Order, *In re Wachovia Corp. ERISA Litig.*, No. 08-5320

[1] A copy of the Class Action Settlement Agreement ("Settlement Agreement") is attached as Exhibit 1 to the Declaration of Derek W. Loeser in Support of Plaintiffs' Motion for an Order Preliminarily Approving Settlement, Preliminarily Certifying the Settlement Class and Appointing Class Counsel and Liaison Counsel, Approving Form and Dissemination of Class Notice, and Setting a Date and Time for the Fairness Hearing ("Loeser Declaration" or "Loeser Decl."). Capitalized terms not otherwise defined in this Memorandum have the same meanings ascribed to them in the Settlement Agreement. Attached to the Settlement Agreement as Exhibit 1 is the [Proposed] Findings and Order Preliminarily Approving Proposed Settlement, Preliminarily Certifying Settlement Class, Approving Form and Dissemination of Notices, and Setting Date for Hearing on Final Approval ("Preliminary Approval Order").

(S.D.N.Y. June 18, 2009) (Dkt. No. 66), Plaintiffs filed a Consolidated Complaint ("Complaint" or "Compl.") on September 18, 2009. (Pls.' Consolidated Compl. for Violations of the Employee Retirement Income Security Act, Sept. 18, 2009, Dkt. No. 104.)

Defendants moved to dismiss the Complaint on October 19, 2009. (Defs.' Mot. to Dismiss Pls.' Consolidated Compl. with Prejudice, Oct. 19, 2009, Dkt. No. 116.) After briefing, the Court dismissed the Complaint, with prejudice, on August 6, 2010. (Mem. of Decision & Order, Aug. 6, 2010, Dkt. No. 144.)

Plaintiffs filed a timely Notice of Appeal. (Pls.' Notice of Appeal, Sept. 2, 2010, Dkt. No. 146.) Plaintiffs filed their opening brief in the United States Court of Appeals for the Fourth Circuit on November 17, 2010. On December 7, 2010, the Parties filed a joint motion to remand the case to the Western District of North Carolina for settlement purposes, and the motion was granted ten days later.

B. Investigation of Claims and Discovery

The Complaint seeks to recover losses under ERISA sections 409 and 502(a)(2), 29 U.S.C. §§ 1109 and 1132(a)(2), suffered by the Wachovia Savings Plan and the A.G. Edwards, Inc. Retirement and Profit Sharing Plan ("the Plans") and the members of the Settlement Class as a result of alleged breaches of fiduciary duty. The Complaint alleges six causes of action: (1) failure to prudently and loyally manage the Plans' investment in Wachovia stock; (2) failure to monitor

fiduciary appointees; (3) failure to disclose necessary information to co-fiduciaries; (4) failure to provide Plan participants with complete and accurate information regarding Wachovia stock; (5) failure to prevent breaches by co-fiduciaries of their duties of prudent and loyal management, adequate monitoring, and complete and accurate communications; and (6) knowing participation in breaches.

Proposed Class Counsel, Keller Rohrback L.L.P., have conducted a thorough investigation into Plaintiffs' claims and the allegations set forth in the Complaint, including: (1) reviewing and analyzing documents that were publicly available concerning the Company's financial condition and the performance of Company stock during the relevant time period, including but not limited to: news articles, related complaints and pleadings, press releases, analyst reports, and regulatory filings; (2) inspecting, reviewing, and analyzing numerous documents concerning the Plans and the administration of the Plans; (3) interviewing participants of the Plans and reviewing and analyzing documents collected from participants; and (4) researching the applicable law with respect to the claims asserted and the potential defenses thereto.

C. Settlement Negotiations

Class Counsel were cognizant that there was no guarantee of success in their appeal, and were aware of the risk of depletion of available insurance coverage. Accordingly, the Parties engaged in mediation with Robert A. Meyer, Esq., a

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nationally recognized and highly experienced mediator, on December 8, 2010. Following lengthy and contentious arm's-length negotiations, the Parties reached an agreement in principle to settle the Action for $12.35 million and signed the term sheet on December 8, 2010. The Parties executed the final Settlement Agreement on February 10, 2011.

D. Terms of the Settlement Agreement

The complete terms and conditions of the Settlement are set forth in Exhibit 1 to the Loeser Declaration. The following is a summary of the principal terms of the Settlement Agreement.

1. Class Notice and Internet/Publication Notice. The Settlement Agreement provides for notice of the Settlement to be sent to the Settlement Class, so that class members may have an opportunity to object to the Settlement or otherwise express their opinion. A proposed Preliminary Approval Order is attached to the Settlement Agreement as Exhibit 1. The Preliminary Approval Order provides for the following notices:

(a) A mailed Class Notice (Exhibit A to the Preliminary Approval Order), to be mailed to the last known address of Settlement Class members; and

(b) An Internet/Publication Notice, to make information about the Settlement available at www.erisafraud.com and www.kellersettlements.com.

2. Plan of Allocation. Pursuant to the Agreement, Class Counsel have

formulated a Plan of Allocation, subject to approval by this Court at the Fairness Hearing, whereby the Class Settlement Amount will be distributed for the benefit of the Settlement Class. The proposed Plan of Allocation is attached as Exhibit 2 to the Loeser Declaration.

3. Releasees. The Settlement Agreement discharges the class's Released Claims—as defined below—against Releasees, which generally includes Defendants and any Person who served as a trustee, investment manager, service provider, record-keeper, or named or functional fiduciary (including de facto fiduciaries) of the Plans, any and all predecessors, Successors-In-Interest, present and former Representatives, direct or indirect parents and subsidiaries, attorneys and any Person that controls, is controlled by, or is under common control with any of the foregoing, including, without limitation, every person who was a director, officer, governor, management committee member, in-house counsel, employee, or agent of Wachovia Corporation, Wells Fargo & Co., and their subsidiaries and affiliates, together with, for each of the forgoing, any and all present or former Representatives, insurers, reinsurers, consultants, attorneys, administrators, employee benefit plans, investment advisors, investment underwriters, and spouses.

4. Settlement Amount. The Parties agreed to settle the Action for the sum of $12.35 million in cash.

5. Settlement Class. Pursuant to Federal Rule of Civil Procedure 23(b)(1) and/or (b)(2), the Settlement Agreement includes a non-opt out class consisting of all persons other than Defendants who were participants in or beneficiaries of the Wachovia Savings Plan at any time between May 8, 2006 and December 31, 2008 and/or participants in or beneficiaries of the A.G. Edwards, Inc. Retirement and Profit Sharing Plan at any time between October 1, 2007 and December 31, 2008 (collectively, the "Class Period"), and whose Plan account included units of investments in Wachovia Corporation stock.

6. Released Claims. Sections 4.1 and 1.20 of the Settlement Agreement define the Plaintiffs' Released Claims, Plans' Released Claims and Defendants' Released Claims, which include, in general terms, all claims raised or that could have been raised in this action that pertain to the allegations of the Complaint. The Settlement Agreement does not in any way bar, limit, waive, or release any right by members of the Settlement Class to recover any moneys resulting from a judgment in or settlement of the non-ERISA actions listed in Section 4.1.5 of the Settlement Agreement. However, Section 4.1.5 shall not permit any member of the Settlement Class to recover more than 100% of their losses.

7. Reasons for the Settlement. Plaintiffs have entered into this proposed Settlement with an understanding of the strengths and weaknesses of their claims. This understanding is based on: (1) the motion practice undertaken

by the Parties; (2) the investigation, research, and discovery as outlined above; (3) the likelihood that Plaintiffs would prevail on appeal; (4) the likelihood that Plaintiffs would prevail at trial if their appeal is granted; (5) the range of possible recovery; (6) the substantial complexity, expense, and duration of litigation necessary to prosecute this action through appeal, and if successful there, through trial, post-trial motions, and likely additional appeals, and the significant uncertainties in predicting the outcome of this complex litigation; (7) Defendants' determination to fight and contest every aspect of the case; and (8) the significant risk that any available insurance would be depleted over the course of the litigation. Having undertaken this analysis, Class Counsel and Plaintiffs have concluded that the Settlement is fair, reasonable, and adequate, and should be presented to the Court for approval.

II. PROPOSED SCHEDULE

As laid out in the Preliminary Approval Order, the Parties have agreed to the following schedule of events, the dates of which will be determined after the Court enters the Preliminary Approval Order and sets a Fairness Hearing date:

Event	Time for Compliance
Deadline for Mailing of Class Notice and Internet/Publication Notice	30 days after entry of Preliminary Approval Order
Deadline for filing Plaintiffs' motions for final approval and for attorneys' fees and costs	21 days prior to the proposed Fairness Hearing

Deadline for Class Members to comment upon or object to the proposed Settlement	7 days prior to the proposed Fairness Hearing
Deadline for filing Plaintiffs' response to any objection filed by Class members	3 days prior to the proposed Fairness Hearing
Proposed Fairness Hearing in District Court[2]	No sooner than May 23, 2011

III. DISCUSSION

A. The Settlement Agreement Meets the Judicial Standards for Preliminary Approval Under Fourth Circuit Law and Federal Rule of Civil Procedure 23(e).

Although the procedure for approval of a class action settlement is not specifically delineated in Rule 23(e), a two-step procedure is set forth and approved in the MANUAL FOR COMPLEX LITIGATION § 21.63, at 318-24 (4th ed. 2010), a procedure the federal courts generally follow when considering class action settlements. *See Horton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 855 F. Supp. 825, 827 (E.D.N.C. 1994).

First, the Court conducts a preliminary approval or pre-notification hearing to determine whether the proposed settlement is "'within the range of possible approval' or, in other words whether there is 'probable cause' to notify the class of the proposed settlement." *Id.* at 827 (citing *Armstrong v. Bd. of Sch. Dirs. of Milwaukee*, 616 F.2d 305, 314 (7th Cir. 1980), *overruled on other grounds by*

[2] Pursuant to the Class Action Fairness Act of 2005, 28 U.S.C. § 1715(d), the date of the Fairness Hearing must be at least 90 days after notices are served on the appropriate state and federal officials.

Felzen v. Andreas, 134 F.3d 873, 875 (7th Cir. 1998)).

Second, assuming that the Court grants preliminary approval and notice is sent to the class, the Court conducts a final "fairness" hearing which provides all interested parties with an opportunity to be heard on the proposed settlement. The ultimate purpose of this procedure is to ensure that the settlement is "fair, reasonable and adequate," *id.*, and that all class members and/or objectors have the ability to be heard.

When considering final approval, the Court has discretion in making the first-stage determination. *See, e.g. Horton,* 855 F. Supp. at 828; *Evans v. Jeff D.*, 475 U.S. 717, 742 (1986). "[A]pproval of a class action settlement is committed to 'the sound discretion of the district courts to appraise the reasonableness of particular class-action settlements on a case-by-case basis, in light of the relevant circumstances.'" *In re MicroStrategy, Inc. Sec. Litig.*, 148 F. Supp. 2d 654, 663 (E.D. Va. 2001) (quoting *Evans*, 475 U.S. at 742). The Supreme Court has cautioned, however, that in reviewing a proposed class settlement, a court should "not decide the merits of the case or resolve unsettled legal questions." *Carson v. Am. Brands, Inc.*, 450 U.S. 79, 88 n. 14 (1981). Because the object of settlement is to avoid, not confront, the determination of contested issues, the approval process should not be converted into an abbreviated trial on the merits. *See Flinn v. FMC Corp.*, 528 F.2d 1169, 1172-73 (4th Cir. 1975) (noting that the settlement hearing

is not "a trial or a rehearsal of the trial" (quotation marks and citation omitted)). Instead, courts have consistently held that the function of a judge reviewing a settlement is to determine whether the proposed settlement is fundamentally fair, adequate and reasonable, *see United States v. North Carolina*, 180 F.3d 574, 581 (4th Cir. 1999), "without modifying [the settlement's] terms, and without substituting its business judgment for that of counsel, absent evidence of fraud or overreaching." *In re Global Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 455 (S.D.N.Y. 2004) (internal quotation marks and citations omitted).

B. The Proposed Settlement Meets the Fairness Standard.

In assessing the "fairness" of a proposed settlement, the district court should consider: "(1) the posture of the case at the time settlement was proposed, (2) the extent of discovery that had been conducted, (3) the circumstances surrounding the negotiations, and (4) the experience of counsel in the area of . . . class action litigation." *In re Jiffy Lube Sec. Litig.*, 927 F.2d 155, 159 (4th Cir. 1991). At this preliminary stage, the Court is under no obligation to make an ultimate finding on the proposed settlement's fairness; it need only decide whether the proposed settlement is "within the range" of a fair settlement. *Horton*, 855 F. Supp. at 827 (quotation marks and citation omitted).

1. The Posture of the Case at the Time the Settlement Was Proposed

In the present case, the Parties litigated for two and a half years before

entering into the Settlement. Before reaching agreement on the Settlement, Class Counsel conducted an extensive investigation, the Parties briefed and contested a Motion to Dismiss, and Plaintiffs filed — and partially briefed — an appeal from the Court's Order dismissing the Complaint. The Parties engaged in lengthy settlement discussions culminating in a full-day mediation, which allowed the Parties to fully explore their respective factual and legal positions.

2. The Extent of Discovery That Had Been Conducted

The Court next considers the extent of discovery conducted as a means of evaluating a settlement for preliminary approval. *See id.* at 829. There is, however, no minimum or definitive amount of discovery that must be undertaken to satisfy this fairness consideration. *See id*. at 830. Indeed, discovery may not be necessary for the parties to fully evaluate the merits of the plaintiffs' claims. In *Jiffy Lube*, the Fourth Circuit approved the proposed partial class action settlement — with the exception of a settlement provision about a nonsettling defendant's right of setoff — prior to any formal discovery. *See* 927 F.2d at 159. In *Horton*, the court found that production of under 4,000 pages of documents and two "confirmatory" depositions to be sufficient. *See* 855 F. Supp. at 829.

In the present case, Defendants produced certain initial documents that enabled Class Counsel to determine key issues regarding the nature of the Plans and the liabilities of various Defendant fiduciaries. To use the words of the

MicroStrategy court, "although this settlement came early on — prior to the completion of formal discovery — it is clear that plaintiffs 'have conducted sufficient informal discovery and investigation to . . . evaluate [fairly] the merits of Defendants' positions during settlement negotiations.'" 148 F. Supp. 2d at 664-65 (internal quotation marks and citation omitted).

3. The Circumstances Surrounding the Settlement Negotiations

In *MicroStrategy*, the court recognized that, as in the present case, the settlement resulted from arm's length negotiations conducted by counsel with the "experience and ability…necessary to [effectuate] representation of the class's interests." *Id*. at 665 (quoting *Weinberger v. Kendrick*, 698 F.2d 61, 74 (2d Cir. 1982)). Here, the Parties engaged in settlement negotiations with an experienced mediator and the terms of the Settlement Agreement were hard fought.

4. The Experience of Class Counsel in ERISA Class Actions

Courts also examine the experience of class counsel to determine whether there was any collusion between the defendants and class counsel in reaching the proposed settlement. *Jiffy Lube*, 927 F.2d at 159. The documents Plaintiffs are submitting in support of the Settlement establish that it was heavily negotiated and there was no collusion.

As discussed below, Keller Rohrback has extensive experience in handling ERISA class action cases and other complex litigation. Keller Rohrback is a

national leader in this area of litigation. *See* Loeser Decl. ¶¶ 7-9. Additionally, Wyatt & Blake, L.L.P. has extensive experience in complex civil litigation matters.

Based on Class Counsel's experience and the specific facts and circumstances of this particular case, Class Counsel have concluded that the Settlement is fair, reasonable, and adequate. This factor supports preliminary approval of the proposed Settlement. In *MicroStrategy*, the court concluded that in similar circumstances, it was "'appropriate for the court to give significant weight to the judgment of class counsel that the proposed settlement is in the interest of their clients and the class as a whole.'" 148 F. Supp. 2d at 665 (quoting *S.C. Nat'l Bank v. Stone*, 139 F.R.D. 335, 339 (D.S.C. 1991)); *see also Flinn*, 528 F.2d at 1173 ("While the opinion and recommendation of experienced counsel is not to be blindly followed by the trial court, such opinion should be given weight in evaluating the proposed settlement.").

Based on consideration of all four of the "fairness" factors identified by the Fourth Circuit, Class Counsel recommend preliminary approval of the Settlement.

C. The Proposed Settlement Meets the Adequacy Standard.

In determining the "adequacy" of a proposed settlement, the district court should consider: (a) the relative strength of the merits of plaintiffs' case and the existence of strong defenses or difficulties of proof the plaintiffs will have to face at trial; (b) the expected duration and cost of additional litigation; (c) the

defendants' solvency and the likelihood of plaintiffs' recovery on a judgment; and (d) the degree of class members' opposition to the settlement.[3] *Jiffy Lube*, 927 F.2d at 159. At this stage, the Court need make no definitive finding about the adequacy of the proposed settlement—it must determine simply whether the proposed settlement is "within the range" of an adequate settlement. *Horton*, 855 F. Supp. at 827 (quotation marks and citation omitted).

1. The Relative Strength of the Plaintiffs' Case on the Merits and the Existence of Strong Defenses or Difficulties of Proof

"Perhaps the most important factor in evaluating the adequacy of a class action settlement is the relative strengths of plaintiffs' case and the existence of any defenses or difficulties of proof." *Horton*, 855 F. Supp. at 831; *see also Flinn,* 528 F.2d at 1172; *In re Serzone Prods. Liab. Litig.*, 231 F.R.D. 211, 244 (S.D.W. Va. 2005). The court in *MicroStrategy*, however, commented that "while plaintiffs' counsel express confidence in the strength of plaintiffs' case on the merits, 'the complexities and uncertainties characteristic of class action securities litigation, and the associated expenses of such litigation, make it appropriate for … plaintiffs to compromise their claims pursuant to a reasonable settlement.'" 148 F. Supp. 2d at 665 (quoting *S.C. Nat'l Bank*, 139 F.R.D. at 340).

As evidenced by the vigor with which they have prosecuted it and the

[3] At this preliminary stage it is impossible to gauge the degree of opposition, if any, to the Settlement. This factor can be considered only at the final Fairness Hearing.

amount of time and money they have expended on a contingent basis toward that end, Class Counsel are optimistic about their ultimate success in this matter. But there is risk in any litigation, and especially here, where the district court dismissed the Action, and the area of the law — ERISA class actions — is one of the most complex, unpredictable, and rapidly developing in all of American jurisprudence. As a result, any prediction of success is far from reliable. *Compare, e.g.*, *Veera v. Ambac Plan Admin. Order Comm.*, No. 10-4191, 2011 WL 43534 (S.D.N.Y. Jan. 6, 2011), *with In re Citigroup ERISA Litig.*, No. 07-9790, 2009 WL 2762708 (S.D.N.Y. Aug. 31, 2009).

In this case, Defendants have forcefully defended their actions with respect to the Plans, and have shown no hesitancy to litigate this matter fully through the appeal and trial, should Plaintiffs' appeal be successful. Moreover, Defendants are represented by highly experienced and competent counsel. In view of these potential obstacles to recovery against these Defendants, the Settlement totaling $12.35 million should be regarded as a highly favorable recovery.

2. The Anticipated Duration and Expense of Additional Litigation

ERISA litigation of the type presented here is a rapidly evolving and demanding area of the law. New precedents are issued almost weekly, and the demands on counsel and the Court are complex and require the devotion of significant resources. It is not unreasonable to assume that Defendants would

continue their vigorous defense of this case through the appeal and up through trial. The Settlement obviates that delay and will, if approved, advance the recovery to the Plans, possibly by as much as two years. Thus, this factor also speaks strongly in favor of preliminary approval of the proposed Settlement. *Cf. MicroStrategy*, 148 F. Supp. 2d at 667 ("[T]here is little doubt that a jury verdict for either side would only have ushered in a new round of litigation in the Fourth Circuit and beyond, thus extending the duration of the case and significantly delaying any relief for plaintiffs.").

3. The Solvency of Defendants

In this case, Wachovia was acquired by Wells Fargo, which is not insolvent. There appears to be insurance coverage for the claims asserted in this case. If this case were to continue, however, Plaintiffs might face the risk of future insolvency or developments that call insurance coverage into question.

D. The Proposed Form of Notice to Class Members Satisfies Rule 23 and Due Process Requirements.

Following preliminary approval of the terms of the Settlement, the Class must be notified of the proposed settlement. Rule 23 provides that "[t]he court must direct notice in a reasonable manner to all class members who would be bound by the [proposed settlement]." Fed. R. Civ. P. 23(e)(1). To satisfy due process, notice to the Class must be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford

them an opportunity to present their objections." *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950).

Here, the proposed form of Class Notice (*see* Exhibit A to Preliminary Approval Order) describes in plain English (1) the terms and operation of the Settlement Agreement; (2) the nature of this action; (3) the considerations that caused Plaintiffs and Class Counsel to conclude that the Settlement is fair and adequate; (4) the maximum counsel fees and class representative case contribution awards that may be sought; (5) the procedure for objecting to the Settlement; and (6) the date and place of the Fairness Hearing. With the Court's approval, the Class Notice will be mailed to Class Members no later than 30 days after the entry of the Preliminary Approval Order. In addition, the Internet/Publication Notice will make information about the Settlement available on two websites. These proposed forms of Notice will fairly apprise Class members of the Settlement and their options, as well as fully satisfy due process requirements. *See, e.g.*, *In re Mid-Atl. Toyota Antitrust Litig.*, 585 F. Supp. 1553, 1563 (D. Md. 1984); 3 William B. Rubenstein et al., NEWBERG ON CLASS ACTIONS § 8.32 (4th ed. 2010); Charles Alan Wright et al., FEDERAL PRACTICE AND PROCEDURE § 1797.6 (3d ed. 2010).

IV. CLASS CERTIFICATION IS APPROPRIATE

Class certification is governed by Rule 23, whether certification is sought

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pursuant to a contested motion or pursuant to a settlement. *See generally Amchem Prods., Inc. v. Windsor,* 521 U.S. 591, 619-29 (1997). Thus, the Court may certify the proposed class now upon finding that the action satisfies the four prerequisites of Rule 23(a) and one or more of the three subdivisions of Rule 23(b). *Id.*; *see also Serzone*, 231 F.R.D. at 237 (noting that Fourth Circuit construes Rule 23 liberally).

A. The Proposed Class Satisfies the Four Prerequisites of Rule 23(a)

Federal Rule of Civil Procedure 23(a)(1) requires that the class be "so numerous that joinder of all members is impracticable." Here, there are approximately 155,000 class members, and joinder of all members, who live across the country, would plainly be impracticable. *See Serzone*, 231 F.R.D. at 237 (citing *Christman v. Am. Cyanamid Co.*, 92 F.R.D. 441, 451 (N.D.W. Va. 1981)). The numerosity requirement is met.

Rule 23(a)(2) is satisfied where there are "questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2); *see also Kirkman v. N.C. R.R. Co.*, 220 F.R.D. 49, 52-53 (M.D.N.C. 2004). The rule does not require that all questions of law or fact be common — a single significant common issue is enough. *Holsey v. Armour & Co.*, 743 F.2d 199, 216-17 (4th Cir. 1984). Here, there are a number of common issues (*see* Compl. ¶ 307)—among others, whether Defendants breached the fiduciary duties to the proposed class by imprudently offering and maintaining Wachovia stock as an investment option under the Plans, and whether Defendants

breached their fiduciary duties to the proposed class by failing to communicate truthfully about Wachovia stock. *See, e.g.*, *In re Schering Plough Corp. ERISA Litig.*, 589 F.3d 585, 597 (3d Cir. 2009) (holding that alleged breaches involving investment in employer stock constituted common questions of law and fact, and collecting cases). The commonality requirement is satisfied here.

Rule 23(a)(3) is also satisfied. Under Rule 23(a)(3), the "claims or defenses of the representative parties [must be] typical of the claims or defenses of the class." Fed. R. Civ. P. 23(a)(3). In *Serzone,* the court explained that "[a] sufficient nexus is established [to show typicality] if the claims or defenses of the class and class representatives arise from the same event or pattern or practice and are based on the same legal theory." 231 F.R.D. at 238 (quotation marks and citation omitted); *accord, e.g.*, *Holsey*, 743 F.2d at 217. Here, Named Plaintiffs — the proposed class representatives — were Plan participants and held units of Wachovia stock in their Plan accounts. Each seeks recovery for the Plans as a whole, and asserts a claim based on Defendants' conduct. Thus, the claims of Named Plaintiffs are based on the same legal theories and have the same factual basis as the other class members' claims, and so meet the typicality requirement. *See DiFelice v. U.S. Airways, Inc.*, 235 F.R.D. 70, 79 (E.D. Va. 2006).

Rule 23(a)(4)'s adequacy requirement is satisfied, because the proposed class representatives have and will continue to "fairly and adequately protect the

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interests of the class." Fed. R. Civ. P. 23(a)(4). There are two prongs to this requirement. The representatives must (i) have interests that are not antagonistic to the interest of other members of the class; and (ii) have retained attorneys who are qualified, experienced and able to conduct the litigation. *George v. Duke Energy Ret. Cash Balance Plan*, 259 F.R.D. 225, 232 (D.S.C. 2009). These requirements are easily met here. Plaintiffs' interests are not antagonistic to, but the same as, those of the absentee class members; all seek to increase the value of the Plans. Named Plaintiffs have retained qualified counsel with extensive experience.

B. The Proposed Class Satisfies the Requirements of Rule 23(b)(1)

Plaintiffs must also establish that at least one subsection of Rule 23(b) is satisfied. Here, certification is proper under Rule 23(b)(1). Because of "the derivative nature of ERISA § 502(a)(2) claims, breach of fiduciary duty claims brought under § 502(a)(2) are paradigmatic examples of claims appropriate for certification as a Rule 23(b)(1) class, as numerous courts have held." *Schering Plough*, 589 F.3d at 604 (collecting cases); *see also DiFelice*, 235 F.R.D. at 80 ("Alleged breaches by a fiduciary to a large class of beneficiaries present an especially appropriate instance for treatment under Rule 23(b)(1)." (citing Rule 23 Advisory Committee Notes)).

Under Rule 23(b)(1), a class may be certified if:

> (1) prosecuting separate actions by or against individual class members would create a risk of:

> (A) inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class; or
>
> (B) adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests . . . .

Thus, Rule 23(b)(1)(A) "considers possible prejudice to the defendants, while 23(b)(1)(B) looks to possible prejudice to the putative class members." *In re Ikon Office Solutions, Inc.*, 191 F.R.D. 457, 466 (E.D. Pa. 2000).

1. Rule 23(b)(1)(A)

Here, Rule 23(b)(1)(A) is satisfied, because the classic case for Rule 23(b)(1)(A) is where the defendant "is obliged by law to treat the members of the class alike." *Amchem*, 521 U.S. at 614 (citation and quotation marks omitted). ERISA fiduciaries are under a duty to treat similarly situated participants and beneficiaries alike. *See, e.g.*, *Morse v. Stanley*, 732 F.2d 1139, 1145 (2d Cir. 1984). Thus, a series of individual actions by participants wronged by the same alleged breaches of duty would indeed create a risk of establishing incompatible standards of conduct for the fiduciary, as recompensing one wronged participant and not another is not an option under ERISA. *See Ikon*, 191 F.R.D. at 466.

Moreover, the claims Plaintiffs bring are representative, not individual: they are brought on behalf of the Plans and seek to enforce fiduciary duties owed to the

Plans. *See Kuper v. Iovenko*, 66 F.3d 1447, 1452-53 (6th Cir. 1995) (ERISA "contemplates that breaches of fiduciary duty injure the plan, and, therefore, any recovery under such a theory must go to the plan"). Any judgment obtained under ERISA Section 502(a)(2), therefore, necessarily binds the fiduciary in his dealings with the plan, rather than merely in his dealings with individual participants. Hence, two conflicting judgments that arise out of the same breaches of duty to the Plan would establish incompatible standards of conduct for the fiduciaries. *See, e.g.*, *Piazza v. Ebsco Indus., Inc.*, 273 F.3d 1341, 1352-53 (11th Cir. 2001).

2. Rule 23(b)(1)(B)

Rule 23(b)(1)(B) is also satisfied. The Advisory Committee Note to Rule 23(b)(1)(B) emphasizes that this provision is particularly applicable to "a breach of trust by . . . [a] fiduciary . . . affecting the members of a large class of security holders or other beneficiaries, and which requires an accounting or like measures." Fed. R. Civ. P. 23(b)(1)(B) Advisory Committee Note (1966 Amendment).

If the Court were to adjudicate Plaintiffs' claims that Defendants breached their fiduciary duties by imprudently investing Plan assets, making misrepresentations, failing to disclose information, and failing to monitor co-fiduciaries, it would effectively dispose of the absent Class Members' claims. *See Tatum v. R.J. Reynolds Tobacco Co.*, 254 F.R.D. 59, 67 (M.D.N.C. 2008) (citing *Brieger v. Tellabs, Inc.*, 245 F.R.D. 345, 357 (N.D. Ill. 2007)); *accord, e.g.*, *In re*

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Syncor ERISA Litig., 227 F.R.D. 338, 346 (C.D. Cal. 2005). Rule 23(b)(1)(B), therefore, is a proper vehicle for certification.

C. The Proposed Class Also Satisfies the Requirements of Rule 23(b)(2)

A class may be certified if "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2). Certification under Rule 23(b)(2) requires that (1) the defendant must have acted or refused to act on grounds generally applicable to the class; and (2) the plaintiffs must seek relief that is predominantly injunctive or declaratory, as opposed to a pure claim for damages. *Thorn v. Jefferson-Pilot Life Ins. Co.*, 445 F.3d 311, 330 (4th Cir. 2006).

Here, Plaintiffs' claims are based on conduct by Defendants that is generally applicable on a class-wide basis. *See* Compl. ¶¶ 235-294. These fiduciary breaches affected all of the Plans' participants and beneficiaries whose Plan assets were invested in Wachovia stock; it cannot be disputed that this conduct was "generally applicable to the class." *See, e.g.*, *Pender v. Bank of Am. Corp.*, 269 F.R.D. 589, 599 (W.D.N.C. 2010) (where an ERISA plan acted in the same way toward all 401(k) participants, 23(b)(2) was satisfied).

Rule 23(b)(2)'s requirement that Plaintiffs seek predominantly injunctive or declaratory relief is satisfied here, because the monetary relief that individual class

members will receive will flow directly from the injunctive remedy Plaintiffs seek. *See* Compl. pt. XIII.B, at 96. Monetary relief is therefore "incidental" to the injunctive relief, satisfying Rule 23(b)(2). *See Olvera-Morales v. Int'l Labor Mgmt. Corp.*, 246 F.R.D. 250, 258 (M.D.N.C. 2007).

D. Keller Rohrback Should Be Appointed Class Counsel and Wyatt & Blake Should be Appointed Liaison Counsel.

Rule 23(g) requires courts to consider the following factors when appointing class counsel: (1) the work counsel has done in identifying or investigating the class claims; (2) counsel's experience in handling class actions and complex litigation; (3) counsel's knowledge of the applicable law; and (4) the resources counsel will commit to representing the class. *Pender*, 269 F.R.D. at 599-600.

Keller Rohrback meets the standards of Rule 23(g) because, as set forth in the declaration of counsel, it has extensive experience litigating ERISA class actions and is knowledgeable regarding the applicable law. *See* Loeser Decl. ¶¶ 7-9. It has conducted extensive litigation and pre-settlement investigations of the proposed Class's claims, has committed significant resources to representing the proposed Class, and has demonstrated the ability to represent classes of ERISA plaintiffs and to respond to the unique issues associated with representing employees in ERISA litigation.[4] *See* Loeser Decl. ¶¶ 7-11. Liaison Counsel,

[4] Other firms, at Class Counsel's direction, performed some work in this case on

Wyatt & Blake, L.L.P., also has extensive experience in prosecuting complex litigation actions and representing plaintiffs in class action litigation.

V. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court grant their motion and issue an Order: (1) preliminarily approving the proposed Settlement; (2) preliminarily certifying the Settlement class and appointing Class Counsel and Liaison Counsel; (3) approving the form and dissemination of Class Notice; and (4) setting a date and time for the Fairness Hearing.

Respectfully submitted this 11th day of February, 2011.

KELLER ROHRBACK L.L.P.

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---

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CERTIFICATE OF SERVICE

I hereby certify that on February 11, 2011, I electronically filed **MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR AN ORDER PRELIMINARILY APPROVING SETTLEMENT, PRELIMINARILY CERTIFYING THE SETTLEMENT CLASS AND APPOINTING CLASS COUNSEL AND LIAISON COUNSEL, APPROVING FORM AND DISSEMINATION OF CLASS NOTICE, AND SETTING A DATE AND TIME FOR THE FAIRNESS HEARING** with the Clerk of the Court using the CM/ECF system, which will send notice of such filing to all known counsel of record:

Jeffrey A Berens, Robert Adams Blake, Jr., Adam Karl Doerr, Ellen M. Doyle, Nicole A. Eichberger, Scott Jason Farrell, Stephen J. Fearon, Jr., Michael Ira Fistel, Jr., Matthew Moylan Guiney, Russell Laurence Hirschhorn, Corey D. Holzer, Robert A. Izard, Mark P. Kindall, Ronald Scott Kravitz, Theodore M. Lieverman, Mark William Merritt, Edwin John Mills, M. Travis Payne, William T. Payne, Karen H. Riebel, Mark Carl Rifkin, Myron D. Rumeld, Howard Shapiro, and James F. Wyatt , III.

Executed on February 11, 2011, at Seattle, Washington.

s/Derek W. Loeser
Derek W. Loeser

Responses and Replies

3:09-cv-00262-MR Hansen et al v. Wachovia Corporation et al **CASE CLOSED on 08/06/2010**

APPEAL, CLOSED

U.S. District Court

Western District of North Carolina

Notice of Electronic Filing

The following transaction was entered by Loeser, Derek on 2/11/2011 at 5:14 PM EST and filed on 2/11/2011

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Filer:	Rose Hansen
	Robert M. Cominsky
	Denise A. Tuttle
	Todd A. Wright
	Alan A Hardman
	Richard F Dziak
	Jerry R Kelley, Jr
	David W Allen
WARNING: CASE CLOSED on 08/06/2010	
Document Number:	153

Docket Text:

MEMORANDUM in Support re [152] MOTION for Settlement *For an Order Preliminarily Approving Settlement, Preliminarily Certifying the Settlement Class and Appointing Class Counsel and Liaison Counsel, Approving Form and Dissemination of Class Notice, and Setting a Date and Time for by David W Allen, Robert M. Cominsky, Richard F Dziak, Rose Hansen, Alan A Hardman, Jerry R Kelley, Jr, Denise A. Tuttle, Todd A. Wright. (Loeser, Derek)*

3:09-cv-00262-MR Notice has been electronically mailed to:

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