IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

IN RE TYCO INTERNATIONAL LTD., SECURITIES, DERIVATIVE AND "ERISA" LITIGATION
OVERBY, *et al.*, Plaintiffs, -against- TYCO INTERNATIONAL LTD., *et al.*, Defendants.

02-MDL-1335-B
ERISA ACTION
Civil Action No.
02-1357-B

TYCO DEFENDANTS' MEMORANDUM IN OPPOSITION TO LEAD PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

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Preliminary Statement

In their motion for class certification, lead plaintiffs proposed that 11 individuals serve as representatives of a class under Federal Rule of Civil Procedure 23(b)(1) that includes "all Participants in [Tyco's retirement savings plans] for whose individual accounts the Plans purchased and/or held shares of the Tyco Stock Fund at any time from August 12, 1998 to July 25, 2002."[1] (Lead plaintiffs' Memorandum in Support of Motion for Class Certification ("Pls.' Br.") at 2.) Since lead plaintiffs filed their motion, they have withdrawn five of the 11 proposed class representatives—leaving Edmund Dunne, Kay Jepson, John Gordon, Gary Johnson, Peter Poffenberger and Karen Wade as the remaining proposed class representatives, all six of whom claim to be former or current employees of Tyco who participated in Tyco's retirement savings plans.[2] However, the proposed class should not be certified for three independent reasons.

First, discovery has shown that the claims of the six proposed class representatives do not satisfy Rule 23(a)(3) because they are not typical of those of the proposed class (*see infra* at 4-10). In the first of the two claims asserted in the consolidated amended complaint ("the Complaint" or "Compl."), lead plaintiffs allege

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[1] The eleven individuals proposed as class representatives were Marvin Overby, Edmund J. Dunne, Kay M. Jepson, John B. Gordon, Virginia Konyn, Gary Johnson, Karl Peterson, Steve Swanson, Peter Poffenberger, Eugene Crouch and Karen Wade.

[2] *See* Dunne Dep. at 11, which is Exhibit A to the Declaration of Kristina M. Mentone dated July 10, 2005 ("Mentone Decl. Ex. __"); Jepson Dep. at 14 (Mentone Decl. Ex. B); Gordon Dep. at 9 (Mentone Decl. Ex. C); Johnson Dep. at 9 (Mentone Decl. Ex. D); Poffenberger Dep. at 13 (Mentone Decl. Ex. E); Wade Dep. at 13, 98-100 (Mentone Decl. Ex. F).

that defendants breached their fiduciary duties to the proposed class by negligently misrepresenting and negligently failing to disclose material information. (Claim I, Compl. at pp. 22-43.) But all six of the proposed class representatives either claim to have relied on different alleged misrepresentations or admit that they did not rely at all upon any of the alleged misrepresentations described in the Complaint. In fact, one of them (Poffenberger) testified that the only statements by Tyco or Tyco employees that he relied upon in making his investment decisions in the Plan were statements made to him while he was still an employee at Tyco up until 1994, years before the start of the class period. (Poffenberger Dep. at 13, 120-25 (Mentone Decl. Ex. E).) Another (Johnson) invested in the Tyco Stock Fund only once, and when asked why he did so, he stated, "I don't know. I just--we were, we could put 25 percent of our total in the stock fund, and I guess I just wanted to diversify a little bit." (Johnson Dep. at 78 (Mentone Decl. Ex. D).)

Second, discovery has revealed that all six of the proposed class representatives are doing little more than lending their names to this lawsuit—and thus would not adequately represent the proposed class and protect the interests of absent class members consistent with the requirements of Rule 23(a)(4) (*see infra* at 10-15). For example, when one proposed representative (Dunne) was asked what he understood his responsibilities to be as a class representative, he answered, "I really haven't considered it." (Dunne Dep. at 40 (Mentone Decl. Ex. A).) And when asked if he could identify the *defendants* in this case, the only names he could give were those of two other proposed class representatives, Jepson and Gordon. (*Id.* at 41-42.) It is not an

overstatement to say that, if a class is certified with these representatives, the Court will be endorsing the proposition that a class action may be entirely lawyer-driven, with the class representatives providing only their names and nothing else.

Third, the proposed class action is not maintainable under Rule 23(b). Contrary to lead plaintiffs' contention, the proposed class action cannot be brought under Rule 23(b)(1) because lead plaintiffs' misrepresentation claim raises individual questions concerning whether each class member can prove the element of reliance (*see infra* at 16). And neither does the proposed class action satisfy the requirements of subsections (b)(2) or (b)(3) of Rule 23 (*see infra* at 16-18).

Argument

A class action "may only be certified if the trial court is satisfied, after a *rigorous analysis*, that the prerequisites of Rule 23(a) have been satisfied." *Gen. Tel. Co. of the Southwest v. Falcon*, 457 U.S. 147, 161 (1982) (emphasis added). The four prerequisites are "numerosity, commonality, typicality, and adequate representation." *Tilly v. TJX Cos., Inc.*, 345 F.3d 34, 37 (1st Cir. 2003). If a plaintiff satisfies those requirements, he then "must show that the action is maintainable under Rule 23(b)(1), (2), or (3)." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 614 (1997).

"[H]eightened scrutiny" is appropriate where, as here, lead plaintiffs ask that a mandatory class be certified under Rule 23(b)(1), which does not allow persons to exclude themselves from the class. *In re First Commodity Corp. Customer Accounts Litig.*, 119 F.R.D. 301, 308 (D. Mass. 1987); *see also Coleman v. Gen. Motors Acceptance Corp.*, 296 F.3d 443, 448 (6th Cir. 2002) ("[C]lose scrutiny is necessary if money damages are to be

included in any mandatory class in order to protect the individual interests at stake and ensure that the underlying assumption of homogeneity is not undermined."); *In re Telectronics Pacing Sys., Inc.*, 221 F.3d 870, 881 (6th Cir. 2000) ("Certification under subsection (b)(1)(B), which does not include [notice and opt-out] protections, must be carefully scrutinized and sparingly utilized."). Moreover, it is not the party opposing class certification, but the party seeking certification, that bears the burden of demonstrating that the Rule 23 requirements have been met. *Silva v. Nat'l Telewire Corp.*, No. Civ. 99-219-JD, 2000 WL 1480269, at *1 (D.N.H. Sept. 22, 2000) (citing *Makuc v. Am. Honda Motor Co., Inc.*, 835 F.2d 389, 394 (1st Cir. 1987)); *Rothwell v. Chubb Life Ins. Co.*, 191 F.R.D. 25, 28 (D.N.H. 1998) ("Plaintiffs bear the burden of establishing all of the requirements for class certification.").

Lead plaintiffs have failed to meet their burden of showing that the "adequacy" and "typicality" requirements of Rule 23(a) have been satisfied here and that the proposed class action is maintainable under Rule 23(b).

I. NONE OF THE SIX PROPOSED CLASS REPRESENTATIVES HAS CLAIMS THAT ARE TYPICAL OF THE CLAIMS OF THE PROPOSED CLASS

A class action may be certified only if "the claims or defenses of the representative parties are typical of the claims or defenses of the class." Fed. R. Civ. P. 23(a)(3). This requirement "limit[s] the class claims to those fairly encompassed by the named plaintiff's claims." *Gen. Tel. Co. of the Northwest, Inc. v. Equal Employment Opportunity Comm'n*, 446 U.S. 318, 330 (1980). Although "factual differences between the claims do not alone preclude certification," it is also the case that "[t]ypicality may

be defeated . . . if factual differences predominate to the extent where the court must make highly fact-specific or individualized determinations in order to establish a defendant's liability to each class member." *Collazo v. Calderon*, 212 F.R.D. 437, 442-43 (D.P.R. 2002); *see also Skipper v. Giant Food Inc.*, No. 02-1319, 2003 WL 21350730, at *2 (4th Cir. June 11, 2003) (holding that "individualized nature of plaintiffs' claims" failed to satisfy typicality requirement).

One of lead plaintiffs' two claims alleges that defendants breached their fiduciary duties with respect to the Plans by negligently misrepresenting and negligently failing to disclose material information. (Claim I, Compl. at pp. 22-43.) To establish a breach of fiduciary duty claim based on misrepresentations, "a plaintiff must establish each of the following elements: (1) the defendant's status as an ERISA fiduciary acting as a fiduciary; (2) a misrepresentation on the part of the defendant; (3) the materiality of that misrepresentation; and (4) detrimental reliance by the plaintiff on the misrepresentation." *Romero v. Allstate Corp.*, 404 F.3d 212, 226 (3d Cir. 2005); *see also James v. Pirelli Armstrong Tire Corp.*, 305 F.3d 439, 449 (6th Cir. 2002); *In re AEP ERISA Litig.*, 327 F. Supp. 2d 812, 831 (S.D. Ohio 2004).

Unlike in securities fraud actions, members of the proposed class cannot rely on the "fraud-on-the-market theory" to satisfy the reliance element of Claim I. *See Gunnells v. Healthplan Servs., Inc.*, 348 F.3d 417, 435 (4th Cir. 2003) (rejecting "fraud-on-the market" theory because, "if an individual plaintiff in this case were unaware of the alleged misrepresentations, but nevertheless purchased the Plan, we see no basis for presuming that the misrepresentations nevertheless were a proximate cause of her

damages."); *In re Elec. Data Sys. Corp. "ERISA" Litig.*, 224 F.R.D. 613, 630 (E.D. Tex. 2004) (refusing to apply fraud-on-the-market theory in ERISA context because a misrepresentation claim "requires individualized proof of materiality and reliance").

Without the fraud-on-the-market theory, "individualized inquiry [is] required to show that Plaintiffs actually relied on the [defendant's] alleged misrepresentations." *Gunnells*, 348 F.3d at 436. The need for such individualized inquiries defeats typicality here. *See Rowell v. Voortman Cookies, Ltd.*, No. 02 C 0681, 2005 WL 1026715, at *2 (N.D. Ill. April 27, 2005) (holding that plaintiffs' claim required "individual inquiries into the reliance by the individual Plaintiffs on a promise to his or her detriment and whether the reliance was reasonable in numerous individual circumstances" and that "[t]his level of individual inquiry defeats the typicality requirement under Rule 23(a)"); *Hudson v. Delta Air Lines, Inc.*, 90 F.3d 451, 457 (11th Cir. 1996) (holding that ERISA claims were "not susceptible to class-wide proof" where "highly individualized" decisions regarding reliance were necessary).

Lead plaintiffs assert that there are "no material differences" among "the operative facts upon which the Participants' claims are based." (Pls.' Br. at 11.) But the deposition testimony of the proposed class representatives shows that lead plaintiffs are wrong. As we explain below, four of the six proposed class representatives did not rely on *any* of the alleged misrepresentations described in the Complaint in making their investment decisions under the Plans. Of the remaining two proposed class representatives, one could recall reviewing Tyco newsletters, but he was unsure whether any of them influenced his investment decisions, while the other claimed to

have relied solely on alleged misrepresentations contained in a small subset of documents. Thus, none of the proposed class representatives is pursuing a claim that is typical of the alleged claims of the proposed class, and all are "subject to unique defenses which threaten to become the focus of the litigation." *Gary Plastic Packaging Corp. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 903 F.2d 176, 180 (2d Cir. 1990).

A. Poffenberger

The only statements by Tyco or Tyco employees upon which Poffenberger relied in making his investment decisions with respect to the Tyco Stock Fund were statements made to him while he was an employee at Tyco up until 1994, well before the start of the class period. (Poffenberger Dep. at 13, 120-25 (Mentone Decl. Ex. E).) He increased his holdings in the Tyco Stock Fund in 1997 only because the Tyco Stock Fund was outperforming other funds. (*Id.* at 128.) Thus, by his own admission, Poffenberger did not rely on the statements and documents described in the Complaint that were purportedly relied upon by the putative class members during the alleged class period beginning on August 12, 1998. Accordingly, Poffenberger's claims are not typical of those asserted on behalf of the proposed class, and he is subject to unique defenses.

B. Dunne

Dunne does not believe he ever made any investment decisions with respect to his Tyco retirement plan. (Dunne Dep. at 84-85 (Mentone Decl. Ex. A).) Dunne also testified that when he formulated his opinion of Tyco as an investment, he relied on advice from a third party—the manager of a large investment firm in Spokane. (*Id.* at 95-97.) Therefore, none of the allegedly false or misleading statements cited in the

Complaint could have influenced Dunne's investments in his Tyco retirement plan. Dunne's claims are both atypical and subject to unique defenses.

C. Johnson

Johnson did not rely on the allegedly false or misleading statements cited in the Complaint when investing in the Tyco Stock Fund through his retirement plan. At no point in time did Johnson have more than 308.854 shares of the Tyco Stock Fund in his retirement plan. (Johnson Dep. at 76-77 (Mentone Decl. Ex. D).) Johnson never allocated a percentage of the contributions in his retirement plan to the Tyco Stock Fund. (*Id.* at 76-78, 82, 91). Rather, Johnson made only one transaction on December 10, 1999 in which he acquired the 308.854 shares of the Tyco Stock Fund. (*Id.*) When asked why he invested in the Tyco Stock Fund on December 10, 1999, Johnson stated, "I don't know. I just—we were, we could put 25 percent of our total in the stock fund, and I guess I just wanted to diversify a little bit." (*Id.* at 78). This one investment by Johnson in the Tyco Stock Fund thus was not based on any of the allegedly false or misleading statements cited in the Complaint.

Johnson also testified that he does not rely on documents such as annual reports when making investment decisions. (*Id.* at 56). Furthermore, regarding his Tyco investments generally, Johnson testified that he relied heavily on an instruction to "buy Tyco" from his manager, Carl Kincaid, who is not alleged to have made any misrepresentations to class members. (*Id.* at 50-51, 55-56). Johnson testified he followed the price of the stock and held onto Tyco stock "because [he] wanted it to hit 70 and it was at 63" (*id.* at 60); and that he listened to "speculation" from his colleagues in

making investment decisions (*id.* at 61). Johnson also stated that, in the past four to five years, documents he received from Tyco would not have influenced his opinion of Tyco (*id.* at 71) and that he did not rely on statements in memoranda sent to "all employees" when making any investment decisions (*id.* at 85-89).

Johnson's claims are not typical of those asserted on behalf of the proposed class, and he is subject to unique defenses.

D. Jepson

Jepson testified that she could not describe any statements made in any of the information provided to her by Tyco upon which she relied in deciding to invest in Tyco securities. (Jepson Dep. at 58 (Mentone Decl. Ex. B).) She merely remembers "a lot of positive talk," but she does not "remember anything specific," and does not even remember any categories of things that were referred to positively in the information provided to her by Tyco. (*Id.*) Jepson's inability to identify any materials on which she relied renders her claim atypical and subject to unique defenses.

E. Gordon

Gordon did not rely on documents identified in the Complaint as being false and misleading. (Gordon Dep. at 56, 64-65, 72-74 (Mentone Decl. Ex. C).) Specifically, Gordon indicated that he does not recall reading the Summary Plan Description (*id.* at 64-65) and was not influenced by annual reports from the company (*id.* at 56). Although Gordon reviewed Tyco newsletters discussing Tyco acquisition activities, he was unsure whether any of those influenced his investment decisions. (*Id.* at 82-83). In addition, like Johnson, Gordon was influenced by oral statements made by

his manager, Carl Kincaid. (*Id.* at 72-74). Gordon's claims are atypical of the putative class, and he is subject to unique defenses.

F. Wade

In making her investment decisions, Wade did not rely on any of the numerous proxy statements, SEC filings, annual reports or financial statements alleged in the Complaint to have been materially misleading. (Wade Dep. at 108-110 (Mentone Decl. Ex. F).) The only documents she claims to have relied upon were letters sent by Dennis Kozlowski to all Tyco employees. (*Id.*) Wade's claim premised upon negligent misrepresentations is, thus, not typical of the claims of other members in the proposed class, who allegedly suffered injuries as a result of misrepresentations made in numerous other documents that Wade admitted that she never relied upon, and she is also subject to unique defenses.

II. NONE OF THE SIX PROPOSED CLASS REPRESENTATIVES WOULD ADEQUATELY REPRESENT THE PROPOSED CLASS

An additional prerequisite to a class action under Federal Rule 23(a) is that "the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). Two basic elements guide courts in interpreting the "adequacy of representation" requirement: "The Court must determine, first, whether any potential conflicts exist between the named plaintiffs and the prospective class members and, second, whether the named plaintiffs and their counsel will prosecute the case vigorously." *In re Bank of Boston Corp. Sec. Litig.*, 762 F. Supp. 1525, 1534 (D. Mass. 1991) (citing *Andrews v. Bechtel Power Corp.*, 780 F.2d 124, 130 (1st Cir. 1985)). Because

none of the six proposed class representatives would prosecute this action vigorously, none of them would adequately represent the proposed class.

Class certification may properly be denied "where the class representatives ha[ve] so little knowledge of and involvement in the class action that they would be unable or unwilling to protect the interests of the class against the possibly competing interests of the attorneys." *Maywalt v. Parker & Parsley Petroleum Co.*, 67 F.3d 1072, 1077-78 (2d Cir. 1995) (quoting *Kirkpatrick v. J.C. Bradford & Co.*, 827 F.2d 718, 727 (11th Cir. 1987)). None of the six proposed class representatives has demonstrated that he or she has sufficient knowledge and involvement in this action to protect the interests of the proposed class. Thus, none would adequately represent the proposed class.

A. Dunne

Dunne flatly refused to provide relevant class discovery about his adequacy as a class representative. That refusal, without more, establishes that he is unwilling to meet the responsibilities of a class representative and thus would not adequately represent the proposed class. *See Blatch v. Franco*, No. 97CIV.3918, 2002 WL 342453, at *4 (S.D.N.Y. March 5, 2002); *Hochberg v. Howlett*, No. 92 CIV. 1822, 1994 WL 9677, at *2 (S.D.N.Y. Jan. 10, 1994); *Darvin v. Int'l Harvester Co.*, 610 F. Supp. 255, 257 (S.D.N.Y. 1985) ("[P]laintiff's failure to fully comply with reasonable discovery requests, as demonstrated by his refusal to answer relevant questions at both sessions of his deposition, indicate[s] that he is not suitable to fulfill the fiduciary obligations of a class representative.").

The inadequacy of Dunne as a class representative became abundantly clear at his deposition, where he refused to answer even the most basic questions, stating, "I will answer questions that address my employment, my term with Tyco, and my employment at ADT, and I won't address any other questions." (Dunne Dep. at 9 (Mentone Decl. Ex. A).) Throughout his deposition he refused to answer questions directly related to his adequacy as a class representative, even though his lawyer had not instructed him not to answer. Dunne refused to provide, for example, his current addresses (*id.* at 9), his educational background (*id.* at 10) and information relating to a prior deposition (*id.* at 14-15). He would not say whether he has previously attempted to serve as a class representative (*id.* at 15-16), whether he has previously been arrested, indicted or convicted of any crime (*id.* at 16), whether he has been involved in other litigation (*id.* at 18) or whether he has ever filed for bankruptcy (*id.*). Dunne also refused to answer questions dealing with his general investment practices (*id.* at 77-81) and questions relating to whether any family or friends currently hold Tyco securities (*id.* at 108-109).

Dunne's deposition testimony also made clear that he would not meet his continuing duty to "protect the interests of the class."[3] *Maywalt*, 67 F.3d at 1077-78.

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[3] Dunne's deposition testimony reflects that he did not become involved in this litigation in order to represent a class of individuals, but to express his animosity toward Tyco as his former employer. (*Id.* at 73-76). When asked how much he believes Tyco owes him for the alleged wrongdoing, Dunne suggested one million dollars, explaining, "I'm saying to you my career was ruined because of Tyco. And how--what value, what dollar value can you put on a career being ruined? Is a million dollars appropriate? Is it not enough or what?" (*Id.* at 73-75). Dunne's apparent personal animus towards Tyco raises yet additional doubts about whether he could adequately represent the interests of the proposed class. *See Matassarin v. Lynch*, 174 F.3d 549, 559 (5th Cir. 1999) (holding that district court did not abuse discretion in rejecting proposed

Dunne did not research his counsel prior to becoming involved with this action (*id.* at 40), does not have regular contact with his attorney (*id.* at 28) (whom he met for the first time on the morning of his deposition (*id.* at 27)), is not focused on the litigation (*id.* at 29-30), did not prepare for his deposition (*id.* at 53-54), does not and would not be willing to read long documents relating to the litigation (*id.* at 47), does not maintain an extensive file relating to the litigation (*id.* at 46) and has not considered what his responsibilities would be if he were appointed as a class representative (*id.* at 40) or how much time he is willing to devote to the prosecution of this action (*id.* at 39).

Moreover, Dunne was not able to name any of the defendants in the action (*id.* at 41-42), was not aware of the class period (*id.* at 42-43) and was not familiar with the documents in this litigation (*id.* at 31-32, 34). Dunne stated that he was not aware that Tyco had made a request for the production of documents and had not discussed the document requests with his attorney (*id.* at 55-59). Dunne also did not recognize documents produced by his counsel on his behalf and does not believe that such documents were ever in his possession. (*Id.* at 104-108.)

B. Jepson

Jepson does not plan to be sufficiently involved in the prosecution of this action. She does not know the current status of the case (Jepson Dep. at 37 (Mentone Decl. Ex. B)), is unable to describe what has happened so far in the litigation (*id.*), has not sought to investigate the ways in which this case has been progressing (*id.* at 38)

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class representative who "might be more interested in hurting [defendant] than in ensuring adequate representation for a class").

and does not plan to investigate the ways in which this case progresses in the future (*id.*). She does not know who drafted the Complaint (*id.* at 27), did not provide any information or suggest any changes in connection with the drafting of the Complaint (*id.* at 28) and believes that she does not have a duty to supervise her counsel in the prosecution of this case (*id.* at 23).

C. Johnson

Johnson did not research his attorney's law firm before becoming involved in the litigation (Johnson Dep. at 20 (Mentone Decl. Ex. D)), and is not organized with his documents (*id.* at 37). When he does not understand documents sent to him by his attorneys, he does not ask them to explain them to him (*id.* at 19-20). When asked if he understood the Complaint, Johnson said "not hardly" (*id.* at 20-21), and described it "[a]s a bunch of talk, a bunch of things I don't really understand." (*Id.* at 21). Johnson's deposition testimony also indicates that he believes his lawyers are the ones responsible for determining the course of the litigation and for making decisions with respect to the action. (*Id.* at 29). Johnson was not aware that he was ever required to produce documents and had not read the document requests before the day of his deposition. (*Id.* at 32, 37).

D. Gordon

Gordon met his attorney for the first time on the morning of the deposition (Gordon Dep. at 20 (Mentone Decl. Ex. C)), did not research his counsel prior to seeking to be a class representative (*id.* at 29-30), did not have any conversations with his attorney in preparation for his deposition, (*id.* at 35), does not know who is in charge

of determining the course of litigation (*id.* at 32) and does not understand what his role would be as a class representative (*id.* at 16). He has not read documents pertaining to this matter (*id.* at 20), was not familiar with, or did not understand, many of the pleadings in the litigation and has not seen drafts of the pleadings (*id.* at 22-25). He has no understanding of the Complaint "other than the fact that it pertains to the case." (*Id.* at 22). Furthermore, Gordon testified that the plaintiffs in this case are suing Kozlowski and Swartz, but did not know whether the plaintiffs are suing anyone else or any companies. (*Id.* at 31-32). Gordon was also unaware of the class period. (*Id.* at 32.)

E. Poffenberger

Poffenberger testified that the first time he ever saw the Complaint was earlier this year, approximately two years after it was filed. (Poffenberger Dep. at 26 (Mentone Decl. Ex. E).) Other than deciding to join and participate in this litigation, Poffenberger has made no decisions concerning this case. (*Id.* at 42-43.)

F. Wade

Wade did not provide any information to her attorneys for use in connection with the drafting of the Complaint. (Wade Dep. at 28 (Mentone Decl. Ex. F).) Moreover, she admitted that she has never read any drafts of *any* documents filed by her attorneys on her behalf in this case. (*Id.* at 28, 31, 39.) In fact, she testified that she was unaware of anything that has happened in this case since the filing of the Complaint, except for the class certification issues now being presented to the Court. (*Id.* at 44-45.)

III. THE PROPOSED CLASS ACTION IS NOT MAINTAINABLE UNDER RULE 23

Lead plaintiffs have failed to show that the proposed class action is maintainable under Rule 23(b). They erroneously assert that the proposed class action can properly be brought under Rule 23(b)(1). But Rule 23(b)(1) is applicable "where the final decisions on the merits for all class members will be the same." *Nelson v. Ipalco Enters., Inc.*, No. IP02-477CHK, 2003 WL 23101792, at *10 (S.D. Ind. Sept. 30, 2003). As shown above (*see supra* at 5-7), the final decisions on the merits for all class members will not be the same here because lead plaintiffs' misrepresentation claim raises individual questions about whether each class member can prove the element of reliance. Accordingly, the proposed class action is not maintainable under Rule 23(b)(1). *See Spann v. AOL Time Warner, Inc.*, 219 F.R.D. 307, 321 (S.D.N.Y. 2003) (holding that ERISA action is not maintainable under Rule 23(b)(1)(A) where "[d]efendants are not obligated to treat all members of the class alike" and there would be a need for "individualized inquiry"); *Nelson*, 2003 WL 23101792, at *10 (finding that "certification under Rule 23(b)(1) is not appropriate" because of the "presence of . . . individual issues [including reliance] and the prospect of different results for different class members").

Neither is lead plaintiffs' proposed class action maintainable under Rule 23(b)(2) or Rule 23(b)(3). Subsection (b)(2) authorizes a class action 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." Fed. R. Civ. P. 23(b)(2). It "was never intended to cover cases . . . where the primary claim is for damages" and "is only applicable where the relief sought is exclusively or predominantly injunctive or declaratory." *McLaughlin v. Liberty Mut. Ins. Co.*, 224 F.R.D. 304, 311 (D. Mass. 2004) (quoting *Eisen v. Carlisle & Jacquelin*, 391 F.2d 555, 564 (2d Cir. 1968)); *see George Lussier Enters., Inc. v. Subaru of New England, Inc.*, No. Civ. 99-109-B, 2001 WL 920060, at *6 (D.N.H. Aug. 3, 2001) (denying certification under Rule 23(b)(2) because "it is apparent that plaintiffs' primary goal is to obtain monetary damages"). And "[t]he mere recitation of a request for [equitable] relief cannot transform damages claims into a Rule 23(b)(2) class action." *Bolin v. Sears, Roebuck & Co.*, 231 F.3d 970, 978 (5th Cir. 2000). Accordingly, Rule 23(b)(2) is inapplicable here, where the primary relief sought is monetary.

Rule 23(b)(3) requires plaintiffs to "show that: (1) common questions of law or fact will predominate over questions affecting only individual members; and (2) a class action is superior to other available methods' of adjudicating the case." *Mulligan v. Choice Mortgage Corp. USA*, No. CIV. 96-596-B, 1998 WL 544431, at *4 (D.N.H. Aug. 11, 1998) (Barbadoro, J.) (internal quotation marks omitted). Certification under subsection (b)(3) would be inappropriate here because lead plaintiffs have not sought it and because, as explained above (*see supra* at 5-7), common questions will not predominate over individual questions of reliance. *See Mulligan*, 1998 WL 544431, at *7 (agreeing "with the majority view that certification generally is inappropriate when individual reliance is an issue"); *Rothwell*, 191 F.R.D. at 31 ("As the Supreme Court stated in *Basic*

Inc. v. Levinson, '[r]equiring proof of individualized reliance from each member of the proposed plaintiff class effectively would . . . prevent [] . . . proceeding with the class action, since individual questions then would . . . overwhelm[] the common ones.'") (quoting *Basic v. Levinson*, 485 U.S. 224, 242 (1988)).

Because lead plaintiffs have failed to meet their burden of showing that the proposed class action can be brought under any of the subsections of Rule 23(b), the proposed class action is not maintainable and thus should not be certified.

Conclusion

For the reasons stated above, the Court should deny Lead Plaintiffs' motion for class certification.

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