UNITED STATES DISTRICT COURT
DISTRICT OF NEW HAMPSHIRE

MARVIN OVERBY, ET AL. Plaintiffs, vs TYCO INTERNATIONAL LTD., ET AL. Defendants.	Case No. 02-CV-1357-B This Document Relates To: ERISA Actions

PLAINTIFFS' REPLY MEMORANDUM IN SUPPORT OF MOTION FOR CLASS CERTIFICATION

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I. INTRODUCTION

While Defendants make minor objections to Plaintiffs' motion for class certification, many of Plaintiffs' contentions are simply undisputed. With respect to Plaintiff's imprudent investment claim (Claim II), Defendants concede that Plaintiffs have satisfied the numerosity, commonality and typicality requirements of Rule 23(a) of the Federal Rules of Civil Procedure and that this claim may be certified under Rule 23(b). Defendants' only objection to the certification of Claim II relates to adequacy. With respect to Plaintiffs' misrepresentation claim (Claim I), Defendants do not dispute that Plaintiffs have established both numerosity and commonality. They object to certification on the grounds of adequacy and typicality under Rule 23(a) and under the provisions of Rule 23(b).

First, Defendants wrongly argue as to both the imprudent investment and misrepresentation claims that the proposed class representatives would not adequately represent the class because they are not sufficiently involved in this case. Second, and only with respect to the misrepresentation claim, they erroneously contend that Plaintiffs have not satisfied the typicality requirement because this claim purportedly involves individualized issues of reliance. Finally, Defendants maintain that the same non-existent individualized reliance issues bar certification of the misrepresentation claim under Rule 23(b). As to each of these arguments, Defendants are wrong.

Defendants' arguments boil down to two issues: (1) whether the proposed class representatives are involved enough in this litigation to be adequate representatives and (2) with respect to Claim I, whether individualized issues of reliance preclude certification. As to the first issue, the proposed class representatives will fairly and adequately protect the interests of the class in this litigation. They have sufficient knowledge of the claims, have been actively involved in the case and will vigorously prosecute this action through their retained counsel. More important, there are no conflicts or antagonistic interests between these representatives or between these representatives and the proposed class, and Defendants have not identified any

such conflicts. Defendants' professed concern regarding the adequacy of the proposed class representatives should be seen for what it is: their unspoken quest to have no one represent the class in prosecuting Plaintiffs' legitimate ERISA claims.

As to the second issue, there are no individualized issues of reliance with respect to Count I that would defeat typicality or render the claims unsuitable for certification under Rule 23(b). To begin, reliance is a commonality issue, not a typicality issue. Accordingly, the Court should not even consider the issue of individualized reliance under a typicality analysis. Since reliance is a commonality issue, the Court should also not consider it under Rule 23(b)(1). Defendants also ignore the fact that Claim I belongs to the Plan. This claim is based, not on individual communications or representations but on Plan-wide communications. Furthermore, to the extent that this claim requires proof of reliance, reliance is presumed because the Plan and Plan Participants are presumed to rely on the market price of Tyco stock, which is based on the material public information Tyco provided directly to the market.

In sum, the class representatives have satisfied the requirements of Fed. R. Civ. P. 23. Accordingly, Plaintiffs' claims should be certified as a class action pursuant to Rule 23(b)(1).

II. PLAINTIFFS ARE ADEQUATE REPRESENTATIVES OF THE CLASS

Defendants argue that none of the six proposed class representatives are adequate because none "has sufficient knowledge or involvement in this action to protect the interests of the proposed class." (Defs. Mem., at 11). However, class representatives satisfy the "adequacy" requirement under Fed. R. Civ. P. 23(a)(4) where they (1) do not have interests that are antagonistic to the interests of the class and (2) have retained qualified counsel. See Key v. Gillette Co., 782 F.2d 5, 7 (1st Cir. 1986); In re PolyMedica Corp. Securities Litigation, 224 F.R.D. 27, 36 (D. Mass. 2004) ("Inquiries into the adequacy of representation should focus on the named plaintiff['s] ability to prosecute the action vigorously *through qualified counsel* and [his] lack of conflicting interest with unnamed class members.") (emphasis added). The

adequacy requirement in ERISA company stock cases such as this is no different. See, e.g., Rankin v. Rots, 220 F.R.D. 511, 520 (E.D. Mich.2004) (the adequacy requirement focuses *not* on the personal qualifications or knowledge of the named plaintiff but on the "the adequacy of plaintiffs' counsel and whether plaintiff has a conflicting interest" with the proposed class.); In re Syncor ERISA Litig., 227 F.R.D. 338, 344 (C.D. Cal. 2005) ("This element is satisfied if (1) the named representatives appear able to prosecute the action vigorously *through qualified counsel*, and (2) the representatives do not have antagonistic or conflicting interests with the unnamed members of the class") (emphasis added). As a result, "it is inappropriate to attack the adequacy of a class representative simply based on the representative's ignorance of the underlying facts." Rankin, 220 F.R.D. at 521.[1]

Defendants can not and do not challenge the expertise and qualifications of counsel; nor do they raise any legitimate arguments regarding conflicts or antagonism between the proposed representatives and the class. Accordingly, they all but concede that the proposed representatives are adequate. Instead, they improperly focus upon and criticize each Plaintiffs' personal understanding of the facts and issues underlying this action. Defendants' arguments are based upon an erroneous assumption -- that adequate class representatives must be experts in the arcane and complicated provisions of ERISA and must thoroughly understand virtually every issue of law and fact in this case. However, if that were the legal standard, class representatives would not need counsel -- they could prosecute ERISA class actions on their own. More to the point, for the reasons set forth below, Defendants' adequacy arguments as to each proposed class

[1] Further, more attacks on the adequacy of class representatives' knowledge have been expressly disapproved by the Supreme Court. See Surowitz v. Hilton Hotels Corp., 383 U.S. 363, 372-74 (1966); see also Baffa v. Donaldson, Lufkin & Jenrette Sec. Corp., 222 F.3d 52, 60-62 (2d Cir. 2000) (holding that the district court misapplied the adequacy rule in blocking class certification based on the class representative's lack of knowledge of the case); In re Frontier Ins. Group, Inc. Secs. Litig., 172 F.R.D. 31, 47 (E.D.N.Y. 1997) (refusing to impose stringent knowledge standards on class representatives and holding instead that failing to understand legal strategies and reading the complaint only recently would not defeat class certification); Priest v. Zayre Corp., 118 F.R.D. 552, 556 (D. Mass. 1988) (holding that a class representative "need not have personal knowledge of all the relevant facts to be deemed adequate").

representative are baseless.

A. Dunne

Defendants truly distort the factual record before this Court in claiming, based on a single line of Dunne's deposition testimony, that Dunne lacks the necessary understanding of the facts and commitment to this case to satisfy the adequacy requirement. To the contrary, Dunne's sworn testimony establishes the following: (1) that he understands what a class action is and his role as class representative, and that he understands, and has fulfilled, his obligations as class representative (Transcript of the Deposition of Edmund Dunne ("Dunne Tr."), at 33; 69-73, attached as Exhibit A to the Declaration of Kristina M. Mentone (the "Mentone Decl."); Dunne Declaration executed December 2, 2002, attached to Brief In Support of Appointment of Lead Plaintiffs filed December 16, 2002, at ¶ 3));[2] (2) that he has fully complied with his discovery obligations in the case, through interrogatory answers, document production, and, of course, at deposition (Id. at 30; 59-61; 65; 66-68); (3) that he has had frequent contact with his attorneys in this action, and that all of his time spent on this case has been without compensation (Id. at 22, 24-26; 28; 40); and (4) that he will continue to fulfill his obligations as class representative, including to testify at trial if necessary (Id. at 40).

Indeed, the record before this Court shows why Defendants do not want someone with

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[2] Plaintiff Dunne has testified:

Q. I'm asking you to describe in your own words what, today, at this moment, you understand a class action to be?
A. My definition would be, is when a group of individuals have been grieved or violated by a source, an entity, and there's legal recourse, someone is the representative to do that.
Q. Okay. And in your own words, can you explain what a class representative is?
A. That – a class representative, in my understanding, would be the person that brings forth a complaint against that entity.
Q. Why do you believe you would be an appropriate class representative in this matter?
A. Because I was grieved by Tyco.
Q. Any other reasons?
A. Because I took the initiative to do it.

(Dunne Tr. at 21-22).

Dunne's enthusiasm and motivation prosecuting this case against them. The following excerpt from Dunne's deposition is not the kind of testimony that Defendants want class representatives' offering at trial.

Q. In your own words, can you tell me what you believe Tyco has done wrong?

A. Tyco did everything wrong. I believe that there were thieves at the top running the company whose sole purpose for being there was to loot every penny they could before they got caught, thinking perhaps they would never get caught. And I believe the number that I've seen on the news and read in the papers was $600 million.

* * *

Q. What do you believe Tyco should have done?

A. I think that it should have been run with integrity like a company is supposed to be. You expect honesty from the man at the top, not for him to steal from the company, not to steal from the employees, not – or the stockholders or anyone else that he's responsible for . . .

(Dunne Tr. at 69-70).

* * *

Q. Mr. Dunne, at some point, you became aware that you were invested in the Tyco stock fund?

A. Yes.

Q. Do you remember thinking whether or not the Tyco stock fund was a risky investment?

A. No. At the time, I thought that Tyco probably was a good investment.

Q. Why did you think that?

A. Well, because I was working for the company for one thing, even in lieu of the issues. You know, the Tyco name was always on the financial news. I do occasionally watch the financial news, and Tyco was always in the financial news. And it was – always seemed to be on the good portion of the financial news. What I didn't know was the cooking of the books that was going on behind the scenes.

Q. Did anything else contribute to your understanding of whether or not an investment in the Tyco stock fund was a wise investment?

A. Pardon me?

Q. Was there anything else that contributed to your understanding of whether or not the Tyco stock fund was a good investment?

A. No. I didn't get bits of insider information if that's what you're alluding to.

Q. I'm not alluding to that. I'm asking if there's anything else that contributed to your understanding of whether or not the Tyco stock fund was a wise investment?

A. Well, the only thing that I can tell you, the only thing that stands out in my memory, is that I provided a security system to one of the – one of the exchange – one of the large investment firms here in Spokane. In fact, it's directly across from this hotel. I can't recall the name of it.

And when the fellow looked at my business card, he seen "Tyco." And he says, "Oh, we're recommending this to our clients."

Now, this is in that same time frame when Tyco was getting this good publicity. And behind the scenes, the books were being cooked by Mark Swartz and the rest of the pirates.

(Dunne Tr. at 95-96).

In a last-ditch effort to derail the appointment of Dunne, Defendants say that his refusal to answer a few questions at deposition (including questions going directly to his conversations with counsel in this case, Defendants' Exhibit A at 54, and questions regarding the investments of his family members, Defendants' Exhibit A at 109) should disqualify him. There is, however, a good reason why, despite ample opportunity, Defendants never moved to compel answers to these deposition questions (as they did with respect to certain of plaintiffs' discovery responses in the companion securities case). Defendants did not move here because they know full well that the deposition questions are highly invasive, totally irrelevant and designed to deter Dunne from further prosecution of the case. That Defendants never moved for an order compelling Dunne to answer the questions which he declined to answer at deposition speaks volumes about the appropriateness of the inquiries upon which Defendants now rely as their basis for

disqualification of Dunne as class representative.

B. Jepson

Jepson's deposition testimony also supports her appointment as a class representative. For instance, Jepson gathered documents and information at counsels' request, communicated with counsel numerous times as to the status of the case, and provided pertinent information to counsel for use in drafting pleadings. Jepson carefully considered becoming a lead plaintiff and has a fair understanding of the nature of a class action lawsuit -- "I am representing a population of participants in the 401(k) plan for Tyco; I am an individual representative versus having . . . 100,000 people representing themselves." (Transcript of the Deposition of Kay Jepson ("Jepson Tr."), at 62 attached as Exhibit B to the Mentone Decl.). Additionally, Jepson clearly understands what her role and responsibilities would be as class representative, such as:

> It is my responsibility to provide information to my attorneys to stay abreast of the case and what's going on with the case; to be available for a deposition or . . . whatever [my attorneys] need me for, meetings that I'm required to attend, and I have to read all . . . the information that's sent to me by the attorneys.

(Id. at 62). Jepson also demonstrated basic knowledge and understanding of the procedural posture of this class action litigation and the factual allegations being asserted against Defendants. (Id. at 43-47, 60). Jepson's inability to recall specific details is not sufficient to defeat class certification. Moreover, Jepson's understanding that she need not "supervise" her attorneys is equally insufficient. Indeed, Jepson is in effect already acting in a supervisory role, although she may not have characterized it as "supervision." Specifically, Jepson testified that she understands the factual basis of this lawsuit, she maintains contact with her counsel and she reviews the legal documents filed in this lawsuit.

All of these facts sufficiently demonstrate that Jepson's participation in this litigation thus far, as well as her understanding of her continuing obligations, render Jepson an ideal class representative, and, most certainly, an adequate one. Defendants' few references to Jepson's deposition testimony do not provide the Court with Jepson's full knowledge and understanding of the events in the case and should not distract the Court from the true breadth and scope of

Jepson's knowledge and understanding or from her desire to serve as class representative.

C. Johnson

Defendants claim that Johnson is an inadequate representative because his documents are not organized, he does not understand the pleadings in this case, he was not aware that he was required to produce documents in this case, he did not research the law firms which represent him before hiring them, and he believes the lawyers are responsible for determining the course of the litigation. Each of these arguments should be rejected.

A careful and objective reading of Mr. Johnson's deposition demonstrates that Mr. Johnson has vigorously pursued this case and communicated with this lawyers and understands his role as class representative. Indeed, while Defendants fault Johnson for not being organized with his documents, he indicated that he maintains a file which is a "couple inches" thick containing the documents relating to this case. (Transcript of the Deposition of Gary Johnson ("Johnson Tr."), at 39:15 attached as Exhibit D to the Mentone Decl.). He also testified that he made a thorough search of his house and files for documents responsive to Defendants' document requests. (Id. at 34:1-16). Johnson stated that he understood he was to produce these documents and that he did, in fact, produce the documents which he had, which consisted of account statements. (Id. at 32:18-25; 33:1; 38:5-7).

Johnson also testified that he sought and will continue to seek assistance from his counsel in understanding and pursuing the action on behalf of the class. For example, he testified that he has stayed in regular communication at least once a month with his attorneys and had occasional contact with the other attorneys involved in the case. (Id. at 18:20-25). He is willing to sacrifice his vacation time to work on the case, including taking vacation time to have his deposition taken and is willing to testify at trial if necessary. (Id. at 27:12-16). Moreover, in addition to communicating with class counsel, Johnson communicates with other class members. (Id. at 24:14-16).

More important, Johnson understands his role as class representative. When asked to

explain his understanding of a class, he indicated that "a class is you have some representatives and like I'm one of them that's picked to, you know, oversee to help all the rest of the people."

Q. Okay, who are your people?

A. 120,000 people from Tyco who got ripped off.

Q. What do you think your responsibilities are or would be if you are a class representative?

A. Well, to make sure these guys are doing their jobs.

Q. By these guys you mean –

A. I mean the lawyers, doing their jobs, you know, they send me plenty of papers to look at, and I look at them, and I don't understand them all, but they appear to be doing their job as of now, so –

(Id. at 16:2-16). While Johnson may not be a lawyer and may not understand all the legalize contained in documents arguing esoteric and byzantine principles of ERISA law, he more than understands what this case is about.

The bottom line is that when asked how he could help the class members, he indicated that not only would he go to court, he would do "whatever I would have to do, I would do it." (Id. at 27:24; 28:1-3). These factors demonstrate Johnson's ability to adequately represent the class through vigorous prosecution of the class claims.

D. Gordon

Gordon also is a proper representative. He consults with his attorney twice per month or more, and sometimes spends a few hours per week on the case. (Transcript of the Deposition of John Gordon ("Gordon Tr."), at 19:11-13; 25:12-19 attached as Exhibit C to the Mentone Decl.). Gordon maintains a file on the case that, in addition to Gordon's own records, includes documents received from his attorney. (Id. at 19:18-25; 34:4-8). He understands that his legal obligation in responding to written discovery is to "[a]nswer the questions to the best of my ability, and I answered them honestly." (Id. at 39:10-13). When Gordon could not understand certain interrogatories, he consulted with his attorney for assistance and received a full

explanation. (Id. at 41:7-13). Gordon's diligence in consulting his attorney to assist him in pursuing this class action further demonstrates that he is an adequate class representative.

It is true that Gordon first met his attorney **in person** on the morning of his June 7, 2005 deposition. (Id. at 20:4-5). However, he first communicated with his attorneys over the phone in 2002. (Id. at 19:2-10). Gordon explained that he became a proposed class representative entirely on his own initiative. (Id. at 6:20-22). He felt the class was wronged and decided to seek help, contacting a friend and fellow Tyco/Ansul employee who researched a "couple" of law firms, including Gordon's present counsel, Robbins Umeda & Fink. (Id. at 16:24-17:14). Gordon conducted an initial phone interview with his counsel, asking whether they handled "that kind of case" and whether the case had merit, and thereupon decided to retain counsel. (Id. at 29:22-30:7). Gordon's action in locating, contacting, interviewing and then retaining experienced class counsel demonstrate that he is very capable of adequately representing the class.

Gordon is a lay person and cannot be expected to understand all of the legal terminology and procedures involved in a class action. Gordon nevertheless has a clear and unwavering understanding of his most fundamental role as class representative - to diligently pursue the interests of the class as opposed to his own. When asked to describe in his own words what a class representative is, Gordon replied, "he represents the group of people that are seeking help on a situation." (Id. at 15:4-15). Throughout his deposition, Gordon consistently focused on the harm to the class as opposed to his individual loss. (Id. at 18:4-19:1; 33:8-12; 44:17-24). Gordon has sought, and will continue to seek, assistance from his counsel in understanding and pursuing the action on behalf of the class. (Id. at 14:23-15:3; 15:8-15; 15:25-16:3; 21:12-20; 33:8-12; 33:22-34:3; 39:2-9; and 41:7-15). Finally, Gordon will devote as much time as possible to the case and is willing to testify at trial. (Id. at 29:3-16). All of these facts demonstrate Gordon's ability to adequately represent the class through "vigorous prosecution" of the class claims.

E. Poffenberger

Poffenberger is an adequate class representative. He has a level knowledge of the claims in this case reached by few representatives in reported cases. Although Plaintiffs' Complaint contains extensive and complicated ERISA claims, Poffenberger summarized the Complaint succinctly:

> Q. Okay. Mr. Poffenberger, in your own words, can you please explain what you believe Tyco has done wrong?
>
> A. The people responsible financially for the Plan, [the] fiduciaries, misstated the actual value of the stock, overstated the value of the stock in the company, there were questionable accounting practices, illegal accounting practices; loans that were forgiven. That information was not made public so that I could make a reasonable assertion as to the actual value of the stock.
>
> Q. Okay. What do you think Tyco should have done?
>
> A. Their first priority was to the plan, not to themselves. And I'm speaking of the plan administrators, the fiduciaries.
>
> Q. And what should they have done?
>
> A. Fully disclosed what was going on, made it public and made it right.

(Transcript of the Deposition of Peter Poffenberger ("Poffenberger Tr."), at 66-67 attached as Exhibit E to the Menton Decl.). Poffenberger also understood and testified that the Defendants in this action were the fiduciaries of the plan, (Id. at 39:18-24), and that the class period was between August of 1998 and July of 2002. (Id. at 41:10-11).

Poffenberger is particularly aware of his responsibilities as a class representative and testified that his duties were "[t]o put the interests of the class ahead of my own, to converse with my attorneys to become knowledgeable and to give testimony." (Id. at 19: 23-25). He also confirmed that he had no conflicts of interest with the class. (Id. at 41:12-19).

Poffenberger has been very much involved in this lawsuit. He estimated that he has spent between 48 and 60 hours attending to issues relating to this case. (Id. at 33:5-14). He testified that, over the course of two years, he has spoken with his counsel "perhaps a dozen times." (Id. at 23:1-3) and has continuously provided information to counsel, including financial information,

from the beginning of his involvement in the lawsuit. (Id. at 27: 13-14). In addition, he keeps a file which includes communications with counsel. (Id. at 44:9-21). Finally, Poffenberger testified that he intends to engage in discussions with counsel regarding settlement and to rely upon the advice of counsel in making future decisions with respect to this case. (Id. at 42-43; 159-160).

Defendants claim that Poffenberger lacks sufficient knowledge and involvement in this litigation for two reasons (1) he did not see the Complaint before filing it, and (2) other than deciding to join in this litigation, he has made no decisions in this case. (Defs. Mem. at 15). Defendants' arguments are frivolous. First, Defendants ignore the fact that the Consolidated Amended Complaint was filed on **February 3, 2003***, four months before Poffenberger (and Wade) were added as Plaintiffs to this action,* by the Court's Order granting Plaintiffs' motion to join additional Plaintiffs, dated **June 29, 2003**.

Second, Defendants ignore the fact that this action has been plodding through document discovery over the past two years, and under the circumstances, there have not been opportunities for Poffenberger to make "decisions" with respect to the case. It is telling that Defendants do not identify any "decisions" that Poffenberger (or any of the proposed representatives) should have made during this stage of the proceeding. Indeed, the only thing that Poffenberger could have made decisions about between the date he elected to become a plaintiff and his deposition concern (a) the content of legal arguments in response to Defendants' motion to dismiss and (b) the scope of document discovery, which are matters particularly within the province of counsel. For these reasons, Defendants' arguments that Poffenberger is not adequate should be rejected.

F. Wade

Wade is more than adequate. She has been actively and significantly involved in the progress of this case. She has had numerous telephone conferences with counsel (Transcript of the Deposition of Karen Wade ("Wade Tr."), at 24:17-20, attached as Exhibit F to the Mentone Decl.) and estimated spending at least 40 hours attending to matters related to this action thus far

(Id. at 25: 15-19), including meetings with counsel, telephone conferences and reviewing documents. (Id. at 26:21-25). Moreover, she maintains a file of communications relating to this action. (Id. at 41:16- 25). In sum, Wade has continuously maintained a significant role in the ongoing litigation, demonstrating her adequacy as a class representative.

Wade has also demonstrated a detailed understanding of the claims in this litigation. She summarized the Defendants' wrongdoing as follows:

> Q. [C]ould you describe for me what you believed to be the wrongdoing – what you believe to be wrongdoing (sic) committed by Tyco?
>
> A. Certain individuals used company funds as their own personal piggy bank, bank account, for personal gain and use. Accounting improprieties that were not disclosed. No one knew.
>
> Q. Was there any other wrongdoing which were aware of at the time?
>
> A. Just the lack of letting anyone know. . . No forthrightness on their part in telling people what was going on, again with certain individuals using the company funds for their own personal gain. The accounting improprieties. And the lack of them advising anyone.

(Id. at 68:1-11). She identified the class as "those parties that lost funds or lost earning profits in the Tyco 401(k) plan, Tyco Stock Fund within the class period of August 1998 to July of 2002." (Id. at 40:10-13).

Defendants wrongly claim that Wade was "unaware of anything that has happened in this case since the filing." (Defs. Mem. at 15). Far from being unaware of case proceedings, Wade specifically exhibited an acute understanding of the status of the case, including the fact that the the Court would be considering issues with respect to class certification. (Id. 43:22-24). Wade was well-aware of her role as a class representative, and testified that "a class representative works in the best interests of the class, communicates with their attorney, their counsel and of course testifies if need be." (Id. at 22:4-7). Furthermore, she understood that she has a duty throughout the course of the action to supervise her counsel, (Id. at 23:21-24) and confirmed that there were no conflicts between her and the class. (Id. at 40:14-17).

Defendants next argue that Wade is not an adequate representative because she did not

read any drafts of the Complaint or "provide any information to her attorneys in connection with the drafting of the Complaint." (Defs. Mem. at 15). However, Wade like Poffenberger, did not become a Plaintiff until after the Complaint was filed.

Defendants also argue that Wade did not review other draft documents in this action; however, Defendants do not identify what "draft" documents Wade should have reviewed. Indeed, since Wade became a Plaintiff, the parties have only briefed the motion to dismiss or conducted document discovery. Wade should be not disqualified as a class representative merely because she did not review "drafts" of Plaintiffs' document requests or legal arguments opposing Defendants' motion to dismiss because these matters are particularly within the expertise of counsel. Moreover, Defendants cite no authority in support of this proposition. Indeed, they cite no authority which supports in any way their argument that Wade is not adequate.

III. THE CLAIMS OF THE PROPOSED CLASS REPRESENTATIVES ARE TYPICAL OF THE CLAIMS OF THE PROPOSED CLASS

Defendants contend that Plaintiffs' do not satisfy the typicality requirement with respect to the misrepresentation/nondisclosure claim because individualized issues of reliance exist among the proposed class representatives. (Defs. Mem. at 2). In particular, they argue that Plaintiffs' misrepresentation/non-disclosure claims are atypical because the proposed class representatives purportedly relied on "different alleged misrepresentations." Id. However, typicality concerns whether the claims are based on the same legal theories and arise from the same course of conduct by Defendants. Randle v. Spectran, 129 F.R.D. 386, 391 (D. Mass 1988) ("[t]he question is simply whether a named plaintiff in presenting his case, will necessarily present the claims of the absent plaintiffs."); Priest v. Zayre Corp., 118 F.R.D. 552, 555 (D. Mass. 1988) ("With respect to typicality under Rule 23(a)(3), plaintiffs need not show substantial identity between their claims and those of absent class members, but need only show that their claims arise from the same course of conduct that gave rise to the claims of the absent members."). Here, the misrepresentation/nondisclosure claim is based on negligent

misrepresentations and nondisclosures in SEC filings or in Plan-wide communications to all Participants. Accordingly, these alleged misrepresentations are uniform among all putative class members, and therefore, the claims are typical in that they are all based on the same legal theories and based on the same misleading statements by Defendants.

Reliance is a commonality issue in that the relevant question is whether the issue of individual reliance precludes class-wide or common treatment of all claims, or whether reliance must be considered on a class member by class member basis. Here, Defendants are attempting to turn a commonality issue into a typicality issue. It is no surprise that Defendants attempt this tactic because under Rule 23(a), the commonality test is easily met. Indeed, commonality is satisfied if there is just **one** question of fact or law common to the class. George Lussier Enterprises, Inc. v. Subaru of New England, Inc., 2001 WL 920060, at *3 (D.N.H. Aug. 3, 2001) (Barbadoro, J.) ("To establish the commonality prerequisite, the plaintiffs must show that 'there are questions of law or fact common to the class.' Because the class need share only a single legal or factual issue at this stage of the analysis, the commonality requirement ordinarily is easily satisfied.") (citing Mullen v. Treasure Chest Casino, LLC, 186 F.3d 620, 625 (5th Cir.1999), cert. denied, 120 S.Ct. 1169 (2000); 1 Newberg § 3.10, at 3- 50).

Although Defendants discovered one unreported Illinois District Court case that reviewed reliance through the lens of typicality, in securities and other fraud cases, district courts within the First Circuit routinely analyze reliance issues solely in terms of whether common issues predominate under Rule 23(b)(3). See, eg., In re PolyMedica Corp. Securities Litig., 224 F.R.D. at 38; Kinney v. Metro Global Media, Inc., 2002 WL 31015604, at *5 (D.R.I.,2002); George Lussier Enterprises, Inc., 2001 WL 920060, at *4; Rothwell v. Chubb Life Ins. Co. of America, 191 F.R.D. 25, 30 (D.N.H. 1998) (Barbadoro, J.). The same is true with respect to securities and other fraud cases across the country. Indeed, even in Hudson v. Delta Airlines, Inc., 90 F.3d 451, 465-457 (11th Cir. 1996) -- a case cited by Defendants -- the Court analyzed reliance in terms of commonality when it concluded that plaintiffs failed the commonality test because individualized

issues of reliance precluded class wide treatment of the claims. Critically, these cases do not hold that the proposed class representatives failed typicality under Rule 23(a)(3) because of individual issues of reliance. The Illinois case, Rowell v. Voorman Cookies, Ltd., 2005 WL 1026715 (N.D. Ill. April 27, 2005), cited by Defendants, concerned claims of promissory estoppel and intentional infliction of emotional distress. Unlike this case, there was no evidence that the alleged representations were uniform or class wide.

In attempting to convert commonality into typicality, Defendants focus on various individual facts that the proposed class representatives may have relied upon, among other things, in causing the Plan to invest in the Tyco Stock Fund. However, this argument ignores the overriding common issues: whether reliance is required and if so, whether it may be presumed on a class-wide basis. Moreover, many of the facts upon which Defendants' claim the proposed class representatives relied are not even the subject of this case, are not alleged to be misleading and are not relevant. The proper inquiry in a misrepresentation case is whether the alleged misleading statements were relied upon, not whether there were other facts that may also have been relied upon. Here, the only alleged misleading statements are Plan-wide and should be dealt with on a Plan-wide basis. Accordingly, these facts raise only issues of commonality, not typicality.

Defendants' reliance on In re Electronic Data Systems Corp., 224 F.R.D. 613 (E.D. Tex. 2004) for the proposition that the Plaintiffs' claims are not typical is misplaced. In EDS, the Court expressly rejected the same argument that Defendants' raise here (i.e. that plaintiffs' misrepresentation claim would "require individualized proof of materiality and reliance that precludes certification" under typicality, Id. at 626). Indeed, with respect to the reliance issue, the EDS Court concluded that plaintiffs' claims satisfied the typicality requirement of Rule 23(a)(3):

> Typicality is not a difficult standard to meet and is satisfied if the representatives' claims share essential characteristics with the class members' claims or if the claims arise from a similar course of conduct and share the same legal theories. Plaintiffs allege the Defendants misstated and concealed information the would

> have allowed Plaintiffs to discover the unsoundness or their investments. These allegations arise from similar courses of conduct and share the same legal theories. **The Court[] finds this satisfies Rule 23(a)(3)'s typicality requirement**.

Id. (emphasis added).

Here, there are numerous common questions concerning reliance. For example, whether Plaintiffs must establish individual reliance and, if so, whether it may be presumed, are clearly issues common to the class. However, even if the Court wishes to consider reliance in the context of typicality, which Plaintiffs submit that it should not, Defendants' argument should be rejected for the reasons set forth below.

IV. CLAIM I IS MAINTAINABLE AS A CLASS ACTION UNDER RULE 23(B)

Defendants contend that this case is not suitable for certification under any of the provisions of Rule 23(b). However, the only basis for this argument is that Plaintiffs' misrepresentation claim is not maintainable as a class action because of individual issues of reliance, which is an issue solely with respect to Claim I. (Defs. Mem. at 16). Accordingly, Defendants apparently concede that Claim II may be certified under Rule 23(b).

Plaintiffs' claims should be certified under Rule 23(b)(1) because Plaintiffs here seek Plan-wide relief, and the successful adjudication of these claims would result in a Plan-wide remedy. On the other hand, failure to prove a breach of fiduciary duty would necessarily preclude actions by other plan participants who seek relief on behalf of the Plan. See Furstenau v. AT&T Corp., No. 02-5409, slip op. at 8-9 (D. N.J. 2004) (attached as Ex. A to the Declaration of Wayne Boulton submitted herewith); Rankin, 2004 WL 831124, at *10 (certifying virtually identical claims under 23(b)(1)(A) and (B) because "a failure to certify a class could expose defendants to multiple lawsuits and risk inconsistent decisions" and "adjudication of [plaintiff's] claims will likely be dispositive of the claims of other potential class members"); Ikon, 191 F.R.D. 457, 466; Kolar v. Rite Aide Corp., 2003 WL 1257272, at *3 (E.D. Pa. Mar. 11, 2003)

("inconsistent or varying adjudications would be intolerable for the employees of the same employee benefit plans).

As these cases demonstrate, this is not the first time that Rule 23(b)(1) certification of ERISA breach of fiduciary duty claims involving the type of conduct alleged in this case has been addressed by a court.[3] In addition to the authorities cited above, ERISA breach of fiduciary duty cases granting class certification under 23(b)(1) include: In re Syncor ERISA Litigation, 227 F.R.D. 338, 344-47 (C.D. Cal. 2005); In re CMS Energy ERISA Litig., 225 F.R.D. 539 (E.D. Mich 2004); In re WorldCom ERISA Litig., 2004 WL 2211664, at *3; Koch v. Dwyer, 2001 WL 289972 (S.D.N.Y. Mar. 23, 2001); Thomas v. SmithKline Beecham Corp., 201 F.R.D. 386, 397 (E.D. Pa. 2001); Bunnion v. Consolidated Rail Corp., 1998 WL 372644 (E.D. Pa. May 14, 1998); Kane v. United Independent Union Welfare Fund, 1998 WL 78985 (E.D. Pa. Feb. 24, 1998); Feret v. Corestates Fin. Corp., 1998 WL 512933 (E.D. Pa. I998); Gruby v. Brady, 838 F. Supp. 820, 827 (S.D.N.Y. 1993); Specialty Cabinets & Fixtures, Inc. v. American Equitable Life Ins. Co., 140 F.R.D. 474, 479 (S.D. Ga. 1991).

Defendants ignore these authorities and rely on a case that considered and rejected many of the arguments now advanced by Defendants with respect to the requirements of Rule 23(a). Nelson v. IPALCO Enterprises, Inc., 2003 WL 23101792, at *3-9 (Sept. 3, 2003) (rejecting challenges to Rule 23(a) based on reliance; "plaintiffs satisfy all four criteria of Rule 23(a)").[4] While the Nelson court decided to certify the class action claims under Rule 23(b)(3) because it

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[3] Indeed, the Advisory Committee Notes to the 1996 Amendment of Fed. R. Civ. P. 23 (b)(1)(B) specifically state that certification under Rule 23 is especially appropriate in cases charging breach of trust by a fiduciary to a large class of beneficiaries. Accordingly, this is the paradigm case for Rule 23(b)(1) certification.

[4] Defendants' also cite to Spann v. AOL Time Warner, Inc., 219 F.R.D. 307, 321 (S.D.N.Y. 2003). In Spann, plaintiffs brought individual claims for monetary relief based on a recalculation of their pension benefits. The Spann plaintiffs did not seek plan-wide relief for breach of fiduciary duty under ERISA Section 502(a)(2); rather, they sought "individual benefits under the terms of the Plans and ERISA Section 502(a)(1)." Id. The Court determined that individual issues existed concerning (a) the recalculation of the participants individual benefits and (b) the effects of certain releases signed by absent class members. Since Spann, does not even concern the provisions of ERISA at issue here, it is not relevant.

was concerned that certain issues might require an opt-out provision, Nelson further demonstrates that a class should be certified and severely undermines the argument that Plaintiffs' claims should not be certified on any basis.

As for the Nelson court's decision to certify a class under Rule 23(b)(3) as opposed to 23(b)(1), the Court in Rankin explained:

> The Court finds the reasoning in Ikon and Bunnion more persuasive than the reasoning in IPALCO. Rankin's claims relate to defendants unitary actions with regard to the Plan. Defendants treated the entire class identically. Although there may be factual differences as to whether, in the case of voluntary employee contributions, a class member relied on any alleged misrepresentations, the alleged misrepresentations are alleged to have been made to the entire class of participants. This is not a case where defendants are alleged to have had individualized communications with a participant. Rather, this is a case where defendants' uniform communications with its participants and its uniform decisions with respect to the employer matching portion of the Plan forms the basis for Rankin's claims.

Rankin, 2004 WL 831124, at *10. Plaintiff believes that the rationale articulated in Rankin (and the cases similarly decided) more accurately reflects the essential nature of Plaintiff's Plan-wide ERISA breach of fiduciary duty claims and the Advisory Committee's views of Rule 23.[5]

The only basis for Defendants' argument that Claim I should not be certified under Rule 23(b) is that there are individual issues of reliance. However, individual reliance is not an issue for two reasons: First, Plaintiffs moved for certification under Rule 23(b)(1). Commonality issues such as reliance are not an issue under this section of Rule 23(b). Instead, they should only be considered under Rule 23(b)(3). Moreover, as set forth below, reliance does not raise individualized issues.

[5] For the reasons set forth below, Plaintiffs' claims are equally suitable for class certification under Rule 23(b)(3). Contrary to Defendants' argument, there are no individualized issues of reliance with respect to Plaintiffs' Plan-wide claims under ERISA section 502(a)(2) and common issues of law and fact with respect to the Plan and Plan-wide communications predominate over questions affecting individual members. Nonetheless, since Rule 23(b)(1) standards are met, the class should be certified under that section. See Piazza v. EBSCO Indus., 273F.3d at 1352-53 (District Court abused its discretion by certifying a § 502(a)(2) class under Rule 23(b)(3) instead of 23(b)(1)).

A. Reliance Does Not Preclude Certification Because the Claim is Brought on Behalf of the Plan

Defendants' arguments concerning individual reliance ignore the fact that this action is brought on behalf of the Plan, pursuant to ERISA § 502(a)(2), which authorizes civil enforcement of a fiduciary's violation of § 409. See Massachusetts Mutual Life Ins. Co. v. Russell, 473 U.S. 134, 140 (1985) (Under ERISA, "the potential personal liability of the fiduciary is to make good to such plan any losses to the plan"). Accordingly, the aggrieved party here is the Plan, not the individual Participants who directed the Plan to invest in the Tyco Stock Fund. Here, the Plan is a trust and the Plan owns the claim because only the Plan bought and sold shares in the Fund. All amounts recovered by the Plan in this case will go directly to the Plan, no amounts will go directly to individual Participants.

In a breach of fiduciary duty action such as this, the focus of the Court is on Defendants' actions, *not* Participants' actions. See In re Ikon Office Solutions, Inc. Sec. Litig., 191 F.R.D. 457, 465 (E.D. Pa. 2000) (in an analogous action involving company stock held in a 401(k) plan, the court rejected defendants' argument that individual reliance issues prevented class certification, and stated "[d]efendants' position also ignores the fact that the appropriate focus in a breach of fiduciary duty claim is the conduct of the defendants, not the plaintiffs"). Consequently, the actions/inactions implicated by Plaintiffs' misrepresentation/omission claims illustrate Defendants' fiduciary breaches, *not* Participants' actions. See Xcel Energy, 312 F. Supp. 2d at 1182-83 (noting that the misstatements and omissions proffered by plaintiffs are mere "indicia of defendants' failure to take affirmative steps to protect the plan in breach of duties of prudence and loyalty and the duty to disclose").

Plaintiffs allege that Defendants materially misrepresented and failed to disclose the true financial health of Tyco during the Class Period through filings with the SEC and other public statements disseminated to *all* Plan participants uniformly through Plan-wide communications. See Consol. Am. Compl. ¶¶ 69-115. Once a fiduciary issues misleading information regarding investment in a defined contribution plan, liability attaches. See, e.g., WorldCom, 263 F. Supp.

2d at 767 (denying motion to dismiss where defendant-fiduciary disseminated false information to plan participants). Individual Participants' "reliance" on these "Plan-wide" breaches is immaterial to the issue of Defendants' liability.

Defendants' also point to In re Electronic Data Systems Corp. to support their argument that proof of individual reliance is required. However, in EDS, the determination that Plaintiffs needed to prove individualized reliance rested on the admission by the EDS plaintiffs that their misrepresentation claim was *not* brought on behalf of the Plan under ERISA § 502(a)(2), but on behalf of the individual participants under ERISA § 502(a)(3). See In re Electronic Data Systems Corp., 224 F.R.D. at 620 n.3. Here on the other hand, Plaintiffs' core claims are brought on behalf of the Plan under ERISA § 502(a)(2). Indeed, the court in In re Honeywell Int'l ERISA Litig., 2004 WL 3245931, at *15-16 (D.N.J. 2004), specifically concluded that misrepresentation claims, similar to those asserted by Plaintiffs here, were properly brought under § 502(a)(2).

An overwhelming majority of cases have concluded that misrepresentation claims, like those alleged here, are properly asserted under ERISA Section 502(a)(2).[6] More to the point, by

[6] See, e.g., In re Honeywell ERISA Litigation, 2004 WL 3245931, at *15-16 (rejecting defendants' attempt to undermine directly analogous fiduciary misrepresentation and omission claims by resort to individual reliance arguments); JDS Uniphase, 2005 WL 1662131, at *12 (rejecting identical argument); In re Syncor ERISA Litig., 351 F.Supp.2d 970, 990 (C.D. Cal. Aug. 23, 2004) (declining to find that a request to allocate relief among the Participants' individual accounts in proportion to the accounts' losses constitutes individual relief, and declaring that "such a finding would leave 401(k) plan participants without a remedy for money damages under ERISA"); In re AEP ERISA Litig., 327 F. Supp. 2d 812, 820-821(S.D. Ohio 2004) (holding that plaintiffs could seek recovery on behalf of the Plan for losses suffered by it); In re CMS Energy ERISA Litig., 312 F. Supp. 2d. 898, 912-913 (E.D. Mich. 2004) (rejecting defendants' argument that the plaintiffs sought individual relief and thus failed to satisfy ERISA § 502(a)(2), holding that "[p]laintiffs in this case would, therefore, represent the Plan as a *whole* to the extent the Plan was constituted of CMS stock"); Hill v. BellSouth Corp., 313 F. Supp. 2d 1361 (N.D. Ga. 2004) (allowing claims with respect to employer stock virtually identical to those here to go forward under § 502(a)(2)); In re Xcel Energy, Inc., Sec., Derivative & ERISA Litig., 312 F. Supp. 2d 1165, 1180 (D. Minn. 2004) (same); In re Sears, Roebuck & Co. ERISA Litig.,2004 U.S. Dist. LEXIS 3241(same); In re Enron Corp. Sec., Derivative & ERISA Litig., 284 F. Supp. 2d 511, 602-603 (S.D. Tex. 2003) (same); Rankin v. Rots, 278 F. Supp. 2d 853 (E.D. Mich. 2003) (same); see also Kayes v. Pacific Lumber Company, Nos. C-89-3500 SBA, C-91-1812 SBA, 1993 U.S. Dist. LEXIS 21090, at *6-7 (N.D. Cal. Mar. 8, 1993), aff'd in part, rev'd in part and remanded by 51 F.3d 1449, 1462 (9th Cir. 1995) ("The logical result of reconciling Russell with the plain language of [Section 502(a)(2)] is that a participant or beneficiary who brings suit for breach of fiduciary duty, does so on behalf of the plan and not in his individual capacity. While the individual has standing to bring the suit, and stands to gain if the suit is successful, his benefit is secondary or derivative of the plans gain.").

the plain and unambiguous terms of ERISA §§ 409 and 502, when a fiduciary of a plan breaches his/her fiduciary duties as enumerated in ERISA § 404(a), he/she is liable to the "plan" for any losses caused by such breaches. See Massachusetts Mutual Life Ins. Co. v. Russell, 473 U.S. at 140.

Significantly, Defendants do not deny that there are many common questions of fact and law in this case, perhaps because several courts in like situations have found such uniformity. In Rankin, for example, the Court determined that individual issues of reliance did not predominate over common class-wide issues:

> [Plaintiff's] claims relate to defendants' unitary actions with regard to the Plan. Defendants treated the entire class identically. **Although there may be factual differences as to whether, in the case of voluntary employee contributions, a class member relied on any alleged misrepresentations, the alleged misrepresentations are alleged to have been made to the entire class of participants**. This is not a case where defendants are alleged to have had individualized communications with a participant. Rather, this is a case where defendants' uniform communications with its participants and its uniform decisions with respect to the employer matching portion of the Plan forms the basis for Rankin's claims. Thus, individualized issues do not predominate.

Rankin, 220 F.R.D. at 523 (emphasis added); see also, In re Ikon Office Solutions, Inc., 191 F.R.D. at 466 (the court found that individualized questions of reliance did not predominate over the common course of conduct by defendants and the plan-wide misrepresentations); Bunnion v. Consolidated Rail Corp., 1998 WL 372644 (E.D.Pa. 1998).[7]

[7] See also CMS Energy, 225 F.R.D. 539, 545-46 (E.D. Mich. 2004) (certifying a class of analogous plan participants bringing identical claims, including disclosure claims, and rejecting defendants' arguments that the disclosure claims required individualized analysis - the Court agreed with plaintiffs that the Plan-wide breach of fiduciary duty claim involved "failing to provide [material] information" regarding the true financial condition of the Company/Plan sponsor; also cites Rankin "As Judge Cohn found in his Kmart class certification decision, the appropriate focus is whether the alleged statements–or omissions–are asserted to have been made on a class-wide basis (citations omitted). The Court finds that the answer to this question is in the affirmative and . . . agrees with the statement in the Rankin decision that "this is not a case where defendants are alleged to have had individualized communications with a participant." Rankin, 220 F.R.D. at 523.)

B. Reliance Is Presumed

Even assuming, *arguendo*, that "reliance" is required, under basic trust law -- upon which ERISA is based [8] -- where a defendant-fiduciary's breach includes material misrepresentations and omissions, the trust beneficiary is presumed as a matter of law to have relied on such misrepresentations and omissions to his or her detriment. See, e.g., Restatement (Second) Trusts § 216 (1959); Roth v. Sawyer-Cleator Lumber Co., 16 F.3d 915, 917 (8th Cir. 1994) (burden of proving causation of damages shifts to the defendant after the plaintiff has established a breach of fiduciary duty). The possibility that there may be some individual variations among Plan Participants regarding the effect of Defendants' misrepresentations is immaterial. See In re AEP ERISA Litig., 327 F. Supp. 2d 812, 833 (S.D. Ohio 2004) (upholding the allegation that "the Plan, and the Participants acting on behalf of the Plan, relied upon, and are presumed to have relied upon, Defendants' representations and nondisclosures to their detriment" on defendants' motion to dismiss over the exact same "individualized" reliance arguments raised here); Xcel, 312 F. Supp. 2d at 1182-83.

Plaintiffs' claim for failure to provide complete and accurate information has two components: non-disclosure and misrepresentation. With respect to the non-disclosure aspect of the claim, reliance does not apply because reliance should be presumed from materiality; Participants cannot rely on information that was not given to them. Affiliated Ute Citizens v. United States, 406 U.S. 128 (1972). Thus, Participants cannot rely on nondisclosures.

With respect to negligent misrepresentations, the Plan and each Participant should be presumed to rely on the market price of Tyco stock and, therefore, presumed to rely on the material information contained in Tyco's public communications and its SEC filings. Plaintiffs allege that Defendants breached their duty to provide complete and accurate information in the company's SEC filings, which became fiduciary representations as a result of their incorporation

[8] Central States, Southeast and Southwest Areas Pension Fund v. Central Transport, Inc., 472 U.S. 559, 570 (1985)(citations omitted).

into the Plan documents. Because of this breach, the market price of Tyco stock and, therefore, the price of the Fund, were artificially inflated. The price of the Fund was based on all material information available, including the information contained in the SEC filings made available to the Plan and its Participants, and incorporated that information into the price of the Fund shares. Basic Inc. v. Levinson, 485 U.S. 224 (1988).

As the Supreme Court explained, "the market is performing a substantial part of the valuation process performed by the investor in a face-to face transaction. The market is acting as the unpaid agent of the investor, informing him that given all information available to it, the value of the stock is worth the market price." Id. at 244 (quotations omitted). "Misleading statements will therefore defraud purchasers of stock even if the purchasers do not directly rely on the misstatements." Id. at 241-42 (quotations omitted). For this reason, it does not matter whether the Plan or Participants relied on the allegedly misleading SEC filings because that information was already relied upon by the market in setting the price of Fund shares.

Just as a presumption of reliance supports "the congressional policy embodied in the 1934 Act," Id. at 245, applying the market presumption to an ERISA case involving Plan-wide misrepresentations and omissions supports the legislative objectives of ERISA in protecting employee retirement assets by authorizing participants to bring suit on behalf of the Plan for Plan-wide relief. Indeed, where an employer seeks to cause a plan to invest in company stock, the duty to protect participants is even greater because of the influence companies could exert on their employees. *See* H.R. Conf. Rep. No. 1280, 93th Cong., 2nd Sess. 1974, 1974 WL 11542, at *5086 ("The conferees expect that the regulations will provide more stringent standards . . . where the investments may inure to the direct or indirect benefit of the plan sponsor since, in this case participants might be subject to pressure with respect to investment decisions."). Conversely, failure to apply the presumption in this case would render ERISA's plan-wide enforcement provisions and the protection afforded by the statute meaningless. *Cf.* Basic, 485 U.S. at 242 ("This case required resolution of several common questions of law and fact. . . .

proof of individualized reliance from each member of the proposed plaintiff class effectively would have prevented respondents from proceeding with a class action.").[9]

Material misrepresentations and/or omissions have the same effect on a company stock fund as they do on the price of the company's publically traded securities. Participants can be expected to rely on the integrity of the price of a company stock fund as a reflection of its value in exactly the same way that investors in a 10b-5 securities case do. Basic, 485 U.S. at 244-48. Indeed, under 29 U.S.C. § 1002(18), ERISA defines "adequate consideration" as the price of the security "prevailing on a national securities exchange."

Plainly, Congress expected that Participants would rely on the operation of the market to reflect and incorporate all available information into the price of investments in the Plan so that the market price is conclusively viewed as the fair price. Indeed, the presumption is more warranted in a case such as this seeking Plan-wide relief. Here, the Plan made the investments that are the subject of this action and the fiduciaries are liable for these imprudent investments. If a plan cannot be presumed to rely on its own fiduciaries, then no one should be presumed to rely. Consequently, as set forth above, ERISA relies on the same materiality principles applicable to the securities laws.

In the face of this authority, Defendants erroneously rely on Gunnells v. Healthplan Service, Inc., 348 F.3d 417 (2003), for the proposition that the "fraud on the market" presumption is inapplicable here. In Gunnells, plaintiffs sought class certification with respect to negligent misrepresentations concerning the terms of a health care and dental plan. That case did

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[9] Furthermore, all of the practical considerations for applying the presumption of reliance to securities cases apply to this context as well. "Presumptions typically serve to assist courts in managing circumstances in which direct proof, for one reason or another, is rendered difficult . . . Requiring a plaintiff to show a speculative state of facts, i.e., how he would have acted if omitted material information had been disclosed or if the misrepresentation had not been made would place an unnecessarily unrealistic evidentiary burden . . . ." Basic Inc., 485 U.S. at 245 (Citations omitted). In addition, "[a]rising out of considerations of fairness, public policy, and probability, as well as judicial economy, presumptions are also useful devices for allocating the burdens of proof between parties." Id. The same considerations apply to Plaintiffs' Plan-wide claim for Defendants' breach of fiduciary duty to disclose.

not involve a defined contribution plan that offered a company stock fund, nor did plaintiffs present any allegations that would support a market-based presumption of reliance. Accordingly, the Court determined that the "fraud-on-the-market" presumption did not apply. In light of the differing facts, the Court's determination in Gunnells does not apply here.[10]

C. Plaintiffs' Reliance is Based on Plan-wide Communications

Although, as set forth above, proof of individual reliance is not required, each proposed class representative testified that he/she relied on certain Plan-wide communications with respect to his/her investment decisions regarding the Tyco Stock Fund. Indeed, Defendants' arguments regarding differences in individual reliance are based largely on mischaracterizations of Plaintiffs' testimony. A careful review of the testimony of the proposed class representatives demonstrates individual reliance on uniform Plan-communications:

(1) Poffenberger testifed that he reviewed "[n]ewsletters furnished by the company," (Poffenberger Tr. at 84:6-10), "information from human resources" (Id. at 85-86); the summary plan description (Id. at 88:7-8; 8918-20; 91-92, 94:17-19); documents addressed to plan participants provided to him as part of the plan (Id. at 98-99) and quarterly reports received from human resources (Id. 140:11-16).[11]

(2) Dunne testified that he reviewed, *inter alia*, summary plan descriptions; Tyco

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[10] Defendants cite to two other cases which merely stand for the unremarkable proposition that promissory estoppel claims -- which have not been alleged here -- are generally inappropriate for class certification. See Rowell v. Voortman Cookies, Ltd., 2005 WL 1026715 (N.D. Ill. April 27, 2005) (individual issues of reliance existed as to plaintiffs' promissory estoppel claims); Hudson v. Delta Air Lines, Inc., 90 F.3d 451(11th Cir. 1996) (individual issues existed as to retirees' reliance on airline's promises to provide continual insurance benefits). Plaintiffs reference to Gary Plastic Packaging Corp. v. Merrill Lynch, Pierce, Genner & Smith, Inc., 903 F.2d 176, 180 (2d Cir. 1990) is equally irrelevant. In that securities case, the lead plaintiff was subject to unique defenses because he continued to invest in the securities, despite "having notice of, and having investigated the alleged fraud." Id. at 179. Such circumstances do not exist here.

[11] Although Poffenberger testified that, prior to 1994, he relied on statements concerning Tyco made by Jeffery Boggess, the President of Tyco Fire & Security, those statements concerned Poffenberger's decision to purchase shares in the ***Employee Stock Purchase Plan***, not the ***Tyco Stock Fund***. (Poffenberger Tr.117:1-6). When Poffenberger decided to invest in the Tyco Stock Fund, he testified that he relied on performance of Tyco stock. (Id. at 118:19-119-1).

newsletters; and other mailings that he received with regards to the 401(k) plan. (Dunne Tr. at 85-86, 92). As to such mailings, he would "open up the envelope, . . . look at it, and [he] would file it." (Id. at 94). Dunne was also familiar with memoranda to all employees from Kozlowski. (Id. at 104).

(3) Johnson testified that he read portions of the prospectus and annual reports which he received. (Id. at 56:14-18; 56:24-25; 57:1-4). In addition, he testified that he posted memos read regarding Tyco acquisitions urging investment in Tyco (Id. at 82:13-25; 83:1-4).

(4) Jepson testified that she reviewed Tyco annual reports, Tyco newsletters, and Tyco stock prospectuses. (Jepson Tr. at 57, 68, 73, 84).

(5) Gordon testified that reviewed certain Tyco newsletters discussing Tyco acquisitions which affected his decision making (Id. at 83:22-84:8) and typically read statements and information sent to him by the company in which he invests. (Id. at 62:3-13). Therefore, contrary to Defendants' assertion, it is likely that Gordon did read the Summary Plan Description, as well as any other documents Tyco regularly sent to its employee investors regarding their Tyco investments.

(6) Wade testified that she reviewed basic information from Tyco, "listing the funds and of course the associated risk with any of the funds . . . ",(Wade Tr. at 81: 15-19; 101:20-24),, correspondence concerning Tyco addressed to "all employees" from Dennis Kozlowski. (Id. at 104-107), and Tyco's annual reports. (Id. at 89:18-25)

V. CONCLUSION

As Plaintiffs have demonstrated, their claims satisfy the requirements of Fed. R. Civ. P. 23. Accordingly, Plaintiffs move that all claims be certified as a class under Rule 23(b)(1).

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