

Case Nos. 09-3001 and 09-3018
(consolidated for disposition with Case Nos. 07-3837 and 09-2796)

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

GARY SPANO, et. al.,
Plaintiffs-Appellees,

-v-

THE BOEING CO., et. al.,
Defendants-Appellants.

PAT BEESLEY, et. al.,
Plaintiffs-Appellees,

-v-

INTERNATIONAL PAPER CO., et. al.,
Defendants-Appellants.

On Appeal from the United States District Court
for the Southern District of Illinois,
(Case Nos. 3:06-743 and 3:06-703) Hon. David R. Herndon

**BRIEF OF AARP, PENSION RIGHTS CENTER, AND
NATIONAL SENIOR CITIZENS LAW CENTER AS *AMICI CURIAE* IN
SUPPORT OF PLAINTIFFS-APPELLEES REQUESTING AFFIRMANCE OF
THE DISTRICT COURTS' DECISIONS**

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TABLE OF CONTENTS

CORPORATE DISCLOSURE STATEMENT 1

INTERESTS OF THE AMICI CURIAE 1

INTRODUCTION 3

ARGUMENT 5

 I. Private ERISA Breach of Fiduciary Duty Class Actions Are an Important Component of the Enforcement of ERISA’s Stringent Fiduciary Duties..... 5

 II. Plaintiffs’ Claims Under ERISA § 502(a)(2) Are Representative Claims on Behalf of Plaintiffs’ Respective Plans. 7

 A. ERISA § 502(a)(2) Mandates That Claims Be Brought on Behalf of the Plan..... 7

 B. The Supreme Court’s Decision in *LaRue* Has Not Changed the Representative Nature of § 502(a)(2) Claims. 9

 III. Given the Nature of a § 502(a)(2) Claim, the Proposed Classes Were Properly Certified Under Rule 23(b)(1). 11

 A. ERISA § 502(a)(2) Cases for Breach of Fiduciary Duty Satisfy Both Prongs of Rule 23(b)(1). 11

 B. *LaRue* Does Not Preclude Certification Under Rule 23(b)(1). 14

 1. A breach of fiduciary duty claim under ERISA fits squarely within the historical antecedents contemplated by Rule 23(b)(1)(B)..... 15

 2. Rule 23(b)(3) does not adequately protect against the risks of inconsistent standards that could result from opt-out adjudications..... 18

CONCLUSION..... 20

CERTIFICATE OF WORD-COUNT COMPLIANCE..... 21

CERTIFICATE OF SERVICE 22

TABLE OF AUTHORITIES

Federal Cases

Alvidres v. Countrywide Fin. Corp.,
No. 07-5810 (C.D. Cal. Nov. 16, 2009)..... 7

Alvidres v. Countrywide Fin. Corp.,
No. 07-5810, 2008 WL 1766927 (C.D. Cal. Apr. 16, 2008) 11

Boesenberg v. Chicago Title & Trust Co.,
128 F.2d 245 (7th Cir. 1942) 15, 18

Citizens Banking Co. v. Monticello State Bank,
143 F.2d 261 (8th Cir. 1944) 16

Deposit Guar. Nat’l Bank v. Roper,
445 U.S. 326 (1980)..... 6

DiFelice v. U.S. Airways, Inc.,
235 F.R.D. 70 (E.D. Va. 2006) 11

Firestone Tire & Rubber Co. v. Bruch,
489 U.S. 101 (1989)..... 3

In re A.H. Robins Co., Inc.,
880 F.2d 709 (4th Cir. 1989) 19

In re Enron Corp. Sec., Derivative & ERISA Litig.,
228 F.R.D. 541 (S.D. Tex. 2005)..... 7

In re Global Crossing Sec. & ERISA Litig.,
225 F.R.D. 436 (S.D.N.Y. 2004) 7

In re Ikon Office Solutions, Inc. Sec. Litig.,
191 F.R.D. 457 (E.D. Pa. 2000)..... 13

In re Merck & Co., Inc. Sec., Derivative & ERISA Litig.,
No. MDL-1658, 2009 WL 331426 (D.N.J. Feb. 10, 2009) 14

In re Polaroid ERISA Litig.,
240 F.R.D. 65 (S.D.N.Y. 2006) 12

In re Schering-Plough Corp. ERISA Litig.,
420 F.3d 231 (3d Cir. 2005)..... 10

<i>In re Williams Cos. ERISA Litig.</i> , 231 F.R.D. 416 (N.D. Okla. 2005).....	12
<i>Jones v. NovaStar Fin., Inc.</i> , 257 F.R.D. 181 (W.D. Mo. 2009).....	11, 12, 13
<i>Kanawi v. Bechtel Corp.</i> , 254 F.R.D. 102 (N.D. Cal. 2008).....	11, 16, 17
<i>Kuper v. Iovenko</i> , 66 F.3d 1447 (6th Cir. 1995)	10
<i>LaRue v. DeWolff, Boberg & Associates, Inc.</i> , 128 S. Ct. 1020 (2008).....	passim
<i>Lively v. Dynegy, Inc.</i> , No. 05-0063, 2007 WL 685861 (S.D. Ill. Mar. 2, 2007)	11, 17
<i>Mace v. Van Ru Credit Corp.</i> , 109 F.3d 338 (7th Cir. 1997)	6
<i>Mass. Mut. Life Ins. Co. v. Russell</i> , 473 U.S. 134 (1985).....	3, 8
<i>Ortiz v. Fibreboard Corp.</i> , 527 U.S. 815 (1999).....	12, 14, 15
<i>Rankin v. Rots</i> , 220 F.R.D. 511 (E.D. Mich. 2004)	12
<i>Redmond v. Commerce Trust Co.</i> , 144 F.2d 140 (8th Cir. 1944)	16, 17
<i>Smith v. Aon Corp.</i> , 238 F.R.D. 609 (N.D. Ill. 2006).....	11
<i>Stanford v. Foamex L.P.</i> , No. 07-4225, 2009 WL 3075390 (E.D. Pa. Sept. 24, 2009).....	11
<i>Steinman v. Hicks</i> , 352 F.3d 1101 (7th Cir. 2003)	8
<i>Thomas v. SmithKline Beecham Corp.</i> , 201 F.R.D. 386 (E.D. Pa. 2001).....	12
<i>Tussey v. ABB, Inc.</i> , No. 06-4305, 2007 WL 4289694 (W.D. Mo. Dec. 3, 2007).....	16, 17

Federal Statutes

26 U.S.C. § 401(a) 8, 16

ERISA § 2(b), 29 U.S.C. § 1001(b)..... 3

ERISA § 403(a), 29 U.S.C. § 1103(a) 6, 8, 16

ERISA § 409(a), 29 U.S.C. § 1109(a) passim

ERISA § 409, 29 U.S.C. § 1109 9, 10

ERISA § 502(a)(2), 29 U.S.C. § 1132(a)(2) passim

Federal Rules

Fed. R. Civ. P. 23 4, 6

Fed. R. Civ. P. 23 Advisory Committee Notes (1966) 12, 15

Fed. R. Civ. P. 23(b) 6

Fed. R. Civ. P. 23(b)(1)..... passim

Fed. R. Civ. P. 23(b)(1)(A)..... 3, 11, 12, 13

Fed. R. Civ. P. 23(b)(1)(B) passim

Fed. R. Civ. P. 23(b)(2)..... 11, 19

Fed. R. Civ. P. 23(b)(3)..... 18, 19

Fed. R. Civ. P. 23(c) 6

Fed. R. Civ. P. 23(e) 6

Fed. R. Civ. P. 23(g) 6

Fed. R. Civ. P. 23(h) 6

Other Authorities

2 ALBA CONTE & HERBERT NEWBERG, NEWBERG ON CLASS ACTIONS (4th ed. 2002) 13

3B MOORE’S FEDERAL PRACTICE (2d ed. 1987) 19

7AA CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE (3d ed.
2005) 13

Derek W. Loeser & Benjamin Gould, *The Continuing Applicability of Rule
23(b)(1) to ERISA Actions for Breach of Fiduciary Duty*,
36 BPR 2024, Sept. 1, 2009 3, 11, 18

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1(b) of the Federal Rules of Appellate Procedure, *amici curiae* state the following:

The Internal Revenue Service has determined that AARP is organized and operated exclusively for the promotion of social welfare pursuant to § 501(c)(4) (1993) of the Internal Revenue Code and is exempt from income tax. AARP is also organized and operated as a non-profit corporation pursuant to Title 29 of Chapter 6 of the District of Columbia Code 1951.

Other legal entities related to AARP include AARP Foundation, AARP Services, Inc., Legal Counsel for the Elderly, AARP Financial, AARP Global Network, and Focalyst. AARP has no parent corporation, nor has it issued shares or securities.

The Internal Revenue Service has determined that Pension Rights Center (“PRC”) is organized and operated exclusively for charitable or educational purposes pursuant to § 501(c)(3) of the Internal Revenue Code and is exempt from income tax. PRC is also organized and operated as a non-profit corporation under the laws of the District of Columbia. PRC has no parent corporation, nor has it issued shares or securities.

The Internal Revenue Service has determined that the National Senior Citizens Law Center (“NSCLC”) is organized and operated exclusively for charitable or educational purposes pursuant to § 501(c) (3) of the Internal Revenue Code and is exempt from income tax. NSCLC is also organized and operated as a non-profit corporation under the laws of the State of California.

INTERESTS OF THE AMICI CURIAE

With nearly 40 million members, AARP is the largest nonpartisan, nonprofit organization representing the interests of people age 50 and older. AARP helps people over age 50 have independence, choice, and control in ways that are beneficial and affordable to them and society. Nearly half of the members are employed full- or part-time, with many working for employers

who provide health, pension, and disability benefit plans covered by the Employee Retirement Income Security Act (“ERISA”), 29 U.S.C. § 1001 *et seq.* Over 3.26 million AARP members live in those states within the Seventh Circuit’s jurisdiction.

Through education, advocacy, and service, and by promoting independence, dignity, and purpose, AARP seeks to enhance the quality of life for all. In its efforts to foster the economic security of individuals as they age, AARP seeks to increase the availability, security, equity, and adequacy of public and private pensions, health, and other employee benefits.

Pension Rights Center is a Washington, D.C. nonpartisan, nonprofit consumer organization, which has as its mission the protection and promotion of retirement security for workers, retirees, and their families. For the past 33 years, PRC has provided legal representation and other assistance and information to hundreds of thousands of participants and beneficiaries, and represented their interests before administrative agencies and Congress.

The National Senior Citizens Law Center is a non-profit organization that advocates nationwide to promote the independence and well-being of low-income older persons and people with disabilities. For more than 35 years, NSCLC has served these populations through litigation, administrative advocacy, legislative advocacy, and assistance to attorneys in legal aid programs. NSCLC and its *Herbert Semmel Federal Rights Project* work to ensure access to the federal courts to enforce safety net and civil rights statutes, and have participated as counsel in numerous lawsuits regarding economic security. Millions of older persons and people with disabilities depend on ERISA to protect their private employer-sponsored employee benefit plans from mismanagement. NSCLC is profoundly concerned about the impact that the Court’s decision may have on its clients’ rights under ERISA and corresponding access to the federal courts.

The resolution of the issues in the *Boeing* and *International Paper* cases will have a direct and vital bearing on the economic security of millions of workers. In light of the significance of the issues presented, *amici curiae* respectfully submit this brief to facilitate a full consideration by the Court of these issues.

INTRODUCTION

Recognizing the importance of promoting the interests of participants in employee benefit plans, Congress enacted ERISA in 1974. *See* 29 U.S.C. § 1001(b); *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 113 (1989). ERISA is a remedial statute intended to protect participants from losses incurred through fiduciary misuse and mismanagement of retirement plan assets. *Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 141 n.8 (1985). Accordingly, ERISA § 409(a), 29 U.S.C. § 1109(a), imposes liability on plan fiduciaries for breaches of their duties, and § 502(a)(2), 29 U.S.C. § 1132(a)(2), creates a cause of action to enforce § 409(a). Thus, because of the unique and inherently representative nature of § 502(a)(2), such a claim is necessarily brought on behalf of a plan and is unequivocally well suited to class treatment.

In the over thirty years since ERISA was enacted, ERISA breach of fiduciary duty cases based on the imprudent management of plan assets have—with rare exception—been certified as class actions under Fed. R. Civ. P. 23(b)(1)(A) and (B). This has enabled the cases to proceed in an efficient and effective manner that has protected both defendants from the risk of incompatible standards and absent class members from adjudications that would be dispositive of their interests. These risks are obvious because in the absence of certification, under § 502(a)(2) each participant can bring the same claim against the same defendant fiduciaries for the same fiduciary misconduct that caused a plan to suffer the same plan losses. *See* Derek W. Loeser & Benjamin Gould, *The Continuing Applicability of Rule 23(b)(1) to ERISA Actions for Breach of Fiduciary Duty*, 36 BPR 2024, Sept. 1, 2009.

Defendants in the consolidated *Boeing* and *International Paper* cases present similar arguments against class certification based on the premise that the Supreme Court's decision in *LaRue v. DeWolff, Boberg & Associates, Inc.*, 128 S. Ct. 1020 (2008), changes the nature of claims brought under § 502(a)(2). As a result, as defendants would have it, years of ERISA class jurisprudence should be brushed aside, and in its place a new regime imposed whereby the procedural and practical protections afforded by Rule 23 would no longer be applicable to ERISA breach of fiduciary duty cases. Instead, every single participant would be required to bring a claim based on his own individual plan loss, even where, as here, the fiduciary breaches at issue affected thousands of plan participants. However, there is nothing in *LaRue* that establishes or even remotely suggests this extreme result. This argument ignores one of the chief reasons the Federal Rules permit class actions: the amount at stake for each individual is often not enough to warrant separate litigation.

LaRue did not alter the well-recognized tenet under ERISA jurisprudence that because a § 502(a)(2) action is cohesive, homogenous, and seeks to redress losses to a plan caused by a fiduciary breach *at the plan level*, it is effectively dispositive of the interests of all plan participants and beneficiaries who are impacted by the fiduciary breach. Therefore, in the absence of class certification, there is an obvious risk of prejudice to absent class members whose claims would be decided as a practical matter, as well as to defendants who face the risk of incompatible standards from individual actions. As a result, § 502(a)(2) cases remain textbook examples of Rule 23(b)(1) class actions.

Both the *Boeing* and *International Paper* cases are typical § 502(a)(2) actions because they challenge the plan fiduciaries' process for selecting plan investment options and the excessive fees related to some of these options. Any determination made in these cases would be

dispositive of the rights of other participants who might wish to challenge the same conduct. Likewise, if two or more “individual” actions were to proceed, there would be a risk of inconsistent or varying adjudications that would impose incompatible standards on defendants. Contrary to defendants’ argument, participants’ individual investment decisions are entirely unrelated to the fiduciary breaches for which plaintiffs seek redress, and these decisions in no way detract from the propriety of Rule 23(b)(1) certification.

ARGUMENT

I. Private ERISA Breach of Fiduciary Duty Class Actions Are an Important Component of the Enforcement of ERISA’s Stringent Fiduciary Duties.

Private ERISA class actions are an important vehicle for the enforcement of ERISA’s stringent fiduciary duties and the protection of ERISA plan participants’ retirement savings. Unlike some class actions, ERISA cases—including the *Boeing* and *International Paper* cases—do not involve disparate groups with no connection to one another or whose harms are difficult to trace to any particular source. Rather, ERISA class actions are brought by easily identifiable plan participants for plan losses caused by those persons who served as plan fiduciaries during the relevant time period. The cases involve retirement dollars—an important resource that many participants depend on in the most fundamental way, for food, shelter, health expenses, and other necessities. Courts may come to different conclusions regarding whether alleged misconduct constitutes a fiduciary breach under the law or even whether ERISA provides a remedy for the breach. But whether participants should have the right to bring claims in a class action format so that they may be adjudicated in a fair, efficient, and effective manner should not be debatable.

The fact that the consolidated cases involve defined contribution plans as opposed to defined benefit plans does not make them any less suitable for class certification. Each case is brought on behalf of a plan and seeks to restore losses to a single trust. *See* 29 U.S.C. § 1103(a).

While it is true that each plan participant has a notional account within the plan, this is a distinction without a difference. “The allocation of a plan’s assets to individual accounts for bookkeeping purposes does not change the fact that all of the assets in the plan remain plan assets.” *LaRue*, 128 S. Ct. at 1029 (Thomas, J., concurring). Moreover, the ability of a participant to bring a fiduciary breach claim for losses to his plan account alone does not, as defendants suggest, rule out access to the class action device. Typically, the amount of any one participant’s plan loss would pale in comparison to the cost of a suit seeking to remedy the loss. Thus, the sort of “individual” action suggested by defendants would be an economic non-starter. *See Deposit Guar. Nat’l Bank v. Roper*, 445 U.S. 326, 338-39 (1980) (“Where it is not economically feasible to obtain relief within the traditional framework of a multiplicity of small individual suits for damages, aggrieved persons may be without any effective redress unless they may employ the class-action device.”) (footnote omitted); *Mace v. Van Ru Credit Corp.*, 109 F.3d 338, 344 (7th Cir. 1997) (“The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights.”).

Furthermore, Rule 23 provides important procedural safeguards, mandating, among other things, that the court appoint adequate class counsel, direct appropriate notice to the class, approve any settlement, allow for class member objections to a settlement, and evaluate requests for attorney fees and litigation expenses. *See Fed. R. Civ. P. 23(c), (e), (g), (h)*. As discussed in more detail below, Rule 23 further protects both defendants and plaintiffs by reducing the risk of multiple claims leading to inconsistent or duplicative relief and by safeguarding the interests of absent class members. *See Fed. R. Civ. P. 23(b)*. Removing these protections would not only make it more difficult to obtain redress for the misuse or mismanagement of participants’

retirement savings, it would expose plan participants to increased risks of abuse. Moreover, defendants would lose the ability to obtain a class-wide release and the finality that such a release provides.

Defendants cannot dispute that a large number of ERISA cases have been litigated as non-opt out class actions under Rule 23(b)(1) and have resulted in substantial plan recoveries of retirement savings lost or squandered due to alleged fiduciary misuse or mismanagement. *See, e.g., Alvidres v. Countrywide Fin. Corp.*, No. 07-5810 (C.D. Cal. Nov. 16, 2009) (Final Order and Judgment); *In re Enron Corp. Sec., Derivative & ERISA Litig.*, 228 F.R.D. 541 (S.D. Tex. 2005); *In re Global Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436 (S.D.N.Y. 2004). Elimination of the class certification option would make it more difficult for participants to enforce their rights under ERISA and obtain relief from violations of ERISA's important fiduciary protections. It would also create the potential for increased expense, decreased court control over the litigation, and numerous cases being brought over an extended period of time that would all seek redress for the same fiduciary misconduct. For these reasons—which are supported by ample legal authority discussed below—the district court decisions in *Boeing* and *International Paper* should be affirmed.

II. Plaintiffs' Claims Under ERISA § 502(a)(2) Are Representative Claims on Behalf of Plaintiffs' Respective Plans.

Under the plain language of ERISA and the Supreme Court's decision in *LaRue*, claims brought under § 502(a)(2) are brought on behalf of a plan and are, therefore, representative rather than individual in nature.

A. ERISA § 502(a)(2) Mandates That Claims Be Brought on Behalf of the Plan.

An ERISA § 502(a)(2) claim seeks relief under § 409(a), which provides, in relevant part:

Any person who is a fiduciary with respect to a *plan* who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter

shall be personally liable to make good to such *plan* any losses to the *plan* resulting from each such breach . . . and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary.

29 U.S.C. § 1109(a) (emphasis added). The section focuses on the plan rather than individual participants, because a plan's assets are held in a unitary trust comprised of individual accounts. *See* 29 U.S.C. § 1103(a); 26 U.S.C. § 401(a). Claims under §§ 502(a)(2) and 409(a) are therefore brought on behalf of a plan and are derivative in nature. *Russell*, 473 U.S. at 144; *Steinman v. Hicks*, 352 F.3d 1101, 1102 (7th Cir. 2003). Moreover, § 502(a)(2) authorizes not just plan participants and beneficiaries to file suit, but also plan fiduciaries and the Secretary of Labor with similar powers. This is further “indicative of Congress’ intent that actions for breach of fiduciary duty be brought in a representative capacity on behalf of the plan as a whole.” *Russell*, 473 U.S. at 142 n.9.

In addition, any recovery under § 502(a)(2) inures to the benefit of the plan, further demonstrating that claims under § 502(a)(2) are derivative plan claims. *See Russell*, 473 U.S. at 140; *LaRue*, 128 S. Ct. at 1028 (Thomas, J., concurring) (“The plain text of § 409(a), which uses the term ‘plan’ five times, leaves no doubt that § 502(a)(2) authorizes recovery only for the plan.”); *Steinman*, 352 F.3d at 1102. However, each individual plan account need not be affected by a fiduciary’s breach, and § 409(a) contains no requirement that losses flow to all or most of the plan accounts. *LaRue*, 128 S. Ct. at 1025.

Thus, under the plain language of ERISA, a participant is not authorized to file an individual claim for individual losses unless such claim can be properly characterized as a claim on behalf of the plan and such losses will flow to the plan. *LaRue* does not alter this basic principle of ERISA.

B. The Supreme Court’s Decision in *LaRue* Has Not Changed the Representative Nature of § 502(a)(2) Claims.

The Supreme Court’s recent decision in *LaRue* reaffirmed that § 502(a)(2) claims are representative and not individual, whether they are brought on behalf of a defined contribution or defined benefit plan. *See LaRue*, 128 S. Ct. at 1025. The Court reiterated that § 502(a)(2) authorizes certain individuals “to bring actions on behalf of a plan to recover for violations of the obligations defined in § 409(a).” *Id.* at 1024.

Recognizing that defined contribution plans have become more prevalent since the Court’s decision in *Russell*—which addressed defined benefit plans—the Court clarified that “[f]or defined contribution plans, however, fiduciary misconduct need not threaten the solvency of the entire plan. . . . Whether a fiduciary breach diminishes plan assets payable to all participants and beneficiaries, or only to persons tied to particular individual accounts, it creates the kind of harms that concerned our draftsmen of § 409.” *Id.* at 1025.

Accordingly, Justice Thomas noted in his concurrence that “[t]he majority accepts *Russell*’s fundamental holding” that “§ 409 of ERISA, 29 U.S.C. § 1109, read together with § 502(a)(2), authorizes recovery only by the plan as an entity and does not permit individuals to bring suit when they do not seek relief on behalf of the plan.” *Id.* at 1028 (internal quotations and citations omitted). The majority merely “rein[ed] in the Court’s further suggestion in *Russell* that suits under § 502(a)(2) are meant to protect the entire plan, rather than the rights of an individual beneficiary.” *Id.* Thus, *LaRue* confirms that § 502(a)(2) authorizes claims on behalf of a plan for losses suffered by the plan and clarifies that this is the case even when those losses are not felt by every individual account and even where only one account is injured.

Furthermore, any fiduciary breach in violation of § 409(a) that injures an individual account is nonetheless considered a plan injury. *Id.* at 1026 (finding “§ 502(a)(2) does not

provide a remedy for individual injuries distinct from plan injuries”); *see also id.* at 1029 (Thomas, J., concurring) (recognizing that “losses attributable to the account of an individual participant are necessarily ‘losses to the plan’ for purposes of § 409(a)”). And the Court’s admonition in *LaRue* “that the ‘entire plan’ language from *Russell*, which appears nowhere in § 409 or § 502(a)(2), does not apply to defined contribution plans” merely recognizes that defined contribution plans comprise individual accounts that are not all required to suffer a loss to give rise to a § 502(a)(2) claim. *Id.*

Indeed, this admonition was in response to the oft-repeated and rejected argument that the “entire plan” language from *Russell* required that each individual plan account suffer a loss before § 502(a)(2) authorized a claim for relief under § 409(a). *LaRue* clearly holds what lower courts have ruled for years: an injury need not affect every individual plan account to constitute a loss to the plan and give rise to a claim under § 502(a)(2) on behalf of a plan. *See, e.g., In re Schering-Plough Corp. ERISA Litig.*, 420 F.3d 231, 235 (3d Cir. 2005); *Kuper v. Iovenko*, 66 F.3d 1447, 1452-53 (6th Cir. 1995).

In a twist of irony, the defense bar now appears to be advancing the opposite of its initial argument, claiming that individual participants are now authorized to bring individual claims for individual relief under § 502(a)(2). However, this argument is not only incorrect, it is nonsensical. *LaRue* addressed an unusual case of a fiduciary breach causing losses to only one plan account that nonetheless constituted a plan injury. It did not authorize individual recovery apart from plan recovery, nor did it direct that where a fiduciary breach affects many participants—as is the case in the appeals now before this Court—it no longer is possible for a participant to bring a claim on behalf of the plan to redress the entirety of the loss suffered by the plan, and in so doing provide relief to all of the affected plan participants. To argue otherwise is

to distort the holding in *LaRue*, countermand ERISA, and read into *LaRue* class certification implications that have no basis at all in the decision.

It is thus not surprising that most courts that have considered the *LaRue*-changed-everything class certification argument have rejected it out of hand. *See Stanford v. Foamex L.P.*, No. 07-4225, 2009 WL 3075390, at *15 (E.D. Pa. Sept. 24, 2009); *Jones v. NovaStar Fin., Inc.*, 257 F.R.D. 181, 189-90 (W.D. Mo. 2009); *Kanawi v. Bechtel Corp.*, 254 F.R.D. 102, 108-09 (N.D. Cal. 2008); *Alvidres v. Countrywide Fin. Corp.*, No. 07-5810, 2008 WL 1766927, at *3 (C.D. Cal. Apr. 16, 2008). As these cases persuasively show, *LaRue* does not support defendants' effort to "turn lemons into lemonade." Loeser & Gould, *supra*, at 4.

III. Given the Nature of a § 502(a)(2) Claim, the Proposed Classes Were Properly Certified Under Rule 23(b)(1).

As countless courts have noted, "class actions are an efficient and appropriate means of dealing with cases in which plan participants and/or beneficiaries bring action against plan fiduciaries pursuant to ERISA" and are the "preferred method" for resolving them, since "plan participants or beneficiaries may only bring action to remedy a breach of fiduciary duty in a representative capacity, on behalf of the plan itself." *Smith v. Aon Corp.*, 238 F.R.D. 609, 613-14 (N.D. Ill. 2006) (certifying class under 23(b)(1) and (b)(2)). Thus, § 502(a)(2) actions are often considered "a paradigmatic example of a [Rule 23](b)(1) class." *Lively v. Dynege, Inc.*, No. 05-0063, 2007 WL 685861, at *16 (S.D. Ill. Mar. 2, 2007) (quoting *DiFelice v. U.S. Airways, Inc.*, 235 F.R.D. 70, 80 (E.D. Va. 2006)).

A. ERISA § 502(a)(2) Cases for Breach of Fiduciary Duty Satisfy Both Prongs of Rule 23(b)(1).

Rule 23(b)(1)(A) specifically focuses on the risk of "inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class." Fed. R. Civ. P. 23(b)(1)(A). Courts have found that

certification under Rule 23(b)(1)(A) is appropriate where inconsistent relief “‘could make compliance impossible for defendants.’” *In re Williams Cos. ERISA Litig.*, 231 F.R.D. 416, 425 (N.D. Okla. 2005) (quoting *Thomas v. SmithKline Beecham Corp.*, 201 F.R.D. 386, 397 (E.D. Pa. 2001)). In addition, Rule 23(b)(1)(A) certification is “particularly appropriate where a central element of plaintiffs’ claims are not an individual matter.” *Jones*, 257 F.R.D. at 194.

Looking to possible prejudice to the putative class, Rule 23(b)(1)(B) provides that class certification is appropriate where:

prosecuting separate actions by or against individual class members would create a risk of . . . adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests.

Fed. R. Civ. P. 23(b)(1)(B). The Advisory Committee’s notes indicate that “[t]his clause takes in situations where the judgment in a nonclass action by or against an individual member of the class, while not technically concluding the other members, might do so as a practical matter.”

Fed. R. Civ. P. 23 Advisory Committee Notes (1966). As a result, the Supreme Court has unequivocally found that such a case constitutes a “[c]lassic example” of the type of action appropriate for certification under Rule 23(b)(1)(B). *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 833 (1999) (emphasis added).

Class certification under either subsection of 23(b)(1) is especially appropriate in cases alleging a fiduciary’s breach of trust harming a group of beneficiaries. Fed. R. Civ. P. Rule 23(b)(1)(B), Advisory Committee Note, 1966 Amendment. Indeed, class certification under both subsections of Rule 23(b)(1) is common in ERISA breach of fiduciary duty cases because of the defendants’ unitary treatment of the individual members of the proposed class. *In re Polaroid ERISA Litig.*, 240 F.R.D. 65, 78 (S.D.N.Y. 2006); *Rankin v. Rots*, 220 F.R.D. 511, 522 (E.D. Mich. 2004); *see also* 2 ALBA CONTE & HERBERT NEWBERG, NEWBERG ON CLASS ACTIONS § 4:8

(4th ed. 2002) (“A common occurrence is that a proposed class that qualifies under subdivision (b)(1)(A) will also qualify under subdivision (b)(1)(B).”); 7AA CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 1772 (3d ed. 2005) (“[I]t is quite common for suits brought under subdivision (b)(1) to meet both the test for clause (A) and for clause (B) of that provision.”).

The *Boeing* and *International Paper* cases are no exception. In the *Boeing* case, there are over 180,000 estimated plan participants affected by defendants’ alleged breaches, and in *International Paper*, there are over 70,000. Therefore, in the absence of class certification, there is potential for a large number of individual cases based on the same underlying facts, seeking the same plan-wide relief—as expressly authorized by ERISA § 502(a)(2). This situation would create a high risk of inconsistent or varying adjudications that would establish incompatible standards of defendant conduct: the very mischief that 23(b)(1)(A) sets out to avoid. *See In re Ikon Office Solutions, Inc. Sec. Litig.*, 191 F.R.D. 457, 466 (E.D. Pa. 2000) (finding a “risk of inconsistent dispositions that would prejudice the defendants: contradictory rulings as to whether Ikon had itself acted as a fiduciary, whether the individual defendants had, in this context, acted as fiduciaries, or whether the alleged misrepresentations were material would create difficulties in implementing such decisions”). These risks are heightened by the nature of 502(a)(2) claims, which are derived from core fiduciary allegations that are not individual in nature: whether defendants were fiduciaries, whether defendants breached their fiduciary duties, and whether the plan was harmed by defendants’ breaches. *See Jones*, 257 F.R.D. at 194 (finding that “central questions concerning whether fiduciaries breached their duties to the Plan are not individual” matters). Consequently, § 502(a)(2) actions are properly and sensibly certified under Rule 23(b)(1)(A).

Certification under Rule 23(b)(1)(B) is also appropriate. Any plan participant may bring the same claim under § 502(a)(2) to recover the same losses to the plan caused by the same breaches of fiduciary duty. A participant is not limited to his plan loss alone, but, rather, by force of statute may seek the plan's loss. As a result, a claim by one participant against plan fiduciaries for misconduct that caused the plan to suffer losses would effectively be dispositive of the interests of other participants subject to the same breach. *See, e.g., In re Merck & Co., Inc. Sec., Derivative & ERISA Litig.*, No. MDL-1658, 2009 WL 331426, at *10 (D.N.J. Feb. 10, 2009) (“If the prudence claims proceeded individually, and one court removed a Plan fiduciary, this would be, as a practical matter, dispositive of the interests of other Plan members in that particular regard.”). Even if for some reason a plan participant were to pursue a claim just for his own plan loss, such a claim would require a determination of whether defendants' actions *toward the plan* were a breach of fiduciary duty. In the event that a defendant had already adjudicated this matter and prevailed, it is inconceivable to assume that the defendant would not seek to preclude retrial of the same fiduciary breach claim. While *res judicata* may not be available to defendants in this circumstance, defendants cannot genuinely contend that resolution of such an action would not “have the practical if not the technical effect of concluding the interests of other members as well, or of impairing the ability of others to protect their own interests.” *Ortiz*, 527 U.S. at 834.

B. *LaRue* Does Not Preclude Certification Under Rule 23(b)(1).

Defendants argue that *LaRue*—a decision that does not mention class certification in general or Rule 23(b)(1) in particular—bars certification under Rule 23(b)(1). However, defendants' arguments not only take illogical steps around and within the language of *LaRue*, they ignore the plain language of Rule 23(b)(1), as well as the practical prejudice that would result in the absence of class certification of ERISA breach of fiduciary duty cases.

1. A breach of fiduciary duty claim under ERISA fits squarely within the historical antecedents contemplated by Rule 23(b)(1)(B).

As a preliminary matter, defendants incorrectly argue that the Supreme Court requires class certification under Rule 23(b)(1)(B) to fit within the historical antecedents on which the rule was based. *See* Boeing Defendants-Appellants Br. at 23. This argument finds no support in the plain language of *Ortiz*. The Supreme Court only discussed whether Rule 23(b)(1)(B) applied to the “limited fund” theory and made no express requirements for claimants proceeding under the rule. *See Ortiz*, 527 U.S. at 833-34. In fact, the Court recognized that the rule “covers more historical antecedents than the limited fund.” *Id.* at 842. In any event, defendants’ arguments are beside the point, because there is no doubt that a § 502(a)(2) claim is a prototypical 23(b)(1)(B) class action.

The Advisory Committee has observed that a Rule 23(b)(1)(B) class “applies to an action which charges a breach of trust by an indenture trustee or other fiduciary similarly affecting the members of a large class of security holders or other beneficiaries, and which requires an accounting or like measures to restore the subject of the trust.” Fed. R. Civ. P. 23 Advisory Committee Notes (1966). The focus in a breach of trust class action is the “protection, preservation, and administration of a trust estate.” *Boesenberg v. Chicago Title & Trust Co.*, 128 F.2d 245, 246 (7th Cir. 1942) (cited by the Advisory Committee in its notes to Rule 23(b)(1)(B)). As such, “the subject of the controversy [is] not the recovery of plaintiff’s interest in the trust fund,” and, therefore, the beneficiaries of a trust have “a true class suit, which may be maintained by one or more of the class.” *Id.* (internal quotations and citations omitted). Claims brought under §§ 409(a) and 502(a)(2) fit squarely within this traditional breach of trust scenario because each participant is similarly affected by the breach alleged and is only permitted to seek losses *on*

behalf of the plan. See, e.g. Citizens Banking Co. v. Monticello State Bank, 143 F.2d 261, 264 (8th Cir. 1944); *Redmond v. Commerce Trust Co.*, 144 F.2d 140 (8th Cir. 1944).

The fact that the plans at issue are defined contribution plans, rather than defined benefit plans, does not change this result. Defendants' argument that participants alleging a breach of fiduciary duty in the defined contribution setting stray away from the historical antecedents of Rule 23(b)(1)(B) because of the individual characteristics of a defined contribution plan misses the point. Even though participants in a defined contribution plan have a beneficial interest in assets allocated to their individual accounts, these assets are held in a unitary trust and are legally owned by one or more trustees. *See* ERISA § 403(a), 29 U.S.C. § 1103(a); 26 U.S.C. § 401(a). Any harm caused by a breach of fiduciary duty impacts the assets available to participants and beneficiaries and, therefore, impacts the trust. This is precisely the point made in *LaRue*: that a claim on behalf of a single participant's *plan* account is nonetheless a claim on behalf of *the plan*. *LaRue*, 128 S. Ct. at 1025.

Defendants disingenuously focus on the individual investment behavior of plan participants in a defined contribution plan to support their argument that plan participants are not "similarly affected" by the alleged fiduciary breach. *See* Boeing Defendants-Appellants Br. at 29-30. Individual investment decisions have nothing to do with whether defendants breached their fiduciary duties under ERISA. While it may be and likely is the case that participants did not all lose the same amount, and some may not have suffered any loss at all, this is a damages issue that does not impede class certification. *Bechtel*, 254 F.R.D. at 109 (citing *Tussey v. ABB, Inc.*, No. 06-4305, 2007 WL 4289694, at *5 (W.D. Mo. Dec. 3, 2007)).

As many courts have found, whether and how an individual participant chooses from a different menu of investment options available in an ERISA plan "is beyond the proper scope of

certifying the class.” *Bechtel*, 254 F.R.D. at 109; *see also Lively*, 2007 WL 685861, at *27-28 (listing cases). If plaintiffs recover on behalf of the plan, “it will be up to the Plan administrator to determine how those damages to be distributed.” *Tussey*, 2007 WL 4289694, at *5. If plaintiffs can prove that defendants breached their fiduciary duties by failing to prudently and loyally manage the plans’ assets, plaintiffs will be entitled to recover the losses suffered by the plans, and this recovery will then be allocated to the plan accounts of the affected plan participants in proportion to the losses attributed to the plan accounts. Participants who suffered less will get less, and participants who did not suffer at all will get nothing. This does not mean that class certification is inappropriate; instead it merely demonstrates why a plan of allocation is a necessary component of a class action recovery.

Moreover, defendants’ position contradicts *Redmond*, a case cited by the Advisory Committee in describing a classic “breach of trust” scenario. In *Redmond*, each beneficiary paid a different amount into a certificate that was the subject of the trust indenture. *Redmond*, 144 F.2d at 142. The beneficiaries either made payment in full or by initial and periodical installment payments, and each certificate was assigned a varying interest rate depending upon the beneficiaries’ election. *Id.* at 142-143. Based on these varying amounts, the defendants argued that class certification was precluded because each beneficiary had a potentially different monetary interest in each certificate he or she was entitled to. *Id.* at 151. However, the court rejected this argument:

This petition is based upon a common and undivided obligation and liability – the preservation and proper distribution of a trust fund. . . . The possible situation that the beneficiaries may have divergent views as to their several undivided rights in the distribution of a trust fund which is alleged to be insufficient to pay all in full does not prevent this bring a class action. The preservation of the trust is the prime jurisdictional consideration here.

Id. at 151-52.

As defendants' own authorities explain, class certification is appropriate where "the subject of the controversy *was not the recovery of plaintiff's interest in the trust fund*" but instead the "protection, preservation, and administration of a trust estate." *Boesenberg*, 128 F.2d at 246 (emphasis added). This is precisely the situation presented when a breach of fiduciary duty claim under ERISA is made, and is therefore a classic example of a breach of trust action contemplated by the Advisory Committee.

For these reasons, defendants' arguments based on *LaRue* do not present any credible basis for disregarding the multitude of cases in which courts have found that a claim for losses to the plan under ERISA § 502(a)(2) presents a paradigmatic example of a Rule 23(b)(1) class. *See Loeser & Gould, supra*, at 6 (Appendix of Cases).

2. Rule 23(b)(3) does not adequately protect against the risks of inconsistent standards that could result from opt-out adjudications.

The Boeing defendants suggest that despite abundant authority certifying 502(a)(2) cases under 23(b)(1), "the only possible applicable subdivision of Rule 23 is (b)(3) 'because it allows notice and an opportunity to opt out.'" *See Boeing Defendants-Appellants Br.* at 37 (citation omitted). Defendants contend that these rights are important because of the purportedly individualized nature of each participant's damages. *Id.* But, as discussed above, the focus in a breach of fiduciary duty investment case is the fiduciaries' conduct selecting and monitoring the plan investment options, not the decisions participants make among the options. Proving liability does not require mini trials or determinations regarding individual participants' investment decisions, because all of the affected plan participants have the same basic claim based on the same legal theory seeking recovery for the same *plan* loss. Hence, defendants' argument that the right to opt-out is necessary because each participants' claim is "based on unique facts that must be individually proven," *International Paper Defendants-Appellants Br.* at 18, is false. Indeed,

allowing individuals to “opt-out” of a 502(a)(2) action would result in the very harms that Rule 23(b)(1) is designed to prevent: numerous individual actions that would create inconsistent standards of defendant conduct and result in adjudication of absent class members’ rights.

Furthermore, while defendants suggest that claims of this type can only be evaluated under Rule 23(b)(3), they argue that participants’ individual investment decisions make even this type of certification impossible. Since such decisions are the sine qua non of 401(k) plans, under defendants’ analysis no 401(k) case could be certified under any provision of Rule 23. Such a result of “rendering fiduciaries effectively immune from class-action litigation regarding breaches of their fiduciary duties under ERISA [does not] square[] with the rule that the fiduciary duties imposed by the statute, which originate of course in the law of trusts and in fact are ‘more stringent’ than those common-law duties, are ‘the highest known to law.’” *Lively*, 2007 WL 685861, at *13 (quoting *Boeckman v. A.G. Edwards, Inc.*, 461 F. Supp. 2d 801, 815 (S.D. Ill. 2006)).

While the claims before the Court satisfy the requirements of Rule 23(b)(3)—including the predominance requirement—for the reasons discussed above, they are quintessential Rule 23(b)(1) class actions, and should be certified accordingly. *See In re A.H. Robins Co., Inc.*, 880 F.2d 709, 728 (4th Cir. 1989) (“If an action can be maintained under (b)(1) and/or (b)(2), and also under (b)(3), the court should order that the suit be maintained as a class action under (b)(1) and/or (b)(2), rather than under (b)(3), so that the judgment will have *res judicata* effect as to all the class (since no member has the right to opt out in a (b)(1) or (b)(2) suit), thereby furthering policy underlying (b)(1) and (b)(2) class suits.”) (quoting 3B MOORE’S FEDERAL PRACTICE, ¶ 23.31[3], pp. 236-237 (2d ed. 1987)).

CONCLUSION

For the reasons stated above, *amici curiae* request that this Court affirm the decisions of the district courts.

DATED this 14th day of December, 2009.

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CERTIFICATE OF WORD-COUNT COMPLIANCE

The undersigned attorney hereby certifies, pursuant to Fed. R. App. P. 32(a)(7)(c), that the foregoing Brief of AARP, Pension Rights Center, and National Senior Citizens Law Center as Amici Curiae contains 6,207 words, excluding those sections excluded by Fed. R. App. P. 32(a)(7)(B)(iii).



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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document has been sent this 14th day of December, 2009 by hand delivery to Clerk, United States Court of Appeals for the Seventh Circuit, Room 2722, 219 S. Dearborn Street, Chicago, IL 60604, and to the following via Federal Express, next day delivery, and via email:

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