UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. 09-10527-RGS

CARINA BERTELLA AND DONALD M. WEEKS,
INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED

v.

JETDIRECT AVIATION, INC.,
JETDIRECT AVIATION, LLC,
JETDIRECT AVIATION HOLDINGS, LLC,
GREGORY S. CAMPBELL,
ROBERT P. PINKAS,
and JOHN DOE BOARD MEMBERS

v.

WAYFARER AVIATION, INC., ET AL.

MEMORANDUM AND ORDER ON JOINT MOTION FOR CONDITIONAL CLASS CERTIFICATION FOR SETTLEMENT PURPOSES ONLY

October 19, 2010

STEARNS, D.J.

Plaintiffs Carina Bertella and Donald M. Weeks are former employees of JetDirect Aviation, a defunct aircraft management company. On September 21, 2010, plaintiffs filed a Rule 23 motion to conditionally certify a class of JetDirect employees for settlement purposes. They also moved to appoint the firm of Michaels, Ward & Rabinovitz, LLP (MW&R), as class counsel. Defendants collectively have joined the motion.

BACKGROUND

On April 7, 2009, the instant plaintiffs[1] filed a class action complaint on behalf of

[1]On May 6, 2010, plaintiffs filed their Second Amended Complaint to add Donald M. Weeks as a named plaintiff and proposed class representative, while dropping Collins Zachary, Sean Anthony, and John Doe as plaintiffs.

themselves and all other persons similarly situated against JetDirect, JetDirect Aviation, LLC, JetDirect Aviation Holdings, LLC, JetDirect Funding Corp., Gregory S. Campbell, and the John Doe Board Members. Plaintiffs' lawsuit was brought under the Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1001, et seq. Defendants responded by filing a third-party complaint against Aviation and Wayfarer Aviation, Inc. (Wayfarer) (f/k/a JDA Acquisition Company), the successor company to JetDirect.[2]

Plaintiffs seek to certify all persons who participated in any of the employee benefit plans offered by JetDirect, including JetDirect's 401k, health insurance, life insurance, disability insurance, and flexible spending plans, and who suffered losses at defendants' hands. The proposed class consists of some 800 employees, approximately 50 of whom reside in Massachusetts.

Plaintiffs allege that "[d]efendants falsely represented that the money withheld from employee paychecks would be used solely to fund the employee benefit plans for which that money was designated." Sec. Am. Compl. at ¶ 28. Weeks, a proposed class representative, participated in JetDirect's 401k, life insurance, and medical plans. Bertella, the other proposed class representative, participated in JetDirect's 401k, dental, and medical plans. Plaintiffs assert that each of the defendants is "either a named fiduciary of the Plans, a de facto fiduciary and/or a party in interest" who "violated ERISA by breaching their fiduciary duties to the Class and engaging in prohibited transactions." Id. at ¶¶ 4, 31.

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[2]Sovereign Bank, which was also named as a third-party defendant, was dismissed by the court in a Memorandum and Order filed July 26, 2010. Although defendants in this action have appealed the dismissal, the issue raised in the appeal is ancillary to the pending matter and does not therefore oust the jurisdiction of this court.

DISCUSSION

To facilitate ongoing settlement negotiations, the parties jointly move for a preliminary certification of the proposed class under Fed. R. Civ. P. 23.[3] To satisfy Rule 23, Bertella and Weeks must establish the four elements of Rule 23's subpart (a) and one of the three elements of subpart (b). Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 613-614 (1997). Plaintiffs argue that they satisfy all four elements of Rule 23(a) and at least one of the elements of Rule 23(b), namely (b)(1)(B).

Rule 23(a)

The Rule 23(a) elements are (1) numerosity, (2) commonality, (3) typicality, and (4) adequacy of representation. Id. at 613. Although at least one core issue of fact or law must shape the class, Rule 23(a) does not require that every class member share every factual and legal predicate of the action. See In re Lupron® Mktg. and Sales Practice Litig., 228 F.R.D. 75, 88 (D. Mass. 2005), citing In re Gen. Motors Trucks, 55 F.3d 768, 817 (3d Cir. 1995).

[3]The posture of this case is unusual in that the parties seek class certification to facilitate settlement rather than to effectuate a settlement agreement previously reached. The practice of conditionally certifying a class for settlement purposes is not without controversy. As the Federal Judicial Center's *Manual for Complex Litigation, Fourth* (2004) notes, the certification of a settlement class can provide significant benefits to class members while enabling defendants to achieve an expedited and final resolution of multiple suits. On the other hand, the provisional nature of the settlement certification process can "sometimes make meaningful judicial review more difficult and more important." Id. at § 21.612. The parties explain that their purpose in seeking a conditional certification is to expedite recovery for the vast majority of the class, an effort that has been impeded by multiple filings of lawsuits by an attorney who is attempting to displace MW&R as class counsel. See Goscinak v. Wayfarer Aviation, Inc., No. 1:10-CV-10081. The court notes that any adversarial interest – should there be one – on the part of dissident class members – should there be any – can be voiced at a fairness hearing that will be held should the parties succeed in achieving a proposed settlement.

Rule 23(a)(1): Numerosity

To satisfy the numerosity requirement, the class must be sufficiently large that joinder is impracticable. Fed. R. Civ. P. 23(a)(1). Plaintiffs estimate that the proposed class will exceed 800 members. As a practical matter, the numerosity requirement is met as the joinder of each member of the class is not feasible.

Rule 23(a)(2): Commonality

To satisfy the commonality requirement, there must exist common questions of law or fact impacting the members of the proposed class. Fed. R. Civ. P. 23(a)(2). "The threshold of 'commonality' is not high. Aimed in part at 'determining whether there is a need for combined treatment and a benefit to be derived therefrom,' the rule requires only that resolution of the common questions affect all or a substantial number of the class members." Jenkins v. Raymark Indus., Inc., 782 F.2d 468, 472 (5th Cir. 1986) (citations omitted). For that reason, the commonality requirement has been characterized as a "low hurdle." S. States Police Benevolent Ass'n, Inc. v. First Choice Armor & Equip., Inc., 241 F.R.D. 85, 87 (D. Mass. 2007).

The parties submit that the members of the proposed class share the following common questions of fact and law: (1) whether defendants are fiduciaries under ERISA; (2) whether defendants violated their fiduciary duties by not remitting employee contributions to the benefit plans during the relevant class period; (3) whether defendants engaged in prohibited transactions; and (4) whether the class suffered damages because of wrongful conduct on defendants' part. The resolution of these questions of fact and law will affect all members of the proposed class; therefore, plaintiffs satisfy the commonality

requirement.

Rule 23(a)(3): Typicality

"The representative plaintiff satisfies the typicality requirement when [his or her] injuries arise from the same events or course of conduct as do the injuries of the class and when plaintiff's claims and those of the class are based on the same legal theory." In re Credit Suisse-AOL Sec. Litig., 253 F.R.D. 17, 23 (D. Mass. 2008). The purpose of the typicality requirement is to "align the interests of the class and the class representatives so that the latter will work to benefit the entire class through the pursuit of their own goals." In re Prudential Ins. Co. of Am. Sales Practice Litig., 148 F.3d 283, 311 (3d Cir. 1998). The representative plaintiffs' claims need not be absolutely identical to those of absent class members. In re Credit Suisse, 253 F.R.D. at 23. "The test for typicality, like commonality, is not demanding." Forbach v. J.C. Penney Co., Inc., 994 F.2d 1101, 1106 (5th Cir. 1993).

Weeks and Bertella argue that their claims are typical because "their damages stem from the same underlying course of conduct that give[s] rise to the claims of the Class, and because Plaintiffs' claims and those of the Class are based on the same legal theories." Pls.' Rep. at 3. They contend that defendants' course of conduct was unvarying with regard to all of the benefit plans at issue because "[f]or months, money that was withheld by JetDirect from its employees' bi-weekly paychecks, supposedly to be used as contributions towards the Plans, was not used for that purpose. In other words, the money was withheld from the employees' pay, but not used for the purpose [for] which it was being withheld." Sec. Am. Compl. at Intro.

The typicality requirement is based on the concern that a plaintiff in a case like this one might have an incentive to favor prosecution strategies that favor the specific plans in which he or she participated rather than the plans as a collective whole. Generally speaking, a person may represent a class of plaintiffs, even those whose interests are not perfectly aligned with his, so long as "the gravamen of the plaintiff's challenge is to the general practices [of the defendant] which affect all of the plans." Alves v. Harvard Pilgrim Health Care Inc., 204 F. Supp. 2d 198, 205 (D. Mass. 2002), quoting Fallick v. Nationwide Mut. Ins. Co., 162 F.3d 410, 422 (6th Cir. 1998). See also Forbach, 994 F.2d at 1106 (same). The essence of Bertella's and Weeks's claims is that defendants withheld employee contributions to the employee benefit plans during the relevant class period. Defendants' conduct, plaintiffs contend, was not plan specific; rather, it impacted all of the ERISA plans named in the Second Amended Complaint. Although the amount of damages will differ among class members based on the duration of their employment and the extent of their plan participation, the differences in dollar amounts do not affect the class members' substantive legal rights. Moreover, resolution of the breach of fiduciary duties claim with respect to any of the plans in which either Bertella or Weeks participated would likely be dispositive with respect to all other plans.

Rule 23(a)(4): Adequacy

Finally, the representative plaintiffs must be able to fairly and adequately protect the interests of the class. See Fed. R. Civ. P. 23(a)(4). Although some Courts of Appeals have set a high standard for adequacy by requiring that class representatives be active, well-informed, and able to direct the litigation, the First Circuit has not adopted so strict a

standard. "The controlling test still requires only that '[t]he moving party must show first that the interests of the representative party will not conflict with the interests of any of the class members, and second, that counsel chosen by the representative party is qualified, experienced and able to vigorously conduct the proposed litigation.'" In re Organogenesis Sec. Litig., 241 F.R.D. 397, 406 (D. Mass. 2007), quoting Andrews v. Bechtel Power Co., 780 F.2d 124, 130 (1st Cir. 1985). Compare Feder v. Elec. Data Sys. Corp., 429 F.3d 125, 129-130 (5th Cir. 2005).

With respect to plaintiffs' knowledge of the case, all that is required is a general knowledge and a willingness to participate in discovery. See In re Carbon Black Antitrust Litig., 2005 WL 102966 at *14 (D. Mass. Jan. 18, 2005) (citations omitted). With respect to plaintiffs' basic understanding of the litigation, the court is satisfied by the disclosures in the record. In his deposition, Weeks testified that "during the second pay period of January '09 through the beginning of April '09, 401k money that was electronically being taken from my earnings should have been going to my 401k account, and it was not." Weeks Tr. at 32-33. Weeks also testified that his "understanding is that approximately 800 people were being affected during a four month period of time with company-sponsored benefit," Id. at 36, and that the defendants "had that money essentially diverted for different reasons, whether it be 401k, flexible spending, healthcare coverage for dependents. And that money was not - it was being taken out of the employees' pay, and it was not being funded to the appropriate account." Id. at 41. Similarly, Bertella testified in her deposition that the litigation was against "JetDirect Aviation, Pinkas and Campbell and, if – if I recall correctly, the other board members." Bertella Tr. at 37. She further

testified that the litigation was about "[f]ailure to pay, failure to provide what they had promised" to the employees' "health, medical, [and] 401(k) benefits." Id.

Rule 23(b)

In addition to satisfying the four requirements of Rule 23(a), plaintiffs must establish that their claims fit within one of the three types of class actions described in Rule 23(b). The parties submit that the proposed class members satisfy the requirements of (b)(1)(B).

Rule 23(b)(1)(B)

Rule 23(b)(1)(B) provides for class certification if "adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests." At present, JetDirect and JetDirect, LLC, are in bankruptcy, while Wayfarer Aviation, Inc., ceased business operations as of June of 2010. Recovery through individual adjudications that come first in time would likely deplete the already limited funds available for those adjudications that come later in time because of defendants' precarious financial state. Plaintiffs therefore meet the certification requirement under Rule 23(b)(1)(B).[4]

[4]There is a question whether the Supreme Court's decision in LaRue v. DeWolff, Boberg & Assoc., Inc., 552 U.S. 248 (2008), bars class certification of fiduciary breach claims by participants in defined contribution plans because participants as a result of LaRue's holding may now pursue individual ERISA actions against plan fiduciaries. Although some courts have so held, see, e.g., In re First Am. Corp. ERISA Litig., 622 (C.D. Cal. 2009), other courts, including this one, have not been persuaded that so radical a revision of Rule 23 was intended by the Supreme Court. See Hochstadt v. Boston Scientific Corp., 2010 WL 1704003 at *12 n.12 (D. Mass. Apr. 27, 2010); see also Stanford v. Foamex L.P., 263 F.R.D. 156, 174 (E.D. Pa. 2009) ("The availability of an individual account claim under § 502(a)(2) [of ERISA] does not alleviate the concerns cited by numerous courts that have certified ERISA class actions pursuant to Rule 23(b)(1)(B) in

Class Counsel

With respect to class counsel, the parties request the appointment of MW&R. Under Rule 23(g), the court must consider the work counsel has done in identifying or investigating potential claims, counsel's experience in handling class actions or claims of the type asserted in the action, counsel's knowledge of the applicable law, and the resources that counsel is able to commit to the litigation of the case.

In this case, MW&R has performed substantial work by interviewing plaintiffs, reviewing and analyzing documents relating to plaintiffs' claims, and filing the underlying Complaint. The two lead MW&R attorneys, Peter Michaels and Deborah Evans, have thirty-five years of collective experience in handling class action lawsuits and ERISA matters. Finally, MW&R has demonstrated its willingness to commit substantial effort and resources to representing the proposed class by filing and arguing for injunctive relief, opposing defendants' earlier motion to dismiss, and by conducting discovery. Thus, the court finds that MW&R satisfies the relevant considerations under Rule 23(g).

ORDER

For the foregoing reasons, the joint motion for conditional class certification for settlement purposes under Rule 23 is ALLOWED. The joint motion to appoint MW&R as class counsel is also ALLOWED. The parties will have forty-five days to submit a proposed settlement agreement on behalf of the provisional class. The parties will provide copies of the agreement to each member of the proposed class and so certify to the court.

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situations where claims on behalf of the Plan are identical to those on behalf of an individual account.").

The court will then schedule a fairness hearing with appropriate notice.

SO ORDERED.

/s/ Richard G. Stearns

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UNITED STATES DISTRICT JUDGE