

No. ____

**IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT**

ANTHONY ABBOTT, ERIC FANKHAUSER,)	
JACK JORDAN, and DENNIS)	
TOMBAUGH, individually and on behalf)	Petition for Rule 23(f) Appeal
of classes of persons similarly situated,)	from the United States
)	District Court for the
)	Southern District of Illinois
Plaintiffs-Respondents,)	
)	No. 06-cv-00701-MJR
v.)	
)	Hon. Michael J. Reagan
LOCKHEED MARTIN CORPORATION and)	
LOCKHEED MARTIN INVESTMENT)	
MANAGEMENT COMPANY,)	
)	
Defendants-Petitioners.)	
)	

**DEFENDANTS-PETITIONERS' PETITION FOR LEAVE TO APPEAL
PURSUANT TO RULE 23(f)**

James G. Martin
Patrick J. Kenny
ARMSTRONG TEASDALE LLP
One Metropolitan Square
Suite 2600
St. Louis, Missouri 63102
(314) 621-5070

Jeffrey W. Sarles
MAYER BROWN LLP
71 South Wacker Drive
Chicago, Illinois 60606
(312) 782-0600

Robert P. Davis
Peter White
Brian D. Netter
MAYER BROWN LLP
1909 K Street, NW
Washington, DC 20006
(202) 263-3000

Attorneys for Defendants-Petitioners

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES.....	ii
STATEMENT OF JURISDICTION	1
QUESTIONS PRESENTED	1
INTRODUCTION.....	2
STATEMENT OF FACTS	3
ARGUMENT	6
I. The Petition Should Be Granted To Address Whether Plan Participants Who Lack Any Stake In The Outcome May Represent A Class Of All Participants	8
II. The Petition Also Should Be Granted To Establish Whether, In An ERISA Action, Individualized Issues Of Reliance On Alleged Misrepresentations Defeat Commonality	12
CONCLUSION	16

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Allen v. Int’l Truck & Engine Corp.</i> , 358 F.3d 469 (7th Cir. 2004)	7
<i>In re Allstate Ins. Co.</i> , 400 F.3d 505 (7th Cir. 2005)	7
<i>Amchem Prods., Inc. v. Windsor</i> , 521 U.S. 591, 625 (1997)	9
<i>Arreola v. Godinez</i> , 546 F.3d 788 (7th Cir. 2008)	9
<i>Bendaoud v. Hodgson</i> , 578 F. Supp. 2d 257 (D. Mass. 2008)	11, 12
<i>Bertulli v. Independent Ass’n of Cont’l Pilots</i> , 242 F.3d 290 (5th Cir. 2001)	9
<i>Blair v. Equifax Check Servs., Inc.</i> , 181 F.3d 832 (7th Cir. 1999)	7, 8
<i>Bolig v. Christian Cmty. Homes & Servs., Inc.</i> , 2003 WL 23200362 (W.D. Wis. July 10, 2003)	11
<i>Carnegie v. Household Int’l, Inc.</i> , 376 F.3d 656 (7th Cir. 2004)	7
<i>Cent. States SE. & SW. Areas Health & Welfare Fund v. Merck-Medco Managed Care, LLC</i> , 433 F.3d 181 (2d Cir. 2005)	12
<i>Clark v. Experian Info. Solutions, Inc.</i> , 256 F. App’x 818 (7th Cir. 2007)	14
<i>Dechert v. Cadle Co.</i> , 333 F.3d 801 (7th Cir. 2003)	7
<i>DH2, Inc. v. SEC</i> , 422 F.3d 591 (7th Cir. 2005)	9
<i>Frahm v. Equitable Life Assurance Soc’y</i> , 137 F.3d 955 (7th Cir. 1998)	14
<i>Gen. Tel. Co. v. Falcon</i> , 457 U.S. 147 (1982)	9
<i>Gesell v. Commonwealth Edison Co.</i> , 216 F.R.D. 616 (C.D. Ill. 2003)	15
<i>Glanton v. AdvancePCS Inc.</i> , 465 F.3d 1123 (9th Cir. 2006)	12
<i>Hall v. LHACO, Inc.</i> , 140 F.3d 1190 (8th Cir. 1998)	10
<i>Harzewski v. Guidant Corp.</i> , 489 F.3d 799 (7th Cir. 2007)	12
<i>Hecker v. Deere & Co.</i> , 556 F.3d 575 (7th Cir. 2009)	2, 14, 15
<i>Horvath v. Keystone Health Plan E., Inc.</i> , 333 F.3d 450 (3d Cir. 2003)	12

<i>In re Household Int’l Tax Reduction Plan</i> , 441 F.3d 500 (7th Cir. 2006).....	7
<i>In re Lorazepam & Clorazepate Antitrust Litig.</i> , 289 F.3d 98 (D.C. Cir. 2002)	9
<i>In re Sears Retiree Group Life Ins. Litig.</i> , 1999 WL 35312 (N.D. Ill. Jan. 11, 1999)	16
<i>Kamler v. H/N Telecomm. Servs., Inc.</i> , 305 F.3d 672 (7th Cir. 2002).....	8, 14
<i>Langbecker v. Elec. Data Sys. Corp.</i> , 476 F.3d 299 (5th Cir. 2007)	15
<i>LaRue v. DeWolff, Boberg & Assocs.</i> , 128 S. Ct. 1020 (2008)	11
<i>Lively v. Dynegy, Inc.</i> , 2007 WL 685861 (S.D. Ill. Mar. 2, 2007)	14
<i>Loren v. Blue Cross & Blue Shield</i> , 505 F.3d 598 (6th Cir. 2007)	11
<i>Makor Issues & Rights, Ltd. v. Tellabs, Inc.</i> , 2009 WL 448895 (N.D. Ill. Feb. 23, 2009)	10
<i>Mejdrech v. Met-Coil Sys. Corp.</i> , 319 F.3d 910 (7th Cir. 2003)	7
<i>Nelson v. IPALCO Enters., Inc.</i> , 2003 WL 23101792 (S.D. Ind. Sept. 30, 2003)	15
<i>Piazza v. EBSCO Indus., Inc.</i> , 273 F.3d 1341 (11th Cir. 2001).....	9
<i>Rahman v. Chertoff</i> , 530 F.3d 622 (7th Cir. 2008).....	9
<i>Rector v. City & County of Denver</i> , 348 F.3d 935 (10th Cir. 2003).....	9
<i>Summers v. Earth Island Inst.</i> , 129 S. Ct. 1142 (2009)	8
<i>West v. Prudential Sec., Inc.</i> , 282 F.3d 935 (7th Cir. 2002)	14

Rules and Statues

Fed. R. App. P. 5(a)	1
Fed. R. Civ. P. 23(f)	1
28 U.S.C. § 1292(b)	6
28 U.S.C. § 1331	1
29 U.S.C. § 1002	1
29 U.S.C. § 1104(c)	14

29 U.S.C. § 1132(a)(2)	10
29 C.F.R. § 2550.404c-1(b)(2)(i)(B).....	15

Defendants-Petitioners Lockheed Martin Corporation and Lockheed Martin Investment Management Company (collectively, “Lockheed”) respectfully petition, pursuant to Rule 23(f) of the Federal Rules of Civil Procedure, for leave to appeal from the district court’s order of April 3, 2009 certifying a class. A copy of the district court’s order (“Slip Op.”) is appended hereto.

STATEMENT OF JURISDICTION

Subject to petitioners’ challenge to plaintiffs’ constitutional standing, the district court had subject-matter jurisdiction pursuant to 28 U.S.C. § 1331 and 29 U.S.C. § 1132(e)(1) because plaintiffs’ claims arise under the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1002 *et seq.* (“ERISA”). The district court entered its class certification order on April 3, 2009. This petition is being timely filed within ten days thereafter. This Court has jurisdiction over this petition pursuant to Fed. R. Civ. P. 23(f) and Fed. R. App. P. 5(a).

QUESTIONS PRESENTED

1. Whether participants in a defined-contribution ERISA plan who claim that one of the funds offered to participants was imprudently managed may serve as class representatives where they had not invested in that fund.

2. Whether ERISA breach of fiduciary duty claims that rest on allegedly faulty disclosures satisfy the commonality requirement of Rule 23 where plan participants must prove reliance on those disclosures to prevail on such claims.

INTRODUCTION

This case raises a novel and important issue of ERISA class action law—whether participants in defined contribution plans may represent a class of participants on claims of imprudent management of a fund where they have not invested in that fund. Lockheed contends that such participants lack constitutional standing to bring such a claim because they neither have been harmed by the alleged breach of fiduciary duty nor can benefit from a favorable decision. Although plaintiffs say they are acting on behalf of the plans, if they were to prevail their own accounts would not receive any reimbursement from defendants. In these circumstances, plaintiffs suffered no redressable injury and fail the adequacy and typicality requirements of Rule 23.

This case raises a second issue as well—whether plaintiffs satisfy the Rule 23(a) commonality requirement where the claimed breaches of fiduciary duty rest on alleged misrepresentations that cannot have injured plan participants who did not rely on them. Whether a participant reasonably relied on the alleged disclosures can be determined only through individualized inquiries.

Resolution of these issues on a 23(f) petition is warranted. As this Court has noted, “litigation over alleged mismanagement of defined contribution pension plans” is “becoming common.” *Hecker v. Deere & Co.*, 556 F.3d 575, 577 (7th Cir. 2009). Indeed, this case is one of nine putative class actions now

pending in this Circuit—all filed by the same plaintiffs’ counsel.¹ Because the complaints in these cases are virtually identical, resolving the novel, important, and recurring class action issues presented here will both prevent a substantial waste of resources in the district court proceedings in these cases and establish the parameters for resolving class certification disputes in future ERISA cases.

STATEMENT OF FACTS

Background. This case concerns two 401(k) retirement plans offered by Lockheed: the Salaried Savings Plan and the Hourly Employee Savings Plan Plus (collectively, “the Plans”). The Plans are defined contribution retirement vehicles into which Plan participants make fixed contributions (which may be entitled to “matching” contributions from Lockheed) and choose in which of numerous investment options to invest their account balances. “The Plans offer an array of investment options, including core funds, asset allocation funds and a self-managed account.” R.226 at 2 (Order and Memorandum on Summary Judgment).

Plan participants learn about the investment offerings through periodic Summary Plan Descriptions (“SPDs”), as well as formal and informal updates to the SPDs, annual reports filed with the Department of Labor, and personal

¹ In addition to this case and *Hecker* (on which rehearing is pending), these cases are *Beesley v. Int’l Paper Co.*, No. 3:06-cv-00703 (S.D. Ill. filed Sept. 11, 2006); *Spano v. Boeing Co.*, No. 3:06-cv-00743 (S.D. Ill. filed Sept. 27, 2006); *Will v. Gen. Dynamics Corp.*, No. 3:06-cv-00698 (S.D. Ill. filed Sept. 11, 2006); *George v. Kraft Foods Global, Inc.*, No. 1:07-cv-01713 (N.D. Ill. filed Oct. 16, 2006); *Loomis v. Exelon Corp.*, No. 1:06-cv-04900 (N.D. Ill. filed Sept. 11, 2006); *Martin v. Caterpillar, Inc.*, No. 1:07-cv-01009 (C.D. Ill. filed Sept. 11, 2006); and *Nolte v. CIGNA Corp.*, No. 2:07-cv-02046 (C.D. Ill. filed Feb. 26, 2007).

statements delivered quarterly. R.226 at 3. Additional information is available to participants on the Plan website, which includes detailed data on each investment offering provided by the fund-rating agency Morningstar. *Id.*

District Court Proceedings. Plaintiffs filed suit in September 2006 and amended their complaint in November 2008. The remaining five named plaintiffs allege that Lockheed breached fiduciary duties owed to the Plans under ERISA. The district court granted Lockheed partial summary judgment on March 31, 2009, leaving three fiduciary duty claims to be resolved at trial: (1) whether the “overall fees paid by the Plans” were unreasonably high; (2) whether “the Stable Value Fund was properly disclosed to Plan participants and was a prudent investment option for them”; and (3) whether “the Company Stock Funds were a prudent investment option for Plan participants.” R.226 at 24.

On plaintiffs’ motion for class certification, the district court certified two classes under Rule 23(b)(1)—one for the Salaried Plan and one for the Hourly Plan—on “the issues of overall fees and the Stable Value Fund.” Slip Op. 18. The court denied class certification with respect to the Company Stock Fund claims. *Id.*

With respect to the Stable Value Fund (“SVF”), the district court rejected Lockheed’s contention that the named plaintiffs lack standing and are inadequate class representatives because there is no evidence that they invested in the SVF. The court found it sufficient that plaintiffs testified that they had “invested in the Plans.” Slip Op. 15. In other words, the court took the

view that a participant who did *not* invest in the SVF but invested only in other funds or stocks may represent a class of participants who *did* invest in the SVF and were allegedly harmed thereby. The court reasoned that the non-investor in the SVF would be acting “on behalf of the Plans.” *Id.*

With respect to commonality, the court rejected Lockheed’s contention that issues regarding reliance on allegedly misleading disclosures are inherently individual. According to the court, “[i]t is the conduct of Defendants rather than Plaintiffs that is the focus of ERISA breach of fiduciary duty litigation.” Slip Op. 11.

The Named Plaintiffs’ Investments. There is no evidence that the named plaintiffs invested in the SVF during the relevant period. Their initial complaint (R.2) did not raise any allegations regarding the SVF. Thereafter, plaintiffs’ expert witness opined that the SVF sustained damages from 1997-2005 (it began outperforming plaintiffs’ benchmark in 2006). R.148-3 at 34, 65. Plaintiffs then amended their complaint to allege breaches of fiduciary duty with respect to the SVF. R.137. However, the First Amended Complaint does not allege that any named plaintiff invested in the SVF. See R.137. Lockheed submitted interrogatories requesting that each named plaintiff identify “every Investment in which [he] invested through th[e] plan,” as well as document requests for “Documents related to Investments offered under the [Plans]” and documents that plaintiffs intended “to rely upon for purposes of class certification.” In their responses, plaintiffs did not identify any investments in the SVF during the period 1997-2005. Plaintiffs produced incomplete account

statements, none of which indicates that any named plaintiff invested in the SVF.

On that basis, Lockheed argued in its motion for summary judgment and opposition to class certification that plaintiffs lack standing. R.146 at 23-24; R.179 at 14 & n.14. In response, plaintiffs produced no evidence that any named plaintiff invested in the SVF, instead simply arguing that no such investment is necessary for them to have standing and the ability to represent the proposed class. R.164 at 21-23.²

ARGUMENT

Rule 23(f) authorizes appeals from class certification decisions prior to entry of final judgment. As explained in the Committee Note, the Rule 23(f) standards are less “limiting” than the general interlocutory appeal standards in 28 U.S.C. § 1292(b), and the “most likely” ground for granting a Rule 23(f) petition is “when the certification decision turns on a novel or unsettled question of law.”

This Court has devised several criteria to determine whether to grant a Rule 23(f) petition, one of which is “whether deciding the appeal would advance the development of the law governing class actions.” *In re Household Int’l Tax Reduction Plan*, 441 F.3d 500, 501 (7th Cir. 2006) (citing *Blair v. Equifax Check Servs., Inc.*, 181 F.3d 832, 834-835 (7th Cir. 1999)). Granting this petition

² Two months later, plaintiffs moved to supplement their summary judgment opposition with a document showing that a named plaintiff had invested in the SVF in August 2006 (R.220), *after* the SVF had begun *outperforming* plaintiffs’ benchmark (see R.148-3 at 65). The district court denied that motion as untimely. R.224.

would enable the Court to resolve important questions of class action law that are likely to recur in the 401(k)-plan fee cases now pending in this Circuit. See *In re Allstate Ins. Co.*, 400 F.3d 505, 506 (7th Cir. 2005) (granting 23(f) petition “because it presents a novel and important issue” under Rule 23(b)(2)).³

This case squarely presents a fundamental question of class action law that this Court has not addressed: whether participants in a defined contribution plan may serve as class representatives on breach of fiduciary duty claims where they were not themselves injured by the alleged breach and would not themselves receive any of the monetary relief requested on behalf of the plan. This case also squarely presents another fundamental issue of class action law that this Court has addressed in other contexts but not in the ERISA context—whether individual issues of reliance on alleged misrepresentations preclude commonality and thus class certification. In short, this case raises fundamental questions of standing, adequacy, typicality, and commonality that should be resolved before trial and that, therefore, meet the Court’s standards for Rule 23(f) resolution. As the Court has explained, “the more fundamental the question and the greater the likelihood that it will escape effective disposition at the end of the case, the more appropriate is an appeal under Rule 23(f).” *Blair*, 181 F.3d at 835.

³ See also *Carnegie v. Household Int’l, Inc.*, 376 F.3d 656, 658 (7th Cir. 2004) (granting 23(f) petition to address “novel issues whose prompt resolution is important to the development of the law of class actions as well as to the resolution of the present case”); accord *Allen v. Int’l Truck & Engine Corp.*, 358 F.3d 469, 470 (7th Cir. 2004); *Dechert v. Cadle Co.*, 333 F.3d 801, 801-802 (7th Cir. 2003); *Mejdrech v. Met-Coil Sys. Corp.*, 319 F.3d 910, 910-911 (7th Cir. 2003).

I. The Petition Should Be Granted To Address Whether Plan Participants Who Lack Any Stake In The Outcome May Represent A Class Of All Participants.

An ERISA plan participant bringing a breach of fiduciary duty claim must show “that the breach of fiduciary duty caused some harm to him or her that can be remedied.” *Kamler v. H/N Telecomm. Servs., Inc.*, 305 F.3d 672, 681 (7th Cir. 2002). Here, the named plaintiffs seek more than \$300 million in damages on their breach of fiduciary duty claims related to the Stable Value Fund. However, even if that claim had merit and the plaintiff class were entitled to \$300 million in relief, the *named* plaintiffs would be entitled to nothing.

Despite being put to the burden of production by Lockheed’s motion for summary judgment, and despite being similarly challenged by Lockheed’s opposition to class certification, plaintiffs produced no evidence that any of them had invested in the SVF during the relevant period. Thus, if the class were to be awarded the requested monetary relief on the breach of fiduciary duty claims related to the SVF, none of that amount would be allocated to the named plaintiffs’ accounts because those accounts were not affected by the alleged breaches.

The named plaintiffs’ lack of concrete injury and opportunity for redress means that they lack constitutional standing. See *Summers v. Earth Island Inst.*, 129 S. Ct. 1142, 1149 (2009); *DH2, Inc. v. SEC*, 422 F.3d 591, 596 (7th Cir. 2005). “[C]onstitutional standing [is] a prerequisite to Rule 23 class certification.” *In re Lorazepam & Clorazepate Antitrust Litig.*, 289 F.3d 98, 108

(D.C. Cir. 2002); accord *Bertulli v. Independent Ass'n of Cont'l Pilots*, 242 F.3d 290, 294 (5th Cir. 2001). As the Supreme Court has put it, a class representative must “possess the same interest and suffer the same injury” as the absent class members. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 625-626 (1997); *Gen. Tel. Co. v. Falcon*, 457 U.S. 147, 156 (1982).

Moreover, the named plaintiffs are manifestly atypical of the class they purport to represent. See *Rahman v. Chertoff*, 530 F.3d 622, 627 (7th Cir. 2008). They did *not* invest in the SVF and thus their accounts were not affected by the alleged breaches with respect to the SVF. Yet, they seek to represent participants who *did* invest in the SVF and whose accounts allegedly suffered losses due to the claimed breaches of fiduciary duty. Indeed, none of the Plan participants who *did* invest in the Stable Value Fund has even filed a claim challenging Lockheed’s conduct as imprudent or otherwise in breach of its fiduciary duties. In short, plaintiffs’ lack of standing deprives them of the typicality required to serve as class representatives. See *Rector v. City & County of Denver*, 348 F.3d 935, 950 (10th Cir. 2003) (“By definition, class representatives who do not have Article III standing to pursue the class claims fail to meet the typicality requirements of Rule 23”); accord *Piazza v. EBSCO Indus., Inc.*, 273 F.3d 1341, 1346 (11th Cir. 2001).

Finally, the named plaintiffs are inadequate class representatives. See *Arreola v. Godinez*, 546 F.3d 788, 799 (7th Cir. 2008). Obviously, plaintiffs who lack standing cannot adequately represent a class. See *Hall v. LHACO, Inc.*, 140 F.3d 1190, 1196 (8th Cir. 1998) (one “is not a proper representative of the class

where he himself lacks standing to pursue the claim”). But more concretely, how can plaintiffs who have nothing to gain from a win on this issue be deemed adequate representatives of those who do? Their motivation to fight vigorously on behalf of the absent participants is dubious, to say the least. And even if their standing were merely questionable, their focus would necessarily be concentrated on proving their standing, not on proving claims and relief of value only to other participants. See *Makor Issues & Rights, Ltd. v. Tellabs, Inc.*, 2009 WL 448895, at *12 (N.D. Ill. Feb. 23, 2009).

Plaintiffs argued below that, as Plan participants, they need not demonstrate an individual interest in the SVF claims because 29 U.S.C. § 1132(a)(2) authorizes lawsuits by plan participants. The district court agreed, finding that § 1132(a) resolves all questions of standing. Slip Op. 15; R.226 at 12-14. The district court, however, did not account for the differences between defined contribution plans (such as the Plans at issue here) and defined benefit plans (not at issue here). The court’s order also conflated constitutional standing with statutory standing.

In a defined benefit plan, participants receive a fixed pension paid from a single trust. Any loss to the plan injures all participants. Because any single participant has only a small, fractional interest in the overall plan, § 1132(a) was crafted to allow participants in defined benefit plans to protect their pension interests by pursuing relief “on behalf of” the plan. See *Bendaoud v. Hodgson*, 578 F. Supp. 2d 257, 264 (D. Mass. 2008).

Defined contribution plans work very differently. Because participants have individual accounts, “fiduciary misconduct need not threaten the solvency of the entire plan” but instead can be “tied to particular individual accounts.” *LaRue v. DeWolff, Boberg & Assocs.*, 128 S. Ct. 1020, 1025 (2008). Such fiduciary misconduct may harm only the particular account and not the plan as a whole.

Although § 1132 is not limited to defined benefit plans, the structural differences between defined benefit plans and defined contribution plans have led several courts to hold that the statutory standing conferred by § 1132 is inadequate to confer constitutional standing on a defined-contribution plan participant who lacks a redressable injury-in-fact. As a court in this Circuit has warned, courts should not “confuse statutory standing (which [plaintiffs] have as plan participants) with the constitutional prerequisites for invoking the court’s subject matter jurisdiction.” *Bollig v. Christian Cmty. Homes & Servs., Inc.*, 2003 WL 23200362, at *2 (W.D. Wis. July 10, 2003).

In *Bollig*, the court dismissed an ERISA action for monetary relief because plaintiffs had not shown individual loss that would satisfy the constitutional requirement of injury-in-fact. *Id.* The court thereby adopted the approach to ERISA standing that has been employed by the Second, Third, Sixth, and Ninth Circuits. See *Loren v. Blue Cross & Blue Shield*, 505 F.3d 598, 608 (6th Cir. 2007) (“Merely because Plaintiffs claim that they are suing on behalf of their respective ERISA plans does not change the fact that they must also establish individual standing”); *Glanton v. AdvancePCS Inc.*, 465 F.3d

1123, 1125 (9th Cir. 2006) (although plan participants are “congressionally authorized representatives of the injured plans,” they lack constitutional standing unless “the injury they have suffered will be redressed by a favorable outcome to the litigation”); *Cent. States SE. & SW. Areas Health & Welfare Fund v. Merck-Medco Managed Care, LLC*, 433 F.3d 181, 200 (2d Cir. 2005) (plan participants seeking money damages under ERISA must “demonstrat[e] individual loss”); *Horvath v. Keystone Health Plan E., Inc.*, 333 F.3d 450, 456 (3d Cir. 2003) (same); see also *Bendaoud*, 578 F. Supp. 2d at 266.

The district court’s certification order in this case conflicts with both *Bollig* and the four courts of appeals on whether a defined contribution plan participant who suffered no redressable injury from the alleged misconduct may pursue claims on behalf of the plan. This Court should resolve that conflict over the interplay between standing and Rule 23. The Court previously has resolved ERISA standing disputes in other contexts, see *Harzewski v. Guidant Corp.*, 489 F.3d 799 (7th Cir. 2007) (former employees remain participants with standing to bring claims on behalf of plan), but not this one. It should grant the petition and determine whether a participant who did not invest in a fund allegedly harmed by fiduciary misconduct may represent a class of all participants on behalf of the plan.

II. The Petition Also Should Be Granted To Establish Whether, In An ERISA Action, Individualized Issues Of Reliance On Alleged Misrepresentations Defeat Commonality.

Another issue warranting Rule 23(f) review is whether fiduciary duty claims that rest primarily on allegedly defective disclosures satisfy the

commonality requirement for class certification under Rule 23(a). The district court simply dismissed the inherently individualized inquiries that must take place to determine whether a particular participant relied on such disclosures, opining that courts focus solely on “the conduct of the defendants, not the plaintiffs.” Slip Op. 10. That approach creates another conflict within this Circuit on an important issue of class action law.

Plaintiffs’ claims regarding the SVF and Plan fees and expenses require highly individualized determinations. The First Amended Complaint alleges that Lockheed “misrepresented, tricked, and misled participants about the Stable Value Fund by falsely describing it as a stable value fund and by describing its composition as one that combined investments to provide a source of stable value.” R.137 ¶ 141; see also *id.* at ¶ 151(h). Plaintiffs reiterated in opposing summary judgment that Lockheed “deceived participants through ‘false advertising’ about the fund being a ‘Stable Value Fund.’” R.164 at 17. Similarly, with respect to “fees and expenses,” the First Amended Complaint alleges that Lockheed is liable for “[f]ailing to inform and/or disclose to participants and beneficiaries of the Plans in proper detail and clarity the transactions, fees and expenses which affect participants’ account balances.” R.137 ¶ 151m.

To prove these allegations at trial, plaintiffs would have to demonstrate that plan participants had an understanding of what investments a “stable value fund” should make, understood what fees and expenses were proper, and were misled by the alleged misrepresentations. See, *e.g.*, *Kamler*, 305 F.3d at

681-682; *Lively v. Dynegy, Inc.*, 2007 WL 685861, at *16 (S.D. Ill. Mar. 2, 2007). Such a showing is not susceptible to class-wide proof. Whether the alleged misrepresentations caused a particular participant to invest in the SVF or any other fund—in other words, whether that participant relied on the alleged misrepresentations—would depend on the participant’s level of financial education and sophistication, the disclosures to which the participant was exposed, how the participant understood those disclosures, and other individualized questions. See *Frahm v. Equitable Life Assurance Soc’y*, 137 F.3d 955, 957 (7th Cir. 1998) (rejecting class certification where ERISA claims depended “on what was said” to plan participants); *West v. Prudential Sec., Inc.*, 282 F.3d 935, 938 (7th Cir. 2002) (rejecting class certification on 23(f) review due to individualized issues of causation stemming from misrepresentation claims); *Clark v. Experian Info. Solutions, Inc.*, 256 F. App’x 818, 821-822 & n.1 (7th Cir. 2007) (issues of reliance and deception are too individualized for class treatment).

Lockheed intends to make lack of reliance a central part of its safe-harbor defense authorized by ERISA § 404(c), 29 U.S.C. § 1104(c), for plans (like the Plans here) that permit participants to exercise control over their own assets. See *Hecker*, 556 F.3d at 587-590. That safe harbor provides individualized defenses against plan participants where a court must analyze “whether an individual class member was actually harmed by the purported breaches of fiduciary duty.” *Langbecker v. Elec. Data Sys. Corp.*, 476 F.3d 299, 317 (5th Cir. 2007). One condition for the applicability of the safe harbor is

that participants “have the opportunity to obtain ‘sufficient information to make informed decisions with regard to investment alternatives available under the plan.’” *Hecker*, 556 F.3d at 587, quoting 29 C.F.R. § 2550.404c-1(b)(2)(i)(B). Plaintiffs’ First Amended Complaint alleges that this defense is unavailable because Lockheed “concealed” vital information and thus participants “lacked the information necessary to understand and protect their interests in the Plans.” R.137. Whether those allegations are accurate cannot be determined across-the-board with common evidence but rather will require participant-by-participant inquiries. Lockheed argued this “safe harbor” point in its class certification papers (see R.179 at 12-14), but the district court’s class certification order does not even address it.

In similar situations, other district courts in this Circuit have denied class certification. *E.g.*, *Nelson v. IPALCO Enters., Inc.*, 2003 WL 23101792, at *10-11 (S.D. Ind. Sept. 30, 2003) (finding Rule 23(b)(1) class certification inappropriate as to fiduciary misrepresentation claims under ERISA due to individualized issues of reliance and causation); *Gesell v. Commonwealth Edison Co.*, 216 F.R.D. 616, 624-625 (C.D. Ill. 2003) (denying class certification for ERISA misrepresentation claim where different employees based their decisions on different statements); *In re Sears Retiree Group Life Ins. Litig.*, 1999 WL 35312 (N.D. Ill. Jan. 11, 1999) (denying class certification for ERISA misrepresentation claim where employees had different understandings of plan disclosures).

The district court departed from the views of these courts by ruling that Lockheed raised only “individual issues of loss causation” that “are relevant only to allocating damages.” Slip Op. 11. This Court should grant the petition to resolve this conflict and guide the lower courts as to the propriety of class certification in ERISA actions raising claims involving misrepresentation and reliance.

CONCLUSION

Lockheed’s Rule 23(f) Petition should be granted and a briefing schedule established to address the merits of the district court’s class certification ruling.

Dated: April 17, 2009

Respectfully submitted,

James G. Martin
Patrick J. Kenny
ARMSTRONG TEASDALE LLP
One Metropolitan Square
Suite 2600
St. Louis, Missouri 63102
(314) 621-5070

Jeffrey W. Sarles
MAYER BROWN LLP
71 South Wacker Drive
Chicago, Illinois 60606
(312) 782-0600

Robert P. Davis
Peter White
Brian D. Netter
MAYER BROWN LLP
1909 K Street, NW
Washington, DC 20006
(202) 263-3000

Attorneys for Defendants-Petitioners

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that on April 17, 2009, I caused two copies of the foregoing Rule 23(f) Petition to be served by UPS overnight delivery, and a digital version to be served by e-mail, on the following:

Jerome J. Schlichter
Nelson G. Wolff
Ryan C. Wallis
Schlichter Bogard & Denton
100 S. Fourth St., Suite 900
St. Louis, MO 63102

ADDENDUM