IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
CEDAR RAPIDS DIVISION

JEREMY KARG, MATTHEW R. LAMARCHE, CYNTHIA K. MARSHALL, SHIRLEY RHODES, ROWENA W. SUTTON, and JEANINE E. VEGA, on behalf of themselves and all others similarly situated, Plaintiffs, vs. TRANSAMERICA CORPORATION; TRUSTEES OF THE AEGON USA, INC. PROFIT SHARING TRUST; and DOES 1-40, Defendants.	No. 1:18-CV-134-CJW-KEM **ORDER**

This matter is before the Court on plaintiffs' unresisted[1] motion (Doc. 62) for class certification. Defendants do not resist plaintiffs' motion. For the following reasons, plaintiffs' motion is **granted**.

I. BACKGROUND

Plaintiffs are or were participants in Transamerica Corporation's 401(k) Plan ("Plan") who, under the Employee Retirement Income Security Act of 1974, as amended, Title 29, United States Code, Section 1001, et seq. ("ERISA"), sued defendants, the Plan's fiduciaries. (Doc. 54, at 1-2). Plaintiffs allege that defendants breached their fiduciary

[1] As a condition of defendants' agreement to not resist plaintiffs' motion, plaintiffs agreed not to name any individuals who are or have been employed by or associated with Transamerica as defendants in this action.

duties by selecting and retaining poor-performing investment portfolios for the Plan when superior options were readily available in the market. (Doc. 53, at 2-3). Plaintiffs seek class certification on behalf of all participants and beneficiaries of the Plan. (Docs. 54, at 34-36; 62). Plaintiffs estimate the class size is at least 17,000 members because over 17,000 participants and beneficiaries were or have been invested in the Plan since December 28, 2012. (Docs. 61, at 7; 62-1, at 6).

II. DISCUSSION

A. Requirements for Class Certification

1. Rule 23(a) Requirements

"The class action is 'an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only.'" *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 348 (2011) (quoting *Califano v. Yamasaki*, 442 U.S. 682, 700-01 (1979)). Federal Rule of Civil Procedure 23 governs class certification. One or more members of a class may sue or be sued as representative parties on behalf of all members only if:

> (1) The class is so numerous that joinder of all members is impracticable;
> (2) There are questions of law or fact common to the class;
> (3) The claims or defenses of the representative parties are typical of the claims or defenses of the class; and
> (4) The representative parties will fairly and adequately protect the interests of the class.

FED. R. CIV. P. 23(a). A class action "may only be certified if the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied." *Gen. Tel. Co. v. Falcon*, 457 U.S. 147, 161 (1982). In conducting its analysis the Court may go beyond the pleadings and consider "the evidentiary record, including any affidavits and results of discovery." *Gries v. Standard Ready Mix Concrete, L.L.C.*, 252 F.R.D. 479, 482 (N.D. Iowa 2008).

Plaintiffs bear the burden of showing that they, as class representatives, have the same interest and injury as other class members. *Dukes*, 564 U.S. at 349; *see also Postawko v. Missouri Dep't of Corr.*, 910 F.3d 1030, 1036 (8th Cir. 2018) ("Plaintiffs carry the burden of showing that they have met [the Rule 23] requirements."). Plaintiffs "must affirmatively demonstrate . . . compliance with . . . Rule [23]—that is, [they] must be prepared to prove that there are *in fact* sufficiently numerous parties, common questions of law or fact, etc." *Dukes*, 564 U.S. at 350. In determining whether plaintiffs meet the 23(a) requirements, courts consider the particular circumstances of the case. *See Sanft v. Winnebago Indus., Inc.*, 214 F.R.D. 514, 520 (N.D. Iowa, 2003).

a. Numerosity

Rule 23(a)(1) requires that the proposed class be "so numerous that joinder of all members is impracticable." FED. R. CIV. P. 23(a)(1). The Eighth Circuit has not established a minimum number of plaintiffs that makes joinder impracticable and a class action desirable. *Paxton v. Union Nat. Bank*, 688 F.2d 552, 599 (8th Cir. 1982). In assessing the numerosity requirement, courts consider a variety of factors including (1) the number of persons in the proposed class; (2) the nature of the action, (3) the size of the individual claims; (4) the inconvenience of trying individual suits; (5) the geographic dispersion of class members; (6) the identification of class members; (7) the financial resources of class members; and (8) judicial efficiency. *Gries*, 252 F.R.D. at 484-88.

As plaintiffs noted, this Court once indicated in a footnote that a proposed class of more than 40 people was "a good rule of thumb" for determining whether the class was sufficiently numerous. *Richter v. Bowen*, 669 F. Supp. 275, 281 n.4 (N.D. Iowa 1987). More recently, the Court has cited a wide variety of class certification cases, both in and outside the Eighth Circuit; these cases show that a finding of numerosity turns in part on the facts of the case. *See Sanft*, 214 F.R.D. at 520-21. *Compare, e.g.*, *Bublitz v. E.I.*

du Pont de Nemours and Co., 202 F.R.D. 251, 256 (S.D. Iowa 2001) (holding that 17-member class sufficient, based on the "fear that comes with suing one's employer") *with Gries*, 252 F.R.D. at 488 (holding that plaintiff's proposed class of 90 members whose identities were known and who were geographically concentrated was not "sufficiently large to meet the numerosity requirement").

Multiple districts within the Eighth Circuit, however, have found numerosity satisfied when an ERISA lawsuit involved more than 2,000 potential class members. *See, e.g.*, *Wildman v. Am. Century Servs., LLC*, No. 4:16-CV-00737-DGK, 2017 WL 6045487, at *3 (W.D. Mo. Dec. 6, 2017) (2,000 to 2,500); *Krueger v. Ameriprise Fin., Inc.*, 304 F.R.D. 559, 569 (D. Minn. 2014) (more than 10,000); *Ruppert v. Principal Life. Ins. Co.*, 252 F.R.D. 488, 492 (S.D. Iowa 2008) (24,816 to 57,000). Courts have also found numerosity in ERISA lawsuits involving fewer members. *See, e.g.*, *Paschal v. Child Dev., Inc.*, No., 2014 WL 112214 at *5 (E.D. Ark. Jan. 10, 2014) (more than 300 members across 23 facilities throughout the state).

Here, plaintiffs' proposed class includes over 17,000 members—far more than 2,000. Moreover, defendants do not dispute numerosity. Thus, the Court finds that plaintiffs satisfy the numerosity requirement.

b. Commonality

Rule 23(a)(2) requires the existence of "questions of law or fact common to the class," though not all "question[s] of law or fact [must] be common to every member of the class." *Paxton*, 688 F.2d at 561. The existence of common questions alone, however, is insufficient; the common questions must "generate common *answers* apt to drive the resolution of the litigation." *Dukes*, 564 U.S. at 350 (quoting Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. REV. 97, 132 (2009)). "Dissimilarities within the proposed class . . . impede the generation of common answers." *Id.* at 350. Sufficient commonality exists when common questions and

practices tie class members' claims together. *See id.* at 357 (finding no commonality when no "specific employment practice" united plaintiffs).

ERISA actions have sufficient commonality when class members share questions of "whether Defendants acted as fiduciaries, whether they breached their duties of prudence and loyalty, [and] whether they violated ERISA, as well as whether and to what extent the Plan was injured as a result." *Jones v. NovaStar Fin., Inc.*, 257 F.R.D. 181, 186 (W.D. Mo. 2009); *see also Rozo v. Principal Life Ins. Co.*, No. 4:14-CV-000463-JAJ-CFB, 2017 WL 2292834, at *3 (S.D. Iowa May 12, 2017) (finding commonality requirement met because standardized terms of the plan "appl[ied] uniformly across the proposed class" in ERISA action).

Here, fundamental questions involving defendants' alleged fiduciary breaches are common to proposed class members. As plaintiffs presented in their brief, these questions include: (1) whether defendants are fiduciaries and, if so, whether they breached their duties; (2) whether the Plan and its participants suffered losses as a result and, if so, how to calculate the losses; and (3) "what equitable relief should be imposed to remedy such breaches and to prevent future ERISA violations." (Doc. 62-1, at 3). Neither plaintiffs nor defendants raise dissimilarities within the proposed class that would impede the generation of common answers, and the Court finds none. Thus, the Court finds that plaintiffs satisfy the commonality requirement.

c. Typicality

Rule 23(a)(3) requires that the "claims or defenses of the representative parties [be] typical of the claims or defenses of the class." The Eighth Circuit interprets typicality as "a demonstration that there are other members of the class who have the same or similar grievances as the [class representative]." *Paxton*, 688 F.2d at 562 (finding typicality requirement satisfied because plaintiffs and other employees were

similarly denied timely promotions based on their race). "The burden of showing typicality is not an onerous one." *Id.*

Here, plaintiffs are current or former Plan participants "who held investments in the Challenged Funds on or after December 28, 2012." (Doc. 62-1, at 7). Plaintiffs assert that defendants "breached their fiduciary duty by selecting and retaining the allegedly imprudent Challenged Funds." (*Id.* at 8.). As common investors in the Challenged Funds, plaintiffs and proposed class members allege similar harm resulting from defendants' alleged fiduciary breaches. In fact, the harm may be identical. *Rozo*, 2017 WL 2292834 at *4 (finding that the plaintiff, an ERISA plan participant alleging fiduciary breach, "experienced the *same* alleged injury as all other members of the proposed class" (emphasis added)). Thus, the Court finds that plaintiffs satisfy the typicality requirement.

d. Adequacy

Rule 23(a)(4) requires that the representative parties "fairly and adequately protect the interests of the class." Courts look for "whether: (1) the class representatives have common interests with the members of the class, and (2) whether the class representatives will vigorously prosecute the interests of the class through qualified counsel." *Paxton*, 688 F.2d at 562-63; *Rattray v. Woodbury Cty., Iowa*, 253 F.R.D. 444, 455 (N.D. Iowa 2008), *aff'd sub. nom. Rattray v. Woodbury Cty., IA*, 614 F.3d 831 (8th Cir. 2010).

Here, plaintiffs Jeremy Karg, Matthew R. LaMarche, Cynthia K. Marshall, Shirley Rhodes, and Jeanine E. Vega[2] have submitted signed declarations to the Court attesting to their active participation here, their willingness to undertake additional responsibility, and their understanding of their role as class representatives to fairly and adequately protect the class members' interests. (Docs. 62-6-10). Likewise, plaintiffs'

[2] Plaintiffs do not seek appointment of Rowena W. Sutton as a class representative. (Doc. 62, at 4 n.2).

counsel submitted documentation of their own qualifications and commitment. (Docs. 62-2 through 62-5). As previously noted, plaintiffs Karg, LaMarche, Marshall, Rhodes, and Vega share common interests with the class members. Thus, the Court finds that plaintiffs satisfy the adequacy requirement.

2. Rule 23(b)(1) Requirements

In addition to the Rule 23(a) requirements, the proposed class must also satisfy one of three Rule 23(b)(1) requirements. *See* FED. R. CIV. P. 23(b). Plaintiffs seek certification under Rule 23(b)(1)(A), which authorizes a class action when "prosecuting separate actions . . . would create a 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." Rule 23(b)(1)(A) applies in situations when defendants are required by law or by practical necessity to treat all class members alike and inconstant verdicts could prejudice defendants. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 614 (1997); *Tussey v. ABB, Inc.*, No. 06-04305-CV-NKL, 2007 WL 4289694, *8 (W.D. Mo. Dec. 3, 2007).

Alternatively, plaintiffs seek certification under Rule 23(b)(1)(B). Under this Rule, a class action is appropriate when prosecuting separate actions would create a practical risk that individual adjudications "would be dispositive of the interests of the other members not parties . . . or would substantially impair or impede [the other members'] ability to protect their interests." FED. R. CIV. P. 23(b)(1)(B). Thus, under Rule 23(b)(1)(B), separate actions could prejudice members of the class. *Tussey*, 2007 WL 4289694, at *8.

Here, the fiduciary underpinnings of the ERISA claim protect the participants and beneficiaries collectively. The potential class members' claims are indistinguishable. Different results in separate actions could prejudice both defendants and class members.

Thus, the Court finds that class certification is appropriate under both Rule 23(b)(1)(A) and Rule 23(b)(1)(B).

3. Certification of the Class

Plaintiffs' motion sets forth the factual basis for a class action under Federal Rule of Civil Procedure 23(a), complies with additional requirements under Rule 23(b), and provides sufficient reason to appoint plaintiffs' counsel as class counsel under FED. Rule 23(g)(1). Thus, plaintiffs' motion fulfills all requirements for class certification under Northern District of Iowa Local Rule 23(a).

The Court hereby certifies the following class under Rule 23(b)(1)[3]:

> All participants and beneficiaries of the Transamerica 401(k) Retirement Savings Plan (the "Plan") who invested in (a) the Transamerica International Equity Portfolio, (b) the Transamerica Small Core Portfolio, (c) the Transamerica Large Value Portfolio, (d) Transamerica Large Growth Portfolio, (e) Transamerica High Yield Bond Portfolio, and/or (f) the Transamerica Mid Value Portfolio (collectively, the "Challenged Funds"), at any time from December 28, 2012 through the date of judgment, excluding defendants.

B. Appointment of Class Counsel

When appointing class counsel, the court must consider:

(1) the work counsel has done in identifying or investigating potential claims in the action;
(2) counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action;
(3) counsel's knowledge of the applicable law; and
(4) the resources that counsel will commit to representing the class.

FED. R. CIV. P. 23(g)(1)(A). The court may, among other items, consider additional information relevant "to counsel's ability to fairly and adequately represent the interests of the class." FED. R. CIV. P. 23(g)(1)(B)-(E).

[3] Notice to the class is not necessary because it is certified under Rule 23(b)(1). FED. R. CIV. P. 23(c)(2).

The Court has reviewed information about plaintiffs' counsel, submitted along with plaintiffs' motion for class certification. (Docs. 62, at 7-9; 62-2-5). Counsel have ably represented plaintiffs, some since inception of the case here, and continue to work to identify and investigate other potential claims. Counsel have a wealth of experience in navigating class actions and show knowledge of and intellectual engagement with the applicable law. Counsel and their firm have committed substantial resources to representing the proposed class. Defendants do not resist plaintiffs' counsels' appointment. Thus, the Court finds plaintiffs' counsel can fairly and adequately represent the interests of the class. The Court appoints as class counsel Paul Blankenstein, Charles H. Field, Alexandra Harwin, David Tracey, and Sanford Heisler Sharp, LLP.

C. Local Rule 23(a)

Local Rule 23(a) states that to obtain class certification:

> the party seeking to maintain the action as a class or representative action must, within 180 days after commencement of the action, file a separate motion for certification. The motion must include a proposal for the appointment of class counsel, unless such a proposal has been included in an earlier-filed motion. If the action is brought under Federal Rule of Civil Procedure 23, the motion and documents supporting the motion must do the following:
>
> 1. Set forth with particularity the facts relied upon to satisfy the prerequisites of Federal Rule of Civil Procedure 23(a);
> 2. Fully articulate one or more of the additional requirements for maintenance of a class action that are set forth in Federal Rule of Civil Procedure 23(b); and
> 3. If the motion includes a proposal for the appointment of class counsel, set forth with particularity the information the court must consider in assessing proposed class counsel's ability to represent the interests of the class fairly and adequately, as set forth in Federal Rules of Civil Procedure 23(g)(1)(A) and (B).

Here, plaintiffs' motion sets forth the factual basis for a class action under Rule 23(a), is compliant with 23(b)(1), and provides sufficient reason to appoint plaintiffs' counsel

as class counsel under 23(g)(1). Thus, plaintiffs' motion fulfills all requirements of Local Rule 23(a).[4]

III. Conclusion

For these reasons, plaintiffs' unresisted motion (Doc. 62) for class certification is **granted** and plaintiffs' counsel are hereby **appointed** class counsel.

IT IS SO ORDERED this 25th day of March, 2020.

C.J. Williams
United States District Judge
Northern District of Iowa

[4] Although more than 180 days passed between the commencement of the action and plaintiffs' motion, the Court finds on its own motion that good cause exists, and the delay was the result of excusable neglect. After plaintiffs commenced this action on December 28, 2018, defendants filed a Motion to Dismiss followed by a Motion to Reconsider. (Docs. 23, 39). Until November 7, 2019, when this Court denied defendants' Motion to Reconsider (Doc. 50), plaintiffs did not know whether their case would survive these motions. Fewer than 180 days passed between November 7 and this motion, submitted on January 31, 2020. Thus, the Court finds it is proper to extend plaintiffs' filing deadline. FED. R. CIV. P. 6(b). The Court also notes that defendants do not resist plaintiffs' motion or otherwise raise the timeliness issue.