

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Michael Tate, Joseph Shuster, Lyle
Evanson and John Ayers, individually
and on behalf of all other individuals
similarly situated,

Civil File No. 09-cv-02076 (MJD/JJG)

Plaintiffs,

vs.

**PLAINTIFFS' MEMORANDUM IN
SUPPORT OF MOTION FOR
CLASS CERTIFICATION**

Restaurant Technologies, Inc.,
Parthenon Capital LLC, Jeffery R.
Kiesel, John C. Rutherford, Jonathan
O. Grad, Zachary F. Sadek, Philip A.
Clough and Robert E. Weil,

Defendants.

INTRODUCTION

Plaintiffs Michael Tate, Joseph Shuster, Jack Ayers and Lyle Evanson (“Plaintiffs”), submit this memorandum of law in support of their motion for class certification, pursuant to Rule 23 of the Federal Rules of Civil Procedure. Plaintiffs’ collective resume includes ownership in Restaurant Technologies, Inc. (“RTI”) common stock, preferred stock and options to purchase RTI common stock. Further, several of these Plaintiffs helped found RTI. Finally, each of the Plaintiffs understands the cost and inconvenience of litigation and has shown himself to be a vigorous advocate for the interests of RTI equity holders.

Plaintiffs now move the Court for an Order (1) appointing Plaintiffs as class representatives; (2) appointing the counsel of their choice as Class Counsel; and (3)

certifying this action as a class action pursuant to Fed. R. Civ. P. 23 on behalf of the following:

All individuals and entities who held RTI common stock or Series A preferred stock as of June 12, 2009 and all individuals or entities holding options to purchase RTI common stock as of May 13, 2009 (the "Class"). Excluded from the Class are the individual Defendants and members of their immediate family; Defendant RTI and its current officers and directors, legal representatives and financial representatives; Defendant Parthenon Capital LLC, ABS Capital Partners and their affiliates, subsidiaries and individuals affiliated with those entities.

Plaintiffs' motion also requests that the Court order the parties to negotiate and submit to the Court a form of class notice. As detailed below, this action satisfies each of the requirements for class certification under Rule 23 of the Federal Rules of Civil Procedure.

BACKGROUND

This action was commenced in July 2009. Since the commencement of the action, a Pretrial Scheduling Order has been entered, over 250,000 pages of documents have been exchanged between the parties or produced from numerous third parties, seven depositions have occurred, and a motion to dismiss has been briefed, argued and ruled upon. Under the Court's Pretrial Scheduling Order, parties and claims are to be added by April 1, 2010 and motions for class certification are to be filed by that date.

On March 23, 2010, Plaintiffs filed a 38-page First Amended Complaint setting forth a detailed description of the wrongdoing which occurred. Docket No. 58.¹ The First Amended Complaint added two party Defendants (Parthenon Capital LLC and Zachary Sadek) as well as an additional Plaintiff (Lyle Evanson). The First Amended Complaint also expanded on the nature of the wrongdoing with details drawn in large part from documents unearthed during discovery. The wrongdoing includes various breaches of fiduciary duties as well as the execution of an unfair recapitalization process which resulted in an unfair price to shareholders in the putative class. As set forth in the First Amended Complaint, there are numerous common questions of law and fact in this matter. Defendants either intentionally undervalued RTI and upstreamed equity improperly in connection with the recapitalization in 2009 or RTI was so grossly mismanaged in recent years as to have undergone an extraordinary, preventable deterioration of the equity values held by members of the putative class. In either event, the putative class was damaged by millions of dollars.

ARGUMENT

A. The Proposed Class and Class Representatives Satisfy the Requirements of Rule 23.

The Class which Plaintiffs now seek to have certified is defined as follows:

All individuals and entities who held RTI common stock or Series A preferred stock as of June 12, 2009 and all individuals or entities holding options to purchase RTI

¹ The First Amended Complaint sets forth in detail the factual background giving rise to the legal claims. Those facts are not repeated here, but are incorporated by reference. For the Court's convenience, the First Amended Complaint is attached to the Affidavit of Nathan Brennan, dated March 30, 2010 ("Brennan Aff.") as Exhibit A.

common stock as of May 13, 2009. Excluded from the Class are the individual Defendants and members of their immediate family; Defendant RTI and its current officers and directors, legal representatives and financial representatives; Defendant Parthenon Capital LLC, ABS Capital Partners and their affiliates, subsidiaries and individuals affiliated with those entities.

To assist the Court in assessing the scope and composition of the Class, attached to the Brennan Affidavit at Ex. B is a listing of RTI shareholders and option holders showing those individuals and entities who, under the definition set forth above, would constitute the Class.²

Rule 23(a) sets out four threshold prerequisites that must be satisfied before a party can obtain class certification:

One or more members of a class may sue or be sued as representative parties on behalf of all 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); *In re St. Jude Medical, Inc.*, 425 F.3d 1116, 1119 (8th Cir. 2005); *Burch v. Qwest Communications Intern., Inc.*, Civil No. 06-3523, --- F. Supp. 2d ----, 2009 WL 5812530, at *17 (D. Minn. Dec. 16, 2009). If the above prerequisites of Rule 23(a) have been satisfied, a court may then certify a class if it finds that the action is

² Exhibit B to the Brennan Affidavit specifically identifies those excluded from the Class as proposed. Exhibit B is a document which was included in the appendix to the proxy materials utilized in connection with the recapitalization and filed with the Court by Defendants. Docket No. 11. The “EXCLUDED” designation has been added by Plaintiffs’ counsel to clearly enumerate those excluded from the Class.

maintainable under Rule 23(b). *Brancheau v. Residential Mortg. Group, Inc.*, 177 F.R.D. 655, 659 (D. Minn. 1997). Rule 23(b)(3) includes two additional requirements: (1) common questions of law or fact must “predominate over any questions affecting only individual members,” and (2) “a class action is superior to other available methods for the fair and efficient adjudication of the controversy.” Fed. R. Civ. P. 23(b)(3); *Burch*, 2009 WL 5812530 at *18; *Brancheau*, 177 F.R.D. at 660.

The purpose of class action litigation has long been recognized as providing a uniquely efficient means to vindicate the rights of numerous individuals with similar, albeit small, claims. *Deposit Guar. Nat’l Bank v. Roper*, 445 U.S. 326, 338 (1980) (“Class action suits furnish an efficient means for numerous claimants with a common complaint to obtain a remedy where it is not economically feasible to obtain relief within the traditional framework of a multiplicity of small individual suits for damages.”) (internal quotes omitted); *Lockwood Motors, Inc. v. GM Corp.*, 162 F.R.D. 569, 582 (D. Minn. 1995) (“[Class prosecution] will limit duplicative litigation, limit the burden on this and other courts, and provide a uniform result for similarly situated parties.”).

The party seeking class certification bears the burden of establishing that it has satisfied each of Rule 23’s class certification requirements. *Lockwood Motors*, 162 F.R.D. at 573. A court may not decide the merits of a case at the class certification stage, *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177–78 (1974), however, a motion for class certification “generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff’s cause of action.” *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 469 (1978) (citations and internal quotations omitted). “When there is a

question as to whether certification is appropriate, the court should give the benefit of the doubt to approving the class.” *Mathers v. Northshore Mining Co.*, 217 F.R.D. 474, 483 (D. Minn. 2003). The court ultimately retains broad discretion in determining whether to certify a class under Rule 23. *See Gilbert v. City of Little Rock, Ark.*, 722 F.2d 1390, 1399 (8th Cir. 1983).

Here, absent the class action mechanism, the vast majority of the putative Class would have no viable recourse for the wrongs committed, as the costs of individual litigation would far eclipse the damages suffered by any individual. The economic barriers to obtaining relief in this kind of case result in consequences that have been well-noted by courts. *See Andra v. Blount*, 772 A.2d 183, 194–95 (Del. Ch. 2000) (“Class actions and fee shifting are crucial if litigation is to serve as a method of holding corporate fiduciaries accountable to stockholders ... one wonders whether [plaintiff] could have found counsel to bring this [unfair dealing in cash-out merger] lawsuit on a non-class action basis.”). Further, those few RTI shareholders with the means and the incentive to vindicate their rights would undoubtedly bring substantially duplicative claims. Therefore, a class action is a singularly appropriate mechanism for addressing these concerns.

B. Plaintiffs Have Met the Requirements of Rule 23(a) of the Federal Rules of Civil Procedure.

1. Numerosity

The numerosity requirement is met where joinder of all members would be “impracticable.” *In re Potash Antitrust Litig.*, 159 F.R.D. 682, 689 (D. Minn. 1995)

(citing *In re Federal Skywalk Cases*, 680 F.2d 1175, 1178 (8th Cir. 1982)). However, “[s]atisfaction of the numerosity prong does not require that joinder be impossible, but only that plaintiffs will suffer a strong litigational hardship or inconvenience if joinder is required.” *Carpe v. Aquila, Inc.*, 224 F.R.D. 454, 457 (W.D. Mo. 2004) (citation omitted); *see also Paxton v. Union Nat’l Bank*, 688 F.2d 552, 559–60 (8th Cir. 1982). Further, the “Eighth Circuit has not set forth an arbitrary number or arbitrary rules regarding numerosity.” *Paxton*, 688 F.2d at 559.

Here, the Class is believed to exceed 250 people or entities who collectively held approximately 1.25 million shares in RTI common stock, 329,000 shares of Series A preferred stock and approximately 400,000 options to purchase RTI stock.³ The partial shareholder list obtained by Plaintiffs indicates that the Class members are disbursed nationwide and joinder of all members would be impracticable. *See Brennan Aff., Ex. B*⁴; *see also Boyd v. Ozark Air Lines, Inc.*, 568 F.2d 50, 54 (8th Cir. 1977) (“[T]he question of what constitutes impracticability depends upon the facts of each case.”). Accordingly, it is clear that the number of class members and the facts of this case demonstrate that the numerosity requirement of Rule 23 is easily met.

³ As set forth in the proposed Class definition, these numbers exclude shares held by Defendant Parthenon Capital LLC, ABS Capital Partners, the individual Defendants, Defendant RTI’s financial advisors, legal advisors and its current officers and directors who, even though they are not named in the lawsuit, were complicit in the wrongdoing.

⁴ Exhibit B to Brennan Aff. includes optionholders. While the option holders are numerous (*see Brennan Aff., Ex. B*), it is believed that, unlike RTI shareholders, many are from this area as they are, or were, employees of RTI. Again, the Class will exclude current senior management who held options at the time of the recapitalization. While all option holders were wrongfully wiped out at the time of the recapitalization, those currently holding executive positions at RTI were, on information and belief, provided new options under a management incentive plan.

2. Commonality

The second provision of Rule 23(a) requires Plaintiffs to show “that there are questions of law or fact common to the class.” Fed. R. Civ. P. 23(a)(2). “As a general rule, the commonality requirement imposes a very light burden on plaintiff seeking to certify a class and is easily satisfied.” *In re Hartford Sales Practices Litigation*, 192 F.R.D. 592, 603 (D. Minn. 1999). In determining whether common questions exist, Rule 23(a)(2) requires simply that questions of law or fact be shared by prospective class members—it is not required that all questions be common or that issues be identical. *Lockwood Motors*, 162 F.R.D. at 575.

Here, common questions of law and fact exist as to all members of the Class and predominate over any questions solely affecting individual members of the Class.

Among the questions of law and fact common to the Class are:

- When a private equity firm takes control of a business, can it ignore its fiduciary obligations to other shareholders?
- Is it a breach of fiduciary duty when a controlling shareholder upstreams equity to itself at an unfair price to the detriment of other shareholders?
- Was the recapitalization process unfair to non-insiders because of the failure to disclose material information, the waiving of voting conditions after the fact, the failure to accurately advise shareholders of their appraisal rights, the failure to have an independent committee review the transaction, the establishment of an artificial value designed to upstream equity to a few controlling shareholders and the requirement that certain shareholders release their claims if they sought to maintain any ownership in the company?
- Did Defendant Parthenon Capital LLC convert RTI equity and assets?

- Did Defendant Sadek engage in improper conduct by providing Defendants Kiesel and Weil incentives to consummate the reorganization without disclosing the incentives to RTI shareholders?
- Was the execution of a contract with Jack in the Box material information which needed to be disclosed to RTI shareholders in the proxy memorandum?
- Did Defendants Grad, Sadek and Rutherford breach their fiduciary duty to other shareholders by allowing Defendant Kiesel to continue to manage the company while knowing for several years he “was not knowledgeable about the details of the company” and presented a “principal risk” to the company’s success?
- Was the recapitalization a liquidation event permitting the receipt of liquidation values for holders of Series B-1 and B-2 preferred stock?
- Was the value received by the putative class in the recapitalization fair?
- Was Defendant Parthenon Capital LLC’s decision to pursue a sale of RTI in 2008, rather than an IPO, made because it could obtain a higher return on its own investment and, if so, was that decision a breach of its fiduciary duties to other RTI shareholders?
- Did the failure of the Special Committee to obtain an opinion about the fairness of the transaction to RTI shareholders constitute a breach of fiduciary duty?
- Should Defendant Kiesel have recused himself from serving on the Special Committee in light of the benefits he understood he would receive in the recapitalized entity?
- Was the vote during the recapitalization process conducted fairly?
- Did the failure of RTI to provide the current Delaware appraisal statute with the proxy materials affect shareholders’ rights?
- Was Robert W. Baird independent at the time it was rendering its opinion about the recapitalization?
- Was the management services contract between RTI and an affiliate of Defendant Parthenon Capital LLC negotiated at arm’s-length?

Plaintiffs' allegations of self-dealing conduct in conceiving of, and executing, the recapitalization satisfy the commonality requirement because they comprise a common nucleus of operative fact. *See Pope v. Harvard Bancharres, Inc.*, 240 F.R.D. 383, 388 (N.D. Ill. 2006) ("The court's evaluation of the plaintiffs' claim will necessarily focus on the alleged misconduct of the defendants in conceiving of and conducting the merger, which constitutes a common nucleus of operative fact."). The same nucleus of operative fact gives rise to the allegations of misrepresentation. *See id.* at 388–89 ("Plaintiffs allege that these notices misrepresented the reasons for the merger and announced an unfair price for repurchasing their stock. The presence of the common question of whether these notices were misleading also establishes commonality."). In this case, the proxy materials as well as the supplemental materials distributed to all shareholders by Defendants omitted material facts which were necessary to make them not misleading.

Indeed, in applying Delaware's analogous Rule 23, the Delaware Chancery Court has flatly stated that "[a]n action seeking to prove a breach of [fiduciary] duty is inescapably a true class action. Relief whether it be by injunction, rescission or an award of money will be determined by reference to the effects of the fiduciary's wrong ... on the corporation or all of its stockholders as a class." *Hynson v. Drummond Coal Co., Inc.*, 601 A.2d 570, 575 (Del. Ch. 1991); *see also In re Talley Industries, Inc. Shareholders Litigation*, No. Civ. A. 15961, 1998 WL 191939, at *9 (Del. Ch. Apr. 13, 1998) ("The amended complaint alleges that the defendants breached their fiduciary duties in connection with the ... merger to the detriment of the class and/or aided and abetted in such wrongs. As this question similarly affects each stockholder, the commonality

requirement is also satisfied.”). In sum, the commonality requirement is satisfied as to all plaintiffs’ claims, whether based on breaches of fiduciary duty or misrepresentations.

3. Typicality

The third requirement of Rule 23(a) calls for the party seeking certification to show that “the claims or defenses of the representative parties are typical of the claims or defenses of the class.” Fed. R. Civ. P. 23(a)(3). Typicality under Rule 23(a)(3) suggests “there are other members of the class who have the same or similar grievances as the [representative] plaintiff.” *Chaffin v. Rheem Mfg. Co.*, 904 F.2d 1269, 1275 (8th Cir. 1990) (internal quotation omitted). Typicality is satisfied when the named plaintiffs’ claims emanate from the same event or are based on the same legal theory as the claims of the class members. *Lockwood Motors*, 162 F.R.D. at 575. In many cases the test for typicality is “fairly easily met so long as other class members have claims similar to the named plaintiff.” *DeBoer v. Mellon Mortg. Co.*, 64 F.3d 1171, 1174 (8th Cir. 1995) (citation omitted). “Factual variations in the individual claims will not normally preclude class certification if the claim arises from the same event or course of conduct as the class claims, and gives rise to the same legal or remedial theory.” *Alpern v. Utilicorp United, Inc.*, 84 F.3d 1525, 1540 (8th Cir. 1996).

Here, the Plaintiffs and the other class members have been injured by the same pattern of self-dealing conduct as alleged in the First Amended Complaint. When a controlling shareholder improperly operates a business for his own benefit, it causes injury to all other shareholders. Similarly, when the board of directors of a company fails to supervise and/or remediate the destructive actions of management while

acknowledging that management is a “principal risk” to the company, it harms all shareholders. Further, when a recapitalization process is tainted, flawed and designed to upstream equity to only a few shareholders who control the business, it affects all other shareholders, as well as option holders. The named Plaintiffs’ claims are typical of the claims of all those similarly situated and the “typicality” prerequisite is also met.

4. Adequacy

Fed. R. Civ. P. 23(a) also requires that the plaintiffs must adequately protect the interests of the class. “The focus of Rule 23(a)(4) is 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.” *Burch v. Qwest Communications Intern., Inc.*, Civil No. 06-3523, --- F. Supp. 2d ----, 2009 WL 5812530, at *22 (D. Minn. Dec. 16, 2009) (quoting *Paxton*, 688 F.2d at 562–63). Both aspects of the adequacy requirement are met in this case.

First, the proposed class representatives and other class members all share common interests. The Plaintiffs, like the other class members, have been damaged as a result of the alleged breaches of fiduciary duties of care, candor, loyalty, Defendants Sadek’s and Kiesel’s misrepresentations, the conversion of equity and the unfair recapitalization process which resulted in an unfair price. The same wrongful acts committed in orchestrating the conversion and upstreaming of common and Series A shareholder equity also resulted in the trampling of the rights of RTI option holders.

Second, Plaintiffs have demonstrated that they are committed to conducting the vigorous prosecution required to prove Defendants’ liability and obtain a remedy for the

entire Class. The Plaintiffs retained counsel to investigate and then pursue claims and agreed to pay out-of-pocket for all costs associated with this representation. Further, each of the four named Plaintiffs brings unique experiences, background and various types of investments in RTI to their role as class representatives. *See* First Amended Complaint, ¶¶ 1-4.

- Mr. Tate was one of the original investors in RTI, served on the RTI Board of Directors during 2001 and 2002, owns RTI common stock and options, has monitored his investment in RTI regularly throughout the years as he was heavily relying on the investment in connection with his retirement, brings an accounting/financial background to his desired role as a class representative, has been active in the monitoring of the litigation by attending depositions (including his own) and hearings, and has committed himself to act fairly with respect to all members of the putative class.⁵
- Mr. Shuster was also one of the original investors in RTI, owns common stock in RTI, served for a limited time on the RTI Board of Directors shortly after it was incorporated, is an author, brings a technical engineering background to his desired role as a class representative, has actively monitored the litigation by attending depositions (including his own), has committed himself to pay costs associated with the litigation while pledging to act fairly on behalf of all members of the putative class.⁶
- Mr. Ayers hails from Tucson, Arizona, is a former guidance counselor in the Arizona school system, flew from Arizona to Minneapolis to attend his deposition on March 22, 2010, owns common stock in RTI along with his son, has actively monitored the litigation and has pledged to act fairly with regard to the interests of all members of the putative class.

⁵ At the time of the writing this memorandum, Mr. Tate's deposition transcript from his March 24, 2010 deposition is not available to cite. However, according to his recent deposition testimony, Mr. Tate has been in frequent communications with numerous RTI shareholders keeping them apprised of the status of the litigation. In order to assist in meeting his obligations to pay costs, Mr. Tate has received contributions from approximately 35 similarly situated shareholders who also feel wronged. Mr. Tate's dedication to remedy the wrongdoing has made him the de facto class representative.

⁶ Mr. Shuster's deposition was taken on March 23, 2010 and his transcript is not yet available.

- Mr. Evanson is a recent addition to this action. Mr. Evanson hails from the State of Washington, was a customer of the company from which RTI was spun off, purchased preferred stock in RTI in 2001 and owns common stock, has agreed to pay costs associated with the litigation and has agreed to fly to Minneapolis to have his deposition taken in early April.

Any one of these individuals is clearly “adequate”, but collectively they ensure the protection of the interests of all RTI shareholders who have been harmed.

Additionally, the requirement of adequacy of representation is met by the qualifications of class counsel herein. *See Mathers v. Northshore Mining Co.*, 217 F.R.D. 474, 486 (D. Minn. 2003) (finding adequacy of counsel based on previous experience and expertise). Attached as Exhibit C to the Affidavit of Nathan Brennan are the respective firm resumes of Anthony Ostlund Baer & Louwagie P.A. and Lockridge Grindal Nauen P.L.L.P. Both firms enjoy a great deal of expertise in securities-related class action litigation. Further, vigorous pursuit of this litigation is already shown by the detailed factual allegations described in the First Amended Complaint and the diligence demonstrated by the extensive discovery already completed and currently ongoing. *Dirks v. Clayton Brokerage Co. of St. Louis Inc.*, 105 F.R.D. 125, 133 (D. Minn. 1985) (noting previous class action experience and successful defeat of motion to dismiss in concluding that “no doubt exists that plaintiffs’ counsel are able to handle this action”).

Consequently, the Plaintiffs as well as their choice for Class counsel meet the requirements of Rule 23(a)(4) and (g)(1)(C)(i).

C. Plaintiffs Have Met the Rule 23(b) Requirements.

In addition to satisfying all the criteria of Rule 23(a), a party seeking class certification must satisfy one of the requirements of Rule 23(b). As demonstrated below, Plaintiffs have satisfied both prongs of Rule 23(b)(3), which requires (1) “that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members,” and (2) “that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.” Fed. R. Civ. P. 23(b)(3).

1. Common Questions of Law and Fact Predominate.

Common issues of fact and law clearly predominate over any individual or non-common issues that may arise. *See* discussion *supra* at pp. 7-9. In determining whether common questions predominate over individual questions for the purposes of Rule 23(b)(3), predominance will be found where generalized evidence may prove or disprove elements of a claim, since such proof obviates the need to examine the elements individually. *In re Potash Antitrust Litig.*, 159 F.R.D. 682, 693 (D. Minn. 1995).

In order to prevail on their breach of fiduciary duty claims, Plaintiffs will prove: (1) that Defendants owe duties of loyalty, care and candor to the shareholders of RTI; (2) that Defendants breached those duties through reckless and self-dealing conduct designed to enrich themselves; and (3) the amount of damages Class members sustained as a result. *See Turner v. Bernstein*, 768 A.2d 24, 26 (Del. Ch. 2000) (approving class certification because “[t]his case requires a determination of whether corporate fiduciaries have committed breaches of fiduciary duty in connection with a corporate transaction and, if

so, what the appropriate class-wide remedy should be. Because those issues involve questions of law and fact common to the entire ‘Proposed Class’ and because there are no material questions of law or fact dependent on the individual circumstances of members of the Proposed Class, Rule [Chancery Court] 23(1)(b) certification is appropriate.”).

Moreover, with respect to Plaintiffs’ claim for misrepresentation (or breaches of duty of candor), courts have continually recognized that common issues of law and fact will generally predominate in actions alleging that materially false representations or omissions of material fact were made to large groups of investors. *See, e.g., Mooney v. Allianz Life Ins. Co. of North America*, Civil No. 06-545, 2009 WL 511572, **6–7 (D. Minn. Feb. 26, 2009) (finding common issues predominate in fraud class action case because almost every class member received same misrepresentation); *Glen v. Fairway Independent Mortg. Corp.*, No. 4:08cv730, --- F.R.D. ----, 2010 WL 623675, at *8 (E.D. Mo. Feb. 22, 2010) (finding that common questions of fact predominated where class members received nearly identical representations and primary issue was legality of defendant's non-disclosure).

Here, the Plaintiffs and all members of the Class received the same confusing and misleading information from the Defendants in connection with the unfair recapitalization process. *See Pope v. Harvard Bancharges, Inc.*, 240 F.R.D. 383, 391 (N.D. Ill. 2006) (“[M]inority shareholders all received substantially similar communications and the court will examine those in determining the defendants’ liability.”). Courts in the Eighth Circuit have also found that where a complaint alleges that defendants by virtue of a common course of conduct have made false or misleading

representations and thereby have caused damages to the Class, common issues predominate. *See In re Select Comfort Corp. Securities Litigation*, 202 F.R.D. 598, 611 (D. Minn. 2001) (Rule 23(b)(3) predominance requirement satisfied where alleged fraudulent representations related to stock issuance constituted a common course of conduct); *Metge v. Baehler*, 77 F.R.D. 470, 477 (D. Iowa 1978) (“The Court is satisfied, however, that plaintiffs’ allegations of conspiracy and material omissions and nondisclosures common to the class are sufficiently predominant to warrant class action certification ... it is clear that the primary questions to be resolved are whether a conspiracy to defraud existed and whether defendants pursued a common course of material nondisclosures and omissions.”).

Further, the Plaintiffs and Class members all suffered damages as a result of Defendants’ conduct and in proportion to the number of shares that they owned, making computation relatively straightforward once a method of calculating damages is selected. *Pope*, 240 F.R.D. 391–92 (noting that damages based on proportionate ownership of shares are “easy to compute”). In sum, Rule 23(b) is satisfied because common issues of fact and law predominate.

2. **A Class Action Is Superior to Other Available Methods for the Fair and Efficient Adjudication of the Controversy.**

Plaintiffs’ proposed class action also satisfies Rule 23(b)’s superiority requirement, which provides that the following factors should be considered in assessing the superiority of class resolution of plaintiffs’ claims:

the interests of members of the class in individually controlling the prosecution...of separate actions; B) the extent

and nature of any litigation concerning the controversy already commenced by...members of the class; C) the desirability...of concentrating the litigation of the claims in the particular forum; D) the difficulties likely to be encountered in the management of the class action.

Fed. R. Civ. P. 23(b)(3). Each of those factors weighs in favor of a determination that a class action is the superior method for resolving the claims that the proposed class representatives allege on behalf of the members of the Class.

First, “the interest of members of the class in individually controlling the prosecution ... of separate actions” is minimal here. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 616 (1997). “A class action is a superior form of litigation to address ‘the rights of groups of people who individually would be without effective strength to bring their opponents into court at all.’” *Jancik v. Cavalry Portfolio Services, LLC*, Civil No. 06-3104, 2007 WL 1994026, at *9 (D. Minn. July 3, 2007) (quoting *Amchem*, 521 U.S. at 617). The costs and expenses of such individual actions, when weighed against the individual recoveries obtainable, would be prohibitive. *See Deposit Guar. Nat’l Bank v. Roper*, 445 U.S. 326, 338 (1980) (noting that class-action enable plaintiffs “to bring cases that for economic reasons might not be brought otherwise”); *Dirks v. Clayton Brokerage Co. of St. Louis Inc.*, 105 F.R.D. 125, 137 (D. Minn. 1985) (“[V]irtually all of the investors do not have a sufficient stake in litigating the case to pursue the action, but a class action will allow the case to proceed”). Second, it would promote economy and efficiency of decisions to concentrate the litigation in this forum, where Defendants and

many of the documents relevant to the proposed class representatives' claims are located.⁷ Finally, there is no reason to expect any difficulties in the management of this action as a class action, given its relatively small size.

Other courts have recognized the superiority of class actions involving shareholders and securities. *See Hastings-Murtagh v. Texas Air Corp.*, 119 F.R.D. 450, 459–60 (S.D. Fla. 1988) (finding a class action to be superior method for the fair and efficient adjudication of claims seeking damages for a breach of fiduciary duty to employee–shareholders); *Nelsen v. Craig-Hallum, Inc.*, 659 F. Supp. 480, 487 (D. Minn. 1987) (observing that courts have recognized that class actions are “a particularly appropriate and desirable means to resolve claims based on the securities laws”). While Plaintiffs’ claims do not expressly invoke federal securities laws, the claims of misrepresentation and breach of fiduciary duties draw upon some of the same prohibitions embodied in securities laws designed to protect shareholders.

The granting of class certification in this case will secure the rights of those investors who suffered wrongs that cannot otherwise be redressed because it would not be economically feasible to retain individual counsel or otherwise pursue individual actions. *Vernon J. Rockler, Inc. v. Graphic Enterprises, Inc.*, 52 F.R.D. 335, 347 (D. Minn. 1971) (“a class action must be deemed the only practical method of litigating these issues when the complex nature of the litigation and the comparatively small individual

⁷ Defendants have tacitly acknowledged this fact. While an appraisal proceeding is pending in Delaware Chancery Court for a subset of this proposed Class, it has been agreed that the discovery taking place in this action may be used in the Delaware action. Further, it is probable that resolution of this action may moot out the pending Delaware action.

financial interests are considered.”); *see also In re Potash*, 159 F.R.D. at 699. Even a cursory perusal of Exhibit B to the Brennan Affidavit shows that some of the putative class members enjoy very small holdings in RTI stock or options. A class action is the only option available to those investors who could not hope to bring an individual action given that the potential benefit from such action would not necessarily outweigh the costs of individual litigation. As the Supreme Court noted in circumstances similar to these, “[c]lass actions...permit the plaintiffs to pool claims which would be uneconomical to litigate individually ... most of the plaintiffs would have no realistic day in court if a class action were not available.” *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 809 (1985).

CONCLUSION

For all the above reasons, Plaintiffs respectfully requests that the Court enter an Order similar to that proposed by Plaintiffs which would (1) certify the Class as proposed; (2) appoint Plaintiffs as Class representatives; (3) appoint Anthony Ostlund Baer & Louwagie P.A. and Lockridge Grindal Nauen P.L.L.P. as Class counsel; and (4) establish a timeframe for the approval and mailing of class notice.

Dated: March 31, 2010

**ANTHONY OSTLUND BAER
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