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11 UNITED STATES DISTRICT COURT
12 CENTRAL DISTRICT OF CALIFORNIA
13

14 MAGALY EAGAN and CAROL A.
15 SPINNER, individually and on behalf of
all other similarly situated,

16 Plaintiffs

17 v.

18 AXA EQUITABLE LIFE INSURANCE
19 COMPANY and Does 1-10,

20 Defendant.
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CASE NO. CV 06-7637 DSF (JTLx)

CLASS ACTION

**MEMORANDUM OF POINTS
AND AUTHORITIES IN SUPPORT
OF PLAINTIFFS' MOTION TO
CERTIFY THIS ACTION AS A
CLASS ACTION AND APPOINT
PLAINTIFFS' COUNSEL AS
CLASS COUNSEL**

Judge: Hon. Dale S. Fischer
Date: August 18, 2008
Time: 1:30 p.m.
Courtroom: 840

Complaint Filed: November 30, 2006

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1 **INTRODUCTION**

2 Pursuant to Federal Rules of Civil Procedure, Rule 23, Plaintiffs Magaly
3 Eagan and Carol Spinner (collectively referred to hereafter as “Plaintiffs”)
4 respectfully move this Court for an order certifying this action as a class action and
5 appointing The Sturdevant Law Firm (“Sturdevant”), through Mark T. Johnson,
6 and Paul Adelman of The Law Offices of Paul Adelman, as class counsel. The
7 proposed class for which certification is sought is as follows:

8 All retired employees and independent contractor insurance agents
9 formerly employed by Equitable who received retiree health care
10 benefits from Equitable at any time after December 1, 2000, or who
11 will receive such benefits hereinafter, excluding any retired agents
12 who are held to have released their rights as members of the settling
13 class in *Fischel, et al. v. The Equitable Life Assurance Society of the*
14 *United States*, Case No. 96-04202 VRW, United States District Court,
15 Northern District of California.

16 As argued herein, each of the prerequisites to class certification set forth in
17 Rule 23(a) are satisfied in this case. There is no dispute as to numerosity, as
18 required by Fed. R. Civ. P. 23(a)(1), as AXA Equitable Life Insurance Company
19 (“Equitable”) has conceded that approximately 3,388 retirees fall within the class
20 definition and has agreed that the putative class is sufficiently numerous to make
21 joinder impractical. Commonality exists, as required by Fed. R. Civ. P. 23(a)(2),
22 because the putative class members are bound by the common legal issues that are
23 at the core of this case: (1) whether the reduction in health benefits imposed on
24 class members by Equitable’s implementation of a cap on its contributions to the
25 cost of such benefits were authorized by amendments to the company’s health
26 benefits plan (hereafter “the Plan”), and (2) whether such amendments were
27 validly adopted in compliance with the procedures required for amending the Plan
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1 based upon the terms of the Plan itself and applicable law governing corporate
2 decisions. Plaintiffs' claims are typical of the claims of all class members,
3 satisfying the typicality requirement of Fed. R. Civ. P. 23(a)(3) because they arise
4 from a common set of facts and are based upon the same legal theories. Plaintiffs
5 Eagan and Spinner and the proposed class counsel are adequate representatives of
6 the proposed class, as required by Fed. R. Civ. P. 23(a)(4), since their interests are
7 aligned with the class and counsel are experienced in class actions of this nature.

8 This action also satisfies the criteria set forth in Fed. R. Civ. P. 23(b)(1)(A),
9 23(b)(2), and 23(b)(3), and may, therefore, be maintained as a class action under
10 any of those provisions of Rule 23. Certification under Fed. R. Civ. P. 23(b)(1)(A)
11 is appropriate because separate actions would create the risk of inconsistent
12 adjudications as to whether Equitable's implementation of a cap on its health care
13 contributions was valid or not. Such inconsistent adjudications would require that
14 Equitable apply the same ERISA benefit plan differently to similarly situated
15 employees. Certification under Fed. R. Civ. P. 23(b)(2) is also appropriate because
16 Equitable, by adopting and applying its cap on employer contributions to the costs
17 of retiree benefits based upon purported amendments to its health care benefits
18 plan applicable to all retirees, has acted on grounds that apply generally to the class
19 rather than on an individual basis. Injunctive and declaratory relief on behalf of
20 the class as a whole is appropriate and is the primary relief sought by Plaintiffs on
21 behalf of the class. Finally, should the Court conclude that certification under Fed.
22 R. Civ. P. 23(b)(2) is not appropriate, it can and should certify the action as a class
23 action based upon Fed. R. Civ. P. 23(b)(3) because common issues arising out of
24 the lawfulness of Equitable's conduct predominate over any individual issues and
25 because the prosecution of this action as a class action is superior to separate
26 actions or to any other available method for fairly and efficiently adjudicating the
27 controversy presented by this action.

1 Plaintiffs Eagan and Spinner thus respectfully request that the Court grant
2 this motion and certify this action as a class action under one or more of the
3 provisions authorized by Fed. R. Civ. Proc. 23(b).¹

4 STATEMENT OF FACTS

5 Plaintiffs Magaly Eagan and Carol Spinner are retired former employees of
6 the Defendant Equitable. They filed this proposed class action to enforce their
7 rights under the ERISA retiree health care plan administered by Equitable in which
8 they are participants. In their First Amended Complaint (“FAC”) filed herein on
9 July 19, 2007 [Docket #34], they assert, on behalf of themselves and the proposed
10 class, five claims based upon Equitable’s breach of the applicable Plan.

11 Plaintiffs’ first claim for relief alleges that plan documents signed in 1993
12 (the “1993 Plan”), purporting to supersede the existing 1988 Plan, were not
13 properly adopted by Equitable as required by the 1988 Plan and controlling
14 corporate governance documents. (FAC ¶¶ 2, 21-26.) Accordingly, the 1993 Plan
15 never took effect and the 1988 Plan continues to govern the rights and obligations
16 of the parties. (*Id.*) Beginning in 2004, in misplaced reliance on the 1993 Plan,
17 Equitable breached its obligation arising from the 1988 Plan to employees by
18 capping its contribution for retired employee coverage to 200% of its 1993
19 contribution amount (the “200% Cap”). As a result of the implementation of this
20 cap on employer contributions, also known as the “Company Contribution Limit,”
21 members of the proposed class have since 2004 been forced to pay 100% of the
22 increases in the overall costs of their health care coverage. (*Id.*)

23
24 ¹ The parties have agreed to a hearing date and briefing schedule on this
25 motion which will permit a substantial portion of the discovery related to the
26 motion to be conducted after the issues are more tightly framed by the moving and
27 opposition papers. A stipulation to that effect has been filed with the Court and is
28 pending [Docket #57]. It is anticipated, therefore, that additional facts in support
of the motion based upon such discovery will be provided with Plaintiffs reply
memorandum.

1 Plaintiffs' second, third and fourth claims are pled in the alternative,
2 assuming, arguendo, that the 1993 Plan was properly adopted. Plaintiffs allege
3 therein that Equitable has not applied the 1993 Plan in accordance with its terms, in
4 three distinct respects, as follows: (a) Equitable has applied the 200% Cap to
5 current health plan options, even though the 1993 Plan limits its application to
6 specific enumerated health plan options that are no longer offered; (b) Equitable
7 applied the 200% Cap to all employees at the beginning of 2004 based upon a
8 determination that the trigger for the cap had been reached in the aggregate, despite
9 the fact that the 1993 Plan specifies that the 200% Cap will be applied on an
10 individually calculated basis; and (c) in applying the 200% Cap, Equitable
11 improperly calculates its contribution by imposing the cap when the aggregate
12 premium exceeds the cap rather than when its portion of the total premium exceeds
13 the cap. (FAC at ¶¶ 3, 30-42, 45-49, 52-58.)

14 Plaintiffs' fifth cause of action alleges that Equitable has breached its
15 contract with Employees by failing to continue to offer certain health care choices,
16 known as "Option 1" and "Option 2" ("Options"), under the 1993 Plan. (FAC at
17 ¶¶ 4, 61-67.)

18 In its Answer to the FAC ("Answer to FAC") filed herein on September 6,
19 2007 [Docket #42], Equitable contends that the claims asserted by Plaintiffs on
20 behalf of the proposed class "are barred by the 1993 Plan and properly adopted
21 amendments." (*Id.* at 15:16-20.) In particular, it alleges that in 2002 it adopted
22 additional Amendments to the Plan (the "2002 Amendments") that specifically
23 authorize and provide for the retiree health plan to operate in the manner that
24 Plaintiffs challenge. It asserts that the 2002 Amendments were to be effective
25 January 1, 2003 and applied January 1, 2004, and that they "authorize all of the
26 retiree health plan provisions challenged by Plaintiffs in the FAC." (*Id.* at 15:21-
27 24.)

1 Plaintiffs dispute Equitable's contention that the alleged 2002 Amendments
2 were properly adopted. Plaintiffs expect to establish, following additional
3 discovery on the merits, that the purported 1993 and 2002 amendments to the Plan
4 were not adopted in the manner required by the governing plan documents
5 themselves, applicable provisions of Equitable's corporate rules concerning who
6 was authorized to act on behalf of the corporation with respect to such decisions,
7 and generally applicable law governing corporate decisions.

8 Plaintiffs' claim, at its core, is that Equitable implemented a decision to
9 reduce its Plan costs by shifting 100% of any increases to those costs to the Plan's
10 participants and that this decision did not comply with the 1988 or 1993 Plan
11 requirements for amendment. As a result of this conduct, approximately 3,388
12 retirees have been affected. On behalf of themselves and the retirees affected by
13 Defendant's conduct, Plaintiffs seek injunctive relief preventing Equitable from
14 continuing to apply the changes in its Plan and from continuing to collect excess
15 employee contributions for health care coverage from the class of retirees for
16 which certification is sought herein. Plaintiffs also seek class wide restitution and
17 compensatory economic damages based upon the excess amount Plaintiffs and
18 class members were required to pay as a result of Equitable's improper
19 implementation of a cap on its contribution to the cost of their health care coverage.
20 (FAC at 16:1-13.)

21 ARGUMENT

22 I. THIS ACTION SATISFIES ALL OF THE REQUIREMENTS FOR 23 CLASS CERTIFICATION UNDER FED. R. CIV. P. 23

24 In order to certify a class under Federal Rules of Civil Procedure, rule 23, a
25 district court must find that: (1) the class is so numerous that joinder of all
26 members is impracticable; (2) there are questions of law and fact common to the
27 class; (3) the claims or defenses of the representative parties are typical of the
28

1 claims or defenses of the class; and (4) the class representative parties will fairly
2 and adequately protect the interests of the class. Fed. R. Civ. P. 23(a)(1)-(4).

3 In addition, the Court must find that at least one of the following three
4 conditions are satisfied: (1) the prosecution of separate individual actions creates
5 the risk of “inconsistent or varying adjudications” for individual class members
6 that “would establish incompatible standards of conduct” for Equitable;
7 (2) Equitable has “acted or refused to act on grounds generally applicable to the
8 class, thereby making appropriate final injunctive relief” for the class; or
9 (3) “questions of law or fact common to the members of the class predominate
10 over any questions affecting only individual members,” so a class action is superior
11 to other adjudication proceedings. Fed. R. Civ. P. 23(b); *Dukes v. Wal-Mart, Inc.*,
12 509 F.3d 1168, 1176 (9th Cir. 2007)

13 The party seeking class certification bears the burden of showing that each
14 of the requirements of Rule 23 are met. *Id.* In this case, based upon the arguments
15 made herein and the supporting declarations submitted with this motion, Plaintiffs
16 have met their burden of showing that all four of the conditions of Rule 23(a) and
17 at least one of the requirements of Rule 23(b) are satisfied. Accordingly,
18 certification of this action as a class action is proper. *See, e.g., Dukes*, 509 F.3d at
19 1176; *Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227, 1234 (9th Cir. 1996).

20 **A. This Action Satisfies the Class Certification Prerequisites of Fed.
21 R. Civ. P. 23(a): Numerous Class Members; Common Legal and
22 Factual Issues Arising out of Equitable’s Conduct; a Class
23 Representative with Claims Typical of the Class, and Adequate
24 Class Representative and Counsel.**

25 Under Fed. R. Civ. P. 23(a), class certification is proper if: (1) the class is so
26 numerous that joinder of all members is impracticable; (2) the class members share
27 common issues of law and fact; (3) the class representative’s claims are typical of
28 the class members; and (4) the class representative will fairly and adequately

1 protect the class' interests. Fed. R. Civ. P. 23(a)(1)-(4). Each of these
2 prerequisites is easily satisfied here, as shown below.

3 **1. The Putative Class Is So Numerous that Joinder is**
4 **Impracticable.**

5 The putative class satisfies the numerosity requirement of Rule 23, which
6 has been described as follows:

7 Numerosity, the first requirement under Rule 23(a), does not require
8 that joinder of all members be impossible, but only that joinder be
9 impracticable. Plaintiffs do not need to state the exact number of
10 potential class members, nor is a specific number of class members
11 required for numerosity. Rather, whether joinder is impracticable
12 depends on the facts and circumstances of each case.

13 *Xiufang Situ v. Leavitt*, 240 F.R.D. 551, 559 (N.D. Cal. 2007) (citations omitted);
14 *see also Wang v. Chinese Daily News, Inc.*, 231 F.R.D. 602, 606 (C.D. Cal. 2005).

15 The impracticality of joinder may be established by nothing more than sheer
16 number of persons in the proposed class alone. *Jordan v. County of L.A.*, 669 F.2d
17 1311, 1319 (9th Cir.), *vacated and remanded on other grounds*, 459 U.S. 810
18 (1982) (suggesting that class sizes of 39, 64, and 71 is sufficient to find that joinder
19 is impracticable and identifying cases in which classes with fewer than 50
20 members were certified). This is such a case. Equitable has represented in
21 response to Interrogatories served on it in this case that, as of January 1, 2007, the
22 Plan covered 3,388 retirees falling within the proposed class definition.
23 (Declaration of Mark T. Johnson, filed herewith ("Johnson Decl."), Ex. B (page
24 32) at 13:17-19.) This number is far beyond that which would be practicable to
25 join in this action as individually named plaintiffs. *Cf. Harik v. Cal. Teachers*
26 *Ass'n*, 326 F.3d 1042, 1051-52 (9th Cir. 2003) (class less than 15 is too small, but
27 class of 60 is sufficiently numerous). In recognition of this fact, Equitable has
28 stipulated that the class is so numerous that joinder of all members is

1 impracticable. (Johnson Decl. at 7:6-11.) Thus, this action satisfies the
2 numerosity requirement imposed by Fed. R. Civ. P. 23(a)(1).

3 **2. The Claims of the Putative Class Raise Common Issues of**
4 **Law and Fact.**

5 Rule 23(a)(2) requires that the members of the putative class be bound by
6 common issues of law and fact. The Ninth Circuit recently described the
7 requirement as follows:

8 Commonality focuses on the relationship of common facts and legal
9 issues among class members. *See, e.g.*, 1 Herbert B. Newberg &
10 Alba Conte, *Newberg on Class Actions* § 3:10 at 271 (4th ed. 2002).
11 We noted in *Hanlon v. Chrysler Corp.*, 150 F.3d 1011 (9th Cir. 1998):
12 “Rule 23(a)(2) has been construed permissively. All questions of fact
13 and law need not be common to satisfy the rule. The existence of
14 shared legal issues with divergent factual predicates is sufficient, as is
15 a common core of salient facts coupled with disparate legal remedies
16 within the class.” *Id.* at 1019. . . . As the district court properly noted,
17 “plaintiffs may demonstrate commonality by showing that class
18 members have shared legal issues by divergent facts or that they share
19 a common core of facts but base their claims for relief on different
20 legal theories.” *Dukes v. Wal-Mart Stores, Inc.*, 222 F.R.D. 137, 145
21 (N.D. Cal. 2004)] (citing *Hanlon*, 150 F.3d at 1019).

22 *Dukes*, 509 F.3d at 1177.

23 District Courts have recently made similar pronouncements concerning the
24 commonality test:

25 Rule 23(a)(2) requires that common questions of law or fact exist
26 among class members. To satisfy this requirement, which is to be
27 construed “permissively,” it is sufficient for class members to have
28 shared legal issues but divergent facts or, similarly, to share a

1 common core of facts but base their claims for relief on different legal
2 theories. The Rule 23(a)(2) commonality requirement is less rigorous
3 than that under Rule 23(b)(3), which requires that common issues
4 “predominate,” and the Ninth Circuit considers the requirements for
5 finding commonality under Rule 23(a) (2) to be “minimal.”

6 *Xiufang Situ*, 240 F.R.D. at 560 (citations omitted); *see also Sepulveda v. Wal-*
7 *Mart Stores, Inc.*, 237 F.R.D. 229, 242 (C.D. Cal. 2006); *Wang*, 231 F.R.D. at 607.

8 In *Xiufang Situ*, the district court held that plaintiffs could “easily satisfy”
9 the commonality requirement because “they all base their claims on the same legal
10 theory-namely, that Defendant has failed to comply with his obligations regarding
11 the implementation of Part D benefits for low-income individuals under the
12 Medicare statutes.” *Id.* Defendant argued that commonality was lacking because
13 “plaintiffs fail[ed] to identify a particular system-wide practice or policy that
14 allegedly caused harm to class members,” which the district court rejected:

15 Plaintiffs need not pinpoint a specific policy to satisfy the
16 requirements for class certification. To the contrary, it is sufficient for
17 Plaintiffs to allege that Defendant has failed to take action

18 *Id.* at 560-61 (citations omitted).

19 The claims of each of the members of the putative class in this case are all
20 grounded on a common set of alleged facts. Specifically, Equitable is alleged to
21 have implemented certain changes or reductions in benefits for retirees, including
22 the imposition of a 200% Cap on its contribution to the costs of medical benefits
23 for retirees, without properly amending its ERISA Health Benefit Plan. As a result
24 of such conduct, class members have been required to pay a consistently higher
25 premium for their health care benefits and/or have had more limited health care
26 coverage.

1 Similarly, the legal issues raised by the claims asserted in this case are
2 common to all members of the class because there are no significant differences
3 among class members in terms of their circumstances or the manner in which
4 Defendant acted toward them that would require the application of different legal
5 theories or analyses. The claims of all members of the putative class are based
6 upon the identical legal theories and are generally opposed by Defendant based
7 upon the same denials and affirmative defenses.² Plaintiffs allege on behalf of
8 themselves and the entire class that Equitable's changes in the health care benefits
9 it provides to retirees, including the limits on its contributions to the cost of such
10 benefits, violated the terms of the Plan then in effect and that any efforts by the
11 company to amend the Plan to authorize those changes were inadequate,
12 improperly carried out, and ineffective. As in *Xiufang Situ*, these legal theories
13 raise subsidiary legal issues that are common to all members of the putative class,
14 including Plaintiffs.

15 Federal courts, including the Ninth Circuit, have repeatedly held that the test
16 of commonality is a qualitative rather than a quantitative test, and that "there need
17 be only a single issue common to all members of the class." *In re Am. Med. Sys.,*
18 *Inc.*, 75 F.3d 1069, 1080 (6th Cir. 1996); *Dukes*, 509 F.3d at 1177; *Mullen v.*
19 *Treasure Chest Casino, LLC*, 186 F.3d 620, 625 (5th Cir. 1999) ("at least one
20 issue, the resolution of which will affect all or a significant number of the putative
21

22 ² Of the ten affirmative defenses asserted by Equitable in its Answer to the
23 FAC, only the first two, which allege that the named Plaintiffs released Defendant
24 from liability on the claims asserted, are based upon facts or legal theories that do
25 not apply to the class as a whole. Equitable admits, however, that approximately
26 one quarter of the class signed similar releases. (Johnson Decl., Ex. B (page 33) at
27 14:4-8.) Moreover, the question of whether such releases, by their terms, preclude
28 this action being brought by Plaintiffs or other class members who signed them is
but a single legal issue which will likely be resolved on summary judgment.
Further, since both of the proposed class representatives signed such a release, they
are well suited to represent those members of the proposed class who signed a
release as well as those who did not.

1 class members” (citations and quotes omitted)); *J.B. ex rel. Hart v. Valdez*, 186
2 F.3d 1280, 1288 (10th Cir. 1999); *Cal. Rural Legal Assistance v. Legal Serv.*
3 *Corp.*, 917 F.2d 1171, 1175 (9th Cir. 1990); *Savino v. Computer Credit, Inc.*, 173
4 F.R.D. 346, 352 (E.D.N.Y. 1997), *aff’d*, 164 F.3d 81 (2d Cir. 1998); *see also* 1 H.
5 Newberg & A. Conte, *Newberg on Class Actions* § 3:10, pp. 272-74 (4th ed. 2002).
6 Here, however, there are multiple core issues of both law and fact common to the
7 class, the disposition of any which will affect all of the members of the class.

8 These include:

- 9 • Whether the Plan documents signed in 1993 were properly adopted by
10 Equitable as required by the 1988 Plan and controlling corporate
11 governance documents.
- 12 • Whether the 1988 Plan or the 1993 Plan is the controlling Plan.
- 13 • Whether, starting in 2004, Equitable wrongly capped its contribution
14 for retired Employee coverage at a level equal to 200% of its 1993
15 contribution amount (the “200% Cap”).
- 16 • Whether the 1993 Plan limits application of the 200% Cap to certain
17 enumerated health plan options.
- 18 • Whether the 1993 Plan requires that the 200% Cap be implemented
19 based upon an individual calculation of when 200% of the company’s
20 1993 contributions were reached, as opposed to Equitable’s
21 application of the 200% Cap to the entire class as of the beginning of
22 2004 based on a calculation of its aggregated costs.
- 23 • Whether Equitable’s calculation methods are consistent with the
24 requirements of the 1993 Plan or overcharge the Employees.
- 25 • Whether the 1993 Plan documents require Equitable to offer the
26 health benefit choices known as “Option 1” and “Option 2” to
27 affected Employees.

- 1 • Whether, Equitable wrongly modified, limited, made unavailable or
2 terminated one or both of these Options, and substituted different
3 health care choices that offered inferior coverage and/or cost more
4 than coverage under Option 1 and Option 2, in violation of the terms
5 of the Plan document.
- 6 • Whether the purported 2002 Amendments were properly adopted by
7 Equitable as required by applicable law, the governing plan
8 documents and controlling corporate governance documents.
- 9 • Whether the purported 2002 Amendments authorized the
10 implementation of the 200% cap and other changes in the retiree
11 health plan challenged by Plaintiffs in the FAC.

12 (FAC ¶ 15; Answer to FAC ¶ 81)

13 Each of these enumerated issues is a core factual or legal issue, the
14 resolution of which will dispose of all or major portions of the claims of the class.
15 Consequently, this action satisfies the commonality requirement in Fed. R. Civ. P.
16 23(a)(2).

17 **3. The “Typicality” Requirement Under Rule 23(a) Is Satisfied**
18 **Because Plaintiffs Are Members of the Class, They Have**
19 **Suffered the Same Injury as Class Members and Their**
Claims Are Typical of Those of the Other Members of the
Class.

20 “Although the ‘commonality and typicality requirements of Rule 23(a) tend
21 to merge,’ each factor serves a discrete purpose. Commonality examines the
22 relationship of facts and legal issues common to class members, while typicality
23 focuses on the relationship of facts and issues between the class and its
24 representatives.” *Dukes*, 509 F.3d at 1183 n.12 (citations omitted). “The test of
25 typicality is whether other members have the same or similar injury, whether the
26 action is based on conduct which is not unique to the named plaintiffs, and whether
27 other class members have been injured by the same conduct.” *Hanon v.*

1 *Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992) (citation and internal
2 quotes omitted); 1 *Newberg on Class Actions*, *supra*, § 3:13, p. 327.

3 The Court in *Xiufang Situ* succinctly described the requirement of typicality:
4 Rule 23(a)(3) requires typicality, which, like commonality, the Ninth
5 Circuit interprets permissively. Typicality requires that named
6 plaintiffs be members of the class they represent and “possess the
7 same interest and suffer the same injury” as class members. The
8 named plaintiffs’ claims need not be identical to the claims of the
9 class; rather, claims are typical if they are “reasonably co-extensive
10 with those of absent class members.”

11 240 F.R.D. at 561 (citing *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1020 (9th Cir.
12 1998) (citations omitted) and *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 156,
13 102 S. Ct. 2364, 72 L. Ed. 2d 740 (1982)); *see also Gen. Tel. Co. of Sw.*, 457 U.S.
14 at 156 (“a class representative must be part of the class and possess the same
15 interest and suffer the same injury as the class members” (citations and internal
16 quotes omitted)); *Staton v. Boeing Co.*, 327 F.3d 938, 957 (9th Cir. 2003). In
17 *Xiufang Situ*, the named plaintiffs’ claims were typical because, like all class
18 members, they “are all alleged victims of the systemic failures [of Medicare].
19 Moreover, they each potentially face all of the system’s [alleged] deficiencies.”
20 240 F.R.D. at 561 (citations omitted).

21 Like all the putative class members, Plaintiffs are victims of Equitable’s
22 decision to reduce the costs incurred by the company for its Health Benefits Plan
23 by shifting 100% of any increases in such costs to the participants. There is no
24 dispute that this decision was applicable to all participants in the Plan. Plaintiffs’
25 claim, at its core, is that Equitable implemented this decision without complying
26 with the requirements for amending the Plan. This claim is the same for Plaintiffs
27 as it is for each member of the putative class. Plaintiffs are members of the
28

1 proposed class and have been and continue to be subject to the same alleged
 2 unlawful conduct as that which gives rise to the claims of the class as a whole.
 3 They suffered the same type of injury as that suffered by other members of the
 4 class, *i.e.*, an increase in their share of the cost of health care benefits, and have
 5 interests which are co-extensive with the putative class. Accordingly, the
 6 typicality prerequisite is satisfied.

7 **4. Plaintiffs Are Adequate Representatives of the Putative**
 8 **Class Because They Have No Interests Hostile to or**
 9 **Inconsistent With Those of the Class and Have Retained**
 10 **Qualified Counsel Experienced in Class Action Litigation of**
 11 **this Type.**

12 The fourth and final Rule 23(a) requirement – adequacy – requires an
 13 assessment of whether the class representative will fairly and adequately protect
 14 the interests of the class. This assessment is primarily focused on whether the
 15 proposed class representative has any interests antagonistic to or inconsistent with
 16 those of the class, shares interests with absent class members, and has retained
 17 qualified and competent counsel to represent the class. *Local Joint Exec. Bd. of*
 18 *Culinary/Bartender Trust Fund v. Las Vegas Sands, Inc.*, 244 F.3d 1152, 1162 (9th
 19 Cir. 2001) (“*Las Vegas Sands*”); *Crawford v. Honig*, 37 F.3d 485, 487 (9th Cir.
 20 1994); *Brown v. Ticor Title Ins. Co.*, 982 F.2d 386, 390 (9th Cir. 1992); *Fendler v.*
 21 *Westgate-California Corp.*, 527 F.2d 1168, 1170 (9th Cir. 1975).

22 Plaintiffs Eagan and Spinner are adequate representatives of the proposed
 23 class because their claims are the same as those of the class and their interests in
 24 challenging Equitable’s global reduction of benefits provided to retirees under the
 25 Plan are aligned with the class. (Declaration of Magaly Eagan, filed herewith
 26 (“Eagan Decl.”) ¶¶ 4-10; Declaration of Carol Spinner, filed herewith (“Spinner
 27 Decl.”) ¶¶ 4-11.) They and other members of the class have been treated similarly
 28 by Equitable and have suffered the same or similar injury as a result of its conduct
 toward them. Plaintiffs have no interests antagonistic to or in conflict with those of

1 the class, understand what their duties will be as class representatives, and intend
2 to prosecute this action, through their counsel, in the best interests of the class.
3 (Eagan Decl. ¶¶ 11-12; Spinner Decl. ¶¶ 12-13.) In addition, Plaintiffs have
4 retained qualified and competent counsel who are experienced in complex class
5 action litigation and consumer law, including issues arising in the context of
6 ERISA plans. (Johnson Decl. ¶¶ 2-7; Declaration of Paul Adelman, filed herewith
7 (“Adelman Decl.”) ¶¶ 2-9.) They have demonstrated, in this case and numerous
8 others, the willingness and ability to diligently prosecute such actions and to
9 commit the resources necessary to do so. (Johnson Decl. ¶¶ 4, 6, 7, 11; Adelman
10 Decl. ¶¶ 3-9, 13.)

11 **B. This Action Satisfies Not Only One, but Each of the Three**
12 **Conditions of Fed. R. Civ. P. 23(b).**

13 If all the prerequisites of Rule 23(a) are met, class certification is warranted
14 where at least one of the three prerequisites set forth in Fed. R. Civ. P. 23(b) is also
15 met.³ These include: (1) the prosecution of separate individual actions creates the
16 risk of “inconsistent or varying adjudications” for individual class members that
17 “would establish incompatible standards of conduct for the party opposing the
18 class”; (2) “The party opposing the class has acted or refused to act on grounds
19 generally applicable to the class, thereby making appropriate final injunctive
20 relief” for the class; or (3) “questions of law or fact common to the members of the
21 class predominate over any questions affecting only individual members,” so a
22 class action is superior to other adjudication proceedings. In this case, all three of
23 the conditions of Rule 23(b) are satisfied, permitting this Court to certify the action
24 as a class action on any one or more of those bases.

25
26 ³ The putative class need only satisfy one of Rule 23(b)’s prongs to be
27 sustainable. *See Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1186 (9th
28 Cir. 2001).

1 **1. Rule 23(b)(1)(A) Is Satisfied Because Individual Actions**
2 **Present the Risk of Inconsistent Judgments.**

3 Rule 23(b)(1)(A) takes in cases where the party is obliged by law to
4 treat the members of the class alike . . . or where the party must treat
5 all alike as a matter of practical necessity

6 *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 614, 117 S. Ct. 2231, 138 L.
7 Ed. 2d 689 (1997) (citation and internal quotes omitted); *Ortiz v. Fibreboard*
8 *Corp.*, 527 U.S. 815, 846-47, 119 S. Ct. 2295, 144 L. Ed. 2d 715 (1999).

9 This action falls under Fed. R. Civ. P. 23(b)(1)(A) because it seeks
10 injunctive relief requiring Equitable to halt application of the Company
11 Contribution Limit and to cease collecting from class members those amounts paid
12 by them that are attributable to the implementation of the cap on employer
13 contributions. The conduct which Plaintiffs seek to enjoin is based upon purported
14 amendments to an ERISA health care benefits plan which would be applicable to
15 all members of the proposed class if validly adopted. Thus, inconsistent
16 adjudications in separately prosecuted actions as to whether Equitable properly
17 adopted those amendments and is permitted to apply the cap on its contributions to
18 health care costs would create an “untenable situation.” *See In re Citigroup*
19 *Pension Plan ERISA Litig.*, 241 F.R.D. 172, 180 (S.D.N.Y. 2006) (“*In re*
20 *Citigroup*”). Specifically, such inconsistent adjudications would require Equitable
21 to apply the same ERISA Plan inconsistently to similarly situated retirees,
22 notwithstanding its statutory obligation to “treat the members of the class alike.”
23 *Id.* at 179.

24 In *In re Citigroup* the plaintiffs, who were participants in the defendant’s
25 ERISA-governed pension benefit plan, sought certification of a class of similarly
26 situated plan participants under both Fed. R. Civ. P. 23(b)(1)(A) and 23(b)(2).
27 The court found that the action satisfied the requirements for certification under
28 both (b)(1) and (b)(2), and stated, with respect to (b)(1)(A) certification:

1 The proposed class is well-suited for certification under Rule
2 23(b)(1). The language of subdivision (b)(1)(A), addressing the
3 risk of “inconsistent adjudications,” speaks directly to ERISA
4 suits, because the defendants have a statutory obligation, as
5 well as a fiduciary responsibility, to “treat the members of the
6 class alike.”

7 *Id.* (footnote and citations omitted).

8 If this controversy were litigated in two or more separate actions rather than
9 in a single action on behalf of the class of affected retirees, such actions could
10 result in inconsistent rulings regarding the validity of Equitable’s effort to amend
11 its Plan. Those rulings would require Equitable to apply different rules to the
12 plaintiffs in each of those actions. In addition, it would remain unclear what Plan
13 is actually in effect and controlling for those retirees who did not bring a separate
14 action and who are not bound by the rulings in those individual cases. Such a
15 result would, in the words of the court in *In re Citigroup*, be “untenable” and would
16 impose on Equitable incompatible standards of conduct. Accordingly, certification
17 under Rule 23(b)(1)(A) is appropriate.

18 **2. Certification of the Proposed Class Under Rule 23(b)(2) is**
19 **Appropriate Because Equitable Has Acted on Grounds**
20 **Generally Applicable to the Class, Making Injunctive and**
21 **Declaratory Relief as to the Class as a Whole Appropriate.**

22 Rule 23(b)(2) permits maintenance of a class action if the “party opposing
23 the class has acted or refused to act on grounds generally applicable to the class,
24 thereby making appropriate final injunctive relief or corresponding declaratory
25 relief with respect to the class as a whole.” Fed. R. Civ. P. 23(b)(2). It is not
26 necessary that every single class member be injured or aggrieved in the same way
27 by the defendant’s conduct, or that the defendant has acted directly against each
28 member of the class. It is sufficient if defendant’s actions “affect all persons

1 similarly situated.” *Christman v. Am. Cyanamid Co.*, 92 F.R.D. 441, 453 (N.D. W.
2 Va. 1981) (footnote omitted).

3 Certification under Rule 23(b)(2) “is not appropriate for all classes and ‘does
4 not extend to cases in which the appropriate final relief relates exclusively or
5 predominantly to money damages.’” *Dukes*, 509 F.3d 1186 (quoting Fed. R. Civ.
6 P. 23(b)(2), Adv. Comm. Notes to 1966 amend., 39 F.R.D. 69, 102; *Zinser*, 253
7 F.3d at 1195 (“certification under Rule 23(b)(2) is appropriate only where the
8 primary relief sought is declaratory or injunctive”). Nonetheless, Rule 23 (b)(2)
9 class actions may include claims for monetary damages as long as damages are not
10 the “predominant” relief sought, but only “secondary to the primary claim for
11 injunctive or declaratory relief.” *Dukes*, 509 F.3d at 1186; *Molski v. Gleich*, 318
12 F.3d 937, 947 (9th Cir. 2003). Where damages are related to injunctive relief, Rule
13 23(b)(2) certification is appropriate. *Probe v. State Teachers’ Ret. Sys.*, 780 F.2d
14 776, 780 (9th Cir. 1986) (“Class actions certified under Rule 23(b)(2) are not
15 limited to actions requesting only injunctive or declaratory relief, but may include
16 cases that also seek monetary damages.” (citation omitted)); *Morgan v. Laborers*
17 *Pension Trust Fund*, 81 F.R.D. 669, 681 (N.D. Cal. 1979).

18 Under Ninth Circuit law, the analysis of whether claims for monetary relief
19 “predominate,” for the purpose of determining whether certification under Rule
20 23(b)(2) is appropriate, requires an examination of the “specific facts and
21 circumstances of each case, focusing predominantly on the plaintiffs’ intent in
22 bringing the suit.” *Dukes*, 509 F.3d at 1186 (citing *Molski*, 318 F.3d at 950;
23 *Kanter v. Warner-Lambert Co.*, 265 F.3d 853, 860 (9th Cir. 2001); and *Linney v.*
24 *Cellular Alaska P’ship*, 151 F.3d 1234, 1240 n.3 (9th Cir. 1998)). Moreover, “the
25 issue . . . is whether Plaintiffs’ primary goal in bringing [the] action is to obtain
26 injunctive relief; not whether Plaintiffs will ultimately prevail.” *Dukes*, 509 F.3d at
27 1186. Finally, neither the size of potential monetary relief nor the fact that
28

1 punitive damages are sought will preclude a finding that that injunctive and
2 declaratory relief predominate, since “the predominance test turns on the *primary*
3 *goal* of the litigation – not the theoretical or possible size of the damage award.”

4 *Id.*

5 Based upon these principles, this case is ideally suited for class certification
6 pursuant to Rule 23(b)(2). First, there is no doubt that Equitable has acted on
7 grounds generally applicable to the class, making injunctive relief appropriate. It
8 implemented uniform changes to its health benefit practices with respect to
9 retirees, based upon the imposition of an across-the-board limitation on its
10 contribution to the costs of such benefits.

11 Second, although the relief sought by Plaintiffs on behalf of themselves and
12 members of the putative class includes restitution and damages, the primary relief
13 sought is equitable relief, in the form of a permanent injunction prohibiting
14 Equitable from improperly calculating and charging retiree health insurance
15 premiums in a manner inconsistent with the applicable Plan. (FAC at 16:1-13.)
16 As stated in their declarations, obtaining such equitable relief is Plaintiffs’ primary
17 goal in bringing this putative class action. (Eagan Decl. ¶ 10; Spinner Decl. ¶ 11.)
18 There is no reason to doubt the veracity of these statements.

19 Nor need the Court rely exclusively on Plaintiffs’ stated motivation for filing
20 this action. The nature and scope of the combined relief sought support a
21 conclusion that damages are incidental to the primary remedy of injunctive relief.
22 Although damages are sought based upon Equitable’s past unlawful collection of
23 excess health care contributions from members of the putative class, the primary
24 claim for such damages goes back in time only to the date on which Equitable
25 implemented the Company Contribution Limit, *i.e.*, January 1, 2004. Moreover,
26 although the amount of such potential damages for each class member is not yet
27 known, it is probable that Plaintiffs and members of the proposed class have an
28

1 equal if not greater pecuniary interest in obtaining the injunctive relief sought.
2 Given the rising cost of health care coverage and the fact that Equitable's practice
3 challenged herein will force members of the class to absorb 100% of the increased
4 cost of such coverage, there is little doubt that Plaintiffs have a strong pecuniary
5 interest in obtaining such equitable relief, since it is likely to substantially reduce
6 their share of the cost of their health care coverage going forward.

7 Finally, the damages sought by Plaintiffs on behalf of themselves and the
8 class are incidental to the equitable relief because they flow naturally from the
9 claim for such relief and, for the most part, do not require any valuation or
10 calculation other than that which would have applied had such relief been in effect
11 in the first instance. *Molski*, 318 F.3d at 949 ("incidental damages are damages
12 that flow directly from liability to the class as a whole on the claims forming the
13 basis for the injunction or declaratory relief") (citation, emphasis, and internal
14 quotes omitted). In other words, the monetary relief is in the nature of restitution,
15 merely requiring that Equitable restore to members of the class those sums which it
16 collected from them illegally based upon its improper implementation of the
17 Company Contribution Limit. (FAC at 16:1-10.)

18 For each of these reasons, the Court should conclude that the relief sought
19 by this action is predominantly declaratory and injunctive relief, and that
20 certification of the proposed class under Rule 23(b)(2) is appropriate.

21 **3. Certification of the Proposed Class Under Rule 23(b)(3) is**
22 **Warranted Because Issues of Law and Fact Predominate**
23 **Over Any Individual Issues and Class Treatment Is**
Superior to Other Available Methods for the Fair and
Efficient Adjudication of the Controversy.

24 This case may also be certified as a class action pursuant to Rule 23(b)(3),
25 which requires that "questions of law or fact common to the members of the class
26 predominate over any questions affecting only individual members, and that a class
27 action is superior to other available methods for the fair and efficient adjudication
28

1 of the controversy.” Fed. R. Civ. P. 23(b)(3). Both the “predominance” and
 2 “superiority” components of Rule 23(b)(3) are satisfied here, as argued below.

3 **a. Common Issues of Law and Fact Predominate Over**
 4 **Individual Issues**

5 The Ninth Circuit has explained the predominance requirement of Rule
 6 23(b)(3) as follows:

7 The Rule 23(b)(3) predominance inquiry tests whether proposed
 8 classes are sufficiently cohesive to warrant adjudication by
 9 representation.” *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 623,
 10 117 S. Ct. 2231, 138 L. Ed. 2d 689 (1997) (citation omitted). In
 11 contrast to Rule 23(a)(2), Rule 23(b)(3) focuses on the relationship
 12 between the common and individual issues. When common questions
 13 present a significant aspect of the case and they can be resolved for all
 14 members of the class in a single adjudication, there is clear
 15 justification for handling the dispute on a representative rather than on
 16 an individual basis. *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1022
 17 (9th Cir. 1998) (internal quotes omitted).

18 *Las Vegas Sands*, 244 F.3d at 1162-63. Predominance is determined not by
 19 counting the number of common issues but by weighing their significance.
 20 *Wamboldt v. Safety-Kleen Sys., Inc.*, No. C 07-0884 PJH, 2007 WL 2409200,
 21 at *13 (N.D. Cal. 2007) (“In determining whether common issues predominate, the
 22 court first identifies the substantive issues raised by the cause of action and the
 23 applicable defenses. It then inquires into the proof relevant for each issue.”)

24 As noted above, there are multiple issues of both fact and law which are
 25 common to the members of the class. These issues are not only numerous, they are
 26 the core issues in the case going to Equitable’s liability on the claims asserted and
 27 the predicate facts on which liability is based. They can be litigated to conclusion
 28 without having to take into account any differences that might exist in the

1 characteristics or circumstances of individual class members and, upon resolution,
2 will resolve the claims of all class members. In fact, because the claims asserted
3 by Plaintiffs on behalf of themselves and members of the proposed class stem from
4 an alleged common practice or course of conduct engaged in by Equitable with
5 respect to all class members, it is difficult to identify any significant individual
6 issues in this case that should defeat class certification. Specifically, Equitable
7 engaged in single course of conduct with respect to changes in the benefits it
8 provided to members of the class consisting of the reduction of the amounts it
9 would pay toward the costs of medical care. (FAC ¶¶ 20-26, 30-42, 45-49, 52-58,
10 61-67.) It did so without taking the necessary steps to properly amend its Plan to
11 authorize the changes it implemented. As a result, class members have been
12 uniformly forced to pay 100% of the costs of increases in their health care and will
13 be require to pay 100% of such increases in the future. The lawfulness of this
14 conduct; whether it complied with ERISA requirements of other applicable law
15 and the terms of the own rules of corporate governance, and the relief to which
16 class members might be entitled, are all common legal issues which flow from this
17 common set of facts and Equitable's common course of conduct toward class
18 members.

19 **b. Class Treatment Is Superior to Other Available**
20 **Methods for the Fair and Efficient Adjudication of**
21 **the Controversy.**

22 Rule 23(b)(3) also requires a finding that a class action is superior to other
23 available methods for the fair and efficient adjudication of the controversy. The
24 factors the district courts are to consider in making this finding include: (A) the
25 interest of members of the class in individually controlling the prosecution or
26 defense of separate actions; (B) the extent and nature of any litigation concerning
27 the controversy already commenced by or against members of the class; (C) the
28 desirability or undesirability of concentrating the litigation of the claims in the

1 particular forum; (D) the difficulties likely to be encountered in the management of
2 a class action. Fed. R. Civ. P. 23(b)(3); *see Zinser*, 253 F.3d at 1190-92.

3 The consideration of each of these factors weighs in favor of a determination
4 that the litigation of this action as a class action is superior to any other available
5 method for the fair and efficient adjudication of the controversy. First, there is no
6 reason to believe that individual class members will have a strong interest in
7 controlling the prosecution of their own separate actions. There are no significant
8 issues in this action or any potential individual action on the same claims which are
9 peculiar to individual members of the class. The only determination which will
10 need to be made on an individual basis at some point is the calculation of the
11 monetary relief, *i.e.*, than the amount of damages or restitution that might flow
12 from a judgment in favor of the Plaintiffs. As discussed above, those damages will
13 automatically flow from a judgment in favor of the class in this action and should
14 not need to be the subject of litigation. In other words, if the Court determines, as
15 Plaintiffs contend, that Equitable failed to properly amend its Plan to authorize the
16 use of the 200% cap and other changes challenged by this action, then Equitable
17 will be required to recalculate employee contributions based upon the rules in
18 effect before the implementation of such changes. That recalculation will be based
19 upon fixed formulas in place before Equitable applied the 200% Cap.

20 Accordingly, individual class members are not likely to have an interest in
21 prosecuting a separate action if this action proceeds as a class action on their
22 behalf.

23 Second, as far as is known to Plaintiffs or their counsel, there is no other
24 litigation pending or threatened by members of the class concerning this
25 controversy. Nor, with respect to the third factor to be considered under the Rule
26 23(b)(3) “superiority” requirement, is there any reason why the controversy should
27 not be litigated in this forum. As presently framed, the action seeks relief only on
28

1 behalf of retirees whose benefits have been subject to the 200% Cap on company
2 contributions imposed by Equitable. Plaintiffs propose certification of a class
3 limited to those individuals seeking relief under federal law. There is no reason to
4 believe that any other forum has a greater interest in serving as the forum for the
5 adjudication of this controversy than this Court.

6 Finally, there is no reason to believe that any significant difficulties will be
7 encountered in the management of this litigation should the case be certified as a
8 class action. Neither the claims asserted nor the facts on which they are based are
9 particularly complex. The same claims are asserted based upon the same legal
10 theories and the same facts alleged with respect to all of the members of the
11 proposed class, and no subclasses are proposed or are likely to be necessary.
12 *Cf. Zinser*, 253 F.3d at 1190-92 (finding manageability problems in negligence and
13 products liability case involving medical devices due to complex factual inquiry as
14 to numerous possible causes of harm and due to the application of differing state
15 laws).

16 Since no other realistic alternatives exist for the resolution of this
17 controversy other than through a class action, and no issues of manageability are
18 presented by the litigation of the action on a class wide basis, the superiority
19 portion of Rule 23(b)(3) is satisfied. *See* 7AA C. Wright, A. Miller & M. Kane,
20 Federal Practice & Procedure § 1779 (3d. ed. 2008). Consequently, this action
21 should be certified under Fed. R. Civ. P. 23(b)(3).

22 **II. COUNSEL FOR PLAINTIFFS SHOULD BE APPOINTED CLASS** 23 **COUNSEL**

24 When a district court certifies a class, it must appoint class counsel. Fed. R.
25 Civ. P. 23(g). In appointing class counsel, the Court must consider: (1) work
26 counsel has done in identifying or investigating potential claims in the action; (2)
27 counsel's experience in handling class actions, other complex litigation, and claims
28 of the type asserted in the action; (3) counsel's knowledge of the applicable law;

1 and (4) the resources counsel will commit to representing the class. Fed. R. Civ. P.
2 23(g)(1)(C)(i); *Xiufang Situ*, 240 F.R.D. at 561-62 (citing Fed. R. Civ. P.
3 23(g)(1)(C)(i) (citations omitted)).

4 Should this Court certify this action as a class action, Plaintiffs respectfully
5 request that it appoint Mark Johnson and Paul Adelman, and their respective firms,
6 The Sturdevant Law Firm and the Law Offices of Paul Adelman, as class counsel.
7 Plaintiffs do not expect that Equitable will present any argument that such an
8 appointment is improper based upon the factors set forth in Rule 23(g), and the
9 declarations submitted in connection with this motion clearly establish that
10 appointment of Plaintiffs' counsel as class counsel would appropriate in every
11 respect. (Johnson Decl. ¶¶ 2-7, 11; Adelman Decl. ¶¶ 2-9, 13.)

12 CONCLUSION

13 For the foregoing reasons, Plaintiffs respectfully requests that this Court
14 issue a decision and order finding that each of the prerequisites for class
15 certification have been satisfied, certifying this action as a class action, and
16 appointing Mark Johnson and Paul Adelman, and their respective firms, The
17 Sturdevant Law Firm and the Law Offices of Paul Adelman, as Class Counsel.

18
19 Dated: April 8, 2008

Respectfully Submitted,

20 THE STURDEVANT LAW FIRM
21 A Professional Corporation

22 LAW OFFICES OF PAUL ADELMAN

23 By: /s/ Mark T. Johnson

24 Mark T. Johnson
25 Attorneys for Plaintiff

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