

STATE OF MINNESOTA  
DISTRICT COURT

COUNTY OF DAKOTA  
FIRST JUDICIAL DISTRICT

**File No. C&99-6478**

Lawrence K. Davies, On behalf of himself and AI~ others similarly situated

Plaintiff  
And Counterclaim Defendant

v.

West Publishing Company,  
A Minnesota Corporation, and  
West Publishing Employees'  
Preferred Stock Association,  
An unincorporated association,  
Defendants.

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**ORDER GRANTING**  
RULE 23.02(c)  
CLASS  
CERTIFICATION  
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Whereas, the above-entitled matter came before the Honorable Richard C. Splcer, Judge of District Court on November 23, 1999, at the Dakota County Government Center, Hastings, Minnesota, upon Plaintiff's motion for *class* certification, pursuant to MINNESOTA

RULE OF CIVIL PROCEDURE 23.01 et seq.

**Whereas, Thomas J. Lyons, Sr., Esq.,** Cuy Bums, Fsq., and **Thomas It Lyons, Jr.,** appeared on behalf of Plaintiff. Vernon J. Vander Weide, Esq., and Thomas V. Seifert, Esq, appeared on behalf of Defendant.

Now, therefore, the Court having heard the arguments of counsel, IL~eing fully advised in the premises and upon **all** the *files*, mcords and proceedings herein, hereby *makes* the foflowing:

### ORDER

- 1) That Plaintiff has ad&jtiately satisfied the fcwr requirements for class certification under MINNESOTh RULES OF CIVIL PROCEOtJR~, RULE 2\$.Ot Furthermore, this actfon is properly certifiable under MIN;Ii~5OTA RULEs C\* CIVIL PROCEDURE, RULE 23333(c) for both classes (delineated in fl below).
- 2) That the Court hereby certifies two distinct classes for purposes of this action. At this time, notice may be provided to those who were depositors with ~e West Publishing Employees' Preferred Stock Assodation (hereinafter "WPSA~) from June 11,1993, to July 31, 1999. The Court explicitly reserves the right to modify the extent arid shape of these two classes.
  - a) As it pertains to the unallocated surplus, the following described Plaintiff Class is hereby ordered certified for purposes of litigation and trial:

All employees of West Publishing Company and its Affiliates and subsidiaries who maintained an account with funds on deposit with the West Publishing Employees' Preferred Stock Association, at any time between at least as early as **June ii, 1993** ard July 31, 1999.

b) As it pertains to the bonus distributions paid to all West employees, on a non pro rata basis, on 16 occasions over a 31-year period from 1967 to 1996, the following described Plaintiff Class is hereby ordered certified for purposes of litigation and trial!

**All employees of West Publishing Company and its Affiliates and subsidiaries who maintained an account with funds on deposit with the West Publishing Employees' Preferred Stock Association, at any time between at least as early as June 11, 1993 and July 31, 1999.**

**This initial class (b) is not intended to limit the class to account**

holders, as this determination shall be decided at a later **date**.

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- 3) **That Plaintiff Lawrence K Davies** is approved as the class representative for both classes.
- 4) That the Court reserves the right to modify, expand, or diminish the extent of the two classes should circumstances in the course of the proceedings so require. Furthermore, the Court reserves the merit arguments for later resolution.
- 5) That the Court hereby appoints a Master, pursuant to FED. R Civ. P. 53, to determine the amount of distribution to the aforementioned class members. The Master will be responsible for providing a notice plan to: **give** proper notice to the purported class members.
- 6) That Plaintiff's Motion to Strike the Affidavit of Cheryl Anderson is hereby

Denied.

7) The Court strongly recommends that the Parties enter into mediation in order to resolve Plaintiff's claims.

8) That the following memorandum of law is attached and incorporated hereto.

Dated: December 20, 1999

BY THE COURT:

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#### MEMORANDUM

In order to determine whether class certification is appropriate the Court will examine the class certification criteria of MINNESOTA RULES OF CIVIL PROCEDURE 23. In order to maintain a class action in Minnesota, all four prerequisites of MINNESOTA RULES OF CIVIL PROCEDURE, RULE 23.01 prerequisites to a Class Action/ must be satisfied. After these thresholds are met, then one of the three provisions of MINNESOTA RULES OF CIVIL PROCEDURE, RULE 23.02, must be satisfied. The Court will examine both of these rules in turn.

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I. MINNESOTA RULES OF CIVIL PROCEDURE, RULE 23.01 PRO., RULE 23.01 provides~

One or more members of a class may sue or be sued as representative parties on behalf of all only if

- (a) the class is so numerous that joinder of all members is impracticable;
- (b) there are questions **of law or fact common to the class**;
- (c) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and
- (d) the representative parties will fairly and adequately protect the interests of the class.

The burden of proving these prerequisites is on the representative party or parties seeking class certification. See *Lyons v. Boer*, 733 F.2d 1551, 1556 (11th Cir. 1984); *Nelson v. United States Steel Corp.*, 709 F.2d 675, 678-79 (11th Cir. 1983). The Court finds that these four requirements are satisfied in full.

#### A. Numerosity

First, the numerosity prong is easily fulfilled since no matter which way the date restrictions are imposed, the purported size of both classes is very large. The number of WPSA depositors number in the thousands. As far as a specific number requirement to certify a class, “[g]enerally less than twenty-one is inadequate, more than fifty adequate, with numbers between varying according to other factors,” *Cg & Iron Pine Co.*, 784 F.2d 1546, 1553 (10th Cir. 1986), *aff’d*, 479 U.S. 883 (1986). Here, there is little dispute that the numbers of purported

class members far exceed forty. According to the Joint and Separate Answer of Defendants and Counterclaim, paragraph 69, as of July 31, 1994, approximately 3,327 WPSA members had account balances, and as of July 31, 1998, approximately 2,891 WPSA members had account balances. Both parties agree that the potential class would be so numerous as to make joinder of all members impracticable. The numerosity requirement is fulfilled.

#### 1. Commonality

Second, the Court finds that there are questions of law or fact common to the classes. At this time, it is not appropriate for the Court to determine the merits of such questions of law or fact. The Court simply finds that questions of law or fact common to the classes do exist, and their existence fulfills the commonality requirement Defendant disagrees, yet Defendant delineates specific questions of law or fact in paragraph 73 of Defendant's Counterclaim: "Such common questions of law or fact include, but are not necessarily limited to, the following: the manner in which the unallocated surplus is to be distributed; who is to share in the distributions of the unallocated surplus; the amounts to

be distributed as of each distribution date; the dates as of which the unallocated surplus is to be distributed; and what constitutes a fair and equitable distribution of the unallocated surplus (See Defendant's Counterclaim, paragraph 73). Furthermore, the Court finds that the debate surrounding the possible existence and nature of a fiduciary relationship between WPSA and its depositors is applicable to all putative class members. The threshold of "commonality" is not high and the rule requires only that resolution of the common questions affect all or a substantial number of the class members." Jenkins v. Raymark Int'l, Inc., 782 F.2d 468, 472 (5th Cir. 1986). The questions of law and fact common to the two classes arise from the similar nature of the

relationships the individual class members ("depositors") had with WPSA. Most, if not all class members are concerned with whether or not WPSA owes a fiduciary duty to its depositors, and what kind of distribution scheme is appropriate. Resolution of these common questions affect all or a substantial number of the class members, hence the requirement of "commonality" is fulfilled.

### C. Typicality

Third, the Court finds that the claims or defenses of the representative parties are typical of the claims or defenses of the class. Although the issues of commonality and

typicality are separate inquiries, proof of each also tends to merge. MLIriflon v. Brown & Williamson Tobacco Corp. 959 F.2d 1566, 1569 (11th Cir. 1992). Commonality and typicality are factors that provide the necessary link between the class representatives and the class members. Hudson v. Delta Air Lines, Inc., 90 F.3d 451, 456 (1st Cir. 1996). Typicality focuses on the representative parties and looks to whether the parties have an

inter-compatible with that of the class sought to be represented. Streich v. American Family Mut. Auto Ins. Co., 399 N.W.2d 210, 215 (Minn. App.), *rev. denied*, (Minn. 1987). Davies' claim for a *pro rata* resolution of the WPSA surplus and bonus distributions is a claim "typical" of a claim that an individual class member would assert. Similarly, Davies' claim for breach of

fiduciary duty and claim for an accounting are also typical of claims an individual class member would assert.

#### 0. Adequacy of Representation

Fourth, the Court finds that the representative parties will fairly and adequately protect the interests of the class. Plaintiff Davies was a long-time employee of West and depositor in **WPSA**, and has an interest in the treatment of the class. Plaintiff's counsel are experienced in both litigation and class action lawsuits, and would vigorously pursue class claims and represent the interests of absentees. Defendants have not objected to either Plaintiff Davies as class representative, or to Plaintiff's counsel. This prong has been unchallenged, and is thus satisfied.

#### II. MINNESOTA RULES OF CIVIL PROCEDURE, RULE 2302

The requirements of MINNESOTA RULES OF CIVIL PROCEDURE, RULE 23.01, have been met, thus the Court will proceed to examine the validity of certification under MINNESOTA RULES OF CIVIL PROCEDURE, RULE 2302, 'Class Actions Maintainable' MINN. R. Civ. PRO., Rule 23.02 provides in full:

An action may be maintained as a class action if the prerequisites of Rule 23.01 are satisfied, and in addition:

- (a) the prosecution of separate actions by or against individual members of the class would create a risk of

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- (1) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or
- (2) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the

adjudications or substantially impair or impede their ability to protect their interests~ or

- (b) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; c:~r
- (c) the court finds that the questions of law or fact common to the members of the class predominate over any questions ~ffecting only individual members, and that a class action is superior to other available methods for the fair and efficient adp;idication of the controversy. The matters pertinent to the findings include:
  - (1) the interest of members of the class in individually controlling the prosecution or defense of separate actions;
  - (2) the extent and nature of any litigation concerning the controversy already commenced by or asainst merinbers of the class;
  - (3) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and
  - (4) the difficulties likely to be encountered iii the management of a class actionv .

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The Court finds that Rule 23.02(a) and (b) are inapplicable, but that certltkation is appropriate under Rule 23.02(c), Rule 23.02(c) requires that common qu~stions predominate over individual questions and that a class action is a supenoir method of adjudicating the controversy. As discussed earlier~ the common nature of this case, is the common pattern and practice of WPSA, its distribution policy and the adriiinistration of the WPSA Association. WPSA's administration of the deposit prtgram was common to all members of both classes, as all *WF'SA* depositors (and ~ll West non-depositors) received periodic non pro rata distributions. In addition, having a class action in this instance is a superior method *of* adjudicating this controversy. The sheer number of pi.rported class members makes class certification appropriate, as does the fact that many '::lass members would have small claims. Unique to a

Rule 23.02(c) class certification, class members must be given individual notice and the opportunity to opt out. See, Phillips Petroleum Co. v. Shutte, 472 U.S. 797, 811-12 (1985).

Certification is proper under MINNESOTA

RULES OF CIVIL PROCEDURE, RULE 23.03(c) for both classes.

Special emphasis is placed upon the fact that the merits of the plaintiff's claims are not now before the Court, MINNESOTA RULES OF CIVIL PROCEDURE, RULE 23.02, Rule 23 is a rule governing procedure, not a rule concerning substantive law determinations. "[T]he Court should look only to the facts which go to prerequisites of class certification and should not consider those which go to the merits of the claim!" Rubenstein v. Collins, 162

F.R.D. 5134, 536 (50 Tex. 1-95). Nevertheless, "evidence relevant to the commonality requirement is often intertwined with the merits." Nelson v. Delta Air Lines, Inc., 90 F.3d 451 (11th Cir. 1996). Indeed, in this matter the evidence related to class certification is

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Intertwined with the merits of *Plaintiff's* claims. In initially limiting the two classes to depositors **from** at any time between at least as early as June 11, 1993 and July 31, 1999, the Court is not making any ruling on the merits regarding Davies' claim for breach of fiduciary duty, and whether or not the 5 year statute of Limitations should apply. The Court's logic in providing notification to class members who were depositors for approximately the last 5 years is for the sake of reasonableness. As the language of the Order states, the classes are certified for those

who were depositors from “a’~ least as *early as June 11, 1999*, In the course of these proceedings, it may be necessary ~o expand (or limit) **the two classes**.

The Court reserves the right to modify the extent of the class. “in certifying a class, the Court should consider that certification is conditional and may be modified or vacated as *the case progresses towards resolution on the merits.*” Rubenstein. at 53~. Even after a certification order is entered, the judge remains free to modify it in the light of subsequent developments in the litigation.” Gen. Tel. Co. of the Southw~gL~,~alcon 457 U.S. 147, 160 (1982).

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