UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

KERI EVANS and TIMOTHY WHIPPS, on behalf of themselves and a class of all others similarly situated	)	
Plaintiffs,	)	CIVIL ACTION NO. 04-11380-WGY
v.	)	
JOHN F. AKERS, RONALD C. CAMBRE MARYE ANNE FOX, JOHN J. MURPHY, PAUL J. NORRIS, THOMAS A. VANDERSLICE, H. FURLONG BALDWIN, INVESTMENTS AND BENEFITS COMMITTEE, ADMINISTRATIVE COMMITTEE, BRENDA GOTTLIEB, W. BRIAN MCGOWAN, MICHAEL PIERGROSSI, ROBERT M. TAROLA, EILEEN WALSH, DAVID NAKASHIGE, ELYSE NAPOLI, MARTIN HUNTER, REN LAPADARIO, and UNKNOWN FIDUCIARY DEFENDANTS 1-100	)	
Defendants.	)	

MEMORANDUM AND ORDER

YOUNG, J. December 6, 2006

I. INTRODUCTION

The Court here considers the propriety of certifying a class consisting of all persons who were participants or beneficiaries of the W.R. Grace & Co. Savings and Investment Plan ("the Plan") at any time between July 1, 1999 and April 19, 2004.

II. BACKGROUND

A. Factual Allegations

W.R. Grace & Co. ("Grace") is a global supplier of catalysts and silica products, speciality construction chemicals and building materials, and container products. Am. Compl. [Doc. No. 53] ¶ 95. Grace has over 6,000 employees, operations in nearly 40 countries, and annual sales of approximately $2,000,000,000. Id.

Grace offered eligible employees the opportunity to participate in a Plan that permitted employees to save a certain percentage of their pay through regular payroll deductions and invest those savings in company stock through the Grace Stock Fund. Id. ¶¶ 42, 50. Matching company contributions were deposited in the employee stock plan and invested in Grace stock. Id. ¶ 56.

After January 1, 2001, however, employees were no longer permitted to invest matching company contributions in Grace stock but could otherwise direct investment of those funds. Id. ¶¶ 58, 61. These changes were made in light of "market uncertainty surrounding companies, like Grace, that have significant asbestos liability." Id. ¶ 62. Employees were still permitted to invest their own savings in Grace stock even as the stock price declined precipitously over the next two years. Id. ¶¶ 63, 65.

Finally, on April 17, 2003, the Grace Stock Fund ceased accepting contributions or allocations. Id. ¶ 67. From that point on, contributions were redirected to the Fixed Income Fund. Id. Nonetheless, past contributions were not redirected to other

funds unless the participant expressly decided to change his investment options. See id. ¶ 69.

On February 27, 2004, Plan fiduciaries informed participants that investment in Grace Stock was "clearly imprudent." Id. ¶ 70. State Street Bank & Trust Company ("State Street"), the fund's investment manager, commenced a program to sell Grace stock. Id. State Street sold all Grace stock by April 16, 2004. Id. ¶ 74. On April 19, 2004, the Grace Stock Fund ceased to exist. Id.

B. The Putative Class Action

Keri Evans and Timothy Whipps (the "Plaintiffs") are former employees of Grace who were participants of the Plan during the proposed class period. Id. ¶ 3. They allege that the defendants, as fiduciaries of the Plan, breached their duties to the Plan and Plan participants and beneficiaries in violation of ERISA, particularly with regard to the Plan's various and heavy holdings of Grace stock. Id. ¶ 4.

Specifically, the Plaintiffs allege that the defendants, each having certain responsibilities regarding, or authority over, the management of the investment of Plan assets, breached their fiduciary duties by (1) continuing to offer Grace common stock as a Plan investment option for participant contributions; (2) utilizing Grace securities for employer contributions to the Plan; and (3) maintaining the Plan's pre-existing heavy

investment in Grace securities when the stock was no longer a prudent investment for the Plan. Id. ¶ 5.

The Plaintiffs also allege that certain defendants charged with the selection and monitoring of other Plan fiduciaries failed to (1) provide the "monitored" fiduciaries with material information regarding the imprudence of investing Plan assets in Grace securities; and (2) remove certain such fiduciaries whose deficient performance damaged the Plan and its participants. Id. ¶ 6.

The Plaintiffs further allege that certain defendants failed to communicate to the Plan participants complete and accurate information regarding the Plan's investment in Grace securities sufficient to advise participants of the true risks of investing their retirement savings in Grace stock. Id. ¶ 7.

The Plaintiffs allege that the defendants breached their duty of loyalty to the Plan and its participants by failing to avoid or ameliorate inherent conflicts of interests which crippled their ability to function as independent, single-minded fiduciaries with only the Plan's and its participants' best interests in mind. Id. ¶ 8.

Finally, the Plaintiffs allege that even if certain fiduciaries were not involved in the breach of fiduciary duty, these fiduciaries knew of and did nothing to stop, or even abate, the particular breach and were therefore liable for breach of their co-fiduciary duties in violation of 29 U.S.C. § 1105. Id.

This action was brought on behalf of the Plan and seeks to recover alleged losses to the Plan under 29 U.S.C. §§ 1109, 1132. Id. ¶ 10.

III. DISCUSSION

The Plaintiffs face a barrier to their standing to bring the instant action. Although ERISA's remedial purposes are to be interpreted broadly,[1] **only participants, beneficiaries, fiduciaries, and the Secretary of Labor may bring a civil action.** See **29 U.S.C. § 1132(a).** In the present case, "[t]he requirement that a claimant be a 'participant' is a subject matter jurisdiction requirement as well as a standing issue under

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[1] As the First Circuit explained in Vartanian v. Monsanto Co., 14 F.3d 697, 702 (1st Cir. 1994):

> The legislative history of ERISA indicates that Congress intended the federal courts to construe the Act's jurisdictional requirements broadly in order to facilitate enforcement of its remedial provisions:
>
> > The enforcement provisions have been designed specifically to provide both the Secretary [of Labor] and participants and beneficiaries with broad remedies for redressing or preventing violations of the [Act] . . . . The intent of the Committee is to provide the full range of legal and equitable remedies available in both state and federal courts and to remove jurisdictional and procedural obstacles which in the past appear to have hampered effective enforcement of fiduciary responsibilities under state law or recovery of benefits due to participants. S.Rep. No. 127, 93d Cong., 2d Sess., 3 (1974), reprinted in 1974 U.S.C.C.A.N. 4639, 4871 (emphasis added).

ERISA." Katzoff v. Eastern Wire Products Co., 808 F.Supp. 96, 98 (D.R.I. 1992) (citations omitted).

ERISA defines a participant as "any employee or former employee . . . who is or may become eligible to receive a benefit of any type from [the] employee benefit plan." 29 U.S.C. § 1002(7). In Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 117-18 (1989), the Supreme Court interpreted the term "participant." Former employees, it held, may be considered participants if they have either "a reasonable expectation of returning to covered employment" or "a colorable claim to vested benefits." Id.

The Plaintiffs are no longer employees and they do not plan to return to work for Grace. See Grace Defs.' Opp'n to Mot. to Class Cert. [Doc. No. 99], Ex. A ¶ 5. Nevertheless, the Plaintiffs argue they ought not be denied standing in light of the First Circuit's "expansive" approach to standing and because they have a "colorable claim to benefits." Repl. Mem. in Further Support of Evans Pls.' Mot. for Class Cert. at 3.

The First Circuit's so-called "expansive" approach to standing was articulated in Vartanian. In that case, the court noted that Firestone was not a standing case, permitting continued broad interpretation of the jurisdictional parameters of ERISA in accordance with its remedial nature. 14 F.3d at 701-702. The court adopted a "zone of interest" analysis. Id. at 702 (citing Astor v. Int'l Bus. Machines Corp., 7 F.3d 533, 538-

39 (6th Cir. 1993)). As a consequence of that analysis, the First Circuit held that the plaintiff had standing to sue even though he was no longer an employee and had received the distribution of benefits. Id. at 702. The First Circuit explained that employers ought not be able to defeat standing through their own wrongful acts. Id. at 703.

The Plaintiffs in this case ask the Court to read Vartanian broadly. They argue that the breaches of fiduciary duty occurred while they were plan participants. See Corrected Repl. Mem. in Further Supp. of Evans Pls.' Mot. for Class Cert. [Doc. No. 107] at 8. Thus, in their view, denying them standing would allow the defendants to escape responsibility for the losses caused.

The defendants, on the other hand, read Vartanian narrowly. They argue it creates a unique exception to the Firestone definition of participant exclusively in cases where the employee would still be part of the plan (and thus entitled to higher benefit levels) but for the employer's malfeasance. Grace Defs.' Opp'n to Mot. for Class Cert. at 8-9.

The First Circuit's subsequent analysis of this issue is instructive. In Crawford v. Lamantia, 34 F.3d 28 (1st Cir. 1994), decided only seven months after Vartanian, the First Circuit "cut back sharply on Vartanian's broad approach to ERISA standing by emphasizing literal compliance with the Firestone definition of participant in a standing context." Nahigian v. Leonard, 233 F. Supp. 2d 151, 166 (D. Mass. 2002). In Crawford,

a former employee, after receiving his lump sum distribution of benefits, alleged breaches of fiduciary duties of its employer. 34 F.3d at 30-31. The First Circuit held that the plaintiff lacked standing because he had "failed to show that defendants' alleged breach of fiduciary duty had a direct and inevitable effect on [the employee's] benefits." Id. at 33.

With one exception,[2] district courts in the First Circuit have followed Crawford in holding that the Firestone exception applies only when the former employee would still be a participant but for the employer's alleged malfeasance. See, e.g., Lalonde v. Textron, Inc., 418 F. Supp. 2d 16, 19-20 (D.R.I. 2006). The Court follows this approach.

In this case, unlike in Vartanian, there is no evidence suggesting that the Plaintiffs' cessation of employment was casually connected to the defendant's alleged misconduct. Stripped of the Vartanian's "but for" exception, the Plaintiffs are subject to the general rule that former employees, who have received the full benefits to which plan documents entitled them, cannot be participants of a plan. See Lalonde, 418 F. Supp. 2d at 20.

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[2] See Sotiropoulos v. Travelers Indem. Co. of Rhode Island, 971 F. Supp. 52, 54-55 (D. Mass. 1997) (Ponsor, J.); see also Gray v. Briggs, 1998 WL 386177, No. 97 Civ. 6252(DLC), at *5-6 (S.D.N.Y. July 7, 1998); contra Eggert v. Merrimac Paper Co., Inc. Leveraged Employee Stock Ownership Plan and Trust, 311 F.Supp.2d 245, 254 (D.Mass. 2004) (Collings, M.J.).

Consequently, the Plaintiffs have standing only if they can assert a colorable claim to vested benefits. Since allegedly all plan assets suffered losses due to the defendants' imprudent investment in Grace stock and those losses directly affected the total of benefits the Plaintiffs received upon leaving the Plan, the Plaintiffs essentially claim they are entitled to "higher benefits" than those they already received.

The defendants argue that the Plaintiffs have asserted a claim not for benefits but for damages to the Plan. Grace Defs.' Opp'n to Mot. for Class Cert. at 6-7. To this end, the defendants cite a number of cases holding that former plan participants who have taken their lump sum distribution lack standing to sue for breaches of fiduciary duties. In Re RCN Litigation, 2006 WL 753149, No. 04-5068 (SRC), at *13-*14 (D.N.J. Mar. 21, 2006); Lalonde, 418 F. Supp. 2d at 20-21; Hargrave v. TXU Corp., 392 F.Supp.2d 785, 788-90 (N.D. Tex. 2005); see also Graden v. Conexant Sys., Inc., 2006 WL 1098233, No. Civ. 05-0695, at *2-*5 (D.N.J. Mar. 31, 2006). The Court finds these cases persuasive.

The distinction between benefits and damages is not easy to articulate. In Sommers Drug Stores Co. Employee Profit Sharing Trust v. Corrigan, 883 F.2d 345, 350 (5th Cir. 1989), the Fifth Circuit tried to explain the difference as follows:

> Clearly, a plaintiff alleging that his benefits were wrongly computed has a claim for vested benefits. Payment of the sum sought by such a plaintiff will not

> increase payments due him. On the other hand, a plaintiff who seeks the recovery for the trust of an unascertainable amount, with no demonstration that the recovery will directly effect payment to him, would state a claim for damages, not benefits.

In Hargrave, the district court relied on the Sommers analysis to conclude that the breach of fiduciary duty claims, virtually identical to those asserted here, constituted damages claims. In reaching its holding, the court conducted the following analysis:

> Plaintiffs' claims in this case are readily distinguishable from the claims made in Sommers. In Sommers, the plaintiffs argued that the full market value of the plan assets was greater than the amount they received when the assets were distributed. Sommers, 883 F.2d at 350. Stated another way, the total value of the plan assets was a certain amount that was calculable, and the plaintiffs argued that they did not receive that full calculable value because the defendants held back some of the proceeds for themselves. The Sommers plaintiffs sued to recover the rest of the benefits that were wrongfully withheld. See [i]d. Thus, the Fifth Circuit concluded that the plaintiffs' claims were in fact for vested benefits rather than for damages. Id.
>
> The Plaintiffs in this case, by way of contrast, do not allege that the Defendants[] held back a portion of the benefits of the plan. Rather, they argue that the amount in the entire plan was too small. Specifically, Plaintiffs allege that Defendants' investment in TXU stock resulted in an overall diminution of plan assets, which were then distributed to the Plaintiffs. The allegation is not that benefits were withheld, but that there should have been more benefits to go around. This argument states a claim for "a sum that possibly could have been earned" if Defendants had made prudent investment decisions with respect to plan assets. See Yancy [v. American Petrofina, Inc., 768 F.2d 707, 709 (5th Cir. 1985)]. The Plaintiffs have already received all the benefits that accrued under their Thrift Plan accounts. They are now seeking additional damages that might have accrued but for Defendants' alleged misconduct. See [i]d. These additional damages are speculative and cannot be considered as vested under ERISA. See [i]d.

> Unlike Sommers, the Plaintiffs' argument does not resemble an allegation that benefits were simply miscalculated and cannot be construed as a claim for vested benefits. On the contrary, Plaintiffs are demanding that Defendants make good to the Thrift Plan for the losses sustained as a result of the investments in TXU stock. This argument most closely resembles a claim for damages to the plan.

392 F. Supp. 2d at 789-90 (emphases in original). In this way, the distinction between benefits and damages is a real one, and "concepts must not be conflated in order to expand participant standing." Lalonde, 418 F. Supp. 2d at 21.

In the instant case, the Plaintiffs argue that if the fiduciaries had carried out their duties carefully and diligently, then the investment in Grace stock would either have been reduced or limited, and more prudent investments made. This is hardly a claim for vested benefits. Rather, the Plaintiffs seek the "lost return" on the funds that would have resulted from a more prudent and loyal investment of plan assets. These claims are best characterized as claims for damages, and speculative claims at that.

The nature of the defined contribution plan at issue further supports the Court's conclusion. In these types of investment plans, participants can direct their savings to one or more funds available to them. Thus, the Plaintiffs in this case could have avoided their losses merely by moving their savings to other funds. Also, they were not obligated to take their lump sum

distributions when they did. They could have taken their benefits before or after the proposed class period.

True, this matter is not without doubt. Some courts have upheld standing on the rationale that denying former employees the opportunity to bring their claims would permit employers to evade responsibility simply by paying such employees their vested benefits. See, e.g., Rankin v. Rots, 220 F.R.D. 511, 519-20 (E.D. Mich. 2004). This reasoning, however, renders obsolete the term "participant" as defined by ERISA and interpreted by the Supreme Court in Firestone. To allow the Plaintiffs to bring a suit for a speculative amount that might have been earned had these fiduciaries acted differently would be to ignore the fact that ERISA allows only former participants who have either a "reasonable expectation of returning to covered employment" or "a colorable claim to vested benefits" to bring suit. Firestone, 489 U.S. at 118. The Plaintiffs lack standing because they do not fall within either of these two categories of former participants permitted to bring suit.

IV. Conclusion

Since the Plaintiffs lack standing, this Court lacks subject matter jurisdiction. Katzoff, 808 F.Supp. at 98. Since the Plaintiffs lack standing, they may not seek relief on the behalf of the class. O'Shea v. Littleton, 414 U.S. 488, 494 (1974); Britt v. McKenney, 529 F.2d 44, 45 (1st Cir. 1976), cert. denied,

429 U.S. 854. Accordingly, the Motion to Certify Class [Docket No. 89] is DENIED. This case must be, and hereby is, DISMISSED.

SO ORDERED.

/s/ William G. Young

WILLIAM G. YOUNG
DISTRICT JUDGE

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1:04-cv-11380-WGY Evans v. Akers et al
William G. Young, presiding
Date filed: 06/17/2004
Date terminated: 12/06/2006 Date of last filing: 12/06/2006

Attorneys

Kenneth Betz 6425 Wadsworth #306 Arvada, CO 80003 303-239-9585 Assigned: 08/27/2004 LEAD ATTORNEY ATTORNEY TO BE NOTICED	**represe nting**	**Paul J. Norris (Defendant)**
Jeffrey C Block Berman DeValerio Pease Tabacco Burt & Pucillo One Liberty Square 8th Floor Boston, MA 02109 617-542-8300 617-542-1194 (fax) jblock@bermanesq.com Assigned: 09/12/2005 ATTORNEY TO BE NOTICED	**represe nting**	**David Mueller (Consolidated Plaintiff)**
		Jerry L. Howard, Sr. (Consolidated Plaintiff)
		Lawrence Bunch (Consolidated Plaintiff)
		Keri Evans (Plaintiff)
Katherine B. Bornstein Schiffrin & Barroway, LLP 280 King of Prussia Road Radnor, PA 19087 US 610-667-7706 610-667-7056 (fax) kbornstein@sbclasslaw.com Assigned: 02/22/2006 LEAD ATTORNEY ATTORNEY TO BE NOTICED	**represe nting**	**Keri Evans (Plaintiff)**
Sean T. Carnathan O'Connor, Carnathan and Mack LLC 8 New England Executive Park Suite 310 Burlington, MA 01803 781-359-9002 781-359-9001 (fax) scarnathan@ocmlaw.net Assigned: 02/07/2005 ATTORNEY TO BE NOTICED	**represe nting**	**State Street Bank & Trust Company TERMINATED: 02/21/2006 (Defendant)**
		State Street Global Advisors TERMINATED: 02/21/2006 (Consolidated Defendant)
		State Street Bank & Trust Company TERMINATED: 02/21/2006 (Defendant)

		State Street Bank and Trust Company (Consolidated Defendant)
Stanley M. Chesley Waite, Schneider, Bayless & Chesley Co., LPA One W. Fourth Street 1513 Fourth & Vine Tower Cincinnati, OH 45202 513-621-0267 513-621-0262 (fax) Assigned: 08/22/2005 LEAD ATTORNEY ATTORNEY TO BE NOTICED	**represe nting**	**David Mueller (Consolidated Plaintiff)**
		Jerry L. Howard, Sr. (Consolidated Plaintiff)
		Lawrence Bunch (Consolidated Plaintiff)
Edward W. Ciolko Schiffrin & Barroway, LLP Three Bala Plaza East Suite 400 Bala Cynwyd, PA 19004 610-667-7706 610-667-7056 (fax) eciolko@sbclasslaw.com Assigned: 06/17/2004 LEAD ATTORNEY ATTORNEY TO BE NOTICED	**represe nting**	**Keri Evans (Plaintiff)**
James R. Cummins Waite Schneider, Bayless & Chesley Co., LPA Fourth & Vine Tower 1 West Fourth Street Suite 1513 Cincinnati, OH 45202 513-621-0267 513-381-2375 (fax) jcummins@wsbclaw.com Assigned: 08/01/2005 LEAD ATTORNEY ATTORNEY TO BE NOTICED	**represe nting**	**David Mueller (Consolidated Plaintiff)**
		Jerry L. Howard, Sr. (Consolidated Plaintiff)
		Lawrence Bunch (Consolidated Plaintiff)
Glen DeValerio Berman DeValerio Pease One Liberty Square 8th Floor Boston, MA 02109 617/542-8300 617-542-1194 (fax) gdevalerio@bermanesq.com Assigned: 09/12/2005 ATTORNEY TO BE NOTICED	**represe nting**	**David Mueller (Consolidated Plaintiff)**
		Jerry L. Howard, Sr. (Consolidated Plaintiff)
		Lawrence Bunch (Consolidated Plaintiff)
Gretchen A. Dixon Arent Fox PLLC 1050 Connecticut Avenue, N.W. Washington, DC 20036 Assigned: 02/11/2005 ATTORNEY TO BE NOTICED	**represe nting**	**Administrative Committee (Defendant)**
		Investments and Benefits Committee (Defendant)
		Brenda Gottlieb (Defendant)

		H. Furlong Baldwin (Defendant) **John F. Akers (Defendant)** **Marye Anne Fox (Defendant)** **Michael Piergrossi (Defendant)** **Paul J. Norris (Defendant)** **Ronald C. Cambre (Defendant)** **Thomas A. Vanderslice (Defendant)** **W. Brian McGowan (Defendant)** **Officer John J. Murphy (Defendant)** **David Nakashige (Defendant)** **Eileen Walsh (Defendant)** **Elyse Napoli (Defendant)** **Martin Hunter (Defendant)** **Ren Lapadario (Defendant)**
Arthur W.S. Duff O'Melveny & Myers LLP 1625 Eye Street, N.W. Washington, DC 20006 US Assigned: 01/26/2006 LEAD ATTORNEY ATTORNEY TO BE NOTICED	**represe nting**	**Fidelity Management Trust Company TERMINATED: 10/24/2005 (Defendant)**
Robert N. Eccles O'Melveny & Myers 1625 Eye Street, N.W. Washington, DC 20006 202-383-5300 Assigned: 01/26/2006 LEAD ATTORNEY ATTORNEY TO BE NOTICED	**represe nting**	**Fidelity Management Trust Company TERMINATED: 10/24/2005 (Defendant)**
Caroline Turner English Arent Fox PLLC 1050 Connecticut Avenue, N.W. Washington, DC 20036 Assigned: 02/11/2005 ATTORNEY TO BE NOTICED	**represe nting**	**Administrative Committee (Defendant)**
		Investments and Benefits Committee (Defendant) **Brenda Gottlieb (Defendant)** **H. Furlong Baldwin (Defendant)** **John F. Akers (Defendant)** **Marye Anne Fox (Defendant)** **Michael Piergrossi (Defendant)** **Paul J. Norris (Defendant)** **Ronald C. Cambre (Defendant)** **Thomas A. Vanderslice (Defendant)** **W. Brian McGowan (Defendant)** **Officer John J. Murphy (Defendant)** **David Nakashige (Defendant)** **Eileen Walsh (Defendant)** **Elyse Napoli (Defendant)** **Martin Hunter (Defendant)** **Ren Lapadario (Defendant)**
Scott M. Flicker Paul, Hastings, Janofsky & Walker, LLP 875 Fifteenth Street NW Washington, DC 20005 202-551-1700 202-551-1705 (fax) scottflicker@paulhastings.com	**represe nting**	**State Street Bank & Trust Company TERMINATED: 02/21/2006 (Defendant)**

Assigned: 02/10/2005 ATTORNEY TO BE NOTICED		
Carol Connor Flowe Arent Fox PLLC 1050 Connecticut Avenue NW Washington, DC 20036-5339 202-857-6054 202-857-6395 (fax) flowe.carol@arentfox.com Assigned: 02/11/2005 ATTORNEY TO BE NOTICED	**represe nting**	**Administrative Committee (Defendant)**
		Investments and Benefits Committee (Defendant)
		Brenda Gottlieb (Defendant)
		H. Furlong Baldwin (Defendant)
		John F. Akers (Defendant)
		Officer John J. Murphy (Defendant)
		Marye Anne Fox (Defendant)
		Michael Piergrossi (Defendant)
		Paul J. Norris (Defendant)
		Ronald C. Cambre (Defendant)
		Thomas A. Vanderslice (Defendant)
		W. Brian McGowan (Defendant)
		W.R. Grace & Co. (Consolidated Defendant)
		Fred E. Festa (Consolidated Defendant)
		Robert M. Tarola (Consolidated Defendant)
		State Street Global Advisors TERMINATED: 02/21/2006 (Consolidated Defendant)
		David Nakashige (Defendant)
		Eileen Walsh (Defendant)
		Elyse Napoli (Defendant)
		Martin Hunter (Defendant)
		Ren Lapadario (Defendant)
John A.D. Gilmore DLA Piper Rudnick Gray Cary US LLP One International Place, 21st Floor 100 Oliver Street Boston, MA 02110-2600 617-406-6000 617-406-6100 (fax) john.gilmore@dlapiper.com Assigned: 09/15/2005 ATTORNEY TO BE NOTICED	**represe nting**	**Fidelity Management Trust Company TERMINATED: 10/24/2005 (Defendant)**
Terrence L. Goodman Waite Schneider Bayless & Chesley Co., LPA 1513 Fourth & Vine Tower One West Fourth Street Cincinnati, OH 45202 513-621-0267 Assigned: 09/26/2006 LEAD ATTORNEY ATTORNEY TO BE NOTICED	**represe nting**	**David Mueller (Consolidated Plaintiff)**
		Jerry L. Howard, Sr. (Consolidated

		Plaintiff) **Keri Evans (Plaintiff)** **Lawrence Bunch (Consolidated Plaintiff)**
Thomas J. Hart Slevin & Hart 1625 Massachusetts Avenue, N.W. Suite 450 Washington, DC 20036 202-797-8700 Assigned: 06/17/2004 LEAD ATTORNEY ATTORNEY TO BE NOTICED	**represe nting**	**Keri Evans (Plaintiff)**
Nancy S. Heermans Arent Fox PLLC 1050 Connecticut Avenue, N.W. Washington, DC 20036 202-857-6000 202-857-6395 (fax) heermans.nancy@arentfox.com Assigned: 06/09/2006 LEAD ATTORNEY ATTORNEY TO BE NOTICED	**represe nting**	**Administrative Committee (Defendant)**
		Investments and Benefits Committee (Defendant) **W. R. Grace Investment and Benefits Committee (Consolidated Defendant)** **W.R. Grace & Co. (Consolidated Defendant)** **Brenda Gottlieb (Defendant)** **David Nakashige (Defendant)** **Eileen Walsh (Defendant)** **Elyse Napoli (Defendant)** **Fred E. Festa (Consolidated Defendant)** **H. Furlong Baldwin (Defendant)** **John F. Akers (Defendant)** **Officer John J. Murphy (Defendant)** **Martin Hunter (Defendant)** **Marye Anne Fox (Defendant)** **Michael Piergrossi (Defendant)** **Paul J. Norris (Defendant)** **Ren Lapadario (Defendant)** **Robert M. Tarola (Consolidated Defendant)** **Ronald C. Cambre (Defendant)** **Thomas A. Vanderslice (Defendant)** **W. Brian McGowan (Defendant)**
Matthew C. Hurley Mintz, Levin, Cohn, Ferris, Glovsky & Popeo, PC One Financial Center Boston, MA 02111 617-542-6000 617-542-2241 (fax) mchurley@mintz.com Assigned: 02/04/2005 ATTORNEY TO BE NOTICED	**represe nting**	**Administrative Committee (Defendant)**

Investments and Benefits Committee (Defendant)
Brenda Gottlieb (Defendant)
H. Furlong Baldwin (Defendant)
John F. Akers (Defendant)
Officer John J. Murphy (Defendant)
Marye Anne Fox (Defendant)
Michael Piergrossi (Defendant)
Paul J. Norris (Defendant)
Ronald C. Cambre (Defendant)
Thomas A. Vanderslice (Defendant)
W. Brian McGowan (Defendant)
State Street Bank & Trust Company TERMINATED: 02/21/2006 (Defendant)
Fidelity Management Trust Company TERMINATED: 10/24/2005 (Defendant)
W. R. Grace Investment and Benefits Committee (Consolidated Defendant)
W.R. Grace & Co. (Consolidated Defendant)
David Nakashige (Defendant)
Eileen Walsh (Defendant)
Elyse Napoli (Defendant)
Fred E. Festa (Consolidated Defendant)
Martin Hunter (Defendant)
Ren Lapadario (Defendant)
Robert M. Tarola (Consolidated Defendant)
State Street Bank and Trust Company (Consolidated Defendant)
Unknown Fiduciary Defendants 1-100 (Defendant)
David Mueller (Consolidated Plaintiff)
Jerry L. Howard, Sr. (Consolidated Plaintiff)
Keri Evans (Plaintiff)
Lawrence Bunch (Consolidated Plaintiff)
Fidelity Management Trust Company TERMINATED: 10/24/2005 (Defendant)
State Street Bank & Trust Company TERMINATED: 02/21/2006 (Defendant)
State Street Global Advisors TERMINATED: 02/21/2006

		(Consolidated Defendant)
Joshua Irwin Paul, Hastings, Janofsky & Walker, LLP 55 Second Street 24th Floor San Francisco, CA 94105 415-856-7032 Assigned: 02/10/2005 ATTORNEY TO BE NOTICED	represe nting	State Street Bank & Trust Company TERMINATED: 02/21/2006 (Defendant)
David B Mack Nixon Peabody LLP (BOS) 100 Summer Street Boston, MA 02110 781-359-9005 781-359-9001 (fax) dmack@qoclaw.com Assigned: 04/17/2006 ATTORNEY TO BE NOTICED	represe nting	State Street Bank and Trust Company (Consolidated Defendant)
Joseph H. Meltzer Schiffrin & Barroway, LLP 280 King Of Prussia Road Radnor, PA 19087 610-667-7706 610-667-7056 (fax) jmeltzer@sbclasslaw.com Assigned: 06/17/2004 LEAD ATTORNEY ATTORNEY TO BE NOTICED	represe nting	Keri Evans (Plaintiff)
Brian H. Mukherjee Goodwin Procter, LLP Exchange Place Boston, MA 02109 617-570-1477 617-523-1231 (fax) bmukherjee@goodwinprocter.com Assigned: 06/08/2005 TERMINATED: 09/22/2005 ATTORNEY TO BE NOTICED	represe nting	Fidelity Management Trust Company TERMINATED: 10/24/2005 (Defendant)
Kirsten M. Nelson Shearman & Sterling LLP 599 Lexington Avenue New York, NY 10022-6069 212-848-4320 646-828-4320 (fax) kirsten.nelson@shearman.com Assigned: 09/15/2005 TERMINATED: 12/08/2005 ATTORNEY TO BE NOTICED	represe nting	Fidelity Management Trust Company TERMINATED: 10/24/2005 (Defendant)
David Pastor Gilman and Pastor, LLP 225 Franklin Street 16th Floor Boston, MA 02110 617-742-9700 617-742-9701 (fax) dpastor@gilmanpastor.com Assigned: 06/17/2004 LEAD ATTORNEY ATTORNEY TO BE NOTICED	represe nting	Keri Evans (Plaintiff)
John A. Reding Paul, Hastings, Janofsky & Walker, LLP 55 Second Street 24th Floor San Francisco, CA 94105 415-856-7032 Assigned: 02/10/2005 ATTORNEY TO BE NOTICED	represe nting	State Street Bank & Trust Company TERMINATED: 02/21/2006 (Defendant)
Thomas A. Rust Paul, Hastings, Janofsky & Walker LLP 875 15th Street N.W. Washington, DC 202-551-	represe nting	State Street Bank and Trust Company (Consolidated Defendant)

1787 202-551-0187 (fax) Assigned: 12/05/2006 LEAD ATTORNEY ATTORNEY TO BE NOTICED		
Gary S. Tell O'Melveny & Myers LLP 1625 Eye Street N.W. Washington, DC 20006 US Assigned: 01/26/2006 LEAD ATTORNEY ATTORNEY TO BE NOTICED	**represe nting**	**Fidelity Management Trust Company TERMINATED: 10/24/2005 (Defendant)**
Jane H. Walker Waite, Schneider, Bayless & Chesley Co., L.P.A. Fourth & Vine Tower 1 West Fourth Street Suite 1513 Cincinnati, OH 45202 US 513-621-0267 513-381-2375 (fax) janehwalker@wsbclaw.com Assigned: 10/14/2005 ATTORNEY TO BE NOTICED	**represe nting**	**David Mueller (Consolidated Plaintiff)**
		Jerry L. Howard, Sr. (Consolidated Plaintiff)
		Lawrence Bunch (Consolidated Plaintiff)
Valerie N. Webb Arent Fox PLLC 1050 Connecticut Avenue N.W. Washington, DC 20036 202-715-8482 202-202-6395 (fax) webb.valerie@arentfox.com Assigned: 06/09/2006 LEAD ATTORNEY ATTORNEY TO BE NOTICED	**represe nting**	**Administrative Committee (Defendant)**
		Investments and Benefits Committee (Defendant)
		W. R. Grace Investment and Benefits Committee (Consolidated Defendant)
		W.R. Grace & Co. (Consolidated Defendant)
		Brenda Gottlieb (Defendant)
		David Nakashige (Defendant)
		Elyse Napoli (Defendant)
		Fred E. Festa (Consolidated Defendant)
		H. Furlong Baldwin (Defendant)
		John F. Akers (Defendant)
		Officer John J. Murphy (Defendant)
		Martin Hunter (Defendant)
		Marye Anne Fox (Defendant)
		Michael Piergrossi (Defendant)
		Paul J. Norris (Defendant)
		Ren Lapadario (Defendant)
		Robert M. Tarola (Consolidated Defendant)
		Ronald C. Cambre (Defendant)
		Thomas A. Vanderslice (Defendant)

		W. Brian McGowan (Defendant)
Gerald D. Wells, III Schiffrin & Barroway, LLP Three Bala Plaza East Suite 400 Bala Cynwyd, PA 19004 610-667-7706 Assigned: 06/01/2006 TERMINATED: 06/01/2006 LEAD ATTORNEY ATTORNEY TO BE NOTICED	**represe nting**	**Keri Evans (Plaintiff)**
		Lawrence Bunch (Consolidated Plaintiff)
Jeffrey Robert Yousey Nelson Kinder Mosseau & Saturley, PC 99 Middle Street Manchester, NH 03101 603-606-5024 603-647-1900 (fax) Assigned: 08/10/2004 TERMINATED: 08/11/2005	**represe nting**	**Fidelity Management Trust Company TERMINATED: 10/24/2005 (Defendant)**
		State Street Bank & Trust Company TERMINATED: 02/21/2006 (Defendant)