No. 24-

IN THE

Supreme Court of the United States

PLAN BENEFIT SERVICES, INC.;
FRINGE INSURANCE BENEFITS, INC.;
AND FRINGE BENEFIT GROUP,

Petitioners,

v.

HERIBERTO CHAVEZ; EVANGELINA ESCARCEGA,
AS THE LEGAL REPRESENTATIVE OF HER SON
JOSE ESCARCEGA; AND JORGE MORENO,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The determination of whether a named plaintiff in a class action has Article III standing to bring claims on behalf of others has been addressed by the circuit courts through two divergent approaches:

(1) the "class certification" approach where a plaintiff need only establish standing as to his or her own claims, and the commonality and typicality prongs under Fed. R. Civ. P. 23 supplant traditional Article III analysis; and

(2) the "standing" approach where a plaintiff must establish standing not only as to his or her own claims but also the claims of absent class members before turning to Fed. R. Civ. P. 23.

These conflicting approaches to determining standing in class actions create uncertainty for employers and service providers, as well as district and circuit courts.

The two questions presented are:

I. Whether the "standing" approach or the "class certification" approach is the proper test for determining Article III standing in class actions.

II. Whether, under the "standing" approach, named plaintiffs have Article III standing to bring claims on behalf of absent class members who participated in other unrelated plans, sponsored by separate, unrelated employers, and who did not participate in the named plaintiffs' employer's retirement or health plan.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

1. Petitioners Plan Benefit Services, Inc., Fringe Insurance Benefits, Inc., and Fringe Benefit Group (collectively "Defendants") are defendants in the district court and appellants in the court of appeals.[1]

2. Respondents Heriberto Chavez, Evangelina Escarcega, as the legal representative of her son Jose Escarcega, and Jorge Moreno (collectively "Plaintiffs") are plaintiffs in the district court and appellees in the court of appeals. They represent members of the following classes:

    a. All participants and beneficiaries of plans that provide employee benefits through the welfare benefit trust[2]—other than Defendants' officers, directors, or relatives—from July 6, 2011, until trial; and

    b. All participants and beneficiaries of plans that provide employee benefits through the

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1. Defendant Fringe Benefit Group is an unregistered trade name that does not have a distinct legal existence or perform any distinct business activities. On or about January 6, 2016, Defendant Plan Benefit Services, Inc. was merged into another entity and is now known as Fringe Benefit Group, Inc. References to "Defendants" herein include Plan Benefit Services, Inc. and its successor Fringe Benefit Group, Inc.

2. The official name of the welfare benefit trust is The Contractors Plan Trust ("CPT").

retirement trust[3]—other than (a) participants and beneficiaries of custom plans, and (b) Defendants' officers, directors, or relatives—from August 31, 2014, until trial.

3. FBG Holding, LLC is the parent company of Petitioners Plan Benefit Services, Inc., Fringe Insurance Benefits, Inc., and Fringe Benefit Group. No publicly held corporation owns 10% or more of the stock of any Petitioner.

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3. The official name of the retirement trust is The Contractors and Employees Retirement Trust ("CERT").

RELATED PROCEEDINGS

This case arises out of the following proceedings:

- *Heriberto Chavez, Evangelina Escarcega, as the legal representative of her son Jose Escarcega, Jorge Moreno v. Plan Benefit Services, Inc., Fringe Insurance Benefits, Inc. and Fringe Benefit Group*, No. 1:17-CV-00659 (W.D. Tex.) (order granting class certification entered Aug. 30, 2019; second order granting class certification entered Mar. 29, 2022).

- *Plan Benefit Services, Inc., Fringe Insurance Benefits, Inc., Fringe Benefit Group v. Heriberto Chavez, Evangelina Escarcega, as the legal representative of her son Jose Escarcega, Jorge Moreno*, No. 19-50904 (5th Cir.) (judgment entered Apr. 29, 2020 vacating class certification order entered Aug. 30, 2019, and remanding to District Court).

- *Plan Benefit Services, Inc., Fringe Insurance Benefits, Inc., Fringe Benefit Group v. Heriberto Chavez, Evangelina Escarcega, as the legal representative of her son Jose Escarcega, Jorge Moreno*, No. 22-50368 (5th Cir.) (judgment entered Aug. 11, 2023, affirming grant of class certification entered Mar. 29, 2022; p*er curiam* decision entered July 15, 2024, treating petition for rehearing *en banc* as a petition for panel rehearing, granting such petition and withdrawing previous opinion; and judgment on

panel rehearing entered July 15, 2024, affirming in part and denying in part district court order granting class certification).

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PETITION FOR WRIT OF CERTIORARI

Petitioners Plan Benefit Services, Inc., Fringe Insurance Benefits, Inc., and Fringe Benefit Group respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the Fifth Circuit is published at 108 F.4th 297 (5th Cir. 2024), and is reproduced in the appendix to this petition at Pet. App'x 1a-42a. The order of the district court granting class certification is unpublished and is reproduced at Pet. App'x 80a-144a.

JURISDICTION

A panel of the Fifth Circuit Court of Appeals issued a *per curiam* decision treating petitioners' petition for rehearing *en banc* as a petition for panel rehearing. The Fifth Circuit granted the petition for panel rehearing on July 15, 2024, and entered its opinion on July 15, 2024. Pet. App'x 1a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

U.S. Constitution, Article III, Section 2, Clause 1:

> The Judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States,

> and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction; to Controversies to which the United States shall be a Party;—to Controversies between two or more States; between a State and Citizens of another State; between Citizens of different States,—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

28 U.S.C. § 2702—Rules of procedure and evidence; power to prescribe

> (a) The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrate judges thereof) and courts of appeals.
>
> (b) Such rules shall not abridge, enlarge or modify any substantive right. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.
>
> (c) Such rules may define when a ruling of a district court is final for the purposes of appeal under section 1291 of this title.

29 U.S.C. § 1132(a)(3) [ERISA § 502(a)(3)]—Civil enforcement

(a) Persons empowered to bring a civil action

A civil action may be brought—

. . .

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan;

INTRODUCTION

The Fifth Circuit's holding perpetuates a decades long split among the circuits as to the proper methodology for establishing Article III standing in class actions under Fed. R. Civ. P. 23 ("Rule 23"). The holding also promotes a novel theory of ERISA fiduciary liability against benefit plan service providers in the already rampant excessive fee arena, inviting enterprising plaintiffs to create massive class actions on behalf of any participant in any plan who paid any fee to a common service provider.

The Fifth Circuit found the three named plaintiffs had constitutional standing to bring claims for alleged excessive fees paid by participants in their own employer's

health and retirement plans. The problem is that the Fifth Circuit also found that these same three named plaintiffs had constitutional standing to bring claims for alleged excessive fees paid by 293,058 other participants in 3,342 other health and retirement plans sponsored by over 2,200 other unaffiliated employers. This finding ignores the fact that named plaintiffs did not pay the fees, did not receive the services, and did not participate in the plans they purport to represent. The fees charged to other unrelated plans to which plaintiffs are strangers cannot—and did not—harm them.

The Fifth Circuit declined to adopt the "standing" approach as the controlling test for determining Article III standing. Instead, it held that Plaintiffs satisfied both the "class certification" approach and the "standing" approach.[4] Pet. App'x 22a-23a. If the Fifth Circuit had followed guidance from this Court and properly applied the "standing approach," it would have reversed the district court's order granting Plaintiffs' motion for class certification.

The "standing" approach is the proper test as it comports with this Court's emphasis of Article III standing as "a constitutional principle that prevents courts of law from undertaking tasks assigned to the political branches." *Lewis v. Casey*, 518 U.S. 343, 349 (1996); *see also DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 341-42 (2006) (noting the importance of Article III's standing

4. The terms "class certification" approach and "standing" approach are generally not utilized by courts when analyzing Article III standing in class action cases. The Fifth Circuit adopted these labels based on discussions in the treatise "Newberg and Rubenstein on Class Actions." Pet. App'x 12a-13a.

requirement in ensuring that federal courts respect their limited role). The Fifth Circuit's unwillingness to adopt the "standing approach" as the controlling test for Article III standing ignores this principle.

Moreover, the Fifth Circuit's application of the "standing" approach is contrary to precedent from this Court (s*ee Lewis*, 518 U.S. at 349; *Gratz v. Bollinger*, 539 U.S. 244 (2003)), as well as prior decisions within the Fifth Circuit itself. *See Singh v. RadioShack Corp.*, 882 F.3d 137, 151 (5th Cir. 2018) (applying standing approach and holding plaintiffs in one plan lacked standing to sue for alleged injuries to participants in another plan, because "none of them suffered any personal injury related to" the other plan); s*ee also Perkins v. United Surgical Partners Int'l, Inc.*, 2022 WL 824839, at *4 (N.D. Tex. Mar. 18, 2022) (finding named plaintiffs lack standing to challenge funds not invested in); *Locascio v. Fluor Corp.*, 2023 WL 320000, at *3 (N.D. Tex. Jan. 18, 2023) (similar).

If the panel below followed this prior guidance and properly applied the "standing" approach, it would have found that Plaintiffs lack standing to bring claims on behalf of the class. The reluctance by the Fifth Circuit to choose a controlling test for standing only adds to the lack of clarity nationwide on the proper standard for determining Article III standing in class actions, particularly in the plan service provider industry.

This case squarely puts before the Court the thorny issue of constitutional standing and participant-led ERISA class actions. The Fifth Circuit's decision raises serious constitutional concerns as to the allowable breadth of

class actions brought on behalf of hundreds of thousands of participants in thousands of unrelated employer-sponsored ERISA benefit plans. This lack of constitutional nexus between the named plaintiffs and the alleged class-wide injury they seek to remedy is what this Court warned against when it cautioned that "standing is not dispensed in gross." *Lewis*, 518 U.S. at 358, n.6. This Court should grant certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

STATEMENT OF THE CASE

I. Legal Background—Article III Standing

A plaintiff must have constitutional standing to bring claims on his or her own behalf. To demonstrate the required standing, a plaintiff must show "(1) that he or she suffered an injury in fact that is concrete, particularized, and actual or imminent, (2) that the injury was caused by the defendant, and (3) that the injury would likely be redressed by the requested judicial relief." *Thole v. U.S. Bank N.A.*, 590 U.S. 538, 540 (2020) (citing *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992)).

Case law is less clear on how the standing requirements of Article III are applied when a plaintiff seeks to bring claims on behalf of other individuals through a class action under Rule 23. Currently, there is a split of authority among the circuits as to the proper application of Article III requirements in the context of class actions.

Under the "class certification" approach, once a plaintiff shows individual standing to bring his or her own

claims, courts rely on the Rule 23 inquiry to determine whether the plaintiff may bring claims on behalf of the class. *See In re Asacol Antitrust Litig.*, 907 F.3d 42, 49 (1st Cir. 2018); *Boley v. Universal Health Servs., Inc.*, 36 F.4th 124, 133 (3d Cir. 2022);[5] *Peters v. Aetna, Inc.*, 2 F.4th 199, 241, n.22 (4th Cir. 2021); *Fallick v. Nationwide Mut. Ins. Co.*, 162 F.3d 410, 424 (6th Cir. 1998); *B.K. by next friend Tinsley v. Snyder*, 922 F.3d 957, 967 (9th Cir. 2019), *cert. denied*, 140 S.Ct. 2509 (2020); *Colorado Cross Disability Coalition v. Abercrombie & Fitch Co.*, 765 F.3d 1205, 1212-14 (10th Cir. 2014).

The "standing" approach originated from this Court's decisions in *Blum v. Yaretsky*, 457 U.S. 991 (1982), *Lewis v. Casey*, 518 U.S. 343 (1996), and *Gratz v. Bollinger*, 539 U.S. 244 (2003). Under the "standing" approach, a plaintiff must show standing to bring not only his or her own claims, but also claims on behalf of others separate from any Rule 23 determination. *See*, *Armstrong v. Davis*, 275 F.3d 849, 860-67 (9th Cir. 2001); *Ret. Bd. of the Policemen's Annuity & Ben. Fund of the City of Chicago v. Bank of N.Y. Mellon*, 775 F.3d 154, 159-63 (2d Cir. 2014); *Fox v. Ritz-Carlton Hotel Co., LLC*, 977 F.3d 1039, 1046-47 (11th Cir. 2020); *see also*, *Moss v. United Airlines, Inc.*, 20 F.4th 375, 379, n.7 (7th Cir. 2021) (noting that the

5. In its opinion, the Fifth Circuit cited *Boley* as adopting the class certification approach in the First Circuit. Pet. App'x 15a-16a. However, another panel within the Fifth Circuit cited *Boley* as adopting the standing approach. *Angell v. Geico Advantage Ins. Co.*, 67 F.4th 727, 734 (5th Cir. 2023). These obvious differing interpretations within the Fifth Circuit itself are indicative of the confusion surrounding the proper application of Article III standing requirements in class actions and the need for this Court's guidance in this area.

Court's decision in *TransUnion LLC v. Ramirez*, 594 U.S. 413 (2021) "sets the stage for a renewed examination of the intersection of the demands of Article III and the requirements of Rule 23.").

Within the confines of the "standing" approach, courts have developed "three different avenues for evaluating Plaintiffs' Article III standing," each offering "varied levels of strictness to the standing inquiry in the class context"—(1) the *Lewis* test, (2) the *Gratz* test, and (3) the Second/Eleventh Circuit tests. Pet. App'x 17a-21a.

Under the *Lewis* test, a court must consider whether a plaintiff has alleged such a narrow and unique injury that it would be inappropriate to allow them to represent others with merely similar injuries to which plaintiff has not been subjected. *Lewis v. Casey*, 518 U.S. 343, 358, n.6 (1996) (citing *Blum v. Yaretsky*, 457 U.S. 991, 999 (1982)).

The inquiry under the *Gratz* test requires a determination of whether the plaintiff's alleged injury involves "a significantly different set of concerns" from the alleged injuries to other class members. *Gratz v. Bollinger*, 539 U.S. 244, 265 (2003). This Court noted in *Gratz* that "there is tension in our prior cases" regarding the question of whether a variation between a plaintiff's injury and the alleged injury to members of the class is "a matter of Article III standing at all or whether it goes to the propriety of class certification pursuant to Federal Rule of Civil Procedure 23(a)." *Id.* at 263, n.15. Because the parties there did not brief this issue, the Court did not resolve this question. *Id.* This case squarely presents an opportunity for the Court to address this question and resolve the current split among the circuits.

The Second and Eleventh Circuits have developed their own variations of the standing approach analysis. In the Second Circuit, a plaintiff must allege "(1) that he personally has suffered some actual injury as a result of the putatively illegal conduct of the defendant," and "(2) that such conduct implicates the same set of concerns as the conduct alleged to have caused injury to other members of the putative class by the same defendants." *Barrows v. Becerra*, 24 F.4th 116, 129 (2d Cir. 2022). Similarly, the Eleventh Circuit requires a plaintiff to "satisfy the individual standing prerequisites of the case or controversy requirement" and "must possess the same interest and suffer the same injury as the class members." *Fox v. Ritz-Carlton Hotel Co., LLC*, 977 F.3d 1039, 1046 (11th Cir. 2020).

This circuit conflict is exemplified by the varying decisions within the Fifth Circuit. *Compare Chavez v. Plan Benefit Servs.*, 2022 WL 1493605, at *8 (W.D. Tex. Mar. 29, 2022) [Pet. App'x 27a] (finding named plaintiffs have standing to challenge fees they did not pay) *with Perkins v. United Surgical Partners Int'l, Inc.*, 2022 WL 824839, at *4 (N. D. Tex. Mar. 18, 2022) (finding named plaintiffs lack standing to challenge funds not invested in) and *Locascio v. Fluor Corp.*, 2023 WL 320000, at *3 (N.D. Tex. Jan. 18, 2023) (similar).

II. Factual Background and Procedural History

Plaintiffs are three employees of a single employer, Training, Rehabilitation & Development Institute, Inc. ("TRDI"). TRDI engaged Defendants to provide services for TRDI's retirement and welfare benefit plans. Plaintiffs allege that all fees charged by Defendants for the services

provided to TRDI's plans and thousands of other different and unrelated retirement and health plans are "excessive," thereby breaching Defendants' alleged ERISA fiduciary duty to the plan participants. The numbers themselves reveal the problem: Plaintiffs bring claims on behalf of a class of 293,061 participants in 3,344 employee benefit plans sponsored by over 2,200 unaffiliated employers. These employers independently engaged Defendants through separately negotiated agreements to provide plan-related services as selected by each employer for the fees established in each agreement on behalf of their own employee benefit plan.

(A) Defendants

Defendants are service providers in the retirement and health benefit plan industry specializing in employee benefit plans for employers subject to prevailing wage requirements under the McNamara-O'Hara Service Contract Act, 41 U.S.C. § 6701 *et seq.*, or Davis Bacon and Davis Bacon Related Acts, 40 U.S.C. § 3142. Employers who are government contractors subject to these laws must pay an established minimum wage rate (a "prevailing wage") and can elect to satisfy that obligation by paying the wage rate in cash, bona fide benefits, or a combination of cash and bona fide benefits. Defendants offer a variety of services for group health plans and retirement benefit plans that are designed to satisfy these prevailing wage requirements. Employers can elect from an array of services offered by Defendants to create their own unique benefit offering, which may be an assortment of health only benefits, retirement only benefits, or both health and retirement benefits. Defendants' fees vary from employer to employer based on each employer's choices

for its benefit offerings, the size of the employer and plan designs.

Employers that choose to offer a retirement and/or health plan using Defendants' platform elect from among Defendants' products, adopt a plan document, and utilize one of two trusts—CERT for retirement plans and CPT for health plans. ROA.1707 [Adam Bonsky Aff., p. 1, para. 5].[6] For those employers offering a retirement plan, the assets of each employer's retirement plan are held in CERT where either the named trustee[7] or the participants of each plan choose from among investment options offered by investment platform providers with whom Defendants have contracted.[8] ROA.1712 [Jennifer Pagano Aff., p. 2, para. 13]. For health plans, contributions from each employer sponsoring a health plan are deposited into CPT and then forwarded directly to the applicable insurance carrier each month.

The two trusts—CERT and CPT —are not ERISA employee benefit plans and do not provide employee retirement or health benefits. The trusts are benign; they simply hold employer and employee contributions

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6. References to the Record on Appeal ("ROA") are to the electronic record in the Fifth Circuit Court of Appeals, case number 22-50368.

7. The trustee of both the CERT and CPT is not a defendant in this case even though it is a "named fiduciary" as that term is defined in 29 U.S.C. § 1102(a)(2) [ERISA § 402(a)(2)].

8. Each employer elects whether its participants can direct their own investments under 29 U.S.C. § 1104(c) [ERISA § 404(c)] or if the CERT trustee will direct the investments on behalf of the participants in that employer's plan.

and serve as the funding conduit for investment, and payment of premiums, fees, and other administrative costs associated with each employer's retirement and/or health benefit plan.[9] The trust agreements governing the trusts and signed by the trustees do not establish any fees to be paid to Defendants; instead, they simply permit the trustee to disperse trust assets to pay fees as part of its responsibility to manage and operate the trusts. ROA.4426 and 4451 [CERT trust agreement, p. 4, sec. 5(i)]; ROA.4441 and 4473 [CPT trust agreement, p. 8, section 4.4(d)].

The diversity of the Defendants' offerings and an employer's selection from among these offerings results in not only differences in the *category* of fees paid by each plan but also variance in the *amount* of fees paid by plans within each category. These dissimilarities are not the result of any action by the Defendants but instead are the direct byproduct of the choices made by each employer. As a result, the plan structure and fees charged to the 3,344 plans represented by the class vary significantly based on individual characteristics of each plan resulting from the selections made by each of over 2,200 unaffiliated employers.

For example, Defendants charge retirement plans a per participant/per month administrative fee ("PP/PM fee"). The fee is charged each month, and the per-participant rate charged changes based on the number

9. The use of a trust to hold insurance contracts and act as a conduit for the payment of premiums is one of the requirements for welfare plans known as "group insurance arrangements" to be exempt from certain ERISA reporting and disclosure requirements. DOL Reg. § 2520.104-21.

of participants in the employer's plan in that month, resulting in monthly fluctuations in the rates used to calculate charges to a plan based on changes in the employer's participant population. However, for certain retirement plans, this fee is waived if the plan reaches certain participation and asset thresholds. ROA.4247-4264 [Contractors Retirement Plan—Plan Installation and Retainer Agreement]. So, the PP/PM fee will vary for each plan and from plan to plan each month, while some plans will not pay this fee at all. This same variance in fees is also true for health plans. For example, employers are free to choose from among various insurers to provide health insurance benefits, including insurers who have partnered with Defendants and written policies to CPT. In this case, Plaintiffs' employer, TRDI, chose an insurer outside of Defendants' offerings. This decision by Plaintiffs' employer resulted in Plaintiffs paying fees that other class members did not. In addition, Defendants offer a selection of welfare benefits through MetLife including dental, vision, life, and accident coverage. Fees relating to these benefits are charged only to those plans whose employer/plan sponsor selects these benefits, resulting in not every plan or participant represented in the class paying these fees.

For retirement plans, the fees agreed to by each employer are paid out of plan assets held in the retirement trust (CERT).[10] For health plans, the fees agreed to by each employer are included in the calculation of the premium amount due from each employer and paid out of the contributions made to the health trust (CPT). Premium

10. Certain indirect compensation is agreed to by each employer but is not paid out of plan assets.

amounts received from employers are deposited into the CPT, and after Defendants' agreed-upon fees are withheld, those premiums are transferred to the insurance carrier selected by the employer. It is the separate agreement between each employer and the Defendants in which the employer agrees to, and authorizes, the fees to be paid by the plan; not the terms of the trust agreements.[11]

In short, the plan structure and fees charged to the 3,344 plans represented by the class vary significantly based on individual characteristics of each plan resulting from the selections made by each of over 2,200 unaffiliated employers.

(B) Plaintiffs

Plaintiffs' employer, TRDI, hired Defendants to assist with providing retirement and health benefits to its employees. ROA.1718-1719 [Stephanie Craghead ("Craghead") Aff., pp. 2-3, paras. 6-16]. TRDI chose to offer retirement benefits through Defendants' retirement plan platform and executed a retainer agreement with Defendants in November 2014. ROA.4190-4217 [Adoption Agreement for Plan Benefit Services, Inc. Non-Standardized Profit Sharing Plan]; ROA.4247-4264 [Contractors Retirement Plan—Plan Installation and Retainer Agreement]. As to its health plans, TRDI selected health coverage outside Defendants' offerings through Blue Cross Blue Shield of Texas, a carrier

11. ROA.4423-4432, ROA.4448-4464 [Contractors Retirement Plan Master Trust (CERT)]; ROA.4434-4446, ROA4466-4481 [The Contractors Plan Trust (CPT)]; ROA.4247-4264 [Contractors Retirement Plan—Plan Installation and Retainer Agreement].

with no contractual relationship with Defendants or CPT. TRDI hired Defendants in August 2014 solely to provide administrative services for its health plan offered through Blue Cross Blue Shield of Texas. ROA.4219-4246 [Contractors Plan Non Trust Employer Application]. TRDI terminated this service agreement effective August 31, 2016. ROA.1719 [Craghead Aff., p. 3, para. 14].

There are three named plaintiffs in this action. Plaintiffs Chavez and Escarcega allege that they were provided coverage through TRDI's health plan until "some time" in 2016 when TRDI terminated its contract with Defendants. ROA.395 and 397 [First Amended Complaint, ¶¶ 22 and 31]; ROA.1719 [Craghead Aff., p. 3, para. 14]. Plaintiffs failed to address the participation of Plaintiff Moreno in TRDI's health plan; however, any such coverage would have also ended in 2016. Plaintiffs Escarcega and Moreno participated in TRDI's retirement plan until they each received a distribution of their benefits in 2015 and 2018, respectively. ROA.1720-1721 [Craghead Aff., pp. 4-5, paras. 23-24, 27-28]. Plaintiff Chavez never participated in TRDI's retirement plan while Defendants were the service providers. ROA.1719 [Craghead Aff., p. 3, para. 18].

(C) The Certified Class

Plaintiffs allege two ERISA claims: (i) Defendants charged "excessive compensation" in violation of 29 U.S.C. § 1106(b) [ERISA § 406(b)] and (ii) Defendants breached the duty of loyalty under 29 U.S.C. § 1104(a)(1) [ERISA § 404(a)(1)] by "paying their fees out of plan assets." ROA.413; ROA.414 [First Amended Class Action Complaint, paras. 121 and 132]. Plaintiffs seek declaratory and injunctive relief, disgorgement of profits, and

restitution of alleged losses to the plans under ERISA's civil enforcement scheme pursuant to 29 U.S.C. § 1132(a) [ERISA 502(a)]. ROA.416-417 [First Amended Class Action Complaint, p. 25, paras. B, D and E; p. 26, paras. B, D, E and F.

Plaintiffs sought class certification pursuant to Fed. R. Civ. P. 23(b)(1)(B) and (b)(3) consisting of "[a]ll participants in and beneficiaries [of] employee benefit plans that provide benefits through CPT and CERT." ROA.1818; ROA.1822 [Order on Motion to Certify Class, pp. 4 and 8]. The district court certified the class, which Defendants appealed, and the Fifth Circuit subsequently vacated. *Chavez v. Plan Benefit Servs., Inc.*, 957 F.3d 542, 551 (5th Cir. 2020) [Pet. App'x 160a-161a]. Plaintiffs filed a second motion for class certification, and the district court again certified the class under Rule 23(b)(1) and Rule 23(b)(3). *Chavez v. Plan Benefit Servs., Inc.*, 2022 WL 1493605, at *23 (W.D. Tex. Mar. 29, 2022). [Pet. App'x 143a-144a]. Defendants appealed seeking to reverse the order granting class certification. A Fifth Circuit panel affirmed, *Chavez v. Plan Benefit Servs., Inc.*, 77 F.4th 370, 390 (5th Cir. 2023) [Pet. App'x 79a], and Defendants sought a rehearing *en banc*. After issuing a *per curiam* order treating the petition for rehearing *en banc* as a motion for reconsideration, the Fifth Circuit granted the petition and issued an opinion affirming the district court's finding that Plaintiffs have standing to pursue claims on behalf of the class and granting class certification under Rule 23(b)(3) but reversing the district court's order granting class certification under Rule 23(b)(1). *Chavez v. Plan Benefit Servs., Inc.*, 108 F.4th 297 (5th Cir. 2024) [Pet. App'x 41a-42a].

REASONS FOR GRANTING THE PETITION FOR WRIT OF CERTIORARI

I. There is a circuit split over the application of Article III standing requirements to class actions under Rule 23.

There is a well-recognized split among the circuits on "important questions about the order and depth in which this court grapples with constitutional standing and the Rule 23 inquiry." Pet. App'x 12a; *see also supra* pp. 6-9. The Fifth Circuit acknowledged this split and analyzed the development of case law regarding Article III standing through this Court's decisions and subsequent interpretations by circuit courts. Pet. App'x 13a-23a.[12]

The varying approaches and tests utilized by courts to decide Article III standing in class actions are *prima facie* evidence of a circuit split on this issue—a pivotal constitutional issue. This Court has addressed similar circuit splits and provided much needed guidance on constitutional and statutory questions. *See*, *e.g.*, *US Airways v. McCutchen*, 569 U.S. 88, 106 (2013) (resolving circuit split on whether equitable defenses can override ERISA plan's reimbursement provision); *Central Laborers' Pension Fund v. Heinz*, 541 U.S. 739, 743 (2004) (resolving circuit split on whether imposing new conditions on rights to benefits already accrued violated ERISA's anti-cutback rule); *Smith v. Spizzirri*, 601 U.S. 472, 475 (2024) (resolving circuit split on interpretation of language

12. As described above, *supra*, p. 5, the Fifth Circuit panel holding conflicts with a prior Fifth Circuit decision. *Singh*, 882 F.3d 137 (applying the "standing approach").

in the Federal Arbitration Act); *Ashcroft v. Iqbal*, 556 U.S. 662, 677-80 (2009) (establishing standards for adequate pleading under the Federal Rules of Civil Procedure).

The implications of this conflict extend beyond the specific facts of this case (participants in one plan suing on behalf of participants in other unrelated plans). The same constitutional concerns are present even where a participant in a plan seeks to bring claims on behalf of participants in that same plan. The standing requirement still applies—a plaintiff must show that he has suffered an individualized and specific injury as to each claim he seeks to bring. When a plaintiff cannot show he has been injured in the same way as the class members he seeks to represent, he does not have standing to bring claims on their behalf.

However, courts have differing interpretations of standing requirements in these circumstances. In the plan investment arena, courts have held that a named plaintiff does not have standing to challenge funds in which he did not personally invest because the plaintiff could not show he sustained an individualized and particular injury resulting from the challenged funds. *Perkins v. United Surgical Partners Int'l Inc.*, 2022 WL 824839, at *4 (N.D. Tex. Mar. 18, 2022), *Locascio v. Fluor Corp.*, 2023 WL 320000, at *3 (N.D. Tex. Jan. 18, 2023); *Wilcox v. Georgetown Univ.*, 2019 WL 132281, at *8 (D.D.C. Jan. 8, 2019); *Patterson v. Morgan Stanley*, 2019 WL 4934834, at *5 (S.D.N.Y. Oct. 7, 2019). Other courts have held that an allegation of injury to the plan as a whole dispenses with the requirement for plaintiff to show an investment in each challenged fund. *Khan v. PTC, Inc.*, 2021 WL 1550929, at *3 (D. Mass. Apr. 20, 2021); *Sacerdote v. N.Y. Univ.*, 2018 WL 840364, at *7 (S.D.N.Y., Feb. 13, 2018);

Cunningham v. Cornell Univ., 2019 WL 275827, at *3 (S.D.N.Y. Jan. 22, 2019).

When a plaintiff makes a general allegation of injury from "excessive fees," the analysis from existing case law is not directly on point. This is particularly true when the complained of fees vary—both in category and in amount—not just among participants in a single plan, but among hundreds of thousands of participants in thousands of plans, resulting in not every participant in every plan paying the same category or amount of fees. Does the existence of a common service provider set aside these variances and provide the constitutional link sufficient to confer standing or does Article III demand more? Is it enough for a named plaintiff to simply allege "excessive fees" and thereby gain standing to seek relief on behalf of any participant in any plan who paid any fee to the common service provider? Or would this constitute conduct of another kind, although similar, that named plaintiff has not been subject? *Blum v. Yaretsky*, 457 U.S. 991, 999 (1982) ("It is not enough that the conduct of which the plaintiff complains will injure someone. The complaining party must also show that he is within the class of persons who will be concretely affected. Nor does a plaintiff who has been subject to injurious conduct of one kind possess by virtue of that injury the necessary stake in litigating conduct of another kind, although similar, to which he has not been subject. *See Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 166–167, 92 S.Ct. 1965, 1968–69, 32 L.Ed.2d 627 (1972).").

The Court should grant this petition to resolve the current split among the circuits and provide a uniform rule for Article III standing in Rule 23 class actions.

II. The Court should resolve this important, recurring question of law.

A court's jurisdiction only extends to cases or controversies—those matters where a litigant has standing to invoke the authority of a federal court. *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 342 (2006). Before a court decides any issue put before it, it must find that the question is presented in a "case" or "controversy" that is of a "judiciary nature," which requires a party asserting federal jurisdiction to carry the burden of establishing Article III standing. *Id.*

Thus, the standing requirement ensures that a plaintiff 's claim is one that a court may properly rule upon. It "assumes particular importance in ensuring that the Federal Judiciary respects " 'the proper—and properly limited—role of the courts in a democratic society.' " " *Id.* at 341 (quoting *Allen v. Wright*, 468 U.S. 737, 750 (1984)). This Court has described the standing requirement as "a constitutional principle that prevents courts of law from undertaking tasks assigned to the political branches." *Lewis v. Casey*, 518 U.S. 343, 349 (1996). "If a dispute is not a proper case or controversy, the courts have no business deciding it or expounding the law in the course of doing so." *DaimlerChrysler Corp.*, 547 U.S. at 341.[13]

The issue of whether a Rule 23 plaintiff has standing to bring claims on behalf of participants in other benefit plans implicates important constitutional concerns that affect litigation involving ERISA benefit plans,

13. The "standing" approach is consistent with the deference afforded to Article III by this Court.

employers, and plan service providers. This interplay of constitutional standing and Rule 23 bears upon the scope of ERISA's enforcement scheme and the well-established requirements for determining ERISA functional fiduciary status. This requires careful analysis under the Rules Enabling Act to ensure that the use of a class action does not impermissibly expand a plaintiff 's right to seek redress for an alleged ERISA violation nor abridge a defendant's right to present all available defenses. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 367 (2011).

The determination of constitutional standing in ERISA class actions must consider whether a participant's claim falls within ERISA's enforcement scheme—to determine whether it is a proper "case or controversy." ERISA § 502 [29 U.S.C. § 1132] delineates the civil actions that may be brought by a "participant." The term "participant" is defined in ERISA § 2(7) [29 U.S.C. §1002(7)] as "any employee . . . of an employer . . . who is or may become eligible to receive a benefit of any type from an employee benefit plan which covers employees of such employer." Absent from this definition is any reference to the relationship between a participant and a trust holding assets of an employee benefit plan. The logical inference is that ERISA enforcement actions are linked to an individual's status as a participant in an *ERISA employee benefit plan*, not to a trust that holds the assets of that plan.[14]

14. This inference is even more evident where the plan involved is a health plan. ERISA requires "plan assets" to be held in a separate trust, 29 U.S.C. § 1103(a) [ERISA § 403(a)]. However, the Department of Labor historically has only enforced this requirement on retirement plans and adopted a "nonenforcement" policy as to certain welfare plans (such as fully-insured group

Plaintiffs point to the existence of two trusts to provide the necessary link between them and the class members they seek to represent. This link is illusory. ERISA authorizes civil actions by participants of ERISA plans. The trusts relied on by Plaintiffs are not ERISA plans. Allowing Plaintiffs to use trusts as the basis for their constitutional standing violates the Rules Enabling Act as it exploits Rule 23 class actions to expand Plaintiffs' rights to bring claims not otherwise authorized by the U.S. Constitution or ERISA.[15] *See* 28 U.S.C. § 2702(b) (prohibiting rules of procedure from abridging, enlarging or modifying any substantive right).

To allow a plaintiff to have standing to bring class action claims on behalf of thousands of participants in unrelated benefit plans expounds on the enforcement provisions of ERISA, a job that has been reserved for Congress. *See Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 146 (1985); *see also Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 209 (2002) (warning unequivocally that courts should be "especially reluctant to tamper with the enforcement scheme embodied in the

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health plans). *See* DOL Technical Release 92-01. Therefore, linking a participant's right to bring a civil action under ERISA to the existence of a trust would necessarily preclude civil actions by participants in certain ERISA group health plans where such a trust is not required.

15. The Fifth Circuit erred in its analysis under the "standing" approach using the *Lewis*, *Gratz*, and the Second/Eleventh Circuit tests. In each instance, the Fifth Circuit relied on Plaintiffs' allegation of "mismanagement of the trusts" as the conduct that caused the alleged harm and the basis for the same remedy sought by Plaintiffs and class members. Such reliance on the trusts as a proper basis for Article III standing is misplaced.

[ERISA] statute by extending remedies not specifically authorized by its text"). These concerns are magnified where a court relies on artfully pled generalizations relating to ERISA employee benefit plans and trusts (that are not themselves ERISA plans) to attempt to confer constitutional standing. Furthermore, allowing a plaintiff to use Rule 23 to bring claims on behalf of participants in other plans—plans in which the named plaintiff does not participate—creates an ERISA cause of action that plaintiff could not bring outside the Rule 23 context. This is an impermissible expansion of rights in violation of the Rules Enabling Act. 28 U.S.C. § 2702(b).

In determining whether a plaintiff has standing to bring claims for breach of fiduciary duty under ERISA § 404 on behalf of participants outside of their own plan, it is paramount to ensure that the use of Rule 23 does not abridge the right of a defendant to present all available defenses to such claims. A plaintiff cannot sue for breach of fiduciary duty by an alleged functional fiduciary to a plan in which they do not participate; to do so would assume a fiduciary duty that has not been established and that cannot be established on a class-wide basis.[16]

The requirements for proving functional fiduciary status are well settled. A plaintiff alleging that a service

16. ERISA fiduciaries fall into two categories—named fiduciaries and functional fiduciaries. Named fiduciaries, as the title implies, are those parties that are specifically named in an ERISA plan document as a fiduciary of that plan. Whether a party is a functional fiduciary is a fact-specific determination that examines the party's exercise of authority or discretion regarding plan assets. *Teets v. Great-West Life & Annuity Ins. Co.*, 921 F.3d 1200, 1212 (10th Cir. 2019), *cert. denied*, 140 S.Ct. 554 (2019).

provider to a plan is a functional fiduciary must present individualized evidence that the service provider failed to conform to the terms of its agreement with the plan and if so, whether the plan or its participants may reject the service provider's action or terminate the contract. *Teets v. Great-West Life & Annuity Ins. Co.*, 921 F.3d 1200, 1212 (10th Cir. 2019), *cert. denied* 140 S.Ct. 554 (2019). As to allegations of engaging in a prohibited transaction through charging excessive fees, a defendant may overcome those allegations by presenting evidence that such fees are reasonable under the "particular circumstances of each case," taking into account such factors as the size of the plan, the type of services rendered, and the geographic region of the plan. DOL Reg. § 2550.408c-2(b)(1).

A ruling that a plaintiff has standing to bring a class action on behalf of participants in unrelated benefit plans based on the existence of a trust improperly relieves that plaintiff of his burden of proof as to functional fiduciary status and excessiveness of each challenged fee. It would also strip a defendant of the right to present defenses regarding its alleged functional fiduciary status and the reasonableness of fees.[17] Such a result directly contradicts the Rules Enabling Act. 28 U.S.C. § 2702(b); *see also Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 367 (2011) (rejecting a "trial by formula" approach to circumvent litigation of individual issues); *Sacred Heart Sys. v.*

17. By relying on the existence of two trusts to find Plaintiffs have standing to bring claims on behalf of participants in unrelated plans, the Fifth Circuit ignored Plaintiffs' burden to show that Defendants are functional fiduciaries as to each of the 3,344 plans represented by the class and precluded Defendants from presenting defenses as to their alleged functional fiduciary status and the reasonableness of their fees.

Humana Mil. Healthcare Servs., 601 F.3d 1159, 1176 (11th Cir. 2010) (rejecting proposal to synthesize contents of similar contracts to circumvent individualized issues preventing class certification).

Because service providers in the ERISA industry do not represent a single plan, the circumstances in this case will be present for any service plan provider that provides services to more than one ERISA benefit plan—in other words, every plan service provider nationwide. A definitive standard for establishing constitutional standing to bring a class action against a plan service provider is crucial to provide service providers with a clear picture of their potential liability, allowing them to make informed decisions to address this liability as part of their business models.

CONCLUSION

The Fifth Circuit's holding continues a split among the circuit courts as to the proper test for determining constitutional standing in class actions. Furthermore, the Fifth Circuit's holding is contrary to this Court's guidance regarding Article III standing and violates the Rules Enabling Act. If left to stand, this holding will be the source for wide-sweeping class actions against employers and plan service providers with classes comprised of thousands of participants in unrelated plans based simply on the existence of a common trust or common service provider. This Court's review is necessary to establish the proper parameters of ERISA class actions in the excessive fee arena and provide guidance to employers and service providers as to the potential scope of their liability.

DATED this 11th day of October, 2024.

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October 11, 2024

APPENDIX

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, FILED JULY 15, 2024

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 22-50368

HERIBERTO CHAVEZ; EVANGELINA ESCARCEGA, AS THE LEGAL REPRESENTATIVE OF HER SON JOSE ESCARCEGA; JORGE MORENO,

Plaintiffs-Appellees,

versus

PLAN BENEFIT SERVICES, INC.; FRINGE INSURANCE BENEFITS, INCORPORATED; FRINGE BENEFIT GROUP,

Defendants-Appellants.

Appeal from the United States District Court
for the Western District of Texas
USDC No. 1:17-CV-659.

Before WIENER, STEWART, and ENGELHARDT, *Circuit Judges.*

Appendix A

CARL E. STEWART, *Circuit Judge*:

Heriberto Chavez, Evangelina Escarcega (representing her son, Jose Escarcega), and Jorge Moreno (collectively "Plaintiffs") seek to represent a class in a lawsuit against Plan Benefit Services, Fringe Insurance Benefits, and Fringe Benefit Group (collectively "FBG") for the alleged mismanagement of funds that Plaintiffs contributed to benefit plans through their employers. Because Plaintiffs have standing to sue and the district court did not abuse its discretion in the Rule 23 certification analysis, the district court's order is AFFIRMED in part and REVERSED in part. The order is AFFIRMED insofar as it granted class certification under Rule 23 (b)(3) and REVERSED insofar as it granted class certification under Rule 23(b)(1). Additionally, this matter is REMANDED for further proceedings consistent with this opinion.

I. Background

A. FBG's Alleged Mismanagement of the CERT & CPT Trusts

FBG helps employers design and administer employee benefit programs that offer retirement and health and welfare benefits to their employees. In accordance with FBG's plan, employers disburse benefits to their employees through two trusts: (1) the Contractors and Employee Retirement Trust ("CERT"), which covers retirement plans; and (2) the Contractors Plan Trust ("CPT"), which covers health and welfare benefits. Each employer signs either a separate retainer agreement

or an adoption agreement as part of their enrollment in a plan. FBG serves as "Master Plan Sponsor" and "Recordkeeper" for both CERT and CPT.

The contracts that FBG enters with employers also include a "Master Trust Agreement" granting FBG greater control over the CERT and CPT trusts. For example, the Master Trust Agreement allows FBG to determine the fees deducted from CERT and allows it to direct "banks and other entities holding Trust funds to pay those fees, including to FBG itself." As to CPT specifically, the Master Trust Agreement authorizes FBG to "calculate and deduct its own fees from employer contributions before remitting premium payments to the carriers."

FBG markets CERT and CPT to non-union employers seeking to compete for government contracts. To qualify for the contracts, employers must pay their employees prevailing wages—that is, the wages and benefits paid to the majority of similarly situated laborers in the area at the time. In assisting employers with offering benefits under the prevailing wage laws, FBG offers plans with a combination of administrative and variable fees.

For example, each employer pays an identical, fixed administrative fee of $200, nondiscriminatory testing fee of $400, and indirect percentage-based fees totaling 1.15% of the company's assets in the trust. Variable fees are assessed based on the company's selections with FBG and the company's total size and structure. So, a company that offers its employees a 401(k) may be assessed different

fees than another company that offers a money-purchase plan. "These structures are called Tiered 1-4, Graded 25, and Graded 50." While employers can choose a "'tiered' or 'graded' plan, [FBG] determines where the employer falls within [each] categorization scheme[.]"

Plaintiffs were employees of the Training, Rehabilitation & Development Institute, Inc. ("TRDI"). TRDI contracted with FBG for various services. It was required to provide wage and fringe benefits to its employees in an amount calculated by the applicable prevailing wage determination. It provided retirement plans under CERT and health and welfare plans under CPT. The agreement governing CERT, CPT, and TRDI allotted various "powers and responsibilities" to FBG. For example, FBG had the power to: (1) enter contracts imposing fees and other charges on the trusts and the plans; (2) instruct any insurance company with respect to investment or disbursement of investment funds on behalf of the Trustee; (3) require the Trustee to make disbursements for FBG's own fees in any amount that it directed; and (4) appoint and remove the Trustee.

Chavez participated in CPT, meaning that TRDI paid monthly contributions to CPT on his behalf, from which FBG deducted fees. TRDI contributed a certain amount of money to a fringe benefit account in Chavez's name for every hour that he worked, in accordance with federal and state laws. This fringe benefit account was used to help pay Chavez's premiums incurred through his enrollment in health and welfare plans provided by TRDI. TRDI also paid a premium of $570.58 a month into

CPT for these benefits to cover his insurance. At least ten percent of the premium amount was paid to FBG. These fees were taken from Chavez's individual health and welfare account. He contends that the "account was depleted more than it otherwise would have been if the fees had been reasonable." He also avers that the unreasonable fees are wholly responsible for "no amount ever [being] contributed [to his] retirement account."

Escarcega and Moreno participated in both CERT and CPT. Like Chavez, TRDI made contributions to the fringe benefit accounts based on the number of hours that Escarcega and Moreno worked. Under each plan, FBG's fees for plan administration services were subtracted from their individual accounts. They allege that FBG "deducted fees totaling more than 10% of these payments for their own compensation before remitting the remainder to" their medical insurance providers. Escarcega was also enrolled in a "limited medical plan" with Standard Security Life ("SSL") through CPT. He claims that "FBG deducted compensation for itself . . . for ancillary insurance premiums and fees of more than 17% of these payments, remitting the remaining amount as premiums to SSL."

B. Procedural History

In July 2017, Plaintiffs sued FBG for mismanaging their employee benefit plans by collecting excessive fees in violation of the Employee Retirement Income Security Act ("ERISA"). *See* 29 U.S.C. § 1001 *et seq.* Specifically, Plaintiffs asserted that FBG charged different rates for identical services and charged an excessive base fee.

FBG moved to dismiss Plaintiffs' claims. The district court granted FBG's motion but gave Plaintiffs the opportunity to amend their complaint. Plaintiffs' amended complaint alleged that FBG "accepted excessive fees, handpicked providers to maximize its profits, controlled disbursements from the trusts for its own benefit, and unlawfully procured indirect compensation." *Chavez v. Plan Benefit Servs.*, 957 F.3d 542, 544 (5th Cir. 2020). FBG moved to dismiss again for failure to state a claim under 29 U.S.C. §§ 1106(b) and § 1109(a) and lack of standing, which the district court denied.

Thereafter, Plaintiffs filed a motion for class certification. They sought to represent a class of "all participants in and beneficiaries of employee benefit plans that provide benefits through CERT and CPT, . . . from six years before the filing of this action [July 6, 2011] until the time of trial." The district court encountered a question of first impression: whether Plaintiffs had standing to sue FBG on behalf of unnamed class members from different contribution plans. It requested additional briefing on the issue and ultimately ruled that Plaintiffs had constitutional and statutory standing to sue FBG in a class-action context. On constitutional standing, the district court explained that Plaintiffs had demonstrated injury in fact, traceability, and redressability. Notably, it held that the class context was appropriate because "both the named and unnamed plaintiffs . . . are participants 'of plans that provide employee benefits through CPT or CERT.'" It concluded that commonality was sufficient to allow class certification at this stage.

As for statutory standing, the district court relied on a Sixth Circuit case, *Fallick v. Nationwide Mutual Insurance Company*, to hold that Plaintiffs' only burden at this stage was assuring the court of their own standing to sue FBG. 162 F.3d 410, 424 (6th Cir. 1998). Specifically, it cited *Fallick* for the proposition that "the standing-related provisions of ERISA were not intended to limit a claimant's right to proceed under Rule 23 on behalf of all individuals affected by the [fiduciary's] challenged conduct, regardless of the representative's lack of participation in all the ERISA governed plans involved." *Id.* at 410; FED. R. CIV. P. 23. It reasoned that a deeper inquiry into the appropriateness of Plaintiffs as class representatives was reserved for the Rule 23 analysis, not constitutional or statutory standing. It held in Plaintiffs' favor and certified a Rule 23(b)(1)(B) class of 90,000 employees. *Chavez v. Plan Ben. Servs. Inc.*, No. 1:17-CV-659-SS, 2018 U.S. Dist. LEXIS 100988, 2018 WL 3016925, at *7-8 (W.D. Tex. June 15, 2018).

FBG appealed, and a panel of this court vacated and remanded, holding that the district court failed to engage in the "rigorous analysis" necessary for certifying a class action under Rule 23. *See Chavez*, 957 F.3d at 544. On remand, Plaintiffs amended their motion for class certification, and the case was reassigned. The parties then presented oral argument and submitted supplemental briefing on standing.

Upon consideration, the district court certified the following two classes:

> (1) All participants and beneficiaries of plans that provide employee benefits through CPT—other than [FBG's] officers, directors, or relatives—from July 6, 2011, until trial; and
>
> (2) All participants and beneficiaries of plans that provide employee benefits through CERT—other than (a) participants and beneficiaries of custom plans, and (b) [FBG's] officers, directors, or relatives—from August 31, 2014, until trial.

As of February 2021, the class included "224,995 participants and 2,994 plans in CERT as well as 68,066 participants and 350 plans in CPT."

FBG then filed the instant appeal, urging this court to determine that Plaintiffs lack standing to represent the class and reverse the district court's decision that Rules 23(b)(1)(B) and (b)(3) are proper vehicles for class certification. According to FBG, certification was improper, and we should remand for proceedings on only Plaintiffs' claims.

II. Standard of Review

"Standing is a question of law that we review de novo." *N. Cypress Med. Ctr. Operating Co., Ltd. v. Cigna Healthcare*, 781 F.3d 182, 191 (5th Cir. 2015) (citation and emphasis omitted). We review "all facts expressly or impliedly found by the district court" for clear error. *Rivera v. Wyeth-Ayerst Labs.*, 283 F.3d 315, 319 (5th Cir. 2002).

We review class certification decisions for abuse of discretion. *See Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 408 (5th Cir. 1998) (citation omitted). "Implicit in this deferential standard is a recognition of the essentially factual basis of the certification inquiry and of the district court's inherent power to manage and control pending litigation." *Id.* (citation omitted). "We review de novo, however, whether the district court applied the correct legal standards in determining whether to certify the class." *Flecha v. Medicredit, Inc.*, 946 F.3d 762, 766 (5th Cir. 2020) (emphasis, quotations, and citations omitted).

III. Discussion

Preliminarily, we address FBG's characterization of Plaintiffs' theory on appeal. FBG asserts that Plaintiffs have insisted that their lawsuit is only, or at least primarily, about excessive fees that they and the unnamed class members were subjected to by FBG. But that depiction of Plaintiffs' theory fails to capture the entire breadth of their argument.

Plaintiffs have always sought to make this case about FBG's general practices in upholding their duties as fiduciaries of the CERT and CPT trusts. Indeed, their complaint focuses on the "Master Trust Agreement" and "Adoption Agreement" as the mechanisms through which FBG was able to charge the excessive fees to the various employees that participated in their plans. Furthermore, they have always sought to bring this action on behalf of members of the trust, not just employees who were allegedly charged excessive fees. As Plaintiffs explain, the harm not only derives from FBG's charging of excessive

fees but also from the financial harm that FBG allegedly caused to the CERT and CPT trusts.

We disagree with FBG that this case is *only* about the payment of excessive fees. The more apt characterization is detailed in Plaintiffs' complaint, which explains that this case is also about FBG's alleged mismanagement of the trusts that they compel each employee to pay into through contracts with their employers. Likewise, the class that the district court eventually certified further reflects this understanding of Plaintiffs' theory. With that said, we press on to FBG's standing argument.

A. Standing

FBG asserts that the district court erroneously determined that Plaintiffs had standing to challenge fees that they were never subjected to, in plans that they never participated in, relating to services that they never received, from employers for whom they never worked. It avers that the district court skipped these justiciability concerns by following incorrect and nonbinding out-of-circuit precedent, which resulted in an inappropriate focus on class certifiability despite clear standing issues. More specifically, FBG contends that class action lawsuits cannot be used to aggregate claims of participants in plans in which they have no stake.

In response, Plaintiffs insist that the district court simply recognized that FBG's concerns were best addressed during the Rule 23 analysis and correctly relied on the Sixth Circuit's analysis in *Fallick* to conclude that

Plaintiffs have standing. 162 F.3d at 424. We agree with Plaintiffs on this issue.

Federal courts have a continuing obligation to address jurisdictional defects. *See Lewis v. Hunt*, 492 F.3d 565, 568 (5th Cir. 2007). Constitutional standing is one such consideration. The doctrine requires a plaintiff to demonstrate "(1) that he or she suffered an injury in fact that is concrete, particularized, and actual or imminent, (2) that the injury was caused by the defendant, and (3) that the injury would likely be redressed by the requested judicial relief." *Thole v. U.S. Bank N.A*, 590 U.S. 538, 140 S. Ct. 1615, 1618, 207 L. Ed. 2d 85 (2020) (citing *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-561, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992)).

The concreteness and particularity of Plaintiffs' injuries are especially relevant in this case. The Supreme Court has explained that a concrete injury is one that is "real, and not abstract." *Spokeo, Inc. v. Robins*, 578 U.S. 330, 340, 136 S. Ct. 1540, 194 L. Ed. 2d 635 (2016) (quotations omitted) (explaining that for an injury to be concrete, it "must actually exist"). And for an injury to be particularized, it must "affect the plaintiff in a personal and individual way." *Id.* at 339 (quotations and citation omitted).

"The party invoking federal jurisdiction bears the burden of establishing these elements." *Lujan*, 504 U.S. at 561. Plaintiffs carry this burden throughout the litigation proceedings. *See id.* ("Since [standing is not a] mere pleading requirement[] but rather an indispensable part

of the plaintiff's case, each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of the litigation.").

The Supreme Court has repeatedly explained that "Article III does not give federal courts the power to order relief to any uninjured plaintiff, class action or not." *TransUnion LLC v. Ramirez*, 594 U.S. 413, 141 S. Ct. 2190, 2208, 210 L. Ed. 2d 568 (2021) (citing *Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442, 466, 136 S. Ct. 1036, 194 L. Ed. 2d 124 (2016) (Roberts, C.J., concurring)). The Court has also cautioned us against dispensing standing "in gross" in a class-action context—instead instructing us to ensure that plaintiffs "demonstrate standing for each claim that they press and for each form of relief that they seek[.]" *Id.* (citation omitted).

FBG raises important questions about the order and depth in which this court grapples with constitutional standing and the Rule 23 inquiry. There is a split on this very question that exists across the circuits. *See Standing to litigate what? The relationship between the class representatives' claims and those of absent class members*, 1 William B. Rubenstein, Newberg and Rubenstein on Class Actions § 2:6 (6th ed.) (identifying a circuit split on whether a "class representative may seek to litigate harms not precisely analogous to the ones she suffered but harms that were nonetheless suffered by other class members") [hereinafter, "*Newberg on Class Actions*"]. The split stems from the notion that

"[t]here cannot be a disjuncture between the harm that the plaintiff suffered and the relief that she seeks." *Id.* While relatively tame in individual cases, the disjuncture issue becomes increasingly complex as courts begin to aggregate claims for class consideration. *Id.*

Newberg on Class Actions explains that appellate courts have resolved the disjuncture issue using two methods: (1) Some courts, "having determined that the class representative has standing to pursue her own claims, move on from the standing inquiry and approach the disjuncture as an issue of class certification"; or (2) Other courts "simply find that the class representative lacks standing to pursue the class members' claims because she did not suffer their injuries[.]" *Id.* For the purposes of our analysis herein, the first approach will be referred to as the class certification approach, while the latter is the standing approach.

While the Supreme Court has yet to declare which approach is correct, its standing jurisprudence provides guidance as we weigh the potential options. We examine each respective approach and conclude that, in this case, we may proceed to Rule 23 under either theory.

1. The Class Certification Approach

The Supreme Court first grappled with the disjuncture issue in *Sosna v. Iowa*, 419 U.S. 393, 95 S. Ct. 553, 42 L. Ed. 2d 532 (1975). There, a wife brought a class action suit challenging the constitutionality of an Iowa state law that required individuals seeking a divorce to have been

a resident of the state for at least one year preceding the filing of the divorce petition. *Id.* In upholding the constitutionality of Iowa's law, the Court stated that a "named plaintiff in a class action must show that the threat of injury . . . is 'real and immediate,' not 'conjectural' or 'hypothetical.'" *Id.* at 403. It continued that the named plaintiff "must be a member of the class which he or she seeks to represent at the time the class action is certified by the district court." *Id.*

The *Sosna* court reasoned that its "conclusion [did] not automatically establish that appellant [was] entitled to litigate the interests of the class she [sought] to represent." *Id.* But it explained that "the focus of examination" nonetheless shifted "from the elements of justiciability to the ability of the named representative to 'fairly and adequately protect the interests of the class.'" *Id.* (quoting Fed. R. Civ. P. 23(a)). This conclusion evinces the Court's understanding that the Article III standing analysis, as with any justiciability inquiry, must precede any questions of class certifiability under Rule 23.

The Supreme Court later applied the same reasoning from *Sosna* in *General Telephone Company of Southwest v. Falcon*, 457 U.S. 147, 157-60, 102 S. Ct. 2364, 72 L. Ed. 2d 740 (1982). There, the named plaintiff, a Mexican-American employee, was passed over for a promotion and brought a class-action suit against his employer for alleged discrimination in both the hiring and promoting of minority employees. *Id.* at 150. While the Court acknowledged that the named plaintiff established standing to represent a class comprised of other minorities

passed over for *promotions*, it declined to allow him to represent persons that were never hired because of an allegedly discriminatory *application* process. *Id.* at 157-60. Notably, the Court came to its conclusion in the Rule 23(a) commonality analysis—not during the constitutional or statutory standing inquiries. *Id.*

At the circuit-court level, the class certification approach was followed by the Sixth Circuit in *Fallick* and has gained traction in the First, Third, and Ninth Circuits.[1] *See* 162 F.3d at 424; *see also In re Asacol Antitrust Litig.*, 907 F.3d 42, 49 (1st Cir. 2018) ("Nothing . . . suggests that the claims of the named plaintiffs must in all respects be identical to the claims of each class member. Requiring that . . . to establish standing would confuse the requirements of Article III and Rule 23." (internal quotations and citations omitted)); *Boley*

1. We further note the class certification approach's prominence in the district courts of most circuits, including our own. *See, e.g., In re RadioShack Corp. ERISA Litigation*, 547 F. Supp. 2d 606, 611 (N.D. Tex. 2008) (holding that the named plaintiff established individual standing and stating that whether he could represent the other ERISA class members "should be left for later determination under Rule 23"); *see also Molock v. Whole Foods Market, Inc.*, 297 F. Supp. 3d 114, 130 (D.D.C. 2018), *aff'd on other grounds*, 952 F.3d 293, 445 U.S. App. D.C. 417 (D.C. Cir. 2020) (rejecting defendants' standing argument that "Plaintiffs cannot pursue claims on behalf of putative class members from states in which Plaintiffs do not reside or suffered no injury" because "such considerations are appropriately resolved at the class certification stage, which is designed precisely to address concerns about the relationship between the class representative and the class" (internal quotations and citations omitted)).

v. Universal Health Servs., Inc., 36 F.4th 124, 133 (3d Cir. 2022) (explaining that named plaintiffs established standing and that defendants' "concerns regarding the representation of absent class members might implicate class certification or damages but are distinct from the requirements of Article III"); *B.K. by next friend Tinsley v. Snyder*, 922 F.3d 957, 967 (9th Cir. 2019), *cert. denied*, 140 S. Ct. 2509, 206 L. Ed. 2d 463 (2020) ("As we have previously explained, once the named plaintiff demonstrates her individual standing to bring a claim, the standing inquiry is concluded, and the court proceeds to consider whether the Rule 23(a) prerequisites for class certification have been met. Any issues regarding the relationship between the class representative and the passive class members—*such as dissimilarity in injuries suffered*—are relevant only to class certification, not to standing." (emphasis added) (internal quotation marks and citations omitted)).

2. The Standing Approach

Less than a decade after *Sosna*, the Supreme Court encountered the disjuncture issue again in *Blum v. Yaretsky*, a Medicaid case involving a Fourteenth Amendment challenge to certain nursing homes' unilateral decisions to transfer patients to facilities with lesser or higher levels of care than the patients already had without any administrative hearings for their desires to be heard. 457 U.S. 991, 102 S. Ct. 2777, 73 L. Ed. 2d 534 (1982). The Court's analysis primarily focused on standing, as it explained that:

> It is not enough that the conduct of which the plaintiff complains will injure *someone*. The complaining party must also show that he is within the class of persons who will be concretely affected. Nor does a plaintiff who has been subject to injurious conduct of one kind possess by virtue of that injury the necessary stake in litigating conduct of another kind, although similar, to which he has not been subject.

Id. at 999 (emphasis in original) (citing *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 166-67, 92 S. Ct. 1965, 32 L. Ed. 2d 627 (1972)). In concluding that the plaintiffs lacked standing, the Court explained that "the conditions under which such transfers [to higher levels of care] occur are sufficiently different from those [that] respondents do have standing to challenge that any judicial assessment of their procedural adequacy would be wholly gratuitous and advisory." *Id.* at 1001. The Court's attention in *Blum* clearly centered on the "kind" of injury and whether that injury placed the potential representative "within the class of persons who will be concretely affected." *Id.* at 999.

Fourteen years later, the Supreme Court grappled with the standing approach again in *Lewis v. Casey*, 518 U.S. 343, 346, 116 S. Ct. 2174, 135 L. Ed. 2d 606 (1996). There, the Court considered a class action brought by a group of Arizona inmates alleging a denial of their right of access to the courts. *Id.* The named plaintiff claimed that he was denied access to the courts due to his illiteracy and further averred that the prison refused to provide him

with any services to assist him. *Id.* at 356. While the Court agreed that the named plaintiff likely had standing to sue, it declined to extend standing to others who were denied access to the courts for reasons other than illiteracy. *Id.* at 358 (refusing to provide standing to enter the class to "non-English speakers," "prisoners in lockdown," and the "inmate population at large").

The *Lewis* court supported its cabining of the named plaintiff's standing by explaining that the "actual-injury requirement would hardly serve [its] purpose . . . if once a plaintiff demonstrated harm from one particular inadequacy in government administration, the court were authorized to remedy *all* inadequacies in that administration." *Id.* at 357 (emphasis in original). It continued that "[t]he remedy must of course be limited to the inadequacy that reduced the injury in fact that the plaintiff has established . . . This is no less true with respect to class actions than with respect to other suits." *Id.* Put simply, the Court refused to allow a plaintiff whose injury stemmed from his illiteracy represent those that had suffered the same injury for an entirely different, unrelated reason. *Id.*

Finally, the Supreme Court's decision in *Gratz v. Bollinger* marked a further development in the standing approach. *See* 539 U.S. 244, 123 S. Ct. 2411, 156 L. Ed. 2d 257 (2003). That landmark case involved a class-action challenge to the University of Michigan's ("UM") race-based affirmative action policies in its admissions process. *Id.* at 252. The named plaintiff in that case sought admittance to UM by transferring from another

university. *Id.* Given the Court's decision in *Lewis*, one might think that any class that he represented would be limited to other transfer students that alleged to have been harmed by UM's race-based admissions policies. 518 U.S. at 357. The Court, however, allowed him to not only sue on behalf of transfer students but also prospective freshmen that alleged the same kind of harm. *Gratz*, 539 U.S. at 244. In rejecting the respondent's challenge to the plaintiff's standing at the certification stage, the Court distinguished *Gratz* from *Blum*, holding that UM's "use of race in undergraduate transfer admissions does not implicate *a significantly different set of concerns* than does its use of race in undergraduate freshman admissions." *Id.* at 265 (emphasis added).[2]

Several tests have emerged from the Supreme Court's decision in *Lewis*, offering varied levels of strictness to the standing inquiry in the class context. The broadest interpretation comes from the Ninth Circuit, which has "interpreted the . . . requirements of the *Lewis* decision loosely, requiring only broad similarity of injury between the named plaintiffs and passive class members." *Newberg on Class Actions* § 2:6 (citing *Armstrong v. Davis*, 275 F.3d 849, 867 (9th Cir. 2001) ("When determining what constitutes the same type of relief or the same kind of injury, we must be careful not to employ too narrow or

2. *See Newberg on Class Actions* § 2:6 (stating that the Court's treatment of standing in *Gratz* "suggests that the disjuncture problem may be overcome by demonstrating a sufficient relationship between the named plaintiffs' injury and the class's such that no disjuncture exists and the former can litigate the claims of the latter" (citation and footnote omitted)).

technical an approach. Rather, we must examine the questions realistically: we must reject the temptation to parse too finely, and consider instead the context of the inquiry." (abrogated on other grounds)).

Not every circuit, however, views *Lewis* and its progeny so liberally. The Second Circuit, for example, takes a stricter approach and has developed a two-part test for class standing. *See, e.g., Barrows v. Becerra*, 24 F.4th 116, 129 (2d Cir. 2022). Its test requires a named plaintiff to plausibly allege "(1) that he personally has suffered some actual injury as a result of the putatively illegal conduct of the defendant," and "(2) that such conduct implicates the same set of concerns as the conduct alleged to have caused injury to other members of the putative class by the same defendants." *Id.* (internal quotations, citation, and footnote omitted). It has explained that when this test "is satisfied, the named plaintiff's litigation incentives are sufficiently aligned with those of the absent class members[, such] that the named plaintiff may properly assert claims on their behalf." *Ret. Bd. of the Policemen's Annuity & Ben. Fund of the City of Chicago v. Bank of N.Y. Mellon*, 775 F.3d 154, 161 (2d Cir. 2014).

Notably, the Eleventh Circuit takes an approach akin to the Second Circuit. *See Fox v. Ritz-Carlton Hotel Co., LLC*, 977 F.3d 1039, 1046 (11th Cir. 2020) ("First, the class representative must satisfy the individual standing prerequisites of the case or controversy requirement. Second, the class representative must also be part of the class and possess the same interest and suffer the same injury as the class members.") (internal quotation

marks and citations omitted). In *Fox*, the Eleventh Circuit considered a putative class action against a restaurant owner under the Florida Deceptive and Unfair Trade Practice Act[3] for his alleged failure to provide adequate notice that there was an automatic gratuity or service charge added to each customer's check. *See id.* at 1039.

While the Eleventh Circuit reversed and remanded due to the plaintiff's failure to exhaust administrative remedies, it made clear that he had "class representative standing." *Id.* at 1047. Specifically, the court explained that the district court "conflate[d] the requirements of individual standing with those for a class representative." *Id.* It continued that "class standing does not necessarily require that the class representative suffer injury at the same place and on the same day as the class members. Rather, [standing] requires that the named plaintiff and class members have the same interest and suffer the same injury." *Id.* (internal citation and quotation omitted).

B. *Angell*

Relevantly, a panel of this court recently grappled with the disjuncture issue. *Angell v. Geico Advantage Ins. Co.*, 67 F.4th 727 (5th Cir. 2023). There, a group of plaintiffs (the "Angell Plaintiffs") sought "to represent a class of insureds claiming that GEICO failed to fully compensate them for the total loss of their vehicles under their respective insurance policies." *Id.* at 731. Geico challenged the Angell Plaintiffs' standing, arguing

3. FL. STAT. §§ 501.201 *et seq.* (2023).

that while each plaintiff had standing to "bring a claim on his or her own[,] . . . the nature of each [] injury" failed to "extend to the scope of the injury alleged under the class's definition, making [them] unsuitable class representatives." *Id.* at 733.

In rejecting Geico's argument, we recognized that "[t]here has yet to be a bright line drawn between the issues of standing and class certification." *Id.* (citing *Gratz*, 539 U.S. at 263 n.15). Rather than attempting to draw that line, the panel analyzed the Angell Plaintiffs' standing under both the "more intensive standing approach" and "the more forgiving class certification approach." *Id.* at 734 (internal quotations and citation omitted).

The *Angell* court held that the Angell Plaintiffs had standing to represent the class under the standing approach because their injuries and interests were "sufficiently aligned with those of the class." *Id.* at 734-35 (examining whether the Angell Plaintiffs possessed "sufficiently analogous" injuries as the class they sought to represent). The court likewise held in their favor under the class certification approach because Geico already had conceded that the Angell Plaintiffs established standing, and that was all that this more forgiving approach required. *Id.* at 734. With both tests satisfied, the panel conducted the Rule 23 inquiry. *Id.* at 736-41.

While the *Angell* court's application of the two competing approaches has no dispositive effect on the ultimate result in this case, it still provides a useful analytical framework as we endeavor to grapple with an

identical issue in the instant case. Just as the panel did in *Angell*, we decline to adopt either the class certification or standing approach because we have determined that Plaintiffs have standing under both theories. 67 F.4th at 734-36.

C. Neither Approach Bars Plaintiffs from Rule 23 Consideration

1. The Class Certification Approach

The class certification approach provides a direct route to the Rule 23 inquiry. As a reminder, the approach requires Plaintiffs to first establish their standing to sue FBG for allegedly: (1) hiring itself to perform services to Plaintiffs' insurance plans; (2) paying itself excessive compensation out of plan assets; and (3) arranging for excessive compensation to itself from other service providers to the plans. Assuming they can establish their standing to sue, we then proceed to the Rule 23 analysis to determine whether Plaintiffs can adequately and fairly represent the entire group's interests. *See Sosna*, 419 U.S. at 403; *Falcon*, 457 U.S. 157-60. Plaintiffs may proceed as class representatives only after successfully clearing both hurdles.

Here, Plaintiffs have established their standing to sue FBG. First, they have demonstrated injury in fact by alleging that FBG abused its authority under the Master Trust Agreement by hiring itself to perform services paid with funds from the CERT and CPT trusts, effectively devaluing the trusts and retirement benefits

that Plaintiffs otherwise would have accrued with their employer. Second, they have established that their injury is traceable to FBG's conduct by providing evidence of FBG's direct control over the CERT and CPT trusts and the underlying contractual agreement with their employer. Finally, their injury is redressable in this court by awarding monetary damages or other relief.[4] Any further analysis on the appropriateness of appointing Plaintiffs as the class representatives under this approach would occur during the Rule 23 inquiry. Consequently, we move on to an analysis under the standing approach.

2. The Standing Approach

The standing approach offers three different avenues for evaluating Plaintiffs' Article III standing: (1) the *Lewis* test, requiring us to consider whether Plaintiffs' harm is so unique that it warrants an isolated remedy that would be inappropriate if extended to other class members, *see* 518 U.S. at 358; (2) the *Gratz* test, which requires us to evaluate if Plaintiffs' injury implicates "a significantly different set of concerns" from the other potential class members, *see* 539 U.S. at 265; or (3) the Second or Eleventh Circuit tests for class representative standing, which are hybrid versions of the *Lewis* and *Gratz* tests. *See supra*. We address each in turn.

4. To be clear, FBG does not argue that Plaintiffs lack standing to proceed outside of the class context. Rather, its suit seeks to reverse the district court's class certification because it alleges that Plaintiffs lack standing to represent the other class members.

a. *Lewis*

Under *Lewis*, we analyze whether Plaintiffs alleged a harm that is unique to them, such that it would be unsuitable to permit other nonrelated harms in the same lawsuit. On this record, they have not alleged a narrow injury. Plaintiffs claim that FBG "impos[ed] sky-high administrative costs, . . . enrich[ing] [itself] at the expense of the Trusts' participating employee benefit plans and the employees who receive their retirement and healthcare benefits through those plans." FBG does not contend that the other class members seek or require a different remedy, nor does it assert that the injury is unique to Plaintiffs. Instead, it merely insists that because Plaintiffs had different plans and employers, they lack standing to challenge the same general practices that each member of the class was subjected to. This theory is unsupported by *Lewis*.

b. *Gratz*

The *Gratz* test is also in Plaintiffs' favor. Simply put, Plaintiffs' claim that FBG mismanaged the trust to their detriment "does not implicate a significantly different set of concerns than does" FBG's mismanagement of the trust for the unnamed class members. 539 U.S. at 265. That there is an abundance of employers and plans does nothing to shift the calculus of that conclusion either. Ultimately, Plaintiffs have undeniably suffered the same kind of loss as the unnamed class members because of FBG's alleged misconduct. *Id.* Put another way, the set of concerns here are identical between Plaintiffs and the

unnamed class members: the return of trust funds that each plaintiff would otherwise have been entitled to if FBG had not violated ERISA. Furthermore, at no stage in this litigation, has FBG argued that there are different concerns across the class.

c. The Second & Eleventh Circuit Tests

Under the Second Circuit's test, we examine whether Plaintiffs have established "(1) that [they] personally [] suffered some actual injury as a result of the putatively illegal conduct of the defendant," and "(2) that such conduct implicates the same set of concerns as the conduct alleged to have caused injury to other members of the putative class by the same defendants." *Barrows*, 24 F.4th at 129. The first prong is a traditional standing analysis, which we have already completed in Plaintiffs' favor. *See supra* Part III.C.2.a. And the second prong is nothing more than the *Gratz* test, calling for us to consider whether FBG's conduct "implicates the same set of concerns" as Plaintiffs' injury. *Barrows*, 24 F.4th at 129. As we have already explained, Plaintiffs' claim and FBG's conduct wholly implicate the same concerns with respect to each member of the class that Plaintiffs seek to represent. *See supra* Part III.C.2.b.

The Eleventh Circuit's method yields the same result. That test requires us to consider whether Plaintiffs "and [the other] class members have the same interest and suffer[ed] the same injury." *Fox*, 977 F.3d at 1047. Plaintiffs and the other class members undoubtedly have the same interest: the return of trust funds or any other vindication of their financial harm. The two also share the

same injury: FBG's mismanagement of trust funds and charging of excessive fees deprived them of some portion of the benefits that they were entitled to. Again, that these injuries were the result of different agreements with different employers does not alter that the harm occurred directly from FBG's misconduct pertaining to the trusts that it required participation in through the incorporation of certain provisions in each contract.

Despite FBG's arguments to the contrary, there is no support for a conclusion that Plaintiffs lack constitutional standing to pursue this claim on behalf of other similarly situated plaintiffs allegedly harmed by FBG's mismanagement of the CERT and CPT trusts, charging of excessive fees placed into those trusts, and self-dealing in violation of ERISA.

Having analyzed Plaintiffs' standing under each possible methodology in the Supreme Court and Fifth Circuit's jurisprudence, we are satisfied that they have established their standing to sue FBG under Article III. Whether the district court appropriately determined that they are proper class representatives now depends on whether Plaintiffs satisfy the Rule 23 thresholds for such a status.[5]

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5. Statutory standing is a key requirement for Plaintiffs as well. The district court held that Plaintiffs had statutory standing. On appeal, FBG's primary brief does not contest the district court's determination on this issue, so it is not presently before this court. *See United States v. Fernandez*, 48 F.4th 405, 412 (5th Cir. 2022) ("[F]ailure adequately to brief an issue on appeal constitutes waiver of that argument." (internal quotation and citation omitted)).

D. Rule 23 Analysis

The district court conducted a thorough analysis of Rules 23(a), (b)(1), and (b)(3). It concluded that Plaintiffs satisfied all of Rule 23(a)'s adequacy-of-representation requirements and further demonstrated that this case can be certified under either Rule 23(b)(1) or (b)(3). FBG asserts no challenge to the district court's Rule 23(a) analysis.[6] Instead, it focuses on the district court's Rule 23(b)(1) and (b)(3) determinations.[7] It avers that the district court abused its discretion by: (1) failing to account for the wide variety of plans included in the class and (2) sanctioning hundreds of mini-trials because of the individualized nature of the class claims. We agree that the requirements for class certification under Rule 23(b)(3) have been met, but hold that mandatory class status under Rule 23(b)(1) is inappropriate because this is primarily an action for damages and it is not evident that individual adjudications would substantially impair the interests of members not parties to the individual adjudications. *See* FED. R. CIV. P. 23(b)(1).

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6. While FBG seemingly takes issue with the district court's Rule 23(a) commonality analysis, its stated concerns are limited to its argument that the district court wholly relied on its commonality determinations to satisfy Rule 23(b)(3) predominance.

7. As a reminder, we review the district court's class certification under a deferential abuse-of-discretion standard. *See Allison*, 151 F.3d at 408.

Appendix A

1. Rule 23(b)(1)(B)

The district court determined that Plaintiffs had met their burden to certify a class under Rule 23(b)(1)(B). Rule 23(b)(1)(B) prevents the prejudicing of parties after the initial suit when subsequent suits involve the same subject matter. *See* FED. R. CIV. P. 23(b)(1)(B). Specifically, it stops one party from collecting damages at the expense of other parties and protects later parties from being bound by the judgment of a case in which their interests were not adequately represented. *See id.* (preventing separate actions where there is a "risk of . . . adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests").

FBG asserts that the "district court's analysis completely fails to account for the central fact that this proposed class involves vastly different plans and fees." It also contends that the district court incorrectly assumed that an accounting for Plaintiffs' claim would be dispositive in any way for any other plan members. The district court certified a mandatory class under Rule 23(b)(1) on the basis that damages should not be granted in multiple actions and that defendants might be subjected to incompatible standards by separate adjudications. The district court weighed the differences and similarities among the plans and determined that they were sufficiently similar such that deciding Plaintiffs' case as an individual action would have unwanted or impermissible effects on similarly

situated employees that contributed to the CERT and CPT trusts through different employers. Moreover, it recognized that "prosecuting separate actions could substantially impair the putative class members' ability to protect their interests because Plaintiffs are alleging two claims central to all class members." Namely, whether FBG is or is not a fiduciary, and, if so, whether it breached its duties in that role.

However, the ability of individual class members to opt out and pursue separate remedies should be preserved despite the claim for damages in the class complaint. A large part of the monetary relief that Plaintiffs seek stems from their desire to disgorge FBG of ill-gotten profits, thus restoring assets to the CERT and CPT trusts. In *Langbecker v. Electronic Data Systems Corp.*, we held that "[t]he focus on monetary damages would set this case apart from the examples of classic Rule 23(b)(1) class actions, which are based on situations 'in which different results in separate actions would impair the opposing party's ability to pursue a uniform course of conduct.'" 476 F.3d 299, 318 (5th Cir. 2007) (quoting 7A Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1773, at 16 (2005 ed.)).

Although the district court weighed numerous other factors in certifying the class under Rule 23(b)(1)(B), such as: (1) whether prosecuting these actions separately would be "'dispositive' of the interests of other class members," (2) the possibility of a due process violation against FBG, (3) the degree of prejudice FBG could potentially suffer through a Rule 23(b)(1)(B) class certification, and (4)

whether Plaintiffs' requested monetary and equitable relief was possible through a Rule 23(b)(1)(B) class, the class claims are primarily for damages and the varied amounts each class member may be owed. The inclusion of claims for injunctive and declaratory relief does not change the nature of this action. Rule 23(b)(3) certification, which permits class members to opt out, is the appropriate vehicle for such class actions.

The Supreme Court has cautioned against certification under Rule 23(b)(1)(B). *See Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 845-48, 119 S. Ct. 2295, 144 L. Ed. 2d 715 (1999) (overviewing the many concerns that follow mandatory opt-ins associated with class certification under Rule 23(b)(1)(B)). Certification under Rule 23(b)(1) is improper here because this is primarily an action for damages and it is not evident that individual adjudications would substantially impair the interests of members not parties to the individual adjudications. *See* FED. R. CIV. P. 23(b)(1). In recognition of the Court's warning, we analyze the district court's Rule 23(b)(3) determination.

2. Rule 23(b)(3)

The district court also held that Rule 23(b)(3) was another potential vehicle for certifying Plaintiffs' class because of the common questions of law and fact as to whether FBG owed fiduciary duties to the Plaintiffs and the other class members by virtue of their role in managing the CERT and CPT trusts. It further explained that this question percolated throughout the entirety of the claim as it involved whether that duty was breached.

We examine its analysis and hold that the district court did not abuse its discretion.

Class certification under Rule 23(b)(3) requires Plaintiffs to demonstrate that "questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." *See* FED. R. CIV. P. 23(b)(3). From this rule, courts have reduced the analysis to two inquiries: predominance and superiority. *Mullen v. Treasure Chest Casino, LLC*, 186 F.3d 620, 626-29 (5th Cir. 1999). FBG does not contest the district court's determination on superiority, so our discussion focuses on predominance. "In order to 'predominate,' common issues must constitute a significant part of the individual cases." *Id.* at 626.

We have further clarified that the predominance analysis "entails identifying the substantive issues that will control the outcome, assessing which issues will predominate, and then determining whether the issues are common to the class, a process that ultimately prevents the class from degenerating into a series of individual trials." *Bell Atl. Corp. v. AT&T Corp.*, 339 F.3d 294, 302 (5th Cir. 2003) (quotation marks and citation omitted). Moreover, "[t]he predominance requirement of Rule 23(b)(3), though redolent of the commonality requirement of Rule 23(a), is 'far more demanding' because it 'tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation.'" *Gene & Gene LLC v. BioPay LLC*, 541 F.3d 318, 326 (5th Cir. 2008) (quoting *Amchem Prods.*,

Inc. v. Windsor, 521 U.S. 591, 623-24, 117 S. Ct. 2231, 138 L. Ed. 2d 689 (1997)).

FBG contends that the district court abused its discretion by certifying the class under Rule 23(b)(3) because individualized issues of fee excessiveness predominate this dispute. It avers that the wide variety of different fees and plans will turn this case into a series of mini-trials. Specifically, it insists that there will need to be mini-trials on whether each of the FBG subsidiaries are functional fiduciaries as to each of the 3,344 plans. In support of that contention, it relies on the Tenth Circuit's decision in *Teets v. Great-West Life & Annuity Insurance Co.*, 921 F.3d 1200 (10th Cir. 2019), *cert. denied*, 140 S. Ct. 554, 205 L. Ed. 2d 357 (2019). It contends that *Teets* demonstrates how intricate the functional-fiduciary analysis is, so the district court erred in holding that "fiduciary status could be determined on a class-wide basis by looking at a master trust agreement giving [FBG] 'authority over their own compensation.'" We examine each argument in turn.

a. FBG's Role as Fiduciary

First, we examine the district court's conclusion that this case will not devolve into a series of mini-trials on FBG's status as a fiduciary. The district court first examined that all the claims and defenses in the class involved "concepts of duty, breach, causation, and loss." *See In re Enron Corp. Sec., Derivative & ERISA Litig.*, 284 F. Supp. 2d 511, 579 (S.D. Tex. 2003). It explained that whether FBG owed a duty to Plaintiffs was a common question across the class. Moreover, it observed that

whether that duty was breached was a similarly common question that was significant and likely dispositive over the entire class's claims.

In response, FBG maintains that those common questions fail to predominate the individualized inquiry into each plan that will necessarily follow. It cites *Teets* for the proposition that "Plaintiffs must establish that [FBG was the] functional fiduciar[y] as to each challenged action in relation to each plan." The district court disagreed, and so do we. Besides the fact that it was not bound by the Tenth Circuit's decision in *Teets*, the district court went a different direction than that court because it aptly recognized that trying this case separately would inevitably lead to the redundant production of evidence that is common across the class.[8]

For example, each plaintiff would certainly produce that plaintiff's own contract, which expressly makes FBG a fiduciary by incorporating the Master Trust Agreement. The predominant question from the production of the Master Trust Agreements is whether it operates as Plaintiffs assert. That question's commonality unequivocally dominates any potential individualized

8. FBG's other out-of-circuit authority is similarly unconvincing. For example, their reliance on the Eighth Circuit's decision in *McCaffree Financial Corp. v. Principal Life Insurance Company*, 811 F.3d 998 (8th Cir. 2016) is unpersuasive and distinguishable from the instant case because it involved a bargained-for fee arrangement made by an employer without any attack of the actual management of the trust that held the excessive fees. *Id.*

inquiries that could arise thereafter.[9] The district court did not abuse its discretion.

b. FBG's Due Process Rights

FBG also argues that the district court's decision to consider Plaintiffs' statistical evidence interferes with its constitutional right to due process by robbing it of its right "to defend against the alleged excessiveness of every fee paid by every plan in every geographic area on an individualized basis." But the nonbinding authority it cites for this right contradicts its assertions. *See Mullins v. Direct Digital, LLC*, 795 F.3d 654, 670-71 (7th Cir. 2015) (rejecting a violation of a defendant's due process rights where there is "a common method for showing individual damages," such as "a simple formula [that] could be applied to each class member's employment records" because "that would be sufficient for the predominance and superiority requirements to be met") (quoting *Newberg on Class Actions* § 12:2)).

The Seventh Circuit's understanding of due process in *Mullins* aligns with the Supreme Court's jurisprudence on damage calculations through formulae and statistical modeling in the class context. *See Comcast Corp. v. Behrend*, 569 U.S. 27, 35-37, 133 S. Ct. 1426, 185 L. Ed. 2d 515 (2013) (permitting consideration of a model to

9. FBG's argument here appears to be that it is entitled to hundreds of thousands of opportunities to prove that it is not a fiduciary to the CERT and CPT trusts. But it cites no law persuading us that the district court abused its discretion in refusing it that opportunity.

determine a liability if it "measure[s] only those damages attributable to [the class's] theory"); *see also Tyson Foods*, 577 U.S. at 454-55. In short, the district court did not violate this precedent by acknowledging Plaintiffs' plan to establish FBG's liability using an arithmetic, formulaic method. So, FBG's due process rights are sufficiently protected, and the "[d]ifferences in the amount of damages . . . among class members are no bar to class certification."

3. Rule 23(c) Particular Issues & Subclasses

Although we affirm certification under Rules 23(a) and (b)(3), we now address the district court's cursory Rule 23(c)(4)-5 analysis to provide guidance on remand. *See United States v. Murillo-Lopez*, 444 F.3d 337, 339 & n.5 (5th Cir. 2006). We agree with the district court that Plaintiffs have met their burden of demonstrating that common issues predominate over the significant individual issues in the case. However, in its certification order, the district court did not indicate that it had seriously considered the administration of the trial.

Because common questions predominate the class, Rule 23(c)(4) and Rule 23(c)(5) are relevant here. *See Smith v. Texaco, Inc.*, 263 F.3d 394, 409 (5th Cir. 2001), opinion withdrawn, cause dismissed, 281 F.3d 477 (5th Cir. 2002) (internal citation omitted) ("Therefore, the cause of action, as a whole, must satisfy rule 23(b)(3)'s predominance requirement. Once that requirement is met, rule 23(c)(4) is available to sever the common issues for a class trial."); *Elson v. Black*, 56 F.4th 1002, 1007 (5th Cir. 2023) (acknowledging that subclasses under Rule

23(c)(5)—though "necessary to preserve the possibility of proceeding as a class"—do not "relieve [Plaintiffs] of their duty to show each subclass independently satisfi[es] the Rule 23 requirements").

In *In re Deepwater Horizon*, we concluded that "common and individual issues" can be divided and tried into "multi-phase trials under Rule 23(c)(4), which permits district courts to limit class treatment to 'particular issues' and reserve other issues for individual determination." 739 F.3d 790, 816 (5th Cir. 2014). As part of its 23(b)(3) analysis, the district court acknowledged that "the issues of causation and loss also support a finding of predominance" and "this case also relies upon common proof." However, the district court failed to sufficiently address concerns regarding the variability of individualized damages in the suit. Notably, "the predominance inquiry can still be satisfied under Rule 23(b)(3) if the proceedings are structured to establish 'liability on a class-wide basis, with separate hearings to determine—if liability is established—the damages of individual class members.'" *Id.* at 817. A class may be divided into subclasses for adjudication of damages. FED. R. CIV. P. 23(c)(5).[10] Moreover, "Rule 23(c)(4) explicitly recognizes the flexibility that courts need in class certification by allowing certification 'with respect to particular issues.'" *Bolin v. Sears, Roebuck & Co.*, 231

10. "When appropriate, a class may be divided into subclasses that are each treated as a class under this rule." FED. R. CIV. P. 23(c)(5).

F.3d 970, 976 (5th Cir. 2000); FED. R. CIV. P. 23(c)(4).[11] And, recognizing the necessity for individual damages calculations does not preclude class certification under Rule 23(b)(3). *See Comcast Corp.*, 569 U.S. at 42 (Ginsburg, J., dissenting); *see also* 2 W. RUBENSTEIN, NEWBERG ON CLASS ACTIONS § 4:54, p. 205 (5th ed. 2012) (explaining that ordinarily, "individual damage[s] calculations should not scuttle class certification under Rule 23(b)(3)").

Moreover, in *Frey v. First National Bank Southwest*, we delineated the primary questions with regard to the defendant's liability and concluded that "[t]he answers to these questions [would] affect all class member's claims." 602 Fed. Appx. 164, 170 (5th Cir. 2015) (unpublished). Moreover, the *Frey* panel determined that "[t]hese common issues 'constitute a significant part of the individual cases," sufficient to meet the predominance requirement." *Id.* (citing *Jenkins v. Raymark Indus., Inc.*, 782 F.2d 468, 472 (5th Cir. 1986)). In response to the defendant's contentions that "the court must do an intensive individualized analysis to determine if each class member's account was personal," we held that "the fact that some inquiry into the nature of each account will have to be made does not render that issue predominant over the multiple common issues bearing on [defendant's] liability." *Id.*

Furthermore, *Chalmette Refining* instructed district courts to consider rigorously how they plan to "adjudicate

11. "When appropriate, an action may be brought or maintained as a class action with respect to particular issues." FED. R. CIV. P. 23(c)(4).

common class issues in the first phase and then later adjudicate individualized issues in other phases" of the multi-phase trial before the final decision is made to certify a class. *In re Deepwater Horizon*, 739 F.3d at 816. In *Chalmette Refining*, we admonished the district court because "[i]n stark contrast to the detailed trial plans in *Watson* and *Turner*, the district court simply concluded that '[t]he common liability issues can be tried in a single class action trial with any individual issues of damages reserved for individual treatment.'" *Madison v. Chalmette Refin., L.L.C.*, 637 F.3d 551, 556 (5th Cir. 2011) (citing *Watson v. Shell Oil Co.*, 979 F.2d 1014 (5th Cir. 1992) and *Turner v. Murphy Oil USA, Inc.*, 234 F.R.D. 597 (E.D. La. 2006)).

"[O]ur precedent demands a far more rigorous analysis than the district court conducted." *See Chalmette Refin*. 637 F.3d at 557. By failing to adequately analyze and determine whether liability and damages should be bifurcated in certifying the class the district court abused its discretion. Correspondingly, as this court explained in *Madison v. Chalmette Refining, L.L.C.*, predominance may be ensured in mass tort litigation when a district court performs a sufficiently "rigorous analysis" of the means by which common and individual issues will be divided and tried. *Id.* at 556; *see also In re Deepwater Horizon*, 739 F.3d at 816.

Accordingly, we remand with instructions for the district court to consider whether severing liability from individual damage issues and trying them separately may be appropriate and would be in accord with this court's

previous caselaw and Rule 23(c)(4)-(5). *See Castano v. Am. Tobacco Co.*, 84 F.3d 734, 745-46 n.21 (5th Cir. 1996) ("The proper interpretation of the interaction between subdivisions (b)(3) and (c)(4) is that a cause of action, as a whole, must satisfy the predominance requirement of (b)(3) and that (c)(4) is a housekeeping rule . . . ."); *see also In re Deepwater Horizon*, 739 F.3d at 807 n.66 (quoting *Butler v. Sears, Roebuck & Co.*, 727 F.3d 796, 800 (7th Cir. 2013) "[A] class action limited to determining liability on a class-wide basis, with separate hearings to determine—if liability is established—the damages of individual class members, or homogeneous groups of class members, is permitted by Rule 23(c)(4) and will often be the sensible way to proceed."). "This court has likewise approved mass tort or mass accident class actions when the district court was able to rely on a manageable trial plan—including bifurcation [of issues] and/or subclasses—proposed by counsel." *Steering Comm. v. Exxon Mobil Corp.*, 461 F.3d 598, 603 (5th Cir. 2006) (citing *Watson*, 979 F.2d at 1017-18 & n.9).

Aside from Plaintiffs' request for CERT and CPT subclasses, the district court should allow the parties moving for class certification to have a full opportunity to present proposals for their preferred form of class treatment. Furthermore, some of the arguable distinctions, as alleged by FBG, in the various retirement and welfare benefit plans could be handled via certification of specific issues or subclasses. "The burden is on Plaintiffs to demonstrate to the district court *how* certain proposed subclasses would alleviate existing obstacles to certification." *Elson*, 56 F.4th at 1007-08 (citing *Allison*,

151 F.3d at 420 n.15; *Spence v. Glock, Ges.m.b.H.*, 227 F.3d 308, 313 (5th Cir. 2000)). Use of subclasses or bifurcation of issues, pursuant to rule 23(c)(4) or 23(c)(5), as a remedy for manageability obstacles is supported by caselaw. *See In re Deepwater Horizon*, 739 F.3d at 817 (citing *In re Whirlpool Corp. Front-Loading Washer Products Liab. Litig.*, 722 F.3d 838, 860 (6th Cir. 2013); *Butler*, 727 F.3d at 800; *Leyva v. Medline Indus. Inc.*, 716 F.3d 510, 514 (9th Cir. 2013)).

On remand, the district court should consider whether liability and damages should be resolved commonly and whether injury, causation, and actual damages should be resolved individually. In doing so, we note that the district court has a number of options at its disposal, each of which may or may not be appropriate depending on how the case develops. We express no view on the district court's ultimate decision whether to divide this large, complex litigation into smaller, more manageable pieces in light of today's opinion, nor do we opine on the ultimate merits of the substantive claims.

Because Plaintiffs have standing and certification is appropriate under Rule 23(b)(3), the district correctly determined that this litigation may proceed as a class-action lawsuit. Accordingly, the class certification is modified to certification only under Rule 23(b)(3).

IV. Conclusion

For the foregoing reasons, we AFFIRM the district court's order in part and REVERSE in part. The

order granting class certification under Rule 23(b)(1) is REVERSED in part and granting certification under Rule 23(b)(3) is AFFIRMED in part. This matter is REMANDED for further proceedings consistent with this opinion.

APPENDIX B — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, FILED AUGUST 11, 2023

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 22-50368

HERIBERTO CHAVEZ; EVANGELINA ESCARCEGA, AS THE LEGAL REPRESENTATIVE OF HER SON JOSE ESCARCEGA; JORGE MORENO,

Plaintiffs-Appellees,

versus

PLAN BENEFIT SERVICES, INC.; FRINGE INSURANCE BENEFITS, INCORPORATED; FRINGE BENEFIT GROUP,

Defendants-Appellants.

Appeal from the United States District Court
for the Western District of Texas
USDC No. 1:17-CV-659

Before WIENER, STEWART, and ENGELHARDT, *Circuit Judges.*

Appendix B

CARL E. STEWART, *Circuit Judge*:

Heriberto Chavez, Evangelina Escarcega (representing her son, Jose Escarcega), and Jorge Moreno (collectively "Plaintiffs") seek to represent a class in a lawsuit against Plan Benefit Services, Fringe Insurance Benefits, and Fringe Benefit Group (collectively "FBG") for the alleged mismanagement of funds that Plaintiffs contributed to benefit plans through their employers. Because Plaintiffs have standing to sue and the district court did not abuse its discretion in the Rule 23 certification analysis, we AFFIRM.

I. Background

A. FBG's Alleged Mismanagement of the CERT & CPT Trusts

FBG helps employers design and administer employee benefit programs that offer retirement and health and welfare benefits to their employees. In accordance with FBG's plan, employers disburse benefits to their employees through two trusts: (1) the Contractors and Employee Retirement Trust ("CERT"), which covers retirement plans; and (2) the Contractors Plan Trust ("CPT"), which covers health and welfare benefits. Each employer signs either a separate retainer agreement or an adoption agreement as part of their enrollment in a plan. FBG serves as "Master Plan Sponsor" and "Recordkeeper" for both CERT and CPT.

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The contracts that FBG enters with employers also include a "Master Trust Agreement" granting FBG greater control over the CERT and CPT trusts. For example, the Master Trust Agreement allows FBG to determine the fees deducted from CERT and allows it to direct "banks and other entities holding Trust funds to pay those fees, including to FBG itself." As to CPT specifically, the Master Trust Agreement authorizes FBG to "calculate and deduct its own fees from employer contributions before remitting premium payments to the carriers."

FBG markets CERT and CPT to non-union employers seeking to compete for government contracts. To qualify for the contracts, employers must pay their employees prevailing wages—that is, the wages and benefits paid to the majority of similarly situated laborers in the area at the time. In assisting employers with offering benefits under the prevailing wage laws, FBG offers plans with a combination of administrative and variable fees.

For example, each employer pays an identical, fixed administrative fee of $200, nondiscriminatory testing fee of $400, and indirect percentage-based fees totaling 1.15% of the company's assets in the trust. Variable fees are assessed based on the company's selections with FBG and the company's total size and structure. So, a company that offers its employees a 401(k) may be assessed different fees than another company that offers a money-purchase plan. "These structures are called Tiered 1-4, Graded 25, and Graded 50." While employers can choose a "'tiered'

or 'graded' plan, [FBG] determines where the employer falls within [each] categorization scheme[.]"

Plaintiffs were employees of the Training, Rehabilitation & Development Institute, Inc. ("TRDI"). TRDI contracted with FBG for various services. It was required to provide wage and fringe benefits to its employees in an amount calculated by the applicable prevailing wage determination. It provided retirement plans under CERT and health and welfare plans under CPT. The agreement governing CERT, CPT, and TRDI allotted various "powers and responsibilities" to FBG. For example, FBG had the power to: (1) enter contracts imposing fees and other charges on the trusts and the plans; (2) instruct any insurance company with respect to investment or disbursement of investment funds on behalf of the Trustee; (3) require the Trustee to make disbursements for FBG's own fees in any amount that it directed; and (4) appoint and remove the Trustee.

Chavez participated in CPT, meaning that TRDI paid monthly contributions to CPT on his behalf, from which FBG deducted fees. TRDI contributed a certain amount of money to a fringe benefit account in Chavez's name for every hour that he worked, in accordance with federal and state laws. This fringe benefit account was used to help pay Chavez's premiums incurred through his enrollment in health and welfare plans provided by TRDI. TRDI also paid a premium of $570.58 a month into CPT for these benefits to cover his insurance. At least ten percent of the premium amount was paid to FBG. These fees were taken from Chavez's individual health

and welfare account. He contends that the "account was depleted more than it otherwise would have been if the fees had been reasonable." He also avers that the unreasonable fees are wholly responsible for "no amount ever [being] contributed [to his] retirement account."

Escarcega and Moreno participated in both CERT and CPT. Like Chavez, TRDI made contributions to the fringe benefit accounts based on the number of hours that Escarcega and Moreno worked. Under each plan, FBG's fees for plan administration services were subtracted from their individual accounts. They allege that FBG "deducted fees totaling more than 10% of these payments for their own compensation before remitting the remainder to" their medical insurance providers. Escarcega was also enrolled in a "limited medical plan" with Standard Security Life ("SSL") through CPT. He claims that "FBG deducted compensation for itself . . . for ancillary insurance premiums and fees of more than 17% of these payments, remitting the remaining amount as premiums to SSL."

B. Procedural History

In July 2017, Plaintiffs sued FBG for mismanaging their employee benefit plans by collecting excessive fees in violation of the Employee Retirement Income Security Act ("ERISA"). *See* 29 U.S.C. § 1001 *et seq.* Specifically, Plaintiffs asserted that FBG charged different rates for identical services and charged an excessive base fee. FBG moved to dismiss Plaintiffs' claims. The district court granted FBG's motion but gave Plaintiffs the opportunity to amend their complaint. Plaintiffs' amended

complaint alleged that FBG "accepted excessive fees, handpicked providers to maximize its profits, controlled disbursements from the trusts for its own benefit, and unlawfully procured indirect compensation." *Chavez v. Plan Benefit Servs.*, 957 F.3d 542, 544 (5th Cir. 2020). FBG moved to dismiss again for failure to state a claim under 29 U.S.C. §§ 1106(b) and § 1109(a) and lack of standing, which the district court denied.

Thereafter, Plaintiffs filed a motion for class certification. They sought to represent a class of "all participants in and beneficiaries of employee benefit plans that provide benefits through CERT and CPT, . . . from six years before the filing of this action [July 6, 2011] until the time of trial." The district court encountered a question of first impression: whether Plaintiffs had standing to sue FBG on behalf of unnamed class members from different contribution plans. It requested additional briefing on the issue and ultimately ruled that Plaintiffs had constitutional and statutory standing to sue FBG in a class-action context. On constitutional standing, the district court explained that Plaintiffs had demonstrated injury in fact, traceability, and redressability. Notably, it held that the class context was appropriate because "both the named and unnamed plaintiffs . . . are participants 'of plans that provide employee benefits through CPT or CERT.'" It concluded that commonality was sufficient to allow class certification at this stage.

As for statutory standing, the district court relied on a Sixth Circuit case, *Fallick v. Nationwide Mutual Insurance Company*, to hold that Plaintiffs' only burden

at this stage was assuring the court of their own standing to sue FBG. 162 F.3d 410, 424 (6th Cir. 1998). Specifically, it cited *Fallick* for the proposition that "the standing-related provisions of ERISA were not intended to limit a claimant's right to proceed under Rule 23 on behalf of all individuals affected by the [fiduciary's] challenged conduct, regardless of the representative's lack of participation in all the ERISA governed plans involved." *Id.* at 410; Fed. R. Civ. P. 23. It reasoned that a deeper inquiry into the appropriateness of Plaintiffs as class representatives was reserved for the Rule 23 analysis, not constitutional or statutory standing. It held in Plaintiffs' favor and certified a Rule 23(b)(1)(B) class of 90,000 employees. *Chavez v. Plan Ben. Servs. Inc.*, No. 1:17-CV-659-SS, 2018 U.S. Dist. LEXIS 100988, 2018 WL 3016925, at *7-8 (W.D. Tex. June 15, 2018).

FBG appealed, and a panel of this court vacated and remanded, holding that the district court failed to engage in the "rigorous analysis" necessary for certifying a class action under Rule 23. *See Chavez*, 957 F.3d at 544. On remand, Plaintiffs amended their motion for class certification, and the case was reassigned. The parties then presented oral argument and submitted supplemental briefing on standing.

Upon consideration, the district court certified the following two classes:

> (1) All participants and beneficiaries of plans that provide employee benefits through CPT—other than [FBG's] officers, directors, or relatives—from July 6, 2011, until trial; and

> (2) All participants and beneficiaries of plans that provide employee benefits through CERT—other than (a) participants and beneficiaries of custom plans, and (b) [FBG's] officers, directors, or relatives—from August 31, 2014, until trial.

As of February 2021, the class included "224,995 participants and 2,994 plans in CERT as well as 68,066 participants and 350 plans in CPT."

FBG then filed the instant appeal, urging this court to determine that Plaintiffs lack standing to represent the class and reverse the district court's decision that Rules 23(b)(1)(B) and (b)(3) are proper vehicles for class certification. According to FBG, certification was improper, and we should remand for proceedings on only Plaintiffs' claims.

II. Standard of Review

"Standing is a question of law that we review de novo." *N. Cypress Med. Ctr. Operating Co., Ltd. v. Cigna Healthcare*, 781 F.3d 182, 191 (5th Cir. 2015) (citation and emphasis omitted). We review "all facts expressly or impliedly found by the district court" for clear error. *Rivera v. Wyeth—Ayerst Labs.*, 283 F.3d 315, 319 (5th Cir. 2002).

We review class certification decisions for abuse of discretion. *See Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 408 (5th Cir. 1998) (citation omitted). "Implicit in this

deferential standard is a recognition of the essentially factual basis of the certification inquiry and of the district court's inherent power to manage and control pending litigation." *Id.* (citation omitted). "We review de novo, however, whether the district court applied the correct legal standards in determining whether to certify the class." *Flecha v. Medicredit, Inc.*, 946 F.3d 762, 766 (5th Cir. 2020) (emphasis, quotations, and citations omitted).

III. Discussion

Preliminarily, we address FBG's characterization of Plaintiffs' theory on appeal. FBG asserts that Plaintiffs have insisted that their lawsuit is only, or at least primarily, about excessive fees that they and the unnamed class members were subjected to by FBG. But that depiction of Plaintiffs' theory fails to capture the entire breadth of their argument.

Plaintiffs have always sought to make this case about FBG's general practices in upholding their duties as fiduciaries of the CERT and CPT trusts. Indeed, their complaint focuses on the "Master Trust Agreement" and "Adoption Agreement" as the mechanisms through which FBG was able to charge the excessive fees to the various employees that participated in their plans. Furthermore, they have always sought to bring this action on behalf of members of the trust, not just employees who were allegedly charged excessive fees. As Plaintiffs explain, the harm not only derives from FBG's charging of excessive fees but also from the financial harm that FBG allegedly caused to the CERT and CPT trusts.

We disagree with FBG that this case is *only* about the payment of excessive fees. The more apt characterization is detailed in Plaintiffs' complaint, which explains that this case is also about FBG's alleged mismanagement of the trusts that they compel each employee to pay into through contracts with their employers. Likewise, the class that the district court eventually certified further reflects this understanding of Plaintiffs' theory. With that said, we press on to FBG's standing argument.

A. Standing

FBG asserts that the district court erroneously determined that Plaintiffs had standing to challenge fees that they were never subjected to, in plans that they never participated in, relating to services that they never received, from employers for whom they never worked. It avers that the district court skipped these justiciability concerns by following incorrect and nonbinding out-of-circuit precedent, which resulted in an inappropriate focus on class certifiability despite clear standing issues. More specifically, FBG contends that class action lawsuits cannot be used to aggregate claims of participants in plans in which they have no stake.

In response, Plaintiffs insist that the district court simply recognized that FBG's concerns were best addressed during the Rule 23 analysis and correctly relied on the Sixth Circuit's analysis in *Fallick* to conclude that Plaintiffs have standing. 162 F.3d at 424. We agree with Plaintiffs on this issue.

Appendix B

Federal courts have a continuing obligation to address jurisdictional defects. *See Lewis v. Hunt*, 492 F.3d 565, 568 (5th Cir. 2007). Constitutional standing is one such consideration. The doctrine requires a plaintiff to demonstrate "(1) that he or she suffered an injury in fact that is concrete, particularized, and actual or imminent, (2) that the injury was caused by the defendant, and (3) that the injury would likely be redressed by the requested judicial relief." *Thole v. U.S. Bank N.A*, 140 S. Ct. 1615, 1618, 207 L. Ed. 2d 85 (2020) (citing *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-561, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992)).

The concreteness and particularity of Plaintiffs' injuries are especially relevant in this case. The Supreme Court has explained that a concrete injury is one that is "real, and not abstract." *Spokeo, Inc. v. Robins*, 578 U.S. 330, 340, 136 S. Ct. 1540, 194 L. Ed. 2d 635 (2016) (quotations omitted) (explaining that for an injury to be concrete, it "must actually exist"). And for an injury to be particularized, it must "affect the plaintiff in a personal and individual way." *Id.* at 339 (quotations and citation omitted).

"The party invoking federal jurisdiction bears the burden of establishing these elements." *Lujan*, 504 U.S. at 561. Plaintiffs carry this burden throughout the litigation proceedings. *See id.* ("Since [standing is not a] mere pleading requirement[] but rather an indispensable part of the plaintiff's case, each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and

degree of evidence required at the successive stages of the litigation.").

The Supreme Court has repeatedly explained that "Article III does not give federal courts the power to order relief to any uninjured plaintiff, class action or not." *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2208, 210 L. Ed. 2d 568 (2021) (citing *Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442, 466, 136 S. Ct. 1036, 194 L. Ed. 2d 124 (2016) (Roberts, C.J., concurring)). The Court has also cautioned us against dispensing standing "in gross" in a class-action context—instead instructing us to ensure that plaintiffs "demonstrate standing for each claim that they press and for each form of relief that they seek[.]" *Id.* (citation omitted).

FBG raises important questions about the order and depth in which this court grapples with constitutional standing and the Rule 23 inquiry. There is a split on this very question that exists across the circuits. *See Standing to litigate what? The relationship between the class representatives' claims and those of absent class members*, 1 William B. Rubenstein, Newberg And Rubenstein On Class Actions § 2:6 (6th ed.) (identifying a circuit split on whether a "class representative may seek to litigate harms not precisely analogous to the ones she suffered but harms that were nonetheless suffered by other class members") [hereinafter, "*Newberg on Class Actions*"]. The split stems from the notion that "[t]here cannot be a disjuncture between the harm that the plaintiff suffered and the relief that she seeks." *Id.* While relatively tame in individual cases, the disjuncture

issue becomes increasingly complex as courts begin to aggregate claims for class consideration. *Id.*

Newberg on Class Actions explains that appellate courts have resolved the disjuncture issue using two methods: (1) Some courts, "having determined that the class representative has standing to pursue her own claims, move on from the standing inquiry and approach the disjuncture as an issue of class certification"; or (2) Other courts "simply find that the class representative lacks standing to pursue the class members' claims because she did not suffer their injuries[.]" *Id.* For the purposes of our analysis herein, the first approach will be referred to as the class certification approach, while the latter is the standing approach.

While the Supreme Court has yet to declare which approach is correct, its standing jurisprudence provides guidance as we weigh the potential options. We examine each respective approach and conclude that, in this case, we may proceed to Rule 23 under either theory.

1. The Class Certification Approach

The Supreme Court first grappled with the disjuncture issue in *Sosna v. Iowa*, 419 U.S. 393, 95 S. Ct. 553, 42 L. Ed. 2d 532 (1975). There, a wife brought a class action suit challenging the constitutionality of an Iowa state law that required individuals seeking a divorce to have been a resident of the state for at least one year preceding the filing of the divorce petition. *Id.* In upholding the constitutionality of Iowa's law, the Court stated that a

"named plaintiff in a class action must show that the threat of injury . . . is 'real and immediate,' not 'conjectural' or 'hypothetical.'" *Id.* at 403. It continued that the named plaintiff "must be a member of the class which he or she seeks to represent at the time the class action is certified by the district court." *Id.*

The *Sosna* court reasoned that its "conclusion [did] not automatically establish that appellant [was] entitled to litigate the interests of the class she [sought] to represent." *Id.* But it explained that "the focus of examination" nonetheless shifted "from the elements of justiciability to the ability of the named representative to 'fairly and adequately protect the interests of the class.'" *Id.* (quoting FED. R. CIV. P. 23(a)). This conclusion evinces the Court's understanding that the Article III standing analysis, as with any justiciability inquiry, must precede any questions of class certifiability under Rule 23.

The Supreme Court later applied the same reasoning from *Sosna* in *General Telephone Company of Southwest v. Falcon*, 457 U.S. 147, 157-60, 102 S. Ct. 2364, 72 L. Ed. 2d 740 (1982). There, the named plaintiff, a Mexican-American employee, was passed over for a promotion and brought a class-action suit against his employer for alleged discrimination in both the hiring and promoting of minority employees. *Id.* at 150. While the Court acknowledged that the named plaintiff established standing to represent a class comprised of other minorities passed over for *promotions*, it declined to allow him to represent persons that were never hired because of an allegedly discriminatory *application* process. *Id.* at 157-

60. Notably, the Court came to its conclusion in the Rule 23(a) commonality analysis—not during the constitutional or statutory standing inquiries. *Id.*

At the circuit-court level, the class certification approach was followed by the Sixth Circuit in *Fallick* and has gained traction in the First, Third, and Ninth Circuits.[1] *See* 162 F.3d at 424; *see also In re Asacol Antitrust Litig.*, 907 F.3d 42, 49 (1st Cir. 2018) ("Nothing . . . suggests that the claims of the named plaintiffs must in all respects be identical to the claims of each class member. Requiring that . . . to establish standing would confuse the requirements of Article III and Rule 23." (internal quotations and citations omitted)); *Boley v. Universal Health Servs., Inc.*, 36 F.4th 124, 133 (3d Cir. 2022) (explaining that named plaintiffs established standing and that defendants' "concerns regarding the

1. We further note the class certification approach's prominence in the district courts of most circuits, including our own. *See*, *e.g.*, *In re RadioShack Corp. ERISA Litigation*, 547 F. Supp. 2d 606, 611 (N.D. Tex. 2008) (holding that the named plaintiff established individual standing and stating that whether he could represent the other ERISA class members "should be left for later determination under Rule 23"); *see also Molock v. Whole Foods Market, Inc.*, 297 F. Supp. 3d 114, 130 (D.D.C. 2018), *aff'd on other grounds*, 952 F.3d 293, 445 U.S. App. D.C. 417 (D.C. Cir. 2020) (rejecting defendants' standing argument that "Plaintiffs cannot pursue claims on behalf of putative class members from states in which Plaintiffs do not reside or suffered no injury" because "such considerations are appropriately resolved at the class certification stage, which is designed precisely to address concerns about the relationship between the class representative and the class" (internal quotations and citations omitted)).

representation of absent class members might implicate class certification or damages but are distinct from the requirements of Article III"); *B.K. by next friend Tinsley v. Snyder*, 922 F.3d 957, 967 (9th Cir. 2019), *cert. denied*, 140 S. Ct. 2509, 206 L. Ed. 2d 463 (2020) ("As we have previously explained, once the named plaintiff demonstrates her individual standing to bring a claim, the standing inquiry is concluded, and the court proceeds to consider whether the Rule 23(a) prerequisites for class certification have been met. Any issues regarding the relationship between the class representative and the passive class members—*such as dissimilarity in injuries suffered*—are relevant only to class certification, not to standing." (emphasis added) (internal quotation marks and citations omitted)).

2. The Standing Approach

Less than a decade after *Sosna*, the Supreme Court encountered the disjuncture issue again in *Blum v. Yaretsky*, a Medicaid case involving a Fourteenth Amendment challenge to certain nursing homes' unilateral decisions to transfer patients to facilities with lesser or higher levels of care than the patients already had without any administrative hearings for their desires to be heard. 457 U.S. 991, 102 S. Ct. 2777, 73 L. Ed. 2d 534 (1982). The Court's analysis primarily focused on standing, as it explained that:

> It is not enough that the conduct of which the plaintiff complains will injure *someone*. The complaining party must also show that

> he is within the class of persons who will be concretely affected. Nor does a plaintiff who has been subject to injurious conduct of one kind possess by virtue of that injury the necessary stake in litigating conduct of another kind, although similar, to which he has not been subject.

Id. at 999 (emphasis in original) (citing *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 166-67, 92 S. Ct. 1965, 32 L. Ed. 2d 627 (1972)). In concluding that the plaintiffs lacked standing, the Court explained that "the conditions under which such transfers [to higher levels of care] occur are sufficiently different from those [that] respondents do have standing to challenge that any judicial assessment of their procedural adequacy would be wholly gratuitous and advisory." *Id.* at 1001. The Court's attention in *Blum* clearly centered on the "kind" of injury and whether that injury placed the potential representative "within the class of persons who will be concretely affected." *Id.* at 999.

Fourteen years later, the Supreme Court grappled with the standing approach again in *Lewis v. Casey*, 518 U.S. 343, 346, 116 S. Ct. 2174, 135 L. Ed. 2d 606 (1996). There, the Court considered a class action brought by a group of Arizona inmates alleging a denial of their right of access to the courts. *Id.* The named plaintiff claimed that he was denied access to the courts due to his illiteracy and further averred that the prison refused to provide him with any services to assist him. *Id.* at 356. While the Court agreed that the named plaintiff likely had standing to sue, it declined to extend standing to others who were denied

access to the courts for reasons other than illiteracy. *Id.* at 358 (refusing to provide standing to enter the class to "non-English speakers," "prisoners in lockdown," and the "inmate population at large").

The *Lewis* court supported its cabining of the named plaintiff's standing by explaining that the "actual-injury requirement would hardly serve [its] purpose . . . if once a plaintiff demonstrated harm from one particular inadequacy in government administration, the court were authorized to remedy *all* inadequacies in that administration." *Id.* at 357 (emphasis in original). It continued that "[t]he remedy must of course be limited to the inadequacy that reduced the injury in fact that the plaintiff has established . . . This is no less true with respect to class actions than with respect to other suits." *Id.* Put simply, the Court refused to allow a plaintiff whose injury stemmed from his illiteracy represent those that had suffered the same injury for an entirely different, unrelated reason. *Id.*

Finally, the Supreme Court's decision in *Gratz v. Bollinger* marked a further development in the standing approach. *See* 539 U.S. 244, 123 S. Ct. 2411, 156 L. Ed. 2d 257 (2003). That landmark case involved a class-action challenge to the University of Michigan's ("UM") race-based affirmative action policies in its admissions process. *Id.* at 252. The named plaintiff in that case sought admittance to UM by transferring from another university. *Id.* Given the Court's decision in *Lewis*, one might think that any class that he represented would be limited to other transfer students that alleged to have been

harmed by UM's race-based admissions policies. 518 U.S. at 357. The Court, however, allowed him to not only sue on behalf of transfer students but also prospective freshmen that alleged the same kind of harm. *Gratz*, 539 U.S. at 244. In rejecting the respondent's challenge to the plaintiff's standing at the certification stage, the Court distinguished *Gratz* from *Blum*, holding that UM's "use of race in undergraduate transfer admissions does not implicate *a significantly different set of concerns* than does its use of race in undergraduate freshman admissions." *Id.* at 265 (emphasis added).[2]

Several tests have emerged from the Supreme Court's decision in *Lewis*, offering varied levels of strictness to the standing inquiry in the class context. The broadest interpretation comes from the Ninth Circuit, which has "interpreted the . . . requirements of the *Lewis* decision loosely, requiring only broad similarity of injury between the named plaintiffs and passive class members." *Newberg on Class Actions* § 2:6 (citing *Armstrong v. Davis*, 275 F.3d 849, 867 (9th Cir. 2001) ("When determining what constitutes the same type of relief or the same kind of injury, we must be careful not to employ too narrow or technical an approach. Rather, we must examine the questions realistically: we must reject the temptation to

2. *See Newberg on Class Actions* § 2:6 (stating that the Court's treatment of standing in *Gratz* "suggests that the disjuncture problem may be overcome by demonstrating a sufficient relationship between the named plaintiffs' injury and the class's such that no disjuncture exists and the former can litigate the claims of the latter" (citation and footnote omitted)).

parse too finely, and consider instead the context of the inquiry." (abrogated on other grounds)).

Not every circuit, however, views *Lewis* and its progeny so liberally. The Second Circuit, for example, takes a stricter approach and has developed a two-part test for class standing. *See*, *e.g.*, *Barrows v. Becerra*, 24 F.4th 116, 129 (2d Cir. 2022). Its test requires a named plaintiff to plausibly allege "(1) that he personally has suffered some actual injury as a result of the putatively illegal conduct of the defendant," and "(2) that such conduct implicates the same set of concerns as the conduct alleged to have caused injury to other members of the putative class by the same defendants." *Id.* (internal quotations, citation, and footnote omitted). It has explained that when this test "is satisfied, the named plaintiff's litigation incentives are sufficiently aligned with those of the absent class members[, such] that the named plaintiff may properly assert claims on their behalf." *Ret. Bd. of the Policemen's Annuity & Ben. Fund of the City of Chicago v. Bank of N.Y. Mellon*, 775 F.3d 154, 161 (2d Cir. 2014).

Notably, the Eleventh Circuit takes an approach akin to the Second Circuit. *See Fox v. Ritz-Carlton Hotel Co., LLC*, 977 F.3d 1039, 1046 (11th Cir. 2020) ("First, the class representative must satisfy the individual standing prerequisites of the case or controversy requirement. Second, the class representative must also be part of the class and possess the same interest and suffer the same injury as the class members.") (internal quotation marks and citations omitted). In *Fox*, the Eleventh Circuit considered a putative class action against a restaurant

owner under the Florida Deceptive and Unfair Trade Practice Act[3] for his alleged failure to provide adequate notice that there was an automatic gratuity or service charge added to each customer's check. *See id.* at 1039.

While the Eleventh Circuit reversed and remanded due to the plaintiff's failure to exhaust administrative remedies, it made clear that he had "class representative standing." *Id.* at 1047. Specifically, the court explained that the district court "conflate[d] the requirements of individual standing with those for a class representative." *Id.* It continued that "class standing does not necessarily require that the class representative suffer injury at the same place and on the same day as the class members. Rather, [standing] requires that the named plaintiff and class members have the same interest and suffer the same injury." *Id.* (internal citation and quotation omitted).

B. *Angell*

Relevantly, a panel of this court recently grappled with the disjuncture issue. *Angell v. Geico Advantage Ins. Co.*, 67 F.4th 727 (5th Cir. 2023). There, a group of plaintiffs (the "Angell Plaintiffs") sought "to represent a class of insureds claiming that GEICO failed to fully compensate them for the total loss of their vehicles under their respective insurance policies." *Id.* at 731. Geico challenged the Angell Plaintiffs' standing, arguing that while each plaintiff had standing to "bring a claim on his or her own[,] . . . the nature of each [] injury" failed to "extend to the scope of the injury alleged under

3. Fl. Stat. §§ 501.201 *et seq.* (2023).

the class's definition, making [them] unsuitable class representatives." *Id.* at 733.

In rejecting Geico's argument, we recognized that "[t]here has yet to be a bright line drawn between the issues of standing and class certification." *Id.* (citing *Gratz*, 539 U.S. at 263 n.15). Rather than attempting to draw that line, the panel analyzed the Angell Plaintiffs' standing under both the "more intensive standing approach" and "the more forgiving class certification approach." *Id.* at 734 (internal quotations and citation omitted).

The *Angell* court held that the Angell Plaintiffs had standing to represent the class under the standing approach because their injuries and interests were "sufficiently aligned with those of the class." *Id.* at 734-35 (examining whether the Angell Plaintiffs possessed "sufficiently analogous" injuries as the class they sought to represent). The court likewise held in their favor under the class certification approach because Geico already had conceded that the Angell Plaintiffs established standing, and that was all that this more forgiving approach required. *Id.* at 734. With both tests satisfied, the panel conducted the Rule 23 inquiry. *Id.* at 736-41.

While the *Angell* court's application of the two competing approaches has no dispositive effect on the ultimate result in this case, it still provides a useful analytical framework as we endeavor to grapple with an identical issue in the instant case. Just as the panel did in *Angell*, we decline to adopt either the class certification or standing approach because we have determined that

Plaintiffs have standing under both theories. 67 F.4th at 734-36.

C. Neither Approach Bars Plaintiffs from Rule 23 Consideration

1. The Class Certification Approach

The class certification approach provides a direct route to the Rule 23 inquiry. As a reminder, the approach requires Plaintiffs to first establish their standing to sue FBG for allegedly: (1) hiring itself to perform services to Plaintiffs' insurance plans; (2) paying itself excessive compensation out of plan assets; and (3) arranging for excessive compensation to itself from other service providers to the plans. Assuming they can establish their standing to sue, we then proceed to the Rule 23 analysis to determine whether Plaintiffs can adequately and fairly represent the entire group's interests. *See Sosna*, 419 U.S. at 403; *Falcon*, 457 U.S. 157-60. Plaintiffs may proceed as class representatives only after successfully clearing both hurdles.

Here, Plaintiffs have established their standing to sue FBG. First, they have demonstrated injury in fact by alleging that FBG abused its authority under the Master Trust Agreement by hiring itself to perform services paid with funds from the CERT and CPT trusts, effectively devaluing the trusts and retirement benefits that Plaintiffs otherwise would have accrued with their employer. Second, they have established that their injury is traceable to FBG's conduct by providing evidence of

FBG's direct control over the CERT and CPT trusts and the underlying contractual agreement with their employer. Finally, their injury is redressable in this court by awarding monetary damages or other relief.[4] Any further analysis on the appropriateness of appointing Plaintiffs as the class representatives under this approach would occur during the Rule 23 inquiry. Consequently, we move on to an analysis under the standing approach.

2. The Standing Approach

The standing approach offers three different avenues for evaluating Plaintiffs' Article III standing: (1) the *Lewis* test, requiring us to consider whether Plaintiffs' harm is so unique that it warrants an isolated remedy that would be inappropriate if extended to other class members, *see* 518 U.S. at 358; (2) the *Gratz* test, which requires us to evaluate if Plaintiffs' injury implicates "a significantly different set of concerns" from the other potential class members, *see* 539 U.S. at 265; or (3) the Second or Eleventh Circuit tests for class representative standing, which are hybrid versions of the *Lewis* and *Gratz* tests. *See supra*. We address each in turn.

a. *Lewis*

Under *Lewis*, we analyze whether Plaintiffs alleged a harm that is unique to them, such that it would be

4. To be clear, FBG does not argue that Plaintiffs lack standing to proceed outside of the class context. Rather, its suit seeks to reverse the district court's class certification because it alleges that Plaintiffs lack standing to represent the other class members..

unsuitable to permit other nonrelated harms in the same lawsuit. On this record, they have not alleged a narrow injury. Plaintiffs claim that FBG "impos[ed] sky-high administrative costs, . . . enrich[ing] [itself] at the expense of the Trusts' participating employee benefit plans and the employees who receive their retirement and healthcare benefits through those plans." FBG does not contend that the other class members seek or require a different remedy, nor does it assert that the injury is unique to Plaintiffs. Instead, it merely insists that because Plaintiffs had different plans and employers, they lack standing to challenge the same general practices that each member of the class was subjected to. This theory is unsupported by *Lewis*.

b. *Gratz*

The *Gratz* test is also in Plaintiffs' favor. Simply put, Plaintiffs' claim that FBG mismanaged the trust to their detriment "does not implicate a significantly different set of concerns than does" FBG's mismanagement of the trust for the unnamed class members. 539 U.S. at 265. That there is an abundance of employers and plans does nothing to shift the calculus of that conclusion either. Ultimately, Plaintiffs have undeniably suffered the same kind of loss as the unnamed class members because of FBG's alleged misconduct. *Id.* Put another way, the set of concerns here are identical between Plaintiffs and the unnamed class members: the return of trust funds that each plaintiff would otherwise have been entitled to if FBG had not violated ERISA. Furthermore, at no stage in this litigation, has FBG argued that there are different concerns across the class.

c. The Second & Eleventh Circuit Tests

Under the Second Circuit's test, we examine whether Plaintiffs have established "(1) that [they] personally [] suffered some actual injury as a result of the putatively illegal conduct of the defendant," and "(2) that such conduct implicates the same set of concerns as the conduct alleged to have caused injury to other members of the putative class by the same defendants." *Barrows*, 24 F.4th at 129. The first prong is a traditional standing analysis, which we have already completed in Plaintiffs' favor. *See supra* Part III.C.2.a. And the second prong is nothing more than the *Gratz* test, calling for us to consider whether FBG's conduct "implicates the same set of concerns" as Plaintiffs' injury. *Barrows*, 24 F.4th at 129. As we have already explained, Plaintiffs' claim and FBG's conduct wholly implicate the same concerns with respect to each member of the class that Plaintiffs seek to represent. *See supra* Part III.C.2.b.

The Eleventh Circuit's method yields the same result. That test requires us to consider whether Plaintiffs "and [the other] class members have the same interest and suffer[ed] the same injury." *Fox*, 977 F.3d at 1047. Plaintiffs and the other class members undoubtedly have the same interest: the return of trust funds or any other vindication of their financial harm. The two also share the same injury: FBG's mismanagement of trust funds and charging of excessive fees deprived them of some portion of the benefits that they were entitled to. Again, that these injuries were the result of different agreements with different employers does not alter that the harm occurred

directly from FBG's misconduct pertaining to the trusts that it required participation in through the incorporation of certain provisions in each contract.

Despite FBG's arguments to the contrary, there is no support for a conclusion that Plaintiffs lack constitutional standing to pursue this claim on behalf of other similarly situated plaintiffs allegedly harmed by FBG's mismanagement of the CERT and CPT trusts, charging of excessive fees placed into those trusts, and self-dealing in violation of ERISA.

Having analyzed Plaintiffs' standing under each possible methodology in the Supreme Court and Fifth Circuit's jurisprudence, we are satisfied that they have established their standing to sue FBG under Article III. Whether the district court appropriately determined that they are proper class representatives now depends on whether Plaintiffs satisfy the Rule 23 thresholds for such a status.[5]

D. Rule 23 Analysis

The district court conducted a thorough analysis of Rules 23(a), (b)(1), and (b)(3). It concluded that Plaintiffs

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5. Statutory standing is a key requirement for Plaintiffs as well. The district court held that Plaintiffs had statutory standing. On appeal, FBG's primary brief does not contest the district court's determination on this issue, so it is not presently before this court. *See United States v. Fernandez*, 48 F.4th 405, 412 (5th Cir. 2022) ("[F]ailure adequately to brief an issue on appeal constitutes waiver of that argument." (internal quotation and citation omitted)).

satisfied all of Rule 23(a)'s adequacy-of-representation requirements and further demonstrated that this case can be certified under either Rule 23(b)(1) or (b)(3). FBG asserts no challenge to the district court's Rule 23(a) analysis.[6] Instead, it focuses on the district court's Rule 23(b)(1) and (b)(3) determinations.[7] It avers that the district court abused its discretion by: (1) failing to account for the wide variety of plans included in the class and (2) sanctioning hundreds of mini-trials because of the individualized nature of the class claims. We disagree.

1. Rule 23(b)(1)(B)

The district court first determined that Plaintiffs had met their burden to certify a class under Rule 23(b)(1)(B). Rule 23(b)(1)(B) prevents the prejudicing of parties after the initial suit when subsequent suits involve the same subject matter. *See* FED. R. CIV. P. 23(b)(1)(B). Specifically, it stops one party from collecting damages at the expense of other parties and protects later parties from being bound by the judgment of a case in which their interests were not adequately represented. *See id.* (preventing separate actions where there is a "risk of . . . adjudications with respect to individual class

6. While FBG seemingly takes issue with the district court's Rule 23(a) commonality analysis, its stated concerns are limited to its argument that the district court wholly relied on its commonality determinations to satisfy Rule 23(b)(3) predominance.

7. As a reminder, we review the district court's class certification under a deferential abuse-of-discretion standard. *See Allison*, 151 F.3d at 408.

members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests").

FBG asserts that the "district court's analysis completely fails to account for the central fact that this proposed class involves vastly different plans and fees." It continues that the district court relied on inapposite caselaw that is too dissimilar from the present circumstances to provide a legal foundation for the certification of this class. It also contends that the district court incorrectly assumed that an accounting for Plaintiffs' claim would be dispositive in any way for any other plan members. Its arguments are unpersuasive.

We begin with FBG's contention that the "record demonstrates the variety of fees and plans in play." That proposition, as the district court recognized, is demonstrably untrue. The district court went to great lengths in analyzing the alleged uniqueness of each agreement with every employer involved with FBG and the CERT and CPT trusts.[8] For example, the district court observed that for CERT, FBG's "fees are either uniform or amenable to a pricing grid . . . [in that] all plans are charged the same amount of indirect compensation regardless of employers' choices." Furthermore, "direct compensation" was also "uniform or amenable to a pricing grid." Indeed, the boilerplate-like pricing methodology

8. Although this discussion was conducted in the Rule 23(a) commonality section, its thoroughness is not diminished in later stages of class-certification analysis.

was even explored during depositions, where FBG's Vice President, Jennifer Carol Pagano, testified that the fees FBG charged were unaffected by the different arrangements that the company made with employers.

Ultimately, the district court, in its discretion, weighed the differences and similarities among the plans—a task only possible because of the limited fluctuations in the terms of contracts—and determined that they were sufficiently similar such that deciding Plaintiffs' case as an individual action would have unwanted or impermissible effects on similarly situated employees that contributed to the CERT and CPT trusts through different employers. Moreover, it recognized that "prosecuting separate actions could substantially impair the putative class members' ability to protect their interests because Plaintiffs are alleging two claims central to all class members." Namely, whether FBG is or is not a fiduciary, and, if so, whether it breached their duties in that role.

FBG also urges us to reverse the district court because its class-certification analysis considered the precedential effect that its ruling would have on unnamed class members. Specifically, FBG argues that "[i]t is settled that the possibility that an action will have either [precedential] or stare decisis effect on later cases is not sufficient to satisfy Rule 23(b)(1)(B)." *In re Dennis Greenman Sec. Litig.*, 829 F.2d 1539, 1546 (11th Cir. 1987) (citing *Larionoff v. United States*, 533 F.2d 1167, 1181 n.36, 175 U.S. App. D.C. 32 (D.C. Cir. 1976), *aff'd*, 431 U.S. 864, 97 S. Ct. 2150, 53 L. Ed. 2d 48 (1977)). But this rule is not a categorical bar to the district court's consideration

of precedential factors or preclusive effects under Rule 23(b)(1)(B). *Id.* Rather, it prohibits a district court from certifying a Rule 23(b)(1)(B) class *solely* because of stare decisis concerns. *See*, *e.g.*, *McBirney v. Autrey*, 106 F.R.D. 240, 246 (N.D. Tex. 1985) ("Where, however, the *stare decisis* effect of individual actions presents the *only* potential prejudice to absent class members, Rule 23(b)(1)(B) is not satisfied." (emphasis added)); *see also La Mar v. H & B Novelty & Loan Co.*, 489 F.2d 461, 467 (9th Cir. 1973).

Aside from considering potential stare decisis issues, the district court weighed numerous other factors in certifying the class under Rule 23(b)(1)(B), such as: (1) whether prosecuting these actions separately would be "'dispositive' of the interests of other class members," (2) the possibility of a due process violation against FBG, (3) the degree of prejudice FBG could potentially suffer through a Rule 23(b)(1)(B) class certification, and (4) whether Plaintiffs' requested monetary and equitable relief was possible through a Rule 23(b)(1)(B) class. Because the district court considered more than just stare decisis concerns, it did not abuse its discretion.

Furthermore, FBG ignores an important aspect of Plaintiffs' relief in its attempt to make this case purely about damages and the varied amounts each class member may be owed. A key part of their requested relief sounds in equity, in that they seek a declaration that FBG must stop conduct causing future harm to the trusts and depriving the class of future benefits. This type of relief undoubtedly involves the entire class—or any other members of the

CERT and CPT trusts—and plays an important role in the calculus of Rule 23(b)(1)(B) certification.

Finally, a large part of the monetary relief that Plaintiffs seek stems from their desire to disgorge FBG of ill-gotten profits, thus restoring assets to the CERT and CPT trusts. That is yet another factor favoring the district court's decision to certify under Rule 23(b)(1)(B) because a decision on the merits dispositively implicates the financial interests of potentially hundreds of thousands of contributors to the CERT and CPT trusts.

Because we conclude that the district court did not abuse its discretion, we uphold its certification of Plaintiffs' class-action claim under Rule 23(b)(1)(B). We realize, however, that the Supreme Court has cautioned against certification under Rule 23(b)(1)(B). *See Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 845-48, 119 S. Ct. 2295, 144 L. Ed. 2d 715 (1999) (overviewing the many concerns that follow mandatory opt-ins associated with class certification under Rule 23(b)(1)(B)). In recognition of the Court's warning, we will also analyze the district court's Rule 23(b)(3) determination.

2. Rule 23(b)(3)

The district court also held that Rule 23(b)(3) was another potential vehicle for certifying Plaintiffs' class because of the common questions of law and fact as to whether FBG owed fiduciary duties to the Plaintiffs and the other class members by virtue of their role in managing the CERT and CPT trusts. It further explained

that this question percolated throughout the entirety of the claim as it involved whether that duty was breached. We examine its analysis and hold that the district court did not abuse its discretion.

Class certification under Rule 23(b)(3) requires a Plaintiff to demonstrate that "questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." *See* Fed. R. Civ. P. 23(b)(3). From this rule, courts have reduced the analysis to two inquiries: predominance and superiority. *Mullen v. Treasure Chest Casino, LLC*, 186 F.3d 620, 626-29 (5th Cir. 1999). FBG does not contest the district court's determination on superiority, so our discussion focuses on predominance. "In order to 'predominate,' common issues must constitute a significant part of the individual cases." *See Mullen*, 186 F.3d at 626.

We have further clarified that the predominance analysis "entails identifying the substantive issues that will control the outcome, assessing which issues will predominate, and then determining whether the issues are common to the class, a process that ultimately prevents the class from degenerating into a series of individual trials." *Bell Atl. Corp. v. AT&T Corp.*, 339 F.3d 294, 302 (5th Cir. 2003) (quotation marks and citation omitted). Moreover, "[t]he predominance requirement of Rule 23(b)(3), though redolent of the commonality requirement of Rule 23(a), is 'far more demanding' because it 'tests whether proposed classes are sufficiently cohesive to warrant adjudication

by representation.'" *Gene & Gene LLC v. BioPay LLC*, 541 F.3d 318, 326 (5th Cir. 2008) (quoting *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 623-24, 117 S. Ct. 2231, 138 L. Ed. 2d 689 (1997)).

FBG contends that the district court abused its discretion by certifying the class under Rule 23(b)(3) because individualized issues of fee excessiveness predominate this dispute. It avers that the wide variety of different fees and plans will turn this case into a series of mini-trials. Specifically, it insists that there will need to be mini-trials on whether each of the FBG subsidiaries are functional fiduciaries as to each of the 3,344 plans. In support of that contention, it relies on the Tenth Circuit's decision in *Teets v. Great-West Life & Annuity Insurance Company*, 921 F.3d 1200 (10th Cir. 2019), *cert. denied*, 140 S. Ct. 554, 205 L. Ed. 2d 357 (2019). It contends that *Teets* demonstrates how intricate the functional-fiduciary analysis is, so the district court erred in holding that "fiduciary status could be determined on a class-wide basis by looking at a master trust agreement giving [FBG] 'authority over their own compensation.'" We examine each argument in turn.

a. FBG's Role as Fiduciary

First, we examine the district court's conclusion that this case will not devolve into a series of mini-trials on FBG's status as a fiduciary. The district court first examined that all the claims and defenses in the class involved "concepts of duty, breach, causation, and loss." *See In re Enron Corp. Secs., Derivative & ERISA Litig.*,

284 F. Supp. 2d 511, 579 (S.D. Tex. 2003). It explained that whether FBG owed a duty to Plaintiffs was a common question across the class. Moreover, it observed that whether that duty was breached was a similarly common question that was significant and likely dispositive over the entire class's claims.

In response, FBG maintains that those common questions fail to predominate the individualized inquiry into each plan that will necessarily follow. It cites *Teets* for the proposition that "Plaintiffs must establish that [FBG was the] functional fiduciar[y] as to each challenged action in relation to each plan." The district court disagreed, and so do we. Besides the fact that it was not bound by the Tenth Circuit's decision in *Teets*, the district court went a different direction than that court because it aptly recognized that trying this case separately would inevitably lead to the redundant production of evidence that is common across the class.[9]

For example, each plaintiff would certainly produce that plaintiff's own contract, which expressly makes FBG a fiduciary by incorporating the Master Trust Agreement. The predominant question from the

9. FBG's other out-of-circuit authority is similarly unconvincing. For example, their reliance on the Eighth Circuit's decision in *McCaffree Financial Corporation v. Principal Life Insurance Company*, 811 F.3d 998 (8th Cir. 2016) is unpersuasive and distinguishable from the instant case because it involved a bargained-for fee arrangement made by an employer without any attack of the actual management of the trust that held the excessive fees.

production of the Master Trust Agreements is whether it operates as Plaintiffs assert. That question's commonality unequivocally dominates any potential individualized inquiries that could arise thereafter.[10] The district court did not abuse its discretion.

b. FBG's Due Process Rights

FBG also argues that the district court's decision to consider Plaintiffs' statistical evidence interferes with its constitutional right to due process by robbing it of its right "to defend against the alleged excessiveness of every fee paid by every plan in every geographic area on an individualized basis." But the nonbinding authority it cites for this right contradicts its assertions. *See Mullins v. Direct Digital, LLC*, 795 F.3d 654, 670-71 (7th Cir. 2015) (rejecting a violation of a defendant's due process rights where there is "a common method for showing individual damages," such as "a simple formula [that] could be applied to each class member's employment records" because "that would be sufficient for the predominance and superiority requirements to be met") (quoting *Newberg on Class Actions* § 12:2)).

The Seventh Circuit's understanding of due process in *Mullins* aligns with the Supreme Court's jurisprudence on damage calculations through formulae and statistical

10. FBG's argument here appears to be that it is entitled to hundreds of thousands of opportunities to prove that it is not a fiduciary to the CERT and CPT trusts. But it cites no law persuading us that the district court abused its discretion in refusing it that opportunity.

modeling in the class context. *See Comcast Corp. v. Behrend*, 569 U.S. 27, 35-37, 133 S. Ct. 1426, 185 L. Ed. 2d 515 (2013) (permitting consideration of a model to determine a liability if it "measure[s] only those damages attributable to [the class's] theory"); *see also Tyson Foods*, 577 U.S. at 454-55. In short, the district court did not violate this precedent by acknowledging Plaintiffs' plan to establish FBG's liability using an arithmetic, formulaic method. So, FBG's due process rights are sufficiently protected, and the "[d]ifferences in the amount of damages . . . among class members are no bar to class certification."

Because Plaintiffs have standing and certification is appropriate under Rule 23(b)(1)(B) or (b)(3), the district correctly determined that this litigation may proceed as a class-action lawsuit.

IV. Conclusion

For the foregoing reasons, we AFFIRM.

APPENDIX C — CLASS-CERTIFICATION ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS, AUSTIN DIVISION, FILED MARCH 29, 2022

UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF TEXAS,
AUSTIN DIVISION

CAUSE NO. 1:17-CV-659-LY

HERIBERTO CHAVEZ; EVANGELINA ESCARCEGA, AS THE LEGAL REPRESENTATIVE OF JOSE ESCARCEGA; AND JORGE MORENO, ON BEHALF OF THEMSELVES AND OTHERS SIMILARLY SITUATED,

Plaintiffs,

v.

PLAN BENEFIT SERVICES, INC; FRINGE INSURANCE BENEFITS, INC.; AND FRINGE BENEFIT GROUP,

Defendants.

CLASS-CERTIFICATION ORDER

This is a putative class action under the Employee Retirement Income Security Act of 1974 ("ERISA"). 29 U.S.C. § 1001 *et seq.* Plaintiffs Heriberto Chavez, Evangelina Escarcega, as the representative of her disabled son, Jose Escarcega, and Jorge Moreno (collectively, "Plaintiffs"), on behalf of themselves and

others similarly situated, are suing Defendants Plan Benefit Services, Inc. ("Plan Benefit"), Fringe Insurance Benefits, Inc. ("Fringe Insurance"), and Fringe Benefit Group, Inc.[1] ("Fringe Group") (collectively, "Defendants") to restore the assets of two trusts—the Contractors and Employees Retirement Trust ("CERT") and the Contractors Plan Trust ("CPT"). *See* ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3) (enabling participants of ERISA plan to sue for equitable relief).

Before the court is Plaintiffs' Amended Motion for Class Certification (Doc. 163), Defendants' Response in Opposition to Plaintiffs' Amended Motion for Class Certification (Doc. 168), Plaintiffs' Reply in Support of their Amended Motion for Class Certification (Doc. 169), Plaintiffs' Notice of Errata resubmitting their Amended Motion for Class Certification and Reply in support thereof (Doc. 171), the parties' Agreed Record in Support and Opposition to Plaintiffs' Amended Motion for Class Certification (Doc. 164), the court's Order Correcting Exhibit 89 of the Agreed Record (Doc. 166-167), the

1. Defendants state that Plaintiffs' summons and amended complaint (Doc. 3, 42) from 2017 omit the "Inc." in Fringe Benefit Group, Inc. However, by moving to dismiss on other grounds (Doc. 53), Defendants waived the right to argue that Plaintiffs named the wrong party. Fed. R. Civ. P. 12(b)(4)-(5) (providing defenses are waived unless made in responsive pleading or motion); *see Gartin v. Par Pharm. Co., Inc.*, 289 Fed. App'x 688, 691 n.3 (5th Cir. 2008) (noting "where the alleged defect is that the defendant is misnamed in the summons, the form of process could be challenged under Rule 12(b)(4) on the theory that the summons does not properly contain the name of the parties, or under Rule 12(b)(5) on the ground that the wrong party—a party not named in the summons—has been served").

parties' Agreed Appendix in Support and Opposition to Plaintiffs' Amended Motion for Class Certification (Doc. 170), and the parties' respective Proposed Findings of Fact and Conclusions of Law (Doc. 172-173).

The court previously certified a Rule 23(b)(1)(B) class of some 90,000 employees that involved many employers and many employer-level employee-benefit plans. *Chavez v. Plan Benefit Servs., Inc.*, No. 1:17-CV-659-SS, 2018 U.S. Dist. LEXIS 100988, 2018 WL 3016925, at *7-8 (W.D. Tex. June 15, 2018) (Sparks, J.). The Fifth Circuit vacated and remanded for a more "rigorous analysis" of how Plaintiffs met Federal Rule of Civil Procedure 23 ("Rule 23"). *Chavez v. Plan Benefit Servs., Inc.*, 957 F.3d 542, 545 (5th Cir. 2020) (quoting *Vizena v. Union Pac. R. R.*, 360 F.3d 496, 503 (5th Cir. 2004) (explaining need for rigorous analysis)); Fed. R. Civ. P. 23 (outlining elements of class certification).

After remand, the court held a class-certification hearing at which all parties were present. Plaintiffs now, under Rule 23(b)(1) or (b)(3), move to certify the following class:

> All participants in and beneficiaries of plans that provide employee benefits through CPT or CERT, other than officers and directors of the Defendants and their family members, from July 6, 2011, until trial.[2]

2. Alternatively, Plaintiffs request to (a) certify subclasses (one class of participants of plans in CERT alongside another class of participants of plans in CPT) and (b) exclude the handful of

Plaintiffs pray for a (1) declaration stating Defendants breached fiduciary duties to Plaintiffs and engaged in prohibited transactions; (2) injunction prohibiting Defendants from further breaching fiduciary duties to Plaintiffs or engaging in prohibited transactions; (3) order directing Defendants to disgorge themselves of ill-gotten profits, restore the assets of CERT and CPT, and provide other appropriate equitable relief like paying a surcharge, producing an accounting, and imposing a constructive trust or equitable lien; and (4) award of attorneys' fees, costs of suit, and prejudgment interest.

LEGAL FRAMEWORK

"The class action is an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." *Comcast Corp. v. Behrend*, 569 U.S. 27, 33, 133 S. Ct. 1426, 185 L. Ed. 2d 515 (2013). As such, every class action must meet specific requirements under Rule 23. Fed. R. Civ. P. 23(a)-(b). Once met, Rule 23 enables plaintiffs to aggregate their claims and proceed as a class against common defendants, with the named plaintiffs representing unnamed plaintiffs as well.

To proceed as a class action, every condition of Rule 23(a) must be satisfied. Rule 23(a) requires the (1) class be "so numerous" as to make joinder of all members impracticable; (2) action contain questions of law or fact "common" to the class; (3) claims or defenses of

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participants of custom plans whose fee structure is not based on Defendants' pricing grid.

the representative parties be "typical" of the claims or defenses of the class; and (4) representative parties be parties who will fairly and "adequately" protect the interests of the class. *Id.* at 23(a)(1)-(4). In short, Rule 23(a) requires numerosity, commonality, typicality, and adequacy of representation. *See, e.g., Comcast Corp.*, 569 U.S. at 33.

In addition to satisfying Rule 23(a), class actions must also be certified under Rule 23(b)(1), (b)(2), or (b)(3), which provide:

> (1) prosecuting separate actions by or against individual class members would create a risk of:
>
> > (A) inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class; or
> >
> > (B) adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests;
>
> (2) the party opposing the class has acted or refused to act on grounds that apply generally

> to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole; or
>
> (3) the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings include:
>
> > (A) the class members' interests in individually controlling the prosecution or defense of separate actions;
> >
> > (B) the extent and nature of any litigation concerning the controversy already begun by or against class members;
> >
> > (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and
> >
> > (D) the likely difficulties in managing a class action.

Fed. R. Civ. P. 23(b)(1)-(3).

A "rigorous analysis" of Rule 23's prerequisites is required before courts certify a class. *Vizena*, 360 F.3d

at 503 (citing *Castano v. American Tobacco Co.*, 84 F.3d 734, 740 (5th Cir. 1996)); *see also Cruson v. Jackson Nat'l Life Ins. Co.*, 954 F.3d 240, 249 (5th Cir. 2020). Courts may therefore "probe behind the pleadings when coming to rest on the certification." *In re Deepwater Horizon*, 739 F.3d 806, 811 (5th Cir. 2014) (quoting *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350, 131 S. Ct. 2541, 180 L. Ed. 2d 374 (2011).

Still, district courts "maintain[] substantial discretion in determining whether to certify a class action." *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 408 (5th Cir. 1998) (citation omitted). "Implicit in this deferential standard is a recognition of the essentially factual basis of the certification inquiry and of the district court's inherent power to manage and control pending litigation." *Maldonado v. Ochsner Clinic Found.*, 493 F.3d 521, 523 (5th Cir. 2007) (quoting *In re Monumental Life Ins. Co.*, 365 F.3d 408, 414 (5th Cir. 2004)).

Courts regularly certify classes of participants in ERISA plans—in 2020 alone, three ERISA cases filed by a putative class reached the Supreme Court. *See generally Intel Corp. Inv. Policy Comm. v. Sulyma*, 140 S. Ct. 768, 206 L. Ed. 2d 103 (2020) (resolving circuit split regarding when fiduciaries can invoke three-year statute of limitations for breach of fiduciary duty); *Thole v. U.S. Bank, NA.*, 140 S. Ct. 1615, 207 L. Ed. 2d 85 (2020) (clarifying when plan participants have constitutional standing to sue for statutory violations); *Retirement Plans Comm. of IBM v. Jander*, 140 S. Ct. 592, 205 L. Ed. 2d 432 (2020) (holding fiduciaries were not entitled to presumption of prudence); *see also Hughes v. Northwestern*, 142 S.

Ct. 737, 211 L. Ed. 2d 558 (2022) (holding fact that plan enabled participants to select investments from menu of options did not excuse fiduciaries, who have continuing duty to monitor investments and remove imprudent ones).

ERISA imposes the duties of loyalty and prudence on those who are fiduciaries. 29 U.S.C. § 1104(a)(1). A fiduciary is broadly defined, including any person who exercises discretionary authority or control over the management of an employee-benefit plan or the disposition of its assets. *Id.* § 1002(21). This definition may encompass an "administrator." *Pegram v. Hedrich*, 530 U.S. 211, 222 (2000). This definition may also encompass a "recordkeeper" performing "perfunctory and ministerial" functions—the key is whether the supposed fiduciary "exercises discretionary authority and control that amounts to actual decision making power." *Reich v. Lancaster*, 55 F.3d 1034, 1049 (5th Cir. 1995) (holding third-party insurance agent was functional fiduciary). This is because fiduciary status depends on an entity's "functions," rather than "titles." *Id.* at 1048.

The duty of loyalty consists of an obligation to discharge fiduciary duties "solely in the interest of the [plan] participants." 29 U.S.C. § 1104(a)(1)(A). That is, a fiduciary must act for the "exclusive purpose" of "providing benefits" to plan participants or "defraying reasonable expenses" of administering the plan. *Id.* The duty of prudence requires fiduciaries to act with the same care, skill, diligence, and prudence under the circumstances that a prudent fiduciary acting in a similar capacity and familiar with the matters would use in a similar plan with the same goals. *Id.* § 1104(a)(1)(B).

To supplement these duties, Congress also barred transactions deemed "likely to injure" an employee-benefit plan (*Harris Trust & Say. Bank v. Salomon Smith Barney Inc.*, 530 U.S. 238, 241-242 (2000)). Congress barred fiduciaries from entering a transaction that could lead to a conflict of interest between the fiduciary and the plan to which the fiduciary owes a duty. 29 U.S.C. § 1106(b). For example, a fiduciary cannot act on both sides of a transaction, engaging in self-dealing ("deal[ing] with assets of the plan in his own interest") or accepting kickbacks ("receiv[ing] any consideration for his own personal account from any party dealing with such plan in connection with a transaction involving the assets of the plan"). *Id.* § 1106(b)(1), (3). Congress also barred various transactions[3] between the plan and a "party in interest" (29 U.S.C. § 1106(a)); "Congress defined 'party in interest' to encompass those entities that a fiduciary might be inclined to favor at the expense of the plan's beneficiaries" (*Harris Trust*, 530 U.S. at 242), such as service providers (29 U.S.C. § 1002(14)(B)).

FACTUAL BACKGROUND

Defendants are closely, if not inextricably, intertwined. Plan Benefit ceased to exist as a separate legal entity when it was acquired by Fringe Group in 2016 (before that, Plan Benefit was Fringe Group's subsidiary). Fringe Insurance

3. Some such transactions include the direct or indirect "leasing[] of any property; "lending of money," "furnishing of . . . services," and "transfer[ring] . . . of any assets of the plan" between the plan and party in interest.

continues to be Fringe Group's subsidiary. Fringe Group and Fringe Insurance work in tandem, sharing the same executive team, the same employees, and the same office in Austin, Texas. They are owned by Travis West ("West"), who is also the CEO and agent for service of process. And at the time of Plaintiffs' First Amended Complaint in 2017, Defendants shared the same website, which stated that Fringe Group "includes" all of the following: Plan Benefit, Fringe Insurance, and "The Contractors Plan," which is the umbrella term for the CPT and CERT trusts. Furthermore, there is no contractual relationship between employers and Fringe Insurance, so Fringe Group determines the terms of employers' participation as those terms pertain to Fringe Insurance.

Together, Defendants design employee-benefit plans that provide retirement and health benefits, enabling employers to make contributions while employees accrue benefits. Defendants disburse retirement benefits through CERT and health benefits through CPT. Collectively, CERT and CPT hold the assets of all employee-benefit plans in the putative class ("Plan Assets").

Defendants market CERT and CPT to non-union employers seeking to compete for government contracts. The employers are often required to pay workers prevailing wages—the wages or benefits paid to similarly situated laborers in the area—in order to qualify for government contracts. Leaning on Defendants' know-how, the employers can provide retirement and health benefits and submit competitive bids.

One such employer was the Training, Rehabilitation, and Development Institute ("TRDI"). Plaintiffs are former employees of TRDI. TRDI provided benefits to Plaintiffs through CERT or CPT starting by August 31,2014. Chavez was a full-time technician for TRDI; Escarcega is the legal representative of her disabled son, who was a part-time custodian for TRDI; and Moreno was a part-time custodian for TRDI. Escarcega's benefits were held in CPT and CERT, Moreno's benefits were held in CPT and CERT, and Chavez's health benefits were held solely in CPT, though Chavez claims he would have received retirement benefits held in CERT pursuant to prevailing-wage requirements of the Davis-Bacon Act, McNamara-O'Hara Service Contract Act, and state prevailing-wage laws, had Defendants paid themselves less from CPT. 40 U.S.C. §§ 3141-3148 (Davis-Bacon Act); 41 U.S.C. §§ 6701-6707 (McNamara-O'Hara Service Contract Act).

Plaintiffs challenge Defendants' construction of CERT and CPT. One central issue is that CERT is only compatible with Transamerica Life Insurance Company ("Transamerica") and Nationwide Trust Company ("Nationwide"); Plan Assets must be invested through one or the other. But unbeknownst to Plaintiffs, Transamerica and Nationwide have side deals with Defendants. In effect, Plaintiffs pay Defendants twice: as a product of the transaction between Plaintiffs and Defendants, as well as the transaction Defendants arrange between Plaintiffs and Transamerica or Nationwide. Such payments are possible, in part, because Fringe Group directs disbursements of Plan Assets to itself without trustee approval—a second central issue raised by Plaintiffs. Fringe Group calculates all fees associated with participation in CERT and CPT,

including its own fees. Fringe Group then directs the bank or other entity holding Plan Assets to deduct money from CERT and CPT, paying itself and its wholly-owned subsidiary before putting what money remains towards retirement investments or health-insurance premiums. This causes less money to be invested for Plaintiffs' retirement and more money to be deducted for Plaintiffs' health insurance.

Plaintiffs make the following claims under ERISA. Plaintiffs claim that Defendants breached their fiduciary duties under ERISA Section 404(a)(1) by withdrawing fees from Plan Assets that were not completely or accurately disclosed, withdrawing fees from Plan Assets that were excessive, and receiving kickbacks from the service providers Defendants made available to Plaintiffs. Plaintiffs also claim that Defendants engaged in prohibited transactions with Plan Assets under ERISA Section 406 (a)(1) or (b)(1) by paying themselves excessive compensation out of Plan Assets and under ERISA Section 406(b)(3) by receiving excessive compensation from service providers in transactions involving Plan Assets.

1. CERT

CERT is a master trust that pools the investments of participating employer-level retirement-benefit plans ("CERT Plans"), each of which is a "pension plan" within the meaning of ERISA. 29 U.S.C. § 1002(2).

Joining CERT is a turnkey operation. Fringe Group sponsors the "CERT Master Plan." Participating employers adopt a CERT Plan. The CERT Plans are

modeled after the CERT Master Plan, though employers may make limited customizations from a menu of options. These customizations include whether retainer agreements are characterized as "graded" or "tiered," whether plan investments are participant-directed or trustee-directed, whether trustee-directed plans are actively or passively managed, and whether plans allows for loans.

A. CERT Contracts

To create a CERT Plan, an employer must sign standardized agreements. The agreements, prepared and maintained by Fringe Group, are referred to as a "CERT Adoption Agreement," "CERT Master Trust Agreement," and "CERT Retainer Agreement."

Employers adopt a CERT Plan via a CERT Adoption Agreement. Importantly, every CERT Adoption Agreement incorporates by reference all of the terms of CERT that are contained in the CERT Master Trust Agreement.

Under the CERT Master Trust Agreement, Fringe Group is the self-designated "Master Plan Sponsor" and "Recordkeeper" of CERT. This means Fringe Group is authorized to enter contracts for the CERT Plans, appoint or remove the CERT trustee, calculate costs of participation in CERT, and direct the CERT trustee to make disbursements from Plan Assets. Fringe Group also agrees to "make available various insurance company or custodial platforms" for investment of Plan Assets.

Fringe Group makes just two platforms, Transamerica and Nationwide, available to employers. And either way, Defendants receive additional compensation. On the one hand, Nationwide pays Fringe Insurance a percentage of all investment funds "as consideration for the sale of one or more investment contracts" with Plaintiffs. Nationwide also pays Fringe Group for administrative services. On the other hand, Transamerica pays Fringe Insurance a commission for "soliciting applications" for investment from Plaintiffs. Transamerica also pays a marketing fee equal to a percentage of withdrawals from investment funds to Fringe Insurance and a service fee equal to a percentage of the remaining balance of investment funds to Fringe Group. Part of these payments come out of Plan Assets, because Transamerica and Nationwide use Plan Assets to pay "outside brokers" according to an expense ratio (*i.e.*, according to the annual fee Transamerica and Nationwide charge Plaintiffs for managing Plan Assets).

Finally, every CERT Retainer Agreement describes the relative duties of Defendants, employers, and the CERT trustee.

B. CERT Fees

The CERT Retainer Agreement also discloses all of the fees associated with the CERT Plans. The CERT Retainer Agreement discloses the following "direct" fees: a (1) an annual basic plan administrative fee, which is billed to the employer; (2) nondiscriminatory testing fee, which is billed to the employer; (3) monthly participant administrative fee; (4) monthly plan administrative

fee; (5) monthly investment contract charge; and (6) participant surrender charge. Additionally, the CERT Retainer Agreement discloses the following "indirect" compensation from Transamerica and Nationwide: 0.80% of Plan Assets per year to Fringe Group and 0.35% of Plan Assets per year to Fringe Insurance.

Plaintiffs allege Defendants' fee disclosure is inaccurate and incomplete. This is because Defendants receive additional compensation from Nationwide and Transamerica, some of which even comes out of Plan Assets. Similarly, Fringe Insurance receives additional compensation from Fringe Group; though Fringe Group discloses it may employ "outside brokers" to assist with administering and marketing the CERT Plans, Fringe Group fails to disclose that it considers its wholly-owned subsidiary, Fringe Insurance, to be an outside broker. Finally, Defendants fail to disclose that Fringe Insurance will receive the listed investment contract charges and participant surrender charges, which alone exceed the permitted 0.35% of Plan Assets.

Fringe Group calculates and disburses all fees, which are assessed against Plan Assets.

2. CPT

CPT is the health-insurance arm of Defendants' product. It is a "multiple-employer welfare arrangement" within the meaning of ERISA. 29 U.S.C. § 1002(40). The employer-level health-insurance plans in the putative class ("CPT Plans") are welfare-benefit plans under ERISA. *Id.*

§ 1002(1). A welfare-benefit plan is an employer's promise to provide health benefits to its employees. This means an employees' benefit claims will be paid directly by the employer or by an insurance carrier hired by the employer.

Here, once an employer selects an insurance carrier, Fringe Group pays the premiums on the carrier's insurance policy using Plan Assets. The insurance policy may be issued directly to the employer, or it may be issued to CPT, which procures policies from United HealthCare, Kaiser, and MetLife.[4] Defendants do not process employees' benefit claims, as other healthcare administrators do. Instead, Defendants perform the following tasks: soliciting bids from insurance carriers, transmitting insurance premiums to insurance carriers, maintaining a census of covered participants, and providing a toll-free call center for participants to ask about enrollment and contributions. Like CERT, Fringe Group also creates and maintains the contracts that follow in its capacity as the "Recordkeeper" and "Master Plan Sponsor" of CPT.[5]

A. CPT Contracts

Fringe Group structures CPT much like CERT. An employer adopts a CPT Plan by signing a "CPT Adoption

4. If the insurance policy is issued directly to the employer, then Defendants characterize their work as one for "administrative services only."

5. Fringe Group assumed these roles from Plan Benefit between 2014 and 2016, and Fringe Group acquired Plan Benefit in 2016.

Agreement." The CPT Adoption Agreement incorporates by reference all of the terms of CPT, which are contained in the "CPT Master Trust Agreement." This means every employer participates in CPT and agrees to its terms, which Fringe Group can update at will. The CPT Adoption Agreement also includes a "Schedule C" purporting to disclose Defendants' fees.

Employers can choose the insurance carrier. And each carrier may provide different coverage or charge different out-of-pocket expenses. But Defendants provide a common set of services to all CPT Plans regardless of an employer's choice of carrier, and it is from such services that Plaintiffs' allegations spring.

B. CPT Fees

Like the CERT trust, Fringe Group calculates all fees associated with the CPT trust. It then directs the bank or other entity holding Plan Assets to pay relevant parties, such as insurance carriers. But Fringe Group deducts fees owed to it and Fringe Insurance before remitting premium payments to insurance carriers.

According to West, CEO of Fringe Group since 1998, the "standard" cost of CPT consists of an administrative fee of 7.5% of premiums, paid to Fringe Group, and a sales fee of 7.5% of premiums, paid to Fringe Insurance.

As with CERT, there is no contractual relationship between employers and Fringe Insurance, so Fringe Group determines the terms of the employers' participation

in CPT as those terms pertain to Fringe Insurance. Fringe Group hires its wholly-owned subsidiary, Fringe Insurance, to negotiate the insurance policies available to CPT Plans, including the associated insurance premiums. Since Fringe Insurance's fees are proportionally related to the costs of these insurance premiums, Fringe Insurance negotiates and exercises discretion over its own compensation.

ANALYSIS

Defendants challenge Plaintiffs' ability to certify a class as well as their standing to do so.

1. Standing

Defendants dispute standing for a fourth time.[6]

A. Constitutional Standing

The "irreducible" elements of standing under Article III of the Constitution are an "injury" that is "traceable" to the defendant and "redressable" by the requested relief. *Lujan v Defenders of Wildlife*, 504 U.S. 555, 560-561, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992). "However, the

6. On June 15, 2018, Defendants moved to dismiss for lack of standing, which the court denied. Defendants then submitted appellate briefing on the issue of standing, but the circuit did not address Defendants' standing arguments. Most recently, in February 2021, this court entertained separate briefing on the issue of standing before rejecting Defendants' arguments, which are nevertheless re-litigated here.

standard used to establish these three elements is not constant but becomes gradually stricter as the parties proceed through 'the successive stages of litigation.'" *In re Deepwater Horizon*, 739 F.3d at 799 (citing *Lujan*, 504 U.S. at 560-561)).

There is a circuit split, which the Fifth Circuit has not resolved, regarding whether to evaluate standing at class certification by reviewing both the proposed class representatives' and the absent class members' standing to sue (*see, e.g., Denney v. Deutsche Bank AG*, 443 F.3d 253, 263-264 (2d Cir. 2006) ("*Denney*")) or by reviewing only the proposed class representatives' standing to sue (*see, e.g., Kohen v. Pacific Investment Mgmt. Co.*, 571 F.3d 672, 677 (7th Cir. 2009) ("*Kohen*")). But this is no matter, for both tests are met. *In re Deepwater Horizon*, 739 F.3d at 801-803 (holding case was "not a vehicle . . . to choose whether *Kohen* or *Denney* articulated the correct test," because plaintiffs met both tests).

Plaintiffs have constitutional standing to sue. Plaintiffs allegedly suffered an "injury" because they were entitled to retirement or health benefits through CERT or CPT, but Defendants withdrew undisclosed and unjustified fees from CERT and CPT, resulting in Plaintiffs receiving less in retirement-investment savings or spending more for health-insurance premiums. In short, Defendants diminished Plaintiffs' Plan Assets. Shrinking the size of a trust is an injury in fact—even if it is more abstract than, say, taking adverse possession of a tract of land. *See Thole*, 140 S. Ct. at 1619 (noting "in the private trust context, the value of the trust property and the ultimate amount of

money received by the beneficiaries will typically depend on how well the trust is managed, so every penny of gain or loss is at the beneficiaries' risk."); *Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 592 (8th Cir. 2009) (holding plaintiff "satisfied the requirements of Article III because he has alleged actual injury to his own Plan Account"); *Boley v. Universal Health Servs., Inc.*, No. 20-CV-2644, 2020 U.S. Dist. LEXIS 202565, 2020 WL 6381395, at *6 (E.D. Pa. Oct. 30, 2020) (recognizing standing *post-Thole* for claims defendants breached fiduciary duty by charging excessive fees); *Jacobs v. Verizon Commc 'ns, Inc.*, No. 16-CV-1082-PGG, 2020 U.S. Dist. LEXIS 179421, 2020 WL 5796165, at *6 (S.D.N.Y. Sept. 29, 2020) (likewise recognizing standing post-*Thole*, as "Defendants do not, and could not credibly argue, that diminished returns are insufficient to assert standing [under ERISA].").

The second and third elements of Article III standing are also satisfied. Plaintiffs' claims are "traceable" to Defendants' conduct of not only withdrawing excessive fees from Plan Assets, but also accepting kickbacks from service providers such as Nationwide and Transamerica. *See* 29 U.S.C. § 1104 (stating fiduciary may not breach duty of loyalty nor duty of prudence); *id.* § 1106 (indicating fiduciary may not enter prohibited transactions); *id.* § 1108 (providing reasonable-compensation defense to prohibited-transactions claim). And Plaintiffs' claims are "redressable" by the court because the requested equitable relief—including a declaration, injunction, and order directing Defendants to disgorge themselves of ill-gotten profits, restore Plan Assets, and provide other appropriate equitable relief such as paying a surcharge,

producing an accounting, and imposing a constructive trust or equitable lien—could restore Plan Assets, replenishing Plaintiffs' trusts and remedying Plaintiffs' harm. Congress authorized courts to grant such relief. *See id* § 1132 ("A civil action may be brought . . . by a participant or beneficiary . . . to recover benefits due to him under the plan"); *id.* § 1109 ("Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter shall be personally liable to make good to such plan any losses to the plan resulting from such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary").

Characteristic of both the named and unnamed plaintiffs is that they are participants "of plans that provide employee benefits through CPT or CERT." The application is the same: the unnamed plaintiffs have constitutional standing to sue because they have allegedly suffered an injury that is traceable to Defendants' conduct and redressable by Plaintiffs' requested relief; that is, the unnamed plaintiffs received less in retirement-investment savings or spent more on health-insurance premiums because Defendants withdrew undisclosed and unjustified fees from CPT or CERT, trusts that Plaintiffs seek to restore. *Lujan*, 504 U.S. at 560-561.

The court has "probe[d] behind the pleadings." *In re Deepwater Horizon*, 739 F.3d at 806. Plaintiffs have

articulated a legal entitlement to relief and provided supporting evidence, ranging from authenticated contracts to signed declarations and depositions. However, the court stops short of weighing the evidence and reaching the ultimate question of whether Plaintiffs are in fact entitled to restore Plan Assets. Sure, as Defendants note, standing is supported "with the manner and degree of evidence required" at that successive stage of the litigation. *Id.* at 800. However, at the certification stage, the court has "no license to engage in free-ranging merits inquiries." *Id.* at 798 ("Merits questions may be considered to the extent—but only to the extent—that they are relevant to determining whether the Rule 23 prerequisites for class certification are satisfied.") (citing *Amgen Inc. v. Connecticut Ret. Plans & Trust Funds*, 568 U.S. 455, 466, 133 S. Ct. 1184, 185 L. Ed. 2d 308 (2013)).

B. Statutory Standing

Plaintiffs also have statutory standing to sue. Under ERISA, a "participant" has standing to bring a civil suit for breach of fiduciary duty like the one at hand. 29 U.S.C. § 1109(a). A participant is "[1] any employee or former employee of an employer [2] who is or may become eligible to receive a benefit of any type [3] from an employee benefit plan which covers employees of such employer . . . ." *Id.* § 1002(7).

First, Plaintiffs are "former employee[s]" of TRDI. *Id.* § 1002(7). Chavez was a full-time technician for TRDI; Escarcega is the legal representative of her son, who was a part-time custodian for TRDI; and Moreno was a part-

time custodian for TRDI. Escarcega's benefits were held in CPT and CERT, Moreno's benefits were held in CPT and CERT, and Chavez's health benefits were held solely in CPT, though Chavez asserts he would have received retirement contributions held in CERT per prevailing-wage requirements had the challenged fees for CPT been lower.[7]

Second, Plaintiffs "may become eligible to receive a benefit." *Id.* § 1002(7). A person "may become eligible" if he has a "colorable claim" to benefits under ERISA. *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 116-117, 109 S. Ct. 948, 103 L. Ed. 2d 80 (1989). A colorable claim is merely one that is not frivolous. *See, e.g., Panaras v. Liquid Carbonic Indus. Corp.*, 74 F.3d 786, 790-791 (7th Cir. 1996). Plaintiffs have gone far beyond that requirement, submitting admissible evidence suggesting Defendants withdrew fees from Plaintiffs' Plan Assets as part of unlawful scheme under ERISA. *See* 29 U.S.C. §§ 404, 406. Furthermore, even a person who has already received benefits may be "eligible to receive a benefit" if

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7. Based on Chavez's wages and applicable prevailing-wage laws, TRDI was allegedly required to pay Chavez at least $640.00 in benefits. TRDI did put $640.00 towards Chavez's prevailing-wage contributions. But Defendants deducted much of that contribution from CPT to pay Chavez's monthly heath-insurance premiums and to pay themselves. Thus, Plaintiffs argue, if Defendants had paid themselves less, then Chavez would have had contributions left over to be held in CERT as well. That theory of liability is the origin of this case. Chavez began speaking with coworkers because he noticed no contributions were being made to his retirement account and was concerned that the fees assessed on the welfare-side were so excessive that nothing was left for the retirement-side.

he did not receive "everything owed" to him under the ERISA plan. *Sommers Drug Stores Co. Emp. Profit Sharing Trust v. Corrigan*, 883 F.2d 345, 350 (5th Cir. 1989) (holding class representatives who already accepted vested benefits were still participants authorized to sue for breach of fiduciary duty under ERISA, because amount received was allegedly less than fair market value) (distinguishing *Yancy v. American Petrofina, Inc.*, 768 F.2d 707, 709 (5th Cir. 1985) (regarding "retirees who ha[d] accepted the payment of everything owed to them in a lump sum")); *accord Vaughn v. Bay Env. Mgmt. Inc.*, 567 F.3d 1021, 1026 (9th Cir. 2006) ("Because [the plaintiff] alleges that he did not receive everything that was due to him under the [employee-benefit p]lan, he has standing."). Likewise here, Plaintiffs claim they did not receive "everything owed" to them from Plan Assets because Defendants took Plan Assets, causing Plaintiffs' retirement investments to be smaller and to generate smaller returns (*see Jacobs*, 2020 U.S. Dist. LEXIS 179421, 2020 WL 5796165, at *6 (holding diminished returns are an injury)), and depleting money earmarked for Plaintiffs' health-insurance premiums (*see Braden*, 588 F.3d at 592 (holding smaller account is an injury)). Plaintiffs were not required to sue Defendants before TRDI terminated its relationship with Defendants. *Pfahler v. National Latex Products Co.*, 517 F.3d 816, 827 (6th Cir. 2007) (noting ERISA does not require participants to sue "before plan termination").

Finally, whether Plaintiffs participated in CERT, CPT, or both, Plaintiffs participated in an "employee benefit plan." 29 U.S.C. § 1002(7). An "employee benefit

plan" can be an employee "pension" benefit plan or "welfare" benefit plan. *Id.* § 1002(3). CERT is a trust that certifies a master plan, which is adopted by participating employers' respective pension benefit plans. *Id.* § 1002(2), (3). CPT is a special type of welfare benefit plan known as a "multiple employer welfare arrangement," which is defined as an arrangement established or maintained for the purpose of providing benefits to two or more employers. *Id.* § 1002(40). Each Plaintiff participated in CERT, and it is not significant that only two of the three Plaintiffs participated in CPT. In class actions with multiple named plaintiffs, every plaintiff need not have standing to assert every claim; the court has jurisdiction over a subclaim if at least one named plaintiff has standing to raise the subclaim. *See Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 264 n.9, 97 S. Ct. 555, 50 L. Ed. 2d 450 (1977) ("Because of the presence of this plaintiff, we need not consider whether the other individual and corporate plaintiffs have standing to maintain the suit.").

Still, Defendants aver that the named and unnamed plaintiffs are not participants of the *same* employee-benefit plan insofar as the unnamed plaintiffs include individuals who have accrued benefits through CERT or CPT but have *not* been employed by TRDI. Not so with respect to CPT, because CPT is in and of itself considered an "employee benefit plan" under ERISA. *Id.* § 1002(40). And while seemingly true with respect to CERT, the named plaintiffs still have statutory standing to assert class claims on behalf of the unnamed plaintiffs: Once a potential class representative establishes individual standing to sue his

own ERISA-governed plan, there is no additional standing requirement related to the representative's suitability to represent a potential class including other plans to which he does not belong. *See Fallick v. Nationwide Mut. Ins. Co.*, 162 F.3d 410, 424 (6th Cir. 1998) ("[T]he standing-related provisions of ERISA were not intended to limit a claimant's right to proceed under Rule 23 on behalf of all individuals affected by the [fiduciary's] challenged conduct, regardless of the representative's lack of participation in all the ERISAgoverned plans involved.") (citing *Forbush v. J.C. Penney Co.*, 994 F.2d 1101 (5th Cir. 1993) (where injury arose from defendants' response tactics, which applied uniformly to claims of each class member, court proceeded to Rule 23 analysis and did not consider whether class representative had standing to represent absent class members in other plans), *abrogated on other grounds by In re Rodriguez*, 695 F.3d 360, 370 (5th Cir. 2012); *see also Larson v. Allina Health Sys.*, 350 F. Supp. 3d 780, 791 (D. Minn. 2018) (holding named participants in retirement-investment plan had standing to sue on behalf of unnamed participants even though named participants hadn't individually invested in each possible retirement-investment fund).

Similarly, Plaintiffs have statutory standing to seek restoration of Plan Assets since at least 2014. The question whether recovery might be had for the period before or after Plaintiffs personally suffered injury understandably turns on whether the "statutory provision on which the claim rests properly can be understood as granting persons in the plaintiff's position a right to judicial relief." *Warth v. Seldin*, 422 U.S. 490, 500, 95 S. Ct. 2197, 45

L. Ed. 2d 343 (1975). Here, ERISA provides statutory standing to "participants," defined to include both current and former employees. Plaintiffs have therefore been "participants" since 2014, when TRDI began providing benefits to employees such as Plaintiffs through CERT and CPT, regardless of when Plaintiffs' employment with TRDI or TRDI's relationship with Defendants ended. 29 U.S.C. §§ 1109, 1002; *see Pfahler, 517* F.3d at 827 (noting ERISA does not require participants to sue "before plan termination" and permitting participants "to bring suit to remedy fiduciary breaches even after a plan is defunct effectuates ERISA's underlying goals"). Additionally, Plaintiffs may sue on behalf of those who were "participants" in CPT before 2014 because CPT is itself an "employee benefit plan" and it is well-settled that a suit under ERISA Section 1132 must be brought "on behalf of the plan as a whole." *Id.* § 1002(40); *Braden*, 588 F.3d at 593 (holding recovery under ERISA Section 1132 for breach of fiduciary duty may "be had for the period before [the named plaintiff] personally suffered injury" because it is well-settled that such a suit must be "brought in a representative capacity on behalf of the plan as a whole" and that related remedies "protect the entire plan" (first quoting *Mutual Life Ins. Co. v. Russell*, 473 U.S. 134, 142, 105 S. Ct. 3085, 87 L. Ed. 2d 96 (1985)); and then citing *LaRue v. DeWolff, Boberg & Assocs.*, 552 U.S. 248, 128 S. Ct. 1020, 169 L. Ed. 2d 847 (2008) (ERISA Section 1132 "does not provide a remedy for individual injuries distinct from plan injuries"). But the class for CPT does not reach back before July 6, 2011, because the suit was filed July 6, 2017, and the statute of limitations for a Section-1132 suit is generally six years. 29 U.S.C. § 1113

(providing suits must be filed within six years of alleged breach or within six years of discovery); *see also Intel Corp. Inv. Policy Comm. v. Sulyma*, 140 S. Ct. 768, 206 L. Ed. 2d 103 (2020) (resolving circuit split regarding when fiduciaries can invoke three-year statute of limitations for breach of fiduciary duty). Ultimately, the named plaintiffs are undoubtedly "participants" with statutory standing to sue, and whether they can properly represent the interests of unnamed "participants" from other time periods goes to the appropriateness of class certification. *Braden*, 588 F.3d at 589 (holding plaintiff who alleged defendants charged excessive fees had standing because plaintiff alleged injury to his own plan account, and issue of whether plaintiff could represent claims for time period prior to his contributions related to cause of action, not to standing); *Fallick*, 162 F.3d at 423.

That is, the proposed class representatives are just that—*representative* of the other plaintiffs in the lawsuit. "A potential class representative must demonstrate individual standing vis-as-vis the defendant; he cannot acquire such standing merely by virtue of bringing a class action." *See id.* (citing *Brown v. Sibley*, 650 F.2d 760, 770 (5th Cir. 1981), *superseded by statute on other grounds as stated in McMullen v. Wakulla Bd. of Cty. Comm'rs.*, 650 Fed. App'x 703, 705 (11th Cir. May 25, 2016)). But if individual "standing has been established, whether a plaintiff will be able to represent the putative class, including absent class members, depends solely on whether he is able 0 to meet the additional criteria encompassed in Rule 23." *Fallick*, 162 F.3d at 423 (citing *Cooper v. University of Tex. at Dallas*, 482 F. Supp.

187 (N.D. Tex. 1979) (upon noting Congress intended relevant statute "to be a broad, remedial measure," court then "turn[ed] to Rule 23")); *see also* Herbert B. Newberg, *Newberg on Class Actions* § 2.06 (5th ed. 2020) ("[W]hen a class plaintiff shows individual standing, the court should proceed to Rule 23 criteria to determine whether, and to what extent, the plaintiff may serve in a representative capacity on behalf of the class."); *but see Brown v. Nationwide Life Ins.*, No. 2:17-CV-558, 2019 U.S. Dist. LEXIS 160940, 2019 WL 4543538, *3-6 (S.D. Ohio Sept. 19, 2019) (where plaintiff was participant in 401(k) plan and defendant allegedly charged plan excessive recordkeeping fees, court held plaintiff could not represent class of all participants in 401(k) plans that had similar recordkeeping agreements with defendant, though plaintiff could assert class claims on behalf of 401(k) plan in which she participated). "[C]ourts have recognized that the standing-related provisions of ERISA were not intended to limit a claimant's right to proceed under Rule 23 on behalf of all individuals affected by the challenged conduct, regardless of the representative's lack of participation in all the ERISA-governed plans involved." *Fallick*, 16 F.3d at 424.

Therefore, the named Plaintiffs are "participants"—current or former employees seeking benefits owed under plans that have provided benefits through CERT or CPT. 29 U.S.C. § 1109(a) (providing statutory standing to those who are participants). Likewise, by definition, the unnamed plaintiffs are "participants"—current or former employees seeking benefits owed under plans that have provided employee benefits through CERT or CPT.

Id. The putative class has constitutional and statutory standing to sue Defendants.

2. Class Certification

Turning to the issue of certification, Plaintiffs must satisfy the numerosity, commonality, typicality, and adequacy-of-representation requirements of Rule 23(a), and fit into at least one subcategory under Rule 23(b), to proceed as a class. *See, e.g., Comcast Corp.*, 569 U.S. at 33. Plaintiffs maintain that their proposed class satisfies numerosity, commonality, typicality, and adequacy-of-representation requirements and should be certified under either Rule 23(b)(1) or (b)(3).

A. Numerosity

The parties do not dispute numerosity. But stipulations "cannot foreclose" certain questions (*Case v. Los Angeles Lumber Products Co.*, 308 U.S. 106, 114, 60 S. Ct. 1, 84 L. Ed. 110 (1939))—"[e]ven if [the defendant] stipulates to class certification, the court [is] bound to conduct its own thorough Rule 23(a) inquiry" (*Stirman v. Exxon Corp.*, 280 F.3d 554, 563 n.7 (5th Cir. 2002)).

As of February 2021, there were 224,995 participants and 2,994 plans in CERT as well as 68,066 participants and 350 plans in CPT. The proposed class of thousands of participants is sufficiently numerous, seeing as a class containing hundreds has been deemed numerous. Fed. R. Civ. P. 23(a)(1); *see, e.g., Mullen v. Treasure Chest Casino, LLC*, 186 F.3d 620, 624 (5th Cir. 1999) (holding class with

100-150 members is "within the range that generally satisfies the numerosity requirement").

In further support of this conclusion, Plaintiffs' declarations show that the proposed class members are disbursed throughout the United States and have relatively small individual claims. Chavez, for example, had approximately $57.00 in fees withdrawn on his behalf by Defendants each month. *See Ibe v. Jones*, 836 F.2d 516, 528 (5th Cir. 2016) (providing "a number of facts other than the actual or estimated number of purported class members may be relevant to the numerosity question; these include, for example, the geographical dispersion of the class[,] .. . "the size of each plaintiff's claim," and "the ease with which class members may be identified."); *see also Anderson v. Weinert Enters., Inc.*, 986 F.3d 773, 777 (7th Cir. 2021) (providing key numerosity questions are nature of action, location of class members or property subject to dispute, and size of individual claims) ("Though we have recognized that 40 class members will often be enough to satisfy numerosity, in no way is that number etched in stone. The controlling inquiry remains the practicability of joinder.").

Finally, participants in the proposed class are clearly ascertainable. *See Deepwater Horizon*, 739 F.3d at 821 (recognizing an "implicit 'ascertainabilty' requirement"); *DeBremaecker v. Short*, 433 F.2d 733, 734 (5th Cir. 1970) (per curiam) ("It is elementary that in order to maintain a class action, the class sought to be represented must be adequately defined and clearly ascertainable."). Fringe Group, as Recordkeeper for the CERT Plans and the CPT

Plans, maintains a database with personal identifying information about each participant enrolled in said plans. On several occasions, Defendants have provided the court with the exact number of participants in the CERT and CPT Plans. This is by no means a case where the identification of class members will alone be a feat. *See, e.g.*, *Castano*, 84 F.3d at 747 (identifying cost of providing "notice to millions of class members" as part of "extensive manageability problems" of certification).

B. Commonality

Plaintiffs' claims are predicated on the assertion that Defendants are functional fiduciaries. This case turns on the following common questions: whether Defendants are fiduciaries with respect to plans that provide benefits to Plaintiffs through CERT or CPT, and if so, whether Defendants breached their fiduciary duties to Plaintiffs or engaged in prohibited transactions with Plan Assets. *See Dukes*, 564 U.S. at 2551 (explaining commonality rule requiring plaintiffs' claims raise common questions of law or fact requires plaintiffs' claims to "depend upon a common contention . . . of such a nature that . . . determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke.").

i. Fiduciary Status

Regarding the question whether Defendants are fiduciaries, Plaintiffs allege Defendants are fiduciaries under ERISA for three reasons: Defendants exercise

"discretionary authority or control" over Plan Assets by (1) directing disbursements to themselves; (2) setting and collecting undisclosed compensation; and (3) choosing the investment platforms and insurance carriers available to Plaintiffs. *See* 29 U.S.C. § 1002(21) (defining fiduciary as a person who "exercises *any* discretionary authority or control respecting management or disposition of [a plan']s assets" (emphasis added)); *see, e.g., IT Corp v. General Am. Life Ins. Co.*, 107 F.3d 1415, 1421 (9th Cir. 1997) ("The words of the ERISA statute, and its purpose of assuring that people who have practical control over an ERISA plan's money have fiduciary responsibility to the plan's beneficiaries, require that a person with authority to direct payment of a plan's money be deemed a fiduciary.").

The documents supporting such discretion are undisputed. To be specific, Defendants' control over disbursements from CERT can be established by reference to the CERT Master Trust Agreement, which is incorporated into every single plan.[8] Likewise, Defendants' control over disbursements from CPT can be established by reference to the CPT Master Trust Agreement.[9] Defendants' authority over their own compensation is exhibited by the expense ratios of the

8. For example, the CERT Master Trust Agreement provides that the trustee shall rely upon Fringe Group, the Recordkeeper, "with respect to the investment or disbursement of the Investment Funds on behalf of the Trustee and any Participant."

9. The CPT Master Trust Agreement provides that the trustee shall rely upon Fringe Group, the Recordkeeper, "with respect to the assets or disbursement of the Trust Fund assets on behalf of the Trustee and any Participant."

investment providers and insurance carriers Defendants make available to Plaintiffs.[10] And Defendants' authority over investment platforms and insurance carriers is supported by the Defendants' agreements with said providers, CERT and CPT Master Trust Agreements,[11] as well as Defendants' witnesses, West (CEO of Fringe Group) and Jennifer Carol Pagano, Vice President of Fringe Group ("Pagano").

Defendants try to work around these facts in two ways. First, Defendants note that the CERT and CPT Plans have named other fiduciaries, like the CERT and CPT trustees. However, fiduciary status depends on Defendants' "functions," rather than "titles." *Reich*, 55 F.3d at 1048. Whether Defendants intended to disclaim fiduciary status is not relevant; what would be relevant is whether Defendants intended to disclaim the discretion authorized them. *Id.* By defining a fiduciary in functional terms, Congress intentionally "expand[ed] the universe of

10. If the employer selects Nationwide, the relationship between Nationwide, Fringe Group, and the CERT trustee is governed by a contract called the "Program Agreement." And if the employer selects Transamerica, the relationship is governed by three group annuity contracts between Transamerica and the CERT trustee as well as a separate contract between Transamerica, Fringe Group, and Fringe Insurance to which the CERT trustee is not a party.

11. The agreements provide that Fringe Group "may make available various insurance company or custodial platforms and permit Employers to designate the platform in which the Employer Plan will be invested" (CERT) or "will make available various insurance company Policies and permit Employers to designate the insurance company, Policy and optional provisions for their Employer Plans" (CPT).

persons subject to fiduciary duties—and damages—under [ERISA]." *Id.* (quoting *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 262, 113 S. Ct. 2063, 124 L. Ed. 2d 161 (1993) (citing 29 U.S.C. § 1109(a))).

Second, Defendants argue that the court must examine the substance of the many underlying CERT and CPT Plans, because Defendants cannot be fiduciaries if they took actions authorized by the plans. Not so. Defendants can be fiduciaries if they exercised discretion, even if such discretion was authorized. *See Rozo v. Principal Life Ins. Co.*, 949 F.3d 1071, 1074 (8th Cir. 2020) ("A service provider may be a fiduciary when it exercises discretionary authority, even if the contract authorizes [the fiduciary] to take the discretionary act."). And such discretion is evidenced by the CERT and CPT Master Trust Agreements, which are incorporated by reference into the CERT and CPT Plans. It is not, as Defendants suggest, that Plaintiffs are establishing fiduciary status independent of each individual plan, but rather that the terms of each individual plan can be established by examining the terms of CERT and CPT, which indisputably govern all of the benefit plans in the putative class.

ii. Fiduciary Breach

If Defendants are fiduciaries, it is a violation of ERISA for Defendants to breach the duty of loyalty or the duty of prudence. 29 U.S.C. § 1104(a)(1)(A)-(B). It is also a violation of ERISA for fiduciaries to engage in prohibited transactions with parties in interest or with Plan Assets. *Id.* § 1106(a)-(b).

Appendix C

Regarding the question whether Defendants breached fiduciary duties, Plaintiffs allege Defendants breached the duty of loyalty by collecting (1) undisclosed compensation from Plan Assets and (2) kickbacks from investment providers or insurance carriers like Nationwide and Transamerica. *Id.* § 1104(a)(1)(A) (providing fiduciaries must discharge duties solely in interests of plan participants); *see, e.g., Santomenno v. Transamerica Life Ins. Co.*, 883 F.3d 833, 841 (9th Cir. 2018) (distinguishing collection of undisclosed compensation from collection of "definitively calculable and nondiscretionary compensation"); *Haddock v. Nationwide Fin. Servs., Inc.*, 262 F.R.D. 97, 109, 116-117 (D. Conn. 2009), *vacated and remanded on other grounds sub nom. Nationwide Life Ins. Co. v. Haddock*, 460 Fed. App'x 2d 26 (2d Cir. 2012) (certifying class of plaintiffs who alleged provider violated fiduciary duties by accepting payments from mutual funds defendants made available to plaintiffs). Additionally, Plaintiffs allege Defendants breached the duty of prudence by selecting (1) particular investment platforms or insurance carriers irrespective of their value proposition and (2) Fringe Insurance as an outside broker irrespective of its value proposition. § 1104(a)(1)(B) (requiring fiduciaries to act with same care, skill, diligence, and prudence as another prudent fiduciary would); *Haddock*, 262 F.R.D. at 108, 116-117. Obviously, undisclosed financial incentives and conflicted transactions call into question whether Defendants were indeed acting "solely" for Plaintiffs with the "same care" as another prudent fiduciary would. *Id.* § 1104(a)(1); *see, e.g., Bussian v. RJR Nabisco*, 223 F.3d 286, 299 (5th Cir. 2000) ("The presence of conflicting interests imposes on fiduciaries the obligation to take precautions to ensure

the duty of loyalty is not compromised. As we have noted, the level of precaution necessary to relieve a fiduciary of the taint of a potential conflict should depend on the circumstances of the case and the magnitude of the potential conflict." (citing *Metzler v. Graham*, 112 F.3d 207, 213 (5th Cir. 1997)).

Alternatively, Plaintiffs allege the following transactions are prohibited under ERISA: Defendants' (1) disbursement of Plan Assets to themselves and (2) receipt of Plan Assets from the service providers Defendants made available to Plaintiffs. *See* 29 U.S.C. § 1106(b)(1) (stating fiduciary cannot "deal with assets of the plan in [it]s own interest"); *id.* § 1106(b)(3) (stating fiduciary cannot "receive any consideration for [it]s own personal account from any party dealing with such plan in connection with a transaction involving the assets of the plan"); *Harris Trust*, 530 U.S. at 241-242 (stating Congress barred transactions deemed "likely to injure" ERISA plan); *see, e.g., Barboza v. California Ass'n of Prof'l Firefighters*, 799 F.3d 1257, 1269 (9th Cir. 2015); (holding plan fiduciary engaged in prohibited self-dealing by withdrawing expenses and compensation from plan assets pursuant to agreement with employer); *Danza v. Fidelity*, 553 Fed. App'x 120, 126 (3d Cir. 2013) ("What differentiates this case . . . is the fact that [the service provider here], at the time it collected the fee, had no actual control or discretion over the transaction at issue . . . . A service provider cannot be held liable for merely accepting previously bargained-for fixed compensation that was not prohibited at the time of the bargain.").

Rather than disputing these facts, Defendants argue they are altogether exempt from liability if their fees were not excessive. But this is a misstatement of law: instead, reasonable compensation is an affirmative defense to the claim that Defendants engaged in prohibited transactions. *See* 29 U.S.C. § 1108(c) (providing nothing in statute prohibiting certain transactions "shall be construed to prohibit any fiduciary from . . . receiving any reasonable compensation for services rendered"). In other words, reasonableness is not a defense to Plaintiffs' breach claim, and showing unreasonableness is not Plaintiffs' burden. *Id.; Braden*, 588 F.3d 585 ("Th[e district court] was wrong because the statutory exemptions established by § 1108 are defenses which must be proven by the defendant"); *Howard v. Shay*, 100 F.3d 1484 (9th Cir. 1996) (holding fiduciary engaging in transaction must prove applicability of Section-1108 exemption); *Donovan v. Cunningham*, 716 F.2d 1455, 1467-1468 n.27 (5th Cir. 1983) (holding fiduciary seeking to bring transaction within statutory exemption to broad remedial scheme had burden of proof, where purchase of stock for adequate consideration was defense to violation of duty of prudence) (citing *SEC v. Ralston Purina Co.*, 346 U.S. 119, 126, 73 S. Ct. 981, 97 L. Ed. 1494 (1953)).

Furthermore, whether fees were excessive *can* be shown on a classwide basis. Purported variations among the CERT and CPT Retainer Agreements—form documents created by Fringe Group that disclose Defendants' fees—have been closely examined by the court and largely exaggerated by the Defendants.

For CERT, with one exception,[12] Defendants' fees are either uniform or amenable to a pricing grid. Indirect compensation is uniform; all plans are charged the same amount of indirect compensation regardless of employers' choices (that is, all plans disclose 0.80% of Plan Assets to Fringe Group and 0.35% to Fringe Insurance). And direct compensation is also uniform or subject to a pricing grid. Specifically, Defendants' annual basic plan administrative fee ($200) and nondiscriminatory testing fee ($400 for plans without deferrals and $500 for plans with deferrals) are uniform across plans. Meanwhile, Defendants' monthly participant administrative fee is based on the number of participants in the plan, where the base charge per participant is the same for each size category (*i.e.*, plans with 1-9 participants are charged $6.50 per participant, plans with 10-49 participants are charged $5.50 per participant, and so on); and Defendants' monthly plan administrative fee is based on the amount of assets held in trust, where the base charge is again the same across a size category.

In other words, as Pagano testified, none of Defendants' fees are affected by the "variations" flagged by Defendants, such as whether employers offer retirement benefits through a 401(k) or money-purchase plan, whether employers invest through Nationwide or Transamerica, and whether investments will be trustee-directed or participant-directed, actively managed or

12. Plaintiffs admit there are a limited handful of "custom" plans in CERT whose fee structure is not based on Defendants' pricing grid that can be excluded from the class definition if necessary.

passively managed.[13] Instead, indirect compensation is constant, and direct compensation is set by one of six fee structures in a pricing grid created by Defendants. These structures are called Tiered 1-4, Graded 25, and Graded 50. While employers can choose a "tiered" or "graded" plan, Fringe Insurance determines where the employer falls within either categorization scheme, and simply put there is a limited number of fee structures.

Likewise, Defendants have a limited number of fee structures for CPT. For example, West testified that the "standard" administrative fee paid to Fringe Group is 7.5%, and the CPT Plans on which Defendants' arguments are based deviate from this in one way, each paying the same 5.0% administrative fee to Fringe Group. *See Tyson Foods, Inc. v. Bouaphakeo, 577* U.S. 442, 457-458, 136 S.

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13. Pagano answered "No" to each and every one of the following deposition questions:

> "Does the choice between a money purchase pension plan, a 401(k) pension and profit sharing plan[,] or a profit sharing plan affect the rate at which any of the fees associated with participation in CERT are assessed? . . . Does the choice affect whether the plan will include a graded or tier[ed] commision structure? . . . Does the choice between a trustee-directed or participant-directed plan affect the fees charged for participation in CERT? . . . Does the choice between actively managed or passively managed affect the fees that [Fringe Group] receives associated with an employer's participation in CERT? . . . Does the choice between actively managed or passively managed affect the fees that [Fringe Insurance] receives [from] CERT?"

Ct. 1036, 194 L. Ed. 2d 124 (2016) (standing for proposition that individualized damages issues do not defeat class certification where issues can be managed).

Respecting these fees, Plaintiffs argue Defendants' fees were excessive for two reasons. One, Defendants charge different rates for the same services. *See Perez v. Chimes D.C., Inc.*, No. RDB-15-3315, 2016 U.S. Dist. LEXIS 138172, 2016 WL 5815443, at *10 (D. Md. Oct. 5, 2016) (noting fees must not be excessive "relative to the services rendered"). Two, Defendants' base charge per participant is too high. *See Tyson Foods*, 577 U.S. at 457 (condoning common methodology to establish classwide liability, so long as common methodology does not overcome absence of common policy). Plaintiffs have put forth a study identifying market benchmarks for Defendants' services and intend to offer expert testimony showing Defendants' base charge per participant is too high. Thus, Defendants' fees can be challenged on a classwide basis: Plaintiffs can pursue excessive-compensation claims and reject Defendants' affirmative defense to Plaintiffs' prohibited-transactions claims as a class. *See Perez*, 2016 U.S. Dist. LEXIS 126982, 2016 WL 4993293, at *4, 11 (allegations service provider received excessive compensation in addition to undisclosed compensation were sufficient to support claim under ERISA Section 406 regarding prohibited transactions).

Ultimately, the evidence raises common questions about whether Defendants are fiduciaries, and if so, whether Defendants breached fiduciary duties owed to Plaintiffs or engaged in prohibited transactions with

Plan Assets. *See* 29 U.S.C. §§ 1104, 1106, 1108-1109,1132 (empowering ERISA plan participants to obtain equitable relief from fiduciaries who breach fiduciary duties or enter prohibited transactions and providing fiduciaries "shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary"); *Harris Trust*, 530 U.S. at 241-242 (holding even nonfiduciary party in interest who enters prohibited transaction is subject to suit under ERISA Section 502(a)(3) for restitution of gains realized by transaction).

And importantly, these "common questions" have the capacity to "generate common *answers* apt to drive the resolution of the litigation." *Dukes*, 564 U.S. at 350 ("What matters to class certification is not the raising of common questions—even in droves—but rather, the capacity of a class-wide proceeding to generate common *answers* apt to drive the resolution of the litigation." (quoting Richard A. Nagareda, *Class Certification in the Age ofAggregate Proof*, 84 N.Y.U.L. Rev. 97, 132 (2009))). For example, in *Teets v. Great-West Life & Annuity Insurance Co.*, plaintiffs sought to certify a class of 270,000 participants in 13,600 plans, which had each participated in an investment fund offered by the defendant. 315 F.R.D. 362, 365 (D. Colo. 2016). The plaintiffs challenged the defendant's management of the investment fund. After applying Rule 23 and certifying the class, the court held that the defendant was *not* a fiduciary and granted summary judgment in the defendant's favor. *Id.* at 369. Likewise here, Plaintiffs seek to certify a class

of 224,995 participants and 2,994 plans in CERT as well as 68,066 participants and 350 plans in CPT. All of the plans participated in CERT or CPT, trusts allegedly mismanaged by Defendants. Defendants' fiduciary status thus has the ability to drive the outcome of this case both in the Plaintiffs' and Defendants' favor. *See id.*

Defendants cannot thwart commonality by comparing and contrasting details that are irrelevant to both the merits of Plaintiffs' claims and viability of Defendants' defenses. *See Dukes*, 564 U.S. at 350 ("Dissimilarities within the proposed class are what have the potential to impede the generation of common answers."). Whether a CERT Plan participant has taken out a loan or withdrawn funds within the last three years is immaterial; whether a CPT Plan offers vision and dental is immaterial. The following details are not only material, but also universal to the putative class: employers contribute money to CERT and CPT, Defendants' withdraw money from CERT and CPT, including their own compensation, and this compensation is not fully disclosed. For example, Defendants select five retirement-benefit plans as exemplars. Yet for every plan, Defendants direct disbursements to themselves and increase the amount of their disbursements by maintaining extracontractual arrangements with Transamerica and Nationwide. Similarly, Defendants select three health-benefit plans as exemplars. Once again, any differences are red herrings. To be sure, plans may be insured by various carriers with differentiated product offerings—but such offerings do not alter Defendants' own fees or Defendants' own services. With the exception of a handful of "custom"

plans in CERT who negotiated unique fees and can be excluded from Plaintiffs' class definition, Defendants offer a uniform set of services across all plans and charge fees that are either uniform or amenable to a pricing grid.

C. Typicality

A class representative's claims should be "typical" of the claims of the rest of the class. Fed. R. Civ. P. 23(a)(3). But "the test for typicality is not demanding. It focuses on the similarity between the named plaintiffs' legal and remedial theories and the theories of those whom they purport to represent." *Stirman*, 280 F.3d at 562 (quoting *James v. City of Dallas*, 254 F.3d 551, 571 (5th Cir. 2001)). Ultimately, "the critical inquiry is whether the class representative's claims have the same essential characteristics of those of the putative class. If the claims arise from a similar course of conduct and share the same legal theory, factual differences will not defeat typicality." *Id.*

Here, Plaintiffs' claims do arise from the same course of conduct and theories of liability as the claims of the class. Like the class, Plaintiffs' retirement or health benefits were provided through CERT or CPT, trusts structured by Defendants to the alleged detriment of Plaintiffs. Plaintiffs provide they were owed the same duties and harmed by the same breaches and transactions as every other class member. Notably, Plaintiffs were harmed when Defendants hired service providers (like Nationwide and Transamerica) and outside brokers (like Fringe Insurance) in order to withdraw undisclosed and

unjustified compensation from CERT and CPT, which contained all Plan Assets. In short, "a common course of conduct in violation of ERISA is alleged." *In re Enron. Corp. Sec., Derivative & "ERISA" Litig.*, 228 F.R.D. 541, 555 (S.D. Tex. 2005). Furthermore, by endeavoring to restore Plan Assets, Plaintiffs seek plan-wide relief for all plans in the putative class. *See, e.g. Shirk v. Fifth Third Bancorp*, No. 05-CV-049, 2008 U.S. Dist. LEXIS 85151, 2008 WL 4425535, at *3 (S.D. Ohio Sept. 30, 2008) ("Generally, there is little doubt that a class representative's breach of fiduciary duty claim is in every respect typical of his fellow class members. Typicality is further supported by the fact that ERISA contains unique standing and remedial provisions that allow a participant who sues for a breach of fiduciary duty to obtain plan-wide relief.").

The existence of many plans over many years counsels in favor of aggregation, not against. When, as here, the claims of named plaintiffs are typical of those of unnamed plaintiffs, such numerosity need not thwart typicality. The number of plaintiffs is not necessarily a proxy for the number or diversity of allegations. Instead, typicality can be satisfied when the plaintiff "frame[s] her challenge in terms of [the defendant's] general practice of overestimating . . . . benefits." *Forbush*, 994 F.2d at 1106 (concluding named plaintiff's claims were typical of class, despite unnamed plaintiffs' participation in several different plans). Likewise here, Plaintiffs contest Defendants' "general practice" of designing employee-benefit plans that participate in CERT or CPT for Defendants' benefit to the putative class's detriment.

Rather than challenging typicality on its face, Defendants argue "Plaintiffs have failed to establish typicality because . . . they failed to demonstrate commonality" with respect to the "material variations in the retainer agreements" signed by the employers participating in CERT and CPT. The court has already rejected this argument. These supposed material variations are twofold: employers can make limited customizations from a menu of options, and Defendants can charge employers different fees. For CERT, however, even though employers can invest with Nationwide or Transamerica, investments can be participant- or trustee-directed, and trustee-directed plans can be actively or passively managed, Defendants testified that none of these choices affect the services Defendants provide CERT or the fees Defendants receive from CERT. Again, Defendants' indirect compensation is uniform, and Defendants' direct compensation is—aside from a handful of custom plans excluded from the class definition—either uniform or based on a pricing grid. Similarly for CPT, employers may select an insurance carrier, who may offer a certain amount of coverage or out-of-pocket expense limit, and who may issue the policy directly to employers or CPT. Still, the employers' selection and carriers' offerings do not change the fact that all CPT Plans adopt the terms of the CPT Master Trust Agreement, thereby routing contributions and premiums and fees through CPT. Once again, an employer's choice does not change the fact that CPT and CERT hold all of Plaintiffs' Plan Assets and pay all of Defendants' fees. Defendants' form retainer agreements vary little, in manageable ways, and in no ways that are "material." Defendants' argument

rests on the use of the word "variation," but there is no substance behind it.

Finally, Defendants argue "Plaintiffs also cannot prove . . . typicality because they lack standing." But the court has rejected this argument as well. To reiterate, Plaintiffs have constitutional standing because Defendants shrunk Plan Assets by withdrawing undisclosed and unjustified fees, and the court can both trace such an injury to Defendants' disbursements and redress the injury by restoring Plan Assets. *Lujan*, 504 U.S. at 560-561 (describing elements of constitutional standing); *Thole*, 140 S. Ct. at 1619 (noting "every penny of gain or loss [in a private trust] is at the beneficiaries' risk."); *Braden*, 588 F.3d at 592 (holding plaintiff "satisfied the requirements of Article III because he has alleged actual injury to his own Plan Account"). Relatedly, Plaintiffs have statutory standing because each is a former employee of TRDI who is eligible to receive a benefit from an employee-benefit plan covering TRDI employees. 29 U.S.C. § 1002(7). Once a putative class representative establishes standing to sue his own ERISA plan, there is no additional standing requirement related to his suitability to represent the putative class of members of other ERISA plans. *See Fallick*, 162 F.3d at 424; *Forbush*, 994 F.2d 1101 (where injury arose from defendants' uniform response tactics, court proceeded to Rule 23 analysis); *see also Larson*, 350 F. Supp. 3d at 791 (holding named participants had standing to sue on behalf of unnamed participants even though named participants hadn't individually invested in each possible fund). Similarly, Plaintiffs have statutory standing to seek recovery since at least 2014 because

"participants" include current *or* former employees. 29 U.S.C. § 1002(7); *see also Braden*, 588 F.3d at 593 (holding recovery under ERISA for breach of fiduciary duty may even "be had for the period before [the named plaintiff] personally suffered injury" because "it is well-settled" that such a suit cannot be brought in an individual capacity and that related remedies must "protect the entire plan"); *Warth*, 422 U.S. at 500; *Russell*, 473 U.S. at 140.

D. Adequacy of Representation

A class representative must be able to "fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). This includes the willingness to "vigorously prosecute the interests of the class through qualified counsel" (*Berger v. Compaq Computer Corp.*, 257 F.3d 475, 482-484 (5th Cir. 2001) (quoting *Gonzales v. Cassidy*, 474 F.2d 67, 72 (5th Cir. 1973)), and presence of no conflicts of interest (*Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 625, 117 S. Ct. 2231, 138 L. Ed. 2d 689 (1997)).

The court finds that the proposed class representatives—who have not only initiated this complex litigation, but also steadily pursued its resolution since 2017—are willing to vigorously prosecute the interests of the entire class. Plaintiffs are also supported by qualified counsel, who have the experience and qualifications to successfully advocate for class members here, having successfully prosecuted other ERISA class acions. *See, e.g., Rozo*, 949 F.3d 1075 (reversing lower-court decision holding defendant was not functional fiduciary and reviving class-action suit against defendant for breaching

fiduciary duty by unilaterally setting credited rate paid to participants in investment vehicle sold to retirement plans). Furthermore, Plaintiffs declare under penalty of perjury that they have no actual or potential conflicts of interest. And by excluding Defendants' officers, directors, and family members[14] from the class definition, Plaintiffs avoid representing individuals with a financial interest in ending the lawsuit. Finally, each Plaintiff declares under penalty of perjury that they are aware of the advantages and disadvantages of proceeding as a class rather than as an individual.

Still, Defendants argue Plaintiffs cannot establish that they are adequate class representatives because Plaintiffs lack standing to represent participants in other employee-benefit plans organized through CERT and CPT. Once again, this argument fails because the named plaintiffs have established standing to bring each claim individually and the named plaintiffs can bring representative claims by satisfying certification requirements. *See, e.g., Charters v. John Hancock Life Ins. Co.*, 534 F. Supp. 2d 168, 172 (D. Mass. 2007) (concluding plaintiffs need not establish standing with respect to every plan in putative class so long as plaintiffs have standing with respect to their own plan and allege a common course of conduct affecting the participants of other plans); *In re Deepwater Horizon*, 739 F.3d at 800 ("Whether or not the named plaintiff who meets individual standing requirements may assert the rights of absent class members is neither a standing issue

14. The term "relative" is precisely defined under ERISA, consisting of "a spouse, ancestor, lineal descendant, or spouse of a lineal descendant." 29 U.S.C. § 1002(15).

nor an Article III case or controversy issue but depends rather on meeting the prerequisites of Rule 23 governing class actions." (quoting *Lewis v. Casey*, 518 U.S. 343, 395-396, 116 S. Ct. 2174, 135 L. Ed. 2d 606 (1996) (Souter, J., concurring in part, dissenting in part, and concurring in judgment))).

E. Rule 23(b)(1) Class Action

Having met Rule 23(a), Plaintiffs must still meet at least one subsection of Rule 23(b). Rule 23(b)(1), divided into two clauses, defines two types of related class actions, both designed to prevent prejudice arising from multiple potential suits involving the same subject matter. Fed. R. Civ. P. 23(b)(1)(A)-(B); Fed. R. Civ. P. 23 advisory committee's note to 1966 amendment, 39 F.R.D. 69, 100; Herbert B. Newberg, *Newberg on Class Actions* § 4.1 (Dec. 2021). Rule 23(b)(1)(A) is used to obviate the dilemma that would confront the "party opposing the class" if separate lawsuits were decided differently, resulting in "incompatible standards of conduct" for that party. *Id.* In contrast, Rule 23(b)(1)(B) considers prejudice to the nonparty class members, those plaintiffs who are not named in the caption yet fall under the class definition. *Id.* In these instances, a class action is a necessary joinder device to prevent the injustices that would result from separate litigation.

Cases seeking to remedy fiduciary breaches under ERISA have fit within Rule 23(b)(1)(B) and been certified as such. *See, e.g., In re Schering Plough Corp. ERISA Litig.*, 589 F.3d 585, 604 (3d Cir. 2009) (providing

"breach of fiduciary duty claims brought under [ERISA] are paradigmatic examples of claims appropriate for certification as a Rule 23(b)(1) class, as numerous courts have held"); *Shirk*, 2008 U.S. Dist. LEXIS 85151, 2008 WL 4425535, at *4 ("Most courts have followed the reasoning of the Advisory Committee Notes to the Federal Rules and concluded that subsection (b)(1)(B) is the most appropriate subsection for class certification in an ERISA breach of fiduciary duty case."); *Sessions v. Owens-Illinois, Inc.*, 267 F.R.D. 171 (M.D. Pa. 2010) (certifying ERISA class while noting "there is a very real danger that an adjudication in which one plaintiff participated would affect other plaintiffs' ability to protect their own interests. Rule 23(b)(1)(B) therefore permits a class action to be maintained"); *Jones v. NovaStar Financial, Inc.*, 257 F.R.D. 181, 193 (W.D. Mo. 2009) (certifying Rule 23(b)(1)(B) class because, given that putative representative's claim seeks "[p]lan-wide relief, there is a risk that failure to certify the class would leave future plaintiffs without relief" (quoting *In re Ikon*, 191 F.R.D. 457, 466 (E.D. Pa. 2000)); *Gruby v. Brady*, 838 F. Supp. 820, 828 (S.D.N.Y. 1993) (certifying Rule 23(b)(1)(B) class in ERISA action to restore plan assets depleted as a result of alleged breach of fiduciary duty, holding "[b]ecause a plan participant or beneficiary may bring an action to remedy breaches of fiduciary duty only in a representative capacity, such an action affects all participants and beneficiaries, albeit indirectly").

The Advisory Committee Note to Rule 23 advises that Rule 23(b)(1)(B) takes in situations charging a breach of fiduciary duty. Fed. R. Civ. P. 23 advisory committee's note to 1966 amendment, 39 F.R.D. 69, 101 (providing Rule

23(b)(1)(B) applies "to an action which charges a breach of trust by an indenture trustee or other fiduciary similarly affecting the members of a large class of security holders or beneficiaries, and which requires an accounting or like measures to restore the subject of the trust" (citing, *inter alia, Boesenberg v. Chicago T & T Co.*, 128 F.2d 245 (7th Cir.1942); *Citizens Banking Co. v. Monticello State Bank*, 143 F.2d 261 (8th Cir. 1944)). Although Rule 23(b)(1)(B) also takes in situations involving a defendant whose funds are so limited that it may be incapable of satisfying all potential claimants, the rule also takes in situations charging a breach of fiduciary duty. Fed. R. Civ. P. 23 advisory committee's note to 1966 amendment, 39 F.R.D. 69, 100-101; *see Chavez*, 957 F.3d at 549 (stating "proposed class appears, at first glance, to be an historical example of a 23(b)(1)(B) class"); *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 834, 119 S. Ct. 2295, 144 L. Ed. 2d 715 (1999) (holding it must be shown "the shared character of rights claimed or relief awarded entails that any individual adjudication by a class member disposes of, or substantially affects, the interests of class members" and identifying limited-fund cases as "[o]ne recurring type," but by no means the only type, of Rule 23(b)(1)(B) case); *Langbecker v. Elec. Data Sys. Corp.*, 476 F.3d 299, 318 (5th Cir. 2007) (commenting, without ruling, on *post-Ortiz* applicability of Rule 23(b)(1)(B) to ERISA case); *In re Merck*, MDL No. 1658, No. 05-CV-1151, 2009 U.S. Dist. LEXIS 10243, 2009 WL 331426, at *10 (N.J. Feb. 10, 2009) ("Limited fund cases are but one species of the genus of Rule 23(b)(1)(B) cases." (applying *Ortiz*, 527 U.S. at 834)). Additionally, as a matter of law, money damages recovered from a fiduciary for violating the provision of ERISA establishing liability for breach

of fiduciary duty inure to the benefit of the plan as a whole, not to the individual plaintiffs personally, so even an individual's claim essentially seeks plan-wide relief. *Russell*, 473 U.S. at 140.

Specifically, Rule 23(b)(1)(B) asks whether prosecuting separate actions "would create a risk of . . . adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests." Fed. R. Civ. P. 23(b)(1)(B).

The court finds that prosecuting separate actions would indeed risk adjudications with respect to individual class members that would be "dispositive" of the interests of other class members not parties to the adjudications and "substantially impair" such parties' ability to protect their interests. *Id.* First, prosecuting an action brought by Plaintiffs could be dispositive of the interests of other class members because an action to remedy breaches of fiduciary duty must be brought in a "representative capacity." *Russell*, 473 U.S. at 140. That is, a "breach of fiduciary duty claim brought by one member of a[n ERISA] plan necessarily affects the rights of the rest of the plan members to assert that claim, as the plan member seeks recovery on behalf of the plan as an entity." *In re Beacon Assocs. Litig.*, 282 F.R.D. 315, 342 (S.D.N.Y. 2012). A failure to obtain plan-wide relief would not only affect the individual plan participant, but also all participants to the plan. "This is true with respect to suits involving participants and representatives of one plan. It is equally

true of suits involving participants and beneficiaries of multiple plans." *Id.* For this reason, some courts have said the distinctive "representative capacity" aspect of ERISA suits to remedy a breach of fiduciary duty makes litigation of this kind a "paradigmatic" example of a Rule 23(b)(1) class. *Id.; In re Global Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 453 (S.D.N.Y. 2004); *Kolar v. Rite Aid Corp.*, No. 1-CV-1229, 2003 U.S. Dist. LEXIS 3646, 2003 WL 1257272, at *3 (E.D. Pa. Mar. 11, 2003); *see also Jones v. NovaStar Fin., Inc.*, 257 F.R.D. 181, 193 (W.D. Mo. 2009); *George v. Kraft Foods Global, Inc.*, 251 F.R.D. 338, 352 (N.D. Ill. 2008); *In re Beacon Assocs. Litig.*, 282 F.R.D. at 342. Consistent with this, Plaintiffs here do not seek to recover additional disbursements, but to restore the wrongfully squandered Plan Assets of CERT and CPT.

Second, prosecuting separate actions could substantially impair the putative class members' ability to protect their interests because Plaintiffs are alleging two claims central to all class members. Conclusions that Defendants are not fiduciaries, or are fiduciaries who did not breach their duties, would be "intolerable" for plan participants who are claiming to be owed the very same fiduciary duties. *Kolar*, 2003 U.S. Dist. LEXIS 3646, 2003 WL 1257272, at *3. Such conclusions could cause Defendants to update contracts applicable to all Plaintiffs, rendering claims moot. Such conclusions could even be used against Defendants as a matter of non-mutual issue preclusion, barring Defendants from relitigating an issue, such as fiduciary status, from plan participant to plan participant. *Sidag Aktiengesellschaft v. Smoked Foods Prods. Co., Inc.*, 776 F.2d 1270, 1275 n.4 (5th Cir. 1985)

(comparing nonmutual claim preclusion and nonmutual issue preclusion); *New York Pizzeria, Inc. v. Syal*, 53 F. Supp. 3d 962, 967 (analyzing non-party's attempt to invoke previous judgment in favor of co-conspirators with whom non-party arguably shared "an identity of interests in the basic legal right that is the subject of litigation" and noting Texas courts have explained "at least three" circumstances in which such identify of interests may exist).[15]

Defendants argue against Rule 23(b)(1)(B) certification on the basis that a class seeking monetary relief should be subject to the due-process-based requirements of notice and opt out. As an initial matter, Plaintiffs are not excluded from seeking monetary relief under Rule 23(b)(1)(B) by virtue of due process. *Hansbery v. Lee*, 311 U.S. 32, 40 (1940) (explaining due process principle that, with limited exceptions, one is not bound by a judgment in litigation in which he is not a party). Even Defendants concede that Rule 23(b)(1)(B) classes are often "limited fund" classes where class members are competing for the same limited pot of money. *Ortiz*, 527 U.S. at 834. In fact, a "district

15. While subsection (b)(1)(B) considers prejudice to the Plaintiffs, subsection (b)(1)(A) considers prejudice to the Defendants. Fed. R. Civ. P. 23(b)(1)(A) (asking whether prosecuting separate actions "would create a risk of (A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the opposing class"). Here, there is also risk of inconsistent adjudications that prejudice Defendants: contradictory rulings as to whether Defendants acted as fiduciaries or whether Defendants breached fiduciary duties. *See In re Ikon Office Solutions, Inc.*, 191 F.R.D. 457, 466 (E.D. Penn. 2000).

court is empowered under Rule 23(d)(2) to provide notice and opt-out for *any* class action, so certification should not be denied on the mistaken assumption that a Rule 23(b)(3) class [requiring notice and opt-out] is the only means by which to protect class members" seeking monetary relief. *In re Monumental*, 365 F.3d at 417.

Moreover, Plaintiffs are not primarily seeking monetary relief. Plaintiffs are clearly seeking equitable relief, having prayed for a declaration, injunction, and order directing Defendants to restore Plan Assets and provide any other appropriate equitable relief the court deems proper. Nevertheless, Defendants argue this case involves monetary relief because many class members have already received benefits from CERT and CPT. But this argument demonstrates a misunderstanding of the relief sought by Plaintiffs and authorized by Congress under ERISA. *See* 29 U.S.C. § 1132. Plaintiffs seek to disgorge Defendants of ill-gotten profits and restore the Plan Assets of CERT and CPT. Neither the Defendants nor the court will be involved in divvying up any judgment or settlement, even though participants (including those who have cashed out) will be eligible to receive a portion of the judgment or settlement. Instead, relief will flow from the trusts to the plans and be allocated among participants by employer-level fiduciaries. *See Amalgamated Clothing & Textile Workers Union, AFL-CIO v. Murdock* (9th Cir. 1988) (citing *Russell*, 473 U.S. at 140-142) (holding ERISA "explicitly provides that a fiduciary shall 'restore to the plan' any ill-gotten profits obtained from breaching a fiduciary duty . . . consistent with ERISA's goal of protecting employee benefit plans as entities.").

F. Rule 23(b)(3) Class Action

"Framed for situations in which 'class-action treatment is not as clearly called for' as it is in Rule 23(b)(1) and (b)(2) situations, Rule 23(b)(3) permits certification where class suit 'may nevertheless by convenient and desirable." *Amchem Prods.*, 521 U.S. at 615 (quoting Fed. R. Civ. P. 23 advisory committee's note to 1966 amendment, 39 F.R.D. 69, 102). Under Rule 23(b)(3), the court must find that questions of law or fact common to class members "predominate" over questions affecting only individual members and that class-action treatment is "superior" to other available methods for fairly and efficiently adjudicating the controversy. Fed. R. Civ. P. 23(b)(3). The rule describes four factors "pertinent to these findings," including the (A) "class members' interests" in individually prosecuting separate actions; (B) "extent of litigation" concerning the controversy already begun by other class members; (C) "desirability of concentrating the litigation" in the particular forum; and (D) "likely difficulties in managing a class action." *Id.* at 23(b)(3)(A)-(D).

i. Common Questions Predominate

While Rule 23(a)(2) asks whether common questions of law or fact exist, Rule 23(b)(3) asks whether such questions predominate. Fed. R. Civ. P. 23(a)(2)-(b)(3); *Dukes*, 564 U.S. at 359 ("We agree that for purposes of Rule 23(a)(2) even a single common question will do."). Deciding whether common issues "predominate" requires an understanding ofthe relevant claims and defenses underlying the case. *Castano*, 84 F.3d at 744; *accord Allison*, 151 F.3d at 419.

For example, in a proposed Title VII class action, which would involve showing how each plaintiff was personally subjected to and affected by discrimination, factual dissimilarities could "degenerate in practice into multiple lawsuits separately tried." *Castano*, 84 F.3d at 745 n.19; *Dukes*, 564 U.S. at 359 (denying certification in Title-VII case). But where, say, a corporation sells stock to investors at prices inflated by allegedly misleading statements from the corporation, the efficiency gained by deciding in one fell swoop whether the statements were misleading can warrant the disallowance of individual lawsuits by the investors. *See, e.g., Rifkin v. Crow*, 80 F.R.D. 285, 286 (N.D. Tex. 1978) (granting certification in securities-fraud case); *see also Amchem*, 521 U.S. at 621 ("The Rule 23(b)(3) predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation."); 7AA Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1781.1 (3d ed. 2021) ("Rule 23(b)(3) has been used frequently in cases involving securities frauds.").

Relevant to the claims and defenses here are the concepts of duty, breach, causation, and loss. *See In re Enron Corp. Secs., Derivative & ERISA Litig.*, 284 F. Supp. 2d 511, 579 (S.D. Tex. 2003) (identifying duty, breach, causation, and loss as relevant to ERISA breach-of-fiduciary-duty claim). As discussed at length, Plaintiffs argue that Defendants not only owed fiduciary duties to Plaintiffs by virtue of Defendants' "discretionary authority and control" over CERT and CPT (29 U.S.C. § 1002(21)), but also that Defendants breached those fiduciary duties by selecting certain service providers and

outside brokers in order to collect undisclosed, unjustified compensation from CERT and CPT (*id.* § 1104(a)(1)). Moreover, the issues of duty and breach are "not only significant but also pivotal." *Mullen v. Treasure Chest Casino, LLC*, 186 F.3d 620, 626 (5th Cir. 1999); *accord In re Reliant Energy ERISA Litig.*, 2005 U.S. Dist. LEXIS 44423, 2005 WL 2000707, at *4 (S.D. Tex. Aug. 18, 2005). This is because "Defendants [who] prevail on these issues . . . will prevail in the case." *In re Reliant*, 2005 U.S. Dist. LEXIS 44423, 2005 WL 2000707, at *4 (certifying class of over 12,000 participants in retirement-investment plan managed by defendants); *see also Teets*, 315 F.R.D. at 365 (certifying class of 270,000 participants in 13,600 plans but granting summary judgment in defendant's favor because defendants were not fiduciaries).

The issues of causation and loss also support a finding of predominance. *See In re Enron ERISA Litig.*, 284 F. Supp. 2d at 579 (although duty, breach, causation, and loss are relevant to ERISA breach-of-fiduciary-duty claim, burden shifts to defendant to prove loss was not caused by breach after plaintiff proves breach and makes prima facie case of loss) (citing *McDonald v. Provident Indem. Life Ins. Co.*, 60 F.3d 234, 237 (5th Cir. 1995), *cert. denied, Henss v. Martin*, 506 U.S. 1054, 113 S. Ct. 979, 122 L. Ed. 2d 133 (1993)). Plaintiffs seek to restore Plan Assets and to disgorge Defendant's gains from Plan Assets, as provided by ERISA's "carefully crafted and detailed enforcement scheme." *Great-West Life & Annuity Ins. Co.*, 534 U.S. 204, 209, 122 S. Ct. 708, 151 L. Ed. 2d 635 (2002). To this end, Plaintiffs propose a classwide methodology that tailors Plaintiffs' relief to Defendants' misbehavior:

each plan in CERT and CPT is to be refunded the amount overpaid based on a straightforward arithmetic formula of the fee paid minus the amount that should have been paid. *See Deepwater Horizon*, 739 F.3d at 817 (noting "model purporting to serve as evidence of damages must measure only those damages attributable" to theory of liability on which class action is premised) (citing *Comcast*, 569 U.S. at 35)). This would take the form of a money payment to each plan that would be mechanical based on Defendants' data about the plans. *See CIGNA Corp. v. Amara*, 563 U.S. 421, 441-442, 131 S. Ct. 1866, 179 L. Ed. 2d 843 (2011) (noting certain categories of equitable relief can "take[] the form of a money payment[, which] does not remove it from the category of traditionally equitable relief").

Finally, this case also relies upon common proof. *See Amgem Inc. v. Connecticut Ret. Plans & Trust Funds*, 568 U.S. 469 (2013). This common proof includes the CERT and CPT Master Trust Agreements, which are incorporated into each CERT and CPT Plan (respectively), Defendants' agreements with Transamerica and Nationwide, and Defendants' testimony through West and Pagano. *See Cruson*, 954 F.3d 240, 255 (5th Cir. 2020) (noting "suits involving form contracts often lend themselves to class treatment"); *Glass Dimensions, Inc. v. State St. Bank & Trust Co.*, 285 F.R.D. 169, 179-180 (D. Mass. 2012) (finding predominance in ERISA breach-of-fiduciary-duty case where claims "rest[ed] on documentation . . . [that was] applicable to all the lending funds in questions, and that was generated by Defendants as a matter of course"). If this case were tried separately, redundant evidence would be the rule rather than the exception. *See supra* notes 12-

13 and accompanying text. Common questions of law and fact not only exist, but also predominate.

ii. Class Treatment is Superior

Class treatment is superior for all of the reasons previewed by Rule 23(b)(3)(A)-(D), even though each and every one of the four Rule 23(b)(3) factors need not weigh in favor of certification. *Amchem*, 521 U.S. at 615-616. Importantly, individual ERISA plan participants alleging a breach of fiduciary duty cannot obtain individual relief; relief necessarily inures to the plan as a whole. *Russell*, 473 U.S. at 140. Thus, the "class members' interests in individually prosecuting separate actions," if any, is low. *See* Fed. R. Civ. P. 23(b)(3)(A). Individual interests are also low because the alleged harm to each class members' individual account is small, so class members would be unlikely to seek relief without the economies of scale afforded by certification. *See Healthcare Strategies, Inc. v. ING Life Ins. & Annuity Co.*, 2012 U.S. Dist. LEXIS 184544, 2012 WL 10242276, at *13 (D. Conn. Sept. 27, 2012) ("Superiority is often satisfied where an individual class member's claim would be too small to warrant bringing an individual suit, and a class action would save litigation costs by allowing the parties to efficiently assert their claims and defenses."). In fact, the "most compelling rationale for finding superiority in a class action [is] the existence of a negative value suit." *Castano*, 84 F.3d at 748; *see also Amchem*, 521 U.S. at 615.

Additionally, the court is aware of no other "litigation concerning the controversy already begun by other class

members." *See* Fed. R. Civ. P. 23(b)(3)(B). To that end, it would be more desirable to "concentrate the litigation in [a] particular forum," and the Austin Division of the Western District of Texas is particularly appropriate because Defendants' principal place of business and personnel are all based in Austin, Texas. *See id.* at 23(b)(3)(C).

Finally, because Fringe Group is the Recordkeeper for CERT and CPT, it maintains a database of all participating employees—i.e., of all putative class members. *See id.* at 23(b)(3)(D). What's more, notice to the class is not required where the relief sought is not monetary. *See id.* at 23(c)(2)(B); *In re Monumental*, 365 F.3d at 417. Thus, this is not a case involving special manageability problems. *See, e.g.*, *Castano*, 84 F.3d at 747 (identifying cost of providing "notice to millions of class members" as part of "extensive manageability problems" of certification). Therefore, certification is appropriate under either Rule 23(b)(3) or (b)(1).

G. Rule 23(g) Class Counsel

Rule 23(g) complements the Rule 23(a)(4) requirement of adequate representation by establishing certain requirements for appointing class counsel. Fed. R. Civ. P. 23(g). Defendants do not contest Plaintiffs' argument and supporting declaration showing that proposed local and class counsel have not only worked to identify and investigate potential claims, but also have adequate experience handling class actions, including those brought under ERISA, knowledge of the applicable law, and resources to represent the class. *See id.* The court finds

that Nina Wasow of Feinberg, Jackson, Worthman, & Wasow LLP, among other attorneys of the same firm, will "fairly and adequately represent the interests of the class." *Id.* Plaintiffs have therefore satisfied the requirements of Rule 23(g) in addition to those of Rule 23(a) and (b).

H. Rule 23(c) Subclasses

Rule 23(c)(5) permits a court to create subclasses "[w]hen appropriate." Fed. R. Civ. P. 23(c)(5) ("When appropriate, a class may be divided into subclasses that are each treated as a class under this rule."); *see also id.* at 23(c)(4) ("When appropriate, an action may be brought or maintained as a class action with respect to particular issues."). As an alternative to a global class action for participants and beneficiaries of plans that provide benefits through CERT or CPT, Plaintiffs request to certify subclasses, with one class exclusively relating to CERT alongside another class exclusively relating to CPT. To be sure, the court concludes that the global class action encompassing CERT and CPT satisfies Rule 23. But Plaintiffs seek to restore the assets of two trusts, which Plaintiffs and Defendants have interacted with separately and the court has analyzed independently. The certification of two subclasses reflects this and avoids the charge that weaker claims have been aggregated with stronger ones. *Castano*, 84 F.3d at 746 ("Class certification magnifies and strengthens the number of unmeritorious claims."); *see also Bolin v. Sears, Roebuck & Co.*, 231 F.3d 970, 976 (5th Cir. 2000) (stating Rule 23(c) "explicitly recognizes the flexibility that courts need in class certification by allowing certification 'with respect to particular issues' and division of the class into subclasses"); *Shook v. Board*

of Cty. Comm 'rs. of El Paso, 543 F.3d 597, 607 (10th Cir. 2008) ("While the district court could have *sua sponte* suggested subclassing as a possible solution to Rule 23(b)(2) problems, the Supreme Court has indicated that courts do not bear any obligation to do so."); *Fink v. National Say. & Trust Co.*, 772 F.2d 951, 961 (D.C. Cir. 1985) ("While the court need not take initiative [to construct subclasses *sua sponte*, as *United States Parole Commission v. Geraghty*, 445 U.S. 338, 408 (1980)] holds, it must weigh the possibility of subclasses or of certifying a narrower class."); *Thomas v. Clarke*, 54 F.R.D. 245, 249 (D. Minn. 1971) ("The fact that plaintiff's definition of the class needed modification does not require dismissal of the class action" because a "court can, in its discretion under [Rule 23], define a class in a manner which will allow utilization of the class action procedure.").

CONCLUSION

It is **ORDERED** that Plaintiffs' Amended Motion for Class Certification (Doc. 163) is **GRANTED**. This action shall proceed as a class action under Rule 23(b)(1)(B) of the Federal Rules of Civil Procedure consisting of two subclasses:

(1) All participants and beneficiaries of plans that provide employee benefits through CPT—other than Defendants' officers, directors, or relatives—from July 6, 2011, until trial; and

(2) All participants and beneficiaries of plans that provide employee benefits through CERT—other than (a) participants and beneficiaries of custom plans, and (b)

Defendants' officers, directors, or relatives—from August 31, 2014, until trial.

IT IS FURTHER ORDERED that Nina Wasow of Feinberg, Jackson, Worthman, & Wasow is appointed as class counsel for the above class pursuant to Rule 23(g) of the Federal Rules of Civil Procedure.

IT IS FURTHER ORDERED that Plaintiffs Heriberto Chavez, Evangelina Escarcega, as the representative of her disabled son, Jose Escarcega, and Jorge Moreno are appointed to represent the subclasses of persons defined herein.

IT IS FINALLY ORDERED that a Conference after Class Certification is set in Courtroom No. 7, Seventh Floor of the United States Courthouse, 501 West 5th Street, Austin, Texas, on April 26, 2022 at 9:30 a.m.

SIGNED this 29th day of March, 2022

/s/ Lee Yeakel
LEE YEAKEL
UNITED STATES DISTRICT JUDGE

APPENDIX D — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, FILED APRIL 29, 2020

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 19-50904

HERIBERTO CHAVEZ; EVANGELINA ESCARCEGA, AS THE LEGAL REPRESENTATIVE OF HER SON JOSE ESCARCEGA; JORGE MORENO,

Plaintiffs-Appellees,

versus

PLAN BENEFIT SERVICES, INC.; FRINGE INSURANCE BENEFITS, INCORPORATED; FRINGE BENEFIT GROUP,

Defendants-Appellants.

Appeal from the United States District Court
for the Western District of Texas

Before SMITH, GRAVES, and HO, Circuit Judges.

JERRY E. SMITH, Circuit Judge:

A district court must engage in a "rigorous analysis" when it certifies a class action. In the absence of that rigor, we vacate the certification order.

Appendix D

I.

Plan Benefit Services, Inc., Fringe Insurance Benefits, Inc., and Fringe Benefit Group (collectively "FBG" or "the company") market and administer retirement and health benefit plans to various employers. FBG offers the plans through two trusts, and there are many plan options, which (FBG asserts) vary in fees and structures. Employers can sign up to provide their employees with benefits through those offerings; or they can retain FBG merely to keep records and supply administrative services.

The named plaintiffs are current and former employees of a company that contracted with FBG for various services. They sued FBG under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 *et seq.* The thrust of their complaint is that FBG has acted as a fiduciary and breached its duties. They charge that the company accepted excessive fees, handpicked providers to maximize its profits, controlled disbursements from the trusts for its own benefit, and unlawfully procured indirect compensation. In short: They allege garden-variety fiduciary misbehavior.

The plaintiffs seek to represent a class of "all participants in and beneficiaries of employee benefit plans that provide benefits through [the trusts], . . . from July 6, 2011 until the time of trial." The proposed group involves some 90,000 individuals and implicates many employers and plans.[1]

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1. The record does not reveal the exact number of employers and plans, but the complaint and briefs suggest that there are at

FBG opposes certification with predictable vigor. It maintains that the central issues—such as whether FBG was a fiduciary or charged excessive fees—necessarily turn on the diverse features of each plan, so a class involving so many of them is improper.

After a hearing, the court certified the class. It settled on a mandatory Federal Rule of Civil Procedure 23(b)(1)(B) class and found that Rule 23(a)'s prerequisites—numerosity, commonality, typicality, and adequacy—are met.

Despite the complexity of the certification issues, the sweeping scope of the proposed class, and FBG's numerous case-specific objections, the court's certification order has about five pages of substantive analysis. We accepted this interlocutory appeal, *see* FED. R. CIV. P. 23(f), and vacate.

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least 1,700. Both sides agree that each employer that participates in the trusts creates its own plan arrangement. *Compare* Plaintiffs' Brief at 20 ("[E]ach employer that joins [the trusts] creates an individual employer plan[.]"), *and* Amended Complaint at ¶ 53 ("Each participating employer's health and welfare plan is an employee welfare benefit plan within the meaning of ERISA[.]"), *with* FBG's Opening Brief at 5-6 (contending that each employer creates its own plan by selecting various options). And the complaint alleges that, as of 2015, one trust had 1,716 participating employers and the other had 162, resulting in a minimum estimate of over 1,700, even if one assumes overlap between the two. FBG asserts that the number is much higher, given that the class includes participants over several years, but it does not dispute a floor of 1,700. (The parties strongly disagree, however, as to whether differences among the plans are material.) The district court and the parties are free to arrive at a more precise number in future proceedings.

II.

A.

Given the impact of certification, district courts must analyze Rule 23 with special attention. Certification is proper only where "the trial court is satisfied, after a *rigorous analysis*,"[2] that the Rule's requirements are met. Put another way, "a district court must detail with sufficient specificity how the plaintiff has met the requirements of Rule 23." *Vizena v. Union Pac. R.R.*, 360 F.3d 496, 503 (5th Cir. 2004) (per curiam).

"Rule 23 does not set forth a mere pleading standard." *Dukes*, 564 U.S. at 350. Instead, "[a] party seeking class certification must affirmatively demonstrate his compliance with the Rule—that is, he must be prepared to prove that there are *in fact* sufficiently numerous parties, common questions of law or fact," and so on. *Id.*

As a result, in weighing certification, the court will often have "to probe behind the pleadings," *Falcon*, 457 U.S. at 160, because "[t]he class determination generally

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2. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350-51, 131 S. Ct. 2541, 180 L. Ed. 2d 374 (2011) (emphasis added); *see also Comcast Corp. v. Behrend*, 569 U.S. 27, 33, 133 S. Ct. 1426, 185 L. Ed. 2d 515 (2013) (same); *Gen. Tel. Co. of the Sw. v. Falcon*, 457 U.S. 147, 161, 102 S. Ct. 2364, 72 L. Ed. 2d 740 (1982) (same); *M.D. ex rel. Stukenberg v. Perry*, 675 F.3d 832, 837 (5th Cir. 2012) ("It is well-established that a district court must conduct a rigorous analysis of the Rule 23 prerequisites before certifying a class." (brackets and quotation marks removed)).

involves considerations that are enmeshed in the factual and legal issues" of the case, *Dukes*, 564 U.S. at 351. So the court should seek to "understand the claims, defenses, relevant facts, and applicable substantive law in order to make a meaningful determination[.]" *Flecha v. Medicredit, Inc.*, 946 F.3d 762, 766 (5th Cir. 2020). "If some of the determinations . . . cannot be made without a look at the facts, then the judge must undertake that investigation." *Spano v. Boeing Co.*, 633 F.3d 574, 583 (7th Cir. 2011). The judge cannot merely "review a complaint and ask whether, taking the facts as the party seeking the class presents them, the case *seems* suitable for class treatment." *Id.* (emphasis added). Much more is needed.

Thus, to satisfy the rigor requirement, a district court must detail with specificity its reasons for certifying. *Vizena*, 360 F.3d at 503. It must explain and apply the substantive law governing the plaintiffs' claims to the relevant facts and defenses, articulating why the issues are fit for classwide resolution.[3] The court should respond to the defendants' legitimate protests of individualized issues that could preclude class treatment.[4] And its

3. *See*, *e.g.*, *Stukenberg*, 675 F.3d at 837. We do not mean that the court should decide the merits of the plaintiffs' claims. That is inappropriate at the certification stage. *See*, *e.g.*, *Amgen Inc. v. Conn. Ret. Plans & Tr. Funds*, 568 U.S. 455, 466, 133 S. Ct. 1184, 185 L. Ed. 2d 308 (2013) ("Rule 23 grants courts no license to engage in free-ranging merits inquiries at the certification stage."). Instead, we mean that the certification issues often entail examining the substantive law that the claims implicate. *See*, *e.g.*, *Dukes*, 564 U.S. at 351.

4. *See*, *e.g.*, *Stukenberg*, 675 F.3d at 842-43 (noting that "[t]he district court clearly rejected" the defendant's individualization

analysis must stay close to the facts and law of the case, spurning reliance on generalizations about what types of disputes may be fit for a class.[5] The court must rigorously consider both Rule 23(a)'s prerequisites[6] and the Rule 23(b) class type.[7]

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argument but had not "[]sufficiently analyzed" it); *Ward v. Hellerstedt*, 753 F. App'x 236, 246 (5th Cir. 2018) (per curiam) ("[W]e note that it is incumbent on the district court to consider and discuss the facts of this case, as well as the elements of Plaintiffs' claims, prior to rejecting Defendant's argument that dissimilarities among individual claimants obviate commonality.").

5. *See*, *e.g.*, *E. Tex. Motor Freight Sys., Inc. v. Rodriguez*, 431 U.S. 395, 405, 97 S. Ct. 1891, 52 L. Ed. 2d 453 (1977) ("We are not unaware that suits alleging racial or ethnic discrimination are often by their very nature class suits, involving classwide wrongs. Common questions of law or fact are typically present. But careful attention to the requirements of [Rule] 23 remains nonetheless indispensable."); *Gene & Gene LLC v. BioPay LLC*, 541 F.3d 318, 328 (5th Cir. 2008) ("[T]here are no invariable rules regarding the suitability of a particular case filed under this subsection of the TCPA for class treatment; the unique facts of each case generally will determine whether certification is proper."); *Robinson v. Tex. Auto. Dealers Ass'n*, 387 F.3d 416, 420-21 (5th Cir. 2004) ("There are no hard and fast rules regarding the suitability of a particular type of antitrust case for class action treatment. Rather, the unique facts of each case will generally be the determining factor governing certification." (cleaned up)).

6. *See*, *e.g.*, *Dukes*, 564 U.S. at 350-51.

7. *See Behrend*, 569 U.S. at 33-34 ("[C]ertification is proper only if the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied. . . . The same analytical principles govern Rule 23(b)." (quotation marks removed)); *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 742-43 (5th Cir. 1996) (holding that the district court had not engaged in a

This "rigorous analysis" mandate is not some pointless exercise that we foist on this circuit's hardworking and conscientious district judges, such as the judge in this case. It matters. A "class action is an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only," *Behrend*, 569 U.S. at 33 (quotation marks removed), and creative uses are perilous. It is no secret that certification "can coerce a defendant into settling on highly disadvantageous terms regardless of the merits of the suit."[8] And the existence of a class fundamentally alters the rights of present and absent members, particularly for mandatory classes such as the one here.[9] No less than due process is implicated, so a careful look is necessary. *See Unger v. Amedisys Inc.*, 401 F.3d 316, 320 (5th Cir. 2005).

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rigorous analysis of predominance—that is, whether a Rule 23(b)(3) class type was appropriate); *Madison v. Chalmette Ref., L.L.C.*, 637 F.3d 551, 556-57 (5th Cir. 2011) (same).

8. *CE Design Ltd. v. King Architectural Metals, Inc.*, 637 F.3d 721, 723 (7th Cir. 2011) (Posner, J.); *see also Castano*, 84 F.3d at 746 ("[C]lass certification creates insurmountable pressure on defendants to settle. . . . The risk of facing an all-or-nothing verdict presents too high a risk, even when the probability of an adverse judgment is low.").

9. *See Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 846-47, 119 S. Ct. 2295, 144 L. Ed. 2d 715 (1999) ("Unlike Rule 23(b)(3) class members, objectors to the collectivism of a mandatory subdivision (b)(1)(B) action have no inherent right to abstain. The legal rights of absent class members . . . are resolved regardless of either their consent, or, in a class with objectors, their express wish to the contrary."); *Ward*, 753 F. App'x at 244 ("Such independent analysis is necessary to protect unknown or unnamed potential class members[.]" (quotation marks removed)).

A rigorous analysis also ensures effective appellate review, which we are unable to engage in here. *See Stukenberg*, 675 F.3d at 842. Indeed, in addressing a certification, we search only for abuse of discretion, recognizing "the essentially factual basis of the certification inquiry and . . . the district court's inherent power to manage and control pending litigation." *Id.* at 836. Appellate judges are not finders of fact,[10] and we play no role in managing a district court's docket. So it's up to the district judge to find the facts.

B.

FBG complains that the court analyzed Rule 23 superficially. We agree.

1.

We begin with commonality, which requires the plaintiff to show that "there are questions of law or fact common to the class." FED. R. CIV. P. 23(a)(2). Under *Dukes*—which "heightened the standards"[11]—"all of the class member's claims [must] depend on a common issue . . . whose resolution will resolve an issue that is central to the validity of each one of the class member's claims in one stroke." *Stukenberg*, 675 F.3d at 840 (cleaned up).

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10. *See, e.g.*, *Copeland v. Greyhound Corp.*, 337 F.2d 822, 825 (5th Cir. 1964) (describing the "reluctance, shared by all appellate courts, to second-guess trial courts or other fact finders with respect to determinations of fact").

11. *Stukenberg*, 675 F.3d at 839.

To satisfy the rigor requirement, the district court must explain how that standard is met. *Id.* at 841. It should do so "with specific reference to the claims, defenses, relevant facts, and applicable substantive law raised by the class claims," *id.* at 843 (quotation marks removed), and it must "address actual or potential differences in purported class members' individual circumstances and claims," *Ward*, 753 F. App'x at 246.

Here, however, the court's analysis—for this huge putative class—is fleeting:

> In this case, Plaintiffs allege prohibited self-dealing and fiduciary breaches stemming from Defendants' exertion of discretionary control over [the trusts]. Plaintiffs further allege Defendants' actions affected all plans participating in [the trusts]. Because Defendants' status as fiduciaries with discretionary control over [the trusts] presents a common question capable of classwide resolution, Plaintiffs' proposed class satisfies the commonality requirement (docket citations removed).

Our caselaw demands more than this brevity. First, the order does not identify the common question with any specificity.[12] And, having defined the question vaguely, the court then analyzes it conclusionally. There is no reference

12. *See id.* at 842 ("[T]he formulation of these common questions of law is too general to allow for effective appellate review.").

to ERISA.[13] Nor does the court explain why clarifying FBG's status as a fiduciary will *in one stroke* resolve an issue that is central to the claims of each one of the class members.[14] Most noticeably, the order neglects to consider asserted differences among class members that could prevent the suit from generating "common answers apt to drive the resolution of the litigation."[15]

As the briefs reveal, liability apparently will turn on whether FBG (1) was a fiduciary as to each plan[16] and

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13. *See*, *e.g.*, *id.* (faulting the district court for failing to conduct any "analysis of the elements and defenses for establishing any of the proposed class claims" in weighing commonality); *Ward*, 753 F. App'x at 246 (faulting the district court for failing to explain and apply "the elements of Plaintiffs' claims" in evaluating commonality); *see also Madison*, 637 F.3d at 557 (finding insufficient analysis of predominance because "[t]he opinion [was] . . . silent as to the relevant state law that applie[d] . . . and what Plaintiffs must prove to make their case").

14. *See*, *e.g.*, *Stukenberg*, 675 F.3d at 841 (criticizing the district court for not considering or explaining how the one-stroke standard was met); *Ward*, 753 F. App'x at 246 (same).

15. *Dukes*, 564 U.S. at 350 (emphasis removed) (quoting Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. Rev. 97, 132 (2009)); *see Stukenberg*, 675 F.3d at 842-43 (noting that the district court had apparently rejected defendant's arguments about individualized issues precluding commonality without explaining why); *Ward*, 753 F. App'x at 246 (similarly faulting the district court for rejecting defendant's arguments about dissimilarities obviating commonality without engaging in a proper analysis).

16. *See* 29 U.S.C. § 1104(a) (outlining ERISA fiduciary duties); *id.* § 1002(21)(A) (outlining requirements for becoming a functional fiduciary under ERISA).

(2) received too much compensation.[17] But FBG informs us—just as it told the district court—that differences in fees, structure, and assignment of responsibility among the many plans negate the possibility of a common answer to those issues. The plaintiffs reply that the documents governing each plan are materially indistinguishable, such that the analysis pertaining to one plan will apply to all. FBG retorts that there are fundamental and dispositive differences among the plan documents.

Faced with those warring factual contentions, the district court needed to resolve whether there were relevant differences among the many plans—and, if so, to explain why they did not prevent classwide resolution of the common issue.[18] Instead, the court offered only

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17. *See id.* § 1106(b) (outlining impermissible transactions between a plan and a fiduciary).

18. *See Stukenberg*, 675 F.3d at 843 (noting that the district court needed to explain why it had rejected the defendant's argument that "resolution of each of the class member's . . . claims require[d] individual analysis" that could have prevented the litigation from "generat[ing] common answers"); *see also In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 320 (3d Cir. 2008), *as amended* (Jan. 16, 2009) ("[B]ecause each requirement of Rule 23 must be met, a district court errs as a matter of law when it fails to resolve a genuine legal or factual dispute relevant to determining the requirements.").

The order's only analysis of the differences among the plans occurs (oddly enough) in its discussion of *typicality* under Rule 23(a)(3). And it mentions those asserted differences only in passing before concluding that FBG hadn't "cogently explain[ed] why [they] matter[ed]." Even if we could import that reasoning into the analysis of commonality—and we cannot, because typicality

its unsupported assurance that FBG's fiduciary status is "capable of classwide resolution." It is an abuse of discretion to find commonality on such a thin survey.[19] An issue is not "capable of classwide resolution" just because the district court, without explanation, says it is.

2.

The district court's analysis of the class type is similarly—and reversibly—breezy. The court certified under Rule 23(b)(1)(B), which provides for a mandatory class with no opting out,[20] where

> prosecuting separate actions by or against individual class members would create a risk of . . . adjudications with respect to individual class members that, as a practical matter, would be disposi-tive of the interests of the other members not parties to the individual

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is a distinct issue—it would be insufficient. The court failed to articulate what the asserted differences were, much less say *why* they were immaterial by reference to the facts, allegations, and law of ERISA.

19. *See Stukenberg*, 675 F.3d at 844-45 (concluding that certification order did not rigorously analyze commonality); *Ward*, 753 F. App'x at 246 (same); *cf. Madison*, 637 F.3d at 557 (finding abuse of discretion where district court failed to analyze predominance with sufficient rigor).

20. *See In re Katrina Canal Breaches Litig.*, 628 F.3d 185, 191 (5th Cir. 2010).

> adjudications or would substantially impair or impede their ability to protect their interests[.]

FED. R. CIV. P. 23(b)(1)(B).

The district court's reasoning needs more facts and fewer generalizations. The court noted that the plaintiffs sought "restitution, an accounting for profits, and an order that Defendants make good to the plans the losses stemming from Defendants' exercise of discretion and control with respect to [the trusts]" (quotation marks removed). It then quoted *dictum* in *Ortiz*, which stated that Rule 23(b)(1)(B) would often encompass "actions charging a breach of trust by a[] . . . fiduciary similarly affecting the members of a large class of beneficiaries," because such actions "requir[e] an accounting or similar procedure to restore the subject of the trust." *Ortiz*, 527 U.S. at 834 (quotation marks removed). The proposed group fell within that "[c]lassic example," the district court opined, because the plaintiffs sought an ERISA accounting that would make good any losses that resulted from FBG's fiduciary breaches. So Rule 23(b)(1)(B) applied.

Despite relying on *Ortiz*, the court missed its central premise. Even if a proposed class appears, at first glance, to be an historical example of a 23(b)(1)(B) class, the court must look closely at the facts to ensure that separate adjudications as to each class member would indeed impair nonparties' ability to protect their interests.[21] In other

21. *See Ortiz*, 527 U.S. at 848-61 (analyzing a proposed limited-fund class under Rule 23(b)(1)(B) to see whether its characteristics adhered to the historical limited fund).

words, the Rule does not tolerate a fleeting analysis that assumes that a given class is appropriate just because it appears to be a classic (b)(1)(B) class. *See id.* at 848-61.

Applying that principle, *Ortiz* held that a proposed class did not qualify, because it did not sufficiently resemble a "limited fund." *See id.* In so doing, the Court applied a "limiting construction" to Rule 23(b)(1)(B) designed "to stay close to the historical model[s]" of such classes. *Id.* at 842. It spoke warily of the "likelihood of abuse" of that subsection and counseled against its "adventurous application."[22] The Court wished to avoid "potential conflict with the Rules Enabling Act" and "serious constitutional concerns raised by the mandatory class resolution of individual legal claims." *Id.*

Ortiz shows that the district court's order does not analyze the class type with requisite rigor. The court notes that, just as in *Ortiz, id.* at 834, the plaintiffs' case relates to one of the historical models—namely, an action against a fiduciary seeking an accounting to restore the subject of the trust (in this case, benefits plans). But, parting ways with *Ortiz*, the court's analysis begins and ends there. It fails to examine the facts of this specific class to ensure that it qualifies.

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22. *Id.* at 842, 845; *see Katrina*, 628 F.3d at 192 (noting that *Ortiz* "counseled against adventurous application of Rule 23(b)(1)(B)" and stressed "a limited construction" (quotation marks removed)); *Spano*, 633 F.3d at 587 ("In *Ortiz*, the Supreme Court cautioned strongly against overuse of (b)(1) classes.").

That failure is reversible error.[23] FBG vigorously asserts that the class in no way resembles a typical ERISA class belonging under (b)(1)(B). Among other things, the company contends—as it did at the district court—that

> even assuming that the relief sought for one individual's claim would be dispositive of another individual's claim in the *same plan*, that relief would not affect, much less be dispositive of, claims under the other . . . plans. Different plans require their own liability and damage[s] analysis, and their own respective accountings or other relief.

The order has no response to that fact-bound contention. It instead assumes that the desired relief—an ERISA accounting—automatically entitles the plaintiffs to certification via (b)(1)(B). The court's nonspecific, categorical reasoning contradicts *Ortiz* and fails to demonstrate a rigorous analysis.

It follows that we cannot do this work in the district court's stead. The Rule requires a case-specific inquiry into whether, "*as a practical matter*," one class member's relief in an adjudication would impair the interests of non-parties.[24] But here, the court bypasses that

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23. *Cf. Cruson v. Jackson Nat'l Life Ins. Co.*, 954 F.3d 240, 255 (5th Cir. 2020) ("Here, the district court provided only a cursory analysis on this key point. That is reversible error.").

24. Fed. R. Civ. P. 23(b)(1)(B) (emphasis added); *see* 7AA Charles Alan Wright & Arthur R. Miller, Federal Practice

required analysis, offering instead only its conclusional reassurance that the desired "relief would, as a practical matter, dispose of the interests of the other putative class members."

A more searching analysis is required. "[C]areful attention to the requirements of [Rule] 23 remains . . . indispensable." *Rodriguez*, 431 U.S. at 405. The court must explain, in the factual context of *this* case, why adjudications for individual class members would prejudice nonparty members.[25] Such will necessarily entail considering and responding to FBG's contention that the existence of many different plans prevents (b)(1)(B) from applying.

C.

The plaintiffs, maybe sensing the inadequacies, point out that the court had plenty of evidence before it and that the hearing showed that the court was thoughtfully considering the issues. All true. But the rigor requirement does not turn on how much material the parties submit or on how carefully the court seems to weigh the issues at a hearing. It instead asks whether the court's order

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AND PROCEDURE § 1774 (3d ed.) ("Because of the rule's emphasis on the practical effects of separate adjudications, the determination of whether a particular action falls within its ambit depends largely on the facts of each case.").

25. *See* FED. R. CIV. P. 23(b)(1)(B); *cf. Cruson*, 954 F.3d at 255 ("We recognize that suits involving form contracts often lend themselves to class treatment. But this is not always so." (citations removed)).

sufficiently analyzes Rule 23. *E.g.*, *Stukenberg*, 675 F.3d at 842-44. For reasons described, the one here does not.

The certification order is VACATED. We express no view on whether a class should be certified, and we place no limit on the matters the court may consider in further proceedings.

APPENDIX E — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS, AUSTIN DIVISION, FILED AUGUST 30, 2019

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF TEXAS, AUSTIN DIVISION

CAUSE NO.: AU-17-CA-00659-SS

HERIBERTO CHAVEZ, EVANGELINA ESCARCEGA AS LEGAL REPRESENTATIVE OF JOSE ESCARCEGA, AND JORGE MORENO,

Plaintiffs,

-vs-

PLAN BENEFIT SERVICES, INC., FRINGE INSURANCE BENEFITS, INC., AND FRINGE BENEFIT GROUP,

Defendants.

August 30, 2019, Decided;
August 30, 2019, Filed

ORDER

BE IT REMEMBERED on this day the Court reviewed the file in the above-styled cause, and specifically Plaintiffs' Motion for Class Certification [#99] and Memorandum of Law [#100-31] in support, Defendants'

Responses [#109, #111] and Supplement [#114] in opposition, and Plaintiffs' Reply [#120] in support, as well as Defendants' Supplemental Brief [#124] in opposition and Plaintiffs' Supplemental Brief [#125] in support. Having considered the parties' briefing, the governing law, the arguments of counsel, and the case file as a whole, the Court now enters the following opinion and orders.

Background

I. Facts

Plaintiffs Heriberto Chavez, Evangelina Escarcega on behalf of her disabled son Jose Escarcega, and Jorge Moreno bring this action on behalf of themselves and a proposed class of similarly situated participants and beneficiaries under the Employee Retirement Income Security Act of 1974 (ERISA) against Defendants Fringe Insurance Benefits, Inc., Plan Benefit Services, Inc., and Fringe Benefit Group (collectively, Defendants). Am. Compl. [#42] at 1.[1]

Defendants market and administer retirement, health, and welfare benefit plans to the employees of nonunion employers seeking to compete for government contracts. *Id.* at 10. Nonunion employers seeking to bid on such government contracts are often required to pay their workers prevailing wages—the wages and benefits paid to the majority of similarly situated laborers in the

1. 1n the interest of consistency, all page number citations refer to CM/ECF pagination.

area during the relevant time period—in order to qualify for government contracts. *Id.* at 10. Defendants offer two sorts of plans to such employers—a Contractors Plan and a Contractors Retirement Plan—through which the employers can affordably provide benefits to their workers and thereby submit competitive bids for government work. *Id.* at 10; Resp. Mot. Dismiss [#63] at 3. Health and welfare benefits are provided through the Contractors Plan, while retirement benefits are provided through the Contractors Retirement Plan. *Id.; see also* Mot. Certify [#100-31].

Upon enrollment in the Contractors Plan and the Contractors Retirement Plan, employers can offer retirement benefit plans to their employees through the Contractors and Employee Retirement Trust (CERT) and can offer health and welfare benefit plans to their employees through the Contractors Plan Trust (CPT). Am. Compl. [#42] at 1, 10; Resp. [#109] at 13. CERT is a "master pension trust, which sponsors a prototype defined contribution plan" for employees; CPT is a multiple-employer trust that serves as a vehicle for marketing, administering, and funding the provision of health and welfare benefits to employees. Am. Compl. [#42] at 10-11. Defendant Fringe Benefit Group[2] serves as Master Plan Sponsor and Recordkeeper for both CPT and CERT, while Defendant Fringe Insurance Benefits, Inc. (FIBI) is responsible for marketing the Contractors Plan and the Contractors Retirement Plan to employers. Am. Compl. [#42] at 8-13; Resp. [#109] at 13.

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2. Defendants inform the Court that Plan Benefit Services is now known as Fringe Benefit Group. Resp. [#109] at 13.

Plaintiffs' employer, Training, Rehabilitation & Development Institute, Inc. (TRDI) enrolled in both the Contractors Plan and the Contractors Retirement Plan to facilitate the provision of health, welfare, and retirement benefits to TRDI employees. *Id.* at 1-2; Resp. Mot. Dismiss [#63] at 3. Upon enrollment, TRDI established a health and welfare plan (TRDI Health and Welfare Plan) and a retirement plan (TRDI Retirement Plan) by executing adoption agreements with CPT and CERT, respectively. Am. Compl. [#42] at 11; Mot. Dismiss [#56-1] Attach. A (CPT Adoption Agreement); *id.* [#56-2] Attach. B. (CERT Adoption Agreement). The documents governing CERT, CPT, and the TRDI plans distribute various responsibilities and duties among TRDI, Defendants, and a trustee appointed by Defendants. Am. Compl. [#42] at 9-11.

II. Procedural Posture

In July 2017, Plaintiffs filed this suit against Defendants in federal court alleging Defendants charged excessive fees prohibited by ERISA. Compl. [#1]. In October 2017, Defendants responded with a motion to dismiss Plaintiffs' original complaint, which the Court granted. Prior Mot. Dismiss [#27]; Order of Nov. 6,2017 [#36].

Plaintiffs then filed an amended complaint. Relevant here, Plaintiffs' amended complaint alleges Defendants engaged in prohibited self-dealing in violation of 29 U.S.C. § 1106(b) and breached fiduciary duties owed to plan participants and beneficiaries in violation of 29

U.S.C. § 1109(a). Am. Compl. [#42] at 23-25; *see also* 29 U.S.C. § 1104(a) (outlining fiduciary duties). For example, Plaintiffs allege Defendants controlled disbursements from both CPT and CERT and directed the Trustees with respect to disbursements from the Trust, including for Defendants' own fees. Am. Compl. [#42] at 9-11. According to Plaintiffs, Defendants used this control to collect extracontractual fees that were never disclosed to plan participants. Am. Compl. [#42] at 25. Additionally, Plaintiffs allege Defendants used their control over provider platforms for plans participating in CERT and CPT to select providers that maximized Defendants' indirect compensation at the expense of participants in all of the plans, including the TRDI plans. Resp. [#63] at 20; Am. Compl. [#42] at 17, 23; *see also* Mot. Certify [#100-31] at 19-20.

Defendants again moved to dismiss, arguing, in part, that Plaintiffs failed to state a claim under § 1106(b) and § 1109(a) because Plaintiffs had not plausibly alleged Defendants were acting as fiduciaries. Order of June 15, 2018 [#67] at 9-11. The Court denied Defendants' motion to dismiss those claims after concluding Plaintiffs had plausibly alleged Defendants exercised fiduciary discretion with respect to at least some of the actions complained of by Plaintiffs. *Id.*

Plaintiffs now move to certify a class for these claims, consisting of "all participants in and beneficiaries of employee benefit plans that provide benefits through CPT and CERT, other than officers and directors of the Defendants and their immediate family members, from

July 6, 2011 until the time of trial." Mot. Certify [#100-31] at 8. This pending motion is ripe for review.

Analysis

Plaintiffs seeking to certify a class under Rule 23 bear the burden of establishing the prerequisites to certification have been met. *Amgen Inc. v. Conn. Ret. Plans & Tr. Funds*, 568 U.S. 455, 133 S. Ct. 1184, 1192, 185 L. Ed. 2d 308 (2013). Rule 23(a) sets forth four such prerequisites: numerosity, commonality, typicality, and adequacy. FED. R. CIV. P. 23(a)(1)-(4). Once a plaintiff establishes these prerequisites have been met, the plaintiff must then demonstrate the proposed class is appropriate for certification under one of the provisions of Rule 23(b). The Court first considers whether Plaintiffs have established the Rule 23(a) prerequisites to class certification.

I. Rule 23(a) Prerequisites to Class Certification

A. Numerosity

To meet the numerosity requirement, the plaintiff must establish "the class is so numerous that joinder of all members is impracticable." FED. R. CIV. P. 23(a)(1). Here, Plaintiffs seek to certify a class consisting of 70,000 participants in CERT and 20,000 participants in CPT. Mot. Certify [#100-31] at 22; *see also* Wasow Decl. [#106-1] Ex. 1 (noting CPT alone had thousands of active participants in 2017). The Court concludes the proposed class satisfies the numerosity requirement because the

class is so numerous that joinder of its members would be impracticable.

B. Commonality

To meet the commonality requirement, the plaintiff must establish "there are questions of law or fact common to the class." FED. R. CIV. P. 23(a)(2). In this case, Plaintiffs allege prohibited self-dealing and fiduciary breaches stemming from Defendants' exertion of discretionary control over CPT and CERT. *See* Resp. [#63] at 20; Am. Compl. [#42] at 17, 23, 25. Plaintiffs further allege Defendants' actions affected all plans participating in CPT and CERT. *Id.* Because Defendants' status as fiduciaries with discretionary control over CPT and CERT presents a common question capable of classwide resolution, Plaintiffs' proposed class satisfies the commonality requirement.

C. Typicality

To meet the typicality requirement, the plaintiff must establish "the claims or defenses of the representative part[y] are typical of the claims or defenses of the class." FED. R. CIV. P. 23(a)(3). Here, Plaintiffs' claims and defenses are typical of those of the class. Plaintiffs argue, for example, that Defendants used their control over disbursements from CPT and CERT to extract extracontractual fees from the TRDI plans as well as other plans organized through those trusts. Mot. Certify [#100-31] at 7, 21, 23-24. And Plaintiffs also argue that Defendants used their discretion to select provider

platforms for CERT and CPT in order to maximize Defendants' indirect compensation at the expense of participants in all of the plans, including the TRDI plans. *Id.* at 7, 21. Thus, Plaintiffs' claims are typical of those of the putative class because they depend on a common course of conduct and share the same legal theory.

Defendants protest that Plaintiffs' claims cannot be typical because many of the putative class members participated in different plans and "Plaintiff's individual claims will depend on the performance and on other qualities of the services they personally received." Resp. [#109] at 45-46. But Defendants do not cogently explain why these differences matter given Plaintiffs' classwide theory of liability, nor do Defendants identify any defenses which might apply to Plaintiffs' claims but not to those of other putative class members. *Cf. Forbush v. J. C. Penney Co.*, 994 F.2d 1101, 1106 (5th Cir. 1993) (concluding plaintiff's claims were typical of those of class, despite putative class members' participation in multiple different plans, because plaintiff "framed her challenge in terms of [defendant's] general practice of overestimating . . . benefits"), *abrogation on other grounds recognized by In re Rodriguez*, 695 F.3d 360, 370 (5th Cir. 2012).

In sum, the Court concludes Plaintiffs' claims are typical of those of the class and that Plaintiffs have carried their burden of establishing the typicality requirement.

D. Adequacy

To meet the adequacy requirement, the plaintiff must establish he will "fairly and adequately protect

the interests of the class" in his capacity as class representative. FED. R. CIV. P. 23(a)(4). The purpose of this requirement is to "uncover conflicts of interest between named parties and the class they seek to represent." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 625, 117 S. Ct. 2231, 138 L. Ed. 2d 689 (1997). Moreover, in the Fifth Circuit, the plaintiff must show he is willing and able to "vigorously prosecute the interests of the class through qualified counsel." *Berger v. Compaq Computer Corp.*, 257 F.3d 475, 482-84 (5th Cir. 2001) (quoting *Gonzales v. Cassidy*, 474 F.2d 67, 72-73 (5th Cir. 1973)).

As a predicate matter, Defendants argue that Plaintiffs cannot establish they are adequate class representatives because Plaintiffs lack statutory standing to represent participants in other plans organized through CERT and CPT. Resp. [#109] at 47-49. This argument fails because named plaintiffs need only establish they possess standing to bring each claim asserted on behalf of the class. *See, e.g., Charters v. John Hancock Life Ins. Co.*, 534 F. Supp. 2d 168, 172 (D. Mass. 2007) (concluding plaintiffs need not establish standing with respect to every plan of all putative class members so long as plaintiffs have standing with respect to their own plan and allege a common course of conduct affecting the participants in the various plans); *cf. In re Deepwater Horizon*, 739 F.3d 790, 800-02 (5th Cir. 2014) ("Whether or not the named plaintiff who meets individual standing requirements may assert the rights of absent class members is neither a standing issue nor an Article III case or controversy issue but depends rather on meeting the prerequisites of Rule 23 . . . ." (citation and quotation marks omitted)).

Having dispensed with Defendants' statutory standing objection, Court concludes Plaintiffs are adequate representatives. The Court is aware of no pertinent conflicts between Plaintiffs and the members of the proposed class, and as best the Court can tell, Plaintiffs' interests are aligned with those of the class as a whole. *Amchem*, 521 U.S. at 625. Moreover, Plaintiffs have demonstrated they are both willing and able to vigorously prosecute the interests of the class through qualified counsel. *Gonzales*, 474 F.2d at 72-73. Because Plaintiffs have established they will fairly and adequately protect the interests of the class, Plaintiffs have met the adequacy requirement.

II. Certification Under Rule 23(b)(1)(B)

Plaintiffs urge the Court to certify the proposed class under Rule 23(b)(1)(B). Under that provision, a class action may be maintained if Rule 23(a) is satisfied and if:

> prosecuting separate actions by or against individual class members would create a risk off] . . . adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests.

FED. R. CIV. P. 23(b)(1)(B).

The Court concludes the proposed class is appropriate for certification under Rule 23(b)(1)(B) because the

prosecution of individual actions would create a risk of adjudications "that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications." FED. R. CIV. P. 23(b)(1)(B). In this action, Plaintiffs seek restitution, an accounting for profits, and an order that Defendants "make good to the plans the losses" stemming from Defendants' exercise of discretion and control with respect to CERT and CPT. Am. Compl. [#42] at 26. This relief would, as a practical matter, dispose of the interests of the other putative class members whether or not the Court certifies the class requested by Plaintiffs. Perhaps for this reason, the Supreme Court has referred to actions involving "a breach of trust by an indenture trustee or other fiduciary similarly affecting the members of a large class of beneficiaries" as a "[c]lassic example" of the sort of case suitable for certification under Rule 23(b)(1)(B), because such actions often "require[] an accounting or other similar procedure to restore the subject of the trust." *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 822-34, 119 S. Ct. 2295, 144 L. Ed. 2d 715 (1999) (citation and quotation marks omitted); *see also id.* ("[T]he shared character of rights claimed or relief awarded entails that any individual adjudication by a class member disposes of, or substantially affects, the interests of absent class members."); *In re Glob. Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 453 (S.D.N.Y. 2004) ("Because of ERISA's distinctive representative capacity and remedial provisions, ERISA litigation of this nature presents a paradigmatic example of a (b)(1) class." (citation and quotation marks omitted)); *Moreno v. Deutsche Bank Ams. Holding Corp.*, 15 Civ. 9936, 2017 U.S. Dist. LEXIS 143208, 2017 WL 3868803, at *8-10 (S.D.N.Y. Sept. 5, 2017)

(certifying ERISA class action under Rule 23(b)(1)(B) because equitable relief requested by plaintiffs would, as a practical matter, dispose of the interests of the putative class members).

Conclusion

The Court concludes that Plaintiffs' motion for certification should be granted and that the proposed class should be certified under Rule 23(b)(1)(B) for the purpose of adjudicating Plaintiffs' § 1106(b) and § 1109(a) claims.

Accordingly,

IT IS ORDERED that Plaintiffs' Motion for Class Certification [#99] is GRANTED.

IT IS FURTHER ORDERED that the Court CERTIFIES a class consisting of "all participants in and beneficiaries of employee benefit plans that provide benefits through CPT and CERT, other than officers and directors of the Defendants and their immediate family members, from July 6, 2011 until the time of trial."

IT IS FURTHER ORDERED that the Court appoints Heriberto Chavez, Evangelina Escarcega on behalf of her disabled son Jose Escarcega, and Jorge Moreno as Class Representatives.

IT IS FINALLY ORDERED that the Court APPOINTS the law firms of Feinberg, Jackson, Worthman & Wasow LLP and Altshuler Berzon LLP as Class Counsel.

SIGNED this the 30th day of August 2019.

/s/ Sam Sparks
SAM SPARKS
SENIOR UNITED STATES DISTRICT JUDGE

APPENDIX F— PER CURIAM DECISION TREATING THE PETITION FOR REHEARING EN BANC AS A PETITION FOR PANEL REHEARING, GRANTING SUCH PETITION AND WITHDRAWING PREVIOUS OPINION, FILED JULY 15, 2024

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 22-50368

HERIBERTO CHAVEZ; EVANGELINA ESCARCEGA, AS THE LEGAL REPRESENTATIVE OF HER SON JOSE ESCARCEGA; JORGE MORENO,

Plaintiffs-Appellees,

versus

PLAN BENEFIT SERVICES, INC.; FRINGE INSURANCE BENEFITS, INCORPORATED; FRINGE BENEFIT GROUP,

Defendants-Appellants.

Appeal from the United States District Court
for the Western District of Texas
USDC No. 1:17-CV-659

Before WIENER, STEWART, and ENGELHARDT, *Circuit Judges.*

PER CURIAM:

Appendix F

Treating the petition for rehearing en banc as a petition for panel rehearing (5TH CIR. R. 35 I.O.P.), the petition is GRANTED and *Chavez v. Plan Benefit Services, Inc.*, 77 F.4th 370 (5th Cir. 2023) is WITHDRAWN.