No. _____

In the United States Court of Appeals for the Fifth Circuit

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

v.

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

On Appeal from the United States District Court for the
Western District of Texas, Austin Division
Civil Action No. 1:17-cv-659-SS

PETITION FOR PERMISSION TO APPEAL UNDER FEDERAL RULE OF CIVIL PROCEDURE 23(f)

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Fifth Circuit Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

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PETITION FOR PERMISSION TO APPEAL UNDER FEDERAL RULE OF CIVIL PROCEDURE 23(f)

Pursuant to FED. R. CIV. P. 23(f) and FED. R. APP. P. 5, Defendants petition for permission to appeal the district court's class certification order entered on August 30, 2019. App'x A.

The district court expressed serious concerns at oral argument about Plaintiffs' satisfaction of Rule 23's requirements, but nevertheless certified a class of approximately 90,000 employees of 3,500 unaffiliated employers. The class consists of "all participants in and beneficiaries of employee benefit plans that provide benefits through [3,500 different benefit plans]. . . ." *Id.* at 9. The three class representatives—all employed by the same company—participated in *two* employee benefit plans, and contend that Defendants charged "excessive" fees for administering those plans. Yet they seek to represent all 90,000 participants in 3,500 other materially different plans.

The Court should permit this appeal for three reasons:

First, since *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011), a court should not certify a class where the class representatives did not participate in the thousands of materially different benefit plans about

which they complain. At oral argument, the district court expressed skepticism on this basis, noting that it was "not satisfied that these people could constitute an appropriate plaintiff or plaintiffs," and that it "might just want the Fifth Circuit to tell me what to try." App'x B, 3:1-5, 28:11-12. Despite these concerns, it entered an order that thwarts Rule 23(b)(1) and effectively creates a *per se* rule that ERISA classes must be certified under Rule 23(b)(1)(B) if they seek statutory injunctive relief.

Second, Plaintiffs failed to establish commonality, typicality, and adequacy. This case involves over 3,500 different benefit plans with separately negotiated contractual arrangements and substantial variations in commission structures, fees, plan investment options, health benefits, and named fiduciaries. The evidence necessary to prove Plaintiffs' claims—that Defendants were "functional fiduciaries" as to each of the 3,500 disparate plans and breached their duties with respect to each plan—is not common and requires a case-by-case analysis of each plan and each challenged action by Defendants.

Third, the certification order lacks the requisite "rigorous analysis" of Rule 23's requirements. The order dedicated just four sentences to the

commonality question, failed to evaluate the evidence, and did not address the substantial dissimilarities amongst the class members.

The Court should permit this appeal and reverse the order.

JURISDICTION

This petition is filed within 14 days of entry of the order, and the Court's jurisdiction is invoked under 28 U.S.C. § 1292(e) and Rule 23(f).

QUESTIONS PRESENTED

1. Whether a class may be certified when the class representatives did not participate in the thousands of materially different benefit plans about which they complain.

2. Whether the class meets Rule 23's commonality, typicality, and adequacy requirements when: (a) there are over 3,500 different benefit plans with separately negotiated contractual arrangements; and (b) whether Defendants are "functional fiduciaries" as to each of these plans and breached those duties as to each of the plans are fact-intensive inquiries that depend on the unique circumstances of each of plan.

3. Whether the certification order contains a "rigorous analysis" of Rule 23's requirements, when it did not evaluate the evidence,

dedicated just four sentences to the complex commonality question, and failed to address the substantial dissimilarities amongst class members.

STATEMENT OF FACTS

This case involves a dispute about the reasonableness of various fees charged by Defendants Fringe Insurance Benefits, Inc. and Fringe Benefit Group[1] for marketing and administering employee benefit plans. The case began when three employees of the same company sued Defendants based on their employer's decision to adopt a retirement plan offered by Defendants and engaged Defendants to perform certain services for their health plan. (ECF 1).

Plaintiffs allege that Defendants charged "excessive" fees for servicing the plans. Specifically, Defendants purportedly engaged in self-dealing in charging excessive fees in violation of 29 U.S.C. § 1106(b) and breached fiduciary duties owned to plan participants and beneficiaries in violation of 29 U.S.C. § 1106(a). (ECF 42, at ¶¶ 115-133).

The three Plaintiffs seek to represent approximately 90,000 participants in over 3,500 different benefit plans, consisting of 3,327

[1] Defendant Plan Benefit Services is now known as Fringe Benefit Group, Inc. (ECF 111, at 1).

different retirement plans with 72,000 participants, and 272 different health plans with about 26,000 participants.[2] (ECF 111, at 1). The thousands of plans differ in significant ways relevant to certification, including differing commission structures and fees charged by Defendants in each plan, the existence of brokers or legal counsel on behalf of employers during the negotiation process, whether fees are paid by the employer or the plan, the selection of plans and benefits by the employer, the employer's selection of the type of services it contracts with Defendants to perform, the amounts charged for varying activity in each account in a retirement plan, the lack of fees charged or credits provided for retirement plans with certain asset thresholds, whether investments are actively or passively managed, the named fiduciary and "functional fiduciary" of each separate plan, and Defendants' contractual role in each plan. (*Id.* at 14-26; ECF 42, ¶¶ 86-87).

The parties joined issue over the Plaintiffs' request to certify the class. On August 30, 2019, the district court certified the class, concluding that Plaintiffs had established Rule 23(a)'s prerequisites:

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[2] These class numbers are based on information for 2014 (when the class representatives joined their plans) through 2019. The certified class includes participants and beneficiaries in plans providing benefits from July 6, 2011 to the time of trial. Therefore, these numbers are expected to dramatically increase.

proper class definition, numerosity, commonality, typicality, adequacy of representative parties, and adequacy of class counsel. App'x A, 5-8. It also concluded that Plaintiffs satisfied Rule 23(b)(1)(B). *Id.* at 8.

ARGUMENT

Whether to allow an appeal from a certification order is left to "the sole discretion of the court of appeals," and "[p]ermission may be granted or denied on the basis of any consideration that the court of appeals finds persuasive." FED. R. CIV. P. 23(f) advisory committee's note to 1998 amendment. The district court abused its discretion by certifying this class, and an appeal will permit the Court to correct this manifest error and address the important question of whether a class may be certified when the class representatives did not participate in the materially different benefit plans about which they complain.

I. THIS APPEAL RAISES NOVEL AND UNSETTLED QUESTIONS OF LAW.

This is a case of first impression where, post-*Wal-Mart*, a court has certified a multi-plan case in which the class representatives were participants in only two of the 3,500 plans at issue, each of which differ markedly from the class representatives' own plans. There is no dispute that Plaintiffs are complete strangers to the other 3,500 plans at issue.

And there is no dispute that Plaintiffs' two plans significantly differ from the other plans.[3] With no relevant case law to support this novel class, Plaintiffs' solution is to "extrapolate from the named plaintiffs' experience." App'x B, 7:23-24. But Rule 23 does not permit such guesswork. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 340 (2011). Indeed, the Supreme Court has expressly rejected this type of "Trial by Formula" because it deprives defendants from litigating statutory defenses to individual claims. *Id.* at 367.

The thousands of plans at issue differ in significant ways that render "extrapolation" inappropriate. Each plan, for instance, has its own unique negotiated fees, commission structures, and contractual obligations imposed on Defendants and participants, all of which render a determination that one plan's arrangements were improper or charged "excessive" fees irrelevant to whether other unique plans fall into that

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[3] For example, Defendants did not provide health benefits to Plaintiffs through one of their plans. Instead, Plaintiffs' employer requested health benefits through Blue Cross Blue Shield of Texas, a health insurer with whom Defendants do not normally conduct business. (ECF 111-4, ¶ 6; ECF 121, Ex. 1 at 13, 20). Defendants merely provided billing services in this arrangement, unlike most of the other plans at issue. During the certified class period, very few employers have held group health coverage through Blue Cross Blue Shield of Texas. *Id.* In addition, the unique retirement contract for Plaintiffs' employer was only utilized by five of the 3,327 employers for their retirement needs. Further, as Plaintiffs acknowledge, direct compensation to Defendants varies by plan, "depending on the plan's commission structure." (ECF 125, at 6-7).

category. (ECF 111, at 15-26). And questions of fee reasonableness are fact-intensive inquiries that must examine the fee evaluation and approval process for each of the 3,500 plans. *See Wal-Mart*, 564 U.S. at 350 (class members must "have suffered the same injury," not merely "suffered a violation of the same provision of law").

Likewise, whether Defendants are "functional" fiduciaries is based on Defendants' conduct with respect to each of the 3,500 plans (the circumstances of which differ in material ways, as discussed above), and on individualized decisions made in each plan. *See Teets v. Great-West Life & Annuity Ins. Co.*, 921 F.3d 1200, 1212 (10th Cir. 2019) (determination of "functional" fiduciary status is fact-intensive, and "[w]hen a service provider adheres to a *specific contract term* that is the product of arm's-length negotiation, courts have held that the service provider is not a fiduciary") (emphasis added). As Plaintiffs acknowledge, a fact-finder must examine Defendants' "role in selecting the insurance carrier" in each separate plan and how it "negotiat[ed] the insurance premium" for each plan. (ECF 125, at 2). Resolution of just these two questions will require thousands of different inquires.

These "[d]issimilarities within the proposed class . . . impede the generation of common answers." *Wal-Mart*, 564 U.S. at 350; *see Ahmad v. Old Republic Nat'l Title Ins. Co.*, 690 F.3d 698, 704 (5th Cir. 2012) (no commonality where fact-finder must "engage in file-by-file review" to determine whether class members were overcharged); *Langbecker v. Elec. Data Sys. Corp.*, 476 F.3d 299, 317 (5th Cir. 2007) (rejecting certification because, "to effectuate Appellees' principal goal—reimbursement into the individual accounts of each Plan Participant—numerous individualized hearings would be required. Final resolution of class members' claims will involve new and substantial legal and factual issues") (citations omitted).

The district court was rightfully concerned about the three Plaintiffs' ability to represent the entire class, noting at the hearing that it was "not satisfied that these people could constitute an appropriate plaintiff or plaintiffs." App'x B, 3:1-5. It also recognized the novelty of the proposed class, stating that "[i]f I'm going to try something like that with this docket, I might just want the Fifth Circuit to tell me what to try." App'x B, 28:11-12. Defendants agree: This Court should opine on the certifiability of this novel class.

II. THIS APPEAL IS NECESSARY TO CORRECT THE DISTRICT COURT'S ABUSE OF DISCRETION.

In determining whether to hear a Rule 23(f) appeal, sister circuits consider the vulnerability of a challenged certification decision. *See Prado-Steiman ex rel. Prado v. Bush*, 221 F.3d 1266, 1274-75 (11th Cir. 2000). Here, the district court abused its discretion in certifying the class, leaving its order susceptible to reversal. *See Gene & Gene LLC v. BioPay LLC*, 541 F.3d 318, 325 (5th Cir. 2008) ("We review class-certification decisions for abuse of discretion. . . . We review *de novo*, however, whether the district court applied the correct legal standards in determining whether to certify the class.").

"A party seeking class certification has the burden of establishing that all of Rule 23's requirements are met." *Ward v. Hellerstedt*, 753 F. App'x 236, 243 (5th Cir. 2018) (per curiam). Plaintiffs must "prove that there are in fact sufficiently numerous parties, common questions of law or fact, typicality of claims or defenses, and adequacy of representation" and satisfy one of Rule 23(b)'s provisions "through evidentiary proof." *Comcast Corp. v. Behrend*, 569 U.S. 27, 33 (2013). Plaintiffs failed to carry their burden, and the district court abused its discretion in certifying the class.

A. The district court erred by creating a *per se* rule of certification for ERISA injunction cases under 23(b)(1)(B).

Rule 23(b)(1)(B) permits certification only where individual adjudications would be dispositive of other members' interests, or would substantially impair their ability to protect those interests. FED. R. CIV. P. 23(b)(1)(B). The Supreme Court has "cautioned strongly against overuse of (b)(1) classes" and taught "that short-cuts in the class certification process are not permissible." *Spano v. The Boeing Co.*, 633 F.3d 574, 587, 591 (7th Cir. 2011) (citing *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999)). Whether a (b)(1)(B) class is proper "will turn on the circumstances of each case." *Id.* at 582.

The order below ignores the facts of this case. Instead, it relies on generalizations regarding ERISA injunctions being well-suited for (b)(1) cases. (ECF 132 at 8–10). As a result, it effectively creates a *per se* rule that, if an ERISA class member seeks injunctive relief, the class must be certified—without the need for case-specific analysis. This approach led the district court into error. Assuming *arguendo* that one individual's claim could be dispositive of another individual's claim in the *same plan*, that adjudication does not resolve claims under the other 3,499 plans: different plans require individualized analysis regarding Defendants'

status as a functional fiduciary and any resulting liability and damages from Defendants' alleged conduct. *See infra* part II.B.

Moreover, it is "still uncertain" in this Circuit whether a (b)(1) class can be maintained "if damages are the primary remedy sought." *Langbecker*, 476 F.3d at 318. Here, damages, if any, will eventually "be allocated among the Participants' accounts." *Id.* at 304. This will predominate over injunctive relief because most class members are no longer participants due to "high participant turnover" in the plans. (ECF 125 at 10). The Court should grant review and remove this uncertainty in the law.

B. Plaintiffs did not prove "commonality."

To establish commonality, Plaintiffs must prove that "there are questions of law or fact common to the class." FED. R. CIV. P. 23(a). The common question must "resolve an issue that is central to the validity of each one of the claims in one stroke." *Wal-Mart*, 564 U.S. at 350. The commonality analysis "look[s] beyond the pleadings" to the "claims, defenses, relevant facts, and applicable substantive law." *M.D. ex rel. Stukenberg v. Perry*, 675 F.3d 832, 841 (5th Cir. 2012). "[C]onsidering

dissimilarities among claimants is essential to determining whether even a single common question exists." *Ward*, 753 F. App'x at 246.

The sole "common" question identified by the district court is whether Defendants are fiduciaries to the class members. (ECF 132, at 5). It is undisputed that Defendants are not named fiduciaries of the 3,500 plans; therefore, their status as fiduciaries can only be established by proof that they were "functional fiduciaries." *Teets*, 921 F.3d at 1212 ("[T]o establish a service provider's fiduciary status, an ERISA plaintiff must show the service provider (1) did not merely follow a specific contractual term set in an arm's-length negotiation; and (2) took a unilateral action respecting plan management or assets without the plan or its participants having an opportunity to reject its decision."). But the district court did not analyze the applicable substantive law, what common proof could demonstrate "functional fiduciary" status as to each of the 3,500 plans, or address the dissimilarities amongst the class members based on their participation in separate plans governed by contracts with varying provisions. Had it done so, it could have reached only one conclusion: No common questions exist.

ERISA defines "fiduciary" functionally. 29 U.S.C. § 1002(21)(A)(i)-(iii). And fiduciary status is not an all or nothing concept. *Coleman v. Nationwide Life Ins. Co.*, 969 F.2d 54, 61 (4th Cir. 1992). Indeed, a person can serve as a fiduciary for one purpose, but not for another. *Martinez v. Schlumberger Ltd.*, 338 F.3d 407, 412 (5th Cir. 2003). Plaintiffs' plans allocate *all* fiduciary duties to their employer as the named fiduciary. Defendants deny that their conduct in administering the plans makes them a functional fiduciary of any of the 3,500 plans. (ECF 111 at 37). Given the varying circumstances and unique contractual terms governing each of the 3,500 plans, analyzing whether Defendants "functionally" acted as fiduciaries as to each plan notwithstanding the relevant documents will require an evaluation of Defendants' conduct on a plan-by-plan basis.

For instance, as a basis of Defendants' alleged fiduciary control over their own compensation, Defendants allegedly received compensation that was not fully disclosed in their retainer agreements. (ECF 99, at 10). Although Defendants deny this allegation, the "proof" will require an examination of each plan's respective retainer agreement. And even if that allegation could be determined through class-wide proof—which it

cannot—it still does not resolve Plaintiffs' claim that Defendants acted as fiduciaries by hiring themselves to perform plan services, which would again require plan-by-plan proof.

As Judge Garza wrote in his dissent in *Forbush v. J.C. Penney Co., Inc.*, 994 F.2d 1101, 1107 (5th Cir. 1993), commonality is absent when a plan participant seeks to represent a class comprised of participants in different plans. Importantly, this Court has recognized that the *Forbush* majority is no longer good law after *Wal-Mart*. *See Stukenberg*, 675 F.3d at 840. This case presents the Court with the opportunity to clarify that Judge Garza was correct and that commonality is absent here.

The certification order's silence regarding any common proof is instructive. Plaintiffs did not demonstrate that common evidence would establish that Defendants were "functional fiduciaries" in every challenged action for every plan or that Defendants breached those purported duties as to each of its 3,500 different plans. The district court abused its discretion necessitating reversal by the Court.

C. Plaintiffs did not establish "typicality" or "adequacy."

Plaintiffs must prove "typicality" by showing that "the claims or defenses of the representative parties are typical of the claims or defenses

of the class." FED. R. CIV. P. 23(a). To begin with, the class is defined as participants in one specified set of retirement plans and one specified set of health plans. (ECF 132 at 9). But not a single named Plaintiff participated in those health plans. For example, Heriberto Chavez, the only Plaintiff who purportedly "participated" in a health plan, did not even participate in a health plan *through Defendants*. (ECF 111 at 14). Instead, Plaintiffs' employer hired Defendants to perform billing, eligibility management, and enrollment services for the health plan their employer selected. (*Id.* at 38–39; ECF 111-4 at ¶¶ 6–9). Thus, there is no class representative here that can even arguably represent absent class members who participated in a health plan adopted through Defendants.

Aside from this fatal flaw, Plaintiffs offered no proof of the terms of the other plans governing the services provided by Defendants, or the fees paid to Defendants, much less that their claims are typical of 90,000 other members. Accordingly, Plaintiffs cannot show which legal theories members of the other 3,500 plans can assert and whether those claims are "typical."

By placing the burden on Defendants to demonstrate why differences between the plans defeat typicality—rather than requiring Plaintiffs to produce evidence that their legal claims are "typical" of other members' claims and would apply to the various plans—the district court misapplied the class action standard. (ECF 132 at 6).

Finally, to prove "adequacy," Plaintiffs must demonstrate that "the representative parties will fairly and adequately protect the interests of the class." FED. R. CIV. P. 23(a). Plaintiffs' own evidence negates their adequacy argument. As "evidence" that Defendants unilaterally changed their compensation, Plaintiffs cite agreements with Transamerica, one of Defendants' two investment platform providers for retirement services. (ECF 99, at 10). But those agreements *lowered* Defendants' compensation, defeating any breach of fiduciary duty claim. This creates a class conflict between Plaintiffs (whose plans did not have an agreement with Transamerica) and participants who invested in Transamerica funds. (ECF 111, at 41–42).[4] The certification order ignored this fatal flaw, instead concluding that the "Court is aware of no

[4] Plaintiffs participated in the Nationwide platform as selected by their employer. (ECF 111, at 12).

pertinent conflicts between Plaintiffs and the members of the proposed class." (ECF 132, at 7).

D. Plaintiffs failed to properly define the class.

The district court certified the class for retirement and health plans "from July 6, 2011 until the time of trial." App'x A, at 9. But Plaintiffs' employer did not establish its plans until September 1, 2014, and terminated its health plan on August 31, 2016. (ECF 43, ¶ 22; ECF 111, at 22). As Plaintiffs' counsel explained: "[T]he name plaintiffs here participated for a period of time that was—doesn't encompass the entire class period." App'x B, 4:1-3. Therefore, the proper timeframe for a class, if any, should not begin before September 1, 2014, and any class related to health plans should cease on August 31, 2016.

III. THE DISTRICT COURT FAILED TO CONDUCT THE REQUIRED "RIGOROUS ANALYSIS" OF RULE 23'S REQUIREMENTS.

Before certifying a class, a district court "must conduct a rigorous analysis of the Rule 23 prerequisites," which requires it to "look beyond the pleadings to understand the claims, defenses, relevant facts, and applicable substantive law in order to make a meaningful determination of the certification issues." *Yates v. Collier*, 868 F.3d 354, 362 (5th Cir. 2017). "[W]hen certifying a class a district court must detail with

sufficient specificity how the plaintiff has met the requirements of Rule 23." *Ward*, 753 F. App'x at 244 (citation omitted).

Here, the certification order lacks a "rigorous analysis." For example, it dedicated just four conclusory sentences to the commonality question. App'x A at 5. The key consideration "with respect to a commonality determination is . . . the capacity of a class-wide proceeding to generate common answers apt to drive the resolution of the litigation." *Ward*, 753 F. App'x at 245. And "considering dissimilarities among claimants is essential to determining whether even a single common question exists." *Id.* at 246. Yet the order merely concluded, with no analysis, that Plaintiffs allege self-dealing and breaches by Defendants, and those questions present "a common question capable of classwide resolution." (ECF 132, at 5). The order did not consider the vast dissimilarities between the thousands of plans or whether common answers will resolve all members' claims.

The district court's analysis is nearly identical to the one this Court found inadequate in *Ward*. Like the order in *Ward*, here "the district court did not explain at all, much less with specificity, how the determination of such questions would resolve an issue that is central to

the validity of each one of the [putative class member's] claims in one stroke." *Ward*, 753 F. App'x at 246. Nor could it, because a finding that Defendants were "functional" fiduciaries and breached those duties with respect to Plaintiffs' plans does not answer the same questions with respect to the thousands of other plans. (ECF 111, at 29-31). Here, "it is difficult to appreciate from a plain reading of the common questions identified by the district court how such questions are even capable of being resolved on a class-wide basis." *Ward*, 753 F. App'x at 246.

The order similarly failed to rigorously analyze typicality and adequacy. With respect to adequacy, the order failed to "meaningfully analyze their fitness to serve in such capacity," as required by Rule 23(a)(4) and Rule 23(g). *Id.* at 248. And it failed to address the intra-class conflict, and misallocates the burden on typicality. *See supra* part II.B. In short, the order's unsupported conclusion that commonality, typicality, and adequacy are satisfied, defies the mandate to conduct a rigorous Rule 23(a) analysis.

CONCLUSION

The Court should grant this Rule 23(f) petition for permission to appeal.

Respectfully submitted,

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CERTIFICATE OF CONFERENCE

Pursuant to 5th Cir. Rule 27.4, Defendants' counsel conferred with Plaintiffs' counsel on August 11, 2019, regarding whether an opposition will be filed, and Plaintiffs' counsel indicated an intent to file an opposition.

s/ Matt Dow
Matt Dow

CERTIFICATE OF SERVICE

I certify that on September 13, 2019, the foregoing document was served, via the Court's CM/ECF Document Filing System, https://ecf.ca5.uscourts.gov/, upon the following registered CM/ECF users:

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Counsel also certifies that on September 13, 2019, the foregoing instrument was transmitted to Mr. Lyle W. Cayce, Clerk of the United States Court of Appeals for the Fifth Circuit, via the Court's CM/ECF Document Filing System, https://ecf.ca5.uscourts.gov/.

Counsel further certifies that 1) required privacy redactions have been made in compliance with Fifth Circuit Rule 25.2.13; 2) the electronic submission is an exact copy of the paper document in compliance with Fifth Circuit Rule 25.2.1; and 3) the document has been scanned with Trend Micro OfficeScan Client version 10.6 and is free of viruses.

s/ Matt Dow
Matt Dow

Appendix

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TAB A

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

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.

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

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 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

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

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

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.

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*, 133 S. Ct. 1184, 1192 (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 (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 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 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 (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 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.

Sam Sparks

SAM SPARKS
SENIOR UNITED STATES DISTRICT JUDGE

TAB B

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

HERIBERTO CHAVEZ, EVANGELINA ESCARCEGA, as the legal representative of her son Jose Escarcega, and JORGE MORENO,	)	AU:17-CV-00659-SS
Plaintiffs,	)	
V.	)	AUSTIN, TEXAS
PLAN BENEFIT SERVICES, INC., FRINGE INSURANCE BENEFITS, INC., FRINGE BENEFIT GROUP,	)	
Defendants.	)	JULY 25, 2019

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TRANSCRIPT OF MOTIONS HEARING
BEFORE THE HONORABLE SAM SPARKS

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Proceedings recorded by computerized stenography, transcript produced by computer.

(Open court)

THE CLERK: The Court calls A:17-CV-659, *Heriberto Chavez, et al, v. Plan Benefit Services, Inc., et al*, for Motion For Class Certification Hearing.

MS. WASOW: Good morning, Your Honor. Nina Wasow for Plaintiffs and the proposed class.

THE COURT: Okay.

MS. WASOW: Shall I just begin, or do you have any questions you'd like me to start with?

THE COURT: No. I'll hear the announcements first.

MS. WASOW: Oh. I'm sorry.

THE COURT: That's all right.

MR. DOW: Matt Dow and Jonathan Neerman for the defendants, Your Honor.

THE COURT: Okay. First let me tell you that the volume of materials that you-all have supplied me on the motion to certify the class have been incredible.

The second thing I want to tell you is I thought the briefing was bad. I'm used to class certifications, I'm used to a lot of things, but not for the motions to certify the class being as poor as they are in this case. So that's why I've invited you here, actually, and I've got some specifics I want to talk to you about.

The first is on the Rule 23(a). I'm concerned about, first off, we have one plaintiff who worked for 13 or less

11:04:01 1 months. We have two plaintiffs, one of whom -- well, they both
11:04:07 2 worked for several months, not even half a year. One
11:04:12 3 apparently is incapacitated and has a mother as a plaintiff. I
11:04:20 4 am not satisfied that these people could constitute an
11:04:27 5 appropriate plaintiff or plaintiffs.
11:04:31 6 The second thing that I'm concerned about is,
11:04:39 7 assuming that the plaintiffs' theory is correct and that you're
11:04:44 8 only attacking one contract, which I still have doubts about,
11:04:57 9 we're talking about the plaintiffs -- the named plaintiffs
11:05:04 10 having, obviously, not much damages. But, of the 7,000 other
11:05:14 11 people who, under the plaintiffs' theory of liability would be
11:05:21 12 entitled to damages -- some being in the plan for years, some
11:05:27 13 being in the plan for a year, some being in the plan for a year
11:05:31 14 and a half -- we're talking about a differential of damages
11:05:35 15 that I think is beyond the pale of a class action suit, and I
11:05:40 16 want to hear arguments on that, whether you want to call it
11:05:49 17 commonality or typicality. And then the adequacy I've already
11:05:59 18 covered.
11:05:59 19 Then the plaintiff can't even decide whether you're
11:06:02 20 going to go through 23(b)(1) or 23(b)(3) and why. So we've got
11:06:10 21 alternate theories now, not a singular theory.
11:06:19 22 The damages I am concerned about more than anything
11:06:22 23 else on predominance, that ought to be enough to start you out.
11:06:30 24 MS. WASOW: Certainly. Well, let me start out with
11:06:34 25 addressing your concern about the named plaintiffs, Your Honor.

So understood that the name plaintiffs here participated for a period of time that was -- doesn't encompass the entire class period.

THE COURT: Probably as brief as anybody in any of the plaintiffs would be: less than a half year, they were temporary employees, and one made it a little over a year. And I can't tell from your pleadings whether he's a temporary or not. I assume not, but I don't know.

MS. WASOW: Well, none of them are temporary employees, Your Honor. They may not have been employed for a long time, but they were permanent employees for the period that they were employed. And I would submit that that's actually quite common among the members of the proposed class.

These are -- the plans are covering people in the construction industry. There's a great deal of turnover and transience in that industry. And the plans that participate in these trusts have high level of turnover among the participants. So it's not unusual for that to be the case.

THE COURT: You wouldn't -- you would expect that with 7,000 people.

MS. WASOW: Sure.

THE COURT: Okay. But, still, how would you determine damages, if any?

MS. WASOW: Well, we've submitted expert declarations describing how they would determine damages. So the damages

would be measured by the difference between the fees that the defendants imposed on the plans in the -- in the class and the fees that were reasonable, and that they were would be allocated among participants in the class by the plan-level fiduciaries. There's lots of case law precedent for that being the way that damages work in ERISA class actions. There's a finding of damages that flow to the plan, and then the damages are allocated among participants and proportioned to their years of participation or their -- their amount of --

THE COURT: Well, but you have to get a total at first.

MS. WASOW: Uh-huh.

THE COURT: And then you're going to work backwards to see who is going to do that.

MS. WASOW: Yes. And that would be done using the methodology that's set forth in the Johnson and Taranto declarations, which is essentially measuring the difference between the fees that were charged and reasonable fees as well as quantifying the amount of extra-contractual compensation that the defendants took from the plans and disgorging those amounts to the plans.

THE COURT: Well, the three plaintiffs that you selected, I've got enough money in my pocket to take care of them. And I've got now 6,999-plus others that we're going to have to calculate, and I have the biggest docket in the

country.

MS. WASOW: Well, I assure Your Honor --

THE COURT: Do you have any other comments you want to make on that?

MS. WASOW: Yes. I assure you it wouldn't be you calculating each individual's amount of damages at stake. And the fact that there are many, many participants in these trusts, each of whom have a small claim, actually weighs very strongly in favor of class certification.

THE COURT: Well, you're just picking that out of the sun. You have no idea about that. You say that many of them are part-time employees, but you don't have any idea how many of them have been working for these contractors for a period of time. The whole purpose of the contractors was to try to get their employees some security after their employment. So, you know, I don't accept that they're all three months or six months or whatever.

MS. WASOW: We do have evidence, Your Honor, that there is the -- as set forth in the Worthman declaration, we've gotten data from the defendants about each participant's -- or each plan's number of participants and, you know, other data that our experts would need to do the damages calculation.

We also have sworn testimony from the 30(b)(6) deponent, Mr. West, about the fact that these are small plans for the most part. There's also testimony from Mr. Bonsky

about that. Many, many of the plans in these trusts have fewer than 50 employees. There's a high level of turnover. We do have testimony about that. And it was not something we submitted to the Court, because we didn't understand that that was something the Court would be focused on. But we would be happy to provide supplemental briefing on that, if Your Honor wants it.

The named plaintiffs here were participants during the class period in cert and CPT. There's not really any dispute about that. And they have, therefore, standing to pursue their own claims on the their own behalves. So the question really is whether they meet the Rule 23 requirements to represent, you know, participants in plans other than their own.

And what we would submit is that there's a host of common evidence, namely, the contractual arrangements between both the plans and defendants and then between Defendants and third party -- third parties with whom they deal in order to provide services to the plans. Also Defendants' financial and recordkeeping data which we have received in discovery and the corporate testimony, basically, about the course of conduct that Defendants used with respect to all of these plans. And that the course of conduct is common, and, therefore, we can extrapolate from the named plaintiffs' experience.

I'd like to address your question about the 23(b)(1)

versus 23(b)(3) certification. So we have asked for those -- them in the alternative. We do believe that 23(b)(1) certification is appropriate and is the most suitable form of certification of this class because that is how most ERISA class actions are certified. It's a recovery that flows to the plans and is -- you know, basically, the outcome of this case will be dispositive for participants in multiple plans. That if defendants are found to be acting as fiduciaries and if they're found to be breaching their fiduciary duties, that that would change the way Defendants act with respect to all the plans in the class or it would require Defendants to change the way they act with respect to all of those plans. And that a finding by this Court about the named plaintiffs plan would be inconsistent with the finding by another court about the fiduciary status of Defendants or could be inconsistent. So, therefore, 23(b)(1) certification is -- is the right path.

THE COURT: Well, are you going to make an election between (1) and (3)?

MS. WASOW: Yeah. We would choose 23(b)(1).

THE COURT: Okay. Then say so in your pleadings.

MS. WASOW: Well, we did frame it as asking for 23(b)(3) certification in the alternative if the Court's not persuaded that 23(b)(1) --

THE COURT: I understand that. But as I read, the (1) -- but we still want to attach onto (1). The problem is I

11:14:02 want to know exactly what your allegations are.
11:14:05 MS. WASOW: Uh-huh.
11:14:06 THE COURT: So if you're going to stay with (1), tell
11:14:09 me; and if you're going to stay with (3), tell me.
11:14:13 MS. WASOW: Well, if we have to make an election now,
11:14:15 we would elect 23(b)(1).
11:14:17 THE COURT: Okay. That's what -- at least it's a
11:14:19 preference one way or the other.
11:14:20 MS. WASOW: Yes.
11:14:21 THE COURT: One minute. I just remembered something.
11:17:35 Pardon the interruption. I'm sorry. You may
11:17:39 proceed.
11:17:40 MS. WASOW: Sure. Well, let me respond to
11:17:41 Your Honor's comment about the differential of damages being
11:17:46 beyond the pale. I would submit that all of the class members'
11:17:52 damages are going to be small and that there are -- there will
11:17:55 be differences, certainly, in the amount of damages from one
11:17:59 class member to another. But the fairly settled law is that
11:18:03 the differences in the amount of damages don't --
11:18:06 THE COURT: Give me your best authority of 7,000
11:18:10 people during your period of time.
11:18:13 MS. WASOW: 7,000 is actually quite a small class in
11:18:16 ERISA.
11:18:17 THE COURT: Just give me authority; don't give me
11:18:19 argument.

11:18:19 MS. WASOW: Sure. How about the *Teets* case,
11:18:22 *Great-West v. Teets*? I was class counsel on that case. The
11:18:24 court found 270,000 class members. There are actually over
11:18:28 half a million.
11:18:29 THE COURT: And I've had them like that, but they've
11:18:30 all had the same damages.
11:18:32 MS. WASOW: No, Your Honor, they didn't. That was a
11:18:33 case --
11:18:33 THE COURT: No, no. I'm telling you I've had them
11:18:35 like this in the last 20 years-plus, and the big ones have all
11:18:42 been the same type of damages. Now, on stocks sometimes they
11:18:48 would differentiate, but everybody got the same amount under
11:18:53 the class action.
11:18:55 MS. WASOW: Well, they wouldn't all get the same
11:18:57 amount in an ERISA class action because there are always going
11:19:00 to be differentials between -- in the amount of time that a
11:19:04 participant was in the plan. So that's quite typical in ERISA
11:19:07 class actions. And there's many string cites in our brief that
11:19:11 would point to large ERISA class actions that have been
11:19:14 certified. The *Teets* case is one; the *Rozo* case is another.
11:19:19 THE COURT: So your measure of damages, it doesn't
11:19:21 make any difference who the employer is, it doesn't make any
11:19:26 difference the plan that they went to, even though they had
11:19:31 choices for multiple plans? Nothing makes any difference
11:19:37 except a theoretical calculation of 7,000 people, and everybody

gets a little bit?

MS. WASOW: Well, this is an excessive fee case. So the thing that amount of damages would turn on is the amount of fees that that person's plan paid to the defendants. And that's data that we have and can use with our expert's testimony to flesh liability. So I'm not sure I understand the question.

THE COURT: All right.

MS. WASOW: You know, the -- what employer each participant worked for isn't relevant to the amount of their damages. What will be relevant to the amount of their damages is how much they paid in fees during the time that they participated in these trusts and how much a reasonable fee would have been. And those are questions that can be resolved on a class-wide basis.

THE COURT: And your three selected clients to get into this case are vigorously going to prosecute the interests of the entire class?

MS. WASOW: They certainly will. Yes, Your Honor. And if you have concerns about Mr. Escarcega, the plaintiff who has an intellectual disability --

THE COURT: I have concerns about having a case of this magnitude, with this complicity and complications, in this Court with all of the other cases that we have. I'm no stranger to class actions.

11:21:30 MS. WASOW: All right. Well, I can't -- I'm not sure how to address that concern, given that you're right, it is a complex case. It is -- I wouldn't agree that it's a large case in the scope of ERISA class actions.

11:21:48 THE COURT: Then you're into large cases, but let's just talk about this one --

11:21:51 MS. WASOW: Sure.

11:21:52 THE COURT: -- because it's the only one I'm concerned about.

11:21:56 And the defendants say that the plaintiffs are in conflict with participants who invested in Transamerica funds whose expense ratios were already lowered.

11:22:06 MS. WASOW: And there's evidence in the record that the Nationwide expense ratios were also lowered at least once during the class period. So that's not a conflict that is material or fundamental to the issues in the case.

11:22:28 I think what the issue comes down to, Your Honor, is the case law about whether individuals who are participants in one plan can represent participants in a class of other plans. There seems to be a fundamental discomfort with the idea of a multi-plan class here. And I'm wondering if there's anything I can do to assure Your Honor that those kinds of cases are manageable. Would it be helpful to submit a trial plan? That's not something that we did, but we certainly could.

11:22:58 THE COURT: Well, it would be helpful. Something.

11:23:03 I'm looking superficially because I didn't get any help from your pleadings or the defendants' pleadings on specifics on some of the questions that we looked at. But just -- just looking at the field itself, we've got, obviously, long-term employees, we've got short-term employees, we've got employees who may or may not have -- it's just a difficult class, too many of them, and you get -- you run down and you get three people, you know, file a lawsuit. And I suspect 90 percent of the people who you're trying to get money for and a large fee, too, don't even have any idea and are happy with their plans. And, in the middle of everything, they've chosen different independent companies that have multiple plans that they could select from that, ultimately, the employees selected their own plan after the contractors gave them an opportunity to.

MS. WASOW: And I just want to clarify that this case isn't about investment selection. So what the employees picked from among the universe of investments is not at issue in the case. What's at issue is the defendants' fees that they are charging for the administrative and other services that they're providing to the plans.

THE COURT: Well, that's if you get past the fiduciary issue.

MS. WASOW: Sure. And the fact that the defendants are selecting service providers for all of the plans uniformly, that they're selecting, you know, the trustee, they're

selecting the universe of potential investment platforms either Nationwide or Transamerica, they're selecting the administrative field representative for all the plans, which is the entity that gets a portion of one of the administrative fees for doing certain administrative tasks. They're selecting service providers for the plans. They're exercising control over plan assets. You know, they're actually taking money out of the trusts and disbursing it to themselves and others, and they're also taking fees that are not clearly or completely disclosed or agreed to by the employers. And that's true across the plans that are in the class. So the fact that the employees make investment selections in many of the plans, not in all of them, isn't material to the case.

THE COURT: Well, let's just --

MS. WASOW: It's just not part of the case.

THE COURT: -- let's reverse the process.

What compensation do the defendants have for going out and getting companies to provide these plans and then getting the employers who want to exercise this channel to assist their employees, whether they be permanent or temporary? What is -- your position is, because they charged a fee on every one of these plans, which of course is small, too, aren't the defendant's entitled to fees?

MS. WASOW: Well, they're entitled to reasonable fees. That's what the law is. And so our argument is that the

fees were excessive. They've been appointed by Nationwide and Transamerica to act as agents for Nationwide and Transamerica. They're getting paid 80 basis points for Fringe Benefit Group, 35 basis points for Fringe Insurance Benefits, Inc., FIBI, for just that service and any administrative services that they're providing. On top of that the plans are paying monthly administrative charges, participant administrative charges, surrender charges, investment contract charges. The fees are outrageous in these plans, and they -- I cannot agree with Your Honor's representation of them as small.

For instance, you know, this isn't an investment selection case, but let's look at one of the investments that appears as an option in these plans. There's a Vanguard Fund, Vanguard Target Date Fund. Out on the open market, that fund costs 15 basis points. In these plans it costs 160 basis points. And that's all -- 100 percent of the difference is fees that are charged by the defendants.

So that's the allegation. That's the core of the allegation in the case. And that's the same for all of the plans that participate in these trusts, and that's what we've shown in our briefs. I understand Your Honor is not happy with the submissions; I'm sorry about that. If there's anything we can do to try to clarify or improve upon them, we'd be happy to do that.

THE COURT: Well, I thought I'd given you an

opportunity -- both of you an opportunity on that.

MS. WASOW: And that's what I'm trying to do, Your Honor.

THE COURT: You know, you-all have got more argument in it than information.

Okay. Let me hear from the defendants.

MR. NEERMAN: Good morning, Your Honor. May it please the court:

Your Honor, based on the questions you've asked, I think you've hit upon the fundamental problem with the certification that the plaintiffs are seeking here. Plaintiffs are attempting to certify a class that involves more than 70,000 potential plan participants.

THE COURT: Their theory is they're only really seeking on their own contract -- on your client's own contract, their self-deduction, on the contract that goes out to the people that are going to submit the plans. That's what they're saying.

MR. NEERMAN: Well, Your Honor, it's unclear from their pleadings with respect to fees whether we're talking about direct compensation or indirect compensation. And that's been one of the fundamental problems in their pleadings throughout this case.

THE COURT: Well, let's take it this way: Your clients would carved out two large corporations that have

multiple programs, but your only contract with them is to contract with them and then they're going to supply the different plans to the different employees and the different employers with the selection process that the employer may participate in or whatnot.

But, if you have a diagram of it, their complaint, it appears to me, is their complaint is not with you getting the two giant companies or, in the interim, one went away and you got another one, as I understand, it is the contract that you have with them and that that is the only thing that they're suing for.

MR. NEERMAN: So let me restate it, Your Honor, and make sure I'm on the same page with you. The two defendants in this case -- and that's critical because the plaintiffs haven't made a distinction in their briefing or in their --

THE COURT: No. I understand that. That's another question I have.

MR. NEERMAN: We have FBG and FIBI. When an employer -- in this case, TRDI -- decides to establish an employee benefit plan for its employees, whether it's health and welfare in one bucket and retirement in the other bucket. And there's another complication: We're talking about two different plans, retirement and health and welfare.

FBG contracts with them to act as -- I'm trying to make sure I keep the buckets separate, Your Honor. FIBI works

11:31:20 with the employers to market health and welfare arrangements
11:31:24 and retirement arrangements. FBG acts as the record keeper for
11:31:31 both the retirement and the health and welfare. Those are two
11:31:34 different contractual arrangements, two different types of
11:31:41 services to be provided, two different types of direct
11:31:43 compensation arrangement to be paid to the defendants.
11:31:52 FBG contracts separately with Nationwide and
11:31:55 Transamerica on the retirement side to provide the investment
11:31:57 platform available to the employers when they establish their
11:32:00 retirement plan. FBG is paid an indirect compensation from
11:32:07 Nationwide and Transamerica from the fees that Nationwide and
11:32:12 Transamerica collects from the plan. That's the indirect
11:32:16 compensation. And, again, it's unclear as to which they're
11:32:20 talking about.
11:32:20 Now, with the direct compensation, Your Honor, when
11:32:24 you have more than 3500 different retirement plans, there's
11:32:28 necessarily going to be variations between the contracts
11:32:31 between the employee sponsor, who is the named fiduciary,
11:32:36 Your Honor, at the time that they hire the service providers,
11:32:39 and the contract with FBG.
11:32:43 That is one of the fundamental problems with their
11:32:45 case, Your Honor, in the way they've tried to position the
11:32:49 class certification. For this Court to make a finding that the
11:32:53 defendants were acting as functional fiduciaries -- because if
11:32:57 you remember from the motion to dismiss briefing, the

11:32:59 plaintiffs acknowledged that the contracts specifically
11:33:03 disclaim that FBG is not acting as a fiduciary for the capacity
11:33:08 of hiring itself as a service provider. That is up to the
11:33:11 named fiduciary -- in this case, TRDI.
11:33:15 For the plaintiffs to prove to this Court that the
11:33:18 defendants acted as functional fiduciaries, that's a
11:33:21 fact-intensive analysis for this Court, which means the Court
11:33:26 is going to have to evaluate over 3500 different retirement
11:33:30 plans, 3500 different types of arm's-length negotiations
11:33:35 between the employee sponsor and FBG.
11:33:38 Now, I'd also point out to the Court, as it was with
11:33:43 TRDI, you have instances, Your Honor, where the employee
11:33:46 sponsor is not acting alone making that decision. Some of
11:33:49 these employee sponsors had the benefit of hiring outside
11:33:52 brokers who acted as consultants for them; they had outside
11:33:56 counsel who acted on behalf of them. So these were not
11:33:59 employers who were new to the system, new to the benefits
11:34:03 world. They had the benefit of their own counsel, legal and
11:34:07 otherwise, when making those decisions. All of that is an
11:34:10 important -- for the Court to a make determination as to
11:34:13 functional fiduciary status even before you get to all the
11:34:17 variations of the fee component in the direct fee arena.
11:34:22 And I submit to Your Honor that there's not only a
11:34:25 distinction between the retirement side and the health and
11:34:27 welfare side, but there's also a distinction within the

retirement side. For example, there are certain direct administrative fees that FBG collects as the record keeper depending on the size of the plan. Every plan is going to be a little bit different because you have some plans that have fifteen participants and you have some that are in the thousands.

Furthermore, you will have distinctions as to whether you have only -- well, if you have highly compensated employees within the plans, because if you have highly compensated employees, under the regulations, that requires additional testing that requires additional fees. There's certain fees that are based on the activity within the accounts, and you have to take into consideration the employee pool that's participating in the retirement plans and how active they are in managing their assets.

With respect to the health and welfare side, it's a little bit more clear-cut here, Your Honor, because the way that the system was set up, FBG had what was called a multiple employer welfare agreement. So it's a MEWA. They contracted during the class period with three different major medical plans and then also a supplemental medical provider or supplemental benefits provider that would provide vision, dental, long-term disability, short-term disability, et cetera. That was the platform that was part of the MEWA program.

In this case TRDI chose not to participate in that

11:36:03 MEWA. They chose to bring in their own outside medical
11:36:06 provider, which is Blue Cross Blue Shield, and arrange for FBG
11:36:11 to act as administrative services only. That's a separate
11:36:15 contract than what some of the other 250,000 other employee
11:36:19 sponsors hired FBG to do. So you have some employers who
11:36:23 choose to participate in FBG's MEWA, both on the major medical
11:36:29 and the supplemental, you have some who choose just the
11:36:33 supplemental, some choose the major medical.
11:36:36 In each instance you're going to have variations
11:36:38 where the fees are different charged by FBG and FIBI. I'd also
11:36:42 point out that, unlike the retirement side, FBG and FIBI only
11:36:50 receive direct compensation. They don't receive any indirect
11:36:53 compensation. The direct compensation is agreed to before FBG
11:36:58 is retained by the employee sponsor, and that fee doesn't
11:37:02 change. So at the time the employee sponsor, or the employer
11:37:06 sponsor, chooses to retain FBG, FBG can't be acting as a
11:37:12 fiduciary, because they are offering their services to the
11:37:14 named fiduciary.
11:37:16 Once the fees are agreed to by the named fiduciary,
11:37:19 those fees don't change. They're negotiated every year during
11:37:23 open enrollment, but the fees don't change during that year.
11:37:27 And in this case, Your Honor, because TRDI chose not to
11:37:31 participate in the MEWA through CPT, these plaintiffs -- in
11:37:41 addition to the other adequacy issue you raised with these
11:37:44 plaintiffs, they didn't participate in the very health and

welfare plan about which the plaintiffs' complaint is complaining about. It was a different plan.

Additionally, Your Honor, with respect to the plaintiffs' adequacy, I would note that Mr. Chavez, one of the three named plaintiffs, was never even a participant in a retirement program. Now, two of them were, but Mr. Chavez was not.

THE COURT: Mr. Chavez is the one that worked for 15 months.

MR. NEERMAN: I think that's right, Your Honor.

THE COURT: Well, 14 or 13 months. So the others were just three or four months.

MR. NEERMAN: And Mr. Moreno and Mr. Escarcega -- I may be butchering that name; forgive me -- Mr. Escarcega are no longer employees of TRDI. So you have Mr. Chavez, my understanding, is still an employee of TRDI, Mr. Moreno and Mr. Escarcega --

THE COURT: I think --

MR. NEERMAN: And the point --

THE COURT: -- he was a participant in a TRDI health and welfare plan according to these briefings.

MR. NEERMAN: And, Your Honor, it was only for the administrative services only portion. It was not the traditional MEWA. Our point there was, with respect to typicality and adequacy, the traditional program offered during

this class period was through the MEWA, and TRDI, because they had the option to choose and vary from the standard, chose a nonuniform way of retaining FBG.

There's also the issue, Your Honor, of -- oh, one other thing, Your Honor. With respect to the employer and the named fiduciary, this concept, the use by TRDI of this type of services provided by FBG and FIBI, was not new to them. When TRDI engaged FBG, they were already using a competitor of FBG's. They were using -- sorry for all of the acronyms. They were using FCE, which is a competitor of FBG.

Why do I tell you that? I tell you that because this is a very competitive market. There is a competitive marketplace in the benefits world. And even in this space which seems like a niche market, there is a competitive marketplace. That is important because the other component that Plaintiffs gloss over is, even if we were to concede, which we don't, that we were named fiduciaries for purposes of setting our fees, they still have to prove that the fees were unreasonable. And the unreasonable standard is a comparison to the marketplace and how the marketplace viewed the fees relative to the services that were being provided.

THE COURT: Let's stay away from the merits on that. Let's stay right now with the difficulties on the elements to certify the class.

MR. NEERMAN: Yes, sir. And the only reason I bring

11:41:08 that up, when you're talking about 3,000 different plans on the
11:41:12 retirement plans and 250 plans on the health and welfare side,
11:41:16 that is necessarily going to require individualized analysis
11:41:20 under 23(b)(1) or 23(a). Either way, it's going to require
11:41:26 individualized analysis.
11:41:50 Your Honor, I have nothing else to present unless you
11:41:53 have any other questions for Defendants.
11:41:57 THE COURT: Well, they indicate on the paragraphs on
11:42:03 typicality that, of course, the plaintiff must establish claims
11:42:15 or defenses of the representative party or parties are typical
11:42:19 of the claims or defenses of the class. And they argue that
11:42:24 the claims are typical because the alleged defendants breached
11:42:29 fiduciary duties -- we know that problem -- owed at the
11:42:35 participants' plans, and because their agreements that govern
11:42:39 TRDI's relationship with the defendants are the same agreements
11:42:44 that govern all other participating employees in CPT and CERT.
11:42:55 Therefore, the plaintiffs are challenging the general practices
11:42:57 which affect all plans.
11:42:59 Okay. Go over with me one more time if you agree
11:43:09 with that or not.
11:43:10 MR. NEERMAN: We disagree with that, Your Honor.
11:43:12 THE COURT: Right. And give me, because of the
11:43:15 multitude of plans, the switching of two providers at one time,
11:43:23 and the individual plans of the workers, that by the time the
11:43:39 workers get it, your clients are taking a fee of sending it out

11:43:49 and then a fee after the plans are taken; is that right?
11:43:59 MR. NEERMAN: Yes, sir. There are ongoing fees.
11:44:08 THE COURT: Okay. All right. Are those are the ones you're seeking?
11:44:08 MS. WASOW: Are the fees that we're seeking the ones paid to Defendants? Is that the question?
11:44:19 THE COURT: Well, you know, they provide the providers.
11:44:21 MS. WASOW: Uh-huh.
11:44:25 THE COURT: And they give contracts to the providers --
11:44:26 MS. WASOW: Yes.
11:44:29 THE COURT: -- at the selection of the businesses.
11:44:31 And they're entitled to a fee for that, right?
11:44:36 MS. WASOW: It depends on whether they're a fiduciary. They're entitled to some compensation for the services that they provide, yes.
11:44:42 THE COURT: All right. And your attack is that they have to be reasonable?
11:44:46 MS. WASOW: Yes.
11:44:49 THE COURT: And that they're fiduciaries.
11:44:50 MS. WASOW: Right.
11:44:57 THE COURT: So that's two major issues. Okay. How, in the determination of damages have -- how are you going to mesh all of this to all of these people through expert
11:44:58
11:45:01
11:45:02
11:45:05
11:45:12

testimony when some are not going to be applicable and some are?

MS. WASOW: So, Your Honor, the indirect compensation that Nationwide and Transamerica pay out of plan assets is the same for every plan. It's uniform. And it doesn't matter whether it's Nationwide or Transamerica. There's testimony and documents about that. So that is not -- should not be an issue. The other fees, the direct fees --

THE COURT: The what fees?

MS. WASOW: Sorry?

THE COURT: I didn't hear you.

MS. WASOW: The direct fees.

THE COURT: Direct fees.

MS. WASOW: The fees that the plans pay, they aren't routed through the investment providers. In other words, there are a few choices. It's not like every plan is negotiating and receiving a customized --

THE COURT: No.

MS. WASOW: -- package of fees.

There are a few options and plans to choose from those options, and there are ways of taking all of that data and finding how much of it was excessive. Basically, the experts will be giving testimony about what a reasonable fee would have been that should not -- the services --

Let me back up a little bit, Your Honor. I'm not

being as clear as I would like to be.

The services that the defendants provide for the plans are the same. They don't provide different services for different plans. For every plan they're providing administrative services and marketing services, and they're getting paid for those services. We allege that the compensation they're getting is excessive for both the administrative services and the marketing services, and that they are appointing themselves and appointing other service providers and, thereby, acting as fiduciaries who are not entitled to excessive fees. That's the sort of neatest summation I can give of the claims.

The fees are assessed based on -- the fees are uniform. I don't know how else to put it.

THE COURT: My clerk has a good point. If the direct compensation differs by plan, wouldn't that require subclasses?

MS. WASOW: I don't believe so, Your Honor, because the direct compensation is only based on the type of commission arrangement that the plan has, and our allegation is that it's all excessive. It doesn't -- that regardless of the commission structure that the plan has, the fees are excessive.

THE COURT: So everybody gets the same?

MS. WASOW: Everybody doesn't get the same amount, but everybody gets the amount using the same measurement of reasonableness. Does that make sense?

11:48:19 THE COURT: Yes, if you've taken the position they're
11:48:27 unreasonable.
11:48:28 MS. WASOW: Yes.
11:48:28 THE COURT: Apparently, the employers aren't, and,
11:48:31 apparently, the employees, except for three, aren't. And we're
11:48:34 dealing with an awful lot of -- you know, the employers are at
11:48:44 least trying to give benefit to their employees. And if each
11:48:50 one of these competitors of theirs are getting hit with these
11:48:56 lawsuits, the poor employee is not going to get anything. And
11:49:01 that bothers me. It may not be illegal, but it bothers me.
11:49:04 And if I'm going to try something like that with this docket, I
11:49:11 might just want the Fifth Circuit to tell me what to try.
11:49:14 MS. WASOW: Sure. Well, the -- I think it's
11:49:16 interesting that you make that point, Your Honor, because the
11:49:20 competitor that opposing counsel mentioned, FCE, which is the
11:49:24 plan that the named plaintiffs were participants in used before
11:49:28 they started dealing with Defendants, was successfully sued by
11:49:33 the Department of Labor for charging excessive fees. They
11:49:36 settled their claims.
11:49:37 But the point is, yes, there are other actors in the
11:49:41 market, but that doesn't mean that the fees they're all
11:49:43 charging are reasonable.
11:49:44 THE COURT: So why hadn't the Department of Labor
11:49:47 jump on that?
11:49:48 MS. WASOW: Well, the Department of Labor has limited

resources and can't possibly --

THE COURT: So do I.

MS. WASOW: I understand, Your Honor. I understand. But we do have plaintiffs here who are pressing these allegations. And the fact that they are only three, there's lots of class actions where there's only one named plaintiff. I'm not sure that that's a basis on which to find that there's no --

THE COURT: Well, I have to -- you know, this is a little different from class actions cases and investment cases. But, you know, I have to evaluate the principal plaintiffs just under the same statute.

MS. WASOW: Of course. And let me -- let me respond to some of the statements that my opponent made about the named plaintiffs, and let's look back for a moment at their declarations, if we can, because I think Your Honor referred to them earlier as temporary employees.

Mr. Moreno worked at TRDI from 2012 to 2018, Mr. Escarcega worked from 2010 to the present, and Mr. Chavez worked from 2002 to the present, although he may have left since this declaration was submitted. But the point is these are actually all long-term employees. It is true that their employer had a relationship with Defendants for only a couple of years, but that's a couple of years. And the class period in the case --

11:51:24 THE COURT: Well, the pleadings I looked at on
11:51:29 Escarcega was he's a part-time custodian, and he worked from
11:51:32 August of 2014 to May of 2015.
11:51:35 MS. WASOW: That's not when he worked for TRDI,
11:51:38 Your Honor. That's the period of time when he was a
11:51:40 participant in the trusts that are at issue in the case. And
11:51:43 that's because that's the period of time that his employer had
11:51:46 a relationship with Defendants. In 2016 TRDI terminated its
11:51:52 relationship with Defendants and moved on to new -- new health
11:51:56 and welfare and retirement services providers because they were
11:52:00 unhappy with the fees.
11:52:04 It might be helpful as well to talk a little bit
11:52:11 about the welfare side which I didn't talk a lot about earlier.
11:52:15 My opposing counsel said that these plaintiffs didn't
11:52:19 participate in CPT. That's not accurate. They're -- their
11:52:25 employer adopted CPT. It was on an ASO basis, Administrative
11:52:31 Services Only basis, so it is true that their employer didn't
11:52:34 have a policy that had been issued to CPT directly. But the
11:52:38 only difference is in who actually held the policy. The
11:52:42 services that ASO plans receive are the same as other plans;
11:52:45 the fees that ASO plans pay are the same as other plans.
11:52:50 And there are -- they mentioned there's a separate
11:52:54 contract. There is no separate contract. Of every plan in CPT
11:52:59 plays -- sorry -- enters into an adoption agreement. The named
11:53:04 plaintiffs' plan did that; all the plans do that. And that's

how they formalize their relationship with Defendants for purposes of participating in CPT.

So it's just not true that the named plaintiffs were not participants in CPT. The defendants haven't provided any evidence of that other than a declaration by one person whose personal knowledge is unclear. We haven't been able yet to depose that person. We've noticed her deposition. But --

THE COURT: Well, the employee has the right -- and there's several low categories that they can participate in. They also have the right to seek better plans and pay more, don't they?

MS. WASOW: No, Your Honor. Whatever the plan is that their employer has adopted for CPT -- through CPT is their plan.

THE COURT: Doesn't the employer, reading all of these -- maybe the words is just slipped by me, but I got the impression the employer could designate on a superintendent and have a higher retirement plan.

MS. WASOW: I see. We're talking about the retirement side now. You mean for a highly compensated employee, the employer could choose a different plan?

THE COURT: Yes.

MS. WASOW: No, Your Honor. The -- for each retirement plan there is a set of benefits that's provided. There's one plan per employer on the retirement side.

11:54:46 THE COURT: Okay. Is that correct, Counsel?
11:54:51 MR. NEERMAN: Yes. I think that's right, Your Honor.
11:54:52 THE COURT: Okay.
11:54:53 MS. WASOW: All right. I'd like to just review our theories one last time, if Your Honor is willing to hear that.
11:55:05 THE COURT: That's why you're here.
11:55:06 MS. WASOW: Sure. So the defendants make a lot of noise about how there's 3,000 plans on the retirement side and 200 plans on the welfare side, and you're going to have to look at the negotiations or the relationship between the defendants and the employer for each one of those plans. And a review of the plaintiffs' theories of liability here makes clear that that's not the case.
11:55:34 So our theories are the following: One, Defendants are fiduciaries because they exercise control over plan assets.
11:55:41 THE COURT: Okay. Start over again.
11:55:43 MS. WASOW: Uh-huh.
11:55:44 THE COURT: One.
11:55:44 MS. WASOW: One.
11:55:46 THE COURT: Okay. I was a little behind you. You talk a little fast.
11:55:48 MS. WASOW: I'm sorry about that.
11:55:50 THE COURT: It's okay.
11:55:50 MS. WASOW: So Defendants are exercising control over plan assets, meaning they're taking money out of the trusts,

paying themselves and paying other people. That control all by itself confers fiduciary status.

THE COURT: Let's stop there. Isn't the employer in control?

MS. WASOW: No, Your Honor.

THE COURT: The employer is providing, by contracting with the defendants, the opportunity to have these plans available to his employees if they want them.

MS. WASOW: That is true. But that does not mean that the employer maintains control over the assets in the trust. I'm talking about the money. So the trusts have money in them; Defendants have control over that money. They have the authority to disburse -- make disbursements of that money. So that's one.

Two, there's the defendants' ability to select service providers for the plans that participate in these trusts. And that we've talked about. They select Nationwide and Transamerica; they select the trustee; they select insurance companies to provide insurance on the health and welfare side.

Then there's the issue of extra contractual compensation.

THE COURT: Let me stop you on number two.

MS. WASOW: Sure.

THE COURT: Isn't it true that the companies that are

11:57:13 going to provide the plan seek out the services of the
11:57:18 defendants in a competitive market.
11:57:21 MS. WASOW: Well, debatable whether it's a
11:57:25 competitive market or what the factual circumstances are for
11:57:29 each plan of seeking out defendant services. But that's not --
11:57:32 that's not part of our claim. Our claim is that once they've
11:57:36 entered into a relationship with Defendants, they are limited
11:57:40 in their --
11:57:41 THE COURT: So the employers have no -- nothing to do
11:57:44 with it after they enter the plan? They pay them premiums.
11:57:50 MS. WASOW: They are paying the premiums, and they're
11:57:53 contributing the money. That's basically it. And then
11:57:56 Defendants are running the show.
11:57:57 THE COURT: And I think that puts them in charge,
11:57:59 doesn't it?
11:58:00 MS. WASOW: Respectfully disagree, Your Honor. And
11:58:02 that's --
11:58:03 THE COURT: I mean, if they decide not to have the
11:58:06 plans anymore for the employees or go under or whatever and
11:58:17 they're not paying the premiums, you're still saying that these
11:58:23 defendants are the fiduciaries?
11:58:25 MS. WASOW: Well, certainly the plans do have the
11:58:27 ability to terminate their relationship with Defendants. And
11:58:30 that's actually an argument that came up in the motion to
11:58:33 dismiss. And what Your Honor held was: Look, you can have

more than one functional fiduciary under ERISA. The plan level --

THE COURT: I don't know I made that ruling. I said that may be.

MS. WASOW: The plans are fiduciaries. Certainly they have a named fiduciary at the plan level. And, to the extent Defendants are doing things that make them fiduciaries, they're also fiduciaries. So they are limiting the universe of service providers that are available to these plans, and that is a fiduciary function. And the way that they're exercising that fiduciary function is maximizing their own compensation. That's the theory.

So the evidence that we're going to be using to prove that is the agreements that the employers enter into with Defendants, which are standardized. There's no dispute about that. The agreement that Defendants enter into with the third parties, the service providers, also applicable across plans. There's no dispute about that. It's going to be the defendants' financial and recordkeeping data which has been produced, and then there's going to be some amount of corporate testimony about, you know, the course of conduct that Defendants engage in with respect to the plans.

And there's testimony that Plaintiffs have cited in our briefs about how that course of conduct, in relevant part, is the same across plans. Yes, it's true that plans choose

different features: some of them are trustee directed; some of them are participant directed; some of them have Nationwide; some of them have Transamerica, et cetera. But those distinctions don't have anything to do with the claims that Plaintiffs are making in this lawsuit. The claims that Plaintiffs are making are about the fees that Defendants are extracting from the plans. And those are uniform.

THE COURT: Okay. Thank you.

Anything else?

MR. NEERMAN: Can I just respond briefly?

THE COURT: Sure. That's why you're here.

MR. NEERMAN: Your Honor, let me respond to the last part that counsel said in reviewing her theories. In response to every one of her theories that she laid out, she is making our argument for us. The critical component in every one of those theories is what the role of the employer was.

She says that Defendants are exercising authority in selecting -- excuse me -- choosing their compensation and setting their compensation. But it was the employer who was the named fiduciary. We'll use TRDI as the example. TRDI is the named fiduciary. They negotiated with the Defendants and agreed to the compensation. It was not FBG and FIBI setting their compensation. It was a discussion with an arm's-length transaction with the named fiduciary who had the authority and the discretion whether to hire Defendants or to hire somebody

12:01:50 else. They cannot be a fiduciary. The Defendants cannot be a
12:01:53 fiduciary for setting their own compensation.
12:02:01 And keep in mind, Your Honor, certainly with respect
12:02:04 to TRDI, and presumably with other employers, they have the
12:02:09 benefit of outside brokers and counsel when having those
12:02:13 negotiations. That's going to require a case-by-case basis and
12:02:17 analysis for every plan that's being submitted within this
12:02:21 proposed class.
12:02:23 Furthermore, Your Honor, there's also variation
12:02:31 within the direct compensation. There's variation within these
12:02:35 plans. Sometimes the employers choose to pay those fees to FBG
12:02:42 and FIBI. There are other instances where they're paid from
12:02:46 the plans. So there's an additional variation there.
12:02:50 We didn't touch on this, Your Honor. But since
12:02:54 counsel has told you that she's looking at 23(b)(1) as the
12:02:58 basis for class certification, we submitted in briefing our
12:03:04 concerns about the type of class, the type of damages they're
12:03:09 seeking.
12:03:09 As you know, 23(b)(1) is more appropriate if
12:03:16 Plaintiffs are seeking injunctive relief. And we would submit
12:03:20 that these plaintiffs, because they are no longer participants
12:03:23 in any TDRI plan, don't have standing to seek prospective
12:03:28 injunctive relief regarding TRDI. And because they don't have
12:03:33 standing with TRDI, they cannot have standing on behalf of the
12:03:38 other plans.

12:03:38 The cases that Plaintiffs have cited in their papers
12:03:41 regarding 23(b)(1) certification, they are correct that courts
12:03:45 have used them in ERISA class actions. But I would submit,
12:03:49 Your Honor, that those cases are all factually distinct. And
12:03:52 Plaintiffs couldn't cite to the Court -- and, frankly, we were
12:03:57 unable to find any cases either -- in which a court has
12:04:00 certified the type of multi-plan case like this where you have
12:04:04 the variations and the contracts and decisions that are being
12:04:07 made by the employers. The cases in which Plaintiffs have
12:04:10 cited all deal with either a single computation of employee
12:04:14 benefits or a single stable value fund or some sort of fund
12:04:18 that was applied uniformly across the class.
12:04:21 So, unless you have any other questions, Your Honor,
12:04:24 I'll stand down. Thank you, sir.
12:04:26 THE COURT: Okay. It's your motion, so I'll let you
12:04:31 say the last word. What is your response to the -- when this
12:04:38 case came in, you know that I wrote that the employer had the
12:04:41 right to hire, to terminate it, and was in charge. So you're
12:04:49 now indicating that it's these defendants who are really in
12:04:53 charge. Either stealing from the funds that the employers have
12:04:59 put in.
12:04:59 MS. WASOW: Yes, Your Honor. And that's consistent
12:05:01 with the arguments we made at the motion to dismiss stage, and
12:05:05 Your Honor found it appropriate to at least in part deny --
12:05:09 THE COURT: Well, I haven't certified anything yet.

12:05:12 MS. WASOW: Understood. But the -- what we're
12:05:14 talking about right now is really a merits issue, right? If
12:05:17 the employer's ability to hire and fire is dispositive of
12:05:20 Plaintiffs' claims, then that's -- that's the class cert is
12:05:25 kind of a nonissue, right? I mean, we don't dispute that the
12:05:29 employers have the ability to hire and fire Defendants. We
12:05:32 couldn't possibly dispute that. The question is whether the
12:05:35 defendants are still acting as functional fiduciaries during
12:05:40 the time that they are servicing as service providers to these
12:05:42 plans. And we submit that they are. And if that's not a
12:05:45 viable theory for Your Honor, then, you know, I'm not sure why
12:05:52 you denied the motion to dismiss.
12:05:54 THE COURT: Well ...
12:05:56 MS. WASOW: You know, we think that is a viable
12:05:59 theory for all the reasons that we said in our briefs and in
12:06:02 our opposition to the motion to dismiss. And, you know, we
12:06:07 think there's ample case law supporting the idea that
12:06:10 exercising control over plan assets after entry into a
12:06:14 contract, exercising control over the choice of service
12:06:18 providers, et cetera, are fiduciary functions that are not
12:06:25 extinguished by the plan's ability to walk away. But we can't
12:06:29 really dispute that the plans have the ability to walk away.
12:06:32 That's what happened in our plaintiffs' case. They said:
12:06:37 These fees are outrageous, and we're out.
12:06:39 So I don't think there's anything I can do to assuage

Your Honor's concerns about that.

THE COURT: Well, both of you helped a little bit.

MS. WASOW: I do want to respond briefly, if I may, to the 23(b)(1) -- argument that 23(b)(1) is only appropriate for injunctive cases. I want to point Your Honor to the *Humphrey* case in particular that we cited in our reply brief, which is a Southern District of Texas case, pointing out: Look, if that were true, then there would be no reason for Rule 23(b)(2). Rule 23(b)(2) is limited to injunctive cases. Rule 23(b)(1) isn't, and there are lots of cases -- lots and lots of examples of cases seeking monetary relief that have been certified under Rule 23(b)(1).

THE COURT: Okay.

MS. WASOW: Thank you, Your Honor.

THE COURT: Yes, ma'am.

Well, it's a very simple question. That's why the plaintiffs have filed 28 pounds of paper and the defendant has filed 10. I've raised all the points I think I wanted to raise. I may have caught some of you by surprise, so I'm going to give you 14 days from today to respond as concisely as you can what you would like to say, now that you've heard each other, and then I will come out with something somehow.

MS. WASOW: Thank you, Your Honor.

THE COURT: Thank you both.

Oh, one other thing: I have got three motions to

file sealed. Is there any objections on those?

MR. NEERMAN: I didn't hear the question, Your Honor.

MS. WASOW: Sealing.

MR. NEERMAN: Oh. No, sir.

THE COURT: I've got three motions to file hundreds and hundreds and hundreds of pages under seal: Motion Number 100, Motion Number 110, and Motion Number 121. What is your positions on that?

MS. WASOW: I mean, Plaintiffs filed those motions because they were citing documents that Defendants marked as confidential. So we don't object to them being filed under seal. But if the Court wants further justification, I would defer to Defendants on that.

THE COURT: Yeah. Go ahead.

MR. NEERMAN: Well, they're confidential proprietary documents, Your Honor, so we ask that they be maintained under seal.

THE COURT: Well, you want to go down there and explain to my clerk why you're going to file them -- I'm just kidding.

MR. NEERMAN: Counsel could withdraw them.

THE COURT: All right. Well, I'll grant them. There's no objection to them, so I'll grant them. But you-all are going to get the letters I get from Washington about sealing all of this stuff. We're talking about thousands of

pages.

MR. DOW: Your Honor, could we with that 14 days to respond --

THE COURT: You bet.

MR. DOW: Could we maybe resolve that?

THE COURT: Isolate it if you can.

MR. DOW: Yes, sir. We will do that. Thank you, Your Honor.

THE COURT: You bet.

(End of transcript)

UNITED STATES DISTRICT COURT)

WESTERN DISTRICT OF TEXAS)

I, Arlinda Rodriguez, Official Court Reporter, United States District Court, Western District of Texas, do certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

I certify that the transcript fees and format comply with those prescribed by the Court and Judicial Conference of the United States.

WITNESS MY OFFICIAL HAND this the 29th day of July 2019.

/S/ Arlinda Rodriguez
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