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

HERIBERTO CHAVEZ; EVANGELINA ESCARCEGA, AS THE LEGAL REPRESENTATIVE OF JOSE ESCARCEGA; AND JORGE MORENO, ON BEHALF OF THEMSELVES AND OTHERS SIMILARLY SITUATED,	§	FILED MAR 29 2022 CLERK, U.S. DISTRICT COURT WESTERN DISTRICT OF TEXAS BY DEPUTY CLERK
PLAINTIFFS,	§	
V.	§	CAUSE NO. 1:17-CV-659-LY
PLAN BENEFIT SERVICES, INC; FRINGE INSURANCE BENEFITS, INC.; AND FRINGE BENEFIT GROUP,	§	
DEFENDANTS.	§	

CLASS-CERTIFICATION ORDER

This is a putative class action under the Employee Retirement Income Security Act of 1974 ("ERISA"). 29 U.S.C. § 1001 *et seq.* Plaintiffs Heriberto Chavez, Evangelina Escarcega, as the representative of her disabled son, Jose Escarcega, and Jorge Moreno (collectively, "Plaintiffs"), on behalf of themselves and others similarly situated, are suing Defendants Plan Benefit Services, Inc. ("Plan Benefit"), Fringe Insurance Benefits, Inc. ("Fringe Insurance"), and Fringe Benefit Group, Inc.[1] ("Fringe Group") (collectively, "Defendants") to restore the assets of two trusts—the

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

Contractors and Employees Retirement Trust ("CERT") and the Contractors Plan Trust ("CPT"). *See* ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3) (enabling participants of ERISA plan to sue for equitable relief).

Before the court is Plaintiffs' Amended Motion for Class Certification (Doc. 163), Defendants' Response in Opposition to Plaintiffs' Amended Motion for Class Certification (Doc. 168), Plaintiffs' Reply in Support of their Amended Motion for Class Certification (Doc. 169), Plaintiffs' Notice of Errata resubmitting their Amended Motion for Class Certification and Reply in support thereof (Doc. 171), the parties' Agreed Record in Support and Opposition to Plaintiffs' Amended Motion for Class Certification (Doc. 164), the court's Order Correcting Exhibit 89 of the Agreed Record (Doc. 166–167), the parties' Agreed Appendix in Support and Opposition to Plaintiffs' Amended Motion for Class Certification (Doc. 170), and the parties' respective Proposed Findings of Fact and Conclusions of Law (Doc. 172–173).

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

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

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

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

LEGAL FRAMEWORK

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

To proceed as a class action, every condition of Rule 23(a) must be satisfied. Rule 23(a) requires the (1) class be "so numerous" as to make joinder of all members impracticable; (2) action contain questions of law or fact "common" to the class; (3) claims or defenses of the representative parties be "typical" of the claims or defenses of the class; and (4) representative parties be parties who will fairly and "adequately" protect the interests of the class. *Id.* at 23(a)(1)–(4). In short,

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[2] Alternatively, Plaintiffs request to (a) certify subclasses (one class of participants of plans in CERT alongside another class of participants of plans in CPT) and (b) exclude the handful of participants of custom plans whose fee structure is not based on Defendants' pricing grid.

Rule 23(a) requires numerosity, commonality, typicality, and adequacy of representation. *See, e.g.*, *Comcast Corp.*, 569 U.S. at 33.

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

> (1) prosecuting separate actions by or against individual class members would create a risk of:
>
> > (A) inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class; or
> >
> > (B) adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests;
>
> (2) the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole; or
>
> (3) the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings include:
>
> > (A) the class members' interests in individually controlling the prosecution or defense of separate actions;
> >
> > (B) the extent and nature of any litigation concerning the controversy already begun by or against class members;
> >
> > (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and
> >
> > (D) the likely difficulties in managing a class action.

Fed. R. Civ. P. 23(b)(1)–(3).

A "rigorous analysis" of Rule 23's prerequisites is required before courts certify a class. *Vizena*, 360 F.3d at 503 (citing *Castano v. American Tobacco Co.*, 84 F.3d 734, 740 (5th Cir. 1996)); *see also Cruson v. Jackson Nat'l Life Ins. Co.*, 954 F.3d 240, 249 (5th Cir. 2020). Courts may therefore "probe behind the pleadings when coming to rest on the certification." *In re Deepwater Horizon*, 739 F.3d 806, 811 (5th Cir. 2014) (quoting *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011).

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

Courts regularly certify classes of participants in ERISA plans—in 2020 alone, three ERISA cases filed by a putative class reached the Supreme Court. *See generally Intel Corp. Inv. Policy Comm. v. Sulyma*, 140 S. Ct. 768 (2020) (resolving circuit split regarding when fiduciaries can invoke three-year statute of limitations for breach of fiduciary duty); *Thole v. U.S. Bank, N.A.*, 140 S. Ct. 1615 (2020) (clarifying when plan participants have constitutional standing to sue for statutory violations); *Retirement Plans Comm. of IBM v. Jander*, 140 S. Ct. 592 (2020) (holding fiduciaries were not entitled to presumption of prudence); *see also Hughes v. Northwestern*, 142 S. Ct. 737 (2022) (holding fact that plan enabled participants to select investments from menu of options did not excuse fiduciaries, who have continuing duty to monitor investments and remove imprudent ones).

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

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

To supplement these duties, Congress also barred transactions deemed "likely to injure" an employee-benefit plan (*Harris Trust & Sav. Bank v. Salomon Smith Barney Inc.*, 530 U.S. 238, 241–242 (2000)). Congress barred fiduciaries from entering a transaction that could lead to a conflict of interest between the fiduciary and the plan to which the fiduciary owes a duty. 29 U.S.C. § 1106(b). For example, a fiduciary cannot act on both sides of a transaction, engaging in self-dealing ("deal[ing] with assets of the plan in his own interest") or accepting kickbacks

("receiv[ing] any consideration for his own personal account from any party dealing with such plan in connection with a transaction involving the assets of the plan"). *Id.* § 1106(b)(1), (3). Congress also barred various transactions[3] between the plan and a "party in interest" (29 U.S.C. § 1106(a)); "Congress defined 'party in interest' to encompass those entities that a fiduciary might be inclined to favor at the expense of the plan's beneficiaries" (*Harris Trust*, 530 U.S. at 242), such as service providers (29 U.S.C. § 1002(14)(B)).

FACTUAL BACKGROUND

Defendants are closely, if not inextricably, intertwined. Plan Benefit ceased to exist as a separate legal entity when it was acquired by Fringe Group in 2016 (before that, Plan Benefit was Fringe Group's subsidiary). Fringe Insurance continues to be Fringe Group's subsidiary. Fringe Group and Fringe Insurance work in tandem, sharing the same executive team, the same employees, and the same office in Austin, Texas. They are owned by Travis West ("West"), who is also the CEO and agent for service of process. And at the time of Plaintiffs' First Amended Complaint in 2017, Defendants shared the same website, which stated that Fringe Group "includes" all of the following: Plan Benefit, Fringe Insurance, and "The Contractors Plan," which is the umbrella term for the CPT and CERT trusts. Furthermore, there is no contractual relationship between employers and Fringe Insurance, so Fringe Group determines the terms of employers' participation as those terms pertain to Fringe Insurance.

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

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

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

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

Plaintiffs challenge Defendants' construction of CERT and CPT. One central issue is that CERT is only compatible with Transamerica Life Insurance Company ("Transamerica") and Nationwide Trust Company ("Nationwide"); Plan Assets must be invested through one or the other. But unbeknownst to Plaintiffs, Transamerica and Nationwide have side deals with Defendants. In effect, Plaintiffs pay Defendants twice: as a product of the transaction between Plaintiffs and Defendants, as well as the transaction Defendants arrange between Plaintiffs and Transamerica or Nationwide. Such payments are possible, in part, because Fringe Group directs disbursements of Plan Assets to itself without trustee approval—a second central issue raised by Plaintiffs. Fringe Group calculates all fees associated with participation in CERT and CPT, including its own fees. Fringe Group then directs the bank or other entity holding Plan Assets to deduct money from CERT and CPT, paying itself and its wholly-owned subsidiary before putting what money remains towards retirement investments or health-insurance premiums. This causes less money to be invested for Plaintiffs' retirement and more money to be deducted for Plaintiffs' health insurance.

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

1. CERT

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

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

A. CERT Contracts

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

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

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

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

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

B. CERT Fees

The CERT Retainer Agreement also discloses all of the fees associated with the CERT Plans. The CERT Retainer Agreement discloses the following "direct" fees: a (1) an annual basic plan administrative fee, which is billed to the employer; (2) nondiscriminatory testing fee, which is billed to the employer; (3) monthly participant administrative fee; (4) monthly plan administrative fee; (5) monthly investment contract charge; and (6) participant surrender charge. Additionally, the CERT Retainer Agreement discloses the following "indirect" compensation from Transamerica and Nationwide: 0.80% of Plan Assets per year to Fringe Group and 0.35% of Plan Assets per year to Fringe Insurance.

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

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

2. CPT

CPT is the health-insurance arm of Defendants' product. It is a "multiple-employer welfare arrangement" within the meaning of ERISA. 29 U.S.C. § 1002(40). The employer-level health-insurance plans in the putative class ("CPT Plans") are welfare-benefit plans under ERISA. *Id.* § 1002(1). A welfare-benefit plan is an employer's promise to provide health benefits to its employees. This means an employees' benefit claims will be paid directly by the employer or by an insurance carrier hired by the employer.

Here, once an employer selects an insurance carrier, Fringe Group pays the premiums on the carrier's insurance policy using Plan Assets. The insurance policy may be issued directly to the employer, or it may be issued to CPT, which procures policies from United HealthCare, Kaiser, and MetLife.[4] Defendants do not process employees' benefit claims, as other healthcare administrators

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

do. Instead, Defendants perform the following tasks: soliciting bids from insurance carriers, transmitting insurance premiums to insurance carriers, maintaining a census of covered participants, and providing a toll-free call center for participants to ask about enrollment and contributions. Like CERT, Fringe Group also creates and maintains the contracts that follow in its capacity as the "Recordkeeper" and "Master Plan Sponsor" of CPT.[5]

A. CPT Contracts

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

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

B. CPT Fees

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

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

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

As with CERT, there is no contractual relationship between employers and Fringe Insurance, so Fringe Group determines the terms of the employers' participation in CPT as those terms pertain to Fringe Insurance. Fringe Group hires its wholly-owned subsidiary, Fringe Insurance, to negotiate the insurance policies available to CPT Plans, including the associated insurance premiums. Since Fringe Insurance's fees are proportionally related to the costs of these insurance premiums, Fringe Insurance negotiates and exercises discretion over its own compensation.

ANALYSIS

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

1. Standing

Defendants dispute standing for a fourth time.[6]

A. Constitutional Standing

The "irreducible" elements of standing under Article III of the Constitution are an "injury" that is "traceable" to the defendant and "redressable" by the requested relief. *Lujan v Defenders of Wildlife*, 504 U.S. 555, 560–561 (1992). "However, the standard used to establish these three elements is not constant but becomes gradually stricter as the parties proceed through 'the

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

successive stages of litigation.'" *In re Deepwater Horizon*, 739 F.3d at 799 (citing *Lujan*, 504 U.S. at 560–561)).

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

Plaintiffs have constitutional standing to sue. Plaintiffs allegedly suffered an "injury" because they were entitled to retirement or health benefits through CERT or CPT, but Defendants withdrew undisclosed and unjustified fees from CERT and CPT, resulting in Plaintiffs receiving less in retirement-investment savings or spending more for health-insurance premiums. In short, Defendants diminished Plaintiffs' Plan Assets. Shrinking the size of a trust is an injury in fact—even if it is more abstract than, say, taking adverse possession of a tract of land. *See Thole*, 140 S. Ct. at 1619 (noting "in the private trust context, the value of the trust property and the ultimate amount of money received by the beneficiaries will typically depend on how well the trust is managed, so every penny of gain or loss is at the beneficiaries' risk."); *Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 592 (8th Cir. 2009) (holding plaintiff "satisfied the requirements of Article III because he has alleged actual injury to his own Plan Account"); *Boley v. Universal Health Servs., Inc.*, No. 20-CV-2644, 2020 WL 6381395, at *6 (E.D. Pa. Oct. 30, 2020) (recognizing standing post-*Thole* for claims

defendants breached fiduciary duty by charging excessive fees); *Jacobs v. Verizon Commc'ns, Inc.*, No. 16-CV-1082-PGG, 2020 WL 5796165, at *6 (S.D.N.Y. Sept. 29, 2020) (likewise recognizing standing post-*Thole*, as "Defendants do not, and could not credibly argue, that diminished returns are insufficient to assert standing [under ERISA].").

The second and third elements of Article III standing are also satisfied. Plaintiffs' claims are "traceable" to Defendants' conduct of not only withdrawing excessive fees from Plan Assets, but also accepting kickbacks from service providers such as Nationwide and Transamerica. *See* 29 U.S.C. § 1104 (stating fiduciary may not breach duty of loyalty nor duty of prudence); *id.* § 1106 (indicating fiduciary may not enter prohibited transactions); *id.* § 1108 (providing reasonable-compensation defense to prohibited-transactions claim). And Plaintiffs' claims are "redressable" by the court because the requested equitable relief—including a declaration, injunction, and order directing Defendants to disgorge themselves of ill-gotten profits, restore Plan Assets, and provide other appropriate equitable relief such as paying a surcharge, producing an accounting, and imposing a constructive trust or equitable lien—could restore Plan Assets, replenishing Plaintiffs' trusts and remedying Plaintiffs' harm. Congress authorized courts to grant such relief. *See id.* § 1132 ("A civil action may be brought . . . by a participant or beneficiary . . . to recover benefits due to him under the plan"); *id.* § 1109 ("Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter shall be personally liable to make good to such plan any losses to the plan resulting from such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary").

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

The court has "probe[d] behind the pleadings." *In re Deepwater Horizon*, 739 F.3d at 806. Plaintiffs have articulated a legal entitlement to relief and provided supporting evidence, ranging from authenticated contracts to signed declarations and depositions. However, the court stops short of weighing the evidence and reaching the ultimate question of whether Plaintiffs are in fact entitled to restore Plan Assets. Sure, as Defendants note, standing is supported "with the manner and degree of evidence required" at that successive stage of the litigation. *Id.* at 800. However, at the certification stage, the court has "no license to engage in free-ranging merits inquiries." *Id.* at 798 ("Merits questions may be considered to the extent—but only to the extent—that they are relevant to determining whether the Rule 23 prerequisites for class certification are satisfied.") (citing *Amgen Inc. v. Connecticut Ret. Plans & Trust Funds*, 568 U.S. 455, 466 (2013)).

B. Statutory Standing

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

of such employer . . . ." *Id.* § 1002(7).

First, Plaintiffs are "former employee[s]" of TRDI. *Id.* § 1002(7). Chavez was a full-time technician for TRDI; Escarcega is the legal representative of her son, who was a part-time custodian for TRDI; and Moreno was a part-time custodian for TRDI. Escarcega's benefits were held in CPT and CERT, Moreno's benefits were held in CPT and CERT, and Chavez's health benefits were held solely in CPT, though Chavez asserts he would have received retirement contributions held in CERT per prevailing-wage requirements had the challenged fees for CPT been lower.[7]

Second, Plaintiffs "may become eligible to receive a benefit." *Id.* § 1002(7). A person "may become eligible" if he has a "colorable claim" to benefits under ERISA. *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 116–117 (1989). A colorable claim is merely one that is not frivolous. *See, e.g., Panaras v. Liquid Carbonic Indus. Corp.*, 74 F.3d 786, 790–791 (7th Cir. 1996). Plaintiffs have gone far beyond that requirement, submitting admissible evidence suggesting Defendants withdrew fees from Plaintiffs' Plan Assets as part of unlawful scheme under ERISA. *See* 29 U.S.C. §§ 404, 406. Furthermore, even a person who has already received benefits may be "eligible to receive a benefit" if he did not receive "everything owed" to him under the ERISA plan. *Sommers Drug Stores Co. Emp. Profit Sharing Trust v. Corrigan*, 883 F.2d 345, 350 (5th Cir. 1989) (holding class representatives who already accepted vested benefits were still participants authorized to sue

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

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

Finally, whether Plaintiffs participated in CERT, CPT, or both, Plaintiffs participated in an "employee benefit plan." 29 U.S.C. § 1002(7). An "employee benefit plan" can be an employee "pension" benefit plan or "welfare" benefit plan. *Id.* § 1002(3). CERT is a trust that certifies a master plan, which is adopted by participating employers' respective pension benefit plans. *Id.* § 1002(2), (3). CPT is a special type of welfare benefit plan known as a "multiple employer welfare arrangement," which is defined as an arrangement established or maintained for the purpose of providing benefits to two or more employers. *Id.* § 1002(40). Each Plaintiff participated in CERT, and it is not significant that only two of the three Plaintiffs participated in CPT. In class actions with multiple named plaintiffs, every plaintiff need not have standing to assert every claim; the court has

jurisdiction over a subclaim if at least one named plaintiff has standing to raise the subclaim. *See Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 264 n.9 (1977) ("Because of the presence of this plaintiff, we need not consider whether the other individual and corporate plaintiffs have standing to maintain the suit.").

Still, Defendants aver that the named and unnamed plaintiffs are not participants of the *same* employee-benefit plan insofar as the unnamed plaintiffs include individuals who have accrued benefits through CERT or CPT but have *not* been employed by TRDI. Not so with respect to CPT, because CPT is in and of itself considered an "employee benefit plan" under ERISA. *Id.* § 1002(40). And while seemingly true with respect to CERT, the named plaintiffs still have statutory standing to assert class claims on behalf of the unnamed plaintiffs: Once a potential class representative establishes individual standing to sue his own ERISA-governed plan, there is no additional standing requirement related to the representative's suitability to represent a potential class including other plans to which he does not belong. *See Fallick v. Nationwide Mut. Ins. Co.*, 162 F.3d 410, 424 (6th Cir. 1998) ("[T]he standing-related provisions of ERISA were not intended to limit a claimant's right to proceed under Rule 23 on behalf of all individuals affected by the [fiduciary's] challenged conduct, regardless of the representative's lack of participation in all the ERISA-governed plans involved.") (citing *Forbush v. J.C. Penney Co.*, 994 F.2d 1101 (5th Cir. 1993) (where injury arose from defendants' response tactics, which applied uniformly to claims of each class member, court proceeded to Rule 23 analysis and did not consider whether class representative had standing to represent absent class members in other plans), *abrogated on other grounds by In re Rodriguez*, 695 F.3d 360, 370 (5th Cir. 2012); *see also Larson v. Allina Health Sys.*, 350 F. Supp. 3d 780, 791 (D. Minn. 2018) (holding named participants in retirement-investment plan had standing

to sue on behalf of unnamed participants even though named participants hadn't individually invested in each possible retirement-investment fund).

Similarly, Plaintiffs have statutory standing to seek restoration of Plan Assets since at least 2014. The question whether recovery might be had for the period before or after Plaintiffs personally suffered injury understandably turns on whether the "statutory provision on which the claim rests properly can be understood as granting persons in the plaintiff's position a right to judicial relief." *Warth v. Seldin*, 422 U.S. 490, 500 (1975). Here, ERISA provides statutory standing to "participants," defined to include both current and former employees. Plaintiffs have therefore been "participants" since 2014, when TRDI began providing benefits to employees such as Plaintiffs through CERT and CPT, regardless of when Plaintiffs' employment with TRDI or TRDI's relationship with Defendants ended. 29 U.S.C. §§ 1109, 1002; *see Pfahler*, 517 F.3d at 827 (noting ERISA does not require participants to sue "before plan termination" and permitting participants "to bring suit to remedy fiduciary breaches even after a plan is defunct effectuates ERISA's underlying goals"). Additionally, Plaintiffs may sue on behalf of those who were "participants" in CPT before 2014 because CPT is itself an "employee benefit plan" and it is well-settled that a suit under ERISA Section 1132 must be brought "on behalf of the plan as a whole." *Id.* § 1002(40); *Braden*, 588 F.3d at 593 (holding recovery under ERISA Section 1132 for breach of fiduciary duty may "be had for the period before [the named plaintiff] personally suffered injury" because it is well-settled that such a suit must be "brought in a representative capacity on behalf of the plan as a whole" and that related remedies "protect the entire plan" (first quoting *Mutual Life Ins. Co. v. Russell*, 473 U.S. 134, 142 (1985)); and then citing *LaRue v. DeWolff, Boberg & Assocs.*, 552 U.S. 248 (2008) (ERISA Section 1132 "does not provide a remedy for individual injuries distinct from plan

injuries"). But the class for CPT does not reach back before July 6, 2011, because the suit was filed July 6, 2017, and the statute of limitations for a Section-1132 suit is generally six years. 29 U.S.C. § 1113 (providing suits must be filed within six years of alleged breach or within six years of discovery); *see also Intel Corp. Inv. Policy Comm. v. Sulyma*, 140 S. Ct. 768 (2020) (resolving circuit split regarding when fiduciaries can invoke three-year statute of limitations for breach of fiduciary duty). Ultimately, the named plaintiffs are undoubtedly "participants" with statutory standing to sue, and whether they can properly represent the interests of unnamed "participants" from other time periods goes to the appropriateness of class certification. *Braden*, 588 F.3d at 589 (holding plaintiff who alleged defendants charged excessive fees had standing because plaintiff alleged injury to his own plan account, and issue of whether plaintiff could represent claims for time period prior to his contributions related to cause of action, not to standing); *Fallick*, 162 F.3d at 423.

That is, the proposed class representatives are just that—*representative* of the other plaintiffs in the lawsuit. "A potential class representative must demonstrate individual standing vis-as-vis the defendant; he cannot acquire such standing merely by virtue of bringing a class action." *See id.* (citing *Brown v. Sibley*, 650 F.2d 760, 770 (5th Cir. 1981), *superseded by statute on other grounds as stated in McMullen v. Wakulla Bd. of Cty. Comm'rs.*, 650 Fed. App'x 703, 705 (11th Cir. May 25, 2016)). But if individual "standing has been established, whether a plaintiff will be able to represent the putative class, including absent class members, depends solely on whether he is able to meet the additional criteria encompassed in Rule 23." *Fallick*, 162 F.3d at 423 (citing *Cooper v. University of Tex. at Dallas*, 482 F. Supp. 187 (N.D. Tex. 1979) (upon noting Congress intended relevant statute "to be a broad, remedial measure," court then "turn[ed] to Rule 23")); *see also* Herbert B. Newberg, *Newberg on Class Actions* § 2.06 (5th ed. 2020) ("[W]hen a class plaintiff

shows individual standing, the court should proceed to Rule 23 criteria to determine whether, and to what extent, the plaintiff may serve in a representative capacity on behalf of the class."); *but see Brown v. Nationwide Life Ins.*, No. 2:17-CV-558, 2019 WL 4543538, *3–6 (S.D. Ohio Sept. 19, 2019) (where plaintiff was participant in 401(k) plan and defendant allegedly charged plan excessive recordkeeping fees, court held plaintiff could not represent class of all participants in 401(k) plans that had similar recordkeeping agreements with defendant, though plaintiff could assert class claims on behalf of 401(k) plan in which she participated). "[C]ourts have recognized that the standing-related provisions of ERISA were not intended to limit a claimant's right to proceed under Rule 23 on behalf of all individuals affected by the challenged conduct, regardless of the representative's lack of participation in all the ERISA-governed plans involved." *Fallick*, 16 F.3d at 424.

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

2. Class Certification

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

A. Numerosity

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

As of February 2021, there were 224,995 participants and 2,994 plans in CERT as well as 68,066 participants and 350 plans in CPT. The proposed class of thousands of participants is sufficiently numerous, seeing as a class containing hundreds has been deemed numerous. Fed. R. Civ. P. 23(a)(1); *see, e.g.*, *Mullen v. Treasure Chest Casino, LLC*, 186 F.3d 620, 624 (5th Cir. 1999) (holding class with 100–150 members is "within the range that generally satisfies the numerosity requirement").

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

practicability of joinder.").

Finally, participants in the proposed class are clearly ascertainable. *See Deepwater Horizon*, 739 F.3d at 821 (recognizing an "implicit 'ascertainabilty' requirement"); *DeBremaecker v. Short*, 433 F.2d 733, 734 (5th Cir. 1970) (per curiam) ("It is elementary that in order to maintain a class action, the class sought to be represented must be adequately defined and clearly ascertainable."). Fringe Group, as Recordkeeper for the CERT Plans and the CPT Plans, maintains a database with personal identifying information about each participant enrolled in said plans. On several occasions, Defendants have provided the court with the exact number of participants in the CERT and CPT Plans. This is by no means a case where the identification of class members will alone be a feat. *See, e.g.*, *Castano*, 84 F.3d at 747 (identifying cost of providing "notice to millions of class members" as part of "extensive manageability problems" of certification).

B. Commonality

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

i. Fiduciary Status

Regarding the question whether Defendants are fiduciaries, Plaintiffs allege Defendants are

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

The documents supporting such discretion are undisputed. To be specific, Defendants' control over disbursements from CERT can be established by reference to the CERT Master Trust Agreement, which is incorporated into every single plan.[8] Likewise, Defendants' control over disbursements from CPT can be established by reference to the CPT Master Trust Agreement.[9] Defendants' authority over their own compensation is exhibited by the expense ratios of the investment providers and insurance carriers Defendants make available to Plaintiffs.[10] And

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

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

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

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

Defendants try to work around these facts in two ways. First, Defendants note that the CERT and CPT Plans have named other fiduciaries, like the CERT and CPT trustees. However, fiduciary status depends on Defendants' "functions," rather than "titles." *Reich*, 55 F.3d at 1048. Whether Defendants intended to disclaim fiduciary status is not relevant; what would be relevant is whether Defendants intended to disclaim the discretion authorized them. *Id.* By defining a fiduciary in functional terms, Congress intentionally "expand[ed] the universe of persons subject to fiduciary duties—and damages—under [ERISA]." *Id.* (quoting *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 262 (1993) (citing 29 U.S.C. § 1109(a))).

Second, Defendants argue that the court must examine the substance of the many underlying CERT and CPT Plans, because Defendants cannot be fiduciaries if they took actions authorized by the plans. Not so. Defendants can be fiduciaries if they exercised discretion, even if such discretion was authorized. *See Rozo v. Principal Life Ins. Co.*, 949 F.3d 1071, 1074 (8th Cir. 2020) ("A service provider may be a fiduciary when it exercises discretionary authority, even if the contract authorizes [the fiduciary] to take the discretionary act."). And such discretion is evidenced by the CERT and CPT Master Trust Agreements, which are incorporated by reference into the CERT and CPT Plans.

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

It is not, as Defendants suggest, that Plaintiffs are establishing fiduciary status independent of each individual plan, but rather that the terms of each individual plan can be established by examining the terms of CERT and CPT, which indisputably govern all of the benefit plans in the putative class.

ii. Fiduciary Breach

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

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

prudence as another prudent fiduciary would); *Haddock*, 262 F.R.D. at 108, 116–117. Obviously, undisclosed financial incentives and conflicted transactions call into question whether Defendants were indeed acting "solely" for Plaintiffs with the "same care" as another prudent fiduciary would. *Id.* § 1104(a)(1); *see, e.g.*, *Bussian v. RJR Nabisco*, 223 F.3d 286, 299 (5th Cir. 2000) ("The presence of conflicting interests imposes on fiduciaries the obligation to take precautions to ensure the duty of loyalty is not compromised. As we have noted, the level of precaution necessary to relieve a fiduciary of the taint of a potential conflict should depend on the circumstances of the case and the magnitude of the potential conflict." (citing *Metzler v. Graham*, 112 F.3d 207, 213 (5th Cir. 1997)).

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

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

Furthermore, whether fees were excessive *can* be shown on a classwide basis. Purported variations among the CERT and CPT Retainer Agreements—form documents created by Fringe Group that disclose Defendants' fees—have been closely examined by the court and largely exaggerated by the Defendants. For CERT, with one exception,[12] Defendants' fees are either uniform or amenable to a pricing grid. Indirect compensation is uniform; all plans are charged the same amount of indirect compensation regardless of employers' choices (that is, all plans disclose

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

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

In other words, as Pagano testified, none of Defendants' fees are affected by the "variations" flagged by Defendants, such as whether employers offer retirement benefits through a 401(k) or money-purchase plan, whether employers invest through Nationwide or Transamerica, and whether investments will be trustee-directed or participant-directed, actively managed or passively managed.[13] Instead, indirect compensation is constant, and direct compensation is set by one of six fee structures in a pricing grid created by Defendants. These structures are called

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

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

Tiered 1–4, Graded 25, and Graded 50. While employers can choose a "tiered" or "graded" plan, Fringe Insurance determines where the employer falls within either categorization scheme, and simply put there is a limited number of fee structures.

Likewise, Defendants have a limited number of fee structures for CPT. For example, West testified that the "standard" administrative fee paid to Fringe Group is 7.5%, and the CPT Plans on which Defendants' arguments are based deviate from this in one way, each paying the same 5.0% administrative fee to Fringe Group. *See Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442, 457–458 (2016) (standing for proposition that individualized damages issues do not defeat class certification where issues can be managed).

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

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

And importantly, these "common questions" have the capacity to "generate common *answers* apt to drive the resolution of the litigation." *Dukes*, 564 U.S. at 350 ("What matters to class certification is not the raising of common questions—even in droves—but rather, the capacity of a class-wide proceeding to generate common *answers* apt to drive the resolution of the litigation." (quoting Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. REV. 97, 132 (2009))). For example, in *Teets v. Great-West Life & Annuity Insurance Co.*, plaintiffs sought to certify a class of 270,000 participants in 13,600 plans, which had each participated in an investment fund offered by the defendant. 315 F.R.D. 362, 365 (D. Colo. 2016). The plaintiffs challenged the defendant's management of the investment fund. After applying Rule 23 and certifying the class, the court held that the defendant was *not* a fiduciary and granted summary judgment in the defendant's favor. *Id.* at 369. Likewise here, Plaintiffs seek to certify a class of 224,995 participants and 2,994 plans in CERT as well as 68,066 participants and 350 plans in CPT.

All of the plans participated in CERT or CPT, trusts allegedly mismanaged by Defendants. Defendants' fiduciary status thus has the ability to drive the outcome of this case both in the Plaintiffs' and Defendants' favor. *See id.*

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

C. Typicality

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

Here, Plaintiffs' claims do arise from the same course of conduct and theories of liability as the claims of the class. Like the class, Plaintiffs' retirement or health benefits were provided through CERT or CPT, trusts structured by Defendants to the alleged detriment of Plaintiffs. Plaintiffs provide they were owed the same duties and harmed by the same breaches and transactions as every other class member. Notably, Plaintiffs were harmed when Defendants hired service providers (like Nationwide and Transamerica) and outside brokers (like Fringe Insurance) in order to withdraw undisclosed and unjustified compensation from CERT and CPT, which contained all Plan Assets. In short, "a common course of conduct in violation of ERISA is alleged." *In re Enron Corp. Sec., Derivative & "ERISA" Litig.*, 228 F.R.D. 541, 555 (S.D. Tex. 2005). Furthermore, by endeavoring to restore Plan Assets, Plaintiffs seek plan-wide relief for all plans in the putative class. *See, e.g. Shirk v. Fifth Third Bancorp*, No. 05-CV-049, 2008 WL 4425535, at *3 (S.D. Ohio Sept. 30, 2008) ("Generally, there is little doubt that a class representative's breach of fiduciary duty claim is in every respect typical of his fellow class members. Typicality is further supported by the fact that

ERISA contains unique standing and remedial provisions that allow a participant who sues for a breach of fiduciary duty to obtain plan-wide relief.").

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

Rather than challenging typicality on its face, Defendants argue "Plaintiffs have failed to establish typicality because . . . they failed to demonstrate commonality" with respect to the "material variations in the retainer agreements" signed by the employers participating in CERT and CPT. The court has already rejected this argument. These supposed material variations are twofold: employers can make limited customizations from a menu of options, and Defendants can charge employers different fees. For CERT, however, even though employers can invest with Nationwide or Transamerica, investments can be participant- or trustee-directed, and trustee-directed plans can be actively or passively managed, Defendants testified that none of these choices affect the services Defendants provide CERT or the fees Defendants receive from CERT. Again, Defendants' indirect compensation is uniform, and Defendants' direct compensation is—aside from a handful of custom plans excluded from the class definition—either uniform or based on a pricing grid. Similarly for

CPT, employers may select an insurance carrier, who may offer a certain amount of coverage or out-of-pocket expense limit, and who may issue the policy directly to employers or CPT. Still, the employers' selection and carriers' offerings do not change the fact that all CPT Plans adopt the terms of the CPT Master Trust Agreement, thereby routing contributions and premiums and fees through CPT. Once again, an employer's choice does not change the fact that CPT and CERT hold all of Plaintiffs' Plan Assets and pay all of Defendants' fees. Defendants' form retainer agreements vary little, in manageable ways, and in no ways that are "material." Defendants' argument rests on the use of the word "variation," but there is no substance behind it.

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

also Larson, 350 F. Supp. 3d at 791 (holding named participants had standing to sue on behalf of unnamed participants even though named participants hadn't individually invested in each possible fund). Similarly, Plaintiffs have statutory standing to seek recovery since at least 2014 because "participants" include current *or* former employees. 29 U.S.C. § 1002(7); *see also Braden*, 588 F.3d at 593 (holding recovery under ERISA for breach of fiduciary duty may even "be had for the period before [the named plaintiff] personally suffered injury" because "it is well-settled" that such a suit cannot be brought in an individual capacity and that related remedies must "protect the entire plan"); *Warth*, 422 U.S. at 500; *Russell*, 473 U.S. at 140.

D. Adequacy of Representation

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

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

perjury that they have no actual or potential conflicts of interest. And by excluding Defendants' officers, directors, and family members[14] from the class definition, Plaintiffs avoid representing individuals with a financial interest in ending the lawsuit. Finally, each Plaintiff declares under penalty of perjury that they are aware of the advantages and disadvantages of proceeding as a class rather than as an individual.

Still, Defendants argue Plaintiffs cannot establish that they are adequate class representatives because Plaintiffs lack standing to represent participants in other employee-benefit plans organized through CERT and CPT. Once again, this argument fails because the named plaintiffs have established standing to bring each claim individually and the named plaintiffs can bring representative claims by satisfying certification requirements. *See, e.g.*, *Charters v. John Hancock Life Ins. Co.*, 534 F. Supp. 2d 168, 172 (D. Mass. 2007) (concluding plaintiffs need not establish standing with respect to every plan in putative class so long as plaintiffs have standing with respect to their own plan and allege a common course of conduct affecting the participants of other plans); *In re Deepwater Horizon*, 739 F.3d at 800 ("Whether or not the named plaintiff who meets individual standing requirements may assert the rights of absent class members is neither a standing issue nor an Article III case or controversy issue but depends rather on meeting the prerequisites of Rule 23 governing class actions." (quoting *Lewis v. Casey*, 518 U.S. 343, 395–396 (1996) (Souter, J., concurring in part, dissenting in part, and concurring in judgment))).

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

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

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

Cases seeking to remedy fiduciary breaches under ERISA have fit within Rule 23(b)(1)(B) and been certified as such. *See, e.g.*, *In re Schering Plough Corp. ERISA Litig.*, 589 F.3d 585, 604 (3d Cir. 2009) (providing "breach of fiduciary duty claims brought under [ERISA] are paradigmatic examples of claims appropriate for certification as a Rule 23(b)(1) class, as numerous courts have held"); *Shirk*, 2008 WL 4425535, at *4 ("Most courts have followed the reasoning of the Advisory Committee Notes to the Federal Rules and concluded that subsection (b)(1)(B) is the most appropriate subsection for class certification in an ERISA breach of fiduciary duty case."); *Sessions v. Owens-Illinois, Inc.*, 267 F.R.D. 171 (M.D. Pa. 2010) (certifying ERISA class while noting "there is a very real danger that an adjudication in which one plaintiff participated would affect other plaintiffs' ability to protect their own interests. Rule 23(b)(1)(B) therefore permits a class action to be maintained"); *Jones v. NovaStar Financial, Inc.*, 257 F.R.D. 181, 193 (W.D. Mo. 2009)

(certifying Rule 23(b)(1)(B) class because, given that putative representative's claim seeks "[p]lan-wide relief, there is a risk that failure to certify the class would leave future plaintiffs without relief" (quoting *In re Ikon*, 191 F.R.D. 457, 466 (E.D. Pa. 2000)); *Gruby v. Brady*, 838 F. Supp. 820, 828 (S.D.N.Y. 1993) (certifying Rule 23(b)(1)(B) class in ERISA action to restore plan assets depleted as a result of alleged breach of fiduciary duty, holding "[b]ecause a plan participant or beneficiary may bring an action to remedy breaches of fiduciary duty only in a representative capacity, such an action affects all participants and beneficiaries, albeit indirectly").

The Advisory Committee Note to Rule 23 advises that Rule 23(b)(1)(B) takes in situations charging a breach of fiduciary duty. Fed. R. Civ. P. 23 advisory committee's note to 1966 amendment, 39 F.R.D. 69, 101 (providing Rule 23(b)(1)(B) applies "to an action which charges a breach of trust by an indenture trustee or other fiduciary similarly affecting the members of a large class of security holders or beneficiaries, and which requires an accounting or like measures to restore the subject of the trust" (citing, *inter alia*, *Boesenberg v. Chicago T. & T. Co.*, 128 F.2d 245 (7th Cir.1942); *Citizens Banking Co. v. Monticello State Bank*, 143 F.2d 261 (8th Cir. 1944)). Although Rule 23(b)(1)(B) also takes in situations involving a defendant whose funds are so limited that it may be incapable of satisfying all potential claimants, the rule also takes in situations charging a breach of fiduciary duty. Fed. R. Civ. P. 23 advisory committee's note to 1966 amendment, 39 F.R.D. 69, 100–101; *see Chavez*, 957 F.3d at 549 (stating "proposed class appears, at first glance, to be an historical example of a 23(b)(1)(B) class"); *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 834 (1999) (holding it must be shown "the shared character of rights claimed or relief awarded entails that any individual adjudication by a class member disposes of, or substantially affects, the interests of class members" and identifying limited-fund cases as "[o]ne recurring type," but by no means the

only type, of Rule 23(b)(1)(B) case); *Langbecker v. Elec. Data Sys. Corp.*, 476 F.3d 299, 318 (5th Cir. 2007) (commenting, without ruling, on post-*Ortiz* applicability of Rule 23(b)(1)(B) to ERISA case); *In re Merck*, MDL No. 1658, No. 05-CV-1151, 2009 WL 331426, at *10 (N.J. Feb. 10, 2009) ("Limited fund cases are but one species of the genus of Rule 23(b)(1)(B) cases." (applying *Ortiz*, 527 U.S. at 834)). Additionally, as a matter of law, money damages recovered from a fiduciary for violating the provision of ERISA establishing liability for breach of fiduciary duty inure to the benefit of the plan as a whole, not to the individual plaintiffs personally, so even an individual's claim essentially seeks plan-wide relief. *Russell*, 473 U.S. at 140.

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

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

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

Second, prosecuting separate actions could substantially impair the putative class members' ability to protect their interests because Plaintiffs are alleging two claims central to all class members. Conclusions that Defendants are not fiduciaries, or are fiduciaries who did not breach their duties, would be "intolerable" for plan participants who are claiming to be owed the very same fiduciary duties. *Kolar*, 2003 WL 1257272, at *3. Such conclusions could cause Defendants to update contracts applicable to all Plaintiffs, rendering claims moot. Such conclusions could even be used against Defendants as a matter of non-mutual issue preclusion, barring Defendants from relitigating an issue, such as fiduciary status, from plan participant to plan participant. *Sidag Aktiengesellschaft v. Smoked Foods Prods. Co., Inc.*, 776 F.2d 1270, 1275 n.4 (5th Cir. 1985) (comparing nonmutual claim preclusion and nonmutual issue preclusion); *New York Pizzeria, Inc. v. Syal*, 53 F. Supp. 3d 962, 967 (analyzing non-party's attempt to invoke previous judgment in favor of co-conspirators with whom non-party arguably shared "an identity of interests in the basic legal

right that is the subject of litigation" and noting Texas courts have explained "at least three" circumstances in which such identify of interests may exist).[15]

Defendants argue against Rule 23(b)(1)(B) certification on the basis that a class seeking monetary relief should be subject to the due-process-based requirements of notice and opt out. As an initial matter, Plaintiffs are not excluded from seeking monetary relief under Rule 23(b)(1)(B) by virtue of due process. *Hansbery v. Lee*, 311 U.S. 32, 40 (1940) (explaining due process principle that, with limited exceptions, one is not bound by a judgment in litigation in which he is not a party). Even Defendants concede that Rule 23(b)(1)(B) classes are often "limited fund" classes where class members are competing for the same limited pot of money. *Ortiz*, 527 U.S. at 834. In fact, a "district court is empowered under Rule 23(d)(2) to provide notice and opt-out for *any* class action, so certification should not be denied on the mistaken assumption that a Rule 23(b)(3) class [requiring notice and opt-out] is the only means by which to protect class members" seeking monetary relief. *In re Monumental*, 365 F.3d at 417.

Moreover, Plaintiffs are not primarily seeking monetary relief. Plaintiffs are clearly seeking equitable relief, having prayed for a declaration, injunction, and order directing Defendants to restore Plan Assets and provide any other appropriate equitable relief the court deems proper. Nevertheless, Defendants argue this case involves monetary relief because many class members have already received benefits from CERT and CPT. But this argument demonstrates a misunderstanding of the

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

relief sought by Plaintiffs and authorized by Congress under ERISA. *See* 29 U.S.C. § 1132. Plaintiffs seek to disgorge Defendants of ill-gotten profits and restore the Plan Assets of CERT and CPT. Neither the Defendants nor the court will be involved in divvying up any judgment or settlement, even though participants (including those who have cashed out) will be eligible to receive a portion of the judgment or settlement. Instead, relief will flow from the trusts to the plans and be allocated among participants by employer-level fiduciaries. *See Amalgamated Clothing & Textile Workers Union, AFL-CIO v. Murdock* (9th Cir. 1988) (citing *Russell*, 473 U.S. at 140–142) (holding ERISA "explicitly provides that a fiduciary shall 'restore to the plan' any ill-gotten profits obtained from breaching a fiduciary duty . . . consistent with ERISA's goal of protecting employee benefit plans as entities.").

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

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

23(b)(3)(A)–(D).

i. Common Questions Predominate

While Rule 23(a)(2) asks whether common questions of law or fact exist, Rule 23(b)(3) asks whether such questions predominate. Fed. R. Civ. P. 23(a)(2)–(b)(3); *Dukes*, 564 U.S. at 359 ("We agree that for purposes of Rule 23(a)(2) even a single common question will do."). Deciding whether common issues "predominate" requires an understanding of the relevant claims and defenses underlying the case. *Castano*, 84 F.3d at 744; *accord Allison*, 151 F.3d at 419. For example, in a proposed Title VII class action, which would involve showing how each plaintiff was personally subjected to and affected by discrimination, factual dissimilarities could "degenerate in practice into multiple lawsuits separately tried." *Castano*, 84 F.3d at 745 n.19; *Dukes*, 564 U.S. at 359 (denying certification in Title-VII case). But where, say, a corporation sells stock to investors at prices inflated by allegedly misleading statements from the corporation, the efficiency gained by deciding in one fell swoop whether the statements were misleading can warrant the disallowance of individual lawsuits by the investors. *See, e.g.*, *Rifkin v. Crow*, 80 F.R.D. 285, 286 (N.D. Tex. 1978) (granting certification in securities-fraud case); *see also Amchem*, 521 U.S. at 621 ("The Rule 23(b)(3) predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation."); 7AA Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1781.1 (3d ed. 2021) ("Rule 23(b)(3) has been used frequently in cases involving securities frauds.").

Relevant to the claims and defenses here are the concepts of duty, breach, causation, and loss. *See In re Enron Corp. Secs., Derivative & ERISA Litig.*, 284 F. Supp. 2d 511, 579 (S.D. Tex. 2003) (identifying duty, breach, causation, and loss as relevant to ERISA breach-of-fiduciary-duty claim).

As discussed at length, Plaintiffs argue that Defendants not only owed fiduciary duties to Plaintiffs by virtue of Defendants' "discretionary authority and control" over CERT and CPT (29 U.S.C. § 1002(21)), but also that Defendants breached those fiduciary duties by selecting certain service providers and outside brokers in order to collect undisclosed, unjustified compensation from CERT and CPT (*id.* § 1104(a)(1)). Moreover, the issues of duty and breach are "not only significant but also pivotal." *Mullen v. Treasure Chest Casino, LLC*, 186 F.3d 620, 626 (5th Cir. 1999); *accord In re Reliant Energy ERISA Litig.*, 2005 WL 2000707, at *4 (S.D. Tex. Aug. 18, 2005). This is because "Defendants [who] prevail on these issues . . . will prevail in the case." *In re Reliant*, 2005 WL 2000707, at *4 (certifying class of over 12,000 participants in retirement-investment plan managed by defendants); *see also Teets*, 315 F.R.D. at 365 (certifying class of 270,000 participants in 13,600 plans but granting summary judgment in defendant's favor because defendants were not fiduciaries).

The issues of causation and loss also support a finding of predominance. *See In re Enron ERISA Litig.*, 284 F. Supp. 2d at 579 (although duty, breach, causation, and loss are relevant to ERISA breach-of-fiduciary-duty claim, burden shifts to defendant to prove loss was not caused by breach after plaintiff proves breach and makes prima facie case of loss) (citing *McDonald v. Provident Indem. Life Ins. Co.*, 60 F.3d 234, 237 (5th Cir. 1995), *cert. denied*, *Henss v. Martin*, 506 U.S. 1054 (1993)). Plaintiffs seek to restore Plan Assets and to disgorge Defendant's gains from Plan Assets, as provided by ERISA's "carefully crafted and detailed enforcement scheme." *Great-West Life & Annuity Ins. Co.*, 534 U.S. 204, 209 (2002). To this end, Plaintiffs propose a classwide methodology that tailors Plaintiffs' relief to Defendants' misbehavior: each plan in CERT and CPT is to be refunded the amount overpaid based on a straightforward arithmetic formula of the fee paid minus the amount that should have been paid. *See Deepwater Horizon*, 739 F.3d

at 817 (noting "model purporting to serve as evidence of damages must measure only those damages attributable" to theory of liability on which class action is premised) (citing *Comcast*, 569 U.S. at 35)). This would take the form of a money payment to each plan that would be mechanical based on Defendants' data about the plans. *See CIGNA Corp. v. Amara*, 563 U.S. 421, 441–442 (2011) (noting certain categories of equitable relief can "take[] the form of a money payment[, which] does not remove it from the category of traditionally equitable relief").

Finally, this case also relies upon common proof. *See Amgem Inc. v. Connecticut Ret. Plans & Trust Funds*, 568 U.S. 469 (2013). This common proof includes the CERT and CPT Master Trust Agreements, which are incorporated into each CERT and CPT Plan (respectively), Defendants' agreements with Transamerica and Nationwide, and Defendants' testimony through West and Pagano. *See Cruson*, 954 F.3d 240, 255 (5th Cir. 2020) (noting "suits involving form contracts often lend themselves to class treatment"); *Glass Dimensions, Inc. v. State St. Bank & Trust Co.*, 285 F.R.D. 169, 179–180 (D. Mass. 2012) (finding predominance in ERISA breach-of-fiduciary-duty case where claims "rest[ed] on documentation . . . [that was] applicable to all the lending funds in questions, and that was generated by Defendants as a matter of course"). If this case were tried separately, redundant evidence would be the rule rather than the exception. *See supra* notes 12–13 and accompanying text. Common questions of law and fact not only exist, but also predominate.

ii. Class Treatment is Superior

Class treatment is superior for all of the reasons previewed by Rule 23(b)(3)(A)–(D), even though each and every one of the four Rule 23(b)(3) factors need not weigh in favor of certification. *Amchem*, 521 U.S. at 615–616. Importantly, individual ERISA plan participants alleging a breach of fiduciary duty cannot obtain individual relief; relief necessarily inures to the plan as a whole.

Russell, 473 U.S. at 140. Thus, the "class members' interests in individually prosecuting separate actions," if any, is low. *See* Fed. R. Civ. P. 23(b)(3)(A). Individual interests are also low because the alleged harm to each class members' individual account is small, so class members would be unlikely to seek relief without the economies of scale afforded by certification. *See Healthcare Strategies, Inc. v. ING Life Ins. & Annuity Co.*, 2012 WL 10242276, at *13 (D. Conn. Sept. 27, 2012) ("Superiority is often satisfied where an individual class member's claim would be too small to warrant bringing an individual suit, and a class action would save litigation costs by allowing the parties to efficiently assert their claims and defenses."). In fact, the "most compelling rationale for finding superiority in a class action [is] the existence of a negative value suit." *Castano*, 84 F.3d at 748; *see also Amchem*, 521 U.S. at 615.

Additionally, the court is aware of no other "litigation concerning the controversy already begun by other class members." *See* Fed. R. Civ. P. 23(b)(3)(B). To that end, it would be more desirable to "concentrate the litigation in [a] particular forum," and the Austin Division of the Western District of Texas is particularly appropriate because Defendants' principal place of business and personnel are all based in Austin, Texas. *See id.* at 23(b)(3)(C).

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

G. Rule 23(g) Class Counsel

Rule 23(g) complements the Rule 23(a)(4) requirement of adequate representation by establishing certain requirements for appointing class counsel. Fed. R. Civ. P. 23(g). Defendants do not contest Plaintiffs' argument and supporting declaration showing that proposed local and class counsel have not only worked to identify and investigate potential claims, but also have adequate experience handling class actions, including those brought under ERISA, knowledge of the applicable law, and resources to represent the class. *See id.* The court finds that Nina Wasow of Feinberg, Jackson, Worthman, & Wasow LLP, among other attorneys of the same firm, will "fairly and adequately represent the interests of the class." *Id.* Plaintiffs have therefore satisfied the requirements of Rule 23(g) in addition to those of Rule 23(a) and (b).

H. Rule 23(c) Subclasses

Rule 23(c)(5) permits a court to create subclasses "[w]hen appropriate." Fed. R. Civ. P. 23(c)(5) ("When appropriate, a class may be divided into subclasses that are each treated as a class under this rule."); *see also id.* at 23(c)(4) ("When appropriate, an action may be brought or maintained as a class action with respect to particular issues."). As an alternative to a global class action for participants and beneficiaries of plans that provide benefits through CERT or CPT, Plaintiffs request to certify subclasses, with one class exclusively relating to CERT alongside another class exclusively relating to CPT. To be sure, the court concludes that the global class action encompassing CERT and CPT satisfies Rule 23. But Plaintiffs seek to restore the assets of two trusts, which Plaintiffs and Defendants have interacted with separately and the court has analyzed independently. The certification of two subclasses reflects this and avoids the charge that weaker claims have been aggregated with stronger ones. *Castano*, 84 F.3d at 746 ("Class

certification magnifies and strengthens the number of unmeritorious claims."); *see also Bolin v. Sears, Roebuck & Co.*, 231 F.3d 970, 976 (5th Cir. 2000) (stating Rule 23(c) "explicitly recognizes the flexibility that courts need in class certification by allowing certification 'with respect to particular issues' and division of the class into subclasses"); *Shook v. Board of Cty. Comm'rs. of El Paso*, 543 F.3d 597, 607 (10th Cir. 2008) ("While the district court could have *sua sponte* suggested subclassing as a possible solution to Rule 23(b)(2) problems, the Supreme Court has indicated that courts do not bear any obligation to do so."); *Fink v. National Sav. & Trust Co.*, 772 F.2d 951, 961 (D.C. Cir. 1985) ("While the court need not take initiative [to construct subclasses *sua sponte*, as *United States Parole Commission v. Geraghty*, 445 U.S. 338, 408 (1980)] holds, it must weigh the possibility of subclasses or of certifying a narrower class."); *Thomas v. Clarke*, 54 F.R.D. 245, 249 (D. Minn. 1971) ("The fact that plaintiff's definition of the class needed modification does not require dismissal of the class action" because a "court can, in its discretion under [Rule 23], define a class in a manner which will allow utilization of the class action procedure.").

CONCLUSION

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

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

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

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

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

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

SIGNED this 29th day of March, 2022

LEE YEAKEL
UNITED STATES DISTRICT JUDGE