No. 19-90028

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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

Defendants-Petitioners,

v.

HERIBERTO CHAVEZ; EVANGELINA ESCARCEGA, AS THE LEGAL REPRESENTATIVE OF HER SON, JOSE ESCARCEGA; AND JORGE MORENO, individually and on behalf the Class,

Plaintiffs-Respondents.

On Appeal from the
United States District Court for the Western District of Texas
Austin Division (No. 1:17-cv-659)

PLAINTIFFS'-RESPONDENTS' RESPONSE TO PETITION TO APPEAL PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 23(f)

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I. INTRODUCTION

The district court's decision certifying the class in this case does not warrant interlocutory review. The decision reflects the routine application of well-established law to this ERISA case, in which service providers to employee benefit plans collected excessive fees, and is well-supported by the evidence and argument presented by Plaintiffs below, who more than met their burden of demonstrating that the Court should exercise its discretion to certify the class. *See* ECF Nos. 100-106, 120, 125. The objections raised by Defendants Fringe Benefit Group (FBG) and Fringe Insurance Benefits, Inc. (FIBI) are simply retreads of factual arguments that the district court decided in Plaintiffs' favor. The district court did not make any legal errors and it carefully considered the ample evidence presented, including supplemental submissions after rigorous questioning at oral argument.

Defendants' arguments against class certification boil down to the fact that the class consists of a relatively large number of participants in multiple employee benefit plans. The district court properly ignored this gambit, because Plaintiffs showed, using Defendants' documents and Rule 30(b)(6) testimony, that Defendants enter into the same contracts and provide essentially the same services to all plans. Thus, a classwide determination of the key liability issues presented by this case – whether Defendants exercised the requisite control or authority over the plans, and whether the fees Defendants collected were reasonable relative to the

services rendered – is appropriate, and far superior to individual treatment. Moreover, there are no important or unsettled legal issues raised by this petition that would justify this Court granting the extraordinary step of interlocutory review of the trial court's discretionary decision. The petition for permission to appeal under Federal Rule of Civil Procedure 23(f) should therefore be denied.

II. FACTUAL AND PROCEDURAL BACKGROUND

Defendant FBG operates the Contractors and Employees Retirement Trust ("CERT"), through which participating employers offer retirement benefits, and the Contractors Plan Trust ("CPT"), through which participating employers offer health, dental, vision, life, and other ancillary insurance policies. FBG's affiliate, FIBI, markets CPT and CERT to employers. ECF No. 100-31 at 2-3.[1]

Plaintiffs' evidence submitted in support of class certification below establishes that while each employer that joins CERT or CPT creates an individual employer plan, the terms of those plans and the employer's relationship with Defendants are set forth in standardized contract documents. These include (1) a prototype Plan Document; (2) an Adoption Agreement; and (3) a "Plan Installation and Retainer Agreement" between FBG and the employer. *Id*. at 3-4. The Retainer

[1] For ease of reference, Plaintiffs-Respondents herein cite to the briefs filed in support of their Motion for Class Certification. Those briefs include numerous citations to evidence submitted in support of the Motion. Should this Court require an evidentiary appendix to render a decision on the petition, Plaintiffs-Respondents would be glad to provide one.

Agreement states the duties of the employer and FBG, and purports to disclose all the fees and commissions associated with the plan. *Id*. There are several possible fee structures, but the types of fees charged to plans are the same across the board and in all cases, Defendants collect fees that are not expressly set forth in the Retainer Agreement. *Id*. at 10-11; ECF No. 120 at 4-5.

Defendants select the custodial investment platforms for CERT and insurance providers for plans in CPT. ECF No. 100-31 at 4-5,13; ECF No. 120 at 3-4. Specifically, Defendants act as agents for Nationwide and Transamerica to sell their platforms to retirement plans in CERT. ECF No. 100-31 at 5-6. Defendants receive "indirect compensation" for this in the same amount for every plan. ECF No. 125 at 4. On the welfare side, Defendants select the insurance companies that provide policies to CPT which are adopted by participating employers, and exercise discretion over which insurers issue policies directly to employers whose plans participate in CPT under administrative services only (ASO) arrangements. ECF No. 100-31 at 13-14, ECF No. 120 at 3-4. In addition, FBG prepares the documents used by employers to establish individual employer plans; maintains financial records; drafts participant disclosures; and calculates fee amounts. Notably, FBG, pursuant to the standardized contract documents it drafts and the Trust Agreements for the Trusts, deducts fees, including its own compensation, directly from Trust funds. ECF No. 100-31 at 3; ECF No. 120 at 2-3.

Plaintiffs claim that Defendants have engaged in prohibited transactions under ERISA § 406(b)(1) by paying themselves excessive compensation out of plan assets, and under ERISA § 406(b)(3) by receiving excessive compensation from other service providers to the plans in connection with transactions involving plan assets. ECF No. 42 at ¶ 132. Similarly, by selecting service providers to maximize their own compensation, paying themselves fees that were not completely or accurately disclosed to plans or participants, and paying themselves excessive compensation out of plan assets, Defendants breached their fiduciary duties under ERISA § 404(a)(1). *Id*. ¶ 141. All of these claims were supported below by evidence of classwide practices, including documents and testimony from Defendants' Rule 30(b)(6) representative confirming the use of standardized agreements across plans.

III. LEGAL STANDARD

The Fifth Circuit has held that "the district court maintains great discretion in certifying and managing a class action," and the appellate court "will reverse a district court's decision to certify a class only upon a showing that the court abused its discretion, or that it applied incorrect legal standards in reaching its decision." *Mullen v. Treasure Chest Casino, LLC*, 186 F.3d 620, 624 (5th Cir. 1999) (internal citations omitted). *See also Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 408 (5th Cir.1998) ("We review class certification decisions for abuse of discretion in

recognition of the essentially factual basis of the certification inquiry and of the district court's inherent power to manage and control pending litigation.") (internal citations omitted).

Most Courts of Appeal recognize that "the grant of a petition for interlocutory review constitutes 'the exception rather than the rule.'" *Vallario v. Vendehey*, 554 F.3d 1259, 1262 (10th Cir. 2009) (citation omitted). In particular, Rule 23(f) review is "disfavored" and should rarely be granted. *Prado-Steiman ex rel. Prado v. Bush*, 221 F.3d 1266, 1276–77 (11th Cir. 2000) (quoting *Waste Management Holdings, Inc. v. Mowbray*, 208 F.3d 288, 294 (1st Cir. 2000)). *See also Asher v. Baxter Int'l Inc*., 505 F.3d 736, 741 (7th Cir. 2007); *In re Delta Air Lines*, 310 F.3d 953, 959-60 (6th Cir. 2002); *Chamberlan v. Ford Motor Co.*, 402 F.3d 952, 959 (9th Cir. 2005); *Sumitomo Copper Litig. v. Credit Lyonnais Rouse, Ltd*., 262 F.3d 134, 140 (2d Cir. 2001). Specifically, appellate review pursuant to Rule 23(f) is appropriate in the limited circumstance where (1) a "certification decision turns on a novel or unsettled question of law" or (2) "[a]n order granting certification . . . may force a defendant to settle rather than incur the costs of defending a class action and run the risk of potentially ruinous liability." *Regents*

of Univ. of California v. Credit Suisse First Bos. (USA), Inc., 482 F.3d 372, 379 (5th Cir. 2007) (citing Advisory Committee notes to Rule 23(f)).[2]

As discussed below, Defendants have not shown any good reason for appellate review at this time, nor have they shown any basis on which to find that the district court abused its discretion in certifying the class.

IV. ARGUMENT

A. It is Settled Law That Participants in One Plan Can Represent a Multi-Plan Class Challenging a Standard Course of Conduct.

Defendants urge the Court to grant their 23(f) petition on the ground that this case presents "novel and unsettled questions of law," namely, whether it is appropriate to certify "a multi-plan case in which the class representatives were participants in only two of the 3,500 plans at issue." Pet. 6. This is not a novel question at all; it is well-established that participants in a single plan can represent a class of participants in multiple plans that have been subjected to a common course of conduct by fiduciaries and/or service providers to the plans. And, in any event, more than an "unsettled" legal question is necessary to warrant interlocutory appeal; "a compelling need for resolution of the legal issue sooner rather than later" is required. *Prado-Steiman*, 221 F.3d at 1266, 1274. Accordingly, the

[2] Defendants-Petitioners do not argue that they would be forced to settle rather than defending this case if the Court denies the petition. Nor do they argue the issues presented in the petition will evade review if they are not decided now, rather than at the conclusion of this litigation.

claimed unsettled issue must be "important to the particular litigation as well as important in itself" or one that is "'likely to escape effective review if left hanging until the end of the case.'" *Id.* at 1275, citing *Waste Management Holdings, Inc.*, 208 F.3d at 294. *See also Sumitomo Copper Litig.*, 262 F.3d at 140.

There is no such important legal question in this case. Contrary to Defendants' assertion that "[t]his is a case of first impression," there are many examples of certified multi-plan ERISA class actions where the plaintiff(s) only participated in one plan. *See, e.g., Rozo v. Principal Life Ins. Co.*, 2017 WL 2292834, at *3-4 (S.D. Iowa May 12, 2017); *Meidl v. Aetna, Inc*., 2017 WL 1831916, at *12-14 (D. Conn. May 4, 2017); *Teets v. Great-West Life & Annuity Ins. Co.*, 315 F.R.D. 362, 369-70 (D. Colo. 2016); *Healthcare Strategies, Inc. v. ING Life Ins. & Annuity Co*., 2012 WL 10242276, at *8 (D. Conn. Sept. 27, 2012); *Shanehchian v. Macy's, Inc*., 2011 WL 883659, at *3-5 (S.D. Ohio Mar. 10, 2011).

Further, as this Court held in *Forbush v. J.C. Penney, Inc*., 994 F.2d 1101, 1106 (5th Cir. 1993), where a participant in one ERISA plan challenges general practices that affect participants in other plans, he can represent a class of participants in all affected plans. *See also, e.g., Fallick v. Nationwide Mut. Ins. Co*., 162 F.3d 410, 411-12, 421-24 (6th Cir. 1998); *Charters v. John Hancock Life Ins. Co.*, 534 F.Supp.2d 168, 172 (D. Mass. 2007) (concluding that the reasoning of *Forbush*, *Fallick*, and *Central States SE & SW Areas Health & Welfare Fund v.*

Merck-Medco Managed Care, LLC, 504 F.3d 229, 241 (2d Cir. 2008), permitting "plaintiffs to bring class actions under ERISA on behalf of plans to which they are strangers as long as they meet Fed. R. Civ. P. 23 requirements," is "sound"); *Selby v. Principal Mut. Life Ins. Co.*, 197 F.R.D. 48, 58 n.14 (S.D.N.Y. 2000); *In re Principal U.S. Property Account ERISA Litig*., 274 F.R.D. 649, 654-56 (S.D. Iowa 2011).

Contrary to Defendants' argument, *Forbush*'s holding on this issue has not been abrogated. Pet. 15. This Court's commentary in *M.D. ex rel. Stukenberg v. Perry*, 675 F.3d 832, 840 (5th Cir. 2012) relates to the standard for finding commonality in class actions generally after *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011), not whether participants in one ERISA plan can represent a class including participants in other plans where a common course of conduct does affect all of the plans. On this latter issue, the law is settled and this Court should decline Defendants' invitation to change it.

B. The District Court Did Not Create a *Per Se* Rule Regarding Certification of ERISA Cases Under Rule 23(b)(1)(B).

Defendants accuse the district court of having adopted a *per se* rule that all ERISA cases seeking injunctive relief must be certified under Rule 23(b)(1)(B). In reality, the district court made a case-specific finding that certification under Rule 23(b)(1)(B) was appropriate because "Plaintiffs seek restitution, an accounting for profits, and an order that Defendants 'make good to the plans the losses' stemming

from Defendants' exercise of discretion and control with respect to CERT and CPT," which is relief that "would, as a practical matter, dispose of the interests of the other putative class members whether or not the Court certifies the class requested by Plaintiffs." Appendix Tab A at 8. In other words, if the district court ultimately finds that Defendants are fiduciaries of the plans in CERT and CPT based on their common course of conduct with respect to those plans, and orders Defendants to disgorge their unlawful profits and cease engaging in violations of ERISA, this holding, in the context of the facts of this case, will affect all participants in these plans. It is true that many ERISA breach of fiduciary duty and prohibited transaction cases meet the criteria for certification under Rule 23(b)(1)(B). *See* Pet. 11 (citing district court's decision at 8-10). But the fact that courts frequently certify classes in cases similar to Plaintiffs' bolsters, not undermines, the district court's decision. *See, e.g.*, *In re Beacon Assocs. Litig.*, 282 F.R.D. 315, 342 (S.D.N.Y. 2012); *Shanehchian v. Macy's, Inc.*, 2011 WL 883659, at *9 (S.D. Ohio Mar. 10, 2011); *In re Northrup Grumman Corp. ERISA Litig*., 2011 WL 3505264, at *15-17 (C.D. Cal. Mar. 29, 2011); *In re YRC Worldwide, Inc. ERISA Litig*. 2011 WL 1303367, at *10-12 (D. Kan. Apr. 6, 2011); *Hochstadt v. Boston Scientific Corp*., 708 F. Supp. 2d 95, 105 & n.12 (D. Mass. 2010); *Harris v. Koenig*, 271 F.R.D. 383, 393-94 (D.D.C. 2010).

Defendants repeat here their unsuccessful argument below that adjudication of the claims of participants in any given plan will not be dispositive of the claims of participants in other plans because "different plans require individualized analysis regarding Defendants' status as a functional fiduciary," Pet. 11. The district court correctly rejected this commonality argument on the facts presented by the parties in support of and against class certification: there are no meaningful differences among plans in CERT and CPT vis-à-vis Defendants' discretion over administration and control over plan assets. *See infra* 11-13.

Defendants also ask this Court to grant review because of asserted uncertainty about whether a class should be certified under Rule 23(b)(1) "if damages are the primary remedy sought." Pet. 12. But Defendants rely on a case that involves a different part of Rule 23. *Langbecker v. Elec. Data Sys. Corp.*, 476 F.3d 299 (5th Cir. 2007), on which Defendants rely, stated in dicta that whether a Rule 23(b)(1)(A) class can be maintained if "damages are the primary remedy sought" is "still uncertain in the Fifth Circuit." *Id*. at 318. This case was certified under Rule 23(b)(1)(B). The *Langbecker* court did not address whether certification is inappropriate under Rule 23(b)(1)(B) where the class seeks monetary relief. Further, cases decided after *Langbecker* have held that Rule 23(b)(1) certification may be appropriate even if the relief sought is primarily monetary. *See, e.g.*, *Humphrey v. United Way of Tex. Gulf Coast*, 2007 WL

2330933, at *10 (S.D. Tex. Aug. 14, 2007) (holding that class could be certified under Rule 23(b)(1) even assuming that relief sought was primarily monetary, because holding otherwise would make the requirements of Rule 23(b)(1) coextensive with the requirements of Rule 23(b)(2), rendering Rule 23(b)(1) "superfluous or redundant."). Finally, the relief Plaintiffs seek pursuant to ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3), is not "damages," but rather traditional equitable remedies that can take the form of money payments. *See Cigna Corp. v. Amara*, 563 U.S. 421, 441-42 (2011); *Gearlds v. Entergy Servs., Inc.*, 709 F.3d 448 (5th Cir. 2013); ECF No. 120 at 16-17. This district court did not apply an incorrect legal standard or otherwise err in certifying the class under Rule 23(b)(1)(B).

C. The District Court Did Not Abuse its Discretion in Certifying the Class.

1. Plaintiffs Established Common Issues of Law and Fact.

According to Defendants, Plaintiffs did not establish commonality because there are several thousand plans that participate in CPT and CERT, and the plans "differ in significant ways." Pet. 7, 14. But as Plaintiffs demonstrated through evidence submitted to the district court, Defendants provide materially identical services to the plans pursuant to materially identical contracts. Defendants' rhetorical protests to the contrary notwithstanding, the key questions in this case – whether Defendants are fiduciaries and whether they breached their fiduciary

duties – can be answered "in one stroke" based on common proof, because there is no meaningful variation in the powers that Defendants exercise over every plan in CERT and CPT. *See Wal-Mart*, 564 U.S. at 350.

For every plan in CERT, Defendants select the Trustee and the two possible investment platform providers (Nationwide and Transamerica). For every plan in CPT, Defendants select the Trustee and exercise control over the choice of insurance carrier as well as the insurance premium participants pay. For every plan in both CERT and CPT, Defendants exercise control over participants' money by withdrawing their fees from plan accounts. *See* ECF No. 100-31 at 3-5, 6-9, 12-13 and evidence cited therein; ECF No. 120 at 3-5 and evidence cited therein; ECF No. 111-2 at ¶¶ 13-14; ECF No. 114-1 at ¶¶ 6, 9, 16.

Defendants point to variations among plans including whether they used a broker or legal counsel during the negotiation process, whether they included actively or passively managed investments, and the employer's choices about what benefits to provide. Pet. 5. But Defendants failed to articulate below why these differences are *material* to the claims and defenses in this case, and likewise fail to do so again now. Plaintiffs allege that Defendants collected fees that were excessive relative to the services rendered and were not expressly authorized by contract, and there is no real dispute that the contracts and services were the same across plans. Thus, the district court did not abuse its discretion in concluding that

plaintiffs' claims raise common issues of law and fact across the class. *See, e.g., In re Enron Corp.*, 2006 WL 1662596, at *9 (S.D. Tex. June 7, 2006) (holding that resolution of defendants' fiduciary status and breach "will not depend upon which plan participant sues on behalf of each Plan, but are common to all members of the class").

2. Plaintiffs Established Typicality and Adequacy.

The district court carefully examined the named Plaintiffs' typicality and adequacy, focusing a great deal of attention on these factors at oral argument. Appendix Tab B at 3-4, 11-13, 22-24, 29-31. The court then required supplemental briefing after argument. Having considered all of the arguments and evidence submitted, the court rejected Defendants' argument that Plaintiffs' claims cannot be typical simply because the absent class members participated in different plans. Appendix Tab A at 6.

Defendants repeat arguments here that failed to persuade the district court. Defendants attempt to manufacture an abuse of discretion, by asserting that the named Plaintiffs did not actually participate in CPT because their welfare plan was insured by a policy issued to their employer, TRDI. Pet. 16. But TRDI undisputedly entered into an Adoption Agreement for CPT, and Defendants provided administrative and other services to the TRDI welfare plan under the auspices of CPT. ECF Nos. 110-16, 110-17. Thus, the evidence below

demonstrated that Plaintiffs participated in CPT. The TRDI plan was one of many ASO plans, which enter into an Adoption Agreement to participate in CPT and route contributions of premium and fees through CPT. ECF No. 100-31 at 13; ECF No. 120 at 13-14. They receive the same services from Defendants as do plans that purchase coverage through one of the policies issued directly to CPT. ECF No. 120 at 14. Plaintiffs' claims regarding Defendants' exercise of control over plan assets and collection of excessive fees are the same for ASO plans as all other plans.

Further, contrary to Defendants' contention, the district court did not shift the burden to Defendants to defeat typicality. *See* Appendix Tab A at 5-6 (noting that "the plaintiff must establish" that the requirements of Rule 23(a)(3) are met). It found that the named Plaintiffs' claims "are typical of those of the putative class because they depend on a common course of conduct and share the same legal theory," specifically, that Defendants used their control over CERT and CPT to select service providers to maximize their own compensation and extract extracontractual fees from Plaintiffs' plans "as well as other plans organized through those trusts." *Id*. at 6. This is sufficient. *See Stirman v. Exxon Corp*., 280 F.3d 554, 562 (5th Cir. 2002) (typicality requirement is met if "the class representative's claims have the same essential characteristics as those of the putative class," and if "the claims arise from a similar course of conduct and share the same legal theory").

Plaintiffs did submit substantial evidence that their claims are typical of those of the class. *See* ECF Nos. 103-105, 106-3, 106-4, 106-5; *see also* ECF No. 100-31 at 2-15 and evidence cited therein. Defendants disagree with the district court's decision to credit this evidence, but that does not mean the district court abused its discretion.

Defendants' argument about adequacy likewise falls flat. They accuse the district court of ignoring a conflict between the named Plaintiffs – whose retirement plan used the Nationwide platform – and absent class members whose plans used the Transamerica platform, because Defendants negotiated a fee reduction with Transamerica that did not redound to Plaintiffs' benefit. Pet. 17. This issue too was raised below, and Defendants failed to convince the trial court. What Defendants fail to mention here is that Plaintiffs submitted evidence to the district court that Defendants also negotiated a fee reduction with Nationwide, ECF No. 120 at 15, and plans' fee arrangements are the same whether the investment platform is Nationwide or Transamerica. ECF No. 121-2 at 33:22-25. There is no conflict at all, much less a "material" or "fundamental" conflict that would interfere with the named Plaintiffs' ability to act as adequate class representatives. *See In re Deepwater Horizon*, 739 F.3d 790, 813 & n.99 (5th Cir. 2014).

3. The Temporal Scope of the Class is Appropriate.

The district court appropriately certified a Class dating back to 2011, six years before the filing of the Complaint in this case, based on the applicable ERISA statute of limitations. 29 U.S.C. § 1113. Defendants cite no authority in support of their position that the class period in this case should not go back further than 2014, when the named Plaintiffs began participating in CPT and CERT (and should not continue past 2016, when the named Plaintiffs' employer terminated its relationship with Defendants). The court in *Braden v. Wal-Mart Stores*, Inc., 588 F.3d 585, 592-93 (8th Cir. 2009) rejected a very similar argument. There, the plaintiff did not become a participant in the plan at issue until more than a year after the beginning of the class period. *Id*. The Eighth Circuit held that he could proceed with ERISA claims "for the entire period embraced by his complaint" because he had established his own Article III standing, and "the relief that may be appropriate" under ERISA "is not necessarily limited to the period in which he personally suffered injury." *Id*. (citing *Fallick* in support, which is consistent with the Fifth Circuit's decision in *Forbush*). This decision was well-supported by law and evidence, well-within the district court's discretion, and presents no substantial issue that would warrant this Court's review. There is no basis in law or fact for this Court to grant review in order to limit the class to the period of time in which the named Plaintiffs participated in the Trusts.

D. The District Court's Analysis of the Rule 23 Requirements Was Sufficient.

The district court made the class certification decision with the benefit of an "incredible" volume of materials submitted by the parties. Appendix Tab B at 2. The transcript of the hearing on the motion shows the district court's thoughtful consideration of both the Rule 23 factors and merits issues that are intertwined with class certification. *See id*. at 3-4 (questioning Plaintiffs' counsel regarding the class representatives' adequacy), 6-7 (colloquy with Plaintiffs' counsel regarding attributes of the class representatives as compared to absent class members), 10-11 (questioning Plaintiffs' counsel regarding classwide damages methodology), 12 (discussing Defendants' asserted class conflict), 13-15 (discussing commonality), 24-29, 32-36 (colloquy regarding Plaintiffs' theory of liability and whether Plaintiffs' claims can be proven with classwide evidence). The parties were invited to, and did, submit supplemental briefing on the issues discussed at oral argument. ECF Nos. 124-25. The order certifying the class engaged with Defendants' arguments against certification and cited evidence submitted by the parties. Appendix Tab A at 2-9.

What matters for this Court's review is whether the district court's reasoning was sound on the basis of the record presented to it. *See Postawko v. Missouri Dept. of Corrections*, 910 F.3d 1030, 1037 (8th Cir. 2018) ("The evidence submitted by both parties was sufficient to permit the district court to conduct a

'rigorous analysis' into whether or not class certification was appropriate."). *Cf. Perez v. State Farm Mut. Auto. Ins. Co*., 628 Fed. Appx. 534, 535 (9th Cir. 2016) (holding that district court did not abuse its discretion in concluding that it could not conduct a rigorous analysis "[g]iven the complete lack of evidence" on an issue in the case). The record before the court below more than supports class certification.

Every litigant that has ever lost a motion can likely point to arguments they wished the court gave more attention in writing, as Defendants do here. Simply put, it would elevate form over substance, and waste the resources of this Court, to grant review in order to remand to the district court to write a more detailed order when this case is clearly appropriate for class treatment. *See In re Beacon Assocs*., 282 F.R.D. at 342 (calling participant/beneficiary suits challenging fiduciary violations "a paradigmatic example" of a proper class action).

V. CONCLUSION

Plaintiffs and the Class respectfully request that the Court deny Defendants' Rule 23(f) petition.

Respectfully submitted this 23rd day of September, 2019.

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