

**UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

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

Plaintiffs-Appellees,

v.

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

Defendants-Appellants.

On Appeal from the United States District Court
for the Western District of Texas, Austin Division
1:17-cv-659, Hon. Sam Sparks

**BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES
OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANTS-
APPELLANTS AND REVERSAL**

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CORPORATE DISCLOSURE STATEMENT

The Chamber of Commerce of the United States of America is a non-profit corporation organized under the laws of the District of Columbia. It has no parent corporation, and no publicly held corporation owns ten percent or more of its stock.

CERTIFICATE OF INTERESTED PERSONS

Chavez, et al. v. Plan Benefit Services, Inc., et al., No. 19-50904

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

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INTEREST OF THE *AMICUS CURIAE*¹

Founded in 1912, the Chamber of Commerce of the United States of America (the “Chamber”) is the world’s largest business federation. The Chamber represents approximately 300,000 direct members and indirectly represents the interests of more than three million businesses and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members by participating as *amicus curiae* in cases involving issues of concern to American businesses, such as this one.

The Chamber has a substantial interest in the issues presented in this case. The Chamber’s members include many employers that sponsor benefit plans governed by the Employee Retirement Income Security Act of 1974 (“ERISA”), as well as companies that provide services to those plans. The decision below implicates the interests of both: Under the type of massive, participant-driven, multi-thousand-plan class proceeding authorized by the district court, plan fiduciaries will evidently be cut out of litigation seeking to dismantle the arrangements they negotiated and executed on behalf of their individual plans—exposing them to potential liability for arrangements now labeled unreasonable by

¹ All parties have consented to the filing of this brief. No counsel for any party authored this brief in whole or in part and no entity or person, aside from amicus, its members, and its counsel, made any monetary contribution intended to fund the preparation or submission of this brief.

plaintiffs who are complete strangers to their plans. And plan service providers will be drawn into uniquely expensive and time-consuming litigation in which the individual features of their plan relationships will dominate the fact-finding process. That outcome contravenes the text and goals of ERISA as well as Rule 23 and foundational constitutional principles. The Chamber believes that the experience of its members with these problems makes it well qualified to address the issues presented by the participant-led multi-plan class certified by the district court in this case.

SUMMARY OF ARGUMENT

The district court in this case certified a class of 90,000 participants in 3,500 different employee benefit plans in a challenge to distinct service provider arrangements negotiated and executed by the fiduciaries to each of those many plans. But a class proceeding of participants in multiple plans cannot legally or practically resolve the reasonableness of thousands of disparate bargains in one fell swoop. The class certification order contravenes Article III of the U.S. Constitution, ERISA, and Rule 23.

An individual who is not a participant in an ERISA-governed employee benefit plan cannot assert a claim challenging the plan's contractual arrangements with its service providers. Such an individual lacks Article III standing to vindicate the ERISA claims of an unrelated plan: A plaintiff must have suffered an

injury traceable to the complained-of conduct, but an individual who has no relationship to a benefit plan cannot possibly articulate an injury deriving from that unrelated plan's service arrangements. The text of ERISA reinforces this limitation, granting participants in a plan the authority to litigate on behalf of their own plan alone. These standing limitations guard against the very real risk that participant-driven class litigation will upend unrelated plans' individual service arrangements, to the *detriment* of absent plans and participants, when the class representative has no stake in or even knowledge about the particulars of those arrangements, and has no reason to fault the decision making of the thousands of fiduciaries who approved the arrangements on behalf of their individual plans.

These fundamental standing limitations cannot be circumvented by using Rule 23. On the contrary, a class action lawsuit that purports to singularly resolve the reasonableness of thousands of distinct—and distinctly negotiated—plan service arrangements flunks the requirements of Rule 23. The contested issues in such a proceeding would require thousands of mini-trials to analyze the terms of each plan's relationship with its service providers. And a class representative who has no relationship to the plans he purports to represent cannot fairly and adequately represent the interests of the participants in those plans, which are administered on a day-to-day basis by independent fiduciaries bound by duties of loyalty and prudence. This style of action proposes to supplant the considered

judgments of those independent plan fiduciaries—exposing them to potential fiduciary liability—apparently without involving those fiduciaries at all, or accounting for the unique requirements and considerations that led to their approval of the service arrangements now being questioned by a handful of participants in an unrelated plan.

For similar reasons, a participant-led challenge to the reasonableness of unrelated plans' service arrangements cannot meet the requirements of Rule 23(b)(1)(B). A class certified under that subsection affords class members no notice and opt-out rights and must therefore be cohesive. But in a participant-led multi-plan class, the individual plan-level issues raised by each claim overwhelm any issues conceivably common to each plan. There is also an inherent conflict between the class representatives and the participants in plans whose independent fiduciaries carefully negotiated the service arrangements that would be disrupted by the litigation. In effect, the district court used a Rule 23(b)(1)(B) class to circumvent the stringent requirements for certifying a Rule 23(b)(3) class, including predominance—but Rule 23(b)(1)(B) itself precludes that end-run.

The district court's class certification decision imperils the ability of plan fiduciaries to manage their plans as ERISA contemplates, free of the interference of strangers, and sets the stage for behemoth proceedings to be brought against

plan service providers at the ultimate expense of the participants whose interests the class representatives purport to protect. It should be reversed.

ARGUMENT

I. INDIVIDUALS DO NOT HAVE STANDING TO PURSUE CLAIMS ON BEHALF OF EMPLOYEE BENEFIT PLANS IN WHICH THEY ARE NOT PARTICIPANTS.

Individuals who have absolutely no relationship to employee benefit plans have neither constitutional standing nor a cause of action under ERISA to press claims on behalf of those plans.

To establish standing, a plaintiff must show that he or she (1) has suffered an injury in fact that (2) is fairly traceable to the challenged conduct of the defendant and (3) is likely to be redressed by a favorable judicial decision. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992). When an individual is not a participant in or beneficiary of a plan, he cannot trace any injury to that plan’s service arrangements and thus cannot satisfy traditional constitutional standing requirements.

He also cannot demonstrate that he has a cause of action under ERISA—so-called statutory standing—to press claims on behalf of plans to which he has no connection. ERISA § 502(a)(2) permits an individual to bring a claim for breach of fiduciary duty on behalf of a plan only if he is a “participant” in or “beneficiary” of that plan, unless he is a plan fiduciary or the Secretary of Labor. 29 U.S.C.

§ 1132(a)(2). ERISA defines each of those terms explicitly: A “participant” is “an employee or former employee . . . who is or may become eligible to receive a benefit of any type from an employee benefit plan,” and a “beneficiary” is a “person designated by a participant, or by the terms of an employee benefit plan, who is or may become entitled to a benefit thereunder.” *Id.* § 1002(7), (8). An individual advancing the claims of an unrelated plan is not a participant in or beneficiary of that plan.

It is well-established that the limited authority that ERISA grants to individuals to assert claims on behalf of plans extends only to individuals who have some connection to those plans. *See Acosta v. Pac. Enters.*, 950 F.2d 611, 617 (9th Cir. 1991), *as amended on reh’g* (Jan. 23, 1992) (concluding that plaintiff “lacks standing to challenge decisions affecting ERISA plans in which he does not participate”). Individuals who are participants in one plan cannot derivatively represent other plans any more than a shareholder in a single company can represent the interests of thousands of unrelated corporations. *See Debra A. Demott, Shareholder Derivative Actions: Law & Practice* § 2:2 (2011).

These constitutional and statutory standing limitations ensure that litigants have a stake in their actions and a factual basis to prosecute them. They prevent individuals with no connection to, or knowledge of, the particulars of a plan from upending that plan’s individually negotiated arrangements with service providers

when the plaintiffs have no understanding of those arrangements, much less a reason to question them. Perversely, permitting individuals to advance the claims of unrelated plans would substitute the judgment of their lawyers for the considered, fact-based determinations of the independent plan fiduciaries charged with fiduciary duties of loyalty and prudence to make judgments in the sole interests of their plans—a system that ERISA neither establishes nor authorizes.

II. THESE LIMITATIONS CANNOT BE OVERCOME BY CERTIFYING A PARTICIPANT-LED MULTI-PLAN CLASS ACTION.

The class device cannot be used to circumvent the constitutional and statutory limitations that preclude a participant in a single benefit plan from asserting claims on behalf of participants in thousands of other plans to which he has no connection.

For a lawsuit to proceed as a class action, it must survive a “rigorous analysis”: First, it must satisfy the prerequisites of Rule 23(a); then, it must qualify as one of the types of classes described in Rule 23(b). *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 345, 350-51 (2011). Participant-led multi-plan lawsuits, like the suit at issue here, cannot survive the requisite analysis under either 23(a) or 23(b), and so the class device cannot overcome the constitutional and statutory limitations that preclude these actions.

A. Participant-Led Multi-Plan Actions Cannot Satisfy Rule 23(a)’s Prerequisites.

Rule 23(a) establishes four prerequisites for class certification: “numerosity, commonality, typicality, and adequate representation.” *Dukes*, 564 U.S. at 349; *see also* Fed. R. Civ. P. 23(a). Together, these four requirements “ensure[] that the named plaintiffs are appropriate representatives of the class whose claims they wish to litigate.” *Dukes*, 564 U.S. at 349. Although a participant-led multi-plan suit invariably will satisfy the numerosity requirement, it cannot satisfy the remaining three prerequisites, rendering class treatment of such a suit inappropriate.

1. The Claims In A Participant-Led Multi-Plan Action Do Not Depend On A Common Contention Capable Of Classwide Resolution.

A member of one employee benefit plan cannot prove that a challenge to the distinctly negotiated third-party service arrangements of thousands of different employee benefit plans presents “questions of law or fact common to the class” as required under Rule 23(a)(2). *See* Fed. R. Civ. P. 23(a)(2). To satisfy that requirement, class representatives must show that “[t]heir claims . . . depend upon a common contention . . . of such a nature that it is capable of classwide resolution.” *Dukes*, 564 U.S. at 350. “What matters to class certification,” in other words, “is not the raising of common questions . . . but rather the capacity of a class-wide proceeding to generate common *answers* apt to drive the resolution of

the litigation.” *Id.* (quotation omitted). If the evidence in the case varies from class member to class member instead of generating common answers, the class is not “common” for purposes of Rule 23(a)(2). *See id.* at 352 (commonality not present where it was “impossible to say that examination of all the class members’ claims for relief will produce a common answer to the crucial question”).

Such is the case here. Far from generating common answers, the crucial evidence in a multi-plan lawsuit attacking separately negotiated third-party service arrangements will necessarily vary for each plan. For example, one of the plaintiffs’ claims in this case is that the defendant service providers breached alleged fiduciary duties under ERISA § 502(a)(2) and (a)(3) by paying themselves excessive compensation from plan assets. Resolution of that claim requires two determinations: (1) whether the service providers were fiduciaries with respect to the plan and the compensation their clients agreed to pay for their services; and (2) whether that compensation was excessive. Neither of those determinations can be made with evidence and answers common to a class involving different plans.

A service provider may become a fiduciary of an ERISA plan if it acts as a “functional fiduciary” by virtue of the authority it holds over plan assets. *Teets v. Great-W. Life & Annuity Ins. Co.*, 921 F.3d 1200, 1206 (10th Cir. 2019).

Determining whether a service provider is a fiduciary to any given plan depends, at minimum, on evaluating, at the individual plan level, the provider’s agreements

with its plan clients and the extent to which those agreements vest fiduciary control in the provider. *See id.*; *see also* 29 U.S.C. § 1002(21)(A). When it comes to the fees the service provider receives for its services to plans, the provider is not a fiduciary so long as the compensation terms have been approved by an independent fiduciary. *See, e.g., Santomenno ex rel. John Hancock Tr. v. John Hancock Life Ins. Co. (U.S.A.)*, 768 F.3d 284, 297 (3d Cir. 2014) (service provider not a fiduciary because, even though it had contractual right to change fees on advance notice, “ultimate authority still resided with the trustees, who had the choice whether to accept or reject [the service provider’s] changes”). It is extremely unlikely a service provider would accept fiduciary status over its own fees, as that would preclude the provider from earning any profit at all. *See Acosta v. City Nat’l Corp.*, 922 F.3d 880, 886 (9th Cir. 2019) (ERISA precludes a fiduciary from determining its own compensation and limits any self-determined payment to direct expenses). But even if it were alleged that the service provider had negotiated fiduciary control over its compensation, that fact could not be resolved against the service provider without consulting the full range of documents delimiting the provider’s relationship with each and every plan client. That question is inherently incapable of classwide resolution.

Determining whether compensation is excessive for any given plan also demands an individualized inquiry that is not conducive to classwide resolution.

The compensation that service providers receive depends on arrangements that are individually negotiated by plan fiduciaries. The service providers' compensation in this case, for example, depends on the employers' selections from several different types of plans and investment platforms, as well as the number of participants in and value of the assets held by each plan. Whether a given plan's arrangement was reasonable would depend on a range of plan-specific factors, including the full range of terms negotiated by that plan, the alternatives available to it in the marketplace, and the quality of the investigation that each plan's fiduciary conducted prior to finalizing the challenged arrangement. *See, e.g., Pension Ben. Guar. Corp. ex rel. St. Vincent Catholic Med. Ctrs. Ret. Plan v. Morgan Stanley Inv. Mgmt. Inc.*, 712 F.3d 705, 716 (2d Cir. 2013) (the prudence standard "focuses on a fiduciary's conduct in arriving at an investment decision, not on its results, and asks whether a fiduciary employed the appropriate methods to investigate and determine the merits of a particular investment" (internal quotation marks and alterations omitted)); *Bunch v. W.R. Grace & Co.*, 555 F.3d 1, 7-10 (1st Cir. 2009) (establishing that prudence on the part of individual fiduciaries depends on the appropriateness and thoroughness of an investigation, not its outcome). Variations among individual plans' service requirements and fee arrangements only reinforce that claims across different plans will not stand or fall on common proof. *See M.D. ex rel. Stukenberg v. Perry*, 675 F.3d 832, 843 (5th

Cir. 2012) (“[I]f the merits of each class member’s . . . claims depend on an individualized inquiry . . . , then dissimilarities within the proposed class would appear to prevent the class claims from asserting a common question of law that will resolve an issue that is central to the validity of each one of the claims in one stroke.” (internal quotation marks omitted)).

This litigation cannot proceed without accounting for each of these plan-level variations. To decide the central issues in this case, the district court would have to evaluate factors individual to each plan, including the considerations that each fiduciary accounted for when selecting their plan’s service arrangement—yet that could not happen without holding thousands of mini-trials. Such a docket-busting proceeding would necessarily surrender any advantages of the class device.

2. Participants In Individual Plans Are Neither Typical Nor Adequate Representatives Of Classes Of Participants In Other Plans.

A participant-led multi-plan suit also fails to satisfy Rule 23(a)’s typicality and adequate representation requirements. Those requirements are calculated to ensure that there is sufficient congruence between the named representative’s claim and that of the unnamed members of the class, and that there are no class conflicts that would prevent the interests of the class members from being fairly and adequately represented in their absence. *See Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 157 n.13 (1982); *see also Amchem Prods., Inc. v. Windsor*, 521 U.S.

591, 625 (1997) (adequacy focuses on “uncover[ing] conflicts of interest between named parties and the class they seek to represent”). A district court could never comprehensively analyze adequacy and typicality in this context, when the contexts of unrelated plan arrangements are neither known to the class plaintiffs nor before the court. But a few inherently competing interests are obvious.

First, participants in individual plans are ill-suited to represent a class of participants in thousands of other plans on claims that, if successful, would effectively undo investment or other procurement decisions that each plan’s fiduciaries made for their participants. ERISA dictates that every plan will be administered by one or more “named fiduciaries,” 29 U.S.C. § 1102(a)(1), “who jointly or severally shall have authority to control and manage the operation and administration of the plan,” *id.*; *see also* 29 C.F.R. § 2550.404c-1. Those fiduciaries individually negotiate the service arrangements for each plan and are bound by duties of loyalty and prudence in doing so. *See* 29 U.S.C. § 1104(a).

Here, a few individuals are purporting to put themselves in the fiduciaries’ shoes—not simply on behalf of their own plans, but on behalf of thousands of other plans nationwide to which they are complete strangers. But the individuals driving this litigation know nothing about the considerations and tradeoffs involved in negotiating the service arrangements particular to each plan and are not equipped to question the judgment of the fiduciaries who initially selected, and

continuously monitor, their own plans' individual arrangements. This type of participant-led multi-plan class action inexplicably puts unrelated individuals at the helm of a litigation juggernaut, allowing their preferences to supersede those of the fiduciaries for each plan.

Second, this type of class action threatens not only to disrupt the fiduciaries' carefully negotiated service arrangements, but also to expose the fiduciaries themselves to liability. Whether named or functional, a fiduciary with respect to an ERISA plan has a duty of care and loyalty with respect to management of the plan, *see* 29 U.S.C. § 1104(a), and can be held personally liable for breaching that duty, *see 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 . . . shall be personally liable . . .”). If a service provider's compensation were found unreasonable as part of a participant-led multi-plan class action, it would suggest that the fiduciaries of each plan whose participants were included in the class breached their own duty to approve only reasonable expenses. *See id.* § 1108(b)(2) (providing that contracting with a service provider is a prohibited transaction unless “no more than reasonable compensation is paid”). If the service provider were to escape liability on a showing that it did not exercise fiduciary control over compensation terms judged unreasonable, the plan fiduciaries would have targets on their backs inviting litigation by their own participants.

Ordinarily, the potential impact of this proceeding on the contractual arrangements struck by distinct plan fiduciaries and on the fiduciaries' own personal liability would indicate that the fiduciaries are necessary parties who must be afforded the opportunity to intervene to protect and defend the arrangements they negotiated. In a single-plan action, for example, when the suit has the potential to invalidate a plan's agreements or expose a fiduciary to liability, that fiduciary is a necessary party and so can move to intervene in or assume control of the lawsuit. *See* Fed. R. Civ. P. 24(a); *see also* 29 U.S.C. § 1132(a)(2)-(3). In a participant-led multi-plan class action, however, the fiduciaries appear to have no contemplated role—with the result that their carefully negotiated service arrangements are threatened without their having any say at all in the litigation. Even if plaintiffs proposed an opt-out class (plaintiffs here propose a mandatory class), the franchise would belong to the participants in each plan, and the named fiduciaries of thousands of plans would apparently be powerless to exclude their plans from the litigation or otherwise influence how it might affect their service arrangements. But that does not make the fiduciaries' right to participate as a matter of due process and the federal rules go away. At the same time, it is no solution to permit the fiduciaries to intervene en masse to protect their plans' interests and explain the potential impact of this litigation on their plan

administration, as the massive manageability concerns entailed by such a multilateral proceeding would be wholly inconsistent with the class device.

The effects of a multi-plan class proceeding would be felt not just by the fiduciaries of the unrelated plans, but by the *participants* in those plans as well. If fiduciaries' carefully negotiated service arrangements can be subject to challenge by individuals who participate in unrelated plans, that will disturb arrangements that the fiduciaries have determined best serve the interests of their participants in favor of whatever one-size-fits-all approach is preferred by the class representatives and their lawyers. It may also limit fiduciaries' flexibility in negotiating arrangements that serve the interests of their plan participants based on the distinctive individual circumstances of their plans, which may look nothing like the disparate requirements and features of the thousands of other plans who have selected a common service provider.

Different plans may negotiate a different array of services for the same fee. They may also bundle fees, or services, or both, making it impossible to evaluate any element of that bundle in isolation: A plan fiduciary may negotiate to compensate the plan's recordkeeper through revenue sharing from the plan's investment options, for example, such that the reasonableness of the plan's investment expenses cannot be determined without considering the additional recordkeeping services they pay for. As the Department of Labor and many courts

have cautioned, the reasonableness of a plan's fees must be considered contextually, as part of the plan's overall bargain. *See* U.S. Dep't of Labor, Employee Benefits Security Admin., "A Look at 401(k) Plan Fees," at 7 (Aug. 2013) (when "services and investment options . . . are offered through a bundled program," "[c]ompare the services received in light of the total fees paid"); *see also* *Scott v. Aon Hewitt Fin. Advisors, LLC*, 2018 WL 1384300, at *11-12 (N.D. Ill. Mar. 19, 2018) (for a "bundle" of investment services reasonableness should be examined based on the "total compensation . . . paid"). But if a participant-led multi-plan class action does not allow for that kind of context-driven assessment, it would drive simplistic, generic solutions to complex problems. That, in turn, would compromise the interests of the thousands of plan participants who are needlessly swept into a class comprising the participants in unrelated and distinct plans. The conflicts inherent in a multi-plan class proceeding in which the participants in unrelated plans would control the futures of plans ably represented by independent fiduciaries foreclose certification consistent with Rule 23(a)'s typicality and adequacy requirements.

B. Participant-Led Multi-Plan Classes Cannot Be Certified Under Rule 23(b)(1)(B).

Even if a participant-led multi-plan class could satisfy the prerequisites of Rule 23(a), such a class cannot be certified under Rule 23(b)(1)(B), as the district court did here. The text and structure of Rule 23 establish that classes certified

under Rule 23(b)(1) must be cohesive, a requirement that a participant-led multi-plan class action cannot satisfy.

1. A Rule 23(b)(1) Class Must Be Cohesive.

A class certified under Rule 23(b)(1)(B) must be cohesive and homogenous, without conflicting interests among its members. Rule 23(b)(1)(B) provides that a class action may be maintained when the prosecution of separate actions by individual class members would create “a risk of . . . adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of” absent class members “or would substantially impair or impede their ability to protect their interests.” Fed. R. Civ. P. 23(b)(1)(B). The adjudication of an individual’s claims can only have this type of practical effect on the claims of others if there is cohesiveness within the class—that is, the individual claims of the class members must be “so intertwined that adjudication of one will *necessarily* impinge on the other.” 2 Newberg on Class Actions § 4:2 (5th ed.) (emphasis added). Variations in the relevant facts or the interests at stake would enable a court to adjudicate the claims of one individual without necessarily affecting others, and so eliminate the need for the class device.

That Rule 23(b)(1)(B) requires cohesiveness within a class is also supported by the structure of the Rule. Section (c)(2) of Rule 23 explains the level of notice required for different types of class actions. For (b)(3) classes (classes where

common issues predominate over individual ones and the class device is superior to other methods of adjudication), “the court *must* direct to class members the best notice that is practicable under the circumstances.” Fed R. Civ. P. 23(c)(2)(A)-(B) (emphasis added). But “[f]or (b)(1) or (b)(2) classes,” the court “*may* direct appropriate notice.” *Id.* (emphasis added). In other words, Rule 23(b)(1) and (b)(2) classes, unlike Rule 23(b)(3) classes, do not provide an absolute right to notice or an opportunity to opt out. *Id.*; see also *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 846-48 (1999) (contrasting mandatory nature of (b)(1) classes with (b)(3) classes under which notice to all class members is required). The reason for that difference, the drafters explained, is the inherently cohesive nature of the 23(b)(1) and (b)(2) classes. See Fed. R. Civ. P. 23, supplementary note of advisory committee on 1966 Amendment (“In the degree that there is cohesiveness or unity in the class and the representation is effective, the need for notice to the class will tend toward a minimum.”). When a class is cohesive, “there is less reason to be concerned about each member of the class having an opportunity to be present” and so notice and an opportunity to opt out are not essential. *Juris v. Inamed Corp.*, 685 F.3d 1294, 1319 n.23 (11th Cir. 2012) (quoting 7AA Charles Alan Wright et al., *Federal Practice & Procedure* § 1786 (3d ed. 2005)).

This court, and others, have applied that logic, explaining that “different presumptions with respect to the cohesiveness and homogeneity of interests among

members of (b)(1), (b)(2), and (b)(3) classes are reflected in the different procedural safeguards provided for each potential class.” *Allison v. Citgo Petrol. Corp.*, 151 F.3d 402, 412 (5th Cir. 1998). That the drafters did not provide absolute rights to “notice or to opt-out” for (b)(1) classes suggests they understood those classes “to be [] homogenous and cohesive group[s] with few conflicting interests among [their] members.” *Id.* at 412-13. Cohesiveness, then, is key if members of a (b)(1) class will not be notified of the existence of the class action or afforded the opportunity to opt out of it. It is what enables “an adequate class representative . . . as a matter of due process, [to] bind all absent class members by a judgment.” *Walsh v. Great Atl. & Pac. Tea Co.*, 726 F.2d 956, 963 (3d Cir. 1983) (citing *Hansberry v. Lee*, 311 U.S. 32, 43 (1940)); *see also Casa Orlando Apts., Ltd. v. Fed. Nat’l Mortg. Ass’n*, 624 F.3d 185, 199 (5th Cir. 2010) (“[P]rocedural safeguards” of “notice or opt-out” rights “are not required” when the “class is presumed to be homogeneous in nature, with few conflicting interests among its members.”). Expanding the Rule 23(b)(1) device to circumstances without such cohesiveness would raise serious due process and fairness concerns, by circumventing the requirements and protections for Rule 23(b)(3) actions. That is not the framework the drafters of the Rule established.

2. The Requisite Cohesiveness Does Not Exist In A Participant-Led Multi-Plan Class.

Participant-led multi-plan classes challenging disparate third-party service arrangements, like the class at issue here, do not have the necessary cohesiveness to permit certification under Rule 23(b)(1). The service arrangements of each ERISA plan, as described above, are individually negotiated by a fiduciary owing a duty of loyalty and prudence to its own participants and beneficiaries. *See* 29 U.S.C. § 1104(a). It follows that those arrangements will vary depending on the fiduciaries' choices, judgment, and negotiations. Given this variety, the plan-level questions raised by each individual claim will far outnumber any questions that might be resolved uniformly across plans, and the claims of class members will not be so "intertwined that adjudication of one will necessarily impinge on the other." 2 Newberg on Class Actions § 4:2 (5th ed.); *see Bazemore v. Friday*, 478 U.S. 385, 406-07 (1986) (Brennan, J., concurring) (concluding that certification under Rule 23(b)(1)(B) was improper where each claim depended on whether an individual county acted in an intentionally discriminatory manner). Certification under Rule 23(b)(1)(B) cannot be used to sidestep the individualized considerations that would obviously dominate the resolution of the questions presented.

Moreover, a court could easily grant relief with respect to an individual plan without drawing in the arrangements of unrelated plans. This case illustrates the point. Here the plans' individual fee arrangements *already* differ. Those

differences depend on varying considerations—the size and type of plan, the investment platform the fiduciaries select, the number of participants, and so on—but the key is that service providers are already able to negotiate individualized arrangements. That being so, a court can conduct an assessment of the reasonableness of one plan’s arrangement, and order appropriate relief, without affecting the arrangements of other plans—which may, after all, be perfectly reasonable based on the individual circumstances of each of those other plans. The class vehicle is not necessary to guard the interests of absent class members, which may very well be harmed by relief apportioned in broad strokes.

Ultimately, unitary classwide adjudication of these claims would have the opposite of the desired effect, frustrating rather than advancing the purposes of the class vehicle. Allowing a participant in one plan to represent the interests of participants in thousands of different plans will allow that individual—who has no connection whatsoever to the plans of which he is not a member—to displace the preferences, interests, and considered judgments of the fiduciaries who negotiated service arrangements for those plans. Simply put, certification of a participant-led multi-plan class under Rule 23(b)(1)(B), far from protecting the interests of absent class members, needlessly draws those class members in and then displaces their interests and preferences (along with the judgments of their individual plan fiduciaries), without affording them (or their plans) an opportunity to opt out.

To be sure, “[c]ourts considering whether to certify ERISA breach of fiduciary duty claims have consistently . . . conclud[ed] that subsection 23(b)(1)(B) is the most appropriate basis for class certification.” *In re Marsh ERISA Litig.*, 265 F.R.D. 128, 144 (S.D.N.Y. 2010). But those courts have done so primarily when confronted with a class of participants in the *same* benefit plan. *See, e.g., Krueger v. Ameriprise Fin., Inc.*, 304 F.R.D. 559, 563 (D. Minn. 2014) (certifying a class of participants in one company’s 401(k) plan); *In re Marsh ERISA Litig.*, 265 F.R.D. at 144 (certifying a class of beneficiaries of one company’s 401(k) plan). In those cases, courts have reasoned that the relief sought as a result of the fiduciary breach of duty claim—generally restoration to the plan of any losses resulting from the fiduciary’s breach or an accounting for profits—inures to the benefit of *the plan as a whole* and so necessarily impacts the interests of the other members of *that plan*. *See McCluskey v. Trs. of Red Dot Corp. Emp. Stock Ownership Plan & Tr.*, 268 F.R.D. 670, 677-78 (W.D. Wash. 2010) (“Where, as here, the primary relief is to the Plan as a whole, then adjudications with respect to any individual member of the class would, as a practical matter, alter the interests of other members of the class.”).

But that reasoning has no application here. Here, the proposed class is composed of participants in thousands of *different* benefit plans, all of which have different service arrangements. As those arrangements already vary, a court could

enforce injunctive relief with respect to any single plan arrangement without disturbing the arrangements of unrelated plans. Subsuming the claims of thousands of differently situated plans in a single class action would needlessly subordinate the determinations of thousands of plan fiduciaries without achieving any of the goals associated with the class vehicle.

Because these “mandatory class actions . . . implicate the due process principle . . . that one is not bound by a judgment *in personam* in a litigation in which he is not designated as a party or to which he has not been made a party by service of process,” the Supreme Court has cautioned “against adventurous application of Rule 23(b)(1)(B).” *Ortiz*, 527 U.S. at 845-46 (internal quotation marks omitted). Although there is an “exception to the general rule . . . in certain limited circumstances,” *id.* at 846, participant-led multi-plan class actions, which lack the requisite cohesiveness or homogeneity of interests, cannot justify that exception.

CONCLUSION

For the foregoing reasons, the district court's class certification decision should be reversed.

DATED: December 3, 2019

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CERTIFICATE OF SERVICE

I hereby certify that I caused the foregoing to be filed electronically with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system on December 3, 2019.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Meaghan VerGow
Meaghan VerGow

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 5,645 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

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