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

HERIBERTO CHAVEZ, EVANGELINA ESCARCEGA as legal representative of JOSE ESCARCEGA, and JORGE MORENO

Plaintiffs,

-vs-

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

Defendants.

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

ORDER

BE IT REMEMBERED on this day the Court reviewed the file in the above-styled cause, and specifically Plaintiffs' Motion for Class Certification [#99] and Memorandum of Law [#100-31] in support, Defendants' Responses [#109, #111] and Supplement [#114] in opposition, and Plaintiffs' Reply [#120] in support, as well as Defendants' Supplemental Brief [#124] in opposition and Plaintiffs' Supplemental Brief [#125] in support. Having considered the parties' briefing, the governing law, the arguments of counsel, and the case file as a whole, the Court now enters the following opinion and orders.

Background

I. Facts

Plaintiffs Heriberto Chavez, Evangelina Escarcega on behalf of her disabled son Jose Escarcega, and Jorge Moreno bring this action on behalf of themselves and a proposed class of similarly situated participants and beneficiaries under the Employee Retirement Income Security

Act of 1974 (ERISA) against Defendants Fringe Insurance Benefits, Inc., Plan Benefit Services, Inc., and Fringe Benefit Group (collectively, Defendants). Am. Compl. [#42] at 1.[1]

Defendants market and administer retirement, health, and welfare benefit plans to the employees of nonunion employers seeking to compete for government contracts. *Id.* at 10. Nonunion employers seeking to bid on such government contracts are often required to pay their workers prevailing wages—the wages and benefits paid to the majority of similarly situated laborers in the area during the relevant time period—in order to qualify for government contracts. *Id.* at 10. Defendants offer two sorts of plans to such employers—a Contractors Plan and a Contractors Retirement Plan—through which the employers can affordably provide benefits to their workers and thereby submit competitive bids for government work. *Id.* at 10; Resp. Mot. Dismiss [#63] at 3. Health and welfare benefits are provided through the Contractors Plan, while retirement benefits are provided through the Contractors Retirement Plan. *Id.*; *see also* Mot. Certify [#100-31].

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

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

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

and CERT, while Defendant Fringe Insurance Benefits, Inc. (FIBI) is responsible for marketing the Contractors Plan and the Contractors Retirement Plan to employers. Am. Compl. [#42] at 8–13; Resp. [#109] at 13.

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

II. Procedural Posture

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

Plaintiffs then filed an amended complaint. Relevant here, Plaintiffs' amended complaint alleges Defendants engaged in prohibited self-dealing in violation of 29 U.S.C. § 1106(b) and breached fiduciary duties owed to plan participants and beneficiaries in violation of 29 U.S.C. § 1109(a). Am. Compl. [#42] at 23–25; *see also* 29 U.S.C. § 1104(a) (outlining fiduciary duties). For example, Plaintiffs allege Defendants controlled disbursements from both CPT and CERT

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

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

Plaintiffs now move to certify a class for these claims, consisting of "all participants in and beneficiaries of employee benefit plans that provide benefits through CPT and CERT, other than officers and directors of the Defendants and their immediate family members, from July 6, 2011 until the time of trial." Mot. Certify [#100-31] at 8. This pending motion is ripe for review.

Analysis

Plaintiffs seeking to certify a class under Rule 23 bear the burden of establishing the prerequisites to certification have been met. *Amgen Inc. v. Conn. Ret. Plans & Tr. Funds*, 133 S. Ct. 1184, 1192 (2013). Rule 23(a) sets forth four such prerequisites: numerosity, commonality, typicality, and adequacy. FED. R. CIV. P. 23(a)(1)–(4). Once a plaintiff establishes these prerequisites have been met, the plaintiff must then demonstrate the proposed class is appropriate

for certification under one of the provisions of Rule 23(b). The Court first considers whether Plaintiffs have established the Rule 23(a) prerequisites to class certification.

I. Rule 23(a) Prerequisites to Class Certification

A. Numerosity

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

B. Commonality

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

C. Typicality

To meet the typicality requirement, the plaintiff must establish "the claims or defenses of the representative part[y] are typical of the claims or defenses of the class." FED. R. CIV. P.

23(a)(3). Here, Plaintiffs' claims and defenses are typical of those of the class. Plaintiffs argue, for example, that Defendants used their control over disbursements from CPT and CERT to extract extracontractual fees from the TRDI plans as well as other plans organized through those trusts. Mot. Certify [#100-31] at 7, 21, 23–24. And Plaintiffs also argue that Defendants used their discretion to select provider platforms for CERT and CPT in order to maximize Defendants' indirect compensation at the expense of participants in all of the plans, including the TRDI plans. *Id.* at 7, 21. Thus, Plaintiffs' claims are typical of those of the putative class because they depend on a common course of conduct and share the same legal theory.

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

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

D. Adequacy

To meet the adequacy requirement, the plaintiff must establish he will "fairly and adequately protect the interests of the class" in his capacity as class representative. FED. R. CIV.

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

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

Having dispensed with Defendants' statutory standing objection, Court concludes Plaintiffs are adequate representatives. The Court is aware of no pertinent conflicts between Plaintiffs and the members of the proposed class, and as best the Court can tell, Plaintiffs' interests are aligned with those of the class as a whole. *Amchem*, 521 U.S. at 625. Moreover, Plaintiffs have demonstrated they are both willing and able to vigorously prosecute the interests

of the class through qualified counsel. *Gonzales,* 474 F.2d at 72–73. Because Plaintiffs have established they will fairly and adequately protect the interests of the class, Plaintiffs have met the adequacy requirement.

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

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

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

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

The Court concludes the proposed class is appropriate for certification under Rule 23(b)(1)(B) because the prosecution of individual actions would create a risk of adjudications "that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications." FED. R. CIV. P. 23(b)(1)(B). In this action, Plaintiffs seek restitution, an accounting for profits, and an order that Defendants "make good to the plans the losses" stemming from Defendants' exercise of discretion and control with respect to CERT and CPT. Am. Compl. [#42] at 26. This relief would, as a practical matter, dispose of the interests of the other putative class members whether or not the Court certifies the class requested by Plaintiffs. Perhaps for this reason, the Supreme Court has referred to actions involving "a breach of trust by an indenture trustee or other fiduciary similarly affecting the members of a large class of beneficiaries" as a "[c]lassic example" of the sort of case suitable for certification under Rule 23(b)(1)(B), because such actions often "require[] an accounting or other similar procedure to restore the subject of the trust." *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 822–34 (1999) (citation

and quotation marks omitted); *see also id.* ("[T]he shared character of rights claimed or relief awarded entails that any individual adjudication by a class member disposes of, or substantially affects, the interests of absent class members."); *In re Glob. Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 453 (S.D.N.Y. 2004) ("Because of ERISA's distinctive representative capacity and remedial provisions, ERISA litigation of this nature presents a paradigmatic example of a (b)(1) class." (citation and quotation marks omitted)); *Moreno v. Deutsche Bank Ams. Holding Corp.*, 15 Civ. 9936, 2017 WL 3868803, at *8–10 (S.D.N.Y. Sept. 5, 2017) (certifying ERISA class action under Rule 23(b)(1)(B) because equitable relief requested by plaintiffs would, as a practical matter, dispose of the interests of the putative class members).

Conclusion

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

Accordingly,

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

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

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

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

SIGNED this the 30th day of August 2019.

Sam Sparks

SAM SPARKS
SENIOR UNITED STATES DISTRICT JUDGE