

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

Heriberto Chavez; Evangelina Escarcega,  
as the legal representative of her son, Jose  
Escarcega; and Jorge Moreno,

Plaintiffs,

v.

Plan Benefit Services, Inc.; Fringe Insurance  
Benefits, Inc.; and Fringe Benefit Group,

Defendants.

Civil Action No. 1:17-cv-00659

ERISA Class Action

**FIRST AMENDED CLASS ACTION COMPLAINT**

**PRELIMINARY STATEMENT**

1. Plaintiffs Heriberto Chavez; Evangelina Escarcega, on behalf of her disabled son, Jose Escarcega; and Jorge Moreno bring this action for themselves and a proposed class of similarly situated participants and beneficiaries under the Employee Retirement Income Security Act of 1974, as amended (“ERISA”), 29 U.S.C. § 1001 et seq., against Defendants Fringe Benefits, Inc., Plan Benefit Services, Inc., and Fringe Benefit Group (collectively, “Defendants”).

2. Defendants created two intertwined trusts that they now administer and control: a retirement benefits trust, the Contractors and Employee Retirement Trust (“CERT”), and a health and welfare benefits trust, the Contractors Plan Trust (“CPT”). (CERT and CPT are collectively referred to as the “Trusts”.)

3. Through conflicted and disloyal decisions, Defendants have paid themselves grossly excessive compensation for the administration of the Trusts, enriching themselves at the expense of Plaintiffs and other similarly situated participants and beneficiaries, all of whom have been directly financially harmed by paying more for health care benefits and/or by having less money allocated to their individual retirement benefits accounts than they otherwise would have.

4. Plaintiffs seek restitution, surcharge, a constructive trust, disgorgement of windfall profits, injunctive relief and/or other appropriate relief under ERISA for losses suffered by Plaintiffs and the proposed class from July 6, 2011 (six years prior to the filing of the initial complaint in this action), through the present and ongoing (“the relevant time period”).

5. Plaintiffs and the proposed class of similarly situated participants and beneficiaries include approximately 125,000 workers who receive their benefits through CERT and CPT. They receive these benefits under standard employee benefit plans that Defendants design and market, and which employers across the country adopt through standardized adoption and retainer agreements that Defendants prepare.

6. The vast majority of the more than 1,500 employers participating in CERT and CPT are small, with less than 100 employees, and most contract for public works jobs that require them to pay certain amounts per hour for wages and fringe benefits, as a matter of federal and state prevailing wage law.

7. By signing up their employees to receive benefits through the Trusts, employers seek to comply with their minimum prevailing wage obligations.

8. For the minimal administrative and marketing services they provide as part of arranging health care and retirement benefits for employers, Defendants charge fees on top of the costs of the workers’ benefits. Some of these fees have been disclosed in Defendants’ contracts with employers; others have not.

9. All fees are excessive relative to both industry standards and to the limited services actually provided by Defendants, who have collected more than \$100 million from the Trusts during the relevant time period as direct and indirect compensation, according to annual reports submitted to the IRS.

10. The fees that Defendants charge for CPT and CERT are directly allocated to workers’ retirement and health and welfare accounts.

11. As a result of Defendants’ illegal actions, workers were charged more for health care and/or accrued less retirement savings than they otherwise would have, giving rise to the causes of

action brought here for breaches of fiduciary duty and prohibited transactions in violation of ERISA.

#### LEGAL FRAMEWORK

12. ERISA was enacted for the principal purpose of protecting participants and beneficiaries' interests in retirement and welfare benefit plans, by establishing strict standards of responsibility and conduct for those who administer employee benefits plan, and by providing for appropriate remedies and sanctions for violations.

13. ERISA's fiduciary duties are the "highest known to law." A fiduciary must discharge its duties with respect to a plan "solely in the interest of the participants and beneficiaries," ERISA § 404(a)(1), 29 U.S.C. § 1104(a)(1) (duty of loyalty), for the "exclusive purpose" of "providing benefits to participants and their beneficiaries," and "defraying reasonable expenses of administering the plan," *id.* § 1104(a)(1)(A) (exclusive purpose duty of loyalty), and with the "care, skill, prudence, and diligence under the circumstances that a prudent [person] acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims," *id.* § 1104(a)(1)(B) (duty of prudence).

14. Defendants, who are fiduciaries for all the reasons set forth in this Complaint, have breached their duties under ERISA § 404(a), by arranging for their own excessive compensation at the expense of Plaintiffs and other plan participants and beneficiaries who received their benefits through CERT and CPT.

15. ERISA also protects participants and beneficiaries through rules barring certain transactions with "parties in interest" under ERISA § 406(a), 29 U.S.C. § 1106(a). A "party in interest" includes a fiduciary, as well as non-fiduciary entities providing any services to a plan, among others. *See* ERISA § 3(14), 29 U.S.C. § 1002(14).

16. ERISA's prohibited transaction rules bar fiduciaries from certain transactions when they are self-interested, which are per se violations of ERISA § 406(b), 29 U.S.C. § 1106(b). Defendants, who are fiduciaries, violated ERISA's prohibited transaction rule by their self-dealing, and by failing to act with an "eye single" to the interests of participants in the plans.

17. A party in interest, whether or not a fiduciary, can be held liable for participation in prohibited transactions. *Harris Trust & Savings Bank v. Salomon Smith Barney, Inc.*, 530 U.S. 238, 248-49 (2000). As service providers, whether or not they are fiduciaries (although they are, as explained herein), Defendants have violated ERISA's prohibited transaction rule by engaging in transactions with the plans participating in CPT and CERT and paying themselves out of plan assets.

18. In sum, Defendants are liable to under ERISA to Plaintiffs and the proposed class for Defendants' breaches of fiduciary duty and prohibited transactions, as described in this Complaint and as will be proven at trial.

### **JURISDICTION**

19. Plaintiffs bring this action under ERISA §§ 502(a)(2) and 502(a)(3), 29 U.S.C. §§ 1132(a)(2), (3). This Court has subject matter jurisdiction over Plaintiffs' claims under ERISA § 502(e)(1), 29 U.S.C. § 1132(e)(1), and under 28 U.S.C. § 1331 because this action arises under the laws of the United States.

### **VENUE**

20. Venue lies in the Western District of Texas under ERISA § 502(e)(2), 29 U.S.C. § 1132(e)(2), because Defendants may be found in this District and/or the alleged breaches took place in this District. Venue also is proper under 28 U.S.C. § 1391(b), in that a substantial part of the events or omissions giving rise to Plaintiffs' claims occurred within this District.

### **PARTIES**

#### **Heriberto Chavez**

21. Plaintiff Heriberto Chavez works 40 hours a week as a floor technician for Training, Rehabilitation & Development Institute, Inc. ("TRDI"). He cleans and polishes the floors at the Port of Entry at the border of El Paso and Ciudad Juarez, Mexico. Mr. Chavez resides in El Paso, Texas.

22. Mr. Chavez is a participant, as defined in ERISA § 3(7), 29 U.S.C. § 1002(7), in the TRDI Health & Welfare Plan. Mr. Chavez is also a participant, as defined in ERISA § 3(7), 29 U.S.C. § 1002(7), in the TRDI Retirement Plan, because contributions should have been made on

his behalf to that plan. From August 2014 through some time in 2016, TRDI provided health and welfare benefits through CPT, and retirement benefits through CERT.

23. TRDI was required to provide certain specific wages and fringe benefits amounts under the applicable legally-mandated prevailing wage determination to its employees, including Mr. Chavez. TRDI paid Mr. Chavez \$12.19 an hour for his work. TRDI also contributed from \$3.71 an hour up to \$4.25 an hour to CPT for his benefits, pursuant to the applicable wage determinations in effect during the relevant time period, and TRDI's contract with Defendants. To illustrate, when Mr. Chavez was paid \$12.19 an hour and TRDI contributed \$4.00 an hour to his fringe benefit account, if Mr. Chavez worked 160 hours in a month, TRDI would pay him wages of \$1,950.40 that month, plus contribute \$640.00 a month to the health and welfare account managed by Defendants.

24. As a full-time employee, Mr. Chavez was enrolled in health and welfare plans, including a Blue Cross/Blue Shield PPO for which the premium charged to his account was \$570.58 a month.<sup>1</sup> This \$570.58 premium included fees of at least 10%, which Defendants assessed from Mr. Chavez's individual account. That is, of the \$570.58 each month that CPT assessed as a premium from Mr. Chavez's health and welfare account, Defendants took at least \$57.05 each month from Mr. Chavez's account to pay themselves compensation.

25. Mr. Chavez was directly injured by Defendants' excessive fees. First, these fees were taken from his individual health and welfare account, so that account was depleted more than it otherwise would have been if the fees had been reasonable. Second, the excess of any contribution for Mr. Chavez to the welfare plan was required to be contributed to an individual CERT retirement account in his name. However, no amount was ever contributed for Mr. Chavez to a retirement account. There would have been such a contribution had the fees charged for Mr. Chavez not been excessive.

---

<sup>1</sup> The difference between the premium and the contribution is at least in part attributable to ancillary welfare benefits also provided through CPT, including dental and vision, life insurance, and short-term disability insurance, all of which were paid for out of the same mandatory fringe benefit amount from which the health benefits were paid. The fees associated with those ancillary welfare benefits are not disclosed in any documents that have been provided to Plaintiffs.

**Evangelina Escarcega**

26. Plaintiff Evangelina Escarcega is the legal representative of her son, Jose Escarcega, due to his intellectual disabilities. Mr. Escarcega and his mother Evangelina reside in El Paso, Texas.

27. Mr. Escarcega works part-time as a custodian for TRDI at the Port of Entry at the border of El Paso and Ciudad Juarez, Mexico.

28. Mr. Escarcega is a participant, as defined in ERISA § 3(7), 29 U.S.C. § 1002(7), in the CERT Retirement Plan and the TRDI Health & Welfare Plan.

29. TRDI was required to provide certain specific wages and fringe benefits amounts under the applicable legally-mandated prevailing wage determination to its employees, including Mr. Escarcega. TRDI paid Mr. Escarcega \$11.98 an hour for his work, and contributed an additional amount of \$3.71 - \$4.25 an hour to CERT and CPT for his benefits, pursuant to the applicable wage determinations in effect during the relevant time period, and TRDI's contract with Defendants.

30. From August 2014 through May 2015, TRDI made a total of \$2,698.37 in contributions to CERT on behalf of Mr. Escarcega. Mr. Escarcega paid fees for plan administration services out of his individual retirement account. Had Defendants not compensated themselves excessively, Mr. Escarcega would have had greater contributions to his retirement benefits account and accrued greater retirement savings over time.

31. In June 2015, Mr. Escarcega was enrolled in the TRDI Health & Welfare Plan, which provided benefits through CPT until July 2016. CPT covered Mr. Escarcega, as a part time worker, through a limited medical plan, which provided discounts for medical services, capped at specific amounts for specific services. The premium amounts for these limited medical benefits varied between \$64.60/month and \$222.21/month, depending on the number of hours Mr. Escarcega worked. Defendants assessed 17% of the premium to compensate themselves for administering this Plan. Once Mr. Escarcega was enrolled in the limited medical plan, he no longer received contributions to his retirement account.

32. Mr. Escarcega was directly injured by Defendants having charged excessive fees. First, these fees were taken from his individual retirement and health and welfare accounts, so those

accounts were depleted more than they otherwise would have been if the fees had been reasonable. For example, his retirement account would have had greater contributions and he would have accrued greater retirement savings had Defendants not charged excessive fees. Second, the excess of any contribution for Mr. Chavez to the welfare plan was required to be contributed to a retirement account in his name. However, no amount was contributed for Mr. Escarcega to a retirement account once Mr. Escarcega was enrolled in the limited health plan. There would have been such a contribution had the fees charged for Mr. Escarcega's health benefits administration not been excessive.

**Jorge Moreno**

33. Plaintiff Jorge Moreno works part-time as a custodian for TRDI. He cleans the Port of Entry at the border of El Paso and Ciudad Juarez, Mexico. He resides in El Paso, Texas.

34. Mr. Moreno is a participant, as defined in ERISA § 3(7), 29 U.S.C. § 1002(7), in the CERT Retirement Plan and the TRDI Health & Welfare Plan.

35. TRDI was required to provide certain specific wages and fringe benefits amounts under the applicable, legally-mandated prevailing wage determination to its employees, including Mr. Moreno. TRDI paid Mr. Moreno \$11.98 an hour for his work, and contributed an additional amount of \$3.71 - \$4.25 an hour to CERT and CPT for his benefits, pursuant to the applicable wage determinations in effect during the relevant time period, and TRDI's contract with Defendants.

36. From August 2014 through May 2015, TRDI made contributions to CERT on behalf of Mr. Moreno. These contributions totaled \$6,318.58 based on the fringe benefit amounts of first \$3.71 an hour, and then \$4.00 an hour. Mr. Moreno paid fees to Defendants directly out of his individual retirement plan account.

37. In June 2015, while he was working full-time, Mr. Moreno was enrolled in health and welfare benefits which included premiums for health and welfare benefits, including health benefits at a cost of \$570.58 a month for individual health coverage through a Blue Cross/Blue Shield PPO. The premium of \$570.58 a month included fees of at least 10%, which Defendants assessed from Mr. Moreno's individual account. That is, of the \$570.58 each month that CPT assessed as a

premium from Mr. Moreno's health and welfare account, Defendants paid themselves at least \$57.05 in compensation.

38. Mr. Moreno was directly injured by Defendants having charged excessive fees. First, these fees were taken from his individual retirement and health and welfare accounts, so those accounts were depleted more than they otherwise would have been if the fees had been reasonable. For example, his retirement account would have had greater contributions and he would have accrued greater retirement savings had Defendants not charged excessive fees. Second, the excess of any contribution for Mr. Moreno to the welfare plan was required to be contributed to a retirement account in his name. However, no amount was contributed for Mr. Moreno to a retirement account once Mr. Moreno was enrolled in the limited health plan. There would have been such a contribution had the fees charged for Mr. Moreno's health benefits administration not been excessive.

## **Defendants**

### **a. Background on All Defendants**

39. Defendant Fringe Benefit Group is the parent company of Defendants Plan Benefit Services, Inc., and Fringe Insurance Benefits, Inc. Fringe Benefit Group is headquartered in Austin, Texas.

40. Fringe Benefit Group is the Master Plan Sponsor and Recordkeeper of the Trusts.

41. Defendant Plan Benefit Services, Inc. performs administrative services for the Trusts. It is a wholly-owned subsidiary of Fringe Benefit Group and is located in Austin, Texas.

42. Defendant Fringe Insurance Benefits, Inc. is an insurance brokerage firm. It is a wholly-owned subsidiary of Fringe Benefit Group located in Austin, Texas.

43. Plan Benefit Services, Inc. and Fringe Insurance Benefits, Inc. are solely owned by Travis West. Mr. West has stated in a sworn declaration that "PBS and FIBI collectively do business as Fringe Benefit Group." All three entities have the same physical address and the same website, and their website states that Fringe Benefit Group "includes" Plan Benefit Services, Inc., Fringe Insurance Benefits, Inc., and The Contractors Plan (which is the umbrella for both the CPT and

CERT Trusts). Travis West is the registered agent for service of process for Fringe Benefit Group, Plan Benefit Services, Inc., and Fringe Insurance Benefits, Inc., and the executive team for all three Defendants is, on information and belief, the same.

**b. Defendants are Parties in Interest and Fiduciaries of the Plans in CPT and CERT.**

44. All Defendants are service providers to the Trusts and to the employee benefit plans participating in the Trusts, and are parties in interest to the employee benefit plans under ERISA § 3(14)(B), 29 U.S.C. § 1002(21)(B).

45. Fringe Benefit Group is a fiduciary within the meaning of ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A), of the employee benefit plans participating in CPT because it exercises authority and control respecting management and disposition of the employee benefit plan assets held in CPT. Specifically, it:

- a. controls disbursements from the Trust, including payments made from plan assets for fees to itself and its affiliates;
- b. retains discretionary authority and control to appoint and remove the Trustee of CPT; and
- c. retains discretionary authority and control to select and remove service providers to the employee benefit plans participating in CPT, including Plan Benefit Services, Inc. and related party Fringe Insurance Benefits, Inc.

46. Fringe Benefit Group is a fiduciary within the meaning of ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A), of the employee benefit plans participating in CERT because it exercises authority and control respecting management and disposition of the employee benefit plan assets held in CERT. Specifically, it:

- a. directs the Trustee and other third parties with respect to disbursements from the Trust, including for its own fees;
- b. selects the investment platform options made available to employers (and thus exercises authority over its own compensation from investment providers);

- c. retains discretionary authority and control to appoint and remove the Trustee of CERT; and
- d. retains discretionary authority and control to select and remove service providers to the employee benefit plans participating in CERT, including Plan Benefit Services, Inc. and related party Fringe Insurance Benefits, Inc.

47. On information and belief, Fringe Benefit Group has de facto control over Plan Benefit Services, Inc. and Fringe Insurance Benefits, Inc., and the three entities are so closely related as to be interchangeable. Thus, all Defendants are functional fiduciaries of the Trusts.

#### **FACTS**

48. Fringe Benefit Group was founded as a vehicle for non-union employers to compete for federal, state, and local government contracts. These contracts often require payment of prevailing wages, defined as the wages and benefits paid to the majority of laborers or mechanics in the same job classification on similar projects in the area during the relevant time period.

49. Fringe Benefit Group sells the “Contractors Plan,” which offers retirement benefits through CERT and welfare benefits through CPT. The Contractors Plan markets itself to employers as a means to making the “leanest bid,” saving money on payroll taxes, and avoiding fiduciary liability, while complying with federal and state prevailing wage laws. While the Plan may save employers money and help them win contracts, the pension and health benefits come at a high cost to the workers because of the excessive fees charged by Defendants.

50. Through their control of CERT and CPT, as further set forth below, Defendants have received direct and indirect compensation totaling over \$100 million from 2010 to 2015.

#### **The Welfare Plan (CPT)**

##### **a. The Fringe Benefit Group Exercises Control Over CPT, a Multiple Employer Welfare Arrangement that Defendants Created.**

51. CPT is a multiple-employer welfare arrangement (“MEWA”) within the meaning of ERISA § 3(40), 29 U.S.C. § 1002(40). A MEWA is also known as a multiple employer trust. As the Department of Labor has explained, these are “vehicles for marketing health and welfare benefits to

employers for their employees.” See U.S. Department of Labor, Employee Benefits Security Administration, *Multiple Employer Welfare Arrangements under the Employee Retirement Income Security Act (ERISA): A Guide to Federal and State Regulation*, available at <https://www.dol.gov/sites/default/files/ebsa/about-ebsa/our-activities/resource-center/publications/mewa-under-erisa-a-guide-to-federal-and-state-regulation.pdf>.

52. CPT provides health and other welfare benefits to employees of contractors working on projects covered by state and federal prevailing wage laws. In 2015, CPT had 15,522 end-of-year active participants and 162 participating employers.

53. Each participating employer’s health and welfare plan is an employee welfare benefit plan within the meaning of ERISA § 3(1), 29 U.S.C. § 1002(1). Each of the plans enters into an Adoption Agreement with Fringe Benefit Group, which is the Master Plan Sponsor and Recordkeeper of CPT. Plan Benefit Services, Inc. was previously the Master Plan Sponsor and Recordkeeper, and Fringe Benefit Group assumed this role between 2014 and 2016. The Trust Agreement provides that Fringe Benefit Group is the Recordkeeper, but it may retain another person or entity as the Recordkeeper.

54. Participants receive health and welfare benefits through the purchase of insurance contracts by their employer’s plan. Fringe Benefit Group procures these insurance policies for plans with the consent of the Trustee of CPT, Pentegra Trust Company. Specifically, Fringe Benefit Group selects options for insurance companies and policies, and proffers them to employers.

55. Pursuant to the Trust Agreement, although the Trustee is the custodian of Trust assets, Fringe Benefit Group has the authority to direct the Trustee regarding disposition of such assets. Fringe Benefit Group is authorized to “hold and administer the Trust Fund on behalf of the Trustee,” and it receives and holds contributions to the Trust.

56. Fringe Benefit Group is solely responsible for instructing third parties such as banks or insurance companies regarding disbursement of Trust Fund assets on behalf of the Trustee and any participant.

57. Fringe Benefit Group also has sole responsibility to pay insurance premiums out of the Trust for participating plans.

58. Fringe Benefit Group may direct the Trustee to subdivide the Trust Fund into separate funds and allocate assets among the subdivisions, in order to maintain separate records for each employer or plan.

59. Fringe Benefit Group has the power to charge plans a share of Trust expenses which “generally benefit all or most” plans, “or which are necessary for the operation of the Trust.” This is a discretionary power granted by the Trust Agreement.

60. Fringe Benefit Group has the power to appoint and remove the Trustee of CPT.

**b. Defendants Exercise Control Over CPT and Charge Significant Fees, but the Services They Perform for Participants Are Minimal.**

61. Fringe Benefit Group does not play any role in paying or processing medical claims or provider billing, as would a traditional third-party administrator for health and welfare benefits.

62. Instead, Fringe Benefit Group (or its affiliate) performs services including assisting employers with applications for insurance and forwarding the applications to insurers; assisting in soliciting competitive bids from carriers and negotiating renewals with carriers; maintaining a census of covered participants and participant accounting records; transmitting premium payments to insurers; providing a toll-free call center for participants to get information about enrollment and contributions; and filing an IRS Form 5500 for CPT.

63. In other words, Fringe Benefit Group exercises control over Trust assets, acts as an intermediary between participating plans and insurers, and performs limited recordkeeping functions.

64. Defendant Fringe Insurance Benefits, Inc. performs undescribed “marketing and sales-related services” for CPT, the nature and scope of which are not defined further in the Adoption Agreement.

65. The Adoption Agreement states that plans will pay Plan Benefit Services, Inc. and Fringe Insurance Benefits, Inc. each 5% of the applicable insurance premium for those workers who

have general medical benefits, for a total of 10% in fees. For those workers who have limited medical benefits (i.e., basic insurance coverage capped at specific amounts for specific services), plans pay Fringe Insurance Benefits, Inc. 15% of the premiums (with 10% of that amount going to an undefined “agent”), and Plan Benefit Services, Inc. an additional 2% of the premiums, for a total of 17% in fees.

66. Schedule C to the Adoption Agreement states that “the plan administrative fees are paid by the plan from the trust and are allocated to participant accounts in proportion to each participant’s premiums.”

67. Put another way, plans make contributions to CPT; Plan Benefit Services, Inc. and Fringe Insurance Benefits, Inc. pay themselves fees from the Trust before transmitting funds to the insurers; and these fees are divided up among plan participants.

68. The Adoption Agreement further states that Plan Benefit Services, Inc. receives indirect compensation from MetLife for administrative services in the amount of 5% of premiums paid to MetLife for insurance offered through the plan.

**c. Defendants Are Fiduciaries with Respect to Any Exercise of Their Control Over Plan Assets, Including Arranging for Their Own Compensation.**

69. The Trust Agreement and Adoption Agreement acknowledge that the Trust “may contain assets from the Employer Plans,” and is therefore “governed by ERISA.” This means that Defendants control disposition of plan assets to pay their own fees.

70. Thus, Defendants are fiduciaries within the meaning of ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A) with respect to any exercise of their control over plan assets.

71. The Adoption Agreement and Trust Agreement disclaim Defendants’ fiduciary status with respect to CPT and the participating plans, but ERISA defines fiduciary status in functional terms. Under ERISA, a party cannot exculpate itself from fiduciary status just by stating that it is not a fiduciary in a contract. Any entity that has control over the disposition of plan assets is a fiduciary with respect to the exercise of that control. Defendants are fiduciaries of CPT with respect to their imposition of fees.

**d. Defendants Have Compensated Themselves Excessively, Harming Participants and Plans.**

72. Financial statements of CPT show that participating employers pay an average of 11%-13.5% of contributions in fees for administration and sales.

73. From 2010 to 2015, CPT paid \$32.5 million in fees to Plan Benefit Services, Inc. and Fringe Insurance Benefits, Inc.

74. The fees charged to participants in employee benefits plans provided through CPT are excessive. They are far greater than industry standards and bear no reasonable relationship to the services provided by Plan Benefit Services, Inc. and Fringe Insurance Benefits, Inc.

75. As Plaintiffs will show at trial, the industry standard expense ratio for insured plans for *all* administrative expenses (including but not limited to the charges for more labor-intensive services that Defendants do not provide, such as claims administration), is about one-half to two-thirds the expense ratio Defendants impose on Plaintiffs and the proposed class for a much narrower set of services.

76. Thus, participants (including Plaintiffs) and plans are directly financially harmed by Defendants' imposition of high fees on the plans that participate in CPT, because they pay more for health care coverage than they would have if Defendants' fees had not been excessive.

**The Retirement Plan (CERT)**

**a. Fringe Benefit Group Exercises Control Over CERT, a Master Pension Trust, and Performs Limited Services to the Trust.**

77. CERT is a master pension trust, which sponsors a prototype defined contribution plan—the CERT Master Plan—for employees of contractors working on projects covered by state and federal prevailing wage laws.

78. The CERT Master Plan is adopted by participating employers' retirement plans, each of which is an employee pension benefit plan within the meaning of ERISA § 3(2)(A), 29 U.S.C. § 1002(2)(A).

79. As of 2015, CERT had \$770.5 million in assets and 1,716 participating employers.

80. Employee and employer contributions to the participating plans are deposited into the Contractors and Employees Retirement Plan Master Trust, which is governed by a Master Trust Agreement.

81. Under the Master Trust Agreement, Fringe Benefit Group is the Master Plan Sponsor and Recordkeeper of CERT. It has an array of powers and responsibilities, including:

- a. The authority to enter into contracts imposing costs, fees, expenses, taxes, and other charges and expenses on the Master Trust and the plans, and the authority to calculate such costs for payment by the Trustee;
- b. The authority to select and make available to plans various platforms for investment of plan assets;
- c. The authority to instruct any insurance company, custodian or paying agent with respect to investment or disbursement of investment funds on behalf of the Trustee and any participant;
- d. The authority to direct the Trustee to make payments to such persons and at such times and in such amounts as Fringe Benefit Group shall direct; and
- e. the right to appoint and remove the Trustee.

82. In addition, Fringe Benefit Group (or its affiliate) performs recordkeeping and administrative services for the Master Trust and participating plans.

83. Fringe Benefit Group is also “accountable for” all contributions to the Trust.

84. The Retainer Agreement provides that Plan Benefit Services, Inc. “and its affiliate” may employ brokers to assist in marketing the plans and performing the administrative functions delegated to Plan Benefit Services, Inc. in exchange for a portion of the fees. On information and belief, Plan Benefit Services, Inc. selects Fringe Insurance Benefits, Inc. to hire brokers, and Fringe Insurance Benefits, Inc. receives fees paid out of plan assets in the Trust. On information and belief, Plan Benefit Services, Inc. retains the authority to engage or remove Fringe Insurance Benefits, Inc. as a service provider to the employee benefit plans participating in CERT.

85. The Retainer Agreement and Trust Agreement do not specify what services, if any, Fringe Insurance Benefits, Inc. performs for CERT.

**b. Defendants Charge High Fees on the Trust and the Plans for Their Administration of CERT, Harming Participants and Plans.**

86. Plan Benefit Services, Inc. charges participating plans a monthly administrative fee that is a percentage of the total plan assets. The percentage varies based on the size of the plan (in terms of total assets). The smallest plans, with \$0 to \$149,999 in assets, are charged 1.35% for the services of Plan Benefit Services, Inc.; plans with \$150,000 to \$299,999 are charged 1.25%; plans with \$300,000 to \$499,999 are charged 1.15%; plans with \$500,000 to \$699,999 are charged 0.85%; plans with \$700,000 to \$899,999 are charged 0.60%; plans with \$900,000 to \$1,199,999 are charged 0.20%; plans with \$1.2 million to \$1,499,999 are charged 0.15%; and plans with at least \$3 million in total assets are not charged the administrative fee and receive a credit of 0.15% to offset other expenses.

87. In addition, Plan Benefit Services, Inc. charges an annual fee of \$200 per plan and a monthly participant administrative fee of up to \$6.50 per participant, depending on the number of participants in the plan. Plan Benefit Services, Inc. collects “surrender charges” when a plan terminates its investment in CERT and fees for various specific services, such as participant loan processing. The Retainer Agreement between a plan and Plan Benefit Services, Inc. also makes reference to a “Monthly Investment Provider Charge,” the amount and ultimate recipient of which is unspecified.

88. The Retainer Agreement states that the monthly participant administrative fees are deducted from participants’ accounts directly and the monthly plan administrative fees are “paid by the plan from the trust and are allocated to participant accounts in proportion to each participant’s assets.”

89. Thus, participants and plans are directly financially harmed by Defendants’ imposition of high fees on the Trust and the plans.

90. In addition to direct fees, Defendants receive indirect compensation from Nationwide, an investment provider to CERT. The Retainer Agreement states that Plan Benefit Services, Inc. receives payment in the amount of 0.80% of assets in all plan investments at Nationwide, and Fringe Insurance Benefits, Inc. receives 0.35%.

91. Not all investments available to participating plans through CERT are offered by Nationwide. Defendants also receive indirect compensation from Transamerica Life Insurance Company, another investment provider to CERT. On information and belief, Plan Benefit Services, Inc. and/or Fringe Insurance Benefits, Inc. receive payments from other investment providers as well.

92. From 2010 to 2015, Plan Benefit Services, Inc. was paid \$35 million in direct fees and \$14.5 million in indirect fees for its services to CERT. In the same timeframe, Fringe Insurance Benefits, Inc. was paid \$23.7 million in indirect fees for its services to CERT, for a combined total of \$88.2 million.

93. From 2010 to 2015, direct and indirect fees to Plan Benefit Services, Inc. and Fringe Insurance Benefits, Inc. averaged about 2% of CERT's total pension plan assets.

94. The above-described fees include recordkeeping and other administrative services only, in addition to payments made to Defendants from investment providers. In other words, they are exclusive of the investment fees charged to participants in CERT by providers of particular investment products.

95. Defendants' fees far exceed industry standards and bear little relationship to the services they are providing to CERT. A study by Deloitte Consulting for the Investment Company Institute found that in 2013 the average "all in" (i.e., administrative and investment) fee paid by participants and/or sponsors of defined contribution pension plans was 1.17% of assets for plans with \$1 to \$10 million in assets, 0.89% of assets for plans with \$10 to \$100 million in assets, 0.63% of assets for plans with \$100 to \$500 million in assets, and 0.41% for plans with over \$500 million in assets.

96. As Plaintiffs will show at trial, even assuming that most of the participating plans in CERT are small, fees averaging 2% exclusive of investment fees are grossly excessive, particularly given the narrow set of services that Defendants provide.

97. Participants and plans have been harmed by Defendants' imposition of excessive fees on CERT because their retirement savings were reduced by these fees, and this reduction compounds over the long term to significantly impair the value of their retirement benefits.

**c. Defendants Are Fiduciaries with Respect to Any Exercise of Their Control Over Plan Assets, Including Arranging for Their Own Compensation.**

98. The CERT Master Trust is entirely composed of plan assets. As discussed, Defendants take their fees directly out of participant accounts and otherwise compensate themselves out of the Trust. Because they exercise control over plan assets, Defendants are fiduciaries of the Trust within the meaning of ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A) with respect to any such exercise.

99. Fringe Benefit Group has discretionary authority to select the options for investment platforms made available to plans, and it exercises that authority in its own self-interest, choosing investment providers that will pay it a portion of assets under management, thus maximizing its compensation.

100. Defendants disclaim fiduciary status with respect to CERT and the participating plans, but ERISA defines fiduciary status in functional terms. Under ERISA, a party cannot exculpate itself from fiduciary status just by stating that it is not a fiduciary in a contract. Any entity that has control over the disposition of plan assets is a fiduciary with respect to the exercise of that control. Defendants are fiduciaries of CERT with respect to their imposition of fees.

**Defendants' Excessive Fees Reduce the Value of the Fringe Benefit Components of Prevailing Wage Payments.**

101. As noted above, CERT and CPT are marketed towards employers who have contracts to perform public works projects subject to state and federal prevailing wage laws, including the federal Service Contract Act and the Davis-Bacon Act.

102. Prevailing wage requirements can generally be met through a combination of wages and fringe benefits. Employers must compensate workers in an amount equivalent to the wage and fringe components, and may do so with a combination of wages and benefits; provided, however, that they meet other legal requirements, such as fulfilling the terms of the employer mandate under the ACA.

103. CERT is designed for employers to make “prevailing wage contributions” on behalf of participants. If the employer does not spend enough on health and welfare benefits through CPT to make up the fringe benefits component of its prevailing wage obligation, the employer may pay (or in some cases, must pay) the remaining balance into the employee’s defined contribution retirement plan account, i.e., into plan accounts held through CERT.

104. For participants whose employers make prevailing wage contributions to CERT, retirement contributions were reduced based on excessive fees charged to the health and welfare plans. Had Defendants not charged excessive fees to the plans participating in CPT, thus increasing the amount that employers spent on health and welfare benefits, employers would have had to contribute more to CERT to make up the balance of the fringe benefit portion, pay higher wages, or provide additional fringe benefits to these employees to meet prevailing wage requirements.

105. Defendants’ imposition of excessive fees on CPT and CERT drive down the value of participants’ total package of fringe benefits. Without these fees, participants would have been entitled to greater fringe benefits and/or higher wages. This represents a concrete financial injury to participants, including Plaintiffs.

#### **CLASS ACTION ALLEGATIONS**

106. Plaintiffs bring this action as a class action pursuant to Rules 23(a) and 23(b)(1) or, in the alternative, 23(b)(3) of the Federal Rules of Civil Procedure on behalf of the following class of similarly situated persons (“the Class”): All participants in and beneficiaries employee benefit plans that provide benefits through CPT and CERT, other than officers and directors of the Defendants and their immediate family members, from six years before the filing of this action until the time of trial.

107. The members of the Class are so numerous that joinder of all members is impracticable. While the exact number of Class members is unknown at this time and can be ascertained only through appropriate discovery, Plaintiffs believe that there are, at a minimum, thousands of Class members. There are approximately 125,000 workers who receive their benefits through CPT and CERT.

108. Common questions of law and fact exist as to all members of the Class and predominate over any questions solely affecting individual members of the Class. Among such common questions are:

(a) Whether Defendants are parties in interest with respect to the plans that participate in the Trusts;

(b) Whether Defendants have fiduciary duties to the plans that participate in the Trusts;

(c) Whether Defendants have fiduciary duties to the Trusts themselves;

(d) Whether Defendants breached their fiduciary duties to the plans, the Trusts, and to Plaintiffs and the proposed class;

(d) Whether the compensation paid to Defendants in connection with their services to the plans and/or the Trusts is unreasonable or excessive;

(e) Whether Defendants have knowingly participated in direct sales or exchanges with participating plans and/or transferred or used plan assets for their own benefit; and

(f) Whether Defendants are liable to Plaintiffs and the Proposed Class for losses caused by Defendants' breaches of fiduciary duty and/or for other appropriate equitable relief under ERISA, included but not necessarily limited to restitution, surcharge, a constructive trust, disgorgement of windfall profits, and injunctive relief.

109. There are no substantial individual questions among the Class claims on the merits of this action, and Plaintiffs are not aware of any conflicts between themselves and members of the putative Class.

110. Plaintiffs' claims are typical of the claims of the members of the putative Class, as Plaintiffs and all other members of the putative Class were harmed by Defendants' wrongful conduct. Plaintiffs are aggrieved by the prohibited transactions and breaches of fiduciary duties they and all other members of the Class have suffered at Defendants' hands, and are intent on seeing such wrongs remedied. Neither Plaintiffs nor their counsel have any interests that might cause them to refrain from vigorously pursuing the claims in this class action. Thus, Plaintiffs are adequate representatives of the Class.

111. Class certification of Plaintiffs' Claims for Relief is appropriate under Fed. R. Civ. P. 23(b)(1) because the prosecution of separate actions by individual Class members would create a risk of inconsistent or varying adjudications which would establish incompatible standards of conduct for Defendant, and/or because adjudications with respect to individual Class members would as a practical matter be dispositive of the interests of non-party Class members.

112. In the alternative, class certification of Plaintiffs' Claims for Relief also is appropriate under Fed. R. Civ. P. 23(b)(3) because common issues of law and fact predominate over questions affecting only individual members of the Class. Moreover, a class action is superior to other available methods for the fair and efficient adjudication of this controversy. Defendants have obtained wrongful profits through overcharges that are, on an individual level, small and difficult to detect but in the aggregate have an enormous impact on the value of Class members' employee benefits. Individual participants, and even most plans, have an insufficient stake in the outcome of this matter to devote the substantial resources that would be required to pursue it individually.

113. On information and belief, the Class is easily ascertainable because the names and addresses of the Class members are available from Defendants, and adequate notice can be provided to members of the Class to the extent required by Fed. R. Civ. P. 23.

114. Plaintiffs are committed to fairly, adequately, and vigorously representing and protecting the interests of the members of the Class, and have retained counsel competent and experienced in class action litigation of this nature for this purpose. Thus, the requirements of Rule 23(g) are met.

**CLAIMS FOR RELIEF**  
**FIRST CLAIM FOR RELIEF**

**[In Defendants' Capacities as Parties In Interest, Engaging in Prohibited Transactions  
Forbidden by ERISA § 406(a), 29 U.S.C. § 1106(a), Against All Defendants]**

115. Plaintiffs incorporate Paragraphs 1-114 as though set forth herein.

116. ERISA § 406(a), 29 U.S.C. § 1106(a), requires that a plan fiduciary “shall not cause the plan to engage in a transaction, if he knows or should know that such transaction constitutes a direct or indirect sale or exchange, or leasing of any property between the plan and a party in interest,” or a “transfer to, or use by or for the benefit of, a party in interest, of any assets of the plan.”

117. ERISA § 3(14)(B), 29 U.S.C. § 1002(14)(B), defines any person providing services to an employee benefit plan as a party in interest.

118. Defendants provide, inter alia, administrative, recordkeeping, and marketing services to the participating plans in the Trusts. Accordingly, Defendants are parties in interest with respect to the plans whether or not they are fiduciaries.

119. Defendants pay themselves fees out of plan assets held in the Trusts.

120. ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3), permits a plan participant to bring a suit to obtain appropriate equitable relief to enforce the provisions of Title I of ERISA.

121. By transacting with Defendants and paying their fees out of plan assets, the participating plans' fiduciaries violated ERISA § 406(a), 29 U.S.C. § 1106(a), by causing a direct sale or exchange with a party in interest and/or a transfer or use of plan assets to or by or for the benefit of parties in interest, namely, Defendants.

122. Defendants knowingly participated in such prohibited transactions in violation of ERISA § 406(a), 29 U.S.C. § 1106(a).

123. Through their knowing participation in prohibited transactions, Defendants profited in amounts to be proven at trial but numbering in the millions of dollars.

124. These profits harmed Plaintiffs and members of the proposed class by reducing the amount of money that could accumulate in their retirement and welfare benefit plan accounts.

**SECOND CLAIM FOR RELIEF**

**[Engaging in Prohibited Transactions Forbidden by ERISA § 406(b),  
29 U.S.C. § 1106(b), Against All Defendants]**

125. Plaintiff incorporates Paragraphs 1-124 as though set forth herein.

126. ERISA § 406(b)(1), 29 U.S.C. § 1106(b)(1), mandates that a plan fiduciary shall not “deal with the assets of the plan in his own interest or for his own account.”

127. ERISA § 406(b)(3), 29 U.S.C. § 1106(b)(3), mandates that a plan fiduciary shall not “receive 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.”

128. ERISA § 409, 29 U.S.C. § 1109, provides, inter alia, that any person who is a fiduciary with respect to a plan and who breaches any of the responsibilities, obligations, or duties imposed on fiduciaries by Title I of ERISA shall be personally liable to make good to the plan any losses to the plan resulting from each such breach, and additionally is subject to such other equitable or remedial relief as the court may deem appropriate.

129. ERISA § 502(a)(2), 29 U.S.C. § 1132(a)(2), permits a plan participant to bring a suit for relief under ERISA § 409.

130. ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3), permits a plan participant to bring a suit to obtain appropriate equitable relief to enforce the provisions of Title I of ERISA or to enforce the terms of a plan.

131. Defendants are fiduciaries of the plans that participate in CERT and CPT, as set forth in Paragraphs 45-47, 69-71, and 98-100 above.

132. Defendants engaged in prohibited transactions in violation of ERISA § 406(b), 29 U.S.C. § 1106(b), by hiring themselves to perform services to the plans, by paying themselves excessive compensation out of plan assets, and by arranging for excessive compensation to themselves from other service providers to the plans.

133. Through these prohibited transactions, Defendants caused losses to participants and plans in amounts to be proven at trial but numbering in the millions of dollars.

**THIRD CLAIM FOR RELIEF**

**[Breach of Fiduciary Duty Under ERISA §§ 502(a)(2) and (a)(3),  
29 U.S.C. §§ 1132(a)(2) and (a)(3), Against All Defendants]**

134. Plaintiff incorporates Paragraphs 1-133 as though set forth herein.

135. ERISA § 3(21), 29 U.S.C. § 1001(21), provides that a person is a fiduciary of a plan to the extent he “exercises any discretionary authority or discretionary control respecting management of such plan,” “exercises any authority or control respecting management or disposition of its assets,” or “has any discretionary authority or discretionary responsibility in the administration of such plan.”

136. Defendants are fiduciaries of the plans participating in CPT and CERT as set forth in paragraphs 45-47, 69-71, and 98-100 above.

137. ERISA § 404(a)(1), 29 U.S.C. § 1104(a)(1), requires, inter alia, that a plan fiduciary discharge his, her, or its duties with respect to a plan solely in the interest of the participants and beneficiaries and with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims.

138. ERISA § 409, 29 U.S.C. § 1109, provides, inter alia, that any person who is a fiduciary with respect to a plan and who breaches any of the responsibilities, obligations, or duties imposed on fiduciaries by Title I of ERISA shall be personally liable to make good to the plan any losses to the plan resulting from each such breach, and additionally is subject to such other equitable or remedial relief as the Court may deem appropriate.

139. ERISA § 502(a)(2), 29 U.S.C. § 1132(a)(2), permits a plan participant to bring an action for relief under ERISA § 409.

140. ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3), permits a plan participant to bring an action to obtain appropriate equitable relief to enforce the provisions of Title I of ERISA or to enforce the terms of a plan.

141. Defendants breached their duty of loyalty under ERISA § 404(a)(1), 29 U.S.C. § 1104(a)(1). These breaches include but are not limited to the following: hiring themselves to perform services for the plans; paying themselves excessive compensation from plan assets; and, on information and belief, paying themselves extracontractual fees and determining in their discretion the amount of said fees and failing to disclose said fees to participants,

142. Defendants have profited from the fiduciary violations alleged herein in an amount to be proven at trial.

143. Defendants' actions caused losses to participants and plans in an amount to be proven at trial.

#### **PRAYER FOR RELIEF**

Wherefore, Plaintiffs pray as follows:

#### **As to the First Claim for Relief:**

- A. Certify this action as a class action under Federal Rule of Civil Procedure 23;
- B. Declare that Defendants have knowingly participated in prohibited transactions and violated ERISA in their capacity as parties in interest to the plans;
- C. Enjoin Defendants from engaging in further prohibited transactions;
- D. Order Defendants to disgorge any profits they have made through prohibited transactions and impose a constructive trust and/or equitable lien on any funds received by Defendants in the course of or as a result of prohibited transactions;
- E. Order that Defendants provide other appropriate equitable relief to the plans, including but not limited to restitution and an accounting for profits;
- F. Award Plaintiffs reasonable attorneys' fees and costs of suit incurred herein under ERISA § 502(g), 29 U.S.C. § 1132(g), and/or for the benefit obtained for the common fund;
- G. Order Defendants to pay prejudgment interest; and
- H. Award such other and further relief as the Court deems equitable and just.

#### **As to the Second Claim for Relief:**

- A. Certify this action as a class action under Federal Rule of Civil Procedure 23;

B. Declare that Defendants engaged in prohibited transactions in violation of ERISA § 406(b), 29 U.S.C. § 1106(b), by dealing with the plans in their own interest or for their own account or by knowingly participating in such self-dealing;

C. Enjoin Defendants from further prohibited transactions;

D. Order Defendants to make good to the plans the losses resulting from their prohibited transactions;

E. Order Defendants to disgorge any profits they have made through prohibited transactions and impose a constructive trust and/or equitable lien on any funds received by Defendants in the course of or as a result of prohibited transactions;

F. Order that Defendants provide other appropriate equitable relief to the plans, including but not limited to restitution and an accounting for profits;

G. Award Plaintiffs reasonable attorneys' fees and costs of suit incurred herein under ERISA § 502(g), 29 U.S.C. § 1132(g), and/or for the benefit obtained for the common fund;

H. Order Defendants to pay prejudgment interest; and

I. Award such other and further relief as the Court deems equitable and just.

**As to the Third Claim for Relief:**

A. Certify this action as a class action under Federal Rule of Civil Procedure 23;

B. Declare that Defendants have breached their fiduciary responsibilities to the Class and knowingly participated in breaches of fiduciary responsibility to the Class;

C. Enjoin Defendants from further violations of their fiduciary responsibilities, obligations, and duties;

D. Order Defendants to make good to the plans the losses resulting from these fiduciary violations;

E. Order that Defendants provide other appropriate equitable relief to the plans, including, but not limited to, surcharge, restitution, providing an accounting for profits, imposing a constructive trust and/or equitable lien on any funds wrongfully held by Defendants, or ordering Defendants to disgorge any profits that they have made through breaches of fiduciary duty;

- F. Award Plaintiffs reasonable attorneys' fees and costs of suit incurred herein under ERISA § 502(g), 29 U.S.C. § 1132(g), and/or for the benefit obtained for the common fund;
- G. Order Defendants to pay prejudgment interest; and
- H. Award such other and further relief as the Court deems equitable and just.

Dated: December 4, 2017

Respectfully submitted,

By: /s/ Catha Worthman

Catha Worthman\*  
Nina Wasow\*  
FEINBERG, JACKSON, WORTHMAN &  
WASOW, LLP  
383 4th Street  
Oakland, California 94607  
Telephone: (510) 269-7998  
Facsimile: (510) 269-7994  
catha@feinbergjackson.com  
nina@feinbergjackson.com

Richard Burch  
BRUCKNER BURCH PLLC  
8 Greenway Plaza, Suite 1500  
Houston, TX 77046  
Telephone: (713) 877-8788  
Facsimile: (713) 877-8065  
rburch@brucknerburch.com

Jonathan Weissglass\*  
ALTSHULER BERZON LLP  
177 Post Street, Suite 300  
San Francisco, California 94108  
Telephone: (415) 421-7151  
Facsimile: (415) 362-8064  
jweissglass@altshulerberzon.com

*Attorneys for Plaintiff*

*\*Admitted pro hac vice*

**CERTIFICATE OF SERVICE**

I certify that on December 4, 2017, I served a copy of Plaintiffs' First Amended Complaint via the CM/ECF system on the following:

Matt Dow  
Jonathan Neerman  
Lawton Cummings  
JACKSON WALKER LLP  
100 Congress Avenue, Suite 1100  
Austin, TX 78701  
mdow@jw.com  
jneerman@jw.com  
lcummings@jw.com

Paula Ketcham  
SHIFF HARDIN LLP  
233 South Wacker Drive, Suite 7100  
Chicago, IL 60606  
pketcham@schiffhardin.com

Tess Ferrera  
SCHIFF HARDIN LLP  
901 K Street NW, Suite 700  
Washington, DC 20001  
tferrera@schiffhardin.com

/s/ Catha Worthman