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

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| Heriberto Chavez; Evangelina Escarcega, As the legal representative of her son, Jose Escarcega; and Jorge Moreno | § § § | |
| | § | Case No. 1:17-cv-659-SS |
| v. | § § | ERISA Class Action |
| Plan Benefit Services, Inc.; Fringe Insurance Benefits, Inc.; and Fringe Benefit Group | § § § | |

**DEFENDANTS' MOTION TO DISMISS FIRST AMENDED COMPLAINT AND BRIEF IN SUPPORT**

TO THE HONORABLE UNITED STATES DISTRICT JUDGE:

Defendants Plan Benefit Services, Inc. ("PBS"), Fringe Insurance Benefits, Inc. ("FIBI), and Fringe Benefit Group ("FBG")[1] (collectively "Defendants") submit this Motion to Dismiss Plaintiffs' First Amended Complaint ("FAC") and Brief in Support pursuant to Fed. R. Civ. P. 12(b)(6), because the FAC's three claims fail to state plausible claims for relief, including failing to correct the fatal defects identified by this Court in its November 7, 2017 Order, ECF No. 36. Among other defects, Plaintiffs have failed to allege, much less show, that their employer Training, Rehabilitation, & Development Institute, Inc. ("TRDI"), agreed to overpay Defendants in what was an arms-length, commercial market transaction.

Alternatively, or in addition, this Court should dismiss Plaintiffs' claims on the welfare plan and Plaintiff Chavez's claims in their entirety pursuant to Fed. R. Civ. P. 12(b)(1), because Plaintiffs lack statutory standing under the Employee Retirement Income Security Act of 1974,

[1] Defendant Fringe Benefit Group is an unregistered trade name that does not have a distinct legal existence or perform any distinct business activities. On or about January 6, 2016, Defendant PBS was merged into another entity and is now known as Fringe Benefit Group, Inc. Defendants' corporate filings are publicly available with the Texas Office of the Secretary of State.

as amended ("ERISA"), 29 U.S.C. § 1001 *et seq*., and standing under Article III of the United States Constitution to bring these claims.

## I. INTRODUCTION

Plaintiffs' FAC should be dismissed because it does not cure the deficiencies that the Court identified in its November 7, 2017 Order, ECF No. 36. Although Plaintiffs add over 50 new paragraphs to the FAC, they again have not pled the facts needed to establish plausible claims for relief under ERISA. Plaintiffs also have failed to meet their burden to show that they have standing to bring certain of their claims.

Central to Plaintiffs claims is the notion that their employer TRDI had, for some (unexplained) reason, agreed to pay Defendants more than market value for their administrative and marketing services, which Plaintiffs allege (although contradicted by the undisputed documents) were for "minimal" services.[2] (FAC at ¶ 8). This was an arms-length commercial transaction, however, and in its November 7th Order, this Court concluded that Plaintiffs had failed to plead with sufficient specificity that the fees TRDI paid Defendants were excessive. (*See* Order p. 2).

Plaintiffs' FAC does not cure this fundamental deficiency. With respect to the welfare fund, Plaintiffs now volunteer their unsupported opinion that they hope to "show at trial" that "the industry standard expense ratio for insured plans for *all* administrative expenses . . . is about one-half to two-thirds the expense ratio" of the costs that Defendants charge or charged for their services. (FAC ¶ 75). Other than their bald opinion on what they hope to prove at trial,

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[2] The factual allegations and legal conclusions in the FAC, like the original Complaint, lump defendants, their services, and their compensation together without distinction. As noted in Defendants reply brief on their motion to dismiss the original Complaint, PBS and FIBI may have the same owner, but they are two distinct legal corporate entities with separate and different functions for which they receive compensation. If this case moves forward, these distinctions will be addressed as appropriate.

Plaintiffs provide nothing to back up their allegation, for example, with market information on the fees actually paid to administer similar types of welfare arrangements.

With respect to the retirement plan, the FAC now identifies the same deficient study they relied on in their original Complaint to urge that the fees charged the retirement plan were excessive. Plaintiffs' belated identification confirms this study is deficient. Among other things, the study was released in 2013, at least four years ago, with data likely collected in earlier years. Perhaps most importantly, this dated study does not purport to show market-based comparisons – it does not purport to show what other service providers were paid for similar services in servicing multiple employer arrangements subject to the complexities of state and federal prevailing wage laws. In addition, Plaintiffs provide nothing showing why TRDI would have, in what was an arms-length, commercial transaction, agreed to pay Defendants more than market rates to administer its plans. Any such inference also would be contrary to common sense, and to well-founded assumptions relied on in the law as to how businesses and markets operate.

Rather, as Defendants noted in their reply brief (ECF No. 35), DOL regulations state that determining whether compensation for services is reasonable is based on all the facts and circumstances of the specific services at issue. See DOL Reg. § 2550.408c-2(d). In general, whether compensation is reasonable depends on the **fair <u>market</u> value** of the services or goods provided to the plan compared to the cost of similar services or goods available in the same geographic location where the services or goods are available to the plan. *See McLaughlin v. Bendersky*, 705 F. Supp 417 (E.D. Ill. 1989); *Marshall v. Snyder*, 572 F.2d 894 (2d Cir. 1978); *Dole v. Formica*, 1991 WL 317040, 14 Employee Benefits Cas. (BNA) 1397 (N.D. Ohio Sept. 30, 1991). Therefore, since Plaintiffs have failed to produce benchmarks that measure the actual costs of managing similar arrangements in the complex context of multiple employer plans

subject, in many cases, to state and federal prevailing wage laws, they have failed to support their allegations that TRDI for some (still unexplained) reason agreed to pay Defendants more than market value for their services.

In sum, for the same reasons that this Court dismissed the original complaint, Plaintiffs are not allowed to ignore the fees set in an arms-length, commercial market-based transaction based on their unsupported intuition as to what they think TRDI could have gotten Defendants (or a competitor) to accept for these services. Consequently, Defendants respectfully submit that the FAC fails to cure a critical deficiency that this Court identified in its November 7th Order.

Claims Two and Three also fail for the reasons previously identified in the Court's November 7th Order. Again, Plaintiffs fail to show that Defendants were fiduciaries for the activity central to the claims alleged in the FAC, *i.e.*, they fail to show that Defendants had the unilateral right to hire themselves and to set their own compensation. Instead, as noted by this Court in its November 7th Order, and based on the plan documents Defendants attached to their original Motion to Dismiss, "TRDI, not the defendants in this case, had at all times the final authority and control over the administration of the contract … [and] was the final authority and control over the services and prices provided by the defendants at all times under … the contract." (Order p. 3). This Court also noted "TRDI had the authority to stop the compensation, fees and expenses associated with the plan charged or being charged by defendants," as evidenced by TRDI's exercise of that authority when it terminated its contract with The CPT on August 31, 2016, "over a year prior to the filing of the suit." (Order pp. 2 & 3).

Conclusory allegations in the FAC cannot counter the unequivocal language in the plan documents already considered by this Court, which documents show that TRDI controlled Defendants' compensation and services. Thus, Plaintiffs have failed to cure a second critical

element in this case. Namely, pleading facts that support a plausible inference that Defendants had the fiduciary authority to set their own compensation and select themselves to service the TRDI plans. That power and authority rested exclusively with TRDI.

For these and other reasons discussed more fully below, Defendants respectfully request that the Court dismiss Plaintiffs' FAC with prejudice.

## II. STATEMENT OF THE CASE

### 1. The Parties.

Defendant FIBI is a broker that markets health and welfare benefits through The Contractors Plan Trust ("The CPT"), and retirement benefits through The Contractor Employers Retirement Trust ("The CERT") to employers, many of which are subject to prevailing wage laws. (FAC at ¶¶ 42, 48, and 49). Defendant PBS provides recordkeeping services to plans established by employers that choose to establish plans through The CPT and/or The CERT. (FAC at ¶¶ 53 and 82). Plaintiffs are employees of Training, Rehabilitation, & Development Institute, Inc. ("TRDI"). (FAC at ¶¶ 21, 27 and 33).

### 2. TRDI Established a Health and Welfare Plan.

TRDI established a health and welfare plan ("TRDI H&W Plan") and executed an Adoption Agreement with The CPT through which the TRDI H&W Plan was administered. (Attachment A is a true and correct copy of the TRDI H&W Adoption Agreement).[3] An

[3] The Complaint does not attach any documents in support of its allegations. The allegations of the Complaint are supported by reference to the following documents: the TRDI Adoption Agreements, The CPT, the CERT, the CERT and CPT Trust Agreements, and The CERT Retainer Agreement. Because Plaintiffs have incorporated those documents by reference and relied upon them to assert allegations central to their claims, the documents are properly before the Court because a court may consider "the complaint, its proper attachments, documents incorporated into the complaint by reference, and matters of which a court may take judicial notice" in a motion to dismiss. *Randall D. Wolcott, M.D., P.A. v. Sebelius*, 635 F.3d 757, 763 (5th Cir. 2011) (internal quotation marks omitted). Alternatively, the documents are properly before the Court under a factual attack of standing pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure. *Gonzalez v. United States*, 851 F.3d 538, 543 (5th Cir. 2017) (quoting *In re FEMA Trailer Formaldehyde Prod. Liab. Litig. (Mississippi Plaintiffs)*, 668 F.3d 281, 287 (5th Cir. 2012)); and *see e.g., Superior MRI Services, Inc. v. Alliance Healthcare Services, Inc.*, 778 F.3d 502, 504 (5th Cir. 2015) (citing *Patterson v. Weinberger*, 644 F.2d 521, 523 (5th Cir. 1981)).

employer, including TRDI, that executes an adoption agreement in connection with The CPT establishes a stand-alone employee welfare benefit plan within the meaning of ERISA § 3(1), 29 U.S.C. § 1002(1). (FAC. at ¶ 53).

TRDI provided fully insured benefits to their employees through The CPT. (*See* FAC ¶¶ 24, 31, and 37; and Attachment A, "Addendum to the Contractors Plan Trust Adoption Agreement"). TRDI paid the full amount of the cost of the premiums as required under the then existing and controlling wage law.[4] (FAC ¶¶ 23, 29, and 35).

In signing The CPT Adoption Agreement, TRDI acknowledges that it "serves as the Plan Administrator, [plan] sponsor, and is a fiduciary with respect to its participation in [the TRDI H&W Plan], and that it is solely responsible for compliance with ERISA with respect to its Employer Plan." (Attachment A, Article 2.3). TRDI also acknowledges and approves commissions and other compensation that PBS and FIBI earn for their respective roles and services to the TRDI H&W Plan as set forth in Schedule C of the TRDI Adoption Agreement. (Attachment A, Article 2.6). Article 4 of the Adoption Agreement provides that TRDI (1) appoints PBS to serve as the Plan's recordkeeper; (2) acknowledges that PBS is not a fiduciary to the Plan; and (3) agrees to pay the fees identified in Schedule C of the Adoption Agreement. (Attachment A, Article 4.1). Article 4.2 also provides that TRDI may "unilaterally withdraw from participation in the CPT any time it chooses." (Attachment A, Article 4.2).

On August 31, 2016, TRDI terminated the TRDI H&W Plan that it offered to its employees through The CPT. (*See* Attachment E, Declaration of Jeff Hartnett, Regional Sales

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[4] As an employer subject to the fringe contribution requirements of the SCA, TRDI made the contribution to The CPT and/or The CERT. TRDI did not allow employees to make contributions to their Plans.

Director, Fringe Benefit Group, Inc.).[5] Accordingly, the TRDI H&W Plan has not existed for over a year.

**3. TRDI Established a Retirement Plan.**

TRDI also established a retirement plan by executing an Adoption Agreement with The CERT (hereafter "TRDI Retirement Plan"). (FAC at ¶¶ 77 and 78; *see also* Attachment B, which is a true and correct copy of a TRDI Retirement Plan Adoption Agreement; and Attachment C, which is a true and correct copy of the *PBS Defined Contribution Prototype/Volume Submitter* plan document, hereafter consistent with the Complaint referred to as "The CERT Master Plan"). As part of the arrangement for The CERT, Defendant Plan Benefit Services, Inc. entered into a trust agreement with unaffiliated institutional trust companies. (*See* Attachment G, CERT Master Trust Agreement with American National Bank of Texas; and Attachment H, CERT Master Trust Agreement with Pentegra Trust Company). American National Bank of Texas Trust Division ("ANB of Texas"), served as the discretionary investment trustee and asset custodian from June 1, 2014 through July 1, 2016, after which it was replaced by Pentegra Trust Company ("Pentegra") who continues presently to serve as the discretionary trustee and asset custodian.

Each employer, including TRDI, that executed an adoption agreement in connection with The CERT Master Plan established a stand-alone employee pension benefit plan within the meaning of ERISA § 3(2)(A), 29 U.S.C. § 1002(2)(A). (FAC at ¶ 78). The TRDI Retainer

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[5]In resolving standing issues under Fed. R. Civ. P. 12(b)(l), a court may consider evidence outside the pleadings without converting the motion to dismiss into a motion for summary judgment. *See, e.g., Moran v. Kingdom of Saudi Arabia*, 27 F.3d 169, 172 (5th Cir. 1994) (internal citation omitted). Further, the Court has substantial discretion in how it proceeds to resolve any fact questions raised by a Rule 12(b)(1) motion; the Court need not conduct an evidentiary hearing, but may resolve the issue based on the pleadings, affidavits and other documentary evidence. *Id.* The attached declaration simply explains one reason why Plaintiffs are former participants in the TRDI H&W Plan, present tense language in the FAC claiming participant status in the TRDI H&W Plan notwithstanding. (See FAC ¶¶ 22, 28, and 34).

Agreement acknowledges that TRDI serves as the TRDI Retirement Plan's "Plan Administrator." (*See* p. 8 of Attachment D, which is a true and correct copy of the Retainer Agreement executed by TRDI's President). The Retainer Agreement also sets forth the duties undertaken by the Plan Administrator, the Employer, the Recordkeeper, and the Trustee. (*Id.* at pp. 8-13). When TRDI executed the Retainer Agreement, it "acknowledge[d]" that it had received and reviewed the terms of the Retainer Agreement and that it had approved "the compensation, fees, and expenses associated with the Plan as herein stated." (*Id.* at p. 17).

**4. Plaintiffs' Status with Respect to the TRDI Plans.**

The FAC now baldly asserts that all three Plaintiffs are participants in the TRDI H&W Plan within the meaning of ERISA §3(7), 29 U.S.C. § 1002(7). (FAC ¶¶ 22, 28 and 34). The original Complaint alleged that they were all "former" participants. As noted in this Court's November 7th Order supported by the Declaration of Jeff Hartnett, Regional Sales Director, Fringe Benefit Group, Inc., TRDI terminated its health and welfare arrangement with Defendants in or about August 31, 2016. The FAC acknowledges that the TRDI H&W Plan stopped providing coverage "some time in 2016," at least with respect to Plaintiffs Chavez and Escarcega. (*See* ¶¶ 22 and 31). The FAC fails to address the issue with respect to Moreno, but it cannot be disputed that Moreno also stopped receiving benefits under the TRDI H&W Plan, at the latest, when that plan terminated on August 31, 2016.

Plaintiffs do not allege that they are due and owed any wrongfully denied benefits under the fully insured health insurance policies that provided benefits under the TRDI H&W Plan. Accordingly, as discussed in the Argument section of this brief, Plaintiffs cannot be "participants," within the meaning of ERISA, of the now terminated TRDI H&W Plan.

With respect to Plaintiff Chavez, a TRDI full-time employee, the original Complaint did not allege that Mr. Chavez was a participant in TRDI's Retirement Plan. The FAC now alleges that Mr. Chavez is a participant, within the meaning of ERISA, in the TRDI Retirement Plan, "because contributions **should have been made** on his behalf to that plan." (FAC ¶ 25; emphasis added). The FAC makes similar new allegations with respect to the retirement plan of Plaintiffs Escarcega and Moreno. Specifically, the FAC asserts that because the fees paid for administration of the TRDI H&W Plan were allegedly "excessive," Plaintiffs' retirement accounts were underfunded because TRDI would have been "required" to fund the retirement plan with any excess. (FAC ¶¶ 32 and 38). As detailed in the Argument section below, ERISA does not require this, and Plaintiffs fail to support this allegation with any provision in any of the plan documents. Plaintiffs Escarcega and Moreno also appear to claim that their retirement accounts would have been larger had those accounts not been charged alleged excessive fees.

**5. Allegations Regarding The CPT**

Relying upon the Schedule C to the TRDI H&W Adoption Agreement, Plaintiffs describe verbatim the fees that TRDI agreed could be charged against the premiums collected from it as a participating employer, depending on the coverage TRDI selected for its employees and the amount of premium collected. (FAC at ¶ 65; see Attachment A, Schedule C). TRDI contracted with Defendants (who had no prior relationship with TRDI) in an arms-length, commercial transaction, and Plaintiffs do not identify any benchmark from which to allege that the market-based fees TRDI agreed to pay for services to the TRDI H&W Plan were somehow "excessive." Rather, in the FAC, Plaintiffs now allege, without support, that they intend to prove at trial that:

> 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.

(FAC at ¶ 75).

Even as to these statements of future intent, Plaintiffs do not allege that these other plans will be comparable plans and providers competing in the unique market (with its unique and onerous administrative and regulatory requirements) in which TRDI contracted with Defendants. Plaintiffs also do not allege that TRDI knowingly agreed to pay Defendants excessive fees – and any inference of such would be contrary to how businesses and markets operate in arms-length commercial transactions. Plaintiffs also do not allege that they (or the putative class) were denied any health benefits under the fully insured policies of insurance issued to TRDI when it agreed to participate in the TRDI H&W Plan.

### 6. Allegations Regarding The CERT

Relying upon the TRDI Retirement Plan Retainer Agreement, Plaintiffs describe verbatim the fees that TRDI agreed to pay Defendants depending, among other things, upon the value of the assets held by a participating employer's retirement plan. (FAC at ¶¶ 86, 87, 90 and 93; and Attachment D at pp. 14-16).

Presumably relying upon the Master CERT Plan's annual tax filings, Plaintiffs allege that Defendants PBS and FIBI were paid about $88 million (either directly or indirectly) over a five-year period. (FAC at ¶ 92). Plaintiffs then surmise that over this 5-year period, Defendants' total fees averaged about 2% of the Master CERT's total pension plan assets. (FAC ¶ 93). Although Plaintiffs admit that The CERT had 1,716 participating employers as of 2015, (see FAC ¶ 79), they conveniently do not provide any further information as to the number of plans and participants that Defendants serviced during 2010-2015. Costs without context is

meaningless, and provides no plausible basis to infer that TRDI (or other employers) agreed to overpay Defendants in what were arms-length, commercial market transactions.

Plaintiffs then make conclusory allegations that "Defendants' fees far exceed industry standards and bear little relationship to the services they are providing to CERT." (FAC ¶ 95). Plaintiffs seek to bolster their conclusion by referring to the study they relied on in the original Complaint, but did not identify. The FAC's belated identification of this study has not cured Plaintiffs' pleading deficiency. Plaintiffs now identify this study as one Deloitte Consulting performed for the Investment Company Institute, which appears to have been released in 2013, and which posits a range of average fees charged to retirement plans depending on the size of the plans. *Id.* Among other things, the study was released more than four years ago in 2013, with data likely collected in earlier years. Perhaps more importantly, Plaintiffs do not describe the type of plans that were benchmarked in this study to ensure that the study is meaningful in the context of multiple employer arrangements subject to the complexities of state and federal prevailing wage laws. Further, nothing about this study would suggest why TRDI would have, in what were arms-length, commercial market transactions, agreed to overpay Defendants to administer its plans. Again, such an inference would be contrary to common sense, as well as to well-founded assumptions relied on in the law as to how businesses and markets operate.

## III. <u>ARGUMENT</u>

### A. PLAINTIFFS FAIL TO STATE A CLAIM UNDER ERISA PURSUANT TO RULE 12(b)(6) OF THE FEDERAL RULES OF CIVIL PROCEDURE.

To survive a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), plaintiffs must allege "enough facts to state a claim to relief that is plausible on its face," *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 547 (2007), meaning that from the facts alleged, the court can "draw the reasonable inference that the defendant is liable for the misconduct alleged," *Ashcroft v. Iqbal*,

556 U.S. 662, 678 (2009). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.; see also Gentilello v. Rege*, 627 F.3d 540, 544 (5th Cir. 2010) (*quoting Plotkin v. IP Axess, Inc.*, 407 F.3d 690, 696 (5th Cir. 2005) ("We do not accept as true conclusory allegations, unwarranted factual inferences, or legal conclusions.").

Motions to dismiss have important roles to play in complex ERISA litigation. Specifically, in *Fifth Third Bancorp v. Dudenhoeffer*, 134 S. Ct. 2459, 2470 (2014), the Supreme Court concluded that a motion to dismiss is an "important mechanism for weeding out meritless" ERISA claims of fiduciary breach. The level of factual detail necessary will depend on the complexity of the claims. *Limestone Dev. Corp. v. Vill. Of Lemont, Ill*, 520 F.3d 797, 803 (7th Cir. 2008). For complex litigation or cases in which discovery is likely to be unusually costly – as is the case here – "a fuller set of factual allegations may be necessary to show that relief is plausible." *Tamayo v. Blagojevich*, 526 F.3d 1074, 1083 (7th Cir. 2008). Although the Court must assume that specific factual allegations (that are not contradicted by plan documents) are true, it need not "accept as true a legal conclusion couched as a factual allegation." *Twombly*, 550 U.S. at 555 (*quoting Papasan v. Allain*, 478 U.S. 265, 286 (1986)); *see also R2 Invs. LDC v. Phillips*, 401 F.3d 638, 642 (5th Cir. 2005) ("[W]e will not strain to find inferences favorable to the plaintiffs and we will not accept conclusory allegations, unwarranted deductions, or legal conclusions.") (internal quotation marks and citations omitted).

While a plaintiff need not "marshal all of its evidence in support of each of its factual allegations," *MedioStream, Inc. v. Microsoft Corp.*, 749 F. Supp. 2d 507, 520 (E.D. Tex. 2010), the Complaint "(1) on its face (2) must contain enough factual matter (taken as true) (3) to raise a reasonable hope or expectation (4) that discovery will reveal relevant evidence of each element

of a claim." *Lormand v. U.S. Unwired, Inc.*, 565 F.3d 228, 257 (5th Cir. 2009); *see also, e.g., Clark Fire Equipment Co. v. Arkema*, 176 F. Supp. 3d 646, 648 (S.D. Tex. 2015) ("[d]ismissal is appropriate if the complaint lacks an allegation regarding a required element . . . ").

### 1. Claim One Fails to Allege Facts to Plausibly Support that Defendants Engaged in a Prohibited Transaction as a Non-Fiduciary Service Provider.

Claim One of the Complaint alleges that Defendants were "parties-in-interest" to the participating plans because they provided services to those plans. (FAC at ¶ 118); and *see* ERISA § 3(14)(B), 29 U.S.C. § 1002(14)(B) (defining a plan service provider as a party-in-interest). Claim One further alleges that "[b]y transacting with Defendants and paying their fees out of plan assets," the ***fiduciaries*** (with respect to these Plaintiffs–TRDI) of the "participating plans," 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.[6] (FAC at ¶ 121). Under Claim One, the wrong Plaintiffs allege Defendants committed is that they "knowingly participated in such prohibited transactions in violation of ERISA ¶ 406(a), 29 U.S.C. ¶ 1106(a)." (FAC at ¶ 122).

ERISA § 406(a)(1)(A), 29 U.S.C. § 1106(a)(1)(A), provides 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." Plaintiffs also allege a violation of ERISA § 406(a)(1)(D), 29 U.S.C. § 1106(a)(1)(D), which provides that a fiduciary "shall not transfer plan assets to, or use plan assets for the benefit of, a party in interest." While a party-in-interest can be held liable for a transaction involving a 406(a) violation, *Harris Trust & Savings Bank v. Salomon Smith Barney, Inc.*, 530 U.S. 238 (2000), to

[6] Defendants do not concede that all their compensation constituted "plan" assets. Plaintiffs make no distinctions between compensation and commissions earned.

obtain any relief under 406(a)(1)(A) or (D), a plaintiff must show that there was a statutorily prohibited transaction in the first instance.

In sum, to prevail on Claim One, Plaintiffs must allege facts to support that (1) TRDI as the fiduciary with respect to an employee benefit plan (2) with actual or constructive knowledge, caused the plan to engage in a prohibited transaction by paying excessive fees (3) to a party-in-interest. *See, e.g., Harris Trust*, 530 U.S. at 251; *Patricio v. Voya Fin., Inc.*, 2017 U.S, Dist. Lexis 95735 at *13-*14 (S.D.N.Y. June 20, 2017). Plaintiffs have not shown they have met these elements for three independent reasons.

First, Plaintiffs have not shown that Defendants were parties-in-interest when TRDI transacted with them to provide services to the plans. ERISA 406(a) is concerned about "commercial bargains that present a special risk of plan underfunding because they are struck with ***plan insiders***, presumably not at arm's length." *Lockheed Corp. v. Spink*, 517 U.S. 882, 893 (1996) (emphasis added). Accordingly, a person who has no pre-existing relationship to a plan is not a "plan insider," and is not a party-in-interest to a plan until ***after*** the first arrangement or contract to provide services is established with the plan. *Brock v. Gerace*, 7 Employee Benefits Cas. (BNA) 1713 (D.N.J. 1986). In *Brock v. Gerace*, 7 Employee Benefits Cas. (BNA) 1713 (D.N.J. 1986), a case brought by the United States Department of Labor ("DOL"), the federal agency charged with enforcing ERISA, the court summarized DOL's position as follows:

> [T]he plan's initial agreement with a service provider creates the "party in interest" status and… any ***subsequent*** agreements between the plan and these parties in interest, even routine renewals of existing agreements, fall within the reach of 406(a) of ERISA.

*Id.* at 1715 (Attachment F is a copy of the *Brock* case for the Court's convenience); *see also Danza v. Fidelity Mgmt. Trust Co.*, 533 Fed. Appx 120, 12-26 (3rd Cir. 2103)(no prohibited transaction under ERISA § 406(a) because Fidelity was not a "service provider" at the time the

Trust Agreement was signed); *Fleming v. Fidelity Mgmt Trust Co.,* 2017 WL 4225624 at *8 (D. Mass. September 9, 2017)(same – citing and applying *Lockheed* and *Danza*).

Here, TRDI struck an arms-length commercial transaction with Defendants – who had no pre-existing plan relationship with TRDI prior to TRDI's execution of the adoption agreements with Defendants. Defendants thus were not "parties-in-interest" within the meaning of ERISA § 3(14)(B), 29 U.S.C. § 1002(14)(B), when TRDI transacted with Defendants.

Second, even if one assumed *arguendo* that Defendants were parties-in-interest, Plaintiffs still fail to show that TRDI agreed to pay Defendants excessive fees. The Court identified this flaw when dismissing Plaintiffs' original complaint, and they have failed to cure it in their FAC. This was an arms-length commercial transaction struck in the market. *Compare* DOL Reg. § 2550.408c-2(d) (whether compensation is reasonable depends on the fair market value of the services or goods provided the plan as compared to the cost of similar services in the same geographic location where the services are available to the plan). With respect to the TRDI H&W Plan, Plaintiffs make numerous conclusory allegations to the effect that TRDI agreed to overpay Defendants; however, as noted, they provide no market benchmarks comparing similar arrangements to support their conclusion. Plaintiffs merely assert that they hope to "show at trial" that TRDI agreed to pay Defendants excessive fees. (FAC at ¶ 74). On the Retirement Plan side, Plaintiffs claim to rely on a 2013 study, (FAC at ¶ 95), to seek to support their position that the fees TRDI paid Defendants under The CERT were excessive. This dated study does not purport to show market-based comparisons – it does not show what other service providers were paid for comparable services servicing multiple employer arrangements subject to the complexities of state and federal prevailing wage laws. This study thus provides no basis to make the counter-factual inference that TRDI would have agreed to pay more than market value

for Defendants' services. *See, e.g.*, *R2 Invs*, 401 F.3d at 642 (court does not accept "unwarranted deductions" in evaluating plaintiff's allegations).

Finally, Plaintiffs have not alleged that as a fiduciary for the plans[7] TRDI, with actual or constructive knowledge, [8] agreed to pay excessive fees to Defendants. *See, e.g., Harris Trust*, 530 U.S. at 251; *Patricio*, 2017 WL 2684065 at *4 (dismissing complaint for failure to allege this element). There is a reason Plaintiffs avoided pleading this necessary element to their claim– it makes no sense. TRDI engaged in an arms-length commercial transaction with Defendants, and it is implausible to assume that TRDI would agree to overpay Defendants in what was an arms-length, market-based commercial transaction.

Accordingly, Claim One fails to state a claim under ERISA and should be dismissed. Plaintiffs have failed to show: (1) that Defendants were parties-in-interest when TRDI contracted with them to service its plans; (2) that Defendants were paid excessive fees for their services; and (3) that as a fiduciary for pre-existing plans, TRDI had actual or constructive knowledge that it was agreeing to pay Defendants more than market value for their services. Each ground independently supports dismissal of Claim One.

**2. Claim Two Fails to Allege Facts that Plausibly Support that Defendants Engaged in Fiduciary Self-Dealing.**

In Claim Two, Plaintiffs allege that Defendants engaged in fiduciary self-dealing "by

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[7] On a related point, Plaintiffs have not established that TRDI had either a pre-existing health and welfare plan or a retirement plan on whose behalf TRDI was acting as a fiduciary. If TRDI first established its employee benefit plans by executing the adoption agreements with The CPT and/or The CERT, then any actions taken before the adoption of those agreements would not implicate ERISA because at that moment no employee benefit plan existed. *See, e.g.*, *Seaway Food Town, Inc. v. Medical Mut. of Ohio*, 347 F.3d 610, 617 (6th Cir. 2003) ("An insurance company negotiating the terms of a contract with an employer is not subject to ERISA's standards of fiduciary conduct because, at that point, no employee benefit plan exists.).

[8] Paying service providers to plans who are parties-in-interest is not *per se* unlawful. *E.g., Sacerdote v. New York University*, 2017 U.S. Dist. LEXIS 1371156 at *40-41 (S.D.N.Y. Aug. 25, 2017) (noting no court has accepted such a theory). Rather, to have knowledge that the transaction was unlawful, TRDI would have to have actual or constructive knowledge that it was agreeing to pay Defendants excessive fees. *E.g., Patricio*, 2017 WL 2684065 at *4; *see generally* ERISA § 408(b)(2), 29 U.S.C.§ 1108(b)(2).

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" in violation of ERISA § 406(b)(1) and (3), 29U.S.C. § 1106(b)(1) and (3).[9] (FAC at ¶ 132).

In dismissing the original complaint, the Court noted that "TRDI, not defendants in this case, had at all times the final authority and control over the administration of the contract under which defendants worked" and that "it is clear TRDI had the authority to stop the compensation, fees, and expenses associated with the plan charged or being charged by defendants." (*See* Order p. 3). Plaintiffs cannot cure these defects in their Claim Two, and their re-pleading of this same claim in the FAC is deficient for the same reasons.

In any case alleging a breach of fiduciary duty, the "threshold question" is whether the defendant was "acting as a fiduciary (that is, was performing a fiduciary function) when taking the action subject to the complaint."[10] *Pegram v. Herdrich*, 530 U.S. 211, 226 (2000); *Kirschbaum v. Reliant Energy, Inc.*, 526 F.3d 243, 250-51 (5th Cir. 2008) (The first question a court must address is whether the defendant is a fiduciary). A person is a fiduciary under ERISA "to the extent" he or she exercises or has any discretionary authority over the management or administration of an employee benefit plan or the assets of any such plan. *See*, ERISA ¶ 3(21)(A), 29 U.S.C. ¶1002(21(A); *see, e.g.*, *Kirschbaum*, 526 F.3d at 251.

Here, the threshold question is whether Defendants exercised discretionary authority over the TRDI Plans or its assets regarding the setting of their compensation and the hiring of

[9] Section 406(b)(1) prohibits a plan fiduciary from self-dealing with assets of the plan. 29 U.S.C. § 1106(b)(1). Section 406(b)(3) prohibits a plan fiduciary from receiving "consideration for his own personal account" in connection with a transaction involving the assets of the plan. 29 U.S.C. § 1106(b)(3).

[10] Defendants do not concede that they are fiduciaries for any purpose or that any of Plaintiffs' claims would survive this motion to dismiss if not granted.

themselves or their affiliates to service the TRDI Plans.[11] The authority to hire Defendants and pay them the agreed to fees disclosed in the Adoption Agreements rested with TRDI, not Defendants – a point Plaintiffs themselves judicially concede in Claim One, which alleges that the fiduciaries of the "participating plans" caused those plans to enter into agreements that allegedly violated ERISA ¶¶ 406(a)(1)(A) and (D). (FAC at ¶ 121). Moreover, as the Court already observed, TRDI, not Defendants, exercised final authority and control over the hiring of the Defendants and the fees they would pay. (*See* Order p. 3). The TRDI H&W Adoption Agreement and the TRDI Retirement Plan Retainer Agreement (which Defendants provided to the Court in advance of its November 7 ruling) confirmed this point.

The TRDI H&W Adoption Agreement with PBS unequivocally shows that TRDI: (1) appointed Defendant PBS to serve as the Plan's recordkeeper; (2) acknowledged that PBS was not serving as fiduciary to the Plan; and (3) agreed to pay the fees identified in Schedule C of the Adoption Agreement. (Attachment A, Article 4.1; *see also* Article 2.3 and 2.6). When TRDI executed the TRDI Retirement Plan Retainer Agreement with PBS, it "acknowledge[d]" that it had received and reviewed the terms of the Retainer Agreement and that it had approved "the compensation, fees, and expenses associated with the Plan as herein stated." (Attachment D, at p. 17).

The courts have universally held that in these circumstances, service providers are not fiduciaries when negotiating their compensation with the plan fiduciaries who have the final authority to accept or reject that agreement. *See, e.g., Fleming v. Fidelity Mgmt Trust Co.,* 2017 WL 4225624 at *7 (D. Mass. September 9, 2017); *Patrico v. Voya Financial Inc.*, 2017 WL

[11] The arguments under Claim One regarding the existence of an employee benefit plan at the time of the alleged prohibited transaction are equally applicable here. Fiduciary obligations only apply when a person is exercising or has discretion over an employee benefit plan.

2684065 at *3 (S.D.N.Y. June 6, 2017); *McCaffrey Financial Corp. v. Principal Life Insurance Company*, 811 F.3d 998, 1003 (8th Cir. 2016); *see also Hecker v. Deere & Co*., 556 F.3d 575, 583 (7th Cir. 2009)(same); *Renfro v. Unisys Corp.*, 671 F.3d 314, 324 (3d Cir. 2011) (trustee was not a fiduciary when it negotiated its fee with plan sponsor because it did not have discretionary authority to determine its fee); *Charters v. John Hancock Life Ins. Co*., 583 F. Supp. 189, 196–97 (D. Mass 2008) ("In an arm's-length transaction, an insurance company negotiating with a plan has no responsibility to the plan and no authority or control over whether the plan chooses to enter into the agreement" and therefore has no fiduciary status with respect to its compensation).

At no time did Defendants have any authority or control to select themselves to provide services to the plans that TRDI established. Plaintiffs' conclusory allegations that Defendants set their own compensation and hired themselves to service the TRDI Plans are thus directly contradicted by this Court's earlier ruling, and by the TRDI Plan documents referenced in the FAC. Moreover, "'[c]onclusory allegations and unwarranted deductions of fact are not admitted as true, especially when such conclusions are contradicted by facts disclosed by a document appended to the complaint.'" *See, e.g., Carter v. Target Corp.*, 541 Fed. Appx. 413, 417 (5th Cir. 2013) (*quoting Associated Builders, Inc. v. Ala. Power Co.,* 505 F.2d 97, 100 (5th Cir. 1974)). Accordingly, Plaintiffs' contradicted conclusory allegations are insufficient to state a plausible claim for relief.

In the FAC, Plaintiffs added numerous paragraphs alleging why, in their opinion, some of the alleged services Defendants provided gave rise to fiduciary activity with respect to the TRDI plans. (*See, e.g.,* FAC ¶¶ 45(a)-(c); 46(a)-(d); 69-71; 81; 83; and 98-99). Notably, in spite of having all the plan documents and the two trust agreements in their possession, Plaintiffs' FAC does not quote or cite to language in any of the plan or trust documents when it lists Defendants

alleged duties. Most importantly for present purposes, the key issue here is not whether Defendants function or functioned in a fiduciary capacity with respect to certain services they provided to the TRDI plans (a point Defendants dispute). Rather, the critical question here is whether Defendants exercised fiduciary discretion by setting their own compensation and selecting themselves to provide services to the TRDI plans.

As noted above, TRDI – not Defendants – controlled whether to hire Defendants and the fees to pay them. In an effort to establish some connection between fees and fiduciary discretion, in a number of new paragraphs in the FAC, Plaintiffs allege (1) that Defendants were charged with selecting the investments options made available to employer plans through The CERT, and (2) that by making those selections, Defendants were able to increase their compensation. (*See* FAC ¶¶ 46(b), 81(b), and 99). The FAC ¶ 99 asserts:

> 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.

The Master Trust Agreement entered into with ANB of Texas and Pentegra, however, directly contradict Plaintiffs' new conclusory allegations. (*See* Attachment G, Article 4(b)(2) and (3); and Article 4(c)(1)); and Attachment H, Article 4(b)(2) and (3); and Article 4(c)(1)). Specifically, the Trust Agreements gave ANB of Texas or Pentegra, during their respective tenures, not Defendants, the discretion and responsibility to determine the investment funds offered in The CERT. Just as in the original motion to dismiss, the TRDI Plan documents, including the Master Trust Agreement, are properly before the Court because a court may consider "the complaint, its proper attachments, documents incorporated into the complaint by reference, and matters of which a court may take judicial notice" in a motion to dismiss. *See, e.g. Randall D. Wolcott, M.D., P.A. v. Sebelius*, 635 F.3d 757, 763 (5th Cir. 2011) (internal

quotation marks omitted). And as noted above, although the Court is required to accept all well-pleaded factual allegations as true for purpose of a motion to dismiss, '[c]onclusory allegations and unwarranted deductions of fact are not admitted as true, especially when such conclusions are contradicted by facts disclosed by a document appended to the complaint.' *See, e.g., Carter v. Target Corp.*, 541 Fed. Appx. 413, 417 (5th Cir. 2013) (*quoting Associated Builders, Inc. v. Ala. Power Co.,* 505 F.2d 97, 100 (5th Cir. 1974)).

Plaintiffs have thus failed to plead facts that plausibly support their conclusory allegations that Defendants had fiduciary discretion to set their own compensation or to hire themselves to service the TRDI Plans.[12] Rather, the Court's original ruling applies again here with full force: "TRDI, not defendants in this case, had at all times the final authority and control over the administration of the contract under which defendants worked" and "it is clear TRDI had the authority to stop the compensation, fees, and expenses associated with the plan charged or being charged by defendants." (Order p. 3).

Accordingly, Claim Two fails to state a claim under ERISA ¶ 406(b)(1) or (3).

**3. Claim Three Fails to Allege Facts to Plausibly Support a Conclusion that Defendants Breached Their Fiduciary Duties Under ERISA.**

Claim Three fails for the same reasons as Claim Two because TRDI, not Defendants, controlled Defendants' compensation and whether to hire them. In Claim Three, Plaintiffs complain that:

> 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

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[12] In addition to failing to show that Defendants were fiduciaries for setting their fees, Plaintiffs do not explain why the fees paid to Defendants would violate ERISA § 406(b)(3), 29 U.S.C. ¶1106(b)(3). This provision is generally known as the "anti-kickback" provision. *See Brink v. DaLesio*, 496 F. Supp. 1350 (D. Md. 1980) (citing H.R. Conf. Rep. No. 1280, 93d Cong., 2d Sess. (1974), *reprinted in* 1974 U.S.C.C.A.N. 5038, 5089), *aff'd in relevant part and rev'd in part*, 667 F.2d 420 (4th Cir. 1981). "[T]here is no 'kickback'" when "two independent entities agree between themselves as to the payment to be made for services rendered." *Assocs. in Adolescent Psychiatry, S.C. v. Home Life Ins. Co.*, 941 F.2d 561, 570 (7th Cir. 1991).

> 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,

(FAC at ¶ 141).

ERISA § 404(a)(1), 29 U.S.C. § 1104(a)(1), provides standards of conduct that apply only to a person acting in a fiduciary capacity with respect to an employee benefit plan. For the reasons detailed above regarding Claim Two, Claim Three fails because Plaintiffs cannot show that Defendants functioned in a fiduciary capacity for the purpose of setting their own compensation or hiring themselves as service providers to the TRDI Plans.

## B. THE COMPLAINT SHOULD BE DISMISSED BECAUSE PLAINTIFFS DO NOT HAVE STANDING TO BRING CERTAIN OF THEIR CLAIMS.

### 1. Plaintiffs Lack Statutory Standing to Bring Certain Claims.

ERISA requires that claims be brought by a "participant." *See* ERISA § 502(a)(1) & (3), 29 U.S.C. § 1132(a)(1) & (3); *see also e.g.*, *Harley v. Minn. Mining & Mfg. Co.*, 284 F.3d 901, 906-07 (8th Cir. 2002) (plaintiffs must establish standing under both ERISA and Article III of the U.S. Constitution); *Jackson v. Sears, Roebuck & Co.*, 648 F.2d 225, 229 (5th Cir. 1981) (dismissing plaintiff's claim because she was not a participant in the plan at issue). ERISA defines a "participant" as "an employee or former employee who is or may be eligible to receive a benefit under the plan." *Yancy v. American Petrofina, Inc.*, 768 F.2d 707, 708 (5th Cir. 1985) (citing 29 U.S.C. § 1132(a)(1)(B)).

The FAC states that all three Plaintiffs ***are*** participants in the TRDI H&W Plan. However, it is undisputed that TRDI terminated the TRD H&W Plan on August 31, 2016. The FAC also does not allege that Plaintiffs were wrongly denied a benefit. In exchange for the premiums TRDI paid, in full on their behalf, Plaintiffs were covered under two separate fully insured policies for health insurance: one for the full-time employees and one for the part-time

employees. Plaintiffs make no claim that they were wrongfully denied benefits under the TRDI H&W Plan's policies of insurance.[13] As former participants in the now terminated TRDI H&W Plan, Plaintiffs do not make a claim to a welfare benefit, and therefore lack statutory standing to make any allegations with respect to the TRDI H&W Plan, including any allegation that their employer, TRDI, agreed to overpay for their health insurance. *See Yancy*, 768 F.2d at 708.

Mr. Chavez's claim to be a participant in the TRDI Retirement Plan also must be rejected because his participation in that Plan is based on two allegations that have yet to be proved and cannot be litigated because he lacks standing. The two allegations are: (1) that the fees paid to TRDI H&W Plan were excessive; and (2) that TRDI would have been "required" to contribute any excess not paid to the TRDI H&W Plan to the TRDI Retirement Plan. Mr. Chavez, however, is not and was not a participant in the TRDI Retirement Plan. Mr. Chavez has no statutory standing to bring this claim on the TRDI Retirement Plan.

Plaintiffs now allege, irrespective of any claims connected to the TRDI H&W Plan, that Plaintiffs Moreno and Escarcega, both of whom allegedly have assets in the TRDI Retirement Plan, would have had greater earnings in the TRDI Retirement Plan had the TRDI Retirement Plan administrative fees been less than the alleged two percent Plaintiffs claim were assessed over a five-year period of time. Although, as Defendants detail above, Plaintiffs' claims fail on the merits, Defendants concede that Plaintiffs Moreno and Escarcega would likely have statutory standing to raise these claims on the TRDI Retirement Plan.

**2. Plaintiffs Also Lack Constitutional Standing to Bring Certain Claims.**

In addition to failing on the merits, Plaintiffs also lack constitutional standing under

[13] There is no support for Plaintiffs insinuation that separate welfare fund accounts were established for each of them under the TRDI H&W Plan, and Plaintiffs cite no provision of the TRDI document to support their position. (FAC at ¶¶ 23-24 & 37). Defendants collected premiums on an aggregate basis from TRDI for all employees that were covered under the TRDI H&W Plan and paid aggregate premium to the insurance companies on a monthly basis.

Article III to bring their claims against Defendants concerning the TRDI H&W Plan. In *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016), the Supreme Court recently reiterated the requirements for constitutional standing:

> Our cases have established that the "irreducible constitutional minimum" of standing consists of three elements. The plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision.

*Id.* at 1547 (citations omitted). The injury-in-fact must be "'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.'" *Id*. at 1548 (*quoting Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)). And, "[f]or an injury to be 'particularized,'" it "must affect the plaintiff in a personal and individual way." *Id.; see also Crane v. Johnson*, 783 F.3d 244, 254-55 (5th Cir. 2015) (affirming district court's dismissal under Fed. R. Civ. P. 12(b)(1) where plaintiffs failed to satisfy the requirements of constitutional standing because they did not allege a sufficient injury-in-fact); *Audler v. CBC Innovis Inc.*, 519 F.3d 239, 248 (5th Cir. 2008) (holding plaintiff lacked standing to sue on behalf of a class and noting "a plaintiff's Complaint must establish that he has a personal stake in the alleged dispute, and that the alleged injury suffered is particularized as to him") (internal quotation marks omitted).

Plaintiffs' theory of harm fails under *Lujan* because their alleged injury is speculative and not redressable. Plaintiffs reason that if the TRDI H&W Plan fees had been lower, TRDI would have been "required" to increase its contributions to the TRDI Retirement Plan. (FAC at ¶¶ 25, 32 & 38). ERISA, however, imposes no obligation on TRDI to fund its Retirement Plan with any such savings. *See, e.g., Hughes Aircraft Co. v. Jacobson,* 525 U.S. 432, 444 (1999) ("ERISA's fiduciary duty requirement simply is not implicated where [the plan sponsor] makes a decision regarding the form or structure of the [p]lan such as who is entitled to receive [p]lan benefits and in what amounts, or how such benefits are calculated."). Further, Plaintiffs have

pointed to no language in any of the TRDI Adoption Agreements or other governing plan documents imposing obligations on TRDI to fund its Retirement Plan with any savings resulting from lower administrative fees to the TRDI H&W Plan. Plaintiffs thus have failed to allege a redressable injury. *See, e.g., Glanton v. Alcoa Prescription Drug Plan*, 465 F.3d 1123, 1125 (9th Cir. 2006) (holding Plaintiffs lacked standing to bring their ERISA claim because they failed to allege a redressable injury).

In *Glanton*, plaintiffs brought an action against AdvancePCS, a pharmacy benefits manager, alleging that the cost of their drug benefits were too high. Plaintiffs did not allege that they were denied benefits or received inferior drugs; rather they alleged that AdvancePCS charged plans too much, and that as a result the plans demanded higher copays and contributions from participants. The plaintiffs claimed that if their action was successful, "the plans' drug costs [would] decrease, and that the plans might then reduce contributions or co-payments." *Id.* at 1125. The court concluded that nothing would force ALCOA or Kmart to take the actions the participants were demanding. The court stated that "ALCOA and Kmart would be free to reduce their contributions or cease funding the plans altogether until any such funds [recovered as an award due to the litigation] were exhausted." *Id.* The court therefore held that the participants had no redressable injury and thus lacked standing to bring the action. *Id.*

Here, as a matter of law, the decision regarding what is to be done with any savings from alleged excessive fees on the H&W Plan (as noted above, this claim fails on the merits) resides with TRDI, the plan sponsor and employer, a third party not before the Court. Moreover, the notion that a decision against Defendants on the fees paid by TRDI would induce TRDI (or any other employers of the putative class) to increase its contributions to the TRDI Retirement Plan

is speculative at best. As in *Glanton*, there is no redressable injury here. Plaintiffs therefore have no standing to bring claims on the H&W Plan under Article III.[14]

Finally, Plaintiffs cannot seek to circumvent the constitutional requirements of Article III by bringing this case as a proposed class action. Rule 23 is simply a rule of procedure that the Supreme Court has held cannot expand or modify constitutional requirements. "[T]he Rules Enabling Act forbids interpreting Rule 23 to 'abridge, enlarge or modify any substantive right. . . .'" *Wal-Mart Stores, Inc. v. Dukes,* 564 U.S. 338, 367, 2561 (2011) (quoting *Ortiz v. Fibreboard Corp*., 527 U.S. 815, 845 (1999)). Thus, as *Spokeo* recently reiterated: "[t]hat a suit may be a class action . . . adds nothing to the question of standing, for even named plaintiffs who represent a class 'must allege and show that they personally have been injured, not that injury has been suffered by other, unidentified members of the class to which they belong.'" *Spokeo*, 136 S. Ct. at 1547 n.6 (quoting *Simon v. E. Ky. Welfare Rights Org*., 426 U.S. 26, 40 n.20 (1976)).

## IV. CONCLUSION

Accordingly, for the reasons stated herein, Defendants request that this Court dismiss with prejudice Plaintiffs' claims against the Defendants.

[14] As noted earlier, Plaintiff Chavez does not have statutory standing to pursue any claim on the TRDI Retirement Plan.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

This is to certify that a true and correct copy of the foregoing document was served on the attorney of record by delivering a true and correct copy through the Court's CM/ECF system per Local Rule CV-5(a)(1) on this the 15th day of January, 2018, as follows:

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