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	§	
	§	Case No. 1:17-cv-659
v.	§	
	§	ERISA Class Action
Plan Benefit Services, Inc.; Fringe	§	
Insurance Benefits, Inc.; and Fringe	§	
Benefit Group	§	

DEFENDANTS' MOTION TO DISMIS 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 and Brief in Support to dismiss the Complaint pursuant to Fed. R. Civ. P. 12(b)(1), because Plaintiffs lack statutory standing under Employee Retirement Income Security Act of 1974, as amended ("ERISA"), 29 U.S.C. § 1001 *et seq*., and they lack standing under Article III of the United States Constitution. Alternatively or in addition, the Complaint should be dismissed pursuant to Fed. R. Civ. P. 12(b)(6), because the Complaint's three claims fail to state a claim upon which relief can be granted under ERISA.

[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.

I. STATEMENT OF THE CASE

A. OVERVIEW.

Plaintiffs allege that Defendants violated ERISA's standards of fiduciary conduct and certain transactions prohibited by ERISA, when Defendants, among other things, allegedly charged "excessive" fees for providing services to employee benefit plans in which presumably Plaintiffs participated. They bring this action presumably on behalf of themselves and a putative class of similarly situated participants and beneficiaries in employee benefits plans established by other employers to which they are strangers. (Compl. at ¶ 58).

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. (Compl. at ¶¶ 13, 19, and 20). Defendant PBS provides recordkeeping services to plans established by employers that choose to establish plans through The CPT and/or The CERT. (Compl. at ¶¶ 26 and 44).

Plaintiffs are employees of Training, Rehabilitation, & Development Institute, Inc. ("TRDI"). (Compl. at ¶¶ 8, 9 and 10).

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).[2] An

[2]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 Master Trust Agreement, 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

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). (Compl. at ¶ 24).

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 CPT], 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 recordkeepeer; (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 Director, Fringe Benefit Group, Inc.).[3] Accordingly, the TRDI H&W Plan has not existed for over a year.

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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)).

[3]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

3. TRDI Established a Retirement Plan.

TRDI also established a retirement plan by executing an Adoption Agreement with The CERT (hereafter "TRDI Retirement Plan"). (Compl. at ¶¶ 38 and 39; *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").

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). (Compl. at ¶ 39). The TRDI Retainer 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. Plaintiff's Status with Respect to the TRDI Plans.

The Complaint alleges that Plaintiff Chavez is a full-time employee of TRDI and "is" a participant, within the meaning of ERISA §3(7), 29 U.S.C. § 1002(7), in the TRDI H&W Plan,

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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.* Plaintiffs concede that they are former participants in both TRDI Plans. The attached declaration simply explains one reason why Plaintiffs are former participants to the TRDI H&W Plan. This is a central issue to their ability to have statutory standing to bring this action.

but then also states that the TRDI H&W Plan stopped providing medical benefits to Mr. Chavez "some time" in 2016. (Compl. at ¶ 8). As noted, TRDI terminated its arrangement with The CPT on August 31, 2016. Mr. Chavez therefore is a ***former*** participant in the TRDI H&W Plan. The Complaint does not allege that Mr. Chavez was ever a participant in the TRDI's Retirement Plan.

According to the Complaint, Plaintiffs Escarcega and Moreno are part-time employees of TRDI and "***former***" participants in the TRDI H&W Plan and the TRDI Retirement Plan. (*Id*. at ¶¶ 9 and 10) (emphasis added).

Plaintiffs are never again mentioned in the Complaint.

B. ALLEGATIONS REGARDING THE CPT.

Relying upon the Schedule C to the TRDI H&W Adoption Agreement, Plaintiffs describe verbatim the fees that will or ***may*** be charged against premiums collected from a participating employer, depending on the coverage that a participating employer selects for its employees and on the amount of premium collected. (Compl. at ¶ 29; see Attachment A, Schedule C). Plaintiffs do not allege that the fees **TRDI** paid were excessive in relation to the services it received under the TRDI H&W Plan. Plaintiffs also do not identify any benchmark from which to allege that the fees the TRDI H&W Plan paid for the services it received were excessive, or, for that matter, to support their general allegation that fees paid by any plan established in connection with The CPT were excessive.

Rather, on information and belief, Plaintiffs conclude, with respect to Defendant PBS:

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

(Compl. at ¶ 36) (Emphasis added). Plaintiffs further conclude with respect to FIBI that:

> **On information and belief,** the "sales and marketing'' services of Fringe Insurance Benefits, Inc. are not necessary or reasonable expenses of administering the plans participating in CPT.

(Compl. at ¶ 37) (Emphasis added).

Plaintiffs do not allege that they (or the putative class) were denied any health benefits or otherwise are due any benefits under the fully-insured policies of insurance issued to TRDI when they participated in the TRDI H&W Plan resulting from the alleged excessive fees paid to PBS or FIBI.

C. ALLEGATIONS REGARDING THE CERT.

Relying upon the TRDI Retirement Plan Retainer Agreement, Plaintiffs describe verbatim the fees that **may** be charged to a plan depending, among other things, upon the value of the assets held by a participating employer's retirement plan. (Compl. at ¶¶ 46, 47, and 50; and Attachment D at pp. 14-16).

Presumably relying upon the Master CERT Plan's annual tax filings, Plaintiffs allege that PBS and FIBI were paid about $88 million (either directly or indirectly) over a five year period for services they provided to the approximately 1,716 plans, services which Plaintiffs conclude, without support, are unnecessary or too limited to be worth whatever the plans paid. (Compl. at ¶¶ 40, 52, 53, 54, and 56). And opine that "Defendants' fees far exceed industry standards and bear little relationship to the services they are providing to The CERT." (Compl. at ¶ 56). The only basis for Plaintiffs' conclusion is an undated and unidentified study by an industry consultant positing a range of average fees charged to retirement plans depending on the size of the plans. (Compl. at ¶ 56). This unidentified and undated industry article is uninformative, for among other reasons, because it does not even describe the types of plans to which it applies. This Court should give it no weight.

Plaintiffs do not allege that they (or the putative class) experienced any losses from any alleged excessive fees charged to the TRDI Retirement Plan. The only statement of injury found in the entire Complaint is that:

> ***[f]or participants whose employers elected to 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, the employers would have had to contribute more to CERT to make up the balance of the fringe benefit portion of their prevailing wage obligation.

(Compl. at ¶ 57).

II. ARGUMENT

A. THE COMPLAINT SHOULD BE DISMISSED BECAUSE PLAINTIFFS DO NOT HAVE STANDING TO BRING ANY OF THEIR THREE CLAIMS.

1. Plaintiffs Lack Statutory Standing to Bring Their 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 Complaint states that all three Plaintiffs are former participants in both TRDI Plans and does not explain why as former participants they should have standing to bring this action. As noted, the TRDI H&W Plan that was established in connection with The CPT has not existed for over a year.

Thus, because Plaintiffs are no longer participants in the TRDI Plans, they have no statutory standing to bring this ERISA action. Plaintiffs never had and do not have statutory standing to bring this action on behalf of the putative class because they have never been participants in those plans.

2. Plaintiffs Lack Constitutional Standing to Bring Their Claims.

Just as fundamentally, Plaintiffs have no constitutional standing under Article III to bring their claims against Defendants. 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 is based on their belief that, because the fees charged to administer the TRDI H&W Plan were allegedly too high, "participants whose employers elected

to make prevailing wage contributions to CERT," had their contributions to the retirement plan reduced. (Compl. at ¶ 57). Plaintiffs allege no other injury in the Complaint.

Simply put, their assertion of harm does not meet the *Lujan* requirement that "[t]he injury-in-fact [] be "'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.'" *Spokeo*, 136 S. Ct. 1540 at 1548. Plaintiffs have not presented any facts to plausibly demonstrate how they (or even one of them) were harmed under their theory. To prevail, Plaintiffs must show that they "'personally [] suffered some actual or threatened injury'" *Id*. (quoting *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.,* 454 U.S 464, at 472 (1982)). This, they have not done. As noted earlier, Plaintiff Chavez cannot show any harm under their theory because the Complaint does not allege that he was ever a participant in the TRDI Retirement Plan.

Moreover, class allegations cannot give Plaintiffs standing to bring claims that they cannot otherwise bring on their own behalf because Rule 23 cannot expand a plaintiff's Article III standing. 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)).

In addition to lacking facts to support that they have suffered a concrete and particularized injury, Plaintiffs' theory of harm fails for yet another reason under *Lujan*: their alleged injury is speculative and not redressable. Any supposition that TRDI (or any other employer) might have made contributions to the retirement plan, assuming any savings on the health and welfare plan side, is pure speculation and unlikely to be redressed by a favorable judicial decision in this case.

Plaintiffs reason that if the TRDI H&W Plan fees had been lower, TRDI would have increased its contributions to the TRDI Retirement Plan. Plaintiffs ignore the legal reality that a plan sponsor, like TRDI, has complete discretion to use any such savings to provide additional fringe benefits in whatever manner it chooses, including paying the employees cash in lieu of fringe benefits if it so desires.

Plaintiffs have pointed to no language in any of the TRDI Adoption Agreements or other governing plan documents to support that TRDI had an obligation to fund its Retirement Plan with any savings resulting from lower administrative fees to the TRDI H&W Plan. TRDI was under no legal obligation 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."). The same would be true for any other employer participating in The CPT or The CERT. For this reason, Plaintiffs 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 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 [funds recovered as an award due to the litigation] were exhausted." *Id.* The court therefore held that the participants had no redressable remedy and thus lacked standing to bring the action. *Id.*

Here, as a matter of law, any decision to make additional contributions to the TRDI Retirement Plan would be made by TRDI, the plan sponsor and employer, a third- party who is not before the Court. The notion that a decision against Defendants would induce TRDI (or any other employers of the putative class) to increase its contributions to the TRDI Retirement Plan is nothing more than idle speculation, especially since the TRDI H&W Plan no longer exists. Plaintiffs have failed to allege a redressable injury and therefore have no standing to bring this case under Article III.

It is also significant that the Complaint's three claims for relief do not describe any injury. (*See* Compl. at ¶¶ 67-95). None. Claim One, Two and Three merely recite the elements necessary to make out a cause of action under ERISA ¶¶ 406(a) and (b), 29 U.S.C. ¶¶ 1106(a) and (b), and ERISA ¶ 404(a)(1)(A) and (B), 29 U.S.C. ¶¶ 1104(a)(1)(A) and (B). If Plaintiffs intended to allege a harm different than that which they alleged in Paragraph 57 of the

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Complaint, then Defendants assert that they still have failed to establish an injury-in-fact sufficient to claim standing under Article III to bring this case. *Lee v. Verizon Communications, Incorporated*, 837 F.3d 523, 530 (5th Cir. 2016), cert. denied sub nom. Pundt v. Verizon Communications, Inc., 137 S. Ct. 1374 (2017) ("A bare allegation of improper [] plan management under ERISA, without concomitant allegations that any [] benefits are even potentially at risk, does not meet the dictates of Article III. . . .").

B. CLAIMS ONE, TWO AND THREE 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), the Complaint 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.").

The level of factual detail necessary depends 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 the factual allegations in the Complaint 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).

1. Claim One Fails to Allege Facts to Plausibly Support a Conclusion 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. (Compl. at ¶ 69); 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 contracting with Defendants and paying their fees out of plan assets," the ***fiduciaries*** of the "participating plans" ***caused*** those plans to enter into agreements with Defendants.[4] (Compl. at ¶ 73). The wrong Defendants are alleged to have committed under Claim One is that they "knowingly participated in such prohibited transactions in violation of ERISA ¶ 406(a), 29 U.S.C. ¶ 1106(a)."

In Claim One, Plaintiffs do not allege that Defendants were paid excessive fees and they do not claim that any person or thing was injured in connection with the payment of fees to the Defendants. Claim One appears to merely recite the statutory elements for a potential violation of ERISA. Claim One, however, underscores the point that a fiduciary (a third-party

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[4] Defendants do not concede that all their compensation constituted a "plan" assets. Plaintiffs make no distinctions between compensation and commissions earned. Defendants will address these points at the appropriate time.

independent from Defendants) was on the other side of the alleged prohibited transaction making the decision to enter into the contract with Defendants. (Compl. at ¶ 73).

ERISA § 406(a)(1)(C), 29 U.S.C. § 1106(a)(1)(C), 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." A violation of ERISA Section 406(a)(1)(C), generally subsumes a violation of ERISA Section 406(a)(1)(D). 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 obtain any relief under 406(a)(1)(C) or (D), a plaintiff must show that there was a statutorily prohibited transaction in the first instance.

To prevail on Claim One, Plaintiffs must allege facts to support that a (1) fiduciary with respect to an employee benefit plan (2) caused the plan to engage in a prohibited transaction (3) with a party-in-interest. This Plaintiffs have not done for at least two reasons. First, Plaintiffs have not established that TRDI had either a pre-existing health and welfare plan or a retirement plan on whose behalf TRDI could act 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.).

Secondly, Plaintiffs assert that Defendants were parties-in-interest because they provide "*inter alia,* administrative, recordkeeping, and marketing services to the participating plans in the Trusts." (Compl. at ¶ 70). Plaintiffs have not alleged sufficient facts to demonstrate that Defendants were "parties-in-interest" within the meaning of ERISA ¶ 3(14)(B), 29 U.S.C. ¶1002(14)(B), when TRDI executed the adoption agreements with Defendant PBS. A person who has no pre-existing relationship to a plan 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).

Therefore, even if TRDI had existing plans such that TRDI was acting as fiduciary to its existing plans when it negotiated the terms of the adoption agreements with PBS, Defendant PBS would not have been a party-in-interest to those plans **before** the adoption agreements were executed, and therefore, as a matter of law, there could not have been a prohibited transaction within the meaning of ERISA ¶ 406(a)(1)(C).

Lastly, although Plaintiffs do not allege in Claim One that the transaction is prohibited because Defendants allegedly were paid excessive fees, their Complaint is replete with unsupported allegations that such was the case.[5] With respect to the TRDI H&W Plan, Plaintiffs make numerous allegations that the fees Defendants were paid were excessive, but as noted, they provide no benchmarks comparing similar arrangements to support their conclusion. (Compl. at ¶¶ 22-35). They merely conclude "on information and belief" that Defendants were paid excessive fees. (Compl. at ¶¶ 36 and 37). On the Retirement Plan side, Plaintiffs claim to rely on an undated and unidentified article, to which this Court should give no weight, to support their position that the fees paid under The CERT were excessive. (Compl. at ¶ 56). Not only is the article undated and unidentified, but Plaintiffs do not even describe the types of plans to which the study applies. The Court should give it no weight.

Plaintiffs' conclusory allegations that the "participating plans" paid excessive fees for whatever services Defendants provided are too speculative and insufficient to state a claim for benefits under ERISA. *See, e.g. Innova Hosp. San Antonio, L.P. v. Blue Cross & Blue Shield of Georgia, Inc.*, No. 3:12-CV-1607-O, 2014 WL 10212850, at *3 (N.D. Tex. July 21, 2014)(allegations based upon "information and belief" was speculative and insufficient to state a claim for benefits under ERISA); *Sanctuary Surgical Ctr., Inc. v. UnitedHealth Group., Inc.,* No. 10–81589–CIV, 2013 WL 149356, at *5–6 (S.D.Fla. Jan.14, 2013) (finding plaintiffs' "speculative allegation, purportedly made 'upon information and belief,' that all 300 of the plans at issue contain 'similar' coverage language" was insufficient to state plausible ERISA benefits claim); *In re Darvocet, Darvon, & Propoxyphene Products Liability Litig*., 716 F.3d 917, 931

[5] Plaintiffs cannot prevail on this claim as a matter of law without showing that such fees were excessive. Otherwise, the transactions would be permitted by ERISA § 408(b)(2), 29 U.S.C.§ 1108(b)(2)(transactions prohibited under ERISA ¶406(a)(1)(C) are allowed if the: (1) compensation is reasonable, (2) service is necessary, and (3) the contract is reasonable).

(6th Cir.2014) (stating "[t]he mere fact that someone believes something to be true does not create a plausible inference that it is true.") (citing Twombly, 550 U.S. at 551); *Mann v. Palmer*, 713 F.3d 1306, 1315 (11th Cir.2013) (declining to accept as true "allegations 'upon information and belief" where plaintiff failed to state enough facts "to nudge his claim ... across the line from conceivable to plausible") (citing Twombly, 550 U.S. at 570).

Accordingly, Claim One fails to state a claim under ERISA because to show a violation of ERISA ¶ 406(a)(1)(C) or (D) there must be: (1) a fiduciary, (2) that causes the plan, (3) to engage in transaction, (4) with a party-in-interest. Plaintiffs have failed to plead sufficient facts to show that Defendants were parties-in-interest at the time of the transaction either because there was no plan or because they had no pre-existing relationship with the TRDI Plans at the time they executed the Adoption Agreements.

Claim One should be dismissed because Plaintiffs have failed to plead sufficient facts to show that a statutorily prohibited transaction occurred.

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

In Claim Two, Plaintiffs allege that Defendants engaged in fiduciary self-dealing "by hiring themselves to perform services to the plans, by paying themselves excessive compensation out of plan assets, by arranging for excessive compensation to themselves from other service providers to the plans, and by knowingly participating in Plan Benefit Services, Inc.'s self-dealing with the plans," in violation of ERISA § 406(b)(1) and (3), 29U.S.C. § 1106(b)(1) and (3)[6], (Compl. at ¶ 83).

[6]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).

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." [7] *Pegram v. Herdrich*, 530 U.S. 211, 226 (2000); and see *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) and *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 by setting their own compensation and hiring themselves or their affiliates to service the TRDI Plans.[8] 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 apparently 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)(C) and (D). TRDI, not Defendants, exercised final authority and control over the selection or hiring of the Defendants. TRDI also exercised final authority and control over the price it would pay for the services and/or products it purchased from Defendants. This fact is undisputedly established by the TRDI H&W Adoption Agreement and the TRDI Retirement Plan Retainer Agreement.

[7] 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.

[8] 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.

The TRDI H&W Adoption Agreement with PBS unequivocally demonstrates that TRDI (1) appointed PBS to serve as the Plan's recordkeepeer; (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).

Circuit courts have long held that service providers, in situations like those present here, do not have fiduciary duties when negotiating their compensation. *Fleming v. Fidelity Mgmt Trust Co.,* 2017 WL 4225624 (D. Mass. September 9, 2017); *Daugherty v. The Univ. of Chicago*, 2017 WL 4227942 (N.D. IL. September 9, 2017); *Patrico v. Voya Financial Inc.*, 2017 WL 2684065 (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 either PBS or FIBI have any authority or control to select itself to provide any services to the plans that TRDI established. Plaintiffs' statements based on "information and belief" to the contrary are insufficient to state a claim for benefits under ERISA. *See, e.g.*

Innova Hosp. San Antonio, L.P., 2014 WL 10212850, at *3; see also *In re Darvocet, Darvon, & Propoxyphene Products Liability Litig*., 756 F.3d 917, 931 (6th Cir. 2014) (stating "[t]he mere fact that someone believes something to be true does not create a plausible inference that it is true." (citing *Twombly*, 550 U.S. at 551); *Mann v. Palmer*, 713 F.3d 1306, 1315 (11th Cir.2013) (declining to accept as true allegations upon information and belief where plaintiff failed to state enough facts "to nudge his claim ... across the line from conceivable to plausible.") (citing *Twombly*, 550 U.S. at 570).

Moreover, Plaintiffs' allegations that PBS or FIBI set their own compensation and hired themselves to service the TRDI Plans are directly contradicted by the TRDI Plan documents referenced in the Complaint and upon which Plaintiffs centrally rely to make their allegations. The TRDI Plan documents, attached to this motion, 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). Although the Court is required to accept all well-pleaded factual allegations as true for the 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 failed to plead facts that plausibly support their allegations that Defendants engaged in a breach of fiduciary obligations with respect to setting their own compensation or hiring themselves to service the TRDI Plans.

Plaintiffs do not explain why the fees paid to Defendants 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).

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.

The principle violation Plaintiffs complain about in Claim Three is that:

> Plan Benefit Services, Inc. breached its duty of loyalty under ERISA § 404(a)(1), 29 U.S.C. § 1104(a)(1). Plan Benefit Services, Inc.'s breaches include but are not limited to the following: hiring itself and its affiliates to perform services for the plans at excessive costs; paying itself and its affiliates excessive compensation from plan assets; and, **on information and belief**, paying itself and its affiliates extracontractual fees and determining in their discretion the amount of said fees and failing to disclose said fees to participants.

(Compl. at ¶ 92).

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.[9] For all of the reasons discussed in Claim Two, Claim Three fails because Plaintiffs cannot show as a matter of law that Defendants functioned in fiduciary capacity for the purpose of setting their

[9]ERISA 404(a)(1)(A) provides, *inter alia,* that a fiduciary must discharge his/her duties "solely in the interest of the participants and beneficiaries." ERISA 404(a)(1)(B) provides that a fiduciary must act "with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man 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."

own compensation or hiring themselves as service providers to the TRDI Plans or any other participating plan that may be part of the putative class.

CONCLUSION

Accordingly, for the reasons stated herein, Defendants request that Plaintiffs claims and requests for relief against the Defendants be dismissed with prejudice.

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 6th day of October, 2017, as follows:

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