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

FRINGE BENEFIT GROUP, INC., and FRINGE INSURANCE BENEFITS, INC.	§	
Plaintiffs,	§	
v.	§	Civil Action No. 18-369
FCE BENEFIT ADMINISTRATORS, INC. and CHRIS PORTER	§	JURY TRIAL DEMANDED
Defendants.	§	

PLAINTIFFS' ORIGINAL COMPLAINT

TO THE HONORABLE UNITED STATES DISTRICT COURT JUDGE:

Plaintiffs Fringe Benefit Group, Inc. ("FBG") and Fringe Insurance Benefits, Inc. ("FIBI") (collectively "Plaintiffs") file this Original Complaint against Defendants FCE Benefit Administrators, Inc. ("FCE Administrators") and Chris Porter ("Porter") (collectively "Defendants"), and respectfully show the Court as follows:

I. INTRODUCTION

1. Plaintiffs and Defendants are direct competitors in the marketing, sales, and administration of benefit plans for employers throughout the United States. This case arises from the Defendants' false, misleading, and defamatory advertisements sent to Plaintiffs' customers across the country in January 2018 and March 2018.

2. Apparently embracing a post-factual marketing tactic, Defendants sent solicitation letters to Plaintiffs' customers falsely representing, among other things, that (i) Plaintiffs

wrongfully "commingle" assets held in trust; (ii) Plaintiffs had been sued in class action lawsuit for "commingling" trust assets; (iii) Plaintiffs' customers were "likely" to become defendants in the class action because they conducted business with Plaintiffs; and (iv) Plaintiffs' customers have "significantly greater liability exposure because your plan participates in the commingled trust." The solicitation letters touted Defendants' services and encouraged Plaintiffs' customers to contact Defendants regarding their competing services.

3. Plaintiffs seek entry of a permanent injunction and damages for false advertising and unfair competition under Section 43(a) of the Lanham Act, 15 U.S.C. § 1525(a), and the Texas common law of business disparagement, defamation, and tortious interference with existing contracts and prospective business relations.

II.
PARTIES

4. Plaintiff Fringe Benefit Group, Inc. is a Texas corporation with its principle place of business at 11910 Anderson Mill Road, Suite 401, Austin, Texas 78726-1113. FBG provides administrative and recordkeeping services to employee health and welfare benefit plans established by employers.

5. Plaintiff Fringe Insurance Benefits, Inc. is a Texas corporation with its principle place of business at 11910 Anderson Mill Road, Suite 401, Austin, Texas 78726-1113. FIBI is a sales and marketing company that markets health and welfare benefits for FBG.

6. Defendant FCE Benefit Administrators, Inc. is a California corporation with its principal place of business at 1528 S. El Camino Real, Suite 307, San Mateo, California 94402. FCE Administrators maintains its operations center at 4615 Walzem Road, San Antonio, Texas 78218-1610. FCE Administrators may be served with citation by serving its registered agent for

service of process, Steve Porter, 1528 S. El Camino Real, Suite 307, San Mateo, California 94402.

7. Defendant Chris Porter is an individual California resident. He is the Senior Vice President of Sales and Marketing for FCE Administrators. He may be served with citation by serving him at 1528 S. El Camino Real, Suite 307, San Mateo, California 94402, or wherever he may be found.

III.
JURISDICTION

8. The Court has federal-question jurisdiction over this action pursuant to 28 U.S.C. § 1331, because Defendants have violated the Lanham Act, 15 U.S.C. § 1125. The Court has supplemental jurisdiction over the state-law claims pursuant to 28 U.S.C. § 1367.

9. The Court has personal jurisdiction over Defendants because they regularly conduct business in Texas; Defendant FCE Administrators maintains its operation center in San Antonio, Texas; Defendants have established minimum contacts with Texas; and the exercise of jurisdiction over Defendants does not offend traditional notions of fair play and substantial justice, as Defendants conduct substantial business in Texas, maintain a nerve center in Texas, and contract with Texas residents for services performable in whole or part in Texas. Likewise, Defendants have promoted, marketed, and advertised their services to Texas residents, and the claims and controversies alleged herein arise directly out of or relate to such activities.

IV.
VENUE

10. Venue is proper in this judicial district because a substantial part of the events or omissions giving rise to Plaintiffs' claims occurred in this judicial district. 28 U.S.C. § 1391(b)(2). The claims that form the basis of this action occurred in this judicial district,

among others, and the harm caused to Plaintiffs by Defendants' misconduct, including but not limited to harm to their reputation, was incurred in this judicial district.

V.
Statement of Facts

A. Plaintiffs Market and Administer Health and Welfare Benefit Plans

11. Plaintiff FBG provides administrative and recordkeeping services to employee benefit plans established by employers. Plaintiff FIBI is a sales and marketing company that markets health and welfare benefits to employers, as well as retirement benefits to employers. Plaintiffs FBG and FIBI are separate companies with common ownership.

12. FBG offers employers the opportunity to establish stand-alone health and welfare employee benefit plans governed by the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001, *et seq.* ("ERISA"), through The Contractors Plan Trust (the "Trust"). This arrangement is a permissible "multiple employer welfare arrangement," within the meaning of ERISA § 3(40). The arrangement is fully insured by multiple insurance carriers licensed in the state in which the employer is located. Each employer in the Trust: (i) enters into a separate adoption agreement with the Trust, (ii) adopts its own individual, stand-alone health and welfare plan, (iii) selects coverage from a licensed insurance carrier in its state, and (iv) selects the type of coverage appropriate for its employees. Pentegra Trust Company ("Pentegra") currently serves as the trustee over the Trust. FBG separately reconciles and allocates premiums from the participating employers and, as required by ERISA, places the premiums in the Trust over which Pentegra serves as the trustee, until the premiums are paid monthly to the respective insurance carriers.

13. ERISA defines a fiduciary in functional terms. *See* ERISA § 3(21)(A). Among others, a person with discretionary authority or control over assets that belong to employee benefit plans may be a fiduciary and subject to ERISA's standards. *Id.* Trustees are typically deemed fiduciaries under ERISA because, at a minimum, they have control over the assets of plans over which they serve as trustee. The law of trusts guides the federal common-law of ERISA. In the fiduciary context of trust law, the term "commingle" or "commingling" of assets has a negative connotation that the alleged fiduciary has breached a fiduciary duty.[1] Of course, in the context of multiple employer welfare arrangements under ERISA § 3(40)—the arrangements at issue here—there is no wrongful "commingling" of assets or breaches of fiduciary duty. Instead, consistent with ERISA, FBG offers employers the opportunity to establish stand-alone health and welfare employee benefit plans through the Trust, and FBG *separately* reconciles and allocates premiums from each individual participating employer and employee.

14. Defendant FCE Administrators is engaged in the business of marketing and selling health and welfare benefits to employers. It competes directly with Plaintiffs in this space. It does not compete with Plaintiffs in the retirement benefits business. Defendant Porter is FCE Administrators' Vice President of Sales and Marketing, and he is primarily engaged in

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[1] Black's Law Dictionary defines the term "commingle" as follows: "(Of a fiduciary) to mix personal funds with those of a beneficiary or client, [usually] in an improper or illegal way." BLACK'S LAW DICTIONARY (10th Ed. 2014). It defines "commingling" as:

> A mixing together; [especially], a fiduciary's mixing of personal funds with those of a beneficiary or client. Commingling is [usually] considered a breach of the fiduciary relationship. Under the Model Rules of Professional Conduct, a lawyer is prohibited from commingling personal funds with those of a client. Commingling also occurs when a spouse has mixed his or her separate property with community property to such an extent that they cannot be separated.

Id.; *See also, e.g.,* WEST'S ENCYCLOPEDIA OF AMERICAN LAW (2nd Ed. 2008).

the business of marketing and selling FCE Administrators' services around the country, including in this judicial district. According to FCE Administrators, it is an "international benefit provider" with physical locations in ten states, including Texas.[2]

B. The *Chavez* Lawsuit Filed Against FBG and FIBI

15. On July 6, 2017, Heriberto Chavez and two other plaintiffs (on behalf of themselves and a putative class) filed a lawsuit in this district against FBG, FIBI, and Plan Benefit Services, Inc. (the "Lawsuit").[3] A true and correct copy of the Original Complaint in the Lawsuit is attached hereto as Exhibit 1, and a true and correct copy of the First Amended Complaint (the "Amended Complaint") is attached hereto as Exhibit 2.

16. The Lawsuit alleges that FBG[4] violated ERISA in administering the benefit plans, specifically by receiving excessive compensation for administering the benefit plans. *See, e.g.*, Exhibit 2 at ¶¶ 14, 74, 89, 95, 104, 132. FBG and FIBI specifically denied this assertion and others in both their first and second motions to dismiss, which were filed on October 6, 2017 and January 15, 2018, respectively. *See* Exhibit 3; Exhibit 4.

17. For purposes of the case at bar, the most important aspect of the Lawsuit is what is *not* alleged in it: the Lawsuit does *not* allege that FBG or FIBI wrongfully "commingled" customers' plans into a "single arrangement" or inappropriately "commingled" the assets of any plan. Nor does the Lawsuit allege or threaten that FBG's or FIBI's customers are liable for any alleged ERISA violations or may become defendants in the Lawsuit. To the contrary, the

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[2] https://www.fcebenefits.com.

[3] The Lawsuit is captioned *Chavez, et al. v. Plan Benefit Servs., Inc.*, *et al*., No. 1:17-CV-00659-SS (W.D. Tex. 2017).

[4] Although FBG administers the benefit and retirement plans, the *Chavez* plaintiffs seek to hold FIBI and Plan Benefit Services, Inc. liable based on the contention that "the three entities are so closely related to be interchangeable." Exhibit 2 at ¶ 47. Defendants deny this assertion.

Lawsuit does not name the *Chavez* plaintiffs' employer in the Lawsuit, much less name FBG's or FIBI's other unrelated customers as defendants in either the Original Complaint or the Amended Complaint. And the deadline to add defendants in the Lawsuit has expired.

18. Notably, on October 6, 2017, FBG and FIBI moved to dismiss the Lawsuit, and on November 7, 2017, the Court dismissed the Lawsuit because the *Chavez* plaintiffs lacked constitutional and statutory standing, and they failed to provide any support for their allegations that FBG or FIBI charged more than reasonable compensation for the services provided. A true and correct copy of the Order Granting the Motion to Dismiss is attached hereto as <u>Exhibit</u> 5. Specifically, Judge Sam Sparks ruled as follows in dismissing the Lawsuit: "[T]he plaintiffs' allegations in their complaint as well as in plaintiffs' opposition to defendants' Motion to Dismiss ring only with argumentative opinions and without any specific allegations of fact on standing of the name[d] plaintiffs, any allegations of liability or damages." *Id.* at 3.

19. Judge Sparks dismissed the Lawsuit without prejudice, and the *Chavez* plaintiffs filed the Amended Complaint on December 4, 2017. *See* <u>Exhibit</u> 2. On January 15, 2018, FBG and FIBI moved to dismiss the Amended Complaint. The parties have fully briefed the issue, and the Court's decision is pending.

C. Defendants Sent Numerous Commercial Solicitations to Plaintiffs' Customers Purporting to "Notify" Them of the *Chavez* Lawsuit.

20. In what can only be described as a desperate effort to capitalize on the filing of the Lawsuit against its competitors and to mislead Plaintiffs' customers, Defendants FCE Administrators and Porter sent letters to Plaintiffs' customers across the country, including in this judicial district, on January 25, 2018, entitled "Notification of a Class Action Lawsuit" (the "First Solicitation Letter"). A true and correct copy of the First Solicitation Letter is attached

hereto as Exhibit 6. In a thinly veiled attempt to misappropriate Plaintiffs' customers through false, misleading, and defamatory statements, Defendants FCE Administrators and Porter asserted in the First Solicitation Letter that FIBI—a marketing company that does not administer any plans—and its "affiliates" had "commingle[d] assets of well over 100 separate benefit plans." *See id.* at ¶ 1. This factual assertion is demonstrably false; FBG does not wrongfully "commingle" any benefit plans, and FIBI is a marketing company that does not administer benefit plans and therefore cannot "commingle" any plans or assets.

21. Defendants also falsely alleged in the First Solicitation Letter that the "commingling" claims in the Lawsuit—claims that do not exist *anywhere* in the Lawsuit—posed serious legal risks for Plaintiffs' customers. Notably, the word "commingle" does not even appear in the Lawsuit, much less form a basis for the *Chavez* plaintiffs' claims in the Lawsuit.

22. After making these false and deceptive statements, Defendants then turned to shamelessly soliciting Plaintiffs' customers, asserting in the First Solicitation Letter that FCE Administrators does not commingle assets, unlike Plaintiffs, and encouraging Plaintiffs' customers to "contact [Defendant Porter] directly at (650)-291-4202 or by email at cporter@fcebenefit.com" to "discuss FCE's services for your welfare benefit plan." *Id.* Defendant Porter signed the letter.

23. The First Solicitation Letter also attached an advertisement entitled, "WHY CHOOSE FCE?" *Id.* The advertisement publicized FCE Administrators' purported "growth," "strength," and "stability," and it encouraged recipients of the First Solicitation Letter to contact "Chris Porter, VP Sales and Marketing, cporter@fcebenifits.com 650.291.4202." *Id.*

24. Plaintiffs discovered the existence of the First Solicitation Letter from their concerned customers. In fact, shortly after Defendants sent the First Solicitation Letter, Plaintiffs

began hearing from their customers and brokers who received the letter with questions, concerns, and worries arising from the false and deceptive content of the letter. By way of example only, FBG received an email from a concerned customer on January 29, 2018, which attached a copy of the First Solicitation Letter and stated to FBG: "We received the attached notice in the mail today. Can you please advise if this affects our plan, our participants or if we have to take any action?" On January 29, 2018, FBG received another email from a broker regarding an upcoming call with a highly valued client, stating that they needed to discuss "the attached marketing piece [the First Solicitation Letter] the [client] group received from a competitor," and that "[a]ny formal response from FIBI would be welcomed." Similarly, FBG was provided with a facsimile from a client on January 31, 2018, which attached the First Solicitation Letter and stated: "Received this—what is this??" FBG received a related inquiry on January 31, 2018, from a broker regarding FBG's customer who received the First Solicitation Letter. On February 7, 2018, another broker was contacted by FBG's client stating that it had received the First Solicitation Letter and inquiring about the Lawsuit.

25. As a result of Defendants' false and deceptive advertisements, on or about February 9, 2018, Plaintiffs, through counsel, sent a cease-and-desist letter to Defendants (the "First Demand Letter"), warning Defendants that the First Solicitation Letter was "riddled with statements that [Plaintiffs] would assert, based on easily obtainable evidence, were made with reckless disregard for the truth and with the intent of causing reputational harm to [Plaintiffs] and interfering with [Plaintiffs'] business contracts." The First Demand Letter also demanded that Defendants retract the statements in the First Solicitation Letter. A true and correct copy of the First Demand Letter is attached hereto as Exhibit 7. Defendants responded to the First Demand Letter by email dated February 23, 2018, refusing to correct, clarify, or retract any of the

falsehoods in the First Solicitation Letter. Instead, Defendants boldly stated that the First Solicitation Letter contained only "unequivocal, undisputed and easy to prove facts."

26. Undeterred by the fact that their First Solicitation Letter contained demonstrably false and defamatory statements, Defendant sent *another*, essentially identical letter to Plaintiffs' customers dated March 1, 2018 (the "Second Solicitation Letter"). A true and correct copy of the Second Solicitation Letter is attached hereto as <u>Exhibit</u> 8. Defendant Porter also signed the Second Solicitation Letter, and the letter again encouraged Plaintiffs' customers to "contact [Defendant Porter] directly at (650)-291-4202 or by email at cporter@fcebenefit.com" to "discuss FCE's services for your welfare benefit plan." *Id.* The First Solicitation Letter and the Second Solicitation Letter are referred to herein collectively as the "Solicitation Letters." Defendant Porter's statements in the Solicitation Letters were within the scope of his authority as the Vice President of Sales and Marketing for FCE Administrators and they were in furtherance of FCE Administrator's business.

27. Shortly after Defendants sent the Second Solicitation Letter, Plaintiffs again began to hear from their customers and brokers who received the letter with questions, concerns, and worries arising from the false and deceptive content of the letter. By way of example only, on March 15, 2018, a broker asked on behalf of one of FBG's clients for FBG to "provide an official response [to the Solicitation Letters] as part of our due diligence." That same day, FBG received a call from another client "freaked out" by the false statements in the Solicitation Letters. Similarly, on March 19, 2018, another client contacted FBG via email who attached the Second Solicitation Letter to the email and asked: "What is this about?" On March 20, 2018, FBG was contacted again by a broker on behalf of an FBG customer; that customer forwarded a copy of the Second Solicitation Letter and stated: "We keep receiving correspondence like the

attached. Is this merely a solicitation, or is there a problem that we should be aware of at this time?"

28. On April 12, 2018, Plaintiffs sent another letter to Defendants demanding a correction, clarification, or retraction of the Solicitation Letters (the "Second Demand Letter"). A true and correct copy of the Second Demand Letter is attached hereto as Exhibit 9. To date, Defendants have failed to respond to the Second Demand Letter, much less correct, clarify, or retract their false, defamatory, and deceptive Solicitation Letters.

29. The Solicitation Letters contain the following false, defamatory, deceptive, and misleading statements of fact:

False Statement of Fact in the Solicitation Letters
• "FIBI has bundled your plan into the Contractors Plan Trust, a trust that *commingles assets of well over 100 separate benefit plans*." Exhibit 6 at ¶ 1; Exhibit 8 at ¶ 1 (emphasis added).
• "A class action lawsuit was filed in Texas against FIBI . . . raising issues potentially applicable to all of the *plans in the commingled trust*." *Id.* (emphasis added).
• "We thought you should know about of the existence of the lawsuit that *you may have significantly greater liability exposure because your plan participates in the commingled trust. . . .*" *Id.* (emphasis added).
• "[A]ll the plans have participated in the *commingled trust* on virtually the same terms, all paying the same level of fees." *Id.* (emphasis added).
• "It is very possible, if not *likely*, that the employers sponsoring the participating plans will be joined as defendants in the case on the basis that the employers contracted with FIBI to provide administrative services for their plans for an unreasonable amount of fees. This suggests that every employer that sponsors a plan that is participating in the Contractors Plan *commingled trust* likely has some liability exposure in this lawsuit. This is a consequence of FIBI's practice of *commingling* its clients into a single arrangement." *Id.* (emphasis

added).
• "[P]lacing up to hundreds of benefit plans into a single arrangement is a high risk approach that potentially exposes all employers to similar liability if the lawsuit is successful." *Id.*

30. The Defendants distributed the Solicitation Letters throughout the United States, including in this judicial district, to customers that have established (or are interested in establishing) health and welfare arrangements for their employees utilizing Plaintiffs' services. Those letters contain false, deceptive, and defamatory statements—both directly and by implication—arising out of the sale of Plaintiffs' services and the attempted and potential sale of Defendants' services to Plaintiffs' customers in a commercial transaction. The intended audience of the Solicitation Letters were Plaintiffs' customers and Defendants' potential customers throughout the country that have established (or are interested in establishing) health and welfare arrangements for their employees through the Trust. Defendants made these false and misleading statements to obtain an unfair competitive advantage over Plaintiffs. Defendants' actions constitute a knowing attempt by Defendants to misappropriate Plaintiffs' current and potential customers. In sending the letters, Defendants knew the recipients had contracts with Plaintiffs; indeed, Defendants targeted the recipients precisely *because* they had contracts with Plaintiffs. Defendants intended to cast doubt on the quality of Plaintiffs' services in order to misappropriate Plaintiffs' customers.

31. In addition to the Solicitation Letters, upon information and belief, Defendants published the above-referenced false, defamatory, and deceptive statements orally in the marketplace to brokers, customers, and potential customers of Plaintiffs between January 2018 through present.

i. <u>The Solicitation Letters falsely and deceptively represent that Plaintiffs disregard the integrity of each of their customers' distinct plans and the assets of each distinct plan.</u>

32. As set forth above, the Solicitation Letters assert that Plaintiffs "bundled your plan into the Contractors Plan Trust, a trust that ***commingles*** assets of well over 100 separate benefit plans." *See* <u>Exhibit</u> 6 at ¶ 1; <u>Exhibit</u> 8 at ¶ 1 (emphasis added). Plaintiffs do *not* wrongfully "commingle" assets of separate benefit plans; instead, as Defendants' know, ERISA permits the assets of multiple plans to be placed into a trust fund, provided that each plan's assets are accounted for separately, which was done in this case.[5]

33. Defendants also falsely claimed in the Solicitation Letters that "all plans have participated in the ***commingled*** trust on virtually the same terms, all paying the same level of fees." *Id.* (emphasis added). This statement is absolutely and demonstrably false. Each of Plaintiffs' customers establishes a stand-alone health and welfare benefit plan for its employees by entering into separate adoption agreements with the Trust.

34. In an effort to misappropriate Plaintiffs' customers through outright deceit, Defendants state in the Solicitation Letters that "[i]t is very possible, *if not likely*, that the employers [*i.e.*, Plaintiffs' customers and the recipients of the Solicitation Letters] sponsoring the participating plans will be joined as defendants in the [*Chavez*] case . . . ." *Id.* (emphasis added). Doubling down on this misrepresentation, Defendants stated that the Lawsuit could "significantly" increase Plaintiffs' customers' "liability exposure." *Id.* Defendants falsely

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[5] Notably, Defendants' own website purports to provide consumers guidance on ERISA. *See* https://www.fcebenefits.com/Compliance/ERISA. As Defendants explain on their website, but failed to mention in the Solicitation Letters, "ERISA requires plans to provide participants with plan information including important information about plan features and funding; provides fiduciary responsibilities for those who manage and control plan assets; requires plans to establish a grievance and appeals process for participants to get benefits from their plans; and gives participants the right to sue for benefits and breaches of fiduciary duty." *Id.*

conclude that "[t]his is a consequence of [Plaintiffs'] practice of ***commingling*** its clients into a ***single arrangement***." *Id.* (emphasis added). As set forth above, this statement is completely false and unabashedly deceptive. These statements, directly or by implication, falsely and deceptively inform Plaintiffs' customers that they will "likely" be exposed to legal liability by conducting business with Plaintiffs. Plaintiffs' customers are not defendants in the Lawsuit, and, in fact, when the *Chavez* plaintiffs were afforded an opportunity to amend their complaint, they did not add any new defendants to the lawsuit.[6] Moreover, the *Chavez* plaintiffs' employer was not even joined as a defendant in the Lawsuit, showing the absurdity of Defendants' false statement that completely unrelated customers of Plaintiffs would "likely" be joined as defendants in the Lawsuit.

35. Defendants then moved from scare tactics to trying to close the sale by attempting to distinguish FCE Administrators' services from Plaintiffs' services. In this regard, Defendants falsely and deceptively claimed in the Solicitation Letters that Plaintiffs' placement of "hundreds of benefit plans into a ***single arrangement*** is a high risk approach that potentially exposes all employers to similar liability if the lawsuit is successful." *See* <u>Exhibit</u> 6 at 2; <u>Exhibit</u> 8 at 2 (emphasis added). As set forth above, this scare tactic is absolutely false and deceptive; indeed, those false allegations do not form a basis for alleged liability in the *Chavez* Lawsuit, and Plaintiffs' customers were never targets in the *Chavez* Lawsuit. After setting up this strawman argument, Defendants then deceptively purport to compare their services to Plaintiffs' services: "[FCE Administrators] provides welfare benefit administration services to federal contractors in

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[6] The *Chavez* plaintiffs' deadline to add new parties expired on April 16, 2018. Unsurprisingly, the *Chavez* plaintiffs did not add any new defendants to the Lawsuit, much less the customers of Plaintiffs (and recipients of the Solicitation Letters) with no connection to the Lawsuit. Equally unsurprising, to date the Defendants have failed to disclose this fact to the recipients of the Solicitation Letters. Such a disclosure would, of course, further reveal the falsity of Defendants' Solicitation Letters and their intent to deceive.

a manner that avoids the type of liability exposure associated with the FIBI commingled arrangement." *Id.* ¶ 1.

ii. <u>The Solicitation Letters purport to "notify" Plaintiffs' customers about the *Chavez* Lawsuit, but Defendants intentionally omitted critical information</u>.

36. While the Solicitation Letters contain pages of false, misleading, and defamatory statements and advertisements, they fail to disclose even the most basic truth: the Lawsuit does *not* even contain the word "commingle," much less allege that Plaintiffs "commingled" customers' plans into a "single arrangement" or that Plaintiffs "commingled" the assets of the plans. Instead, the Lawsuit, brought by three employees of one of FBG's customers that established benefits and retirement plans for its employees, alleges that FBG charged more than reasonable compensation for the services provided to the benefit plans. *See* <u>Exhibit</u> 2. But Defendants knew these facts, as evidenced by the fact that: (i) they attached the first page of the Lawsuit to the Solicitation Letters; and (ii) they received the First Demand Letter and Second Demand Letter setting forth the falsity of their statements. And, of course, even the first page of the Lawsuit reveals that it does not complain about the "commingling" of assets; instead, the Lawsuit complains that "[a]ll fees are excessive relative to the minimal services actually provided by Defendants." There is no mention in the first page of the Lawsuit—or anywhere else in the Lawsuit—about commingling assets, much less an allegation about liability for inappropriately commingling assets, as Defendants indicate in their Solicitation Letters.

37. The information that Defendants intentionally omitted from the Solicitation Letters is noteworthy for another reason: On November 7, 2017 (nearly two months *before* Defendants sent the First Solicitation Letter and nearly four months *before* the Second

Solicitation Letter), Judge Sparks dismissed the Lawsuit in its entirety. In discussing the Lawsuit in a truthful manner and to provide the reader with context, the Defendants should have disclosed that Judge Sparks dismissed the Lawsuit and ruled that "the plaintiffs' allegations in their complaint as well as in plaintiffs' opposition to defendants' Motion to Dismiss ring only with argumentative opinions and without any specific allegations of fact on standing of the name[d] plaintiffs, any allegations of liability or damages." *See* Exhibit 5. The Defendants also should have disclosed that the Plaintiffs denied the allegations in the Lawsuit. This information would, of course, run counter to Defendants' false narrative and their attempt to unlawfully solicit Plaintiffs' customers. Defendants purposefully omitted this material information and instead simply attached the first page of the then-dismissed Lawsuit to the Solicitation Letters. *See* Exhibit 6; Exhibit 8.

38. The Defendants also omitted from the Solicitation Letters the fact that, after the *Chavez* plaintiffs filed an amended complaint, FBG and FIBI again moved to dismiss the claims and a decision remains pending.[7] A true and correct copy of the Docket Sheet from the Lawsuit is attached hereto as Exhibit 10.

39. Defendants also sought to frighten Plaintiffs' customers into doing business with Defendants by falsely claiming that the customers are "likely" to be named as defendants in the Lawsuit. This claim is baseless. In fact, the employer of the three lead plaintiffs in the Lawsuit was not even named as a defendant in the Lawsuit. The representation that other unrelated employers who engaged FBG are "likely" defendants is blatantly false.

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[7] As set forth above, the *Chavez* plaintiffs' Amended Complaint does not add any additional defendants to the Lawsuit, and the deadline to do so has expired.

40. Defendants' false and misleading statements in the Solicitation Letters are harmful to fair competition and are causing, and will continue to cause, on information and belief, Plaintiffs to suffer irreparable injury in the form of decreased consumer confidence, lost sales, harm to reputation, and damage to goodwill. Plaintiffs have been forced to spend, and will continue to spend, significant funds and resources to counteract the inaccuracies in the Solicitation Letters. Plaintiffs' injury is particularly potent since Plaintiffs and Defendants are direct competitors in the marketplace.

VI.
CAUSES OF ACTION

A. Count One: Violations of Section 43(a) of the Lanham Act, 15 U.S.C. § 1125

41. Plaintiffs incorporate all prior paragraphs herein by reference.

42. Section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a), prohibits, among other things, "false or misleading descriptions of fact, or false or misleading representation of fact which . . . in commercial advertising or promotion, misrepresents the nature, characteristics, [or] qualities . . . of . . . goods, services, or commercial activities." 15 U.S.C. § 1125(a)(1)(B).

43. Defendants, in connection with Plaintiffs' services and Defendants' services, used false and misleading descriptions and representations of fact in a commercial advertisement or promotion via the Solicitation Letters (and oral communications containing the same falsehoods) that misrepresented the nature, characteristics, and qualities of Plaintiffs' and Defendants' services and commercial activities. Indeed, as set forth above, Defendants falsely advertised and promoted in the Solicitation Letters that, among other things, Plaintiffs wrongfully "commingled" trust assets and exposed their customers to substantial liability, which are blatant misrepresentations of the nature, characteristics, and quality of Plaintiffs' services. In

addition, Defendants misleadingly described the Lawsuit and the allegations therein in order to advertise and promote their services over Plaintiffs' services by representing that the Lawsuit was based on the "commingling" of trust assets and that Plaintiffs' customers are "likely" defendants in the Lawsuit as a result of conducting business with Plaintiffs. Defendants also provided Plaintiffs' customers with a misleading description of the Lawsuit by failing to disclose that, prior to Defendants' circulation of the Solicitation Letters, the federal court unceremoniously dismissed the Lawsuit in its entirety.

44. Defendants' actions were taken in the course of their engagement in interstate commerce, among their offices in ten states, in the sale and solicitation of services across state lines.

45. Defendants' statements about Plaintiffs' and Defendants' services actually deceived or are likely to deceive a substantial segment of consumers. As set forth herein, a number of Plaintiffs' customers have already been deceived by Defendants' misleading Solicitation Letters. Defendants' continuous misrepresentations, undeterred by the Plaintiffs' First Demand Letter and Second Demand Letter, were willful, intentional, and made with deceptive intent, making this an exceptional case. These false statements about Plaintiffs' and Defendants' services are material to consumers' purchasing decisions.

46. Defendants' misrepresentations were made in the context of commercial solicitation, promotion, and/or advertisement. The Solicitation Letters purported to favorably compare Defendants' services to Plaintiffs' services by falsely claiming that Plaintiffs engaged in wrongful "commingling" of the individually established plans or their assets and that Defendants did not. Defendants then expressly invited Plaintiffs' customers to contact Defendants to discuss their competing services. The First Solicitation Letter also attached a one-page "WHY

CHOOSE FCE" brochure, touting its purported "growth," "strength," and "stability." *See* Exhibit 6.

47. Defendants' misrepresentations have deceived and are likely to deceive Plaintiffs' customers into believing, among other things, that Plaintiffs have inappropriately "commingled" funds, that Plaintiffs' services are of a poor or inferior quality, that Plaintiffs have been sued for wrongfully "commingling" funds, and that Plaintiffs' customers are likely to be brought into the Lawsuit as defendants because they have conducted business with Plaintiffs. The Defendants have willfully, knowingly, and intentionally made false descriptions in advertising and promotion via the Solicitation Letters (and in oral recitations of same), and unless permanently enjoined by the Court, will continue to deceive, mislead, and confuse consumers into believing that, among other things, Plaintiffs' services are inferior, unsafe, risky, ineffective, and unsuitable for their intended purpose. The Defendants' false and deceptive advertising and promotion via the Solicitation Letters (and in oral recitations of same) is clearly intended to cause consumers to stop conducting business with Plaintiffs and to opt instead to conduct business with Defendants.

48. Defendants' misrepresentations are particularly harmful due to the fiduciary context of trust law. In this context, the term "commingle" or "commingling" of assets has a connotation that the alleged fiduciary has breached a fiduciary duty. As set forth above, in the multiple employer welfare arrangements at issue here, there is no wrongful "commingling" of assets or breaches of alleged fiduciary duties. Instead, consistent with ERISA, FBG offers employers the opportunity to establish stand-alone health and welfare employee benefit plans through the Trust, and FBG *separately* reconciles and allocates premiums from each individual participating employer and employee. Defendants fully intended to use the term "commingle" in

a negative context to falsely raise doubt among Plaintiffs' customers that Plaintiffs' arrangement violates ERISA's permissible standards with respect to trust funds.

49. As a direct result of Defendants' unlawful acts and practices, Defendants have caused, are causing, and unless permanently enjoined by the Court will continue to cause, immediate and irreparable harm to Plaintiffs.

50. As a direct and proximate result of Defendants' unlawful acts, Plaintiffs have suffered, are suffering, and will continue to suffer damages to their business, reputation, consumer confidence, goodwill, and, upon information and belief, the loss of sales and profits that Plaintiffs would have made but for the Defendants' wrongful acts.

51. Defendants have acted in bad faith and have willfully engaged in false advertising and promotion with the intent to injure Plaintiffs and to deceive the consuming public. In addition to damages and injunctive relief, Plaintiffs are entitled to costs and attorneys' fees.

B. Count Two: Business Disparagement

52. Plaintiffs incorporate all of the proceeding paragraphs herein by reference.

53. In both the Solicitation Letters and through oral communications of the falsehoods contained in those letters, Defendants published false and disparaging words about Plaintiffs' economic interest. Defendants falsely claimed, for instance, that Plaintiffs wrongfully "commingled" trust assets; Defendants inaccurately claimed the Plaintiffs operate an unduly risky business that poses danger to their customers; Defendants misleadingly described the Lawsuit in order to suggest that it was based on the wrongful "commingling" of trust assets; and Defendants falsely stated that Plaintiffs' customers would likely become defendants as a result of doing business with Plaintiffs. Defendants also gave Plaintiffs' customers a misleading description of the Lawsuit by failing to disclose that, prior to Defendants' circulation of the

Solicitation Letters, the federal court dismissed the Lawsuit in its entirety. The Solicitation Letters, taken as a whole, create a substantially false and defamatory impression by omitting material facts and juxtaposing facts in a misleading manner.

54. Defendants' statements were made with malice. Defendants sent the Solicitation Letters to Plaintiffs' customers—even after Plaintiffs sent the First Demand Letter to Defendants—with the intent to interfere with Plaintiffs' economic interests. The Solicitation Letters purported to favorably compare Defendants' services to Plaintiffs' services by falsely claiming Plaintiffs wrongfully engaged in "commingling" and the Defendants did not. Defendants then expressly requested Plaintiffs' customers to contact Defendant Porter to discuss Defendants' competing services. To make the solicitation abundantly clear, the First Solicitation Letter attached a one-page "WHY CHOOSE FCE" brochure, touting its purported "growth," "strength," and "stability." *See* Exhibit 6. Despite receiving the First Demand Letter and the Second Demand Letter, the Defendants have refused to correct, clarify, or retract their false and defamatory statements. Defendants sent the Solicitation Letters with ill will and with an intent to interfere with Plaintiffs' economic interest.

55. Defendants also sent the Solicitation Letters with actual knowledge that they were false and misleading, or with reckless disregard for whether they were true. There is no basis in fact for Defendants' claims that Plaintiffs wrongfully "commingled" trust assets or that their business model posed undue risk to customers. Likewise, Defendants acted, at a minimum, recklessly in sending the Solicitation Letters and by failing to disclose basic information about the Lawsuit, such as the Plaintiffs' denial of the accusations and the Court's dismissal of the Lawsuit. For the same reasons that the statements were made with malice, they were made without privilege.

56. Defendants' publication of their misrepresentations caused special damages to Plaintiffs, including but not limited to, upon information and belief, the loss of customers and sales, loss of business, and expenses in counteracting the false Solicitation Letters. Because Defendants' misconduct set forth herein was committed with gross negligence, malice, and/or fraud, Plaintiffs seek an award of exemplary damages against Defendants.

C. Count Three: Libel and Libel *Per Se*

57. Plaintiffs incorporate all of the proceeding paragraphs herein by reference.

58. Defendants' Solicitation Letters published false statements of objectively verifiable facts referring to Plaintiffs. For instance, Defendants falsely claimed that Plaintiffs wrongfully "commingled" trust assets and conducted business in an unduly risky fashion, which exposed Plaintiffs' customers to significant legal exposure. In addition, the Solicitation Letters misleadingly described the Lawsuit in order to suggest that it was based on wrongful "commingling" of trust assets and that Plaintiffs' customers were "likely" to become defendants in the Lawsuit as a result of conducting business with Plaintiffs. Defendants additionally gave Plaintiffs' customers a misleading description of the Lawsuit by failing to disclose that, prior to Defendants' circulation of the Solicitation Letters, the Plaintiffs denied the accusations and the Court dismissed the Lawsuit in its entirety.

59. Defendants' false statements and omissions were defamatory and particularly harmful due to the fiduciary context of trust law. In this context, the term "commingle" or "commingling" of assets has a connotation that the alleged fiduciary has breached a fiduciary duty. Defendants fully intended to use the term "commingle" in this negative context to falsely raise doubt among Plaintiffs' customer base that Plaintiffs' arrangement violates ERISA's standards and exposes customers to liability. As such, Defendants are liable for libel *per se*,

since Defendants' statements do (and were reasonably calculated to): (i) injure Plaintiffs' reputations and expose them to public contempt, ridicule, and financial injury; (ii) impeach Plaintiffs' honesty, integrity, virtue, and reputation; and (iii) injure Plaintiffs in their profession, occupation, and business reputation.

60. Moreover, Defendants made these false statements with actual knowledge of their falsity or with reckless disregard for the truth, and certainly with negligence. There is no basis for Defendants' claims that Plaintiffs wrongfully "commingled" trust assets—and Plaintiffs pointed this out to Defendants in their First Demand Letter and Second Demand Letter. Likewise, Defendants acted, at a minimum, recklessly by failing to disclose basic information about the Lawsuit, such as the Plaintiffs' denial of the accusations or the Court's dismissal, with harsh language, of the Original Complaint in the Lawsuit. Defendants knew that their defamatory statements and omissions were likely to injure Plaintiffs in the conduct of their business by tarnishing their reputations and deterring customers from doing business with them.

61. Defendants' statements were made without justification or privilege and constitute libel and libel *per se*.

62. As a direct and proximate result of Defendants' libelous publications in the Solicitation Letters, Plaintiffs have suffered, are suffering, and will continue to suffer irreparable damages to their business, reputation and goodwill, and, upon information and belief, the loss of sales and profits that Plaintiffs would have made but for Defendants' misconduct. Further, because Defendants committed libel *per se*, they are strictly liable and damages are presumed.

63. Plaintiffs have also suffered significant pecuniary injury. Defendants' misrepresentations have caused, and are likely to cause, competitive or commercial injury and

special damages to Plaintiffs through, upon information and belief, the loss of customers and harm to reputation and goodwill.

64. Because Defendants' misconduct set forth herein was committed with gross negligence, malice, and/or fraud, Plaintiffs seek an award of exemplary damages against Defendants.

D. Count Four: Tortious Interference with Existing Contracts

65. Plaintiffs incorporate all of the proceeding paragraphs herein by reference.

66. Plaintiffs have valid contracts with customers of their benefits program, marketing, and administrative services who received Defendants' Solicitation Letters (and Defendants' oral recitations of same).

67. Defendants willfully and intentionally interfered with those contracts. Defendants sent the Solicitation Letters and orally communicated the false and misleading information in the letters with the intent to interfere with Plaintiffs' economic interests. In fact, the Defendants specifically targeted Plaintiffs' customers precisely *because* they had contracts with Plaintiffs. The Solicitation Letters and the oral repetitions of that content purported to favorably compare Defendants' services to Plaintiffs' services by falsely claiming Plaintiffs engaged in wrongful "commingling" and Defendants did not. Defendants then expressly invited Plaintiffs' customers to contact Chris Porter to engage Defendants' competing services. The Solicitation Letters also falsely informed Plaintiffs' customers that Plaintiffs operated an unduly risky business that exposed them to significant liability for conducting business with Plaintiffs. The First Solicitation Letter sent to Plaintiffs' customers also attached a one-page "WHY CHOOSE FCE" brochure, touting its supposed "growth," "strength," and "stability." Exhibit 6.

68. Plaintiffs have suffered pecuniary injury as a result of Defendants' misconduct. Defendants' misrepresentations have caused, and are likely to continue to cause, competitive or commercial injury to Plaintiffs through, on information and belief, the loss of existing contracts as a result of Defendants' Solicitation Letters (and oral recitations of same). Further, Defendants' misconduct hindered Plaintiffs' performance of their contracts by making performance more burdensome, difficult, and expensive. Because Defendants' misconduct set forth herein was committed with gross negligence, malice, and/or fraud, Plaintiffs seek an award of exemplary damages against Defendants.

E. Count Five: Tortious Interference with Prospective Relations

69. Plaintiffs incorporate all of the proceeding paragraphs herein by reference.

70. There was a reasonable probability that Plaintiffs would have entered into new or extended business relationships with existing customers and new business relationships with new customers absent Defendants' intentional interference with those relationships through the Solicitation Letters with customers and phone calls to brokers, customers, and prospective customers reiterating the same false information contained in the letters.

71. Defendants intentionally interfered with these prospective relations by sending the Solicitation Letters and orally reciting same. Defendants intended to interfere with these relationships and knew their interference was certain or substantially certain to occur as a result of their misconduct. Plaintiffs informed Defendants of such in the First Demand Letter and Second Demand Letter.

72. Defendants' misconduct, as set forth above, in violating the Lanham Act, committing business disparagement, and defaming Plaintiffs constitutes independently tortious

and unlawful conduct. Further, Defendants made fraudulent statements about Plaintiffs in the Solicitation Letters, as set forth herein.

73. Defendants' interference with Plaintiffs' prospective customers and existing customers who were going to renew or extend their relationships with Plaintiffs proximately caused injury to Plaintiffs. Upon information and belief, Plaintiffs have suffered actual damage and loss as a result of Defendants' tortious interference with prospective relations. Further, because Defendants' misconduct set forth herein was committed with gross negligence, malice, and/or fraud, Plaintiffs seek an award of exemplary damages against Defendants.

VII.
CONDITIONS PRECEDENT

74. All conditions precedent to Plaintiffs' claims have occurred, been performed, or are excused from performance.

VIII.
JURY DEMAND

75. Plaintiffs demand a jury trial on all triable issues.

IX.
PRAYER

76. Plaintiffs respectfully request the following relief:

a. all actual, consequential, and special damages caused by Defendants' misconduct set forth herein;

b. that the Defendants account for and pay to Plaintiffs any and all profits derived by the Defendants from the publication of the Solicitation Letters and/or all other false or misleading representations to consumers about the nature, quality, or characteristics of Plaintiffs' services;

c. for permanent injunctive relief prohibiting Defendants and their agents, officers, employees, servants, and those in privity with them, from making, disseminating, or causing to be made or disseminated any further false or misleading statements regarding Plaintiffs' services, business practices, the Lawsuit, or Plaintiffs' alleged wrongful commingling of trust assets;

d. an order that Defendants publish and send to the recipients of the Solicitation Letters a corrective statement to dispel the false and deceptive statements and impressions created by their false statements;

e. for attorneys' fees, costs, and expenses from Defendants according to law, including 15 U.S.C. § 1117(a), Texas law, and in this Court's equitable discretion;

f. for pre- and post-judgment interest according to law;

g. in light of the willful, grossly negligent, fraudulent, malicious, and intentional nature of Defendants' conduct, Plaintiffs recover from Defendants punitive/exemplary damages in an amount to be determined at trial; and

h. for all other and further relief, at law and/or in equity, special or general, as the Court may deem just and proper.

DATED: April ___, 2018.

Respectfully submitted,

JACKSON WALKER L.L.P.

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

FRINGE BENEFIT GROUP, INC., and FRINGE INSURANCE BENEFITS, INC. Plaintiffs, v. FCE BENEFIT ADMINISTRATORS, INC. and CHRIS PORTER Defendants.	§ § § § § § § § § § § § § §	Civil Action No. 18-369 JURY TRIAL DEMANDED

<u>Exhibit</u> 1

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

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

CLASS ACTION COMPLAINT

PRELIMINARY STATEMENT

1. More than 125,000 workers, most of them in the construction industry, receive pension and welfare benefits through the Contractors and Employees Retirement Trust ("CERT") and the Contractors Plan Trust ("CPT") (collectively, "the Trusts").

2. Defendants Plan Benefit Services, Inc. and Fringe Insurance Benefits, Inc., collectively doing business as Defendant Fringe Benefit Group, provide administrative and marketing services to the Trusts. Defendants charge workers fees for those services on top of the costs of the workers' benefits. Some of these fees are disclosed in agreements between Defendants and the employers that administer the employee benefit plans participating in the Trusts, but others are not. All fees are excessive relative to the minimal services actually provided by Defendants, who have collected tens of millions of dollars from the Trusts during the period at issue in this case.

3. The Trusts and Defendants are closely related entities: Fringe Benefit Group created and administers the Trusts through its wholly-owned subsidiary, Plan Benefit Services, Inc. Defendants have taken advantage of their control of the Trusts in compensating themselves excessively for services which, on information and belief, cost very little to provide.

4. The Trusts are explicitly marketed to non-union contractors as a vehicle to get credit for payment of prevailing wages on lucrative public works projects. As a result of Defendants' actions, workers paid more for health care, received less wages, and accrued less retirement savings than they otherwise would have.

5. By imposing sky-high administrative costs, Defendants enriched themselves at the expense of the Trusts' participating employee benefit plans and the employees who receive their retirement and healthcare benefits through those plans. Plaintiffs seek monetary and appropriate equitable relief on behalf of the class.

JURISDICTION

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

VENUE

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

PARTIES

8. Plaintiff Heriberto Chavez works 40 hours a week as a floor technician for Training, Rehabilitation & Development Institute, Inc. ("TRDI"). Mr. Chavez resides in El Paso, Texas. He cleans and polishes the floors at the Port of Entry at the border of El Paso and Ciudad Juarez, Mexico. He is a participant, as defined in ERISA § 3(7), 29 U.S.C. § 1002(7), in the TRDI Health & Welfare Plan. From August 2014 through some time in 2016, the TRDI Health & Welfare Plan provided benefits through CPT. Mr. Chavez is paid $12.19 an hour for his work. TRDI contributed an additional amount of $3.71 - $4.25 an hour to CPT for his health and welfare benefits.

9. Plaintiff Evangelina Escarcega is the legal representative of her son, Jose Escarcega, due to his intellectual disabilities. Mr. Escarcega and his mother reside in El Paso, Texas. Mr. Escarcega works part-time as a custodian for TRDI at the Port of Entry at the border of El Paso and Ciudad Juarez, Mexico. Mr. Escarcega was a participant, as defined in ERISA § 3(7), 29 U.S.C. § 1002(7), in the CERT Retirement Plan and the TRDI Health & Welfare Plan. From August 2014 through May 2015, TRDI made contributions to CERT on behalf of Mr. Escarcega. In June 2015, TRDI enrolled Mr. Escarcega in the TRDI Health & Welfare Plan, which provided benefits through CPT until July 2016. CPT covered Mr. Escarcega through a limited medical plan, which provided basic insurance coverage capped at specific amounts for specific services. Mr. Escarcega earns $11.98 an hour as a janitor. TRDI contributed an additional amount of $3.71 to $4.25 an hour to CERT and CPT for his retirement and health and welfare benefits.

10. Plaintiff Jorge Moreno works part-time as a custodian for TRDI. He resides in El Paso, Texas. He cleans the Port of Entry at the border of El Paso and Ciudad Juarez, Mexico. Mr. Moreno was a participant, as defined in ERISA § 3(7), 29 U.S.C. § 1002(7), in the CERT Retirement Plan and the TRDI Health & Welfare Plan. From August 2014 through May 2015, TRDI made contributions to CERT on behalf of Mr. Moreno. In June 2015, TRDI enrolled Mr. Moreno in the TRDI Health & Welfare Plan, which provided benefits through CPT until July 2016. CPT covered Mr. Moreno through a limited medical plan, which provided basic insurance coverage capped at specific amounts for specific services. Mr. Moreno earns $11.98 an hour as a janitor. TRDI contributed an additional amount of $3.71 to $4.25 an hour to CERT and CPT for his retirement and health and welfare benefits.

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

12. Defendant Plan Benefit Services, Inc. is the Administrator of CPT and the Master Plan Sponsor and Recordkeeper of the Contractors and Employees Retirement Plan and Trust

("CERT Master Plan"). It is a wholly-owned subsidiary of Fringe Benefit Group and is located in Austin, Texas.

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

14. Plan Benefit Services, Inc. and Fringe Insurance Benefits, Inc. are solely owned by Travis West. Mr. West has stated in a sworn declaration that "PBS and FIBI collectively do business as Fringe Benefit Group." All three entities have the same physical address and the same website, and their website states that Fringe Benefit Group "includes" Plan Benefit Services, Inc., Fringe Insurance Benefits, Inc., and The Contractors Plan (which is the umbrella for both the CPT and CERT Trusts). Travis West is the registered agent for service of process for Fringe Benefit Group, Plan Benefit Services, Inc., and Fringe Insurance Benefits, Inc., and the executive team for all three Defendants is, on information and belief, the same.

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

16. Plan Benefit Services, Inc. is a fiduciary within the meaning of ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A), of the employee benefit plans participating in the Trusts. It exercises authority and control respecting management and disposition of the employee benefit plan assets held in the Trusts. On information and belief, it (1) determines the recipients, amounts, and timing of payments made from plan assets to itself and to Fringe Insurance Benefits, Inc., as well as controlling all other disbursements from the Trusts; (2) retains discretionary authority and control to appoint and remove the Trustees, approve compensation for the Trustees, and amend the Master Plan, Master Trust Agreements, and Adoption Agreements without the consent of participating employers; and (3) retains discretionary authority and control to select and remove service providers to the employee benefit plans participating in CERT and CPT, including Plan Benefit Services, Inc. and related party Fringe Insurance Benefits, Inc.

17. Also on information and belief, under the CERT Master Trust Agreement and Master Plan, Plan Benefit Services, Inc. has the power and responsibility for interpreting the provisions of the Master Plan and preparing and publishing rules and regulations that are not inconsistent with its terms and provisions. It has all powers necessary to determine all questions arising in connection with the administration, interpretation, and application of the Master Plan. Accordingly, Plan Benefit Services, Inc. has exercised discretionary authority and/or discretionary control in the administration of the participating employee benefit plans and has been a fiduciary under ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A).

18. On information and belief, Fringe Benefits Group has de facto control over Plan Benefit Services, Inc. and Fringe Insurance Benefits, Inc., and the three entities are so closely related as to be interchangeable.

FACTS

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

20. The Fringe Benefits Group sells the "Contractors Plan," which offers retirement benefits through CERT and welfare benefits through CPT. The Contractors Plan markets itself to employers as a means to making the "leanest bid," saving money on payroll taxes, and avoiding fiduciary liability. While the Plan may save employers money and help them win contracts, the pension and health benefits come at a high cost to the workers because of the excessive fees charged by Defendants.

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

The Welfare Plan (CPT)

22. CPT is a multiple-employer welfare arrangement within the meaning of ERISA § 3(40), 29 U.S.C. § 1002(40), and a group insurance arrangement under 29 C.F.R. §§ 2520.104-43.

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

24. Each participating employer's health and welfare plan enters into an Adoption Agreement with Plan Benefit Services, Inc., which is the Master Plan Sponsor and Administrator of CPT. Each of the underlying plans is an employee welfare benefit plan within the meaning of ERISA § 3(1), 29 U.S.C. § 1002(1).

25. Participants receive health and welfare benefits through the purchase of insurance contracts by their employer's plan, which CPT arranges.

26. Plan Benefit Services, Inc. does not play any role in paying or processing insurance claims or provider billing, as would a traditional third-party administrator in the health care industry. Pursuant to the Adoption Agreement, Plan Benefit Services, Inc. performs a limited set of services for CPT and the underlying plans including assisting employers with applications for insurance and forwarding the applications to insurers; assisting in soliciting competitive bids from carriers and negotiating renewals with carriers; maintaining a census of covered participants and participant accounting records; transmitting premium payments to insurers; providing a toll-free call center for participants to get information about enrollment and contributions; and filing an IRS Form 5500 for CPT.

27. In other words, Plan Benefit Services, Inc. simply acts as an intermediary between participating plans and insurers and performs limited recordkeeping functions.

28. Defendant Fringe Insurance Benefits, Inc. performs undescribed "marketing and sales-related services" for CPT, the nature and scope of which are not defined further in the Adoption Agreement or other materials.

29. The Adoption Agreement states that Plan Benefit Services, Inc. and Fringe Insurance Benefits, Inc. are each paid 5% of the applicable insurance premium for those workers who have general medical benefits, for a total of 10% in fees. For those workers who have limited medical benefits (i.e., basic insurance coverage capped at specific amounts for specific services),

Fringe Insurance Benefits, Inc. is paid 15% of the premiums (with 10% of that amount going to an undefined "agent"), and Plan Benefit Services, Inc. is paid an additional 2% of the premiums, for a total of 17% in fees. Participating employees pay the 10% or 17% fees, depending on the level of medical benefits, to Plan Benefit Services, Inc. and Fringe Insurance Benefits Inc. Schedule C to the Adoption Agreement states that "the plan administrative fees are paid by the plan from the trust and are allocated to participant accounts in proportion to each participant's premiums."

30. Plans make contributions to CPT, and then Plan Benefit Services, Inc. and Fringe Insurance Benefits, Inc. pay themselves before transmitting funds to the insurers.

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

32. The Adoption Agreement acknowledges that the Trust "may contain assets from the Employer Plans," and is therefore "governed by ERISA."

33. Plan Benefit Services, Inc. and Fringe Benefit Services, Inc. pay themselves out of plan assets.

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

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

36. 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.

37. 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.

The Retirement Plan (CERT)

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

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

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

41. If the employer so chooses, employees may make contributions to CERT and/or employers may make discretionary profit sharing contributions. Employers may also make "prevailing wage contributions" on behalf of participants who perform work subject to prevailing wage statutes. Prevailing wage requirements can generally be met through a combination of wages and fringe benefits. If the employer does not spend enough on health and welfare benefits to make up the fringe benefits component and thus meet its obligation to pay prevailing wages, the employer may pay the remaining balance into the employee's defined contribution retirement plan account, i.e., into plan accounts held through CERT.

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

43. On information and belief, the CERT Master Plan and the Master Trust Agreement give Defendant Plan Benefit Services, Inc. broad authority over CERT. This authority includes the right to appoint and remove the Trustee, approve compensation for the Trustee, direct the Trustee to make payments to such persons and at such times and in such amounts as Plan Benefit Services, Inc. shall direct, and amend the Master Plan, Master Trust Agreement, and Adoption Agreement without the consent of participating employers.

44. In addition, Plan Benefit Services, Inc. performs recordkeeping and administrative services for the master trust and participating plans.

45. Plan Benefit Services, Inc. also receives contributions to the Trust. American National Bank of Texas Trust serves as the Trustee of CERT, and in that capacity, it holds the assets of the Trust and pays benefits to participants and beneficiaries.

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

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

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

49. The Retainer Agreement further provides that Plan Benefit Services, Inc. "and its affiliate" may employ brokers to assist in marketing the plans and performing the administrative functions delegated to Plan Benefit Services, Inc. in exchange for a portion of the fees. On information and belief, Fringe Insurance Benefits, Inc. is the affiliate that receives fees paid out of

plan assets in the Trust. On information and belief, Plan Benefit Services, Inc. retains the authority to engage or remove Fringe Insurance Benefits, Inc. as a service provider to the employee benefit plans participating in CERT.

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

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

52. The Retainer Agreement does not specify what services, if any, Fringe Insurance Benefits, Inc. performs for CERT. On information and belief, it does not perform any services necessary to the operation of CERT.

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

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

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

56. Defendants' fees far exceed industry standards and bear little relationship to the services they are providing to CERT. A study by Deloitte found that the average "all in" (i.e.,

administrative and investment) fee paid by participants and/or sponsors of defined contribution pension plans was 1.17% of assets for plans with $1 to $10 million in assets, 0.89% of assets for plans with $10 to $100 million in assets, 0.63% of assets for plans with $100 to $500 million in assets, and 0.41% for plans with over $500 million in assets. Even assuming that most of the participating plans in CERT are small, fees averaging 2% exclusive of investment fees are grossly excessive.

57. For 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 obligations.

CLASS ACTION ALLEGATIONS

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

59. The members of the Class are so numerous that joinder of all members is impracticable. While the exact number of Class members is unknown at this time and can be ascertained only through appropriate discovery, Plaintiffs believe that there are, at a minimum, thousands of Class members.

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

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

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

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

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

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

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

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

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

64. In the alternative, class certification of Plaintiffs' Claims for Relief also is appropriate under Fed. R. Civ. P. 23(b)(3) because common issues of law and fact predominate over questions affecting only individual members of the Class. Moreover, a class action is superior to other available methods for the fair and efficient adjudication of this controversy. Defendants have obtained wrongful profits through overcharges that are, on an individual level, small and difficult to detect but

in the aggregate have an enormous impact on the value of Class members' employee benefits. Individual participants, and even most plans, have an insufficient stake in the outcome of this matter to devote the substantial resources that would be required to pursue it individually.

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

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

CLAIMS FOR RELIEF

FIRST CLAIM FOR RELIEF

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

67. Plaintiffs incorporate Paragraphs 1-66 as though set forth herein.

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

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

70. Defendants provide, *inter alia*, administrative, recordkeeping, and marketing services to the participating plans in the Trusts. Accordingly, Defendants are parties in interest with respect to the plans.

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

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

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

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

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

SECOND CLAIM FOR RELIEF

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

76. Plaintiff incorporates Paragraphs 1-75 as though set forth herein.

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

78. ERISA § 406(b)(3), 29 U.S.C. § 1106(b)(3), mandates that a plan fiduciary shall not "receive any consideration for his own personal account from any party dealing with such plan in connection with a transaction involving the assets of the plan."

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

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

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

82. Plan Benefit Services, Inc. was a fiduciary of the plans that participated in CERT and CPT, as set forth in Paragraphs 16-17 above.

83. Defendants engaged in prohibited transactions in violation of ERISA § 406(b), 29 U.S.C. § 1106(b), by hiring themselves to perform services to the plans, by paying themselves excessive compensation out of plan assets, 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.

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

THIRD CLAIM FOR RELIEF

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

85. Plaintiff incorporates Paragraphs 1-84 as though set forth herein.

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

87. Plan Benefit Services, Inc. is a fiduciary of the plans participating in CPT and CERT as set forth in paragraphs 16-17 above.

88. ERISA § 404(a)(1), 29 U.S.C. § 1104(a)(1), requires, *inter alia*, that a plan fiduciary discharge his, her, or its duties with respect to a plan solely in the interest of the participants and beneficiaries and with the care, skill, prudence, and diligence under the circumstances then prevailing

that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims.

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

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

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

92. 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,

93. Defendants are liable under ERISA § 502(a)(3) for knowingly participating in Plan Benefit Services, Inc.'s breaches of fiduciary duty.

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

95. Defendants' actions caused losses to the plans in an amount to be proven at trial.

PRAYER FOR RELIEF

Wherefore, Plaintiffs pray as follows:

<u>As to the First Claim for Relief:</u>

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

B. Declare that Defendants have knowingly participated in prohibited transactions and violated ERISA in their capacity as parties in interest to the plans;

C. Enjoin Defendants from engaging in further prohibited transactions;

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

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

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

G. Order Defendants to pay prejudgment interest; and

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

As to the Second Claim for Relief:

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

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

C. Enjoin Defendants from further prohibited transactions;

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

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

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

G. Order Defendants to pay prejudgment interest; and

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

As to the Third Claim for Relief:

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

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

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

D. Order Defendant Plan Benefit Services, Inc. to make good to the plans the losses resulting from these fiduciary violations;

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

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

G. Order Defendants to pay prejudgment interest; and

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

Dated: July 6, 2017

Respectfully submitted,

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**Pro hac vice* application forthcoming

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

FRINGE BENEFIT GROUP, INC., and FRINGE INSURANCE BENEFITS, INC.	§	
Plaintiffs,	§	
v.	§	Civil Action No. 18-369
FCE BENEFIT ADMINISTRATORS, INC. and CHRIS PORTER	§	JURY TRIAL DEMANDED
Defendants.	§	

<u>Exhibit</u> 2

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

Heriberto Chavez; Evangelina Escarcega, as the legal representative of her son, Jose Escarcega; and Jorge Moreno, Plaintiffs, v. Plan Benefit Services, Inc.; Fringe Insurance Benefits, Inc.; and Fringe Benefit Group, Defendants.	Civil Action No. 1:17-cv-00659 ERISA Class Action

FIRST AMENDED CLASS ACTION COMPLAINT

PRELIMINARY STATEMENT

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

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

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

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

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

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

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

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

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

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

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

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

LEGAL FRAMEWORK

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

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

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

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

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

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

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

JURISDICTION

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

VENUE

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

PARTIES

Heriberto Chavez

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

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

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

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

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

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

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

Evangelina Escarcega

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

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

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

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

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

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

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

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

Jorge Moreno

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

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

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

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

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

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

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

Defendants

a. Background on All Defendants

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

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

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

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

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

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

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

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

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

a. controls disbursements from the Trust, including payments made from plan assets for fees to itself and its affiliates;

b. retains discretionary authority and control to appoint and remove the Trustee of CPT; and

c. retains discretionary authority and control to select and remove service providers to the employee benefit plans participating in CPT, including Plan Benefit Services, Inc. and related party Fringe Insurance Benefits, Inc.

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

a. directs the Trustee and other third parties with respect to disbursements from the Trust, including for its own fees;

b. selects the investment platform options made available to employers (and thus exercises authority over its own compensation from investment providers);

c. retains discretionary authority and control to appoint and remove the Trustee of CERT; and

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

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

FACTS

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

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

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

The Welfare Plan (CPT)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The Retirement Plan (CERT)

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

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

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

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

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

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

a. The authority to enter into contracts imposing costs, fees, expenses, taxes, and other charges and expenses on the Master Trust and the plans, and the authority to calculate such costs for payment by the Trustee;

b. The authority to select and make available to plans various platforms for investment of plan assets;

c. The authority to instruct any insurance company, custodian or paying agent with respect to investment or disbursement of investment funds on behalf of the Trustee and any participant;

d. The authority to direct the Trustee to make payments to such persons and at such times and in such amounts as Fringe Benefit Group shall direct; and

e. the right to appoint and remove the Trustee.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

<u>Defendants' Excessive Fees Reduce the Value of the Fringe Benefit Components of Prevailing Wage Payments.</u>

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

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

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

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

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

Class Action Allegations

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CLAIMS FOR RELIEF

FIRST CLAIM FOR RELIEF

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

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

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

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

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

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

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

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

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

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

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

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

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

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

127. ERISA § 406(b)(3), 29 U.S.C. § 1106(b)(3), mandates that a plan fiduciary shall not "receive any consideration for his own personal account from any party dealing with such plan in connection with a transaction involving the assets of the plan."

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

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

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

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

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

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

THIRD CLAIM FOR RELIEF

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

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

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

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

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

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

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

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

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

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

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

PRAYER FOR RELIEF

Wherefore, Plaintiffs pray as follows:

As to the First Claim for Relief:

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

B. Declare that Defendants have knowingly participated in prohibited transactions and violated ERISA in their capacity as parties in interest to the plans;

C. Enjoin Defendants from engaging in further prohibited transactions;

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

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

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

G. Order Defendants to pay prejudgment interest; and

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

As to the Second Claim for Relief:

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

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

C. Enjoin Defendants from further prohibited transactions;

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

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

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

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

H. Order Defendants to pay prejudgment interest; and

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

<u>As to the Third Claim for Relief:</u>

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

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

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

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

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

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

G. Order Defendants to pay prejudgment interest; and

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

Dated: December 4, 2017

Respectfully submitted,

By: */s/ Catha Worthman*

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CERTIFICATE OF SERVICE

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

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

FRINGE BENEFIT GROUP, INC., and FRINGE INSURANCE BENEFITS, INC.	§	
Plaintiffs,	§	
v.	§	Civil Action No. 18-369
FCE BENEFIT ADMINISTRATORS, INC. and CHRIS PORTER	§	JURY TRIAL DEMANDED
Defendants.	§	

Exhibit 3

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

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 (5^{th} 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

[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).

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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.

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[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 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).

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

FRINGE BENEFIT GROUP, INC., and FRINGE INSURANCE BENEFITS, INC.	§ § § § §	
Plaintiffs,	§ §	
v.	§	Civil Action No. 18-369
	§ §	
FCE BENEFIT ADMINISTRATORS, INC. and CHRIS PORTER	§ §	JURY TRIAL DEMANDED
Defendants.	§ §	

Exhibit 4

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-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,

[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

[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

[5]In resolving standing issues under Fed. R. Civ. P. 12(b)(1), 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

[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

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[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 (5^{th} Cir. 2013) (*quoting Associated Builders, Inc. v. Ala. Power Co.*, 505 F.2d 97, 100 (5^{th} 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

[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,

HOLIFIELD JANICH RACHAL
FERRERA, PLLC
Washington, DC 20005
202.440-3890 –Telephone
865.566.0119 – Facsimile

/s/ Tess Ferrera
Tess J. Ferrera
Pro Hac Vice
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Robert Rachal
Pro Hac Vice Pending
rrachal@holifieldlaw.com

JACKSON WALKER L.L.P.
100 Congress Avenue, Suite 1100
Austin, Texas 78701
512.236.2230 – Telephone
512.391.2113 – Facsimile

/s/ Matt Dow
Matt Dow
State Bar No. 06066500
mdow@jw.com
Jonathan Neerman
State Bar No. 24037165
jneerman@jw.com
Lawton P. Cummings
State Bar No. 24103608
lcummings@jw.com

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

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:

Richard J. (Rex) Burch
Bruckner Burch PLLC
8 Greenway Plaza, Suite 1500
Houston, TX 77046
rburch@brucknerburch.com

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383 4th Street
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Jonathan Weissglass
Altshuler Berzon LLP
177 Post Street, Suite 300
San Francisco, California 94108
jweissglass@altshulerberzon.com

/s/ Matt Dow
Matt Dow

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

FRINGE BENEFIT GROUP, INC., and FRINGE INSURANCE BENEFITS, INC.	§	
	§	
Plaintiffs,	§	
	§	
v.	§	Civil Action No. 18-369
	§	
FCE BENEFIT ADMINISTRATORS, INC. and CHRIS PORTER	§	JURY TRIAL DEMANDED
	§	
Defendants.	§	

Exhibit 5

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

17 NOV -7 AM 9:11
CLERK, U.S. DISTRICT COURT
WESTERN DISTRICT OF TEXAS
BY AD

HERIBERTO CHAVEZ; EVANGELINA ESCARCEGA as the legal representative of her son Jose Escarcega; and JORGE MORENO,
Plaintiffs,

-vs-

Case No. A-17-CA-659-SS

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

O R D E R

BE IT REMEMBERED on this day the Court reviewed the file in the above-styled cause, and specifically "Defendants' Motion to Dismis [sic] and Brief in Support" [#27 filed October 6, 2017] and "Plaintiffs' Opposition to Defendants' Motion to Dismiss" [#33 filed October 27, 2017] and, thereafter, enters the following:

The pleading establish that the plaintiffs were at one time employees of Training Rehabilitation and Development Institute, Inc. ("TRDI"). TRDI established a health and welfare plan referred to as "TRDI H&W Plan" and executed an adoption plan with The Contractor's Plan Trust ("CPT"). The adoption plan set out how the TRDI H&W Plan was to be administered, including the approval of a "stand alone employee pension plan within the meaning of ERISA § 3(2)(a), 29 U.S.C. § 1002(2)(A)." The CERT Master Plan acknowledges that TRDI serves as the TRDI retirement plan's administrator and the retainer agreement sets forth all duties undertaken by the plan administrator, the employer, the record keeper, and the trustee.

The plaintiffs sue alleging part time employment status but fail to specify the appropriate times they are alleging. Also, the plaintiffs fail to allege any specific damages other than their allegations of opinions and conclusions without specific fact allegations. The plaintiffs allege the defendants had excessive charges, which in the plaintiffs' and their counsels' opinions reduced the benefits to those employees. Again without factual allegations. The pleadings indicate that the TRDI H&W Plan established with the CPT has not existed for "over a year." The defendants allege "because plaintiffs are no longer participants in the TRDI Plans, [the plaintiffs] have no statutory standing to bring this ERISA action."

The defendants' authority exclusively comes from a contract between the employer TRDI, who contracts with the defendants through the TRDI H&W Plan. TRDI H&W Plan could at any time with or without cause cancel the contract with the defendants and apparently did so over a year prior to the filing of this lawsuit.

The plaintiffs seek to remedy non-described injuries other than alleged losses of the value of retirement payments and/or medical protection, apparently in the past and questionably in the future. There are no specific allegations of damages in these pleadings. The defendants allege the failure of establishing any "injury in fact" for any of the present plaintiffs, and it would appear, if a class action was established as requested by the plaintiffs in their pleadings, only theoretical damages would exist under them

Without any specific allegations of facts in detailed pleadings of excessive fees, breach of fiduciary obligations by having contract(s) with an alleged related company (and allegations of excessive fees but no specifics), the plaintiffs' pleadings are insufficiently specific to state any claim for benefits under ERISA whether or not the defendants were (as alleged by the plaintiffs) fiduciaries. Despite all of the opinions and speculation of plaintiffs' pleadings, it is clear throughout the pleadings that TRDI, not the defendants in this case, had at all times the final authority and control over the administration of the contract under which the defendants worked. TRDI was the final authority and control over the services and prices provided by the defendants at all times under the performance of the contract.

It is alleged in the defendants' pleadings that TRDI executed a contract "acknowledging that PBS was not serving as a fiduciary to the Plan" and agreed to pay the fees identified in the schedule contained in the adoption agreement. Whether this is important or not, it is clear TRDI had the authority to stop the compensation, fees, and expenses associated with the plan charged or being charged by the defendants. The implications in the plaintiffs' complaint are opinions that charges (not identified) were excessive and certain transactions (not identified) breached alleged fiduciary duties (clearly not established in the pleadings) of defendants and related companies. There is no implication in the pleadings TRDI ever made these allegations before it terminated the contract with the defendants.

In sum, the plaintiffs' allegations in their complaint as well as in plaintiffs' opposition to defendants' Motion to Dismiss ring only with argumentative opinions and without any specific allegations of fact on standing of the name plaintiffs, any allegations of liability and or damages.

The defendants' Motion to Dismiss (not "Dismis") is GRANTED, and the plaintiffs may file an amended complaint addressing the deficiencies in defendants' motion and specified in this order within twenty days from this date.

SIGNED this the 6th day of November 2017.

Sam Sparks
UNITED STATES DISTRICT JUDGE

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

FRINGE BENEFIT GROUP, INC., and FRINGE INSURANCE BENEFITS, INC. Plaintiffs,	§	
v.	§	Civil Action No. 18-369
FCE BENEFIT ADMINISTRATORS, INC. and CHRIS PORTER Defendants.	§	JURY TRIAL DEMANDED

Exhibit 6

FCE Benefit Administrators, Inc.
1528 S. El Camino Real, Suite 307
San Mateo, CA 94402

Tel 650 -341-0306
Toll Free 800-899-0306
Fax 650-341-7432
corpoffice@fcebenefit.com

FCE

Benefits for Government Contractors

1/25/2018

Re: **Notification of Class Action Lawsuit**

Dear SCA Contractor,

Public filings indicate that you are the sponsor of a welfare benefit plan that uses the services of Fringe Insurance Benefits, Inc. and its affiliates (FIBI). FIBI has bundled your plan into the Contractors Plan Trust, a trust that commingles assets of well over 100 separate benefit plans. A class action lawsuit was filed in Texas against FIBI in July 2017 by participants in one of those plans raising issues potentially applicable to all of the plans in the commingled trust. We thought you should know of the existence of the lawsuit that you may have significantly greater liability exposure because your plan participates in the commingled trust, and that FCE Benefit Administrators, Inc. provides welfare benefit administration services to federal contractors in a manner that avoids the type of liability exposure associated with the FIBI commingled arrangement.

I have included the title page of the above mentioned lawsuit in the event you would like to pursue the matter further. The lawsuit alleges that FIBI violated several provisions of the Employee Retirement Income Security Act of 1974 (ERISA) including causing the commingled trust to pay themselves unreasonable amounts of administrative fees over the years resulting in various prohibited transactions. Of course, FCE cannot predict whether the court will agree that FIBI's fees were unreasonable, or whether any of the other allegations made in the complaint will be found to be true. However, all the plans have participated in the commingled trust on virtually the same terms, all paying the same level of fees. It is very possible, if not likely, that the employers sponsoring the participating plans will be joined as defendants in the case on the basis that the employers contracted with FIBI to provide administrative services for their plans for an unreasonable amount of fees. This suggests that every employer that sponsors a plan that is participating in the Contractors Plan commingled trust likely has some liability exposure in this lawsuit. This is a consequence of FIBI's practice of commingling its clients into a single arrangement.

FCE takes a very different approach; it does not ask its federal contractor clients to have its plans participate in a single large commingled trust. Instead, each FCE client maintains its own separate health & welfare plan that has no connection with any other FCE client other than being an FCE client. This has many advantages over the FIBI commingled approach. Each employer has greater flexibility and control of plan design, service provider fees are far more transparent, and, significantly, a lawsuit that is filed relating to one FCE-administered plan has no direct connection to any other FCE-administered plan.

FCE takes no satisfaction in seeing any lawsuit filed alleging improper plan administration of a federal contractor's fringe benefit plan. FCE has had its own challenges in this regard recently, which we are working through. However, placing up to hundreds of benefit plans into a single arrangement is a high risk approach that potentially exposes all employers to similar liability if the lawsuit is successful. FCE's approach diffuses that risk, and otherwise provides each of its client's sufficient tools to ensure that their plan is designed and maintained more closely to each employer's unique needs and expectations.

FCE views the reasonableness of administrative fees to be a very important matter. In our Plans, only the Employer has the authority to approve the administrative fees. The fees are proposed, discussed, and agreed upon with the Employer, and then documented at the outset of the relationship. Furthermore, FCE has never caused a trust to pay ourselves an administrative fee. In our Plans, only the Employer's appointed Trustee, strictly following the terms of the Employer's signed documents, has the authority to pay trust expenses. Additionally, FCE has taken the extra step of submitting its fees to an outside expert to render a professional opinion about the reasonableness of our fees, measured by the services actually performed, and the fees charged by other TPAs in our industry for performing similar services. FCE's fees were proven to be reasonable.

If you would like to discuss FCE's services for your welfare benefit plan, please contact me directly at (650)-291-4202 or by email at cporter@fcebenefit.com.

Sincerely,

Chris Porter
VP Sales & Marketing
FCE Benefits
1528 south El Camino Real Suite 307
San Mateo, CA 94402
(650)-291-4202- Direct

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

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

CLASS ACTION COMPLAINT

PRELIMINARY STATEMENT

1. More than 125,000 workers, most of them in the construction industry, receive pension and welfare benefits through the Contractors and Employees Retirement Trust ("CERT") and the Contractors Plan Trust ("CPT") (collectively, "the Trusts").

2. Defendants Plan Benefit Services, Inc. and Fringe Insurance Benefits, Inc., collectively doing business as Defendant Fringe Benefit Group, provide administrative and marketing services to the Trusts. Defendants charge workers fees for those services on top of the costs of the workers' benefits. Some of these fees are disclosed in agreements between Defendants and the employers that administer the employee benefit plans participating in the Trusts, but others are not. All fees are excessive relative to the minimal services actually provided by Defendants, who have collected tens of millions of dollars from the Trusts during the period at issue in this case.

3. The Trusts and Defendants are closely related entities: Fringe Benefit Group created and administers the Trusts through its wholly-owned subsidiary, Plan Benefit Services, Inc. Defendants have taken advantage of their control of the Trusts in compensating themselves excessively for services which, on information and belief, cost very little to provide.

FCE
BENEFITS

WHY CHOOSE FCE?

With 30 years in fringe-benefit design & compliance for government contractors FCE Benefit Administrators, Inc. leads the industry as a full service third party administrator.

GROWTH

FCE has the ability to meet your needs as you grow here as well as overseas. Our goal is to create solutions that allow you to support your employees and to stay focused on a successful future, while staying within a financially viable cost structure.

STRENGTH

We develop and maintain our proprietary systems to meet specific needs of government contractors. Our plans ensure continuous compliance with government regulations while remaining within your budget. Our strategic alliances provide our clients with all the resources necessary to meet their fringe obligations under SCA, DBA, the AbilityOne Program (JWOD), Collective Bargained Agreements, Living Wage Ordinances and other legislation.

STABILITY

With more than 200 employees working in 10 offices across the country, we have the coverage and resources to deliver. FCE has 14 dedicated Regional Account Executives to provide you with outstanding customer service and a sales staff who remain in constant contact with clients and consultants. We ensure the best employee retention in the industry!

Your FCE Contact: Chris Porter, VP Sales and Marketing, cporter@fcebenefit.com 650.291.4202

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

FRINGE BENEFIT GROUP, INC., and FRINGE INSURANCE BENEFITS, INC.	§	
Plaintiffs,	§	
v.	§	Civil Action No. 18-369
FCE BENEFIT ADMINISTRATORS, INC. and CHRIS PORTER	§	JURY TRIAL DEMANDED
Defendants.	§	

Exhibit 7

Holifield • Janich
Rachal • Ferrera
PLLC

Tess J. Ferrera, Member
700 12th Street, NW, Suite 700 · Washington, DC 20005

Email: tferrera@holifieldlaw.com
Office Phone: (202) 440-3809
Cell: (202) 365-9038
Fax: 865.566.0119 · Web: www.holifieldlaw.com

VIA OVERNIGHT MAIL
February 9, 2018

Chris Porter
VP Sales & Marketing
FCE Benefits
1528 South El Camino Real, Suite 307
San Mateo, CA 94402

Dear Mr. Porter:

I represent Fringe Benefit Group, Inc., in among other matters, *Chavez v. Plan Benefit Services, Inc., et al.*, the lawsuit filed against it, Plan Benefit Services, Inc., and Fringe Insurance Benefits, Inc. (collectively "FBG"). FBG has provided me with a copy of a document titled "Notification of Class Action Lawsuit" ("Notification"), dated January 25, 2018, that you apparently authored and distributed to a list of sponsors that utilize FBG's services.

The Notification is riddled with statements that FBG would assert, based on easily obtainable evidence, were made with reckless disregard for the truth and with the intent of causing reputational harm to FBG and interfering with FBG's business contracts.

Although your Notification purports to inform the addressees about the *Chavez* lawsuit, your letter includes statements that are not found in the Complaint and are easily proven to be false. FBG believes that the Notification is defamatory and demands a retraction (that FBG will review and approve) that you must send to the list that received the original Notification and do so within the next 30-days. You are also hereby instructed to provide me with the list of sponsors to whom you sent the Notification. If you do not provide me with the requested list and cease distributing the Notification, FBG will take appropriate action against you.

If you have any questions, please contact me or have your lawyers call me.

Very truly yours,

HOLIFIELD JANICH RACHAL FERRERA, PLLC

By:______________________________
Tess J. Ferrera

TJF:scr

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

<table>
<tr><td>FRINGE BENEFIT GROUP, INC., and
FRINGE INSURANCE BENEFITS,
INC.

Plaintiffs,

v.

FCE BENEFIT ADMINISTRATORS,
INC. and CHRIS PORTER

Defendants.</td><td>§
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§</td><td>Civil Action No. **18-369**

JURY TRIAL DEMANDED</td></tr>
</table>

<u>**Exhibit 8**</u>

FCE Benefit Administrators, Inc
1528 S El Camino Real Suite 307
San Mateo, CA 94402

Tel 650 -341-0306
Toll Free 800-899-0306
Fax 650-341-7432
corpoffice@fcebenefit com

FCE
Benefits for Government Contractors

3/1/2018

NOTIFICATION OF A CLASS ACTION LAWSUIT

Dear SCA Contractor,

Public filings indicate that you are the sponsor of a welfare benefit plan that uses the services of Fringe Insurance Benefits, Inc. and its affiliates (FIBI). FIBI has bundled your plan into the Contractors Plan Trust, a trust that commingles assets of well over 100 separate benefit plans. A class action lawsuit was filed in Texas against FIBI in July 2017 by participants in one of those plans raising issues potentially applicable to all of the plans in the commingled trust. We thought you should know of the existence of the lawsuit that you may have significantly greater liability exposure because your plan participates in the commingled trust, and that FCE Benefit Administrators, Inc. provides welfare benefit administration services to federal contractors in a manner that avoids the type of liability exposure associated with the FIBI commingled arrangement.

The lawsuit alleges that FIBI violated several provisions of the Employee Retirement Income Security Act of 1974 (ERISA) including causing the commingled trust to pay themselves unreasonable amounts of administrative fees over the years resulting in various prohibited transactions. Of course, FCE cannot predict whether the court will agree that FIBI's fees were unreasonable, or whether any of the other allegations made in the complaint will be found to be true. However, all the plans have participated in the commingled trust on virtually the same terms, all paying the same level of fees. It is very possible, if not likely, that the employers sponsoring the participating plans will be joined as defendants in the case on the basis that the employers contracted with FIBI to provide administrative services for their plans for an unreasonable amount of fees. This suggests that every employer that sponsors a plan that is participating in the Contractors Plan commingled trust likely has some liability exposure in this lawsuit. This is a consequence of FIBI's practice of commingling its clients into a single arrangement.

FCE takes a very different approach; it does not ask its federal contractor clients to have its plans participate in a single large commingled trust. Instead, each FCE client maintains its own separate health & welfare plan that has no connection with any other FCE client other than being an FCE client.

This has many advantages over the FIBI commingled approach. Each employer has greater flexibility and control of plan design, service provider fees are far more transparent, and, significantly, a lawsuit that is filed relating to one FCE-administered plan has no direct connection to any other FCE-administered plan.

FCE takes no satisfaction in seeing any lawsuit filed alleging improper plan administration of a federal contractor's fringe benefit plan. FCE has had its own challenges in this regard recently, which we are working through. However, placing up to hundreds of benefit plans into a single arrangement is a high risk approach that potentially exposes all employers to similar liability if the lawsuit is successful. FCE's approach diffuses that risk, and otherwise provides each of its client's sufficient tools to ensure that their plan is designed and maintained more closely to each employer's unique needs and expectations.

FCE views the reasonableness of administrative fees to be a very important matter. In our Plans, only the Employer has the authority to approve the administrative fees. The fees are proposed, discussed, and agreed upon with the Employer, and then documented at the outset of the relationship. Furthermore, FCE has never caused a trust to pay ourselves an administrative fee. In our Plans, only the Employer's appointed Trustee, strictly following the terms of the Employer's signed documents, has the authority to pay trust expenses. Additionally, FCE has taken the extra step of submitting its fees to an outside expert to render a professional opinion about the reasonableness of our fees, measured by the services actually performed, and the fees charged by other TPAs in our industry for performing similar services. FCE's fees were proven to be reasonable.

If you would like to discuss FCE's services for your welfare benefit plan, please contact me directly at (650)-291-4202 or by email at cporter@fcebenefit.com.

Sincerely,

Chris Porter
VP Sales & Marketing
FCE Benefits
1528 south El Camino Real Suite 307
San Mateo, CA 94402
(650)-291-4202- Direct

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

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

CLASS ACTION COMPLAINT

PRELIMINARY STATEMENT

1. More than 125,000 workers, most of them in the construction industry, receive pension and welfare benefits through the Contractors and Employees Retirement Trust ("CERT") and the Contractors Plan Trust ("CPT") (collectively, "the Trusts").

2. Defendants Plan Benefit Services, Inc. and Fringe Insurance Benefits, Inc., collectively doing business as Defendant Fringe Benefit Group, provide administrative and marketing services to the Trusts. Defendants charge workers fees for those services on top of the costs of the workers' benefits. Some of these fees are disclosed in agreements between Defendants and the employers that administer the employee benefit plans participating in the Trusts, but others are not. All fees are excessive relative to the minimal services actually provided by Defendants, who have collected tens of millions of dollars from the Trusts during the period at issue in this case.

3. The Trusts and Defendants are closely related entities: Fringe Benefit Group created and administers the Trusts through its wholly-owned subsidiary, Plan Benefit Services, Inc. Defendants have taken advantage of their control of the Trusts in compensating themselves excessively for services which, on information and belief, cost very little to provide.

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

FRINGE BENEFIT GROUP, INC., and FRINGE INSURANCE BENEFITS, INC.	§	
Plaintiffs,	§	
v.	§	Civil Action No. 18-369
FCE BENEFIT ADMINISTRATORS, INC. and CHRIS PORTER	§	JURY TRIAL DEMANDED
Defendants.	§	

Exhibit 9

JW | Jackson Walker LLP

James Matthew Dow
(512) 236-2230 (Direct Dial)
(512) 391-2113 (Direct Fax)
mdow@jw.com

Certified Article Number
9414 7266 9904 2056 9091 41
SENDERS RECORD

April 12, 2018

Certified Article Number
9414 7266 9904 2056 9091 58
SENDERS RECORD

VIA CERTIFIED MAIL

FCE Benefit Administrators, Inc.
c/o Chris Porter
VP of Sales and Marketing
1528 S. El Camino Real, Suite 307
San Mateo, California 94402

FCE Benefit Administrators, Inc.
c/o Gary Beckman
President and CEO
4615 Walzem Road
San Antonio 78218-1610

Re: Request for Correction, Clarification, or Retraction of Solicitation Letters dated January 25, 2018 and March 1, 2018

Dear Messrs. Porter and Beckman:

This firm represents Fringe Benefit Group, Inc. ("FBG") and Fringe Insurance Benefits, Inc. ("FIBI") (collectively "Fringe"). I write regarding the two solicitation letters that Chris Porter and FCE Benefit Administrators, Inc. (collectively "FCE") sent to Fringe's customers across the country dated January 25, 2018 and March 1, 2018, entitled "Notification of Class Action Lawsuit" (collectively the "Solicitation Letters"). As set forth below, Fringe hereby makes a request for correction, clarification, or retraction of the Solicitation Letters.

I. Background

As you know, FBG offers employers the opportunity to establish stand-alone health and welfare employee plans governed by ERISA through The Contractors Plan Trust ("CPT"). The arrangement is fully-insured by multiple carriers licensed in the state in which the employer is located. The arrangement is a permissible "multiple employer welfare arrangement," within the meaning of ERISA § 3(40). Each employer in the CPT enters into an adoption agreement with CPT and selects coverage from a licensed carrier in its state and selects the type of coverage appropriate for its employees. Pentegra Trust Company ("Pentegra") currently serves as the trustee over CPT. FBG reconciles and allocates premiums from the participating employers and, as required by ERISA, places the premiums in a trust over which Pentegra serves as the trustee, until the premiums are paid monthly to the respective carriers.

ERISA defines a fiduciary in functional terms. *See* ERISA § 3(21)(A). Among others, a person that has discretionary authority or control over assets that belong to employee benefits plans may be a fiduciary and subject to ERISA's standards. *Id.* Trustees are typically deemed fiduciaries under ERISA because, at a minimum, they have control over the assets of plans over which they serve as trustees.

The law of trusts guides the federal common-law of ERISA. As you know, in the fiduciary context of trust law, the term "commingle" or "commingling" of assets has a negative connotation that the fiduciary has breached a fiduciary duty. As discussed below, this term, among others, is used in a defamatory fashion against Fringe and its services in the Solicitation Letters.

II. FCE's False and Defamatory Solicitation Letters to Fringe's Clients.

As Fringe's counsel informed you by letter dated February 9, 2018, the Solicitation Letters are riddled with false and defamatory statements. Specifically, the Solicitation Letters, which are identical in form and substance, repeatedly and in a defamatory light use the term "commingle" or some variation thereof, in relation to the services of "FIBI and its affiliates."[1] These statements are all false and defamatory. As set forth above, in the fiduciary context of trust law, the term "commingle" negatively conveys that a fiduciary duty has been breached. FCE fully intended to use the term "commingle" and variations thereof in the Solicitation Letters to convey to Fringe's customers that Fringe wrongfully commingled trust assets and breached their fiduciary duties. But neither FBG nor FIBI wrongfully commingle trust assets. While ERISA allows the use of a single trust to hold the assets of multiple employers, a separate accounting for each employer must be kept, as is done in the case of trusts marketed and administered by Fringe. That fact, of course, was conspicuously omitted from the defamatory Solicitation Letters.

Moreover, the Solicitation Letters' description of the *Chavez* lawsuit and statements regarding the "likely[hood]" of Fringe's customers being brought into the *Chavez* litigation as defendants are false and defamatory. The Solicitation Letters fail to disclose that, among other things, on November 7, 2017, the *Chavez* court dismissed the plaintiffs' original complaint in its entirety. The letters likewise do not disclose that the dismissal order states: "[T]he plaintiffs' allegations in their complaint as well as in plaintiffs' opposition to defendants' Motion to Dismiss ring only with argumentative opinions and without any specific allegations of fact on standing of the name[d] plaintiffs, any allegations of liability and or damages." Instead, the letters attach a copy of the first page of a complaint that the federal court dismissed *before* the letters were sent (along with a commercial solicitation entitled "WHY CHOOSE FCE."). The letters further fail to disclose that a motion to dismiss the amended complaint in *Chavez* has been filed and is pending before the court. Further, the letters fail to disclose that there are no indications of additional defendants being added, and to the contrary, the *Chavez* plaintiffs filed an amended complaint without adding any new defendants. Further, the letters fail to disclose

[1] FIBI, as you know, is a marketing company that does not administer or provide recordkeeping for any benefit plan.

that the *Chavez* plaintiffs did not sue their own employer, much less unaffiliated clients of Fringe. Thus, the statements in the Solicitation Letters that Fringe's clients—the recipients of the letters—are "likely" to become defendants in the *Chavez* lawsuit and will face potentially significant liability are untrue. Finally, FCE's repeated references to "commingling" or some variation thereof falsely communicate that "commingling" was the basis of the *Chavez* lawsuit. It clearly was not.

We understand that FCE also verbally relayed the deceptive and defamatory statements in the Solicitation Letters to Fringe's customers and brokers. Accordingly, the below request for clarification, correction, or retraction applies equally to FCE's oral communications of the false statements set forth in the Solicitation Letters

In the spirit of full disclosure, the following statements, among others, in the Solicitation Letters (and any oral recitations of same) are false and defamatory:

Statement of Fact in the Letter	**Defamatory meaning of statements**
• "FIBI has bundled your plan into the Contractors Plan Trust, a trust that comingles assets of well over 100 separate benefit plans."	Fringe does not wrongfully "commingle" assets. As set forth above, Fringe fully complies with its duties and obligations under ERISA, and there is a trustee overseeing Fringe's compliance. This statement purports to inform customers that Fringe has breached fiduciary duties through "commingling" and that its services impose significant legal risks.
• "A class action lawsuit was filed was filed in Texas against FIBI . . . raising issues potentially applicable to all of the plans in the commingled trust."	Fringe does not wrongfully "commingle" assets. This statement purports to inform Fringe's customers that they have significant legal risks in the *Chavez* suit because Fringe "comingled" assets, and that the recipients of the letter face legal liability because they have done business with FBG or FIBI. This is false.

• "We thought you should know about of the existence of the lawsuit that you may have significantly greater liability exposure because your plan participates in the commingled trust. . . ."	Fringe does not wrongfully "commingle" assets. FBG and FIBI's customers do not have "significantly great liability exposure" because they participate in FBG's trust. This statement relays the exact opposite to customers. In fact, none of the recipients of the Solicitation Letters have been sued in the *Chavez* case.
• "[FCE] provides welfare benefit administration services to federal contractors in a manner that avoids the type of liability exposure associated with the FIBI commingled arrangement."	Fringe does not wrongfully "commingle" assets. This statement purports to inform customers, in the context of comparing Fringe's and FCE's services, that Fringe's plans are inappropriately commingled and inferior to FCE's services. This information is false. As set forth above, Fringe strictly adheres to ERISA's requirements and a trustee ensures compliance of separate accounting information and documents.
• "[A]ll the plans have participated in the commingled trust on virtually the same terms, all paying the same level of fees."	Fringe does not inappropriately commingle trust assets. This statement falsely informs clients that Fringe inappropriately and illegally "commingles" trust assets. Each plan participant enters into its own employer-selected plan and the assets are separately accounted for each plan participant (down to each individual employee).
• "It is very possible, if not likely, that the employers sponsoring the participating plans will be joined as defendants in the case on the basis that the employers contracted with FIBI to provide administrative services for their plans for an unreasonable amount of fees. This suggests that every employer that sponsors a plan that is participating in the Contractors Plan commingled trust likely has some liability exposure in this lawsuit. This	The *Chavez* plaintiffs have not sued Fringe's customers in the putative class action lawsuit. Further, Fringe's customers are not "likely" defendants in the case. The *Chavez* plaintiffs have not sued their own employer, much less employers unrelated to them. Fringe does not inappropriately "commingle" assets into "single arrangements." These statements in

is a consequence of FIBI's practice of commingling its clients into a single arrangement."	the Solicitation Letters relay to customers false information on each of these issues.
• "[P]lacing up to hundreds of benefit plans into a single arrangement is a high risk approach that potentially exposes all employers to similar liability if the lawsuit is successful."	This statement falsely relays to the recipients that Fringe's plans are unduly risky, inappropriate, unsafe, unsound, or otherwise unsuitable for the recipients. These statements are untrue because Fringe faithfully complies with ERISA and does not inappropriately place plans into a "single arrangement" or otherwise breach any fiduciary duties.

III. <u>Demand for Correction, Clarification, or Retraction.</u>

Based on the false and defamatory statements in the Solicitation Letters (and oral communications of same) set forth herein, Fringe hereby demands that FCE publish to the recipients of the Solicitation Letters (and related oral statements) a new communication, using the same method of distribution as the Solicitation Letters (or oral statements), to affirmatively correct, clarify, or retract the above-referenced false and defamatory misrepresentations.

Sincerely,

Matt Dow

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

FRINGE BENEFIT GROUP, INC., and FRINGE INSURANCE BENEFITS, INC. Plaintiffs,	§	
v.	§	Civil Action No. 18-369
FCE BENEFIT ADMINISTRATORS, INC. and CHRIS PORTER Defendants.	§	JURY TRIAL DEMANDED

Exhibit 10

U.S. District Court [LIVE]
Western District of Texas (Austin)
CIVIL DOCKET FOR CASE #: 1:17-cv-00659-SS

Chavez et al v. Plan Benefit Services, Inc. et al
Assigned to: Judge Sam Sparks
Cause: 28:1132 E.R.I.S.A.

Date Filed: 07/06/2017
Jury Demand: None
Nature of Suit: 791 Labor: E.R.I.S.A.
Jurisdiction: Federal Question

Plaintiff

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Plaintiff

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V.

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Date Filed	#	Docket Text
07/06/2017	1	COMPLAINT (Filing fee $ 400 receipt number 0542-9756921). No Summons requested at this time, filed by Heriberto Chavez, Jorge Moreno, Evangelina Escarcega. (Attachments: # 1 Civil Cover Sheet)(Burch, Richard) (Entered: 07/06/2017)
07/06/2017		Case Assigned to Judge Sam Sparks. CM WILL NOW REFLECT THE JUDGE INITIALS AS PART OF THE CASE NUMBER. PLEASE APPEND THESE JUDGE INITIALS TO THE CASE NUMBER ON EACH DOCUMENT THAT YOU FILE IN THIS CASE. (afd) (Entered: 07/07/2017)
07/07/2017	2	Letters to Catha Worthman, Nina Wasow and Jonathan Weissglass re: Non-Admitted Status. (afd) (Entered: 07/07/2017)
07/10/2017	3	REQUEST FOR ISSUANCE OF SUMMONS by Heriberto Chavez. (Burch, Richard) (Entered: 07/10/2017)
07/10/2017	4	Summons Issued as to Fringe Benefit Group, Fringe Insurance Benefits, Inc., Plan Benefit Services, Inc.. (ml) (Entered: 07/10/2017)
07/13/2017	5	Certificate of Interested Parties by Heriberto Chavez, Evangelina Escarcega, Jorge Moreno. (Burch, Richard) (Entered: 07/13/2017)
07/14/2017	6	MOTION to Appear Pro Hac Vice by Richard J. Burch *for Catha Worthman* (Filing fee $ 100 receipt number 0542-9784293) by on behalf of Heriberto Chavez, Evangelina Escarcega, Jorge Moreno. (Attachments: # 1 Proposed Order)(Burch, Richard) (Entered: 07/14/2017)
07/14/2017	7	MOTION to Appear Pro Hac Vice by Richard J. Burch *for Nina Wasow* (Filing fee $ 100 receipt number 0542-9784309) by on behalf of Heriberto Chavez, Evangelina Escarcega, Jorge Moreno. (Attachments: # 1 Proposed Order)(Burch, Richard) (Entered: 07/14/2017)
07/17/2017	8	MOTION to Appear Pro Hac Vice by Richard J. Burch *for Jonathan Weissglass* (Filing fee $ 100 receipt number 0542-9788820) by on behalf of Heriberto Chavez, Evangelina Escarcega, Jorge Moreno. (Attachments: # 1 Proposed Order)(Burch, Richard) (Entered: 07/17/2017)
07/18/2017	9	ORDER GRANTING 7 Motion for Nina Wasow to Appear Pro Hac Vice. Pursuant to our Administrative Policies and Procedures for Electronic Filing, the attorney hereby granted to practice pro hac vice in this case must register for electronic filing with our court within 10 days of this order. Signed by Judge Sam Sparks. (ml) (Entered: 07/18/2017)
07/18/2017	10	ORDER GRANTING 6 Motion for Catha Worthman to Appear Pro Hac Vice. Pursuant to our Administrative Policies and Procedures for Electronic Filing, the attorney hereby

		granted to practice pro hac vice in this case must register for electronic filing with our court within 10 days of this order. Signed by Judge Sam Sparks. (ml) (Entered: 07/18/2017)
07/19/2017	11	ORDER GRANTING 8 Motion for Jonathan Weissglass to Appear Pro Hac Vice. Pursuant to our Administrative Policies and Procedures for Electronic Filing, the attorney hereby granted to practice pro hac vice in this case must register for electronic filing with our court within 10 days of this order. Signed by Judge Sam Sparks. (ml) (Entered: 07/19/2017)
08/03/2017	12	Unopposed MOTION for Extension of Time to File Answer re 1 Complaint by Fringe Benefit Group, Fringe Insurance Benefits, Inc., Plan Benefit Services, Inc.. (Attachments: # 1 Proposed Order)(Dow, Matt) (Entered: 08/03/2017)
08/03/2017	13	Letter to Lawton P. Cummings regarding non-admission status. (ml) (Entered: 08/03/2017)
08/04/2017	14	ORDER GRANTING 12 Motion for Extension of Time to Answer ; Fringe Benefit Group answer due 10/6/2017; Fringe Insurance Benefits, Inc. answer due 10/6/2017; Plan Benefit Services, Inc. answer due 10/6/2017. Signed by Judge Sam Sparks. (ml) (Entered: 08/04/2017)
08/09/2017	15	MOTION for Cherie O'Reilly to Appear Pro Hac Vice by Matt Dow (Filing fee $ 100 receipt number 0542-9863034) by on behalf of Fringe Benefit Group, Fringe Insurance Benefits, Inc., Plan Benefit Services, Inc.. (Attachments: # 1 Proposed Order)(Dow, Matt) Modified on 8/9/2017 to add attorneys name (ml). (Entered: 08/09/2017)
08/09/2017	16	MOTION for Paula M. Ketcham to Appear Pro Hac Vice by Matt Dow (Filing fee $ 100 receipt number 0542-9863317) by on behalf of Fringe Benefit Group, Fringe Insurance Benefits, Inc., Plan Benefit Services, Inc.. (Attachments: # 1 Proposed Order)(Dow, Matt) Modified on 8/9/2017 to add attorneys name (ml). (Entered: 08/09/2017)
08/09/2017	17	MOTION for Tess Ferrera to Appear Pro Hac Vice by Matt Dow (Filing fee $ 100 receipt number 0542-9863334) by on behalf of Fringe Benefit Group, Fringe Insurance Benefits, Inc., Plan Benefit Services, Inc.. (Attachments: # 1 Proposed Order)(Dow, Matt) Modified on 8/9/2017 to add attorneys name (ml). (Entered: 08/09/2017)
08/11/2017	18	ORDER GRANTING 15 Motion to Appear Pro Hac Vice by Cherie O'Reilly. Pursuant to our Administrative Policies and Procedures for Electronic Filing, the attorney hereby granted to practice pro hac vice in this case must register for electronic filing with our court within 10 days of this order. Signed by Judge Sam Sparks. (td) (Entered: 08/14/2017)
08/11/2017	19	ORDER GRANTING 17 Motion to Appear Pro Hac Vice Tess Ferrera. Pursuant to our Administrative Policies and Procedures for Electronic Filing, the attorney hereby granted to practice pro hac vice in this case must register for electronic filing with our court within 10 days of this order. Signed by Judge Sam Sparks. (td) (Entered: 08/14/2017)
08/11/2017	20	ORDER GRANTING 16 Motion to Appear Pro Hac Vice by Paula M. Ketcham. Pursuant to our Administrative Policies and Procedures for Electronic Filing, the attorney hereby granted to practice pro hac vice in this case must register for electronic filing with our court within 10 days of this order. Signed by Judge Sam Sparks. (td) (Entered: 08/14/2017)
09/22/2017	21	MOTION to Withdraw as Attorney *Pro Hac Vice* by Fringe Benefit Group, Fringe Insurance Benefits, Inc., Plan Benefit Services, Inc.. (Attachments: # 1 Proposed Order Proposed Order)(Cummings, Lawton) (Entered: 09/22/2017)
09/22/2017	22	CORRECTED MOTION to Withdraw as Attorney *Pro Hac Vice* by Fringe Benefit Group, Fringe Insurance Benefits, Inc., Plan Benefit Services, Inc.. (Attachments: # 1 Proposed Order)(Dow, Matt) (Entered: 09/22/2017)

09/26/2017	23	ORDER GRANTING 22 Motion to Withdraw as Attorney. Signed by Judge Sam Sparks. (td) (Entered: 09/26/2017)
10/02/2017	24	*Agreed Motion for Entry of Agreed Scheduling Order* by Fringe Benefit Group, Fringe Insurance Benefits, Inc., Plan Benefit Services, Inc.. (Attachments: # 1 Proposed Order Final Scheduling Order)(Dow, Matt) Modified on 10/2/2017 to correct event (td). (Entered: 10/02/2017)
10/04/2017	25	SCHEDULING ORDER: Docket Call set for 12/20/2019 at 11:00 AM before Judge Sam Sparks, ADR Report Deadline due by 12/1/2017, Amended Pleadings due by 4/16/2018, Discovery due by 6/15/2018, Joinder of Parties due by 4/16/2018, Motions due by 2/8/2019. Signed by Judge Sam Sparks. (td) (Entered: 10/04/2017)
10/05/2017	26	Agreed MOTION for Extension of Time to File Response/Reply *to Defendants' Motion to Dismiss* by Heriberto Chavez, Evangelina Escarcega, Jorge Moreno. (Attachments: # 1 Proposed Order)(Wasow, Nina) (Entered: 10/05/2017)
10/06/2017	27	MOTION to Dismiss for Lack of Jurisdiction by Fringe Benefit Group, Fringe Insurance Benefits, Inc., Plan Benefit Services, Inc.. (Attachments: # 1 Proposed Order, # 2 Appendix, # 3 Appendix, # 4 Appendix, # 5 Appendix, # 6 Appendix, # 7 Affidavit)(Ferrera, Tess) (Entered: 10/06/2017)
10/06/2017	28	Unopposed MOTION for Leave to Exceed Page Limitation by Fringe Benefit Group, Fringe Insurance Benefits, Inc.. Plan Benefit Services, Inc.. (Attachments: # 1 Proposed Order)(Ferrera, Tess) (Entered: 10/06/2017)
10/06/2017	29	ORDER GRANTING 26 Motion for Extension of Time to File Response to Motion to Dismiss. Signed by Judge Sam Sparks. (td) (Entered: 10/06/2017)
10/10/2017	30	ORDER GRANTING 28 Motion for Leave to File Excess Pages. Signed by Judge Sam Sparks. (ml) (Entered: 10/11/2017)
10/13/2017	31	NON-CONSENT to Trial by US Magistrate Judge by Heriberto Chavez, Evangelina Escarcega, Jorge Moreno. (Weissglass, Jonathan) (Entered: 10/13/2017)
10/13/2017	32	NON-CONSENT to Trial by US Magistrate Judge by Fringe Benefit Group, Fringe Insurance Benefits, Inc., Plan Benefit Services, Inc.. (Dow, Matt) (Entered: 10/13/2017)
10/27/2017	33	Response in Opposition to Motion, filed by Heriberto Chavez, Evangelina Escarcega, Jorge Moreno, re 27 MOTION to Dismiss for Lack of Jurisdiction filed by Defendant Plan Benefit Services, Inc., Defendant Fringe Benefit Group, Defendant Fringe Insurance Benefits, Inc. (Attachments: # 1 Proposed Order Denying Motion to Dismiss)(Wasow, Nina) (Entered: 10/27/2017)
10/27/2017	34	AFFIDAVIT in Opposition to 27 MOTION to Dismiss for Lack of Jurisdiction by Heriberto Chavez, Evangelina Escarcega, Jorge Moreno. (Attachments: # 1 Exhibit 1)(Wasow, Nina) (Entered: 10/27/2017)
11/03/2017	35	REPLY to Response to Motion, filed by Fringe Benefit Group, Fringe Insurance Benefits, Inc., Plan Benefit Services, Inc., re 27 MOTION to Dismiss for Lack of Jurisdiction filed by Defendant Plan Benefit Services, Inc., Defendant Fringe Benefit Group, Defendant Fringe Insurance Benefits, Inc. (Ferrera, Tess) (Entered: 11/03/2017)
11/07/2017	36	ORDER GRANTING 27 Motion to Dismiss and Brief in Support. Plaintiffs may file an amended complaint within twenty days from this date. Signed by Judge Sam Sparks. (ml) (Entered: 11/07/2017)
11/10/2017	37	Unopposed MOTION for Extension of Time to File *Amended Complaint* by Heriberto Chavez, Evangelina Escarcega, Jorge Moreno. (Wasow, Nina) (Entered: 11/10/2017)

11/13/2017	38	DEFICIENCY NOTICE: for Nina Wasow re 37 Unopposed MOTION for Extension of Time to File *Amended Complaint* (ml) (Entered: 11/13/2017)
11/13/2017	39	ATTACHMENT *(Proposed Order)* to 37 Unopposed MOTION for Extension of Time to File *Amended Complaint* by Heriberto Chavez, Evangelina Escarcega, Jorge Moreno. (Wasow, Nina) (Entered: 11/13/2017)
11/17/2017	40	ORDER GRANTING 37 Motion for Extension of Time to File Amended Complaint. Amended Complaint due on or before 12/04/2017. Signed by Judge Sam Sparks. (ml) (Entered: 11/17/2017)
11/30/2017	41	ADR Report Filed - *Tess J. Ferrera* by Fringe Benefit Group, Fringe Insurance Benefits, Inc., Plan Benefit Services, Inc.(Ferrera, Tess) (Entered: 11/30/2017)
12/04/2017	42	AMENDED COMPLAINT against All Defendants amending, filed by Heriberto Chavez, Jorge Moreno, Evangelina Escarcega.(Worthman, Catha) (Entered: 12/04/2017)
12/11/2017	43	Unopposed MOTION to Substitute *Counsel* by Fringe Benefit Group, Fringe Insurance Benefits, Inc., Plan Benefit Services, Inc.. (Attachments: # 1 Proposed Order)(Dow, Matt) (Entered: 12/11/2017)
12/12/2017	44	MOTION to Withdraw *of Paula M. Ketcham* by Fringe Benefit Group, Fringe Insurance Benefits, Inc., Plan Benefit Services, Inc.. (Attachments: # 1 Proposed Order)(Dow, Matt) (Entered: 12/12/2017)
12/12/2017	45	Unopposed MOTION for Extension of Time to File Response/Reply *to Plaintiffs' First Amended Class Action Complaint* by Fringe Benefit Group, Fringe Insurance Benefits, Inc., Plan Benefit Services, Inc.. (Attachments: # 1 Proposed Order)(Dow, Matt) (Entered: 12/12/2017)
12/12/2017	46	NOTICE *of Counsel's Firm Change* by Fringe Benefit Group, Fringe Insurance Benefits, Inc., Plan Benefit Services, Inc. (Dow, Matt) (Entered: 12/12/2017)
12/14/2017	47	ORDER GRANTING 45 Motion for Extension of Time to File Response. Signed by Judge Sam Sparks. (dm) (Entered: 12/15/2017)
12/14/2017	48	ORDER GRANTING 44 Motion to Withdraw. Signed by Judge Sam Sparks. (dm) (Entered: 12/15/2017)
01/09/2018	49	MOTION to Appear Pro Hac Vice by Matt Dow *for Robert Rachal* (Filing fee $ 100 receipt number 0542-10338080) by on behalf of Fringe Benefit Group, Fringe Insurance Benefits, Inc., Plan Benefit Services, Inc.. (Dow, Matt) (Entered: 01/09/2018)
01/10/2018	50	ORDER GRANTING 49 Motion to Appear Pro Hac Vice as to Robert Rachal. Pursuant to our Administrative Policies and Procedures for Electronic Filing, the attorney hereby granted to practice pro hac vice in this case must register for electronic filing with our court within 10 days of this order. Signed by Judge Sam Sparks. (dm) (Entered: 01/10/2018)
01/12/2018	51	Unopposed MOTION for Leave to Exceed Page Limitation by Fringe Benefit Group, Fringe Insurance Benefits, Inc., Plan Benefit Services, Inc.. (Attachments: # 1 Proposed Order)(Dow, Matt) (Entered: 01/12/2018)
01/12/2018	52	Unopposed MOTION for Extension of Time to File Response/Reply *and to Exceed Page Limits* by Heriberto Chavez, Evangelina Escarcega, Jorge Moreno. (Attachments: # 1 Proposed Order Granting Plaintiffs' Unopposed Motion)(Wasow, Nina) (Entered: 01/12/2018)
01/15/2018	53	MOTION to Dismiss *Plaintiffs First Amended Complaint and Brief in Support* by Fringe Benefit Group, Fringe Insurance Benefits, Inc., Plan Benefit Services, Inc.. (Attachments:

		# 1 Exhibit A, # 2 Exhibit B, # 3 Exhibit D, # 4 Exhibit E, # 5 Exhibit F, # 6 Exhibit G, # 7 Exhibit H, # 8 Proposed Order)(Dow, Matt) (Entered: 01/15/2018)
01/15/2018	54	ATTACHMENT *Exhibit C* to 53 MOTION to Dismiss *Plaintiffs First Amended Complaint and Brief in Support* by Fringe Benefit Group, Fringe Insurance Benefits, Inc., Plan Benefit Services, Inc.. (Attachments: # 1 Exhibit C part 2)(Dow, Matt) (Entered: 01/15/2018)
01/17/2018	55	DEFICIENCY NOTICE to Matt Dow: re 54 Attachment. (td) (Entered: 01/17/2018)
01/17/2018	56	MOTION to Dismiss *Plaintiffs First Amended Complaint and Brief in Support* by Fringe Benefit Group, Fringe Insurance Benefits, Inc., Plan Benefit Services, Inc.. (Attachments: # 1 Exhibit A, # 2 Exhibit B, # 3 Exhibit C, # 4 Exhibit D, # 5 Exhibit E, # 6 Exhibit F, # 7 Exhibit G, # 8 Exhibit H, # 9 Proposed Order)(Dow, Matt) Modified on 1/17/2018 To correct event. (dl) (Entered: 01/17/2018)
01/17/2018	57	ORDER GRANTING 51 Motion for Leave to File Excess Pages. Signed by Judge Sam Sparks. (td) (Entered: 01/18/2018)
01/22/2018	58	ORDER GRANTING 52 Motion for Extension of Time. Signed by Judge Sam Sparks. (dm) (Entered: 01/22/2018)
01/30/2018	59	MOTION to Appear Pro Hac Vice by Richard J. Burch *for Danielle Leonard* (Filing fee $ 100 receipt number 0542-10413181) by on behalf of Heriberto Chavez, Evangelina Escarcega, Jorge Moreno. (Attachments: # 1 Proposed Order)(Burch, Richard) (Entered: 01/30/2018)
01/31/2018	60	ORDER GRANTING 59 Motion for Danielle Leonard to Appear Pro Hac Vice on behalf of Plaintiffs. Pursuant to our Administrative Policies and Procedures for Electronic Filing, the attorney hereby granted to practice pro hac vice in this case must register for electronic filing with our court within 10 days of this order. Signed by Judge Sam Sparks. (lt) (Entered: 01/31/2018)
02/02/2018	61	MOTION to Withdraw as Attorney by Heriberto Chavez, Evangelina Escarcega, Jorge Moreno. (Attachments: # 1 Proposed Order)(Weissglass, Jonathan) (Entered: 02/02/2018)
02/08/2018	62	ORDER GRANTING 61 Motion to Withdraw as Attorney. Signed by Judge Sam Sparks. (lt) (Entered: 02/08/2018)
02/12/2018	63	Memorandum in Opposition to Motion, filed by Heriberto Chavez, Evangelina Escarcega, Jorge Moreno, re 56 MOTION to Dismiss filed by Defendant Plan Benefit Services, Inc., Defendant Fringe Benefit Group, Defendant Fringe Insurance Benefits, Inc. (Attachments: # 1 Exhibit Attachment 1, # 2 Proposed Order)(Wasow, Nina) (Entered: 02/12/2018)
02/20/2018	64	Unopposed MOTION for Leave to Exceed Page Limitation by Fringe Benefit Group, Fringe Insurance Benefits, Inc., Plan Benefit Services, Inc.. (Attachments: # 1 Proposed Order)(Rachal, Robert) (Entered: 02/20/2018)
02/20/2018	65	REPLY to Response to Motion, filed by Fringe Benefit Group, Fringe Insurance Benefits, Inc., Plan Benefit Services, Inc., re 56 MOTION to Dismiss filed by Defendant Plan Benefit Services, Inc., Defendant Fringe Benefit Group, Defendant Fringe Insurance Benefits, Inc. (Rachal, Robert) (Entered: 02/20/2018)
02/22/2018	66	ORDER GRANTING Defendants' Unopposed 64 Motion for Leave to File Excess Pages. Signed by Judge Sam Sparks. (lt) (Entered: 02/22/2018)

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Billable Pages:	9	**Cost:**	0.90