IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION

MARK T. EDDINGSTON, JEFFERY M. DAVIS, ELRIDGE NICHOLAS BOLLICH, RAY A. COX and GEORGE GALANIS,	§	
Plaintiffs,	§	Civil Action No. 2:12-CV-00422
v.	§	**FILED UNDER SEAL**
UBS FINANCIAL SERVICES, INC.,	§	
Defendant.	§	

PLAINTIFFS' SUPPLEMENTAL BRIEF
IN SUPPORT OF THEIR MOTION FOR CLASS CERTIFICATION

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INTRODUCTION

This lawsuit alleges violations of the Employee Retirement Income Security Act of 1974 ("ERISA").[1] It involves a pension plan called PartnerPlus which has been operated by the Defendant or its predecessor company since 1995. Plaintiffs seek to certify a class of "registered representatives in the United States who left the employment of Defendant prior to January 1, 2011 and who are alleged by Defendant to have forfeited [entitlements under PartnerPlus] that if the Plan was governed by ERISA would not be forfeitable." *See* Motion for Class Certification ("Motion") at 1 (Dkt No. 58). According to counsel for Defendant, "there are 1776 [individuals] in the putative [] class and the forfeitures total $195 million." O'Connell Decl. Ex. D.[2]

This Is a Textbook Case for Class Treatment. It is difficult to imagine a case better suited to class adjudication than this one. It will require the litigation of three – and only three – questions each of which is common to the entire class. *See* Motion at 6. First, Plaintiffs will establish that PartnerPlus is an ERISA-governed pension plan. The statute defines a "pension plan" to include any plan that "as a result of surrounding circumstances . . . (i) provides retirement income to employees, or (ii) results in a deferral of income by employees for periods extending to the termination of covered employment or beyond." 29 U.S.C. § 1002(2)(A).[3]

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[1] Defendant has consented to the filing by Plaintiffs of a single, consolidated supplemental brief for this case and its companion case, *Hendricks v. UBS Financial Services, Inc.*, Civil Action No. 2:12-CV-00606, which is currently pending before this Court. The cases are virtually identical, as are the oppositions to class certification that Defendant has filed.

[2] Plaintiffs intend to prove that the class size and forfeiture amounts are significantly greater.

[3] UBS claims that PartnerPlus was *not* an ERISA-governed plan from 1998 - 2011. Levitan Dep. 178:11-25; 179:1-25; 180:1-10; 270:11-24. A disclaimer of ERISA coverage can be found in the PartnerPlus Plan from 2004 until 2011 (and in 1998 PartnerPlus made no reference to ERISA). *See* O'Connell Decl. Ex. F, G, H, I, J. But, as UBS and its counsel are well aware, whether a plan is governed by ERISA is based on substance not labels. *See* Opposition at 6 (citing 29 U.S.C. § 1002(2)(A); *Murphy v. Inexco Oil Co.*, 611 F.2d 570, 575 (5th Cir. 1980); *Boos v. AT&T, Inc.*, 643 F.3d 127, 134 (5th Cir. 2011)). *See also* Opinion No. 98-02A

PartnerPlus has always been operated by UBS as a pension plan. For example, it has always been administered pursuant to what UBS itself refers to as the plan's "standard retirement rules." *See* Levitan Dep. 218:18-25, 219:1-25, 220:1-5. Under such rules, a participant who leaves UBS is deemed "retired" if the participant meets one of three criteria:

	Age of Participant Upon Leaving UBS	Minimum Length of PartnerPlus Participation	Minimum Length of Employment with UBS
65+ Retiree	65 or older	5 years	Not applicable
55-64 Retiree	55 to 64 years old	10 years	Not applicable
45-54 Retiree	45 to 54 years old	10 years	15 years

Levitan Dep. 178:11-25, 179:1-25, 180:1-10. Tellingly, the account balances of retirees have always comprised the overwhelming majority of the Plan's total liabilities. Indeed, UBS's own expert concedes that 67% of all withdrawals from the Plan were made by participants who had reached the age of 55. O'Connell Decl. Ex. M.[4] And that is merely *withdrawals.*[5]

Moreover, participants – until 2010 – were encouraged by UBS to use PartnerPlus as a retirement plan. Mendenhall Dep. 32:12-18, 58:19-25, 59:1-25, 63:9-25, 107:4-24; Ellspermann Dep. 22:16-25, 23:1-13, 79:17-25, 80:1-9, 86:12-25, 87:1-25, 88:1-9. To be sure: each participant's interest in PartnerPlus vested after 10 years and was then scheduled to be

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(describing the application of the surrounding circumstances test to a plan facially described as a bonus program); Opinion No. 2002-13A (noting that, "in the instant case [involving an incentive compensation plan], a significant factor would be whether . . . the economic benefits under the Plans are disproportionately allocated to participants either at or near retirement age . . . .").

[4] UBS's expert refers to 55 as an early retirement age. Such characterization, however, is directly contradicted by the very documents prepared by UBS to describe the procedures used to administer PartnerPlus. *Cf. Morris v. Nat'l Football League Ret. Bd.*, 833 F. Supp. 2d 1374, 1377 (S.D. Fla. 2011) (normal retirement age for NFL players considered to be 55).

[5] UBS's expert has completely ignored hundreds of millions of dollars of plan entitlements that were *forfeited by retirees* – i.e., an amount estimated by UBS to be a staggering $195 million in just 4 of the 18 years analyzed by its expert. *See* O'Connell Decl. Ex. D.

distributed. *See* O'Connell Decl. Ex. J at 34 (defining in-service distribution). At the same time, however, participants whose account balances were not trivial were permitted to "roll over" their account balance into another plan called the Executive Capital Accumulation Plan. Levitan Dep. 188:6-23. And UBS made clear to participants that it was attractive to continue deferring PartnerPlus benefits until retirement. *See, e.g.*, O'Connell Decl. Ex N (charting the "accumulation of voluntary contribution amount deferred each year to age 65").

Second, Plaintiffs will establish that during the class period (i.e., prior to 2011) PartnerPlus did not qualify as an ERISA top-hat plan. A "top-hat plan" is "a plan which is unfunded and is maintained by an employer primarily for the purpose of providing deferred compensation for a select group of management or highly compensated employees". 29 U.S.C. § 1051(2). Such a plan is exempted from the provisions of ERISA that Plaintiffs allege were violated in this case. *See, e.g.*, 29 U.S.C. § 1051(2) (exempting top hat plans from, *inter alia*, vesting requirements). As the Fifth Circuit has explained, "top hat plans are in some degree analogous to pre-ERISA pension plans." *Spacek v. Maritime Association*, 134 F.3d 283, 296 (5th Cir. 1998).[6] Plaintiffs will establish that – during the class period – PartnerPlus did not meet the definition set forth in 29 U.S.C. § 1051(2) as clarified by pertinent regulations and case-law.

Finally, Plaintiffs will establish that PartnerPlus – as administered by UBS – blatantly violated 29 U.S.C. § 1053 by deeming forfeited and refusing to pay *hundreds of millions of*

[6] Defendant has conceded in this litigation that PartnerPlus was amended – effective January 1, 2011 – to qualify as an ERISA top-hat plan. *See* Levitan Dep. 75:2-24; O'Connell Decl. Ex. O. This was done, according to UBS, by increasing the production threshold for participation in PartnerPlus so as to reduce substantially the number of eligible participants. Levitan Dep. 63:8-25, 64:1-4, 66:13-24. Tellingly, Defendant concedes that no other changes were made to PartnerPlus as of January 1, 2011 that might relate to whether it constitutes a pension plan. *Id.* 57:13-25, 58:1-25, 59:1-17. Thus, in arguing that PartnerPlus was a top-hat plan as of January 1, 2011, *Defendant has effectively conceded that it was a pension plan prior to 2011*. As such, Plaintiffs' anticipate that at some point in this litigation Defendant will retreat to its alternative defense – i.e., that PartnerPlus has always been a top-hat plan. Answer ¶ 7 (Dkt No. 63).

dollars of retirement benefits that would be deemed vested under ERISA.

UBS Offers Three Unpersuasive Reasons to Deny Certification. In its opposition, UBS offers three reasons why the pending motion for class certification should be denied. None is persuasive. First, UBS argues that all members of the putative class have "contractually agreed not to bring or participate in a class action." Opposition at 1. As explained below, UBS is simply wrong. *See infra* pp. 4-8 (Argument Section I). The provision on which UBS relies makes clear that it does not apply to PartnerPlus disputes. *Id.* Second, UBS argues that the "proposed class fails the typicality and adequacy requirements of Rule 23(a)." Opposition at 1. To make this argument, UBS manufactures three "individualized *defenses* . . . ." *Id.* (emphasis in original). But, as explained below, the "defenses" asserted by UBS do not require any individualized determinations and – perhaps more importantly – are not actually available to UBS in this case. *See infra* pp. 8-11 (Argument Section II). Finally, UBS argues that the proposed class does not satisfy the requirements of Rule 23(b). As explained below, however, UBS interprets each subsection of Rule 23(b) in a manner that is directly contrary to the law. *See infra* pp. 11-15 (Argument Section III). Class certification is clearly warranted.

ARGUMENT

I. NEITHER THE NAMED PLAINTIFFS – NOR ANY OTHER PUTATIVE CLASS MEMBERS – HAVE WAIVED CLASS ADJUDICATION OF THEIR CLAIMS.

UBS argues that all members of the putative class have "contractually agreed not to bring or participate in a class action." Opposition at 1. In making this argument, UBS relies entirely on language from an arbitration provision found in an annual brochure that summarizes every type of compensation available to financial advisors in a given year. And the express language of this Summary Brochure makes clear that its arbitration provision – including the class action waiver on which UBS relies – does not apply to PartnerPlus disputes. Consequently, no member of the

putative class has waived the right to class adjudication of this lawsuit.[7]

A. The Waiver Referred to by UBS Is Part of an Arbitration Provision in a Brochure That Summarizes All Types of Compensation Received by Financial Advisors.

The waiver argument advanced by UBS is predicated entirely on language found in one document which UBS refers to as the "Financial Advisor Compensation Plan" or the "Compensation Plan." *See, e.g.*, O'Connell Decl. Ex. L. At the beginning of its opposition, UBS describes this document as one (of some unspecified number) of "detailed contracts and plans" that governed the "production-based commissions and special bonuses" of financial advisors. Opposition at 2. That description is too cute by half.

As explained previously by Plaintiffs, the "Compensation Plan" is an annually distributed brochure that *summarizes* every type of compensation available to financial advisors in a given year. Opposition to Motion to Compel Arbitration at 12 (Dkt. No 38). *See also* Levitan. Dep.

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[7] Interestingly, UBS concedes that its waiver argument would fail if PartnerPlus were an ERISA Plan. *See, e.g.*, Opposition at 5 (arguing that "plaintiffs cannot evade their class waiver agreement" because they "have not *proved* that PartnerPlus is an ERISA plan . . . ." (emphasis in original)). In so doing, UBS invites this Court to adjudicate the merits of this case prior to ruling on class certification. That invitation should be declined. UBS's waiver argument is untenable *irrespective* of the ERISA-status of PartnerPlus. *See infra* pp. 5-8 (Argument Section I.A. and I.B). And as this Court has already explicitly noted, "these issues are not supposed to be on the merits." Hr'g Tr. 82:22 (explaining why the class certification hearing "can be done with a minimum of discovery").

If, however, applicability of the relevant Summary Brochure provision turns on whether PartnerPlus is an ERISA Plan, then it would certainly be appropriate to resolve that "merits" question prior to ruling on the pending motion for certification. *See Floyd v. Bowen*, 833 F.2d 529, 534 (5th Cir. 1987). It would not, however, be appropriate for this Court to deny the pending certification motion on that basis. Instead, the proper course of action would be to stay the issue of class certification until resolution of the underlying merits question – presumably via a ruling on cross-motions for summary judgment. *See, e.g.*, *Stavroff v. Midland Credit Mgmt. Inc.*, 3:05-CV-127 AS, 2005 WL 6329149 (N.D. Ind. June 8, 2005) (granting motion to "bifurcate discovery so that the parties may address the merits of the case before determining the class certification issue" and holding that "[t]he issue of class certification is STAYED until a resolution of the liability phase."); *Ladd v. EquiCredit Corp. of Am.*, CIV. A. 00-2688, 2001 WL 175236 (E.D. La. Feb. 21, 2001) (granting motion to stay all class certification issues pending resolution of defendant's motion for summary judgment).

253:11-15. Indeed, there were different versions prepared and distributed each year to different categories of UBS employees (e.g., Financial Advisors, Branch Managers, etc.). For simplicity and accuracy, Plaintiffs refer to each version of this type of document as a Summary Brochure. This Court, however, need not rely on Plaintiffs' description. Through recently conducted discovery, Plaintiffs have obtained and authenticated every copy of this Summary Brochure from 2000 – 2010 that would apply to members of this putative class. *See* Levitan Dep. 235-242 (authenticating documents).

For purposes of the pending motion, it is critical to understand that multiple sections of the Summary Brochure summarize the terms of compensation that a financial advisor may receive pursuant to a separate formal plan document. *See* O'Connell Decl. Ex. L at 15, 17, 19 (summarizing the PartnerPlus Plan Document, the Survivor Benefit Plan Document, and the Business Builder Plan Documents). In each such case, the Summary Brochure emphasizes the importance and primacy of the official plan document. *See id.* In the case of PartnerPlus, the Summary Brochure goes so far as to declare that "[i]f there is *any difference* between this summary [i.e., the Summary Brochure] and the Plan Document [i.e., PartnerPlus], the Plan Document will govern." *Id.* at 15. (emphasis added).

B. The Summary Brochure Makes Clear That Its Arbitration Provision – Including the Class Action Waiver – Does Not Apply to PartnerPlus Disputes.

The waiver language relied on by UBS is found on a single page in the Summary Brochure under the heading: "Arbitration." The Summary Brochure had no such section from 2000 – 2006. This section was added to the Summary Brochure in 2007 and remained – with minor alterations – in the 2008, 2009, and 2010 versions. It is this section – which is the only part of the Summary Brochure containing dispute resolution provisions – that is currently at issue.

This is not a dispute over compensation governed by the Summary Brochure. It is a dispute

about the benefits owed to members of the putative class pursuant to PartnerPlus. And UBS concedes that PartnerPlus entitlements are governed – not by the Summary Brochure – but by a formal plan document. Levitan Dep. 255:3-13. The original PartnerPlus Plan Document was established in 1995 by a predecessor company of UBS and is entitled the "PaineWebber PartnerPlus Plan." O'Connell Decl. Ex. E. Since then, PartnerPlus has been bifurcated into two separate Plans: one for Financial Advisors and another for Branch Managers. *See id.* Ex. F. The Plan relating to Financial Advisors, now called the "UBS PartnerPlus Plan for Financial Advisors," has been amended 6 times. *Id.* Exs. F, G, H, I, J, K. The most recent amendment occurred on January 1, 2011. *Id.* Ex. K.

The PartnerPlus Plan sets forth all of the terms that govern its administration. For example, it establishes who is eligible to enroll, what contributions the employer must make, and how participants receive distributions. *Id.* Ex J at 3, 6, 12. It also contains an express dispute resolution clause. *Id.* at 29. As with the Summary Brochure, the PartnerPlus dispute resolution procedures are included in a section under the heading "Arbitration." *Id.* Unlike the Summary Brochure, this section has been included in the PartnerPlus Plan every year since its creation in 1995. The language of that provision has varied slightly over the years but has remained identical in all material aspects. Opposition to Motion to Compel Arbitration at 8-9 (Dkt. No. 38) (quoting and discussing the arbitration provision for each year).

Although the dispute resolution sections of the Summary Brochure and the PartnerPlus Plan have the same heading (i.e., "Arbitration"), they are different. For example:

- The PartnerPlus provision is narrowly limited to "any dispute, claim or controversy involving a Claimant and the Plan and a Sponsor, arising out of the Plan" – such as this lawsuit. O'Connell Decl. Ex. J at 29. By contrast, the Summary Brochure provision – subject to a few exceptions – applies to "any disputes between you and UBS including claims concerning compensation, benefits or other terms or conditions of employment and termination of employment, or any claims for discrimination, retaliation or harassment, or any other claims"

and makes clear that such is true "whether they arise by statute or otherwise, including but not limit to claims arising under [10 enumerated statutes] or any other federal, state or local employment or discrimination law, rules or regulations, including wage and hour laws . . . ." *Id.* Ex. L at 20.

- The PartnerPlus provision states that covered disputes "shall be resolved before a FINRA arbitration panel in accordance with the arbitration rules of FINRA." *Id.* Ex. J at 29. In a separate section, PartnerPlus makes clear that all provisions are governed by New York law. *Id.* Ex. J at 39. By contrast, the Summary Brochure provision states that covered disputes "will be determined by arbitration as authorized and governed by the arbitration law of the state of New Jersey [and] heard, as set forth above, by FINRA or JAMS . . . ." *Id.* Ex. 20.
- The PartnerPlus provision – by expressly incorporating the arbitration rules of FINRA – preserves the right of a plaintiff to participate in class action litigation in court. *See, e.g.*, Hr'g Tr. 78:5-8 (Dkt. No. 58) (holding "that the arbitration clause in the PartnerPlus Plan clearly does not extend to arbitration of class claims.").[8] Other than this class action exception, the PartnerPlus provision requires that all other claims be resolved via arbitration. By contrast, the Summary Brochure provision expressly preserves for litigation in court "claims for injunctive relief or the denial of benefits under the firm's disability or medical plans." O'Connell Decl. Ex. J at 29. It also purports to include a class action waiver. *Id.*

Indeed, to say that the relevant sections of these documents are different is gross understatement.

These differences matter. To avoid *precisely* the type of argument that UBS has repeatedly advanced in this litigation – i.e., that summary terms should be applied instead of Plan terms – the Summary Brochure explicitly states that "[i]f there is *any difference* between this summary [i.e., the Summary Brochure] and the Plan Document, the Plan Document will govern." *Id.* Ex. L at 15 (emphasis added). And to the extent there is any ambiguity regarding the meaning of this phrase, such ambiguity – as a matter of black-letter contract law – must be construed against UBS. *See* Restatement (Second) of Contracts § 206 (1981).

II. THE REQUIREMENTS OF RULE 23(a) ARE CLEARLY SATISFIED.

UBS offers three reasons why "PLAINTIFFS CANNOT SATISFY THE RULE 23(a) PREREQUISITES." Opposition at 7; *id.* at 8-11. Each is baseless.

[8] In 2011, UBS amended PartnerPlus to expressly preclude class adjudication. *See* O'Connell Decl. Ex. K at 32. That change has no relevance here (except to reinforce the conclusion that PartnerPlus previously did not preclude class adjudication) because Plaintiffs' class is limited to individuals who left the employment of UBS prior to January 1, 2011.

A. UBS's Statute of Limitations Argument Is Baseless.

First, UBS argues that variations in state statutes of limitations applicable to the proposed class members' ERISA claims undermine adequacy and/or typicality. Opposition at 8-10. The argument proceeds as follows: UBS asserts that, in an ERISA lawsuit seeking relief under 29 U.S.C. § 1132(a)(3), courts typically borrow the most analogous state law statute of limitations. Opposition at 8. UBS next observes that "[l]imitations periods for breach of contract vary greatly." *Id.* Finally, UBS concludes that the named plaintiffs will either have to "contend that Texas's limitations period applies to this case [which] would create a serious intra-class conflict with class members from states [with] longer limitations periods" or "contend that the limitations period for each class member is determined by that member's state of residence . . . result[ing in] a high degree of individuation and variation that is starkly inconsistent with typicality and adequacy." *Id.* As explained below, UBS is wrong.[9]

The shortest state-law limitations period for breach of contract is 3 years. *See* Chart: Statutes of Limitations in All 50 States, available at http://www.nolo.com/legal-encyclopedia/statute-of-limitations-state-laws-chart-29941.html (listing the statute of limitations for a written contract in each state). That is important because there is not a single member of the putative class whose claim would be untimely – *even under a 3 year statute*. UBS has attempted to manufacture a statute of limitations defense by taking the indefensible position that the limitations period for each class member in this case began to run "when each individual claimant first saw the Plan after becoming employed by UBS (or Paine Webber)." Opposition at 9. Such an accrual rule has never been adopted by a court in a case like this. The reason is simple: "where an employer

[9] Plaintiffs reserve the right to contest the premises of UBS's argument – i.e., that Plaintiffs have asserted the type of ERISA claim in which the statute of limitations is borrowed from state law and that the most analogous statute of limitations is one for breach of contract.

denies that a plan is subject to ERISA, a claim that the plan violates ERISA does not accrue when plaintiffs receive notice of non-ERISA compliant plan terms." *England v. Marriott Int'l, Inc.*, 764 F. Supp. 2d 761, 772 (D. Md. 2011). Indeed, "[t]o conclude that Plaintiffs' claims accrued while their employer was actively denying ERISA's applicability to their Retirement Awards would make no sense and would undermine ERISA's underlying purposes of promoting the interests of employees and protecting their contractually defined retirement benefits." *Id.*[10]

Here, virtually every member of the putative class will have learned that they have legal claims under ERISA when (or after) the complaint in this action was filed. *Cf. England*, 764 F. Supp. 2d at 772. As such, there is no possible way that their claims would be time barred.[11] That reality belies UBS's professed concerns that (i) the named Plaintiffs are inadequate class representatives or that (ii) an individualized inquiry will be needed to determine the state law statute of limitations for each putative class member. Opposition at 9.[12]

B. UBS's In-Service Distribution Argument Is Baseless.

Second, UBS argues that distributions received by the named plaintiffs undermine typicality and adequacy. Opposition at 10-11. That is wrong. The relevant question in this litigation is whether PartnerPlus is an ERISA-governed pension plan as defined in 29 U.S.C. § 1002(2)(A).

[10] UBS takes – and has always taken – the position that PartnerPlus was *not* an ERISA-governed plan from 1998 until 2011. Levitan Dep. 178:11-25; 179:1-25; 180:1-10; 270:11-24.

[11] Insofar as there are a handful of class members (e.g., the named plaintiffs) who discovered that they have legal claims under ERISA *prior* to the filing of this lawsuit, there is no reason to believe that such discovery happened more than 3 years before commencement of this litigation.

[12] Even if an individualized inquiry were necessary to determine statute of limitations issues in this case, such an inquiry is no bar in itself to class certification, especially in a case such as this which turns entirely on three common issues about the applicability of ERISA. *See, e.g., In re Enron Corp. Sec.*, 529 F. Supp. 2d 644, 711-12 (S.D. Tex. 2006) (citing *Waste Management Holdings, Inc. v. Mowbray*, 208 F.3d 288, 295-96 (1st Cir. 2000) ("As long as a sufficient constellation of common issues binds class members together, variations in the sources and application of statutes of limitations will not automatically foreclose class certification . . . .")).

The existence and character of in-service distributions are but one of the "surrounding circumstances" that will determine the answer. And such distributions are only relevant *in the aggregate*. The administration of the Plan with respect to any particular individual has no bearing whatsoever on questions about ERISA coverage. UBS's argument is akin to claiming that a named Plaintiff will not be liked by the jury. It has absolutely no legal relevance.[13]

C. UBS's Release Argument Is Baseless.

Third, UBS argues that "[t]he named plaintiffs' claims and defenses are atypical of the putative class, as many putative class members signed releases of 'any and all claims . . . of any kind or nature whatsoever' against UBS, but the named plaintiffs did not." Opposition at 11. UBS is wrong. A general release of claims cannot waive claims for vested benefits under ERISA. *See* 29 U.S.C. § 1056(d)(1). *See also Lynn v. CSX Transp., Inc.*, 84 F.3d 970, 975 (7th Cir. 1996) (citing *Patterson v. Shumate*, 504 U.S. 753, 760 (1992)) ("Pension entitlements are, without exception, subject to the anti-alienation provision of ERISA."). In this action, Plaintiffs exclusively seek to recover vested benefits that accrued pursuant to ERISA while they were participants in PartnerPlus and which UBS unlawfully deemed forfeited. In such a case, a purported general release of claims has no application.[14]

III. THE REQUIREMENTS OF RULE 23(b) ARE CLEARLY SATISFIED.

A. This Case Should Be Certified Under Rule 23(b)(1).

Courts regularly grant class certification pursuant to Rule 23(b)(1)(A) in ERISA cases like

[13] UBS also half-heartedly argues that ERISA's vesting rules will create an intra-class conflict because "[d]ifferent [Financial Advisors] would fare better under different vesting rules, depending on their years of service." Opposition at 11. UBS is wrong. Where, as here, the defendant has complied with neither schedule, each participant is entitled to vested benefits based on the more favorable provision. *See* 29 U.S.C § 1053(a)(2)(B).

[14] In the unlikely event that the court agrees with UBS's standing argument, Plaintiffs respectfully request leave to amend the Complaint to add a named plaintiff whose claims will be subject to UBS's release defense.

this one. *See* Motion at 13-15 (citing cases). In its opposition, UBS cites three cases for the uncontroversial proposition that claims seeking monetary relief are often inappropriate for certification under Rule 23(b)(1)(A), Opposition at 12-13 (citing *Casa Orlando Apartments, Ltd. v. Federal Nat'l Mortg. Ass'n*, 624 F.3d 185, 197 (5th Cir. 2010); *Langbecker v. Elec. Data Sys. Corp.*, 476 F.3d 299, 318 (5th Cir. 2007); *Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1193 (9th Cir. 2001)), and two additional cases for the uncontroversial proposition that certification under Rule 23(b)(1)(A) is inappropriate in cases that do not subject a defendant to the risk of inconsistent judgments, Opposition at 13 (citing *McBirney v. Autrey*, 106 F.R.D. 240, 245 (N.D. Tex. 1985); *Pipefitters Local 636 Ins. Fund v. Blue Cross Blue Shield of Mich.*, 654 F.3d 631, 633 (6th Cir. 2011)). The cases cited by UBS have absolutely no relevance here.

As the Supreme Court has announced, Rule 23(b)(1)(A) applies where a party "is obliged by law to treat members of the class alike." *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 614 (1997). Administrators of ERISA plans such as UBS are *statutorily required* to treat similarly-situated participants identically – i.e., an administrator cannot grant benefits to one participant while denying them to another (unlike the defendants in the cases cited by UBS who could lawfully, for example, pay damages to one tort victim but not another). *Humphrey v. United Way of Texas Gulf Coast*, CIV.A. H-05-0758, 2007 WL 2330933, at *10 (S.D. Tex. Aug. 14, 2007); *In re Citigroup Pension ERISA Litig.*, 241 F.R.D. 172, 179-80 (S.D.N.Y. 2006). Pursuant to *Amchem*, certification under Rule 23(b)(1)(A) in this case is indisputably appropriate. Motion at 13-14. UBS has made no attempt to respond to this argument because it has none.[15]

[15] Indeed, four of the five cases cited by UBS do not even involve an attempt to certify a class of ERISA claims. And the one case that does, *Langbecker*, is irrelevant here because the injunctive relief sought in that case – the removal of a fiduciary – does not implicate the statutory duty of fiduciaries to treat similarly-situated participants alike. 476 F.3d at 318.

Certification in this case is also appropriate pursuant to Rule 23(b)(1)(B). Motion at 15-16. UBS argues that Rule 23(b)(1)(B) is unavailable here because "[t]his case does not involve a 'limited fund' . . . ." Opposition at 13. But the very Supreme Court decision relied on by UBS stresses that Rule 23(b)(1)(B) "covers more historical antecedents than the limited fund." *Ortiz v. Fibreboard Corp.*, 527 U.S. 805, 842 (1999). *See also Hilton v. Wright*, 235 F.R.D. 40, 53 (N.D.N.Y. 2006) ("Certification under Rule 23(b)(1)(B) is not reserved only for those bringing 'limited fund' claims."); *Ingles v. City of New York*, No. 01-8279, 2003 WL 402565, at *8 (S.D.N.Y. Feb. 20, 2003) (same); *In re IKON Office Solutions, Inc.*, 191 F.R.D. 457, 467 (E.D. Pa. 2000) (certifying ERISA class action under Rule 23(b)(1)(A) and (b)(1)(B) and noting that "Rule 23(b)(1) is not exclusively applied in limited fund classes").

B. This Case Should Be Certified Under Rule 23(b)(2).

UBS argues that the monetary relief sought by Plaintiffs in this case is not incidental to their claims for injunctive relief. Opposition at 14. UBS is wrong. The Fifth Circuit's interpretation of the term "incidental" unquestionably supports certification of this case under Rule 23(b)(2). *See Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 415 (5th Cir. 1998). Indeed, the Seventh Circuit – applying the exact same rule – has upheld class certification pursuant to Rule 23(b)(2) under facts identical to those of this case:

> In this case . . . all that the class is seeking . . . is a reformation of the [defendant's] pension plan – a declaration of the rights that the plan confers and an injunction ordering [the defendant] to conform the text of the plan to the declaration. If once that is done the award of monetary relief will just be a matter of laying each class member's pension-related employment records alongside the text of the reformed plan . . . the monetary relief will truly be merely "incidental" to the declaratory and (if necessary) injunctive relief (necessary only if [the defendant] ignores the declaration).

Johnson v. Meriter Health Servs. Employee Ret. Plan, 702 F.3d 364, 371 (7th Cir. 2012).[16]

[16] UBS does not contend that *Johnson*'s analysis is unpersuasive or inconsistent with the law of this Circuit. Instead, UBS argues that *Johnson* "has no application here" because it "does not even address whether the requested injunctive relief is merely a means of facilitating monetary

UBS also argues that Plaintiffs have failed to request injunctive relief because they seek "reformation." Opposition at 15. UBS is confused. Plaintiffs have pled a claim under 29 U.S.C. § 1132(a)(3). Section 1132(a)(3) authorizes a civil action by a participant "to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan." And Plaintiffs expressly "seek an injunction against any act or practice which violates ERISA [such as UBS's reliance on its unlawful forfeiture provision]." Complaint ¶ 20. The Court need not reach Plaintiffs' alternative argument under Section 1132(a)(3) that they are entitled to reformation.[17]

C. At a Minimum, the Proposed Class Should Be Certified Under Rule 23(b)(3).

Predominance. UBS argues that common questions do not "predominate" over individual questions in this case for several reasons. Opposition 16-18. Three of these reasons are simply

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payments." Opposition at 15. To be clear: UBS is referencing its earlier assertion that "Rule 23(b)(2) cannot be used where plaintiffs 'have nothing to gain from an injunction, and the declaratory relief they seek serves only to facilitate the award of damages.'" Opposition at 14 (quoting *Langbecker*, 476 F.3d at 317 and *Bolin v. Sears, Roebuck & Co.*, 231 F.3d 970, 978 (5th Cir. 2000)). That proposition and the two cases that UBS cites in its support are inapposite. *Bolin* and *Langbecker* each involved a putative class that sought both actual damages and injunctive relief. Most class members, however, would not benefit from (or would be harmed by) an injunction. *See Langbecker*, 476 F.3d at 317; *Bolin*, 231 F.3d at 978 ("[M]ost of the class does not stand to benefit from any injunctive relief."). The panels were thus deeply concerned that "certification of a (b)(2) class without individual treatment of the claims may deny unnamed class members the notice and opt-out protections of Rule 23(b)(3)." *Bolin*, 231 F.3d at 976. *See also Langbecker*, 476 F.3d at 317. In contrast, all class members in this case stand to directly benefit from an injunction prohibiting UBS's unlawful conduct. This renders the holdings and underlying reasoning for the decisions in *Bolin* and *Langbecker* wholly irrelevant here.

[17] UBS argues that Plaintiffs cannot sue for reformation because they have not pled fraud or mutual mistake. Opposition at 15. But "inequitable conduct" as well as conduct "violative of ERISA" can be grounds for reformation. *See, e.g., Simmons Creek Coal Co. v. Doran*, 142 U.S. 417, 435 (1892) (inequitable conduct sufficient ground for reformation); *Nechis v. Oxford Health Plans*, Inc., 421 F.3d 96, 103-04 (2d Cir. 2005) (conduct violative of ERISA one predicate for reformation claim). This is not surprising. Not only did the Supreme Court specifically endorse equitable reformation as a remedy in *CIGNA Corp. v. Amara*, 131 S. Ct. 1866 (2011), it took pains to caution against the invocation of meaningless technicalities such as those urged by UBS to deny relief; Justice Breyer reminded lower courts that, when fashioning equitable relief: "[e]quity suffers not a right to be without a remedy." *Id.* at 1879 (citation omitted).

restatements of the statute of limitations, vesting, and release arguments UBS previously made under Rule 23(a). Plaintiffs have already responded to these arguments at length, see *supra* pp. 8-11 (Argument Section II). UBS also argues that an individual inquiry will be necessary to determine "the amounts each plaintiff forfeited," and "what mitigation income the class member received or could have received from a successor employer." Opposition at 17-18. These contentions are baseless. No individualized inquiry will be necessary to determine a participant's forfeitures because UBS keeps records that calculate each participant's forfeitures down to the penny. *See* O'Connell Decl. Ex. P. And "mitigation income" is irrelevant because neither the plan nor ERISA permit recovery of illegal forfeitures to be reduced by income from a subsequent employer.[18]

Superiority. UBS concedes that Plaintiffs' class satisfies the statutory requirement of "superiority." It does not claim that it would be unfair or inefficient to adjudicate Plaintiffs' claims in one class action rather than 1,750+ individual actions. And it does not claim that any of the four superiority factors are unmet. Instead, it resorts to a policy argument that Plaintiffs' claims are too big to proceed as a class. *See* Opposition at 18. This court should decline UBS's invitation to rewrite the statute to include such a requirement – i.e., that "class adjudication [must be] necessary for plaintiffs' claims to be economically viable." Opposition at 18.[19]

[18] In any event, to the extent individual questions arise in this case at all, they certainly do not predominate over the ERISA-status, forfeiture, and vesting issues that unquestionably relate to the claim of every class member and are the central issues in this litigation.

[19] UBS also argues that "Plaintiffs were required to present a trial plan . . . ." Opposition at 19 (citation omitted). But neither Rule 23(b)(3) nor this Court's local rules require that a trial plan be presented in conjunction with a motion for class certification. If the Court believes, however, that a trial plan is necessary for it to determine whether class adjudication will be manageable under Rule 23(b)(3), Plaintiffs request that this Court grant leave to file a supplemental trial plan.

CONCLUSION

The Court should grant Plaintiffs' Motion for Class Certification and appoint Robert E. Goodman and Peter K. Stris as co-lead class counsel.

Date: May 24, 2013

Respectfully submitted,

/s/ Peter K. Stris

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CERTIFICATE OF SERVICE

I hereby certify that I have caused to be served by electronic mail on all counsel of record the foregoing Plaintiffs' Supplemental Brief in Support of Their Motion for Class Certification pursuant to Local Rule CV-5(a)(7)(C) on May 25, 2013.

/s/ Peter K. Stris
Peter K. Stris

CERTIFICATION OF AUTHORIZATION TO SEAL

I hereby certify under Local Rule CV-5(D), the foregoing document is filed under seal pursuant to the Court's Protective Order entered in this matter.

/s/ Peter K. Stris
Peter K. Stris