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

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

DEFENDANT UBS FINANCIAL SERVICES, INC.'S
<u>OPPOSITION TO PLAINTIFFS' MOTION FOR CLASS CERTIFICATION</u>

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INTRODUCTION

The named plaintiffs contractually agreed not to bring or participate in a class action. Their motion for class certification should be denied for that reason alone.

Plaintiffs' motion should also be denied because their proposed classes fail the typicality and adequacy requirements of Rule 23(a) and the predominance and superiority requirements of Rule 23(b). *See Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011) ("certification is proper only if the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied" (internal quotations omitted)); *Comcast Corp. v. Behrend*, --- S. Ct. ---, 2013 WL 1222646, at *4 (Mar. 27, 2013) ("the same analytical principles govern Rule 23(b)").

Plaintiffs maintain that Rule 23(a) is satisfied because the question whether PartnerPlus is an ERISA plan is common to all members of the putative class. Even if true, UBS is entitled to assert individualized *defenses* that preclude a finding of typicality and adequacy. *See Wal-Mart*, 131 S. Ct. at 2561. These defenses include the statutes of limitations (which require individualized inquiries), in-service distributions (which some of the named plaintiffs received), and releases of the claims asserted in this case (which some putative class members signed).

Plaintiffs' motion fares no better under Rule 23(b). Plaintiffs seek an injunction, but (as their counsel candidly told this Court) they really "want money." 2/4/13 Hr'g Tr. 30:6 (Blankenstein Dec. Ex. M). As a result, they cannot proceed under the mandatory provisions of Rule 23(b)(1) or (b)(2). *Wal-Mart*, 131 S. Ct. at 2558 ("individualized monetary claims belong in Rule 23(b)(3)"). And they cannot establish predominance or superiority under Rule 23(b)(3).

This Court should therefore deny plaintiffs' motion for class certification in its entirety.

STATEMENT OF FACTS

The named plaintiffs are sophisticated, highly compensated securities professionals who were previously employed as financial advisors, or "FAs," by UBS. Although their compensation varied, in most years the plaintiffs earned several hundred thousand dollars. Plaintiff Eddingston received more than $4 million in compensation from UBS from 2000 through 2008. *See* Eddingston Dep. Tr. 49:25–50:4. FA compensation was derived primarily from production-based commissions and special bonuses, and was governed by detailed contracts and plans. One of these—the Financial Advisor Compensation Plan—states: *"[Y]ou waive any right to commence, be a party to or an actual or putative class member of any class or collective action arising out of or relating to your employment with UBS or the termination of your employment with UBS."* 2008 Comp. Plan at 26 (emphasis added) (Blankenstein Dec. Ex. B); *see also* Ex. P at 26.

FAs who met certain eligibility requirements were permitted to defer portions of their special bonuses through the PartnerPlus Plan, which was designed to "retain and motivate" FAs by "providing enhanced financial awards" during employment and "permitting the voluntary deferral of Compensation for a fixed period of years." 2006 PartnerPlus Plan § 1.2 (Blankenstein Dec. Ex. A). The PartnerPlus Plan stated that it was "not intended to be subject to ERISA," and that "[t]o the extent that any term or provision of the Plan could be read in a manner that would subject the Plan to ERISA, such term or provision shall be read and applied in a manner that causes the Plan not to be subject to ERISA." *Id.* § 1.4. All of the named plaintiffs became participants in the Plan between 1995 (at the earliest) and 2001 (at the latest). *See* Blankenstein Dec. Exs. H–L.

Contributions made by UBS and the FAs pursuant to the PartnerPlus Plan were credited with "turbo interest"—up to 24 percent in some years—for the first four years that the deferred amounts were in the Plan, and a market rate of interest thereafter. 2006 PartnerPlus Plan § 5.3; Blankenstein Dec. Ex. H. Ten years after the initial contribution, FAs were *required* to take a distribution equal to the initial contribution plus all interest earned on that contribution. 2006 PartnerPlus Plan § 7.2. The majority of the named plaintiffs received hundreds of thousands of dollars in distributions from the PartnerPlus Plan during their employment with UBS. *See* Eddingston Dep. Tr. 59:7–23; Blankenstein Dec. Exs. H–L. Plaintiff Eddingston received $523,000 in these "in-service" distributions. Eddingston Dep. Tr. 61:2–7; Blankenstein Dec. Ex. H.

In accordance with the Plan's stated purpose of fostering employee retention, PartnerPlus provided that unvested contributions by UBS, and interest, would be forfeited if FAs left UBS before meeting certain age and service requirements, and if they went to work for a competitor. 2006 PartnerPlus Plan §§ 7.3–7.5 (Because employees' contributions vested immediately, they could not be forfeited. *Id.*) Some FAs, including the named plaintiffs, did leave UBS for a competitor, choosing to forfeit the unvested amounts in exchange for signing bonuses or other incentives to change employment. Plaintiff Eddingston received a signing bonus of $1.5 to $1.6 million to join Morgan Stanley—far more than the $336,000 he forfeited. Eddingston Dep. Tr. 15:15–16:7; 77:22–78:1. Some of those departing FAs signed releases in which they agreed to forego "any and all claims" against UBS, including those related to "compensation" and the "forfeiture of … deferred cash awards," as well as "other benefits." *See* Ferreira Dec. Exs. A–C.

The named plaintiffs now seek to recover the forfeited amounts—often several hundred thousand dollars—that they gave up when leaving UBS.

ARGUMENT

A "class action is an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." *Wal-Mart*, 131 S. Ct. at 2550 (quoting *Califano v. Yamasaki*, 442 U.S. 682, 700–01 (1979)). The named plaintiffs, who bear the burden of proving that their claims fit that exception, face at least two insurmountable hurdles.

First, the named plaintiffs and putative class members all signed Compensation Plan agreements with express provisions requiring *individual*—not class—resolution of compensation-related disputes. That agreement should lead to the denial of certification without further ado.

Second, the "party seeking class certification must *affirmatively demonstrate* his compliance with [Rule 23]." *Wal-Mart*, 131 S. Ct. at 2551 (emphasis added); *see also Langbecker v. Elec. Data Sys. Corp.*, 476 F.3d 299, 306 (5th Cir. 2007); *Unger v. Amedisys Inc.*, 401 F.3d 316, 321 (5th Cir. 2005). Rule 23 is not a "mere pleading standard," but demands reliable evidence that all the requirements of Rule 23 have been satisfied. *Wal-Mart*, 131 S. Ct. at 2551–52; *see also Comcast*, 2013 WL 1222646, at *4. Plaintiffs have not met that standard.

I. PLAINTIFFS HAVE WAIVED CLASS ADJUDICATION OF THEIR CLAIMS

Each named plaintiff agreed to "waive any right to commence, be a party to, or an actual or putative class member of any class or collective action arising out of or relating to your employment with UBS." *See* Blankenstein Dec. Exs. B at 26, C–G; Eddingston Dep. Tr. 48:2–17. This agreement precludes class certification.

Plaintiffs previously argued that they could not be compelled to arbitrate, because PartnerPlus provides for arbitration in accordance with FINRA rules, and FINRA rules prohibit "enforc[ing] any *arbitration agreement* against a member of a certified or putative class action." Rule 13204(a)(4) (emphasis added); Dkt. 38 at 14–16. UBS respectfully disagrees with the Court's ruling on that argument, but the parties are now before the Court on a separate issue: Plaintiffs' motion to certify a class, and their separate contractual commitment not "to commence or be a party to an actual or putative class member of any class" action. 2008 Compensation Plan at 26. FINRA's arbitration rules—and the PartnerPlus arbitration provision—have no relevance here, as they govern arbitration, not federal court proceedings. The subject of how a federal court is to address a class certification motion is addressed only in the Compensation Plan, where plaintiffs agreed not to bring or participate in a class action.

That agreement alone is sufficient reason to deny plaintiffs' motion. *See Parisi v. Goldman, Sachs & Co.*, 2013 WL 1149751, at *4 (2d Cir. 2013) ("Rule 23 cannot create a non-waivable, substantive right to bring such a claim."); *cf. In re Prudential Ins. Co. of Am.*, 148 S.W.3d 124, 132–35 (Tex. 2004) (parties may contractually agree to waive litigation rights, such as a jury trial). But there is a second and independent reason why plaintiffs cannot evade their class waiver agreement in the same way they evaded their arbitration agreement: In response to UBS's motion to compel arbitration, plaintiffs argued that the Compensation Plan was an illegal amendment to the PartnerPlus Plan under ERISA. The Court assumed "at [that] time" that PartnerPlus *was* an ERISA plan, based in part on the allegations of plaintiffs' complaint, but the Court did not actually hold that it was an ERISA plan. *See* 2/4/13 Hr'g Tr. 78:18–22. Now, at class certification, assumptions will not suffice; rather, plaintiffs must "affirmatively demonstrate" that Rule 23 is satisfied, *Wal-Mart*, 131 S. Ct. at 2551, and the Court must go "beyond the pleadings," *Unger*, 401 F.3d at 321, even though that "analysis will frequently entail 'overlap with the merits of the plaintiff's underlying claim[s].'" *Comcast*, 2013 WL 1222646, at *4 (quoting *Wal-Mart*, 131 S. Ct. at 2551); *see also Madison v. Chalmette Ref., L.L.C.*, 637 F.3d 551, 555 (5th Cir. 2011). If PartnerPlus is not an ERISA plan, the class waiver in the Compensation Plan cannot be an illegal amendment, and must be enforced. Plaintiffs have not *proved* that PartnerPlus is an ERISA plan, nor could they.[1]

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[1] In this respect too, the question before the Court is different than on the motion to compel. On a motion to compel, it is inappropriate to reach the merits—ambiguities must be resolved in favor of arbitration (*see* Dkt. 70 at 1–2)—but the Supreme Court and Fifth Circuit have made clear that the rule is different in the class certification context.

PartnerPlus is not an ERISA plan. It says so explicitly: "The Plan is not intended to be subject to ERISA and shall be construed and administered accordingly." 2006 PartnerPlus Plan § 1.4. Nor does PartnerPlus *operate* like an ERISA plan, as it "provid[es] enhanced financial awards" to participants, rather than retirement income. *Id*. § 1.2; *cf*. 29 U.S.C. § 1002(2)(A); *Murphy v. Inexco Oil Co.*, 611 F.2d 570, 574 (5th Cir. 1980) (concluding plan not an ERISA plan and noting "the *primary thrust* of the plan is to reward employees during their active years") (emphasis added); *Boos v. AT&T, Inc.*, 643 F.3d 127, 134 (5th Cir. 2011). For example, PartnerPlus requires participants to take distributions during employment, which is incompatible with saving for *retirement* income. 2006 PartnerPlus Plan § 7.2. Indeed, Judge Ellison held just a few weeks ago that a similar plan was not governed by ERISA because there were "no express terms for providing retirement or termination/post-termination income to employees" and employees received "in-service distributions" during their employment. *Tolbert v. RBC Capital Markets Corp.*, No. 11-107, slip op. at *13, 27 (S.D. Tex. Mar. 27, 2013). The Court can and should make the determination that PartnerPlus is not an ERISA plan for Rule 23 purposes now, even if it might need to be revisited later in the litigation. *See Wal-Mart*, 131 S. Ct. at 2552 n.6.

Even if PartnerPlus were construed to be an ERISA plan, nothing in ERISA prohibits employers and employees from agreeing to forego class adjudication, as UBS and the FAs did in the Compensation Plans. The class waivers are not an impermissible "amendment" of an ERISA plan: PartnerPlus and the FINRA rules govern *arbitration*, but now that plaintiffs are proceeding in court they are governed by their class waiver in the Compensation Plan and by the incontestable legal proposition that the ability to proceed via a class action is—like any other procedural right—waivable by the litigants. *See Parisi*, 2013 WL 1149751, at *4; *In re Prudential*, 148 S.W.3d at 132–35; *Carter v. Countrywide Credit Indus., Inc.*, 362 F.3d 294, 298, 301 (5th Cir.

2004); *In re Halliburton Co.*, 80 S.W.3d 566, 572–73 (Tex. 2002).

II. PLAINTIFFS CANNOT SATISFY THE RULE 23(a) PREREQUISITES

In examining whether the Rule 23(a) factors—numerosity, commonality, typicality, and adequacy—are met, the court must undertake a "rigorous analysis" of the facts and the law. *Gen. Tel. Co. of the Sw. v. Falcon*, 457 U.S. 147, 161 (1982); *Langbecker*, 476 F.3d at 306. Plaintiffs' request for class certification does not withstand that rigorous analysis.

Plaintiffs proffer the supposedly common question of "whether the [PartnerPlus] Plan is governed by ERISA." Pls. Mem. at 6. Even assuming *arguendo*, however, that this would be sufficient to establish commonality notwithstanding plaintiffs' failure to present any evidence supporting their contention (*see Wal-Mart*, 131 S. Ct. at 2552), plaintiffs also bear the burden of establishing typicality and adequacy.

The typicality requirement "focuses on the similarit[ies] between the named plaintiffs' legal and remedial theories and the theories of those whom they purport to represent." *Stirman v. Exxon Corp.*, 280 F.3d 554, 562 (5th Cir. 2002). Similarly, the adequacy requirement "serves to uncover conflicts of interest between named parties and the class they seek to represent." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 625 (1997); *see also Feder v. Elec. Data Sys. Corp.*, 429 F.3d 125, 129-30 (5th Cir. 2005). These two requirements "serve as guideposts for determining whether . . . the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence." *Amchem*, 521 U.S. at 626 n.20 (quoting *Falcon*, 457 U.S. at 152 n.13). Where, as here, the named plaintiffs are subject to unique defenses as compared to the putative class, or the nature of the defenses undermines the cohesion of the class, typicality and adequacy are not met. *Warren v. Reserve Fund, Inc.*, 728 F.2d 741, 747 (5th Cir. 1984).

A. Variations in State Statutes of Limitations Applicable to the Proposed Class Members' ERISA Claims Undermine Adequacy and/or Typicality

Although ERISA provides a uniform statute of limitation for some claims, such as claims under the Act's commonly used fiduciary-duty provision (*see*, *e.g.*, 29 U.S.C. § 1113), the statute is silent as to other claims, such as plaintiffs' claims here under 29 U.S.C. § 1132(a)(3). *See North Star Steel Co. v. Thomas*, 515 U.S. 29, 33–34 (1995); *Hall v. Nat'l Gypsum Co.*, 105 F.3d 225, 230 (5th Cir. 1997). Where ERISA does not provide a statute of limitations, courts have looked to the most analogous state law, such as breach of contract. *See Stahl v. Exxon Corp.*, 212 F. Supp. 2d 657, 666 (S.D. Tex. 2002).

Limitation periods for breach of contract vary greatly. *Compare*, *e.g.*, Ky. Rev. Stat. Ann. 413.080 *et seq.* (15 years), *with* Tex. Civ. Prac. & Rem. Code 16.001 *et seq.* (4 years). If the named plaintiffs were to contend that Texas's limitations period applies to this case, that would create a serious intra-class conflict with class members from states whose longer limitations periods would permit claims to proceed that are time-barred by Texas's limitations period. On the other hand, if the named plaintiffs contend that the limitations period for each class member is determined by that member's state of residence, the result is a high degree of individuation and variation that is starkly inconsistent with typicality and adequacy. *See Jones v. R.R. Donnelley & Sons Co.*, 541 U.S. 369, 378–79 (2004) ("Interstate variances of that sort could be especially confounding in class actions because they . . . pose[ ] problems for joint resolution.").

Moreover, the application of limitations periods requires individualized inquiry because the "discovery rule" for accrual applies to ERISA claims. *See Guilbert v. Gardner*, 480 F.3d 140, 149 (2d Cir. 2007); *Berry v. Allstate Ins. Co.*, 252 F. Supp. 2d 336, 341 (E.D. Tex. 2003). Under that rule, a plaintiff's claim accrues when the plaintiff discovers, or with due diligence should have discovered, the injury that is the basis of the litigation. *Guilbert*, 480 F.3d at 149.

The limitations bar thus turns on when each individual claimant first saw the Plan after becoming employed by UBS (or Paine Webber). *Id*.

Courts properly refuse certification when such features of state law require individualized inquiry that is unsuited to class adjudication. *See*, *e.g.*, *Stirman*, 280 F.3d at 562 (typicality and adequacy not met "[g]iven the differences among the state laws"); *see also Novella v. Westchester Cnty.*, 661 F.3d 128, 148 (2d Cir. 2011) (typicality requirement not met because of "the fact-intensive nature" of the individualized statute-of-limitations analysis); *Thorn v. Jefferson-Pilot Life Ins. Co.*, 445 F.3d 311, 321 (4th Cir. 2006) ("the record must affirmatively reveal that resolution of the statute of limitations defense on its merits may be accomplished on a class-wide basis"); *Bilello v. JPMorgan Chase Ret. Plan*, 607 F. Supp. 2d 586, 593 (S.D.N.Y. 2009); *cf. Cole v. Gen. Motors Corp.*, 484 F.3d 717, 724 (5th Cir. 2007).

Further, the named plaintiffs are inadequate representatives of the class because their own claims are time-barred under any limitations period. Each plaintiff, with the exception of Mr. Cox, was employed in Texas, which has a four-year statute of limitations. Tex. Civ. Prac. & Rem. Code § 16.001 et seq. Oregon, where Mr. Cox was employed, has a six-year statute of limitations. *See* Or. Rev. Stat. § 12.010 et seq. All named plaintiffs worked at UBS longer than six years (Blankenstein Dec. Exs. H–L), and as sophisticated financial advisers they knew or through reasonable diligence should have known when they joined UBS, or became Plan participants, about the terms that underlie their cause of action. Indeed, plaintiff Eddingston affirmed that he reviewed the Compensation Plan—which detailed the provisions of PartnerPlus that he now challenges—as early as 2000. *See* Eddingston Dep. Tr. 44:10–14; Blankenstein Dec. Ex. O. The named plaintiffs' claims are therefore time-barred, making them both atypical and inadequate representatives. *See In re Taxable Mun. Bond Sec. Litig.*, 51 F.3d 518, 522 (5th Cir. 1995);

Piazza v. Ebsco Indus., Inc., 273 F.3d 1341, 1347–49 (11th Cir. 2001).

B. In-Service Distributions Received by the Named Plaintiffs, and ERISA Vesting Rules, Undermine Typicality and Adequacy

The vast majority of named plaintiffs received distributions from PartnerPlus while employed by UBS. *See* Blankenstein Dec. Ex. H–J. These so-called "in-service" distributions, which in many instances amounted to hundreds of thousands of dollars, are fundamentally inconsistent with plaintiffs' contention that PartnerPlus is an ERISA plan whose "primary thrust" is providing retirement income. *See Murphy*, 611 F.2d at 574 (plan not governed by ERISA where "the primary thrust of the plan is to reward employees during their active years," even if "payments to some employees ... are likely to continue after the employee has retired or ceased work"). Taking distributions while still employed is a clear indicator that a plan is not subject to ERISA. *See Tolbert*, No. 11-107, slip op. at *9–13. The named plaintiffs here thus pose a serious vulnerability on the central issue of ERISA coverage, and are not adequate to represent a class asserting that PartnerPlus is an ERISA plan.

Plaintiff Eddingston, for example, received $523,718 in distributions while employed. *See* Eddingston Dep. Tr. 61:2–7. That is incompatible with his arguing, on behalf of the class, that PartnerPlus is an ERISA plan. Indeed, he—and others who took in-service distributions—should be estopped from making that argument. Having received hundreds of thousands of dollars in non-retirement compensation, they cannot turn around now and claim—in equity—that PartnerPlus Plan is a retirement plan. *See Murphy*, 611 F.2d at 575–76; *Young v. Amoco Production Co.*, 610 F. Supp. 1479, 1487 (E.D. Tex. 1985) ("a person who accepts and retains the benefits of a [] transaction will not thereafter be permitted to avoid its obligations or repudiate the disadvantageous portions"); *see also Pickett v. Iowa Beef Processors*, 209 F.3d 1276, 1280 (11th Cir. 2000). To hold otherwise would create an impermissible intra-class conflict. *See Spano v.*

Boeing Co., 633 F.3d 574, 582 (7th Cir. 2011).

There is yet another intra-class conflict. ERISA permits two types of vesting—"cliff" vesting, under which a participant is fully vested immediately after three years, and "graduated" vesting, under which a participant vests gradually over six years. See ERISA § 203(a)(2)(B). Different FAs would fare better under different vesting rules, depending on their years of service. But because only one vesting schedule could be used under plaintiffs' approach to class certification, they have created an intra-class conflict that defeats class certification. *See Langbecker*, 476 F.3d at 315 (intra-class conflicts exist where different theories would "have different consequences for class members' recovery").

C. Releases Signed By Class Members Undermine Typicality and Adequacy

The 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. *See* Ferreira Dec. Ex. A–C. The putative class members with releases would have to litigate the releases' applicability, which is a complete defense for UBS but a matter of no interest to the named plaintiffs. Plaintiffs' claims and defenses therefore are not aligned with the putative class they seek to represent, which defeats typicality. *See*, *e.g.*, *Bernard v. Gulf Oil Corp.*, 841 F.2d 547, 550 (5th Cir. 1988) (class representatives must "'possess the same interest and suffer the same injury' as the class members, and ... a plaintiff lacks standing to litigate injurious conduct to which he was not subjected" (quoting *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 216 (1974)); *In re Schering Plough Corp. ERISA Litig.*, 589 F.3d 585, 601–03 (3d Cir. 2009); *Melong v. Micronesian Claims Comm'n*, 643 F.2d 10, 15 (D.C. Cir. 1980).

III. PLAINTIFFS' PROPOSED CLASS DOES NOT MEET THE REQUIREMENTS OF RULE 23(b)

Plaintiffs' proposed class cannot be certified under subsection 23(b)(1) or (b)(2), because, as they acknowledged at the hearing on UBS's motion to compel, "[they] want money." 2/4/13 Hr'g Tr. 30:6; *see also* Eddingston Dep. Tr. 80:8–17 (testifying that his desired injunctive relief would be to "order UBS to pay all the individuals the forfeiture amounts"). The Supreme Court made clear in *Wal-Mart*, however, that monetary relief claims can only be certified under 23(b)(3), which guarantees absent class members notice of the class action and the opportunity to opt out, because "plaintiffs with individual monetary claims [must] decide *for themselves* whether to tie their fates to the class representatives' or go it alone—a choice [the mandatory class action] does not ensure that they have." 131 S. Ct. at 2559. But plaintiffs cannot meet the predominance or superiority requirements of Rule 23(b)(3).[2]

A. Plaintiffs' Claims Cannot Be Certified Under Rule 23(b)(1)

Rule 23(b)(1)(A) provides that a class may be certified where inconsistent judgments in individual trials would create "incompatible standards of conduct for the party opposing the class." The Fifth Circuit has questioned whether a (b)(1)(A) class may *ever* be certified where "damages are the primary remedy sought." *Langbecker*, 476 F.3d at 318; *see also Casa Orlando Apartments, Ltd. v. Federal Nat'l Mortg. Ass'n*, 624 F.3d 185, 197 (5th Cir. 2010) ("certification under (b)(1)(A) is seldom appropriate when dealing with monetary compensation because no inconsistency is created when courts award varying levels of money damages to different plaintiffs"). Other courts have squarely held that there is no "risk of inconsistent judgments" where monetary relief is the goal. *See*, *e.g.*, *Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1193

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[2] Plaintiffs half-heartedly suggest that the Court could certify their request for injunctive relief under (b)(2) and any monetary relief under (b)(3). Pls. Mem. at 18 n.10, 22 n.12. This alternative runs contrary to Rule 23, and therefore should be denied. *See McManus v. Fleetwood Enterprises, Inc.*, 320 F.3d 545, 554 (5th Cir. 2003).

(9th Cir. 2001).

"Rule 23(b)(1)(A) is satisfied only in the event inconsistent judgments in separate suits would trap the party opposing the class in the inescapable legal quagmire of not being able to comply with one judgment without violating the terms of another." *McBirney v. Autrey*, 106 F.R.D. 240, 245 (N.D. Tex. 1985) (internal quotation omitted). That is not the case here. If one court determined, for example, that PartnerPlus was an ERISA plan and another determined that it was not, UBS could still comply with both orders. *See Casa Orlando Apartments*, 624 F.3d at 197–98 ("if one court failed to require [the defendant] to cease its relationship with [a company], [the defendant] could still end this relationship in order to comply with a different court order"); *see also Pipefitters Local 636 Ins. Fund v. Blue Cross Blue Shield of Mich*., 654 F.3d 631, 633 (6th Cir. 2011). Plaintiffs rely on district court cases that pre-date *Langbecker* and *Casa Orlando*, are distinguishable, or both. Pls. Mem. at 13–15.[3]

This case also does not fit within 23(b)(1)(B), which properly is limited to the historical antecedents identified in the Rule's Advisory Committee Notes, *see Ortiz v. Fiberboard Corp.*, 527 U.S. 815, 842–45 (1999), none of which is present here. This case does not involve a "limited fund," which is the paradigmatic (b)(1)(B) case. Indeed, PartnerPlus is not a funded plan (Complaint ¶ 11), and the Fifth Circuit has stated that "a Rule 23(b)(1)(B) limited fund class ac-

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[3] In *Humphrey v. United Way of the Tex. Gulf Coast*, 2007 U.S. Dist. LEXIS 59557 (S.D. Tex. 2007), the court granted certification under 23(b)(1)(A) even though the relief sought was "primarily monetary." *Id.* at *37. Similarly, the courts in *Stoffels v. SBC Communications, Inc.*, 238 F.R.D. 446 (W.D. Tex. 2006) and *Pender v. Bank of America Corp.*, 269 F.R.D. 589, 599 (W.D.N.C. 2010), certified a class without weighing the due process concerns of binding absent class members to monetary judgments without notice or opt out rights. These decisions cannot survive *Wal-Mart*. *See* 131 S. Ct. at 2559. And in *Boos v. AT&T, Inc.*, 252 F.R.D. 319 (W.D. Tex. 2008), the defendants did not oppose class certification and the plaintiffs freely acknowledged they suffered no actual damages. 252 F.R.D. at 321.

tion is plainly not appropriate" in an ERISA suit. *Langbecker*, 476 F.3d at 318.

B. Plaintiffs' Claims Cannot Be Certified Under Rule 23(b)(2)

Rule 23(b)(2) is limited by its terms to claims in which "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2). Certifying claims for monetary relief under 23(b)(2) "has no basis in [Rule 23's] text, and ... does obvious violence to the Rule's structural features." *Wal-Mart*, 131 S. Ct. at 2559. Indeed, the Supreme Court has "expressed serious doubt" as to whether *any* monetary relief is ever available in a (b)(2) class. *Id.* at 2560 (citing *Ticor Title Ins. Co. v. Brown*, 511 U.S. 117, 121 (1994) (*per curiam*)). Plaintiffs here seek hundreds of millions of dollars in individualized monetary relief, yet claim this is "incidental" to an injunction against their *former* employer. *See* Pls. Mem. at 16–18. For multiple reasons, they are incorrect.

The Fifth Circuit has repeatedly held 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." *Langbecker*, 476 F.3d at 317 (quoting *Bolin v. Sears, Roebuck & Co.*, 231 F.3d 970, 978 (5th Cir. 2000)). If "the class does not stand to benefit from any injunctive relief[,] . . . whether the monetary relief is incidental to the injunctive relief sought is not an issue, since monetary relief is effectively the sole remedy sought." *Bolin*, 231 F.3d at 978.

That is unquestionably true here. Because the putative class members are no longer participants in PartnerPlus, an injunction against UBS does nothing to improve their situation without an accompanying award of monetary relief. Plaintiffs have freely admitted that they "hope[] to resolve [this case] by an award of money," and that the injunctive relief they seek "end[s] up getting [them] money." 2/4/13 Tr. 30:6–7, 31:10–16. Plaintiff Eddingston—whose testimony is representative of all named plaintiffs—stated that he is seeking an injunction that "would order

UBS to pay all the individuals the forfeiture amounts." Eddingston Dep. Tr. 80:11–12. As the Fifth Circuit recognizes, a Rule 23(b)(2) class may not be certified where the injunctive relief serves only as a vehicle to obtain monetary relief. *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 416, 425 (5th Cir. 1998) (holding that monetary relief is only "incidental" to injunctive or declaratory relief, and therefore potentially recoverable in a (b)(2) class, if it "flow[s] directly from liability to the class *as a whole* on claims forming the basis of the injunctive or declaratory relief" and does not require "individualized proof and determinations" or "entail complex individualized determinations").[4]

Here, the relief plaintiffs seek would not flow to the class *as a whole* because the putative class members only have an interest in the assets attributable to their individual accounts within the Plan. Consequently, each putative class member has an interest in recovering only the portion that she allegedly forfeited when leaving UBS and, if recovered, that amount would flow only to the individual plaintiff.

Plaintiffs do not request proper injunctive or declaratory relief for another reason. Plaintiffs claim to seek "reformation" of PartnerPlus, so that it conforms to ERISA. But "[t]o obtain reformation of a contract, a party must show that . . . the written contract does not reflect the parties' agreement *because of a mutual mistake*." *GeoSouthern Energy Corp. v. Chesapeake Operating, Inc.*, 274 F.3d 1017, 1021 (5th Cir. 2001) (emphasis added). There is no allegation of mutual mistake here (nor of fraud, which reformation may also redress). Moreover, plaintiffs seek a thorough re-writing of PartnerPlus, but "[c]ourts of equity . . . have no power to make agree-

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[4] Plaintiffs prefer *Johnson v. Meriter Health Services Employee Retirement Plan*, 702 F.3d 364 (7th Cir. 2012), which—in addition to being non-binding on this Court—does not even address whether the requested injunctive relief is merely a means of facilitating monetary payments, which is a crucial inquiry under Fifth Circuit law. *Johnson* has no application here.

ments or to alter those which have been understandingly made." *R.B. Homer Lumber Co. v. Bryant*, 62 F.2d 131, 132 (4th Cir. 1932) (citing *United States v. Ames*, 99 U.S. 35, 42 (1878)).

Finally, determination of the appropriate amount of monetary relief would require individualized proof, also in contravention of *Allison*. For each individual participant, the Court would have to calculate the sum that would have vested under ERISA's more lenient vesting provisions, and that therefore would not have been forfeited if the Plan had been governed by ERISA. As noted, moreover, different class members would prefer their awards determined according to different ERISA vesting rules. This "process would require the type of non-incidental, individualized proceedings for monetary awards that *Wal–Mart* rejected under Rule 23(b)(2)." *Nationwide Life Ins. Co. v. Haddock*, 460 F. App'x 26, 29 (2d Cir. 2012); *see also Langbecker*, 476 F.3d at 317; *Allison*, 151 F.3d at 415.

C. Plaintiffs' Claims Cannot Be Certified Under Rule 23(b)(3)

1. *Common Questions Do Not Predominate*

Rule 23(b)(3) requires proponents of class certification to prove that common issues *predominate* over individual ones. The Supreme Court reiterated this very Term that the Rule 23(b)(3) predominance inquiry is "more demanding" than the commonality requirement of 23(a). *Comcast*, 2013 WL 1222646, at *4; *see also Amchem*, 521 U.S. at 623–24. The predominance inquiry must take account of all relevant facts—the nature of plaintiffs' claims, the available defenses, and whether "damages are capable of measurement on a classwide basis" or, instead, "individual damage calculations will inevitably overwhelm questions common to the class." *Comcast*, 2013 WL 1222646, at *5; *Wal-Mart*, 131 S. Ct. at 2561. Indeed, after reversing the class certification order in *Comcast*, the Supreme Court vacated certification orders from other courts, including a wage-hour case with a purportedly common liability theory but individualized damages. *RBS Citizens, NA v. Ross*, No. 12-165 (Apr. 1, 2013).

As discussed above, the supposedly "common" question plaintiffs proffer is whether PartnerPlus is an ERISA plan (and, if so, whether the forfeiture provision violates ERISA). Pls. Mem. at 11–12. But even if the Court were to agree that this is a common question, it would be overwhelmed by the number of individualized determinations that would be required before a final judgment could be rendered on the claims of the putative class.

The numerous and varying statute of limitations issues, as well as plaintiffs' possible contention that different state limitations statutes apply to the class, would swamp the common question, particularly because, as discussed at page 8 above, applying the limitations period for plaintiffs' claims will depend on when each plaintiff "discovered" the challenged plan provisions. Plaintiffs have identified no way of determining the statutes of limitations applicable to each putative class member on a class-wide basis. For this reason alone, 23(b)(3)'s predominance requirement is not met. *See*, *e.g.*, *Cole*, 484 F.3d at 724; *Johnson v. Kansas City S. Ry. Co.*, 208 F. App'x 292, 296–97 (5th Cir. 2006) ("the plaintiffs' individual issues, e.g., statute of limitations . . . predominate over the common ones").

The Court would also have to examine whether any individual FA signed a release, and if so whether that release was valid, enforceable, and covered the claims at issue. The releases signed by putative class members differ in format and circumstance. Plaintiffs have not put forth any evidence showing or even suggesting that this could be done with common, class-wide evidence. This, also, militates against certification. *See*, *e.g.*, *In re Wilborn*, 609 F.3d 748, 756 (5th Cir. 2010) (predominance of affirmative defenses precluded class certification); *Witt v. Chesapeake Exploration, L.L.C.*, 276 F.R.D. 458, 469 (E.D. Tex. 2011).

Finally, if liability were found, determining monetary relief would require individually assessing, among other things, the amounts each plaintiff forfeited; what (if any) schedule

ERISA required, and the amount of the difference; and what mitigation income the class member received or could have received from a successor employer, such as plaintiff Eddingston received here. *Supra*, page 3.

2. *A Class Action Is Not Superior*

Rule 23(b)(3) also requires plaintiffs to show that a class action is a superior method for fairly and efficiently adjudicating the claims. Four factors guide the "superiority" analysis: (1) "the class members' interests in individually controlling the prosecution or defense of separate actions"; (2) "the extent and nature of any litigation concerning the controversy already begun by or against class members"; (3) "the desirability or undesirability of concentrating the litigation of the claims in the particular forum"; and (4) "the likely difficulties in managing a class action." Fed. R. Civ. P. 23(b)(3)(A)–(D).

Plaintiffs and each putative class member are seeking to recover thousands, if not hundreds of thousands of dollars (*see* Blankenstein Dec. Ex. H–L), which undermines any claim that class adjudication is necessary for plaintiffs' claims to be economically viable. "The policy at the very core of the class action mechanism is to overcome the problem that *small recoveries* do not provide the incentive for any individual to bring a solo action prosecuting his or her rights.'" *Amchem*, 521 U.S. at 617 (emphasis added) (quoting *Mace v. Van Ru Credit Corp*., 109 F.3d 338, 344 (7th Cir. 1997)). The vast majority of the FAs who would be members of the putative class have substantial amounts at stake, and indeed multiple individuals have filed claims against UBS for the precise relief plaintiffs seek through a class action (*see, e.g.*, *Preston, et al. v. UBS Financial Services, Inc.*, No. 12-4949 (N.D. Tx.)), directly undermining plaintiffs' claim that class adjudication is necessary for these sophisticated financial professionals to vindicate their claimed rights to individual relief. *See Allison*, 151 F.3d at 420; *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 748 (5th Cir. 1996) (denying certification because, *inter alia*, "[t]he most compelling rationale for finding superiority in a class action—the existence of a negative value suit—is missing"); *Corley v. Entergy Corp.*, 220 F.R.D. 478, 489–90 (E.D. Tex. 2004).

Moreover, plaintiffs do not even attempt to show "how a trial on the merits would be conducted if a class were certified," as Rule 23(b)(3) requires. *Sandwich Chef of Texas, Inc. v. Reliance Nat'l Indem. Ins. Co.*, 319 F.3d 205, 218 (5th Cir. 2003). Plaintiffs were required to present a trial plan in order to establish that class adjudication would be manageable (*see Madison*, 637 F.3d at 556–57), and their failure to do so precludes certification, *see*, *e.g.*, *MP Vista, Inc. v. Motiva Enterprises, LLC*, 286 F.R.D. 299 (E.D. La. 2012).[5]

CONCLUSION

The Court should deny plaintiffs' motion for class certification.

Date: April 8, 2013 Respectfully submitted,

/s/ Eugene Scalia

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[5] In addition to requesting a nationwide class for their ERISA claims, plaintiffs seek a class of Texas residents to address their Texas state law claims. Pls. Mem. at 6. The entirety of plaintiffs' argument for the Texas class is a footnote which asserts that certification "is warranted for the same reasons . . . as to their claims under ERISA." Pls. Mem. at 6 n.1. This perfunctory argument comes nowhere near meeting plaintiffs' burden to affirmatively demonstrate compliance with Rule 23. *See Comcast*, --- S. Ct. ---, slip op. at *4. The reasoning as to plaintiffs' ERISA claims cannot be extrapolated to their Texas non-compete claims; the claims and defenses for each are distinct. Plaintiffs' request for a Texas class should be denied on this basis alone. In any event, the Texas claims are subject to binding arbitration, and plaintiffs' ERISA-based defense to arbitration is irrelevant to their state law claims.

Moreover, plaintiffs have not identified a single common question that would be applicable to their Texas state law claims, and they have not—and cannot—explain how those claims meet the typicality and adequacy requirements, nor any of the requirements of Rule 23(b). The validity of a non-compete agreement under Texas law is an individualized, "fact-specific" determination of "reasonableness," which precludes certification. *See, e.g.*, *Am. Nat'l Ins. Co. v. Cannon*, 86 S.W.3d 801, 808–09 (Tex. Ct. App. 2002) (reversing certification of class based on non-compete agreement because the "[f]act specific individual determinations" for "reasonableness . . . cannot be made on a class-wide scale"). Plaintiffs also have not demonstrated that UBS's numerous individualized defenses do not prohibit a finding of typicality, adequacy, and predominance.

Michael C. Smith
(michaelsmith@siebman.com)
SIEBMAN, BURG, PHILLIPS & SMITH LLP
113 East Austin Street
Marshall, TX 75670
T. 903. 938.8900, F. 972.767.4620

William J. Kilberg (*pro hac vice*)
(wkilberg@gibsondunn.com)
Eugene Scalia (*pro hac vice*)
(escalia@gibsondunn.com)
Paul Blankenstein (*pro hac vice*)
(pblankenstein@gibsondunn.com)
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, DC 20036
T. 202.955.8693, F. 202.530.9532

Attorneys for Defendant UBS Financial Services, Inc.

<u>CERTIFICATE OF SERVICE</u>

I hereby certify that I have caused to be served by electronic mail on all counsel of record the foregoing Defendant UBS Financial Services, Inc.'s Opposition to Plaintiffs' Motion for Class Certification pursuant to Local Rule CV-5(a)(7)(C) on April 8, 2013.

<u>/s/ Eugene Scalia</u>
Eugene Scalia

<u>CERTIFICATION</u>

I hereby certify that a motion to seal the foregoing Defendant UBS Financial Services, Inc.'s Opposition to Plaintiffs' Motion for Class Certification has been filed with the Court.

<u>/s/ Eugene Scalia</u>
Eugene Scalia