

**IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
CENTRAL DIVISION**

RICHARD L. MEHLBERG, and ANGELA R.)	
DEIBEL, individually and on behalf of all)	
others similarly situated, and on behalf of the)	
Plan,)	
)	
Plaintiffs,)	Case No. 2:24-cv-04179 SRB
)	
v.)	
)	
COMPASS GROUP USA, INC.,)	
)	
Defendant.)	

ORDER

Before the Court is Plaintiffs’ Motion for Class Certification. (Doc. #64.) For the reasons set forth below, the motion is GRANTED IN PART and DENIED IN PART.

I. FACTUAL BACKGROUND

The following facts are taken from the First Amended Class and Representative Action Complaint (Doc. #56), and from the parties’ briefs with exhibits.¹ Defendant Compass Group USA, Inc. (“Defendant” or “Compass Group”) is a Fortune 500 foodservice company that employed Plaintiffs Richard L. Mehlberg and Angela R. Deibel (the “Named Plaintiffs”) and the proposed class members (collectively, “Plaintiffs”). At all relevant times, Defendant sponsored and administered a medical plan (the “Plan”) and gave all regular employees and eligible dependents an opportunity to participate in it. The Plan qualifies as an employee welfare benefit plan and must comply with the Employee Retirement Income Security Act of 1974 (“ERISA”). *See* 29 U.S.C. § 1182.

¹ Only those facts necessary to resolve the pending motion are discussed below, and those facts are simplified to the extent possible. Additional relevant facts are discussed in Section III.

Beginning in 2016, Defendant implemented and imposed a tobacco surcharge for all group health participants that used tobacco products. For plan years 2016 through 2024, Defendant deducted \$48 per bi-weekly pay period—or \$1,248 annually—from the wages of each covered individual using tobacco products. Defendant learned about tobacco use by requiring all participants to declare whether they were a tobacco user during open enrollment.

Plaintiffs were employed by Defendant, participated in the Plan, and paid the tobacco surcharge. Counts I and II of the First Amended Class and Representative Action Complaint allege that Defendant’s tobacco surcharge violated statutory provisions under ERISA. Count III alleges that Defendant breached fiduciary duties owed to the Plan under ERISA by collecting and retaining tobacco surcharges for Defendant’s own benefit and Count IV seeks individual relief for the same alleged fiduciary breaches. Counts V and VI allege that Defendant violated the terms of the Plan under ERISA by operating a discriminatory wellness program.

As further discussed in Section III, Plaintiffs allege that: (a) in plan years 2016-2024, Defendant issued uniform documents that wrongfully failed to notify participants of an alternative way to avoid the tobacco surcharge; (b) Defendant failed to comply with the “full reward” requirement by wrongfully informing participants they could not receive a retroactive reimbursement of a prior tobacco surcharge; (c) Defendant violated the terms of the Plan by applying the unauthorized tobacco surcharge; and (d) by collecting the surcharge, Defendant breached its duties as a fiduciary of the Plan.

Plaintiffs now move for class certification of four classes of participants who had a tobacco surcharge deducted from their wages. These four proposed classes are as follows: three proposed Classes under Rule 23(a) and (b)(3) and one proposed Class under Rule 23(a) and (b)(1).

(1) Statutory Violation Class—Counts I and II:

All persons within the United States who paid Compass Group’s tobacco surcharge from October 9, 2020, through the date of the class certification order.

(2) Plan Terms Violation Class—Counts V and VI:

All persons within the United States who paid Compass Group’s tobacco surcharge through the date of the class certification order.

(3) Individual Fiduciary Duty Class—Count IV:

All persons within the United States who paid Compass Group’s tobacco surcharge from October 9, 2018 through the date of the class certification order.

(4) Plan Fiduciary Duty Class—Count III:

All persons within the United States who paid Compass Group’s tobacco surcharge from October 9, 2018 through the date of the class certification order.

Defendant opposes class certification, and the parties’ arguments are addressed below.

II. LEGAL STANDARD

Class certification is governed by Federal Rule of Civil Procedure 23. Rule 23 requires a plaintiff to satisfy all four prerequisites of Rule 23(a) and at least one of the provisions of Rule 23(b). *Comcast Corp. v. Behrend*, 569 U.S. 27, 33 (2013). “Rule 23 does not set forth a mere pleading standard.” *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011). Instead, a plaintiff “must affirmatively demonstrate his compliance with the Rule—that is, he must be prepared to prove that there are *in fact* sufficiently numerous parties, common questions of law or fact, etc.” *Id.* (emphasis in original).

A district court “must undertake a rigorous analysis to ensure that the requirements of Rule 23 are met.” *Bennett v. Nucor Corp.*, 656 F.3d 802, 814 (8th Cir. 2011) (quotation marks omitted). The Rule 23 analysis will frequently overlap with the merits of the underlying claims. *Wal-Mart*, 564 U.S. at 351. However, there are limits to a court’s analysis of the merits at the class certification stage. “A court’s inquiry on a motion for class certification is tentative,

preliminary, and limited.” *In re Zurn Pex Plumbing Prod. Liab. Litig.*, 644 F.3d 604, 613 (8th Cir. 2011) (quotation marks omitted). “Rule 23 grants courts no license to engage in free-ranging merits inquiries at the certification stage. Merits questions may be considered to the extent—but only to the extent—that they are relevant to determining whether the Rule 23 prerequisites for class certification are satisfied.” *Amgen Inc. v. Connecticut Ret. Plans & Trust Funds*, 568 U.S. 455, 466 (2013).

III. DISCUSSION

The Court must “begin by considering the nature of plaintiffs’ claim to determine whether it is suitable for class certification.” *Harris v. Union Pac. R.R. Co.*, 953 F.3d 1030, 1033 (8th Cir. 2020) (citation omitted). Here, Plaintiffs allege that Defendant’s tobacco surcharge violated four requirements under ERISA. The applicable law and facts are discussed below.

A. The Nature of Plaintiffs’ Claims

1. Reasonable Alternative Standard

Plaintiffs first allege Defendant’s tobacco surcharge was unlawful because it was not part of a valid wellness program. Specifically, they contend that Defendant violated ERISA’s nondiscrimination provision by failing to provide a “reasonable alternative standard” to the requirement of being a non-smoker. The nondiscrimination provision prohibits a group health plan from charging a premium based on a participant’s health status-related factor. 29 U.S.C. § 1182(b)(1) provides that:

A group health plan . . . *may not require any individual* (as a condition of enrollment or continued enrollment under the plan) *to pay a premium or contribution which is greater* than such premium or contribution for a similarly situated individual enrolled in the plan *on the basis of any health status-related factor* in relation to the individual or to an individual enrolled under the plan as a dependent of the individual.

29 U.S.C. § 1182(b)(1) (emphasis supplied).

However, the non-discrimination prohibition is not absolute. Section 1182(b)(2)(B) contains an exception that allows a plan to issue discounts to participants who comply with a wellness program:

[n]othing in paragraph [b](1) shall be construed . . . to prevent a group health plan . . . from establishing premium discounts or rebates or modifying otherwise applicable copayments or deductibles in return for adherence to programs of health promotion and disease prevention.

29 U.S.C. § 1182(b)(2)(B) (emphasis supplied). As relevant here, these two statutory provisions allow a plan to issue discounts or rebates to participants that do not use tobacco if the plan has implemented a valid wellness program. *See id.*

Under Department of Labor regulations, a plan's wellness program must comply with certain requirements in order to qualify for § 1182(b)(2)(B)'s exception. *See* 78 Fed. Reg. 33158, at 33160 (June 3, 2013) (“Set[ting] forth criteria . . . that must be satisfied in order for the plan . . . to qualify for an exception to the prohibition on discrimination based on health status”).

Plaintiffs allege that Defendant's tobacco surcharge failed to comply with two requirements:

- (1) that participants have notice of an alternate way to avoid paying the tobacco surcharge; and
- (2) that participants be retroactively reimbursed and receive the “full reward” if they complete that alternative option.

Next, for an “alternative standard” to be deemed reasonable, “[t]he *full reward* under the outcome-based wellness program *must be available* to all similarly situated individuals.” 29 C.F.R. § 2590.702(f)(4)(iv) (emphasis supplied). The “full reward” requires retroactively reimbursing a participant that completes the alternative standard. In particular, “if a calendar year plan offers a health-contingent wellness program with a premium discount and an individual

who qualifies for a reasonable alternative standard satisfies that alternative on April 1, the plan or issuer must provide the premium discounts for January, February, and March to that individual.” 78 Fed. Reg. 33158, at 33163.

Here, Plaintiffs allege that Defendant deprived participants of the full reward by failing to retroactively reimburse participants who completed the alternative standard. “Instead, he or she could avoid the surcharge on a going-forward basis only and would not be eligible to receive a reimbursement for surcharge payments already made in that plan year.”² (Doc. #56, p. 9.) Because “participant[s] could not receive a retroactive reimbursement to avoid the tobacco surcharge in its entirety, Compass Group does not permit participants to receive the ‘full reward’ and therefore does not provide for a ‘reasonable alternative standard.’” (Doc. #56, pp. 9–10.)

2. Notice Requirement

Second, Plaintiffs allege that Defendant did not provide a reasonable alternative standard but if they did, Defendant failed to provide adequate notice of it. (Doc. #65, p. 10.) For example, when referencing the tobacco surcharge, the 2022 Compass Group Enrollment Guide fails to disclose the availability of an alternative standard to avoid the surcharge and states only that:

All associates eligible for Compass Group Benefits will have to identify, at enrollment, whether they (and their spouse if applicable) are a tobacco user. Associates who identify that they are a tobacco user will pay an additional tobacco surcharge for medical coverage. Tobacco users may also pay a higher premium rate for select voluntary benefits (Aetna Critical Illness Plan).

(Doc. #56, p. 11.)

² Defendant contends it began to reimburse participants in 2024. In particular, “Effective January 1, 2024 to the present, after Compass received confirmation of the tobacco cessation program, Compass removed the surcharge prospectively for the rest of the Plan year and refunded any tobacco surcharges paid during the plan year.” (Doc. #72, p. 9.)

An outcome-based wellness program (e.g., not using tobacco) must give participants “notice of availability of [a] reasonable alternative standard” to qualify for the discount or rebate. 29 C.F.R. § 2590.702(f)(4)(v).³ “The plan or issuer must disclose in *all* plan materials describing the terms of an outcome-based wellness program, and in any disclosure that an individual did not satisfy an initial outcome-based standard, the availability of a reasonable alternative standard to qualify for the reward.” 29 C.F.R. § 2590.702(f)(4)(v) (emphasis supplied). “[A] plan disclosure that references a premium differential based on tobacco use . . . is a disclosure describing the terms of a health-contingent wellness program and, therefore, must include this disclosure.” 78 Fed. Reg. 33158, at 33166.

3. Plan Terms

Third, Plaintiffs allege that Defendant violated the terms of the Plan and seek individual recovery “for all losses resulting therefrom under . . . ERISA § 502(a)(1)(B); 29 U.S.C. § 1132(a)(1)(B).” (Doc. # 56, p. 24.) ERISA mandates that every employee benefit plan be “established and maintained pursuant to a written instrument,” which “must specify the basis on which payments are made to and from the plan.” 29 U.S.C. § 1102. Plan fiduciaries are required to act in accordance with the Plan documents.⁴ Plaintiffs deny receiving the Plan document and contend that the governing Plan makes no mention of a tobacco surcharge. Because the tobacco surcharge was described only in supplemental documents, which do not govern in place of the Plan document, Plaintiffs contend that the surcharge was not authorized by the Plan terms.

4. Fiduciary Duty

³ As discussed below, retroactive reimbursement following the completion of a smoking cessation program could be a reasonable alternative option to avoid the tobacco surcharge.

⁴ See, e.g., *Admin. Comm. of the Wal-Mart Stores, Inc. v. Shank*, 500 F.3d 834, 838 (8th Cir. 2007) (stating that a “primary purpose[] of ERISA is to insure the integrity and to protect the expectations of participants and beneficiaries.”)

Finally, Plaintiffs allege that Defendant breached its fiduciary duties owed to the Plan and to individual participants under ERISA by “assessing and collecting the tobacco surcharge in violation of the law and in violation of the terms of the Plan . . . thereby benefiting itself and harming the Plan.” (Doc. #56, pp. 18–19.) They seek “individual equitable relief to remedy these breaches under 29 U.S.C. § 1132(a)(3),” (Doc. #56, p. 23), as well as “the disgorgement of these ill-gotten profits.” (Doc. #65, p. 11.)

Based on these alleged violations, Plaintiffs’ proposed Classes seek multiple forms of equitable relief. *See* 29 U.S.C. § 1132(a)(3)(B)(i) (providing that “a civil action may be brought . . . to obtain other appropriate equitable relief”). In addition to the forms of relief discussed above, Plaintiffs ask for reimbursement of the tobacco surcharge, a permanent injunction against Defendant, to “restore the Plan to the position it would have occupied but for the breaches of fiduciary duty . . . including removal and replacement of the fiduciary,” and for the Court to impose a constructive trust on profits received by Defendant as a result of the alleged breaches. (Doc. #56, p. 27.)

Having framed “the nature of plaintiffs’ claim[s],” the Court must now determine whether they are “suitable for class certification.” *Harris*, 953 F.3d at 1033.

B. Standing

Defendant argues that Named Plaintiffs, as former participants in the Plan, lack standing to seek prospective relief. (Doc. #72, p. 18.) They also contend that Named Plaintiffs lack standing to pursue damages because “Neither Plaintiff enrolled in or completed the tobacco cessation program offered by Compass, nor did they request another alternative.” (Doc. # 72, p. 9.) To represent the Classes, Named Plaintiffs must have both Article III standing and a cause of action under ERISA. *Braden v. Wal-mart Stores, Inc.*, 588 F.3d 585, 591 (2009) (internal

citations omitted). To establish standing, a plaintiff must show (1) an “injury in fact,” (2) “a causal connection between the injury and the conduct complained of,” and (3) a likelihood “that the injury will be redressed by a favorable decision.” *Republican Party of Minn. v. Klobuchar*, 381 F.3d 785, 791-92 (8th Cir. 2004) (citations and quotations omitted).

1. Prospective Relief

In the Amended Complaint, Plaintiffs request prospective relief including “a permanent injunction against Compass Group prohibiting it from collecting a tobacco surcharge unless and until the company revises the surcharge to comply with all ERISA statutory requirements.” (Doc. #56, p. 27.) Defendant contends that Named Plaintiffs lack standing as to the prospective injunctive relief they seek given their status as former plan participants.

It is well established that each class member “must demonstrate standing separately for each form of relief sought.” *Friends of the Earth, Inc. v. Laidlaw Env’t Servs. (TOC), Inc.*, 528 U.S. 167, 185 (2000). To demonstrate standing to seek prospective relief, a plaintiff must show that they are likely to face future harm. *See Holling-Fry v. Coventry Health Care of Kan., Inc.*, No. 07–0092–CV–W–DGK, 2010 WL 3636156, at *3 (W.D. Mo. Sep. 10, 2010). Defendant argues, and Plaintiffs do not dispute, that neither of the Named Plaintiffs are still enrolled in the Plan. (Doc. #72, p. 18.) One of the Named Plaintiffs admitted in his deposition that forward-looking remedies would not impact him “one iota.” *Id.* Because Named Plaintiffs are no longer enrolled in the Plan, there is no threat of future injury from Defendant’s future decisions regarding the Plan. *See Garthwait v. Eversource Energy Co.*, No. 3:20-CV-00902(JCH), 2022 WL 1657469 at *5-6 (D. Conn. May 25, 2022).

Here, Plaintiffs contend their request for prospective relief coincides with their ability to “assert causes of action which are based on conduct that harmed [them], but which sweep more

broadly than the injury [they] personally suffered.” *Braden*, 588 F.3d at 592. In *Braden*, the Eighth Circuit clarified that a plaintiff with standing may pursue claims under ERISA § 502(a)(2) on behalf of the plan, even for periods where the plaintiff did not personally suffer injury, as long as the plaintiff alleges a concrete and particularized injury that is causally related to the challenged conduct. *Id.*

Upon review, the Court rejects Plaintiffs’ argument. The cases cited by Plaintiff concern statutory standing, not Article III standing. Although ERISA provides a plaintiff with standing if they meet the statutory definition of a plan “participant,” this is not enough—Plaintiffs must still demonstrate constitutional standing.⁵ *Garthwait*, 2022 WL 1657469 at *6. As former Plan participants, Named Plaintiffs have not alleged a real or immediate threat of future injury based on Defendant’s conduct. *See Park v. U.S. Forest Serv.*, 205 F.3d 1034, 1037 (8th Cir. 2000). “[A]s former, not present, plan participants, [the plaintiffs] have not alleged a real or immediate threat of future injury based on the defendants’ conduct.” *Fitzpatrick v. Nebraska Health Sys.*, No. 8:23CV27, 2024 WL 6977298, at *5 (D. Neb. Sept. 20, 2024). Therefore, the Court finds that Plaintiffs lack standing to pursue prospective relief.⁶

2. Damages

Defendant also argues that Plaintiffs lack standing to pursue their claim for damages because “[n]either Plaintiff enrolled in or completed the tobacco cessation program offered by Compass, nor did they request another alternative.” (Doc. # 72, p. 9.) This argument ignores that ERISA’s antidiscrimination rules prohibit Defendant from imposing a tobacco surcharge “unless ‘all of the [regulatory] requirements’ of its outcome-based wellness program are

⁵ “There is no ERISA exception to Article III.” *Thole v. U.S. Bank N.A.*, 590 U.S. 538, 547 (2020).

⁶ However, for the reasons discussed below, this does not bar class certification.

‘satisfied.’ *Id.* (quoting 29 C.F.R. § 2590.702(f)(4)). Plaintiffs have alleged and presented facts showing that Defendant imposed a tobacco surcharge on them and on putative class members in violation of ERISA and its implementing regulations. “[A] statutory right not to be charged . . . cause[s] a particularized injury that affect[s] the class members in a personal and individual way. Paying a fee they should not have been charged [is] also a concrete injury, not an abstract one that does not actually exist.” *McKeage v. Bass Pro Outdoor World, LLC*, 943 F.3d 1148, 1150 (8th Cir. 2019) (citations and quotations omitted). Plaintiffs’ payment of a fee that they had a “statutory right not to be charged” counts as a concrete injury for standing purposes. *See Lipari-Williams v. Mo. Gaming. Co., LLC*, 339 F.R.D. 515, 524 (W.D. Mo. 2021). Therefore, Plaintiffs have sufficiently shown an injury and the standing requirement is satisfied with regard to retrospective relief.

C. Statute of Limitations⁷

Defendant argues that each Class includes putative class members whose claims are time-barred. Defendant further argues that “determining whether a participant’s claims are time-barred requires an individualized inquiry into when each claim accrued,” which defeats predominance under Rule 23(b)(3). (Doc. #72, p. 22.) Plaintiffs seek to certify three of the proposed Classes under Rule 23(b)(3), which requires that “questions of law or fact common to class members predominate over any questions affecting only individual members.”

Defendant’s timeliness argument turns on whether an individualized inquiry is needed to determine when each class member’s claim accrued. “An individual question is one where ‘members of a proposed class will need to present evidence that varies from member to

⁷ Defendant asks the Court to take notice of a recent decision, *Wiederhold v. Res-Care, Inc.*, which dismissed a plaintiff’s claims under a statute-of-limitations defense. (Doc. # 76.) Upon review, this Court’s analysis remains unaffected by *Weiderhold*.

member.” *Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442, 453 (2016). “If the plaintiffs’ method of proving their claim would ‘include individualized inquiries that cannot be addressed in a manner consistent with Rule 23, then the class cannot be certified.’” *Ford v. TD Ameritrade Holdin Corp.*, 995 F.3d 616, 620 (8th Cir. 2021) (internal citation omitted). Plaintiffs assert that even with the possibility of individual issues of compliance with the statute of limitations, predominance is still met because “most of the limitations issues are uniform in nature and easily applicable on a class-wide basis.” (Doc. #75, p. 19.)

Upon review, the Court finds that Plaintiffs’ claims were timely brought by each of the four proposed Classes. Plaintiffs discuss the statute of limitations for each Class in their Motion to Certify and in their Reply Brief (Doc. #75.) For the **Statutory Violation Class**, Plaintiffs argue that the limitations are “governed by the federal catchall limitations period of four years because ERISA does not otherwise supply one.” (Doc. #65, p. 19 fn. 10.) They do not dispute that the claims accrued on the date in which the deductions were made, nor do Plaintiffs attempt to lengthen the claim window by arguing for delayed accrual or tolling.⁸ (Doc. #75, p. 20.) Instead, Plaintiffs seek a “straightforward and mechanical” application of the limitations bar to the Class’s claims, which they contend requires “nothing more than the formulaic filtering of a spreadsheet.” *Id.* (internal citations omitted). For example, the date upon which each Class member paid the surcharge is easily ascertainable by looking at computerized payroll deduction records. Because Plaintiffs can use the same uniform method to ascertain whether a Class member’s claims are timely, there is no “individualized inquiry” needed to answer this question. Consequently, the Court rejects Defendant’s predominance argument and finds that the Statutory Violations Class claims are timely.

⁸ Prospective Class members seek to recover all surcharge fees Defendant collected on or after October 9, 2020. (Doc. #75, p. 20.)

For both the **Individual and Plan Fiduciary Duty Classes**, Plaintiffs point to ERISA's six-year statute of repose. (Doc. #65, p. 20.) They contend that ERISA's six-year statute of repose applies to claims "with respect to a fiduciary's breach of any responsibility, duty, or obligation." *Id.*; 29 U.S.C. § 1113. The Individual and Plan Fiduciary Duty Classes seek recovery for "any surcharges made since October 9, 2018." (Doc. #75, p. 21.) For the same reasons as previously discussed, it is unnecessary to conduct an individualized inquiry here and the Court finds that both Fiduciary Duty Classes' claims are timely.

Finally, Plaintiffs argue that the **Plan Terms Violation Class** "uniformly" falls within the limitations period and raises no individualized issues of timeliness. *Id.* Although ERISA allows plans to set a reasonable limitations period within the plan documents, Plaintiffs contend that ERISA's six-year statute of repose governs because "the operative Plan Document was not provided . . . absent a statutory request." (Doc. #65, p. 19); *see Heimeshoff v. Hartford Life & Acc. Ins. Co.*, 571 U.S. 99, 105-06 (2013). Defendant argues this class is time-barred and is not suitable for certification because determining the timeliness of each member's claim requires individualized proof. (Doc. #72, p. 26.)

Upon review, the Court finds that Plaintiffs' Plan Terms Violation Class is not time-barred because ERISA's six-year statute of response is applicable. In particular, the Court agrees with Plaintiffs that "[u]ntil the Plan document was produced in litigation, Plaintiffs had no way to know what the governing terms were. As a result, the limitations period for the Plan Terms Violation Claim could not have started running until Plaintiffs knew or should have known that the Plan Document did not authorize the company's tobacco surcharge." (Doc. #65, p. 19 fn. 11.) Consequently, all claims brought by this Class are timely. The relevant limitations period began with Defendant's adoption of the tobacco surcharge in 2016 and spans to the present. For

these reasons, and the additional reasons stated by Plaintiffs, the Court rejects Defendant's arguments that the Plan Terms Violation Class is time-barred and not suitable for class certification.

D. Requirements Under Rule 23(a)

All four proposed Classes raise overlapping facts and issues under Rule 23(a). As a result, the Court addresses all Classes in a single unified analysis rather than undertaking a separate inquiry for each Class. Under Rule 23(a), a proposed class must satisfy four elements: (1) the class is so numerous that joinder of all members is impracticable (numerosity); (2) there are questions of law or fact common to the class (commonality); (3) the claims or defenses of the representative party are typical of the claims or defenses of the class (typicality); and (4) the representative party will fairly and adequately protect the interests of the absent class members (adequacy). Fed. R. Civ. P. 23(a)(1)-(4). Each element is addressed below.

1. Numerosity

Rule 23(a)(1) requires that "the class is so numerous that joinder of all members is impracticable." In determining whether the numerosity requirement is satisfied, "the nature of the action, the size of the individual claims, the inconvenience of trying individual suits, and any other factor relevant to the practicability of joinder is relevant." *Emanuel v. Marsh*, 828 F.2d 438, 444 (8th Cir. 1987), *cert. granted and judgment vacated on other grounds*, 487 U.S. 1229 (1988) (citing *Paxton v. Union Nat. Bank*, 688 F.2d 552, 559–560 (8th Cir. 1982)).

Here, Plaintiffs contend that thousands of individuals paid the challenged tobacco surcharge between 2018 and 2025. (Doc. #65, p. 22.) Due to the size of the group as a whole and the overlap between the Classes, each Class size likely exceeds the numbers previously found sufficient by the Eighth Circuit. *Ark. Educ. Ass'n v. Bd. Of Educ.*, 446 F.2d 763, 765 (8th

Cir. 1971) (20 class members sufficient); *Paxton*, 688 F.2d at 561 (impracticable to join some portion of the 74 class members). Defendant does not dispute the numerosity element.

Consequently, the Court finds the numerosity element is satisfied for all four proposed Classes.

2. Commonality

Rule 23(a)(2) requires that “there are questions of law or fact common to the class.”

“Commonality requires the plaintiff to demonstrate that the class members ‘have suffered the same injury,’” which “does not mean merely that they have all suffered a violation of the same provision of law.” *Wal-Mart*, 564 U.S. at 349–50. The “claims must depend upon a common contention . . . of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke.” *Id.* at 350. Commonality “does not require that every question of law or fact be common to every member of the class . . . and may be satisfied, for example, where the question of law linking the class members is substantially related to the resolution of the litigation even though the individuals are not identically situated.” *Downing v. Goldman Phipps PLLC*, No. 13-206 CDP, 2015 WL 4255342, at *4 (E.D. Mo. July 14, 2015) (quoting *Paxton*, 688 F.2d at 561).

Named Plaintiffs argue that commonality is met because Defendant’s “tobacco surcharge policy is, and at all times relevant was, common to all class members.” (Doc. #65, p. 23.) In addition, whether “the bodies of law (the HIPAA nondiscrimination rule and ERISA’s fiduciary obligations) and the Plan Document this policy violates are uniform to all class members nationwide.” *Id.* Defendant does not dispute commonality.

Upon review, the Court finds the commonality requirement is satisfied for all four proposed Classes. Plaintiffs’ theory of liability is based on common, class-wide tobacco

surcharge documents that were distributed and/or available to all participants. This document-based theory of liability does not require individualized testimony. Moreover, the proposed Classes are limited to those participants who “have in fact paid the surcharge” to remain insured. (Doc. #56, p. 6.) Those participants allegedly suffered a common injury by paying an unlawful fee. Consequently, there are common questions of law and fact.

3. Typicality

Rule 23(a)(3) requires that the “claims or defenses of the representative parties are typical of the claims or defenses of the class.” “The burden of demonstrating typicality is fairly easily met so long as other class members have claims similar to the named plaintiff.” *DeBoer v. Mellon Mortg. Co.*, 64 F.3d 1171, 1174 (8th Cir. 1995) (citing *Paxton*, 688 F.2d at 562). Rule 23(a)(3) “requires a demonstration that there are other members of the class who have the same or similar grievances as the plaintiff.” *Donaldson v. Pillsbury Co.*, 554 F.2d 825, 830 (8th Cir. 1977).

Named Plaintiffs argue that the typicality requirement is satisfied because they “assert the same legal claims against the challenged tobacco surcharge policy as the rest of the class.” (Doc. #65, p. 23.) Plaintiffs’ claims “turn on the uniformly distributed documents describing the tobacco surcharge, the uniformly applicable Plan Document, and application of common federal law to those common facts.” (Doc. #65, p. 23.)

Defendant argues that the Named Plaintiffs’ claims are not typical of the rest of the class because Plaintiffs:

have not shown even basic eligibility for the reward they seek, never enrolled in the tobacco cessation program, never sought a reasonable alternative standard . . . whatever their individual claims may be, they are not typical of Plan participants who are entitled to a reasonable alternative standard, participated in the wellness program, and reviewed the Plan’s documents.

(Doc. #72, p. 7.)

Defendant points out the difference between participants who actually enrolled in the tobacco cessation program and those who did not as evidence that Plaintiffs' claims "turn on numerous individualized issues that make this case unsuitable for class treatment." (Doc. #72, p. 7.) Defendant believes that these factual differences would necessitate individualized inquiries, thus defeating the typicality requirement. *Id.*

Upon review, the Court rejects Defendant's arguments. Even if there are some factual differences to be resolved at a later stage, the Named Plaintiffs' claims are typical of the proposed Classes' claims. "Typical" claims include that Defendant's tobacco surcharge violated ERISA and that Defendant failed to provide adequate notice of a reasonable alternative standard. Therefore, the Court finds that the typicality requirement is satisfied for all four Classes.

4. Adequacy

Rule 23(a)(4) requires that "the representative parties will fairly and adequately protect the interests of the class." The adequacy inquiry examines whether (1) the named plaintiff has any conflicts of interest with the putative class members, and (2) the class representatives will vigorously prosecute the interests of the other class members through qualified counsel.

Amchem Prods., Inc., v. Windsor, 521 U.S. 591, 625 (1997); *Paxton v. Union Nat. Bank*, 688 F.2d 552, 562–63 (8th Cir. 1982).

Named Plaintiffs argue that adequacy is satisfied because "their interests are coextensive with those of proposed class members in establishing Compass Group's violation of law and the governing Plan Document by failing to provide a reasonable alternative standard to avoid the tobacco surcharge and failing to provide notice of the same." (Doc. #65, p. 24.) Named

Plaintiffs decline having an “interest that is antagonistic to, or conflicting with, the interests of the classes.” (Doc. #65, p. 24.) Further, Named Plaintiffs assert a shared interest in showing that Defendant violated ERISA and the governing Plan Document by “failing to provide a reasonable alternative standard to avoid the tobacco surcharge and failing to provide notice of the same.” (Doc. #65, p. 24.) Regarding adequacy of representation, “Plaintiffs have retained qualified attorneys who are experienced in class action litigation” and have conducted “extensive discovery and motion practice in this case.” (Doc. #65, p. 24.)

Defendant first disputes adequacy by raising the same arguments found within the typicality section: that because Named Plaintiffs never enrolled in the tobacco cessation program or sought a reasonable alternative standard, they do not have common interests with the members of the class and are not adequate class representatives. For the same reasons as previously discussed, the Court rejects Defendant’s argument that Named Plaintiffs lack common interests with the putative class members.

Defendant next argues that the “Named Plaintiffs simply have no motive to aggressively pursue the claims urged on behalf of the class” because the Named Plaintiffs “simply did not do the program” or review the Plan documents explaining the wellness program. (Doc. #72, pp. 16-17.) As previously stated, Named Plaintiffs have alleged and presented facts showing that Defendant imposed a tobacco surcharge on them and on putative class members in violation of ERISA and its implementing regulations. Defendant has not shown that a Named Plaintiff’s failure to read the Plan documents would preclude them from suing for violations of ERISA’s notice requirements. In addition, there does not appear to be any conflict of interest between the interests of Named Plaintiffs and the proposed classes. Consequently, the Court finds that Named Plaintiffs have satisfied the adequacy requirement for all four proposed Classes.

E. Requirements Under Rule 23(b)

If Rule 23(a) is satisfied, the party seeking certification “must also satisfy through evidentiary proof at least one of the provisions of Rule 23(b).” *Comcast*, 569 U.S. at 33.

Plaintiffs move for certification of one class under Rule 23(b)(1) and three classes under Rule 23(b)(3). Each rule is discussed below.

a. Rule 23(b)(1)

Plaintiffs move to certify the Plan Fiduciary Duty Class under Rule 23(b)(1). Rule 23(b)(1) allows a class action to be maintained if:

(1) prosecuting separate actions by or against individual class members would create a risk of:

(A) inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class; or

(B) adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests.

Fed. R. Civ. P. 23(b)(1).

Plaintiffs argue that both provisions are satisfied because courts have frequently found both provisions applicable to ERISA plan claims. As to subsection (A), Plaintiffs argue that since Defendant owes fiduciary duties to the Plan, separate lawsuits by individual participants could establish incompatible standards governing Defendant’s conduct. *See Widman v. Am. Century Servs., LLC*, No. 16–CV–00737–DGK, 2017 WL 6045487, at *6 (W.D. Mo. Dec. 6, 2017). As to subsection (B), Plaintiffs argue that adjudication of their claims would be dispositive of the interests of other Plan participants’ claims. Upon review, the Court agrees.

Plaintiffs contend that their breach of fiduciary duty claims are brought on behalf of the Plan and would thus be dispositive of the claims of other class members. Defendant allegedly breached its fiduciary obligations by implementing the tobacco surcharge and by using that money to offset its own costs related to the Plan. Under these circumstances, Plaintiffs' claim for breach of fiduciary duty on behalf of the Plan would likely be dispositive of the claims of other class members. For these reasons, the Court finds the Fiduciary Duty Class satisfies Rule 23(b)(1).

b. Rule 23(b)(3)

Plaintiffs move for class certification of the Statutory Violation Class, Plan Terms Violation Class and Individual Fiduciary Duty Class under Rule 23(b)(3). This rule provides that a class may be certified if the Court finds as follows:

The questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings include:

- (A) the class members' interests in individually controlling the prosecution or defense of separate actions;
- (B) the extent and nature of any litigation concerning the controversy already begun by or against class members;
- (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and
- (D) the likely difficulties in managing a class action.

Fed. R. Civ. P. 23(b)(3)(A)-(D).

1. Common Questions Predominate Individual Questions

“Rule 23(b)(3)’s predominance criterion is even more demanding than Rule 23(a).” *Comcast*, 569 U.S. at 34. “The predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation . . . and goes to the efficiency of a class action as an alternative to individual suits.” *Ebert v. Gen. Mills, Inc.*, 823 F.3d 472, 479

(8th Cir. 2016) (internal citations omitted). “What matters to class certification . . . is not the raising of common questions—even in droves—but rather, the capacity of a classwide proceeding to generate common answers apt to drive the resolution of the litigation.” *Wal-Mart*, 564 U.S. at 350 (quotation marks omitted). The predominance inquiry “asks whether the common, aggregation-enabling, issues in the case are more prevalent or important than the non-common, aggregation-defeating, individual issues.” *Orduno v. Pietrzak*, 932 F.3d 710, 716 (8th Cir. 2019) (citations and quotation marks omitted).

Here, Plaintiffs argue that common questions predominate over individual questions because the focus of the proposed class action is on Defendant’s conduct rather than that of the individual class members. (Doc. #65, pp. 25–26.) Plaintiffs also describe the questions that predominate over each Class. First, with respect to the **Statutory Violation Class**, Plaintiffs argue that each class member’s claim will turn on whether Defendant’s tobacco surcharge policy complied with HIPAA’s nondiscrimination statute, “particularly the requirements that it provide a reasonable alternative standard to tobacco users that offers the full reward and corresponding disclosure requirements.” (Doc. #65, p. 26.) Second, Plaintiffs argue a related question predominates over the **Plan Terms Violation Class**, “which seeks to enforce the terms of the governing Plan Document, which are also uniformly applicable to all class members, and incorporates the same HIPAA nondiscrimination principles imposed by law.” (Doc. #65, p. 26.) Finally, the **Individual Fiduciary Duty Class** members’ claims “will rise or fall based on the company’s disposition of the collected surcharge funds as Plan assets . . . and whether that uniform treatment complies with ERISA’s fiduciary obligations.” (Doc. #65, p. 27.)

In response, Defendant argues that individual questions swamp the class and “liability would devolve into a series of participant-by participant determinations” on a variety of matters,

including “smoking status, eligibility, notice, participation decisions, and requests for alternative standards.” (Doc. #72, p. 7.) In the alternative, Defendant requests certification of all Classes under 23(b)(1) rather than (b)(3) based on Plaintiffs’ position that “the core issue in this case is the plan wide legality of the wellness program.” (Doc. #73, p. 8.)

Upon review, the Court finds the predominance factor is satisfied for the proposed Classes. Any individualized inquiries do not override the predominate commonality of the class-wide documents Defendant distributed and/or made available to all participants. Because Plaintiffs and the putative class members also allegedly paid the tobacco surcharge, the nature of the relief sought also predominates over any individual questions. Even if this action “will necessitate a degree of individual inquiries into the harm suffered by class members, common issues relating to Defendants’ adoption, implementation, and enforcement of the [tobacco surcharge] still predominate[.]” *Cope v. Let’s Eat Out, Inc.*, 354 F. Supp. 3d 976, 991 (W.D. Mo 2019).

2. Class Certification is the Superior Method to Adjudicate This Case

Rule 23(b)(3) also requires that a class action be “superior to other available methods for fairly and efficiently adjudicating the controversy.” Fed. R. Civ. P. 23(b)(3). When evaluating superiority, the Court considers: (1) the class members’ interest in individually controlling separate actions; (2) the extent and nature of existing litigation by class members; (3) the desirability of concentrating claims in the particular forum; and (4) likely difficulties in managing a class action. Fed. R. Civ. P. 23(b)(3).

Upon review of the record, the Court finds that the superiority requirement is satisfied. On an individualized basis, the monetary amounts of the tobacco surcharge—\$48 per period—are unlikely to be worth the expense and effort of litigating individual cases. Aggregating these

claims would “achieve economies of time, effort, and expense and allows Plaintiffs an opportunity to join together to pursue Defendant’s alleged ERISA violations. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 615 (1997). Class-wide damages are easily calculable because Defendant’s payroll records identify every tobacco surcharge, the amount deducted, the worker against whom it was assessed, and the date of the deduction. (Doc. #65, p. 28.) Further, as discussed above, Plaintiffs’ claims raise common questions and will involve the same or similar class-wide evidence for all affected participants. Conversely, if class certification is not granted, class members would have to engage in repetitive discovery and the presentation of common evidence.

The Court also cannot discern any difficulties in managing the class action. Because common questions predominate individual questions, “certification will not generate any complexities from a case management perspective.” *Moore v. Ulta Salon, Cosmetics & Fragrance, Inc.*, 311 F.R.D. 590, 624 (C.D. Cal. 2015). Under these circumstances, a class action is the superior method for fairly and efficiently adjudicating the claims brought by the proposed Classes.

For all these reasons, the Court finds the proposed Classes satisfy Rule 23(b)(3).

F. Modifications to the Classes

As discussed above, Named Plaintiffs are former plan participants and therefore lack standing to pursue prospective relief on behalf of the four Classes. However, “[a] court is not bound by the proposed definitions of the class,” and “has the authority to redefine a proposed class in such a way as to allow the class action to be maintained.” *In re Zurn Pex Plumbing Prods. Liability Litig.*, 267 F.R.D. 549, 558 (D. Minn. 2010); *Smith v. Brown & Williamson Tobacco Corp.*, 174 F.R.D. 90, 92 n.2 (W.D. Mo. 1997) (citation omitted). Rule 23(c)(4)

provides that “[w]hen appropriate, an action may be brought or maintained as a class action with respect to particular issues.”

Here, Named Plaintiffs state that if the Court finds they lack standing, “the proper approach would be to cut loose the request for prospective relief, rather than sink the classes outright.” (Doc. #75, p. 19 n.7.) The Court agrees. Because “the [Named P]laintiffs lack standing to bring their claims for prospective injunctive relief . . . the court will exercise its discretion under Rule 23(c)(4) to limit the claims at issue to those for retrospective relief.” *Garthwait*, 2022 WL 1657469, at * 16.

G. Notice Requirements Under Rule 23(c)(2)(B)

For classes certified under Rule 23(b)(3), “the court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort.” Plaintiffs request the Court “instruct the parties to meet and confer regarding a notice plan in accordance with Federal Rule of Civil Procedure 23(c)(2).” (Doc. #65, p. 31.) Defendant’s brief does not discuss the notice requirement. The Court orders the parties to meet and confer to determine agreed upon proper notice procedures regarding the classes certified herein.

IV. CONCLUSION

Accordingly, it is hereby ORDERED that Plaintiffs’ Motion for Class Certification (Doc. #64) is GRANTED IN PART and DENIED IN PART. It is ORDERED that the motion is GRANTED to the following extent:

- (1) the Court hereby certifies the following Classes under Federal Rule of Civil Procedure 23(a), (b)(1), and (b)(3):

(1) Statutory Violation Class—Counts I and II:

All persons within the United States who paid Compass Group’s tobacco surcharge from October 9, 2020, through the date of the class certification order.

(2) Plan Terms Violation Class—Counts V and VI:

All persons within the United States who paid Compass Group’s tobacco surcharge through the date of the class certification order.

(3) Individual Fiduciary Duty Class—Count IV:

All persons within the United States who paid Compass Group’s tobacco surcharge from October 9, 2018 through the date of the class certification order.

(4) Plan Fiduciary Duty Class—Count III:

All persons within the United States who paid Compass Group’s tobacco surcharge from October 9, 2018 through the date of the class certification order.

The foregoing classes are certified only as to Plaintiffs’ claims for retrospective relief.

(2) The following are hereby appointed as class counsel: Stueve Siegel Hanson LLP and McClelland Law Firm, P.C. The following are hereby appointed as Class Representatives: Richard L. Mehlberg and Angela Deibel.

(3) Within twenty-one (21) days from the date of this Order, the parties shall submit a joint proposed Class Notice and Notice Plan regarding the foregoing classes; and

(4) Within twenty-one (21) days from the date of this Order, the parties shall file a joint proposed amended scheduling order.

It is further ORDERED that the motion is DENIED insofar as the Named Plaintiffs request certification of any class to pursue prospective relief.

IT IS SO ORDERED.

Dated: April 9, 2026

/s/ Stephen R. Bough
STEPHEN R. BOUGH
UNITED STATES DISTRICT JUDGE