UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION

ELECTRICAL MEDICAL TRUST, et al., Plaintiffs, v. U.S. ANESTHESIA PARTNERS, INC., et al. Defendants.	Case No. 4:23-cv-04398 **ORAL ARGUMENT REQUESTED**

U.S. ANESTHESIA PARTNERS' CROSS-MOTION TO COMPEL NON-PARTY GALLAGHER BASSETT SERVICES INC. TO COMPLY WITH SUBPOENA

Pursuant to Federal Rule of Civil Procedure 45(d)(2)(B), Defendants in the above-captioned Action—U.S. Anesthesia Partners, Inc., U.S. Anesthesia Partners Holdings, Inc., and U.S. Anesthesia Partners of Texas, P.A. (together, "USAP")—seek an order compelling non-party Gallagher Bassett Services ("Gallagher") to comply with its December 3, 2025 Subpoena (the "Subpoena"). USAP complied with Local Rule 7.1(D) by conferring with Gallagher on December 10, 2025 and January 13, 2026, discussing the Subpoena that is the basis of this Cross-Motion ("Cross-Motion"). *See infra* Cross-Motion, at 13 (USAP's "Rule 7.1 Certificate of Conference"). Instead of meaningfully engaging with USAP or submitting its Responses and Objections ("R&Os")—after having requested an extension—Gallagher filed a Motion to Quash (ECF Nos. 180, 181, "Motion") on January 14, 2026, the day those R&Os were due. In its Opposition memorandum to Gallagher's Motion to Quash (ECF No. 186, "Opposition" or "Opp."), USAP noted that Gallagher filed its Motion in the wrong court. *See* Opp. at 5. Nonetheless, to preserve its rights to cross-move to compel, and because USAP does not object to this Court resolving Gallagher's Motion, USAP hereby files this Cross-Motion before this Court—rather than in the Northern District of Texas, where it would be required to be filed under normal circumstances.

INTRODUCTION

Plaintiffs, two self-funded benefit plans, brought this class-action under the federal antitrust laws against USAP, alleging that USAP engaged in anticompetitive conduct that caused them and other benefit plans to pay supracompetitive prices for anesthesia services in Texas. But Plaintiffs cannot meet their burden to certify a class because each self-funded plan operates through unique, individualized arrangements with third-party administrators, or "TPAs." These TPAs customize the plan's benefits arrangements with payors, providers, and members based on each plan's needs, size, and risk tolerance. As a result, determining whether USAP's alleged conduct injured any self-funded plan, and the extent of any damages (if they exist), requires individualized inquiries into each plan, not common proof. This defeats the commonality and predominance requirements of Rule 23(b)(3).

To support its class-action defenses, USAP seeks discovery from Gallagher, a TPA that serves self-funded plans in Texas. The Subpoena seeks plan-level administrative documents—including administrative services agreements, plan documents, stop-loss insurance policies, claims processing protocols, and regulatory implementation procedures—that Gallagher maintains for its clients. These documents are highly relevant to proving USAP's class certification defense: they will demonstrate that each plan's unique TPA arrangements, varying coverage terms, different risk allocation structures, and individualized regulatory responses create such significant plan-to-plan differences that determining injury and damages requires individualized analysis, thus defeating the predominance requirement of Federal Rule of Civil Procedure 23(b)(3).

Procedurally, Gallagher seeks a "protective order" but it violated Rule 26(c)(1)'s mandatory requirement to certify good-faith conferral.[1] USAP, by contrast, can demonstrate its record of attempting all means possible to avoid involving the Court in this dispute. Substantively, Gallagher's burden claims are hyperbolic—Gallagher estimates 302 million hours of work based on reviewing workers' compensation claims files the Subpoena ***does not even request***.

In response to Gallagher's Motion, USAP cross-moves to compel compliance with the Subpoena. As described below and in the Opposition, USAP made repeated good faith efforts to secure compliance, but to no avail. *See* Opp. at 3. Accordingly, pursuant to FRCP 45(d)(2)(B)(i), USAP asks the Court to compel Gallagher to comply fully with its Subpoena.

BACKGROUND

A. The Parties

USAP is the defendant in the above-captioned putative antitrust class action, *Electrical Medical Trust, et al. v. United States Anesthesia Partners, et al.,* No. 4:23-cv-04398 (S.D. Tex.). Plaintiffs in the same action—Electrical Medical Trust and Plumbers Local Union No. 68 Welfare Fund, both self-funded employee benefit plans ("Plaintiffs")—allege USAP monopolized anesthesia services markets in Houston, Dallas-Fort Worth, and Austin through anticompetitive acquisitions and exclusionary conduct. Plaintiffs seek to certify a class of all entities "who, on or after four years prior to the filing of [the] complaint. . . paid for hospital-only anesthesia services provided in Texas by USAP or its co-conspirators." *See* Am. Compl. (Dkt. 128) ¶¶ 14–15, 133, 135.

[1] As explained in USAP's Opposition, it is insufficient to simply "certify" that Gallagher met and conferred with USAP. Gallagher was required to do so "in good faith," which requires "two-way communication" to "compare views with the goal of resolving the dispute short of judicial intervention." *See* Opp. at 5–6 (citing cases). Failure to do so is a "sufficient reason in itself to deny the motion [to quash]." *Id.* at 5 (quoting *Rogers v. Orleans Par. Sheriff Off.*, 2025 WL 2460267, at *7 (E.D. La. Aug. 27, 2025)).

Gallagher is a third-party administrator ("TPA") that provides claims administration services for health plans, insurers, and self-funded plans throughout Texas. As a TPA, Gallagher performs the critical intermediary functions that self-funded plans require to operate—*e.g.*, processing and adjudicating healthcare claims, establishing and managing provider networks, negotiating reimbursement rates with providers on behalf of plans, implementing regulatory requirements like the No Surprises Act (and its Texas equivalent the Texas SBL), procuring stop-loss insurance, and coordinating benefits across multiple coverage sources. Gallagher's client base includes both fully insured commercial plans and self-funded employer plans across Texas, meaning Gallagher routinely processes claims for anesthesia services—including those provided by USAP—and maintains extensive records concerning how plans structure coverage, what rates plans negotiate, and how TPA-client relationships function in practice.

B. USAP's Asserted Defenses in the Above-Captioned Action

USAP's defense strategy will rely, in part, on Gallagher (and other TPAs') documents to substantiate its claim that class certification should be denied because individualized differences in how self-funded plans structure their TPA relationships defeat the predominance and superiority requirements of Rule 23(b)(3). These documents will show that each plan's relationship with its TPA is unique—customized based on the plan's size, geographic footprint, employee demographics, risk tolerance, and coverage priorities. For example, a multinational employer with 50,000 employees across Texas will negotiate distinct administrative services agreements, stop-loss arrangements, and network structures as compared to a municipal school district with 300 employees in one city. Such individualized arrangements mean that determining whether a plan was harmed by USAP's alleged conduct, and calculating any resulting damages, requires plan-by-plan analysis—not common proof applicable to all class members.

C. USAP's Efforts to Engage with Gallagher Regarding the Subpoena

At the parties' first meeting on December 10, 2025, USAP agreed to extend Gallagher's R&O deadline by nearly a month—until **January 14, 2026**. In the interim, USAP repeatedly attempted to discuss with Gallagher how the parties might work together to facilitate Gallagher's compliance with the Subpoena, including by offering several compromises to various objections. Gallagher did not respond until the eve of its R&O deadline. *See* Opp. at 3. On January 13, 2026, Gallagher met with USAP and relayed that it would submit its R&Os the following day; it did not, and instead filed its Motion. Since then, USAP has reached out to Gallagher twice to see if a resolution could be reached, but Gallagher has not responded. *See id.*

LEGAL STANDARD

"Federal Rule of Civil Procedure 45 explicitly contemplates the use of subpoenas in relation to non-parties and governs subpoenas served on a third party. . . as well as motions to quash or modify or to compel compliance with such a subpoena." *Am. Fed'n of Musicians of the U.S. and Canada v. Skodam Films, LLC*, 313 F.R.D. 39, 42 (N.D. Tex. 2015) (quoting *Isenberg v. Chase Bank USA, N.A.*, 661 F. Supp. 2d 627, 629 (N.D. Tex. 2009)) (cleaned up). Courts routinely compel compliance with valid subpoenas where, as here, a non-party has been properly served but fails to respond, object, or otherwise comply. *See Skodam Films*, 313 F.R.D. at 42.

Rule 26(b)(1) allows parties to "obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case[.]" FED. R. CIV. P. 26(b)(1). "Relevancy is broadly construed, and a request for discovery should be considered relevant if there is 'any possibility' that the information sought may be relevant to the claim or defense of any party." *Camoco, LLC v. Leyva*, 333 F.R.D. 603, 606 (W.D. Tex. 2019) (citation omitted). To evaluate the relevancy and proportionality of the requested discovery, the court considers "the importance of the issues at stake in the action, the amount in controversy, the

parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit." *Kilmon v. Saulsbury Industries, Inc.*, 2018 WL 5800757, at *1 (WD. Tex. Feb. 28, 2018) (quoting FED. R. CIV. P. 26(b)(1)).

To succeed on a Rule 45 motion to compel subpoena compliance, a movant "must establish that the issued subpoena was valid, was properly served, and the recipient of the subpoena failed to respond or otherwise comply." *Kyle on Behalf of Estate of Kyle v. Saiz*, 2022 WL 4280905, at *1 (W.D. Tex. Aug. 4, 2022) (citing *Martin v. Trinity Indus., Inc.*, 959 F.2d 45, 47 (5th Cir. 1992)). Once a court is satisfied that the movant "has made a *prima facie* showing that it issued a valid subpoena [it] may then issue an order requiring the nonparty to either comply with the subpoena [or, *inter alia*] seek protection under Rule 45." *EB Holdings II, Inc. v. Ill. Nat'l Ins. Co.*, 2021 WL 6134783, at *1 (S.D. Tex. Dec. 29, 2021).

ARGUMENT

I. THE COURT SHOULD DENY GALLAGHER'S MOTION TO QUASH AND GRANT USAP'S CROSS-MOTION TO COMPEL

Gallagher does not deny that it possesses documents relevant to the Subpoena. It does not allege it could not obtain and produce these documents if it tried. It simply does not want to. At no point has Gallagher meaningfully attempted to negotiate the scope of the Subpoena, let alone in good faith. The Court should grant USAP's Cross-Motion.

A. The Subpoena Was Valid, Properly Served, and Gallagher Has Failed to Comply with its Mandate

The requested discovery satisfies Rule 26(b)(1)'s requirements: it is relevant to USAP's class certification defense (proving individualized plan variations that defeat predominance), proportional to the needs of this broad antitrust class action, and reasonable in scope (requesting

plan-level business documents for a sample of clients, not individual claim files for all clients). *See* FED. R. CIV. P. 26(b)(1). The Court should compel compliance.

First, under Rule 45, a subpoena is valid if it

> (i) state[s] the court from which it issued; (ii) state[s] the title of the action and its civil-action number; (iii) command[s] each person to whom it is directed to . . . . at a specified time and place . . . produce designated documents, electronically stored information, or tangible things in that person's possession, custody, or control . . . ; and (iv) set[s] out the text of Rule 45(d) and (e).

FED. R. CIV. P. 45(a)(1)(A). The Subpoena here complied with the rule: it (i) stated that it issued from the United States District Court for the Southern District of Texas, *see* Ex. A to Motion, at 2; (ii) stated the underlying title and civil-action number for the above-captioned action, *see id.*; (iii) commanded the production of documents and electronically stored information, *see id.* at 2, 5–17; and (iv) set out the verbatim text of Rule 45(d) and (e), *see id.* at 4. Gallagher did not object to the Subpoena's structure.

Second, the Subpoena satisfied the service requirements of Rule 45. Gallagher accepted service of the Subpoena through counsel via email, and it does not otherwise dispute that service was proper. *See generally* Ex. A to Opp.

Third, to date—Gallagher has refused to meaningfully engage with USAP regarding the Subpoena; instead of serving R&O's and continuing the parties' ongoing discussions or attempting to negotiate the scope of the Subpoena with USAP, Gallagher simply sought to quash. *See generally* Opp. at 5–6. Given that Gallagher seeks a "protective order"—in addition to simply seeking to quash the Subpoena—it was required to meet and confer in good faith. *See Rogers*, 2025 WL 2460267, at *7 ("[B]ecause [plaintiff] has filed a motion for protective order in conjunction with her motion to quash, she is required to comply with Rule 26(c)(1)'s meet-and-

confer and certification requirements.") (citing cases). At no point did Gallagher meaningfully engage with USAP to satisfy this requirement. *See* Opp. at 3, 5–6; *see also infra* at 13.

B. The Requested Documents are Both Relevant and Proportional to the Scope of this Case

The documents sought by the Subpoena are relevant to USAP's class-certification defenses. Courts apply Rule 26(b)(1)'s proportionality analysis by considering "the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit." *Kilmon*, 2018 WL 5800757, at *1 (quoting FED. R. CIV. P. 26(b)(1)). Here, each factor weighs in favor of production.

1. USAP Seeks Highly Relevant Documents

Plaintiffs seek to certify a class of self-funded employee benefit plans that allegedly paid supracompetitive prices for USAP's anesthesia services in Texas. To certify a class under Rule 23(b)(3), plaintiffs must prove that "questions common to the class members predominate over questions affecting only individual members" and that "class resolution is superior to alternative methods for adjudication of the controversy." *Gambrill v. CS Disco, Inc.*, 2025 WL 3771433, at *4 (W.D. Tex. Dec. 16, 2025) (quoting *Elson v. Black*, 56 F.4th 1002, 1006 (5th Cir. 2023)). USAP's defense in this regard is straightforward: each self-funded plan operates through unique, individualized arrangements with its plan and TPA that make class treatment inappropriate.

As noted above, self-funded plans do not negotiate coverage themselves; they engage TPAs like Gallagher to handle that process. The documents USAP seeks will demonstrate that Gallagher customizes these arrangements for each client based on that client's specific circumstances, and

that these differences are not cosmetic—they fundamentally affect how each plan experiences (and responds to) alleged overcharges.

For example, **Administrative Services Agreements** (Requests 1-4(a)) will show the bespoke nature of each TPA-client relationship, including what services Gallagher provides, how claims are processed, what authority Gallagher has to negotiate rates, and how disputes are resolved. **Stop-Loss Insurance Documents** (Requests 1-4(i)) reveal each plan's risk tolerance: plans with low attachment points bear less financial exposure to high anesthesia costs and have different incentives to challenge rates than plans with high attachment points or aggregate-only coverage. That is, plans with high insurance coverage will pay less in damages for any alleged supracompetitive prices in anesthesia services—further demonstrating individualization in plan negotiation and any potential damages.

Summary Plan Descriptions and Plan Documents (Requests 1-4(b), (j)) show varying coverage terms, exclusions, and cost-sharing arrangements that directly impact what each plan paid and whether it was harmed. A plan that excludes certain anesthesia services or requires high patient cost-sharing experiences alleged overcharges differently than a plan with comprehensive coverage and low deductibles. **No Surprises Act ("NSA") Implementation Protocols** reveal how different plans responded to 2021 federal (and state) surprise billing protections. The NSA created an independent dispute resolution process for out-of-network claims. Some plans (through their TPAs) aggressively used independent dispute resolution ("IDR") to contest anesthesia charges, potentially recovering alleged overcharges or preventing them entirely. Other plans accepted initial payment determinations without dispute. This variation means alleged harm differs by plan based on how each implemented federal protections—another individualized issue defeating commonality.

2. Any Data Privacy Concerns are Addressed by the Protective Orders

Inversely, any data privacy or "confidentiality" concerns Gallagher may have are obviated by the comprehensive protective orders entered by this Court in the above-captioned action.[2] For example, USAP and the FTC have successfully exchanged dozens of terabytes of sensitive data under substantially identical protective orders in the parallel FTC administrative proceeding—*In the Matter of U.S. Anesthesia Partners, Inc., et al.*, FTC Docket No. 9344. That case involves the same alleged conduct, the same markets, and the same competitive concerns, yet the parties have produced and reviewed massive volumes of confidential business information, competitively sensitive pricing data, and proprietary strategic documents without incident. USAP provided Gallagher with the protective orders in conjunction with the Subpoena. The orders allow Gallagher to designate documents as Confidential or Highly Confidential, and thereby limit who can review those documents. Confidentiality is therefore no reason to excuse Gallagher's obligation to produce documents responsive to the Subpoena. *See generally* Opp. at 7.

3. The Subpoena's Proportionality is Evident Under Rule 26(b)(1)

Finally, the proportionality analysis strongly favors production. This is a complex antitrust class action. The discovery goes to threshold issues—class certification in particular—that will determine the case's trajectory.

C. The Court Should Order Gallagher to Comply with the Subpoena

USAP seeks Gallagher's documents for a simple purpose: to substantiate its defense against class certification (namely, that variations in plan language require individualized inquires,

[2] To the extent Gallagher Bassett has concerns about HIPAA, USAP notes that HIPAA explicitly permits disclosure of protected health information in response to lawful subpoenas (45 C.F.R. § 164.512(e)), particularly where protective orders are in place. Gallagher can and should redact individual patient names or other direct patient identifiers if present, but plan-level information, aggregate claims data, and administrative documents are not restricted by HIPAA. *See* Opp. at 7.

defeating commonality). Just last week, a New Jersey District Court reached a similar conclusion in an ERISA action against United Healthcare. *See Tamburrino v. United Healthcare Ins. Co.*, No. 21-12766 (D.N.J. Jan. 28, 2026) ("This Court cannot determine which plans reserve discretion without reviewing the plan language of each members' plan . . . determining which standard of review applies to each plan would require an individualized, fact-specific inquiry, as this Court would have to review each individual plan . . . .") (Order attached as **Exhibit A**).

Gallagher has offered no excuse—adequate or otherwise—for its refusal to comply with USAP's Subpoena. Courts routinely compel compliance in such circumstances where, as here, counsel has refused to respond to repeated attempts to engage via email, phone, and letter. *See e.g., Folkenflik v. Chapwood Cap. Inv. Mgmt., LLC*, 2020 WL 9936142, at *1 (E.D. Tex. June 5, 2020) (ordering compliance with subpoena under similar circumstances). USAP seeks the same remedy.

CONCLUSION

For the foregoing reasons, USAP respectfully requests that this Court issue an order: a) granting USAP's Cross-Motion to Compel; b) granting USAP's reasonable attorneys' fees and costs associated with bringing this Cross-Motion; and c) any such other and further relief as the Court deems appropriate.

DATED: February 4, 2026

Respectfully submitted,

/s/ *Julianne Jaquith*

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RULE 7.1 CERTIFICATE OF CONFERENCE

I hereby certify that I spoke with counsel for Gallagher on two separate occasions regarding the above-described Subpoena—on December 10, 2025, and then again on January 13, 2026. My colleague Aseem Chipalkatti joined me on both calls. During our first such meeting, I agreed to extend Gallagher's deadline to submit R&Os to the Subpoena until January 14, 2026, on the condition that—during that interim period—Gallagher would engage in good faith towards a January production of documents. Counsel for Gallagher agreed. Over the next 30 days, USAP reached out on multiple occasions to schedule a meeting and check in to see if progress was being made on the Subpoena, but we were not able to schedule a phone call with Gallagher's counsel

until January 13, 2026. During that phone call, counsel bluntly informed me that Gallagher could not comply with USAP's Subpoena because it had no way of identifying the number of beneficiaries for each client, as requested by USAP's subpoena. I responded by suggesting several ways in which we could help Gallagher with that endeavor, but none were agreeable to Gallagher. Gallagher's counsel informed me that she would file R&Os for her client and then we could speak again, but I was never able to reach Gallagher's counsel after that phone conversation, despite several attempts to do so. I expected to continue our discussions after Gallagher submitted its R&Os on January 14, but it instead filed the Motion to Quash, which is why negotiations failed.

DATED: February 4, 2026 */s/ Alexander S. Allred*

CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of February, 2026, I caused to be filed the foregoing Cross-Motion to Compel with the Court through ECF filing, which caused a copy to be sent to all counsel of record.

/s/ *Alexander Allred*

EXHIBIT A

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

JOSEPH F. TAMBURRINO, M.D., as an assignee and authorized representative of his patient L.K., and BARBARA WILLIAMS, on behalf of themselves and on behalf of all others similarly situated, Plaintiffs, v. UNITED HEALTHCARE INSURANCE COMPANY, Defendant.	Civil Action No. 21-12766 (SDW) (LDW) **OPINION** January 28, 2026

WIGENTON, District Judge.

Before this Court is Plaintiff Barbara Williams's ("Plaintiff") Motion for Class Certification (D.E. 119 ("Mot.")) pursuant to Federal Rule of Civil Procedure ("Rule") 23. Jurisdiction is proper pursuant to 28 U.S.C. § 1331 and 29 U.S.C. § 1132(e). Venue is proper pursuant to 28 U.S.C. § 1391(b) and 29 U.S.C. § 1132(e). This opinion is issued without oral argument pursuant to Rule 78 and Local Civil Rule 78.1. For the reasons stated herein, Plaintiff's Motion is **DENIED.**

I. FACTUAL AND PROCEDURAL BACKGROUND[1]

[1] This Court also incorporates the background sections from its opinions dated April 25, 2022, and January 26, 2023. (D.E. 35 at 1–3 ("April 25 Opinion"); D.E. 51 at 1–2 ("January 26 Opinion")).

Plaintiff's Motion arises out of her claim that Defendant denied coverage to herself and all of the putative class members because of its application of a denial policy that relies on inapplicable Medicare billing and coding guidelines. Specifically, Plaintiff contends that Defendant relied on Medicare billing and coding guidelines, rather than using HCPCS S2068, the billing code created for DIEP flap microsurgery.

Plaintiff is enrolled in a health insurance plan governed by the Employee Retirement Income Security Act ("ERISA") and allegedly administered by Defendant. On September 24, 2018, Drs. Taylor Theunissen and Alireza Sadeghi performed, as co-surgeons, a post-mastectomy delayed bilateral breast reconstruction with deep inferior epigastric perforator ("DIEP") flap microsurgery on Plaintiff. (D.E. 37 ¶ 51.) After the surgery, Drs. Theunissen billed Defendant for the services he rendered. (*Id.* ¶¶ 52-53.) Defendant denied reimbursement for services performed by Drs. Theunissen and Sadeghi because they operated as co-surgeons. (*Id.*) Dr. Theunissen appealed Defendant's decision, but Defendant upheld the denial. (*Id.* ¶¶ 54-57.)

On June 21, 2021, then-named Plaintiffs[2], Dr. Joseph Tamburrino and Dr. Theunissen, instituted this putative class action challenging then-named Defendants alleged "uniform claim processing and reimbursement policy that denies coverage to United members whose plastic surgeons perform DIEP flap microsurgery as either assistant surgeons or as co-surgeons."[3] (D.E. 1 ¶ 6.) Defendants moved to dismiss the original complaint. (D.E. 11.) In response, Plaintiffs

[2] The original Complaint and First Amended Complaint ("FAC") named as plaintiffs Drs. Joseph Tamburrino and Taylor Theunissen. (D.E. 1, 28.) The named plaintiffs in the Second Amended Complaint were Dr. Tamburrino and Barbara Williams. (D.E. 37.)

[3] The original Complaint and FAC named as defendants the following six entities: United Healthcare Insurance Company, UnitedHealth Group Inc., United Healthcare Services, Inc., United Healthcare Service LLC, Oxford Health Plans, LLC, and Oxford Health Insurance, Inc. (D.E. 1, 28.) The sole defendant named in the SAC is United Healthcare Insurance Company. (D.E. 37.)

opposed Defendants' motion and cross-moved for leave to file an amended complaint, (D.E. 25), which this Court granted, (D.E. 26).

On October 11, 2021, the same Plaintiffs filed a three-count First Amended Class Action Complaint ("FAC") alleging wrongful denial of benefits under 29 U.S.C. § 1132(a)(1)(B) (Count I), a claim for equitable relief under 29 U.S.C. § 1132(a)(3)(A) (Count II), and a claim for equitable relief under 29 U.S.C. § 1132(a)(3)(B) (Count III).[4] (*See generally* D.E. 28.) On November 10, 2021, the same then-named Defendants again moved to dismiss all of Dr. Theunissen's claims, all claims against UnitedHealth Group Inc., United Healthcare Services, Inc., United Healthcare Service LLC, Oxford Health Plans, LLC, and Oxford Health Insurance, Inc., and Counts II and III. (D.E. 31.) On April 25, 2022, this Court granted Defendants' motion to dismiss and specifically provided Plaintiffs with "one final opportunity to amend the complaint" to cure the deficiencies therein. (D.E. 35 at 12.)

On May 25, 2022, Plaintiffs Dr. Tamburrino and Barbara Williams filed the Second Amended Complaint ("SAC"), in which they allege the same three counts as in the FAC against only Defendant United Healthcare Insurance Company. (D.E. 37.) On June 22, 2022, Defendant moved to partially dismiss the SAC because Plaintiffs failed to adequately plead a breach of fiduciary duty by Defendant or any other theory of liability that would warrant additional equitable relief under Section 502(a)(3) (Counts II and III). (D.E. 42.) On January 26, 2023, this Court issued an Opinion granting Defendant's partial motion to dismiss and dismissed Counts II and III with prejudice. (D.E. 51.) On November 14, 2024, Dr. Tamburrino voluntarily dismissed his claims against Defendant, leaving Plaintiff Williams as the sole plaintiff and proposed class representative. (D.E. 103.) On July 1, 2025, Plaintiff filed the instant Motion to certify this case

[4] Hereinafter, 29 U.S.C. § 1132(a) will be referred to as ERISA § 502(a).

to proceed as a class action pursuant to Rule 23(b)(1) or (2). (*See* D.E. 119 and D.E. 120.) Plaintiff seeks to certify the following class:

> All people in the United States who were a member of a health benefit plan governed by ERISA (a) whose request for coverage for DIEP Flap surgery was denied by UHIC on or after June 21, 2015; where (b) such denial was based on UHIC's Co-Surgeons/Team Surgeon Policy, Assistants-at-Surgery Policy, or UHIC's Breast Reconstruction Policy; and (c) such denial was not reversed on administrative appeal.

The parties timely completed briefing.

II. LEGAL STANDARD

A "party proposing class-action certification bears the burden of affirmatively demonstrating by a preponderance of the evidence ... compliance with the requirements of Rule 23." *Byrd v. Aaron's Inc.*, 784 F.3d 154, 163 (3d Cir. 2015), *as amended* (Apr. 28, 2015) (citing *Comcast Corp. v. Behrend*, 569 U.S. 27, 33 (2013)). Specifically, "every putative class action must satisfy the four requirements of Rule 23(a) and the requirements of either Rule 23(b)(1), (2), or (3)." *Marcus v. BMW of N. Am., LLC*, 687 F.3d 583, 590 (3d Cir. 2012). Under Rule 23(a), a class may be certified only if:

> (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class.

Fed. R. Civ. P 23(a)(1)–(4). These requirements are, respectively, referred to as the numerosity, commonality, typicality, and adequacy requirements. *See*, *e.g.*, *Marcus*, 687 F.3d at 590–91. Under Rule 23(b)(2), a class action may be maintained if "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). Additionally, under Rule 23(b)(2), a plaintiff must show the class claims are cohesive among the class members. *See Gates v. Rohm & Haas Co.*, 665 F.3d 255, 263-64 (3d Cir. 2011).

III. DISCUSSION

A. Numerosity

A party seeking class certification must show that "the class is so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). "No minimum number of plaintiffs is required to maintain a suit as a class action, but generally if the named plaintiff demonstrates that the potential number of plaintiffs exceeds 40, the first prong of Rule 23(a) has been met." *Stewart v. Abraham*, 275 F.3d 220, 226–27 (3d Cir. 2001). Plaintiff alleges the numerosity requirement is satisfied because discovery revealed thousands of claims that were denied due to Defendant's reimbursement policy at issue. (D.E. 120 ("Mov. Br.") at 32.) Defendant does not dispute whether Plaintiff satisfies the numerosity requirement. Accordingly, the numerosity requirement is satisfied because the claims data produced by Defendant demonstrates a sufficient number of potential plaintiffs.

B. Commonality

Plaintiff states that several questions of law and fact are common to all class members. Specifically, Plaintiff alleges common issues are: (1) whether Defendant maintained uniform surgical team policies that resulted in systemic denials of covered claims; (2) whether Defendant's policy violates ERISA; and (3) whether Defendant's denial of coverage for assistants-at-surgery and co-surgeons violates the terms of the plans at issue. (Mov. Br. at 34.) In response, Defendant asserts that Plaintiff fails to satisfy the commonality requirement because the alleged class-wide injury cannot be resolved without individualized inquiries because of variations in plan language.

(D.E. 123 ("Opp. Br.") at 30.) Plaintiff counters that the variations in plan language are immaterial because the class members suffered the same injury and were deprived of the coverage promised in their plan documents. (D.E. 126 ("Reply Br.") at 5, 16.)

Rule 23(a) requires that Plaintiff identify "questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). The commonality requirement is met "if the named plaintiffs share at least one question of fact or law with the grievances of the prospective class." *In re Schering Plough Corp. ERISA Litig.*, 589 F.3d 585, 596–97 (3d Cir. 2009) (citing *Baby Neal v. Casey*, 43 F.3d 48, 56 (3d Cir. 1994)). However, the claims of the class members " 'must depend upon a common contention ... [which] must be of such a nature that it is capable of class-wide 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.' " *Mielo v. Steak 'n Shake Operations, Inc.*, 897 F.3d 467, 489 (3d Cir. 2018) (quoting *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 349-50 (2011)) (emphasis added).

Here, importantly, Plaintiff seeks class certification to pursue her claims for benefits under ERISA § 502(a)(1)(B). To assert a claim under ERISA § 502(a)(1)(B), a plan participant must demonstrate that "he or she ... ha[s] a right to benefits that is legally enforceable against the plan," and that the plan administrator improperly denied those benefits. *Fleisher v. Standard Ins. Co.*, 679 F.3d 116, 120 (3d Cir. 2012). The Supreme Court has held that "a denial of benefits challenged under [ERISA] is to be reviewed under a de novo standard unless the benefit plan gives the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan." *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 115 (1989). If the plan gives the administrator or fiduciary discretionary authority to make eligibility determinations, a court reviews its decisions under an abuse-of-discretion (or arbitrary and capricious) standard.

Viera v. Life Ins. Co. of N. Am., 642 F.3d 407, 413 (3d Cir. 2011) (citing *Metro. Life Ins. Co. v. Glenn*, 554 U.S. 105, 111 (2008)). "Whether a plan administrator's exercise of power is mandatory or discretionary depends upon the terms of the plan." *Luby v. Teamsters Health, Welfare, & Pension Trust Funds*, 944 F.2d 1176, 1180 (3d Cir. 1991). Therefore, to determine whether the plan administrator improperly denied benefits, a court must determine the applicable standard of review.

This Court agrees with Defendant that the question of which standard of review applies to the members' plan cannot be resolved on a class-wide basis and as such, Plaintiff fails to satisfy the commonality requirement. Courts in this district have found that a proposed class fails to satisfy the commonality requirement when a court is required to engage in individualized inquiries to resolve the class members' claims. *See e.g.*, *Lipstein v. UnitedHealth Grp.*, 296 F.R.D. 279, 288 (D.N.J. 2013) (finding that no single common answer could possibly answer the class members' claims because the court would need to make individual determinations after analyzing each plan's language and potentially other evidence relevant to each claim); *see also Wragg v. Ortiz*, 462 F. Supp. 3d 476, 515 (D.N.J. 2020) (stating that plaintiffs failed to satisfy the commonality requirement because the court would be required to engage in an intensive, multi-step, individualized inquiry as to whether each prisoner met criteria for conditional release). Here, this Court cannot determine which plans reserve discretion without reviewing the plan language of each members' plan, and Plaintiff offers no method of identifying plans that reserve discretion on a class-wide basis. As such, determining which standard of review applies to each plan would require an individualized, fact-specific inquiry, as this Court would have to review each individual plan to ascertain which plans reserve discretion and how far that discretion extends.

Although Plaintiff contends that the variations in plan language are immaterial, the difference in whether this Court should apply a de novo, arbitrary and capricious, or a more deferential standard of review could materially impact the outcomes of each class member's claim. Accordingly, the claims of the class members cannot be resolved in a single stroke and Plaintiff fails to establish the Rule 23(a) prerequisite of commonality. *See Mielo v. Steak 'n Shake Operations, Inc.*, 897 F.3d 467, 489 (3d Cir. 2018) (stating that class members' claims must "depend upon a common contention" that "is capable of class wide resolution ... in one stroke) (internal citation omitted). Therefore, Plaintiff's Motion for Class Certification is denied. *See Marcus v. BMW of N. Am., LLC*, 687 F.3d 583, 590 (3d Cir. 2012) ("[E]very putative class action must satisfy the four requirements of Rule 23(a) . . ."). Notwithstanding, this Court shall address the remaining factors.

C. Typicality

Typicality requires that "the claims or defenses of the representative parties are typical of the claims or defenses of the class." Fed. R. Civ. P. 23(a)(3). This requirement "ensur[es] that the class representatives are sufficiently similar to the rest of the class—in terms of their legal claims, factual circumstances, and stake in the litigation—so that certifying those individuals to represent the class will be fair to the rest of the proposed class." *In re Schering Plough Corp. ERISA Litig.*, 589 F.3d 585, 598 (3d Cir. 2009) (citations omitted). In determining whether the typicality requirement for class certification is satisfied, courts must address three concerns:

> (1) the claims of the class representative must be generally the same as those of the class in terms of both (a) the legal theory advanced and (b) the factual circumstances underlying that theory; (2) the class representative must not be subject to a defense that is both inapplicable to many members of the class and likely to become a major focus of the litigation; and (3) the interests and incentives of the representative must be sufficiently aligned with those of the class.

Marcus v. BMW of N. Am., LLC, 687 F.3d 583, 598 (3d Cir. 2012) (citing *Schering Plough*, 589 F.3d at 597-99). "It is well-established that a proposed class representative is not 'typical' under Rule 23(a)(3) if 'the representative is subject to a unique defense that is likely to become a major focus of the litigation.' " *Schering Plough*, 589 F.3d at 598 (quoting *Beck v. Maximus, Inc*., 457 F.3d 291, 301 (3d Cir. 2006)).

Plaintiff asserts that she satisfies the Rule 23(a)(3) typicality requirement because Plaintiff makes the same legal argument and alleges the same unlawful conduct as putative class members. (Mov. Br. at 30.) Defendant contends that Plaintiff fails to satisfy Rule 23(a)(3)'s typicality requirement because there are defenses applicable to the class that may not be applicable to Plaintiff. (Opp. Br. at 29-32.) Specifically, Defendant highlights that the variety of limitation periods in members' plans demonstrate that some class members' claim may be untimely. (*Id.*)

Here, Plaintiff seeks to certify a class dating back to June 21, 2015. However, as demonstrated by the sample claims[5], there is a wide variety of limitation periods amongst the members' plans, ranging from a three-year limitation period to a one-year limitation period. Consequently, several class members' claims would be time barred. Despite the time-barred claims, Plaintiff argues that statute of limitation issues do not defeat typicality. However, the Third Circuit has highlighted that statute of limitation issues overlap with certain Rule 23 requirements; and may preclude a finding of typicality where the proposed class includes numerous class members with untimely claims, thereby rendering the named plaintiff's timely claims atypical. *See In re Cmty. Bank of N. Virginia*, 622 F.3d 275, 293 (3d Cir. 2010). Based on the sample claims

[5] In response to Plaintiff's claims, Defendant produced claims data for the time period of January 2018 to July 2023 that contained claims for ERISA plans whose members submitted claims for DIEP flap microsurgery under the HCPCS S2068 code with co-surgeon or assistant surgeon modifiers. From the produced claims data, the parties agreed upon a sample of 30 DIEP flap microsurgery claim denials, including Plaintiff, as the "Member Sample."

and thousands of putative class members, it is likely that the numerous class members with untimely claims could render Plaintiff's timely claims atypical. Regardless, this Court need not render a decision on this element because certification is denied on other dispositive grounds.

D. Adequacy

To show adequacy, the named plaintiffs must show that they will "fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). This inquiry is twofold. First, "the named plaintiffs' interests must be sufficiently aligned with the interests of the absentees." *Beneli v. BCA Fin. Servs., Inc.*, 324 F.R.D. 89, 98 (D.N.J. 2018) (citing *In re General Motors*, 55 F.3d 768, 800 (3d Cir. 1995)). Second, "the plaintiff's counsel must be qualified to represent the class." *Id.* "The party challenging representation bears the burden of proving the representation is not adequate." *In re Prudential Ins. Co. of Am. Sales Practices Litig.*, 962 F. Supp. 450, 519 (D.N.J. 1997).

Here, Defendant raises significant concerns regarding Plaintiff's ability to serve as class representative. First, Defendant highlights that the relief sought by Plaintiff, reprocessing of claims, may be harmful to some class members as they could be worse off financially while providers may be better off financially. (Opp. Br. at 41.) Second, Defendant points to Plaintiff's sworn deposition testimony where Plaintiff expressed doubts or an unwillingness to serve as a class representative. (*Id.* at 43.) Plaintiff counters that Defendant's arguments are speculative and mischaracterizes Plaintiff's testimony. (Reply Br. at 18.) While there may be issues concerning Plaintiff's ability to adequately protect the interests of the class, this Court need not reach a decision at this time, as certification is denied on other grounds.

E. Rule 23(b) Requirements

This Court need not address whether Plaintiff has met the requirements of Rule 23(b), because Plaintiff has not met the prerequisite requirements of Rule 23(a).

IV. CONCLUSION

For the reasons stated above, Plaintiff's Motion for Class Certification is **DENIED**. An appropriate order follows.

/s/ Susan D. Wigenton
SUSAN D. WIGENTON, U.S.D.J.

Orig: Clerk
cc: Parties
Leda D. Wettre, U.S.M.J.