IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF INDIANA
EVANSVILLE DIVISION

LYNNETTE J. KAISER, et al., Plaintiffs, v. ALCOA USA CORP., et al., Defendants.	No. 3:20-cv-278-RLY-MPB

DEFENDANTS' RESPONSE TO
PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

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INTRODUCTION

Plaintiffs are two unions and one individual claiming that Alcoa USA Corp. ("Alcoa") has violated the rights of over 3,000 of its retirees and their eligible spouses and dependents by implementing certain changes to their supplemental healthcare benefits last year. Plaintiffs contend that the retirees, spouses, and dependents are entitled to vested healthcare coverage that cannot be changed under the terms of collective bargaining agreements ("CBAs") and plan documents negotiated between Alcoa and the unions. They seek to litigate the rights of all of these individuals together, and are asking the Court to certify a broad class against Alcoa of all affected retirees and eligible spouses and dependents nationwide who retired over nearly a 30-year period. However, the required "rigorous analysis" shows that Plaintiffs have failed to carry their burden to show that their claims can "in fact" be adjudicated on a classwide basis. *Wal-Mart v. Dukes*, 564 U.S. 338, 350 (2011).

At the center of Plaintiffs' case is their contention that Alcoa breached its labor agreements with the unions, but that claim is incapable of classwide resolution because the retirees in the proposed class retired under numerous different CBAs negotiated separately over 30 years across 48 different facilities nationwide. Plaintiffs have not identified any agreements that expressly provide for vested retiree healthcare benefits beyond the duration of the CBAs. Thus, the Court will have to analyze and interpret each CBA to determine if any of them provide a vested benefit to persons who retired during the term of that contract, and whether the changes implemented by Alcoa breached that commitment. Plaintiffs have not shown this is possible on a classwide basis, and they have identified only a small fraction of the applicable CBAs. Instead, they ask the Court to simply assume that all of the documents contain identical language granting them vested benefits. But it is well settled that Plaintiffs cannot plead their way to certification.

Furthermore, the classwide injunctive relief sought by Plaintiffs presents a significant conflict of interest between them and the class they seek to certify. Despite Plaintiffs' repeated efforts to paint it as such, this is not a termination of benefits case. The majority of retirees, eligible spouses, and dependents were transitioned by Alcoa from a fixed group plan to individual private insurance plans under a Health Reimbursement Account ("HRA") program. Extensive research and analysis determined that almost all retirees and eligible spouses would receive ***better*** healthcare coverage under the HRA program by tailoring their coverage based on their unique healthcare needs. Over the past year, the putative class members have been using their HRA contributions to purchase individual medical, drug, vision, and dental plans reflecting their particular circumstances. Yet Plaintiffs are asking the Court to dismantle the HRA program and force everyone back onto the prior fixed group plan—regardless of whether any would prefer to keep the superior healthcare coverage offered by the HRA program. The law is clear that an injunctive class cannot be certified when some members benefit from the same conduct from which other members claim harm. For these and other reasons, this case cannot be tried on a classwide basis and Plaintiffs' motion should be denied.

FACTUAL BACKGROUND

I. In 2021, Alcoa transitioned certain hourly retirees, eligible spouses, and dependents from a fixed group healthcare plan to individual plans under an HRA program.

For years, Alcoa sponsored a fixed group healthcare plan that offered Medicare-eligible retirees and their eligible spouses and dependents supplemental Medicare coverage (the "Fixed Group Plan").[1] Ex. 1, Decl. of Tiffany Ackerman ¶ 2 ("Ackerman Decl."). In recent years, the

[1] Like most Americans, the primary source of health insurance for most of Alcoa's retirees who are age 65 or older is Medicare, but it does not cover all health-related expenses, resulting in a private insurance market for supplemental Medicare coverage. Ackerman Decl. ¶ 2.

individual Medicare market has undergone profound changes, resulting in increasing options and savings for retirees and former employers compared to traditional group plans. *Id.* ¶ 3. In light of these benefits, Alcoa retained a consulting firm to determine whether Alcoa could provide its retirees equivalent coverage through the individual market. *Id.* Alcoa determined that the vast majority of retirees could receive substantially equivalent—and in most cases, ***superior***—coverage at lower costs to retirees and Alcoa by transitioning to individual plans, depending on where they live and what plans are offered in their area. *Id.* ¶¶ 4-6.

Alcoa made the decision to transition certain hourly retirees, surviving spouses, and dependents from the Fixed Group Plan to individual plans effective January 1, 2021. *Id.* ¶ 7. Under the new arrangement, Alcoa provides funds through an annual HRA contribution. *Id.* Individuals use the HRA funds, which are tax-free, to purchase their own healthcare plan through an insurance exchange secured and identified by Alcoa. *Id.* The retirees can use the funds to pay for any qualified medical expense, such as their plan premiums or out-of-pocket medical costs such as a deductible or copayment. *Id.* Any unused HRA funds roll-over each year and can be used in the future. *Id.* The annual HRA contributions of the putative class members for the 2021 plan year varied from $2,500 to $3,400, depending on where a retiree was employed and when they retired. *Id.* ¶ 15. These amounts were derived from the Fixed Group Plan costs and the lower cost of coverage available to retirees on the individual market. *Id.* Alcoa increased the contribution for every putative class member to $3,400 for the 2022 plan year. *Id.*

Because participating in the HRA program requires a retiree to actively enroll and purchase individual plans on an insurance exchange with HRA funds, Alcoa took steps to assist its retirees and their eligible spouses with the enrollment process and engaged Via Benefits, the nation's largest private Medicare exchange that helps retirees find and purchase benefits. *Id.* ¶ 8.

Beginning in August 2020, Via Benefits and Alcoa sent multiple communications to retirees and eligible spouses explaining the upcoming changes, urging them to take action and work with Via Benefits to transition from the Fixed Group Plan to the new HRA program, and providing them with information to evaluate, choose, and enroll in new individual plans.[2] *Id.* ¶ 9.

II. The USW and one individual sued Alcoa to dismantle the HRA program.

On December 10, 2020, the unions USW and ATC (together, the "USW") ,[3] one retiree,[4] and one spouse of a deceased retiree filed this putative class action against Alcoa alleging that the transition from the Fixed Group Plan to the HRA program violates a series of CBAs and plan documents negotiated between Alcoa and the USW, as well as unspecified "other promises" provided by Alcoa to retirees. Pls.' Compl. ¶ 8, ECF No. 1. Plaintiffs seek to certify a broad, nationwide class meant to encompass every retiree represented by the USW during their employment, as well as their eligible spouses and dependents:

> All former employees of [Alcoa] who were represented by the [USW], or a predecessor union, together with their eligible spouses, surviving spouses, and other dependents, who as of December 31, 2020 were eligible to receive uncapped health care benefits from Alcoa upon attaining Medicare-eligibility, and whose Alcoa-provided benefits or eligibility for those benefits were terminated as of January 1, 2021.

Pls.' Mot. to Certify Class, ECF No. 81. According to Alcoa's records, there are 3,153 individuals in this proposed class. Ackerman Decl. ¶ 12. By the end of the enrollment period for

[2] Details of Alcoa's outreach efforts are set forth in Alcoa's Response to Plaintiffs' Motion for Preliminary Injunction at 8-10, ECF No. 30. Alcoa also provided the contact information of the putative class members to Plaintiffs' counsel so that they could help reach out to retirees and make sure that any who wanted to could enroll in the HRA program.

[3] The unions' full names are United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO/CLC; and Aluminum Trades Council of Wenatchee, Washington AFL-CIO.

[4] The retiree, Robert W. Simpkins, has since withdrawn as a class representative. ECF No. 80.

the 2021 plan year, a total of 2,091 putative class members enrolled in the HRA program, while 794 affirmatively declined to enroll. *Id.* ¶ 13. Thus, approximately 91.5% of the putative class members either enrolled in the HRA program or affirmatively declined to participate. Despite the joint efforts of Alcoa, Via Benefits, and Plaintiffs to contact them, 268 individuals (8.5% of the putative class) could not be reached and did not enroll. *Id.* ¶ 14. The parties sent a joint communication to these individuals in October 2021 explaining that they could enroll for the 2022 plan year during the next enrollment period (October 15 – December 7, 2021). *Id.* An additional 29 individuals enrolled in this period, bringing the number of putative class members enrolled in the HRA program to 2,120 (approximately 67% of the proposed class). *Id.* Plaintiffs ask the Court to dismantle the HRA program and reinstate the prior Fixed Group Plan for all class members, and also seek damages "to make the class members whole." Pls.' Compl. at 26.

III. The putative class members' rights to benefits are governed by numerous distinct CBAs and plan documents.

The proposed class consists of retirees that worked at and retired from numerous Alcoa facilities across the country over several decades. As retirees, their rights to healthcare benefits are governed by the terms of expired CBAs—that is, "the [CBAs] in place when the Class Member retired, or, in the case of dependents, when the employee through whom the dependent receives their coverage retired or died," as well as bargained summary plan descriptions ("SPDs"). *Id.* ¶ 23. Together, the retirees in the proposed class worked at and retired from 48 different Alcoa facilities. Ackerman Decl. ¶ 18. Each facility is represented by a Local Union that enters into a distinct CBA with Alcoa. *Id.* Accordingly, the CBA applicable to a particular retiree, eligible spouse, or dependent depends on the facility they retired from and when they retired. *Id.*; *see also* Pls.' Compl. ¶ 7 ("For example, the 1988 versions of [CBAs] are the governing CBAs as to those retiring from [a specific Alcoa facility] during the period from

November 1, 1988 and May 31, 1993."). Any retiree who retired from a different facility, or from the same facility during a different period, would be subject to a different CBA (and accordingly, differing rights—and different arguments for rights—for healthcare benefits). According to the data available to Alcoa (and provided to Plaintiffs), the retirees in the proposed class retired across a period of approximately 30 years, from 1970 to 2001. Ackerman Decl. ¶ 20. There have been well over 100 separate CBAs negotiated between Alcoa and the USW over the past several decades, with provisions evolving for many years. *Id.* ¶ 21.

The facilities can be further characterized as "Master" and "Non-Master" facilities, which indicates how Alcoa and the Local Unions at those facilities conduct collective bargaining. *Id.* ¶ 19. Generally, the CBAs for Master Facilities are negotiated on a group basis, resulting in a "Master Settlement Agreement" between Alcoa and the USW every four years providing that the terms of the prior CBAs at the Master Facilities will be renewed (except as otherwise provided). *Id.* New CBAs at the Master Facilities are then prepared and executed with the Local Unions. *Id.* The CBAs for Non-Master Facilities are separately negotiated with the Local Union and are not part of the Master Settlement Agreement bargaining process. *Id.*

IV. Plaintiffs have identified only a fraction of the applicable CBAs and documents.

Plaintiffs are seeking to certify a broad class of 3,153 individuals, but have identified only a fraction of the CBAs applicable to the proposed class. By way of illustration, the below table sets forth: (1) each of the 48 different facilities applicable to the putative class members; (2) the number of putative class members associated with each facility; and (3) the CBAs that Plaintiffs have actually identified in support of their claims:

CBAs applicable to Class Members (by facility, in alphabetical order)	
1. Acuna Warehouse, Mexico (3) 2. Alcoa, TN (2) • ***Plaintiffs identify the 1977, 1980, 1986, 1988 CBAs*** 3. Arkadelphia, AR (10) 4. Ashville Plant, OH (17) 5. Badin, NC (38) • ***Plaintiffs identify the 1977, 1980, 1986, 1988 CBAs*** 6. Batan Rouge Coke Plant, LA (3) 7. Bauxite, AR (177) • ***Plaintiffs identify the 1977, 1980, 1986, 1988 CBAs*** 8. Bauxite, AR (HURR CRK) (51) 9. Bellwood Extrusion Plant, VA (38) 10. Bristol End Plant, VA (1) 11. FDI (2) 12. Fluorsparr-Eagle Pass, AR (5) 13. Fort Meade, FL (2) 14. Fredrick, MD (Alumax) (254) 15. Gregory, TX (RMC) (13) 16. Hot Spring Cont Rolling, AR (4) 17. Hurricane Creek Plant, AR (100) 18. Jones Mills, AR (123) 19. Listerhill Reduction Plant, AL (142) 20. Logans Ferry, PA (15) 21. Longview Cable Plant, WA (50) 22. Longview Reduction Plant, WA (62) 23. Louisville Foil Plant #1, KY (57) 24. Louisville Laminating Plant, KY (8) 25. Louisville Powder & Paste, KY (9) 26. Louisville, KY (RMC-Lvle # 3) (5) 27. Malvern, AK (2) 28. Malvren Cable Plant, AR (220)	29. Marshall (Scottsville), TX (1) 30. Massena, NY (148) • ***Plaintiffs identify the 1977 CBA*** 31. Mobile, AL (64) • ***Plaintiffs identify the 1977, 1980, 1986, 1988 CBAs*** 32. New Kensington, PA (12) 33. Patterson Reduction Plan, AR (45) 34. Phoenix Extrusion Plan, AZ (98) 35. Point Comfort, TX (227) • ***Plaintiffs identify the 1977, 1980, 1986, 1988 CBAs*** 36. Richmond, IN (66) • ***Plaintiffs identify the 1977, 1980, 1986, 1988 CBAs*** 37. Richmond, VA – Foil North (24) 38. Richmond, VA – Foil South (40) 39. Rockdale, TX (160) • ***Plaintiffs identify the 1977, 1980, 1986, 1988 CBAs*** 40. San Patricio, TX (64) 41. Sherwin Aluminia Plant, TX (80) 42. St Lawerence Reduction Plant, NY (112) 43. St Louis Printing Plant, MO (38) 44. Tapoco, NC (9) 45. Torrance, CA (RMC TORR EXT) (5) 46. Troutdale, OR (37) 47. Warrick (Newburgh, IN) (284) • ***Plaintiffs identify the 1977, 1980, 1983, 1986, 1988 CBAs*** 48. Wenatchee, WA (65) • ***Plaintiffs identify the 1988 CBA***
NOTE: Alcoa's records do not contain any information regarding which of the above facilities are associated with 142 of the putative class members, or their dates of retirement.	

Ackerman Decl. ¶ 22. As can clearly be seen, the majority of the CBAs applicable to the putative class members have not been identified by Plaintiffs. Throughout the course of this litigation, they have argued that the language of the CBAs is identical, but offer little to support this claim. The Complaint attaches only two 1988 CBAs. *See* Exs. 1 & 2, Pls.' Compl., ECF Nos. 1-1 & 2-2. Plaintiffs contend (without support) that these CBAs "contain the same or substantively the same operative language as a number of other Alcoa CBAs that govern as to prior time periods and/or as to other facilities," but also admit that "[o]ther CBAs differ." Pls.'

Compl. ¶¶ 25-26. In their motion to certify a class, Plaintiffs identify an additional eight CBAs which they call "Master Agreements" (CBAs that apply to several Master Facilities), but provide only a few excerpted pages.[5] For example, while Exhibit 1 appears to be a complete CBA with 128 pages, the rest of the CBAs in Exhibits 2 through 10 contain only 4-6 pages. Plaintiffs admit they "do not have a comprehensive set of non-Master Agreement CBAs," despite the fact that the USW or its predecessors is a party to these agreements. Pls.' Mem. of Law at 2 n.1, ECF No. 82.

ARGUMENT

I. Rule 23 creates a heightened burden for class certification.

Class actions are "an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." *Comcast Corp. v. Behrend*, 569 U.S. 27, 33 (2013). As such, Federal Rule of Civil Procedure 23 "imposes stringent requirements for certification that in practice exclude most claims." *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228, 234 (2013). "A district court may certify a case for class-action treatment only if it satisfies the four requirements of [Rule] 23(a)—numerosity, commonality, typicality, and adequacy of representation—and one of the conditions of Rule 23(b)." *Jamie S. v. Milwaukee Pub. Schs.*, 668 F.3d 481, 493 (7th Cir. 2012).

Plaintiffs bear the burden of proving that the requirements of Rule 23 are met by a preponderance of the evidence. *Messner v. Northshore Univ. HealthSystem*, 669 F.3d 802, 811 (7th Cir. 2012). Mere allegations do not suffice, as "Rule 23 does not set forth a mere pleading standard." *Dukes*, 564 U.S. at 350. Instead, "[a] party seeking class certification must affirmatively demonstrate his compliance with the Rule—that is, he must be prepared to prove

[5] These appear to be the same CBA excerpts attached to Plaintiffs' Motion for Preliminary Injunction, filed on December 16, 2020. *See* ECF No. 10 (attaching CBA excerpts).

that there are ***in fact*** sufficiently numerous parties, common questions of law or fact, etc." *Id.*. Thus, Plaintiffs must satisfy each of the elements with "evidentiary proof." *Comcast*, 569 U.S. at 33. "Certification is proper only if the trial court is satisfied, after a ***rigorous analysis***, that the prerequisites of Rule 23(a) have been satisfied." *Dukes*, 564 U.S. at 350-51 (emphasis added) (citation omitted). This analysis "[f]requently . . . will entail some overlap with the merits of the plaintiff's underlying claim." *Id.* at 351; *see also Am. Honda Motor Co. v. Allen*, 600 F.3d 813, 815 (7th Cir. 2010) ("[A] district court must make whatever factual and legal inquiries are necessary to ensure that requirements for class certification are satisfied before deciding whether a class should be certified, even if those considerations overlap the merits of the case.").

II. Plaintiffs misstate the current Rule 23 standards.

Plaintiffs erroneously contend that "[i]n evaluating whether class certification is appropriate, 'the court accepts all well-pled allegations made in support of certification as true.'" Pls.' Mem. of Law at 9 (quoting *Selburg v. Virtuoso Sourcing Grp., LLC*, No. 1:11-cv-1458, 2012 WL 4514152 (S.D. Ind. Sept. 29, 2012)). This is incorrect. The notion that Plaintiffs can plead their way to certification has been explicitly rejected by the Supreme Court:

> Rule 23 does not set forth a mere pleading standard. A party seeking class certification 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 for fact, etc. . . . Frequently [the trial court's] "rigorous analysis" will entail some overlap with the merits of the plaintiff's underlying claim. That cannot be helped.

Dukes, 564 U.S. at 350-51 (emphasis in original). The Seventh Circuit agrees. *See Messner*, 669 F.3d at 811 ("On issues affecting class certification, however, a court may not simply assume the truth of the matters as asserted by the plaintiff."). Under the analysis required by the correct legal standards, it is clear Plaintiffs have not met their burden to show certification is warranted.

III. Plaintiffs have not satisfied Rule 23(a).

A. Plaintiffs' proposed class lacks commonality.

Under Rule 23(a)(2), class certification is appropriate only if "there are questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). This language "is easy to misread, since any competently crafted class complaint literally raises common questions." *Dukes*, 564 U.S. at 349 (quotation omitted). Instead, commonality requires a plaintiff to do more than simply raise common questions. *See Suchanek v. Sturm Foods, Inc.*, 764 F.3d 750, 755 (7th Cir. 2014) ("Commonality demands more than a showing that the class members 'have all suffered a violation of the same provision of law' at the hands of the same defendant."). "What matters to class certification . . . is . . . the capacity of a class-wide proceeding to generate common ***answers*** apt to drive the resolution of the litigation." *Dukes*, 564 U.S. at 350 (emphasis in original). The claims "must depend upon a common contention . . . 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." *Id.* Put differently, "[t]o bring individual . . . claims together to litigate as a class, the plaintiffs must show that they share some question of law or fact that can be answered ***all at once*** and that the ***single answer*** to that question will resolve a central issue in ***all*** class members' claims." *Jamie S.*, 668 F.3d at 497 (emphases added).

i. There are no common documents that yield common answers for all class members.

Plaintiffs first argue that commonality is satisfied by pointing to several documents they contend are common across the entire class, specifically "the Master Agreements applicable to all retirees from the Master Agreement facilities" and "the Alcoa and Reynolds SPDs." Pls.' Mem. of Law at 17. These arguments fail to satisfy commonality. Rule 23(a) charges Plaintiffs with the burden of establishing by a preponderance of the evidence that there are relevant

questions that will "generate common answers apt to drive the resolution of the litigation." *Dukes*, 564 U.S. at 350. But the limited number of CBAs identified by Plaintiffs in their motion—what they call the "Master Agreements"—apply to only a small fraction of the class members. *See supra* at Factual Background § III. Indeed, Plaintiffs admit that "[r]etirees from Alcoa facilities other than the Master Agreement facilities retired under ***different*** CBAs" than the "Master Agreements," but ignore them entirely. Pls.' Mem. of Law at 2 (emphasis added).

Additionally, Plaintiffs' focus on a few SPDs cannot satisfy commonality either, because it improperly severs the analysis of the CBAs and plan documents. *See Cent. States, SE, SW Areas Pension Fund v. George W. Burnett, Inc.*, 451 F. Supp. 2d 969, 978 (N.D. Ill. 2006) ("One general contract principle that the Seventh Circuit applies to CBA interpretation is that 'a document should be read as a whole with all its parts given effect, and ***related documents must be read together***.'" (quoting *Bland v. Fiatallis N. Am. , Inc.*, 401 F.3d 779, 783-84 (7th Cir. 2005) (emphasis added)). The SPDs can only be interpreted in conjunction with the applicable CBAs and plan documents. Accordingly, whether any of the SPDs precludes Alcoa from modifying the benefits cannot be "answered all at once" across the class without individualized analysis of the contracts that differ between retirees. *Jamie S.*, 668 F.3d at 497. Focusing on the SPDs and putting on blinders to the CBAs and plan documents will not produce classwide "common answers apt to drive the resolution of the litigation." *Dukes*, 564 U.S. at 350.[6]

In short, there are too many individual questions concerning different contracts between different locations of retirees. Because retirees are divided among many different facilities and retirement dates, there are different rights to benefits among the retirees depending on which CBA and plan documents applies to them. Furthermore, none of the CBAs identified by

[6] As explained below, Plaintiffs also identify only a handful of the SPDs applicable to the class.

Plaintiffs expressly provides for vested retiree healthcare benefits beyond the duration of the CBA. Thus, the Court will have to analyze each CBA and plan document under standard principles of contract law to determine if any provide a vested benefit to persons who retired during the term of that contract. And if the Court determines that any of these documents are ambiguous, the factfinder will have to review extrinsic evidence that is not the same across all CBAs and plan documents, including the circumstances and bargaining history surrounding each agreement when it was negotiated. The contracts were negotiated at different times, by different people (including different predecessor companies and unions), and for different facilities. While some were negotiated on a Master Facility basis (which might suggest some common extrinsic evidence), other agreements were not, and different things might have been said by different people, different documents might have been generated, etc. The Court would have to look at a different universe of evidence applicable to each CBA and SPD each time it was negotiated. This would further impede the generation of classwide common answers.[7]

These variations in the retirees' factual and legal arguments make it clear that this case is unsuitable for class treatment, and Plaintiffs fail to meet their burden to show otherwise. *See Dukes*, 564 U.S. at 350 ("Dissimilarities within the proposed class are what have the potential to impede the generation of common answers."); *Broussard v. Meineke Discount Muffler Shops, Inc.*, 155 F.3d 331, 340 (4th Cir. 1998) (no commonality due to differing contract language, as the differences "raise the distinct possibility that there was a breach of contract with some class

[7] In addition to extrinsic evidence related to negotiations, Plaintiffs also rely on individual "promises" to retirees by Alcoa. In their Reply in Support of their Motion to Bifurcate, Plaintiffs explained that their allegations rely on "Alcoa promises . . . outside of the parties' bargained contracts because such promises would be relevant extrinsic evidence of the parties' intent." ECF No. 48 at 7. They further articulated an example of such individualized "other promises" as "a manager's assurances that health-care benefits would last for the lifetime of retirees if they retired under a specific contract." *Id.*

members, but not with other class members"); *Grey Fox, LLC v. Plains All Am. Pipeline, L.P.*, No. 16-3157, 2020 WL 1272613, at *4 (C.D. Cal. Jan. 28, 2020) ("Courts often find certification inappropriate where individualized extrinsic evidence is relevant to a contract interpretation question."); *In re Aetna UCR Litig.*, No. 07-cv-3541, 2018 WL 10419839, at *11-20 (D.N.J. June 30, 2018) (no commonality in ERISA class action due to variation in plan language, stating that "the plethora of diverse contractual standards involved in this case drives the Court into highly individualized inquiries" that "keeps this putative class action from ever getting resolved in one stroke") (quotation omitted)); *Bell v. Bimbo Foods Bakeries Distr., Inc.*, No. 11 C 03343, 2013 WL 6253450, at *10 (N.D. Ill. Dec. 3, 2013) (no commonality where plaintiffs failed to establish that all contracts are uniform or substantially similar); *Stock v. Integrated Health Plan, Inc.*, No. 3:06-cv-215, 2007 WL 2565981, at *1-2 (S.D. Ill. Sept. 4, 2007) (same).

Plaintiffs acknowledge the differences between the groups of CBAs and plan documents across the facilities, but offer no solution to address how the differences could be managed on a classwide basis. In fact, they do not analyze or even identify the majority of the documents that are applicable to the class. The total number of CBAs and SPDs is significant, as Cary Burnell, Chief Technician of the USW, confirmed during his deposition:

> Q: And how many agreements would be applicable to the purported class members in the [Kaiser] healthcare case?
> A: Virtually – I mean it's the same answer as previously, there are dozens, there are dozens of labor agreements. There are dozens – there's more than dozens. And there are dozens of summary plan descriptions.
> Q: Can you ballpark?
> A: There are dozens. Multiple dozens. There are Reynolds SPDs, there are Alcoa SPDs, there are Alumax, Amax, Alumax SPDs. There are flavors within the Reynolds universe. There are flavors within the Alcoa universe. Alcoa knows that better than I. And that they go back – they go back, they go way back.
> Q: They go way back. And as you said before, there are many, many of them; is that right?
> A: There are many, many.

Ex. 2, Burnell Dep. at 88:24-89:14. Faced with this overwhelming number of documents, Plaintiffs ask the Court to simply assume that the handful of CBAs they have identified "contain the same or substantively the same operative language as a number of other Alcoa CBAs that govern as to prior time periods and/or as to other facilities." Pls.' Compl. ¶ 26. But allegations alone cannot meet their burden under Rule 23. *See Dukes*, 564 U.S. at 350; *Bell*, 2013 WL 6253450, at *10 (no commonality because the movant "provided no evidence demonstrating how many iterations of the . . . agreement there are," and had "failed to meet his burden of showing that a substantial number of [class members] have the same agreement" or "that the relevant provisions . . . are substantially the same"); *Stock*, 2007 WL 2565981, at *1 (finding "the existence of different contractual obligations with regard to different members of the class is fatal to class certification," and rejecting argument that "the Court should simply rely on [the] complaint for the proposition that all contracts were the same"). Without providing evidence that class members share common contractual language governing their rights to benefits that can be answered in one stroke classwide, Plaintiffs fail to demonstrate commonality.[8]

ii. Sidestepping the CBA terms to focus on extrinsic evidence or implied terms does not satisfy commonality.

Seemingly acknowledging that the combination of differing CBAs and plan documents across the proposed class is an insurmountable hurdle to commonality, Plaintiffs pivot to argue

[8] Two weeks after filing their Motion for Certification, Plaintiffs' counsel sent Alcoa's counsel a 14-page letter raising various purported discovery issues, including their contention that it is Alcoa's responsibility to identify and provide all of the CBAs and plan documents applicable to the class members. Alcoa has already produced a number of CBAs to Plaintiffs, and has produced a list of every class member and their associated facility, through which Plaintiffs' counsel can readily identify the applicable CBAs and plan documents. Alcoa will continue to cooperate in good faith on discovery issues, but it rejects Plaintiffs' contention that Alcoa is obligated to make their case for them, when they have access to the same documents to which they are a party and are in an equal if not better position to do so themselves. This is especially true with regard to their burden under Rule 23.

that "variation in CBA language would not preclude class certification because . . . the parties' common course of performance demonstrates an intention to provide all Class Members with lifetime healthcare benefits[.]" Pls.' Mem. of Law at 2 n.1. Specifically, Plaintiffs contend that "in making a claim for vested benefits that extend beyond the term of a CBA, plaintiffs may rely upon ***either*** express contract language ***or*** implied terms, and "'practice, usage and custom' are significant when interpreting bargaining agreements." *Id.* at 17 (emphases in original). In other words, Plaintiffs attempt to sidestep the CBA terms to focus solely on implied terms and "common" extrinsic evidence. This argument fails for multiple reasons.

The Supreme Court set forth the principles governing the review of CBAs to determine whether retiree healthcare benefits are vested under ERISA in two recent cases—*M&G Polymers USA, LLC v. Tackett*, 574 U.S. 427 (2015), and *CNH Industrial N.V. v. Reese*, 138 S. Ct. 761 (2018). Courts are to "interpret [CBAs], including those establishing ERISA plans, according to ordinary principles of contract law, at least when those principles are not inconsistent with federal labor policy." *Tackett*, 574 U.S. at 435. "Where the words of a [CBA] in writing are clear and unambiguous, its meaning is to be ascertained in accordance with its plainly expressed intent." *Id.* (quoting 11 R. Lord, *Williston on Contracts* § 30:6, p. 108 (4th ed. 2012) ("*Williston*")). It is true that "when a [CBA] is ambiguous, courts can consult extrinsic evidence to determine the parties' intentions, . . . [b]ut a [CBA] is not ambiguous unless, 'after applying established rules of interpretation, [it] remains reasonably susceptible to at least two reasonable but conflicting meanings.'" *Reese*, 138 S. Ct. at 765 (quoting *Williston* § 30:4, at 53-54) (omissions in original). Further, even where there exists ambiguity, a court "should not construe ambiguous writings to create lifetime promises." *Tackett*, 574 U.S. at 441 (quoting 3 A. Corbin,

Corbin on Contracts § 553, p. 216 (1960)). Thus, Alcoa's "course of conduct" cannot be considered unless it is first determined there is an ambiguity in the applicable CBAs.

Plaintiffs' contention that courts can avoid a CBA's express terms and look solely to extrinsic evidence relies on a patchwork of misleading case law citations and irrelevant authority that runs counter to well-established principles of CBA (and basic contract) interpretation. First, they cite to *Reese* for the proposition that "plaintiffs may rely upon ***either*** express contract language ***or*** implied terms"—suggesting that CBAs can be interpreted without reference to the contract language at all. Pls.' Mem. of Law at 17 (emphases in original). This is a deeply misleading statement of the law. In *Reese*, the Supreme Court held that where a CBA includes a general durational clause specifying that the agreement terminates on a specified date, that clause applies to all benefits under the CBA unless the CBA says otherwise. 138 S. Ct. at 766. Thus, employees retiring under such a CBA have no right to continued benefits unless other provisions of the CBA specify that the benefits "were subject to a different durational clause." *Id.* If there is no such provision, the CBA is unambiguous that the benefits are not vested beyond the term of the CBA. *Id.* at 763. In so holding, the Court acknowledged in dicta that the lower court "did not point to any explicit terms, implied terms, or industry practice suggesting that the [CBA] vested healthcare benefits for life," while citing Justice Ginsburg's concurrence in the earlier *Tackett* decision. *See* 138 S. Ct. at 765. In that concurrence, Justice Ginsburg remarked that an employer's obligation to pay benefits after the expiration of a CBA "may arise as well from . . . implied terms of the expired agreement," but this in no way detracts from the primacy of the CBA language. 574 U.S. at 443 (concurring, Ginsburg, J.). Indeed, Justice Ginsburg further stated that "[w]hen the intent of the parties is unambiguously expressed in the contract, that expression controls, and the court's inquiry should proceed no further." *Id.* Only when "the

contract is ambiguous" may "a court . . . consider extrinsic evidence to determine the intentions of the parties," like a party's course of performance. *Id.*

Thus, Plaintiffs' reliance on dicta in *Reese* to sidestep the CBAs and plan documents misreads that opinion and is an incorrect statement of the law. *See Stone v. Signode Indus. Grp. LLC*, 943 F.3d 381, 384 (7th Cir. 2019) ("[I]f [benefits] vest at all, they do so under the terms of a particular contract.") (quotation omitted)); *Gable v. Sweetheart Cup Co., Inc.*, 35 F.3d 851, 855 (4th Cir. 1994) ("[I]n recognition of ERISA's requirement that employee benefit plans be governed by written plan documents . . . , any participant's right to a fixed level of lifetime benefits must be found in the plan documents and must be stated in clear and express language.") (citations and quotation omitted); *USC Corp. v. Prime Leasing Inc.*, 988 F.2d 433, 438 (3d Cir. 1993) ("[O]ne can invoke 'implied' terms only when there are no express terms in the contract relating to the particular issue."); *Williston* § 63:21 ("[I]t is elementary that one cannot imply a term or promise in a contract which is inconsistent with an express term of the contract itself.").

Plaintiffs relatedly argue that the express terms of the CBAs can be avoided because "the parties' 'practice, usage and custom' are significant when interpreting bargained agreements." Pls.' Mem. of Law at 17 (quoting *Consol. Rail v. Ry. Labor Execs.' Ass'n*, 491 U.S. 299, 311 (1989)). Plaintiffs argue that the Supreme Court in *Consolidated Rail* held that "a claim arising from 'implied contractual terms, as interpreted in light of past practice' may be considered even where the CBA itself is not before the Court at all." *Id.* (quoting 491 U.S. at 311). Plaintiffs similarly point to *Bhd. of Locomotive Eng'rs & Trainmen (Gen. Comm. of Adjustment) v. Union Pac. R.R.*, 237 F. Supp. 3d 762, 769 (N.D. Ill. 2017) for the notion that "implied terms in a CBA are established by looking at evidence of past 'practice, usage and custom.'" Pls.' Mem. of Law at 17. Plaintiffs' reliance on these cases is misplaced, however, as both were brought under the

federal Railway Labor Act ("RLA"), which has its own distinct principles of CBA interpretation for disputes that look to implied as well as express terms. *See, e.g.*, *Bhd. of Maint. of Way Emps. v. Atchison, Topeka & Santa Fe Ry. Co.*, 138 F.3d 635, 641 (7th Cir. 1997) ("For collective bargaining agreements under the [RLA], we must look beyond the document itself. We must look to the parties' 'practice, usage and custom.'"). These principles do not apply to the interpretation of the CBAs here. And even if they did, the CBAs could still not be blithely ignored as Plaintiffs propose. *See id.* ("The RLA may direct us to look beyond the agreement, but it does not free either party from the consequences of assenting to a text.").[9]

In sum, no matter which way Plaintiffs try to spin the analysis, as they themselves admit, "[e]ach Class Member's right to Company-provided retiree healthcare coverage is governed by the [CBAs] in place when the Class Member retired, or, in the case of dependents, when the employee through whom the dependent receives their coverage retired or died." Pls.' Compl. ¶ 23. Interpreting the "more than dozens" and "many, many" CBAs and SPDs (and any extrinsic evidence) across the proposed class, Burnell Dep. at 88:24-89:14, is not a claim that "can productively be litigated at once," preventing a finding of commonality, *Dukes*, 564 U.S. at 350.

B. Plaintiffs are not typical class representatives.

To meet typicality, Plaintiffs must show 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). "Typicality ensures that class representatives have an 'incentive to litigate vigorously' the claims of the absent class members." *Howard v. Cook Cty. Sheriff's Off.*, 989 F.3d 587, 606 (7th Cir. 2021) (quoting *Muro v. Target Corp.*, 580 F.3d 485, 493 (7th Cir. 2009)). The requirement "'primarily

[9] Additionally, as previously explained, to the extent that extrinsic evidence ever becomes relevant to interpreting the meaning of the CBAs and plan documents, it would not satisfy commonality because that extrinsic evidence is not the same across all CBAs and plan documents and therefore would not yield common answers.

directs the district court to focus on whether the named representatives' claims have the same essential characteristics as the claims of the class at large.'" *Muro* 580 F.3d at 492 (quoting *De La Fuente v. Stokely–Van Camp, Inc.*, 713 F.2d 225, 232 (7th Cir.1983)).

Plaintiffs fail to meet the typicality requirement for reasons similar to their inability to demonstrate commonality. They seek to certify broad classes of Alcoa retirees nationwide who are divided among 48 different facilities with different groups of CBAs and plan documents. However, the sole class representative, Lynnette Kaiser, is an eligible spouse whose husband worked at and retired from only ***one*** of these facilities. *See* Pls.' Mem. of Law at 1. Thus, her claims depend on only one of the applicable agreements, and her right to healthcare benefits is not the same as those who retired from any of the other facilities. These are material differences between the sole class representative and the thousands of class members that preclude a finding of typicality. *See Vega v. T-Mobile USA, Inc.*, 564 F.3d 1256, 1276 (11th Cir. 2009) (no typicality where there is no common contract and court would have to examine each class member's contract); *Gruss v. Kraft Heinz Foods Co., Inc.*, No. 15-cv-788, 2017 WL 4119658, at *8 (W.D. Wis. Sept. 15, 2017) (noting in ERISA class action that "if plaintiffs had sought certification of a class including members subject to other CBAs, the named plaintiffs would not be proper class representatives under typicality and adequacy requirements"); *Bond v. Marriott Int'l, Inc.*, 296 F.R.D. 403, 408 (D. Md. 2014) (ERISA class action failed to satisfy commonality, typicality, and adequacy, in part because "[t]he Plaintiffs did not participate in all of the plans at issue and thus their claims may be different from those of proposed class members whose Retirement Awards are subject to different terms under different plans").

Other individualized evidence relied on by Plaintiffs raises further typicality concerns. Plaintiffs allege that Alcoa made "other promises to provide continuing coverage" outside of the

applicable CBAs to an unspecified number of retirees. *See* Pls.' Compl. ¶ 8. The alleged existence of these distinct and different representations, each with the alleged ability to impact a particular retiree's or group's right to benefits, also shows that Plaintiffs cannot satisfy typicality. *See Chicago Police Ass'n v. City of Chicago*, 7 F.3d 584, 597 (7th Cir. 1993) (no typicality where different groups of class members received different representations regarding benefits).

C. Plaintiffs are not adequate class representatives.

Rule 23(a)(4) "requires that the representative parties fairly and adequately represent the class." *Rosario v. Livaditis*, 963 F.2d 1013, 1018 (7th Cir. 1992). This "serves to uncover conflicts of interest between named parties and the class they seek to represent." *Amchem Prod., Inc. v. Windsor*, 521 U.S. 591, 625 (1997). Frequently, "the requirement of typicality merges with the further requirement that the class representative 'will fairly and adequately protect the interests of the class.'" *CE Design Ltd. v. King Architectural Metals, Inc.*, 637 F.3d 721, 724 (7th Cir. 2011) (quoting Fed. R. Civ. P. 23(a)(4)). Plaintiffs contend that "[n]othing suggest[s] that [there] are any conflicting or antagonistic interests here," arguing that the sole class representative, Ms. Kaiser, "has the same stake in the outcome as all other Class Members" and "has every incentive to safeguard Company-provided retiree healthcare benefits to which they are contractually entitled." Pls.' Mem. of Law at 21. In fact, analysis reveals the existence of significant conflicts of interest that preclude certification.

As explained above regarding typicality, Ms. Kaiser's husband worked at and retired from only one of the 48 Alcoa facilities applicable to the proposed class, meaning that her rights regarding healthcare benefits are not the same as retirees who retired from any of the other facilities, or even under different CBAs at the same facility. *See* Pls.' Compl. ¶¶ 13-15, 17. Accordingly, her incentive to resolve claims for retirees associated with other facilities and CBAs is diminished. The Court cannot just assume Ms. Kaiser will vigorously and effectively

litigate the rights of the retirees whose theories are different from hers. *See Muro*, 580 F.3d at 493 ("[I]f [a plaintiff's] claim is atypical, he is not likely to be an adequate representative; his incentive to press issues important to the other members of the class will be impaired.").

An additional conflict of interest is created by the nature of the classwide injunctive relief sought by Plaintiffs to dismantle the HRA program. Despite Plaintiffs' efforts to paint it as such, this is not a termination of benefits case—the vast majority of retirees and eligible spouses (including Ms. Kaiser) did not lose supplemental Medicare healthcare benefits. Rather, their benefits were moved from the prior Fixed Group Plan to the HRA program after Alcoa determined that the majority of putative class members could in most cases receive ***better*** healthcare coverage by tailoring their coverage based on their unique healthcare needs and circumstances. Ackerman Decl. ¶¶ 2-7. Over the past year, approximately 67% of the putative class members (2,091 individuals) have been using their HRA funds to purchase a variety of medical, drug, vision, and dental plans reflecting their particular needs, and using their funds to pay for any corresponding qualified medical expense, such as their healthcare and prescription drug plan premiums, or out-of-pocket medical costs such as a deductible or copayment. *Id.* ¶ 13. Yet, the USW and Ms. Kaiser are asking the Court to dismantle these individual plans and force all of the retirees and eligible spouses back to the Fixed Group Plan—whether they like it or not.

The notion that a significant portion of the putative class members would prefer to keep the HRA program over the prior Fixed Group Plan is not just speculation. Before implementing the HRA program, Alcoa retained the consulting firm Willis Towers Watson to conduct impact modeling across all affected retirees and eligible spouses to determine the impact of moving to the HRA program, and in particular whether the HRA program could provide equivalent benefits at a lower cost to retirees and Alcoa. *Id.* ¶¶ 3-4. The analysis examined retirees' total out-of-

pocket costs under the prior Fixed Group Plan, including Medicare Part B and Part D premiums, and studied the impact on costs through the HRA program based on variables that included utilization (the amount of services a retiree uses), geographic location (as individual insurance rates vary by location), age (as Medicare supplement insurance rates vary by age), and choice of plans (as future costs will depend upon the level of benefit a retiree chooses). *Id.* ¶ 4. After simulating thousands of possible outcomes, the analysis determined that 99% of Alcoa's retirees would have ***better*** coverage through the HRA program by taking advantage of the cost savings, additional flexibility, and greater options in the individual market. *Id.* ¶¶ 5-6.

Plaintiffs have offered no evidence of a classwide study in rebuttal. They previously provided a witness statement by the USW Chief Technician, Mr. Burnell, in which he stated that he reviewed the plans available to ***a single retiree*** under the HRA program in 2020 and claimed they were not as good as the prior Fixed Group Plan. *See* ECF No. 10 at ¶¶ 19-22. During his deposition, he stated that his analysis had "generally" looked at "a lot of the plans" available through the HRA program, including "at all of the locations that had more than a thousand retirees . . . or maybe it was more than that," but he offered little specifics and admitted he did no written analysis of whether the retirees are better off under the HRA program. Burnell Dep. at 102-106. Mr. Burnell further stated he was unaware of any classwide study by the USW of the retirees' selection of plans under the HRA program, and that he could not recall whether he did any analysis for any individual retirees beyond the one he examined in 2020. *Id.* at 115:16-20. In addition, Mr. Burnell admitted that retirees' healthcare needs and preferences might differ between them—which the individual plans under the HRA program take advantage of to provide better coverage. *Id.* at 106-108, 114. Plaintiffs make the offhanded remark in their motion that superior coverage under the HRA program "seems implausible" given Alcoa's projected cost

savings. Pls.' Mem. of Law at 18 n.6. But any costs savings are simply a feature of the increased value of individual plans on the private market.

Plaintiffs have also previously referenced the prescription drug plan purchased in 2021 by Ms. Kaiser through the HRA program, and emphasized that its premium, deductible, and copayments are higher than the prior Fixed Group Plan. *See* Pls.'s Br. Supp. Mot. Prelim. Inj. at 23-24, ECF No. 9. However, Plaintiffs ignore that all of these amounts are covered expenses under the HRA program. Ackerman Decl. ¶ 7. Indeed, Ms. Kaiser testified during her deposition that she had successfully used her HRA funds to purchase healthcare and prescription drug coverage, and had been reimbursed for premiums and out-of-pocket costs. Ex. 3, Kaiser Dep. at 29:17-31:2.[10] Ms. Kaiser also testified that she does not know whether any of the class members like the HRA program or prefer it to the prior Fixed Group Plan; in fact, she has never spoken to any of them. Kaiser Dep. at 13:2-21. Instead, the USW merely approached her and asked her to be a part of this lawsuit to "get us our benefits back." *Id.* at 9:6-14.

Thus, evidently without conducting any sort of inquiry or comprehensive analysis of whether the retirees are better off under the HRA program or would prefer the new program, Plaintiffs filed this lawsuit and are seeking to certify a non-opt out class to force all of the retirees to give up their coverage under the HRA program. Even if Ms. Kaiser were to "litigate vigorously" and successfully obtain an order to dismantle the HRA program, this would create conflict between Ms. Kaiser and those retirees who would prefer to keep the superior healthcare

[10] Other portions of Ms. Kaiser's testimony were conflicting. For example, she stated that she "didn't get reimbursed for all of my medications for a little over $200," but then stated that "the insurance company reimbursed me for around $200." *Id.* at 34:24-35:6. At one point, she claimed she paid nearly $2,000 in out-of-pocket drug costs in 2021, but this was contradicted by her medical records providing that her covered drug costs by the end of October 2021 were approximately $1,000. *Id.* at 44:1-45:11. Finally, Ms. Kaiser also stated that she paid out-of-pocket drug costs of $900 that were not covered by her drug plan, *id.* at 38:25-39:11, but then confirmed a portion of these costs was indeed covered by the HRA program, *id.* at 41:1-11.

coverage offered by the HRA program. *See, e.g.*, *Valley Drug Co. v. Geneva Pharm., Inc.*, 350 F.3d 1181, 1189 (11th Cir. 2003) ("A fundamental conflict exists where some party members claim to have been harmed by the same conduct that benefitted other members of the class. In such a situation, the named representatives cannot 'vigorously prosecute the interests of the class through qualified counsel' because their interests are actually or potentially antagonistic to, or in conflict with, the interests and objectives of other class members."); *see also Prudhomme v. Gov't Emps. Ins. Co.*, No. 21-30157, 2022 WL 510171, at *1 (5th Cir. Feb. 21, 2022) (plaintiffs' theory of liability was not "beneficial to the proposed class," as "a portion of the proposed class members received payments above (that is, benefitted from) the allegedly unlawful valuation," which "undermined Appellants' class-wide theory of liability and thereby doomed adequacy"); *Bieneman v. City of Chicago*, 864 F.2d 463, 465 (7th Cir. 1988) (no certification of a class of landowners near an airport because, while the named plaintiffs claimed that the airport decreased the value of their land, other landowners benefitted from the proximity of the airport).[11]

The Rule 23(b)(1)(A) and (b)(2) classes sought by Plaintiffs are especially problematic, as they would not afford retirees an opt-out right to an injunction to dismantle the HRA program, regardless of their preferences. *See Dukes*, 564 U.S. at 362; *Jefferson v. Ingersoll Int'l Inc.*, 195

[11] In a further attempt to paint the HRA program as harmful to retirees, Plaintiffs argue that "Alcoa has reserved the right to terminate its entire contribution at any time" and that "[t]he prospect of losing Alcoa's entire contribution toward healthcare costs at any time plainly is an injury." Pls.' Mem. of Law at 18. But the "prospect" of an injury is just that—a prospect. Such injury has not occurred and Plaintiffs offer nothing but unfounded speculation that it will. Plaintiffs further contend that "Alcoa previously reimbursed Class Members for part or all of their Medicare Part B premiums," and that the HRA program in the 2021 plan year did not allow this reimbursement. *Id.* at 18-19. Setting aside that Alcoa reinstated reimbursement in the 2022 plan year, the amounts provided under the HRA program in fact account for the loss of the Part B premium reimbursement, and the loss of the reimbursement was incorporated into the analysis and determination by Willis Towers Watson that nearly all of the retirees would be better off under the HRA program. *See* Ackerman Decl. ¶¶ 4-6. Thus, Plaintiffs' theory that class members were injured by the loss of the Part B premium reimbursement is incorrect.

F.3d 894, 896 (7th Cir. 1999). The retirees and eligible spouses are not members of the USW, and it has no formal authority to represent them in this litigation. Burnell Dep. at 23:24-24:2. Nor could the USW Chief Technician, Mr. Burnell, confirm whether the USW sought or obtained their consent to bring this suit. *Id.* at 90:10-16. This is a conflict of interest that precludes certification. *See Valley Drug*, 350 F.3d at 1190 ("To our knowledge, no circuit has approved of class certification where some class members derive a net economic benefit from the very same conduct alleged to be wrongful by the named representatives of the class.").

IV. Plaintiffs have not satisfied Rule 23(b)(1), (2), or (3).

To certify a class, Plaintiffs must also demonstrate their proposed class satisfies one of the conditions of Rule 23(b), which sets forth different "types" of class actions. Their motion asks the Court to certify the proposed class under either Rule 23(b)(1)(A), Rule 23(b)(2), or Rule 23(b)(3), but they fail to demonstrate that class treatment is justified under those rules.

A. Plaintiffs' class does not meet the requirements of Rule 23(b)(1)(A).

Rule 23 (b)(1)(A) states that a class action can be maintained if "prosecuting separate actions by or against individual class members would create a risk of inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class." Plaintiffs fail to show that their proposed class meets these requirements.

Plaintiffs argue that "[b]ecause Defendants were and are required to treat participants consistently under the [CBAs], a violation of ERISA with respect to one participant will establish a violation with respect to all similarly situated participants," and therefore "if the Class is not certified, there is a significant risk that individual suits could result in inconsistent adjudications that would establish different standards of conduct for Defendants with respect to similarly situated retirees." Pls.' Mem. of Law at 22-23. However, as demonstrated above, the

retirees' rights to benefits are controlled by different groups of CBAs and plan documents applicable to their situation alone, including, potentially, extrinsic evidence that may vary by individual retiree. *See supra* § III. Plaintiffs have not established that Alcoa must treat all putative class members alike as to retiree healthcare benefits. *See Barnett v. Ameren Corp.*, 436 F.3d 830, 832 (7th Cir. 2006) ("[I]n the absence of a contractual obligation employers are generally free . . . for any reason at any time, to adopt, modify or terminate welfare plans.").

Accordingly, individual adjudications would depend upon the different CBAs, plan documents, and extrinsic evidence affecting each individual litigant, meaning there is little risk the outcome in one case would interfere with another. Moreover, the collateral estoppel effects of a judgment in an individual case would reduce the risk of inconsistent adjudications for litigants covered by the same plan documents (and would reduce the risk of retirees being bound by a judgment in favor of Alcoa against any other retiree). *See Vulcan Golf, LLC v. Google Inc.*, 254 F.R.D. 521, 537 (N.D. Ill. 2008) (no certification under Rule 23(b)(1)(A) where individualized inquiries between class members would produce "varying results" in individual actions, finding that "[s]uch different results do not implicate Rule 23(b)(1)(A) . . . because they would not establish incompatible standards of conduct for the defendants . . . ."); *Doe v. Guardian Life Ins. Co.*, 145 F.R.D. 466, 477 (N.D. Ill. 1992) (no certification under Rule 23(b)(1), stating that "[c]ertification under Rule 23(b)(1) should be confined to those cases where there are no, or few, individual questions," because "[t]he presence of individual issues, such as those in this case . . . , precludes the possibility of varying adjudications in different lawsuits and establishing incompatible standards to govern defendants' conduct").

More generally, courts have consistently held that "Rule 23(b)(1)(A) . . . requires more . . . than a risk that separate judgments would oblige the opposing party to pay damages to

some class members but not to others." *Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1193 (9th Cir. 2001) (quotation omitted); *see also Spano v. The Boeing Co.*, 633 F.3d 574, 587 (7th Cir. 2011) (noting the Supreme Court has "cautioned strongly against overuse of (b)(1) classes"); *In re Bendectin Prod. Liab. Litig.*, 749 F.2d 300, 305 (6th Cir. 1984) ("The fact that some plaintiffs may be successful in their suits against a defendant while others may not is clearly not a ground for invoking Rule 23(b)(1)(A)."). Instead, the defendant must be "unable to comply with one judgment without violating the terms of another judgment"—which is not the case here, for the reasons explained above. *See Bowe Bell + Howell Co. v. Immco Emps.' Ass'n*, No. 03 C 8010, 2005 WL 1139645, at *4-5 (N.D. Ill. May 11, 2005) (finding certification under Rule 23(b)(1)(A) inappropriate where the company would be "required to issue medical benefits to some putative class members but not others because of factual differences between the retired employees"); *Wotus v. GenCorp. Inc.*, No. 5:00 CV 2604, 2004 WL 7333099, at *3 (N.D. Ohio Feb. 24, 2004) ("The possibility that should [defendant] be faced with multiple suits it might be ordered to provide free lifetime health benefits in one case, but not in another, does not meet the standard for (b)(1)(A) certification."); *Nelson v. IPALCO Enters.*, No. IP02-477CHK, 2003 WL 23101792, at *10 (S.D. Ind. Sept. 30, 2003) (no certification under Rule 23(b)(1) in ERISA class action, stating that "[t]he presence of . . . individual issues and the prospect of different results for different class members means that Rule 23(b)(1) does not fit this case").[12]

[12] Plaintiffs further argue certification under Rule 23(b)(1)(A) is appropriate by analogizing to *Barton v. Constellium Rolled Prodcs.-Ravenswood, LLC*, No. 2:13-cv-03127, 2014 WL 1660388 (S.D. W. Va. Apr. 25, 2014), another retiree benefits class action. *See* Pls.' Mem. of Law at 23. However, the classes in *Barton* were limited to retirees from a ***single facility*** only. *See Barton*, 2015 WL 1660388, at *1. Further, class certification was not opposed by defendants. *Id.* Similarly, other than a request to limit the definition of class, class certification was undisputed in another case cited by Plaintiffs, *Alday v. Raytheon Co.*, 619 F. Supp. 2d 726, 736 (D. Ariz. 2008). Accordingly, neither the holdings nor the reasoning in these cases support certification.

B. Plaintiffs' class does not meet the requirements of Rule 23(b)(2).

Under Rule 23(b)(2), Plaintiffs must show that "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). Plaintiffs' proposed class cannot be certified under Rule 23(b)(2) because they seek significant individualized monetary damages. *See* Pls.' Compl. at 26 (requesting "monetary damages or surcharge or restitution or other monetary relief (plus interest) . . . to restore [the class members] to the position in which they would have been but for" the termination of their benefits). Using Rule 23(b)(2) to obtain individualized monetary relief is discouraged. *See Dukes*, 564 U.S. at 360-62 ("[Rule 23(b)(2)] does not authorize class certification when each class member would be entitled to an individualized award of money damages . . . . we think it clear that individualized monetary claims belong in Rule 23(b)(3).")).[13]

Accordingly, a Rule 23(b)(2) class "cannot seek money damages unless the monetary relief is incidental to the injunctive or declaratory relief." *Chicago Tchrs. Union, Loc. No. 1 v. Bd. of Educ. of City of Chicago*, 797 F.3d 426, 443 (7th Cir. 2015). Monetary relief is not "incidental," and therefore improper, where plaintiffs seek monetary "awards based on evidence specific to particular class members." *Johnson v. Meriter Health Servs. Emp. Ret. Plan*, 702 F.3d 364, 370 (7th Cir. 2012). Put differently, "damages are incidental where the computation of

[13] It is no mystery why Plaintiffs largely ignore Rule 23(b)(3) and instead try to improperly certify a class for monetary damages under Rule 23(b)(1)(A) or (b)(2). *See Randall v. Rolls-Royce Corp.*, 637 F.3d 818, 825 (7th Cir. 2011) (noting that "[c]lass action lawyers like to sue under [Rule 23(b)(2)] because it is less demanding, in a variety of ways, than Rule 23(b)(3) suits," and "[o]f particular significance, plaintiffs may attempt to shoehorn damages actions into the Rule 23(b)(2) framework, depriving class members of notice and opt-out protections," as "[t]he incentives to do so are large" because "Plaintiffs' counsel effectively gathers clients—often thousands of clients—by a certification under (b)(2)") (quotation omitted).

damages is mechanical, without the need for individual calculation." *Bauer v. Kraft Foods Global, Inc.*, 277 F.R.D. 558, 562 (W.D. Wis. 2012) (quotation omitted).

Plaintiffs' monetary claims are not "incidental." They ask for damages to put each class member in a position they would have been but for the transition to the HRA program. This will require individualized analysis of evidence specific to each retiree to calculate their (alleged) costs incurred from the difference in coverage under the HRA program compared to the prior Fixed Group Plan. For example, such individual calculation would have to include:

- What individual plans did the retiree purchase on the exchange?
- What were the copays, deductibles, and costs associated with the individual plans?
- What were the actual healthcare expenditures made by the retiree over the years-long period that the HRA program was in effect?
- What would these actual expenditures made under the HRA program have cost under the prior Fixed Group Plan?

Indeed, in other filings, Plaintiffs have explained the "significant resources" and "enormous number of records" that would be involved in calculating their damages claims:

> [B]oth sides would likely need to expend significant resources, including the retention of experts, to calculate the monetary losses suffered by thousands of retirees as a result of Alcoa's termination of the long-provided benefits. This calculation would focus on the difference between the measure of benefits that the retirees were promised and what they actually received following Alcoa's unilateral benefit termination and, for some retirees, Alcoa's imposition of the HRA structure. . . . [I]t will be necessary for Defendants to produce full enrollment records and claims records as to each class member with an HRA. It would then be necessary for the parties' experts to analyze and synthesize these records to determine retirees' damages. . . . In some instances, it might prove necessary to try to obtain individual records of the out-of-pocket expenses class members with HRAs have paid, and expense records would have to be sought for those class members who failed to meet Alcoa's requirements for obtaining an HRA. Because class members will continuously pay premiums, deductibles, copayments, and coinsurance unless and until the negotiated plan is reinstated resulting in an enormous number of records, this fact too supports bifurcation.

Pls.' Br. Supp. Mot. to Bifurcate at 5-6 & 6 n.3, ECF No 46; *see also* Burnell Dep. at 106-108 (acknowledging putative class members "may have different needs, preferences, [and] desires, with regard to their healthcare coverage"). Additionally, Alcoa does not have visibility into the plans purchased by the putative class members or their out-of-pocket expenses, due in large part to HIPAA restrictions, meaning each class member must be willing to cooperate and share their personal health information. Ackerman Decl. ¶ 16. This poses not only significant logistical challenges, but also privacy issues. In sum, the undisputed massive amount of individualized analysis called for by Plaintiffs' monetary claims precludes certification under Rule 23(b)(2). *See Lemon v. Int'l Union of Operating Eng'rs, Local No. 139, AFL-CIO*, 216 F.3d 577, 581 (7th Cir. 2000) (monetary relief is "incidental" when damages "do not depend in any significant way on the intangible, subjective differences of each class member's circumstances") (quotation omitted); *Bauer*, 277 F.R.D. at 563 (no certification under Rule 23(b)(2) where retirees sought injunction to restore health insurance plans and monetary damages to "make whole all of the Plaintiffs and similarly situated persons for all losses proximately caused by the violations," due to individualized questions relating to deductibles and other out-of-pocket expenditures); *Boyle v. Int'l Bhd. of Teamsters Loc. 863 Welfare Fund*, 579 F. App'x 72, 76 (3d Cir. 2014) (no certification of Rule 23(b)(2) class where retirees sought restoration of medical benefits and various forms of monetary relief, stating that "the monetary relief for each Early Retiree is individualized, based on the specific alleged harms caused by the lapse in health benefits"); *Fair Housing Ctr. of Central Ind., Inc. v. Rainbow Realty Grp., Inc.*, No. 1:17-cv-1782, 2020 WL 1493021, at *5 (S.D. Ind. Mar. 27, 2020) ("Because those claims require individual damages calculations . . . they can't be certified under Rule 23(b)(2).").[14]

[14] Plaintiffs' individualized damages claims preclude certification under Rule 23(b)(1)(A) as well. *See Oakley v. Verizon Comms. Inc.*, No. 9 Civ. 9175, 2012 WL 335657, at *11 (S.D.N.Y.

C. Plaintiffs' class does not meet the requirements of Rule 23(b)(3).

For certification under Rule 23(b)(3), Plaintiffs must meet two requirements: "Common questions must 'predominate over any questions affecting only individual members'; and class resolution must be 'superior to other available methods for the fair and efficient adjudication of the controversy.'" *Windsor*, 521 U.S. at 615. Despite seeking certification under Rule 23(b)(3), Plaintiffs' brief merely recites the rule's requirements and asserts without explanation that they are satisfied. *See* Pls.' Mem. of Law at 24. Analysis shows they cannot meet either requirement.

The "predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Windsor*, 521 U.S. at 623. It is a "demanding" requirement where courts have a "duty to take a 'close look' at whether common questions predominate over individual ones." *Comcast*, 569 U.S. at 34 (citation omitted). "An individual question is one where members of a proposed class will need to present evidence that varies from member to member, while a common question is one where the same evidence will suffice for each member to make a prima facie showing or the issue is susceptible to generalized, class-wide proof." *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1045 (2016) (internals omitted). Predominance is "far more demanding" than commonality. *Windsor*, 521 U.S. at 623-24.

A "close look" at Plaintiffs' claims reveals a number of factual and legal questions particular to each proposed class member. *See Reed v. Advocate Health Care*, 268 F.R.D. 573, 580 (N.D. Ill. 2009) (Rule 23(b)(3) requires courts to "examine the substantive elements of plaintiffs' claims, the proof necessary for those elements, and the manageability of trial on those

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Feb. 1, 2012) ("Courts in this Circuit have repeatedly recognized that certification under subsection (b)(1)(A) is limited to claims for equitable relief."); *Butler v. Ill. Bell Tel. Co.*, No. 06 C 5400, 2008 WL 474367, at *6 (N.D. Ill. Feb. 14, 2008) ("Rule 23(b)(1)(A) certification generally is inappropriate when the action is for money damages.").

issues"). Plaintiffs seek to certify a class of over 3,000 retirees and eligible spouses divided among many different facilities and retirement dates, with different rights to benefits depending on which CBA and plan documents applies to them, and extrinsic evidence if the Court determines any documents are ambiguous. Because the same evidence will not suffice for each class member, the claims are not susceptible to generalized, class-wide proof. These individualized issues overwhelm common ones. *See Sacred Heart Health Sys., Inc. v. Humana Mil. Healthcare Servs., Inc.*, 601 F.3d 1159, 1176–77 (11th Cir. 2010) (individual issues predominate "if individualized extrinsic evidence bears heavily on the interpretation of the class members' agreements"); *Butler*, 2008 WL 474367, at *6 ("If liability determinations will be individual and fact-intensive, Rule 23(b)(3) certification is inappropriate."); *Stock*, 2007 WL 2565981, at *1-2 (variations in contracts and the need for individualized inquiries defeated predominance); *Bell*, 2013 WL 6253450, at *10-11 (no predominance where "individualized analysis of each contract would overwhelm any common questions of law or fact").

Additionally, Plaintiffs' damages claims cannot be determined on a classwide basis or based on a single formula. A particular class member's damages will depend on, among other things, the circumstances of their individual plans chosen and their history of expenditures, which will differ among class members. According to Plaintiffs, these calculations will require "significant resources" and an "enormous number of records." ECF No 46 at 5-6 & 6 n.3; *see also* Burnell Dep. at 106-108 (acknowledging putative class members "may have different needs, preferences, [and] desires, with regard to their healthcare coverage"). The size of the class and the nature of these damages calculations means individual issues predominate. For example, in *Espenscheid v. DirectSat USA, LLC*, the Seventh Circuit held class certification was inappropriate under Rule 23(b)(3) because a formulaic calculation of damages was not possible

and over 2,000 individual damages hearings loomed due to variance in damages, and class representatives' damages could not be used to project damages for absent class members. 705 F.3d 770, 773-77 (7th Cir. 2013). Here, Plaintiffs' proposed class would require nearly ***1,000 more*** individual damages hearings. *See also Dailey v. Groupon, Inc.*, No. 11 C 05685, 2014 WL 4379232, at *8-9 (N.D. Ill. Aug. 27, 2014) (no certification based on individualized damages issues, and rejecting plaintiffs' "extreme position" that "individualized hearings on damages are never a problem"); *Farmer v. DirectSat USA, LLC*, No. 08 CV 3962, 2013 WL 2457956, at *5-6 (N.D. Ill. June 6, 2013) (no certification based on individualized damages issues, and noting that even "the burden of 512 separate hearings is still onerous").[15]

Plaintiffs' motion ignores these individualized issues relating to liability and damages. At a minimum, they should present a trial plan that describes how both classwide liability and damages will be calculated. *See* Fed. R. Civ. P. 23 Advisory Committee's Note to 2003 Amendment ("An increasing number of courts require a party requesting class certification to present a 'trial plan' that describes the issues likely to be presented at trial and tests whether they are susceptible of class-wide proof.").[16] Additionally, Alcoa anticipates Plaintiffs will again ask the Court to overlook damages through bifurcation. *See* Order Denying Pls.' Mot. to Bifurcate,

[15] *Espenscheid* and *Dailey* were class actions under the Fair Labor Standards Act, but the Seventh Circuit applies the same standards for class actions under Rule 23. *See Espenscheid*, 705 F.3d at 772; *Alvarez v. City of Chicago*, 605 F.3d 445, 449 (7th Cir. 2010).

[16] In their Motion to Bifurcate, Plaintiffs previously argued they can overcome individualized damages issues through the certification of separate issue and damages classes under Rule 23(c)(4). Plaintiffs have not raised this argument in their motion and therefore have waived it, but, regardless, courts in the Seventh Circuit have held that damages must first satisfy the predominance requirement as a whole. *See Hamilton v. O'Connor Chevrolet, Inc.*, No. 02-cv-1897, 2006 WL 1697171, at *6 (N.D. Ill. June 12, 2006).

ECF No. 75. Courts can of course use bifurcation in an attempt to manage individualized damages where possible, but that does not mean they can be ignored, as shown above.

In addition to predominance, the superiority prong of Rule 23(b)(3) requires Plaintiffs to demonstrate a class action is a superior method of litigating the claim. Rule 23(b)(3) sets forth a non-exhaustive list of factors, including "the likely difficulties in managing a class action." In light of the individualized issues discussed above, this case cannot be effectively managed as a class action. *See Andrews v. Chevy Chase Bank*, 545 F.3d 570, 577 (7th Cir. 2008) ("If the class certification only serves to give rise to hundreds or thousands of individual proceedings requiring individually tailored remedies, it is hard to see how common issues predominate or how a class action would be the superior means to adjudicate the claims."); *Fletcher v. ZLB Behring, LLC*, 245 F.R.D. 328, 334 (N.D. Ill. 2006) ("Here, class certification would not be a superior method of adjudicating Plaintiffs' claims because resolution of each member's claims would entail sifting through a significant amount of individualized facts and allegations.").

V. The case law cited by Plaintiffs does not support certification.

Finally, Plaintiffs broadly contend that "[c]ourts in this Circuit routinely certify LMRA and ERISA cases like this one," and cite to four cases without explanation. Pls.' Mem. of Law at 22. As an initial matter, class certification is never "routine." *See Am. Express*, 570 U.S. at 234 (Rule 23 "imposes stringent requirements for certification that in practice exclude most claims"). Furthermore, Plaintiffs "must show more than that other courts certified classes in other ERISA cases based on different facts." *Groussman v. Motorola, Inc.*, 2011 WL 5554030, at *4 (N.D. Ill. Nov. 15, 2011). But besides, the cases relied on by Plaintiffs did not involve transitions to HRA programs and did not otherwise contain the numerous problems discussed above:

- ***Diehl v. Twin Disc, Inc.*, 102 F.3d 301 (7th Cir. 1996).** The class consisted of 120 retirees at a single plant and involved a single contract—a "shutdown agreement"—

and several insurance agreements incorporated into the contract. *See Diehl v. Twin Disc, Inc.*, No. 94 C 50031, 1995 WL 330637, at *1-3 (N.D. Ill. May 30, 1995).

- ***Rossetto v. Pabst Brewing Co.*, 217 F.3d 539 (7th Cir. 2000).** The class consisted of 45 retirees from a single plant, with agreements with identical provisions between them. Class certification was undisputed. *See Rossetto v. Pabst Brewing Co.*, 71 F. Supp. 2d 913 (E.D. Wis. Nov. 1, 1999), *rev'd*, 217 F.3d 539 (7th Cir. 2000).

- ***Bidlack v. Wheelabrator Corp.*, 993 F.2d 603 (7th Cir. 1993).** The class consisted of retirees from a single plant. The court analyzed all of the agreements at issue and determined they all had provisions that are "materially identical." *Id.* at 605.

- ***Senn v. United Dominion Indus.*, 951 F.2d 806 (7th Cir. 1992).** The class consisted of 95 to 166 retirees from a single plant. *See Senn v. AMCA Int'l*, No. 87-C-1353, 1988 WL 168321, at *2 (E.D. Wis. Dec. 21, 1988).

Additionally, it is significant that these cases predate current class certification law, most notably the Supreme Court's 2011 decision in *Dukes*, which rejected certification based on mere allegations, instructed courts to resolve merits issues when necessary, rejected the notion that commonality was a low bar, and held that individualized monetary claims do not belong in Rule 23(b)(2). *See* 564 U.S. at 350-53, 361-62, 375; *see also Groussman*, 2011 WL 5554030, at *3 ("[T]he determination of whether the [Rule 23] requirements are met in this case must be made based upon a detailed and rigorous evaluation of the facts and law in this case, not based on rulings in other cases, particularly pre-*Dukes* cases.").

CONCLUSION

For the foregoing reasons, Plaintiffs' motion to certify a class should be denied.[17]

[17] As discussed throughout this brief, there are numerous ways that Plaintiffs' motion for class certification fails to meet the requirements of Rule 23, no matter how they define the class. Regardless, the Court should reject any attempt by Plaintiffs in their reply brief to propose new class or subclass definitions that were not properly raised in their motion. *See, e.g.*, *Van v. Ford Motor Co.*, 332 F.R.D. 249, 292-93 (N.D. Ill. Aug. 22, 2019) ("To the extent that Plaintiffs raise new issues for certification under Rule 23(c)(4) in their reply brief, they waived any argument with respect to those issues.")); *Sandefur v. Iron Workers St. Louis Dist. Council Pension Fund*, No. 3:14-cv-175, 2015 WL 4232490, at *2 (S.D. Ind. July 13, 2015) (Young, J.) (declining to consider argument raised for the first time in reply).

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on April 25, 2022, a true and correct copy of the foregoing document was served upon counsel of record by the Court's CM/ECF service.

/s/ *Mark Miller*