UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES -- GENERAL

Case No. **CV 16-9141-JFW (JCx)** Date: December 6, 2019

Title: Lindie L. Banks, et al. *-v-* Northern Trust Corporation

PRESENT:
HONORABLE JOHN F. WALTER, UNITED STATES DISTRICT JUDGE

Shannon Reilly	**None Present**
Courtroom Deputy	**Court Reporter**

ATTORNEYS PRESENT FOR PLAINTIFFS:	**ATTORNEYS PRESENT FOR DEFENDANTS:**
None	None

PROCEEDINGS (IN CHAMBERS): **ORDER DENYING PLAINTIFFS' MOTION FOR CLASS CERTIFICATION [filed 11/4/19; Docket No. 99]**

On November 4, 2019, Plaintiffs Lindie L. Banks ("Banks") and Erica LeBlanc ("LeBlanc") (collectively, "Plaintiffs") filed a Motion for Class Certification ("Motion"). On November 18, 2019, Defendants Northern Trust Corporation ("NT Corp.") and The Northern Trust Company ("Northern") (collectively, "Defendants") filed their Opposition. On November 25, 2019, Plaintiffs filed a Reply. Pursuant to Rule 78 of the Federal Rules of Civil Procedure and Local Rule 7-15, the Court found the matter appropriate for submission on the papers without oral argument. The matter was, therefore, removed from the Court's December 9, 2019 hearing calendar and the parties were given advance notice. After considering the moving, opposing, and reply papers, and the arguments therein, the Court rules as follows:

I. Factual and Procedural Background

A. The Parties

Northern is a financial services company that was founded in 1889 and is a wholly owned subsidiary of NT Corp. Northern provides asset servicing, fund administration, asset management, fiduciary, and banking solutions for corporations, institutions, families, and individuals. Northern services client assets through its Wealth Management business, which provides investment management, philanthropic, and other services to individuals, families, business owners, professionals, retirees, and privately held businesses. Northern serves as trustee for nearly 30,000 unique trusts in the United States. In this role, Northern carries out varying trust terms and performs accounting, reporting, investment management, tax, and other administrative services.

Banks, who is 87 years old, is a beneficiary of two trusts: (1) the irrevocable Katherine Lindstrom Trust (the "KL Trust"), created in 1961; and (2) the Ralph G. And Katherine Lindstrom

Trust (the "RGKL Trust"), created in 1964 and which became irrevocable in 1975. LeBlanc is Banks' daughter and a remainder beneficiary of the KL Trust and the RGKL Trust (collectively, the "Lindstrom Trusts"). Northern has served as the trustee for the Lindstrom Trusts since the early 1990s and has sole discretion on how to manage the trusts' assets.[1]

In their First Amended Class Action Complaint[2], Plaintiffs allege that Northern[3] has charged improper and excessive tax preparation fees for the routine preparation of fiduciary tax returns while also overcharging "fixed fee" trusts. Plaintiffs allege that Northern violated the terms of the Lindstrom Trusts, as well as any other trust that contains a "fixed fee" provision, by taking any tax return preparation fee. In addition, Plaintiffs allege that to the extent these fees were allowable, they are still improper because Northern inflated the amounts charged and has no documentation to support that those amounts were reasonable. Plaintiffs also allege that Northern breached its duty of loyalty and prudent investment by investing the trusts' assets in Northern's own affiliated "Funds Portfolio" rather than seeking superior investments outside its financial umbrella. Plaintiffs allege that Northern's practice led the trusts to suffer suboptimal returns, which would not have happened if Northern prioritized the interests of the trust beneficiaries rather than it's own.

B. Northern Administered Trusts

1. Trust Instruments

Grantors establish trusts, which are defined by written instruments, to serve the particular desires, needs, and circumstances of the grantors and beneficiaries. Trust instruments are customized and varied. For example, among other parameters, trust instruments identify the trustee selected by the grantor and set forth different purposes, beneficiaries, durations, standards for distributions and trustee compensation, the beneficiary's authority to remove the trustee, and the level of discretion granted to trustees in making investments. Trusts also differ as to their value, assets held, and tax attributes. Trusts have different amounts of unrealized capital gains and offsetting losses and are taxed at different rates, or not at all, depending on net earnings for

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[1] The Lindstrom Trusts originally designated Title Insurance and Trust Company ("TI") as trustee, which was later consolidated with Trust Services of America, Inc. ("TSA"). TSA administered the Lindstrom Trusts until Northern acquired them in the early 1990s.

[2] On December 9, 2016, Plaintiffs filed a Class Action Complaint against Defendants. On June 5, 2017, after the Court granted Defendants' Motion to Dismiss with leave to amend, Plaintiffs filed their First Amended Class Action Complaint, alleging causes of action for: (1) breach of fiduciary duty in connection with fund selection; (2) unjust enrichment or restitution; (3) accounting as to the fund-related claims; (4) breach of fiduciary duty in connection with tax preparation fees; (5) accounting as to the tax preparation claims; (6) unfair competition under California Business and Professions Code § 17200; and (7) elder abuse under California Welfare and Institutions Code §§ 15600, *et seq*. On July 14, 2017, the Court entered an Order dismissing the First Amended Class Action Complaint without leave to amend. Plaintiffs appealed the Court's July 14, 2019 Order, and on July 29, 2019, the Ninth Circuit reversed the Court's dismissal of this action.

[3] Plaintiffs allege claims against NT Corp. on the ground that NT Corp. "directs and approves the actions of its subsidiaries."

the year, distributions, and whether the trust is a grantor trust or tax exempt. Some grantors provide investment instructions unique to their trusts. Some trust instruments specifically permit use of proprietary mutual funds, which are sponsored by an affiliate of Northern. Some trust instruments permit "reasonable" trustee compensation, while others provide for a fixed or asset-based fee, or a fee set according to internal or statutory fee schedules. Trust instruments also vary as to tax preparation fees – some expressly permit such fees and some do not address them at all.

2. Investment Management

Northern administers and invests assets for many types of trusts. Northern assigns each trust a relationship manager. For most trusts, Northern also assigns a portfolio manager ("PM"). The relationship manager is responsible for trust administration, including making distributions, communicating with beneficiaries, and, in coordination with the PM, setting investment objectives based on the individual circumstances of each trust. Each PM is responsible for implementing a given trust's investment strategy. Each PM considers numerous trust-specific factors, including existing assets, diversification, investment performance, tax considerations, beneficiaries' needs, and the terms of the trust instrument. The PM may also consider the views of the beneficiaries. The trust's investment strategy may vary depending on the value of its assets, which range from thousands to millions of dollars. Each PM may choose from a wide range of investment options, including (1) proprietary and non-proprietary funds; (2) individual equities; (3) individual fixed-income securities; and (4) over 100 model portfolios. Grantors also may instruct PMs to invest in assets beyond these categories, such as a closely-held business. Northern reviews and approves investment funds available to PMs and includes them on its monthly "Capabilities List." Northern carefully evaluates multiple factors, such as how closely the fund tracks its stated benchmark, cash investment and securities lending, performance, benchmark stability, expense ratio, communication with managers, and management turnover. Northern modifies the Capabilities List periodically to provide PMs a broad array of options to accommodate different client needs. The Capabilities List currently includes approximately 440 products, of which approximately 325 are approved for use in trusts. Of those 325, approximately 150 are proprietary, and approximately 175 are sponsored by unaffiliated firms, such as Vanguard or DFA.

3. Tax Return Preparation

Northern prepares tax returns for the majority of trusts it administers. Although Northern has updated its tax preparation fee structure a number of times during the alleged class period, since 2016 Northern has published its fee of $900 to prepare federal returns for irrevocable trusts and $100 for the first state return. Published fees for other types of trusts vary. Those fees are based on Northern's estimate of its costs (such as preparer time and support), and marketplace information about the typical fee for comparable services. The actual time required to prepare each trust's returns varies. Northern does not charge every trust the same fee, and sometimes waives them. Northern may charge a higher fee where the trust's returns are particularly complex, such as a trust that has a high trading volume, complex beneficiary structures, or unique investments. Between 2013 and 2018, Northern charged tax preparation fees ranging from $3.00 to $11,800. If a trust instrument has specific instructions as to the amount of the fee that can be charged for tax preparation, Northern follows those instructions even if the resulting fee departs from its fee schedule. Northern began charging tax preparation fees to different trusts it

administers at different times. With respect to the Lindstrom Trusts, Northern has charged a tax preparation fee since the early 1990s. For most other trusts, Northern has charged a tax preparation fee since 2003. Northern has sent trust beneficiaries written notices advising them of any change to its fee schedule.

C. Management of the Lindstrom Trusts

1. Fees

Unlike most trusts Northern administers, the Lindstrom Trusts have an unusual fee provision that authorizes an annual fee of three-fifths of one percent (*i.e.*, 0.60%) of assets under management, plus "reasonable compensation" for "extraordinary services." TSA charged a separate tax preparation fee since at least the 1980s, which its fee schedule identified as "extraordinary services." Northern continued this practice. When Northern's fees changed over time, it notified Banks. In fact, Banks testified that she was aware of the separate tax preparation fee since at least 2003 and recognized it as a line item in her account statements. Between December 1, 2002 and January 2012, Northern also charged the Lindstrom Trusts 0.60% of assets under management for trust administration. Northern (and its affiliates) rebated mutual fund management fees for its proprietary funds held by the trusts. After Northern implemented a new fee schedule in January 2012, it began waiving the 0.60% administrative fee for the Lindstrom Trusts (unlike most trusts) and stopped rebating mutual fund management fees.

2. Investments

The Lindstrom Trusts' investment objectives and portfolios have varied over time. Since at least 2000, the trusts have been invested in at least one proprietary mutual fund. In January 2000, Banks asked Northern to redirect the focus of the trusts' portfolios in order to increase her monthly income, and Northern complied with her instructions. Banks also has requested specific investments. In 2004, the trusts' PM rebalanced the Lindstrom Trusts' portfolios using a model portfolio that included several proprietary index funds. .

3. Prior Legal Proceedings

In March 2003, Banks' attorney wrote Northern requesting information, acknowledging that "all of the assets of the trusts are invested in" Northern funds. On May 20, 2003, Banks filed a class action against Northern's predecessor, Northern Trust Bank of California, N.A., alleging Northern breached its fiduciary duties by charging fixed-fee trusts higher fees than permitted by the trusts' instruments. *See Banks v. N. Trust Bank of Cal., N.A.*, Los Angeles Superior Case No. BC295997. Banks, represented by Derek Howard (one of her lawyers in this action), conducted discovery into many aspects of Northern's trust administration, including its tax preparation fees. In 2005, the Superior Court approved a settlement of the class action. Banks and the settlement class agreed to "forever release, waive and discharge" claims arising from "the facts, transactions, events, occurrences, acts, disclosures, statements, omissions or failures to act which were alleged or could have been alleged in the Action" by the settlement class. Banks acknowledges that the current litigation involves the same conduct and fees that were at issue in the prior class action.

II. Legal Standard

Before certifying a class, the trial court must conduct a "rigorous analysis" to determine whether the party seeking certification has met the prerequisites of Federal Rule of Civil Procedure 23. *Zinser v. Accufix Research Institute, Inc.*. 253 F. 3d 1180, 1186 (9th Cir. 2001), *as amended*, 273 F.3d 1266 (9th Cir. 2001). The party seeking class certification bears the burden of demonstrating that the four requirements of Rule 23(a) and at least one of the requirements of Rule 23(b) have been satisfied. *Id.*

Under Rule 23(a), a class action is only proper 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. Proc. 23(a).

If the Rule 23(a) prerequisites are met, the Court must decide if certification is appropriate under Rule 23(b). In this case, Plaintiffs seek certification of the Class under Rule 23(b)(3), which authorizes certification if:

> [T]he court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings include:
>
> (A) the class members' interest in individually controlling the prosecution or defense of separate actions;
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> (B) the extent and nature of any litigation concerning the controversy already begun by or against class members;
>
> (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and
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> (D) the likely difficulties in managing a class action.

Fed. R. Civ. P. 23(b)(3).

"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 or fact, etc." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011). "When considering class certification under

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Rule 23, district courts are not only at liberty to, but must perform 'a rigorous analysis [to ensure] that the prerequisites of Rule 23(a) have been satisfied.'" *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 980 (9th Cir. 2011) (*quoting Wal-Mart*, 564 U.S. 338). "In many cases, 'that rigorous analysis will entail some overlap with the merits of the plaintiff's underlying claim. That cannot be helped.'" *Id.*

III. Discussion

A. The Proposed Classes

In their Motion, Plaintiffs seek to certify three classes. Specifically, Plaintiffs seek to certify the "Tax Preparation Fee Class," which is defined as:

> From January 1, 2008 to the present, all grantors, trustors, beneficiaries, remaindermen, co-trustees and/or successor trustees of Class Trusts, which are defined as all revocable or irrevocable personal or charitable trusts: (1) for which Defendants served or serve as trustee, and where Defendants charged a "fiduciary" or "tax preparation" fee for one or more of the covered years, and (2) the paid preparer of the fiduciar
>
> Excluded from the Nationwide Class are Defendants and their employees, affiliates, parents, subsidiaries, and co-conspirators, whether or not named in this Complaint, and the United States government. Also excluded are any trusts where the trustee was both unpaid, and did not prepare fiduciary returns, but rather a return was performed entirely by a third-party accountant that was paid directly from the trust.[4]

In addition, Plaintiffs seek to certify the "Fixed-Fee Overcharge Class," which is defined as:

> From January 1, 2008 to the present, all grantors, trustors, beneficiaries, remaindermen, co-trustees and/or successor trustees of Class Trusts, which are defined as all revocable or irrevocable personal or charitable fixed-fee trusts: (1) for which Defendants served or serve as trustee, (2) for which the amount of the trustee's compensation is specified in the governing instrument for the trust, and (3) for which fees were charged in excess of the specified compensation by Defendants.
>
> Excluded from the Nationwide Class are Defendants and their employees, affiliates, parents, subsidiaries, and co-conspirators, whether or not named in this Complaint, and the United States government.[5]

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[4] Plaintiff Banks also seeks a subclass of elder California beneficiaries who are at least 65 years old and members of the Tax Preparation Fee Class.

[5] Plaintiff Banks also seeks a subclass of elder California beneficiaries who are at least 65 years old and members of the Fixed-Fee Overcharge Class.

Finally, Plaintiffs seek certification of the "Investment Class,"[6] which is defined as:

> From December 9, 2012 to the present, all grantors, trustors, beneficiaries, remaindermen, co-trustees and/or successor trustees of Class Trusts, which are defined as all revocable or irrevocable personal or charitable trusts: (1) for which Defendants served or serve as trustee, (2) for which Defendants had sole investment discretion or recommendation responsibility over principal and/or income, and (3) which had trust assets invested in index fund investments that were financially affiliated with Defendants, that were also invested in the Lindstrom Trust.[7]
>
> Excluded from the Nationwide Class are Defendants and their employees, affiliates, parents, subsidiaries, and co-conspirators, whether or not named in this Complaint, and the United States government.[8]

B. Rule 23(a) Requirements

1. Numerosity

To satisfy the numerosity requirement of Rule 23(a), the class must be "so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). "Joinder need not be impossible so long as potential class members would suffer a strong litigation hardship or inconvenience if joinder were required." *Rannis v. Recchia*, 2010 WL 2124096, at *3 (9th Cir. May 27, 2010) (citing *Harris v. Palms Springs Alpine Estates, Inc.*, 329 F.2d 909, 913-14 (9th Cir. 1964)). Courts routinely find the numerosity requirement satisfied when the class consists of 40 or more members. *See EEOC v. Kovacevich "5" Farms*, 2007 WL 1174444, at *21 (E.D. Cal. Apr. 19,

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[6] Plaintiffs' First Amended Class Action Complaint alleges an "Investment Class" consisting of trusts with assets invested in any "investments that were financially affiliated with Defendants" since 2006. First Amended Class Action Complaint ("FAC"), ¶ 217. In their Motion, Plaintiffs limited the Investment Class to trusts that had assets invested in seven index funds that were financially affiliated with Defendants and were also investments held by the Lindstrom Trusts. However, Plaintiffs did not seek leave to amend their First Amended Class Action Complaint by the October 11, 2019 deadline to change the definition of the Investment Class to conform with the definition of the Investment Class they are now seek to certify. Courts have held that a court may not certify a class different than the one alleged in the complaint. *See, e.g., Baker v. Big Lots Stores, Inc.*, 2009 WL 10673045, *3-4 (C.D. Cal. Aug. 25, 2009). Therefore, Plaintiffs' Motion is denied with respect to the Investment Class on this basis. However, the Court also denies Plaintiffs' Motion with respect to the Investment Class as alleged in the Motion for the reasons set forth in this Order.

[7] The proprietary index funds are: Northern Stock Index Fund; Northern Mid Cap Index Fund; Northern Small Cap Index Fund; Northern International Equity Fund; Northern Emerging Markets Equity Index Fund; Northern Bond Index Fund; and Northern Global Real Estate Index Fund.

[8] Plaintiff Banks also seeks a subclass of elder California beneficiaries who are at least 65 years old and members of the Investment Class.

2007).

In this case, it is undisputed that the numerosity requirement is satisfied for the Tax Preparation Fee Class and the Investment Class. With respect to the Fixed-Fee Overcharge Class, as Defendants argue, Plaintiffs have failed to provide any evidence to support their contention in their Motion that "thousands of trusts [are] involved."[9] *See* Motion, 21:19.

Accordingly, the Court concludes that Plaintiffs have satisfied the numerosity requirement with respect to the Tax Preparation Fee Class and the Investment Class. However, the Court concludes that Plaintiffs have not satisfied the numerosity requirement with respect to the Fixed-Fee Overcharge Class.

2. Commonality

The commonality requirement is satisfied "if there are questions of fact and law which are common to the class." Fed. R. Civ. P. 23(a)(2). "The Supreme Court has recently emphasized that commonality requires that the class members' claims 'depend upon a common contention' such that 'determination of its truth or falsity will resolve an issue that is central to the validity of each claim in one stroke.'" *Mazza v. Am. Honda Motor* Co., 666 F.3d 581, 588 (9th Cir. 2012) (*quoting Wal-Mart*, 564 U.S. 338) (internal alteration omitted). "What matters to class certification is not the raising of common 'questions' – even in droves – but rather the capacity of a classwide proceeding to generate common *answers* apt to drive the resolution of the litigation." *Wal-Mart*, 564 U.S. 338 (quotations and citations omitted). "This does not, however, mean that *every* question of law or fact must be common to the class; all that Rule 23(a)(2) requires is 'a single *significant* question of law or fact.'" *Abdullah v. U.S. Security Associates, Inc.*, 731 F.3d 952, 957 (9th Cir. 2013) (quoting *Mazza*, 666 F.3d at 589).

a. The Tax Preparation Fee Class

The Court concludes that Plaintiffs have failed to meet their burden of demonstrating that there are questions of fact and law which are common to the Tax Preparation Class.[10] In this case, Plaintiffs have failed to demonstrate that common proof would permit class-wide resolution of these claims. Although Plaintiffs argue that charging a "line item" tax preparation fee is "uniformly illegal,"

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[9] Moreover, Plaintiffs fail to respond to Defendants argument in their Reply.

[10] In their Notice of Motion, Plaintiffs describe the Fixed-Fee Overcharge Class as its own, independent class. However, in their Motion, Plaintiffs describe the Fixed-Fee Overcharge Class as a subclass of the Tax Preparation Fee Class. Although Plaintiffs and Defendants have provided detailed analysis of the Tax Preparation Fee Class and the Investment Class, they have only provided a perfunctory analysis of the Fixed Fee Overcharge Class. In fact, in their Motion, Plaintiffs do not cite any factual or legal support for their argument supporting certification of the Fixed Fee Overcharge Class. For this reason, the Court concludes that Plaintiffs have failed to carry their burden as to certification of the Fixed Fee Overcharge Class and, thus, denies Plaintiffs' Motion with respect to the Fixed Fee Overcharge Class. In addition, the Court denies Plaintiffs' Motion with respect to the Fixed Fee Overcharge Class for the reasons set forth below with respect to typicality, adequacy, and whether common issues predominate.

Plaintiffs identify no legal support for their argument. To the contrary, many states, including California, allow the trustee of a trust to be paid for its services, including the preparation of tax returns, according to the trust instrument or, if no fee is specified, in an amount that is reasonable "under the circumstances."[11] *See, e.g.,* Cal. Prob. Code §§ 15680, 15681; *see also* Colo. Rev. Stat. § 15-10-602; 760 Ill. Comp. Stat. 3/708, 5/7. Because the propriety of a tax preparation fee can only be determined by reference to individual trust instruments, various state laws, and what is reasonable based on the unique circumstances of each trust, individualized inquiry is unavoidable. For example, the work required to prepare tax filings for different trusts is dependant on a number of individual factors. For trusts with relatively few beneficiaries and trades, the return may be simple, but trusts that have greater trading volume, unique investments, or complex beneficiary structures will require substantially more work. Thus, what constitutes a reasonable tax preparation fee would differ significantly.

Plaintiffs also argue, without evidentiary support, that Northern charges every trust the same tax preparation fee. *See Comcast Corp. v. Behrend*, 569 U.S. 27, 33 (2013). In fact, as Northern demonstrated, trusts within the putative Tax Preparation Fee Class have been charged a variety of fees over time. In addition, regardless of whether all the trusts were charged the same tax preparation fee or not, individualized inquiries would still predominate because it would be necessary to assess whether a particular tax preparation fee was appropriate for any specific trust in light of the terms of each trust instrument and the circumstances of that trust.

In addition, although Plaintiffs argue that similar fee claims were certified in *Henderson v. Bank of New York Mellon, N.A.* 332 F.Supp. 3d 419 (D. Mass. 2018), the Court agrees with Northern that *Henderson* is distinguishable. In *Henderson*, the plaintiffs alleged that BNY Mellon uniformly outsourced tax preparation services to a third party firm, PwC, without disclosure and then improperly "mark[ed] up" the fee it passed on to trusts. *Id*. at 423-26. Thus, the class-wide issue was "BNY Mellon allegedly overcharging the trusts for PwC's services" *Id*. at 426. However, in this case, the issue is whether Northern charged each trust an appropriate and reasonable tax preparation fee for services that Northern itself performed, in light of the terms of each trust instrument and the circumstances of each trust.

Finally, Plaintiffs argue, without any legal authority, that Northern breached fiduciary duties on a class-wide basis by failing to maintain records of "the actual cost" of preparing each trust's return. However, Northern has demonstrated that it does maintain records from which cost information could be derived, if necessary.

Accordingly, the Court concludes that Plaintiffs have failed to demonstrate that there are questions of fact and law which are common to the class with respect to the Tax Preparation Fee Fund.

b. The Investment Class

The Court also concludes that Plaintiffs have failed to meet their burden of demonstrating

[11] Many states, including California, also expressly authorize a trustee to hire "associated or affiliated" accountants to assist in administrative duties. *See, e.g.*, Cal. Prob. Code § 16247; *see also* 760 Ill. Comp. Stat. 5/4.09; Mo. Rev. Stat. § 473.797.

that there are questions of fact and law which are common to the Investment Class. Plaintiffs argue that whether Northern breached its fiduciary duties by investing in the specified proprietary funds can be answered with common proof. However, the use of proprietary funds is not, in and of itself, a breach of fiduciary duty. *See* Cal. Fin. Code § 1582(b); Uniform Trust Code § 802(f) cmt. f (2018); Restatement (Third) of Trusts § 78 cmt. c(8) (2007). Instead, any analysis of whether a trustee may have breached its duties requires consideration of whether the trustee acted with "reasonable care, skill, and caution" in light of the circumstances of a particular trust and the investment decisions made for the trust. *See, e.g.,* Cal. Prob. Code § 16047(b) and (c); *see also* Unif. Prudent Investor Act § 2(b) and (c). Relevant circumstances include "general economic conditions," the "expected tax consequences," and the role of each investment within the portfolio, among others. *Id.*

In *Wal-Mart,* 564 U.S. at 350, the Supreme Court held that Rule 23(a)(2) requires proof that the claims of the entire class can be resolved "in one stroke." In this case, hundreds of individual PMs made investment decisions for thousands of trusts, and those PMs exercised their independent judgment based on each trust's individual circumstances. Thus, in order to evaluate whether an investment of trust assets was a breach of Northern's fiduciary duties, the Court would be required to determine whether each of the thousands of different investment decisions was "reasonable" under the specific circumstances of each trust at a particular point in time. *See, e.g.*, Cal. Prob. Code § 16047(b) and (c); *see also* Unif. Prudent Investor Act § 2(b) and (c).

Plaintiffs argue, without evidentiary support, that Northern eliminated the PMs' discretion by: (1) limiting investment selections to a "Capabilities List" that includes an allegedly disproportionate number of Northern proprietary funds; and (2) requiring PMs to invest trust accounts in "model portfolios" comprised of Northern proprietary funds. In fact, Northern's Capabilities List is simply a list that identifies hundreds of proprietary and non-proprietary investment products approved for use in Northern accounts. In addition, there are 325 funds on the Capabilities List approved for use in trust accounts, and less than half are proprietary, with Plaintiffs' seven challenged funds making up a very small fraction of the list. Moreover, PMs, instead of choosing funds, may choose from hundreds more approved individual stocks and bonds. Furthermore, Northern has demonstrated that PMs have complete discretion to select from among these hundreds of options using their own judgment in light of the needs and requirements of each individual trust, and may – but are not required to – select from over 106 different model portfolios comprised of proprietary and non-proprietary products.[12]

In addition, trusts satisfying the Investment Class definition vary widely in terms of the number of disputed funds held, the relative proportion of each trust assets invested in those funds, and investment timing. Moreover, the performance of each of the challenged funds, the fees each charged, and how each compares to competitors' funds changes frequently. Furthermore, some

[12] In addition, even if PMs were limited to only proprietary products, a PM's decision to select a particular fund or model would require evaluation of the circumstances of each trust in relation to the investment. As Plaintiffs' experts Pomerantz and Halpern conceded, there are many reasons why a PM may have decided to buy, sell, or hold any of the seven funds at any given time. Pomerantz also conceded that in some years, some Northern funds outperformed the funds he used as comparators.

trusts within the putative Investment Class, including the Lindstrom Trusts, held challenged funds prior to the proposed class period and had significant unrealized gains in those holdings, which would impact the wisdom of selling them (and incurring a tax liability) in a given year. Moreover, for each trust in the putative Investment Class, the intent of its grantors and its terms, purposes, investment objectives, beneficiaries, and governance structure fundamentally differ. All of these unique and individual issues will require a trust-by-trust, investment-by-investment inquiry to determine whether each PM prudently weighed those factors in making their investment decisions. *See Williams v. Oberon Media, Inc.*, 2010 WL 8453723, at *7 (C.D. Cal. Apr. 19, 2010), *aff'd*, 468 F. App'x 768 (9th Cir. 2012).

Accordingly, the Court concludes that Plaintiffs have failed to demonstrate that there are questions of fact and law which are common to the class with respect to the Investment Fund.

3. Typicality

Typicality exists when "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). "Under the rule's permissive standards, representative claims are 'typical' if they are reasonably co-extensive with those of absent class members; they need not be substantially identical." *Hanlon v. Chrysler Corp*., 150 F.3d 1011, 1020 (9th Cir.1998). "Although the claims of the purported class representative need not be identical to the claims of other class members, the class representative 'must be part of the class and possess the same interest and suffer the same injury as the class members.'" *Lymburner v. U.S. Financial Funds, Inc.*, 263 F.R.D. 534, 540 (N.D. Cal. 2010) (quoting *General Tel. Co. of Southwest v. Falcon*, 457 U.S. 147, 156 (1982)). To assess whether or not the representative's claims are typical, the Court examines "'whether other members have the same or similar injury, whether the action is based on conduct which is not unique to the named plaintiffs, and whether other class members have been injured by the same course of conduct.'" *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992) (quoting *Schwartz v. Harp*, 108 F.R.D. 279, 282 (C.D.Cal.1985)). In addition, "class certification is inappropriate where the putative class representative is subject to unique defenses which threaten to become the focus of the litigation." *Id*. (citing cases).

The Court concludes that the Lindstrom Trusts are not typical of trusts in the proposed Classes. It is undisputed that the Lindstrom Trusts have an atypical fee history. For example, unlike many other trusts within the proposed Classes, Northern has waived its trust administration fee for the Lindstrom Trusts since January 1, 2012. Although Plaintiffs argue that this fact is "entirely irrelevant," Plaintiffs ignore the fact that the entire basis for Plaintiffs' claim that the tax preparation fee is improper is that Northern is "already compensated" for those services "through a trustee management or advisory fee." However, it is undisputed that, with respect to the Lindstrom Trusts, Northern was not "already compensated" for tax preparation through an administrative fee (because it was waived) and, thus, Plaintiffs' argument does not apply to Plaintiffs' trusts. In addition, prior to January 1, 2012, Northern rebated its proprietary fund management fees to the Lindstrom Trusts and many other, but not all, putative class trusts. Thus, as Plaintiffs tacitly concede, Plaintiffs are atypical representatives of the Investment Class.

In addition, Plaintiffs do not dispute that their claims are atypical because the historical relationship of the Lindstrom Trusts differs from the trusts of other putative class members. The Lindstrom Trusts were established in the 1960s, when trustees were thought to be prohibited from

"delegating" investment responsibility, such as purchasing a mutual fund managed by a third party. *See* Restatement (First) of Trusts § 171, cmt. h (1935). However, trusts created more recently were established after the change in the law allowing trustees to purchase third-party mutual funds. *See Questioning the Trust Law Duty of Loyalty: Sole Interest or Best Interest?*, 114 Yale L.J. 929, 973-75 (2005); *see also* Unif. Prudent Investor Act § 9. Thus, a trust created more than fifty years ago, such as the Lindstrom Trusts, is not typical of trusts created under the modern laws governing trusts.

Moreover, Plaintiffs do not dispute that the Lindstrom Trusts' grantors did not originally appoint Northern as trustee, which makes them atypical of trusts that were created by grantors who intentionally selected Northern, and were well aware of Northern's investment strategy and use of some proprietary funds.

Finally, the Court concludes that Banks' prior lawsuit against Northern and resulting release creates atypical defenses. As a result of that lawsuit, Banks was on notice that the Lindstrom Trusts held Northern funds and were charged a tax preparation fee. In 2005, Banks settled and agreed to a broad release of claims. Thus, Plaintiffs are vulnerable to unique defenses, including release, laches, waiver, and estoppel. *See, e.g., Estate of Kampen*, 201 Cal. App. 4th, 971, 998 (2011); *Mardirosian v. Lincoln Nat. Life Ins. Co.*, 739 F.2d 474, 477 (9th Cir. 1984). Plaintiffs have failed to demonstrate that these unique defenses will not affect their representation of absent class members. *See Brady v. Deloitte & Touche LLP*, 2012 WL 1059694, at *5 (N.D. Cal. Mar. 27, 2012); *see also Spann v. AOL Time Warner, Inc.*, 219 F.R.D. 307, 319 (S.D.N.Y. 2003) (holding that "so long as it is appropriate to consider the Releases at all, their existence presents an insurmountable barrier to class-wide adjudication of these claims").

Accordingly, the Court concludes that Plaintiffs' claims are not typical of the members of the proposed Classes.

4. Adequacy of Representation

Rule 23(a)(4) requires that "the representative parties will fairly and adequately protect the interests of the class. Fed. R. Civ. P. 23(a)(4). To satisfy constitutional due process concerns, "absent class members must be afforded adequate representation before entry of a judgment which binds them." *Hanlon*, 150 F.3d at 1020 (*citing Hansberry v. Lee*, 311 U.S. 32, 42-3 (1940)). "Resolution of two questions determines legal adequacy: (1) do the named plaintiffs and their counsel have any conflicts of interest with other class members and (2) will the named plaintiffs and their counsel prosecute the action vigorously on behalf of the class?"[13] *Id.* (citing *Lerwill v. Inflight Motion Pictures, Inc.*, 582 F.2d 507, 512 (9th Cir. 1978)).

The Court concludes that Plaintiffs are not adequate representatives of the Classes because they apparently had actual knowledge of the facts underlying their claims for several years prior to the filing of this action, and, thus, will likely be unable to rely on any "discovery rule" to toll the statute of limitations. In California, where evidence of a potential breach of trust claim is disclosed in an account statement, the statute of limitations is three years. *See* Cal. Prob. Code §

[13] It is undisputed that Plaintiffs' counsel would fairly and adequately represent the interests of the proposed Classes.

16460(a). Thus, because Plaintiffs' Class Action Complaint was filed in 2016, the statute of limitations would normally bar any claims that occurred prior to 2013. Plaintiffs argue that the discovery rule will extend that period to 2012 for investment claims and 2008 for tax preparation claims. However, Banks had notice of her claim by at least 2003 based on the prior litigation against Northern. Since the settlement of that case, Banks has received quarterly statements disclosing all investments and itemizing all fees, including for tax preparation. Therefore, Plaintiffs will be unable to rely on the discovery rule to extend the limitations period.[14] *See Noggle*, 70 Cal. App. 4th at 860-61. Because Plaintiffs will be unable to invoke the discovery rule, they are inadequate representatives for Classes containing members who would require and may be entitled to such tolling to save their claims.

In addition, the members of the potential Classes have internal conflicts with Plaintiffs, which makes Plaintiffs inadequate class representatives. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 626-27 (1997); *see Radcliffe v. Experian Info. Sols. Inc.*, 715 F.3d 1157, 1165 (9th Cir. 2013) (holding that class representatives with "significantly different financial incentives than" the class were inadequate). For example, Plaintiffs allege Northern charges the same tax preparation fee for every trust. Even if that were true (which Northern argues it is not), the result would be that some putative class trusts with complex portfolios or beneficiary structures would benefit from an alleged fee that is substantially lower than what the market would deem reasonable, while others with simpler tax issues would argue the same fee is unreasonable. However, a class may not be certified where the interests of one sub-group of plaintiffs "tug" against the interests of another. *Amchem*, 521 U.S. at 626.

Finally, Plaintiffs are unable to demonstrate that they are adequate representatives to prosecute the action vigorously on behalf of the class. For example, during her deposition, Banks admitted that she did not see the First Amended Class Action Complaint before it was filed. In addition, LeBlanc conceded during her deposition that her involvement with this action has been minimal, as is her knowledge of the relevant facts.

Accordingly, the Court concludes that Plaintiffs are not adequate representatives of the members of the proposed Classes.

C. Plaintiffs Have Failed to Satisfy the Requirements of Rule 23(b)(3) That Common Issues Predominate.

A class may be certified under Rule 23(b)(3) if a court "finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy."[15] Fed. R. Civ. Proc. 23(b)(3). "[T]o meet the predominance requirement of Rule

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[14] As a remainder beneficiary, LeBlanc's interest in the Lindstrom Trusts is contingent and she is charged with Banks' knowledge. *See Noggle v. Bank of America*, 70 Cal. App. 4th 853, 860 n. 5 (1999).

[15] Plaintiffs argue that their Classes can also be certified under Rule 23(b)(2) and Rule 23(b)(1). However, Rule 23(b)(2) does not permit certification when, as in this case, plaintiffs seek "an individualized award of monetary damages." *Dukes*, 564 U.S. at 360-61. In addition, Rule

23(b)(3), a plaintiff must establish that 'the issues in the class action that are subject to generalized proof, and thus applicable to the class as a whole . . . predominate over those issues that are subject only to individualized proof.'" *In re Visa Check/Master Money Antitrust Litig.*, 280 F.3d 124, 136 (2d Cir. 2001); *see, also, Jiminez v. Domino's Pizza, Inc.,* 238 F.R.D. 241, 251 (C.D. Cal. 2006) ("The predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation.") (internal quotation omitted). A Rule 23(b)(3) action is inappropriate where "the main issues in a case require the separate adjudication of each class member's individual claim or defense." *Zinser*, 253 F.3d at 1189. "To determine whether common issues predominate, this Court must first examine the substantive issues raised by Plaintiff[ ] and second inquire into the proof relevant to each issue." *Jiminez*, 238 F.R.D. at 251.

As explained above, Plaintiffs have not demonstrate that common issues predominate. Although Plaintiffs argue that courts have certified classes alleging fiduciary breaches common to multiple trusts, five of the six cases Plaintiff cite in support of their argument involve beneficiaries of a single ERISA plan and the sixth case involves a uniform set of alleged misrepresentations by investment fund advisors. *See In re Beacon Assocs. Litig.*, 282 F.R.D. 315, 332 (S.D.N.Y. 2012). However, when considering class certification in cases more analogous to this one, courts have concluded that individual issues predominated because of the presence of different governing documents, investment objectives, portfolios, and risk tolerances. *See, e.g., Bd. of Trustees. of S. Cal. IBEW-NECA Defined Contribution Plan v. Bank of N.Y. Mellon Corp*., 287 F.R.D. 216, 226-29 (S.D.N.Y. 2012) (holding that individual issues predominate in case involving 239 different plans). In this case, the Court concludes that determining whether Northern caused injury to any specific trust will require "individualized proof." *Moheb v. Nutramax Laboratories, Inc.*, 2012 WL 6951904, at *7 (C.D. Cal. Sept. 4, 2012). For example, the Court would be required to examine each trust to evaluate whether withdrawing the investment from the disputed Northern funds would result in negative tax consequences. In addition, the Court would be required to examine whether the grantor initially made the decision to invest in the Northern funds. Moreover, because beneficiaries have had varying communications with Northern regarding investments and fees, class certification is properly denied, where, as in this case, each member of a potential class has had different communications with the defendant. *Berger v. Home Depot USA, Inc*., 741 F.3d 1061, 1068-69 (9th Cir. 2014) (*abrogated on other grounds by Microsoft Corp. v. Baker*, 137 S. Ct. 1702 (2017)); *see also Mazza*, 666 F.3d at 596.

Furthermore, individual issues would predominate in any damages analysis. *See Comcast,* 569 U.S. at 34. Plaintiffs must "tether" their "theory of liability to a methodology for determining the damages suffered by the class." *Vaccarino v. Midland Nat'l Life Ins. Co.*, 2013 WL 3200500, at *14 (C.D. Cal. June 17, 2013). With respect to the Investment Class, Plaintiffs' expert, Pomerantz, simply assumed that all index funds are interchangeable, and, thus, a trust suffers "damages" by paying more fees than it would have if it had invested in a comparable non-Northern fund. However, Pomerantz admitted that his comparators are not perfectly interchangeable with Northern's funds, and that a portfolio manager could reasonably select one fund over another. Thus, Plaintiffs have failed to demonstrate that damages in this case can be determined by simply

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23(b)(1) typically applies to cases involving a "limited fund" or beneficiaries of a single trust. Although Plaintiffs argue that any individual adjudication would "apply to the trusts as a whole," Plaintiffs' argument is nothing more than attempt make a Rule 23(b)(3) case into a Rule 23(b)(1) case. *See In re Park Cent. Glob. Litig*., 2014 WL 4261950, at *6-7 (N.D. Tex. Aug. 25, 2014).

calculating a fee differential. As Northern's expert, Fischel, stated, because fees and performance of funds vary over time, "permutations involving" alleged damages calculations "are nearly endless." *Comcast*, 569 U.S. at 38.

Similarly, to prove damages for their Tax Preparation Fee Class claims, Plaintiffs would have to establish some way to determine the appropriate fee chargeable to each trust and whether it exceeded the actual fees charged. However, as Northern's expert, Daniel FitzPatrick ("FitzPatrick") testified, given the varying complexities of returns for different trusts, such a showing is impossible and "would require cumbersome mini-trials." *Manigo v. Time Warner Cable, Inc*., 2017 WL 5149225, at *5-6 (C.D. Cal. Apr. 4, 2017).

Finally, individual choice of law issues would also predominate. Although each proposed Class is nationwide in scope, state laws governing a trustee's fiduciary obligations differ from state to state. Therefore, in order to properly adjudicate the Class claims this Court would be required to apply statutes and common law from numerous states. *See Kramer v. Wilson Sporting Goods Co.*, 2013 WL 12133670, at *5-6 (C.D. Cal. Dec. 13, 2013). Plaintiffs have failed to demonstrate that these various state laws are sufficiently similar to permit the Court to resolve the claims of a nationwide class. *See In re Paxil Litig*., 212 F.R.D. 539, 544-45 (C.D. Cal. 2003). Therefore, Plaintiffs have failed to outline a "manageable trial plan adequate to deal with individualized issues and variances in state law."[16] *Zinser*, 253 F.3d at 1190.

IV. Conclusion

For all the foregoing reasons, Plaintiffs' Motion is **DENIED**.

IT IS SO ORDERED.

[16] Banks' elder abuse subclass claims present a similar issue because standing under California's Elder Abuse Act (residents over 65) differs from other states. *See, e.g.,* 720 Ill. Comp. Stat. 5/17-56(c)(1) (persons age 60 or older); Colo. Rev. Stat. § 18-6.5-102(3) (persons age 70 or older).