

treatment. (Doc. 97-1, at 28, 31.) Defendant denied Plaintiff's request for PBRT because under the Plan's Proton Beam Medical Policy ("PBRT Policy") it deemed the treatment "investigational" for prostate cancer. (Docs. 91-10, at 2; 103-2, at 2, 7; 103-3, at 4.)

Under the Plan, treatments can be designated as "medically necessary" or "investigational." (See Docs. 91-10, at 2; 103-1, at 63–66.) A "medically necessary" treatment is defined as all services

provide[d] to a Member for the purpose of preventing, evaluating, diagnosing or treating an illness, injury or disease or its symptoms, and that are:

- a. In accordance with generally accepted standards of medical practice;
- b. Clinically appropriate in terms of type, frequency, extent, site and duration; and considered effective for the Member's illness, injury or disease;
- c. Not primarily for the Convenience of the Member, physician or other health care Provider; and
- d. Not more costly than an alternative service or sequence of services at least as likely to produce equivalent therapeutic or diagnostic results as to the diagnosis or treatment of that Member's illness, injury or disease.

For these purposes, "generally accepted standards of medical practice" means standards that are based on credible scientific evidence published in peer-reviewed medical literature generally recognized by the relevant medical community, physician specialty society recommendations, and the views of medical Practitioners practicing in relevant clinical areas and any other relevant factors.

(Doc. 103-1, at 65–66.) An "investigational" technology is any technology that "fails to meet **ALL** of the following four criteria[:]"

- a. The technology must have final approval from the appropriate governmental regulatory bodies, as demonstrated by:
 - i. This criterion applies to drugs, biological products, devices and any other product or procedure that must have final approval to market from the U.S. Food and Drug Administration or any other federal governmental body with authority to regulate the use of the technology. . .
- b. The scientific evidence must permit conclusions concerning the effect of the technology on health outcomes, as demonstrated by:
 - i. The evidence should consist of well-designed and well-conducted investigations published in peer-reviewed journals. The quality of the

- body of studies and the consistency of the results are considered in evaluating the evidence.
- ii. The evidence should demonstrate that the technology could measure or alter the physiological changes related to a disease, injury, illness or condition. In addition, there should be evidence or a convincing argument based on established medical facts that such measurement or alteration affects health outcomes.
 - c. The technology must improve the net health outcome, as demonstrated by:
 - i. The technology's beneficial effects on health outcomes should outweigh any harmful effects on health outcomes.
 - d. The improvement must be attainable outside the investigational settings, as demonstrated by:
 - i. Reviewing the criteria above, the medical policy panel will consider physician specialty society recommendations, the view of prudent medical Practitioners practicing in relevant clinical areas and any other relevant factors.

(Doc. 103-1, at 63–64.) The Plan “does not provide benefits for services . . . that are determined to be not Medically Necessary and Medically Appropriate” or “that are Investigational in nature” (*Id.* at 94.)

The PBRT Policy states that PBRT “is considered *medically necessary* if the medical appropriateness criteria are met[,]” but considers it “*investigational* unless there are unique clinical circumstances applicable to a specific member that would make use of [PBRT] medically appropriate” for twenty-one different ailments. (Doc. 91-10, at 2.) Prostate cancer is listed among the twenty-one ailments where PBRT is designated as “investigational.” (*Id.*)

Plaintiff filed a class action complaint on July 20, 2023, alleging that Defendant breached the terms of the Plan and its fiduciary duty by designating PBRT “investigational” for prostate cancer. (*See generally* Doc. 1.)

II. STANDARD OF REVIEW

Federal Rule of Civil Procedure 23 allows “members of a class” to sue or be sued “on behalf of all members” of the class. Fed. R. Civ. P. 23(a); *see Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 348 (2011) (“The class action is ‘an exception to the usual rule that litigation is

conducted by and on behalf of the individual named parties only.”) (quoting *Califano v. Yamasaki*, 442 U.S. 682 (1979)). For a class to be certified, a plaintiff must prove he or she meets the requirements of both Rule 23(a) and 23(b). See *Sprague v. Gen. Motors Corp.*, 133 F.3d 388, 397 (6th Cir. 1998) (“No class that fails to satisfy all four of the prerequisites of Rule 23(a) may be certified, and each class meeting those prerequisites must also pass at least one of the tests set forth in Rule 23(b).”).

“Rule 23 does not set forth a mere pleading standard.” *Dukes*, 564 U.S. at 350. The burden is on the party seeking certification to “affirmatively demonstrate his compliance with the Rule . . . he must be prepared to prove that there are in fact sufficiently numerous parties, common questions of law or fact, etc.” *Id.* “If the parties disagree over a fact critical to a Rule 23 requirement . . . plaintiffs cannot rest on their complaint,” rather they must offer “significant proof” of disputed facts. *Doster v. Kendall*, 54 F.4th 398, 432 (6th Cir. 2022) (quoting *Dukes*, 564 U.S. at 353). Often, the “rigorous analysis” required of courts at the class-certification stage “will entail some overlap with the merits of the plaintiff’s underlying claim.” *Dukes*, 564 U.S. at 351. However, Rule 23 does not give courts “license to engage in free-ranging merits inquiries at the certification stage.” *Amgen Inc. v. Conn. Ret. Plans & Tr. Funds*, 568 U.S. 455, 466 (2013). “Merits questions may be considered to the extent—but only to the extent—that they are relevant to determining whether the Rule 23 prerequisites for class certification are satisfied.” *Id.* (citing *Dukes*, 564 U.S. at 351 n.6).

III. ANALYSIS

A. Rule 23(a) Requirements

To proceed as a class under Rule 23(a), the parties seeking class certification must show that:

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

Fed. R. Civ. P. 23(a); *see also Dukes*, 564 U.S. at 349 (describing these requirements as “numerosity, commonality, typicality, and adequate representation”). A plaintiff must demonstrate that he or she meets all four requirements. *See Davis v. Cintas Corp.*, 717 F.3d 476, 483 (6th Cir. 2013) (“If the plaintiff does not satisfy each of these requirements, her class claim fails at the threshold.”); *see also In re Am. Med. Sys., Inc.*, 75 F.3d 1069, 1079 (6th Cir. 1996) (“Subsection (a) of Rule 23 contains four prerequisites which must all be met before a class can be certified”).

1. Numerosity

Plaintiff argues that the numerosity requirement is met because there are at least seventy-four members who are geographically dispersed across the United States. (Doc. 91, at 20.)

Defendant contends that numerosity is not satisfied, because class members are easily identifiable and most live in Tennessee, making joinder practical.¹ (Doc. 97, at 26–28.)

To secure class certification, a plaintiff must first show that “the class is so numerous that joinder of all members is impracticable.” Fed. R. Civ. P. 23(a)(1). “The plaintiff is not required

¹ Defendant brings a third argument, that the purported damages are sufficiently large to justify each class member to bring their own action. (Doc. 97, at 27–28.) Rule 23(b)(3) requires courts to analyze “whether the proposed class action beats the conventional approach of resolving disputes on a case-by-case basis in terms of efficiency and administrability.” *Bowles v. Sabree*, 121 F.4th 539, 554 (6th Cir. 2024). If the members of a proposed class “seek small damages,” it might be more efficient for both the litigants and judiciary to pool all the claims rather than allowing multiple individual claims to proceed. *Id.* This argument typically is analyzed under Rule 23(b)(3).

to establish that it is impossible to join all members of the proposed class, but simply that joinder would be difficult and inconvenient.” *Swigart v. Fifth Third Bank*, 288 F.R.D. 177, 182 (S.D. Ohio 2012) (citation modified). The number of prospective class members required to satisfy the numerosity requirement is case-specific and requires examination of the underlying facts. *Gen. Tel. Co. of the Nw. v. Equal Emp. Opportunity Comm’n*, 446 U.S. 318, 330 (1980). “[W]hile there is no strict numerical test, ‘substantial’ numbers usually satisfy the numerosity requirement.” *Daffin v. Ford Motor Co.*, 458 F.3d 549, 552 (6th Cir. 2006). And while the “sheer number of potential litigants in a class . . . can be the only factor needed to satisfy 23(a)(1),” *Bacon v. Honda of America Manufacturing, Inc.*, 370 F.3d 565, 570 (6th Cir. 2004), district courts in this circuit consider a variety of non-numerical factors when evaluating the impracticality of joinder, including putative class members’ geographic dispersion, *see Turnage v. Norfolk S. Corp.*, 307 F. App’x 918, 921 (6th Cir. 2009).

As it relates to numerosity, the Court of Appeals for the Sixth Circuit has found that a proposed class of thirty-five plaintiffs is sufficient to meet the numerosity requirement. *See Young v. Nationwide Mut. Ins. Co.*, 693 F.3d 532, 542 (6th Cir. 2012); *Afro Am. Patrolmen’s League v. Duck*, 503 F.2d 294 (6th Cir. 1974). The Sixth Circuit has further explained that, even when all class members are identifiable, it does not necessarily follow that joinder is practical, especially when plaintiffs are geographically dispersed. *See In re Tipton*, No. 17-0512, 2018 WL 11661433, at *2 (6th Cir. Feb. 15, 2018).

Here, Plaintiff has satisfied his burden of demonstrating numerosity. Both parties agree that there are at least seventy-four members in the class. (Docs. 91, at 20; 97, at 27.) Furthermore, the seventy-four individuals are geographically dispersed across the United States—Tennessee, Maryland, Illinois, Washington, Florida, Alabama, North Carolina, and

Georgia.² (Docs. 91, at 20; 91-13, at 2–3; 97-4, at 2–3.) Even if all class members are identifiable, joinder of at least seventy-four geographically dispersed plaintiffs would be impractical, imposing expense and delay that serve no useful purpose. Accordingly, Plaintiff has satisfied the numerosity requirement.

2. Commonality

Plaintiff argues that Rule 23’s commonality requirement is satisfied because his claims turn on the common question of whether Defendant wrongfully designated PBRT as investigational for class members. (See Doc. 91, at 20–22.) Defendant maintains that commonality is not satisfied, because the PBRT “Policy does not apply a one-size-fits-all ‘automatic denial’ rule. . . [.]” but rather, it considers “each member’s specific claim to determine whether there are ‘unique clinical circumstances’” to allow PBRT. (Doc. 97, at 23.)

Rule 23(a)(2) requires that “there are questions of law or fact common to the class.” Fed. R. Civ. P. 23(a)(2). Although Rule 23(a)(2) refers to common questions of law or fact, in the plural, there need only be one question common to the class—though that question must be a common issue[,] the resolution of which will advance the litigation.” *Alkire v. Irving*, 330 F.3d 802, 820 (6th Cir. 2003) (citation modified). To determine if there is a common question, courts must determine if the question “affect[s] at least one element” of all claims. *Speerly v. Gen. Motors, LLC*, 143 F.4th 306, 317 (6th Cir. 2025). This “element-oriented analysis permits the court to identify which questions meaningfully move the lawsuit forward.” *Id.* (citing *Dukes*, 564 U.S. at 350). Further, if the common question cannot be answered the same “in one stroke” for all class members, but instead “requires ‘evidence that varies from member to member[,]”

² Two members of the class of seventy-four do not have a “member state” listed. (See Docs. 91-13, at 2–3; 97-4, at 2–3.)

the question is not common. *Id.* at 318 (quoting *Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442, 453 (2016)).

In this case, commonality is satisfied because Plaintiff's claims include common questions about whether Defendant violated the ERISA plan and breached fiduciary duties owed to putative class members by designating PBRT as investigational with regard to treatment of prostate cancer. The class members' plans uniformly contain the same "investigational" designation and applicable criteria. (Doc. 91, at 11–12; Doc. 97, at 9–10; *see* Doc. 103-4.) Plaintiff alleges that Defendant, in contradiction to the terms of the Plan, designated PBRT for prostate cancer as "investigational." *See* 29 U.S.C. § 1132(a)(1)(B) (allowing an individual to bring a civil action "to enforce his rights under the terms of the plan"); *Chelf v. Prudential Ins. Co. of Am.*, 31 F.4th 459, 464–65 (6th Cir. 2022) (explaining that a breach of fiduciary duty claim under ERISA requires the plaintiff to prove a fiduciary failed to act in accordance with governing the plan). As a result, the question of whether PBRT for prostate cancer was improperly designated as "investigational" is common to all class members and will yield the same answer for all class members. The commonality requirement is satisfied.

Defendant argues that commonality is not satisfied because the PBRT Policy considered each putative class member's "unique clinical circumstances." (Doc. 97, at 23.) But that framing does not match how the PBRT Policy actually works. For prostate cancer and twenty other ailments, PBRT is designated as "investigational," and only in that context does the PBRT Policy require a showing of "unique clinical circumstances." (Doc. 91-10, at 2.) Outside these twenty-one listed ailments, however, PBRT is deemed "medically necessary," and coverage instead turns on whether the "medical appropriateness" criteria are met—criteria that do not ask whether an individual has "unique clinical circumstances." (*Id.* at 2–3.) Simply put, whether

“unique clinical circumstances” matter at all depends on a single, class-wide question: whether the Plan incorrectly deemed PBRT for prostate cancer as “investigational” instead of “medically necessary.” That question can be resolved on a class-wide basis, so Plaintiff has satisfied his burden on commonality.

3. Adequacy and Typicality

Next, Rule 23(a)(3) requires that a plaintiff’s claims be “typical” of the class. Fed. R. Civ. P. 23(a)(3). “Typicality is met if the class members’ claims are ‘fairly encompassed by the named plaintiffs’ claims.’” *In re Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig.*, 722 F.3d 838, 852 (6th Cir. 2013) (quoting *Sprague*, 133 F.3d at 399). Conversely, the typicality requirement “is not satisfied when a plaintiff can prove his own claim but not ‘necessarily have proved anybody else’s claim.’” *Beattie v. CenturyTel, Inc.*, 511 F.3d 554, 561 (6th Cir. 2007) (quoting *Sprague*, 133 F.3d at 399).

“The adequacy inquiry under Rule 23(a)(4) serves to uncover conflicts of interest between named parties and the class they seek to represent.” *Beattie*, 511 F.3d at 562. “A class representative must be part of the class and possess the same interest and suffer the same injury as the class members.” *Id.* (quoting *Amchem Prod., Inc. v. Windsor*, 521 U.S. 591, 625–26 (1997)). And class certification is inappropriate when there “is evidence that the representative plaintiffs appear unable to ‘vigorously prosecute the interests of the class.’” *Stout v. J.D. Byrider*, 228 F.3d 709, 717 (6th Cir. 2000) (quoting *In re Am. Med. Sys.*, 75 F.3d at 1083). Nonetheless, the adequacy and typicality inquiries “tend to merge” with the commonality inquiry because all three “serve as guideposts for determining whether under the particular circumstances maintenance of a class action is economical and whether the named plaintiff’s claim and the class claims are so interrelated that the interests of the class members will be fairly

and adequately protected in their absence.” *In re Whirlpool*, 722 F.3d at 853 (quoting *Dukes*, 564 U.S. at 378 n.5); *see also Gooch v. Life Invs. Ins. Co. of Am.*, 672 F.3d 402, 429 (6th Cir. 2012).

Plaintiff satisfies adequacy and typicality. The law and facts relating to the claims of the putative class members are nearly identical to and are fairly encompassed in Plaintiff’s claims. All class members’ plans use similar language to define “investigational” and set forth the criteria for that designation. (*See* Doc. 103-1, at 64–64; *see generally* Doc. 103-4.) There is no evidence that Plaintiff has interests that are antagonistic to the rest of the class, and he appears to be an adequate representative who has every incentive to vigorously prosecute these claims on behalf of the putative class. Accordingly, adequacy and typicality are met.

B. Rule 23(b) Requirements

In addition to satisfying Rule 23(a), plaintiffs must satisfy at least one of the three paths to certification under Rule 23(b). *Coleman v. Gen. Motors Acceptance Corp.*, 296 F.3d 443, 446 (6th Cir. 2002). Plaintiff moves to certify the class under 23(b)(1), (b)(2), and (b)(3). (Doc. 91, at 8, 24–29.)

1. Rule 23(b)(2) and Rule 23(b)(1)(A)

A class may be certified under 23(b)(2) if “the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole.” Fed. R. Civ. P. 23(b)(2). Whether a class action can proceed under 23(b)(2) depends on whether “the conduct is such that it can be enjoined or declared unlawful only as to all of the class members or as to none of them.” *Dukes*, 564 U.S. at 360 (citations omitted). The Sixth Circuit has noted that 23(b)(2) is a “narrow” path which “does not permit plaintiffs to seek relief that would require a court to

issue different injunctions . . . on a member-by-member basis.” *Doster*, 54 F.4th at 439 (citation modified).

Furthermore, 23(b)(2) “does not authorize class certification when each class member would be entitled to an individualized award of monetary damages.” *Dukes*, 564 U.S. at 360–61. Therefore, 23(b)(2) is not appropriate when monetary damages are anything more than “incidental to the injunctive and declaratory relief” that a class seeks. *Davis*, 717 F.3d at 491. Where monetary damages are at issue, the Sixth Circuit allows “bifurcated certification: subrule (b)(2) certification for contract interpretation, and subrule (b)(3) certification of classes and subclasses for determining damages.” *Clemons v. Norton Healthcare Inc. Ret. Plan*, 890 F.3d 254, 279 (6th Cir. 2018) (citing *Gooch*, 672 F.3d at 427–28). To do so properly, the plaintiff must create distinct sub-classes, separating those seeking declaratory relief from those seeking monetary damages. *See Gooch*, 672 F.3d at 428.

Similar to Rule 23(b)(2), Rule 23(b)(1)(A) is applicable in cases where a defendant “is obliged by law to treat the members of the class alike.” *Amchem*, 521 U.S. at 614. To proceed under 23(b)(1)(A), a plaintiff must show that prosecuting separate actions by 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.” Fed. R. Civ. P. 23(b)(1)(A). The Sixth Circuit has stated that, even though “[o]nly Rule 23(b)(2) was at issue in *Dukes*,” “the due process concerns that led the [Supreme] Court to conclude that ‘individualized monetary claims belong in Rule 23(b)(3)’ are similar for (b)(1) classes.” *Clemons*, 890 F.3d at 281; *Dukes*, 564 U.S. at 362–63 (“In the context of a class action predominantly for money damages we have held that absence of notice and opt out violates due process.”).

Here, there is a single proposed class pursuing both monetary damages and equitable relief. On the monetary side, Plaintiff seeks “any unpaid benefits to Plaintiff and the Member Class;” “[p]ayment of health benefits due to Plaintiff and the Member Class under [BCBST’s] applicable plans;” and “damages in an amount to be proved at trial[.]” (Doc. 1, at 22–23.) The amount of an individual class member’s award may vary depending on their circumstances, and the inability of the class members to opt out of the class under Rule 23(b)(1) or (b)(2) raises due process concerns. Accordingly, certification under Rule 23(b)(1) and (b)(2) is inappropriate in this matter.

2. Rule 23(b)(3)

Class certification under Rule 23(b)(3) requires a plaintiff to establish “predominance” and “superiority.” *See In re Whirlpool*, 722 F.3d at 858; Fed. R. Civ. P. 23(b)(3).

Plaintiff argues that whether Defendant incorrectly designated PBRT as “investigational” predominates over any individualized issues because all class members’ plans contain materially similar language and class members were denied PBRT coverage based on that incorrect designation. (Doc. 91, at 28.) Defendant counters that questions about whether each class member qualified for PBRT under the applicable plan predominate because an individualized analysis of each class member’s medical history is necessary to resolve each claim. (Doc. 97, at 34–35; Doc. 110, at 6–9.)

For a class to be certified under 23(b)(3), a district court must “find[] that the questions of law or fact common to class members predominate over any questions affecting only individual members[.]” Fed. R. Civ. P. 23(b)(3); *see also Bouaphakeo*, 577 U.S. at 452. The predominance requirement is “far more demanding” than the commonality requirement of Rule 23(a)(2).

Windsor, 521 U.S. at 623–24; *see also Comcast Corp. v. Behrend*, 569 U.S. 27, 34 (2013) (“If anything, Rule 23(b)(3)’s predominance criterion is even more demanding than Rule 23(a).”).

To evaluate predominance, “a court must first characterize the issues in the case as common or individual and then weigh which predominate.” *Martin v. Behr Dayton Thermal Prods., LLC*, 896 F.3d 405, 413 (6th Cir. 2018) (citation omitted). The court must ask “whether the common, aggregation-enabling, issues in the case are more prevalent or important than the non-common, aggregation-defeating, individual issues.” *Bouaphakeo*, 577 U.S. at 453 (citation omitted). “[A] class may be certified based on a predominant common issue even though other important matters will have to be tried separately, such as damages or some affirmative defenses peculiar to some individual class members.” *Pickett v. City of Cleveland, Ohio*, 140 F.4th 300, 310 (6th Cir. 2025) (citation omitted); *see also Bouaphakeo*, 577 U.S. at 453. Predominance is “generally satisfied when adjudication of questions of liability common to the class will achieve economies of time and expense, . . . even if damages are not provable in the aggregate.” *Pickett*, 140 F.4th 310 (citation modified).

Here, the predominance requirement is not satisfied. Even though the underlying claim for liability is whether Defendant incorrectly designated PBRT as “investigational” instead of “medically necessary” (*see* Doc. 1), each putative plaintiff’s damages will require highly individualized inquiries concerning PBRT treatment costs and possibly any other costs or damages incurred due to the denial of PBRT treatment for prostate cancer. (*See* Doc. 1, at 22–23 (seeking “any unpaid benefits to plaintiffs”, “payment of health benefits” due to plaintiffs, and “damages in an amount to be proved at trial”).) Since the class members’ damages are so individualized, Plaintiff has not met the predominance requirement and certification under Rule 23(b)(3) is inappropriate at this time.

IV. CONCLUSION

For the foregoing reasons, Plaintiff's motion for class certification (Doc. 91) is **DENIED** under Rule 23(b)(3).

SO ORDERED.

/s/ Travis R. McDonough

**TRAVIS R. MCDONOUGH
UNITED STATES DISTRICT JUDGE**