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

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

ANSWER AND AFFIRMATIVE DEFENSES

Defendant, Compass Group USA, Inc., hereby answers Plaintiffs' First Amended Class and Representative Action Complaint as follows:

NATURE OF THE ACTION

1. Compass Group USA, Inc. ("Compass Group") is a Fortune 500 foodservice company. According to its website, Compass Group is "the nation's largest family of foodservice and facilities services companies, serving more than 13 million meals and maintaining more than 1.9 billion square feet a day."

RESPONSE: Defendant admits the allegation in Paragraph 1.

2. Upon information and belief, all regular employees and eligible dependents and certain part-time employees can receive health insurance coverage by participating in a medical plan sponsored and administered by Compass Group. These medical plans operate under the plan name Employee Benefit Plan of the Compass Group USA, Inc. ("the Plan").

RESPONSE: Defendant submits that the written plan document cited in Paragraph 2 is the best evidence of its contents and denies any characterization contrary to the terms of the written plan document.

3. For those employees and their dependents to participate in the Plan, they must declare whether they are a tobacco user. Those who do use tobacco products are required to pay an additional fee of $48 per pay period—or $1,248 per year—to maintain coverage.

RESPONSE: Defendant submits that the written plan documents referenced in Paragraph 3 are the best evidence of their contents and denies any characterization contrary to the terms of the written plan documents.

4. Fees of this sort, frequently referred to as "tobacco surcharges", have proliferated in recent years. But to be legal, they must strictly comply with the terms of the Employee Retirement Income Security Act ("ERISA"), applied to medical plans by the Patient Protection and Affordable Care Act, and implementing regulations. Compass Group did not do so, and therefore collected the tobacco surcharge in violation of the law and in violation of its duties to plan participants and the Plan.

RESPONSE: The allegations in Paragraph 4 state legal conclusions to which no response is required. Further, Defendant submits that the statutes cited in Paragraph 4 are the best evidence of their contents and denies any characterization contrary to the terms of the statutes. To the extent a response is required, Defendant denies any violation of ERISA, the ACA, or any other law.

5. More specifically, ERISA's anti-discrimination provisions prohibit any medical plan from charging an extra premium or fee based on any health status related factor, including tobacco use, unless that fee is part of a *bona fide* "wellness program." To qualify as a compliant

wellness program, a company must offer a "reasonable alternative standard", usually in the form of a smoking/tobacco cessation program, completion of which allows participants to avoid the entire surcharge. In other words, a reasonable alternative standard will refund a tobacco user all tobacco surcharges paid during the operative plan year or allow them to avoid paying it in the first place.

RESPONSE: The allegations in Paragraph 5 state legal conclusions to which no response is required. Further, Defendant submits that the statute cited in Paragraph 5 is the best evidence of its contents and denies any characterization contrary to the terms of the statute. To the extent a response is required, Defendant denies any violation of ERISA or any other law.

6. Although Compass Group has made Virgin Pulse's Tobacco Cessation Program available to its Plan participants who are tobacco users, completing the program only allowed participants to avoid the tobacco surcharge prospectively. However, a compliant wellness program's reasonable alternative standard must allow participants to receive the program's "full reward"; that is, avoid the surcharge for the entire plan year upon completion of the alternative standard, and must provide notice that such an alternative program exists in every communication regarding the surcharge. This notice must also include a statement that recommendations of an individual's personal physician in formulating a reasonable alternative standard will be accommodated.

RESPONSE: Defendant admits that until January 1, 2024, its Tobacco Cessation Program allowed participants completing the program to avoid the tobacco surcharge prospectively; starting on January 1, 2024 surcharges already paid during the current plan year were retroactively refunded for participants who completed the

cessation program. Defendant admits that a tobacco cessation program was offered throughout the relevant class period but denies that Virgin Pulse was the only such provider. The remaining allegations in Paragraph 6 state legal conclusions to which no response is required. To the extent a response is required, Defendant denies any violation of ERISA or any other law.

7. But a Compass Group plan participant who ceased tobacco use would only be eligible to avoid the surcharge on a going-forward basis, and thus could not earn the "full reward"—i.e., avoiding the surcharge for the entire plan year. Further, Compass Group's plan materials used for communicating information about the surcharge with participants make no mention of an opportunity to earn the full reward for the entire plan year by completing a reasonable alternative standard. Further, many of those communications do not tell participants at all about the ability to avoid the tobacco surcharge. Thus, the surcharge violates ERISA's anti-discrimination requirements, and its collection by Compass Group was and remains unlawful.

RESPONSE: Defendant admits that until January 1, 2024, its Tobacco Cessation Program allowed participants completing the program to avoid the tobacco surcharge prospectively; starting on January 1, 2024 surcharges already paid during the current plan year were retroactively refunded for participants who completed the cessation program. The remaining allegations in Paragraph 7 state legal conclusions to which no response is required. To the extent a response is required, Defendant denies any violation of ERISA or any other law.

8. Plaintiffs were regular, full-time employees of Compass Group subsidiaries who were required to pay the illegal tobacco surcharge to maintain health insurance coverage. Plaintiffs bring this lawsuit on behalf of themselves and all similarly situated plan participants and

beneficiaries, seeking to have these unlawful fees returned, and for plan-wide relief under 29 U.S.C. §§ 1109 and 1132(a)(2).

RESPONSE: Defendant admits that Plaintiffs have been full-time employees of Compass Group subsidiaries at various times during the relevant class period. Also, Defendant submits that the statutes cited in Paragraph 8 are the best evidence of their contents and denies any characterization contrary to the terms of the statutes. Further, the remaining allegations of Paragraph 8 assert legal conclusions to which no response is required. To the extent a response is required, Defendant denies the remaining allegations of Paragraph 8.

PARTIES, JURISDICTION, AND VENUE

9. Plaintiff Mehlberg is a citizen of the State of Missouri. Plaintiff Mehlberg worked for Compass Group's subsidiary Morrison Management Specialists, Inc. in Columbia, Missouri. Plaintiff Mehlberg participated in the Plan in connection with his work and paid the $48 bi-weekly tobacco surcharge. For example, Compass Group deducted $48 from his wages during the pay period of December 2 to December 15, 2022.

RESPONSE: Upon information and belief, Defendant admits that Mehlberg is a citizen of the state of Missouri. Defendant also admits that Mehlberg is a former employee of Compass Group's subsidiary Morrison Management Specialists, Inc. in Colombia, Missouri; that he participated in the Plan at times during his employment; and that a tobacco surcharge was deducted from his bi-weekly paycheck at times during his employment, including a $48 surcharge deducted from his paycheck for the pay period covering December 2 to December 15, 2022. Defendant denies the remaining allegations of Paragraph 9.

10. Plaintiff Deibel is a citizen of the State of Missouri. Plaintiff Deibel worked for Compass Group's subsidiary Fresh Ideas Management LLC in Marshall, Missouri. Plaintiff Deibel participated in the Plan in connection with her work and paid the $69.33 bi-weekly tobacco surcharge. For example, Compass Group deducted $69.33 from her wages during the pay period of November 17 to November 30, 2023.

RESPONSE: Upon information and belief, Defendant admits that Deibel is a citizen of the state of Missouri. Defendant also admits that Deibel is an employee of Compass Group's subsidiary Fresh Ideas Management LLC in Marshall, Missouri; that she has participated in the plan at times during her employment; and that a tobacco surcharge was deducted from her paycheck at times during her employment, including a $69.33 surcharge deducted from her paycheck for the pay period covering November 17 to November 30, 2023. Defendant denies the remining allegations of Paragraph 17.

11. Defendant Compass Group Company is a corporation organized under the laws of the State of Delaware with its principal place of business in the State of North Carolina. Compass Group is registered to do and does business in the State of Missouri.

RESPONSE: Defendant admits the allegations in Paragraph 11 of the Amended Complaint.

12. At all times relevant to this lawsuit, Compass Group operated the Plan, which was available for Compass Group employees and their dependents. The Plan is an employee benefit plan subject to the provisions and statutory requirements of ERISA pursuant to 29 U.S.C. § 1003(a).

RESPONSE: Defendant submits that the statute cited in Paragraph 12 is the best evidence of its contents and denies any characterization contrary to the terms of the statute. To the extent a response is required, Defendant admits the Plan is governed by ERISA and denies the remaining allegations of Paragraph 12.

13. Plaintiffs have both been participants in the Plan pursuant to 29 U.S.C. § 1102(7).

RESPONSE: The allegations in Paragraph 13 are admitted.

14. This Court possesses subject matter jurisdiction pursuant to 29 U.S.C. § 1132(e)(1) and 28 U.S.C. § 1331, as this suit seeks relief under ERISA, a federal statute. This Court also possesses subject matter jurisdiction under the Class Action Fairness Act, 28 U.S.C. § 1332(d), because this is a proposed class action in which: (1) there are at least 100 class members; (2) the amount in controversy exceeds $5,000,000, exclusive of interest and costs; and (3) Defendant and at least one class member are citizens of different states, and/or are a citizen or subject of a foreign state, and at least one class member is a citizen of a state.

RESPONSE: Defendant admits that this Court possesses subject matter jurisdiction pursuant to 29 U.S.C. § 1132(e)(1) and 28 U.S.C. § 1331. Defendant denies the remaining allegations of Paragraph 14.

15. This Court possesses personal jurisdiction over Compass Group in this case because its subsidiaries employed Plaintiffs within the State of Missouri and both Plaintiffs were Plan participants within the State of Missouri. Compass Group has purposefully availed itself of the privilege of conducting business within the State of Missouri. Further, ERISA authorizes nationwide service of process. 29 U.S.C. § 1132(e)(2).

RESPONSE: Paragraph 15 of the Amended Complaint asserts legal conclusions to which no response is required. To the extent a response is required, Defendant admits the remaining allegations of Paragraph 15.

16. Venue is proper in this District under 29 U.S.C. § 1132(e)(2) because this is the District where Plaintiffs worked for subsidiaries of Compass Group, where they participated in the Plan, and where the unlawful acts occurred.

RESPONSE: Paragraph 16 of the Amended Complaint asserts legal conclusions to which no response is required. To the extent a response is required, Defendant denies the remaining allegations of Paragraph 16.

17. Defendant is represented by counsel in this lawsuit and can be served with this First Amended Complaint through its counsel of record

RESPONSE: The allegations in Paragraph 17 are admitted.

FACTUAL ALLEGATIONS

a. Compass Group's Tobacco Surcharge is a *Prima Facie* Violation of ERISA's Anti-Discrimination Rule.

18. As a baseline rule, and to broaden access to affordable health insurance coverage, the Patient Protection and Affordable Care Act amended ERISA to prohibit any health insurer or medical plan from discriminating against any participant in providing coverage or charging premiums based on a "health status-related factor", including the use of tobacco. Pursuant to this rule, a plan "may not require any individual (as a condition of enrollment or continued enrollment under the plan) to pay a premium or contribution which is greater than such premium or contribution for a similarly situated individual enrolled in the plan on the basis of any health status-

related factor in relation to the individual or to an individual enrolled under the plan as a dependent of the individual." 29 U.S.C. § 1182(b)(1); 42 U.S.C. § 300gg-4(b)(1).

RESPONSE: Defendant submits that the statutes cited in Paragraph 18 are the best evidence of their contents and denies any characterization contrary to the terms of the statutes. Further, Paragraph 18 of the Amended Complaint sets forth legal conclusions that do not require a response. To the extent a response is required, Defendant denies the remaining allegations of Paragraph 18. To the extent a response is required, Defendant denies any violation of ERISA, the ACA, or any other law.

19. On its face, Compass Group's tobacco surcharge violates this provision. Plaintiffs and all others similarly situated were required to pay an additional "premium or contribution" of based on a "health status-related factor", that being their use of tobacco products.

RESPONSE: Defendant denies the allegations of Paragraph 19.

20. Specifically, at all times relevant to this lawsuit, pursuant to Compass Group's enrollment rules for the Plan, any participant who used any form of tobacco or vaping products were required to declare themselves to be tobacco users as part of the enrollment process and were subsequently required to pay the tobacco surcharge to maintain coverage.

RESPONSE: Defendant denies the allegations of Paragraph 20.

21. Payment of the tobacco surcharge was required for Plaintiffs and all others similarly situated to remain insured under the Plan. Plaintiffs and all others similarly situated have in fact paid the surcharge.

RESPONSE: Defendant admits that the Named Plaintiffs paid a tobacco surcharge but denies the allegations as to "others similarly situated" due to lack of sufficient information. Defendant denies the remaining allegations of Paragraph 21.

22. Compass Group is and has been required to make contributions to the Plan to ensure that it remains adequately funded. By collecting the tobacco surcharge, Compass Group has taken money for itself that, even if unlawfully collected in violation of 29 U.S.C. § 1182(b)(1), should have been paid into the Plan and instead reduced the amount of its own contributions. It also used those funds to increase its profits.

RESPONSE: Defendant submits that the statute cited in Paragraph 22 is the best evidence of its contents and denies any characterization contrary to the terms of the statute. To the extent a response is required, Defendant denies the allegations of Paragraph 22.

23. At all times relevant to this lawsuit, Compass Group has maintained sole control of the tobacco surcharge program, including by determining which participants are required to pay the surcharge, withholding participants' funds from their paychecks to pay the surcharge, and determining which employees (if any) can cease paying the surcharge.

RESPONSE: Defendant denies the allegations of Paragraph 23.

b. Compass Group Cannot Avail Itself to ERISA's Safe Harbor for Wellness Programs.

24. As an exception to its anti-discrimination rule, ERISA carves out protection for "programs of health promotion and disease prevention", also known as "wellness programs." 29 U.S.C. § 1182(b)(2)(B); 42 U.S.C. § 300gg-4(b)(2)(B).

RESPONSE: Defendant submits that the statutes cited in Paragraph 24 are the best evidence of their contents and denies any characterization contrary to the terms of the statutes. Further, Paragraph 24 of the Amended Complaint contains legal conclusions to which no response is required. To the extent a response is required, Defendant denies the remaining allegations of Paragraph 24.

25. But to qualify as a lawful wellness program, a plan must fully comply with a set of statutory and regulatory requirements. Those requirements concern (1) the frequency of the opportunity for a participant to qualify for the reward; (2) the size of the reward; (3) reasonable design of the program; (4) uniform availability and reasonable alternative standards; and (5) notice of the availability of a reasonable alternative standard. 29 C.F.R. § 2590.702(f). These regulations "set forth criteria for an *affirmative defense* that can be used by plans and issuers in response to a claim that the plan or issuer discriminated under the [] nondiscrimination provisions." *Incentives for Nondiscriminatory Wellness Programs in Group Health Plans*, 78 Fed. Reg. 33158 at 33160 (June 3, 2013) (emphasis added). Every one of the requirements "must be satisfied in order for the plan or issuer to qualify for an exception to the prohibition on discrimination based on health status." *Id.*

RESPONSE: Defendant submits that the regulations cited in Paragraph 25 are the best evidence of their contents and denies any characterization contrary to the terms of the regulations. Further, Paragraph 25 of the Amended Complaint asserts legal conclusions to which no response is required. To the extent a response is required, Defendant denies the remaining allegations of Paragraph 25.

26. Compass Group's tobacco surcharge program did not and does not satisfy the requirements that it provide a reasonable alternative standard, nor does it provide notice of a reasonable alternative standard. As a result, it cannot meet each element of its affirmative defense.

RESPONSE: Defendant denies the allegations of Paragraph 26.

27. Consequently, Compass Group is not entitled to safe harbor protection for operating a compliant wellness program and its assessment of its tobacco surcharge constitutes unlawful discrimination based on a health status-related factor.

RESPONSE: Defendant denies the allegations of Paragraph 27.

c. Compass Group's Tobacco Surcharge Program Did Not Provide for a Reasonable Alternative Standard

28. *First*, by law, a tobacco surcharge is an example of an "outcome-based" and "health contingent" wellness program. 78 Fed. Reg. 33158 at 33161 ("An outcome-based wellness program is a type of health-contingent wellness program that requires an individual to attain or maintain a specific health outcome (such as not smoking . . .) in order to obtain a reward."); *see also id.* at 33159 ("Examples of health-contingent wellness programs in the proposed regulations included a program that imposes a premium surcharge based on tobacco use").

RESPONSE: Defendant submits that the regulation cited in Paragraph 28 is the best evidence of its contents and denies any characterization contrary to the terms of the regulation. Further, Paragraph 28 asserts legal conclusions to which no response is required. To the extent a response is required, Defendant denies the remaining allegations of Paragraph 28.

29. To be lawful, such a program must provide for "[u]niform availability and reasonable alternative standards." 29 C.F.R. § 2590.702(f)(4)(iv). "[A] reasonable alternative standard must be provided to all individuals who do not meet the initial standard, to ensure that the program is reasonably designed to improve health and is not a subterfuge for underwriting or reducing benefits based on health status." 78 Fed. Reg. 33158 at 33160.

RESPONSE: Defendant submits that the regulation cited in Paragraph 29 is the best evidence of its contents and denies any characterization contrary to the terms of the regulation. Further, Paragraph 29 asserts legal conclusions to which no response is required. To the extent a response is required, Defendant denies the remaining allegations of Paragraph 29.

30. A common means by which plan administrators attempt to provide a reasonable alternative standard to a tobacco surcharge is to permit participants to avoid the surcharge by completing a tobacco cessation program.

RESPONSE: Paragraph 30 sets forth assertions and assumptions neither related nor directed to Defendant and therefore does not require a response. To the extent a response is required, Defendant denies the remaining allegations of Paragraph 30.

31. But as the Department of Labor's regulations make clear, a putative alternative that requires the participant to actually quit smoking in order to receive the reward is necessarily not a "reasonable alternative standard." One example offered by the Department states that:

> Example 7—Tobacco use surcharge with alternative program requiring actual cessation. (i) Facts. Same facts as Example 6, except the plan does not provide participant F with the reward in subsequent years **unless F actually stops smoking after participating in the tobacco cessation program.**
>
> (ii) Conclusion. In this Example 7, **the program is not reasonably designed under paragraph (f)(4)(iii) of this section and does not provide a reasonable alternative standard as required under paragraph (f)(4)(iv) of this section.** The plan cannot cease to provide a reasonable alternative standard merely because the participant did not stop smoking after participating in a smoking cessation program.

29 C.F.R. § 2590.702, Example 7 (emphasis added).

RESPONSE: Defendant submits that the regulation cited in Paragraph 31 is the best evidence of its contents and denies any characterization contrary to the terms of the regulation. Further, Paragraph 31 of the Amended Complaint sets forth argumentative assertions and legal conclusions and therefore does not require a response. To the extent a response is required, Defendant denies the allegations and states that Defendant does not require tobacco users to quit using tobacco after participating in a smoking cessation program.

32. Although Compass Group offered an alternative standard to avoid the tobacco surcharge, it was not a "reasonable alternative standard" because it failed to offer the "full reward" because participants could not avoid the entirety of the tobacco surcharge if they completed the cessation program. For a putative alternative standard (such as attending a tobacco cessation program) to be deemed "reasonable" under the law, "[t]he full reward under the outcome-based wellness program must be available to all similarly situated individuals." 29 C.F.R. § 2590.702(f)(4)(iv). Thus, a participant who meets the alternative standard must be eligible to avoid the surcharge in its entirety for a given plan year.

RESPONSE: Defendant submits that the regulation cited in Paragraph 32 is the best evidence of its contents and denies any characterization contrary to the terms of the regulation. To the extent a response is required, Defendant denies the remaining allegations of Paragraph 32.

33. The applicable regulatory guidelines state that "while an individual may take some time to request, establish, and satisfy a reasonable alternative standard, the same, full reward must be provided to that individual as is provided to individuals who meet the initial standard for that plan year. (For example, if a calendar year plan offers a health-contingent wellness program with a premium discount and an individual who qualifies for a reasonable alternative standard satisfies that alternative on April 1, *the plan or issuer must provide the premium discounts for January, February, and March to that individual*.) Plans and issuers have flexibility to determine how to provide the portion of the reward corresponding to the period before an alternative was satisfied (e.g., payment for the retroactive period or pro rata over the remainder of the year) as long as the method is reasonable and the *individual receives the full amount of the reward*." 78 Fed. Reg. 33158 at 33163 (emphasis added).

RESPONSE: Defendant submits that the regulation cited in Paragraph 33 is the best evidence of its contents and denies any characterization contrary to the terms of the regulation. Further, Paragraph 33 sets forth argumentative assertions and legal conclusions and therefore does not require a response. To the extent a response is required, Defendant denies the remaining allegations of Paragraph 33.

34. But a Compass Group participant who completed the alternative standard (unlawful as it may be) during a given plan year would not be eligible to avoid the entire tobacco surcharge. Instead, he or she could avoid the surcharge on a going-forward basis only and would not be eligible to receive a reimbursement for surcharge payments already made in that plan year. The handful of enrollment documents that do disclose an alternative standard to avoid the tobacco surcharge other than being tobacco free (most do not) state as follows:

> If you use tobacco products, but you enroll and complete two tobacco journeys, Compass Group will remove the tobacco surcharge—regardless of whether you have stopped using tobacco products … The surcharge will be removed beginning in the first of the month that Compass Group receives notification that you have been compliant with the Virgin Pulse Tobacco Cessation Program, or as soon as administratively possible.

RESPONSE: Defendant admits that until January 1, 2024, its Tobacco Cessation Program allowed participants completing the program to avoid the tobacco surcharge prospectively; starting on January 1, 2024 surcharges already paid during the Plan year were retroactively refunded for participants who completed the cessation program. Defendant submits that the written documents cited in Paragraph 34 are the best evidence of their contents and denies any characterization contrary to their terms. To the extent a response is required, Defendant denies the remaining allegations of Paragraph 34.

35. The Plan documents are clear that the surcharge will only be removed on a going forward basis. Because a Plan participant could not receive a retroactive reimbursement to avoid the tobacco surcharge in its entirety, Compass Group does not permit participants to receive the "full reward" and therefore does not provide for a "reasonable alternative standard."

RESPONSE: Defendant submits that the written documents referenced in Paragraph 35 are the best evidence of their contents and denies any characterization contrary to their terms. Defendant denies the remaining allegations of Paragraph 35.

d. Compass Group Failed to Provide Notice of Availability of a Reasonable Alternative Standard

36. *Second*, to be deemed a lawful wellness program, "[t]he plan or issuer must disclose *in all plan materials describing the terms of an outcome-based wellness program* . . . the availability of a reasonable alternative standard to qualify for the reward." 29 C.F.R. § 2590.702 (emphasis added); 42 U.S.C. § 300gg-4(j)(3)(E). "[A] plan disclosure that references a premium differential based on tobacco use . . . must include this disclosure." 78 Fed. Reg. 33158-01 at 33166.

RESPONSE: Defendant submits that the statute and regulation cited in Paragraph 36 are the best evidence of their contents and denies any characterization contrary to the terms of the statute and regulation. Further, Paragraph 36 of the Amended Complaint sets forth legal conclusions and therefore does not require a response. To the extent a response is required, Defendant denies the allegations of Paragraph 36.

37. But Plan materials discussing the tobacco surcharge do not disclose the existence of a reasonable alternative standard by which it can be avoided. Further, most do not even disclose what the amount of the tobacco surcharge will be. Though some of the materials note that a participant may enroll in a tobacco cessation program, they do not disclose that such a program is

an alternative standard by which a participant may qualify for the award (that is, avoid the surcharge in its entirety).

RESPONSE: Defendant submits that the written documents referenced in Paragraph 37 are the best evidence of their contents and denies any characterization contrary to their terms. To the extent a response is required, Defendant denies the remaining allegations of Paragraph 37.

38. As alleged above, Compass Group's open enrollment guides that mention the tobacco surcharge and the premium differential fail to provide legally adequate notice in that they (1) fail to disclose the existence of a reasonable alternative standard by which a participant may avoid the surcharge; and (2) fail to disclose that a participant who completed the cessation program would be eligible for retroactive reimbursement for surcharge payments made during that plan year.

RESPONSE: Defendant submits that the written documents referenced in Paragraph 35 are the best evidence of their contents and denies any characterization contrary to their terms. To the extent a response is required, Defendant denies the remaining allegations of Paragraph 38.

39. For example, the Compass Group 2022 Enrollment Guide specifically discusses the tobacco surcharge premium differential. Despite this, the entire 23-page document does not disclose the availability of an alternative standard to avoid the tobacco surcharge stating only that:

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

RESPONSE: Defendant submits that the written document cited in Paragraph 39 is the best evidence of its contents and denies any characterization contrary to its terms. To the extent a response is required, Defendant denies the remaining allegations of Paragraph 39.

40. The same or similar language appears in the 2021 Enrollment Guide.

RESPONSE: Defendant submits that the written document cited in Paragraph 40 is the best evidence of its contents and denies any characterization contrary to its terms. To the extent a response is required, Defendant denies the remaining allegations of Paragraph 40.

41. *Third*, under the applicable regulations, "[t]he plan or issuer must disclose in all plan materials describing the terms of an activity-only wellness program . . . contact information for obtaining a reasonable alternative standard and a *statement that recommendations of an individual's personal physician will be accommodated.* 29 C.F.R. § 2590.702(f)(4)(v).

RESPONSE: Defendant submits that the regulation cited in Paragraph 41 is the best evidence of its contents and denies any characterization contrary to the terms of the regulation. Further, Paragraph 41 of the Amended Complaint sets forth legal conclusions and therefore does not require a response. To the extent a response is required, Defendant denies the remaining allegations of Paragraph 41.

42. The Plan materials cited above do not include a statement that the recommendations of an individual's physician will be accommodated. Upon information and belief, many of Compass Group's other written Plan materials referencing the tobacco surcharge also fail to include this.

RESPONSE: Defendant submits that the written documents referenced in Paragraph 42 are the best evidence of their contents and denies any characterization contrary to their terms. To the extent a response is required, Defendant denies the remaining allegations of Paragraph 42.

43. Compass Group, then, has not complied with the requirement that it provide notice of the availability of a reasonable alternative standard by which a Plan participant could avoid the tobacco surcharge and receive the full reward, or that the recommendations of his or her personal physician would be accommodated. The company cannot then avail itself of the regulatory safe harbor for operating a lawful wellness program.

RESPONSE: Defendant submits that the allegations in Paragraph 43 are legal conclusions to which no response is required. To the extent a response is required, Defendant denies the allegations of Paragraph 43.

e. Additionally, Compass Group Violated the Terms of the Plan

44. In addition to the foregoing statutory violation, Compass Group also violated the terms of the governing Plan Document by assessing and implementing its tobacco surcharge.

RESPONSE: Defendant submits that the written plan document cited in Paragraph 44 is the best evidence of its contents and denies any characterization contrary to the terms of the written plan documents. To the extent a response is required, Defendant denies the remaining allegations of Paragraph 44.

45. Compass Group maintains a Plan Document, which constitutes the "written instrument" by which the Plan is "established and maintained" as required by 29 U.S.C. § 1102(a)(1). The provisions set out therein constitute the "terms of the plan" under ERISA.

RESPONSE: Defendant submits that the written plan document and statute cited in Paragraph 45 are the best evidence of their contents and denies any characterization

contrary to the terms of the written plan documents and statute. To the extent a response is required, Defendant admits that the Plan is governed by ERISA and denies the remaining allegations in Paragraph 45.

46. Compass has revised and amended these terms on multiple occasions. But at all times relevant to this action, the operative Plan terms have prohibited the imposition of its tobacco surcharge.

RESPONSE: Defendant submits that the written plan documents referenced in Paragraph 46 are the best evidence of their contents and denies any characterization contrary to the terms of the written plan documents. To the extent a response is required, Defendant admits that it has amended the Plan terms from time to time and denies the remaining allegations of Paragraph 46.

47. For instance, the Plan Document in effect for Plan Year 2024 provides that "The Plan and the Component Plans will comply with all applicable nondiscrimination rules under the Code and any other applicable law." Plan Document § 11.19. The "Code" means the Internal Revenue Code. Id. at § 1.10

RESPONSE: Defendant submits that the written plan document cited in Paragraph 47 is the best evidence of its contents and denies any characterization contrary to the terms of the written plan documents. To the extent a response is required, Defendant admits the allegations of Paragraph 47.

48. 29 U.S.C. § 1182 is an applicable nondiscrimination rule, as is a nearly identical enactment in 26 U.S.C. § 9802. The latter is a nondiscrimination rule under the Internal Revenue Code. Both are titled "Prohibiting discrimination against individual participants and beneficiaries

based on health status" and prohibit any group health plan from charging an extra premium or fee based on any health status related factor, including tobacco use.

RESPONSE: Defendant submits that the statues cited in Paragraph 48 are the best evidence of their contents and denies any characterization contrary to the terms of the statutes. Further, Paragraph 48 of the Amended Complaint sets forth legal conclusions and therefore does not require a response. To the extent a response is required, Defendant denies the remaining allegations of Paragraph 48.

49. The governing Plan Documents in effect for Plan Years 2021 and 2022 contain identical language. And the terms of an earlier version of Compass Group's Plan Document—upon information and belief, in effect for Plan Years 2013 through 2020—also precludes the imposition of Compass Group's tobacco surcharge.

RESPONSE: Defendant submits that the written plan documents cited in Paragraph 49 are the best evidence of their contents and denies any characterization contrary to the terms of the written plan documents. To the extent a response is required, Defendant denies the allegations of Paragraph 49.

50. Those terms provide, *inter alia*, that "The Plan is intended to operate in compliance with the Code, ERISA and other applicable Federal laws, including, without limitation: . . . HIPAA . . . and the Affordable Care Act." Plan Document § 9.08.

RESPONSE: Defendant submits that the written plan document cited in Paragraph 50 is the best evidence of its contents and denies any characterization contrary to the terms of the written plan documents. Further, Paragraph 50 of the Amended Complaint sets forth legal conclusions and therefore does not require a response. To the extent a response is required, Defendant denies the allegations of Paragraph 50.

51. Compass Group violated these provisions, as alleged extensively herein, by imposing a tobacco surcharge without providing for a reasonable alternative standard. In so doing, the company violated the terms of the plans.

RESPONSE: Defendant submits that the written plan documents cited in Paragraph 51 are the best evidence of its contents and denies any characterization contrary to the terms of the written plan documents. Further, Paragraph 51 of the Amended Complaint sets forth legal conclusions and therefore does not require a response. To the extent a response is required, Defendant denies the allegations of Paragraph 51.

CLASS ACTION ALLEGATIONS

52. Class Definition: Plaintiffs bring this action individually and on behalf of all other similarly situated individuals. Pursuant to Federal Rules of Civil Procedure 23(b)(3), 23(b)(1)(B), 23(b)(2), and/or 23(c)(4), Plaintiffs seek certification of a class consisting of:

> All persons within the United States who paid Compass Group's tobacco surcharge at any time during the relevant limitation period.

RESPONSE: Defendant admits that Plaintiffs purport to bring a class action pursuant to Fed R. Civ. P. 23 on behalf of themselves and others similarly situated as defined in Paragraph 52 but denies that class certification is proper.

53. Excluded from the Class are the Court and its officers, employees, and relatives; Compass Group and its subsidiaries, officers, and directors; and governmental entities.

RESPONSE: Defendant admits that Plaintiffs purport to bring a class action pursuant to Fed R. Civ. P. 23 on behalf of themselves and others similarly situated as but denies that class certification is proper.

54. Numerosity: the Class consists of members so numerous and geographically dispersed that joinder of all members is impracticable, as Compass Group employs thousands of similarly situated individuals across the United States.

RESPONSE: Defendant admits that Plaintiffs purport to bring a class action pursuant to Fed R. Civ. P. 23 on behalf of themselves and others similarly situated as but denies that class certification is proper.

55. All members of the Class are ascertainable by reference to objective criteria, as Compass Group has access to addresses and other contact information for Class members that can be used for notice purposes.

RESPONSE: Defendant denies the allegations of Paragraph 56.

56. Common Questions of Law and Fact Predominate: There are many questions of law and fact common to Plaintiffs and the Class, and those questions substantially predominate over any questions that may affect individual members of the Class. Indeed, the claims of *every* class member will rise or fall on the question of whether the tobacco surcharge is compliant with all legal requirements, and therefore lawful. Common questions include:

a. Whether Compass Group's tobacco surcharge discriminates against Plan participants and beneficiaries based on a health status-related factor;

b. Whether Compass Group's tobacco surcharge program qualifies for statutory safe harbor protection as a compliant wellness program;

c. Whether Compass Group can meet every element of its statutory affirmative defense for operating a compliant wellness program;

d. Whether Compass Group offered a reasonable alternative standard when it required tobacco users to actually quit smoking and remain tobacco-free for ninety days to remove the surcharge;

e. Whether Compass Group would allow a participant to be retroactively reimbursed for surcharge payments previously made in a given plan year;

f. Whether all of Compass Group's Plan materials describing the tobacco surcharge give notice of a reasonable alternative standard by which a plan participant may receive the full reward;

g. Whether a plan document that describes the tobacco surcharge and notes the existence of a smoking cessation program, but does not disclose that enrollment in a smoking cessation program will allow a plan participant to avoid the surcharge gives adequate notice of a reasonable alternative standard;

h. Whether a plan document that describes the tobacco surcharge but does not disclose an alternative program by which a participant can earn the full reward for the plan year gives notice of a reasonable alternative standard;

i. Whether a plan document that describes the tobacco surcharge but does not disclose a statement that recommendations of an individual's personal physician will be accommodated gives notice of a reasonable alternative standard;

j. Whether Compass Group's tobacco surcharge violates the law;

k. Whether Compass Group's tobacco surcharge violates the terms of the Plan; and

l. Whether Compass Group breached its fiduciary duties with respect to its collection and retention of the tobacco surcharge.

RESPONSE: Defendant denies the allegations of Paragraph 56.

57. Typicality: Plaintiffs' claims are typical of other members of the Class because all the claims arise from the same course of conduct by Compass Group—its collection of an unlawful surcharge—and are based on the same legal theories.

RESPONSE: Defendant denies the allegations of Paragraph 57.

58. Adequacy of Representation: Plaintiffs are adequate class representatives because their interests do not conflict with the interests of the Class members whom they seek to represent. Plaintiffs have retained counsel with substantial experience in prosecuting complex class action litigation. Plaintiffs and their counsel are committed to vigorously prosecuting this action on

behalf of Class members and have the financial resources to do so. The Class members' interests will be fairly and adequately protected by Plaintiffs and their counsel.

RESPONSE: Defendant denies the allegations of Paragraph 58.

59. Superiority of Class Action: Class treatment is superior to individual treatment, as it will permit a large number of similarly situated persons to prosecute their respective class claims in a single forum, simultaneously, efficiently, and without unnecessary duplication of evidence, effort, and expense that numerous individual actions would produce.

RESPONSE: Defendant denies the allegations of Paragraph 59.

60. To the extent not all issues or claims, including the amount of damages, can be resolved on a class-wide basis, Plaintiffs invoke Federal Rule of Civil Procedure 23(c)(4), reserving the right to seek certification of a class action with respect to particular issues, and Federal Rule of Civil Procedure 23(c)(5), reserving the right to divide the class into subclasses.

RESPONSE: Defendant denies the allegations of Paragraph 60.

COUNT I – ERISA STATUTORY VIOLATION
Unlawful Surcharge – Failure to Provide a Reasonable Alternative Standard
By Plaintiffs and the Class

61. Plaintiffs hereby reallege by reference each of the foregoing allegations.

RESPONSE: Defendant incorporates by reference the answers Paragraphs 1 through 60 as if fully set forth herein.

62. To enroll in the Plan, Plaintiffs and class members were required to pay a bi-weekly tobacco surcharge in varying amounts ($48 for Plaintiff Mehlberg and $69.33 for Plaintiff Deibel).

RESPONSE: Defendant submits that the Plan's requirements are set forth in writing and those writings provide the best evidence of their contents. Defendant denies any allegations contained in Paragraph 62 that are incomplete or inconsistent with the written documents. Defendant admits that, in at least one pay period, Plaintiff

Mehlberg paid a $48 tobacco surcharge and Plaintiff Deibel paid a $69.33 surcharge. Defendant denies the remaining allegations of Paragraph 62.

63. Compass Group's tobacco surcharge is not and was not a permissible wellness program, because it did not provide for a reasonable alternative standard, in that:

a. A tobacco user could not avoid the surcharge by simply completing a designated smoking cessation program; rather, he or she was required to be tobacco free for 12 months; and

b. Even after Compass Group began offering an alternative standard to being tobacco free, the alternative was not "reasonable" because it did not reimburse surcharge payments already made during that plan year. In other words, a participant who completed the alternative standard was not eligible to receive the "full reward" of the tobacco surcharge program, that being avoiding the entire surcharge for the year.

RESPONSE: Defendant submits that the allegations of Paragraph 63 set forth legal conclusions and therefore do not require a response. To the extent a response is required, Defendant denies the allegations of Paragraph 63.

64. Compass Group cannot meet every element of its affirmative defense for operating a lawful, compliant wellness program, and is therefore not entitled to statutory safe harbor protection.

RESPONSE: Defendant submits that the allegations of Paragraph 64 set forth legal conclusions and therefore do not require a response. To the extent a response is required, Defendant denies the allegations of Paragraph 64.

65. Compass Group's tobacco surcharge has discriminated against, and continues to discriminate against, Plan participants based on a health status-related factor is assessing premiums or contributions, in violation of 29 U.S.C. § 1182(b).

RESPONSE: Defendant submits that the statute cited in Paragraph 65 is the best evidence of its contents and denies any characterization contrary to the terms of the

statute. Defendant further submits that the allegations of Paragraph 65 set forth legal conclusions and therefore do not require a response. To the extent a response is required, Defendant denies the remaining allegations of Paragraph 65.

66. 29 U.S.C. § 1182(b) is a provision of ERISA that Plaintiffs and class members may enforce pursuant to 29 U.S.C. § 1132(a)(3).

RESPONSE: Defendant submits that the statutes cited in Paragraph 66 are the best evidence of their contents and denies any characterization contrary to the terms of the statutes. Further, Paragraph 66 of the Amended Complaint sets forth legal conclusions and therefore do not require a response. To the extent a response is required, Defendant denies the allegations of Paragraph 66.

67. Plaintiffs and class members were required to pay an illegal fee, and Compass Group collected that fee from them in violation of the law. Equity requires that those funds be returned.

RESPONSE: Defendant submits that Paragraph 67 sets forth legal conclusions and therefore do not require a response. To the extent a response is required, Defendant denies the allegations of Paragraph 67.

COUNT II – ERISA STATUTORY VIOLATION
Unlawful Surcharge – Failure to Provide Required Notice
By Plaintiffs and the Class

68. Plaintiffs hereby reallege by reference each of the foregoing allegations.

RESPONSE: Defendant incorporates by reference the answers Paragraphs 1 through 67 as if fully set forth herein.

69. To enroll in the Plan, Plaintiffs and class members were required to pay a bi-weekly tobacco surcharge in varying amounts ($48 for Plaintiff Mehlberg and $69.33 for Plaintiff Deibel).

RESPONSES: Defendant submits that the Plan's requirements are set forth in writing and those writings provide the best evidence of their contents. Defendant denies any allegations contained in Paragraph 69 that are incomplete or inconsistent with the written documents. Defendant admits that, in at least one pay period, Plaintiff Mehlberg paid a $48 tobacco surcharge and Plaintiff Deibel paid a $69.33 surcharge. Defendant denies the remaining allegations of Paragraph 69.

70. Compass Group's tobacco surcharge is not and was not a permissible wellness program, because Compass Group did not give statutorily required notice of a reasonable alternative standard, in that:

a. The Plan's written materials discussed the tobacco surcharge, but did not disclose the availability of an alternative standard—such as a smoking cessation program—by which the surcharge could be avoided;

b. The Plan's written materials discussed the tobacco surcharge, but did not notify participants and beneficiaries that they would be eligible to receive the full reward of the tobacco surcharge program for the plan year, including the retroactive reimbursement of any surcharge fees already paid that plan year; and

c. The Plan's written materials discussed the tobacco surcharge but did not include a statement that recommendations of an individual's personal physician will be accommodated in conjunction with the formation of a reasonable alternative standard.

RESPONSE: Defendant submits that Paragraph 70sets forth legal conclusions and therefore do not require a response. To the extent a response is required, Defendant denies the allegations of Paragraph 70.

71. Compass Group cannot meet every element of its affirmative defense for operating a lawful, compliant wellness program, and is therefore not entitled to statutory safe harbor protection.

RESPONSE: Defendant submits that Paragraph 71 sets forth legal conclusions and therefore do not require a response. To the extent a response is required, Defendant denies the allegations of Paragraph 71.

72. Compass Group's tobacco surcharge has discriminated against, and continues to discriminate against, Plan participants based on a health status-related factor is assessing premiums or contributions, in violation of 29 U.S.C. § 1182(b).

RESPONSE: Defendant submits that the statute cited in Paragraph 72 is the best evidence of its contents and denies any characterization contrary to the terms of the statute. Further, Paragraph 72 sets forth legal conclusions and therefore does not require a response. To the extent a response is required, Defendant denies the remaining allegations in Paragraph 72.

73. 29 U.S.C. § 1182(b) is a provision of ERISA that Plaintiffs and class members may enforce pursuant to 29 U.S.C. § 1132(a)(3).

RESPONSE: Defendant submits that the statutes cited in Paragraph 73 are the best evidence of their contents and denies any characterization contrary to the terms of the statutes. Further, Paragraph 73 of the Amended Complaint sets forth legal conclusions and therefore does not require a response. To the extent a response is required, Defendant denies the remaining allegations of Paragraph 73.

74. Plaintiffs and class members were required to pay an illegal fee, and Compass Group collected that fee from them in violation of the law. Equity requires that those funds be returned.

RESPONSE: Defendant submits that Paragraph 74 of the Amended Complaint sets forth legal conclusions and therefore does not require a response. To the extent that a response is required, Defendant denies the allegations of Paragraph 74.

COUNT III – ERISA BREACH OF FIDUCIARY DUTY
29 U.S.C. § 1109
By Plaintiffs and the Class, On Behalf of the Plan

75. Plaintiffs hereby reallege by reference each of the foregoing allegations.

RESPONSE: Defendant incorporates by reference the answers to Paragraph 1 through 74 as if fully set forth herein.

76. At all times relevant to this lawsuit, Compass Group was the administrator of the Plan within the meaning of 29 U.S.C. § 1002(16) and was a fiduciary within the meaning of 29 U.S.C. § 1002(21), in that it exercised discretionary authority and discretionary control respecting management of the medical benefits plans and disposition of their assets by holding in trust the funds collected from the tobacco surcharge, and had discretionary authority and discretionary responsibility in the administration of the medical plan.

RESPONSE: Defendant admits that the Plan terms are set forth in writing and those writings provide the best evidence of their contents. Defendant denies any allegations contained in Paragraph 76 that are incomplete or inconsistent with the written documents. Further, Defendant submits that the statutes cited in Paragraph 76 are the best evidence of their contents and denies any characterization contrary to the terms of the statutes. Further, Paragraph 76 of the Amended Complaint sets forth legal conclusions and therefore does not require a response. To the extent a response is required, Defendant denies the allegations of Paragraph 76.

77. Compass Group breached its fiduciary duty by assessing and collecting the tobacco surcharge in violation of the law and in violation of the terms of the Plan, as the receipt of additional funds reduced its own costs associated with funding the plan and forestalled its own obligations to make contributions thereto.

RESPONSE: Defendant submits that the allegations in Paragraph 77 are legal conclusions to which no response is required. To the extent a response is required, Defendant denies the allegations of Paragraph 77.

78. Upon information and belief, Compass Group's responsibility with respect to the funding of the Plan's claims and administrative expenses relating to the Plan's self-funded arrangements equaled the amount by which the Plan's claims and administrative expenses exceeded all participant contributions, including the tobacco surcharge funds, Compass Group's collection of the tobacco surcharge diminished the amount it had to contribute to the plan, thereby benefiting itself and harming the Plan.

RESPONSE: Defendant denies the allegations of Paragraph 78.

79. Despite being unlawful for the reasons already discussed above, Compass Group was duty-bound to deposit the tobacco surcharge amounts into the Plan once they were collected from Plaintiffs and other similarly situated participants. Instead, on information and belief, Compass Group took those amounts, did not deposit them into the Plan, used them to offset its own contribution amounts, and otherwise used them to profit at the expense of the Plan.

RESPONSE: Defendant denies the allegations of Paragraph 79.

80. As a result of the imposition of the tobacco surcharge, Compass Group enriched itself at the expense of the Plan, thereby resulting in it receiving a windfall.

RESPONSE: Defendant denies the allegations of Paragraph 80.

81. Compass Group breached its fiduciary duties under ERISA in that it:

a. failed to act solely in the interest of the participants and beneficiaries of the Plan and for the exclusive purpose of providing benefits to participants and their beneficiaries and defraying reasonable expenses of plan administration, in violation of ERISA. See 29 U.S.C. § 1104(a)(1)(A);

b. failed to discharge its duties in accordance with the documents and instruments governing the Plan insofar as the documents and instruments are consistent with ERISA, in violation of ERISA. See 29 U.S.C. § 1104(a)(1)(D);

c. failed to ensure that the assets of the Plan did not inure to the benefit of the employer, in violation of ERISA *See* 29 U.S.C. § 1106(a)(1)(D);

d. caused the Plan to engage in transactions that Compass Group knew or should have known constituted a direct or indirect transfer to, or use by or for the benefit of, a party in interest, of assets of the health plan, in violation of ERISA. *See* 29 U.S.C. § 1106(a)(1)(D);

e. dealt with assets of the Plan in Compass Group's own interests in violation of ERISA. See 29 U.S.C. § 1106(b)(1);

f. acted on behalf of a party whose interests were averse to the interests of the Plan or the interests of its participants and beneficiaries, in violation of ERISA. See 29 U.S.C. § 1106(b)(2); and

g. caused the Plan to require participants to pay a premium or contribution which was greater than such premium or contribution for a similarly situated participant enrolled in the health plan on the basis of a health status-related factor in relation to the participant or to an individual enrolled under the health plan as a dependent of the individual, in violation of ERISA. See 29 U.S.C. § 1182(b).

RESPONSE: Defendant submits that the statutes cited in Paragraph 81 are the best evidence of their contents and denies any characterization contrary to the terms of the statutes. Further, Paragraph 81 of the Amended Complaint sets forth legal conclusions and therefore does not require a response. To the extent a response is required, Defendant denies the allegations of Paragraph 81.

82. As a result of these breaches, and pursuant to 29 U.S.C. § 1109, Compass Group is liable to make good to the plan all losses to the Plan resulting from its breaches, disgorge all unjust enrichment and ill-gotten profits, and to restore to the Plan and/or a constructive trust all profits it

acquired through its violations alleged herein and which it made through use of assets of the plan, and for such other equitable or remedial relief as is proper.

RESPONSE: Defendant submits that the statue cited in Paragraph 82 is the best evidence of its contents and denies any characterization contrary to the terms of the statute. Further, Paragraph 82 if the Amended Complaint sets forth legal conclusions and therefore does not require a response. To the extent a response is required, Defendant denies the remaining allegations of Paragraph 82.

83. Plaintiffs are authorized to bring this action on behalf of the plan pursuant to 29 U.S.C. § 1132(a)(2).

RESPONSE: Defendant submits that Paragraph 83 sets forth legal conclusions and therefore does not require a response. To the extent a response is required, Defendant denies the allegations of Paragraph 83.

COUNT IV – ERISA BREACH OF FIDUCIARY DUTY
Individual Relief for Fiduciary Violations Under ERISA § 502(a)(3)
By Plaintiffs and the Class

84. Plaintiffs hereby reallege by reference each of the foregoing allegations.

RESPONSE: Defendant incorporates by reference the answers to Paragraph 1 through 83 as if fully set forth herein.

85. At all times relevant to this lawsuit, Compass Group was the administrator of the Plan within the meaning of 29 U.S.C. § 1002(16) and was a fiduciary within the meaning of 29 U.S.C. § 1002(21), in that it exercised discretionary authority and discretionary control respecting management of the medical benefits plans and disposition of their assets by holding in trust the funds collected from the tobacco surcharge, and had discretionary authority and discretionary responsibility in the administration of the medical plan.

RESPONSE: Defendant submits that the statutes cited in Paragraph 85 are the best evidence of their contents and denies any characterization contrary to the terms of the statutes. Further, Paragraph 85 of the Amended Complaint sets forth legal conclusions and therefore does not require a response. To the extent a response is required, Defendant admits the allegations in Paragraph 85.

86. Compass Group breached its fiduciary duty by assessing and collecting the tobacco surcharge in violation of the law and in violation of the terms of the Plan, as the receipt of additional funds reduced its own costs associated with funding the plan and forestalled its own obligations to make contributions thereto.

RESPONSE: Defendant submits that the allegations in Paragraph 86 are legal conclusions to which no response is required. To the extent a response is required, Defendant denies the allegations of Paragraph 86.

87. Upon information and belief, Compass Group's responsibility with respect to the funding of the Plan's claims and administrative expenses relating to the Plan's self-funded arrangements equaled the amount by which the Plan's claims and administrative expenses exceeded all participant contributions, including the tobacco surcharge funds, Compass Group's collection of the tobacco surcharge diminished the amount it had to contribute to the plan, thereby benefiting itself and harming the Plan.

RESPONSE: Defendant denies the allegations of Paragraph 87.

88. Despite being unlawful for the reasons already discussed above, Compass Group was duty-bound to deposit the tobacco surcharge amounts into the Plan once they were collected from Plaintiffs and other similarly situated participants. Instead, on information and belief,

Compass Group took those amounts, did not deposit them into the Plan, used them to offset its own contribution amounts, and otherwise used them to profit at the expense of the Plan.

RESPONSE: Defendant denies the allegations of Paragraph 88.

89. As a result of the imposition of the tobacco surcharge, Compass Group enriched itself at the expense of the Plan, thereby resulting in it receiving a windfall.

RESPONSE: Defendant denies the allegations of Paragraph 89.

90. Compass Group breached its fiduciary duties under ERISA in that it:

a. failed to act solely in the interest of the participants and beneficiaries of the Plan and for the exclusive purpose of providing benefits to participants and their beneficiaries and defraying reasonable expenses of plan administration, in violation of ERISA. See 29 U.S.C. § 1104(a)(1)(A);

b. failed to discharge its duties in accordance with the documents and instruments governing the Plan insofar as the documents and instruments are consistent with ERISA, in violation of ERISA. See 29 U.S.C. § 1104(a)(1)(D);

c. failed to ensure that the assets of the Plan did not inure to the benefit of the employer, in violation of ERISA. See 29 U.S.C. § 1103(c).

d. caused the Plan to engage in transactions that Compass Group knew or should have known constituted a direct or indirect transfer to, or use by or for the benefit of, a party in interest, of assets of the health plan, in violation of ERISA. See 29 U.S.C. § 1106(a)(1)(D);

e. dealt with assets of the Plan in Compass Group's own interests in violation of ERISA. See 29 U.S.C. § 1106(b)(1);

f. acted on behalf of a party whose interests were averse to the interests of the Plan or the interests of its participants and beneficiaries, in violation of ERISA. See 29 U.S.C. § 1106(b)(2); and

g. caused the Plan to require participants to pay a premium or contribution which was greater than such premium or contribution for a similarly situated participant enrolled in the health plan on the basis of a health status-related factor in relation to the participant or to an individual enrolled under the health plan as a dependent of the individual, in violation of ERISA. See 29 U.S.C. § 1182(b).

RESPONSE: Defendant submits that the statutes cited in Paragraph 90 are the best evidence of their contents and denies any characterization contrary to the terms of the statutes. Further, Defendant submits that the allegations in Paragraph 90 are legal conclusions to which no response is required. To the extent that a response is required, Defendant denies the allegations of Paragraph 90.

91. Plaintiffs and class members are authorized to recover individual equitable relief to remedy these breaches under 29 U.S.C. § 1132(a)(3).

RESPONSE: Defendant submits that the statute cited in Paragraph 91 is the best evidence of its contents and denies any characterization contrary to the terms of the statute. Further, Defendant submits that the allegations in Paragraph 91 are legal conclusions to which no response is required. To the extent that a response is required, Defendant denies the allegations of Paragraph 91.

COUNT V – ERISA VIOLATION
Violation of the Terms of the Plan Under ERISA § 502(a)(3)
By Plaintiffs and the Class

92. Plaintiffs hereby reallege by reference each of the foregoing allegations.

RESPONSE: Defendant incorporates by reference the answers to Paragraph 1 through 91 as if fully set forth herein.

93. Compass Group violated the terms of the Plan, as set out in the Plan Document, for the reasons alleged supra at ¶¶ 44-51.

RESPONSE: Defendant submits that the written plan documents referenced in Paragraph 93 are the best evidence of their contents and denies any characterization contrary to the terms of the documents. Further, Defendant submits that the allegations in Paragraph 93 are legal conclusions to which no response is required.

To the extent a response is required, Defendant denies the allegations of Paragraph 93.

94. As a result of these violations, Plaintiffs and class members were required to pay a tobacco surcharge, costing them hundreds of dollars per year.

RESPONSE: Defendant denies the allegations in Paragraph 94.

95. Plaintiffs and class members are authorized to recover individual equitable relief to remedy these violations of the terms of the Plans under 29 U.S.C. § 1132(a)(3).

RESPONSE: Defendant submits that the statute cited in Paragraph 95 is the best evidence of its contents and denies any characterization contrary to the terms of the statute. Further, Defendant submits that the allegations in Paragraph 95 are legal conclusions to which no response is required. To the extent a response is required, Defendant denies the allegations of Paragraph 95.

COUNT VI – CLAIM FOR BENEFITS
Violation of the Terms of the Plan Under ERISA § 502(a)(1)(B)
By Plaintiffs and the Class

96. Plaintiffs hereby realleged by reference each of the foregoing allegations.

RESPONSE: Defendant incorporates by reference the answers to Paragraph 1 through 95 as if fully set forth herein.

97. ERISA § 502(a)(1)(B) provides that a participant may bring a civil action "to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan." A participant's right to avoid paying an increased cost to maintain coverage under the terms of a plan is a "benefit" within the meaning of this section.

RESPONSE: Defendant submits that the statute cited in Paragraph 97 is the best evidence of its contents and denies any characterization contrary to the terms of the statute. Further, Defendant submits that the allegations in Paragraph 97 are legal conclusions to which no response is required. To the extent a response is required, Defendant denies the allegations of Paragraph 97.

98. Compass Group violated the terms of the Plan, as set out in the Plan Document, for the reasons alleged *supra* at ¶¶ 44-51.

RESPONSE: Defendant incorporates is responses to Paragraphs 44-51. Defendant submits that the written plan document cited in Paragraph 98 is the best evidence of its contents and denies any characterization contrary to the terms of the document. Further, Defendant submits that the allegations in Paragraph 98 are legal conclusions to which no response is required. To the extent a response is required, Defendant denies the allegations of Paragraph 98.

99. Compass Group has violated the terms of the plan and are liable to Plaintiffs and the Class for all losses resulting therefrom under to ERISA § 502(a)(1)(B); 29 U.S.C. § 1132(a)(1)(B).

RESPONSE: Defendant submits that the written plan document and statute cited in Paragraph 99 are the best evidence of their contents and denies any characterization contrary to the terms of the document and statute. Further, Defendant submits that the allegations in Paragraph 99 are legal conclusions to which no response is required. To the extent a response is required, Defendant denies the allegations of Paragraph 99.

100. Administrative Exhaustion: Plaintiffs asserting claims under ERISA § 502(a)(1)(B); 29 U.S.C. § 1132(a)(1)(B) need not comply with the prudential and discretionary administrative exhaustion requirement if exhaustion would be futile, the remedy would be inadequate, the plan's claims procedure would be unreasonable, or there would be no meaningful access to the internal review procedure. Each of these exceptions are met in this case for the following reasons, individually or in combination:

a. Under the Plan's administrative claims appeal process, a claim can only be initiated after the receipt of a written notice of an adverse claims decision or denial notice, and Plaintiffs and the Class were never provided such a notice;

b. The subject matter of the claims of Plaintiffs and the Class fall outside of the scope of the Plan's appeals process, which reviews questions of medical necessity, coverage, and the like, and not disputes concerning the costs borne by a participant and beneficiaries to maintain coverage;

c. The administrative remedies of Plaintiffs and the Class are deemed exhausted by operation of law because Compass Group's claims appeals procedures do not comply with all requirements established by 29 C.F.R. § 2590.715-2719, 29 C.F.R. § 2560.503-1, and other regulations governing internal claims procedures;

d. Plaintiffs and the Class are challenging a fixed, official, *de jure* policy established by Compass Group on its face, as opposed to a discretionary interpretation of a policy made by a claims adjuster or other discrete decisionmaker, rendering an internal appeal futile;

e. The claims of Plaintiffs and the Class would require interpretation of ERISA's statutory requirements and implementing regulations; and

f. Other reasons to be determined based on facts found through the course of discovery.

RESPONSE: Defendant submits that the statutes cited in Paragraph 100 are the best evidence of their contents and denies any characterization contrary to the terms of the statutes. Further, Defendant submits that the allegations in Paragraph 100 are legal conclusions to which no response is required. To the extent that a response is required, Defendant denies the allegations of Paragraph 100.

101. Statute of Limitations: Plaintiffs and the Class's Count V and VI seeking relief for violations of the terms of the Plan did not accrue and/or the statute of limitations was otherwise tolled until such time as Plaintiffs engaged counsel (who sent a request for a copy of the Plan Document in accordance with 29 U.S.C. § 1024(b)(4)) and received a copy of the Plan Document. Though Plaintiffs were aware that they were required to pay a tobacco surcharge to maintain health insurance coverage, they were not, and could not reasonably have been, aware that this surcharge was in violation of the terms of the Plan. Though Compass Group provides its employees with various written Plan materials, such as enrollment documents and summaries of material modifications to certain plan provisions, it does not provide participants copies of the Plan Document—the written instrument that sets out the binding "terms of the plan" within the meaning of ERISA. Upon information and belief, the only means by which a Plan participant could access the Plan Document would be to invoke his or her legal rights under 29 U.S.C. § 1024(b)(4).

RESPONSE: Defendant submits that the statutes cited in Paragraph 101 are the best evidence of their contents and denies any characterization contrary to the terms of the statutes. To the extent that a response is required, Defendant denies the allegations of Paragraph 101.

102. Compass Group was aware that Plaintiffs and class members did not know and could not reasonably have known that the tobacco surcharge was not authorized by the terms of the Plan, and did not provide them with a copy of the binding and official terms of the Plan so that they might have had the opportunity to correct that misunderstanding. Instead, the plan-related materials Compass Group did disseminate to participants, such as enrollment materials, tended to suggest—incorrectly—that the tobacco surcharge was authorized under the terms of the Plan. Due to Compass Group's fiduciary position, it had a duty to disclose these facts to Plaintiffs and other

class members. Compass Group's superior knowledge, concealment of its violation of the terms of the Plan, and failure to disclose the same to Plaintiffs and class members constitute fraudulent concealment and tolls the statute of limitations for Plaintiffs and other class members.

RESPONSE: Defendant denies the allegations of Paragraph 102.

103. Plaintiffs did not discover, nor could they have discovered through reasonable diligence, the facts establishing Compass Group's violation of the terms of the plan.

RESPONSE: Defendant denies the allegations of Paragraph 103.

104. As a result of the date of accrual and/or tolling of the statute of limitations, all tobacco surcharge payments made in violation of the terms of the Plan are timely recoverable by Plaintiffs and the Class.

RESPONSE: Defendant denies the allegations of Paragraph 104.

REQUEST FOR RELIEF

Plaintiffs, individually and on behalf of all others similarly situated, respectfully request that the Court enter judgment in their favor and against Compass Group as follows:

A. That the Court certify this action as a class action, proper and maintainable pursuant to Rule 23 of the Federal Rules of Civil Procedure; declare that Plaintiffs are proper class representatives, and appoint Plaintiffs' counsel as Class Counsel;

B. That the Court order Compass Group to reimburse all persons who paid the tobacco surcharge within the relevant limitations period;

C. That the Court order disgorgement and/or restitution of all payments unlawfully assessed by Compass Group, or, alternatively, the profits earned by Compass Group in connection with its receipt of such unlawful fees;

D. That the Court grant a declaratory judgment holding that the acts of Compass Group described herein violate ERISA and applicable law, as well as the terms of the plan;

E. That the Court enter a permanent injunction against Compass Group prohibiting it from collecting a tobacco surcharge unless and until the company revises the surcharge to comply with all ERISA statutory requirements;

F. That the Court order Compass Group to provide all accountings necessary to determine the amounts it must make good to the plan and to plan participants and beneficiaries;

G. That the Court surcharge against Compass Group all funds it collected in violation of ERISA and the terms of the plan;

H. That the Court find and adjudge that Compass Group is liable to make good to the Plan all losses to the Plan resulting from each breach of fiduciary duties, to otherwise restore the Plan to the position it would have occupied but for the breaches of fiduciary duty, and grant all other proper relief authorized by 29 U.S.C. § 1109, including removal and replacement of the fiduciary;

I. That the Court impose a constructive trust on profits received by Compass Group as a result of fiduciary breaches committed by it or for which it is liable, upon which Plaintiffs and the class can make claims for equitably vested benefits;

J. That the Court award Plaintiffs and the class all damages available at law in an amount to be determined at trial;

K. That the Court award reasonable attorneys' fees, costs, and expenses as provided by law;

L. That the Court order the payment of interest to the extent it is allowed by law; and

M. That the Court grant all other equitable, remedial, and legal relief as it deems just and proper under the circumstances.

RESPONSE: Defendant denies the allegations set forth in the Request for Relief including each and every subpart, and denies that Plaintiffs or those similarly situated are entitled to any of the relief south in the Request for Relief. Defendant prays that the Court deny Plaintiffs' requests for relief and instead enter judgment in favor of Defendant, dismiss Plaintiffs' claims with prejudice, award Defendant attorneys' fees and costs, and award Defendant all other appropriate relief.

AFFIRMATIVE DEFENSES

Defendant advances the following defenses to the Amended Complaint. The defenses asserted below will apply, or will not apply, in varying degrees to members of the putative class including Plaintiffs, depending upon the particular factual circumstances of each individual

member of the putative class. By setting forth these defenses, Defendant does not assume the burden of proving any fact, issue, or element of a cause of action where such burden properly belongs to Plaintiffs. Nothing stated herein is intended or shall be construed as an admission that any particular issue or subject matter is relevant to Plaintiffs' allegations or is indeed an affirmative defense.

First Defense

The Amended Complaint fails to state a claim upon which relief can be granted.

Second Defense

Plaintiffs lack standing because they cannot prove that: (i) they suffered an injury that is concrete, particularized, and actual or imminent; (ii) if they did suffer an injury, that it is traceable to Defendant's conduct, and (iii) the injury is redressable by judicial relief.

Third Defense

Plaintiffs' claims are barred in whole or in part by the applicable statute of limitations and repose.

Fourth Defense

Any loss, damage, or injury sustained by Plaintiffs was not directly or proximately caused by the alleged breach of fiduciary duty as stated in the Amended Complaint.

Fifth Defense

To the extent members of the putative class have executed a waiver or release of claims against Defendant, their claims may be barred by that waiver or release of claims.

Sixth Defense

Defendant acted at all times and in all respects in good faith and with due care and did not engage in any conduct which would constitute a breach of fiduciary duty.

Seventh Defense

Defendant is not, or was not acting as, a fiduciary within the meaning of ERISA § 3(21)(A), 29 U.S.C. § 1102(21)(A), with respect to certain conduct alleged by Plaintiffs.

Eighth Defense

Plaintiffs' claims are barred, in whole or in part, because the Amended Complaint seeks relief that cannot be obtained under ERISA §§ 409 and 502(a)(2), 29 U.S.C. §§ 1109 and 1132(a)(2). Plaintiffs allege the surcharges were not deposited into the Plan. As such, the surcharges are not "Plan assets" that can form the basis of an ERISA § 409 and 502(a)(2) claim, as such claims are limited to claims regarding misuse of Plan assets.

Ninth Defense

Plaintiffs lack standing regarding their notice claim because they do not allege that a lack of notice caused them to forgo participation in a cessation program and pay the surcharge.

Tenth Defense

Plaintiffs have proximately caused, contributed to, and/or failed to mitigate, any and all harm and/or loss claimed.

Eleventh Defense

Plaintiffs' claims are barred by the doctrine of laches, waiver, and/or *estoppel*.

Twelfth Defense

Plaintiffs' claims are barred, in whole or in part, because the Amended Complaint seeks relief that cannot be obtained under ERISA §§ 409 and 502(a)(2), 29 U.S.C. §§ 1109 and 1132(a)(2), because Plaintiffs cannot prove any loss to the Plan.

Thirteenth Defense

Plaintiff Mehlberg lacks constitutional standing to assert claims as of January 1, 2023 because he waived medical coverage for Plan years 2023 and 2024 and terminated employment on April 6, 2024. Plaintiff Deibel lacks constitutional standing to assert claims as of January 1, 2024 because she waived medical coverage as of that date. Thus, neither could not have suffered an injury sufficient to confer Article III standing from those points to the present.

Fourteenth Defense

Plaintiffs lack statutory standing. Only a participant or beneficiary of a Plan may file suit under ERISA Sections 502(a)(2) and 502(a)(3). Neither Plaintiff fits that definition because Mehlberg and Deibel ceased participating in the Plan in 2022 and 2024, respectively. As such, Mehlberg and Deibel lack statutory standing to assert their claims after December 31, 2021 and December 31, 2023, respectively.

Fifteenth Defense

Plaintiffs and the class they purport to represent lack constitutional standing to assert their claims after January 1, 2024 when Compass began retroactively refunding the surcharges.

Sixteenth Defense

Defendant was not acting as a fiduciary when it made the decision to charge a tobacco surcharge for individuals who neither refrained from using tobacco products nor completed a reasonable alternative. Because Plaintiffs' Amended Complaint takes aim at the terms of the Plan's tobacco wellness program, *i.e.*, its plan design, it falls outside the scope of ERISA's fiduciary duties and cannot give rise to a claim under ERISA Section 502(a)(2).

Seventeenth Defense

Plaintiffs lack standing to challenge Defendant's wellness program because Plaintiffs do not allege, as required by 42 U.S.C. § 300gg-4(j)(3)(D)(i), that it would have been "medically inadvisable" or "unreasonably difficult due to a medical condition" for them to qualify for the reasonable alternative standard. Plaintiffs' failure to allege that it would have been "medically inadvisable" or "unreasonably difficult due to a medical condition" for them to qualify for the reasonable alternative standard means that Plaintiffs were not entitled to be offered any reasonable alternative standards in the first instance.

Eighteenth Defense

Where, as here, a participant is provided with a reasonable opportunity to enroll in a wellness program "at the beginning of the plan year and qualify for the reward" – but declines the opportunity to do so – the plan is not required "to provide the opportunity to avoid the surcharge or provide another reward to the individual for that plan year." *See* FAQs About Affordable Care Act Implementation (Part XVIII) & Mental Health Parity Implementation (Jan. 9, 2014), at 6.

Nineteenth Defense

Plaintiffs fail to state a prohibited transaction claim under 29 U.S.C. § 1106(a)(1)(D) because they do not identify a party in interest to whom assets of the health plan were transferred by Compass.

Twentieth Defense

Plaintiffs fail to state a prohibited transaction claim under 29 U.S.C. § 1106(a)(1)(D) because they do not identify a transaction in which assets of the health plan were transferred by Compass.

Twenty-First Defense

Because all surcharges collected were allocated to the Plan, Compass did not deal with assets of the Plan in Compass's own interests. As such, Plaintiffs fail to state a prohibited transaction claim under 29 U.S.C. § 1106(b)(1).

Twenty-Second Defense

Plaintiffs fail to state a prohibited transaction claim under 29 U.S.C. § 1106(b)(2) because Compass did not act on behalf of a party whose interests were adverse to the interests of the Plan or the interests of its participants and beneficiaries because all surcharges collected were allocated to the Plan.

Twenty-Fifth Defense

Plaintiffs fail to state a claim under 29 U.S.C. § 1109 to make good to the plan all losses to the Plan resulting from its breaches, disgorge all unjust enrichment and ill-gotten profits, and to restore to the Plan because all surcharges collected were allocated to the Plan.

Twenty-Sixth Defense

Even if Plaintiffs could state a claim under 29 U.S.C. § 1109, Named Plaintiffs and anyone similarly situated (i.e., former and/or non-Plan participants), do not have standing for such a claim because as former/non-Plan participants, and they cannot benefit from any restoration of losses to the Plan.

Twenty-Seventh Defense

Plaintiffs have failed in their burden of proving that Compass did not meet the criteria for a compliant wellness program contained in 29 U.S.C. § 1182(b) as amended by 42 U.S.C. § 300gg-4(j)(3).

Twenty-Eighth Defense

Plaintiffs failed to administratively exhaust their claim for benefits under 29 U.S.C. § 502(a)(1)(B).

Twenty-Ninth Defense

Plaintiffs did not timely file an administrative claim for benefits under the Plan's one-year limitations period for such claim.

Thirtieth Defense

The remedy sought in Count V under 29 U.S.C. § 1132(a)(3) for is duplicative of relief sought in other counts of the Amended Complaint and therefore must be dismissed.

Dated: October 20, 2025

JACKSON LEWIS P.C.

/s/ René E. Thorne

René E. Thorne (*pro hac*)
René.Thorne@jacksonlewis.com
Lindsey H. Chopin (*pro hac*)
Lindsey.Chopin@jacksonlewis.com
601 Poydras Street, Suite 1400
New Orleans, Louisiana 70130
Telephone: (504) 208-1755
Facsimile: (504) 208-1759

Phillip C. Thompson (MO Bar #69915)
7101 College Blvd., Suite 1200
Overland Park, KS 66210
Telephone: (913) 981-1018
Facsimile: (913) 981-1019
Phillip.Thompson@jacksonlewis.com

ATTORNEYS FOR DEFENDANT