UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

STACEY PARKS KENNEDY, ANGELA BOZELL and BRITTNEY WILLIAMS, individually and on behalf of all others similarly situated, Plaintiffs, v. AEGIS MEDIA AMERICAS, INC., BOARD OF DIRECTORS OF AEGIS MEDIA AMERICAS, INC., THE BENEFITSPLUS 401(K) PROFIT SHARING PLAN COMMITTEE, and JOHN DOES 1-30. Defendants.	**CIVIL ACTION NO.**: 1:20-cv-03624

AMENDED COMPLAINT

Plaintiffs, Stacey Parks Kennedy, Angela Bozell and Brittney Williams ("Plaintiffs"), by and through their attorneys, on behalf of the BenefitsPlus 401(k) Profit Sharing Plan (the "Plan"),[1] themselves and all others similarly situated, state and allege as follows:

I. INTRODUCTION

1. This is a class action brought pursuant to §§ 409 and 502 of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1109 and 1132, against the Plan's fiduciaries, which include Aegis Media Americas, Inc. ("Aegis" or "Company"), the Board of Directors of Aegis ("Board") and its members during the Class Period and the BenefitsPlus

[1] The Plan is a legal entity that can sue and be sued. ERISA § 502(d)(1), 29 U.S.C. § 1132(d)(1). However, in a breach of fiduciary duty action such as this, the Plan is not a party. Rather, pursuant to ERISA § 409, and the law interpreting it, the relief requested in this action is for the benefit of the Plan and its participants.

401(k) Profit Sharing Plan Committee and its members during the Class Period ("Committee") for breaches of their fiduciary duties.

2. To safeguard Plan participants and beneficiaries, ERISA imposes strict fiduciary duties of loyalty and prudence upon employers and other plan fiduciaries. 29 U.S.C. § 1104(a)(1)(B). These twin fiduciary duties are "the highest known to the law." *Donovan v. Bierwirth*, 680 F. 2d 263, 272 n.8 (2d Cir. 1982); *see also Severstal Wheeling v. WPN Corporation*, 659 F.Appx. 24 (2nd Cir. 2016).

3. The Department of Labor has explicitly stated that employers are held to a "high standard of care and diligence" and must, among other duties, both "establish a prudent process for selecting investment options and service providers" and "monitor investment options and service providers once selected to see that they continue to be appropriate choices." *See*, "*A Look at 401(k) Plan Fees*," *supra*, at n.3; *see also Tibble v. Edison Int'l*, 135 S. Ct. 1823, 1823 (2015) (reaffirming the ongoing fiduciary duty to monitor a plan's investment options).

4. Under 29 U.S.C. § 1104(a)(1), a plan fiduciary must give substantial consideration to the cost of investment options. "Wasting beneficiaries' money is imprudent. In devising and implementing strategies for the investment and management of trust assets, trustees are obligated to minimize costs." Uniform Prudent Investor Act (the "UPIA"), § 7.

5. "The Restatement … instructs that 'cost-conscious management is fundamental to prudence in the investment function,' and should be applied 'not only in making investments but also in monitoring and reviewing investments.'" *Tibble v. Edison Int'l*, 843 F.3d 1187, 1197-98 (9th Cir. 2016) (*en banc*) (quoting Restatement (Third) of Trusts, § 90, cmt. b).[2]

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[2] *See also* U.S. Dep't of Labor, *A Look at 401(k) Plan Fees*, (Aug. 2013), at 2, available at https://www.dol.gov/sites/dolgov/files/ebsa/about-ebsa/our-activities/resource-center/publications/a-look-at-401k-plan-fees.pdf (last visited February 21, 2020) ("You should be aware that your employer also has a specific obligation to consider the fees and expenses paid by your plan.").

6. Additional fees of only 0.18% or 0.4% can have a large effect on a participant's investment results over time because "[b]eneficiaries subject to higher fees … lose not only money spent on higher fees, but also lost investment opportunity; that is, the money that the portion of their investment spent on unnecessary fees would have earned over time." *Tibble*, 843 F.3d at 1198 ("It is beyond dispute that the higher the fees charged to a beneficiary, the more the beneficiary's investment shrinks.").

7. Most participants in 401(k) plans expect that their 401(k) accounts will be their principal source of income after retirement. Although at all times 401(k) accounts are fully funded, that does not prevent plan participants from losing money on poor investment choices by plan sponsors and fiduciaries, whether due to poor performance, high fees or both.

8. Prudent and impartial plan sponsors thus should be monitoring both the performance and cost of the investments selected for their 401(k) plans, as well as investigating alternatives in the marketplace to ensure that well-performing, low cost investment options are being made available to plan participants.

9. At the end of 2018 and 2017, the Plan had over 540 million dollars and 375 million dollars, respectively, in assets under management that were/are entrusted to the care of the Plan's fiduciaries. *See,* 2018 Form 5500 filing at page 4 of the attached audited financial statement.

10. The Plan's assets under management qualifies it as a large plan in the defined contribution plan marketplace, and among the largest plans in the United States. As a large plan, the Plan had substantial bargaining power regarding the fees and expenses that were charged against participants' investments. Defendants, however, did not try to reduce the Plan's expenses or exercise appropriate judgment to scrutinize each investment option that was offered in the Plan to ensure it was prudent.

11. Plaintiffs allege that during the putative Class Period (May 8, 2014 through December 31, 2018) Defendants, as "fiduciaries" of the Plan, as that term is defined under ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A), breached the duties they owed to the Plan, to Plaintiffs, and to the other participants of the Plan by, *inter alia,* (1) failing to objectively and adequately review the Plan's investment portfolio with due care to ensure that each investment option was prudent, in terms of cost; (2) maintaining certain funds in the Plan despite the availability of identical or similar investment options with lower costs and/or better performance histories; and (3) failing to control the Plan's recordkeeping costs.

12. Defendants failed to utilize the lowest cost share class for many of the mutual funds within the Plan, and failed to consider available collective trusts as alternatives to the mutual funds in the Plan, despite their lower fees.

13. In late 2018, over ***four years*** into the Class Period, Defendants made the decision to change many of the funds at issue in this lawsuit to lower cost share classes or lower cost funds. These changes were effective as of December 31, 2018. These changes were far too little and too late as the damages suffered by Plan participants to that point had already been baked in. There is no reason to not have implemented these changes as soon as the cheaper funds became available.

14. For example, "[b]ecause the institutional share classes are otherwise *identical* to the Investor share classes, but with lower fees, a prudent fiduciary would know immediately that a switch is necessary. Thus, the 'manner that is reasonable and appropriate to the particular investment action, and strategies involved…in this case would mandate a prudent fiduciary – who indisputably has knowledge of institutional share classes and that such share classes provide identical investments at lower costs – to switch share classes immediately." *Tibble, et al. v. Edison Int. et al.*, No. 07-5359, 2017 WL 3523737, at * 13 (C.D. Cal. Aug. 16, 2017).

15. Defendants' mismanagement of the Plan, to the detriment of participants and beneficiaries, constitutes a breach of the fiduciary duty of prudence in violation of 29 U.S.C. § 1104. Their actions were contrary to actions of a reasonable fiduciary and cost the Plan and its participants millions of dollars.

16. Based on this conduct, Plaintiffs assert claims against Defendants for breach of the fiduciary duty of prudence (Count One) and failure to monitor fiduciaries (Count Two).

II. JURISDICTION AND VENUE

17. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1331 because it is a civil action arising under the laws of the United States, and pursuant to 29 U.S.C. § 1332(e)(1), which provides for federal jurisdiction of actions brought under Title I of ERISA, 29 U.S.C. § 1001, *et seq*.

18. This Court has personal jurisdiction over Defendants because they transact business in this District, reside in this District, and/or have significant contacts with this District, and because ERISA provides for nationwide service of process.

19. Venue is proper in this District pursuant to ERISA § 502(e)(2), 29 U.S.C. § 1132(e)(2), because some or all of the violations of ERISA occurred in this District and Defendants reside and may be found in this District. Venue is also proper in this District pursuant to 28 U.S.C. § 1391 because Defendants do business in this District and a substantial part of the events or omissions giving rise to the claims asserted herein occurred within this District.

III. PARTIES

Plaintiffs

20. Plaintiff, Stacey Parks Kennedy ("Kennedy"), resides in Warren, Michigan. During her employment, Plaintiff Kennedy participated in the Plan investing in the options offered

by the Plan and which are the subject of this lawsuit, including the TRowe Price Retirement 2040 fund.

21. Plaintiff, Angela Bozell ("Bozell"), resides in Grosse Pointe Woods, Michigan. During her employment, Plaintiff Bozell participated in the Plan investing in the options offered by the Plan and which are the subject of this lawsuit, including the TRowe Price Retirement 2055 fund.

22. Plaintiff, Brittney Williams ("Williams"), resides in Brooklyn, New York. During her employment, Plaintiff Williams participated in the Plan investing in the options offered by the Plan and which are the subject of this lawsuit, including the TRowe Price Retirement 2055 fund.

23. Each Plaintiff has standing to bring this action on behalf of the Plan because each of them participated in the Plan and were injured by Defendants' unlawful conduct. Plaintiffs are entitled to receive benefits in the amount of the difference between the value of their accounts currently, or as of the time their accounts were distributed, and what their accounts are or would have been worth, but for Defendants' breaches of fiduciary duty as described herein.

24. Plaintiffs did not have knowledge of all material facts (including, among other things, the investment alternatives that are comparable to the investments offered within the Plan, comparisons of the costs and investment performance of Plan investments versus available alternatives within similarly-sized plans, total cost comparisons to similarly-sized plans, information regarding other available share classes, and information regarding the availability and pricing of separate accounts and collective trusts) necessary to understand that Defendants breached their fiduciary duties and engaged in other unlawful conduct in violation of ERISA until shortly before this suit was filed. Only in the last few weeks have Plaintiffs obtained further documents and information that support their claims as part of the limited discovery conducted by the parties.

Defendants

Company Defendant

25. Aegis is the Plan sponsor with a principal place of business being 150 East 42nd Street, 14th Floor, New York, New York, 10017. *See*, 2018 Form 5500 at 1.

26. Aegis describes itself as a global media and digital marketing communications company.[3]

27. The Company is a fiduciary for several reasons. First, it is designated as the "Fiduciary" to "select the array of investment options to be made available for participant investment, and then provide on-going oversight of those investment options." Investment Policy Statement (Aegis Media Americas, Inc.), eff. June 2017 ("IPS"), AEGIS000168-189, at 3.

28. Second, the Company, "appoint[ed] a Plan Investment Committee (the "Committee") to assist in the fulfillment of its fiduciary responsibilities." IPS at 3.

29. Lastly, the Company acted through its officers, including the Board and the Committee, and their members, to perform Plan-related fiduciary functions in the course and scope of their employment.

30. For the foregoing reasons, the Company is a fiduciary of the Plan, within the meaning of ERISA Section 3(21)(A), 29 U.S.C. § 1002(21)(A).

Board Defendants

31. The Company acted through the Board (defined above) to perform some of the Company's Plan-related fiduciary functions, including appointing and monitoring the activities of the Committee.

32. In addition, the Board makes direct decisions about the Plan. As noted in the Plan's SPD, "[y]our Employer may make discretionary nonelective contributions in an amount to be

[3] https://www.dentsuaegisnetwork.com

determined by the Board of Directors for each Plan Year." Summary Plan Description ("SPD") at 9.

33. Accordingly, each member of the Board during the putative Class Period (referred to herein as John Does 1-10) is/was a fiduciary of the Plan, within the meaning of ERISA Section 3(21)(A), 29 U.S.C. § 1002(21)(A) because each exercised discretionary authority to appoint and/or monitor the Committee, which had control over Plan management and/or authority or control over management or disposition of Plan assets.

34. The unnamed members of the Board of Directors for Aegis during the Class Period are collectively referred to herein as the "Board Defendants."

Committee Defendants

35. A discussed above, Aegis and the Board appointed the Committee to oversee the Plan's investments.

36. "The Committee normally will review, at least on an annual basis, the acceptability of the universe of investment options made available within the Plan's chosen administrative environment, e.g. the Plan's record-keeper and trustee/ custodian." IPS at 3. Further, the Committee reviews the Plan's investment options. *Id.*

37. The Committee and each of its members were fiduciaries of the Plan during the Class Period, within the meaning of ERISA Section 3(21)(A), 29 U.S.C. § 1002(21)(A) because each exercised discretionary authority over management or disposition of Plan assets.

38. The Committee and unnamed members of the Committee during the Class Period (referred to herein as John Does 11-20), are collectively referred to herein as the "Committee Defendants."

Non-Defendant Fiduciary

CapTrust

39. Under the IPS, the "Investment Consultant/Advisor shall acknowledge that it is acting as a fiduciary as defined by § 3(21)(A)(ii) of ERISA with respect to the selection of investment options available to the Plan." IPS at 3.

40. The Investment Consultant/Advisor is charged with, among other things, "[a]ssisting in the analysis and initial selection of investment options to be made available for participant investment." IPS at 4.

41. CapTrust served in that role for the Plan. According to their website, "[i]ndividually, and as a company, we accept responsibility for our actions. We embrace our role as trusted advisors and understand our obligation to be vigilant stewards of all that is entrusted to us." https://www.captrust.com/our-story/

42. Although CapTrust is a relevant party and has information relevant to this action, it is not named as a defendant given that Aegis and the Company ultimately remain responsible for the selection and monitoring of all investment options. Nonetheless, Plaintiffs reserve the right to name CapTrust as a defendant in the future if deemed necessary.

Additional John Doe Defendants

43. To the extent that there are additional officers, employees and/are contractors of Aegis who are/were fiduciaries of the Plan during the Class Period, or were hired as an investment manager for the Plan during the Class Period, the identities of whom are currently unknown to Plaintiffs, Plaintiffs reserve the right, once their identities are ascertained, to seek leave to join them to the instant action. Thus, without limitation, unknown "John Doe" Defendants 21-30 include, but are not limited to, Aegis officers, employees and/or contractors who are/were fiduciaries of the Plan within the meaning of ERISA Section 3(21)(A), 29 U.S.C. § 1002(21)(A) during the Class Period.

IV. CLASS ACTION ALLEGATIONS

44. Plaintiffs bring this action as a class action pursuant to Rule 23 of the Federal Rules of Civil Procedure on behalf of themselves and the following proposed class ("Class"):[4]

> All persons, except Defendants and their immediate family members, who were participants in or beneficiaries of the Plan, at any time between May 8, 2014 through December 31, 2018 (the "Class Period").

45. The members of the Class are so numerous that joinder of all members is impractical. The 2018 Form 5500 filed with the Dept. of Labor lists 11,775 Plan "participants with account balances as of the end of the plan year." *See*, the Aegis 2018 Form 5500 at p. 2.

46. Plaintiffs' claims are typical of the claims of the members of the Class. Like other Class members, Plaintiffs participated in the Plan and have suffered injuries as a result of Defendants' mismanagement of the Plan. Defendants treated Plaintiffs consistently with other Class members, and managed the Plan as a single entity. Plaintiffs' claims and the claims of all Class members arise out of the same conduct, policies, and practices of Defendants as alleged herein, and all members of the Class have been similarly affected by Defendants' wrongful conduct.

47. There are questions of law and fact common to the Class, and these questions predominate over questions affecting only individual Class members. Common legal and factual questions include, but are not limited to:

A. Whether Defendants are fiduciaries of the Plan;

B. Whether Defendants breached their fiduciary duty of prudence by engaging in the conduct described herein;

[4] Plaintiffs reserve the right to propose other or additional classes or subclasses in their motion for class certification or subsequent pleadings in this action.

C. Whether the Company and Board Defendants failed to adequately monitor the Committee and other fiduciaries to ensure the Plan was being managed in compliance with ERISA;

D. The proper form of equitable and injunctive relief; and

E. The proper measure of monetary relief.

48. Plaintiffs will fairly and adequately represent the Class, and have retained counsel experienced and competent in the prosecution of ERISA class action litigation. Plaintiffs have no interests antagonistic to those of other members of the Class. Plaintiffs are committed to the vigorous prosecution of this action, and anticipate no difficulty in the management of this litigation as a class action.

49. This action may be properly certified under Rule 23(b)(1). Class action status in this action is warranted under Rule 23(b)(1)(A) because prosecution of separate actions by the members of the Class would create a risk of establishing incompatible standards of conduct for Defendants. Class action status is also warranted under Rule 23(b)(1)(B) because prosecution of separate actions by the members of the Class would create a risk of adjudications with respect to individual members of the Class that, as a practical matter, would be dispositive of the interests of other members not parties to this action, or that would substantially impair or impede their ability to protect their interests.

50. In the alternative, certification under Rule 23(b)(2) is warranted because the Defendants have acted or refused to act on grounds generally applicable to the Class, thereby making appropriate final injunctive, declaratory, or other appropriate equitable relief with respect to the Class as a whole.

V. THE PLAN

51. As stated in the Plan's SPD, Aegis established the Plan "to enable eligible Employees to save for retirement." SPD at 1; *see also* IPS at 2.

52. The Plan is a "defined contribution" or "individual account" plan within the meaning of ERISA § 3(34), 29 U.S.C. § 1002(34), in that the Plan provides for individual accounts for each participant and for benefits based solely upon the amount contributed to those accounts, and any income, expense, gains and losses, and any forfeitures of accounts of the participants which may be allocated to such participant's account. Consequently, retirement benefits provided by the Plan are based solely on the amounts allocated to each individual's account.

Eligibility

53. In general, regular full-time employees are eligible to participate in the Plan "as of the date of hire." *See,* 2017 Form 5500 filing at page 6 of the attached audited financial statement.

Contributions

54. There are several types of contributions that can be added to a participant's account, including: an employee salary deferral contribution, an employee Roth 401(k) contribution, an employee after-tax contribution, catch-up contributions for employees aged 50 and over, rollover contributions, and employer matching contributions based on employee pre-tax, Roth 401(k), and employee after-tax contributions. SPD at 7-9.

55. With regard to employee contributions, participants may contribute the lesser of 75.00% of eligible compensation or $18,000 (in 2016; thereafter as adjusted by the Secretary of the Treasury." *Id*.

56. Aegis "may make a discretionary matching contribution each Plan Year. The Employer has elected to contribute 50% of the Participant contribution up to a maximum of 6% of the Participant's compensation." *See,* 2017 Form 5500 filing at page 6 of the attached audited financial statement.

57. Like other companies that sponsor 401(k) plans for their employees, Aegis enjoys both direct and indirect benefits by providing matching contributions to Plan participants. Employers are generally permitted to take tax deductions for their contributions to 401(k) plans at the time when the contributions are made. *See generally*, https:/www.irs.gov/retirement-plans/plan-sponsor/401k-plan-overview.

58. Aegis also benefits in other ways from the Plan's matching program. It is well-known that "[o]ffering retirement plans can help in employers' efforts to attract new employees and reduce turnover." *See* https://www.paychex.com/articles/employee-benefits/employer-matching-401k-benefits.

59. Given the size of the Plan, Aegis likely enjoyed a significant tax and cost savings from offering a match.

Vesting

60. A participant is 100 percent vested at all times in their contributions plus actual earnings thereon. SPD at 12 and 14. However, matches made by Aegis are not considered fully vested until after 4 years of regular full-time employment. *Id.*

The Plan's Investments

61. As described below, several funds were available to Plan participants for investment each year during the putative Class Period.

62. Plan assets grew incrementally during the Class Period. By December 31, 2018, the Plan's assets under management were over $540,000,000. *See*, 2018 Form 5500 filing at page 4 of the attached audited financial statement.

63. The Plan's T.Rowe Price target date funds were the most popular investment options among Plan participants during the Class Period accounting for more than half of the Plan's total assets during the Class Period as demonstrated below:

Year	**T.Rowe Price Target Date Funds**	**Total Plan Assets**
2014	$115, 616, 760	$197, 325, 943
2015	$129, 560, 532	$229, 614, 883
2016	$152, 407, 074	$268,870,127
2017	$216,863, 091	$376, 482, 819
2018	$307, 060, 706	$540, 919, 371

See form 5500s for 2014-2018.

VI. THE PLAN'S FEES DURING THE CLASS PERIOD WERE UNREASONABLE

64. As described in the "Parties" section above, Defendants were fiduciaries of the Plan.

65. ERISA "imposes a 'prudent person' standard by which to measure fiduciaries' investment decisions and disposition of assets." *Fifth Third Bancorp v. Dudenhoeffer*, 134 S. Ct. 2459, 2467 (2014) (quotation omitted). In addition to a duty to select prudent investments, under ERISA a fiduciary "has a continuing duty to monitor [plan] investments and remove imprudent ones" that exists "separate and apart from the [fiduciary's] duty to exercise prudence in selecting investments." *Tibble I*, 135 S. Ct. at 1828.

66. Defendants' breaches of their fiduciary duties, relating to their overall decision-making, resulted in the selection (and maintenance) of several funds in the Plan throughout the Class Period that wasted the assets of the Plan and the assets of participants because of unnecessary costs.

A. Defendants Lacked a Prudent Fiduciary Process to Evaluate the Plan's Fees

67. In January 2012, the Department of Labor ("DOL") issued a final regulation under Section 408(b)(2) of ERISA which requires a "covered service provider" to provide the responsible

plan fiduciary with certain disclosures concerning fees and services provided to certain of their ERISA governed plans. This regulation is commonly known as the service provider fee disclosure rule, often referred to as the "408(b)(2) Regulation."[5]

68. The required disclosures must be furnished in advance of a plan fiduciary entering into or extending a contract or arrangement for covered services. The DOL has said that having this information will permit a plan fiduciary to make a more informed decision on whether or not to enter into or extend such contract or arrangement.

69. As stated by the DOL: ERISA "requires plan fiduciaries, when selecting and monitoring service providers and plan investments, to act prudently and solely in the interest of the plan's participants and beneficiaries. Responsible plan fiduciaries also must ensure that arrangements with their service providers are 'reasonable' and that only 'reasonable' compensation is paid for services. Fundamental to the ability of fiduciaries to discharge these obligations is obtaining information sufficient to enable them to make informed decisions about an employee benefit plan's services, the costs of such services, and the service providers." DOL 408(b)(2) Regulation Fact Sheet.

70. Investment options have a fee for investment management and other services. With regard to investments like mutual funds, like any other investor, retirement plan participants pay for these costs via the fund's expense ratio evidenced by a percentage of assets. For example, an expense ratio of .75% means that the plan participant will pay $7.50 annually for every $1,000 in assets. However, the expense ratio also reduces the participant's return and the compounding effect of that return. This is why it is prudent for a plan fiduciary to consider the effect that expense ratios have on investment returns because it is in the best interest of participants to do so.

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[5] *See* *https://www.dol.gov/sites/dolgov/files/ebsa/about-ebsa/our-activities/resource-center/fact-sheets/final-regulation-service-provider-disclosures-under-408b2.pdf* ("DOL 408(b)(2) Regulation Fact Sheet")

71. "The duty to pay only reasonable fees for plan services and to act solely in the best interest of participants has been a key tenet of ERISA since its passage." "Best Practices for Plan Fiduciaries," at 36, published by Vanguard, 2019.[6]

72. Fiduciaries "should develop and follow a deliberative process for evaluating the reasonableness of fees. This includes understanding the sources, amounts, and nature of recordkeeping and investment management fees paid by the plan. Under DOL fee disclosure regulation, [fiduciaries] should be sure they receive service and fee information from each covered service provider, and they should diligently review this information as part of the reasonableness evaluation process." *Id.*

73. "[Fiduciaries] must understand the content of the fee disclosure materials received from service providers. If the disclosure is not clear, or if the plan sponsor believes the information is incomplete, they must request additional information or clarification. Additionally, the plan sponsor may have an obligation to inquire as to the availability of lower-cost investment alternatives, such as lower-cost share classes for mutual funds or the availability of collective trusts." Best Practices for Plan Fiduciaries," at 36; *See also* Aegis Media Americas, Inc. 2nd Quarter, 2015 quarterly review, AEGIS000719 (CapTrust acknowledging that fiduciaries should periodically review share classes selected for the Plan and document reasons for such selection).

74. For purposes of evaluating expense ratios of an investment, plan fiduciaries should obtain competitive pricing information (*i.e.*, fees charged by other comparable investment funds to similarly situated plans). This type of information can be obtained through mutual fund data services, such as Morningstar, or with the assistance of the plan's expert consultant. However, for comparator information to be relevant for fiduciary purposes, it must be consistent with the size

[6] Available at https://institutional.vanguard.com/iam/pdf/FBPBK.pdf?cbdForceDomain=false.

of the plan and its relative bargaining power. Large plans for instance are able to qualify for lower fees on a per participant basis, and comparators should reflect this fact.

75. According to Vanguard, "[b]enchmarking is one of the most widely used supplements to fee disclosure reports and can help plan sponsors put into context the information contained in the reports." "Best Practices for Plan Fiduciaries," at 37.

76. "The use of third-party studies provides a cost-effective way to compare plan fees with the marketplace. Plan sponsors may elect to engage a consultant to assist in the benchmarking process. For a fee, consultants can give plan sponsors a third-party perspective on quality and costs of services. It is important to understand the plan (*e.g.*, plan design, active or passive investment management, payroll complexities, etc.) as it relates to the benchmarking information in order to put the results in an appropriate context. By understanding all of the fees and services, a plan sponsor can make an accurate 'apples-to-apples' comparison." *Id.*

77. When conducting fiduciary reviews of the plan's investment menu, plan fiduciaries should document the relevant information gathered and considered for purposes of the investment review, as well as supporting evidence for any decision to continue or change investment options. *See* "Best Practices for Plan Fiduciaries," at 36 ("Plan sponsors should build a record to document the information and factors used to determine the reasonableness of plan fees.")

78. Documentation of fiduciary reviews is generally accomplished in the form of meeting minutes. These minutes do not necessarily need to be lengthy, but they should describe the (i) fiduciary topics discussed, (ii) type of investment information considered for the fiduciary review, and (iii) the rationale for resulting investment decisions. Any related documents or data considered for purposes of the investment review (*e.g.*, prospectuses, plan investment reports, market data, etc.) should be included as attachments to the meeting minutes or otherwise memorialized. Without proper documentation of the investment decision-making process, plan

fiduciaries are open to the charge that their decisions were made in an imprudent or conflicted manner.

79. During the Class Period, CapTrust in fact reiterated to the Committee the need to properly document fiduciary decisions. Aegis Media Americas, Inc., 4th Quarter, 2014, at AEGIS000585.

80. Plaintiffs have reviewed the Committee's quarterly meetings from May 2014 through December 3, 2018. Review of the meeting minutes demonstrates the Committee did not follow best practices and indeed failed to employ a prudent process in monitoring investment management fees for the Plan's investments.

81. The Committee did not document any effort to give adequate attention to the high investment management fees charged by several of the Plan's investments, especially the T.Rowe Price funds. As described in the next section, the investment management fees charged by a majority of the Plan's funds, including the T.Rowe Price funds were in excess of the median and average fees of identical and comparable funds in similarly-sized plans. These fees were unreasonable because the Plan had significant size to negotiate for lower fees.

82. Materials reviewed at the Committee meetings focused primarily on fund performance and provided little information about the investment management fees being charged by the Plan's investments. The Committee did not meaningfully review the investment management fees charged for the Plan's investments as indicated by the ***absence*** of discussions in meeting minutes about these fees or any ***benchmarks*** regarding what the Plan's fees should be.

83. There is also no documentation to indicate the Committee investigated whether the actively managed mutual funds in the Plan's investment lineup provided sufficiently greater benefits over available index fund alternatives to offset the higher costs of the actively managed funds. Nor is there evidence that the Committee ever conducted a Plan-wide comparison of the

Plan's actively managed mutual funds with alternative index funds that were available to the Plan. The Committee's failure to meaningfully consider replacing the Plan's actively managed mutual fund options resulted in Plan participants paying much higher investment fees than was necessary.

84. This lack of focus on fees is particularly egregious because it violated the terms of the IPS which states that the "expense ratio for a given investment should generally fall below the average expense ratio for the peer group." IPS at 5. The IPS further recognizes that in "addition to performance, the Committee should consider other variables including **… fees**…." *Id* (emphasis added).

85. The eventual transition of several funds to lower share classes was done as a result of a Plan merger with the Merkle Group Inc. 401(k) Plan, not as a result of any systematic, regular, or deliberate review of the Plan's fees. *See* August 30, 2018 Committee meeting minutes, AEGIS000385. Prior to this transition, for over four years, no thought or discussion had been given to moving Plan assets into the lowest possible investment expense. This multi-year gap in time falls woefully short of best practices that says review of fees and services should occur "on at least an annual basis." "Best Practices for Plan Fiduciaries," at 36.

86. With regard to recordkeeping fees, the Plan's fiduciaries fared no better in their fee review process. In December 2014, the Committee noted that Fidelity had agreed to reduce the basis points charged for recordkeeping services by 53 percent. December 5, 2014 meeting minutes, AEGIS000330. The Committee found the new fee to be reasonable but provided no rationale as to why this was so. For instance, the Committee did not compare the new Fidelity rate to any benchmarks.

87. Indeed, it was not until nearly three years later, as documented in the December 18, 2017 Committee meeting minutes, that the Committee asked the commonsense question of how the new rate translated to real dollars. December 18, 2017 Committee meeting minutes,

AEGIS000373. In doing so the Committee realized the Plan paid more in recordkeeping fees in 2017 than it did from 2013 to 2016. *Id.*

88. It appears the first time CapTrust conducted fee benchmarking for Plan recordkeeping was in 2018 – four years into the Class Period -- when it conducted a fee benchmarking exercise using plan demographic data specific to the Plan. March 27, 2018 meeting minutes, AEGIS000378. Through the benchmarking exercise, CapTrust obtained quotes of $40, $43, $45, $45 and $50 from five different recordkeepers. *Id.* These amounts were 28% to 60% cheaper than what the Plan paid for recordkeeping in 2017. These amounts were also significantly less than what the Plan paid for recordkeeping from the start of the Class Period.

89. The Plan fiduciaries eventually secured a per participant recordkeeping fee for the Plan at $40 per participant. May 21, 2018 Committee meeting minutes, AEGIS000383.

90. As discussed *infra*, the Plan's fiduciaries could have obtained this recordkeeping rate by the start of the Class Period had the fiduciaries engaged in prudent conduct. The Plan's participants would have been spared excess recordkeeping costs.

91. Based on reasonable inferences from these facts, as well as others set forth below, during the Class Period Defendants failed to have a proper system of review in place to ensure that participants in the Plan were being charged appropriate and reasonable fees for the Plan's investment options.

92. In sum, Defendants failed to leverage the size of the Plan to negotiate for: (1) lower expense ratios for certain investment options maintained and/or added to the Plan during the Class Period; and (2) a prudent payment arrangement with regard to the Plan's recordkeeping and administrative fees.

B. The Totality of Circumstances Demonstrate that the Plan Fiduciaries Failed to Administer the Plan in a Prudent Manner

(1) There Was Little to No Change in Plan Investment Options for the Entirety of the Class Period

93. One indication of Defendants' failure to prudently monitor the Plan's funds is that the Plan has retained many funds as Plan investment options despite the fact that these funds charged grossly excessive fees compared with identical, comparable and/or superior alternatives, and despite ample evidence available to a reasonable fiduciary that the costs associated with these funds were imprudently high. These funds in the Plan stayed unchanged from 2014 to 2018:

Fund	Years in the Plan
T. Rowe Price Retirement 2040	Since 2014
T. Rowe Price Retirement 2045	Since 2014
T. Rowe Price Retirement 2050	Since 2014
T. Rowe Price Retirement 2035	Since 2014
T. Rowe Price Retirement 2055	Since 2014
T. Rowe Price Retirement 2030	Since 2014
T. Rowe Price Retirement 2025	Since 2014
T. Rowe Price Retirement 2060	Since 2015
MainStay Large Cap Growth I	Since 2014
JHancock Disciplined Value R4	Since 2014
JPMorgan Mid Cap Value I	Since 2013
Fidelity Total Bond Fund	Since 2014
Goldman Sachs Small Cap Value Instl	Since 2014
Hartford International Opp HLS IA	Since 2014
Loomis Sayles Small Cap Growth Instl	Since 2012
Invesco Oppenheimer Developing Markets A	Since 2014

T. Rowe Price Retirement Balanced	Since 2014

94. Failure to remove or change imprudent funds to cheaper share classes or cheaper cost structures over the course of several years is a clear indication that Defendants were not monitoring the Plan's funds as they should have been.

(2) Many of the Plan's Funds Had Investment Management Fees In Excess of Fees for Funds in Similarly-Sized Plans

95. Another indication of Defendants' failure to prudently monitor the Plan's funds is that several funds during the Class Period were more expensive than comparable funds found in similarly sized plans (conservatively, plans having between $250m and $500m in assets). The Plan grew from $229,614,883 to $268,870,127 in assets from 2015 to 2016. By the end of 2018, the Plan had $540, 919, 371 in assets.

96. In 2016, at least 19 out of 31, or more than 61% of Plan funds were more expensive than comparable funds found in similarly sized plans. The expense ratios for funds in the Plan in some cases were up to ***104%*** (in the case of the JHancock Disciplined Value R4) above the median expense ratios in the same category: [7]

Current Fund	ER[8]	Category	ICI Median[9]
T. Rowe Price Retirement 2040	0.70 %	Target-date	0.58%
T. Rowe Price Retirement 2045	0.71 %	Target-date	0.58%
T. Rowe Price Retirement 2050	0.71 %	Target-date	0.58%
T. Rowe Price Retirement 2035	0.68 %	Target-date	0.58%
T. Rowe Price Retirement 2055	0.71 %	Target-date	0.58%

[7] *See* BrightScope/ICI Defined Contribution Plan Profile: *A Close Look at 401(k) Plans, 2016* at 69 (March 2018) (hereafter, "ICI Study") available at *https://www.ici.org/pdf/ppr_18_dcplan_profile_401k.pdf*

[8] The listed expense figures are taken from Plaintiff Parks' January 1, 2016 – March 31, 2016 account statement.

[9] This median fee is taken from plans with $250m to $500m in assets in a survey conducted by the ICI in 2016.

Current Fund	ER[8]	Category	ICI Median[9]
T. Rowe Price Retirement 2030	0.65 %	Target-date	0.58%
T. Rowe Price Retirement 2025	0.62 %	Target-date	0.58%
T. Rowe Price Retirement 2060	0.71 %	Target-date	0.58%
MainStay Large Cap Growth I	0.74 %	Domestic Equity	0.52%
JHancock Disciplined Value R4	1.06 %	Domestic Equity	0.52%
JPMorgan Mid Cap Value I	0.86 %	Domestic Equity	0.52%
Fidelity Total Bond Fund	0.45 %	Domestic Bond	0.43%
Carillon Eagle Mid Cap Growth I	0.74 %	Domestic Equity	0.52%
Goldman Sachs Small Cap Value Instl	0.97 %	Domestic Equity	0.52%
Hartford International Opp HLS IA	0.73 %	Int'l Equity	0.64%
Loomis Sayles Small Cap Growth Instl	0.95 %	Domestic Equity	0.52%
Invesco Oppenheimer Developing Markets A	1.24 %	Int'l Equity	0.64%
T. Rowe Price Retirement Balanced	0.50 %	Non-target date Balanced	0.45%
Fidelity Money Market Trust Retirement Government Money Market Portfolio	0.42 %	Money Market	0.18%

97. The high cost of the Plan's funds is even more stark when comparing the Plan's funds to the average fees of funds in similarly-sized plans because 22 out of 31 funds, including all the target-date funds, had fees higher than the average:

Current Fund	ER[10]	Category	ICI Average[11]
T. Rowe Price Retirement 2005	.52	Target-date	0.45%
T. Rowe Price Retirement 2010	.52	Target-date	0.45%
T. Rowe Price Retirement 2015	.55	Target-date	0.45%
T. Rowe Price Retirement 2040	0.70 %	Target-date	0.45%
T. Rowe Price Retirement 2045	0.71 %	Target-date	0.45%

[10] The listed expense figures are taken from Plaintiff Parks' January 1, 2016 – March 31, 2016 account statement.

[11] This median fee is taken from plans with $250m to $500m in assets in a survey conducted by the ICI in 2016. *See* ICI study at 56.

Current Fund	ER[10]	Category	ICI Average[11]
T. Rowe Price Retirement 2050	0.71 %	Target-date	0.45%
T. Rowe Price Retirement 2035	0.68 %	Target-date	0.45%
T. Rowe Price Retirement 2055	0.71 %	Target-date	0.45%
T. Rowe Price Retirement 2030	0.65 %	Target-date	0.45%
T. Rowe Price Retirement 2025	0.62 %	Target-date	0.45%
T. Rowe Price Retirement 2060	0.71 %	Target-date	0.45%
MainStay Large Cap Growth I	0.74 %	Domestic Equity	0.45%
JHancock Disciplined Value R4	1.06 %	Domestic Equity	0.45%
JPMorgan Mid Cap Value I	0.86 %	Domestic Equity	0.45%
Fidelity Total Bond Fund	0.45 %	Domestic Bond	0.34%
Carillon Eagle Mid Cap Growth I	0.74 %	Domestic Equity	0.45%
Goldman Sachs Small Cap Value Instl	0.97 %	Domestic Equity	0.45%
Hartford International Opp HLS IA	0.73 %	Int'l Equity	0.62%
Loomis Sayles Small Cap Growth Instl	0.95 %	Domestic Equity	0.45%
Invesco Oppenheimer Developing Markets A	1.24 %	Int'l Equity	0.62%
T. Rowe Price Retirement Balanced	0.50 %	Non-target date Balanced	0.39%
Fidelity Money Market Trust Retirement Government Money Market Portfolio	0.42 %	Money Market	0.22%

98. Although a good gauge of Defendants' imprudence, median-based and average-based comparisons still understate the excessiveness of the investment management fees of the Plan funds because many prudent alternative funds were available (which Defendants failed to consider) that offered lower expenses than the median and average fees.

(3) Defendants Failed to Investigate Availability of Lower Cost Collective Trusts

99. Plan fiduciaries such as Defendants here must be continually mindful of investment options to ensure they do not unduly risk plan participants' savings and do not charge unreasonable

fees. Some of the best investment vehicles for these goals are collective trusts (also referred to as CITs), which pool plan participants' investments further and provide lower fee alternatives to even institutional shares of mutual funds.[12]

100. Indeed, fiduciary best practices requires that fiduciaries inquire as to the availability of lower-cost investment alternatives like collective trusts. "Best Practices for Plan Fiduciaries," at 36. The use of collective trusts is also endorsed under trust law from which ERISA is derived. *Tibble*, 135 S. Ct. at 1828. Trust law states to determine whether a fiduciary has selected appropriate funds for the trust, appropriate comparators may include "return rates of one or more **suitable common trust funds**, or suitable index mutual funds or market indexes (with such adjustments as may be appropriate)." Restatement (Third) of Trusts § 100 cmt. b(1) (emphasis added).

101. Another indication of Defendants' fiduciary breaches was the failure to timely consider available collective trusts for the T.Rowe Price funds which were available on the market in January 2012. As noted above, meeting minutes show that the Committee inexplicably failed to consider T.Rowe Price collective trust funds prior to 2018.[13] The failure is inexplicable given

[12] Collective trusts are administered by banks or trust companies, which assemble a mix of assets such as stocks, bonds and cash. Regulated by the Office of the Comptroller of the Currency rather than the Securities and Exchange Commission, collective trusts have simple disclosure requirements, and cannot advertise or issue formal prospectuses. As a result, their costs are much lower, with lower or no administrative costs, and lower or no marketing or advertising costs. *See* Powell, Robert, "Not Your Normal Nest Egg," The Wall Street Journal, March 2013, available at http://www.wsj.com/articles/SB10001424127887324296604578177291881550144.

[13] The criticisms that have been launched against collective trust vehicles in the past no longer apply. Collective trusts use a unitized structure and the units are valued daily; as a result, participants invested in collective trusts are able to track the daily performance of their investments online. *Use of CITs in DC Plans Booming*; Paula Aven Gladych, *CITs Gaining Ground in 401(k) Plans*, EMPLOYEE BENEFIT NEWS (Apr. 14, 2016), available at http://www.benefitnews.com/news/cits-gaining-ground-in-401-k-plans (hereinafter "*CITs Gaining Ground*"). Many if not most mutual fund strategies are available in a collective trust format, and the investments in the collective trusts are identical to those held by the mutual funds. *Use of CITs in DC Plans Booming; CITs Gaining Ground*. And because collective trusts contract

that the Committee knew the benefits and propriety of collective trusts because as of 2014 the Plan included the Fidelity Managed Income Portfolio Class 1, which was a collective trust.

102. Accordingly, prior to 2018, the Plan incurred excess fees due to Defendants' failure to adequately investigate the availability of T.Rowe Price collective trusts which had the same asset allocation as the T.Rowe Price target date mutual funds in the Plan. Because of the Plan's significant concentration in T.Rowe Price target date funds, it could have reaped considerable cost savings by using collective trusts, but Defendants failed to investigate, or blatantly ignored, this option.

103. As indicated below, in December 2018 all the T.Rowe Price target date funds were transitioned to collective trust formats that had expense ratios of only .43%, well below the expense ratios of the T.Rowe Price mutual funds:

Fund	**2018 ER**[14]	**Collective Trust**	**2018 Lower Cost ER**[15]	**Fund Excess Expense**
TRRDX $ 47,066,972 T. Rowe Price Retirement 2040	.74%	T. Rowe Price Retirement 2040 F	.43%	72%
TRRKX $ 37,894,030 T. Rowe Price Retirement 2045	.74%	T. Rowe Price Retirement 2045 F	.43%	72%
TRRMX $ 36,801,592 T. Rowe Price Retirement 2050	.74%	T. Rowe Price Retirement 2050 F	.43%	72%

directly with the plan, and provide regular reports regarding costs and investment holdings, the plan has the same level of protection that the Investment Company Act provides to individual investors, thus eliminating the need for the protections of the Investment Company Act. Further, collective trusts are still subject to state and federal banking regulations that provide comparable protections. American Bankers Association, ABA Primer on Bank Collective Funds, June 2015, at 1, available at https://www.aba.com/advocacy/policy-analysis/primer-bank-collective-investment-funds.

[14] Expense ratio as reported in Aegis Media Mapping document, AEGIS0015663.

[15] Expense ratio as reported in Aegis Media Mapping document, AEGIS0015663.

Fund	2018 ER[14]	Collective Trust	2018 Lower Cost ER[15]	Fund Excess Expense
TRRJX $ 31,132,336 T. Rowe Price Retirement 2035	.72%	T. Rowe Price Retirement 2035 F	.43%	67%
TRRNX $ 20,274,196 T. Rowe Price Retirement 2055	.74%	T. Rowe Price Retirement 2055 F	.43%	72%
TRRCX $ 19,457,469 T. Rowe Price Retirement 2030	.69%	T. Rowe Price Retirement 2030 F	.43%	60%
TRRHX $ 14,916,167 T. Rowe Price Retirement 2025	.67%	T. Rowe Price Retirement 2025 F	.43%	56%
TRRBX $ 7,037,856 T. Rowe Price Retirement 2020	.63%	T. Rowe Price Retirement 2020 F	.43%	47%
TRRLX $ 1,711,230 T. Rowe Price Retirement 2060	.74%	T. Rowe Price Retirement 2060 F	.43%	72%
TRRLX $ 958,644 T. Rowe Price Retirement 2015	.59%	T. Rowe Price Retirement 2015 F	.43%	37%
TRRLX $ 305,137 T. Rowe Price Retirement 2010	.57%	T. Rowe Price Retirement 2010 F	.43%	33%
TRRLX $ 160,737 T. Rowe Price Retirement 2005	.58%	T. Rowe Price Retirement 2005 F	.43%	35%

104. The T.Rowe Price Retirement Balanced fund (with a balance of $799,030) was also transitioned to various target date funds depending on the participants' age. There was no reason for delaying the transition of the mutual funds for six years (dating back to 2012 when the target date funds became available).

105. In summary, Defendants could have used the Plan's bargaining power to obtain high-quality, low-cost alternatives to mutual funds. By failing to investigate the use of T.Rowe

Price collective trusts prior to 2018, Defendants caused the Plan to pay millions of dollars per year in unnecessary fees.

(4) Several of the Plan's Funds Were Not in the Lowest Fee Share Class Available to the Plan

106. Another fiduciary breach stemming from Defendants' flawed investment monitoring system resulted in the failure to identify available lower-cost share classes of many of the funds in the Plan during the Class Period.

107. Many mutual funds offer multiple classes of shares in a single mutual fund that are targeted at different investors. There is no difference between share classes other than cost—the funds hold identical investments and have the same manager. Because the institutional share classes are otherwise *identical* to the Investor share classes, but with lower fees, a prudent fiduciary would know immediately that a switch is necessary. *Tibble*, 2017 WL 3523737, at * 13.

108. Generally, more expensive share classes are targeted at smaller investors with less bargaining power, while lower cost shares are targeted at institutional investors with more assets. Qualifying for lower share classes usually requires only a minimum of a million dollars for individual funds. However, it is common knowledge that investment minimums are often waived for large plans like the Plan. *Sweda v. Univ. of Pennsylvania*, 923 F.3d 320, 329 (3d Cir. 2019) (citing *Tibble II*, 729 F.3d at 1137 n.24).

109. The assets under management for several Plan funds ranged from \$11m to \$47m thus easily qualifying them for lower share classes. The following is a sampling of the assets under management as of the end of 2017:

Fund in Plan	2017 Assets Under Management
T. Rowe Price Retirement 2040 Fund Mutual Fund	\$47.1m
T. Rowe Price Retirement 2045 Fund Mutual Fund	\$37.9m

Fund in Plan	2017 Assets Under Management
T. Rowe Price Retirement 2050 Fund Mutual Fund	$36.8m
T. Rowe Price Retirement 2035 Fund Mutual Fund	$31.1m
T. Rowe Price Retirement 2055 Fund Mutual Fund	$20.3m
T. Rowe Price Retirement 2030 Fund Mutual Fund	$19.5m
T. Rowe Price Retirement 2025 Fund Mutual Fund	$14.9m
John Hancock Funds Disciplined Value Fund Class R4 Mutual Fund	$13.6m
JPMorgan Mid Cap Value Institutional Fund	$11.1m

110. In several instances during the Class Period, Defendants failed to prudently monitor the Plan to determine whether the Plan was invested in the lowest-cost share class available for the Plan's mutual funds. Even when the Plan fiduciaries failed to move the T.Rowe Price target date funds into collective trusts at the start of the Class Period, they had an opportunity in 2016 to move the target date funds to available lower-cost share classes. They failed in this regard as well.

111. The below chart uses 2020 expense ratios to demonstrate cost differentials between the T.Rowe Price mutual funds and the cheaper identical I shares that became available in late 2015:

Fund	2020 ER	Lower Share Class	Identical Lower Cost ER	Fund Excess Expense
TRRDX $ 47,066,972 T. Rowe Price Retirement 2040	0.70 %	TRPDX T. Rowe Price Retirement I 2040 I	0.58 %	20.69%
TRRKX $ 37,894,030 T. Rowe Price Retirement 2045	0.71 %	TRPKX T. Rowe Price Retirement I 2045 I	0.59 %	20.34%
TRRMX $ 36,801,592 T. Rowe Price Retirement 2050	0.71 %	TRPMX T. Rowe Price Retirement I 2050 I	0.59 %	20.34%

Fund	2020 ER	Lower Share Class	Identical Lower Cost ER	Fund Excess Expense
TRRJX $ 31,132,336 T. Rowe Price Retirement 2035	0.68 %	TRPJX T. Rowe Price Retirement I 2035 I	0.56 %	21.43%
TRRNX $ 20,274,196 T. Rowe Price Retirement 2055	0.72 %	TRPNX T. Rowe Price Retirement 2055 I	0.59%	22.03%
TRRCX $ 19,457,469 T. Rowe Price Retirement 2030	0.66 %	TRPCX T. Rowe Price Retirement I 2030 I	0.53 %	24.53%
TRRHX $ 14,916,167 T. Rowe Price Retirement 2025	0.63 %	TRPHX T. Rowe Price Retirement I 2025 I	0.50 %	26.00%
TRRBX $ 7,037,856 T. Rowe Price Retirement 2020	0.59 %	TRBRX T. Rowe Price Retirement I 2020 I	0.46 %	28.26%
TRRLX $ 1,711,230 T. Rowe Price Retirement 2060	0.72 %	TRPLX T. Rowe Price Retirement I 2060 I	0.59%	22.03%

112. Several other Plan funds, in addition to the T.Rowe Price funds, were available in lower-cost share classes during the Class Period:

Fund	2018 ER	Lower Share Class	2018 Identical Lower Cost ER	Fund Excess Expense
JDVFX $ 13,595,404 JHancock Disciplined Value R4	0.95 %	JDVWX JHancock Disciplined Value R6	0.70 %	35.71%
JMVSX $ 11,164,641 JPMorgan Mid Cap Value L	0.99 %	FLMVX JPMorgan Mid Cap Value L	0.75 %	32.00%
HAGIX $ 8,684,474 Carillon Eagle Mid Cap Growth I	0.78 %	HRAUX Carillon Eagle Mid Cap Growth R6	0.69 %	13 %
ODMAX $5,209,674 Oppenheimer Developing Markets A	1.32%	Oppenheimer Developing Markets I	0.88%	50%

113. Plan funds were finally transitioned to lower-share classes and lower cost investment vehicles in 2018, including the following funds: Vanguard Total Bond Market Index

Adm; Fidelity Extended Market Index Premium; Fidelity International Index Premium; Fidelity Total Bond Fund; Mainstay Large Cap Growth I; American Funds Europacific Growth R5; Goldman Sachs Small Cap Value Instl; and Loomis Sayles Small Cap Growth Instl.

114. The above is for illustrative purposes only. At all times during the Class Period, Defendants knew or should have known of the existence of cheaper share classes and therefore also should have immediately identified the prudence of transferring the Plan's funds into these alternative investments.

115. There is no good-faith explanation for utilizing high-cost share classes when lower-cost share classes are available for the exact same investment. Because the more expensive share classes chosen by Defendants were the same in every respect other than price to their less expensive counterparts, the more expensive share class funds ***could not have*** (1) a potential for higher return, (2) lower financial risk, (3) more services offered, (4) or greater management flexibility. In short, the Plan did not receive any additional services or benefits based on its use of more expensive share classes; the only consequence was higher costs for Plan participants.

116. In other words, given the size of the Plan, Defendants made investments with higher costs (higher expense ratios) available to participants while the same investments with lower costs (lower expense ratios) were available to the detriment of the compounding returns that participants should have received. This reduced the likelihood that Plan participants would achieve their preferred lifestyle in retirement.

117. It is not prudent to select higher cost versions of the same fund even if a fiduciary believes fees charged to plan participants by the "retail" class investment were the same as the fees charged by the "institutional" class investment, net of the revenue sharing paid by the funds to defray the Plan's recordkeeping costs. *Tibble*, 2017 WL 3523737, at * 8. Fiduciaries should not "choose otherwise imprudent investments specifically to take advantage of revenue sharing." *Id.*

at * 11. This lack of good fiduciary practice resonates loudly in this case especially where the recordkeeping and administrative costs were excessive and were paid for through an imprudent process using in part the Plan's forfeiture accounts.

(5) The Plan's Recordkeeping and Administrative Costs Were Excessive During the Class Period

118. Another result of Defendants' imprudent process was the excessive recordkeeping and administrative fees Plan participants were required to pay during the Class Period.

119. Long-standing DOL guidance explicitly states that employers are held to a "high standard of care and diligence" and must, among other duties, both "establish a prudent process for selecting … service providers" and "monitor … service providers once selected to see that they continue to be appropriate choices." *See*, "*A Look at 401(k) Plan Fees*," *supra*, at n.3.

120. The Restatement of Trusts also puts cost-conscious management above all else while administering a retirement plan. *Tibble*, 843 F.3d at 1197-98.

121. The term "recordkeeping" is a catchall term for the suite of administrative services typically provided to a defined contribution plan by the plan's "recordkeeper." Recordkeeping expenses can either be paid directly from plan assets, or indirectly by the plan's investments in a practice known as revenue sharing (or a combination of both or by a plan sponsor). Revenue sharing payments are payments made by investments within the plan, typically mutual funds, to the plan's recordkeeper or to the plan directly, to compensate for recordkeeping and trustee services that the mutual fund company otherwise would have to provide.

122. Although utilizing a revenue sharing approach is not *per se* imprudent, unchecked, it is devastating for Plan participants. "At worst, revenue sharing is a way to hide fees. Nobody sees the money change hands, and very few understand what the total investment expense pays for. It's a way to milk large sums of money out of large plans by charging a percentage-based fee that never goes down (when plans are ignored or taken advantage of). In some cases, employers

and employees believe the plan is 'free' when it is in fact expensive." Justin Pritchard, "Revenue Sharing and Invisible Fees" available at http://www.cccandc.com/p/revenue-sharing-and-invisible-fees (last visited March 19, 2020).

123. In this matter, using revenue sharing to pay for recordkeeping resulted in a worst-case scenario for the Plan's participants for two independent reasons: it saddled Plan participants with (1) above-market recordkeeping fees and (2) an imprudent method for paying for those fees.

124. From 2014 until 2017, the Plan's forms 5500 indicate that the Plan paid an average of $63 per participant for recordkeeping and administrative services through both direct and indirect (revenue sharing) compensation to the Plan's recordkeeper. For the years ended December 31, 2015 and 2014, recordkeeping and administrative fees were reduced by $201,109 and $107,323, respectively, from forfeited non-vested accounts. Similarly, in 2017 and 2016, recordkeeping and administrative fees were reduced by $197,979 and $72,497 from forfeited non-vested accounts.

125. As noted above, the Plan was capable of obtaining recordkeeping fees of $40 per participant per year during the Class Period but failed to achieve that amount until four years into the Class Period.

126. By way of comparison, we can look at what other plans paid for recordkeeping and administrative costs during the same time period.

127. One data source, the *401k Averages Book* (20th ed. 2020)[16] studies plan fees for smaller plans, those under $200 million in assets. Although it studies smaller plans than the Plan, it is nonetheless a useful resource because we can extrapolate from the data what a bigger plan like the Plan should be paying for recordkeeping. That is because recordkeeping and administrative

[16] "Published since 1995, the *401k Averages Book* is the oldest, most recognized source for non-biased, comparative 401(k) average cost information." *401k Averages Book* at p. 2.

fees should ***decrease*** as a plan increases in size. For example, a plan with 200 participants and $20 million in assets has an average recordkeeping and administration cost (through direct compensation) of $12 per participant. *401k Averages Book* at p. 95. A plan with 2,000 participants and $200 million in assets has an average recordkeeping and administration cost (through direct compensation) of $5 per participant. *Id*., at p. 108. Thus, the Plan, with between $250 million and $500 million dollars in assets throughout the Class Period should have had direct recordkeeping costs below the $5 average, which it clearly did not.

128. Given the size of the Plan's assets during the Class Period and total number of participants, in addition to the general trend towards lower recordkeeping expenses in the marketplace as a whole, the Plan could have obtained recordkeeping services that were comparable to or superior to the typical services provided by the Plan's recordkeeper at a lower cost.

129. Additionally, because Plan participants were paying more for recordkeeping than they should have as a result of the Plan fiduciaries' conduct, this confirms that the use of higher-cost share classes cannot be justified as a prudent means to pay recordkeeping and administrative costs.

130. By failing to investigate the availability of certain identical lower share classes of the same funds, Defendants caused the Plan to pay millions of dollars per year in unnecessary fees.

131. Moreover, because a significant amount of the recordkeeping and administrative fees were paid for by forfeiture accounts there was no need to use revenue sharing from the Plan's investments to pay for recordkeeping and administrative fees. But there is no indication that the Plan's fiduciaries returned the revenue sharing collected from the Plan's investments back to the Plan's participants as they should have.

132. Indeed, the Plan's fiduciaries acknowledge their imprudent conduct by switching the majority of the Plan's funds in December 2018 to funds that had no revenue sharing attached to them.

133. By failing to investigate the use of lower cost share classes Defendants caused the Plan to pay millions of dollars per year in unnecessary fees. Further, to the extent Defendants failed to return revenue sharing amounts back to Plan participants, this was a further fiduciary breach that cost Plan participants.

(6) Failure to Investigate Lower Cost Passively Managed Funds

134. Finally, another indication of Defendants' imprudent management of the Plan was their failure to investigate the benefits vs. drawbacks of selecting available passively managed funds to replace the funds already in the Plan. Defendants' failure wasn't the failure to scour the market for the cheapest available funds. Rather, theirs was a failure to engage in a process to determine whether the fees being paid by Plan participants were reasonable by benchmarking the Plan's actively managed fund's performance to other similar funds on the market with cheaper fees.

135. Vanguard's white paper on investment management fees, "Vanguard's Principles for Investing Success," talks about the importance of minimizing costs. Importantly, "[m]arkets are unpredictable. Costs are forever." *Id.* at 17.[17] Vanguard lays out four bullet points all investors must keep in mind: higher costs can significantly depress a portfolio's growth over long periods; costs create an inevitable gap between what the markets return and what investors actually earn – but keeping expenses down can help narrow that gap; lower-cost mutual funds have tended to

[17] Available at https://about.vanguard.com/what-sets-vanguard-apart/principles-for-investing-success/

perform better than higher-cost funds over time; and indexed investments can be a useful tool for cost control. *Id.*

136. As noted *supra*, ERISA is derived from trust law. *Tibble*, 135 S. Ct. at 1828. Accordingly, appropriate investments for a fiduciary to consider are "suitable index mutual funds or market indexes (with such adjustments as may be appropriate)." Restatement (Third) of Trusts § 100 cmt. b(1).

137. Relevant statistics bear this out. The majority of U.S. equity funds did not outperform their index counterparts in the five years ending June 30, 2019:[18]

Fund Category	**Comparison Index**	**Percentage of Funds That Underperformed Their Benchmark 5 Yr (%)**
Large-Cap	S&P 500	78.52
Mid-Cap	S&P MidCap 400	63.56
Small-Cap	S&P SmallCap 600	75.09
Multi-Cap	S&P Composite 1500	82.79
Domestic Equity	S&P Composite 1500	81.66
Large-Cap Value	S&P Value	84.74
Mid-Cap Value	S&P MidCap 400 Value	92.31

138. Digging deeper, other statistics bear out the vast underperformance of actively managed funds over passively managed funds over different stretches of 5 to 10 year periods beginning in 2008.

139. 77.97% of large-cap mutual fund managers and 73.21% of institutional accounts

[18] Source: https://us.spindices.com/spiva/#/reports.

underperformed the S&P 500® on a gross-of-fees basis over the 10-year horizon between 2008 and 2018.[19]

140. The following chart denotes Domestic Equity-Percentage of Managers Underperforming over ten years as of December 31, 2018.[20]

Category	**Benchmark**	**Mutual Funds (%) Net/ Gross of Fees**
All Domestic	S&P Comp 1500	84.49/75.58
All L/C	S&P 500	85.14/ 77.97
All M/C	S&P M/C 400	88.03/ 76.25
All S/C	S&P S/C 600	85.67/ 76.01
All Multi/C	S&P Comp 1500	86.36/ 77.90

141. It is the same story looking at different five-year intervals over the last decade. In 2015, over 76.23% of mutual fund managers and 85.81% of institutional accounts in the large-cap equity space underperformed the S&P 500®. In the mid-cap space, 65.81% of mutual funds and 64.71% of institutional accounts underperformed the S&P MidCap 400®. In the small-cap space, over 80% of managers on both fronts underperformed the S&P SmallCap 600®. The findings in the small-cap space dispel the myth that small-cap equity is an inefficient asset class that is best accessed via active management.

142. Undeniably, fees play a major role in the active versus passive debate. After subtracting fees, returns from active management tend to be less than those from passive

[19] *See* SPIVA® Institutional Scorecard– How Much Do Fees Affect the Active Versus Passive Debate?, September 18th, 2019 p. 1.

[20] Data obtained from SPIVA® Institutional Scorecard– How Much Do Fees Affect the Active Versus Passive Debate?, September 18th, 2019, Exhibit 2, p.6.

management, as the latter costs less.[21]

143. The following chart denotes Domestic Equity-Percentage of Managers Underperforming over five years as of December 31, 2015.[22]

Category	**Benchmark**	**Mutual Funds (%) Net of Fees**	**Mutual Funds % Gross of Fees**	**Inst. Accts %**
All Domestic	S&P Comp 1500	88	79.85	85.00
All L/C	S&P 500	84.13	76.23	85.51
All M/C	S&P M/C 400	76.69	65.81	64.71
All S/C	S&P S/C 600	90.13	81.11	81.82
All Multi/C	S&P Comp 1500	88.56	79.67	83.20

144. In 2016, in the large-cap equity space, 84.60% of mutual fund managers and 79.58% of institutional accounts underperformed the S&P 500® on a net-of-fees basis. When measured on a gross-of-fees basis, 68.16% of large-cap mutual funds and 69.20% of institutional accounts underperformed.

145. Similarly, in the mid-cap space, 96.03% (86.24%) of mutual funds and 92.02% (82.51%) of institutional accounts underperformed the S&P MidCap 400® on a net (gross) basis. In the small-cap space, over 80% of managers on both fronts underperformed the S&P SmallCap 600®, regardless of fees.

[21] Sharpe, William F., "The Arithmetic of Active Management" Financial Analysts Journal, January/February 1991, Volume 47 Issue 1. "Properly measured, the average actively managed dollar must underperform the average passively managed dollar, net of costs."

[22] Data obtained from SPIVA® Institutional Scorecard– How Much Do Fees Affect the Active Versus Passive Debate?, July 31st, 2016, Exhibit 2, p.5.

146. The following chart denotes Domestic Equity-Percentage of Managers Underperforming over five years as of December 31, 2016.[23]

Category	Benchmark	Mutual Funds (%) Net of Fees	Mutual Funds % Gross of Fees	Inst. Accts % N/G
All Domestic	S&P Comp 1500	82.87	67.11	76.31/65.52
All L/C	S&P 500	84.60	68.16	79.58/69.20
All M/C	S&P M/C 400	96.03	86.24	92.02/82.51
All S/C	S&P S/C 600	95.64	81.40	90.61/78.91
All Multi/C	S&P Comp 1500	89.31	77.67	81.31/70.33

147. In 2017, the majority of equity managers in 15 out of 17 categories underperformed their respective benchmarks over the 10-year horizon, gross-of-fees.[24] In the preceding ten years in the large-cap equity space, 89.51% of mutual fund managers and 73.61% of institutional accounts lagged the S&P 500® on a net-of-fees basis. When measured on a gross-of-fees basis, 71.97% of large-cap mutual funds and 62.88% of institutional accounts underperformed. Over 80% of mutual funds underperformed the S&P SmallCap 600® (net- and gross-of-fees) over the last decade, while 86.80% (72.92%) of institutional accounts underperformed on a net (gross) basis.

148. The following chart denotes Domestic Equity-Percentage of Managers

[23] Data obtained from SPIVA® Institutional Scorecard– How Much Do Fees Affect the Active Versus Passive Debate?, August 8th, 2017, Exhibit 2, p.5

[24] *See* SPIVA® Institutional Scorecard– How Much Do Fees Affect the Active Versus Passive Debate?, January 8th, 2019, p. 1.

Underperforming over ten years as of December 31, 2017.[25]

Category	**Benchmark**	**Mutual Funds (%) Net of Fees**	**Mutual Funds % Gross of Fees**	**Inst. Accts % N/G**
All Domestic	S&P Comp 1500	86.65	71.20	71.11/ 59.88
All L/C	S&P 500	89.51	71.97	73.61/ 62.88
All M/C	S&P M/C 400	96.48	85.37	85.16/ 77.01
All S/C	S&P S/C 600	95.71	82.00	86.80/ 72.92
All Multi/C	S&P Comp 1500	90.70	78.77	79.00/ 68.59

149. Based on the above data, the Plan fiduciaries should have considered on an active fund by active fund basis whether the actively managed funds chosen for the Plan could be transitioned to passively managed funds to save participants money.

150. The chart below demonstrates that the expense ratios of the Plan's investment options were more expensive by multiples of comparable passively-managed funds in the same investment style and compared to the same benchmark as of March 31, 2020. A reasonable investigation would have revealed the existence of lower-cost and better performing alternatives to the Plan's funds.

151. The first chart below uses 2020 expense ratios as a methodology to demonstrate how much more expensive the Plan's funds were than their alternative fund counterparts.

Current Fund	**ER**	**Benchmark**	**Alternative Index Fund Index**	**Alternative ER**	**% Fee Excess**
T. Rowe Price Retirement 2040	0.70 %	Vanguard Trgt 2040 Inv	Fidelity Freedom Index 2040 Investor	0.12 %	483%
T. Rowe Price Retirement 2045	0.71 %	Vanguard Trgt 2045 Inv	Fidelity Freedom Index 2045 Investor	0.12 %	491%

[25] Data obtained from SPIVA® Institutional Scorecard– How Much Do Fees Affect the Active Versus Passive Debate?, January 8th, 2019, Exhibit 2, p.5.

Current Fund	ER	Benchmark	Alternative Index Fund Index	Alternative ER	% Fee Excess
T. Rowe Price Retirement 2050	0.71 %	Vanguard Trgt 2050 Inv	Fidelity Freedom Index 2050 Investor	0.12 %	491%
T. Rowe Price Retirement 2035	0.68 %	Vanguard Trgt 2035 Inv	Fidelity Freedom Index 2035 Investor	0.12 %	466%
T. Rowe Price Retirement 2055	0.72 %	Vanguard Trgt 2055 Inv	Fidelity Freedom Index 2055 Investor	0.12 %	500%
T. Rowe Price Retirement 2030	0.66 %	Vanguard Trgt 2030 Inv	Fidelity Freedom Index 2030 Investor	0.12 %	450%
T. Rowe Price Retirement 2025	0.63 %	Vanguard Trgt 2025 Inv	Fidelity Freedom Index 2025 Investor	0.12 %	425%
T. Rowe Price Retirement 2020	0.59 %	Vanguard Trgt 2020 Inv	Fidelity Freedom Index 2020 Investor	0.12 %	391%
T. Rowe Price Retirement 2060	0.72 %	Vanguard Trgt 2060 Inv	Fidelity Freedom Index 2060 Investor	0.12 %	500%
JPMorgan Mid Cap Value I	0.99 %	iShares Russell Mid-Cap ETF	Vanguard Mid-Cap Value Index Admiral	0.07 %	1,314%
Fidelity Total Bond Fund	0.45 %	iShares Core U.S. Aggregate Bond	Fidelity US Bond Index	0.03 %	1,400%
Carillon Eagle Mid Cap Growth I	0.75 %	iShares Russell Mid-Cap Growth	BNY Mellon Sm/Md Cap Gr. Y	0.65 %	15%

Current Fund	ER	Benchmark	Alternative Index Fund Index	Alternative ER	% Fee Excess
T. Rowe Price Retirement Balanced	0.51 %	40% SPY 60% AGG Composite	Vanguard Balanced Index Adm	0.07 %	628%

152. The second chart below compares the Plan's active funds with passive alternatives to the same benchmark to demonstrate that the actively managed funds performed worse relative to the benchmark.

Current Fund	Benchmark	Alternative Index Fund Index	Benchmark Relative		
			1Y	3Y	5Y
T. Rowe Price Retirement 2040	Vanguard Trgt 2040 Inv	Fidelity Freedom Index 2040 Investor	-1.53%	-.20%	-.01%
			-0.19%	.27%	.31%
T. Rowe Price Retirement 2045	Vanguard Trgt 2045 Inv	Fidelity Freedom Index 2045 Investor	-0.78%	.07%	0.13%
			1.25%	0.72%	0.52%
T. Rowe Price Retirement 2050	Vanguard Trgt 2050 Inv	Fidelity Freedom Index 2050 Investor	-.77%	0.07%	0.12%
			1.22%	0.71%	0.49%
T. Rowe Price Retirement 2035	Vanguard Trgt 2035 Inv	Fidelity Freedom Index 2035 Investor	-2.24%	-0.43%	-0.10%
			-0.14%	0.53%	0.55%
T. Rowe Price Retirement 2055	Vanguard Trgt 2055 Inv	Fidelity Freedom Index 2055 Investor	-0.91%	-0.01%	0.08%
			1.23%	0.71%	0.49%

Current Fund	Benchmark	Alternative Index Fund Index	Benchmark Relative		
			1Y	3Y	5Y
T. Rowe Price Retirement 2030	Vanguard Trgt 2030 Inv	Fidelity Freedom Index 2030 Investor	-2.70%	-0.57%	-0.13%
			1.40%	0.89%	0.66%
T. Rowe Price Retirement 2025	Vanguard Trgt 2025 Inv	Fidelity Freedom Index 2025 Investor	-3.00%	-0.78%	-.024%
			1.56%	0.61%	0.33%
T. Rowe Price Retirement 2020	Vanguard Trgt 2020 Inv	Fidelity Freedom Index 2020 Investor	-03.33%	-0.90%	-0.27%
			1.02%	0.53%	0.31%
T. Rowe Price Retirement 2060	Vanguard Trgt 2060 Inv	Fidelity Freedom Index 2060 Investor	-0.88%	0.02%	0.07%
			1.22%	0.72%	0.49%
JPMorgan Mid Cap Value I	iShares Russell Mid-Cap ETF	Vanguard Mid-Cap Value Index Admiral	-6.37%	-5.15%	-3.23%
			-4.29%	-4.16%	-1.81%
Fidelity Total Bond Fund	iShares Core U.S. Aggregate Bond	Fidelity US Bond Index	-3.41%	-1.03%	-0.10%
			0.60%	0.12%	0.11%
Carillon Eagle Mid Cap Growth I	iShares Russell Mid-Cap Growth	BNY Mellon Sm/Md Cap Gr. Y	1.20%	0.24%	0.60%
			5.12%	5.05%	3.27%
	40% SPY		1.73%	3.21%	1.68%

Current Fund	**Benchmark**	**Alternative Index Fund Index**	**Benchmark Relative**		
			1Y	**3Y**	**5Y**
T. Rowe Price Retirement Balanced	60% AGG Composite	T. Rowe Price Retirement Balanced I	5.19%	3.45%	–

153. Another metric in a third chart below measures the deficiency of certain of the above actively managed funds by showing that accounting for risk and fees paid, the actively managed funds lagged behind in performance. The chart below indicates the efficiency of the active funds or lack thereof (*i.e.*, the return needed by the actively managed fund, taking risk factors into account, to match the returns of the passively managed fund):

Fund Name/Comparator	**Ticker**	**Expense Ratio**[26]	**Return (5 Year)**	**INDEX Report/Return Deficiency**
T. Rowe Price Retirement 2045	TRRKX	0.71	4.5	Fails Efficiency Requires 0.95% more return to pass efficiency
Fidelity Freedom Index 2045 Investor	FIOFX	0.12	4.72	
T. Rowe Price Retirement 2050	TRRMX	0.71	4.51	Fails Efficiency Requires 0.95% more return to pass efficiency
Fidelity Freedom Index 2050 Investor	FIPFX	0.12	4.73	
T. Rowe Price Retirement 2035	TRRJX	0.68	4.51	Fails Efficiency Requires 1.06% more return to pass efficiency
Fidelity Freedom Index 2035 Investor	FIHFX	0.12	4.98	
T. Rowe Price Retirement 2055	TRRNX	0.71	4.46	Fails Efficiency Requires 1.01% more return to pass efficiency

[26] Expense ratios are as of January 2020.

Fund Name/Comparator	**Ticker**	**Expense Ratio[26]**	**Return (5 Year)**	**INDEX Report/Return Deficiency**
Fidelity Freedom Index 2055 Investor	FDEWX	0.12	4.72	
T. Rowe Price Retirement 2030	TRRCX	0.65	4.47	Fails Efficiency Requires 1.35% more return to pass efficiency
Fidelity Freedom Index 2030 Investor	FXIFX	0.12	5.01	
T. Rowe Price Retirement 2025	TRRHX	0.62	4.35	Fails Efficiency Requires 1.19% more return to pass efficiency
Fidelity Freedom Index 2025 Investor	FQIFX	0.12	4.65	
T. Rowe Price Retirement 2020	TRRBX	0.58	4.20	Fails Efficiency Requires 1.14% more return to pass efficiency
Fidelity Freedom Index 2020 Investor	FPIFX	0.12	4.57	
T. Rowe Price Retirement 2060	TRRLX	0.71	4.46	Fails Efficiency Requires 1.01% more return to pass efficiency
Fidelity Freedom Index 2060 Investor	FDKLX	0.12	4.73	
T. Rowe Price Retirement 2015	TRRGX	0.55	3.92	Fails Efficiency Requires 1.25% more return to pass efficiency
Fidelity Freedom Index 2015 Investor	FLIFX	0.12	4.49	

154. The comparator funds above belong to the same peer group as the Plan fund. Comparing funds in the same peer group is an industry-standard that allows comparisons to be "apples to apples." Here, the following data points were used to calculate the Plan fund's efficiency: r-squared, standard deviation, and 5-year return. The same data points were used on both the active and passive funds to calculate the incremental cost and incremental return and then

to determine if the active fund is efficient, less than efficient, or fails efficiency.

155. The Plan's fund identified in the above chart charged unjustified fees for additional reasons. First, the funds are what are called closet index funds because they charge as if they are actively managed but vary little from the index benchmark. Second, the funds charge approximately 5 times more than the comparison funds. Third, the funds assume more risk than the comparison funds. Fourth, all the funds above had lower returns the comparison funds.

156. Defendants' failure to investigate lower cost alternative passively managed investments during the Class Period cost the Plan and its participants millions of dollars.

FIRST CLAIM FOR RELIEF
Breaches of Fiduciary Duty of Prudence
(Asserted against the Committee and Aegis)

157. Plaintiffs re-allege and incorporate herein by reference all prior allegations in this Complaint as if fully set forth herein.

158. At all relevant times, the Committee and its members and Aegis ("Prudence Defendants") were fiduciaries of the Plan within the meaning of ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A), in that they exercised discretionary authority or control over the administration and/or management of the Plan or disposition of the Plan's assets.

159. As fiduciaries of the Plan, these Defendants were subject to the fiduciary duties imposed by ERISA § 404(a), 29 U.S.C. § 1104(a). These fiduciary duties included managing the assets of the Plan for the sole and exclusive benefit of Plan participants and beneficiaries, and acting with the care, skill, diligence, and prudence under the circumstances that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of like character and with like aims.

160. The Prudence Defendants breached these fiduciary duties in multiple respects as discussed throughout this Complaint. They did not make decisions regarding the Plan's investment

lineup based solely on the merits of each investment and what was in the best interest of Plan participants. Instead, the Prudence Defendants selected and retained investment options in the Plan despite the high cost of the funds in relation to other comparable investments. The Prudence Defendants also failed to investigate the availability of lower-cost share classes of certain mutual funds in the Plan. In addition, the Prudence Defendants failed to timely investigate collective trusts as alternatives to mutual funds, even though they generally provide the same investment management services at a lower cost.

161. As a direct and proximate result of the breaches of fiduciary duties alleged herein, the Plan suffered millions of dollars of losses due to excessive costs and lower net investment returns. Had Defendants complied with their fiduciary obligations, the Plan would not have suffered these losses, and Plan participants would have had more money available to them for their retirement.

162. Pursuant to 29 U.S.C. §§ 1109(a) and 1132(a)(2), the Prudence Defendants are liable to restore to the Plan all losses caused by their breaches of fiduciary duties, and also must restore any profits resulting from such breaches. In addition, Plaintiffs are entitled to equitable relief and other appropriate relief for Defendants' breaches as set forth in their Prayer for Relief.

163. The Prudence Defendants knowingly participated in each breach of the other Defendants, knowing that such acts were a breach, enabled the other Defendants to commit breaches by failing to lawfully discharge such Defendants' own duties, and knew of the breaches by the other Defendants and failed to make any reasonable and timely effort under the circumstances to remedy the breaches. Accordingly, each Defendant is also liable for the breaches of its co-fiduciaries under 29 U.S.C. § 1105(a).

SECOND CLAIM FOR RELIEF

Failure to Adequately Monitor Other Fiduciaries
(Asserted against Aegis and the Board Defendants)

164. Plaintiffs re-allege and incorporate herein by reference all prior allegations in this Complaint as if fully set forth herein.

165. Aegis and the Board (the "Monitoring Defendants") had the authority to appoint and remove members of the Committee, and the duty to monitor the Committee and were aware that the Committee Defendants had critical responsibilities as fiduciaries of the Plan.

166. In light of this authority, the Monitoring Defendants had a duty to monitor the Committee Defendants to ensure that the Committee Defendants were adequately performing their fiduciary obligations, and to take prompt and effective action to protect the Plan in the event that the Committee Defendants were not fulfilling those duties.

167. The Monitoring Defendants also had a duty to ensure that the Committee Defendants possessed the needed qualifications and experience to carry out their duties; had adequate financial resources and information; maintained adequate records of the information on which they based their decisions and analysis with respect to the Plan's investments; and reported regularly to the Monitoring Defendants.

168. The Monitoring Defendants breached their fiduciary monitoring duties by, among other things:

(a) Failing to monitor and evaluate the performance of the Committee Defendants or have a system in place for doing so, standing idly by as the Plan suffered significant losses as a result of the Committee Defendants' imprudent actions and omissions;

(b) failing to monitor the processes by which Plan investments were evaluated, their failure to investigate the availability of lower-cost share classes, and their failure to investigate the availability of lower-cost collective trust vehicles; and

(c) failing to remove Committee members whose performance was inadequate in that they continued to maintain imprudent, excessively costly, and poorly performing investments within the Plan, all to the detriment of the Plan and Plan participants' retirement savings.

169. As a consequence of the foregoing breaches of the duty to monitor, the Plan suffered millions of dollars of losses. Had the Monitoring Defendants complied with their fiduciary obligations, the Plan would not have suffered these losses, and Plan participants would have had more money available to them for their retirement.

170. Pursuant to 29 U.S.C. §§ 1109(a) and 1132(a)(2), the Monitoring Defendants are liable to restore to the Plan all losses caused by their failure to adequately monitor the Committee Defendants. In addition, Plaintiffs are entitled to equitable relief and other appropriate relief as set forth in their Prayer for Relief.

PRAYER FOR RELIEF

171. **WHEREFORE**, Plaintiffs pray that judgment be entered against Defendants on all claims and requests that the Court awards the following relief:

A. A determination that this action may proceed as a class action under Rule 23(b)(1), or in the alternative, Rule 23(b)(2) of the Federal Rules of Civil Procedure;

B. Designation of Plaintiffs as Class Representatives and designation of Plaintiffs' counsel as Class Counsel;

C. A Declaration that the Defendants, and each of them, have breached their fiduciary duties under ERISA;

D. An Order compelling the Defendants to make good to the Plan all losses to the Plan resulting from Defendants' breaches of their fiduciary duties, including losses to the Plan resulting from imprudent investment of the Plan's assets, and to restore to the Plan all profits the Defendants made through use of the Plan's assets, and to restore to the Plan all profits which the participants would have made if the Defendants had fulfilled their fiduciary obligations;

E. An order requiring the Company Defendants to disgorge all profits received from, or in respect of, the Plan, and/or equitable relief pursuant to 29 U.S.C. § 1132(a)(3) in the form of an accounting for profits, imposition of a constructive trust, or a surcharge against the Company Defendant as necessary to effectuate said relief, and to prevent the Company Defendant's unjust enrichment;

F. Actual damages in the amount of any losses the Plan suffered, to be allocated among the participants' individual accounts in proportion to the accounts' losses;

G. An order enjoining Defendants from any further violations of their ERISA fiduciary responsibilities, obligations, and duties;

H. Other equitable relief to redress Defendants' illegal practices and to enforce the provisions of ERISA as may be appropriate, including appointment of an independent fiduciary or fiduciaries to run the Plan and removal of Plan fiduciaries deemed to have breached their fiduciary duties;

I. An award of pre-judgment interest;

J. An award of costs pursuant to 29 U.S.C. § 1132(g);

K. An award of attorneys' fees pursuant to 29 U.S.C. § 1132(g) and the common fund doctrine; and

L. Such other and further relief as the Court deems equitable and just.

Dated: November 12, 2020

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CERTIFICATE OF SERVICE

I hereby certify that on November 12, 2020 a true and correct copy of the foregoing document was filed with the Court utilizing its ECF system, which will send notice of such filing to all counsel of record.

By: _/s/ *Mark K. Gyandoh*