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9 **IN THE UNITED STATES DISTRICT COURT**
10 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**

11 MARIA KARLA TERRAZA,
12 Individually and On Behalf of the
SAFEWAY 401(K) PLAN,

13 Plaintiff,

14 v.

15 SAFEWAY INC., BENEFIT PLANS
16 COMMITTEE SAFEWAY INC. n/k/a
ALBERTSONS COMPANIES
17 RETIREMENT BENEFIT PLANS
COMMITTEE, PETER J. BOCIAN,
18 DAVID F. BOND, MICHAEL J.
BOYLAN, ROBERT B. DIMOND,
19 LAURA A. DONALD, DENNIS J.
DUNNE, ROBERT L. EDWARDS,
BRADLEY S. FOX, BERNARD L.
20 HARDY, RUSSELL M. JACKSON,
PEGGY JONES, SUZ-ANN KIRBY,
21 ROBERT LARSON, MELISSA C.
PLAISANCE, PAUL ROWAN,
22 ANDREW J. SCOGGIN and
AON HEWITT INVESTMENT
23 CONSULTING, INC.,

24 Defendants.

Case No. 3:16-cv-03994-JST

THIRD AMENDED COMPLAINT

Class Action Complaint

25 **I. INTRODUCTION**

26 1. Pursuant to Rule 15(a)(2) of the Federal Rules of Civil Procedure, upon consent of
27 the below-named Defendants, Plaintiff, Maria Karla Terraza (“Plaintiff”), individually and on
28

1 behalf of the Safeway 401(K) Plan (the “Safeway Plan” or the “Plan”), Dennis Lorenz, and all
2 other Plan participants, brings this action under 29 U.S.C. § 1132 on behalf of the Plan against
3 Defendants, Safeway Inc. (“Safeway”), the Benefit Plans Committee Safeway Inc. n/k/a
4 Albertsons Companies Retirement Benefit Plans Committee, Peter J. Bocian, David F. Bond,
5 Michael J. Boylan, Robert B. Dimond, Laura A. Donald, Dennis J. Dunne, Robert L. Edwards,
6 Bradley S. Fox, Bernard L. Hardy, Russell M. Jackson, Peggy Jones, Suz-Ann Kirby, Robert
7 Larson, Melissa C. Plaisance, Paul Rowan, Andrew J. Scoggin and Aon Hewitt Investment
8 Consulting, Inc. (collectively, “Defendants”), for breach of fiduciary duties and other violations
9 of the Employee Retirement Income Security Act (“ERISA”), 29 U.S.C. § 1001, *et seq.*

10 2. Defined contribution plans that are qualified as tax-deferred vehicles under
11 Section 401 of the Internal Revenue Code, 26 U.S.C. §§ 401(a) and (k) (*i.e.*, 401(k) plans), have
12 become the primary form of retirement savings in the United States and, as a result, America’s *de*
13 *facto* retirement system. Unlike traditional defined benefit retirement plans, in which the
14 employer typically promises a calculable benefit and assumes the risk with respect to high fees or
15 under-performance of pension plan assets used to fund defined benefits, 401(k) plans operate in a
16 manner in which participants bear the risk of high fees and investment under-performance.

17 3. The importance of defined contribution plans to the United States retirement
18 system has become increasingly pronounced as employer-provided defined benefit (“DB”) plans
19 have become increasingly rare as an offered and meaningful employee benefit.

20 4. With more than \$1.9 billion in assets, the Plan is in the top one percent (1%) of
21 401(k) plans in terms of assets. The marketplace for 401(k) retirement plan services is well
22 established and can be competitive when fiduciaries of defined contribution retirement plans act
23 in an informed and prudent fashion. Billion dollar defined contribution plans, like the Plan, have
24 significant bargaining power and the ability to demand low-cost administrative and investment
25 management services within the marketplace for administration of 401(k) plans and the
26 investment of 401(k) assets. As fiduciaries to the Plan, Defendants are obligated to act for the

1 exclusive benefit of participants, invest the assets of the Plan in a prudent fashion and ensure that
2 Plan expenses are fair and reasonable. At all pertinent times, as explained below, Defendants: (a)
3 were fiduciaries under ERISA; (b) breached their fiduciary duties under ERISA by failing to fully
4 disclose to participants the expenses and risks of the Plan's investment options; (c) breached
5 their fiduciary duties under ERISA by allowing unreasonable expenses to be charged to
6 participants for administration of the Plan; and (d) breached their fiduciary duties under ERISA
7 by selecting and retaining opaque, high-cost, and poor-performing investments instead of other
8 available and more prudent alternative investments.

9 5. To remedy these fiduciary breaches and other violations of ERISA, Plaintiff,
10 individually and on behalf of the Plan and Plan Participants, brings this action under Section 502,
11 29 U.S.C. §1132, and Section 409 of ERISA, 29 U.S.C. §1109, to recover and obtain all losses
12 resulting from each breach of fiduciary duty. In addition, Plaintiff seeks such other equitable or
13 remedial relief for the Plan as the Court may deem appropriate and just under all of the
14 circumstances.

15 6. Plaintiff specifically brings this action on behalf of the Plan and all other Plan
16 participants under ERISA §§ 409 and 502, 29 U.S.C. §§ 1109 and 1132, to recover the following
17 relief:

- 18 ● A declaratory judgment holding that the acts of Defendants described
19 herein violate ERISA and applicable law;
- 20 ● A permanent injunction against Defendants prohibiting the practices
21 described herein and affirmatively requiring them to act in the best
22 interests of the Plan and its participants;
- 23 ● Equitable, legal or remedial relief for all losses and/or compensatory
24 damages;
- 25 ● Attorneys' fees, costs and other recoverable expenses of litigation; and
- 26 ● Such other and additional legal or equitable relief that the Court deems
27 appropriate and just under all of the circumstances.

28 **II. THE PARTIES**

7. Plaintiff was a participant under 29 U.S.C. §1002(7) of the Safeway Plan, which

1 is a defined contribution, individual account, employee pension benefit plan under 29 U.S.C.
2 §1002(2)(A) and §1002(34). Plaintiff is a resident of Salinas, Monterey County, California.
3 The Plan is established and maintained under a written document in accordance with 29 U.S.C.
4 §1102, and serves as a vehicle for retirement savings and to produce retirement income for
5 employees of Safeway, excluding those employees who are eligible to participate in the
6 Dominick's Finer Foods, LLC 401(k) Plan or the Vons Companies, Inc. Pharmacists' 401(k)
7 Plan of Safeway's subsidiaries and/or affiliates. Retirement income generated by the Plan
8 depends upon contributions made on behalf of each employee by Safeway, deferrals of employee
9 compensation and employer matching contributions, and from the performance of the Plan's
10 investment options (net of fees and expenses). Safeway established a trust (the "Master Trust")
11 to hold participant and employer contributions and such other earnings, income and appreciation
12 from Plan investments, less payments made by the Plan's trustee, to carry out the purposes of the
13 Trust, in accordance with 29 U.S.C. § 1103. As of December 31, 2014, the Plan was one of the
14 country's largest 401(k) plans, with more than \$1.9 billion in total assets and over 36,000
15 participants with account balances. As of December 31, 2015, the Plan still had total assets of
16 almost \$1.8 billion.

17 8. Dennis M. Lorenz ("Lorenz") is a Class Representative and also was a participant
18 of the Safeway Plan. Lorenz is a resident of California. Lorenz filed a related action in the
19 Northern District of California, Oakland Division on August 25, 2016, *Lorenz v. Safeway Inc., et*
20 *al.*, No. 3:16-cv-04903-JST. On November 14, 2016, the *Lorenz* case was found to be related to
21 this case and was reassigned to the Honorable Judge Tigar, also presiding over this action.

22 9. Defendant, Safeway, is a corporation organized and existing under the laws of
23 Delaware, with its principal place of business in Pleasanton, Alameda County, California.
24 Safeway is the Plan sponsor, Plan Administrator, a designated fiduciary of the Plan, and a
25 fiduciary under ERISA pursuant to 29 U.S.C. §§ 1002, 1102.

26 10. Defendant, the Benefit Plans Committee Safeway Inc. n/k/a Albertsons
27
28

1 Companies Retirement Benefit Plans Committee (“Benefit Plans Committee”), is a named
2 fiduciary under the Plan, administers the Plan, and is a fiduciary under ERISA pursuant to 29
3 U.S.C. §§ 1002, 1102. The Benefit Plans Committee maintains its address at Safeway’s
4 headquarters in Pleasanton, Alameda County, California. The Benefit Plans Committee and its
5 members are appointed by Safeway to administer the Plan on Safeway’s behalf.

6 11. Defendant, Peter J. Bocian (“Bocian”), is an individual who served as a member
7 of the Benefit Plans Committee from November 2013 to November 2014, and who served as
8 Chairman of the Benefit Plans Committee from December 2013 to November 2014.

9 12. Defendant, David F. Bond (“Bond”), served as a member of the Benefit Plans
10 Committee from March 2010 to November 2014.

11 13. Defendant, Michael J. Boylan (“Boylan”), served as a member of the Benefit
12 Plans Committee from March 2010 to November 2015, and served as the Secretary of the Benefit
13 Plans Committee from December 2011 to November 2015.

14 14. Defendant, Robert B. Dimond (“Dimond”), has been a member of the Benefit
15 Plans Committee since June 2015.

16 15. Defendant, Laura A. Donald (“Donald”), has been a member of the Benefit Plans
17 Committee since May 2016.

18 16. Defendant, Dennis J. Dunne (“Dunne”), served as a member of the Benefit Plans
19 Committee from November 2013 to February 2016.

20 17. Defendant, Robert L. Edwards (“Edwards”), served as a member of the Benefit
21 Plans Committee member from March 2010 to September 2013 and served as Chairman of the
22 Benefit Plans Committee from March 2010 to June 2013.

23 18. Defendant, Bradley S. Fox (“Fox”), served as a member of the Benefit Plans
24 Committee from March 2010 to November 2014.

25 19. Defendant, Bernard L. Hardy (“Hardy”), served as a member of the Benefit Plans
26 Committee from March 2010 to November 2014.

1 20. Defendant, Russell M. Jackson (“Jackson”), served as a member of the Benefit
2 Plans Committee from March 2010 to November 2014.

3 21. Defendant, Peggy Jones (“Jones”), has been a member of the Benefit Plans
4 Committee since May 2016.

5 22. Defendant, Suz-Ann Kirby (“Kirby”), has been a member of the Benefit Plans
6 Committee since February 2016.

7 23. Defendant, Robert Larson (“Larson”), has been a member of the Benefit Plans
8 Committee since May 2016.

9 24. Defendant, Melissa C. Plaisance (“Plaisance”), served as a member of the Benefit
10 Plans Committee from March 2010 to November 2014.

11 25. Defendant, Paul Rowan (“Rowan”), served as a member of the Benefit Plans
12 Committee from June 2015 to November 2015.

13 26. Defendant, Andrew J. Scoggin (“Scoggin”), has been a member of the Benefit
14 Plans Committee since June 2015.

15 27. Defendants, Benefit Plans Committee, Bocian, Bond, Boylan, Dimond, Donald,
16 Dunne, Edwards, Fox, Hardy, Jackson, Jones, Kirby, Larson, Plaisance, Rowan and Scoggin are
17 referred to collectively hereafter as the “Benefit Plans Committee” or the “Benefit Plans
18 Committee Defendants.”

19 28. Defendant, Aon Hewitt Investment Consulting, Inc. f/k/a Hewitt Ennis Knupp or
20 HEK (“Aon”), is a corporation that maintains its headquarters and its principal place of business
21 in Chicago, Illinois, while maintaining an office in San Francisco, California and significant
22 business operations in this judicial district. At all pertinent times, Aon served as the investment
23 adviser for the Plan and acted as a fiduciary of the Plan.

24 **III. JURISDICTION AND VENUE**

25 29. Plaintiff seeks relief on behalf of the Safeway Plan and Plan participants pursuant
26 to ERISA’s civil enforcement remedies with respect to fiduciaries and other interested parties

1 and, specifically, under ERISA Section 409, 29 U.S.C. § 1109 and 29 U.S.C. § 1132.

2 30. This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331 and
3 ERISA Section 502(e), 29 U.S.C. § 1132(e). The Court also has jurisdiction pursuant to 28
4 U.S.C. § 1332(d)(2) because the matter in controversy, upon information and belief, exceeds
5 \$5,000,000, exclusive of interests and costs, and this is a class action in which Class Members
6 and Defendant are citizens of different states.

7 31. Venue is proper in this judicial district pursuant to ERISA Section 502(e), 29
8 U.S.C. § 1132(e) and 28 U.S.C. § 1391, because Safeway’s principal place of business is in this
9 district. Furthermore, the Benefit Plans Committee is located in this district.

10 **IV. FACTUAL ALLEGATIONS**

11 **A. Background**

12 **1. The Safeway Plan Management Structure**

13 32. The Safeway Plan is a participant-directed plan in which participants direct their
14 retirement assets into a pre-selected menu of investment offerings consisting of mutual funds,
15 Safeway common stock,¹ common collective trusts, and a stable-value fund.

16 33. Pursuant to the Safeway Plan, which was established in 1952 “for the exclusive
17 benefit of [Safeway’s] eligible employees,” Safeway, as the named and designated plan
18 administrator and fiduciary, appointed the Benefit Plans Committee “to administer the Plan on its
19 behalf.” The Benefit Plans Committee is thus delegated with Safeway’s “full discretionary
20 authority” to “administer the Plan in accordance with the Plan and ERISA,” as well as, among
21 other things, the “full discretionary power and authority:

- 22 i. To engage actuaries, attorneys, accountants, appraisers, brokers,
23 consultants, administrators, recordkeepers, custodians, physicians, or other
24 firms or persons and (with its officers, directors and employees) to rely
upon the reports, advice, opinions or valuations of any such persons except
as required by law;

26 ¹The Safeway common stock investment option was eliminated effective January 2015, as
27 explained below.

- 1 ii. To adopt Rules of the Plan that are not inconsistent with the Plan or
2 applicable law and to amend or revoke any such rules;
- 3 iii. To construe and interpret the Plan and the Rules of the Plan and to remedy
4 any ambiguities and inconsistencies therein;
- 5 iv. To determine questions of eligibility and vesting of Participants;
- 6 v. To determine entitlement to allocations of contributions and distributions
7 of Participants, former Participants, Beneficiaries, and all other persons;
- 8 vi. To make findings of fact as necessary to make any determinations and
9 decisions in the exercise of such discretionary power and authority;
- 10 vii. To appoint claims and review officials to conduct claims
11 procedures...;
- 12 viii. To compute, certify to and direct the Trustee with regard to the amount
13 and kind of benefits payable to Participants and their Beneficiaries;
- 14 ix. To authorize all disbursements by the Trustee from the Trust Fund;
- 15 x. To maintain all records that may be necessary for the administration of the
16 Plan other than those maintained by the Trustee;
- 17 xi. To delegate any power or duty to any firm or person engaged under
18 paragraph (i) or to any other person or persons; and
- 19 xii. To select or eliminate Investment Funds.”

20 34. The Safeway Plan’s assets are held under the Master Trust. All investments and
21 asset allocation are performed through the Master Trust.

22 **2. The Plan’s Investment Offerings**

23 35. Until on or about July 28, 2016, when the Plan changed its service provider from
24 Great-West Life & Annuity Insurance Company d/b/a Empower Retirement (“Empower”) to The
25 Vanguard Group, Inc. (“Vanguard”), at which time Defendants belatedly began to offer a menu
26 of investment options with expense ratios more appropriate in light of the assets in and size of
27 the Plan, Defendants offered investments in the Plan that had grossly excessive fees by any
28 objective standard (and paid correspondingly excessive fees to the Plan’s service provider,
 Empower, its predecessor-in-interest, J.P. Morgan Retirement Plan Services, LLC (“J.P.
 Morgan”), and Defendants, in the exercise of any modicum of reasonable due diligence, knew, or

1 should have known, about the excessive nature of these fees at all pertinent times. The menu of
2 investment options that the Plan began offering on July 28, 2016 has, in many instances, fees
3 associated with it that are 12.5% or less of the fees previously charged to Plan participants during
4 the pertinent period (meaning from July 14, 2010 and continuing). Defendants could have
5 achieved these enormous costs savings throughout the pertinent period, based upon a cursory
6 examination of the marketplace for defined contribution products but, clearly, either chose not to
7 look or, instead, to ignore the manner in which the Plan participants were having their retirement
8 savings slowly eroded en masse by excessive fees.

9 36. Until the Plan made the change to Vanguard, Defendants engaged in virtually no
10 significant consideration, examination or bench-marking of the costs associated with the Plan,
11 including any evaluation of total plan cost (“TPC”), which is discussed more fully below, and did
12 not engage in any detailed examination of whether there were better and/or less costly investment
13 options available to the Plan and its participants or if the Plan should offer a greater complement
14 of passively managed investments or a sufficient number of passively managed investments to
15 permit a participant to meaningfully pursue a passive management investment strategy, as
16 opposed to an active management investment strategy. Indeed, Defendants only considered a
17 handful of potential changes in the investment options offered to the Plan’s participants during
18 the pertinent period, and consistently chose not to replace poor performing and/or unnecessarily
19 expensive investment options with more prudent alternatives despite possessing specific
20 evidence and information that would have resulted in a prudent fiduciary replacing investment
21 options or, at a minimum, improving and expanding the scope of investment options available to
22 Plan participants.

23 37. At all pertinent times through July 27, 2016 (except as noted below), the Plan
24 offered the following investment options: mutual funds, separately managed accounts (“SMAs”),
25 Safeway common stock, common collective trusts (“Common Trusts”), and the Interest Income
26 Fund (distinct from the other Common Trusts).

1 38. Mutual funds are publicly-traded investment vehicles consisting of a pool of funds
2 collected from many investors for the purpose of investing in a portfolio of equities, bonds, and
3 other securities. Mutual funds are operated by professional investment advisers, who, like the
4 mutual funds, are registered with the Securities and Exchange Commission (“SEC”). Mutual
5 funds are subject to SEC regulation, and are required to provide certain investment and financial
6 disclosures and information in the form of a prospectus.

7 39. SMAs are investment portfolios that begin with the same allocation as that of their
8 mutual fund counterpart, but for which the professional investment adviser will make individual
9 investment decisions that may depart from that of the mutual fund. In essence, SMAs are mutual
10 funds customized for that investor. However, unlike mutual funds, SMAs do not issue registered
11 prospectuses and, as such, their fees and other disclosures are not as transparent.

12 40. The Safeway common stock investment option was eliminated from the Plan
13 effective January 30, 2015, and the stock was liquidated due to a merger with Albertsons
14 Companies Inc., another grocery company.

15 41. Common Trusts are, in essence, mutual funds without the SEC regulation.
16 Common Trusts fall under the regulatory purview of the Office of the Comptroller of the
17 Currency or individual state banking departments. Common Trusts were first organized under
18 state law in 1927, and were blamed for the market crash in 1929. As a result, Common Trusts
19 were severely restricted, giving rise to the more transparent and publicly-trade mutual funds.
20 Today, banks create Common Trusts only for their trust clients and for employee benefit plans
21 like the Plan. The main advantage of opting for a Common Trust, rather than a mutual fund, is
22 the negotiability of the fees, so larger retirement plans are able to leverage their size for lower
23 fees. Unfortunately, in light of the grossly excessive fees paid by the Plan at all pertinent times
24 relative to the fees that any reasonable or prudent fiduciary would have been willing to pay based
25 upon the available investments in the marketplace at the time, it is clear that the Plan never
26 leveraged its size to achieve lower or appropriate fees.

1 Inspector General, have criticized LSAs “as a major obstacle in providing audit protections for
2 plan participants.” For decades, the DOL Inspector General has sought repeal of the LSA
3 exemption in ERISA. See <http://www.oig.dol.gov/public/reports/oa/2012/09-12-002-12-121.pdf>.

4 47. When an auditor is engaged to perform a full-scope audit, everything in the plan is
5 subject to audit testing. However, when performing an LSA of the financial statements, the
6 auditor need not perform any auditing procedures with respect to investment information
7 prepared and certified by a qualified bank or similar institution, or by an insurance carrier. To be
8 qualified, a bank or insurance carrier must act as a trustee or custodian for the plan, be state or
9 federally chartered and be regulated, supervised and subject to periodic examination by a state or
10 federal agency. Additionally, the trustee or custodian must certify as to the accuracy and
11 completeness of the investment information.

12 48. LSAs are especially risky (and likely inappropriate) where the trustee is certifying
13 non-publicly traded investments, such as collective trusts and SMAs, which consist of the
14 majority of the assets in the Safeway Plan. And, it is worse still, where, as here, the trustee is
15 certifying the values of its own proprietary funds that are not publicly traded.

16 49. In short, as discussed below, virtually all investment balances and investment
17 information are unaudited. Defendants’ decision to permit the investments of the Plan to go
18 unaudited is inexplicable in light of the size of the Plan and the fact that the Plan previously was
19 audited. Defendants’ decision to utilize an LSA in connection with a Plan with almost \$2 billion
20 in assets is, at best, reckless, and raises a significant “red flag” with respect to the seriousness
21 with which Defendants approached their duties to the Plan.

22 **B. Defendants’ Breaches Of Fiduciary Duty**

23 50. Defendants have severely mismanaged the Plan in a myriad of ways detailed
24 below. Defendants’ failure to monitor the investments in the Plan to ensure that they provided
25 adequate available returns and were not excessively priced, as were the vast majority of the
26 investments in the Plan, constitutes breaches of fiduciary duty. Indeed, the Safeway Plan is an
27

1 enormously expensive plan in terms of total plan cost when compared to defined contribution
2 retirement plans of a similar size. Total plan cost (“TPC”) is “the combination of explicit and
3 implicit expenses that employers and employees pay for their defined contribution plan.” *See*
4 *Doing Your Homework: Understanding 401(k) Fees and Making Every Basis Point Count*
5 (Benefits Quarterly; Fourth Quarter 2010)(Hewitt Associates). In fact, at all pertinent times, the
6 Plan’s TPC has been 2-3 times more expensive than the average TPC for defined contribution
7 plans with assets of more than \$1 billion. Defendants knew, or should have known, through the
8 exercise of any modicum of reasonable diligence that the Plan was paying grossly excessive fees.
9 Based upon the Plan’s design, participants in the Plan pay virtually all of these excessive fees
10 and, as a result, achieve significantly lower retirement savings, since these excessive fees,
11 especially when compounded, have a devastating impact upon participant retirement savings.

12 51. As a reflection of the enormous overpayments that Defendants were permitting
13 the Plan to make to Empower (the successor to J.P. Morgan) in terms of TPC, an analysis
14 conducted in 2016 regarding a change from Empower to Vanguard (while keeping a number of
15 expensive and underperforming investment options still available within the Plan) demonstrated
16 that TPC could be reduced by 32.6% with the costs of the Plan reduced by over 33% and more
17 than \$2.5 million in savings per annum. Savings of this kind could have easily been obtained on
18 behalf of the Plan through the exercise of reasonable diligence by Defendants throughout the
19 pertinent period and thereby reduced the excessive participant fees [in the form of either direct
20 payments of up to \$65-\$67 per participant or revenue sharing payments (discussed more fully
21 below) that were being used indirectly in the place of such fees based upon estimates, as opposed
22 to dollar-for-dollar crediting] that were used to pay the expenses of the Plan.

23 52. At all pertinent times, Safeway and the Benefit Plans Committee were responsible
24 for selecting and monitoring the investments, while Aon was responsible for offering investment
25 advice to Safeway and the Benefit Plans Committee, as well as bench-marking and evaluating the
26 fees and expenses charged to the Plan and paid by the participants. Defendants breached their
27

1 fiduciary duties by imprudently failing to evaluate and monitor the fees charged directly and
2 indirectly to the Plan and its participants, and by failing to ensure that such fees were fair and
3 reasonable under all of the circumstances.

4 53. At all pertinent times, the Benefit Plans Committee, Safeway and Aon were
5 responsible for offering prudent and sound advice with respect to the investments offered to
6 participants of the Plan in the sole interest of the Plan participants, disclosing necessary
7 information such that the Plan participants could make informed decisions, and ensuring that the
8 fees and expenses charged with respect to these investments were fair and reasonable.
9 Defendants breached those fiduciary duties.

10 54. At all pertinent times, Defendants were legally responsible for monitoring the
11 advice and services provided by the Plan's service providers. In light of the apparent breaches of
12 fiduciary duty in terms of both poor investment options, blatantly excessive fees, and undisclosed
13 conflicts and fees, it is apparent that all Defendants breached those fiduciary duties.

14 55. As a participant in the Plan, Plaintiff directed that her contributions to the Plan be
15 allocated to certain investment options made available to her by Defendants, including the
16 Interest Income Fund, the PIMCO Bond Fund, the JPMCB SmartRetirement Passive Blend 2025
17 C-20 Fund, the Dodge & Cox Stock Fund, the Wells Fargo Advantage Large Cap Growth-Inst
18 Fund, the Emerald Growth-Inst. Fund, the RS Small Cap Value Portfolio Fund, the SSgA S&P
19 500 Indx-NL-A Fund, Safeway Co. Stock, and the American Funds EuroPacific Growth-R5
20 Fund. Plaintiff did not have knowledge of the costs and performance of the Plan's investments,
21 as compared to other available alternatives for similarly-sized defined contribution plans, or
22 information regarding other available share classes for the Plan's mutual fund or other
23 investments (including information about which share classes charged lower expense ratios),
24 information regarding the SMAs and Common Trusts (including whether these instruments had
25 layered fees that rendered their expense ratios illusory and/or understated), or information
26 regarding the actual/effective fees charged by the Interest Income Fund (including the spread
27

1 earned by the Interest Income Fund) until shortly before this lawsuit was filed. Plaintiff also did
2 not have knowledge of the acts or omissions of Defendants or the process (or lack thereof) by
3 which Defendants evaluated and chose available investment options for the Plan and monitored
4 the fees and expenses incurred by the Plan and its participants.

5 **1. Overwhelming Majority Of Unregistered Investment Options Lacking**
6 **Prospectuses**

7 56. As of December 31, 2014, the Plan's Common Trusts investment options were the
8 following so-called "target date" funds, as well as one "index" fund:

9 Retirement Income

- 10 i. JPMCB SmartRetirement Passive Blend Income-C20
11 ii. JPMCB SmartRetirement Passive Blend 2015-C20
12 iii. JPMCB SmartRetirement Passive Blend 2020-C20
13 iv. JPMCB SmartRetirement Passive Blend 2025-C20
14 v. JPMCB SmartRetirement Passive Blend 2030-C20
15 vi. JPMCB SmartRetirement Passive Blend 2035-C20
16 vii. JPMCB SmartRetirement Passive Blend 2045-C20
17 viii. JPMCB SmartRetirement Passive Blend 2050-C20

18 Stocks-Large Blend

- 19 ix. SSgA S&P 500 Index NL-A

20 57. As of December 31, 2014, the Plan's mutual fund investment options were the
21 following:

22 Stocks-Large Value

- 23 i. Dodge & Cox Stock (DODGX)

24 Stocks-Large Growth

- 25 ii. Wells Fargo Advantage Large Cap Growth-Inst (STNFX)

26 Stocks-Small Growth

- 27 iii. Emerald Growth-Inst (FGROX)

1 Foreign Large Growth

2 iv. American Funds EuroPacific Growth-R5

3 58. As of December 31, 2014, the Plan's SMA options were the following:

4 Bonds

5 i. PIMCO Bond Fund

6
7 Stocks-Small Growth

8 ii. RS Small Cap Value Portfolio

9 59. As indicated above, excluding Safeway common stock, nine of the 15 riskier
10 investment options were opaque Common Trust vehicles,² with two of the remaining six options
11 non-transparent SMAs.³ In all, only four of the 16 options were mutual funds. And, even
12 discounting the Retirement Income investment options (*i.e.*, the target date funds), half of the
13 remaining six stock or bond investment options were either SMAs or Common Trusts.
14 Moreover, the Retirement Income investment options (*i.e.*, the JPMCB SmartRetirement Passive
15 Common Trusts -- *i.e.*, the target date funds) are the default for the Plan, which pushes Plan
16 participants to place their retirement assets with these expensive, poor performing investment
17 vehicles.

18 60. The excessively priced and poorly performing investment options, which were
19 exceptionally limited in number and virtually lacking in the necessary complement of passively
20 managed mutual funds or other investments to make the Plan's investment portfolio
21 appropriately diversified based upon any reasoned fiduciary review, remained essentially

22
23 ²As discussed above, *supra* Section IV.A.2, Common Trusts are not required to file a
24 prospectus or registration statement with the SEC.

25 ³As discussed above, *supra* Section IV.A.2, an SMA, while identical to a mutual fund in
26 its initial disposition, varies its investment portfolio as time progresses. No prospectus or
27 registration statement is filed for the SMA, which means that there are no regular reports as to
the current allocation of the SMA's investment portfolio.

1 unchanged throughout the pertinent period. Beyond changing the available target date funds
2 between 2010 and 2011, changing the offering of one large cap fund during that same period and
3 making a few modest “share class” changes to reduce expense ratios modestly (which changes
4 achieved minimal savings, as compared to the savings available in the marketplace at the time,
5 based upon a reasoned review by any competent fiduciary), the investments in the Plan remained
6 virtually unchanged and continued to pay excessive fees for poor investments throughout the
7 pertinent period until the Plan switched from Empower to Vanguard this past summer after the
8 initial Complaint was filed. The modest changes by Defendants until this past summer are
9 damning in their very nature. Although the changes appear to indicate an awareness of the
10 critical need to examine fees in the marketplace, the minimal nature of the changes also reflects
11 that virtually no due diligence could have been performed regarding available investment options
12 and the fees that should be charged to retirement plans with the assets and purchasing power of
13 the Plan.

14 61. Defendants’ act in offering these opaque investment options and the Plan’s
15 concentration of investments in such options did not alone amount to any breach of fiduciary
16 duty. Rather, Defendants’ decisions to offer these opaque investment options, coupled with the
17 fact that they were expensive when compared to their mutual fund counterparts (when they are
18 supposed to be designed to be exactly the opposite) and poor performing when compared to their
19 benchmarks and other available investments, along with the fact that they failed to offer any
20 meaningful manner for a participant to diversify his or her investments and avoid the dubious
21 approach of investing in actively managed mutual funds that attempt (but regularly fail) to beat
22 the market, as discussed below, and were not accompanied by fulsome disclosures regarding
23 their investment objectives and other risk factors (discussed below), all coupled together resulted
24 in the breaches of fiduciary duty associated with these investment options.

25 2. The Absence of Available Passive Investment Options

26 62. In connection with a review of the Plan in March 2016 prior to the transition to
27

1 Vanguard, Aon specifically and essentially acknowledged that a traditional three tiered structure
2 of a well diversified defined contribution plan requires that the following investment alternatives
3 be offered: (a) a qualified default investment alternative (“QDIA”) typically in the form of a
4 target date fund for participants with a lack of interest, knowledge or time to create their own
5 diversified portfolio; (b) passive funds in the form of a low cost tier of index funds for
6 participants who wish to construct their own asset allocation without the added cost and risk of
7 active management; and (c) actively managed funds for participants who are comfortable making
8 their own asset allocation decisions and wish to employ an active management strategy. In
9 acknowledging this traditional three tiered structure, based upon Aon’s own 2013 study, *Trends*
10 *and Experience in Defined Contribution Plans*, Aon asserted that 66% of defined contribution
11 plans in the United States are structured this way, while falsely categorizing the Plan as a defined
12 contribution plan that had adopted this accepted three tiered approach. Since the Plan only
13 offered one passive investment option in the form of the underperforming and expensive, SSgA
14 S&P 500 Index NL-A, the Plan obviously did not offer participants an opportunity to engage in
15 asset allocation based upon choosing a low cost tier of index *funds* (meaning in the plural),
16 thereby confirming that, based upon Aon’s own analysis, the Plan was not appropriately
17 diversified and effectively deprived Plan participants of the opportunity to pursue a passive
18 investment strategy, despite the overwhelming evidence that such a strategy favors the vast
19 majority of participants in defined contribution plans, including the Plan itself. Jeff Brown, *Do*
20 *Actively Managed Funds Really Pay Off For Investors?* (April 14, 2016) (U.S. News & World
21 Report), [http://money.usnews.com/investing/articles/2016-04-14/do-actively-managed](http://money.usnews.com/investing/articles/2016-04-14/do-actively-managed-funds-really-pay-off-for-investors)
22 [-funds-really-pay-off-for-investors](http://money.usnews.com/investing/articles/2016-04-14/do-actively-managed-funds-really-pay-off-for-investors) (“A year-end study by S&P Dow Jones Indices found that
23 ‘over the 10-year investment horizon, 82.14 percent of large-cap managers, 87.61 percent of
24 mid-cap managers, and 88.42 percent of small-cap managers failed to outperform (their index
25 benchmarks) on a relative basis.’ Appeal for the human touch. But most investment dollars
26 remain in managed funds, so what is their appeal? Many observers say managed funds survive
27

1 through salesmanship. Because their higher fees produce bigger profits for fund companies, the
2 firms keep pitching them, these critics say”); Kwak, *Improving Retirement Savings Options For*
3 *Employees*, 15:2 U. Pa. J. Bus. Law. 483, 512-529 (2013)(explaining why the law of trust and
4 ERISA favors, at a minimum, a presumption in favor of offering index funds, as opposed to
5 actively managed funds).

6 63. During the pertinent period, although, on limited occasions, Defendants
7 referenced the possibility of adding passively managed funds to the compliment of investment
8 options available within the Plan and/or the possibility of replacing poorly performing actively
9 managed funds with passively managed funds, Defendants never engaged in any serious analysis
10 or deliberations with respect to the potential benefits or prudence of doing so. At a minimum,
11 Defendants’ failure and refusal to even consider providing participants with the opportunity to
12 invest their retirement savings in passively managed funds (a strategy acknowledged by the
13 Plan’s investment adviser as a traditional offering to defined contribution retirement plans in the
14 United States) was a breach of fiduciary duty.

15 64. Throughout the pertinent period, Defendants were aware of the potential benefits
16 of passive management, as opposed to active management, but engaged in no serious
17 deliberations about the wisdom of doing so and literally did nothing to provide Plan participants
18 with an opportunity to avoid actively managed funds and the expenses and risks associated with
19 them. During part of the pertinent period, Aon provided limited periodic reporting to Safeway
20 and the Benefit Plans Committee regarding the performance of actively managed funds, as
21 opposed to passively managed funds, in the form of a so-called “active management report card.”
22 This “report” however, only addressed comparative performance of actively managed funds vs.
23 passively managed funds in a cursory manner based on industry averages, as opposed to the
24 actual investments in the Plan, and provided such limited information in terms of longitudinal
25 performance (*i.e.*, for the previous quarter and year to date but with no metrics as to long-term
26 performance) so as to make the report meaningless, or even worse. In sum, Aon provided

1 Safeway and the Benefit Plans Committee with “snap shot” reporting of generalized data
2 regarding actively managed funds, as compared to passively managed funds, which had the effect
3 of creating ambiguity and misinformation regarding the performance of actively vs. passively
4 managed investments and thereby supported the active management investment strategy
5 explicitly and implicitly endorsed by Aon through its investment choices, while effectively
6 masking the truth about the long-term underperformance of virtually all actively managed
7 investments, when compared to passively managed investments, which is entirely consistent with
8 “efficient fund hypothesis” and to be expected based upon “efficient market hypothesis.”
9 www.forbes.com/sites/rickferri/2012/04/10/the-efficient-fund-hypothesis/#294e4e867ba1. Any
10 responsible and prudent investment adviser or fiduciary should have been familiar and
11 conversant with these principles and, at a minimum, should consider their impact in determining
12 a complement of diversified investment options to be offered to participants. Of course, since
13 the Plan is a retirement savings vehicle, long-term performance of available investments is one of
14 the most important factors to be considered on behalf of the Plan and by Defendants. Thus,
15 through its incomplete and misleading reporting, Aon encouraged an investment strategy that
16 failed to consider or offer an opportunity to participants to pursue a passive management
17 investments strategy through an appropriately diverse menu of investment options if a participant
18 chose to pursue such an investment strategy, which Aon itself has explicitly acknowledged is an
19 acceptable and reasoned manner in which Plan participants may (and perhaps should) elect to
20 invest their retirement savings.

21 65. Throughout the pertinent period, Defendants did not offer Plan participants an
22 appropriate complement of passively managed mutual funds to render the investment options
23 sufficiently diverse or reasonable. Instead, Defendants consistently offered Plan participants a
24 number of actively managed mutual funds or their equivalents in the form of Common Trusts or
25 SMAs (“active funds”), which attempt to beat the market by requiring investors to pay fees to
26 have an expert manage their investment funds (and for which higher fees are almost always

1 charged). However, research has consistently found that active funds rarely ever do better than
 2 their alternative, passively managed counterparts (“passive funds” or “index funds”).
 3 Passive funds attempt to imitate the performance of a market index, such as the S&P 500, by
 4 buying all the securities that make up the index. Therefore, passive funds should provide gross
 5 investment returns that are very close to those of the market segment tracked by the index with
 6 relatively low costs to the plan’s participants. Most existing literature comparing active funds to
 7 passive funds has found that active funds fail to achieve what they set out to do. According to
 8 certain studies, fund managers for active funds generally make inadequate selections of stocks
 9 and their market timing skills are not efficient enough to outperform the market return. In fact,
 10 studies consistently show that the raw return of active funds is lower than that of passive funds.
 11 *See also* [http://www.nytimes.com/2014/07/20/your-money/who-routinely-trounces](http://www.nytimes.com/2014/07/20/your-money/who-routinely-trounces-the-stock-market-try-2-out-of-2862-funds.html?)
 12 [-the-stock-market-try-2-out-of-2862-funds.html?](http://www.nytimes.com/2014/07/20/your-money/who-routinely-trounces-the-stock-market-try-2-out-of-2862-funds.html?) Indeed, in recent communications to Plan
 13 participants, Defendants have effectively conceded that the investment options that they
 14 previously offered to Plan participants before switching to Vanguard this summer were
 15 inappropriate and not sufficiently diverse.

16 66. The skewed investment option selection offered by Defendants throughout most
 17 of the pertinent period translated into the Master Trust’s allocation of Plan assets as well. For
 18 example, as of December 31, 2014, over *a third* of the Plan’s \$1.9 billion in assets were placed
 19 in the opaque Common Trusts and over **48%** were placed in Common Trusts or SMAs, not
 20 including the Common Trusts within the Interest Income Fund:

21	● Mutual Funds:	\$442.5 million
22	● SMAs:	\$284.7 million
23	● Safeway Common Stock:	\$195.6 million
24	● Common Trusts (outside of Interest Income Fund):	\$659.3 million
25	● Interest Income Fund:	\$417.7 million

26 67. And, of the Plan assets in the Common Trusts, \$244.8 million was placed in the
 27

1 default Retirement Income investment options (*i.e.*, the JPMCB SmartRetirement Passive
2 Common Trusts), which “target date” funds are very opaque, as discussed further below.

3 **3. Undisclosed Expenses, Fees, And Risks**

4 68. The Plan’s predisposition for unregistered and opaque investment options matches
5 the lack of full disclosure of information material to Plan participants, which is indicative of
6 Defendants’ approach to their fiduciary duties. When Empower succeeded to J.P. Morgan, the
7 revenue sharing disclosures changed from misleading to false, since they now asserted that
8 Empower or its affiliates received revenue sharing payments “for providing recordkeeping,
9 distribution and administrative services,” even though that statement is patently untrue, since
10 Empower provides the same exact services to all of its plan customers regardless of whether it
11 receives revenue sharing payments and the amount of revenue sharing payments bear no
12 relationship whatsoever to the value of the services rendered. In sum, the revenue sharing
13 disclosures provided by Defendants to Plan participants were, at best, meaningless and, at times,
14 entirely misleading in nature. It appears that, with the switch from Empower to Vanguard, a
15 significant amount of the mischief associated with revenue sharing payments has been eliminated
16 from the Plan, the excessive fees paid by the Plan to Empower during the pertinent period have
17 been reduced (if not eliminated), and all participants now pay comparatively transparent direct
18 fees.

19 69. ***Administrative Expenses And Expense Reimbursement.*** According to the 2013-
20 2014 Financials,⁴ for example, “[p]ayment for Plan administrative expenses is paid in part by the
21 investment funds based on revenue sharing agreements between the Plan and the investment
22 funds.” In the retirement plan industry, revenue share agreements are very rarely between the
23

24
25 ⁴References to the 2013-2014 Financials and the investment lineup as of December 31,
26 2014 for illustrative purposes. At all times during the pertinent period, Safeway’s disclosures
27 and other documents related to the Plan suffered from the same infirmities and lack of
28 transparency, while the investments offered within the Plan, at all pertinent times, were not
sufficiently diverse and were excessively priced by any objective measure.

1 plan and the investment funds. Instead, these agreements are almost always between the
2 recordkeeper and the investment funds, which is reflected by a later disclosure in the 2013-2014
3 Financials that the recordkeeper, “or one or more of its affiliates, may receive a fee from the
4 investment option provider for providing certain recordkeeping, distribution and administrative
5 services.” To the extent that the Plan received some credits during the pertinent period
6 associated with revenue sharing payments, it does not appear that, for a significant period of time
7 at issue, the Plan received full, dollar-for-dollar crediting as required by guidance from the DOL.
8 Moreover, the Plan never has engaged in any effort to rebalance revenue sharing payments to
9 engage in fee equalization for participants and, as a result, participants in expensive investments
10 that pay more in terms of revenue sharing payments indirectly subsidize those participants who
11 choose less expensive investment options that pay little or no revenue sharing payments. None
12 of the Defendants ever disclosed or recommended disclosure of this important and material
13 information regarding the manner in which the Plan effectively discriminates against one class of
14 participants in favor of another class of participants, and should result in participants choosing
15 investments in lower cost index funds if those facts are made available to them.

16 70. ***Exempt Party-In-Interest Transactions.*** According to the 2013-2014 Financials:

17 Certain Plan investments are managed or ***significantly influenced*** by J.P. Morgan
18 Chase Bank N.A., trustee of the Plan. As J.P. Morgan Retirement Plan Services
19 provides recordkeeping services to the Plan, these transactions qualify as party-in-
20 interest transactions until the third quarter 2014 acquisition of JP Morgan
Retirement Plan Services by Great West Financial® (see Note 1). Administrative
fees paid to J.P. Morgan Retirement Plan Services for recordkeeping were
\$759,556 in 2014 and \$1,144,220 in 2013.

21 (Emphasis added.)

22 71. While it is clear that the JPMCB SmartRetirement Passive Blend Common Trusts
23 are managed by J.P. Morgan Chase Bank N.A. (together, with J.P. Morgan, hereafter “JPMCB”),
24 the exact nature, extent, and identity of investment options “significantly influenced” by JPMCB
25 is unclear and, upon information and belief, the relationship and influence inappropriately
26 affected and compromised the Plan’s investment options. JPMCB has a notorious history of

1 engaging in unlawful product-steering practices to influence its customers to invest in its own
2 proprietary funds and, upon information and belief, JPMCB engaged in the same or similar
3 practices with respect to the Plan, and Defendants allowed those practices to occur without
4 addressing or remedying them.

5 72. ***JPMCB SmartRetirement Passive Common Trusts.*** Even though the JPMCB
6 SmartRetirement Passive Common Trusts are called “Passive,” these Common Trusts combine
7 both actively managed and indexed strategies, which is misleading to participants who prefer
8 passive management. The proper name should be “Passive/Active.”

9 73. Further, there does not appear to be any guideline specifying the percentage of
10 assets that will be passively managed, nor does there appear to be any guideline regarding the
11 percentage of assets in these funds of funds that will be invested in JPMCB-affiliated funds
12 versus funds maintained by unaffiliated banks and trust companies. However, the 12/31/15 Fact
13 Sheets, which are available online, disclose that, for example: the 2020 Common Trust was 45%
14 invested in Northern Trust Index funds and 55% apparently in JPMCB-affiliated funds; the 2030
15 Common Trust was 60% invested in Northern Trust Index funds and 40% in JPMCB-affiliated
16 funds; and the 2050 Common Trust was 72% invested in Northern Trust Index Funds and 28%
17 apparently invested in JPMCB-affiliated funds.

18 74. The exact expense ratios for these Common Trusts are also unclear. The gross
19 expense ratios of these Common Trusts (.47%-.50%) included in the Default Notice section of
20 the 2013-2014 Financials are noted, as the “funds’ total annual operating expense ratios, gross of
21 any fee waivers or expense reimbursements.” The Default Notice section also provides, in an
22 endnote, that the “JPMCB SmartRetirement Funds indirectly bears its proportionate share of the
23 operating expenses of any underlying funds in which it may invest (excluding management fees
24 and services fees) . . . “the Trustee of the JPMCB SmartRetirement Funds agrees to reimburse the
25 Fund for such fund operating expenses . . . [to the extent they] exceed 0.04%.” And, putting
26 aside the undisclosed or not necessarily determinable fees, the disclosed fees were grossly
27

1 excessive in light of the size and bargaining power of the Plan and the availability of a number of
2 less expensive and comparable investments.

3 75. According to public information available from JPMCB online:

4 When you select a SmartRetirement Passive Blend Fund, you're automatically
5 invested in more than 15 underlying funds across two asset classes - stocks and
6 bonds. By investing in the fund, a team of more than 100 investment
7 professionals at J.P. Morgan is responsible for shifting the allocation from stocks
8 to bonds as the fund approaches its target date. This way your fund automatically
9 changes to become more conservative as you approach your target retirement date.

10 <https://www.jpmorgansmartretirement.com/passiveblend/SR2030>. However, JPMCB then goes
11 on to warn that, "the gross expense ratio of the fund includes the *estimated* fees and expenses of
12 the underlying funds. *There may be additional fees associated with investing in a Fund of Funds*
13 *strategy.*" *Id.* (Emphasis added.)

14 76. These "additional fees" associated with a fund of funds, especially with one
15 managed by JPMCB, may be significant. Without a prospectus or a complete audit, the actual,
16 rather than estimated, total expense ratio is unavailable. Thus, it is impossible to determine the
17 true nature of the fees and expenses, while the disclosed fees are grossly excessive on their face.

18 77. **Concentration Of Risk.** The Plan's financial statements for the year ended
19 December 31, 2014 disclosed a "Concentration of Risk," wherein the Master Trust's investments
20 included a mutual fund with a year-end fair value of \$157.3 million, of which the Master Trust
21 held a 65.2% beneficial ownership of the outstanding institutional shares. The identity of this
22 mutual fund is, however, undisclosed and indiscernible based on the information provided in the
23 financial statements. As a result, it is impossible to determine if inclusion of that mutual fund
24 unbalances the risk allocation of the Plan's investment options as a whole, and participants were
25 not fully informed of that investment option's risk, thereby placing the diversification of the
26 Plan's investment options and available investment options at risk. Since Plan participants did
27 not receive adequate or necessary information regarding this concentration of risk within the
28 Plan, they could not have made informed decisions about their investments in the Plan.

1 lower than the Barclays Capital U.S. Aggregate Bond Index (BarCap US Agg Bond) benchmark
2 of 2.02% for the same period. During the same period, the PIMCO Bond Fund charged an
3 expense ratio of 46 basis points (0.46%), while the expense ratio for Admiral Shares of the
4 Vanguard Total Bond Market Index Fund, which tracks the BarCap US Agg Bond, was 7 basis
5 points (.07%). In other words, despite its underperformance, the PIMCO Bond Fund charged 39
6 basis points (0.39%), or *six times more* than its peer, the Vanguard Total Bond Market Index
7 Fund. All of this information was known and/or available to Defendants each and every year
8 during the pertinent period when they maintained this costly and unreasonable investment option
9 in the Plan.

10 81. ***The JPMCB SmartRetirement Passive Blend Common Trusts.*** Of the eight
11 JPMCB SmartRetirement Passive Blend Common Trusts presented to Plan participants, only one
12 – the JPMCB SmartRetirement Passive Blend Income – has outperformed its benchmark since
13 inception. Meanwhile, their expense ratios range from 47 basis points (.47%) to 50 basis points
14 (.50%), which is significantly higher than their Vanguard counterparts that had an average
15 expense ratio of 17 basis points (.17%) as of December 31, 2014. Indeed, the expense ratios of
16 the Blackrock index fund investment options that replaced the JPMCB SmartRetirement Passive
17 Blend Common Trusts (*i.e.*, the target date funds) when the Plan moved from Empower to
18 Vanguard earlier this year, have expense ratios of 5.6 basis points -- over 87.5% less expensive.
19 All of this information was known and/or available to Defendants each and every year during the
20 pertinent period when they maintained these costly and unreasonable investment options in the
21 Plan.

22 82. Moreover, the Plan's share class for the JPMCB SmartRetirement Passive Blend
23 Common Trusts was not even the least expensive share class available. The Plan offered the C20
24 share class, which, as of March 31, 2016, had an expense ratio of either 45 or 46 basis points
25 (.45% or .46%). This is significantly higher than the other two classes: the CF share class
26 charged either 25 or 26 basis points (.25% or .26%), while the CF10 class charged either 35 or 36
27

1 basis points (.35% or .36%). In other words, on top of the fact that the JPMCB SmartRetirement
2 Passive Blend Common Trusts are objectively overpriced, Defendants did not even secure the
3 least expensive share class available, despite the Safeway Plan's size (making the least expensive
4 share class easily available) and the investment options' role as the default investment. There
5 can be no excuse for this apparent breach of fiduciary duty and, again, all of this information was
6 known and/or available to Defendants each and every year during the pertinent period when they
7 maintained these costly and unreasonable investment options in the Plan.

8 83. ***The Dodge & Cox Stock Mutual Fund (DODGX)***. Despite an expense ratio of
9 52 basis points (.52%), as of December 31, 2014, this mutual fund only outperformed the S&P
10 500 in the three- and five-year benchmark. Moreover, the .13% differential between the five-
11 year bench mark – 15.57% return as opposed to the S&P 500's 15.46% return – is mooted by the
12 expense ratio, which would make the actual 15.05% return on this mutual fund lower than the
13 S&P 500's return. Meanwhile, the expense ratios of comparable Vanguard mutual funds are
14 much lower, ranging from 16 basis points (.16%) (Vanguard High Dividend Yield Index Fund
15 Investor Shares), 17 basis points (.17%) (Vanguard Equity Income Fund Admiral Shares), 26
16 basis points (.26%) (Vanguard U.S. Value Fund and Vanguard Windsor II Fund Admiral Shares),
17 to 29 basis points (.29%) (Vanguard Windsor Fund Admiral Shares). All of this information was
18 known and/or available to Defendants each and every year during the pertinent period when they
19 maintained this costly and unreasonable investment option in the Plan.

20 84. ***The SSgA S&P 500 Index NL-A Common Trust***. This Common Trust was the
21 only index option available to the Plan until the switch to Vanguard was made -- yet it still
22 somehow underperformed the S&P 500 for every benchmark year, with a dramatic 87 basis
23 points (.87%) for the 10-year/inception benchmark. Meanwhile, its expense ratio of 16 basis
24 points (.16%), is more than three times more than that of the 5 basis points (.05%) expense ratio
25 for Vanguard 500 Index Fund Admiral Shares, which more closely tracks the S&P 500. All of
26 this information was known and/or available to Defendants each and every year during the
27

1 pertinent period when they maintained this costly and unreasonable investment option in the
2 Plan.

3 85. Moreover, the Common Trust's mutual fund counterpart, SsgA S&P 500 Index
4 Fund, tracked the S&P 500 more closely than the Common Trust while levying an expense ratio
5 of 15 basis points (.15%), which is lower than that of the Common Trust. These facts suggest
6 either (a) the performance quoted to the Plan's participants in the 2013-2014 Financials is wrong;
7 (b) an additional fee has been imposed on the Common Trust, which reduced the past net
8 performance; or (c) the Common Trust was mismanaged. All of this information was known
9 and/or available to Defendants each and every year during the pertinent period when they
10 maintained this costly and unreasonable investment option in the Plan.

11 86. *Wells Fargo Advantage Large Cap Growth-Inst Mutual Fund (STNFX)*. This
12 mutual fund underperformed every period compared to its benchmark. Meanwhile, with an
13 expense ratio of 79 basis points (.79%), this mutual fund charged approximately 70 basis points
14 (.70%) more than its Vanguard counterpart, the Vanguard Growth Index Fund Admiral Shares,
15 which had an expense ratio of 9 basis points (.09%) for that same period. All of this information
16 was known and/or available to Defendants each and every year during the pertinent period when
17 they maintained this costly and unreasonable investment option in the Plan.

18 87. *RS Small Cap Value Portfolio SMA*. This SMA significantly underperformed
19 compared to its benchmark, having a -2.29% return, while the Russell 2000 Value benchmark
20 had a return of 4.44%. Meanwhile, with an expense ratio of 89 basis points (.89%), this SMA
21 charged approximately 80 basis points (.80%) more than its Vanguard counterpart, the Vanguard
22 Small Cap Value Index Fund Admiral Shares, which had an expense ratio of 9 basis points
23 (.09%) for that same period. All of this information was known and/or available to Defendants
24 each and every year during the pertinent period when they maintained this costly and
25 unreasonable investment option in the Plan.

26 5. JPMCB's Conflicted Roles

1 JPMCB and, for the most part, recommended that the other Defendants do little or nothing to
2 improve the investments offered by the Plan and the expenses paid by the Plan and its
3 participants. As noted above, Aon also implicitly endorsed an active management investment
4 philosophy, while offering no information to Safeway and the Benefits Plan Committee regarding
5 the potential wisdom of passive management with respect to investments and the prudence of
6 offering low-cost, passively managed investments so that participants had such investment
7 alternatives available to them.

8 93. Despite its fiduciary duties, like the other Defendants, Aon also engaged in
9 virtually no meaningful benchmarking or other studies during the pertinent period to evaluate
10 whether the fees and expenses paid by the Plan were fair and reasonable and whether there were
11 better service providers or investment options available to the Plan. Indeed, Aon essentially took
12 no meaningful or comprehensive actions until it learned that the Plan was likely moving from
13 Empower to Vanguard in 2016. The failure of Aon and the other Defendants to evaluate the fees
14 and expenses of the available investment options throughout the pertinent period was a breach of
15 fiduciary duty.

16 94. In light of the advice provided by Aon and the lack of meaningful fiduciary
17 services provided by Aon, the fees charged by Aon to the Plan (and which the other Defendants
18 permitted to be paid to Aon) were rendered excessive and unreasonable.

19 **V. ERISA'S FIDUCIARY STANDARDS**

20 95. ERISA imposes strict fiduciary duties of loyalty and prudence upon the
21 Defendants as fiduciaries of the Plan. 29 U.S.C. §1104(a), states, in relevant part, as follows:

22 [A] fiduciary shall discharge his duties with respect to a plan solely
23 in the interest of the participants and beneficiaries and -

24 (A) for the exclusive purpose of

- 25 (i) providing benefits to participants and their beneficiaries;
26 and
27 (ii) defraying reasonable expenses of administering the plan;

[and]

1 (B) with the care, skill, prudence, and diligence under the circumstances
2 then prevailing that a prudent man acting in a like capacity and
3 familiar with such matters would use in the conduct of an enterprise
4 of like character and with like aims.

5 96. Under 29 U.S.C. 1103(c)(1), with certain exceptions not relevant here,
6 the assets of a plan shall never inure to the benefit of any employer and
7 shall be held for the exclusive purposes of providing benefits to participants
8 in the plan and their beneficiaries and defraying reasonable expenses of
9 administering the plan.

10 97. Under ERISA, fiduciaries that exercise any authority or control over plan assets,
11 including the selection of plan investments and service providers, must act prudently and solely
12 in the interest of participants in a plan.

13 98. ERISA's fiduciary duties are "the highest known to the law" and must be
14 performed "with an eye single" to the interests of participants.

15 99. ERISA also imposes explicit co-fiduciary liabilities on plan fiduciaries. 29 U.S.C.
16 §1105(a) provides a cause of action against a fiduciary for knowingly participating in a breach by
17 another fiduciary and knowingly failing to cure any breach of duty. ERISA states, in relevant
18 part, as follows:

19 In addition to any liability which he may have under any other provision
20 of this part, a fiduciary with respect to a plan shall be liable for a breach
21 of fiduciary responsibility of another fiduciary with respect to the same
22 plan in the following circumstances:

- 23 (1) if he participates knowingly in, or knowingly undertakes
24 to conceal, an act or omission of such other fiduciary,
25 knowing such act or omission is a breach; or
- 26 (2) if, by his failure to comply with section 404(a)(1) in the
27 administration of his specific responsibilities which give
28 risk to his status as a fiduciary, he has enabled such other
fiduciary to commit a breach; or
- (3) if he has knowledge of a breach by such other fiduciary,
unless he makes reasonable efforts under the circumstances
to remedy the breach.

100. 29 U.S.C. §1132(a)(2) authorizes a plan participant to bring a civil action to
enforce a breaching fiduciary's liability to the plan under 29 U.S.C. §1109. Section 1109(a)

1 provides, in relevant part:

2 Any person who is a fiduciary with respect to a plan who breaches any of the
3 responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter
4 shall be personally liable to make good to such plan any losses to the plan
5 resulting from each such breach, and to restore to such plan any profits of such
6 fiduciary which have been made through use of assets of the plan by the fiduciary,
7 and shall be subject to such other equitable or remedial relief as the court may
8 deem appropriate, including removal of such fiduciary.

9 101. 29 U.S.C. §1132(a)(2) authorizes any participant or beneficiary of the Plan to
10 bring an action individually, on behalf of the Plan, to enforce a breaching fiduciary's liability to
11 the Plan under 29 U.S.C. § 1109(a).

12 VI. CLASS ACTION ALLEGATIONS

13 102. This action is brought as a class action by Plaintiff on behalf of herself, proposed
14 Class Representative Lorenz, and the following proposed class ("Class")

15 Class

16 All current and former participants and beneficiaries of the Safeway
17 401(k) Plan at any time on or after July 14, 2010 through and
18 including July 28, 2016 ("Class Period"), including any Beneficiary
19 of a deceased person who was a Participant in the Plan at any time
20 during the Class Period, and any Alternate Payees, in the case of a
21 person subject to a Qualified Domestic Relations Order who was a
22 Participant in the Plan at any time during the Class Period.

23 Excluded from the Class are Defendants and the Judge(s) to whom this case is assigned or any
24 other judicial officer having responsibility for this case who is a beneficiary.

25 103. This action may be maintained as a class action pursuant to Rule 23 of the Federal
26 Rules of Civil Procedure.

27 104. **Numerosity**. Plaintiff and Lorenz are informed and believe that there are at least
28 thousands of Class members throughout the United States. As a result, the members of the Class
are so numerous that their individual joinder in this action is impracticable.

105. **Commonality**. There are numerous questions of fact and/or law that are common
to Plaintiff and Lorenz, and all the members of the Class, including, but not limited to the
following:

- 1 (a) whether Defendants failed and continue to fail to discharge their duties
2 with respect to the Plan solely in the interest of the Plan's participants for
3 the exclusive purpose of providing benefits to participants and their
4 beneficiaries;
- 5 (b) whether Defendants breached their fiduciary duties under ERISA by
6 failing to defray the reasonable expenses of administering the Plans; and
- 7 (c) whether and what form of relief should be afforded to Plaintiff, Lorenz,
8 and the Class.

9 106. **Typicality.** Plaintiff, and Lorenz, who are members of the Class, have claims
10 that are typical of all of the members of the Class. Plaintiff's claims and Lorenz's claims and all
11 of the Class members' claims arise out of the same uniform course of conduct by Defendants and
12 arise under the same legal theories that are applicable as to all other members of the Class.

13 107. **Adequacy of Representation.** Plaintiff and Lorenz will fairly and adequately
14 represent the interests of the members of the Class. Plaintiff and Lorenz have no conflicts of
15 interest with or interests that are any different from other members of the Class. Plaintiff and
16 Lorenz have retained competent counsel experienced in class action and other complex litigation,
17 including class actions under ERISA.

18 108. **Predominance.** Common questions of law and fact predominate over questions
19 affecting only individual Class members, and the Court, as well as the Parties, will spend the vast
20 majority of their time working to resolve these common issues. Indeed, virtually the only
21 individual issues of significance will be the exact amount of damages recovered by each Class
22 member, the calculation of which will ultimately be a ministerial function and which does not bar
23 certification.

24 109. **Superiority.** A class action is superior to all other feasible alternatives for the
25 resolution of this matter. The vast majority, if not all, of the Class members are unaware of
26 Defendants' breaches of fiduciary duty and prohibited transactions such that they will never bring
27

1 suit individually. Furthermore, even if they were aware of the claims they have against
2 Defendants, the claims of virtually all Class members would be too small to economically justify
3 individual litigation. Finally, individual litigation of multiple cases would be highly inefficient, a
4 gross waste of the resources of the courts and of the parties, and potentially could lead to
5 inconsistent results that would be contrary to the interests of justice.

6 110. **Manageability**. This case is well-suited for treatment as a class action and easily
7 can be managed as a class action since evidence of both liability and damages can be adduced,
8 and proof of liability and damages can be presented, on a Class-wide basis, while the allocation
9 and distribution of damages to Class members would be essentially a ministerial function.

10 111. Prosecuting separate actions would create a risk of adjudications with respect to
11 individual class members that, as a practical matter, would be dispositive of the interests of the
12 other members not parties to the individual adjudications or would substantially impair or
13 impede their ability to protect their interests, because this action involves Defendants' plan-wide
14 conduct. Defendants have acted on grounds generally applicable to the Class by uniformly
15 subjecting them to breaches of fiduciary duty described above. Accordingly, injunctive relief, as
16 well as legal and/or equitable monetary relief (such as disgorgement and/or restitution, along
17 with corresponding declaratory relief, are appropriate with respect to the Class as a whole.

18 **COUNT I**
19 **(For Breach Of Fiduciary Duty)**

20 112. Plaintiff incorporates the allegations in the previous paragraphs of this Complaint
21 as if fully set forth herein.

22 113. Defendants' conduct, as set forth above, violates their fiduciary duties under
23 ERISA § 404(a)(1)(A) and (B), 29 U.S.C. § 1104(a)(1)(A),(B) and (C), in that Defendants failed
24 and continue to fail to discharge their duties with respect to the Plan solely in the interest of the
25 Plan's participants and beneficiaries and (a) for the exclusive purpose of (i) providing benefits to
26 participants and their beneficiaries; and (ii) defraying reasonable expenses of administering the
27 Plan with (b) the care, skill, prudence, and diligence under the circumstances then prevailing that

1 a prudent man acting in a like capacity and familiar with such matters would use in the conduct
2 of an enterprise of a like character and with like aims, and (c) by failing to act in accordance with
3 the documents and instruments governing the Plan. In addition, as set forth above, Defendants
4 violated their respective fiduciary duties under ERISA to monitor other fiduciaries of the Plan in
5 the performance of their duties.

6 114. As a direct result of Defendants' breaches of duties, Plaintiff, Lorenz and the Plan
7 have suffered losses and damages.

8 115. Pursuant to ERISA § 409, 29 U.S.C. § 1109, and ERISA § 502, Defendants are
9 liable to restore to the Plan the losses that have been suffered as a direct result of Defendants'
10 breaches of fiduciary duty and are liable for damages and any other available equitable or
11 remedial relief, including prospective injunctive and declaratory relief, and attorneys' fees, costs
12 and other recoverable expenses of litigation.

13 **COUNT II**
14 **(In The Alternative, Liability For Knowing Breach Of Trust)**

15 116. Plaintiff incorporates the allegations in the previous paragraphs of this Complaint
16 as if fully set forth herein.

17 117. In the alternative, to the extent that any of the Defendants are not deemed a
18 fiduciary or co-fiduciary under ERISA, each such Defendant should be enjoined or otherwise
19 subject to equitable relief as a non-fiduciary from further participating in a breach of trust.

20 118. To the extent any of the Defendants are not deemed to be fiduciaries and/or are
21 not deemed to be acting as fiduciaries for any and all applicable purposes, any such Defendants
22 are liable for the conduct at issue here, since all Defendants possessed the requisite knowledge
23 and information to avoid the fiduciary breaches at issue here and knowingly participated in
24 breaches of fiduciary duty by permitting the Plan to offer a menu of poor and expensive
25 investment options that cannot be justified in light of the size of the Plan and the other expenses
26 of the Plan.

27 WHEREFORE, Plaintiff, and Lorenz, on behalf of themselves, the Plan, and all other

1 Plan participants demand judgment against Defendants, for the following relief:

2 (a) Declaratory and injunctive relief pursuant to ERISA § 502, 29 U.S.C. § 1132, as
3 detailed above;

4 (b) Equitable, legal or remedial relief to return all losses to the Plan and/or for
5 restitution and/or damages as set forth above, plus all other equitable or remedial relief as the
6 Court may deem appropriate pursuant to ERISA §§ 409 and 502, 29 U.S.C. §§ 1109 and 1132;

7 (c) Pre-judgment and post-judgment interest at the maximum permissible rates,
8 whether at law or in equity;

9 (d) Attorneys' fees, costs and other recoverable expenses of litigation; and

10 (e) Such further and additional relief to which Plaintiff, Lorenz, and the Plan may be
11 justly entitled and the Court deems appropriate and just under all of the circumstances.

12 **NOTICE PURSUANT TO ERISA § 502(h)**

13 To ensure compliance with the requirements of ERISA § 502(h), 29 U.S.C. § 1132(h), the
14 undersigned hereby affirms that, on this date, a true and correct copy of this Second Amended
15 Complaint was served upon the Secretary of Labor and the Secretary of the Treasury by certified
16 mail, return receipt requested.

17 Dated: September 13, 2019

Respectfully submitted,

18 SHEPHERD, FINKELMAN, MILLER
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***Attorneys for Plaintiff, the Plan,
and the Class***

CERTIFICATE OF SERVICE

I hereby certify that on September 13, 2019, I electronically filed the foregoing Second Amended Complaint with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all counsel of record.

s/ Kolin C. Tang
Kolin C. Tang

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