

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT**

RIGOBERTO SANDOVAL,	:	Civil Action
individually and as a representative of a class of	:	No. 3:17-cv-1573 (DJS)
similarly situated plan participants and	:	
beneficiaries, on behalf of the	:	
EXELA 401(k) PLAN,	:	SECOND AMENDED
the successor-in-interest of the	:	COMPLAINT
NOVITEX ENTERPRISE SOLUTIONS	:	
RETIREMENT SAVINGS PLAN,	:	
	:	
Plaintiff,	:	
	:	
vs.	:	
	:	JURY TRIAL REQUESTED
EXELA ENTERPRISE SOLUTIONS, INC.,	:	
NOVITEX ENTERPRISE SOLUTIONS	:	
EMPLOYEE BENEFITS COMMITTEE	:	
and DOES NO. 1-10, Whose Names Are	:	
Currently Unknown,	:	
	:	
Defendants.	:	May 1, 2020

Plaintiff, Rigoberto Sandoval (“Plaintiff”), by and through his undersigned counsel, in support of this Second Amended Complaint (“Complaint”), which is hereby filed pursuant to Federal Rule of Civil Procedure 15(a)(2) with the written consent of Defendants (defined below), hereby pleads and avers as follows:

I. INTRODUCTION

1. Plaintiff, individually and as a representative of a class of similarly situated plan participants and beneficiaries, on behalf of the Exela 401(k) Plan (or the “Exela Plan”), the successor-in-interest of the Novitex Enterprise Solutions Retirement Savings Plan (the “Novitex Plan”), brings this action under 29 U.S.C. § 1132 against Defendants, Exela Enterprise Solutions,

Inc. (“Exela”),¹ Novitex Enterprise Solutions Employee Benefits Committee (“Benefits Committee”), and Does No. 1-10, who are members of the Benefits Committee and whose names are currently unknown (collectively, “Defendants”), for breaches of fiduciary duty and other violations of the Employee Retirement Income Security Act (“ERISA”), 29 U.S.C. § 1001, *et seq.*

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

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

4. The Novitex Plan was a significant and large 401(k) plan in terms of assets, with more than \$154 million in assets as of December 31, 2016 (down from \$172 million at the beginning of 2015) and nearly 9,000 participants. The marketplace for 401(k) retirement plan services is well established and can be competitive when fiduciaries of defined contribution

¹In 2018, Novitex Enterprise Solutions, Inc. became Exela Enterprise Solutions, Inc. and will be referred to as Exela throughout the Second Amended Complaint. The Novitex Plan was terminated at the end of 2018, with its assets merged with the SourceHOV 401(k) Plan, which was subsequently renamed the Exela Plan. As a result of the merger, Plaintiff became a participant of the Exela Plan, which is the successor-in-interest of the Novitex Plan .

retirement plans act in an informed and prudent fashion. Large defined contribution plans, like the Novitex Plan, have significant bargaining power and the ability to demand low-cost administrative and investment management services within the marketplace for administration of 401(k) plans and the investment of 401(k) assets. As fiduciaries to the Novitex Plan, Defendants were obligated to act for the exclusive benefit of participants, invest the assets of the Novitex Plan in a prudent fashion, and ensure that the Novitex Plan's expenses are fair and reasonable. At all pertinent times, as explained below, Defendants: (a) were fiduciaries under ERISA; (b) breached their fiduciary duties under ERISA by failing to select and retain the least expensive share classes for certain Novitex Plan investment options; and (c) breached their fiduciary duties under ERISA by allowing unreasonable expenses to be charged to participants for administration of the Novitex Plan.

5. To remedy these fiduciary breaches and other violations of ERISA, Plaintiff, individually and as a representative of a class of similarly situated plan participants and beneficiaries, on behalf of the Exela Plan, the Novitex Plan's successor-in-interest, brings this action under Section 502, 29 U.S.C. §1132, and Section 409 of ERISA, 29 U.S.C. §1109, to recover and obtain all losses resulting from each breach of fiduciary duty. In addition, Plaintiff seeks such other equitable or remedial relief as the Court may deem appropriate and just under all of the circumstances.

6. Plaintiff specifically brings this action under ERISA §§ 409 and 502, 29 U.S.C. §§ 1109 and 1132, to recover the following relief:

- ! A declaratory judgment holding that the acts of Defendants described herein violate ERISA and applicable law;

- ! Equitable, legal or remedial relief for all losses and/or compensatory damages;
- ! Attorneys' fees, costs and other recoverable expenses of litigation; and
- ! Such other and additional legal or equitable relief that the Court deems appropriate and just under all of the circumstances.

II. THE PARTIES

7. Plaintiff was a participant under 29 U.S.C. §1002(7) of the Novitex Plan, which was a defined contribution, individual account, employee pension benefit plan under 29 U.S.C. §1002(2)(A) and §1002(34), until it was terminated and its assets merged with the SourceHOV 401(k) Plan at the end of 2018 to form the Exela Plan, of which Plaintiff became a participant as a result. Plaintiff is a resident of Canoga Park, Los Angeles County, California. The Novitex Plan was established and maintained under a written document in accordance with 29 U.S.C. §1102 and served as a vehicle for retirement savings and to produce retirement income for Exela employees. Retirement income generated by the Novitex Plan depends upon contributions made on behalf of each employee by Exela, deferrals of employee compensation and employer matching contributions, and from the performance of the Novitex Plan's investment options (net of fees and expenses).

8. Defendant, Exela, formerly known as Novitex Enterprise Solutions, Inc., as well as Pitney Bowes Management Services, is a corporation organized and existing under the laws of Delaware, with its principal place of business at 300 First Stamford Place, 2nd Floor West, Stamford, Fairfield County, Connecticut. Exela was the Plan sponsor, Plan Administrator, a designated fiduciary of the Novitex Plan, and a fiduciary under ERISA pursuant to 29 U.S.C. §§ 1002, 1102.

9. Defendant, the Benefits Committee, was a named fiduciary under the Novitex Plan, administered the Novitex Plan, and was a fiduciary under ERISA pursuant to 29 U.S.C. §§ 1002, 1102. The Benefits Committee maintained its address at Exela's headquarters in Stamford, Fairfield County, Connecticut, and the Benefits Committee and its members were appointed by Exela to administer the Novitex Plan on Exela's behalf.

10. Defendants, Does Nos. 1-10, were the members of the Benefits Committee and, by virtue of their membership, were fiduciaries of the Novitex Plan. Plaintiff is currently unable to determine the membership of the Benefits Committee despite reasonable and diligent efforts because it appears that the membership of the Benefits Committee during the relevant period is not provided to the public. Although Plaintiff has requested information in discovery that would have revealed the identity of the members of the Benefits Committee and Defendants committed at one point in time to producing such information, to date, Defendants have failed and effectively refused to produce information or documents that would disclose the identity of the Benefits Committee members or the nature of their deliberations (or lack thereof). As such, these defendants are named Does 1-10 as placeholders. Plaintiff will move, pursuant to Rule 15(a)(2) of the Federal Rules of Civil Procedure, to amend this Complaint to name the members of the Benefits Committee as defendants once their identities are revealed.

III. JURISDICTION AND VENUE

11. Plaintiff seeks relief, individually and as a representative of a class of similarly situated plan participants and beneficiaries, on behalf of the Exela Plan as the successor-in-interest to the Novitex Plan, pursuant to ERISA's civil enforcement remedies with respect to fiduciaries and other interested parties and, specifically, under ERISA Section 409, 29 U.S.C. §

1109 and 29 U.S.C. § 1132.

12. This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331 and ERISA Section 502(e), 29 U.S.C. § 1132(e).

13. Venue is proper in this judicial district pursuant to ERISA Section 502(e), 29 U.S.C. § 1132(e) and 28 U.S.C. § 1391, because Defendants reside and/or conduct significant business activity in this judicial district.

IV. FACTUAL ALLEGATIONS

A. Background

1. The Novitex Plan Management Structure

14. The Novitex Plan was a participant-directed plan in which participants direct their retirement assets into a pre-selected menu of investment offerings consisting of mutual funds and a stable-value fund.

15. Pursuant to the Novitex Plan, which was established “to provide retirement income benefits” to employees, Exela, as the named and designated Novitex Plan administrator and fiduciary, appointed the Benefits Committee as the “governing body” authorized to administer the Novitex Plan. The Novitex Plan document gives the Benefits Committee and Exela the “sole discretion [to] determine and select the Funding Agent(s) and . . . the number and type of Investment Funds to be offered under a Funding Arrangement.”² In addition, the Benefits Committee and Exela “may, in [their] sole discretion, change the Novitex Plan’s Investment

²The Novitex Plan document defines “Funding Agent” as “any person or entity, including without limitation a mutual fund investment company, insurance company, bank or trust company . . . that offers one or more Investment Funds through a Funding Arrangement under the [Novitex] Plan.”

Funds from time to time with respect to future periods,” and “may in [their] sole discretion determine which Participants’ Accounts are eligible to invest in any Investment Fund.”

16. In addition, the Benefits Committee and Exela “[m]ay delegate any and all of his or her powers and duties hereunder to another person, persons, or entity including, without limitation, the Novitex Plan’s attorney, accountant, actuary, or any other person needed to administer the [Novitex] Plan.”

17. Indeed, Exela and the Benefits Committee “have full power and authority to interpret the provisions of the Plan, to adopt rules and regulations for the administration of the [Novitex] Plan, and to interpret, alter, amend, or revoke any rules and regulations so adopted.”

18. The Benefits Committee included a subsidiary “Investment Committee” which was responsible for, among other things, (a) establishing and maintaining an investment policy (the “Plan Investment Policy”), (b) selecting the Novitex Plan investment options, (c) determining the default investment option for assets in the Novitex Plan that are without specific investment direction, (d) periodically evaluating the performance of the Novitex Plan’s investment options and implementing changes when deemed necessary under the guidelines of the Novitex Plan’s investment policy, (e) monitoring the Novitex Plan’s investment, recordkeeping, and administrative expenses to ensure that they are reasonable, and (f) making changes where they are deemed necessary or desirable.

19. Exela and the Benefits Committee, as the Novitex Plan sponsor and Administrators, retained UBS as the Novitex Plan’s fiduciary investment advisor. As the investment advisor, UBS was charged with (a) helping the Investment Committee adhere to a disciplined and rigorous oversight of the investment process, (b) producing and coordinating

regular investment results and other reports on a regular basis for the Investment Committee, (c) assisting the Investment Committee in developing a Plan Investment Policy Statement and applying its guidelines in all investment decisions and updating the policy statement when warranted, (d) advising the Committee of new Novitex Plan design options, (e) assisting the Committee in reviewing Novitex Plan pricing options every three to five years, and (f) assisting with participant investment education and communication.

20. In addition, Exela and the Benefits Committee, as the Novitex Plan sponsor and Administrators, retained Transamerica Retirement Solutions Corporation (“Transamerica”) as the Novitex Plan Recordkeeper. As the Novitex Plan Recordkeeper, Transamerica was charged with providing recordkeeping and administrative services for the Novitex Plan to its participants and beneficiaries, including (a) maintaining and updating individual account balances, (b) maintaining information regarding Novitex Plan contributions, withdrawals, and distributions, (c) processing participant instructions, (d) providing participants with quarterly statements, (e) providing participants with sufficient information intended to allow them to make informed investment decisions, (f) reporting investment results on a regular basis, and (g) preparing Form 5500 and documentation required by the Novitex Plan auditors.

21. The Novitex Plan’s assets were, upon information and belief, held by State Street Bank and Trust Company (“SSBT”) in trust pursuant to the Trust Agreement between Exela and SSBT (the “Trust”). All investments and asset allocations are performed through that Trust.

2. The Novitex Plan’s Investment Offerings

22. Aside from a stable value investment option and twelve (12) target date funds, the Novitex Plan offered twelve (12) core investment options [consisting of four bond funds, an

institutional index fund, two large-cap funds, a small cap fund, a real estate fund, and an international fund], all of which are mutual funds:

Asset Class	Investment Option
International-Term Bonds	Janus Flexible Bond T
Intermediate-Term Bonds	PIMCO Income Admin
Government Bonds	Vanguard Inflation-Protected Secs Adm
World/Foreign Bonds	Templeton Global Bond A
Large-Cap Value Stocks	American Beacon Bridgeway Large Cap Value Inv
Large-Cap Blend Stocks	Vanguard Institutional Index
Large-Cap Growth Stocks	T. Rowe Price Growth Stock Adv
Mid-Cap Value Stocks	JHancock Disciplined Value Mid Cap I
Mid-Cap Growth Stocks	T. Rowe Price Mid-Cap Growth Adv
Small-Cap Blend Stocks	Goldman Sachs Small Cap Value Inst
Real Estate	Prudential Global Real Estate Z
World/Foreign Stocks	American Funds Europacific Gr R4

23. The twelve (12) target date funds were all T. Rowe Price Retirement funds, which vary based on the target date of retirement.

24. The Novitex Plan's stable income fund was the Prudential Guaranteed Income Stable Value Fund, which guarantees a gross return (before cost) of at least 1.50%.

B. Defendants' Breaches of Fiduciary Duty

1. The Failure To Use The Least Expensive Share Class

25. As fiduciaries charged with selecting, monitoring, and removing the Novitex Plan's investment options, Exela and the Benefits Committee (including its subsidiary

Investment Committee) breached their duty of prudence by failing to monitor the Novitex Plan's investment options to ensure that they were not excessively priced.

26. There is no distinction whatsoever, *other than price*, between the share classes for the same investment option. The share class used is typically, if not always, dependent on the negotiating leverage of the investor; in other words, large institutional investors, such as the Novitex Plan, have significant amounts of monies to invest such that mutual fund managers will agree to lower fees/offer cheaper share classes for access to those Novitex Plan assets. Despite the negotiating leverage based on the size of the Novitex Plan, Defendants did not even utilize the cheapest share class for most of its investment options:

- **Janus Flexible Bond T:** The Novitex Plan invested in Class T shares, which have a 0.69% expense ratio³, even though the fund offers Class N shares, which have a 0.44% expense ratio. From 2014 through 2017, the Novitex Plan paid an average of 0.25% more than the least expensive share class available to it;
- **PIMCO Income Admin:** The Novitex Plan invested in Administrative Class shares, which have a 0.75% expense ratio, even though the fund offers Class I shares, which have a 0.50% expense ratio. From 2014 through 2017, the Novitex Plan paid an average of 0.25% more than the least expensive share class available to it;
- **Templeton Global Bond A:** The Novitex Plan invested in Class A shares, which have a 0.96% expense ratio (with 0.25% attributed to 12b-1 fees), even

³The "expense ratio" is the annual fees and expenses that the managers of the investment options charge their shareholders, expressed in the percentage of assets deducted annually.

though the fund offers R6 shares, which have a 0.56% expense ratio. From 2014 through 2017, the Novitex Plan paid an average of 0.40% more than the least expensive share class available to it;

- **American Beacon Bridgeway Large Cap Value Inv:** The Novitex Plan invested in Investor Class shares, which have a 1.06% expense ratio (with no 12b-1 fees), even though the fund offers R6 shares, which have a 0.70% expense ratio. From 2014 through 2017, the Novitex Plan paid an average of 0.33% more than the least expensive expense share class available to it;

- **T. Rowe Price Growth Stock Advisor:** The Novitex Plan invested in Advisor Class shares, which have a 0.92% expense ratio (with 0.25% attributed to 12b-1 fees), even though the fund offers Investor Class shares, which have a 0.67% expense ratio (with no 12b-1 fees), as well as Institutional shares, which are lower still, with a 0.52% expense ratio. From 2014 through 2017, the Novitex Plan paid an average of 0.40% more than the least expensive share class available to it;

- **John Hancock Disciplined Value Mid Cap I:** The Novitex Plan invested in I Class shares, which have had a 0.85% to 0.87% expense ratio, even though the fund offers R6 shares, which have a 0.76% expense ratio. From 2014 through 2017, the Novitex Plan paid an average of 0.10% more than the least expensive share class available to it;

- **T. Rowe Price Mid Cap Growth Advisor:** The Novitex Plan invested in Advisor Class shares, which have a 1.01% expense ratio (with 0.25% attributed to 12b-1 fees), even though the fund offers Investor Class shares, which have a

0.77% expense ratio (with no 12b-1 fees), as well as Institutional shares, which are lower still, with a 0.62% expense ratio. From 2014 through 2017, the Novitex Plan paid an average of 0.39% more than the least expensive share class available to it;

- **Goldman Sachs Small Value Inst:** The Novitex Plan invested in Inst shares, which have a 0.97% expense ratio, even though the fund offers R6 shares, which have a 0.95% expense ratio. From 2014 through 2017, the Novitex Plan paid an average of 0.02% more than the least expensive share class available to it;

- **Prudential Global Real Estate Z:** The Novitex Plan invested in Z Class shares, which have had a 0.93% to 0.97% expense ratio, even though the fund offers Q Class shares (later called R6 shares), which have been offered to retirement plans since 2011 with a 0.8% expense ratio. From 2014 through 2017, the Novitex Plan paid an average of 0.15% more than the least expensive share class available to it;

- **American Funds EuroPacific Growth R4:** The Novitex Plan invested in R4 shares, which have had a 0.83% to 0.85% expense ratio (with 0.25% attributable to 12b-1 fees), even though the fund offers R6 shares, which have a 0.49% expense ratio. From 2014 through 2017, the Novitex Plan paid an average of 0.35% more than the least expensive share class available to it; and

- **The T. Rowe Price Target Date Funds - Advisor Class:** All of the target date investment options offered in the Novitex Plan were T. Rowe Price Retirement Funds Advisor Class shares, which have an additional 0.25% 12b-1 fee, which the Investor Class shares do not have. As a result, the total annual fund operating

expenses of the Advisor Class shares is 0.25% more expensive than the Investor Class shares. Indeed, as of 2015, the T. Rowe Retirement funds began offering Institutional shares, with even lower expense ratios. By way of example, the T. Rowe Price Retirement 2055 Advisor Class offered in the Novitex Plan has an expense ratio of 1.01%; in contrast, the Investor Class expense ratio is 0.76%, which is 0.25% lower than the Advisor Class, while the Institutional Class has an expense ratio of 0.61%, or 0.40% lower than the Advisor Class. Likewise, for the T. Rowe Price Retirement (2005), T. Rowe Price Target Date Fund (2010), T. Rowe Price Retirement Fund (2015), T. Rowe Price Retirement Fund (2020), T. Rowe Price Retirement Fund (2025), T. Rowe Price Retirement Fund (2030), T. Rowe Price Retirement Fund (2035), T. Rowe Price Retirement Fund (2040), T. Rowe Price Retirement Fund (2045), T. Rowe Price Retirement Fund (2050) and T. Rowe Price Retirement Fund (2060) offered by the Novitex Plan, at all pertinent times, the Novitex Plan paid an average of 0.25% more than the cheapest share class available to it and failed to provide its participants with the opportunity to invest in the least expensive share class.

27. In addition to the 11 funds listed above, the Novitex Plan also maintained two investment options for a limited portion of the pertinent period in which it invested in inappropriately expensive share classes:

- **The T. Rowe Price Equity Income Fund:** The Novitex Plan invested in Advisor class shares in 2015, which had a 0.94% expense ratio in 2014 even though the fund offered Institutional Class shares, which have a 0.53% expense

ratio. From 2014 through 2015, the Novitex Plan paid an average of 0.38% more than the least expensive share class available to it.

- **The PIMCO Real Return Fund:** The Novitex Plan invested in Administrative Class shares in 2016, which had an expense ratio of 0.89% even though the fund offers Institutional Class shares with a 0.64% expense ratio. From 2014 through 2016, the Novitex Plan paid an average of 0.25% more than the least expensive share class available to it.

28. In addition, although Plaintiff does not challenge the practice of revenue sharing in general, any revenue sharing paid from the investment options offered by the Novitex Plan to compensate for administrative, recordkeeping and other services was unreasonable on its face because, as detailed below, a retirement plan with the assets of the Novitex Plan could have easily paid a much lower total plan cost for the same exact services by adopting a zero revenue sharing menu of investment options with appropriately negotiated and benchmarked Novitex Plan expenses, and/or by properly obtaining all available savings from revenue sharing by establishing a properly structured and designed plan expense account (“PEA”) that credited all revenue sharing to the benefit of the Novitex Plan and equalized the amount of participant fees (both direct and indirect) paid by participants of the Novitex Plan, with appropriately negotiated and benchmarked Novitex Plan expenses.

29. It is quite clear that such an obvious oversight by the Defendants caused the Novitex Plan to suffer significant damages – and will continue to harm the Novitex Plan – so long as Defendants continue to refrain from offering the least expensive available share class for each investment option for the Novitex Plan and continue to pay excessive investment

management and recordkeeping expenses, as discussed below.

2. The Novitex Plan's Excessive And Unreasonable Recordkeeping Fees

30. Throughout the pertinent period, Transamerica was paid excessive recordkeeping and related fees in light of the assets and other characteristics of the Novitex Plan. Exela and the Benefits Committee breached their fiduciary duties by failing to monitor and ensure that Transamerica was paid reasonable compensation.

31. The Novitex Plan was required to pay Transamerica 0.27% of all assets held in the Novitex Plan for recordkeeping services. Transamerica received its fee through asset-based indirect compensation from many of the investment options in the Novitex Plan. As of January 1, 2014, Transamerica collected revenue from all but one of the Novitex Plan's investments:

Investment Option	Compensation to Transamerica
Prudential Guaranteed Income Stable Value	0.40%
PIMCO Real Return Admin	0.28%
Janus Flexible Bond T	0.35%
PIMCO Income Admin	0.28%
Templeton Global Bond A	0.50%
T. Rowe Price Equity Income Adv	0.40%
Vanguard Institutional Index I	0.00%

T. Rowe Price Growth Stock Adv	0.40%
John Hancock Disciplined Value Mid Cap I	0.10%
T. Rowe Price Mid-Cap Growth Adv	0.40%
Goldman Sachs Small Cap Value Inst	0.17%
American Funds EuroPacific Growth R4	0.35%
Prudential Global Real Estate Z	0.25%
T. Rowe Price Retirement Income Adv	0.40%
T. Rowe Price Retirement 2005 Adv	0.40%
T. Rowe Price Retirement 2010 Adv	0.40%
T. Rowe Price Retirement 2015 Adv	0.40%
T. Rowe Price Retirement 2020 Adv	0.40%
T. Rowe Price Retirement 2025 Adv	0.40%
T. Rowe Price Retirement 2030 Adv	0.40%
T. Rowe Price Retirement 2035 Adv	0.40%
T. Rowe Price Retirement 2040 Adv	0.40%

T. Rowe Price Retirement 2045 Adv	0.40%
T. Rowe Price Retirement 2050 Adv	0.40%
T. Rowe Price Retirement 2055 Adv	0.40%

32. Although Transamerica was entitled to receive 0.27% annually from the total Novitex Plan assets, in fact, it had collected significantly more for the same services that it is required to provide for 27 basis points in compensation. The revenue collected by Transamerica according to the fee schedule above has amounted to between 0.32% and 0.35% annually from 2014 through 2017. Moreover, it does not appear that Transamerica has credited this extra .05% to .08% back to the participants through a Plan Expense Account (“PEA”) or otherwise and, instead, it appears that Defendants have permitted Transamerica to collect 5 to 8 basis points in extra compensation without providing any additional services beyond those which it is contractually obligated to perform for 27 basis points.

33. Independent of whether Transamerica has been permitted to collect and retain recordkeeping fees to which it is not entitled, the Novitex Plan is significantly expensive in terms of total Novitex Plan cost, especially when compared to defined contribution retirement plans of a similar size. Total plan cost (“TPC”) refers to the sum of all fees and expenses associated with the operation of a retirement plan; notably, the administrative, or recordkeeping, fees and investment management fees. Not only do the components of the Novitex Plan lineup selected by Defendants have exceedingly high expense ratios which cost much more than available alternatives in the marketplace, they combine, along with the recordkeeping fees paid from

Novitex Plan assets to Transamerica, to produce a Novitex Plan with a TPC that vastly exceeds those of retirement plans of comparable size to the Novitex Plan.

34. It is clear that Defendants engaged in virtually no examination, comparison or benchmarking of the TPC of the Novitex Plan to those of other similarly sized retirement plans. At all pertinent times, the Novitex Plan's TPC has been approximately 60% higher than that of the average defined contribution plan with assets between \$100 million and \$250 million. Defendants knew, or would have known, with any reasonable consideration of the Novitex Plan's cost to participants, that the Novitex Plan was paying grossly excessive fees. Based upon the Novitex Plan's design, participants in the Novitex Plan pay virtually all of these excessive fees and, as a result, achieve considerably lower retirement saving, since those excessive fees, particularly when compounded, have a damaging impact upon the returns attained by participant retirement savings.

35. As of December 31, 2016, the Novitex Plan had \$154,457,420 in total assets and 8,682 participants. The investment management fees and recordkeeping fees that are paid out of Novitex Plan assets are discussed at length above. Provided these components, and understanding that the Novitex Plan is likely charged other fees that have not been provided to Plaintiff, the Novitex Plan's TPC for the year ended December 31, 2016 is calculated below:

Investment Management Fees	\$787,838
Recordkeeping Fees	\$489,914
Total Plan Cost	\$1,277,752

36. On a per-participant basis, the Novitex Plan's TPC is \$147.17, an incredible \$90.74 of which is in investment management fees. The TPC as a percentage of total Novitex Plan assets equals 0.83%. According to BrightScope's most current Defined Contribution Plan

Profile, the average 401(k) plan with between \$100 million and \$250 million in assets had a TPC of 0.52%, or **just 60%** of current cost of the Novitex Plan. Moreover, Brightscope provides the 10th and 90th percentiles of TPC based on the amount of assets contained in a retirement plan. Utilizing these parameters, the costs of 401(k) plans with between \$100 million and \$250 million in assets ranged from 0.22% (10th percentile) to .74% (90th percentile).⁴ Therefore, the TPC of the Novitex Plan, at 0.83%, was grossly excessive and firmly within the top 10% of plans containing between \$100 million and \$250 million in assets. Furthermore, as the Novitex Plan itself had over \$150 million in assets in 2016, it was sufficiently larger than many of the plans in the data subset, and should, due to its significant bargaining power and ability to demand lower-cost administrative and investment management services within the marketplace, rank even lower in comparisons of TPC when measured against other plans with between \$100 million and \$250 million in assets.

37. The excessive TPC is not only attributable to excessive investment management expenses paid by the Novitex Plan but, instead, also is attributable to excessive recordkeeping expenses in the amount of approximately \$56.43 per participant, as compared to \$35 per participant, which is the maximum amount that the Novitex Plan should have been paying at the time based upon industry averages and benchmarking for such services. As a result, the Novitex Plan was over 60% more expensive in terms of recordkeeping fees than comparable retirement plans receiving the same or similar services. Even if the Novitex Plan had capped its recordkeeping expenses at 27 basis points, based upon its contract with Transamerica, that still would have resulted in the Novitex Plan paying grossly excessive recordkeeping fees in the

⁴*The BrightScope/ICI Defined Contribution Plan Profile: A Close Look at 401(k) Plans, 2015*, BRIGHTSCOPE, Mar. 2018, at 52-53.

amount of approximately \$48 per participant, when the same recordkeeping services could have easily been obtained for approximately 33% less in costs at all pertinent times.

38. If Defendants had exercised the requisite care in administering the Novitex Plan, they would have discovered the great disparity between the TPC of the Novitex Plan, including the investment management fees and recordkeeping expenses, and other similarly sized plans. By failing to recognize that the Novitex Plan and its participants were being charged much higher fees than they should have been and failing to take effective remedial actions, Defendants breached their fiduciary duties to the Novitex Plan.

V. ERISA'S FIDUCIARY STANDARDS

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

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

(A) for the exclusive purpose of

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

[and]

(B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man 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.

40. Under 29 U.S.C. 1103(c)(1), with certain exceptions not relevant here, the assets of a plan shall never inure to the benefit of any employer and shall be held for the exclusive purposes of providing benefits to participants

in the plan and their beneficiaries and defraying reasonable expenses of administering the plan.

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

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

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

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

- (1) if he participates knowingly in, or knowingly undertakes to conceal, an act or omission of such other fiduciary, knowing such act or omission is a breach; or
- (2) if, by his failure to comply with section 404(a)(1) in the administration of his specific responsibilities which give 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.

44. 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) provides, in relevant part:

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

45. 29 U.S.C. §1132(a)(2) authorizes any participant or beneficiary of the Novitex Plan to bring an action individually, on behalf of the Novitex Plan, to enforce a breaching fiduciary's liability to the Novitex Plan under 29 U.S.C. § 1109(a).

VI. CLASS ACTION ALLEGATIONS

46. In acting in a representative capacity and to enhance the due process protections of unnamed participants of the Exela Plan, the successor-in-interest of the Novitex Plan, as an alternative to other procedural protections he may employ if the proposed class is not certified for any reason, Plaintiff seeks to certify this action as a class action on behalf of a class of similarly situated plan participants and beneficiaries of the Exela Plan. Plaintiff seeks to certify, and to be appointed, as representative of, the following class (the "Class"):

All participants and beneficiaries of the Novitex Plan prior to the merger of the Novitex Plan with the SourceHOV 401(k) Plan, excluding the Defendants and all other individuals who are or have ever been a member of the Novitex Enterprise Solutions Employee Benefits Committee or otherwise served as fiduciaries of the Novitex Plan.

47. The action meets the requirements of Rule 23 and should be certified as a class action for the following reasons:

- a. The Class includes more than 9,000 members and is so large that joinder of all its members is impracticable;
- b. There are questions of law and fact common to the Class because

Defendants owed fiduciary duties to the Novitex Plan and all its participants and beneficiaries, yet took the actions and omissions alleged herein as to the Novitex Plan and not as to any individual participant. Thus, common questions of law and fact exist, including the following, without limitation: to whom are the fiduciaries liable for the remedies provided by 29 U.S.C. § 1109(a); whether the fiduciaries of the Novitex Plan breached their fiduciary duties to the Novitex Plan; what are the losses to the Novitex Plan resulting from each breach of fiduciary duty; and what plan-wide equitable and other relief the Court should impose in light of Defendants' breaches of duty;

- c. Plaintiff's claims are typical of the Class because Plaintiff is a participant of the Exela Plan; the Exela Plan, as the successor-in-interest of the Novitex Plan, was harmed by Defendants' misconduct; and ERISA authorizes all participants of the Exela Plan to bring suit on behalf of the Exela Plan for legal and equitable remedies caused by breaches of fiduciary duty;
- d. Plaintiff is an adequate representative of the Class because he is a participant in the Exela Plan; has no interest that is in conflict with the Class; is committed to the vigorous representation of the Class; and has engaged experienced and competent attorneys to represent the Class; and
- e. Prosecution of separate actions for these breaches of fiduciary duties by individual participants and beneficiaries would create the risk of: (A) inconsistent or varying adjudications that would establish incompatible

standards of conduct for Defendants with respect to the discharge of their fiduciary duties to the Novitex Plan and personal liability to the Novitex Plan under 29 U.S.C. § 1109(a); and (B) adjudications by individual participants and beneficiaries regarding these breaches of fiduciary duties and remedies would, as a practical matter, be dispositive of the interests of the participants and beneficiaries not parties to the adjudication or would substantially impair or impede those participants' and beneficiaries' ability to protect their interests;

Therefore, this action should be certified as a class action under Rules 23(a) and 23(b)(1).

48. Plaintiff's counsel will fairly and adequately represent the interests of the Class and are best able to represent the interests of the Class under Rule 23(g) of the Federal Rules of Civil Procedure.

COUNT I
(For Breach Of Fiduciary Duty)

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

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

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

51. As a direct result of Defendants' breaches of duties, Plaintiff and the Exela Plan, the successor-in-interest to the Novitex Plan, have suffered losses and damages.

52. Pursuant to ERISA § 409, 29 U.S.C. § 1109, and ERISA § 502, Defendants are liable to restore to the Exela Plan the losses that the Novitex Plan had suffered as a direct result of Defendants' breaches of fiduciary duty and are liable for damages and any other available equitable or remedial relief, including declaratory relief, and attorneys' fees, costs and other recoverable expenses of litigation.

WHEREFORE, Plaintiff, on behalf of himself and the Exela Plan, the successor-in-interest of the Novitex Plan, demands judgment against Defendants for the following relief:

- (a) Declaratory relief pursuant to ERISA § 502, 29 U.S.C. § 1132, as detailed above;
- (b) Equitable, legal or remedial relief to return all losses to the Exela Plan and/or for restitution and/or damages as set forth above, plus all other equitable or remedial relief as the Court may deem appropriate pursuant to ERISA §§ 409 and 502, 29 U.S.C. §§ 1109 and 1132;
- (c) Pre-judgment and post-judgment interest at the maximum permissible rates, whether at law or in equity;
- (d) Attorneys' fees, costs and other recoverable expenses of litigation; and
- (e) Such further and additional relief to which Plaintiff and the Exela Plan may be justly entitled and the Court deems appropriate and just under all of the circumstances.

NOTICE PURSUANT TO ERISA § 502(h)

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

Dated: May 1, 2020

Respectfully submitted,

SHEPHERD, FINKELMAN, MILLER
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/s/ Laurie Rubinow

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***Attorneys for Plaintiff, the Proposed Class
and the Exela 401(k) Plan***

CERTIFICATE OF SERVICE

I hereby certify that on May 1, 2020, I caused the foregoing to be electronically filed with the Clerk of Court using the CM/ECF system, which will send notification to all counsel of record.

/s/ Laurie Rubinow _____
Laurie Rubinow
Shepherd Finkelman Miller
& Shah, LLP