EXHIBIT 1

Complaints

**UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

MARY K. BOLEY, KANDIE SUTTER and PHYLLIS JOHNSON, individually and on behalf of all others similarly situated,	
Plaintiffs,	**CIVIL ACTION NO.**:
v.	**CLASS ACTION COMPLAINT**
UNIVERSAL HEALTH SERVICES, INC., THE BOARD OF DIRECTORS OF UNIVERSAL HEALTH SERVICES, INC., THE PLAN COMMITTEE OF UNIVERSAL HEALTH SERVICES, INC., and JOHN DOES 1-30.	
Defendants.	

COMPLAINT

Plaintiffs Mary K. Boley, Kandie Sutter and Phyllis Johnson ("Plaintiffs"), by and through their attorneys, on behalf of the Universal Health Services, Inc., Retirement Savings Plan (the "Plan"),[1] themselves and all others similarly situated, state and allege as follows:

I. INTRODUCTION

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

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

("Administrative Committee" or "Committee") and its members during the Class Period for breaches of their fiduciary duties.

2. Defined contribution retirement plans, like the Plan, confer tax benefits on participating employees to incentivize saving for retirement. As of the end of 2015, Americans had approximately $6.7 trillion in assets invested in defined contribution plans. *See* INVESTMENT COMPANY INSTITUTE, *Retirement Assets Total $24.0 Trillion in Fourth Quarter 2015* (Mar. 24, 2016), available at https://www.ici.org/research/stats/retirement/ret_15_q4; PLAN SPONSOR, *2015 Recordkeeping Survey* (June 2015), available at http://www.plansponsor.com/2015-Recordkeeping-Survey/.

3. In a defined contribution plan, participants' benefits "are limited to the value of their own investment accounts, which is determined by the market performance of employee and employer contributions, less expenses." *Tibble v. Edison Int'l*, 135 S. Ct. 1823, 1826 (2015) ("*Tibble I*"). Thus, the employer has no incentive to keep costs low or to closely monitor the Plan to ensure every investment remains prudent, because all risks related to high fees and poorly-performing investments are borne by the participants.

4. To safeguard Plan participants and beneficiaries, ERISA imposes strict fiduciary duties of loyalty and prudence upon employers and other plan fiduciaries. 29 U.S.C. § 1104(a)(1). These twin fiduciary duties are "the highest known to the law." *Sweda v. Univ. of Pennsylvania*, 923 F.3d 320, 333 (3d Cir. 2019). Fiduciaries must act "solely in the interest of the participants and beneficiaries," 29 U.S.C. § 1104(a)(1)(A), with the "care, skill, prudence, and diligence" that would be expected in managing a plan of similar scope. 29 U.S.C. § 1104(a)(1)(B).

5. The Plan has at all times, during the Class Period maintained over 1.3 billion dollars in assets (including having 1.9 billion dollars in assets in 2018), qualifying it as a large plan in the defined contribution plan marketplace, and among the largest plans in the United States. These

assets are entrusted to the care of the Plan's fiduciaries. As a large plan, the Plan had substantial bargaining power regarding the fees and expenses that were charged against participants' investments. Defendants, however, did not try to reduce the Plan's expenses or exercise appropriate judgment to scrutinize each investment option that was offered in the Plan to ensure it was prudent.

6. Plaintiffs allege that during the putative Class Period (June 5, 2014 through the date of judgment) Defendants, as "fiduciaries" of the Plan as that term is defined under ERISA Section 3(21)(A), 29 U.S.C. § 1002(21)(A), breached the duties they owed to the Plan, to Plaintiffs, and to the other participants of the Plan by, *inter alia*, (1) failing to objectively and adequately review the Plan's investment portfolio with due care to ensure that each investment option was prudent, in terms of cost; and (2) maintaining certain funds in the Plan despite the availability of identical or materially similar investment options with lower costs and/or better performance histories.

7. To make matters worse, Defendants failed to consider lower cost collective trusts that were available to the Plan as alternatives to certain mutual funds in the Plan.

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

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

II. JURISDICTION AND VENUE

10. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1331 because it is a civil action arising under the laws of the United States, and pursuant to 29

U.S.C. § 1332(e)(1), which provides for federal jurisdiction over actions brought under Title I of ERISA, 29 U.S.C. § 1001, *et seq*.

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

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

III. PARTIES

Plaintiffs

13. Plaintiff Mary K. Boley ("Boley") resides in Anna, Texas. During her employment, Plaintiff Boley participated in the Plan, investing in the options offered by the Plan and which are the subject of this lawsuit.

14. Plaintiff Kandie Sutter ("Sutter") resides in Corona, California. During her employment, Plaintiff Sutter participated in the Plan, investing in the options offered by the Plan and which are the subject of this lawsuit.

15. Plaintiff Phyllis Johnson ("Johnson") resides in Las Vegas, Nevada. During her employment, Plaintiff Johnson participated in the Plan, investing in the options offered by the Plan and which are the subject of this lawsuit.

16. Each Plaintiff has standing to bring this action on behalf of the Plan because each of them participated in the Plan and were injured by Defendants' unlawful conduct. Plaintiffs are entitled to receive benefits in the amount of the difference between the value of their accounts

currently, or as of the time their accounts were distributed, and what their accounts are or would have been worth, but for Defendants' breaches of fiduciary duty as described herein.

17. Plaintiffs did not have knowledge of all material facts (including, among other things, the investment alternatives that are comparable to the investments offered within the Plan, comparisons of the costs and investment performance of Plan investments versus available alternatives within similarly-sized plans, total cost comparisons to similarly-sized plans, information regarding other available share classes, and information regarding the availability and pricing of collective trusts) necessary to understand that Defendants breached their fiduciary duties and engaged in other unlawful conduct in violation of ERISA until shortly before this suit was filed. Further, Plaintiffs did not have and do not have actual knowledge of the specifics of Defendants' decision-making process with respect to the Plan, including Defendants' processes (and execution of such) for selecting, monitoring, and removing Plan investments, because this information is solely within the possession of Defendants prior to discovery.[2] Moreover, having never managed a large 401(k) plan such as the Plan, Plaintiffs lacked actual knowledge of reasonable fee levels and prudent alternatives available to such plans. For purposes of this Complaint, Plaintiffs have drawn reasonable inferences regarding these processes based upon (among other things) the facts set forth herein.

Defendants

Company Defendant

18. Universal Health Services, Inc., is the Plan sponsor. *See* 2018 Form 5500 at 1. Its corporate headquarters is located at 367 S. Gulph Road, King of Prussia, Pennsylvania. UHS

[2] *See Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 598 (8th Cir. 2009) ("If Plaintiffs cannot state a claim without pleading facts which tend systematically to be in the sole possession of defendants, the remedial scheme of [ERISA] will fail, and the crucial rights secured by ERISA will suffer.").

describes itself as "one of the nation's largest and most respected providers of hospital and healthcare services."[3] It "has 400 acute care hospitals, behavioral health facilities and ambulatory centers across the U.S., Puerto Rico and the U.K….and employs 90,000 employees."[4] In 2019, "UHS generated net revenues of approximately $11.4 billion, an increase of 5.6% over 2018." *See*, the December 31, 2019 Annual Report of Universal Health Services, Inc., at 6.

19. "The Company and its authorized representatives appointed by the Board of Directors are the Plan fiduciaries and the Plan Administrator." Summary Plan Description Handbook of Universal Health Services, Inc., Effective January 1, 2020 ("UHS 2020 SPD"), at 81. In executing their powers, the "Plan Administrator and Plan Sponsor have the authority to control and manage the operation and administration of the plan…." *Id.* at 92.

20. In addition, UHS is responsible for "selecting and removing Plan trustees, investment media, record-keepers and/or insurance companies." UHS 2020 SPD at 81. Under ERISA, fiduciaries with the power to appoint have the concomitant fiduciary duty to monitor and supervise their appointees.

21. Additionally, at all times, UHS acted through its officers, including the Committee, to perform Plan-related fiduciary functions.

22. Lastly, UHS made discretionary decisions to make matching and discretionary contributions (explained below) to Plan participants. As described in the 2018 Audited Statement, UHS "contributes a discretionary amount of each participant's contribution to the Plan in accordance with Plan provisions…" *See,* the December 31, 2018 Audited Financial Statements of Universal Health Services, Inc., ("2018 Audited Statement") at 4.

[3] https://www.uhsinc.com/about-uhs/
[4] *Id.*

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

Board Defendants

24. The Board appointed "authorized representatives" of the Company, including the Committee, as Plan fiduciaries. UHS 2020 SPD at 81.

25. Accordingly, the Board had the fiduciary duty to monitor and supervise the Committee while it performed its role as the fiduciary responsible for selection and monitoring of the Plan's investments.

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

27. The Board and it members during the Class Period are collectively referred to herein as the "Board Defendants."

Committee Defendants

28. As noted in the 2018 Audited Financial Statement: "[t]he Company's Plan Committee … is the plan administrator." 2018 Audited Statement at 4. "Participants direct the investment of their contributions … into various investment options selected by the Plan Committee." *Id.*

29. Further, the Administrative Committee and its members, as "authorized representatives of the Company," appointed the trustee of the Plan. UHS 2020 SPD at 81. The Committee selected "Fidelity Trust Company" to act as the Plan trustee. *Id.* The Plan trustee, Fidelity Trust Company "shall be the named fiduciary with respect to management and control of

Plan assets held by it…" The Universal Health Services, Inc., Retirement Saving Plan Document as amended and restated effective January 1, 2017 ("2017 Plan Doc.") at 54.

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

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

Additional John Doe Defendants

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

IV. THE PLAN

33. The Plan "which became effective January 1, 1985, is a defined contribution plan available to qualifying employees of Universal Health Services, Inc." 2018 Audited Statement at 4. The plan was amended and restated effective January 1, 1997. *See*, 2017 Plan Doc. at 1.

34. The Plan is a "defined contribution" or "individual account" plan within the meaning of ERISA Section 3(34), 29 U.S.C. § 1002(34), in that the Plan provides for individual accounts for each participant and for benefits based solely upon the amount contributed to those accounts, and any income, expense, gains and losses, and any forfeitures of accounts of the participants which may be allocated to such participant's account. *See,* 2017 Plan Doc at 9.

Further, the 2020 SPD provides: "[t]he Plan is a defined contribution plan…" UHS 2020 SPD at 82. Consequently, retirement benefits provided by the Plan are based solely on the amounts allocated to each individual's account.

Eligibility

35. As detailed in the 2018 Auditor Report: "[t]o be eligible to participate in the Plan, an employee must generally have completed at least one month of credited service and be 21 years of age." 2018 Auditor Report at 4.

Contributions and Vesting

36. There are several types of contributions that can be added to a participant's account: an employee salary deferral contribution, an employer matching contribution, and an employer profit sharing contribution. UHS 2020 SPD at 72 and 73. Participants can also roll over amounts from other qualified benefit or defined contribution plans. *Id*.

37. As described in the UHS 2020 SPD, a participant "can save from 1% to 75% of your eligible compensation on a pre-tax basis…." *Id.* In addition, "the Company will match a portion of your pre-tax and/or Roth after-tax contributions (your "Company Matching Contribution") each pay period.

38. UHS made discretionary decisions about the matching and discretionary contributions to Plan participants. 2015 Plan Doc. at 25. As described in the 2018 Audited Statement, UHS "contributes a discretionary amount of each participant's contribution to the Plan in accordance with Plan provisions…" 2018 Audited Statement at 4. As long as an employee is eligible to participate in the Plan, UHS will make contributions to each participants' accounts on the first day of eligibility. *See*, UHS 2020 SPD at 71.

39. Generally, "[p]articipants are immediately vested in their contributions plus actual earnings thereon. Vesting in the Company's contribution portion is based on years of continuous

service. Generally, participants vest 25% each year and are fully vested after four years of service." 2018 Auditor Report at 4.

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

41. UHS also benefits in other ways from the Plan's matching program. It is well-known that "[m]any employers match their employees' contributions to the 401(k) plan in order to help attract and retain talent at their company. By hiring and retaining employees with a high-caliber of talent, [a company] may save money on training and attrition costs associated with unhappy or lower-performing workers." *See,* https://www.paychex.com/articles/employee-benefits/employer-matching-401k-benefits.

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

The Plan's Investments

43. Several investments were available to Plan participants for investment each year during the putative Class Period, including several Fidelity target date funds. As noted above, the Committee determines the appropriateness of the Plan's investment offerings and monitors investment performance. For 2018, the Plan offered 31 investment options, which included 29 mutual funds, 1 collective trust and 1 money market fund.

44. The Plan's assets under management for all funds as of the end of 2018 was $1,914,043,716. 2018 Auditor Report at 2. From 2014 to 2017 the Plan's assets under management ranged from $1.3 billion to $1.9 billion.

Plan Expenses

45. "Certain expenses of maintaining the Plan are paid directly by the Plan …" 2018 Auditor Report at 6.

V. CLASS ACTION ALLEGATIONS

46. Plaintiffs bring this action as a class action pursuant to Rule 23 of the Federal Rules of Civil Procedure on behalf of themselves and the following proposed class ("Class"):[5]

> All persons, except Defendants and their immediate family members, who were participants in or beneficiaries of the Plan, at any time between June 5, 2014 through the date of judgment (the "Class Period").

47. The members of the Class are so numerous that joinder of all members is impractical. The 2018 Form 5500 filed with the Dept. of Labor lists 41,872 Plan "participants with account balances as of the end of the plan year." 2018 Form 5500 at 2.

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

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

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

A. Whether Defendants are/were fiduciaries of the Plan;

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

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

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

E. The proper measure of monetary relief.

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

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

52. In the alternative, certification under Rule 23(b)(2) is warranted because the Defendants have acted or refused to act on grounds generally applicable to the Class, thereby

making appropriate final injunctive, declaratory, or other appropriate equitable relief with respect to the Class as a whole.

VI. DEFENDANTS' FIDUCIARY STATUS AND OVERVIEW OF FIDUCIARY DUTIES

53. ERISA requires every plan to provide for one or more named fiduciaries who will have "authority to control and manage the operation and administration of the plan." ERISA § 402(a)(1), 29 U.S.C. § 1102(a)(1).

54. ERISA treats as fiduciaries not only persons explicitly named as fiduciaries under Section 402(a)(1), 29 U.S.C. § 1102(a)(1), but also any other persons who in fact perform fiduciary functions. Thus, a person is a fiduciary to the extent "(i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan." ERISA § 3(21)(A)(i), 29 U.S.C. § 1002(21)(A)(i).

55. As described in the "Parties" section above, Defendants were fiduciaries of the Plan because:

(a) they were so named; and/or

(b) they exercised authority or control respecting management or disposition of the Plan's assets; and/or

(c) they exercised discretionary authority or discretionary control respecting management of the Plan; and/or

(d) they had discretionary authority or discretionary responsibility in the administration of the Plan.

56. As fiduciaries, Defendants are/were required by ERISA Section 404(a)(1), 29 U.S.C. § 1104(a)(1), to manage and administer the Plan, and the Plan's investments, solely in the interest of the Plan's participants and beneficiaries and with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person 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. These twin duties are referred to as the duties of loyalty and prudence and are "the highest known to the law." *Sweda*, 923 F.3d at 333.

57. The duty of loyalty requires fiduciaries to act with an "eye single" to the interests of plan participants. *Pegram v. Herdrich*, 530 U.S. 211, 235 (2000). "Perhaps the most fundamental duty of a [fiduciary] is that he [or she] must display . . . complete loyalty to the interests of the beneficiary and must exclude all selfish interest and all consideration of the interests of third persons." *Id.*, at 224 (quotation marks and citations omitted). Thus, "in deciding whether and to what extent to invest in a particular investment, a fiduciary must ordinarily consider *only* factors relating to the interests of plan participants and beneficiaries . . . . A decision to make an investment may not be influenced by [other] factors unless the investment, when judged *solely* on the basis of its economic value to the plan, would be equal or superior to alternative investments available to the plan." Dep't of Labor ERISA Adv. Op. 88-16A, 1988 WL 222716, at *3 (Dec. 19, 1988) (emphasis added).

58. In effect, the duty of loyalty includes a mandate that the fiduciary display complete loyalty to the beneficiaries and set aside the consideration of himself or third persons.

59. ERISA also "imposes a 'prudent person' standard by which to measure fiduciaries' investment decisions and disposition of assets." *Fifth Third Bancorp v. Dudenhoeffer*, 134 S. Ct.

2459, 2467 (2014) (quotation omitted). In addition to a duty to select prudent investments, under ERISA a fiduciary "has a continuing duty to monitor [plan] investments and remove imprudent ones" that exists "separate and apart from the [fiduciary's] duty to exercise prudence in selecting investments." *Tibble I*, 135 S. Ct. at 1828.

60. In addition, ERISA Section 405(a), 29 U.S.C. § 1105(a) (entitled "Liability for breach by co-fiduciary"), further provides that:

> [I]n 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: (A) if he participates knowingly in, or knowingly undertakes to conceal, an act or omission of such other fiduciary, knowing such an act or omission is a breach; (B) if, by his failure to comply with section 404(a)(1), 29 U.S.C. §1104(a)(1), in the administration of his specific responsibilities which give rise to his status as a fiduciary, he has enabled such other fiduciary to commit a breach; or (C) if he has knowledge of a breach by such other fiduciary, unless he makes reasonable efforts under the circumstances to remedy the breach.

61. During the Class Period, Defendants did not act in the best interests of the Plan participants. Investments chosen for a plan are not to favor the fund provider over the plan's participants. Yet here, to the detriment of the Plan and its participants and beneficiaries, the Plan's fiduciaries included and retained in the Plan many mutual fund investments that were more expensive than necessary and otherwise not justified on the basis of their economic value to the Plan or Plan participants.

62. Based on reasonable inferences from the facts set forth in this Complaint, during the Class Period Defendants failed to have a proper system of review in place to ensure that participants in the Plan were being charged appropriate and reasonable fees for the Plan's investment options. Additionally, Defendants failed to leverage the size of the Plan to negotiate for: (1) lower expense ratios for certain investment options maintained and/or added to the Plan

during the Class Period; and (2) a prudent payment arrangement with regard to the Plan's recordkeeping and administrative fees.

63. As discussed below, Defendants breached fiduciary duties to the Plan and its participants and beneficiaries and are liable for their breaches and the breaches of their co-fiduciaries under 29 U.S.C. §§ 1104(a)(1) and 1105(a).

VII. SPECIFIC ALLEGATIONS

A. Improper Management of an Employee Retirement Plan Can Cost the Plan's <u>Participants Millions in Savings</u>

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

65. "The Restatement … instructs that 'cost-conscious management is fundamental to prudence in the investment function,' and should be applied 'not only in making investments but also in monitoring and reviewing investments.'" *Tibble v. Edison Int'l*, 843 F.3d 1187, 1197-98 (9th Cir. 2016) (*en banc*) (quoting Restatement (Third) of Trusts, § 90, cmt. b) ("*Tibble II*"). *See also* U.S. Dep't of Labor, *A Look at 401(k) Plan Fees*, (Aug. 2013), at 2, available at https://www.dol.gov/sites/dolgov/files/ebsa/about-ebsa/our-activities/resource-center/publications/a-look-at-401k-plan-fees.pdf (last visited February 21, 2020) ("You should be aware that your employer also has a specific obligation to consider the fees and expenses paid by your plan."). As the Ninth Circuit described, additional fees of only 0.18% or 0.4% can have a large effect on a participant's investment results over time because "[b]eneficiaries subject to higher fees … lose not only money spent on higher fees, but also lost investment opportunity; that

is, the money that the portion of their investment spent on unnecessary fees would have earned over time." *Tibble II*, 843 F.3d at 1198 ("It is beyond dispute that the higher the fees charged to a beneficiary, the more the beneficiary's investment shrinks.").

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

67. In fact, the Department of Labor has explicitly stated that employers are held to a "high standard of care and diligence" and must, among other duties, both "establish a prudent process for selecting investment options and service providers" and "monitor investment options and service providers once selected to see that they continue to be appropriate choices." *See*, "*A Look at 401(k) Plan Fees*," *supra*, at 2.

68. The duty to evaluate and monitor fees and investment costs includes fees paid directly by plan participants to investment providers, usually in the form of an expense ratio or a percentage of assets under management within a particular investment. *See* Investment Company Institute ("ICI"), *The Economics of Providing 401(k) Plans: Services, Fees, and Expenses* (July 2016), at 4. "Any costs not paid by the employer, which may include administrative, investment, legal, and compliance costs, effectively are paid by plan participants." *Id*., at 5.

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

B. Defendants Breached Their Fiduciary Duties in Failing to Investigate and Select <u>Lower Cost Alternative Funds</u>

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

71. The Supreme Court recently reaffirmed the ongoing fiduciary duty to monitor a plan's investment options. *Tibble I*, 135 S. Ct. at 1823. In *Tibble I*, the Court held that "an ERISA fiduciary's duty is derived from the common law of trusts" and that, "[u]nder trust law, a trustee has a continuing duty to monitor trust investments and remove imprudent ones." *Id.*, at 1828. In so holding, the Supreme Court referenced with approval the UPIA, treatises, and seminal decisions confirming the duty.

72. Under trust law, one of the responsibilities of the Plan's fiduciaries is to "avoid unwarranted costs" by being aware of the "availability and continuing emergence" of alternative investments that may have "significantly different costs." Restatement (Third) of Trusts, ch. 17, intro. note (2007); *see also* Restatement (Third) of Trusts, § 90 cmt. B (2007) ("Cost-conscious management is fundamental to prudence in the investment function."). Adherence to these duties requires regular performance of an "adequate investigation" of existing investments in a plan to determine whether any of the plan's investments are "improvident" or if there is a "superior alternative investment" to any of the plan's holdings. *Pension Ben. Gaur. Corp. ex rel. St. Vincent Catholic Med. Ctrs. Ret. Plan v. Morgan Stanley Inv. Mgmt.*, 712 F.3d 705, 718-19 (2d Cir. 2013).

73. When large plans, particularly those with over a billion dollars in assets like the Plan here, have options which approach the retail cost of shares for individual investors or are simply more expensive than the average or median institutional shares for that type of investment, a careful review of the plan and each option is needed for the fiduciaries to fulfill their obligations to the plan participants.

74. The Plan has retained several actively-managed funds as Plan investment options despite the fact that these funds charged grossly excessive fees compared with comparable or superior alternatives, and despite ample evidence available to a reasonable fiduciary that these funds had become imprudent due to their higher costs relative to the same or similar investments available. This fiduciary failure decreased participant compounding returns and reduced the available amount participants will have at retirement.

75. During the Class Period, the Plan lost millions of dollars by offering investment options that had similar or identical characteristics to other lower-priced investment options.

76. The majority of funds in the Plan stayed relatively unchanged during the Class Period. In 2018, a majority of the funds in the Plan, at least 20 out of the Plan's 31 funds (65%) were much more expensive than comparable funds found in similarly-sized plans (plans having over a billion dollars in assets). The expense ratios for funds in the Plan in some cases were up to ***203%*** (in the case of the Northern Small Cap Value fund) and ***218%*** (in the case of the MSIF Small Cap Growth IS fund) above the median expense ratios in the same category:[6]

Plan Fund	Expense Ratio[7]	Category	ICI Median Fee
Fidelity Contra Class K	0.73%	Domestic Equity	0.33%
Fidelity Balanced Class K	0.45%	Domestic Equity	0.33%
Harbor Capital Appreciation Fund Inst Class	0.68%	Domestic Equity	0.33%
Neuberger Berman Genesis Fund R6	0.75%	Domestic Equity	0.33%
Northern Small Cap Value Fund	1.00%	Domestic Equity	0.33%

[6] *See* BrightScope/ICI Defined Contribution Plan Profile: *A Close Look at 401(k) Plans, 2016* at 62 (June 2019) (hereafter, "ICI Study") available at https://www.ici.org/pdf/19_ppr_dcplan_profile_401k.pdf.

[7] The listed expense figures are as of 2019.

Franklin Small Cap Growth Fund R6	0.65%	Domestic Equity	0.33%
Wells Fargo Special Mid Cap Value R6	0.73%	Domestic Equity	0.33%
Principal Midcap Fund Inst C1	0.69%	Domestic Equity	0.33%
Neuberger Berman Large Cap Value Inst	0.70%	Domestic Equity	0.33%
MSIF Small Cap Growth IS	1.05%	Domestic Equity	0.33%
Fidelity Diversified International Class K	0.69%	International Equity	0.50%
Fidelity Freedom K 2020 Fund	0.53%	Target Date	0.47%
Fidelity Freedom K 2025 Fund	0.56%	Target Date	0.47%
Fidelity Freedom K 2030 Fund	0.60%	Target Date	0.47%
Fidelity Freedom K 2035 Fund	0.63%	Target Date	0.47%
Fidelity Freedom K 2040 Fund	0.65%	Target Date	0.47%
Fidelity Freedom K 2045 Fund	0.65%	Target Date	0.47%
Fidelity Freedom K 2050 Fund	0.65%	Target Date	0.47%
Fidelity Freedom K 2055 Fund	0.65%	Target Date	0.47%
Fidelity Freedom K 2060 Fund	0.65%	Target Date	0.47%

77. The above comparisons understate the excessiveness of fees in the Plan throughout the Class Period. That is because the above ICI Median fee is based on a study conducted in 2016 when expense ratios were generally higher than fees today or even in 2019 given the downward trend of expense ratios the last few years. Indeed, the ICI median expense ratio for target date funds for plans with over 1 billion dollars in assets was 0.56% using 2015 data compared with 0.47% in 2016. Accordingly, 2019 median expense ratios would be lower than indicated above, demonstrating a greater disparity between the Plan's 2019 expense ratios charted above and the

median expense ratios in the same category.

78. Further, median-based comparisons also understate the excessiveness of the investment management fees of the Plan's funds because many prudent alternative funds were available that offered lower expenses than the median.

Failure to Investigate Availability of Lower Cost Collective Trusts

79. Many mutual funds offer multiple classes of shares in a single mutual fund that are targeted at different investors. Generally, more expensive share classes are targeted at smaller investors with less bargaining power, while lower cost shares are targeted at institutional investors with more assets, generally $1 million or more, and therefore greater bargaining power. There is no difference between share classes other than cost—the funds hold identical investments and have the same manager.

80. Collective trusts, also referred to as CITs, are akin to low-cost share classes because many if not most mutual fund strategies are available in a collective trust format, and the investments in the collective trusts are identical to those held by the mutual fund, except they cost less.

81. As noted *supra*, ERISA is derived from trust law. *Tibble I*, 135 S. Ct. at 1828. Accordingly, the Supreme Court has stated that where ERISA is silent, courts should seek guidance from trust law. *Varity Corp v. Howe*, 516 U.S. 489, 496-97 (1996). One such area is the selection of appropriate funds for a plan. Trust law states it depends on "the type of trustee and the nature of the breach involved, the availability of relevant data, and other facts and circumstances of the case." Restatement (Third) of Trusts, § 100 cmt. b(1). To determine whether a fiduciary has selected appropriate funds for the trust, appropriate comparators may include "return rates of one or more **suitable common trust funds**, or suitable index mutual funds or market indexes (with such adjustments as may be appropriate)." *Id.* (emphasis added).

82. Plan fiduciaries such as Defendants here must be continually mindful of investment options to ensure they do not unduly risk plan participants' savings and do not charge unreasonable fees. Some of the best investment vehicles for these goals are collective trusts, which pool plan participants' investments further and provide lower fee alternatives to even institutional and 401(k) plan specific shares of mutual funds. Defendants knew this, or at least should have known this, because the Plan included at least one collective trust during the Class Period.

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

84. Due to their potential to reduce overall plan costs, collective trusts are becoming increasingly popular; *Use of CITs in DC Plans Booming* (discussing data showing that among both mid-size and large defined contribution plans, significantly more assets are held in collective trusts than in mutual funds).[8]

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[8] The criticisms that have been launched against collective trust vehicles in the past no longer apply. Collective trusts use a unitized structure and the units are valued daily; as a result, participants invested in collective trusts are able to track the daily performance of their investments online. *Use of CITs in DC Plans Booming*; Paula Aven Gladych, *CITs Gaining Ground in 401(k) Plans*, EMPLOYEE BENEFIT NEWS (Apr. 14, 2016), available at http://www.benefitnews.com/news/cits-gaining-ground-in-401-k-plans (hereinafter "*CITs Gaining Ground*"). Many if not most mutual fund strategies are available in a collective trust format, and the investments in the collective trusts are identical to those held by the mutual funds. *Use of CITs in DC Plans Booming; CITs Gaining Ground*. And because collective trusts contract directly with the plan, and provide regular reports regarding costs and investment holdings, the plan has the same level of protection that the Investment Company Act provides to individual investors, thus eliminating the need for the protections of the Investment Company Act. Further,

85. A clear indication of Defendants' lack of a prudent investment evaluation process was their failure to identify and select available collective trusts. A prudent fiduciary conducting an impartial review of the Plan's investments would have identified all funds that could be converted to collective trusts at the earliest opportunity. Here, the following funds in the Plan in 2018 were available as collective trusts in 2018 and most of the Class Period:

Fund in Plan	Exp. Ratio[9]	Collective Trust Version	Incep Date	Exp. Ratio[10]	% Fee Excess
Fidelity Contrafund Class K	0.73%	Fidelity Contrafund Commingled Pool	Jan. 17, 2014	0.43%	70%
Fidelity Diversified International Class K	0.69%	Fidelity Diversified International Commingled Pool	Dec. 13 2013	0.58%	19%
Fidelity Freedom K 2005 Fund	0.42%	FIAM Blend Target Date 2005 Q Fund	Oct. 31 2007	0.32%	31%
Fidelity Freedom K 2010 Fund	0.46%	FIAM Blend Target Date 2010 Q Fund	Oct. 31 2007	0.32%	44%
Fidelity Freedom K 2015 Fund	0.49%	FIAM Blend Target Date 2015 Q Fund	Oct. 31 2007	0.32%	53%
Fidelity Freedom K 2020 Fund	0.53%	FIAM Blend Target Date 2020 Q Fund	Oct. 31 2007	0.32%	66%
Fidelity Freedom K 2025 Fund	0.56%	FIAM Blend Target Date 2025 Q Fund	Oct. 31 2007	0.32%	75%
Fidelity Freedom K 2030 Fund	0.60%	FIAM Blend Target Date 2030 Q Fund	Oct. 31 2007	0.32%	88%

collective trusts are still subject to state and federal banking regulations that provide comparable protections. American Bankers Association, ABA Primer on Bank Collective Funds, June 2015, at 1, available at https://www.aba.com/advocacy/policy-analysis/primer-bank-collective-investment-funds.

[9] The listed expense figures are as of 2019.

[10] The listed expense figures are as of 2019.

Fund in Plan	**Exp. Ratio**[9]	**Collective Trust Version**	**Incep Date**	**Exp. Ratio**[10]	**% Fee Excess**
Fidelity Freedom K 2035 Fund	0.63%	FIAM Blend Target Date 2035 Q Fund	Oct. 31 2007	0.32%	97%
Fidelity Freedom K 2040 Fund	0.65%	FIAM Blend Target Date 2040 Q Fund	Oct. 31 2007	0.32%	103%
Fidelity Freedom K 2045 Fund	0.65%	FIAM Blend Target Date 2045 Q Fund	Oct. 31 2007	0.32%	103%
Fidelity Freedom K 2050 Fund	0.65%	FIAM Blend Target Date 2050 Q Fund	Oct. 31 2007	0.32%	103%
Fidelity Freedom K 2055 Fund	0.65%	FIAM Blend Target Date 2055 Q Fund	July 12 2011	0.32%	103%
Fidelity Freedom K 2060 Fund	0.65%	FIAM Blend Target Date 2060 Q Fund	May 15 2015	0.32%	103%
Fidelity Freedom Income K	0.42%	FIAM Blend Target Date Fund Q	Oct. 31, 2007	0.32%	31%

86. The above is for illustrative purposes only. During the Class Period, Defendants knew or should have known of the existence of these available collective trusts and therefore also should have immediately identified the prudence of transferring the Plan's funds into these alternative investments.

87. As noted above, minimum initial investment amounts are typically waived for institutional investors like retirement plans. *See, e.g.*, *Davis, et al. v. Washington Univ., et al.*, No. 18-3345, slip op. at 5 (8th Cir. May 22, 2020) ("minimum investment requirements are 'routinely waived' for individual investors in large retirement-savings plans"); *Sweda*, 923 F.3d at 329 (citing *Tibble II*, 729 F.3d at 1137 n.24) (confirming that investment minimums are typically waived for large plans).

88. The following is a sampling of the assets under management during the Class Period:

Fund in Plan	2018 AUM	2017 AUM	2016 AUM	2015 AUM	2014 AUM
Fidelity Contrafund Class K	$180,455,076	$190,989,424	$146,274,249	$153,029,000	NA
Fidelity Diversified International Class K	$44,874,063	$56,981,096	$45,695,069	$51,730,000	$51,140,000
Fidelity Freedom K 2005 Fund	$3,328,214	$3,130,674	$2,980,076	$2,625,000	$2,482,000
Fidelity Freedom K 2010 Fund	$14,700,883	$16,583,150	$15,357,026	$15,438,000	$18,073,000
Fidelity Freedom K 2015 Fund	$29,860,328	$35,486,423	$30,758,572	$32,142,000	$32,983,000
Fidelity Freedom K 2020 Fund	$142,344,416	$154,508,611	$125,978,134	$109,099,000	$101,979,000
Fidelity Freedom K 2025 Fund	$142,133,737	$140,054,309	$100,640,796	$79,073,000	$67,813,000
Fidelity Freedom K 2030 Fund	$181,948,301	$180,472,559	$131,011,400	$105,753,000	$91,411,000
Fidelity Freedom K 2035 Fund	$118,099,631	$113,934,046	$77,225,399	$59,307,000	$48,851,000
Fidelity Freedom K 2040 Fund	$121,013,003	$121,428,667	$87,806,045	$69,409,000	$61,568,000
Fidelity Freedom K 2045 Fund	$86,309,175	$82,780,657	$56,344,010	$40,492,000	$31,922,000
Fidelity Freedom K 2050 Fund	$73,574,568	$68,595,224	$45,056,791	$31,561,000	$23,943,000
Fidelity Freedom K 2055 Fund	$46,478,867	$37,831,154	$20,863,675	$10,902,000	$5,475,000

Fidelity Freedom K 2060 Fund	$4,501,198	$1,208,904	NA	NA	NA
Fidelity Freedom Income K Index Fund	$9,232,127	$9,537,914	48,774,311	$7,958,00	$8,792,000

89. At all times during the Class Period, the above funds had sufficient assets under management to qualify for conversion to collective trusts given that investment managers will waive investment minimums for retirement plans. Moreover, all of the collective trusts were available during the Class Period. A prudent fiduciary conducting an impartial review of the Plan's investments would have identified the cheaper available collective trusts and transferred the Plan's investments into the lower cost funds at the earliest opportunity.

90. There is no good-faith explanation for utilizing higher-cost funds when lower-cost funds are available for the exact same investment. Indeed, given that the collective trusts were comprised of the same underlying investments as their mutual fund counterparts, and managed by the same investment manager, but had lower fees, they generally had greater returns when looking at the 1, 3, 5, and 10 year average annual returns. Moreover, the Plan did not receive any additional services or benefits based on its use of more expensive funds; the only consequence was higher costs for Plan participants. Defendants failed in their fiduciary duties either because they did not negotiate aggressively enough with their service providers to obtain better pricing or they were asleep at the wheel and were not paying attention. Either reason is inexcusable.

91. Moreover, it is not prudent to select higher cost versions of the same fund even if a fiduciary believes fees charged to plan participants by the "retail" class investment were the same as the fees charged by the "institutional" class investment, net of the revenue sharing paid by the funds to defray the Plan's recordkeeping costs. *Tibble, et al. v. Edison Int. et al.*, No. 07-5359,

2017 WL 3523737, at * 8 (C.D. Cal. Aug. 16, 2017) ("*Tibble III*"). Fiduciaries should not "choose otherwise imprudent investments specifically to take advantage of revenue sharing." *Id.*, at * 11. This basic tenet of good fiduciary practice resonates loudly in this case given the unreasonable recordkeeping and administrative costs arrangements put in place by Defendants.

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

93. Although utilizing a revenue sharing approach is not *per se* imprudent, unchecked, it is devastating for Plan participants. "At worst, revenue sharing is a way to hide fees. Nobody sees the money change hands, and very few understand what the total investment expense pays for. It's a way to milk large sums of money out of large plans by charging a percentage-based fee that never goes down (when plans are ignored or taken advantage of). In some cases, employers and employees believe the plan is 'free' when it is in fact expensive." Justin Pritchard, "Revenue Sharing and Invisible Fees" available at http://www.cccandc.com/p/revenue-sharing-and-invisible-fees (last visited March 19, 2020).

94. The Plan participated in Fidelity's participant revenue credit program through which recordkeeping fees and other Plan administrative costs were paid through the following structure. The Trustee made annual revenue credit payments, from the funds it received through revenue sharing, to a Revenue Credit Account. Afterward, the administrator could direct the Trustee to use amounts held in the Revenue Credit Account to reimburse the Sponsor for fees and

expenses associated with services provided to the Plan, or pay such vendors, including the Trustee or third parties, directly. Further, amounts held in the Revenue Credit Account may be fully utilized each year and any unused amount may be carried over from year to year rather than being remitted back to participants.

95. Over the years, this arrangement of placing revenue sharing funds into a Revenue Account before disbursement to pay for Plan expenses deprived Plan participants of use of their money and millions of dollars in lost opportunity costs. A more prudent arrangement in this case would have been to select available lower cost investment funds that used little to no revenue sharing and for the Defendants to negotiate and/or obtain reasonable direct compensation per participant recordkeeping/administration fees.

96. By failing to investigate the availability of certain collective trusts, Defendants caused the Plan to pay millions of dollars per year in unnecessary fees. Further, to the extent Defendants held revenue sharing amounts for a prolonged period of time and failed to remit any excess revenue sharing back to Plan participants, this was a further fiduciary breach that cost Plan participants millions of dollars during the Class Period.

Failure to Utilize Lower Fee Share Classes

97. To make matters worse, in 2017 the Plan fiduciaries added two new funds but failed to prudently investigate whether the funds were the lowest-cost share class available.

98. Recently, a court observed that "[b]ecause the institutional share classes are otherwise *identical* to the Investor share classes, but with lower fees, a prudent fiduciary would know immediately that a switch is necessary. Thus, the 'manner that is reasonable and appropriate to the particular investment action, and strategies involved…in this case would mandate a prudent fiduciary – who indisputably has knowledge of institutional share classes and that such share

classes provide identical investments at lower costs – to switch share classes immediately." *Tibble III*, 2017 WL 3523737, at * 13.

99. The two funds added which cost more than available identical lower share classes were the following:

Fund in Plan	**Years in the Plan**	**2018 AUM**	**Exp. Ratio**[11]	**Lower Cost Share**	**Exp. Ratio**[12]	**% Fee Excess**
Harbor Capital Appreciation Inst Class	Since 2014	$83.8m	0.68%	Harbor Capital Appreciation Ret Class	0.58 %	17%
Principal Midcap Fund Inst C1	Since 2014	$58.0m	0.69%	Principal Midcap Fund R6	0.59%	17%

100. Defendants knew or should have known of the existence of the above cheaper share classes and therefore also should have immediately identified the prudence of selecting these alternative investments. The Harbor Capital Appreciation Ret Class fund was available as of March 1, 2016 and the Principal Midcap Fund R6 was available as of November 22, 2016.

101. As noted above, qualifying for lower share classes usually requires only a minimum of a million dollars for individual funds. However, initial investment minimums are generally waived for financial intermediaries and retirement plans.

102. A prudent fiduciary conducting an impartial review of the Plan's investments would have identified the cheaper share classes available and selected the lower share classes.

103. Failure to do so was because either Defendants did not negotiate aggressively enough with their service providers to obtain better pricing or they simply were not paying attention.

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[11] The listed expense figures are as of 2019.

[12] The listed expense figures are as of 2019.

104. Nor is it an excuse to select higher cost versions of the same fund to pay for Plan expenses. As noted above, fiduciaries should not "choose otherwise imprudent investments specifically to take advantage of revenue sharing." *Tibble III*, 2017 WL 3523737, at * 11.

105. By failing to investigate the use of lower cost share classes, Defendants caused the Plan and its participants to pay millions of dollars per year in unnecessary fees.

<u>Failure to Utilize Lower Cost Passively-Managed Funds</u>

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

107. While higher-cost mutual funds may outperform a less-expensive option, such as a passively-managed index fund, over the short term, they rarely do so over a longer term. *See* Jonnelle Marte, *Do Any Mutual Funds Ever Beat the Market? Hardly*, The Washington Post, available at https://www.washingtonpost.com/news/get-there/wp/2015/03/17/do-any-mutual-funds-ever-beat-the-market-hardly/ (citing a study by S&P Dow Jones Indices which looked at 2,862 actively-managed mutual funds, focused on the top quartile in performance and found most did not replicate performance from year to year); *see also Index funds trounce actively managed funds: Study*, available at http://www.cnbc.com/2015/06/26/index-funds-trounce-actively-managed-funds-study.html ("long-term data suggests that actively-managed funds "lagged their passive counterparts across nearly all asset classes, especially over the 10-year period from 2004 to 2014.")

108. Indeed, on average funds with high fees perform worse than less expensive funds, even on a pre-fee basis. Javier Gil-Bazo & Pablo Ruiz-Verdu, *When Cheaper is Better: Fee Determination in the Market for Equity Mutual Funds*, 67 J. Econ. Behav. & Org. 871, 873 (2009)

(hereinafter "*When Cheaper is Better*"); *see also* Jill E. Fisch, *Rethinking the Regulation of Securities Intermediaries*, 158 U. Pa. L. Rev. 1961, 1967-75 (2010) (summarizing numerous studies showing that "the most consistent predictor of a fund's return to investors is the fund's expense ratio").

109. During the Class Period, Defendants failed to consider materially similar but cheaper alternatives to the Plan's investment options. This failure is a further indication that Defendants lacked a prudent investment monitoring process.

110. The chart below demonstrates that the expense ratios of the Plan's investment options were more expensive by multiples of comparable passively-managed alternative funds in the same fund category. The chart below analyzes funds in the Plan in 2018 using 2018 expense ratios as a methodology to demonstrate the greater relative expense of the Plan's funds compared to their alternative fund counterparts.

Fund in Plan	**Net Expense Ratio**	**Passive Alternative**	**Net Expense Ratio**[13]	**Incep. Date**	**% Fee Excess**
Fidelity Freedom K 2005 Fund	0.42%	Fidelity Freedom Index 2005 Investor Class	0.14%	Dec. 2 2009	200%
		Fidelity Freedom Index 2005 Inst. Premium Class	0.08%	June 24 2015	425%
Fidelity Freedom K 2010 Fund	0.46%	Fidelity Freedom Index 2010 Investor Class	0.14%	Oct. 2 2009	229%
		Fidelity Freedom Index 2010 Inst. Premium Class	0.08%	June 24 2015	475%
Fidelity Freedom K 2015 Fund	0.49%	Fidelity Freedom Index 2015 Investor Class	0.14%	Oct. 2 2009	250%

[13] As of June 1, 2019, Fidelity Freedom Index Funds – Investor Class' expenses were reduced to 0.12% from 0.14%.

Fund in Plan	Net Expense Ratio	Passive Alternative	Net Expense Ratio[13]	Incep. Date	% Fee Excess
		Fidelity Freedom Index 2015 Inst. Premium Class	0.08%	June 24 2015	513%
Fidelity Freedom K 2020 Fund	0.53%	Fidelity Freedom Index 2020 Investor Class	0.14%	Oct. 2 2009	279%
		Fidelity Freedom Index 2020 Inst. Premium Class	0.08%	June 24 2015	563%
Fidelity Freedom K 2025 Fund	0.56%	Fidelity Freedom Index 2025 Investor Class	0.14%	Oct. 2 2009	300%
		Fidelity Freedom Index 2025 Inst. Premium Class	0.08%	June 24 2015	600%
Fidelity Freedom K 2030 Fund	0.60%	Fidelity Freedom Index 2030 Investor Class	0.14%	Oct. 2 2009	329%
		Fidelity Freedom Index 2030 Inst. Premium Class	0.08%	June 24 2015	650%
Fidelity Freedom K 2035 Fund	0.63%	Fidelity Freedom Index 2035 Investor Class	0.14%	Oct. 2 2009	350%
		Fidelity Freedom Index 2035 Inst. Premium Class	0.08%	June 24 2015	688%
Fidelity Freedom K 2040 Fund	0.65%	Fidelity Freedom Index 2040 Investor Class	0.14%	Oct. 2 2009	364%
		Fidelity Freedom Index 2040 Inst. Premium Class	0.08%	June 24 2015	713%
Fidelity Freedom K 2045 Fund	0.65%	Fidelity Freedom Index 2045 Investor Class	0.14%	Oct. 2 2009	364%
		Fidelity Freedom Index 2045 Inst. Premium Class	0.08%	June 24 2015	713%

Fund in Plan	Net Expense Ratio	Passive Alternative	Net Expense Ratio[13]	Incep. Date	% Fee Excess
Fidelity Freedom K 2050 Fund	0.65%	Fidelity Freedom Index 2050 Investor Class	0.14%	Oct. 2 2009	364%
		Fidelity Freedom Index 2050 Inst. Premium Class	0.08%	June 24 2015	713%
Fidelity Freedom K 2055 Fund	0.65%	Fidelity Freedom Index 2055 Investor Class	0.14%	June 1 2011	364%
		Fidelity Freedom Index 2055 Inst. Premium Class	0.08%	June 24 2015	713%
Fidelity Freedom K 2060 Fund	0.65%	Fidelity Freedom Index 2060 Investor Class	0.14%	Jan. 12 2014	364%
		Fidelity Freedom Index 2060 Inst. Premium Class	0.08%	June 24 2015	713%

111. The above alternative funds generally outperformed the Plan's funds in their 3 and 5 year average returns as of 2020 given that they were comprised of virtually identical underlying funds but had lower fees. Moreover, these alternative investments had no material difference in risk/return profiles with the Plan's funds and there was a high correlation of the alternative funds' holdings with the Plan's funds holdings such that any difference was immaterial.

112. These results are not surprising given that in the long-term, actively managed funds do not outperform their passively-managed counterparts. Indeed, the majority of U.S. equity funds did not outperform their index counterparts in the five years ending June 30, 2019:[14]

Fund Category	Comparison Index	Percentage of Funds That Underperformed Their Benchmark 5 Yr (%)

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

Large-Cap	S&P 500	78.52
Mid-Cap	S&P MidCap 400	63.56
Small-Cap	S&P SmallCap 600	75.09
Multi-Cap	S&P Composite 1500	82.79
Domestic Equity	S&P Composite 1500	81.66
Large-Cap Value	S&P Value	84.74
Mid-Cap Value	S&P MidCap 400 Value	92.31
Small-Cap Value	S&P SmallCap 600 Value	90.57
Multi-Cap Value	S&P Composite 1500 Value	91.35

113. A prudent investigation would have revealed the existence of these lower-cost and better performing alternatives to the Plan's funds.

114. The above is for illustrative purposes only as the significant fee disparities detailed above existed for all years of the Class Period. The Plan expense ratios were multiples of what they should have been given the bargaining power available to the Plan fiduciaries.

C. Defendants Breached Their Duty of Loyalty to the Plan and Its Participants

115. The structure of this Plan is rife with potential conflicts of interest because Fidelity and its affiliates were placed in positions that allowed them to reap profits from the Plan at the expense of Plan participants. Here, the Plan's Trustee is Fidelity, and an affiliate of Fidelity performs the recordkeeping services for the Plan.

116. This conflict of interest is laid bare in this case where lower-cost Fidelity collective trusts and index funds – materially similar or identical to the Plan's other Fidelity funds (other than

in price) – were available but not selected because the higher-cost funds returned more value to Fidelity.

117. There appears to be no reasonable justification for the millions of dollars collected from Plan participants that ended up in Fidelity's coffers.

118. The Company, and the fiduciaries to whom it delegated authority, breached their duty of undivided loyalty to Plan participants by failing to adequately supervise Fidelity and its affiliates and ensure that the fees charged by Fidelity and its affiliates were reasonable and in the best interests of the Plan and its participants. Clearly, Defendants failed this aspect of their fiduciary duties.

FIRST CLAIM FOR RELIEF
Breaches of Fiduciary Duties of Loyalty and Prudence
(Asserted against the Committee Defendants)

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

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

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

122. The Prudence Defendants breached these fiduciary duties in multiple respects as discussed throughout this Complaint. They did not make decisions regarding the Plan's investment lineup based solely on the merits of each investment and what was in the best interest of Plan participants. Instead, the Prudence Defendants selected and retained investment options in the Plan despite the high cost of the funds in relation to other comparable investments. The Prudence Defendants also failed to investigate the availability of lower-cost share classes of certain mutual funds in the Plan. In addition, the Prudence Defendants failed to investigate certain collective trusts as alternatives to mutual funds, even though they generally provide the same investment management services at a lower cost. Likewise, the Prudence Defendants failed to monitor or control the grossly excessive compensation paid for recordkeeping services.

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

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

125. The Prudence Defendants knowingly participated in each breach of the other Defendants, knowing that such acts were a breach, enabled the other Defendants to commit breaches by failing to lawfully discharge such Defendant's own duties, and knew of the breaches by the other Defendants and failed to make any reasonable and timely effort under the

circumstances to remedy the breaches. Accordingly, each Prudence Defendant is also liable for the breaches of their co-fiduciaries under 29 U.S.C. § 1105(a).

SECOND CLAIM FOR RELIEF
Failure to Adequately Monitor Other Fiduciaries
(Asserted against Universal and the Board Defendants)

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

127. Universal and the Board Defendants (the "Monitoring Defendants") had the authority to appoint and remove members of the Committee and were aware that the Committee Defendants had critical responsibilities as fiduciaries of the Plan.

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

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

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

(a) Failing to monitor and evaluate the performance of the Committee Defendants or have a system in place for doing so, standing idly by as the Plan suffered significant losses in the form of unreasonably high expenses, imprudent choices of funds' class of shares, and inefficient fund management styles that adversely affected the investment performance of the Funds' and their participants' assets as a result of the Committee Defendants' imprudent actions and omissions;

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

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

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

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

PRAYER FOR RELIEF

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

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

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

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

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

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

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

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

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

I. An award of pre-judgment interest;

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

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

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

Dated: June 5, 2020

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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MARY K. BOLEY, KANDIE SUTTER and PHYLLIS JOHNSON, individually and on behalf of all others similarly situated, Plaintiffs, v. UNIVERSAL HEALTH SERVICES, INC., THE UHS RETIREMENT PLANS INVESTMENT COMMITTEE, and JOHN DOES 1-20. Defendants.	**CIVIL ACTION NO.: 2:20-CV-02644** **AMENDED COMPLAINT**

Plaintiffs Mary K. Boley, Kandie Sutter and Phyllis Johnson ("Plaintiffs"), by and through their attorneys, on behalf of the Universal Health Services, Inc., Retirement Savings Plan (the "Plan"),[1] themselves and all others similarly situated, state and allege as follows:

I. INTRODUCTION

1. This is a class action brought pursuant to §§ 409 and 502 of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1109 and 1132, against the Plan's fiduciaries, which include Universal Health Services, Inc., ("UHS," "Universal" or the "Company") and the UHS Retirement Plans Investment Committee ("Committee") and its members during the Class Period for breaches of their fiduciary duties.

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

2. Defined contribution retirement plans, like the Plan, confer tax benefits on participating employees to incentivize saving for retirement. As of the end of 2015, Americans had approximately $6.7 trillion in assets invested in defined contribution plans. *See* INVESTMENT COMPANY INSTITUTE, *Retirement Assets Total $24.0 Trillion in Fourth Quarter 2015* (Mar. 24, 2016), available at https://www.ici.org/research/stats/retirement/ret_15_q4; PLAN SPONSOR, *2015 Recordkeeping Survey* (June 2015), available at http://www.plansponsor.com/2015-Recordkeeping-Survey/.

3. In a defined contribution plan, participants' benefits "are limited to the value of their own investment accounts, which is determined by the market performance of employee and employer contributions, less expenses." *Tibble v. Edison Int'l*, 135 S. Ct. 1823, 1826 (2015) ("*Tibble I*"). Thus, the employer has no incentive to keep costs low or to closely monitor the Plan to ensure every investment remains prudent, because all risks related to high fees and poorly-performing investments are borne by the participants.

4. To safeguard Plan participants and beneficiaries, ERISA imposes strict fiduciary duties of loyalty and prudence upon employers and other plan fiduciaries. 29 U.S.C. § 1104(a)(1). These twin fiduciary duties are "the highest known to the law." *Sweda v. Univ. of Pennsylvania*, 923 F.3d 320, 333 (3d Cir. 2019). Fiduciaries must act "solely in the interest of the participants and beneficiaries," 29 U.S.C. § 1104(a)(1)(A), with the "care, skill, prudence, and diligence" that would be expected in managing a plan of similar scope. 29 U.S.C. § 1104(a)(1)(B).

5. The Plan has at all times, during the Class Period maintained over 1.3 billion dollars in assets (including having 1.9 billion dollars in assets in 2018), qualifying it as a large plan in the defined contribution plan marketplace, and among the largest plans in the United States. These assets are entrusted to the care of the Plan's fiduciaries. As a large plan, the Plan had substantial bargaining power regarding the fees and expenses that were charged against participants'

investments. Defendants, however, did not try to reduce the Plan's expenses or exercise appropriate judgment to scrutinize each investment option that was offered in the Plan to ensure it was prudent.

6. Plaintiffs allege that during the putative Class Period (June 5, 2014 through the date of judgment) Defendants, as "fiduciaries" of the Plan as that term is defined under ERISA Section 3(21)(A), 29 U.S.C. § 1002(21)(A), breached the duties they owed to the Plan, to Plaintiffs, and to the other participants of the Plan by, *inter alia*, (1) failing to objectively and adequately review the Plan's investment portfolio with due care to ensure that each investment option was prudent, in terms of cost; and (2) maintaining certain funds in the Plan despite the availability of identical or materially similar investment options with lower costs and/or better performance histories.

7. To make matters worse, Defendants failed to consider lower cost collective trusts that were available to the Plan as alternatives to certain mutual funds in the Plan.

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

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

II. JURISDICTION AND VENUE

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

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

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

III. PARTIES

Plaintiffs

13. Plaintiff Mary K. Boley ("Boley") resides in Anna, Texas. During her employment, Plaintiff Boley participated in the Plan, investing in the options offered by the Plan and which are the subject of this lawsuit.

14. Plaintiff Kandie Sutter ("Sutter") resides in Corona, California. During her employment, Plaintiff Sutter participated in the Plan, investing in the options offered by the Plan and which are the subject of this lawsuit.

15. Plaintiff Phyllis Johnson ("Johnson") resides in Las Vegas, Nevada. During her employment, Plaintiff Johnson participated in the Plan, investing in the options offered by the Plan and which are the subject of this lawsuit.

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

17. Plaintiffs did not have knowledge of all material facts (including, among other things, the investment alternatives that are comparable to the investments offered within the Plan, comparisons of the costs and investment performance of Plan investments versus available alternatives within similarly-sized plans, total cost comparisons to similarly-sized plans, information regarding other available share classes, and information regarding the availability and pricing of collective trusts) necessary to understand that Defendants breached their fiduciary duties and engaged in other unlawful conduct in violation of ERISA until shortly before this suit was filed. Further, Plaintiffs did not have and do not have actual knowledge of the specifics of Defendants' decision-making process with respect to the Plan, including Defendants' processes (and execution of such) for selecting, monitoring, and removing Plan investments, because this information is solely within the possession of Defendants prior to discovery.[2] Moreover, having never managed a large 401(k) plan such as the Plan, Plaintiffs lacked actual knowledge of reasonable fee levels and prudent alternatives available to such plans. For purposes of this Complaint, Plaintiffs have drawn reasonable inferences regarding these processes based upon (among other things) the facts set forth herein.

Defendants

Company Defendant

18. Universal Health Services, Inc., is the Plan sponsor. *See* 2018 Form 5500 at 1. Its corporate headquarters is located at 367 S. Gulph Road, King of Prussia, Pennsylvania. UHS describes itself as "one of the nation's largest and most respected providers of hospital and

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[2] *See Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 598 (8th Cir. 2009) ("If Plaintiffs cannot state a claim without pleading facts which tend systematically to be in the sole possession of defendants, the remedial scheme of [ERISA] will fail, and the crucial rights secured by ERISA will suffer.").

healthcare services."[3] It "has 400 acute care hospitals, behavioral health facilities and ambulatory centers across the U.S., Puerto Rico and the U.K….and employs 90,000 employees."[4] In 2019, "UHS generated net revenues of approximately $11.4 billion, an increase of 5.6% over 2018." *See*, the December 31, 2019 Annual Report of Universal Health Services, Inc., at 6.

19. "The Company and its authorized representatives appointed by the Board of Directors are the Plan fiduciaries and the Plan Administrator." Summary Plan Description Handbook of Universal Health Services, Inc., Effective January 1, 2020 ("UHS 2020 SPD"), at 81. In executing their powers, the "Plan Administrator and Plan Sponsor have the authority to control and manage the operation and administration of the plan…." *Id.* at 92.

20. In addition, UHS is responsible for "selecting and removing Plan trustees, investment media, record-keepers and/or insurance companies," UHS 2020 SPD at 81, and appointing members of the Committee through action of its Board of Directors. Under ERISA, fiduciaries with the power to appoint have the concomitant fiduciary duty to monitor and supervise their appointees.

21. Lastly, at all times, UHS acted through its officers, including the Committee, to perform Plan-related fiduciary functions.

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

Committee Defendants

23. As noted in the 2018 Audited Financial Statement: "[t]he Company's Plan Committee … is the plan administrator." December 31, 2018 Audited Financial Statements of

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[3] https://www.uhsinc.com/about-uhs/

[4] *Id.*

Universal Health Services, Inc., ("2018 Audited Statement") at 4. "Participants direct the investment of their contributions … into various investment options selected by the Plan Committee." *Id.*

24. Further, the Committee and its members, as "authorized representatives of the Company," appointed the trustee of the Plan. UHS 2020 SPD at 81. The Committee selected "Fidelity Trust Company" to act as the Plan trustee. *Id.* The Plan trustee, Fidelity Trust Company "shall be the named fiduciary with respect to management and control of Plan assets held by it…" The Universal Health Services, Inc., Retirement Saving Plan Document as amended and restated effective January 1, 2017 ("2017 Plan Doc.") at 54.

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

26. The Committee and members of the Committee during the Class Period (referred to herein as John Does 1-10), are collectively referred to herein as the "Committee Defendants."

Additional John Doe Defendants

27. To the extent that there are additional officers and employees of UHS who are/were fiduciaries of the Plan during the Class Period, or other individuals who were hired as investment managers for the Plan during the Class Period, the identities of whom are currently unknown to Plaintiffs, Plaintiffs reserve the right, once their identities are ascertained, to seek leave to join them to the instant action. Thus, without limitation, unknown "John Doe" Defendants 11-20 include, but are not limited to, UHS officers and employees who are/were fiduciaries of the Plan within the meaning of ERISA Section 3(21)(A), 29 U.S.C. § 1002(21)(A), during the Class Period.

IV. THE PLAN

28. The Plan "which became effective January 1, 1985, is a defined contribution plan available to qualifying employees of Universal Health Services, Inc." 2018 Audited Statement at 4. The plan was amended and restated effective January 1, 1997. *See*, 2017 Plan Doc. at 1.

29. The Plan is a "defined contribution" or "individual account" plan within the meaning of ERISA Section 3(34), 29 U.S.C. § 1002(34), in that the Plan provides for individual accounts for each participant and for benefits based solely upon the amount contributed to those accounts, and any income, expense, gains and losses, and any forfeitures of accounts of the participants which may be allocated to such participant's account. *See*, 2017 Plan Doc at 9. Further, the 2020 SPD provides: "[t]he Plan is a defined contribution plan…" UHS 2020 SPD at 82. Consequently, retirement benefits provided by the Plan are based solely on the amounts allocated to each individual's account.

Eligibility

30. As detailed in the 2018 Auditor Report: "[t]o be eligible to participate in the Plan, an employee must generally have completed at least one month of credited service and be 21 years of age." 2018 Auditor Report at 4.

Contributions and Vesting

31. There are several types of contributions that can be added to a participant's account: an employee salary deferral contribution, an employer matching contribution, and an employer profit sharing contribution. UHS 2020 SPD at 72 and 73. Participants can also roll over amounts from other qualified benefit or defined contribution plans. *Id*.

32. As described in the UHS 2020 SPD, a participant "can save from 1% to 75% of your eligible compensation on a pre-tax basis…." *Id.* In addition, "the Company will match a

portion of your pre-tax and/or Roth after-tax contributions (your "Company Matching Contribution") each pay period.

33. UHS made discretionary decisions about the matching and discretionary contributions to Plan participants. 2015 Plan Doc. at 25. As described in the 2018 Audited Statement, UHS "contributes a discretionary amount of each participant's contribution to the Plan in accordance with Plan provisions…" 2018 Audited Statement at 4. As long as an employee is eligible to participate in the Plan, UHS will make contributions to each participants' accounts on the first day of eligibility. *See*, UHS 2020 SPD at 71.

34. Generally, "[p]articipants are immediately vested in their contributions plus actual earnings thereon. Vesting in the Company's contribution portion is based on years of continuous service. Generally, participants vest 25% each year and are fully vested after four years of service." 2018 Auditor Report at 4.

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

36. UHS also benefits in other ways from the Plan's matching program. It is well-known that "[m]any employers match their employees' contributions to the 401(k) plan in order to help attract and retain talent at their company. By hiring and retaining employees with a high-caliber of talent, [a company] may save money on training and attrition costs associated with unhappy or lower-performing workers." *See,* https://www.paychex.com/articles/employee-benefits/employer-matching-401k-benefits.

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

The Plan's Investments

38. Several investments were available to Plan participants for investment each year during the putative Class Period, including several Fidelity target date funds. As noted above, the Committee determines the appropriateness of the Plan's investment offerings and monitors investment performance. For 2018, the Plan offered 31 investment options, which included 29 mutual funds, 1 collective trust and 1 money market fund.

39. The Plan's assets under management for all funds as of the end of 2018 was $1,914,043,716. 2018 Auditor Report at 2. From 2014 to 2017 the Plan's assets under management ranged from $1.3 billion to $1.9 billion.

Plan Expenses

40. "Certain expenses of maintaining the Plan are paid directly by the Plan …" 2018 Auditor Report at 6.

V. CLASS ACTION ALLEGATIONS

41. Plaintiffs bring this action as a class action pursuant to Rule 23 of the Federal Rules of Civil Procedure on behalf of themselves and the following proposed class ("Class"):[5]

> All persons, except Defendants and their immediate family members, who were participants in or beneficiaries of the Plan, at any time between June 5, 2014 through the date of judgment (the "Class Period").

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

42. The members of the Class are so numerous that joinder of all members is impractical. The 2018 Form 5500 filed with the Dept. of Labor lists 41,872 Plan "participants with account balances as of the end of the plan year." 2018 Form 5500 at 2.

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

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

A. Whether Defendants are/were fiduciaries of the Plan;

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

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

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

E. The proper measure of monetary relief.

45. Plaintiffs will fairly and adequately represent the Class and have retained counsel experienced and competent in the prosecution of ERISA class action litigation. Plaintiffs have no interests antagonistic to those of other members of the Class. Plaintiffs are committed to the

vigorous prosecution of this action and anticipate no difficulty in the management of this litigation as a class action.

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

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

VI. DEFENDANTS' FIDUCIARY STATUS AND OVERVIEW OF FIDUCIARY DUTIES

48. ERISA requires every plan to provide for one or more named fiduciaries who will have "authority to control and manage the operation and administration of the plan." ERISA § 402(a)(1), 29 U.S.C. § 1102(a)(1).

49. ERISA treats as fiduciaries not only persons explicitly named as fiduciaries under Section 402(a)(1), 29 U.S.C. § 1102(a)(1), but also any other persons who in fact perform fiduciary functions. Thus, a person is a fiduciary to the extent "(i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) he renders investment advice for a fee or

other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan." ERISA § 3(21)(A)(i), 29 U.S.C. § 1002(21)(A)(i).

50. As described in the "Parties" section above, Defendants were fiduciaries of the Plan because:

(a) they were so named; and/or

(b) they exercised authority or control respecting management or disposition of the Plan's assets; and/or

(c) they exercised discretionary authority or discretionary control respecting management of the Plan; and/or

(d) they had discretionary authority or discretionary responsibility in the administration of the Plan.

51. As fiduciaries, Defendants are/were required by ERISA Section 404(a)(1), 29 U.S.C. § 1104(a)(1), to manage and administer the Plan, and the Plan's investments, solely in the interest of the Plan's participants and beneficiaries and with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person 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. These twin duties are referred to as the duties of loyalty and prudence and are "the highest known to the law." *Sweda*, 923 F.3d at 333.

52. The duty of loyalty requires fiduciaries to act with an "eye single" to the interests of plan participants. *Pegram v. Herdrich*, 530 U.S. 211, 235 (2000). "Perhaps the most fundamental duty of a [fiduciary] is that he [or she] must display . . . complete loyalty to the interests of the beneficiary and must exclude all selfish interest and all consideration of the interests

of third persons." *Id.*, at 224 (quotation marks and citations omitted). Thus, "in deciding whether and to what extent to invest in a particular investment, a fiduciary must ordinarily consider *only* factors relating to the interests of plan participants and beneficiaries . . . . A decision to make an investment may not be influenced by [other] factors unless the investment, when judged *solely* on the basis of its economic value to the plan, would be equal or superior to alternative investments available to the plan." Dep't of Labor ERISA Adv. Op. 88-16A, 1988 WL 222716, at *3 (Dec. 19, 1988) (emphasis added).

53. In effect, the duty of loyalty includes a mandate that the fiduciary display complete loyalty to the beneficiaries and set aside the consideration of himself or third persons.

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

55. In addition, ERISA Section 405(a), 29 U.S.C. § 1105(a) (entitled "Liability for breach by co-fiduciary"), further provides that:

> [I]n 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: (A) if he participates knowingly in, or knowingly undertakes to conceal, an act or omission of such other fiduciary, knowing such an act or omission is a breach; (B) if, by his failure to comply with section 404(a)(1), 29 U.S.C. §1104(a)(1), in the administration of his specific responsibilities which give rise to his status as a fiduciary, he has enabled such other fiduciary to commit a breach; or (C) if he has knowledge of a breach by such other fiduciary, unless he makes reasonable efforts under the circumstances to remedy the breach.

56. During the Class Period, Defendants did not act in the best interests of the Plan participants. Investments chosen for a plan are not to favor the fund provider over the plan's participants. Yet here, to the detriment of the Plan and its participants and beneficiaries, the Plan's fiduciaries included and retained in the Plan many mutual fund investments that were more expensive than necessary and otherwise not justified on the basis of their economic value to the Plan or Plan participants.

57. Based on reasonable inferences from the facts set forth in this Complaint, during the Class Period Defendants failed to have a proper system of review in place to ensure that participants in the Plan were being charged appropriate and reasonable fees for the Plan's investment options. Additionally, Defendants failed to leverage the size of the Plan to negotiate for: (1) lower expense ratios for certain investment options maintained and/or added to the Plan during the Class Period; and (2) a prudent payment arrangement with regard to the Plan's recordkeeping and administrative fees.

58. As discussed below, Defendants breached fiduciary duties to the Plan and its participants and beneficiaries and are liable for their breaches and the breaches of their co-fiduciaries under 29 U.S.C. §§ 1104(a)(1) and 1105(a).

VII. SPECIFIC ALLEGATIONS

A. Improper Management of an Employee Retirement Plan Can Cost the Plan's Participants Millions in Savings

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

60. "The Restatement … instructs that 'cost-conscious management is fundamental to prudence in the investment function,' and should be applied 'not only in making investments but also in monitoring and reviewing investments.'" *Tibble v. Edison Int'l*, 843 F.3d 1187, 1197-98 (9th Cir. 2016) (*en banc*) (quoting Restatement (Third) of Trusts, § 90, cmt. b) ("*Tibble II*"). *See also* U.S. Dep't of Labor, *A Look at 401(k) Plan Fees*, (Aug. 2013), at 2, available at https://www.dol.gov/sites/dolgov/files/ebsa/about-ebsa/our-activities/resource-center/publications/a-look-at-401k-plan-fees.pdf (last visited February 21, 2020) ("You should be aware that your employer also has a specific obligation to consider the fees and expenses paid by your plan."). As the Ninth Circuit described, additional fees of only 0.18% or 0.4% can have a large effect on a participant's investment results over time because "[b]eneficiaries subject to higher fees … lose not only money spent on higher fees, but also lost investment opportunity; that is, the money that the portion of their investment spent on unnecessary fees would have earned over time." *Tibble II*, 843 F.3d at 1198 ("It is beyond dispute that the higher the fees charged to a beneficiary, the more the beneficiary's investment shrinks.").

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

62. In fact, the Department of Labor has explicitly stated that employers are held to a "high standard of care and diligence" and must, among other duties, both "establish a prudent process for selecting investment options and service providers" and "monitor investment options and service providers once selected to see that they continue to be appropriate choices." *See,* "*A Look at 401(k) Plan Fees*," *supra*, at 2.

63. The duty to evaluate and monitor fees and investment costs includes fees paid directly by plan participants to investment providers, usually in the form of an expense ratio or a percentage of assets under management within a particular investment. *See* Investment Company Institute ("ICI"), *The Economics of Providing 401(k) Plans: Services, Fees, and Expenses* (July 2016), at 4. "Any costs not paid by the employer, which may include administrative, investment, legal, and compliance costs, effectively are paid by plan participants." *Id*., at 5.

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

B. Defendants Breached Their Fiduciary Duties in Failing to Investigate and Select Lower Cost Alternative Funds

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

66. The Supreme Court recently reaffirmed the ongoing fiduciary duty to monitor a plan's investment options. *Tibble I*, 135 S. Ct. at 1823. In *Tibble I*, the Court held that "an ERISA fiduciary's duty is derived from the common law of trusts" and that, "[u]nder trust law, a trustee has a continuing duty to monitor trust investments and remove imprudent ones." *Id.*, at 1828. In so holding, the Supreme Court referenced with approval the UPIA, treatises, and seminal decisions confirming the duty.

67. Under trust law, one of the responsibilities of the Plan's fiduciaries is to "avoid unwarranted costs" by being aware of the "availability and continuing emergence" of alternative

investments that may have "significantly different costs." Restatement (Third) of Trusts, ch. 17, intro. note (2007); *see also* Restatement (Third) of Trusts, § 90 cmt. B (2007) ("Cost-conscious management is fundamental to prudence in the investment function."). Adherence to these duties requires regular performance of an "adequate investigation" of existing investments in a plan to determine whether any of the plan's investments are "improvident" or if there is a "superior alternative investment" to any of the plan's holdings. *Pension Ben. Gaur. Corp. ex rel. St. Vincent Catholic Med. Ctrs. Ret. Plan v. Morgan Stanley Inv. Mgmt.*, 712 F.3d 705, 718-19 (2d Cir. 2013).

68. When large plans, particularly those with over a billion dollars in assets like the Plan here, have options which approach the retail cost of shares for individual investors or are simply more expensive than the average or median institutional shares for that type of investment, a careful review of the plan and each option is needed for the fiduciaries to fulfill their obligations to the plan participants.

69. The Plan has retained several actively-managed funds as Plan investment options despite the fact that these funds charged grossly excessive fees compared with comparable or superior alternatives, and despite ample evidence available to a reasonable fiduciary that these funds had become imprudent due to their higher costs relative to the same or similar investments available. This fiduciary failure decreased participant compounding returns and reduced the available amount participants will have at retirement.

70. During the Class Period, the Plan lost millions of dollars by offering investment options that had similar or identical characteristics to other lower-priced investment options.

71. The majority of funds in the Plan stayed relatively unchanged during the Class Period. In 2018, a majority of the funds in the Plan, at least 20 out of the Plan's 31 funds (65%) were much more expensive than comparable funds found in similarly-sized plans (plans having over a billion dollars in assets). The expense ratios for funds in the Plan in some cases were up to

203% (in the case of the Northern Small Cap Value fund) and ***218%*** (in the case of the MSIF Small Cap Growth IS fund) above the median expense ratios in the same category:[6]

Plan Fund	Expense Ratio[7]	Category	ICI Median Fee
Fidelity Contra Class K	0.73%	Domestic Equity	0.33%
Fidelity Balanced Class K	0.45%	Domestic Equity	0.33%
Harbor Capital Appreciation Fund Inst Class	0.68%	Domestic Equity	0.33%
Neuberger Berman Genesis Fund R6	0.75%	Domestic Equity	0.33%
Northern Small Cap Value Fund	1.00%	Domestic Equity	0.33%
Franklin Small Cap Growth Fund R6	0.65%	Domestic Equity	0.33%
Wells Fargo Special Mid Cap Value R6	0.73%	Domestic Equity	0.33%
Principal Midcap Fund Inst C1	0.69%	Domestic Equity	0.33%
Neuberger Berman Large Cap Value Inst	0.70%	Domestic Equity	0.33%
MSIF Small Cap Growth IS	1.05%	Domestic Equity	0.33%
Fidelity Diversified International Class K	0.69%	International Equity	0.50%
Fidelity Freedom K 2020 Fund	0.53%	Target Date	0.47%
Fidelity Freedom K 2025 Fund	0.56%	Target Date	0.47%
Fidelity Freedom K 2030 Fund	0.60%	Target Date	0.47%
Fidelity Freedom K 2035 Fund	0.63%	Target Date	0.47%
Fidelity Freedom K 2040 Fund	0.65%	Target Date	0.47%
Fidelity Freedom K 2045 Fund	0.65%	Target Date	0.47%

[6] *See* BrightScope/ICI Defined Contribution Plan Profile: *A Close Look at 401(k) Plans, 2016* at 62 (June 2019) (hereafter, "ICI Study") available at https://www.ici.org/pdf/19_ppr_dcplan_profile_401k.pdf.

[7] The listed expense figures are as of 2019.

Fidelity Freedom K 2050 Fund	0.65%	Target Date	0.47%
Fidelity Freedom K 2055 Fund	0.65%	Target Date	0.47%
Fidelity Freedom K 2060 Fund	0.65%	Target Date	0.47%

72. The above comparisons understate the excessiveness of fees in the Plan throughout the Class Period. That is because the above ICI Median fee is based on a study conducted in 2016 when expense ratios were generally higher than fees today or even in 2019 given the downward trend of expense ratios the last few years. Indeed, the ICI median expense ratio for target date funds for plans with over 1 billion dollars in assets was 0.56% using 2015 data compared with 0.47% in 2016. Accordingly, 2019 median expense ratios would be lower than indicated above, demonstrating a greater disparity between the Plan's 2019 expense ratios charted above and the median expense ratios in the same category.

73. Further, median-based comparisons also understate the excessiveness of the investment management fees of the Plan's funds because many prudent alternative funds were available that offered lower expenses than the median.

Failure to Investigate Availability of Lower Cost Collective Trusts

74. Many mutual funds offer multiple classes of shares in a single mutual fund that are targeted at different investors. Generally, more expensive share classes are targeted at smaller investors with less bargaining power, while lower cost shares are targeted at institutional investors with more assets, generally $1 million or more, and therefore greater bargaining power. There is no difference between share classes other than cost—the funds hold identical investments and have the same manager.

75. Collective trusts, also referred to as CITs, are akin to low-cost share classes because many if not most mutual fund strategies are available in a collective trust format, and the

investments in the collective trusts are identical to those held by the mutual fund, except they cost less.

76. As noted *supra*, ERISA is derived from trust law. *Tibble I,* 135 S. Ct. at 1828. Accordingly, the Supreme Court has stated that where ERISA is silent, courts should seek guidance from trust law. *Varity Corp v. Howe*, 516 U.S. 489, 496-97 (1996). One such area is the selection of appropriate funds for a plan. Trust law states it depends on "the type of trustee and the nature of the breach involved, the availability of relevant data, and other facts and circumstances of the case." Restatement (Third) of Trusts, § 100 cmt. b(1). To determine whether a fiduciary has selected appropriate funds for the trust, appropriate comparators may include "return rates of one or more **suitable common trust funds**, or suitable index mutual funds or market indexes (with such adjustments as may be appropriate)." *Id.* (emphasis added).

77. Plan fiduciaries such as Defendants here must be continually mindful of investment options to ensure they do not unduly risk plan participants' savings and do not charge unreasonable fees. Some of the best investment vehicles for these goals are collective trusts, which pool plan participants' investments further and provide lower fee alternatives to even institutional and 401(k) plan specific shares of mutual funds. Defendants knew this, or at least should have known this, because the Plan included at least one collective trust during the Class Period.

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

79. Due to their potential to reduce overall plan costs, collective trusts are becoming increasingly popular; *Use of CITs in DC Plans Booming* (discussing data showing that among both mid-size and large defined contribution plans, significantly more assets are held in collective trusts than in mutual funds).[8]

80. A clear indication of Defendants' lack of a prudent investment evaluation process was their failure to identify and select available collective trusts. A prudent fiduciary conducting an impartial review of the Plan's investments would have identified all funds that could be converted to collective trusts at the earliest opportunity. Here, the following funds in the Plan in 2018 were available as collective trusts in 2018 and most of the Class Period:

Fund in Plan	**Exp. Ratio**[9]	**Collective Trust Version**	**Incep Date**	**Exp. Ratio**[10]	**% Fee Excess**
Fidelity Contrafund Class K	0.73%	Fidelity Contrafund Commingled Pool	Jan. 17, 2014	0.43%	70%

[8] The criticisms that have been launched against collective trust vehicles in the past no longer apply. Collective trusts use a unitized structure and the units are valued daily; as a result, participants invested in collective trusts are able to track the daily performance of their investments online. *Use of CITs in DC Plans Booming*; Paula Aven Gladych, *CITs Gaining Ground in 401(k) Plans*, EMPLOYEE BENEFIT NEWS (Apr. 14, 2016), available at http://www.benefitnews.com/news/cits-gaining-ground-in-401-k-plans (hereinafter "*CITs Gaining Ground*"). Many if not most mutual fund strategies are available in a collective trust format, and the investments in the collective trusts are identical to those held by the mutual funds. *Use of CITs in DC Plans Booming; CITs Gaining Ground*. And because collective trusts contract directly with the plan, and provide regular reports regarding costs and investment holdings, the plan has the same level of protection that the Investment Company Act provides to individual investors, thus eliminating the need for the protections of the Investment Company Act. Further, collective trusts are still subject to state and federal banking regulations that provide comparable protections. American Bankers Association, ABA Primer on Bank Collective Funds, June 2015, at 1, available at https://www.aba.com/advocacy/policy-analysis/primer-bank-collective-investment-funds.

[9] The listed expense figures are as of 2019.

[10] The listed expense figures are as of 2019.

Fund in Plan	Exp. Ratio[9]	Collective Trust Version	Incep Date	Exp. Ratio[10]	% Fee Excess
Fidelity Diversified International Class K	0.69%	Fidelity Diversified International Commingled Pool	Dec. 13 2013	0.58%	19%
Fidelity Freedom K 2005 Fund	0.42%	FIAM Blend Target Date 2005 Q Fund	Oct. 31 2007	0.32%	31%
Fidelity Freedom K 2010 Fund	0.46%	FIAM Blend Target Date 2010 Q Fund	Oct. 31 2007	0.32%	44%
Fidelity Freedom K 2015 Fund	0.49%	FIAM Blend Target Date 2015 Q Fund	Oct. 31 2007	0.32%	53%
Fidelity Freedom K 2020 Fund	0.53%	FIAM Blend Target Date 2020 Q Fund	Oct. 31 2007	0.32%	66%
Fidelity Freedom K 2025 Fund	0.56%	FIAM Blend Target Date 2025 Q Fund	Oct. 31 2007	0.32%	75%
Fidelity Freedom K 2030 Fund	0.60%	FIAM Blend Target Date 2030 Q Fund	Oct. 31 2007	0.32%	88%
Fidelity Freedom K 2035 Fund	0.63%	FIAM Blend Target Date 2035 Q Fund	Oct. 31 2007	0.32%	97%
Fidelity Freedom K 2040 Fund	0.65%	FIAM Blend Target Date 2040 Q Fund	Oct. 31 2007	0.32%	103%
Fidelity Freedom K 2045 Fund	0.65%	FIAM Blend Target Date 2045 Q Fund	Oct. 31 2007	0.32%	103%
Fidelity Freedom K 2050 Fund	0.65%	FIAM Blend Target Date 2050 Q Fund	Oct. 31 2007	0.32%	103%
Fidelity Freedom K 2055 Fund	0.65%	FIAM Blend Target Date 2055 Q Fund	July 12 2011	0.32%	103%
Fidelity Freedom K 2060 Fund	0.65%	FIAM Blend Target Date 2060 Q Fund	May 15 2015	0.32%	103%

81. The above is for illustrative purposes only. During the Class Period, Defendants knew or should have known of the existence of these available collective trusts and therefore also should have immediately identified the prudence of transferring the Plan's funds into these alternative investments.

82. As noted above, minimum initial investment amounts are typically waived for institutional investors like retirement plans. *See, e.g., Davis, et al. v. Washington Univ., et al.*, No. 18-3345, slip op. at 5 (8th Cir. May 22, 2020) ("minimum investment requirements are 'routinely waived' for individual investors in large retirement-savings plans"); *Sweda*, 923 F.3d at 329 (citing *Tibble II*, 729 F.3d at 1137 n.24) (confirming that investment minimums are typically waived for large plans). Here, "[t]he eligibility requirement for FIAM Blend Target Date is $25 million in client assets." *See* Fidelity Pricing Options for Retirement Plans as of Dec. 31, 2019 ("Fidelity Pricing"), p. 11. And, "[c]lient assets is defined as assets invested in qualified defined contribution plans only, which are profit sharing, 401(k), and defined benefit plans that are qualified under Section 401(a) and governmental plans that are described in section 401(a)24 of the IRS code." *Id.*

83. Clearly, per the below chart, the Plan had sufficient assets under management during the Class Period to qualify for Fidelity collective trusts:

Fund in Plan	2018 AUM	2017 AUM	2016 AUM	2015 AUM	2014 AUM
Fidelity Contrafund Class K	$180,455,076	$190,989,424	$146,274,249	$153,029,000	NA
Fidelity Diversified International Class K	$44,874,063	$56,981,096	$45,695,069	$51,730,000	$51,140,000
Fidelity Freedom K 2005 Fund	$3,328,214	$3,130,674	$2,980,076	$2,625,000	$2,482,000

Fidelity Freedom K 2010 Fund	$14,700,883	$16,583,150	$15,357,026	$15,438,000	$18,073,000
Fidelity Freedom K 2015 Fund	$29,860,328	$35,486,423	$30,758,572	$32,142,000	$32,983,000
Fidelity Freedom K 2020 Fund	$142,344,416	$154,508,611	$125,978,134	$109,099,000	$101,979,000
Fidelity Freedom K 2025 Fund	$142,133,737	$140,054,309	$100,640,796	$79,073,000	$67,813,000
Fidelity Freedom K 2030 Fund	$181,948,301	$180,472,559	$131,011,400	$105,753,000	$91,411,000
Fidelity Freedom K 2035 Fund	$118,099,631	$113,934,046	$77,225,399	$59,307,000	$48,851,000
Fidelity Freedom K 2040 Fund	$121,013,003	$121,428,667	$87,806,045	$69,409,000	$61,568,000
Fidelity Freedom K 2045 Fund	$86,309,175	$82,780,657	$56,344,010	$40,492,000	$31,922,000
Fidelity Freedom K 2050 Fund	$73,574,568	$68,595,224	$45,056,791	$31,561,000	$23,943,000
Fidelity Freedom K 2055 Fund	$46,478,867	$37,831,154	$20,863,675	$10,902,000	$5,475,000
Fidelity Freedom K 2060 Fund	$4,501,198	$1,208,904	NA	NA	NA

84. A prudent fiduciary conducting an impartial review of the Plan's investments would have identified the cheaper available collective trusts and transferred the Plan's investments into the lower cost funds at the earliest opportunity.

85. There is no good-faith explanation for utilizing higher-cost funds when lower-cost funds are available for the exact same investment. Indeed, given that the collective trusts were comprised of the same underlying investments as their mutual fund counterparts, and managed by

the same investment manager, but had lower fees, they generally had greater returns when looking at the 1, 3, 5, and 10 year average annual returns. Moreover, the Plan did not receive any additional services or benefits based on its use of more expensive funds; the only consequence was higher costs for Plan participants. Defendants failed in their fiduciary duties either because they did not negotiate aggressively enough with their service providers to obtain better pricing or they were asleep at the wheel and were not paying attention. Either reason is inexcusable.

86. Moreover, it is not prudent to select higher cost versions of the same fund even if a fiduciary believes fees charged to plan participants by the "retail" class investment were the same as the fees charged by the "institutional" class investment, net of the revenue sharing paid by the funds to defray the Plan's recordkeeping costs. *Tibble, et al. v. Edison Int. et al.*, No. 07-5359, 2017 WL 3523737, at * 8 (C.D. Cal. Aug. 16, 2017) ("*Tibble III*"). Fiduciaries should not "choose otherwise imprudent investments specifically to take advantage of revenue sharing." *Id.*, at * 11. This basic tenet of good fiduciary practice resonates loudly in this case given the unreasonable recordkeeping and administrative costs arrangements put in place by Defendants.

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

88. Although utilizing a revenue sharing approach is not *per se* imprudent, unchecked, it is devastating for Plan participants. "At worst, revenue sharing is a way to hide fees. Nobody sees the money change hands, and very few understand what the total investment expense pays

for. It's a way to milk large sums of money out of large plans by charging a percentage-based fee that never goes down (when plans are ignored or taken advantage of). In some cases, employers and employees believe the plan is 'free' when it is in fact expensive." Justin Pritchard, "Revenue Sharing and Invisible Fees" available at http://www.cccandc.com/p/revenue-sharing-and-invisible-fees (last visited March 19, 2020).

89. The Plan participated in Fidelity's participant revenue credit program through which recordkeeping fees and other Plan administrative costs were paid through the following structure. The Trustee made annual revenue credit payments, from the funds it received through revenue sharing, to a Revenue Credit Account. Afterward, the administrator could direct the Trustee to use amounts held in the Revenue Credit Account to reimburse the Sponsor for fees and expenses associated with services provided to the Plan, or pay such vendors, including the Trustee or third parties, directly. Further, amounts held in the Revenue Credit Account may be fully utilized each year and any unused amount may be carried over from year to year rather than being remitted back to participants.

90. Over the years, this arrangement of placing revenue sharing funds into a Revenue Account before disbursement to pay for Plan expenses deprived Plan participants of use of their money and millions of dollars in lost opportunity costs. A more prudent arrangement in this case would have been to select available lower cost investment funds that used little to no revenue sharing and for the Defendants to negotiate and/or obtain reasonable direct compensation per participant recordkeeping/administration fees.

91. By failing to investigate the availability of certain collective trusts, Defendants caused the Plan to pay millions of dollars per year in unnecessary fees. Further, to the extent Defendants held revenue sharing amounts for a prolonged period of time and failed to remit any

excess revenue sharing back to Plan participants, this was a further fiduciary breach that cost Plan participants millions of dollars during the Class Period.

Failure to Utilize Lower Fee Share Classes

92. Plan fiduciaries had an option to choose lower cost Fidelity collective trusts during the Class Period. But they also had the option of other lower cost identical funds which they similarly failed to select. Since June 2017, Fidelity has offered K shares of its target date funds. Generally, "K6 Funds and Class K are available to retirement plans recordkept at Fidelity [like the Plan here]." Fidelity Pricing at 3. "K6 Funds are intended for plan sponsors that do not want to receive any revenue sharing or recordkeeping offsets." *Id.* The K6 target date shares were significantly cheaper than the Class K shares – price being the only difference between the two classes of shares. The following chart illustrates the point:

Fund in Plan	**Exp. Ratio**[11]	**K6**	**Incep Date**[12]	**Exp. Ratio**[13]	**% Fee Excess**
Fidelity Freedom K 2005 Fund	0.42%	Fidelity Freedom K6 2005 Fund	June 7 2017	0.37%	14%
Fidelity Freedom K 2010 Fund	0.46%	Fidelity Freedom K6 2010 Fund	June 7 2017	0.39%	18%
Fidelity Freedom K 2015 Fund	0.49%	Fidelity Freedom K6 2015 Fund	June 7 2017	0.41%	20%
Fidelity Freedom K 2020 Fund	0.53%	Fidelity Freedom K6 2020 Fund	June 7 2017	0.43%	23%
Fidelity Freedom K 2025 Fund	0.56%	Fidelity Freedom K6 2025 Fund	June 7 2017	0.45%	24%
Fidelity Freedom K 2030 Fund	0.60%	Fidelity Freedom K6 2030 Fund	June 7 2017	0.47%	28%

[11] The listed expense figures are as of 2019.

[12] *See* May 30, 2020 Fidelity Freedom Funds Prospectus.

[13] The listed expense figures are as of 2019.

Fund in Plan	Exp. Ratio[11]	K6	Incep Date[12]	Exp. Ratio[13]	% Fee Excess
Fidelity Freedom K 2035 Fund	0.63%	Fidelity Freedom K6 2035 Fund	June 7 2017	0.49%	29%
Fidelity Freedom K 2040 Fund	0.65%	Fidelity Freedom K6 2040 Fund	June 7 2017	0.50%	30%
Fidelity Freedom K 2045 Fund	0.65%	Fidelity Freedom K6 2045 Fund	June 7 2017	0.50%	30%
Fidelity Freedom K 2050 Fund	0.65%	Fidelity Freedom K6 2050 Fund	June 7 2017	0.50%	30%
Fidelity Freedom K 2055 Fund	0.65%	Fidelity Freedom K6 2055 Fund	June 7 2017	0.50%	30%
Fidelity Freedom K 2060 Fund	0.65%	Fidelity Freedom K6 2060 Fund	June 7 2017	0.50%	30%

93. Additionally, the Plan fiduciaries added two funds during the Class Period that cost more than available identical lower share classes:

Fund in Plan	Years in the Plan	2018 AUM	Exp. Ratio[14]	Lower Cost Share	Exp. Ratio[15]	% Fee Excess
Harbor Capital Appreciation Inst Class	Since 2014	$83.8m	0.68%	Harbor Capital Appreciation Ret Class	0.58 %	17%
Principal Midcap Fund Inst C1	Since 2014	$58.0m	0.69%	Principal Midcap Fund R6	0.59%	17%

94. According to the Harbor Capital fund prospectus:

> Retirement Class shares commenced operations on March 1, 2016. The performance attributed to the Retirement Class shares prior to that date is that of the Institutional Class shares. Performance prior to March 1, 2016 has not been adjusted to reflect the lower expenses

[14] The listed expense figures are as of 2019.

[15] The listed expense figures are as of 2019.

> of Retirement Class shares. During this period, Retirement Class shares would have had returns similar to, but somewhat higher than, Institutional Class shares due to the fact that Retirement Class shares represent interests in the same portfolio as Institutional Class shares but are subject to lower expenses.

Harbor Funds Annual Report, Oct. 31, 2019, at 3.

95. Recently, a court observed that "[b]ecause the institutional share classes are otherwise *identical* to the Investor share classes, but with lower fees, a prudent fiduciary would know immediately that a switch is necessary. Thus, the 'manner that is reasonable and appropriate to the particular investment action, and strategies involved…in this case would mandate a prudent fiduciary – who indisputably has knowledge of institutional share classes and that such share classes provide identical investments at lower costs – to switch share classes immediately." *Tibble III*, 2017 WL 3523737, at * 13.

96. Defendants knew or should have known of the existence of the above cheaper share classes (both for the Fidelity funds and Harbor and Principal Midcap Funds) and therefore also should have immediately identified the prudence of selecting these alternative investments which were all available during the Class Period. The Harbor Capital Appreciation Ret Class fund was available as of March 1, 2016 and the Principal Midcap Fund R6 was available as of November 22, 2016.

97. As noted above, qualifying for lower share classes usually requires only a minimum of a million dollars for individual funds. However, initial investment minimums are generally waived for financial intermediaries and retirement plans.

98. A prudent fiduciary conducting an impartial review of the Plan's investments would have identified the cheaper share classes available and selected the lower share classes.

99. Failure to do so was because either Defendants did not negotiate aggressively enough with their service providers to obtain better pricing or they simply were not paying attention.

100. Nor is it an excuse to select higher cost versions of the same fund to pay for Plan expenses. As noted above, fiduciaries should not "choose otherwise imprudent investments specifically to take advantage of revenue sharing." *Tibble III*, 2017 WL 3523737, at * 11.

101. By failing to investigate the use of lower cost share classes, Defendants caused the Plan and its participants to pay millions of dollars per year in unnecessary fees.

<u>Failure to Utilize Lower Cost Passively-Managed Funds</u>

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

103. While higher-cost mutual funds may outperform a less-expensive option, such as a passively-managed index fund, over the short term, they rarely do so over a longer term. *See* Jonnelle Marte, *Do Any Mutual Funds Ever Beat the Market? Hardly*, The Washington Post, available at https://www.washingtonpost.com/news/get-there/wp/2015/03/17/do-any-mutual-funds-ever-beat-the-market-hardly/ (citing a study by S&P Dow Jones Indices which looked at 2,862 actively-managed mutual funds, focused on the top quartile in performance and found most did not replicate performance from year to year); *see also Index funds trounce actively managed funds: Study*, available at http://www.cnbc.com/2015/06/26/index-funds-trounce-actively-managed-funds-study.html ("long-term data suggests that actively-managed funds "lagged their passive counterparts across nearly all asset classes, especially over the 10-year period from 2004 to 2014.")

104. Indeed, on average funds with high fees perform worse than less expensive funds, even on a pre-fee basis. Javier Gil-Bazo & Pablo Ruiz-Verdu, *When Cheaper is Better: Fee Determination in the Market for Equity Mutual Funds*, 67 J. Econ. Behav. & Org. 871, 873 (2009) (hereinafter "*When Cheaper is Better*"); *see also* Jill E. Fisch, *Rethinking the Regulation of Securities Intermediaries*, 158 U. Pa. L. Rev. 1961, 1967-75 (2010) (summarizing numerous studies showing that "the most consistent predictor of a fund's return to investors is the fund's expense ratio").

105. During the Class Period, Defendants failed to consider materially similar but cheaper alternatives to the Plan's investment options. This failure is a further indication that Defendants lacked a prudent investment monitoring process.

106. The chart below demonstrates that the expense ratios of the Plan's investment options were more expensive by multiples of comparable passively-managed alternative funds in the same fund category. The chart below analyzes funds in the Plan in 2018 using 2018 expense ratios as a methodology to demonstrate the greater relative expense of the Plan's funds compared to their alternative fund counterparts.

Fund in Plan	**Net Expense Ratio**	**Passive Alternative**	**Net Expense Ratio**[16]	**Incep. Date**	**% Fee Excess**
Fidelity Freedom K 2005 Fund	0.42%	Fidelity Freedom Index 2005 Investor Class	0.14%	Dec. 2 2009	200%
		Fidelity Freedom Index 2005 Inst. Premium Class	0.08%	June 24 2015	425%
Fidelity Freedom K 2010 Fund	0.46%	Fidelity Freedom Index 2010 Investor Class	0.14%	Oct. 2 2009	229%

[16] As of June 1, 2019, Fidelity Freedom Index Funds – Investor Class' expenses were reduced to 0.12% from 0.14%.

Fund in Plan	Net Expense Ratio	Passive Alternative	Net Expense Ratio[16]	Incep. Date	% Fee Excess
		Fidelity Freedom Index 2010 Inst. Premium Class	0.08%	June 24 2015	475%
Fidelity Freedom K 2015 Fund	0.49%	Fidelity Freedom Index 2015 Investor Class	0.14%	Oct. 2 2009	250%
		Fidelity Freedom Index 2015 Inst. Premium Class	0.08%	June 24 2015	513%
Fidelity Freedom K 2020 Fund	0.53%	Fidelity Freedom Index 2020 Investor Class	0.14%	Oct. 2 2009	279%
		Fidelity Freedom Index 2020 Inst. Premium Class	0.08%	June 24 2015	563%
Fidelity Freedom K 2025 Fund	0.56%	Fidelity Freedom Index 2025 Investor Class	0.14%	Oct. 2 2009	300%
		Fidelity Freedom Index 2025 Inst. Premium Class	0.08%	June 24 2015	600%
Fidelity Freedom K 2030 Fund	0.60%	Fidelity Freedom Index 2030 Investor Class	0.14%	Oct. 2 2009	329%
		Fidelity Freedom Index 2030 Inst. Premium Class	0.08%	June 24 2015	650%
Fidelity Freedom K 2035 Fund	0.63%	Fidelity Freedom Index 2035 Investor Class	0.14%	Oct. 2 2009	350%
		Fidelity Freedom Index 2035 Inst. Premium Class	0.08%	June 24 2015	688%
Fidelity Freedom K 2040 Fund	0.65%	Fidelity Freedom Index 2040 Investor Class	0.14%	Oct. 2 2009	364%
		Fidelity Freedom Index 2040 Inst. Premium Class	0.08%	June 24 2015	713%

Fund in Plan	**Net Expense Ratio**	**Passive Alternative**	**Net Expense Ratio[16]**	**Incep. Date**	**% Fee Excess**
Fidelity Freedom K 2045 Fund	0.65%	Fidelity Freedom Index 2045 Investor Class	0.14%	Oct. 2 2009	364%
		Fidelity Freedom Index 2045 Inst. Premium Class	0.08%	June 24 2015	713%
Fidelity Freedom K 2050 Fund	0.65%	Fidelity Freedom Index 2050 Investor Class	0.14%	Oct. 2 2009	364%
		Fidelity Freedom Index 2050 Inst. Premium Class	0.08%	June 24 2015	713%
Fidelity Freedom K 2055 Fund	0.65%	Fidelity Freedom Index 2055 Investor Class	0.14%	June 1 2011	364%
		Fidelity Freedom Index 2055 Inst. Premium Class	0.08%	June 24 2015	713%
Fidelity Freedom K 2060 Fund	0.65%	Fidelity Freedom Index 2060 Investor Class	0.14%	Jan. 12 2014	364%
		Fidelity Freedom Index 2060 Inst. Premium Class	0.08%	June 24 2015	713%

107. The above alternative funds generally outperformed the Plan's funds in their 3 and 5 year average returns as of 2020 given that they were comprised of virtually identical underlying funds but had lower fees. Moreover, these alternative investments had no material difference in risk/return profiles with the Plan's funds and there was a high correlation of the alternative funds' holdings with the Plan's funds holdings such that any difference was immaterial.

108. These results are not surprising given that in the long-term, actively managed funds do not outperform their passively-managed counterparts. Indeed, the majority of U.S. equity funds did not outperform their index counterparts in the five years ending June 30, 2019:[17]

Fund Category	**Comparison Index**	**Percentage of Funds That Underperformed Their Benchmark 5 Yr (%)**
Large-Cap	S&P 500	78.52
Mid-Cap	S&P MidCap 400	63.56
Small-Cap	S&P SmallCap 600	75.09
Multi-Cap	S&P Composite 1500	82.79
Domestic Equity	S&P Composite 1500	81.66
Large-Cap Value	S&P Value	84.74
Mid-Cap Value	S&P MidCap 400 Value	92.31
Small-Cap Value	S&P SmallCap 600 Value	90.57
Multi-Cap Value	S&P Composite 1500 Value	91.35

109. A prudent investigation would have revealed the existence of these lower-cost and better performing alternatives to the Plan's funds.

110. The above is for illustrative purposes only as the significant fee disparities detailed above existed for all years of the Class Period. The Plan expense ratios were multiples of what they should have been given the bargaining power available to the Plan fiduciaries.

C. Defendants Breached Their Duty of Loyalty to the Plan and Its Participants

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

111. The structure of this Plan is rife with potential conflicts of interest because Fidelity and its affiliates were placed in positions that allowed them to reap profits from the Plan at the expense of Plan participants. Here, the Plan's Trustee is Fidelity, and an affiliate of Fidelity performs the recordkeeping services for the Plan.

112. This conflict of interest is laid bare in this case where lower-cost Fidelity collective trusts and index funds – materially similar or identical to the Plan's other Fidelity funds (other than in price) – were available but not selected because the higher-cost funds returned more value to Fidelity.

113. There appears to be no reasonable justification for the millions of dollars collected from Plan participants that ended up in Fidelity's coffers.

114. The Company, and the fiduciaries to whom it delegated authority, breached their duty of undivided loyalty to Plan participants by failing to adequately supervise Fidelity and its affiliates and ensure that the fees charged by Fidelity and its affiliates were reasonable and in the best interests of the Plan and its participants. Clearly, Defendants failed this aspect of their fiduciary duties.

FIRST CLAIM FOR RELIEF
Breaches of Fiduciary Duties of Loyalty and Prudence
(Asserted against Universal and the Committee Defendants)

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

116. At all relevant times, the Committee Defendants, and Universal to the extent of actions it took as a Plan administrator ("Prudence Defendants"), were fiduciaries of the Plan within the meaning of ERISA Section 3(21)(A), 29 U.S.C. § 1002(21)(A), in that they exercised discretionary authority or control over the administration and/or management of the Plan or disposition of the Plan's assets.

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

118. The Prudence Defendants breached these fiduciary duties in multiple respects as discussed throughout this Complaint. They did not make decisions regarding the Plan's investment lineup based solely on the merits of each investment and what was in the best interest of Plan participants. Instead, the Prudence Defendants selected and retained investment options in the Plan despite the high cost of the funds in relation to other comparable investments. The Prudence Defendants also failed to investigate the availability of lower-cost share classes of certain mutual funds in the Plan. In addition, the Prudence Defendants failed to investigate certain collective trusts as alternatives to mutual funds, even though they generally provide the same investment management services at a lower cost. Likewise, the Prudence Defendants failed to monitor or control the grossly excessive compensation paid for recordkeeping services.

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

120. Pursuant to 29 U.S.C. §§ 1109(a) and 1132(a)(2), the Prudence Defendants are liable to restore to the Plan all losses caused by their breaches of fiduciary duties, and also must restore any profits resulting from such breaches. In addition, Plaintiffs are entitled to equitable

relief and other appropriate relief for the Prudence Defendants' breaches as set forth in their Prayer for Relief.

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

SECOND CLAIM FOR RELIEF
Failure to Adequately Monitor Other Fiduciaries
(Asserted against Universal)

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

123. Universal (the "Monitoring Defendant") had the authority to appoint and remove members of the Committee through its Board of Directors, and was aware that the Committee Defendants had critical responsibilities as fiduciaries of the Plan.

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

125. The Monitoring Defendant also had a duty to ensure that the Committee Defendant possessed the needed qualifications and experience to carry out their duties (or used qualified advisors and service providers to fulfill their duties); had adequate financial resources and information; maintained adequate records of the information on which they based their decisions

and analysis with respect to the Plan's investments; and reported regularly to the Monitoring Defendant.

126. The Monitoring Defendant breached their fiduciary monitoring duties by, among other things:

(a) Failing to monitor and evaluate the performance of the Committee Defendants or have a system in place for doing so, standing idly by as the Plan suffered significant losses in the form of unreasonably high expenses, imprudent choices of funds' class of shares, and inefficient fund management styles that adversely affected the investment performance of the Funds' and their participants' assets as a result of the Committee Defendants' imprudent actions and omissions;

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

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

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

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

PRAYER FOR RELIEF

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

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

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

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

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

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

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

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

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

I. An award of pre-judgment interest;

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

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

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

Dated: July 6, 2020

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MARY K. BOLEY, KANDIE SUTTER and PHYLLIS JOHNSON, Individually and as representatives of a class of similarly situated persons, on behalf of the UNIVERSAL HEALTH SERVICES, INC. RETIREMENT SAVINGS PLAN, Plaintiffs, v. UNIVERSAL HEALTH SERVICES, INC., UNIVERSAL INC; THE UHS RETIREMENT PLANS INVESTMENT COMMITTEE; and DOES No. 1-10, Whose Names Are Currently Unknown, Defendants.	Case No: 2:20-cv-02644 **SECOND AMENDED CLASS ACTION COMPLAINT**

I. INTRODUCTION

1. Plaintiffs, Mary K. Boley ("Boley"), Kandie Sutter ("Sutter") and Phyllis Johnson ("Johnson") (collectively, "Plaintiffs"), individually and as participants of the Universal Health Services, Inc. Retirement Savings Plan ("Plan"), bring this action under 29 U.S.C. § 1132, on behalf of the Plan and a class of similarly-situated participants and beneficiaries of the Plan, against Defendants, Universal Health Services, Inc. ("Universal"), the UHS Retirement Plans Investment Committee ("Administrative Committee" or "Committee"), and Does No. 1-10, who are members of the Administrative Committee or other fiduciaries of the Plan and whose names are currently unknown (collectively, "Defendants") for breach of their fiduciary duties under the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1001, *et seq*., and related breaches of applicable law beginning six years from the date this action is filed and continuing to the date of judgment (the "Class Period").

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 underperformance.

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

4. As of December 31, 2018, the Plan had 41,872 participants with account balances and assets totaling over $1.9 billion, placing it in the top 0.1% of all 401(k) plans by plan size.[1] Defined contribution plans with substantial assets, like the 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. The marketplace for 401(k) retirement plan services is well-established and can be competitive when fiduciaries of defined contribution retirement plans act in an informed and prudent fashion.

5. Defendants maintain the Plan, and are responsible for selecting, monitoring, and retaining the service provider(s) that provide investment, recordkeeping, and other administrative services. Defendants are fiduciaries under ERISA, and, as such, are obligated to (a) act for the exclusive benefit of participants, (b) ensure that the investment options offered through the Plan are prudent and diverse, and (c) ensure that Plan expenses are fair and reasonable.

[1]The BrightScope/ICI Defined Contribution Plan Profile: A Close Look at 401(k) Plans, 2016 (pub. June 2019).

6. Defendants have breached their fiduciary duties to the Plan and, as detailed below, have: (1) failed to fully disclose the expenses and risk of the Plan's investment options to participants; (2) allowed unreasonable expenses to be charged to participants; and (3) selected, retained, and/or otherwise ratified high-cost and poorly-performing investments, instead of offering more prudent alternative investments when such prudent investments were readily available at the time that they were chosen for inclusion within the Plan and throughout the Class Period (defined below).

7. To remedy these fiduciary breaches and other violations of ERISA, Plaintiffs bring this class action under ERISA Sections 404, 409 and 502, 29 U.S.C. §§ 1104, 1109 and 1132, to recover and obtain all losses resulting from each breach of fiduciary duty. In addition, Plaintiffs seek such other equitable or remedial relief for the Plan and the proposed class defined below (the "Class") as the Court may deem appropriate and just under all of the circumstances.

8. Plaintiffs specifically seek the following relief on behalf of the Plan and the Class:

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

b. A permanent injunction against Defendants prohibiting the practices described herein and affirmatively requiring them to act in the best interests of the Plan and its participants;

c. Equitable, legal or remedial relief for all losses and/or compensatory damages;

d. Attorneys' fees, costs and other recoverable expenses of litigation; and

e. Such other and additional legal or equitable relief that the Court deems appropriate and just under all of the circumstances.

II. THE PARTIES

9. Boley is a former employee of Universal and current participant in the Plan under 29 U.S.C. § 1002(7). Boley is a resident of Anna, Texas.

10. Sutter is a former employee of Universal and former participant in the Plan under 29 U.S.C. § 1002(7). Sutter is a resident of Corona, California.

11. Johnson is a former employee of Universal and former participant in the Plan under 29 U.S.C. § 1002(7). Johnson is a resident of Las Vegas, Nevada.

12. Universal is a public Delaware corporation headquartered in King of Prussia, Pennsylvania. Universal is a provider of hospital and healthcare services, with 400 acute care hospitals, behavioral health facilities and ambulatory centers across the U.S., Puerto Rico, and the U.K.

13. The Administrative Committee is the Plan Administrator and is a fiduciary under ERISA pursuant to 29 U.S.C. §§ 1002 and 1102. The Administrative Committee maintains its address at Universal's corporate headquarters in King of Prussia, Pennsylvania. The Administrative Committee and its members are appointed by Universal's Chief Executive Officer to administer the Plan on Universal's behalf.

14. Does No. 1-10 are the members of the Administrative Committee and, by virtue of their membership, fiduciaries of the Plan or otherwise are fiduciaries to the Plan. Plaintiffs are currently unable to determine the membership of the Administrative Committee because, despite reasonable and diligent efforts, it appears that the membership of the Administrative Committee is not publicly available. As such, these Defendants are named Does 1-10 as placeholders. Plaintiffs will move, pursuant to Rule 15 of the Federal Rules of Civil Procedure, to amend this

Complaint to name the members of the Administrative Committee and other responsible individuals as defendants as soon as their identities are discovered.

III. JURISDICTION AND VENUE

15. Plaintiffs seek relief on behalf of the Plan pursuant to ERISA's civil enforcement remedies with respect to fiduciaries and other interested parties and, specifically, under 29 U.S.C. § 1109 and 29 U.S.C. § 1132.

16. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1331 because this action arises under the laws of the United States.

17. Venue is proper in this District pursuant to ERISA Section 502(e), 29 U.S.C. § 1332(e), and 28 U.S.C. § 1391 because Universal's principal place of business is in this District and the Plan is administered from this judicial district. Furthermore, a substantial part of the acts and omissions giving rise to the claims asserted herein occurred in this District.

IV. FACTUAL ALLEGATIONS

A. Background And Plan Structure

18. The Plan is a participant-directed 401(k) plan, in which participants direct the investment of their contributions into various investment options offered by the Plan. Each participant's account is credited with the participant contributions, employer matching contributions, any discretionary contributions, and earnings or losses thereon. The Plan pays Plan expenses from Plan assets, and the majority of administrative expenses are paid by participants as a reduction of investment income. Each participant's account is charged with the amount of distributions taken and an allocation of administrative expenses. The available investment options for participants of the Plan include various mutual funds and a collective investment trust.

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

20. Collective trusts are, in essence, mutual funds without the SEC regulation. Collective trusts fall under the regulatory purview of the Office of the Comptroller of the Currency or individual state banking departments. Collective trusts were first organized under state law in 1927 and were blamed for the market crash in 1929. As a result, collective trusts were severely restricted, giving rise to the more transparent and publicly-traded mutual funds. Today, banks create collective trusts only for their trust clients and for employee benefit plans, like the Plan. The main advantage of opting for a collective trust, rather than a mutual fund, is the negotiability of the fees, so that larger retirement plans should be able to leverage their size for lower fees.

21. During the Class Period, Plan assets were held in a trust by the Plan Trustee, Fidelity Management Trust Company. All investments and asset allocations are performed through this trust instrument.

B. <u>Defendants' Breaches of Fiduciary Duties</u>

22. As discussed in detail below, Defendants have severely breached their fiduciary duties of prudence and/or loyalty to the Plan. Plaintiffs did not acquire actual knowledge regarding Defendants' breaches at issue here until shortly before this Complaint was filed.

1. The Plan's Investment in the Fidelity Freedom Funds

23. Among other investments, the Plan lineup offers a suite of 13 target date funds. A target date fund is an investment vehicle that offers an all-in-one retirement solution through a portfolio of underlying funds that gradually shifts to become more conservative as the assumed target retirement year approaches. Target date funds offer investors dynamic, easy asset allocation, while providing both long-term growth and capital preservation. All target date funds are inherently actively managed, because managers make changes to the allocations to stocks, bonds and cash over time. These allocation shifts are referred to as a fund's glide path. The underlying mutual funds that target date fund managers choose to represent each asset class can be actively or passively managed.

24. According to the Plan's Form 5500s,[2] since at least December 31, 2009,[3] the Plan has offered the Fidelity Freedom fund target date suite. Fidelity Management & Research Company ("Fidelity") is the second largest target date fund provider by total assets. Among its several target date offerings, two of Fidelity's target date suites are the risky Freedom funds (the "Active suite") and the substantially less costly and less risky Freedom Index funds (the "Index suite"). Defendants were responsible for crafting the Plan lineup and could have chosen any of the target date families offered by Fidelity, or those of any other target date provider. Defendants failed to compare the Active and Index suites and consider their respective merits and features. A simple weighing of the benefits of the two suites indicates that the Index suite is a far superior option, and consequently the more appropriate choice for the Plan. Had Defendants carried out their responsibilities in a single-minded manner with an eye focused

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[2]The Form 5500 is the annual report that 401(k) plans are required to file pursuant to the reporting requirements of ERISA.

[3]The Form 5500 provides a detailed schedule of the Plan's holdings at the end of each calendar year. The suite of Fidelity Freedom funds appears as a Plan investment option as far back as the 2009 Form 5500, the earliest publicly available filing.

solely on the interests of the participants, they would have come to this conclusion and acted upon it. Instead, Defendants failed to act in the sole interest of Plan participants, and breached their fiduciary duty by imprudently selecting and retaining the Active suite.

25. The two fund families have nearly identical names and share a management team.[4] But while the Active suite invests predominantly in actively managed Fidelity mutual funds,[5] the Index suite places no assets under active management, electing instead to invest in Fidelity funds that simply track market indices. The Active suite is also dramatically more expensive than the Index suite, and riskier in both its underlying holdings and its asset allocation strategy. Defendants' decision to add the Active suite over the Index suite, and their failure to replace the Active suite with the Index suite at any point during the Class Period, constitutes a glaring breach of their fiduciary duties.

26. Exacerbating Defendants' imprudent choice to add and retain the Active suite is its role as the Plan's Qualified Default Investment Alternative ("QDIA"). A retirement plan can designate one of the investment offerings from its lineup as a QDIA to aid participants who lack the knowledge or confidence to make investment elections for their retirement assets; if participants do not direct where their assets should be invested, all contributions are automatically invested in the QDIA. Plan fiduciaries are responsible for the prudent selection and monitoring of an appropriate QDIA. The Fidelity Freedom fund with the target year that is closest to a participant's assumed retirement age (age 65) serves as the QDIA in the Plan.

27. Given that the vast majority of plan participants are not sophisticated investors, many of the Plan participants, by default, concentrate their retirement assets in target date funds.

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[4] Both target date suites have been managed by Brett Sumsion and Andrew Dierdorf since 2014. Finola McGuire Foley was added to the Index suite team in 2018.
[5] Per Morningstar, the Active suite's underlying holdings are 88.8% actively managed, by asset weight.

As such, the impact of Defendants' imprudent selection of target date funds is magnified vis-à-vis other asset categories. Indeed, by December 31, 2018, approximately 51% of the Plan's assets were invested in the Active suite.

i. The Active Suite is High-Risk and Unsuitable for Plan Participants

28. The Active suite chases returns by taking levels of risk that render it unsuitable for the average retirement investor, including participants in the Plan, and particularly those whose savings were automatically invested through the QDIA. At first glance, the equity glide paths of the two fund families (meaning the Active suite and Index suite) appear nearly identical, which would suggest both target date options have a similar risk profile. However, the Active suite subjects its assets to significantly more risk than the Index suite, through multiple avenues. At the underlying fund level, where the Index suite invests only in index funds that track segments of the market, the Active suite primarily features funds with a manager deciding which securities to buy and sell, and in what quantities.

29. The goal of an active manager is to beat a benchmark—usually a market index or combination of indices—by taking on additional risk. Market research has indicated that investors should be very skeptical of an actively managed fund's ability to consistently outperform its index, which is a significant concern for long-term investors saving for retirement, like the Plan participants in this action. Actively managed funds tend to charge higher fees than index funds (which are passed on to the target date fund investor through higher expense ratios). These extra costs present an additional hurdle for active managers to clear in order to provide value and compensate investors for the added risk resulting from their decision-making. Indeed, Morningstar has repeatedly concluded that "in general, actively managed funds have failed to

survive and beat their benchmarks, especially over longer time horizons."[6] Although they may experience success over shorter periods, active fund managers are rarely able to time the market efficiently and frequently enough to outperform the market. The Active suite's allocation to primarily actively managed funds subjects investor dollars to the decision-making skill and success, or lack thereof, of the underlying managers and the concomitant risk associated with these investments.

30. At all times across the glide path, the Active suite's top three domestic equity positions were and are in Fidelity Series funds (funds created for exclusive use in the Freedom funds), two of which have dramatically trailed their respective indices over their respective lifetimes. The Intrinsic Opportunities Fund, which is currently allocated 8.13% of the total assets in the 2040-2060 Funds, has, over its lifetime, missed its benchmark, the Russell 3000 Index, by an astonishing 326 basis points (3.26%) on an annualized basis. The Large Cap Stock Fund, which is currently allocated 7.11% of the total assets in the 2040-2060 Funds, has suffered even worse underperformance; its annualized lifetime returns trail that of its benchmark, the S&P 500 Index, by 357 basis points (3.57%). The portfolio of the Active suite is diversified among 32 underlying investment vehicles; the two aforementioned series funds represent over 15% of the 2040 through 2060 vintages, meaning for at least 20 years (because those target date funds have an associated target retirement date of at least twenty years from now), 15% of investor dollars are subject to the poor judgment exercised by just those two managers.

31. Compounding the level of risk inherent in the Active suite's underlying holdings is the suite's managers' approach to portfolio construction and asset allocation decisions. Returning to the equity glide paths discussed above, the Active and Index suites appear to follow

[6] "How Actively and Passively Managed Funds Performed: Year-End 2018"; https://www.morningstar.com/insights/2019/02/12/active-passive-funds.

essentially the same strategy. The chart below shows the percentage of assets devoted to equities in each vintage.

Equity Glide Path													
	Years to Target Retirement Year												
Series	**40**	**35**	**30**	**25**	**20**	**15**	**10**	**5**	**0**	**-5**	**-10**	**-15**	**-20**
Fidelity Freedom	90	90	90	90	89	78	65	58	53	43	35	24	24
Fidelity Freedom Index	90	90	90	90	90	80	65	59	52	43	34	24	24

This chart only considers the mix of the portfolio at the level of stocks, bonds and cash. A deeper examination of the sub-asset classes of the Active suite's portfolio, however, exposes the significant risks its managers take to boost returns. Across the glide path, the Active suite allocates approximately 1.5% more of its assets to riskier international equities than the Index suite. The Active suite also has higher exposure to classes like emerging markets and high yield bonds.

32. Since the Active suite series underwent a strategy overhaul in 2013 and 2014, its managers have had the discretion to deviate from the glide path allocations by 10 percentage points in either direction. In a departure from the accepted wisdom that target date funds should maintain pre-set allocations, Fidelity encouraged its portfolio managers to attempt to time market shifts in order to locate underpriced securities, which the firm dubs "active asset allocation." This strategy heaps further unnecessary risk on investors, such as Plan participants, in the Active suite. A March 2018 Reuters special report[7] on the Fidelity Freedom funds (the "Reuters Report") details how many investors lost confidence in the Active suite "because of their history of underperformance, frequent strategy changes and rising risk." The report quotes a member of Longfellow Advisors, who told Reuters that, after the 2014 changes, "it was not clear to us that

[7] "Special Report: Fidelity puts 6 million savers on risky path to retirement", https://www.reuters.com/article/us-funds-fidelity-retirement-special-rep/special-report-fidelity-puts-6-million-savers-on-risky-path-to-retirement-idUSKBN1GH1SI.

[the managers of the Active suite] knew what they were doing." While many target date fund managers are increasing exposure to riskier investments in an effort to augment performance by taking on additional risk, the president of research firm, Target Date Solutions, states that the Active suite has gone further down this path than its peers.[8] Morningstar has noted in the past that active management has hindered the Active suite's performance, criticizing a previous poor decision to heavily weight to commodities. Morningstar similarly characterized Fidelity's shifts in the allocation of stocks between 1996 and 2010 as "shocking" and "seemingly chaotic." Yet, since 2014, a fund family with a history of poor decisions has been given "carte blanche" to take further risks, to the severe detriment of the Plan and its participants.

33. This desire and latitude to assume more risk exposes investors in what Fidelity brands "a lifetime savings solution" to significant losses in the event of volatility similar to the downturn experienced during the COVID-19 epidemic. Morningstar analyst Jeff Holt opines that the popularity of target date funds derives from investors' belief that the funds are designed to "not lose money." As a result, the average unsophisticated investor, such as the typical participant in the Plan, tends to gravitate toward the all-in-one savings solution a target date fund offers. Given this reality, Plan participants should be shielded from the riskiest fund families where active manager decisions could amplify losses in periods of market decline. The Active suite's lack of downside protection has been magnified by the current COVID-19 crisis, and has been felt most sharply by Plan participants approaching their target date, because Plan participants close to retirement age do not have ample time to recoup significant losses before they start withdrawing their retirement savings. The more conservative Fidelity Freedom Index 2020 Fund has handled the current volatility exceptionally, with year to date returns through

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[8] *Id.*

August 11, 2020 ranking in the 19th percentile among other 2020 target date funds.[9] In stark contrast, the Fidelity Freedom 2020 Fund (i.e., part of the Active suite), in which the Plan had approximately $142 million at the end of 2018, ranks in the 56th percentile among the same peer group.

ii. The Active Suite's Considerable Cost

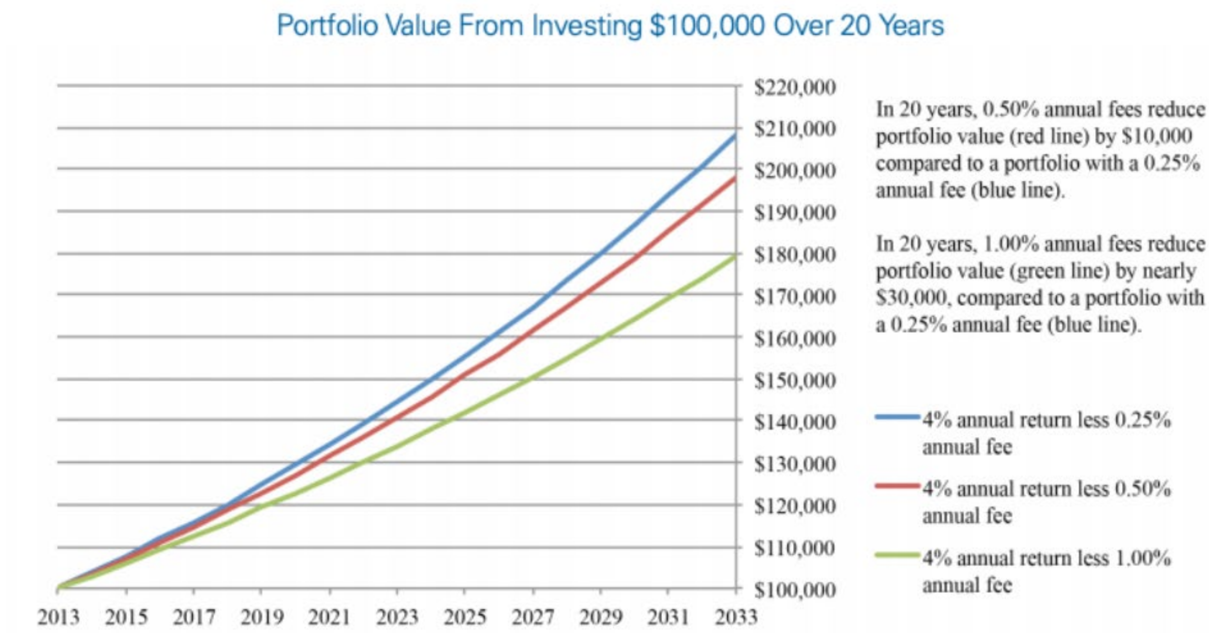
34. Even a minor increase in a fund's expense ratio (the total annual cost to an investor, expressed as a percentage of assets) can considerably reduce long-term retirement savings. The fees charged by the Active suite are many multiples higher than the Index suite's industry-leading low costs. While the Institutional Premium share class for each target year of the Index suite charges a mere 8 basis points (0.08%), the K share class of the Active suite—which the Plan offers—has expense ratios ranging from 42 basis points (0.42%) to 65 basis points (0.65%).

Cost Comparison						
Freedom Suite	**Ticker**	**Exp Rat**	**Freedom Index Suite**	**Ticker**	**Exp Rat**	**Difference**
Income K	FNSHX	0.42%	Income Inst Prem	FFGZX	0.08%	-0.34%
2005 K	FSNJX	0.42%	2005 Inst Prem	FFGFX	0.08%	-0.34%
2010 K	FSNKX	0.46%	2010 Inst Prem	FFWTX	0.08%	-0.38%
2015 K	FSNLX	0.49%	2015 Inst Prem	FIWFX	0.08%	-0.41%
2020 K	FSNOX	0.53%	2020 Inst Prem	FIWTX	0.08%	-0.45%
2025 K	FSNPX	0.56%	2025 Inst Prem	FFEDX	0.08%	-0.48%
2030 K	FSNQX	0.60%	2030 Inst Prem	FFEGX	0.08%	-0.52%
2035 K	FSNUX	0.63%	2035 Inst Prem	FFEZX	0.08%	-0.55%
2040 K	FSNVX	0.65%	2040 Inst Prem	FFIZX	0.08%	-0.57%
2045 K	FSNZX	0.65%	2045 Inst Prem	FFOLX	0.08%	-0.57%
2050 K	FNSBX	0.65%	2050 Inst Prem	FFOPX	0.08%	-0.57%
2055 K	FNSDX	0.65%	2055 Inst Prem	FFLDX	0.08%	-0.57%
2060 K	FNSFX	0.65%	2060 Inst Prem	FFLEX	0.08%	-0.57%

35. The higher fee, charged by the 2040 through 2060 Active funds, represents an annual cost to investors that is over eight times higher than what shareholders of the

[9] For Morningstar's peer group rankings, 1st percentile is the best performers.

corresponding Index fund pay. The impact of such high fees on participant balances is aggravated by the effects of compounding, to the significant detriment of participants over time. This effect is illustrated by the below chart, published by the SEC, showing the 20-year impact on a balance of $100,000 by fees of 25 basis points (0.25%), 50 basis points (0.50%), and 100 basis points (1.00%).



36. Higher fees significantly reduce retirement account balances over time. Considering just the gap in expense ratios from the Plan's current investment in the Active suite to the Institutional Premium share class of the Index suite, in 2018 alone, the Plan could have saved approximately $5.03 million in costs. This tremendous cost difference goes straight into Fidelity's pockets and is paid for by Plan participants. As the costs for recordkeeping services have dropped precipitously over the past decade,[10] recordkeepers like Fidelity have been forced to chase profits elsewhere. The management fees derived from a plan's use of a provider's

[10] "NEPC: Corporate Defined Contribution Plans Report Flat Fees," https://www.nepc.com/press/nepc-corporate-defined-contribution-plans-report-flat-fees.

investment offerings substantially trump any compensation for recordkeeping services. Thus, Fidelity is heavily incentivized to promote its own investment products, specifically those that charge the highest fees, to each plan for which it recordkeeps, including the Plan.

iii. Investors Have Lost Faith in the Active Suite

37. The flow of funds to, or from, target date families constitutes one indicator of the preferences of investors at large. According to Morningstar's report on the 2019 Target Date Fund Landscape,[11] investor demand for low-cost target date options has skyrocketed in recent years. Following suit, the Index suite has seen significant inflows, receiving an estimated \$4.9 billion in new funds in 2018 alone. At the same time, investor confidence in the Active suite has deteriorated; 2018 saw the series experience an estimated \$5.4 billion in net outflows. The movement of funds out of the Active suite has been substantial for years; the Reuters Report notes that nearly \$16 billion has been withdrawn from the fund family over the prior four years. Defendants' act, in offering and maintaining the Active suit in the Plan, evidences their failure to acknowledge, or act upon, investors' crumbling confidence in the Active suite, while ignoring the simultaneous and justified surge in faith in the Index suite.

iv. The 5-Star Index Suite

38. Morningstar assigns each mutual fund in its extensive database a star rating, which is a "purely mathematical measure that shows how well a fund's past returns have compensated shareholders for the amount of risk it has taken on." This measurement emphatically favors the Index suite. Each Fidelity Freedom Index fund bears a higher star rating than the corresponding Active fund (other than the Income and 2005 Index Funds, which have the same 3 stars as the Income and 2005 Active Funds). With the exception of the Income, 2005,

[11]"2019 Target-Date Fund Landscape: Simplifying the Complex."

and 2060 iterations, the full Index suite is assigned 5 stars, Morningstar's highest rating. The risk-adjusted returns of funds with a 5-star rating rank in the top 10% of their peers. The Active suite does not achieve a single 5-star rating, and only receives one 4-star rating. Defendants were likely aware, or should have been aware, of the higher ratings of the Index suite, yet continued to offer the Active suite, to the detriment of Plan participants.

Morningstar Ratings					
Freedom Suite	**Ticker**	**Stars**	**Freedom Index Suite**	**Ticker**	**Stars**
Income K	FNSHX	3	Income Inst Prem	FFGZX	3
2005 K	FSNJX	3	2005 Inst Prem	FFGFX	3
2010 K	FSNKX	3	2010 Inst Prem	FFWTX	5
2015 K	FSNLX	3	2015 Inst Prem	FIWFX	5
2020 K	FSNOX	4	2020 Inst Prem	FIWTX	5
2025 K	FSNPX	3	2025 Inst Prem	FFEDX	5
2030 K	FSNQX	3	2030 Inst Prem	FFEGX	5
2035 K	FSNUX	3	2035 Inst Prem	FFEZX	5
2040 K	FSNVX	3	2040 Inst Prem	FFIZX	5
2045 K	FSNZX	3	2045 Inst Prem	FFOLX	5
2050 K	FNSBX	3	2050 Inst Prem	FFOPX	5
2055 K	FNSDX	3	2055 Inst Prem	FFLDX	5
2060 K	FNSFX	3	2060 Inst Prem	FFLEX	4

v. The Active Suite's Inferior Performance

39. In the period following the strategy overhaul in 2013 and 2014, the Active suite's higher levels of risk have failed to produce substantial outperformance when compared to the Index suite. While assuming significantly higher levels of risk with investor dollars (and among them, the Plan participants' hard-earned savings), the Active suite has simply failed to measure up to the returns produced by its index cousin, in which the Plan participants' assets would be significantly better off. Since the strategic changes took effect in 2014, the Index suite has outperformed the Active suite in four out of six calendar years. Broadening the view to historical measures that encompass a period closer to a full market cycle, the Active suite has substantially underperformed the Index suite on a trailing three- and five-year annualized basis:

3-Year Trailing Performance as of 8/31/20				
Freedom Suite	Return	Freedom Index Suite	Return	Difference
Income K	5.17%	Income Inst Prem	5.81%	-0.64%
2005 K	5.68%	2005 Inst Prem	6.34%	-0.66%
2010 K	6.26%	2010 Inst Prem	6.98%	-0.72%
2015 K	6.76%	2015 Inst Prem	7.58%	-0.82%
2020 K	7.15%	2020 Inst Prem	8.09%	-0.94%
2025 K	7.51%	2025 Inst Prem	8.46%	-0.95%
2030 K	8.07%	2030 Inst Prem	9.11%	-1.04%
2035 K	8.45%	2035 Inst Prem	9.61%	-1.16%
2040 K	8.49%	2040 Inst Prem	9.73%	-1.24%
2045 K	8.51%	2045 Inst Prem	9.73%	-1.22%
2050 K	8.50%	2050 Inst Prem	9.73%	-1.23%
2055 K	8.51%	2055 Inst Prem	9.74%	-1.23%
2060 K	8.50%	2060 Inst Prem	9.73%	-1.23%

5-Year Trailing Performance as of 8/31/20				
Freedom Suite	Return	Freedom Index Suite	Return	Difference
Income K	5.35%	Income Inst Prem	5.25%	0.10%
2005 K	6.14%	2005 Inst Prem	6.10%	0.04%
2010 K	6.86%	2010 Inst Prem	6.88%	-0.02%
2015 K	7.52%	2015 Inst Prem	7.64%	-0.12%
2020 K	8.01%	2020 Inst Prem	8.21%	-0.20%
2025 K	8.42%	2025 Inst Prem	8.71%	-0.29%
2030 K	9.27%	2030 Inst Prem	9.69%	-0.42%
2035 K	9.85%	2035 Inst Prem	10.38%	-0.53%
2040 K	9.89%	2040 Inst Prem	10.48%	-0.59%
2045 K	9.90%	2045 Inst Prem	10.48%	-0.58%
2050 K	9.89%	2050 Inst Prem	10.49%	-0.60%
2055 K	9.89%	2055 Inst Prem	10.48%	-0.59%
2060 K	9.87%	2060 Inst Prem	10.48%	-0.61%

40. It is unclear at what point in 2014 the Active suite's major strategic changes were implemented, but using a start date of January 1, June 30, or December 31, 2014, the Index suite has outperformed the Active suite to date. Investing research and information websites commonly show the growth of $10,000 invested in a mutual fund and a benchmark over a period to provide a comparison of returns in a simple-to-understand format. Using this method to

compare the two suites, at each proposed start date, across every vintage of the fund families, the Index suite would have earned investors significantly greater sums on a $10,000 investment. Defendants breached their fiduciary duty to Plan participants by choosing to select and retain the Active suite, thus causing Plan participants to miss out on greater investment returns for their retirement savings.

2. The Plan's Excessive Recordkeeping/Administrative Costs

41. Another obvious indicator of Defendants' breach of their fiduciary duties is the Plan's excessive recordkeeping and administrative costs. According to one industry publication,[12] the average annual cost for recordkeeping and administration in 2017 for plans much smaller than the Plan (plans with 100 participants and $5 million in assets) was $35 per participant. Other courts have acknowledged that a plan with $3.4 billion in assets and 41,863 active participants should be paying $30 per participant (*Cassell v. Vanderbilt Univ.*, 285 F. Supp. 3d 1056, 1064 (M.D. Tenn. 2018)) and that the "market rate" of total administrative fees for "jumbo" plans, *i.e.*, those within the top 1%, should be $35 per participant (*Sacerdote v. New York Univ.*, No. 16-CV-6284 (KBF), 2017 WL 3701482, at *9 (S.D.N.Y. Aug. 25, 2017)). As of December 31, 2018, the Plan had more than $1.9 billion in assets and 41,872 participants. Given its size, and resulting negotiating power, with prudent management and administration, the Plan should have unquestionably been able to obtain recordkeeping and administrative services for significantly lower than $30 or $35 per participant.

42. Plan participants pay a flat annual recordkeeping fee of $36 per head and a flat "non-Fidelity" administrative fee of $8 per head, for a total administrative cost of $44 per participant, a figure 25% to 47% higher than those cited above. Indeed, given its size and

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[12] The 401k Averages Book (20th ed.).

negotiating power, the Plan should have been able to negotiate a recordkeeping fee of no more than the $14-$21 per-participant figure that Fidelity itself admitted its recordkeeping services were worth.[13] Thus, Defendants clearly engaged in a shocking breach of fiduciary duty by allowing the Plan to pay 71% to 157% more than it should have paid for such services if they had engaged in any modestly prudent approach to ensuring that the Plan's recordkeeping expenses were fair and reasonable.

43. As such, it is clear that Defendants either engaged in virtually no examination, comparison, or benchmarking of the recordkeeping/administrative fees of the Plan to those of other similarly sized defined contribution plans, or were complicit in paying grossly excessive fees. Had Defendants conducted any examination, comparison, or benchmarking, Defendants would have known that the Plan was compensating Fidelity at levels inappropriate for its size and scale. Plan participants bear this excessive fee burden and, accordingly, achieve considerably lower retirement savings since the excessive fees, particularly when compounded, have a damaging impact upon the returns attained by participant retirement savings.

44. By failing to recognize that the Plan and its participants were being charged much higher fees than they should have been and/or failing to take effective remedial actions, Defendants breached their fiduciary duties to the Plan.

3. The Plan's Excessively Expensive Investment Menu

45. In another obvious breach of their fiduciary duties, Defendants also failed to monitor the average expense ratios charged to similarly sized plans. Indeed, participants were offered an exceedingly expensive menu of investment options, clearly demonstrating that Defendants neglected to benchmark the cost of the Plan lineup or consider ways in which to

[13] *Moitoso v. FMR LLC*, No. 18-CV-12122 (WGY), 2020 WL 1495938, at *15 (D. Mass. Mar. 27, 2020).

lessen the fee burden on participants during the pertinent period. The majority of the funds in the Plan stayed relatively unchanged during the Class Period. In 2018, a majority of the funds in the Plan, at least 19 out of the Plan's 31 funds (61%), were substantially more expensive than comparable funds found in similarly sized plans (plans with over $1 billion in assets), according to the most recent Brightscope/ICI study published in August 2020:

Fund	**Expense Ratio**	**Category**	**ICI Average Fee**
Fidelity Contrafund K	0.77%	Domestic Equity	0.34%
Fidelity Balanced K	0.45%	Domestic Equity	0.34%
Harbor Capital Appreciation Inst	0.67%	Domestic Equity	0.34%
Neuberger Berman Genesis R6	0.75%	Domestic Equity	0.34%
Northern Small Cap Value	1.00%	Domestic Equity	0.34%
Franklin Small Cap Growth R6	0.66%	Domestic Equity	0.34%
Wells Fargo Special Mid Cap Value R6	0.72%	Domestic Equity	0.34%
Principal Midcap Inst	0.70%	Domestic Equity	0.34%
Fidelity Diversified International K	0.63%	International Equity	0.50%
Fidelity Freedom 2015 K	0.49%	Target Date	0.40%
Fidelity Freedom 2020 K	0.53%	Target Date	0.40%
Fidelity Freedom 2025 K	0.56%	Target Date	0.40%
Fidelity Freedom 2030 K	0.60%	Target Date	0.40%
Fidelity Freedom 2035 K	0.63%	Target Date	0.40%
Fidelity Freedom 2040 K	0.65%	Target Date	0.40%
Fidelity Freedom 2045 K	0.65%	Target Date	0.40%
Fidelity Freedom 2050 K	0.65%	Target Date	0.40%
Fidelity Freedom 2055 K	0.65%	Target Date	0.40%
Fidelity Freedom 2060 K	0.65%	Target Date	0.40%

46. Indeed, from 2014 through 2018, the Plan paid out investment management fees of 0.52%-0.54% of its total assets, considerably more than those of comparable plans. According to the Brightscope/ICI study, the average total plan fees/cost is 0.28%[14] for the largest plans such as the Plan at issue in this case, with investment management fees comprising just one component of the total plan cost.[15] The fact that the investment management fees for the Plan alone were nearly double the average total plan cost (inclusive of all fees) confirms the plain fact that Defendants failed to ensure that the Plan was paying reasonable fees and committed an apparent and significant breach of their fiduciary duties by failing to ensure that the Plan only paid reasonable investment management fees. Moreover, the fact that the Plan currently pays a flat recordkeeping fee of $36 per participant and an additional administrative fee of $8 per participant renders the Plan's current total plan cost even more excessive. Of course, the fact that Defendants allowed such poor investments to be maintained in the Plan only compounded the injuries caused by such breaches.

47. A further indication of Defendants' lack of a prudent investment evaluation process was their failure to identify and select collective trusts where available. A prudent fiduciary conducting an impartial review of the Plan's investment lineup would have recognized that the Plan could have shaved off a portion of its excessive spend on investment management fees by converting the following funds to collective trusts:

Fund	**Expense Ratio**	**2018 Plan AUM**	**Collective Trust Version**	**Inception Date**	**Expense Ratio**
Fidelity Contrafund K	0.77%	$180.5m	Fidelity Contrafund Commingled Pool	Jan. 17, 2014	0.43%

[14]This figure is for 2017. Given technological advances and market-based competitive pressures since 2017, the average total plan cost should be even lower today.
[15]Total plan cost refers to the sum of all fees and expenses associated with the operation of a retirement plan; notably, the recordkeeping fees, any other administrative fees, and investment management fees. The TPC permits a straight "apples-to-apples" comparison of the total fees incurred by different plans, as service providers can and do manipulate price reporting by shifting or redirecting their fees to investment management expenses to minimize the billing for recordkeeping and other service components, and vice versa.

Fidelity Diversified International K	0.63%	$44.9m	Fidelity Diversified International Commingled Pool	Dec. 13, 2013	0.58%

48. During the Class Period, Defendants knew or should have known of the existence of these available collective trusts and therefore also should have immediately identified the prudence of transferring the Plan's substantial assets from the mutual funds into these alternative investment vehicles. The above collective trusts were comprised of the same underlying investments as their mutual fund counterparts, but charged lower fees. The Plan did not receive any additional services or benefits based on its use of the more expensive funds; the sole consequence was higher costs for participants. Defendants' failure to select the better-priced investment vehicle, or their inexplicable ignorance to the availability of collective trusts, was a severe breach of fiduciary duty.

49. Compounding this issue is Defendants' failure to monitor the Plan's investment options to ensure that they were in the least expensive available share class. 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 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 Plan assets. Despite the negotiating leverage based on the size of the Plan, Defendants neglected to utilize the least expensive share class for the following two funds:

Fund	**In Plan Since**	**2018 AUM**	**Exp Ratio**	**Cheaper Share Class**	**Exp Ratio**
Harbor Capital Appreciation Inst	2009	$83.8m	0.67%	Harbor Capital Appreciation Retirement	0.59%
Principal Midcap Inst	2012	$58.0m	0.70%	Principal Midcap R6	0.60%

50. As long as Defendants continue to refrain from offering the least expensive share class for each investment option in the Plan lineup, participants will suffer harm to their retirement savings through the payment of needless extra fees. By failing to recognize that the Plan and its participants were being paying higher investment management fees than they should have been and/or failing to take effective remedial actions, Defendants breached their fiduciary duties to the Plan.

V. ERISA'S FIDUCIARY STANDARDS

51. ERISA imposes strict fiduciary duties of loyalty and prudence upon the Defendants as fiduciaries of the 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.

52. Under 29 U.S.C. § 1103(c)(l), 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 a plan and their beneficiaries and defraying reasonable expenses of administering the plan.

53. 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.

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

55. 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)(l) 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.

56. 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.

VI. CLASS ALLEGATIONS

57. This action is brought as a class action by Plaintiffs on behalf of themselves and the following proposed Class:

> All participants and beneficiaries in the Universal Health Services, Inc. Retirement Savings Plan (the "Plan") at any time on or after June 5, 2014 to the present (the "Class Period"), including any beneficiary of a deceased person who was a participant in the Plan at any time during the Class Period.

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

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

59. **Numerosity**. Plaintiffs are informed and believe that there are at least 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.

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

(a) Whether Defendants failed and continue to fail to discharge their duties with respect to the Plan solely in the interest of the Plan's participants for the exclusive purpose of providing benefits to participants and their beneficiaries;

(b) Whether Defendants breached their fiduciary duties under ERISA by failing to defray the reasonable expenses of administering the Plan; and

(c) Whether and what form of relief should be afforded to Plaintiffs and the Class.

61. **Typicality**. Plaintiffs, who are members of the Class, have claims that are typical of all of the members of the Class. Plaintiffs' claims and all of the Class members' claims arise out of the same uniform course of conduct by Defendants and arise under the same legal theories that are applicable as to all other members of the Class.

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

63. **Potential Risks and Effects of Separate Actions**. The prosecution of separate actions by or against individual Class members would create a risk of: (A) inconsistent or varying adjudications with respect to individual Class members that would establish incompatible standards of conduct for the party opposing the Class; or (B) adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests.

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

65. **Superiority**. A class action is superior to all other feasible alternatives for the resolution of this matter. The vast majority, if not all, of the Class members are unaware of Defendants' breaches of fiduciary duty and prohibited transactions such that they will never bring suit individually. Furthermore, even if they were aware of the claims they have against Defendants, the claims of virtually all Class members would be too small to economically justify individual litigation. Finally, individual litigation of multiple cases would be highly inefficient, a gross waste of the resources of the courts and of the parties, and potentially could lead to inconsistent results that would be contrary to the interests of justice.

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

67. Defendants have acted on grounds generally applicable to the Class by uniformly subjecting them to the breaches of fiduciary duty described above. Accordingly, injunctive relief, as well as legal and/or equitable monetary relief (such as disgorgement and/or restitution), along with corresponding declaratory relief, are appropriate with respect to the Class as a whole.

68. Plaintiffs' 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. Moreover, treating this case as a class action is superior to proceeding on an individual basis and there will be no difficulty in managing this case as a class action.

69. Therefore, this action should be certified as a class action under Rules 23(a) and 23(b)(1) and/or 23(b)(3).

COUNT I
(For Breach of Fiduciary Duty)

70. Plaintiffs incorporate by reference the allegations in the previous paragraphs of this Complaint as if fully set forth herein.

71. Defendants' conduct, as set forth above, violates their fiduciary duties under ERISA § 404(a)(1)(A), (B) and (D), 29 U.S.C. § 1104(a)(1)(A), (B) and (D), in that Defendants failed and continue to fail to discharge their duties with respect to the Plan solely in the interest of the 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 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 Plan. In addition, as set forth above, Defendants violated their respective fiduciary duties under ERISA to monitor other fiduciaries of the Plan in the performance of their duties.

72. To the extent that any of the Defendants did not directly commit any of the foregoing breaches of fiduciary duty, at the very minimum, each such Defendant is liable under 29 U.S.C. § 1105(a) because he, she, they or it was a co-fiduciary and knowingly participated in (or concealed) a breach by another fiduciary, enabled another fiduciary to commit breaches of fiduciary duty in the administration of his, her, their or its specific responsibilities giving rise to his, her, their or its fiduciary status and/or knowingly failing to cure a breach of fiduciary duty by another fiduciary and/or failed to take reasonable efforts to remedy the breach.

73. As a direct result of Defendants' breaches of duties, the Plan has suffered losses and damages.

74. Pursuant to ERISA § 409, 29 U.S.C. § 1109, and ERISA § 502, 29 U.S.C. § 1132, Defendants are liable to restore to the Plan the losses that have been 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 prospective injunctive and declaratory relief, and attorneys' fees, costs and other recoverable expenses of litigation.

COUNT II
(Failure to Monitor Fiduciaries and Co-Fiduciary Breaches)

75. Plaintiffs incorporate the allegations in the previous paragraphs of this Complaint as if fully set forth herein.

76. Universal is responsible for appointing, overseeing, and removing members of the Administrative Committee, who, in turn, are responsible for appointing, overseeing, and removing members of the Committee.

77. In light of its appointment and supervisory authority, Universal had a fiduciary responsibility to monitor the performance of the Committee and its members. In addition, Universal, and the Administrative Committee had a fiduciary responsibility to monitor the performance of the members of the Committee.

78. A monitoring fiduciary must ensure that the monitored fiduciaries are performing their fiduciary obligations, including those with respect to the investment and holding of Plan assets, and must take prompt and effective action to protect the Plan and participants when they are not.

79. To the extent that fiduciary monitoring responsibilities of Universal or the Committee was delegated, each Defendant's monitoring duty included an obligation to ensure that any delegated tasks were being performed prudently and loyally.

80. Universal and the Committee breached their fiduciary monitoring duties by,

among other things:

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

(b) Failing to monitor their appointees' fiduciary processes, which would have alerted a prudent fiduciary to the breaches of fiduciary duties described herein, in clear violation of ERISA; and

(c) Failing to remove appointees whose performances were inadequate in that they continued to maintain imprudent, excessively costly, and poorly performing investments within the Plan, all to the detriment of the Plan and its participants' retirement savings.

81. As a consequence of these breaches of the fiduciary duty to monitor, the Plan suffered substantial losses. Had Universal and the Committee discharged their fiduciary monitoring duties prudently as described above, the losses suffered by the Plan would have been minimized or avoided. Therefore, as a direct result of the breaches of fiduciary duties alleged herein, the Plan and its participants have lost millions of dollars of retirement savings.

82. Universal and the Committee are liable under 29 U.S.C. § 1109(a) to make good to the Plan any losses to the Plan resulting from the breaches of fiduciary duties alleged in this Count, to restore to the Plan any profits made through use of Plan assets, and are subject to other equitable or remedial relief as appropriate.

83. Each of the Defendants also knowingly participated in the breaches of the other Defendants, knowing that such acts were a breach; enabled the other Defendants to commit a breach by failing to lawfully discharge their own fiduciary duties; and knew of the breaches by

the other Defendants and failed to make any reasonable effort under the circumstances to remedy the breaches. Defendants, thus, are liable for the losses caused by the breaches of their co-fiduciaries under 29 U.S.C. § 1105(a).

COUNT III
(In the Alternative, Liability for Knowing Breach of Trust)

84. Plaintiffs incorporate the allegations in the previous paragraphs of this Complaint as if fully set forth herein.

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

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

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs, on behalf of themselves, the Class and the Plan, demand judgment against Defendants for the following relief:

(a) Declaratory and injunctive 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 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 the 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 Complaint was served upon the Secretary of Labor and the Secretary of the Treasury by certified mail, return receipt requested.

DATED: September 25, 2020

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