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8 *Attorney for Plaintiff, the Plan,*
9 *and the Proposed Class*

10 **IN THE UNITED STATES DISTRICT COURT**
11 **FOR THE CENTRAL DISTRICT OF CALIFORNIA**

12 NORMA VALENZUELA,
13 individually and as a representative
14 of a class of similarly situated
15 persons, on behalf of the
16 ADVANTAGE 401(k) SAVINGS
17 PLAN,

18 Plaintiff,

19 v.

20 ADVANTAGE SALES &
21 MARKETING LLC; THE BOARD
22 OF DIRECTORS OF
23 ADVANTAGE SALES &
24 MARKETING LLC; THE
25 ADVANTAGE 401(K) SAVINGS
26 PLAN ADMINISTRATIVE
27 COMMITTEE; and DOES No. 1-20,
28 Whose Names Are Currently
Unknown,

Defendants.

Case No.:

CLASS ACTION COMPLAINT

I. INTRODUCTION

1. Plaintiff Norma Valenzuela (“Plaintiff”), on behalf of the Advantage 401(k) Savings Plan (“Plan”) and a proposed Class (“Class”) of participants and beneficiaries in the Plan, brings this action (“Action”) under 29 U.S.C. § 1132 against Defendants Advantage Sales & Marketing LLC d/b/a Advantage Solutions (“Advantage”), the Board of Directors of Advantage Sales & Marketing LLC (“Board”), the Advantage 401(k) Savings Plan Administrative Committee (“Administrative Committee” or “Committee”), and Does No. 1-20, who are/were members of the Board and Committee or other fiduciaries of the Plan whose names are currently unknown (collectively, “Defendants”), for breaches 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 prior to the date the action is filed and continuing to the date of judgment, or such earlier date that the Court determines is appropriate and just (“Class Period”).

2. As employer-provided defined benefit plans have become increasingly rare as a meaningful benefit offered and available to employees, defined contribution plans (*e.g.*, 401(k) plans) qualified as tax-deferred vehicles have become the primary form of retirement saving in the United States and, as a result, the country’s *de facto* retirement system. In traditional defined benefit retirement plans, a sponsoring employer typically promises a calculable benefit and assumes the risk with respect to high fees or underperformance of pension plan assets used to fund defined benefits, since such an employer is responsible for any shortfall in funding to provide the benefits promised. In the context of defined contribution plans, however, *participants* bear the risk of high fees and investment underperformance.

3. As of December 31, 2022, the Plan had 11,822 participants with account balances and assets totaling approximately \$690 million, placing it in the top 0.1% of all U.S. defined contribution plans by plan participant count and top

1 0.2% of all U.S. defined contribution plans by total assets.¹ Defined contribution
2 plans with substantial assets, like the Plan, have significant bargaining power and
3 can demand low-cost administrative and investment management services within
4 the marketplace. The market for defined contribution retirement plan services is
5 well-established and can be competitive when fiduciaries of defined contribution
6 retirement plans act in an informed and prudent fashion.

7 4. Defendants maintain the Plan and are responsible for selecting,
8 monitoring, and retaining the service providers that provide investment,
9 recordkeeping, and other administrative services. Defendants are fiduciaries under
10 ERISA, and, as such, owe a series of duties to the Plan and its participants and
11 beneficiaries, including obligations to act for the exclusive benefit of participants,
12 select and maintain prudent and diverse investment options to offer through the
13 Plan, and ensure that Plan expenses are fair and reasonable in relation to the
14 services obtained. These fiduciary duties are well understood to be the “highest
15 known to the law.” *Howard v. Shay*, 100 F.3d 1484, 1888 (9th Cir. 1996) (citing
16 *Donovan v. Bierwirth*, 680 F.3d 263, 272 n.8 (2d Cir. 1982)).

17 5. Defendants breached their fiduciary duties to the Plan. As detailed
18 below, Defendants: (1) caused unreasonable expenses to be charged to participants;
19 and (2) failed to appropriately monitor the Plan’s investments, resulting in the
20 retention of unsuitable investments in the Plan instead of prudent alternative
21 investments that were readily available at all times Defendants selected and retained
22 the funds at issue and throughout the Class Period. Since Defendants have
23 discretion to select the investments made available to participants, as well as
24 establish and/or negotiate the type and amount of fees owed by participants to cover
25

26 ¹ BrightScope and Investment Company Institute, *The BrightScope/ICI Defined*
27 *Contribution Plan Profile: A Close Look at 401(k) Plans*, 2020, September 2023,
28 available at www.ici.org/files/2023/23-ppr-dcplan-profile-401k.pdf, accessed on
January 24, 2024.

1 Plan administrative costs, Defendants' breaches directly caused the losses alleged
2 herein.

3 6. To remedy these fiduciary breaches and other violations of ERISA,
4 Plaintiff brings this class action under Sections 404, 409, and 502 of ERISA, 29
5 U.S.C. §§ 1104, 1109, and 1132, to recover and obtain all losses resulting from
6 each breach of fiduciary duty. In addition, Plaintiff seeks such other equitable or
7 remedial relief for the Plan and the proposed Class as the Court may deem
8 appropriate and just under the circumstances.

9 7. Plaintiff specifically seeks the following relief on behalf of the Plan
10 and the Class:

- 11 i. A declaratory judgment holding that the acts of Defendants
- 12 described herein violate ERISA and applicable law;
- 13 ii. A permanent injunction against Defendants prohibiting the
- 14 practices described herein and affirmatively requiring them to
- 15 act in the best interests of the Plan and its participants;
- 16 iii. Equitable, legal, or remedial relief for all losses and/or
- 17 compensatory damages;
- 18 iv. Attorneys' fees, costs, and other recoverable expenses of
- 19 litigation; and
- 20 v. Such other and additional legal or equitable relief that the Court
- 21 deems appropriate and just under the circumstances.

22 **II. THE PARTIES**

23 8. Plaintiff is a former employee of Advantage Sales & Marketing and
24 participant in the Plan under 29 U.S.C. § 1002(7). Plaintiff is a resident of
25 Calexico, California. During the Class Period, Plaintiff maintained an investment
26 through the Plan in the Franklin Growth Fund and was subject to the excessive
27 recordkeeping and administrative costs alleged below.

28 9. Advantage Sales & Marketing is a sales, merchandising, and

1 marketing company headquartered in Irvine, California. Advantage is the Plan
2 Sponsor.

3 10. The Board appointed “authorized representatives” of Advantage,
4 including the Administrative Committee, as Plan fiduciaries. Does No. 1–10 are
5 current and former members of the Board who are fiduciaries of the Plan under
6 ERISA under 29 U.S.C. §§ 1002(21)(A) because each exercised discretionary
7 authority to appoint and/or monitor the Administrative Committee, which had
8 control over Plan management and/or authority or control over management or
9 disposition of Plan assets.

10 11. The Administrative Committee is responsible for the general
11 administration of the Plan and is a fiduciary under ERISA under 29 U.S.C. §§ 1002
12 and 1102. The Administrative Committee maintains its address at Advantage’s
13 company headquarters in Irvine, California. The Administrative Committee and its
14 members are appointed by Advantage or its delegate to administer the Plan on
15 Advantage’s behalf. Does No. 11–20 are current and former members of the
16 Administrative Committee and, by virtue of their membership, fiduciaries of the
17 Plan or otherwise are fiduciaries of the Plan.

18 12. Plaintiff is currently unable to determine the membership of the Board
19 and the Committee or the identities of the other fiduciaries of the Plan because,
20 despite reasonable and diligent efforts, it appears that the membership of the Board
21 and Committee or the identities of any other fiduciaries are not publicly available.
22 As such, these Defendants are named Does as placeholders. As soon as practicable
23 after their identities are discovered, Plaintiff will move, under Federal Rule of Civil
24 Procedure 15, to amend this Complaint to name the members of the Board,
25 members of the Administrative Committee, and other responsible individuals as
26 Defendants.

27 **III. JURISDICTION AND VENUE**

28 13. Plaintiff seeks relief on behalf of the Plan pursuant to ERISA’s civil

1 enforcement remedies with respect to fiduciaries and other interested parties and,
2 specifically, under 29 U.S.C. § 1109 and U.S.C. § 1132.

3 14. This Court has subject matter jurisdiction over the Action pursuant to
4 28 U.S.C. § 1331 because the Action arises under the laws of the United States.

5 15. Venue is proper in this District pursuant to Section 502(e) of ERISA,
6 29 U.S.C. § 1332(e), and 28 U.S.C. § 1391 because Advantage's principal place of
7 business is in this District and the Plan is administered in this District. Further, a
8 substantial part of the acts and omissions giving rise to the claims asserted herein
9 occurred in this District.

10 16. Plaintiff has standing to bring the Action because the assets
11 attributable to her Plan account were invested in the investment alternative
12 challenged in the action and she paid the excessive recordkeeping and
13 administrative fees at issue during the Class Period. Section 502(a)(2) of ERISA,
14 29 U.S.C. § 1132(a)(2), authorizes any participant, fiduciary, or the Secretary of
15 Labor to bring suit as a representative of a plan, with any recovery necessarily
16 flowing to a plan. As explained herein, the Plan has suffered millions of dollars in
17 losses due to Defendants' fiduciary breaches and remains vulnerable to continuing
18 harm, all redressable by the Court. And, although standing under Section 502(a)(2)
19 of ERISA, 29 U.S.C. § 1132(a)(2), is established by these Plan-wide injuries,
20 Plaintiff and all Plan participants also suffered financial harm as a result of the
21 Plan's imprudent investment options and were deprived of the opportunity to invest
22 in prudent options and pay only reasonable recordkeeping and administrative fees,
23 among other injuries.

24 **IV. FACTUAL ALLEGATIONS**

25 **A. BACKGROUND AND PLAN STRUCTURE**

26 17. The Plan is a participant-directed 401(k) plan, meaning participants
27 direct the investment of their contributions into various investment options offered
28 by the Plan. Each participant's account is credited with their participant

1 contributions, applicable employer matching contributions, any discretionary
2 contributions, and earnings or losses thereon. The Plan pays expenses from Plan
3 assets, and the majority of administrative expenses are paid by participants as a
4 reduction of investment income. Each participant's account is charged with the
5 amount of distributions taken and an allocation of administrative expenses. The
6 investment options made available to Plan participants include various mutual
7 funds and collective trust funds.

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

15 19. Collective trusts are, in essence, mutual funds without the SEC
16 regulation. Collective trusts fall under the regulatory purview of the Office of the
17 Comptroller of the Currency or individual state banking departments. Collective
18 trusts were first organized under state law in 1927 and were blamed for the market
19 crash in 1929. As a result, collective trusts were severely restricted, giving rise to
20 the more transparent and publicly traded mutual funds described above. Today,
21 banks create collective trusts only for their trust clients and for employee benefit
22 plans, like the Plan. Despite their historic lack of transparency, modern collective
23 trust sponsors provide sufficient information for investors to make informed
24 decisions about the merits of investing in collective trusts. The main advantage of
25 opting for a collective trust rather than a mutual fund is the negotiability of the fees.
26 Accordingly, large retirement plans are able to leverage their size for lower fees.

27 20. During the Class Period, Plan assets were held in a trust by the Plan
28 trustee, Principal Life Insurance Company ("Principal"). All investments and asset

1 allocations are performed through this trust instrument.

2 **B. THE DEFINED CONTRIBUTION INDUSTRY**

3 21. Failures by ERISA fiduciaries to monitor fees and costs for
4 reasonableness, such as those identified herein, have stark financial consequences
5 for retirees. Every extra level of expenses imposed upon plan participants
6 compounds over time and reduces the value of participants' investments available
7 upon retirement. Over time, even small differences in fees compound and can
8 result in vast differences in the amount of a participant's savings available at
9 retirement. As the Supreme Court has explained, "[e]xpenses, such as management
10 or administrative fees, can sometimes significantly reduce the value of an account
11 in a defined-contribution plan." *Tibble v. Edison Int'l*, 575 U.S. 523, 525 (2015).

12 22. The impact of excessive fees on a plan's employees' and retirees'
13 retirement assets is dramatic. The U.S. Department of Labor ("DOL") has noted
14 that a 1% higher level of fees over a 35-year period makes a 28% difference in
15 retirement assets at the end of a participant's career.²

16 23. Plan participants typically have little appreciation of the fees being
17 assessed to their accounts. Indeed, according to a 2017 survey conducted by TD
18 Ameritrade, only 27% of investors believed they knew how much they were paying
19 in fees as participants in defined contribution plans, and 37% were unaware that
20 they paid defined contribution fees at all.³ It is incumbent upon plan fiduciaries to
21 act for the exclusive best interest of plan participants, protect their retirement

22
23 ² *A Look at 401(k) Plan Fees*, UNITED STATES DEPT. OF LABOR at 1-2 (Sept.
24 2019), <https://www.dol.gov/sites/dolgov/files/ebsa/about-ebsa/our-activities/resourcecenter/publications/a-look-at-401k-plan-fees.pdf> (last visited
25 February 27, 2024).

26 ³ See, e.g., Ted Godbout, *How Much Do 401(k) Participants Know About Their*
27 *Plan Fees?*, American Society of Pension Professionals and Actuaries (Feb. 6,
28 2018), <https://www.asppa.org/news/browse-topics/how-much-do-401k-participants-know-about-their-plan-fees> (last visited Feb. 29, 2024).

1 dollars, and ensure that fees are and remain reasonable for the services provided
2 and properly and fully disclosed. Unfortunately, fiduciaries of defined contribution
3 retirement plans, including large retirement plans like the Plan, also often lack
4 understanding of the fees being charged to the plans that they administer, manage
5 and control.

6 **C. RECORDKEEPING AND ADMINISTRATIVE SERVICES**

7 24. Fiduciaries of virtually all large defined contribution plans, including
8 the Plan, hire a single provider for the essential recordkeeping and administrative
9 (“RK&A”) services for the plan. These services include, but are not limited to,
10 maintaining plan records, tracking participant account balances and investment
11 elections, and providing transaction processing, call center support, investment
12 education and guidance, participant communications, and trust and custodial
13 services.

14 25. The term “recordkeeping” is a catchall term for the entire suite of
15 recordkeeping and administrative services typically provided by a plan’s service
16 provider or “recordkeeper.” In other words, recordkeeping fees and RK&A fees are
17 one and the same and the terms are used synonymously.

18 26. Recordkeepers typically collect their fees from “direct” compensation
19 and “indirect” compensation.

20 27. Direct compensation is paid directly from plan assets and is reflected as
21 a deduction in the value of participant accounts.

22 28. Indirect compensation is paid to the recordkeeper indirectly by third
23 parties and is not transparent to retirement plan participants. These fees are taken
24 from the investment options before the value of the investment option is provided
25 to the participant. Thus, in most cases, participants are not aware they are paying
26 these fees. Most indirect compensation is typically collected by recordkeepers
27 through asset-based “revenue sharing.”

28 29. Virtually all recordkeepers are subsidiaries or affiliates of financial

1 services and insurance companies that also provide investment options to defined
2 contribution plans (*e.g.*, mutual funds, insurance products, collective trusts, separate
3 accounts, *etc.*) or have some other ancillary line of business (*e.g.*, consulting) to sell
4 to plans. As a result, all recordkeepers consider the economic benefit of their entire
5 relationship with a defined contribution plan when setting fees for their RK&A
6 services. Discounts in a RK&A fee rate are often available based on revenues the
7 recordkeeper earns through the provision of other services (*e.g.*, investment
8 management revenues). In many cases, the additional investment management
9 revenues are more than double or triple the revenue earned by the recordkeeper for
10 providing RK&A services.

11 30. There are two types of essential recordkeeping services provided by all
12 national recordkeepers for large plans with substantial bargaining power (like the
13 Plan). First, an overall suite of recordkeeping services is provided to large plans as
14 part of a “bundled” arrangement for a buffet-style level of service (meaning that the
15 services are provided, in retirement industry parlance, on an “all-you-can-eat”
16 basis). These services include, but are not limited to, the following:

- 17 i. Recordkeeping;
- 18 ii. Transaction processing (including technology to provide
19 participants access to investment options selected by the plan
20 sponsor and to process purchases and sales of participants’
21 assets);
- 22 iii. Administrative services related to converting a plan from one
23 recordkeeper to another;
- 24 iv. Participant communications (including employee meetings, call
25 centers/phone support, voice response systems, web account
26 access, and the preparation of materials distributed to
27 participants, *e.g.*, summary plan descriptions);
- 28 v. Maintenance of an employer stock fund (if needed);

- vi. Plan document services, including updates to standard plan documents to ensure compliance with new regulatory and legal requirements;
- vii. Plan consulting services, including assistance in selecting the investment lineup offered to participants;
- viii. Accounting and audit services, including the preparation of annual reports, *e.g.*, Form 5500s⁴ (excluding any separate fees charged by an independent third-party auditor);
- ix. Compliance support, including assistance interpreting plan provisions and ensuring plan operation complies with legal requirements and plan provisions (excluding separate legal services provided by a third-party law firm); and
- x. Compliance testing to ensure the plan complies with U.S. Internal Revenue Service nondiscrimination rules.

31. This suite of essential RK&A services can be referred to as “Bundled RK&A” services. These services are offered by all recordkeepers for one price (typically at a *per capita* rate), regardless of the services chosen or used by the plan. Anyone who has passing familiarity with recordkeepers’ responses to requests for proposals, bids, and contracts understands and appreciates that the services chosen by a large plan do not affect the amount charged by recordkeepers for such basic and fungible services. In fact, providers of RK&A services will provide bids for services without knowing details of a plan beyond the number of participant accounts and asset levels in the plan. Any claim that the pricing of RK&A services depends upon the level of services provided to a plan is both false and frivolous. Nonetheless, fiduciary-defendants all too often attempt to stave off breach of

⁴ The Form 5500 is the annual report that defined contribution plans are required to file with the DOL and Department of Treasury pursuant to ERISA reporting requirements.

1 fiduciary duty claims by disingenuously asserting that the pricing of Bundled
2 RK&A services depends upon service level, even though the marketplace for these
3 services belies such an assertion.

4 32. The second type of essential RK&A services all national recordkeepers
5 provide are “A La Carte RK&A” services, for which providers often charge
6 separate, additional fees based on the use of such services by individual
7 participants. These fees are kept distinct from the Bundled RK&A arrangement to
8 ensure that one participant is not forced to help another cover the cost of, for
9 example, taking a loan from their plan account balance. A La Carte RK&A
10 services typically include, but are not limited to, the following:

- 11 i. Loan processing;
- 12 ii. Brokerage services/account maintenance (if offered by the plan);
- 13 iii. Distribution services; and
- 14 iv. Processing of qualified domestic relations orders.

15 33. All national recordkeepers have the capability to provide all the
16 aforementioned RK&A services to large defined contribution plans, including those
17 much smaller than the Plan.

18 34. For large plans with more than 5,000 participants, any minor variations
19 in the way these essential RK&A services are delivered have no material impact on
20 the fees charged by recordkeepers to deliver the services. Indeed, the industry-wide
21 practice of recordkeepers quoting fees for Bundled RK&A services on a per-
22 participant basis without regard for any individual differences in services requested
23 confirms that recordkeepers view such differences as immaterial and
24 inconsequential from a cost perspective.

25 35. While recordkeepers in the defined contribution industry attempt to
26 distinguish themselves through marketing and other means, they all offer the same
27
28

1 bundles and combinations of services.⁵ Accordingly, the market for defined
2 contribution plan RK&A services has become increasingly price competitive,
3 particularly for larger plans, like the Plan, that have a considerable number of
4 participants and significant assets.

5 36. The marginal cost of adding an additional participant to a
6 recordkeeping platform is relatively low. These economies of scale are inherent in
7 all recordkeeping arrangements for defined contribution plans, including the Plan.
8 As a plan's participant count increases, the recordkeeper's fixed costs of providing
9 RK&A services are spread over a larger population, thereby reducing the average
10 unit cost of delivering services on a per-participant basis. In other words, because
11 the incremental variable costs for providing RK&A services depend on the number
12 of participants with account balances in a defined contribution plan, the cost to the
13 recordkeeper on a per-participant basis declines as the number of plan participants
14 increases. As a result, a recordkeeper will accept a lower fee to provide RK&A as
15 the number of participants in the plan increases.

16 37. It is axiomatic in the retirement plan services industry that, all else
17 being equal: (1) a plan with more participants can and will receive a lower effective
18 per-participant fee when evaluated on a per-participant basis; and (2) as participant
19 counts increase, the effective per-participant RK&A fee should decrease.

20 38. Similarly, the average cost for a recordkeeper to provide services to a
21 participant does not hinge on that participant's account balance. In other words, it
22 costs a recordkeeper the same amount to provide services to a participant with an
23 account balance of \$10,000 as it does to provide services to a participant with a
24

25 ⁵ Sarah Holden, James Duvall & Elena Barone Chism, *The Economics of Providing*
26 *401(k) Plans: Services, Fees, and Expenses*, ICI Research Perspective 27, No. 6
27 (June 2021), <https://www.ici.org/system/files/2021-06/per27-06.pdf> (last visited
28 Feb. 29, 2024) (list of standard services provided to 401(k) plans in Figure 2, at
page 2).

1 balance of \$1,000,000.

2 39. Informed, prudent plan fiduciaries are aware of these cost structure
3 dynamics and marketplace realities and will leverage the plan's participant count to
4 obtain lower effective per- participant fees.⁶

5 40. Since recordkeeping fees are paid in dollars, prudent fiduciaries
6 evaluate the fees for RK&A services on a dollar-per-participant basis. This is the
7 current standard of care for ERISA fiduciaries and has been throughout the Class
8 Period.

9 41. Prudent fiduciaries will regularly ensure that a plan is paying fees
10 commensurate with its size in the marketplace by soliciting competitive bids from
11 recordkeepers other than the plan's current provider. Recognizing that RK&A
12 services are essentially uniform in nature, and that small differences in the services
13 required by a large plan are immaterial to the cost of providing such services, most
14 recordkeepers only require a plan's participant count and asset level in order to
15 provide a fee quote. These quotes are typically provided on a per-participant basis,
16 enabling fiduciaries to easily compare quotes on an apples-to-apples basis to
17 determine if the current level of fees being charged by a plan's recordkeeper is
18 reasonable.

19 42. Having received quotes, a prudent fiduciary will then negotiate with
20 the plan's current provider for a lower fee or move to a new provider for the same
21 (or better) services at a competitive (or lower) fee. This is because prudent
22 fiduciaries understand that excessive fees significantly and detrimentally impact the
23 value of participants' retirement accounts.

24 43. After negotiating the fee the plan will pay to the recordkeeper, the

25
26 ⁶ See Defined Contribution Plan Fee Practices, MERCER (2020),
27 [https://www.mercer.us/content/dam/mercer/attachments/north-america/us/us-2020-](https://www.mercer.us/content/dam/mercer/attachments/north-america/us/us-2020-dc-fee-practices.pdf)
28 [dc-fee-practices.pdf](https://www.mercer.us/content/dam/mercer/attachments/north-america/us/us-2020-dc-fee-practices.pdf) (noting that the costs incurred by recordkeepers "are directly
impacted by the number of participants in the plan.").

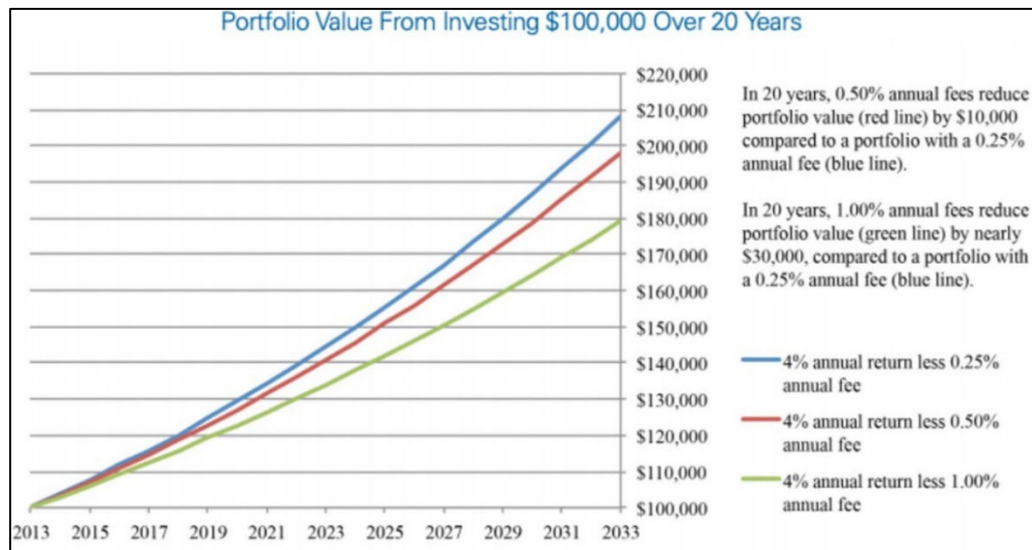
1 fiduciaries can allocate the fee among participant accounts at the negotiated per-
 2 participant rate, or *pro rata* based on participant account balances, or use a
 3 different, less common method.

4 **D. DEFENDANTS' BREACHES OF FIDUCIARY DUTIES**

5 44. Defendants have severely breached their fiduciary duties of prudence
 6 and loyalty to the Plan in several ways. Plaintiff did not acquire actual knowledge
 7 of Defendants' breaches until shortly before this Complaint was filed.

8 **1. The Plan's Excessive Recordkeeping/Administrative Costs**

9 45. An obvious indicator of Defendants' breaches of their fiduciary duties
 10 is the Plan's excessive RK&A expenses. The impact of such high fees on
 11 participant balances is aggravated by the effect of compounding, to the significant
 12 detriment of participants over time. This effect is illustrated by the below chart,
 13 published by the SEC, showing the 20-year impact on a balance of \$100,000 by
 14 fees of 25 basis points (0.25%), 50 basis points (0.50%), and 100 basis points
 15 (1.00%).



25 46. During the Class Period, participants paid Principal for RK&A
 26 services indirectly through asset-based charges to their account balances.

27 47. The RK&A services provided to the Plan are (and at all times were)
 28

the same standard services identified above and are the same as those provided to comparable plans. Principal provides no services to the Plan and its participants that are unusual or out of the ordinary. Regardless, for large plans, like the Plan here, any differences in services are immaterial to pricing considerations, the primary drivers of which are the number of participants and whether fiduciaries employed a competitive process of soliciting bids to determine the reasonable market rate for the services required by the plan.

48. Since the start of the Class Period, Defendants caused the Plan to pay total amounts of RK&A fees that far exceeded the reasonable market rate. According to the Plan's participant fee disclosures, an annual RK&A expense of 0.125% is applied to each participant's Plan account balance, less any revenue sharing amounts included in the total investment expense of particular Plan investment options. Any such revenue sharing amounts are credited back to the impacted participant as a fee adjustment and serve to reduce the net effective RK&A expense paid by the impacted participant. The table below sets forth the annual amounts per participant the Plan ultimately paid to Principal in RK&A fees pursuant to the 0.125% charge, less any applicable revenue sharing identified in the expense ratios of particular investment options in the Plan's participant fee disclosures. If at any time during the Class Period the RK&A expense rate was greater than 0.125%, the effective per participant fees would be greater than the amounts displayed below.

	2018	2019	2020	2021	2022	Average
Participant Accounts with a Balance	13,095	12,586	11,500	12,037	11,822	12,208
Net Asset-Based RK&A Fee	\$578,196	\$694,922	\$784,190	\$913,829	\$733,054	740,838
RK&A Fee (\$ per participant)	\$44	\$55	\$68	\$76	\$62	\$61

49. Given the Plan's size, expected growth, and resulting negotiating power, with prudent management and administration, the Plan should unquestionably have been able to obtain reasonable rates for RK&A services that were significantly lower than the effective per-participant RK&A rates set forth

1 above.

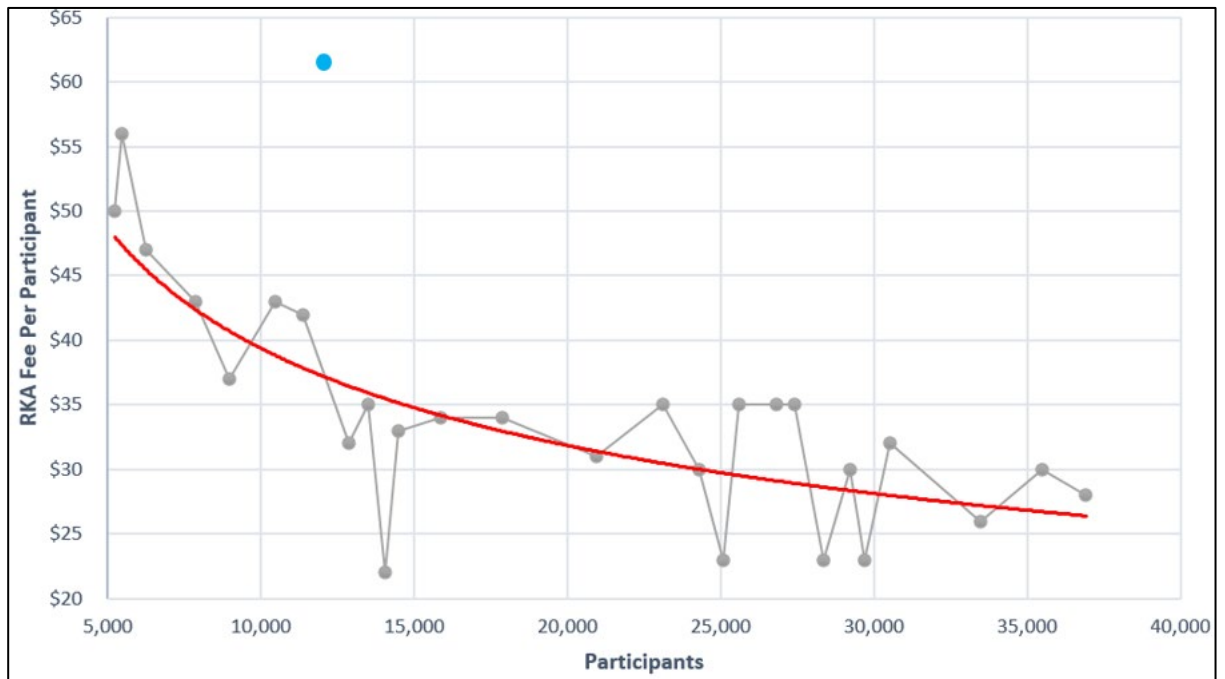
2 50. While asset-based fee arrangements, such as the 0.125% per
3 participant charge paid by the Plan, are not inherently imprudent, this method of
4 paying fees risks an undue increase in fees as plan assets grow.

5 51. According to publicly available data and information from participant
6 fee disclosures and Form 5500 filings of similarly sized defined contribution plans
7 during the Class Period, other comparable plans were paying much lower fees than
8 the Plan throughout the Class Period. The ability of comparable plans to negotiate
9 lower fees for materially identical services is clear and compelling evidence that the
10 reasonable market rate is lower than the fee the Plan was paying.

11 52. Table 1 below lists the RK&A fees paid by 27 similarly sized defined
12 contribution plans to several different national recordkeepers, which represent the
13 prices available to the Plan during the Class Period. Table 1 also indicates the
14 number of participants and assets of each plan.

Plan	Participants	RK&A Fee (\$)	RK&A Fee (\$/pp)	Recordkeeper
Komatsu Mining Corp. Retirement Savings Plan	5,235	\$263,330	\$50	Fidelity
Menasha Corporation 401(k) Retirement Savings Plan	5,442	\$304,429	\$56	Prudential
Smithfield Foods, Inc. Salaried 401(k) Plan	6,266	\$295,016	\$47	Great West
Thedacare Retirement and 403(b) Savings Plan	7,847		\$43	Transamerica
Bausch Health Companies Inc. Retirement Savings Plan	8,964	\$338,828	\$37	Fidelity
The Boston Consulting Group, Inc. Employees' Savings Plan and Profit Sharing Retirement Fund	10,455	\$449,739	\$43	Vanguard
Southern California Permanente Medical Group Tax Savings Retirement Plan	11,388	\$473,410	\$42	Vanguard
Advantage 401(k) Savings Plan	12,208	\$740,838	\$61	Principal
Viacom 401(k) Plan	12,884	\$411,959	\$32	Great West
Fortive Retirement Savings Plan	13,502	\$472,673	\$35	Fidelity
United Airlines Pilot Retirement Account Plan	14,042		\$22	Schwab
DHL Retirement Savings Plan	14,472	\$483,191	\$33	Fidelity
Michelin 401(k) Savings Plan	15,880	\$543,332	\$34	Vanguard
Ecolab Savings Plan and ESOP	17,886	\$608,061	\$34	Fidelity
Qualcomm Incorporated Employee Savings and Retirement Plan	20,955	\$639,143	\$31	Fidelity
MassMutual Thrift Plan	23,131		\$35	MassMutual
The Rite Aid 01(k) Plan	24,309	\$719,730	\$30	Great West
Sanofi U.S. Group Savings Plan	25,086	\$567,836	\$23	T. Rowe Price
Dollar General Corp 401(k) Savings and Retirement Plan	25,614	\$901,634	\$35	Voya
Farmers Group, Inc. 401(k) Savings Plan	26,826		\$35	Vanguard
Fidelity National Information Services, Inc. 401(k) Profit Sharing Plan	27,396	\$958,957	\$35	Vanguard
Philips North America 401(k) Plan	28,348	\$720,606	\$23	Prudential
Orlando Health, Inc. Retirement Savings Plan 403B	29,229	\$870,097	\$30	Fidelity
Baptist Health South Florida, Inc. 403(b) Employee Retirement Plan	29,704		\$23	Transamerica
Bristol-Myers Squibb Savings and Investment Program	30,518		\$32	Fidelity
Chevron Employee Savings Investment Plan	33,484		\$26	Fidelity
Danaher Corporation & Subsidiaries Savings Plan	35,467	\$1,062,204	\$30	Fidelity
Beaumont Health 403(b) Retirement Savings Plan	36,916		\$28	Fidelity

53. When the fees in Table 1 are plotted by participant count (as shown in Table 2 below), the resulting graph illustrates the well-established and widely-understood dynamic in the RK&A marketplace that plans with larger participant counts are able to leverage their size to achieve lower relative RK&A fees. National RK&A service providers maintain internal pricing curves that reflect the same dynamic, and they use such pricing curves in preparing bids to plans.



54. The blue datapoint far above the trendline in Table 2 represents the Plan's average RK&A fee.

55. The RK&A fees calculated for each comparable plan in Tables 1 and 2 include all the direct and indirect compensation paid to the recordkeeper disclosed on each plan's Form 5500,⁷ accounting for Bundled and any A La Carte services. Specifically, if the pricing structure as described in the relevant Form 5500 reveals that some or all revenue sharing is not returned to the plan, then the appropriate amount of revenue sharing is also included to calculate the RK&A fees. In some cases, the plan's investment options do not provide any revenue sharing, meaning any indirect revenue is immaterial to the RK&A fees. In other plans, all of the revenue sharing is returned to the plans and is therefore not included in the fee calculation. The calculated sum of the total RK&A fees that each plan paid to its recordkeeper is then divided by the total number of participants with an account

⁷ Fee calculations for the comparable plans are based on the information disclosed in each plan's 2020 Form 5500, or the most recently filed Form 5500 if 2020 is not available.

1 balance in the plan in order to determine the plan's fees on a per-participant basis.
2 For the plans for which no total RK&A fee is provided in Table 1, the per
3 participant fee was sourced directly from publicly available participant fee
4 disclosures.⁸ Accordingly, no calculation is necessary for these plans. The
5 foregoing assumptions ensure that the comparison between plans appropriately
6 accounts for any differences in the arrangement or method by which the identified
7 plans pay RK&A fees.

8 56. The comparable plans above received at least the same RK&A
9 services as the Plan. Therefore, the fees shown in Tables 1 and 2 above are apples-
10 to-apples comparisons in that they include all the fees being charged by each
11 recordkeeper to provide the same RK&A services to similar defined contribution
12 plans.

13 57. As Tables 1 and 2 above indicate, the fees the Plan paid for a
14 materially identical package of services are much higher than those charged to
15 plans with comparable (and in many cases smaller) participant counts. Indeed,
16 based on fees paid by these comparator plans during the Class Period, it is more
17 than reasonable to infer that Defendants failed to follow a prudent process to ensure
18 that the Plan was paying only reasonable fees for RK&A services.

19 58. Prevailing standards dictate that fiduciaries of large retirement plans
20 regularly evaluate the fees paid out of plan assets (i.e., participant accounts) to
21 ensure that such fees are reasonable at all times. This entails conducting
22 competitive bidding roughly every three years and appropriate benchmarking
23 during gaps in competitive bidding. In fact, the DOL formally recognized as early
24 as 2010 that prudent plan fiduciaries normally conduct requests for proposal (the
25

26 ⁸ While participant fee disclosures for the vast majority of plans are not publicly
27 available, the participant fee disclosures reflected in Tables 1 and 2 plainly validate
28 the pricing curve set forth in Table 2 and confirm that comparable plans were able
to achieve vastly lower RK&A fees than the Plan.

1 most formal type of competitive bidding) every three to five years. See 75 Fed.
2 Reg. 41,619 (July 16, 2010).

3 59. In light of the fact that the effective RK&A fees paid by Plan
4 participants grew during the Class Period despite no material change in the services
5 provided or the number of participants, Defendants clearly engaged in virtually no
6 examination, comparison, or benchmarking of the RK&A fees of the Plan to those
7 of other similarly sized defined contribution plans or were complicit in paying
8 grossly excessive fees.

9 60. Defendants' failure to recognize that the Plan and its participants were
10 grossly overcharged for RK&A services and its failure to take effective remedial
11 actions amount to a shocking breach of its fiduciary duties to the Plan. To the
12 extent Defendants had a process in place, it was imprudent and ineffective given the
13 objectively unreasonable fees the Plan paid for RK&A services. Had Defendants
14 appropriately monitored the compensation paid to Principal and ensured that
15 participants were only charged reasonable RK&A fees, Plan participants would not
16 have lost millions of dollars in their retirement savings over the last six-plus years.

17 **2. The Plan's Imprudent Investment Options**

18 61. The goal of an active manager is to beat a benchmark—usually a
19 market index or a combination of indices—by taking more risk than the relevant
20 index or indices.⁹ It is a basic principle of investment theory that the risks

21 ⁹ See Ashley Kilroy, *What Is Active Management and Is It Right For You?*,
22 SmartAsset Advisor, LLC, February 16, 2023, available at
23 <https://smartasset.com/financial-advisor/active-management>, accessed on January
24 24, 2024 (“[t]he goal of active management is to outperform a specific market
25 index or, in a market downturn, to book losses that are less severe than a specific
26 market index suffers”); Lehman and Modest, *Mutual Fund Performance*
27 *Evaluation: A Comparison of Benchmarks and Benchmark Comparisons*, Journal of
28 Finance, Vol. XLII, No. 2, June 1987 (evaluating the performance of benchmarks
using CAPM and APT, and explaining that the entire purpose of actively managed
mutual funds is to exceed the performance of an index/benchmark); Baks, Metrick,
and Wachter, *Should Investors Avoid All Actively Managed Mutual Funds? A Study*

1 associated with an investment must be justified by its potential returns in order for
 2 that investment to be rational. This principle applies even before considering the
 3 purpose of the investment or the needs of an investor. The Capital Asset Pricing
 4 Model (“CAPM”)—which is used to price securities and generate expected returns
 5 for assets given their risks and the cost of capital—provides the following
 6 mathematical formula for this principle:

$$ER_i = R_f + \beta_i(ER_m - R_f), \text{ where:}$$

8 ER_i = the expected return of the investment

9 R_f = the risk-free rate

10 β_i = the beta of the investment

11 $(ER_m - R_f)$ = the market risk premium

12 62. Applied here, the beta— β_i —is the risk associated with an actively
 13 managed mutual fund or collective trust, which can be justified only if the expected
 14 return— ER_i —is, at the very least, above that of its benchmark, R_f .¹⁰ Otherwise, the
 15 model collapses, and it would be imprudent to assume the extra risk without
 16 achieving a higher return than the benchmark.

17 63. The goal of an active manager is to beat a benchmark—usually a
 18 market index or a combination of indices—by taking more risk than the relevant

19 _____
 20 *in Bayesian Performance Evaluation*, Journal of Finance, Vol. LVI, No. 1,
 21 February 2001 (observing that, since Jensen in 1968, “most studies have found that
 22 the universe of mutual funds does not outperform its benchmarks after expenses”
 23 and “evidence indicates that the average active mutual fund should be avoided”);
 24 Jensen, *The Performance of Mutual Funds in the Period 1945-1964*, Vol. XXIII,
 No. 2, May 1968 (explaining that most actively managed mutual funds do not
 outperform indexes and that only those that outperform indexes can justify the risk
 and expense from an economic perspective).

25 ¹⁰ In this instance, the index benchmark takes place of the “risk-free” rate, as the
 26 investment option is measured against the performance of that investment category,
 27 rather than the typical U.S. Treasury Bonds or equivalent government security in a
 28 general CAPM calculation. The Arbitrage Pricing Theory (“APT”) likewise
 dictates the same result.

1 index or indices. Kilroy, *Is Active Management a Good Idea for Your Portfolio*
 2 (SmartAsset Advisor, LLC) (December 11, 2019), [https://smartasset.com/financial-](https://smartasset.com/financial-advisor/active-management)
 3 [advisor/active-management](https://smartasset.com/financial-advisor/active-management) (“the goal of active management is to outperform a
 4 specific market index or, in a market downturn, to book losses that are less severe
 5 than a specific market index suffers”); *see also* Lehman and Modest, *Mutual Fund*
 6 *Performance Evaluation: A Comparison of Benchmarks and Benchmark*
 7 *Comparisons*, Journal of Finance, Vol. XLII, No. 2 (June, 1987) (evaluating the
 8 performance of benchmarks using CAPM and Arbitrage Pricing Theory (“APT”)
 9 and explaining that the entire purpose of actively managed mutual funds is to
 10 exceed the performance of an index/benchmark); Baks, Metrick, & Wachter,
 11 *Should Investors avoid all actively managed mutual funds? A Study in Bayesian*
 12 *performance evaluation*, Journal of Finance, Vol. LVI, No. 1 (February, 2001)
 13 (observing that, since Jensen in 1968, “most studies have found that the universe of
 14 mutual funds does not outperform its benchmarks after expenses” and “evidence
 15 indicates that the average active mutual fund should be avoided”); Jensen, *The*
 16 *Performance of Mutual Funds in the Period 1945-1964*, Vol. XXIII, No. 2 (May,
 17 1968) (explaining that most actively managed mutual funds do not outperform
 18 indexes and that only those that outperform indexes can justify the risk and expense
 19 from an economic perspective). Thus, any suggestion that a comparison of actively
 20 managed funds to passively managed investments (as a proxy for the specific
 21 market index that the actively managed investment attempts to beat) is somehow
 22 inappropriate or an “apples to oranges” comparison in every instance ignores the
 23 fundamental purpose and design of active mutual funds and is inconsistent with
 24 basic investment theory and the prevailing frameworks employed by prudent
 25 fiduciaries.

26 64. Indeed, prudent fiduciaries should compare actively managed funds to
 27 passively managed funds or similar indices in order to determine whether a plan is
 28 getting the additional return to justify the increased expense and risk of the active

1 investment. This, in addition to other metrics (such as peer relative performance),
 2 is exactly what every minimally competent investment professional does to
 3 evaluate an actively managed investment and arguments or suggestions to the
 4 contrary fall far outside mainstream thought in terms of investment management,
 5 basic economics and minimum standards of fiduciary care and prudence. Indeed, in
 6 promulgating its Final Rule to Improve Transparency of Fees and Expenses to
 7 Workers in 401(k)-Type Retirement Plans in February, 2012, the DOL specifically
 8 required that plan sponsors identify benchmarks in the form of an appropriate
 9 broad-based securities market index for each investment offered in the plan, thus
 10 specifically recognizing that actively managed investments must be evaluated
 11 against indexes, for which passively managed index funds serve as an investable
 12 proxy. Performing such a comparative analysis is not merely intended to determine
 13 whether a plan would be better served by a passively managed investment, but
 14 rather whether an actively managed fund is providing value sufficient to justify its
 15 retention.

16 65. Market research has indicated that investors should be skeptical of
 17 certain actively managed funds' ability to consistently outperform their indices,
 18 which is a significant concern for long-term investors saving for retirement, like
 19 Plan participants and beneficiaries. Indeed, Morningstar has repeatedly concluded
 20 that "in general, actively managed funds have failed to survive and beat their
 21 benchmarks, especially over longer time horizons."¹¹ Although they may

22
 23 ¹¹ Ben Johnson, *How Actively and Passively Managed Funds Performed: Year-End*
 24 *2018*, MORNINGSTAR (Feb. 12, 2019),
 25 www.morningstar.com/insights/2019/02/12/active-passive-funds. *See also* Kilroy,
 26 *Is Active Management a Good Idea for Your Portfolio* (SmartAsset Advisor, LLC)
 27 (December 11, 2019), <https://smartasset.com/financial-advisor/active-management>
 28 [there is controversy around the performance of active managers and if they](https://smartasset.com/financial-advisor/active-management)
[produce superior returns. In fact, over the past 15 years, 92.43% of large-cap](https://smartasset.com/financial-advisor/active-management)
[managers, 95.13% of mid-cap managers, 97.70% of small-cap managers failed to](https://smartasset.com/financial-advisor/active-management)
[surpass their benchmark index. Also, over three years, active managers](https://smartasset.com/financial-advisor/active-management)

1 experience success over shorter periods, active fund managers are infrequently able
2 to time their activity efficiently enough to outperform the market. This is not to
3 suggest that active management is inappropriate for use in a retirement plan lineup,
4 but that plan fiduciaries must carefully analyze each active fund's ability to provide
5 value and, if they deem a fund does not, replace it with an active or passive fund
6 that has demonstrated such capabilities.

7 66. In this environment, prudent fiduciaries scrutinize investment
8 managers to determine whether an active manager has presented an ability to
9 exploit inefficiencies in their chosen sector of the market. To do so and distinguish
10 between a skilled manager and a lucky one, fiduciaries judge fund performance
11 against both an appropriate index benchmark and a universe of similar funds over
12 periods most closely approximating a market cycle—namely, three- and five-year
13 intervals. These time horizons are emphasized by virtually all competent
14 investment professionals as sufficient to gauge a fund manager's ability to execute
15 their strategy. In addition, these two specific time horizons (three- and five-year
16 trailing performance) are the specific timeframes that almost all investment policy
17 statements identify as the most important to review in connection with review of
18 401(k) investments.¹²

19 [underperformed the market by 0.36%.](#)
20

21 ¹² Although it may be tempting to somewhat simplistically suggest that 10-year
22 performance, for example, is more important since the plans at issue are retirement
23 plans, any such suggestion is eschewed by competent and principled investment
24 professionals for several important reasons: (1) waiting for 10 years to determine
25 whether the performance of an investment is acceptable is simply too long because
26 losses that can accrue over such a prolonged period can be devastating to an
27 investor and are almost always unrecoverable in nature; (2) in light of labor market
28 flexibility in the United States (with the average employee holding a position for
slightly more than four years, *i.e.* between three and five years), the average
participant does not remain invested in the same 401(k) plan or retirement
instruments for as long as 10 years, *see* Department of Labor, Bureau of Labor
Statistics News Release: Employee Tenure in 2022 (September 22, 2022),

67. A prudent investment monitoring process will regularly review fund performance against a relevant index and peer group for the most recent calendar quarter end over the previous three- and five-year periods, as well as several preceding three- and five-year periods, in order to discern any pattern of underperformance. Through this lens, if a fund exhibits a persistent inability to both exceed the returns of its market index and rank in the top 50 percent among its peers, prudent fiduciaries perform a detailed review of the fund and investigate potential replacements.¹³

i. **The Franklin Growth Fund**

68. The Franklin Growth Fund R6 (“Franklin Fund” or “Fund”) was retained as a Plan investment option despite an inability to support an expectation of performance sufficient to justify its retention, including as evidenced by its consistent and significant underperformance relative to its benchmark, the Russell 1000 Growth Index, and its peer group, as represented by the Morningstar US Large Growth category. However, due to the Committee’s investment review procedures, a general lack of understanding of how to evaluate investment returns, and/or a general attitude of neglect toward the Plan, Defendants failed to appropriately scrutinize, and ultimately replace the investment. The below

<https://www.bls.gov/news.release/pdf/tenure.pdf>; and (3) the average market cycle is less than 10 years and, therefore, as a matter of investment theory and management, it is not the most important or meaningful benchmark with respect to performance.

¹³ The degree of cumulative underperformance that prudent fiduciaries consider to be material varies by investment type and asset class. For example, the underperformance that a large cap fund experiences before such underperformance is material is not the same degree of underperformance that a real estate fund or foreign investment fund experiences before such underperformance is material. As explained below, the degree of underperformance experienced by the challenged investment was material and should have prompted Defendants to investigate and remove the funds.

1 performance data represent information that was easily accessible to the Committee
2 during the Class Period and would have been reviewed by prudent fiduciaries.

3 69. By the start of the Class Period, as of the end of the First Quarter of
4 2018, the Franklin Growth Fund's three-year returns had trailed those of the
5 benchmark for *nine of the last ten quarters*, while the Fund's five-year returns had
6 lagged the benchmark for *all of the previous ten consecutive quarters*. The
7 prevailing standard of care for investment monitoring demands awareness and
8 consideration of *rolling* performance to identify trends of out- or underperformance.
9 Underperformance over a three- or five-year period is a cause for concern and
10 scrutiny and can itself be reason to remove an investment from a plan. In any
11 event, prudent fiduciaries will seek to understand the reasons for the
12 underperformance and closely monitor the investment to see if it subsequently
13 outperforms.¹⁴ Underperformance over several consecutive three- or five-year
14 trailing periods is a cause for both alarm and action.

15 70. As discussed above, active managers face an uphill battle to provide
16 value by consistently beating their benchmarks and compensating for fees higher
17 than those funds that simply track the benchmark. The domestic large cap space is
18 particularly difficult: Morningstar concluded in its year-end 2018 report on active
19 versus passive management that long term success rates (a fund's ability to survive
20 and outperform a low-cost index fund tracking its benchmark over longer time
21 horizons) were lowest among U.S. large cap funds. A fiduciary prudently
22 evaluating the Franklin Fund at the start of the Class Period would have noted its
23 persistent inability to add value in excess of the benchmark. Such
24 underperformance relative to the market segment in which the Franklin Fund

25
26 ¹⁴ It should be noted that "improved" or lessening underperformance over time is
27 still just that: underperformance. A fund manager that persistently fails to
28 outperform, however great or slight the underperformance, persistently fails to add
value.

1 operates persisted through the remainder of the Class Period; by the First Quarter of
2 2019, the Franklin Fund was similarly underperforming its peers. The Franklin
3 Fund's repeated failure to generate long-term returns that exceeded the benchmark
4 alone should have been sufficient to convince a fiduciary prudently monitoring its
5 performance to remove the troubled investment; that the fund was retained by the
6 Committee despite concurrently failing to rank in the top half of all large cap
7 growth funds represents a severe and inexplicable breach of fiduciary duty.

8 71. Had the Committee met to appropriately review the Plan's investment
9 results as of the end of the First Quarter of 2019, it would have noted that the
10 Franklin Fund's three-year return ranked in the 56th percentile among large growth
11 funds and trailed the return of the Russell 1000 Growth Index by 0.93% annualized,
12 while the Fund's five-year return ranked in the 46th percentile among peers and
13 trailed the benchmark return by 1.18% annualized.

14 72. Had the Committee met to appropriately review the Plan's investment
15 results as of the end of the Second Quarter of 2019, it would have noted that the
16 Franklin Fund's three-year return ranked in the 51st percentile among large growth
17 funds and trailed the return of the Russell 1000 Growth Index by 0.73% annualized,
18 while the Fund's five-year return ranked in the 44th percentile among peers and
19 trailed the benchmark return by 0.85% annualized.

20 73. Had the Committee met to appropriately review the Plan's investment
21 results as of the end of the Third Quarter of 2019, it would have noted that the
22 Franklin Fund's three-year return ranked in the 51st percentile among large growth
23 funds and trailed the return of the Russell 1000 Growth Index by 1.54% annualized,
24 while the Fund's five-year return ranked in the 39th percentile among peers and
25 trailed the benchmark return by 1.00% annualized.

26 74. Had the Committee met to appropriately review the Plan's investment
27 results as of the end of the Fourth Quarter of 2019, it would have noted that the
28 Franklin Fund's three-year return ranked in the 62nd percentile among large growth

1 funds and trailed the return of the Russell 1000 Growth Index by 2.61% annualized,
2 while the Fund's five-year return ranked in the 50th percentile among peers and
3 trailed the benchmark return by 1.84% annualized.

4 75. At this point, had it engaged in an appropriate ongoing review of the
5 Franklin Fund, the Committee would have been aware as of its meeting following
6 the Fourth Quarter of 2019 of the Fund's performance shortcomings against the
7 benchmark, which stretched back several years on both a three- and five-year basis,
8 and relative to peers over the four most recent quarters on a three-year basis. The
9 foregoing trend represented compelling information requiring a serious and
10 deliberate decision as to whether there was any basis to retain the Franklin Fund, as
11 sustained underperformance is the clearest indication of a manager's inability to
12 provide value. However, Defendants ignored or were otherwise unaware of the
13 troubling pattern of rolling returns, failed to investigate a replacement for the
14 Franklin Fund, and allowed it to linger even as its performance issues persisted, and
15 worsened.

16 76. Had the Committee met to appropriately review the Plan's investment
17 results as of the end of the First Quarter of 2020, it would have noted that the
18 Franklin Fund's three-year return ranked in the 65th percentile among large growth
19 funds and trailed the return of the Russell 1000 Growth Index by **3.07%** annualized,
20 while the Fund's five-year return ranked in the 53rd percentile among peers and
21 trailed the benchmark return by **2.19%** annualized.

22 77. Had the Committee met to appropriately review the Plan's investment
23 results as of the end of the Second Quarter of 2020, it would have noted that the
24 Franklin Fund's three-year return ranked in the 71st percentile among large growth
25 funds and trailed the return of the Russell 1000 Growth Index by **4.62%** annualized,
26 while the Fund's five-year return ranked in the 61st percentile among peers and
27 trailed the benchmark return by **2.96%** annualized.

28 78. Had the Committee met to appropriately review the Plan's investment

1 results as of the end of the Third Quarter of 2020, it would have noted that the
2 Franklin Fund's three-year return ranked in the 70th percentile among large growth
3 funds and trailed the return of the Russell 1000 Growth Index by **5.10%** annualized,
4 while the Fund's five-year return ranked in the 61st percentile among peers and
5 trailed the benchmark return by **3.26%** annualized.

6 79. Had the Committee met to appropriately review the Plan's investment
7 results as of the end of the Fourth Quarter of 2020, it would have noted that the
8 Franklin Growth Fund's three-year return ranked in the 66th percentile among large
9 growth funds and trailed the return of the Russell 1000 Growth Index by **3.98%**
10 annualized, while the Fund's five-year return ranked in the 52nd percentile among
11 peers and trailed the benchmark return by **2.50%** annualized.

12 80. At this point, consistent with their regular monitoring duties, the
13 Committee should have been aware of the Franklin Fund's dismal trend: **sixteen**
14 **straight quarters** of three-year underperformance versus the benchmark, **twenty-**
15 **one straight quarters** of five-year underperformance versus the benchmark, **eight**
16 **consecutive quarters** of three-year returns that ranked in the bottom half of large
17 cap growth funds, and **four consecutive quarters** of five-year returns that ranked in
18 the bottom half of large cap growth funds. Such blatant indicators of the
19 imprudence of the continued retention of the Franklin Fund should have been
20 sufficient to convince Defendants to investigate a replacement but were
21 inexplicably ignored.

22 81. Had the Committee met to appropriately review the Plan's investment
23 results as of the end of the First Quarter of 2021, it would have noted that the
24 Franklin Growth Fund's three-year return ranked in the 66th percentile among large
25 growth funds and trailed the return of the Russell 1000 Growth Index by **3.77%**
26 annualized, while the Fund's five-year return ranked in the 59th percentile among
27 peers and trailed the benchmark return by **2.15%** annualized.

28 82. Had the Committee met to appropriately review the Plan's investment

1 results as of the end of the Second Quarter of 2021, it would have noted that the
 2 Franklin Fund's three-year return ranked in the 61st percentile among large growth
 3 funds and trailed the return of the Russell 1000 Growth Index by **3.54%** annualized,
 4 while the Fund's five-year return ranked in the 63rd percentile among peers and
 5 trailed the benchmark return by **2.87%** annualized.

6 83. Had the Committee met to appropriately review the Plan's investment
 7 results as of the end of the Third Quarter of 2021, it would have noted that the
 8 Franklin Growth Fund's three-year return ranked in the 66th percentile among large
 9 growth funds and trailed the return of the Russell 1000 Growth Index by **3.63%**
 10 annualized, while the Fund's five-year return ranked in the 63rd percentile among
 11 peers and trailed the benchmark return by **3.27%** annualized.

12 84. Had the Committee met to appropriately review the Plan's investment
 13 results as of the end of the Fourth Quarter of 2021, it would have noted that the
 14 Franklin Fund's three-year return ranked in the 63rd percentile among large growth
 15 funds and trailed the return of the Russell 1000 Growth Index by **5.52%** annualized,
 16 while the Fund's five-year return ranked in the 65th percentile among peers and
 17 trailed the benchmark return by **4.05%** annualized.

18 85. At this point, with the Franklin Growth Fund's miserable long-term
 19 performance having continued unabated for another four quarters, consistent with
 20 their regular monitoring duties, the Committee should have been aware of the
 21 Fund's **twenty straight quarters** of three-year underperformance versus the
 22 benchmark, **twenty-five straight quarters** of five-year underperformance versus the
 23 benchmark, **twelve consecutive quarters** of three-year returns that ranked in the
 24 bottom half of large cap growth funds, and **eight consecutive quarters** of five-year
 25 returns that ranked in the bottom half of large cap growth funds. This deplorable
 26 performance has endured through the filing of this Complaint.

27 86. As is clearly exhibited by the weak performance shown above,
 28 Franklin Fund has never been an appropriate investment option for the Plan. When

1 an investment option's track record is so poor, as is apparent here, Defendants
 2 should necessarily replace the fund in the Plan with an alternative that has
 3 demonstrated the ability to consistently outperform the benchmark and regularly
 4 rank in the top half of similar investment strategies, or, at the very least, in such an
 5 efficient segment of the market, retain an alternative that tracks the benchmark.
 6 While the low-cost Russell 1000 Growth Index Fund I offered by Vanguard
 7 provided investors the opportunity to track the returns of the Russell 1000 Growth
 8 Index for the duration of the Class Period, alternative actively managed large cap
 9 growth funds like the Fidelity Growth Company Fund K ("Fidelity Fund") and
 10 JPMorgan Large Cap Growth Fund R6 ("JPMorgan Fund") provided investors with
 11 consistent added value: from the First Quarter of 2018 through the Fourth Quarter
 12 of 2023, the three-year returns of the Fidelity Fund ranked lower than the top
 13 *quartile* just twice, and similarly trailed the benchmark just twice, while its five-
 14 year returns never ranked lower than the 12th percentile and never trailed the
 15 benchmark; over the same 24-quarter period, the three-year returns of the
 16 JPMorgan Fund ranked outside the top *quartile* just three times and trailed the
 17 benchmark just four times, while its five-year returns never ranked lower than the
 18 18th percentile and trailed the benchmark just once. At all relevant times the three-
 19 and five-year returns of the Fidelity and JPMorgan Funds ranked in the top half of
 20 their peer group.

21 87. Despite transparent and persistent red flags and the availability of
 22 investment options that provided the benchmark returns at low cost, as well as
 23 several prudent alternative actively managed large cap growth options, Defendants
 24 failed to appropriately monitor the Franklin Fund throughout the Class Period and
 25 neglected to replace the underachieving investment option in a severe breach of
 26 fiduciary duty.

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

28 88. ERISA imposes strict fiduciary duties of prudence and loyalty on the

1 Defendants as fiduciaries of the Plan. Section 404(a) of ERISA, 29 U.S.C. §
2 1104(a), states, in relevant part, as follows:

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

5 (A) for the exclusive purpose of:

6 (i) providing benefits to participants and their
7 beneficiaries; and

8 (ii) defraying reasonable expenses of administering the
9 plan;

10 [and]

11 (B) with the care, skill, prudence, and diligence under the
12 circumstances then prevailing that a prudent man acting in
13 a like capacity and familiar with such matters would use in
14 the conduct of an enterprise of like character and with like
15 aims.

16 89. Under 29 U.S.C. § 1103(c)(1), as relevant here, the assets of a plan
17 shall never inure to the benefit of any employer and shall be held for the exclusive
18 purposes of providing benefits to plan participants and their beneficiaries and
19 defraying reasonable expenses of administering the plan.

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

23 91. ERISA's fiduciary duties are "the highest known to the law" and must
24 be performed "with an eye single" to the interests of participants. *Howard*, 100
25 F.3d at 1888 (citing *Donovan*, 680 F.3d at 272 n.8).

26 92. ERISA also imposes explicit co-fiduciary liabilities on plan
27 fiduciaries. Section 405(a) of ERISA, 29 U.S.C. § 1105(a), provides a cause of
28 action against a fiduciary for knowingly participating in a breach by another

1 fiduciary and knowingly failing to cure any breach of duty. Specifically, Section
2 405(a) of ERISA states:

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

- 7 (1) if he participates knowingly in, or knowingly undertakes to
8 conceal, an act or omission of such other fiduciary,
9 knowing such act or omission is a breach; or
10 (2) if, by his failure to comply with section 404(a)(1) in the
11 administration of his specific responsibilities which give
12 risk to his status as a fiduciary, he has enabled such other
13 fiduciary to commit a breach; or
14 (3) if he has knowledge of a breach by such other fiduciary,
15 unless he makes reasonable efforts under the circumstances
16 to remedy the breach.

17 93. Section 502(a)(2) of ERISA, 29 U.S.C. § 1132(a)(2) authorizes a plan
18 participant to bring a civil action to enforce a breaching fiduciary's liability to the
19 plan under Section 409, 29 U.S.C. § 1109. Section 409(a) of ERISA states, in
20 relevant part:

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

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VI. CLASS ALLEGATIONS

88. This Action is brought as a class action by Plaintiff on behalf of herself and the following proposed Class:

All participants and beneficiaries in the Advantage 401(k) Savings Plan at any time on or after March 4, 2018, and continuing to the date of judgment, or such earlier date that the Court determines is appropriate and just.

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.

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

90. **Numerosity.** Plaintiff is informed and believes 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.

91. **Commonality.** There are numerous questions of fact and/or law that are common to Plaintiff and all members of the Class, including the following:

- (1) 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;
- (2) Whether Defendants breached their fiduciary duties under ERISA by failing to defray reasonable expenses of administering the Plan; and
- (3) Whether and what form of relief should be afforded to Plaintiff and the Class.

92. **Typicality.** Plaintiff, who is a member of the Class, has claims that are typical of all members of the Class. Plaintiff's claims and all Class members'

1 claims arise out of the same uniform course of conduct by Defendants and arise
2 under the same legal theories applicable to all other members of the Class. In
3 addition, Plaintiff seeks relief for the Plan under the same remedial theories that are
4 applicable to all Class members.

5 93. **Adequacy of Representation.** Plaintiff will fairly and adequately
6 represent the interests of all Class members. Plaintiff has no conflicts of interest
7 with other Class members and no interests that are different from any other Class
8 other members. Plaintiff has retained competent counsel experienced in class
9 action and other complex litigation, including ERISA class actions.

10 94. **Potential Risks and Effects of Separate Actions.** The prosecution of
11 separate actions by individual Class members would create a risk of: (1)
12 inconsistent or varying adjudications for individual Class members that would
13 establish incompatible standards of conduct for Defendants; or (2) adjudications
14 with respect to individual Class members that, as a practical matter, would be
15 dispositive of the interests of other Class members not parties to the individual
16 adjudications or would substantially impair or would substantially impair or impede
17 their ability to protect their interests.

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

24 96. **Superiority.** A class action is superior to all other feasible alternatives
25 for the resolution of this matter. The vast majority of, if not all, Class members are
26 unaware of Defendants' breaches of fiduciary duty and prohibited transactions such
27 that they will never bring suit individually. Further, even if they were aware of the
28 claims they have against Defendants, the claims of virtually all Class members

1 would be too small to economically justify individual litigation. Finally, individual
 2 litigation of multiple cases would be highly inefficient, a gross waste of the
 3 resources of the courts and the parties, and potentially could lead to inconsistent
 4 results that would be contrary to the interests of justice.

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

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

15 99. Plaintiff's counsel will fairly and adequately represent the interests of
 16 the Class and are best able to represent the interests of the Class under Rule 23(g)
 17 of the Federal Rules of Civil Procedure. Moreover, treating this case as a class
 18 action is superior to proceeding on an individual basis, and there will be no
 19 difficulty in managing this case as a class action.

20 100. Therefore, this action should be certified as a class action under Rules
 21 23(a), and 23(b)(1), or 23(b)(3) of the Federal Rules of Civil Procedure.

22 **COUNT I**
 23 **(For Breaches of Fiduciary Duty Against All Defendants)**

24 101. Plaintiff incorporates by reference the allegations in the previous
 25 paragraphs.

26 102. Defendants' conduct, as set forth above, violates their fiduciary duties
 27 under Sections 404(a)(1)(A), (B), and (D) of ERISA, 29 U.S.C. § 1104(a)(1)(A),
 28

1 (B), and (D), in that Defendants failed and continue to fail to discharge their duties
2 with respect to the Plan solely in the interest of the Plan's participants and
3 beneficiaries and: (A) for the exclusive purpose of (i) providing benefits to
4 participants and their beneficiaries, and (ii) defraying reasonable expenses of
5 administering the Plan; (B) with the care, skill, prudence, and diligence under the
6 circumstances then prevailing that a prudent man acting in a like capacity and
7 familiar with such matters would use in the conduct of an enterprise of a like
8 character and with like aims; and (C) by failing to act in accordance with the
9 documents and instruments governing the Plan. In addition, as set forth above,
10 Defendants violated their respective fiduciary duties under ERISA to monitor other
11 fiduciaries of the Plan in the performance of their duties.

12 103. To the extent any Defendant did not directly commit any breach of
13 fiduciary duty, at the very minimum, each such Defendant is liable under 29 U.S.C.
14 § 1105(a) because he, she, they, or it was a co-fiduciary and knowingly participated
15 in, or concealed, a breach of fiduciary duty by another fiduciary, enabled another
16 fiduciary to commit breaches of fiduciary duty in the administration of his, her,
17 their, or its specific responsibilities giving rise to his, her, their, or its fiduciary
18 status, or knowingly failed to cure a breach of fiduciary duty by another fiduciary
19 and failed to take reasonable efforts to remedy the breach.

20 104. As a direct result of Defendants' breaches of fiduciary duties, the Plan
21 has suffered losses and damages.

22 105. Pursuant to Sections 409 and 502(a)(2) of ERISA, 29 U.S.C. §§ 1109
23 and 1132, Defendants are liable to restore to the Plan the losses that have been
24 suffered as a direct result of Defendants' breaches of fiduciary duty and are liable
25 for damages and any other available equitable or remedial relief, including
26 prospective injunctive and declaratory relief, and attorneys' fees, costs, and other
27 recoverable expenses of litigation.
28

COUNT II
**(Failure to Monitor Fiduciaries and Co-Fiduciary Breaches
Against Advantage and the Board)**

106. Plaintiff incorporates by reference the allegations in the previous paragraphs.

107. Advantage, acting through the Board, 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.

108. In light of its appointment and supervisory authority, Advantage and the Board had a fiduciary duty to monitor the performance of the Administrative Committee and its members. Advantage, the Board, and the Administrative Committee as a whole also had a fiduciary duty to monitor the performance of the members of the Committee.

109. A monitoring fiduciary must ensure that the monitored fiduciaries perform their fiduciary obligations, including those related to the investment and holding of Plan assets, and must take prompt and effective action to protect the Plan and its participants when the monitored fiduciaries do not perform their fiduciary obligations.

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

111. Advantage, the Board, and the Administrative Committee breached their fiduciary monitoring duties by:

- (1) 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 due to the

1 appointees' imprudent actions and omissions related to the
2 Plan;

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

7 (3) Failing to remove appointees whose performances were
8 inadequate in that they continued to maintain imprudent
9 and poorly performing investments and excessively costs
10 fee arrangements in the Plan, all to the detriment of the Plan
11 and its participants' retirement savings.

12 112. As a consequence of these breaches of fiduciary duties to monitor, the
13 Plan suffered substantial losses. If Advantage, the Board, and the Administrative
14 Committee had discharged their fiduciary monitoring duties prudently, the losses
15 suffered by the Plan would have been avoided or minimized. Therefore, as a direct
16 result of the breaches of fiduciary duties alleged herein, the Plan and its participants
17 lost millions of dollars in retirement savings.

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

23 114. Each Defendant also knowingly participated in the breaches of
24 fiduciary duties by the other Defendants, knowing that such acts constituted
25 breaches; enabled the other Defendants to commit breaches of fiduciary duties by
26 failing to lawfully discharge their own fiduciary duties; and knew of the breaches of
27 fiduciary duties by the other fiduciaries and failed to make any reasonable effort
28 under the circumstances to remedy those breaches. Defendants are thus liable for

1 the losses caused by the breaches of their co-fiduciaries under 29 U.S.C. § 1105(a).

2 **COUNT III**

3 **(In the Alternative, Liability for Knowing Breach of Trust Against All**
4 **Defendants)**

5 115. Plaintiff incorporates by reference the allegations in the previous
6 paragraphs.

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

11 117. To the extent any Defendant is not deemed to be a fiduciary or is not
12 deemed to be acting as a fiduciary for any and all applicable purposes, any such
13 Defendant is liable for the conduct at issue here, since all Defendants possessed the
14 requisite knowledge and information to avoid the fiduciary breaches at issue here
15 and knowingly participated in these breaches of fiduciary duty by permitting the
16 Plan to offer a menu of imprudent investment options and pay excessive
17 recordkeeping and administrative fees, all of which was unjustifiable in light of the
18 size and characteristics of the Plan.

19 **PRAYER FOR RELIEF**

20 118. WHEREFORE, Plaintiff, on behalf of herself, the Plan, and the Class,
21 demands judgment against Defendants for the following relief:

- 22 (1) Declaratory and injunctive relief under Section 502 of
23 ERISA, 29 U.S.C. § 1132, as detailed above;
- 24 (2) Equitable, legal, or remedial relief to return all losses to the
25 Plan and/or for restitution and/or damages as stated above,
26 plus all other equitable or remedial relief as the Court may
27 deem appropriate under Sections 409 and 502 of ERISA,
28 29 U.S.C. §§ 1109 and 1132;

- 1 (3) Pre-judgment and post-judgment interest at the maximum
2 permissible rates, whether at law or in equity;
3 (4) Attorneys' fees, costs, and other recoverable expenses of
4 litigation; and
5 (5) Such further and additional relief to which the Plan may be
6 justly entitled and the Court deems appropriate and just
7 under all of the circumstances.

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

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

13 Dated: March 4, 2024

Respectfully submitted,

14 /s/ James C. Shah

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