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**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA**

In re Sutter Health ERISA Litigation

Master Case and File No:
1:20-cv-01007-NONE-BAM

**AMENDED CONSOLIDATED
CLASS ACTION COMPLAINT**

JURY TRIAL DEMANDED

I. INTRODUCTION

1. Plaintiffs, Christina Bonicarlo (“Bonicarlo”), Nicole Garcia (“Garcia”), Obaleet Sargony (“Sargony”), Ronald Hudson (“Hudson”), Adam Blackburn (“Blackburn”), Robert L. Hackett (“Hackett”), Tabitha Hoglund (“Hoglund”), and Stephanie Chadwick (“Chadwick”) (collectively, “Plaintiffs”), individually and as participants of the Sutter Health 403(b) 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, Sutter Health, the Retirement Benefits Investment Committee (“Administrative Committee” or “Committee”), and

1 Does No. 1-10, who are members of the Administrative Committee or other fiduciaries of the Plan
2 and whose names are currently unknown (collectively, “Defendants”), for breach of their fiduciary
3 duties under the Employee Retirement Income Security Act (“ERISA”), 29 U.S.C. § 1001, *et seq.*,
4 and related breaches of applicable law beginning six years from the date this action is filed and
5 continuing to the date of judgment (the “Class Period”). This Consolidated Amended Complaint
6 (“CAC” or “Complaint”) is filed pursuant to Fed.R.Civ.P. 15(a)(2).

8 2. Defined contribution plans that are qualified as tax-deferred vehicles have become
9 the primary form of retirement savings in the United States and, as a result, America’s *de facto*
10 retirement system. Unlike traditional defined benefit retirement plans, in which the employer
11 typically promises a calculable benefit and assumes the risk with respect to high fees or under-
12 performance of pension plan assets used to fund defined benefits, 403(b) and 401(k) plans operate
13 in a manner in which participants bear the risk of high fees and investment underperformance.
14

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

18 4. As of December 31, 2018, the Plan had 73,408 active participants with account
19 balances and assets totaling approximately \$3.7 billion, placing it in the top 0.1% of all defined
20 contribution plans by plan size.¹ Defined contribution plans with substantial assets, like the Plan,
21 have significant bargaining power and the ability to demand low-cost administrative and
22 investment management services within the marketplace for administration of defined contribution
23 plans and the investment of defined contribution assets. The marketplace for defined contribution
24 retirement plan services is well-established and can be competitive when fiduciaries of defined
25 contribution retirement plans act in an informed and prudent fashion.
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28 ¹The BrightScope/ICI Defined Contribution Plan Profile: A Close Look at 401(k) Plans, 2016 (pub. June 2019).

1 5. Defendants maintain the Plan, and are responsible for selecting, monitoring, and
2 retaining the service provider(s) that provide investment, recordkeeping, and other administrative
3 services. Defendants are fiduciaries under ERISA, and, as such, are obligated to (a) act for the
4 exclusive benefit of participants, (b) ensure that the investment options offered through the Plan
5 are prudent and diverse, and (c) ensure that Plan expenses are fair and reasonable.
6

7 6. Defendants have breached their fiduciary duties to the Plan and, as detailed below,
8 have: (1) failed to fully disclose the expenses and risk of the Plan's investment options to
9 participants; (2) allowed unreasonable expenses to be charged to participants for administration of
10 the Plan; and (3) selected, retained, and/or otherwise ratified high-cost and poorly-performing
11 investments, instead of offering more prudent alternative investments when such prudent
12 investments were readily available at the time that they were chosen for inclusion within the Plan
13 and throughout the Class Period (defined below).
14

15 7. To remedy these fiduciary breaches and other violations of ERISA, Plaintiffs bring
16 this class action under ERISA Sections 404, 409 and 502, 29 U.S.C. §§ 1104, 1109 and 1132, to
17 recover and obtain all losses resulting from each breach of fiduciary duty. In addition, Plaintiffs
18 seek such other equitable or remedial relief for the Plan and the proposed class defined below (the
19 "Class") as the Court may deem appropriate and just under all of the circumstances.
20

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

- 22 a. A declaratory judgment holding that the acts of Defendants described herein
23 violate ERISA and applicable law;
- 24 b. A permanent injunction against Defendants prohibiting the practices
25 described herein and affirmatively requiring them to act in the best interests
26 of the Plan and its participants;
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- 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. Bonicarlo is a former employee of Sutter Health and former participant in the Plan under 29 U.S.C. § 1002(7). Bonicarlo is a resident of Hayward, California.

10. Garcia is a current employee of Sutter Health and participant in the Plan under 29 U.S.C. § 1002(7). Garcia is a resident of Oakley, California.

11. Sargony is a former employee of Sutter Health and participant in the Plan under 29 U.S.C. § 1002(7). Sargony is a resident of Turlock, California.

12. Hudson is a former employee of Sutter Health and participant in the Plan under 29 U.S.C. § 1002(7). Hudson is a resident of Valeo, California.

13. Blackburn is a former employee of Sutter Health and participant in the Plan under 29 U.S.C. § 1002(7). Blackburn is a resident of Northampton, California.

14. Hackett is a former employee of Sutter Health and former participant in the Plan under 29 U.S.C. § 1002(7). Hackett is a resident of Antioch, California.

15. Hoglund is a former employee of Sutter Health and former participant in the Plan under 29 U.S.C. § 1002(7). Hoglund is a resident of Saginaw, Texas.

16. Chadwick is a former employee of Sutter Health and former participant in the Plan under 29 U.S.C. § 1002(7). Chadwick is a resident of Reno, Nevada.

1 17. Sutter Health is a California non-profit corporation headquartered in Sacramento,
2 California. Sutter Health is a health services provider, operating a network of hospitals and health
3 programs throughout Northern California.

4 18. The Administrative Committee is the Plan Administrator and is a fiduciary under
5 ERISA pursuant to 29 U.S.C. §§ 1002 and 1102. The Administrative Committee maintains its
6 address at Sutter Health's corporate headquarters in Sacramento, California. The Administrative
7 Committee and its members are appointed by Sutter Health's Chief Executive Officer to
8 administer the Plan on Sutter Health's behalf.

9 19. Does No. 1-10 are the members of the Administrative Committee and, by virtue of
10 their membership, fiduciaries of the Plan. Plaintiffs are currently unable to determine the
11 membership of the Administrative Committee or the identity of the other fiduciaries of the Plan
12 because, despite reasonable and diligent efforts, it appears that the membership of the
13 Administrative Committee and the identity of any other fiduciaries is not publicly available. As
14 such, these Defendants are named Does 1-10 as placeholders. Plaintiffs will move, pursuant to
15 Rule 15 of the Federal Rules of Civil Procedure, to amend this Complaint to name the members of
16 the Administrative Committee and other responsible individuals as defendants as soon as their
17 identities are discovered.

21 **III. JURISDICTION AND VENUE**

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

25 21. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. §
26 1331 because this action arises under the laws of the United States.

1 22. Venue is proper in this District pursuant to ERISA Section 502(e), 29 U.S.C. §
2 1332(e), and 28 U.S.C. § 1391 because Sutter Health's principal place of business is in this District
3 and the Plan is administered from this judicial district. Furthermore, a substantial part of the acts
4 and omissions giving rise to the claims asserted herein occurred in this District.
5

6 23. Plaintiffs have standing to bring this action. ERISA Section 502(a)(2), 29 U.S.C. §
7 1132(a)(2), authorizes any participant, fiduciary or the Secretary of Labor to bring suit as a
8 representative of a plan, with any recovery necessarily flowing to a plan. As explained herein, the
9 Plan has suffered millions of dollars in losses resulting from Defendants' fiduciary breaches and
10 remains vulnerable to continuing harm, all redressable by this Court. In addition, although
11 standing under ERISA Section 502(a)(2), 29 U.S.C. § 1132(a)(2), is established by these Plan-
12 wide injuries, Plaintiffs and all Plan participants suffered financial harm as a result of the Plan's
13 imprudent investment options and excessive fees, and were deprived of the opportunity to invest in
14 prudent options with reasonable fees, among other injuries.
15

16 IV. FACTUAL ALLEGATIONS

17 A. Background And Plan Structure

18 24. The Plan is a participant-directed single employer 403(b) plan, in which participants
19 direct the investment of their contributions into various investment options offered by the Plan.
20 Each participant's account is credited with the participant contributions, employer matching
21 contributions, any discretionary contributions, and earnings or losses thereon. The Plan pays Plan
22 expenses from Plan assets, and the majority of administrative expenses are paid by participants as
23 a reduction of investment income. Each participant's account is charged with the amount of
24 distributions taken and an allocation of administrative expenses. The available investment options
25 for participants of the Plan include various mutual funds and a guaranteed investment contract.
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1 25. Mutual funds are publicly-traded investment vehicles consisting of a pool of
2 monetary contributions collected from many investors for the purpose of investing in a portfolio of
3 equities, bonds, and other securities. Mutual funds are operated by professional investment
4 advisers, who, like the mutual funds, are registered with the Securities and Exchange Commission
5 (“SEC”). Mutual funds are subject to SEC regulation, and are required to provide certain
6 investment and financial disclosures and information in the form of a prospectus.
7

8 26. Guaranteed investment contracts are insurance company contracts that guarantees a
9 rate of return in exchange for keeping a deposit for a certain period of time. Contributions are held
10 in the general account of the issuing insurance company and are credited with earnings on the
11 underlying investments and charged for withdrawals and administrative costs. The guaranteed
12 return of principal, plus the contractually obligated interest rate, is subject to the long-term
13 financial health and claims-paying ability of the issuing company.
14

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

18 **B. Defendants’ Breaches of Fiduciary Duties**

19 28. As discussed in detail below, Defendants have severely breached their fiduciary
20 duties of prudence and/or loyalty to the Plan. Plaintiffs did not acquire actual knowledge
21 regarding Defendants’ breaches at issue here until shortly before this Complaint was filed.
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23 **1. The Plan’s Investment in the Fidelity Freedom Funds**

24 29. Among other investments, the Plan lineup offers a suite of thirteen target date
25 funds. A target date fund is an investment vehicle that offers an all-in-one retirement solution
26 through a portfolio of underlying funds that gradually shifts to become more conservative as the
27 assumed target retirement year approaches. Target date funds offer investors dynamic, easy asset
28

1 allocation, while providing both long-term growth and capital preservation. All target date funds
2 are inherently actively managed, because managers make changes to the allocations to stocks,
3 bonds and cash over time. These allocation shifts are referred to as a fund's glide path. The
4 underlying mutual funds that target date fund managers choose to represent each asset class can be
5 actively or passively managed.
6

7 30. According to the Plan's Form 5500s,² from at least December 31, 2009³ through
8 December 31, 2018, the Plan offered the Fidelity Freedom fund target date suite. Fidelity
9 Management & Research Company ("Fidelity") is the second largest target date fund provider by
10 total assets. Among its several target date offerings, Fidelity offers the riskier and more costly
11 Freedom funds (the "Active suite") and the substantially less costly and less risky Freedom Index
12 funds (the "Index suite"). Defendants were responsible for crafting the Plan lineup and could have
13 chosen any of the target date families offered by Fidelity, or those of any other target date
14 provider. Defendants failed to compare the Active and Index suites and consider their respective
15 merits and features. A simple weighing of the benefits of the two suites indicates that the Index
16 suite is and has been a far superior option, and consequently the more appropriate choice for the
17 Plan. Had Defendants carried out their responsibilities in a single-minded manner with an eye
18 focused solely on the interests of the participants, they would have come to this conclusion and
19 acted upon it. Instead, Defendants failed to act in the sole interest of Plan participants, and
20 breached their fiduciary duty by imprudently selecting and retaining the Active suite for the
21 majority of the relevant period.
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27 ²The Form 5500 is the annual report that defined contribution plans are required to file pursuant to the reporting
requirements of ERISA.

28 ³The 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.

31. The two fund families (meaning the Active suite and the Index suite) 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.

32. Exacerbating Defendants’ imprudent choice to add and retain the Active suite is its role as the Plan’s Qualified Default Investment Alternative (“QDIA”) for as long as it was an option in the Plan investment menu. 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) served as the QDIA in the Plan until the suite was removed.

33. 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. 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 67% of the Plan’s assets were invested in the Active suite.

⁴Both 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.

⁵Per Morningstar, the Active suite’s underlying holdings are 88.8% actively managed, by asset weight.

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

34. 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.

35. 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

⁶“How Actively and Passively Managed Funds Performed: Year-End 2018”; <https://www.morningstar.com/insights/2019/02/12/active-passive-funds>.

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.

36. 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.

37. 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 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

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

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8 38. Since the Active suite series underwent a strategy overhaul in 2013 and 2014, its
9 managers have had the discretion to deviate from the glide path allocations by 10 percentage points
10 in either direction. In a departure from the accepted wisdom that target date funds should maintain
11 pre-set allocations, Fidelity encouraged its portfolio managers to attempt to time market shifts in
12 order to locate underpriced securities, which the firm dubs "active asset allocation." This strategy
13 heaps further unnecessary risk on investors, such as Plan participants, in the Active suite. A March
14 2018 Reuters special report⁷ on the Fidelity Freedom funds (the "Reuters Report") details how
15 many investors lost confidence in the Active suite "because of their history of underperformance,
16 frequent strategy changes and rising risk." The report quotes a member of Longfellow Advisors,
17 who told Reuters that, after the 2014 changes, "it was not clear to us that [the managers of the
18 Active suite] knew what they were doing." While many target date fund managers are increasing
19 exposure to riskier investments in an effort to augment performance by taking on additional risk,
20 the president of research firm, Target Date Solutions, states that the Active suite has gone further
21 down this path than its peers.⁸ Morningstar has noted in the past that active management has
22 hindered the Active suite's performance, criticizing a previous poor decision to heavily weight to
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27 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-idUSKBN1GH1SL>.

28 ⁸*Id.*

1 commodities. Morningstar similarly characterized Fidelity's shifts in the allocation of stocks
 2 between 1996 and 2010 as "shocking" and "seemingly chaotic." Yet, since 2014, a fund family
 3 with a history of poor decisions has been given "carte blanche" to take further risks, to the severe
 4 detriment of the Plan and its participants.

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 6 39. This desire and latitude to assume more risk exposes investors in what Fidelity
 7 brands "a lifetime savings solution" to significant losses in the event of volatility similar to the
 8 downturn experienced during the COVID-19 epidemic. Morningstar analyst Jeff Holt opines that
 9 the popularity of target date funds derives from investors' belief that the funds are designed to "not
 10 lose money." As a result, the average unsophisticated investor, such as the typical participant in
 11 the Plan, tends to gravitate toward the all-in-one savings solution a target date fund offers. Given
 12 this reality, Plan participants should be shielded from the riskiest fund families where active
 13 manager decisions could amplify losses in periods of market decline. The Active suite's lack of
 14 downside protection has been magnified by the current COVID-19 crisis, and has been felt most
 15 sharply by Plan participants approaching their target date, because Plan participants close to
 16 retirement age do not have ample time to recoup significant losses before they start withdrawing
 17 their retirement savings. The more conservative Fidelity Freedom Index 2020 Fund has handled
 18 the current volatility exceptionally, with year to date returns through August 11, 2020 ranking in
 19 the 19th percentile among other 2020 target date funds.⁹ In stark contrast, the Fidelity Freedom
 20 2020 Fund (i.e., part of the Active suite), in which the Plan had nearly \$345 million at the end of
 21 2018, ranks in the 56th percentile among the same peer group.

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 24 ii. The Active Suite's Considerable Cost

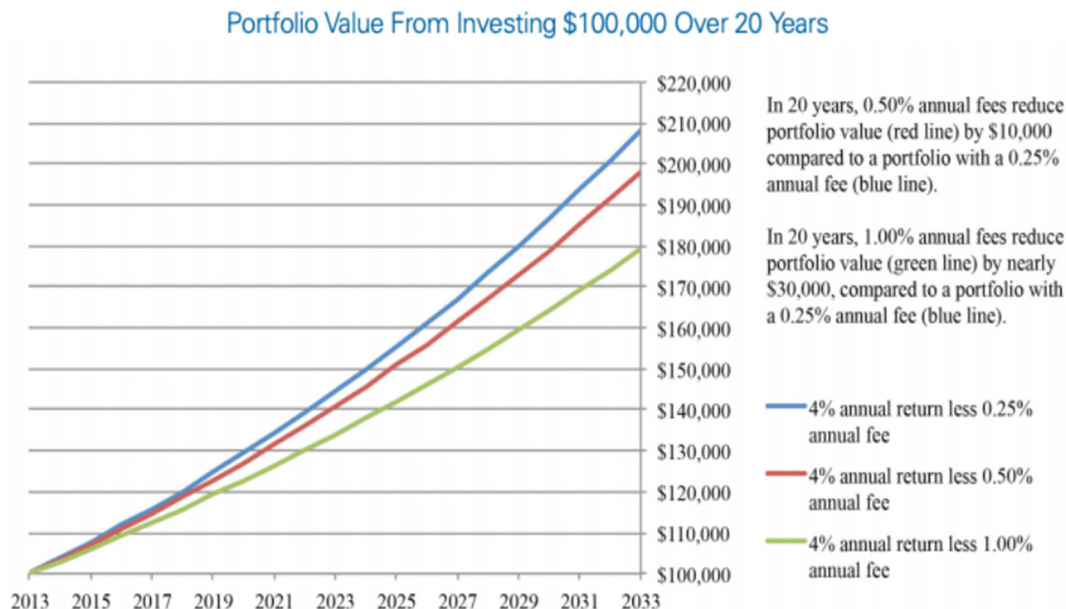
25 40. Even a minor increase in a fund's expense ratio (the total annual cost to an investor,
 26 expressed as a percentage of assets) can considerably reduce long-term retirement savings. The
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28 ⁹For Morningstar's peer group rankings, 1st percentile is the best performers.

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%

41. 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 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%).



42. Higher fees significantly reduce retirement account balances over time. Considering just the gap in expense ratios from the Plan's investment in the Active suite to the Institutional Premium share class of the Index suite, in 2018 alone, the Plan could have saved approximately \$12.8 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 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

43. 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

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

1 Landscape,¹¹ investor demand for low-cost target date options has skyrocketed in recent years.
 2 Following suit, the Index suite has seen significant inflows, receiving an estimated \$4.9 billion in
 3 new funds in 2018 alone. At the same time, investor confidence in the Active suite has
 4 deteriorated; 2018 saw the series experience an estimated \$5.4 billion in net outflows. The
 5 movement of funds out of the Active suite has been substantial for years; the Reuters Report notes
 6 that nearly \$16 billion has been withdrawn from the fund family over the prior four years.
 7 Defendants' act, in offering and maintaining the Active suit in the Plan through the majority of the
 8 Class Period, evidences their failure to acknowledge, or act upon, investors' crumbling confidence
 9 in the Active suite, while ignoring the simultaneous and justified surge in faith in the Index suite.
 10

11 iv. The 5-Star Index Suite

12 44. Morningstar assigns each mutual fund in its extensive database a star rating, which
 13 is a "purely mathematical measure that shows how well a fund's past returns have compensated
 14 shareholders for the amount of risk it has taken on." This measurement emphatically favors the
 15 Index suite. Each Fidelity Freedom Index fund bears a higher star rating than the corresponding
 16 Active fund (other than the Income and 2005 Index Funds, which have the same 3 stars as the
 17 Income and 2005 Active Funds). With the exception of the Income, 2005, and 2060 iterations, the
 18 full Index suite is assigned 5 stars, Morningstar's highest rating. The risk-adjusted returns of funds
 19 with a 5-star rating rank in the top 10% of their peers. The Active suite does not achieve a single
 20 5-star rating, and only receives one 4-star rating. Defendants were likely aware, or should have
 21 been aware, of the higher ratings of the Index suite, yet continued to offer the Active suite, to the
 22 detriment of Plan participants.
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28 ¹¹"2019 Target-Date Fund Landscape: Simplifying the Complex."

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

45. 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%

46. 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

1 their fiduciary duty to Plan participants by choosing to select and retain the Active suite, thus
 2 causing Plan participants to miss out on greater investment returns for their retirement savings.

3 **2. The Plan’s Objectively Imprudent Investment Options**

4 47. In addition to the Active suite, Defendants have saddled participants with additional
 5 objectively imprudent investment options. It is a basic principle of investment theory that the risks
 6 associated with an investment must first be justified by its potential returns for that investment to
 7 be rational. This principle applies even before considering the purpose of the investment and the
 8 needs of the investor, such as the retirement assets here. The Capital Asset Pricing Model
 9 (“CAPM”), which is used for pricing securities and generating expected returns for assets given
 10 the risk of those assets and the cost of capital, provides a mathematical formula distilling this
 11 principle:
 12

13 $ER_i = R_f + \beta_i(ER_m - R_f)$, where:

14 ER_i =expected return of investment

15 R_f =risk-free rate

16 β_i =beta of the investment

17 $(ER_m - R_f)$ =market risk premium

18 Applied here and put simply, the β_i is the risk associated with an actively-managed mutual fund or
 19 collective trust, which can only be justified if the ER_i of the investment option is, at the very least,
 20 above that of its benchmark, R_f .¹² Otherwise, the model collapses, and it would be imprudent to
 21 assume any risk without achieving associated return above the benchmark returns.

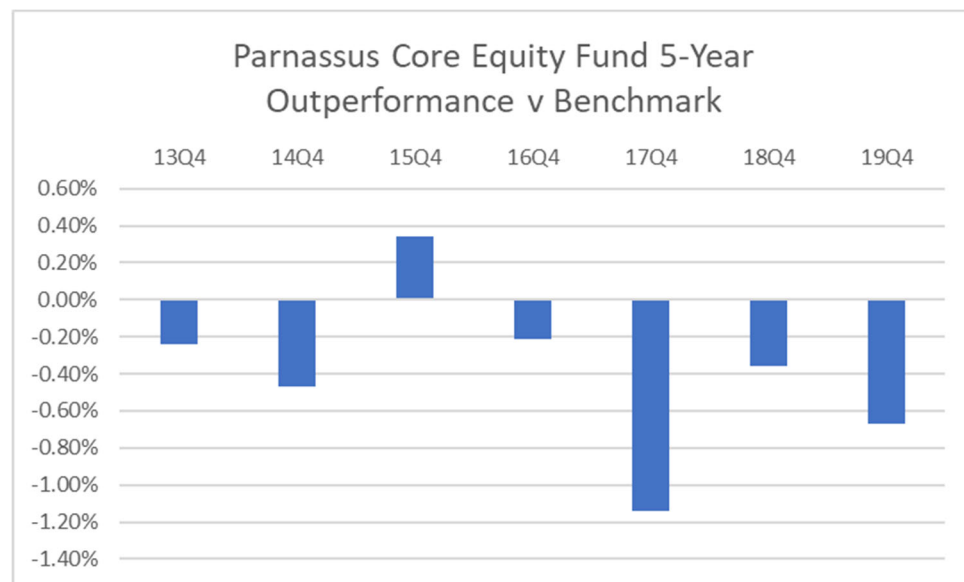
22 i. The Parnassus Core Equity Fund

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24
25
26
27
28 ¹²In this instance, the index benchmark takes place of the “risk-free” rate, as the investment option is measured against the performance of that investment category, rather than the typical U.S. Treasury Bonds or equivalent government security in a general CAPM calculation.

48. The Parnassus Core Equity Fund Institutional Class has consistently and significantly underperformed its benchmark, the S&P 500 Index, on a rolling 5-year annualized basis:

5-Year Trailing Performance

As of	Performance, adjusted for investment expense	S&P 500 Index Benchmark	Investment Option Performance/Underperformance Compared to Benchmark
4Q2013	17.67%	17.91%	-0.24%
4Q2014	14.95%	15.42%	-0.47%
4Q2015	12.89%	12.55%	0.34%
4Q2016	14.42%	14.63%	-0.21%
4Q2017	14.65%	15.79%	-1.14%
4Q2018	8.13%	8.49%	-0.36%
4Q2019	11.03%	11.70%	-0.67%



49. As discussed above, active managers face an uphill battle to provide value by consistently beating their benchmarks with the additional obstacle of high fees, compared to those

funds that simply track the benchmark. Given the presence in the Plan lineup of an index fund that already tracks the Core Equity Fund's benchmark (the Fidelity 500 Index Fund), there was no reason to include an actively managed fund in the US large cap space, particularly not one so poor. Indeed, Morningstar concluded in its year-end 2018 report on active vs passive management that long term success rates (a fund's ability to survive and outperform a low-cost index fund tracking its benchmark over longer time horizons) were lowest among US large cap funds. Defendants' misguided decision to retain the Fund, an actively managed US large cap, was exacerbated by the Fund's complete inability to provide participants with returns to justify its 63 basis point (0.63%) expense ratio. Indeed, by the end of the second quarter of 2020, the Fund's 10-year annualized returns trailed the benchmark by 36 basis points (0.36%). Defendants' failure to eliminate this underachieving investment option earlier than they ultimately did was a severe breach of fiduciary duty.

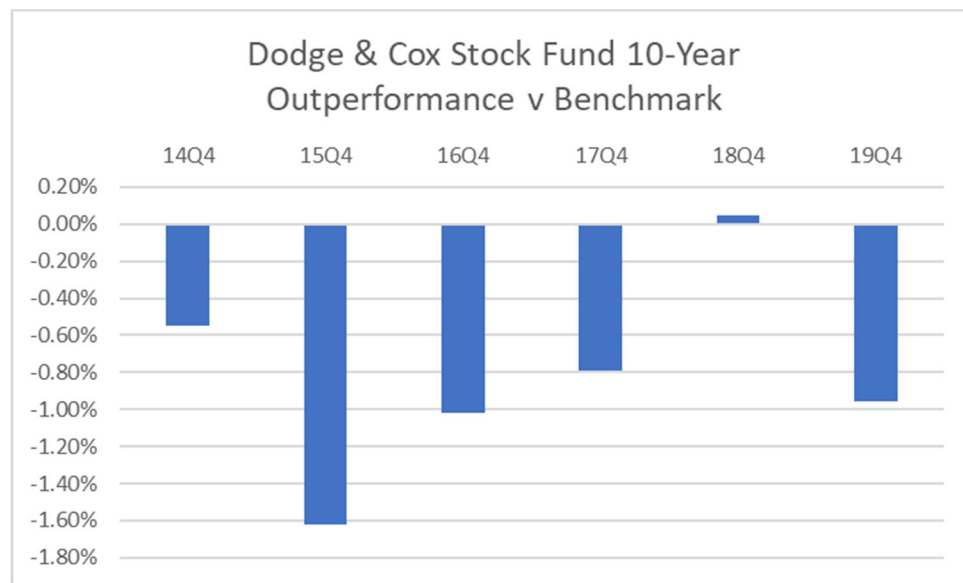
ii. The Dodge & Cox Stock Fund

50. The Dodge & Cox Stock Fund exhibits the same shortcomings as the Parnassus fund, as it has consistently and significantly underperformed its benchmark, again the S&P 500. The Fund has demonstrated a repeated inability to match its benchmark on a rolling 10-year annualized basis:

10-Year Trailing Performance

As of	Performance, adjusted for investment expense	S&P 500 Index Benchmark	Investment Option Performance/Underperformance Compared to Benchmark
4Q2014	7.13%	7.68%	-0.55%
4Q2015	5.69%	7.31%	-1.62%
4Q2016	5.93%	6.95%	-1.02%

4Q2017	7.71%	8.50%	-0.79%
4Q2018	13.17%	13.12%	0.05%
4Q2019	12.60%	13.56%	-0.96%



51. Again, as discussed above, active managers face an uphill battle to provide value by consistently beating their benchmarks with the additional obstacle of high fees, compared to those funds that simply track the benchmark. Given the presence in the Plan lineup of an index fund that already tracks the Stock Fund's benchmark (the Fidelity 500 Index Fund), there was no reason to include an actively managed fund in the US large cap space, particularly not one so poor. Defendants' misguided decision to retain the Fund, an actively managed US large cap (the category with the lowest success rate, per Morningstar), was exacerbated by the Fund's complete inability to provide participants with returns to justify its 52 basis point (0.52%) expense ratio. Indeed, by the end of the second quarter of 2020, the Fund's 5-year annualized returns trailed the benchmark by 481 basis points (4.81%) and its 10-year annualized returns fell an equally incredible 228 basis points (2.28%) short of the benchmark. Defendants' failure to eliminate this

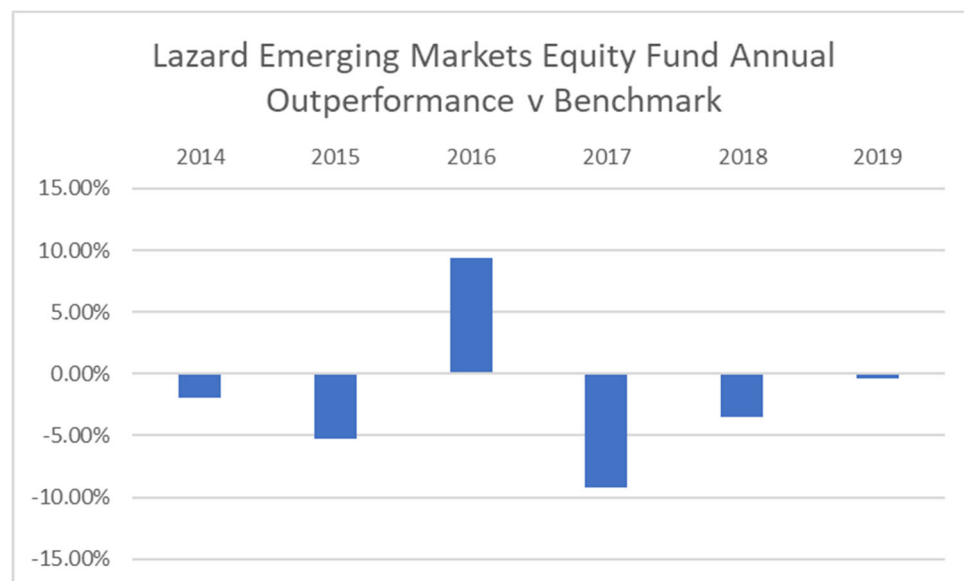
underachieving investment option earlier than they ultimately did was a severe breach of fiduciary duty.

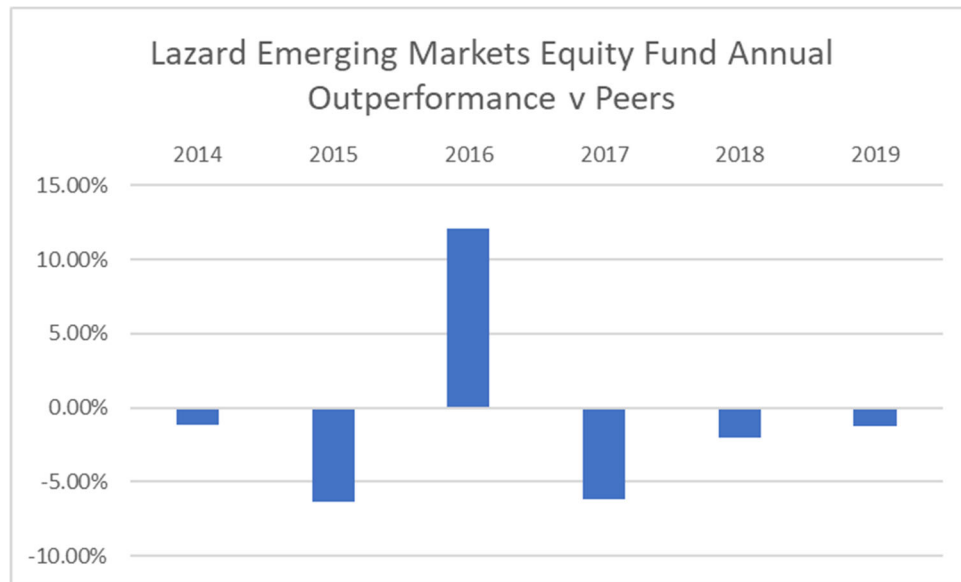
iii. The Lazard Emerging Markets Equity Fund

52. The Lazard Emerging Markets Equity Fund Institutional Class has consistently underperformed both its benchmark, the MSCI Emerging Markets Index, and its peer group (as defined by Morningstar) on an annual basis:

Annual Return v. Benchmark and Peer Group

Year	Performance, adjusted for investment expense	Performance/ Underperformance Compared to Benchmark	Performance/ Underperformance Compared to Morningstar Peer Group
2014	-4.16%	-1.97%	-1.15%
2015	-20.16%	-5.24%	-6.36%
2016	20.52%	9.33%	12.05%
2017	28.02%	-9.26%	-6.15%
2018	-18.09%	-3.51%	-2.02%
2019	18.04%	-0.40%	-1.20%



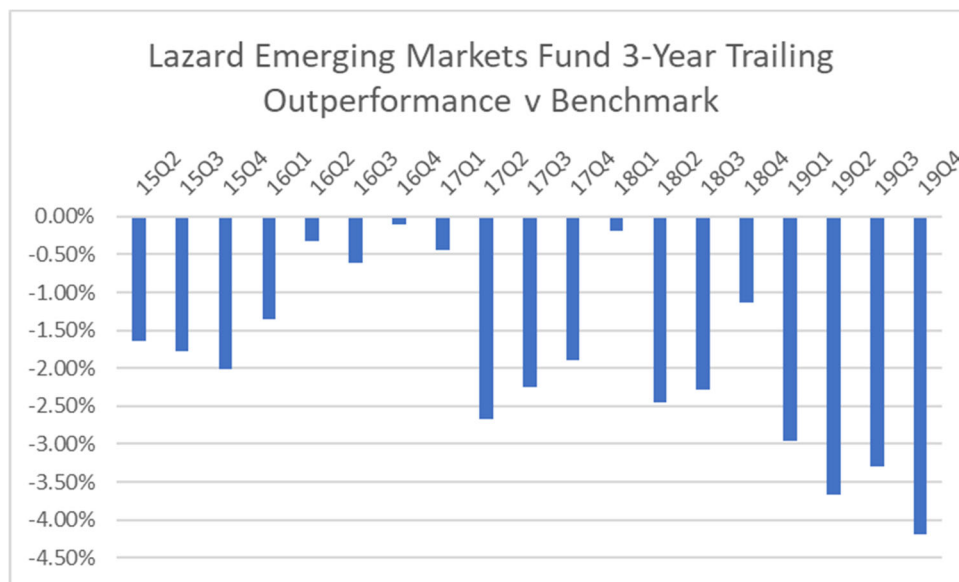


53. Thought the Fund produced favorable returns in 2016, this single positive year failed to compensate for its persistently poor performance, as reflected in the Fund's 3- and 5-year rolling annualized returns:

3-Year Trailing Performance

As of	Performance, adjusted for investment expense	MSCI Emerging Markets Index Benchmark	Investment Option Performance/Underperformance Compared to Benchmark
2Q2015	2.06%	3.71%	-1.65%
3Q2015	-7.04%	-5.27%	-1.77%
4Q2015	-8.78%	-6.76%	-2.02%
1Q2016	-5.85%	-4.50%	-1.35%
2Q2016	-1.89%	-1.56%	-0.33%
3Q2016	-1.17%	-0.56%	-0.61%
4Q2016	-2.66%	-2.55%	-0.11%
1Q2017	0.74%	1.18%	-0.44%
2Q2017	-1.60%	1.07%	-2.67%

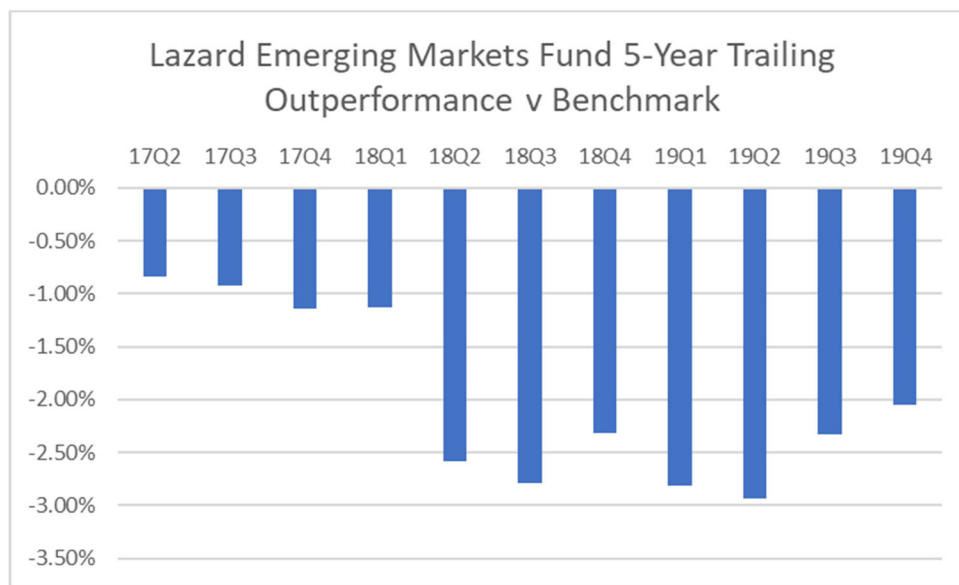
3Q2017	2.65%	4.90%	-2.25%
4Q2017	7.20%	9.10%	-1.90%
1Q2018	8.62%	8.81%	-0.19%
2Q2018	3.15%	5.60%	-2.45%
3Q2018	10.08%	12.36%	-2.28%
4Q2018	8.11%	9.25%	-1.14%
1Q2019	7.72%	10.68%	-2.96%
2Q2019	6.99%	10.66%	-3.67%
3Q2019	2.68%	5.97%	-3.29%
4Q2019	7.37%	11.57%	-4.20%



5-Year Trailing Performance

As of	Performance, adjusted for investment expense	MSCI Emerging Markets Index Benchmark	Investment Option Performance/Underperformance Compared to Benchmark
2Q2017	3.12%	3.96%	-0.84%

3Q2017	3.07%	3.99%	-0.92%
4Q2017	3.21%	4.35%	-1.14%
1Q2018	3.86%	4.99%	-1.13%
2Q2018	2.43%	5.01%	-2.58%
3Q2018	0.82%	3.61%	-2.79%
4Q2018	-0.67%	1.65%	-2.32%
1Q2019	0.87%	3.68%	-2.81%
2Q2019	-0.44%	2.49%	-2.93%
3Q2019	0.00%	2.33%	-2.33%
4Q2019	3.56%	5.61%	-2.05%



54. Indeed, the Fund has continued to underperform dramatically, its returns as of the end of the second quarter of 2020 lagging the benchmark by an incredible 396 basis points (3.96%) on a 5-year annualized basis and 195 basis points (1.95%) annualized over the trailing 10-year period.

1 55. When an investment option's track record is so apparently poor, as it is here,
2 Defendants should necessarily replace the fund in the Plan with an alternative that has
3 demonstrated the ability to consistently outperform the benchmark, or, at the very least, retain an
4 alternative that tracks the benchmark. By way of example and to illustrate, there is a Fidelity
5 Emerging Markets Index Fund that simply tracks the MSCI Emerging Markets Index, with a very
6 low expense ratio of 7.6 basis points (0.076%). While participants should have had the option to
7 achieve the index's returns at minimal cost, Defendants' imprudence in retaining the Lazard
8 Emerging Markets Equity Fund instead forced them to pay 108 basis points (1.08%) to
9 consistently lag the index. Defendants' failure to replace this underachieving investment option
10 with better performing alternatives was a breach of fiduciary duty.
11

12 **3. The Plan's Excessive Recordkeeping Costs**

13
14 56. Another obvious indicator of Defendants' breach of their fiduciary duties is the
15 Plan's excessive recordkeeping costs. According to one industry publication,¹³ the average cost
16 for recordkeeping *and* administration in 2017 for plans much smaller than the Plan (plans with 100
17 participants and \$5 million in assets) was \$35 per participant. As of December 31, 2018, the Plan
18 had approximately \$3.7 billion in assets and 73,408 participants. Given its size, and resulting
19 negotiating power, with prudent management and administration, the Plan would have
20 unquestionably been able to obtain a per-participant cost significantly lower than \$35 per
21 participant. Indeed, given its size and negotiating power, the Plan should have been able to
22 negotiate a recordkeeping fee of no more than \$14 to \$21 per participant, based upon the amount
23 that comparable plans were paying during the relevant period. Thus, Defendants clearly engaged
24 in a shocking breach of fiduciary duty by paying 66% to 150% more than it should have paid for
25
26
27

28 ¹³The 401k Averages Book (20th ed.).

1 such services if they had engaged in any modestly prudent approach to ensuring that the Plan's
2 recordkeeping fees were fair and reasonable.

3 57. Despite the size and negotiating power of the Plan, participants have throughout the
4 Class Period paid a flat recordkeeping fee of \$34 per participant.

5
6 58. As such, it is clear that Defendants either engaged in virtually no examination,
7 comparison, or benchmarking of the recordkeeping fees of the Plan to those of other similarly-
8 sized defined contribution plans, or were complicit in paying grossly excessive fees. Had
9 Defendants conducted any examination, comparison, or benchmarking, Defendants would have
10 known that the Plan was compensating Fidelity at an inappropriate level for its size. Plan
11 participants bear this excessive fee burden and, accordingly, achieve considerably lower retirement
12 savings, since the excessive fees, particularly when compounded, have a damaging impact upon
13 the returns attained by participant retirement savings.
14

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

18 **4. The Plan's Excessive Total Plan Cost**

19 60. In another obvious breach of their fiduciary duties, Defendants also failed to
20 monitor the average expense ratios charged to similarly sized plans, which together with the Plan's
21 recordkeeping costs renders the Plan's Total Plan Cost ("TPC")¹⁴ significantly above the market
22 average for similarly-sized and situated defined contribution plans. Indeed, participants were
23 offered an exceedingly expensive menu of investment options, clearly demonstrating that
24
25

26 ¹⁴TPC refers to the sum of all fees and expenses associated with the operation of a retirement plan; notably, the
27 recordkeeping fees, any other administrative fees, and investment management fees. The TPC permits a straight
28 "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.

Defendants neglected to benchmark the cost of the Plan lineup or consider ways in which to lessen the fee burden on participants during the pertinent period. From 2014 through 2018, the Plan paid out investment management fees of 0.49%-0.55% of its total assets, considerably more than those of comparable plans. Indeed, according to the most recent Brightscope/ICI study published in June 2019, the average TPC is 0.28%¹⁵ for plans with over \$1 billion in assets, with investment management fees comprising just one component of the TPC. The fact that the investment management fees for the Plan alone have been nearly double the average TPC (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. Of course, the fact that Defendants allowed such poor investments to be maintained in the Plan only compounded the injuries caused by such breaches. And, with the excessive \$34 per-participant recordkeeping fee, the total cost to the plan was even more expensive.

61. The Plan's TPC during the relevant period ranges between 0.56% to 0.64% of net assets.

Year	2014	2015	2016	2017	2018
TPC as % of Net Assets	0.64%	0.59%	0.58%	0.58%	0.56%

Indeed, at all times, the Plan's TPC was at least double that which Defendants should have reasonably accepted or negotiated for under any circumstances and caused the Plan to incur annual overpayments of fees of at least \$2.6 million to \$10.4 million. Defendants' failure to ensure that

¹⁵This figure is for 2016. Given technological advances and market-based competitive pressures since 2016, the average TPC should be even lower today.

1 the Plan paid reasonable and appropriate expenses in terms of TPC represents a profound breach of
2 fiduciary duty based upon any objective evaluation of the ADP Defendants' conduct.

3
4 **V. ERISA'S FIDUCIARY STANDARDS**

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

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

9 (A) for the exclusive purpose of

10 (i) providing benefits to participants and their
beneficiaries; and

11 (ii) defraying reasonable expenses of administering the plan;

12 [and]

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

16 63. Under 29 U.S.C. § 1103(c)(1), with certain exceptions not relevant here, the assets
17 of a plan shall never inure to the benefit of any employer and shall be held for the exclusive
18 purposes of providing benefits to participants in a plan and their beneficiaries and defraying
19 reasonable expenses of administering the plan.

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

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

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

1 another fiduciary and knowingly failing to cure any breach of duty. ERISA states, in relevant part,
2 as follows:

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
plan in the following circumstances:

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

14 67. 29 U.S.C. § 1132(a)(2) authorizes a plan participant to bring a civil action to
15 enforce a breaching fiduciary's liability to the plan under 29 U.S.C. § 1109. Section 1109(a)
16 provides, in relevant part:

17 Any person who is a fiduciary with respect to a plan who breaches
18 any of the responsibilities, obligations, or duties imposed upon
19 fiduciaries by this subchapter shall be personally liable to make good
20 to such plan any losses to the plan resulting from each such breach,
21 and to restore to such plan any profits of such fiduciary which have
22 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.

22 VI. CLASS ALLEGATIONS

23 68. This action is brought as a class action by Plaintiffs on behalf of themselves and the
24 following proposed Class:
25

26 All participants and beneficiaries in the Sutter Health 403(b) Savings Plan
27 (the "Plan") at any time on or after July 21, 2014 to the present (the "Class
28 Period"), including any beneficiary of a deceased person who was a
participant in the Plan at any time during the Class Period.

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

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

5 70. **Numerosity**. Plaintiffs are informed and believe that there are at least thousands of
6 Class members throughout the United States. As a result, the members of the Class are so
7 numerous that their individual joinder in this action is impracticable.

8 71. **Commonality**. There are numerous questions of fact and/or law that are common
9 to Plaintiffs and all the members of the Class, including, but not limited to the following:
10

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

14 (b) Whether Defendants breached their fiduciary duties under ERISA by failing to
15 defray the reasonable expenses of administering the Plan; and
16

17 (c) Whether and what form of relief should be afforded to Plaintiffs and the Class.
18

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

23 73. **Adequacy of Representation**. Plaintiffs will fairly and adequately represent the
24 interests of the members of the Class. Plaintiffs have no conflicts of interest with or interests that
25 are any different from the other members of the Class. Plaintiffs have retained competent counsel
26 experienced in class action and other complex litigation, including class actions under ERISA.
27

28 74. **Potential Risks and Effects of Separate Actions**. The prosecution of separate

1 actions by or against individual Class members would create a risk of: (A) inconsistent or varying
2 adjudications with respect to individual Class members that would establish incompatible
3 standards of conduct for the party opposing the Class; or (B) adjudications with respect to
4 individual class members that, as a practical matter, would be dispositive of the interests of the
5 other members not parties to the individual adjudications or would substantially impair or impede
6 their ability to protect their interests.
7

8 75. **Predominance.** Common questions of law and fact predominate over questions
9 affecting only individual Class members, and the Court, as well as the parties, will spend the vast
10 majority of their time working to resolve these common issues. Indeed, virtually the only
11 individual issues of significance will be the exact amount of damages recovered by each Class
12 member, the calculation of which will ultimately be a ministerial function and which does not bar
13 Class certification.
14

15 76. **Superiority.** A class action is superior to all other feasible alternatives for the
16 resolution of this matter. The vast majority, if not all, of the Class members are unaware of
17 Defendants' breaches of fiduciary duty and prohibited transactions such that they will never bring
18 suit individually. Furthermore, even if they were aware of the claims they have against
19 Defendants, the claims of virtually all Class members would be too small to economically justify
20 individual litigation. Finally, individual litigation of multiple cases would be highly inefficient, a
21 gross waste of the resources of the courts and of the parties, and potentially could lead to
22 inconsistent results that would be contrary to the interests of justice.
23

24 77. **Manageability.** This case is well-suited for treatment as a class action and easily
25 can be managed as a class action since evidence of both liability and damages can be adduced,
26 and proof of liability and damages can be presented, on a Class-wide basis, while the allocation
27 and distribution of damages to Class members would be essentially a ministerial function.
28

78. 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.

79. 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.

80. 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)

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

82. 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.

83. 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.

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

85. 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)

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

87. Sutter Health 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.

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

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

5
6 90. To the extent that fiduciary monitoring responsibilities of Sutter Health or the
7 Committee was delegated, each Defendant's monitoring duty included an obligation to ensure that
8 any delegated tasks were being performed prudently and loyally.

9 91. Sutter Health and the Committee breached their fiduciary monitoring duties by,
10 among other things:

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

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

17 (c) Failing to remove appointees whose performances were inadequate in that they
18 continued to maintain imprudent, excessively costly, and poorly performing investments
19 within the Plan, all to the detriment of the Plan and its participants' retirement savings.
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22 92. As a consequence of these breaches of the fiduciary duty to monitor, the Plan
23 suffered substantial losses. Had Sutter Health and the Committee discharged their fiduciary
24 monitoring duties prudently as described above, the losses suffered by the Plan would have been
25 minimized or avoided. Therefore, as a direct result of the breaches of fiduciary duties alleged
26 herein, the Plan and its participants have lost millions of dollars of retirement savings.

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

4 94. Each of the Defendants also knowingly participated in the breaches of the other
5 Defendants, knowing that such acts were a breach; enabled the other Defendants to commit a
6 breach by failing to lawfully discharge their own fiduciary duties; and knew of the breaches by the
7 other Defendants and failed to make any reasonable effort under the circumstances to remedy the
8 breaches. Defendants, thus, are liable for the losses caused by the breaches of their co-fiduciaries
9 under 29 U.S.C. § 1105(a).

11 **COUNT III**

12 **(In the Alternative, Liability for Knowing Breach of Trust)**

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

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

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

25 **PRAYER FOR RELIEF**

26 WHEREFORE, Plaintiffs, on behalf of themselves, the Class and the Plan, demand
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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.

JURY DEMAND

Plaintiffs demand a jury trial with respect to all claims so triable.

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: November 9, 2020

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/s/ James C. Shah

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