

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK**

KAILA GONZALEZ, Individually and
as a representative of a class of similarly
situated persons, on behalf of the
NORTHWELL HEALTH 403(B)
PLAN,

Plaintiff,

v.

NORTHWELL HEALTH, INC., the
NORTHWELL HEALTH 403(B) PLAN
COMMITTEE and DOES No. 1-10,
Whose Names Are Currently Unknown,

Defendants.

Case No: 20-cv-03256-RPK-RLM

**SECOND AMENDED CLASS ACTION
COMPLAINT**

JURY TRIAL DEMANDED

I. INTRODUCTION

1. Plaintiff, Kaila Gonzalez (“Plaintiff”), individually in her capacity as a participating employee of the Northwell Health 403(b) Plan (“Plan”), formerly known as the North Shore-Long Island Jewish Health System 403(b) Plan, brings this action under 29 U.S.C. § 1132, on behalf of the Plan and a class of similarly-situated participating employees and their beneficiaries, against Defendants, Northwell Health, Inc. (“Northwell”), the Northwell Health, Inc. 403(b) Plan Committee (“Committee”), and Does No. 1-10, who are members of the Committee or other fiduciaries of the Plan and whose names are currently unknown (collectively, “Defendants”), for breach of their fiduciary duties under the Employee Retirement Income Security Act (“ERISA”), 29 U.S.C. § 1001, *et seq.*, and related breaches of applicable law beginning six years from the date the initial complaint originating this action was filed and continuing to the date of judgment (the “Class Period”). This Second Amended Class Action Complaint (“Complaint”) is filed pursuant to Federal Rule of Civil Procedure 15(a)(2).

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

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

4. As of December 31, 2018, the Plan had 56,289 participants with account balances and assets totaling over \$5.6 billion, placing it in the top 0.1% of defined contribution plans by plan size. Defined contribution plans with substantial assets, like the Plan, have significant bargaining power and the ability to demand low-cost administrative and investment management services within the marketplace for administration of defined contribution plans and the investment of defined contribution assets. The marketplace for defined contribution retirement plan services is well-established and can be competitive when fiduciaries of defined contribution retirement plans act in an informed and prudent fashion.

5. Defendants maintain the Plan, and are responsible for selecting, monitoring, and retaining the service provider(s) that provide investment, recordkeeping, and other administrative services. Defendants are fiduciaries under ERISA, and, as such, owe specific duties to the Plan and its participants and beneficiaries, including obligations to act for the exclusive benefit of

participants, ensure that the investment options offered through the Plan are prudent and diverse, and ensure that Plan expenses are fair and reasonable in relation the services obtained.

6. Defendants have breached their fiduciary duties to the Plan and, as detailed below, have: (1) allowed unreasonable recordkeeping and administrative expenses to be charged to the Plan; and (2) selected, retained, and/or otherwise ratified unsuitable investments in the Plan, instead of offering prudent alternative investments that were readily available at the time Defendants selected and retained the funds at issue and throughout the Class Period (defined above). Since Defendants have discretion to select the investments made available to participants, Defendants' breaches are the direct cause of the losses alleged herein.

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

8. Plaintiff specifically seeks the following relief:
- a. A declaratory judgment holding that the acts of Defendants described herein violate ERISA and applicable law;
 - b. A permanent injunction against Defendants prohibiting the practices described herein and affirmatively requiring them to act in the best interests of the Plan and its participants;
 - c. Equitable, legal or remedial relief for all losses and/or compensatory damages;
 - d. Attorneys' fees, costs and other recoverable expenses of litigation; and

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

II. THE PARTIES

9. Plaintiff, a former employee of Northwell and a participant in the Plan under 29 U.S.C. § 1002(7), is a resident of Bronx County, New York. During the Class Period, Plaintiff maintained an investment through the Plan in the Lazard Emerging Markets Fund and was subject to the excessive recordkeeping and administrative costs alleged below.

10. Northwell is a New York domestic not-for-profit corporation headquartered in Westbury, Nassau County, New York. Northwell is the largest healthcare provider in New York, offering clinical care through numerous hospitals and outpatient facilities.

11. The Committee is the Plan administrator and a fiduciary under ERISA pursuant to 29 U.S.C. §§ 1002 and 1102. The Committee maintains its address at Northwell's corporate headquarters in Westbury, New York. The Committee and its members were appointed by Northwell to administer the Plan on Northwell's behalf.

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

III. JURISDICTION AND VENUE

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

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

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

16. Plaintiff has standing to bring this action. Section 502(a)(2) of ERISA, 29 U.S.C. § 1132(a)(2), authorizes any participant, fiduciary or the Secretary of Labor to bring suit as a representative of a plan, with any recovery necessarily flowing to a plan. As explained herein, the Plan has suffered millions of dollars in losses resulting from Defendants' fiduciary breaches and remains vulnerable to continuing harm, all redressable by this Court. In addition, although standing under Section 502(a)(2) of ERISA, 29 U.S.C. § 1132(a)(2), is established by these Plan-wide injuries, Plaintiff and all Plan participants also suffered harm, including injuries in the form of financial losses as a result of the Plan's imprudent investment options and excessive fees in terms of recordkeeping and administrative expenses, while being deprived of the opportunity to invest in prudent options with reasonable fees being charged for recordkeeping and administrative services.

IV. FACTUAL ALLEGATIONS

A. Background And Plan Structure

17. The Plan is a single-employer 403(b) plan in which participants direct the investment of their contributions into various investment options offered by the Plan. Each participant's account is credited with the participant contributions, employer matching contributions, any discretionary contributions, and earnings or losses thereon. The Plan pays its expenses from Plan assets, and substantially all administrative expenses are paid by participants as a reduction of investment income. Each participant's account is charged with the amount of distributions taken and an allocation of administrative expenses. The available investment options for participants of the Plan include various mutual funds and a fixed interest separate account.

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

19. The MetLife Fixed Interest Separate Account is a stable value fund that invests in a guaranteed separate account under a group annuity contract. The Separate Account's guarantees of principal and interest are backed by the assets of Metropolitan Life Insurance Company.

20. Transamerica Retirement Solutions, LLC ("Transamerica"), which Defendants engaged, was the recordkeeper for the Plan throughout the Class Period. As the recordkeeper,

Transamerica is responsible for maintaining records with respect to employees' accounts in the Plan, effecting participant Plan investment elections, and performing administrative functions such as processing loan and withdrawal requests.

21. During the Class Period, Plan assets were held in trust by the primary custodians of the Plan, State Street Bank and Trust Company and Transamerica Financial Life Insurance Company Inc. All investments and asset allocations are performed through these trust accounts.

B. Recordkeeping and Administrative Services

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

23. The term "recordkeeping" is a catchall term for the entire suite of recordkeeping and administrative services typically provided by a plan's service provider or "recordkeeper." In other words, recordkeeping fees and RK&A fees are one and the same and the terms are used synonymously in the retirement plan industry.

24. Recordkeepers typically collect their fees in two forms, respectively referred to as "direct" compensation and "indirect" compensation.

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

26. Indirect Compensation is paid to the recordkeeper indirectly by third parties and is not transparent to retirement plan participants. In other words, the fees are taken from the

investment options before the value of the investment option is provided to the participant.

Thus, in most cases, participants are not aware they are paying these fees. Most indirect compensation is typically collected by recordkeepers through asset-based “revenue sharing.”

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

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

- i. Recordkeeping;
- ii. Transaction processing (which includes the technology to process purchases and sales of participants’ assets, as well as providing the participants access to investment options selected by the plan sponsor);

- iii. Administrative services related to converting a plan from one recordkeeper to another;
- iv. Participant communications (including employee meetings, call centers/phone support, voice response systems, web account access, and the preparation of other materials distributed to participants, *e.g.*, summary plan descriptions);
- 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 5500s¹ (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

¹The Form 5500 is the annual report that defined contribution plans are required to file with the Department of Labor (“DOL”) and U.S. Department of Treasury pursuant to ERISA reporting requirements. In terms of service codes listed on a Form 5500, there is virtually no uniformity in the manner that Form 5500s are completed; there are multiple ways to complete a Form 5500 with respect to the same services performed for a retirement plan receiving the same services and there is essentially no penalty associated with inaccurately completing a Form 5500. As a result, any person that compares the service codes on a Form 5500 in an effort to determine whether the same or similar services are being provided to a given retirement plan belies a fundamental misunderstanding of how Form 5500s work, how they are completed, and what they actually reflect and show. Thus, the Court should eschew any analysis on the basis of service codes in a Form 5500 since any such analysis only amounts to an effort to mislead and an invitation to err.

- x. Compliance testing to ensure the plan complies with U.S. Internal Revenue Service nondiscrimination rules.

29. 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 utilized by a plan. Anyone who has passing familiarity with recordkeepers’ responses to requests for proposals, their bids and their 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; any claim that recordkeeping expenses depend upon the service level provided to a plan is both false and frivolous. Nonetheless, fiduciary-defendants all too often attempt to stave off breach of fiduciary duty claims by disingenuously asserting that the cost of Bundled RK&A services depends upon service level, even though such an assertion is plainly untrue based upon the actual marketplace for such services.

30. The second type of essential RK&A services provided by all national recordkeepers, “A La Carte RK&A” services, often have separate, additional fees based on the conduct and use of individual participants. These fees are distinct from the Bundled RK&A arrangement and ensure that one participant is not forced to help another cover the cost of, for example, taking a loan from their plan account balance. These A La Carte RK&A services typically include, but are not limited to, the following:

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

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

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

33. While recordkeepers in the defined contribution industry attempt to distinguish themselves through marketing and other means, they all offer the same bundles and combinations of services. Accordingly, the market for defined contribution plan RK&A services has become increasingly price competitive, particularly for larger plans like the Plan, that have a considerable number of participants and significant assets.

34. The marginal cost of adding an additional participant to a recordkeeping platform is relatively low. These economies of scale are inherent in all recordkeeping arrangements for defined contribution plans, including the Plan. As a plan's participant count increases, the recordkeeper's fixed costs of providing RK&A services are spread over a larger population, thereby reducing the average unit cost of delivering services on a per-participant basis.

35. Due to these economies of scale inherent in the recordkeeping relationship, and because the incremental variable costs for providing RK&A depend on the number of participants with account balances in a defined contribution plan, the cost to the recordkeeper on

a per-participant basis declines as the number of plan participants increases and, as a result, a recordkeeper will accept a lower fee to provide RK&A as the number of participants in the plan increases.

36. As a result, it is axiomatic in the retirement plan services industry that: (1) a plan with more participants can and will receive a lower effective per-participant fee when evaluated on a per-participant basis; and (2) as participant counts increase, the effective per-participant RK&A fee should decrease, assuming the same services are provided.

37. Similarly, the average cost for a recordkeeper to provide services to a participant does not hinge on that participant's account balance. In other words, it costs a recordkeeper the same amount to provide services to a participant with an account balance of \$10,000 as it does to provide services to a participant with a balance of \$1,000,000.

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

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

40. Prudent fiduciaries will regularly ensure that a plan is paying fees commensurate with its size in the marketplace by soliciting competitive bids from recordkeepers other than the plan's current provider. Recognizing that RK&A services are essentially uniform in nature, and that small differences in the services required by a large plan are immaterial to the cost of providing such services, most recordkeepers only require a plan's participant count and asset level in order to provide a fee quote. These quotes are typically provided on a per-participant

basis, enabling fiduciaries to easily compare quotes on an apples-to-apples basis to determine if the current level of fees being charged by a plan's recordkeeper is reasonable.

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

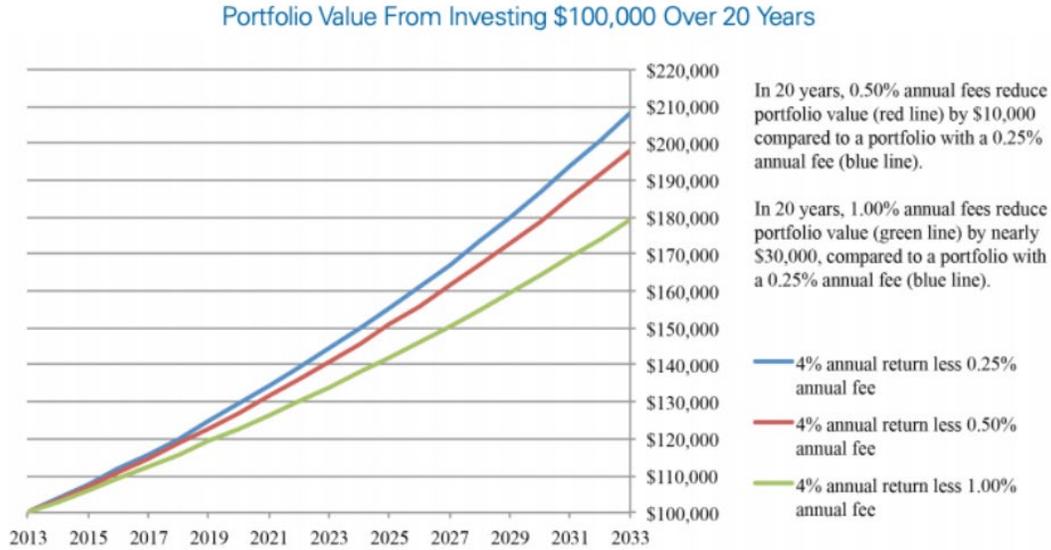
42. After negotiating the fee the plan will pay to the recordkeeper, the fiduciaries can allocate the fee among participant accounts at the negotiated per-participant rate or *pro rata* based on participant account balances or use a different, less common method.

C. Defendants' Breaches of Fiduciary Duties

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

1. The Plan's Excessive Recordkeeping/Administrative Costs

44. An obvious indicator of Defendants' breach of their fiduciary duties is the Plan's excessive RK&A costs. The impact of such high fees on participant balances is aggravated by the effect 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%).



45. During the Class Period, participants paid Transamerica for RK&A services through direct charges to their accounts.² Per the fee disclosures provided to participants on an annual basis, from the start of the Class Period through 2018, participants each paid a flat annual RK&A fee of \$60. In 2019, that flat fee was reduced to \$45 per participant, and in 2020 it was further lowered to \$37 per head. At all times during the Class Period, the Plan’s RK&A fees far exceeded the reasonable market rate.

²The direct fees paid by participants throughout the Class Period represent the total RK&A fee charged to the Plan. Certain of the Plan investment options pay revenue that is credited to the Plan (and some do not). Transamerica, in its capacity as the Plan recordkeeper, receives no benefit from such revenues; it merely redirects them to the associated participant accounts as Plan Service Credits that reduce the effective investment management expense paid by participants invested in those Plan funds. This process, as explained to participants in every quarterly account statement they receive, has the “objective of providing participants [with] the lowest available cost for investing in a mutual fund option in the plan.” In other words, any Plan Service Credit effectively decreases the amount participants pay to the mutual fund companies that manage their investments, but it has no impact on the amount each participant must pay for RK&A services or on the amount Transamerica receives from the Plan as compensation for providing such recordkeeping services. As a result, any claim by Defendants that so-called “revenue sharing” reduces the cost for recordkeeping services in the Plan is, in a word, false.

46. The RK&A services provided to the Plan are and were the same standard services identified above, and are and were the same as those provided to comparable plans.

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

47. 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 RK&A rates set forth above.

48. According to publicly available data and information from the Form 5500 filings, Summary Plan Descriptions, and annual participant fee disclosures of similarly sized defined contribution plans during the Class Period, other comparable plans were paying much lower fees than the Plan throughout the Class Period. That is clear and compelling evidence that the reasonable market rate was lower than what the Plan was paying since these comparable plans were able to negotiate lower fees for materially identical services.

49. The tables below list the RK&A fees paid by similarly sized defined contribution plans to several different high-quality, national recordkeepers providing materially identical services, which represent the prices available to the Plan during the Class Period. The tables also indicate the number of participants and assets of each plan.

| Plan | Participants | Assets | RK Fee PP | Recordkeeper | Year |
|--|---------------|------------------------|-------------|---------------------|-------------|
| IU Health 401k Savings Plan | 20,315 | \$718,354,287 | \$34 | JP Morgan | 2014 |
| Tax Deferred Savings Plan Of Novant Health, Inc. | 29,533 | \$943,788,327 | \$39 | Great-West | 2014 |
| LifePoint Hospitals, Inc. Retirement Plan | 31,207 | \$754,135,562 | \$22 | Schwab | 2014 |
| The Procter & Gamble Savings Plan | 35,335 | \$3,079,624,851 | \$39 | Great-West | 2014 |
| CenturyLink Dollars and Sense 401k Plan | 36,685 | \$3,842,542,000 | \$33 | Wells Fargo | 2014 |
| Northwell Health 403(b) Plan | 43,325 | \$3,788,530,191 | \$60 | Transamerica | 2014 |

50. As the table above indicates, in 2014, the RK&A fees paid by participants were 81% higher than the closest comparator plan in terms of participant count.

| Plan | Participants | Assets | RK Fee PP | Recordkeeper | Year |
|--|---------------|------------------------|-------------|---------------------|-------------|
| Philips North America 401(k) Plan | 25,142 | \$3,753,456,646 | \$33 | Vanguard | 2015 |
| Tax Deferred Savings Plan Of Novant Health, Inc. | 29,710 | \$969,670,230 | \$38 | Great-West | 2015 |
| IU Health 401k Savings Plan | 32,605 | \$1,132,580,425 | \$28 | Great-West | 2015 |
| CenturyLink Dollars and Sense 401k Plan | 35,944 | \$3,537,928,000 | \$37 | Wells Fargo | 2015 |
| Northwell Health 403(b) Plan | 47,233 | \$3,988,098,878 | \$60 | Transamerica | 2015 |
| Hewlett Packard Enterprise 401k Plan | 51,510 | \$8,090,048,000 | \$34 | Fidelity | 2015 |
| HP Inc. 401k Plan | 54,100 | \$8,345,636,000 | \$34 | Fidelity | 2015 |

51. As the table above indicates, in 2015, the RK&A fees paid by participants were 76% higher than the closest comparator plan in terms of participant count.

| Plan | Participants | Assets | RK Fee PP | Recordkeeper | Year |
|--|---------------|------------------------|-------------|---------------------|-------------|
| LSC Savings Plan | 18,779 | \$1,090,044,239 | \$24 | Great-West | 2016 |
| Philips North America 401(k) Plan | 26,327 | \$3,640,020,114 | \$33 | Vanguard | 2016 |
| IU Health 401k Savings Plan | 26,869 | \$1,229,368,447 | \$20 | Great-West | 2016 |
| Harris Teeter Supermarkets, Inc. Retirement and Savings Plan | 31,753 | \$746,856,948 | \$38 | T. Rowe Price | 2016 |
| CenturyLink Dollars and Sense 401k Plan | 34,026 | \$3,688,084,000 | \$36 | Wells Fargo | 2016 |
| HP Inc. 401(k) Plan | 47,981 | \$8,211,430,821 | \$34 | Fidelity | 2016 |
| Northwell Health 403(b) Plan | 51,645 | \$4,544,808,799 | \$60 | Transamerica | 2016 |
| Hewlett Packard Enterprise 401k Plan | 52,151 | \$8,900,126,000 | \$34 | Fidelity | 2016 |
| Amazon 401(K) Plan | 58,101 | \$1,479,510,086 | \$35 | Vanguard | 2016 |

52. As the table above indicates, in 2016, the RK&A fees paid by participants were 76% higher than the closest comparator plan in terms of participant count.

| Plan | Participants | Assets | RK Fee PP | Recordkeeper | Year |
|--|---------------|------------------------|-------------|---------------------|-------------|
| Philips North America 401(k) Plan | 27,618 | \$4,374,044,020 | \$33 | Vanguard | 2017 |
| Regions Financial Corporation 401(k) Plan | 29,967 | \$1,969,846,454 | \$38 | Fidelity | 2017 |
| Harris Teeter Supermarkets, Inc. Retirement and Savings Plan | 31,753 | \$883,569,342 | \$38 | T. Rowe Price | 2017 |
| CenturyLink Dollars and Sense 401k Plan | 32,609 | \$5,683,920,000 | \$35 | Wells Fargo | 2017 |
| Hewlett Packard Enterprise 401k Plan | 41,289 | \$8,927,981,000 | \$34 | Fidelity | 2017 |
| HP Inc. 401(k) Plan | 45,013 | \$9,154,235,903 | \$34 | Fidelity | 2017 |
| Northwell Health 403(b) Plan | 55,390 | \$5,582,471,582 | \$60 | Transamerica | 2017 |
| Ernst & Young Retirement Savings Plan | 68,920 | \$7,900,037,666 | \$25 | Fidelity | 2017 |

53. As the table above indicates, in 2017, the RK&A fees paid by participants were 76% higher than the closest comparator plan in terms of participant count.

| Plan | Participants | Assets | RK Fee PP | Recordkeeper | Year |
|---|---------------|------------------------|-------------|---------------------|-------------|
| MassMutual Thrift Plan | 23,131 | \$2,831,042,432 | \$35 | MassMutual | 2018 |
| Philips North America 401(k) Plan | 29,070 | \$4,180,529,769 | \$33 | Vanguard | 2018 |
| Hewlett Packard Enterprise 401k Plan | 36,937 | \$7,515,949,000 | \$34 | Fidelity | 2018 |
| CenturyLink Dollars and Sense 401k Plan | 42,910 | \$5,141,045,000 | \$33 | Wells Fargo | 2018 |
| HP Inc. 401(k) Plan | 43,122 | \$8,196,102,364 | \$34 | Fidelity | 2018 |
| Nationwide Savings Plan | 49,105 | \$5,705,297,532 | \$36 | Fidelity | 2018 |
| Cigna 401(k) Plan | 54,132 | \$5,958,762,000 | \$30 | Prudential | 2018 |
| Northwell Health 403(b) Plan | 56,289 | \$5,631,860,977 | \$60 | Transamerica | 2018 |
| Ernst & Young Retirement Savings Plan | 73,368 | \$7,858,527,518 | \$25 | Fidelity | 2018 |

54. As the table above indicates, in 2018, the RK&A fees paid by participants were double those of the closest comparator plan in terms of participant count.

| Plan | Participants | Assets | RK Fee PP | Recordkeeper | Year |
|---|---------------|------------------------|-------------|---------------------|-------------|
| Philips North America 401(k) Plan | 28,428 | \$4,898,009,752 | \$23 | Prudential | 2019 |
| Hewlett Packard Enterprise 401k Plan | 34,780 | \$8,467,311,000 | \$34 | Fidelity | 2019 |
| CenturyLink Dollars and Sense 401k Plan | 40,005 | \$5,953,443,000 | \$35 | Wells Fargo | 2019 |
| HP Inc. 401(k) Plan | 40,880 | \$9,377,015,788 | \$34 | Fidelity | 2019 |
| Northwell Health 403(b) Plan | 54,389 | \$7,013,663,973 | \$45 | Transamerica | 2019 |
| Cigna 401(k) Plan | 77,695 | \$9,926,207,000 | \$32 | Prudential | 2019 |
| Ernst & Young Retirement Savings Plan | 78,174 | \$10,175,371,976 | \$25 | Fidelity | 2019 |

55. As the table above indicates, in 2019, the RK&A fees paid by participants were 32% higher than the closest comparator plan in terms of participant count.

| Plan | Participants | Assets | RK Fee PP | Recordkeeper | Year |
|--|---------------|------------------------|-------------|---------------------|-------------|
| Farmers Group, Inc. 401(k) Savings Plan | 26,826 | \$4,102,361,526 | \$35 | Vanguard | 2020 |
| Philips North America 401(k) Plan | 28,348 | \$5,663,746,665 | \$23 | Prudential | 2020 |
| Chevron Employee Savings Investment Plan | 33,484 | \$17,372,888,796 | \$26 | Fidelity | 2020 |
| Northwell Health 403(b) Plan | 52,781 | \$8,598,203,841 | \$37 | Transamerica | 2020 |
| Cigna 401(k) Plan | 84,377 | \$11,411,705,000 | \$24 | Prudential | 2020 |

56. As the table above indicates, in 2020, the RK&A fees paid by participants were 42% higher than the closest comparator plan in terms of participant count.

| Plan | Participants | Assets | RK Fee PP | Recordkeeper | Year |
|--|---------------|------------------------|-------------|---------------------|-------------|
| Nissan Employee 401(k) Plan | 22,465 | \$4,081,073,307 | \$25 | Vanguard | 2021 |
| SAP America, Inc. 401(k) Plan | 26,778 | \$7,620,650,900 | \$20 | Vanguard | 2021 |
| Baptist Health South Florida, Inc. 403(b) Employee Retirement Plan | 29,704 | \$2,146,294,985 | \$23 | Transamerica | 2021 |
| Philips North America 401(k) Plan | 30,245 | \$6,384,324,582 | \$23 | Prudential | 2021 |
| IU Health 401(k) Savings Plan | 44,120 | \$2,883,007,648 | \$31 | Great-West | 2021 |
| Leidos, Inc. Retirement Plan | 46,995 | \$10,028,148,473 | \$31 | Vanguard | 2021 |
| Northwell Health 403(b) Plan | 55,776 | \$9,823,558,065 | \$37 | Transamerica | 2021 |
| Allstate 401k Savings Plan | 61,520 | \$7,065,770,000 | \$31 | Alight | 2021 |
| Cigna 401(k) Plan | 88,106 | \$12,743,390,000 | \$20 | Prudential | 2021 |

57. As the table above indicates, in 2021, the RK&A fees paid by participants were 19% higher than the closest comparator plan in terms of participant count.

58. The RK&A fees for each similar comparable plan in the table above are pulled from publicly available Summary Plan Descriptions, annual participant fee disclosures and Form 5500 filings. Where Form 5500s are used, the RK&A fees include all the disclosed direct compensation paid to the recordkeeper, as well as all indirect compensation. Specifically, if the plan's pricing structure as described in each plan's Form 5500 reveals that some or all of the 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 contain revenue sharing and, as a result, 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.

59. The comparable plans above received at least the same RK&A services received by the Plan. Therefore, the fees in the tables above are apples-to-apples comparisons in that they include all the fees being charged by each recordkeeper to provide the same RK&A services to similar defined contribution plans.

60. As the tables above indicate, the fees paid by the Plan for virtually the same package of services are much higher than those of plans with comparable, and in many cases smaller, participant counts. Indeed, based on fees paid by other large plans during the Class Period receiving materially identical RK&A services, it is more than reasonable to infer that Defendants failed to follow a prudent process to ensure that the Plan was paying only reasonable fees. Prudent fiduciaries engage in regular examination and benchmarking of a plan's RK&A fees, including by soliciting bids (*e.g.*, requests for information and requests for proposal) from incumbent and competitor service providers. In light of the amounts remitted to Transamerica throughout the Class Period, Defendants clearly engaged in virtually no examination, comparison, or benchmarking (including meaningful competitive bidding) of the RK&A fees of the Plan to those of other similarly sized defined contribution plans, or they were complicit in paying grossly excessive fees.

61. Defendants' failure to recognize that the Plan and its participants were grossly overcharged for RK&A services and their failure to take effective remedial actions amounts to a shocking breach of their fiduciary duties to the Plan. To the extent Defendants had a process in place, it was imprudent and ineffective given the objectively unreasonable fees the Plan paid for RK&A services. Had Defendants appropriately monitored the compensation paid to Transamerica and ensured that participants were only charged reasonable RK&A fees, Plan

participants would not have lost millions of dollars in their retirement savings over the last eight-plus years.

2. The Plan's Objectively Imprudent Investment Options

62. Several of the Plan's investment options are objectively imprudent,³ separate and apart from the apparent excesses with respect to the Plan's RK&A fees, as well as its relationship with Transamerica, which the Plan entered into at Defendants' behest.

63. It is a basic principle of investment theory that the risks associated with an investment must first be justified by its potential returns for that investment to be rational. This principle applies even before considering the purpose of the investment and the needs of the investor, such as the retirement assets here. The Capital Asset Pricing Model ("CAPM"), which is used for pricing securities and generating expected returns for assets given the risk of those assets and the cost of capital, provides a mathematical formula distilling this principle:

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

ER_i =expected return of investment

R_f =risk-free rate

β_i =beta of the investment

³In her Amended Complaint, Plaintiff relied on returns data provided to all Plan participants via the Transamerica web portal to support her imprudent investment allegations. Upon further scrutiny, it appears that certain of these data, specifically those showing the performance of the 50% Champlain/50% Diamond Hill Small Cap Option ("Small Cap Option"), were inaccurate and materially understated the actual performance of the Small Cap Option. Accordingly, Plaintiff no longer challenges Defendants' retention of the Small Cap Option in this Second Amended Complaint (that is, because the information communicated to participants and justifiably relied upon in pleading the Amended Complaint proved to be materially inaccurate once a full quantitative deconstruction of the Small Cap Option was performed in connection with preparation of this Second Amended Complaint). Of course, the provision of erroneous information to Plan participants and beneficiaries is an independent breach of fiduciary duty. Prudent fiduciaries are required to monitor information provided to plan participants and beneficiaries, even if provided by a third party engaged by fiduciaries on behalf of a plan, and ensure such information is complete and accurate. Defendants' failure to ensure the accuracy of information provided to Plan participants and beneficiaries is emblematic of their lax management and administration of the Plan, as well as their apparent failure to take their fiduciary duties seriously.

$(ER_m - R_f)$ = market risk premium

Applied here and put simply, the β_i is the risk associated with an actively-managed mutual fund, which can only be justified if the ER_i of the investment option is, at the very least, above that of its benchmark, R_f .⁴ Otherwise, the model collapses, and it would be imprudent to assume any risk without achieving an associated return above the benchmark returns.

64. The goal of an active manager is to beat a benchmark—usually a market index or a combination of indices—by taking more risk than the relevant index or indices. Kilroy, *Is Active Management a Good Idea for Your Portfolio* (SmartAsset Advisor, LLC) (December 11, 2019), <https://smartasset.com/financial-advisor/active-management> (“the goal of active management is to outperform a specific market index or, in a market downturn, to book losses that are less severe than a specific market index suffers”); *see also* Lehman and Modest, *Mutual Fund Performance Evaluation: A Comparison of Benchmarks and Benchmark Comparisons*, *Journal of Finance*, Vol. XLII, No. 2 (June, 1987) (evaluating the performance of benchmarks using Capital Asset Pricing Model (“CAPM”) and Arbitrage Pricing Theory (“APT”) and explaining that the entire purpose of actively managed mutual funds is to exceed the performance of an index/benchmark); Baks, Metrick, & Wachter, *Should Investors avoid all actively managed mutual funds? A Study in Bayesian performance evaluation*, *Journal of Finance*, Vol. LVI, No. 1 (February, 2001) (observing that, since Jensen in 1968, “most studies have found that the universe of mutual funds does not outperform its benchmarks after expenses” and “evidence indicates that the average active mutual fund should be avoided”); Jensen, *The Performance of Mutual Funds in the Period 1945-1964*, Vol. XXIII, No. 2 (May, 1968) (explaining that most

⁴In this instance, the index benchmark takes the 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.

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). Thus, any suggestion that a comparison of actively managed funds to passively managed investments (as a proxy for the specific market index that the actively managed investment attempts to beat) is somehow inappropriate or an “apples to oranges” comparison in every instance ignores the fundamental purpose and design of active mutual funds, and is inconsistent with basic investment theory and the prevailing frameworks employed by prudent fiduciaries.

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

66. Market research has indicated that investors should be skeptical of certain actively managed funds' ability to consistently outperform their indices, which is a significant concern for long-term investors saving for retirement, like Plan participants and beneficiaries. Indeed, Morningstar has repeatedly concluded that "in general, actively managed funds have failed to survive and beat their benchmarks, especially over longer time horizons."⁵ Although they may experience success over shorter periods, active fund managers are infrequently able to time their activity efficiently enough to outperform the market. This is not to suggest that active management is inappropriate for use in a retirement plan lineup, but that plan fiduciaries must carefully analyze each active fund's ability to provide value and, if they deem a fund does not, replace it with an active or passive fund that has demonstrated such capabilities.

67. In this environment, prudent fiduciaries scrutinize investment managers to determine whether an active manager has presented an ability to exploit inefficiencies in their chosen sector of the market. To do so, and distinguish between a skilled manager and a lucky one, fiduciaries judge fund performance against both an appropriate index benchmark and a universe of similar funds over periods most closely approximating a market cycle—namely, three- and five-year intervals. These two time horizons are emphasized by virtually all competent investment professionals as sufficient to gauge a fund manager's ability to execute their strategy. In addition, these two specific time horizons (three- and five-year trailing

⁵Ben Johnson, *How Actively and Passively Managed Funds Performed: Year-End 2018*, MORNINGSTAR (Feb. 12, 2019), www.morningstar.com/insights/2019/02/12/active-passive-funds. See also Kilroy, *Is Active Management a Good Idea for Your Portfolio* (SmartAsset Advisor, LLC) (December 11, 2019), <https://smartasset.com/financial-advisor/active-management> (there is controversy around the performance of active managers and if they produce superior returns. In fact, over the past 15 years, 92.43% of large-cap managers, 95.13% of mid-cap managers, 97.70% of small-cap managers failed to surpass their benchmark index. Also, over three years, active managers underperformed the market by 0.36%.)

performance) are the specific time-frames that almost all investment policy statements (“IPs”) identify as the most important to review in connection with review of 401k investments.⁶

68. 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.⁷

i. The Lazard Emerging Markets Fund

69. The Lazard Emerging Markets Fund Institutional Class (“Lazard Fund”) has substantially and repeatedly underperformed the benchmark chosen by its own manager, the

⁶Although it may be tempting to somewhat simplistically suggest that ten (10) year performance, for example, is more important since the plans at issue are retirement plans, any such suggestion is eschewed by competent and principled investment professionals for several important reasons: (1) waiting for 10 years to determine whether the performance of an investment is acceptable is simply too long because losses that can accrue over such a prolonged period can be devastating to an investor and are almost always unrecoverable in nature; (2) in light of labor market 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), <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.

⁷The 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.

MSCI Emerging Markets Index, on rolling three-, five- and ten-year annualized bases. However, due to the Committee's investment review procedures, a general lack of understanding of how to evaluate investment returns, and/or a general atmosphere of neglect toward the Plan, Defendants failed to appropriately scrutinize, and ultimately replace, this poor performing fund. At their meetings during the Class Period, Committee members had access to the below returns data⁸ in real time, which would have been sufficient to convince a fiduciary following a prudent process that the Lazard Fund should be removed:

- As of the end of the First Quarter of 2015, the Lazard Fund's three- and five-year annualized returns trailed those of its benchmark by 1.59% and 0.40% (equivalent to 4.76% and 2.17% of cumulative underperformance), respectively. At the same time, there were several superior, readily investable alternative emerging markets funds, including the American Funds New World Fund ("New World Fund") and the Fidelity Advisor Emerging Markets Fund ("Fidelity Fund"). Over the same three- and five-year periods, the New World Fund beat the Lazard Fund by 6.05% and 3.25%, respectively and the Fidelity Fund beat the Lazard Fund by 4.33% and 0.94%, respectively. Moreover, the Lazard Fund's three- and five-year returns ranked in the 72nd and 58th percentile among its emerging markets fund peers (as classified by Morningstar), while the New World Fund ranked 13th and 12th and the Fidelity Fund ranked 20th and 37th, respectively.
- As of the end of the Second Quarter of 2015, the Lazard Fund's three- and five-year annualized returns trailed those of its benchmark by 2.01% and 0.24% (equivalent to 6.42% and 1.43% of cumulative underperformance), respectively. Over the same three- and five-year periods, the New World Fund beat the Lazard Fund by 5.05% and 2.83%, while the Fidelity Fund exceeded the Lazard Fund by 4.14% and 0.64%, respectively. Moreover, the Lazard Fund's three- and five-year returns ranked in the 75th and 58th percentile among its peer group, while the New World Fund ranked 14th and 11th and the Fidelity Fund ranked 22nd and 38th, respectively.
- As of the end of the Third Quarter of 2015, the Lazard Fund's three- and five-year annualized returns trailed those of its benchmark by 2.10% and 0.95% (equivalent to 5.57% and 4.10% of cumulative underperformance), respectively. Over the same three- and five-year periods, the New World Fund beat the Lazard Fund by 7.34% and 4.82%, while the Fidelity Fund exceeded the Lazard Fund by 5.87% and 1.85%, respectively. Moreover, the Lazard Fund's three- and five-year returns ranked in the 84th and 55th percentile among its peer group, while the New World

⁸All returns cited in the Complaint are annualized unless otherwise noted.

Fund ranked 12th and 10th and the Fidelity Fund ranked 18th and 32nd, respectively.

- As of the end of the Fourth Quarter of 2015, the Lazard Fund's three- and five-year annualized returns trailed those of its benchmark by 2.36% and 0.77% (equivalent to 6.04% and 3.15% of cumulative underperformance), respectively. Over the same three- and five-year periods, the New World Fund beat the Lazard Fund by 8.66% and 5.72%, while the Fidelity Fund exceeded the Lazard Fund by 7.04% and 2.25%, respectively. Moreover, the Lazard Fund's three- and five-year returns ranked in the 89th and 69th percentile among its peer group, while the New World Fund ranked 9th and 6th and the Fidelity Fund ranked 14th and 30th, respectively.

70. At this point, consistent with its regular monitoring duties, the Committee should have reviewed at least *four consecutive quarters* of the Lazard Fund's underperformance relative to both its benchmark and its peers over the preceding three- and five-year periods, a troubling pattern of rolling returns that should have been sufficient to convince Defendants to investigate a replacement.⁹ These issues were ignored, however, and Defendants allowed the fund to linger even as its performance issues persisted:

- As of the end of the First Quarter of 2016, the Lazard Fund's three-year annualized returns trailed those of its benchmark by 1.69% (equivalent to 4.59% of cumulative underperformance) and ranked 77th among its peers. Over the same three-year period, the New World Fund beat the Lazard Fund by 5.30% and ranked 8th, while the Fidelity Fund exceeded the Lazard Fund by 4.20% and ranked in the 13th percentile.
- As of the end of the Second Quarter of 2016, the Lazard Fund's three-year annualized returns trailed those of its benchmark by 0.68% (equivalent to 1.97% of cumulative underperformance) and ranked 69th among its peers. Over the same three-year period, the New World Fund beat the Lazard Fund by 3.06% and ranked 15th, while the Fidelity Fund exceeded the Lazard Fund by 3.70% and ranked in the 9th percentile.

⁹Four quarters of trailing three- or five-year returns is distinct from four quarters of returns. Plaintiff notes, for example, four consecutive quarters of trailing five-year underperformance to show that, were the Committee meeting on a regular, quarterly basis, it would have reviewed five-year underperformance at four straight separate meetings. Any trailing three- or five-year underperformance as of a single quarter end is worth a fiduciary's attention; trends such as those detailed in this Complaint are cause for considerable concern.

- As of the end of the Third Quarter of 2016, the Lazard Fund's three-year annualized returns trailed those of its benchmark by 0.96% (equivalent to 2.84% of cumulative underperformance) and ranked 70th among its peers. Over the same three-year period, the New World Fund beat the Lazard Fund by 1.95% and ranked 28th, while the Fidelity Fund exceeded the Lazard Fund by 3.60% and ranked in the 12th percentile.
- As of the end of the Fourth Quarter of 2016, the Lazard Fund's three-year annualized returns trailed those of its benchmark by 0.48% (equivalent to 1.36% of cumulative underperformance) and ranked 51st among its peers. Over the same three-year period, the New World Fund beat the Lazard Fund by 0.65% and ranked 32nd, while the Fidelity Fund exceeded the Lazard Fund by 0.73% and ranked in the 31st percentile.

71. At this point, the Committee should have reviewed returns data demonstrating the Lazard Fund's persistent inability to beat its benchmark or rank in the top half of its peer group over *eight consecutive* three-year periods. Defendants' confounding refusal to replace the fund by this juncture represented a severe breach of fiduciary duty. These issues have endured; the fund has continued to underperform its benchmark severely and has been rated as terrible among its emerging markets peers through the filing of this Complaint, while alternatives like the New World and Fidelity Funds have continued to provide investors with consistent added value:

- As of the end of the First Quarter of 2017, the Lazard Fund's three- and five-year annualized returns trailed those of its benchmark by 0.80% and 0.12% (equivalent to 2.46% and 0.65% of cumulative underperformance), respectively. Over the same three- and five-year periods, the New World Fund beat the Lazard Fund by 0.43% and 3.01%, while the Fidelity Fund exceeded the Lazard Fund by 1.52% and 1.50%, respectively. Moreover, the Lazard Fund's three- and five-year returns ranked in the 63rd and 56th percentile among its peer group, while the New World Fund ranked 53rd and 11th and the Fidelity Fund ranked 27th and 25th, respectively.
- As of the end of the Second Quarter of 2017, the Lazard Fund's three- and five-year annualized returns trailed those of its benchmark by 3.04% and 1.21% (equivalent to 9.12% and 6.99% of cumulative underperformance), respectively. Over the same three- and five-year periods, the New World Fund beat the Lazard Fund by 3.15% and 3.40%, while the Fidelity Fund exceeded the Lazard Fund by 4.89% and 3.47%, respectively. Moreover, the Lazard Fund's three- and five-year returns ranked in the 89th and 73rd percentile among its peer group, while the New World Fund ranked 33rd and 11th and the Fidelity Fund ranked 12th and 10th, respectively.

- As of the end of the Third Quarter of 2017, the Lazard Fund's three- and five-year annualized returns trailed those of its benchmark by 2.64% and 1.29% (equivalent to 8.56% and 7.47% of cumulative underperformance), respectively. Over the same three- and five-year periods, the New World Fund beat the Lazard Fund by 3.19% and 3.53%, while the Fidelity Fund exceeded the Lazard Fund by 5.09% and 4.14%, respectively. Moreover, the Lazard Fund's three- and five-year returns ranked in the 81st and 81st percentile among its peer group, while the New World Fund ranked 28th and 13th and the Fidelity Fund ranked 8th and 8th, respectively.
- As of the end of the Fourth Quarter of 2017, the Lazard Fund's three- and five-year annualized returns trailed those of its benchmark by 2.30% and 1.52% (equivalent to 8.11% and 8.87% of cumulative underperformance), respectively. Over the same three- and five-year periods, the New World Fund beat the Lazard Fund by 1.90% and 3.39%, while the Fidelity Fund exceeded the Lazard Fund by 3.89% and 4.46%, respectively. Moreover, the Lazard Fund's three- and five-year returns ranked in the 74th and 79th percentile among its peer group, while the New World Fund ranked 41st and 14th and the Fidelity Fund ranked 12th and 7th, respectively.
- As of the end of the First Quarter of 2018, the Lazard Fund's three- and five-year annualized returns trailed those of its benchmark by 0.58% and 1.50% (equivalent to 2.08% and 9.00% of cumulative underperformance), respectively. Over the same five-year period, the New World Fund beat the Lazard Fund by 2.72%, while the Fidelity Fund exceeded the Lazard Fund by 1.69% and 3.52% over the same three- and five-year periods. Moreover, the Lazard Fund's three- and five-year returns ranked in the 53rd and 75th percentile among its peer group, while the New World Fund ranked 54th and 17th and the Fidelity Fund ranked 26th and 9th, respectively.
- As of the end of the Second Quarter of 2018, the Lazard Fund's three-, five- and ten-year annualized returns trailed those of its benchmark by 2.83%, 2.96% and 0.54% (equivalent to 9.29%, 17.23% and 6.62% of cumulative underperformance), respectively. Over the same three-, five- and ten-year periods, the New World Fund beat the Lazard Fund by 4.07%, 3.97% and 1.52%, while the Fidelity Fund exceeded the Lazard Fund by 5.16% and 4.75% over the same three- and five-year periods, respectively. Moreover, the Lazard Fund's three-, five- and ten-year returns ranked in the 82nd, 85th and 51st percentile among its peer group, while the New World Fund ranked 19th, 15th and 12th and the Fidelity Fund ranked 7th, 6th and 69th, respectively.
- As of the end of the Third Quarter of 2018, the Lazard Fund's three-, five- and ten-year annualized returns trailed those of its benchmark by 2.69%, 3.17% and 1.75% (equivalent to 10.01%, 17.43% and 26.91% of cumulative underperformance), respectively. Over the same three-, five- and ten-year periods, the New World Fund beat the Lazard Fund by 1.23%, 3.68% and 1.90%, while

the Fidelity Fund exceeded the Lazard Fund by 2.66%, 4.62% and 0.91%, respectively. Moreover, the Lazard Fund's three-, five- and ten-year returns ranked in the 62nd, 89th and 75th percentile among its peer group, while the New World Fund ranked 46th, 13th and 9th and the Fidelity Fund ranked 24th, 5th and 50th, respectively.

- As of the end of the Fourth Quarter of 2018, the Lazard Fund's three-, five- and ten-year annualized returns trailed those of its benchmark by 1.54%, 2.69% and 1.14% (equivalent to 5.46%, 13.85% and 22.44% of cumulative underperformance), respectively. Over the same five- and ten-year periods, the New World Fund beat the Lazard Fund by 2.62% and 1.07%, while the Fidelity Fund exceeded the Lazard Fund by 3.36% and 1.12%, respectively. Moreover, the Lazard Fund's three-, five- and ten-year returns ranked in the 42nd, 86th and 58th percentile among its peer group, while the New World Fund ranked 64th, 20th and 13th and the Fidelity Fund ranked 47th, 8th and 29th, respectively.
- As of the end of the First Quarter of 2019, the Lazard Fund's three-, five- and ten-year annualized returns trailed those of its benchmark by 3.36%, 3.19% and 1.04% (equivalent to 12.08%, 17.58% and 22.20% of cumulative underperformance), respectively. Over the same three-, five- and ten-year periods, the New World Fund beat the Lazard Fund by 3.68%, 3.66% and 1.81%, while the Fidelity Fund exceeded the Lazard Fund by 4.48%, 4.81% and 2.03%, respectively. Moreover, the Lazard Fund's three-, five- and ten-year returns ranked in the 77th, 87th and 66th percentile among its peer group, while the New World Fund ranked 24th, 16th and 12th and the Fidelity Fund ranked 16th, 6th and 18th, respectively.
- As of the end of the Second Quarter of 2019, the Lazard Fund's three-, five- and ten-year annualized returns trailed those of its benchmark by 4.07%, 3.31% and 0.75% (equivalent to 14.53%, 17.39% and 12.51% of cumulative underperformance), respectively. Over the same three-, five- and ten-year periods, the New World Fund beat the Lazard Fund by 5.06%, 4.77% and 2.46%, while the Fidelity Fund exceeded the Lazard Fund by 5.39%, 5.68% and 1.99%, respectively. Moreover, the Lazard Fund's three-, five- and ten-year returns ranked in the 80th, 92nd and 61st percentile among its peer group, while the New World Fund ranked 15th, 9th and 4th and the Fidelity Fund ranked 12th, 4th and 14th, respectively.
- As of the end of the Third Quarter of 2019, the Lazard Fund's three-, five- and ten-year annualized returns trailed those of its benchmark by 3.70%, 2.71% and 0.81% (equivalent to 12.12%, 14.31% and 10.93% of cumulative underperformance), respectively. Over the same three-, five- and ten-year periods, the New World Fund beat the Lazard Fund by 6.84%, 5.28% and 3.18%, while the Fidelity Fund exceeded the Lazard Fund by 6.90%, 5.81% and 2.21%, respectively. Moreover, the Lazard Fund's three-, five- and ten-year returns ranked in the 89th, 85th and 64th percentile among its peer group, while the New World

Fund ranked 4th, 4th and 5th and the Fidelity Fund ranked 3rd, 1st and 14th, respectively.

- As of the end of the Fourth Quarter of 2019, the Lazard Fund's three-, five- and ten-year annualized returns trailed those of its benchmark by 4.62%, 2.45% and 0.62% (equivalent to 16.67%, 14.76% and 8.67% of cumulative underperformance), respectively. Over the same three-, five- and ten-year periods, the New World Fund beat the Lazard Fund by 7.07%, 4.36% and 3.04%, while the Fidelity Fund exceeded the Lazard Fund by 10.03%, 4.92% and 2.01%, respectively. Moreover, the Lazard Fund's three-, five- and ten-year returns ranked in the 90th, 79th and 61st percentile among its peer group, while the New World Fund ranked 11th, 7th and 4th and the Fidelity Fund ranked 2nd, 4th and 17th, respectively.
- As of the end of the First Quarter of 2020, the Lazard Fund's three-, five- and ten-year annualized returns trailed those of its benchmark by 6.54%, 3.23% and 1.84% (equivalent to 17.90%, 15.13% and 18.62% of cumulative underperformance), respectively. Over the same three-, five- and ten-year periods, the New World Fund beat the Lazard Fund by 9.61%, 5.30% and 4.30%, while the Fidelity Fund exceeded the Lazard Fund by 12.61%, 6.61% and 3.79%, respectively. Moreover, the Lazard Fund's three-, five- and ten-year returns ranked in the 91st, 85th and 82nd percentile among its peer group, while the New World Fund ranked 7th, 7th and 3rd and the Fidelity Fund ranked 2nd, 1st and 7th, respectively.
- As of the end of the Second Quarter of 2020, the Lazard Fund's three-, five- and ten-year annualized returns trailed those of its benchmark by 7.07%, 4.33% and 2.32% (equivalent to 20.68%, 22.63% and 28.92% of cumulative underperformance), respectively. Over the same three-, five- and ten-year periods, the New World Fund beat the Lazard Fund by 12.21%, 7.79% and 5.34%, while the Fidelity Fund exceeded the Lazard Fund by 13.87%, 9.40% and 5.03%, respectively. Moreover, the Lazard Fund's three-, five- and ten-year returns ranked in the 95th, 91st and 91st percentile among its peer group, while the New World Fund ranked 6th, 7th and 5th and the Fidelity Fund ranked in the 3rd percentile in all three metrics.
- As of the end of the Third Quarter of 2020, the Lazard Fund's three-, five- and ten-year annualized returns trailed those of its benchmark by 8.87%, 5.67% and 3.20% (equivalent to 25.76%, 36.54% and 35.90% of cumulative underperformance), respectively. Over the same three-, five- and ten-year periods, the New World Fund beat the Lazard Fund by 13.77%, 7.54% and 6.12%, while the Fidelity Fund exceeded the Lazard Fund by 16.34%, 10.77% and 6.05%, respectively. Moreover, the Lazard Fund's three-, five- and ten-year returns ranked in the 98th, 91st and 97th percentile among its peer group, while the New World Fund ranked 9th, 19th and 6th and the Fidelity Fund ranked 4th, 4th and 3rd, respectively.

- As of the end of the Fourth Quarter of 2020 the Lazard Fund's three-, five- and ten-year annualized returns trailed those of its benchmark by 7.69%, 4.90% and 2.69% (equivalent to 24.36%, 36.93% and 34.08% of cumulative underperformance), respectively. Over the same three-, five- and ten-year periods, the New World Fund beat the Lazard Fund by 13.32%, 5.98% and 5.85%, while the Fidelity Fund exceeded the Lazard Fund by 14.37%, 8.91% and 5.33%, respectively. Moreover, the Lazard Fund's three-, five- and ten-year returns ranked in the 94th, 88th and 93rd percentile among its peer group, while the New World Fund ranked 7th, 22nd and 8th and the Fidelity Fund ranked 5th, 6th and 7th, respectively.
- As of the end of the First Quarter of 2021, the Lazard Fund's three-, five- and ten-year annualized returns trailed those of its benchmark by 7.06%, 4.91% and 2.14% (equivalent to 22.63%, 36.03% and 27.81% of cumulative underperformance), respectively. Over the same three-, five- and ten-year periods, the New World Fund beat the Lazard Fund by 12.17%, 6.88% and 5.27%, while the Fidelity Fund exceeded the Lazard Fund by 13.87%, 9.56% and 4.80%, respectively. Moreover, the Lazard Fund's three-, five- and ten-year returns ranked in the 96th, 90th and 89th percentile among its peer group, while the New World Fund ranked 8th, 18th and 12th and the Fidelity Fund ranked 4th, 4th and 7th, respectively.
- As of the end of the Second Quarter of 2021, the Lazard Fund's three-, five- and ten-year annualized returns trailed those of its benchmark by 4.97%, 5.71% and 2.27% (equivalent to 17.77%, 42.71% and 31.01% of cumulative underperformance), respectively. Over the same three-, five- and ten-year periods, the New World Fund beat the Lazard Fund by 10.19%, 8.31% and 5.63%, while the Fidelity Fund exceeded the Lazard Fund by 11.92%, 9.75% and 5.05%, respectively. Moreover, the Lazard Fund's three-, five- and ten-year returns ranked in the 91st, 92nd and 92nd percentile among its peer group, while the New World Fund ranked 10th, 12th and 10th and the Fidelity Fund ranked 7th, 6th and 6th, respectively.
- As of the end of the Third Quarter of 2021, the Lazard Fund's three-, five- and ten-year annualized returns trailed those of its benchmark by 3.34%, 4.70% and 2.18% (equivalent to 11.54%, 31.15% and 34.89% of cumulative underperformance), respectively. Over the same three-, five- and ten-year periods, the New World Fund beat the Lazard Fund by 10.03%, 8.58% and 5.54%, while the Fidelity Fund exceeded the Lazard Fund by 12.05%, 9.67% and 5.48%, respectively. Moreover, the Lazard Fund's three-, five- and ten-year returns ranked in the 88th, 96th and 91st percentile among its peer group, while the New World Fund ranked 11th, 7th and 15th and the Fidelity Fund ranked 7th, 5th and 4th, respectively.

- As of the end of the Fourth Quarter of 2021, the Lazard Fund's three-, five- and ten-year annualized returns trailed those of its benchmark by 3.79%, 4.81% and 2.01% (equivalent to 13.63%, 32.60% and 30.88% of cumulative underperformance), respectively. Over the same three-, five- and ten-year periods, the New World Fund beat the Lazard Fund by 11.49%, 9.12% and 5.50%, while the Fidelity Fund exceeded the Lazard Fund by 14.06%, 11.37% and 5.49%, respectively. Moreover, the Lazard Fund's three-, five- and ten-year returns ranked in the 91st, 97th and 90th percentile among its peer group, while the New World Fund ranked 10th, 8th and 13th and the Fidelity Fund ranked 6th, 4th and 6th, respectively.
- As of the end of the First Quarter of 2022, the Lazard Fund's three-, five- and ten-year annualized returns trailed those of its benchmark by 1.78%, 3.82% and 1.94% (equivalent to 5.81%, 22.73% and 24.83% of cumulative underperformance), respectively. Over the same three-, five- and ten-year periods, the New World Fund beat the Lazard Fund by 6.38%, 7.32% and 5.13%, while the Fidelity Fund exceeded the Lazard Fund by 6.76%, 8.04% and 4.70%, respectively. Moreover, the Lazard Fund's three-, five- and ten-year returns ranked in the 74th, 93rd and 86th percentile among its peer group, while the New World Fund ranked 9th, 6th and 10th and the Fidelity Fund ranked 9th, 5th and 5th, respectively.
- As of the end of the Second Quarter of 2022, the Lazard Fund's three-, five- and ten-year annualized returns trailed those of its benchmark by 2.39%, 2.91% and 2.07% (equivalent to 7.13%, 15.22% and 25.67% of cumulative underperformance), respectively. Over the same three-, five- and ten-year periods, the New World Fund beat the Lazard Fund by 4.35%, 5.51% and 4.47%, while the Fidelity Fund exceeded the Lazard Fund by 5.28%, 5.92% and 4.71%, respectively. Moreover, the Lazard Fund's three-, five- and ten-year returns ranked in the 78th, 88th and 87th percentile among its peer group, while the New World Fund ranked 17th, 5th and 6th and the Fidelity Fund ranked 12th, 3rd and 4th, respectively.
- As of the end of the Third Quarter of 2022, the Lazard Fund's three-, five- and ten-year annualized returns trailed those of its benchmark by 2.20%, 2.45% and 1.89% (equivalent to 6.24%, 10.98% and 19.71% of cumulative underperformance), respectively. Over the same three-, five- and ten-year periods, the New World Fund beat the Lazard Fund by 4.63%, 6.08% and 4.84%, while the Fidelity Fund exceeded the Lazard Fund by 4.03%, 5.14% and 4.66%, respectively. Moreover, the Lazard Fund's three-, five- and ten-year returns ranked in the 76th, 86th and 89th percentile among its peer group, while the New World Fund ranked 18th, 4th and 5th and the Fidelity Fund ranked 23rd, 11th and 4th, respectively.

72. All of the above returns data was available in real time to Defendants at the moments they decided to retain the Lazard Fund. As is clearly exhibited by the weak performance shown above, the fund has never been an appropriate investment option for the Plan. When an investment option's track record is so apparently poor, as it is here, Defendants should necessarily replace the fund in the Plan with an alternative that has demonstrated the ability to consistently outperform the benchmark, or, at the very least, retain an alternative that tracks the benchmark. There were also several other prudent available actively managed funds that Defendants could have chosen for the Plan instead of the Lazard Fund, including the New World and Fidelity Funds. However, Defendants neglected to follow a prudent investment evaluation process and ignored this negative trend. Defendants' failure to replace this underachieving investment option with better performing alternatives was a severe breach of fiduciary duty.

V. ERISA'S FIDUCIARY STANDARDS

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

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

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

[and]

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

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

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

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

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

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

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

78. 29 U.S.C. § 1132(a)(2) authorizes a plan participant to bring a civil action to enforce a breaching fiduciary's liability to the plan under 29 U.S.C. § 1109. Section 1109(a) provides, in relevant part:

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

VI. CLASS ALLEGATIONS

79. This action is brought as a class action by Plaintiff on behalf of herself and the following proposed class (the "Class"):

All participants and beneficiaries in the Northwell Health 403(b) Plan (the "Plan") at any time on or after July 20, 2014 to the present (the "Class Period"), including any beneficiary of a deceased person who was a participant in the Plan at any time during the Class Period.

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

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

81. **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.

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

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

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

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

83. **Typicality.** Plaintiff, who is a member of the Class, has claims that are typical of all of the members of the Class. Plaintiff's claims and all of the Class members' claims arise out of the same uniform course of conduct by Defendants and arise under the same legal theories that are applicable as to all other members of the Class.

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

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

86. **Predominance.** Common questions of law and fact predominate over questions affecting only individual Class members, and the Court, as well as the parties, will spend the

vast majority of their time working to resolve these common issues. Indeed, virtually the only individual issues of significance will be the exact amount of damages incurred by each Class member, the calculation of which will ultimately be a ministerial function and which does not bar Class certification.

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

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

89. 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.

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

Civil Procedure. 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.

91. 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)

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

93. 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 they failed and continue to fail to discharge their duties with respect to the Plan solely in the interest of its 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.

94. 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.

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

96. 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)

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

98. Northwell is responsible for appointing, overseeing, and removing members of the Committee.

99. In light of its appointment and supervisory authority, Northwell had a fiduciary responsibility to monitor the performance of the Committee and its members.

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

101. To the extent that fiduciary monitoring responsibilities of Northwell was delegated, its monitoring duty included an obligation to ensure that any delegated tasks were being performed prudently and loyally.

102. Northwell breached its fiduciary monitoring duties by, among other things:

- (a) Failing to monitor and evaluate the performance of its appointees or have a system in place for doing so, standing idly by as the Plan suffered enormous losses as a result of the appointees' imprudent actions and omissions with respect to the Plan;
- (b) Failing to monitor its appointees' fiduciary processes, which would have alerted a prudent fiduciary to the breaches of fiduciary duties described herein, in clear violation of ERISA; and
- (c) Failing to remove appointees whose performances were inadequate in that they continued to maintain imprudent, excessively costly, and poorly performing investments within the Plan, all to the detriment of the Plan and its participants' retirement savings.

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

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

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

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

COUNT III

(In the Alternative, Liability for Participation In Breach of Fiduciary Duty)

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

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

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

PRAYER FOR RELIEF

WHEREFORE, Plaintiff, on behalf of herself, the Class and the Plan, demands 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

Plaintiff demands 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 Second Amended Complaint was served upon the Secretary of Labor and the Secretary of the Treasury by certified mail, return receipt requested.

DATED: April 9, 2024

MILLER SHAH LLP

/s/ Laurie Rubinow

James E. Miller

Laurie Rubinow

Miller Shah LLP

65 Main Street

Chester, CT 06412

Telephone: (866) 540-5505

Facsimile: (866) 300-7367

Email: jemiller@millershah.com

lrubinow@millershah.com

James C. Shah

Alec J. Berin

Miller Shah LLP

1845 Walnut Street, Suite 806

Philadelphia, PA 19103

Telephone: (866) 540-5505
Facsimile: (866) 300-7367
Email: jcshah@millershah.com
ajberin@millershah.com

*Attorneys for Plaintiff, the Plan
and the Proposed Class*