UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ROBERT HUMPRHRIES, and DENNIS MOWRY, Individually and On Behalf of All Others Similarly Situated,

Plaintiffs,

v.

MITSUBISHI CHEMICAL AMERICA, INC., MITSUBISHI CHEMICAL AMERICA EMPLOYEES' SAVINGS PLAN ADMINISTRATIVE COMMITTEE, TRAVIS BAYNE, SHINICHIRO IGUCHI, ROSE MARCHEK, PATRICIA SAUNDERS, TOM WELSH, TOM SKINTA, ATSUHIKO SATO, DEBORAH MOORER, KAREN ZORUMSKI, DANNETTE GRANT, DORIS FOSTER, BETH CASEY, DAN MICHALAK, KELLY EDWARDS, KEN SOUCY, and KITTY ANTWINE,

Defendants.

Case No. 1:23-cv-06214-JLR

SECOND AMENDED COMPLAINT

JURY TRIAL DEMANDED

Plaintiffs Robert Humphries and Dennis Mowry ("Plaintiffs"), individually and as representatives of a class of participants and beneficiaries of the Mitsubishi Chemical America Employees' Savings Plan (the "Plan"), bring this action under the Employee Retirement Income Security Act of 1974, as amended, 29 U.S.C. §§1001-1461 ("ERISA") against Plan sponsor, Mitsubishi Chemical America, Inc. ("Mitsubishi Chemical") and current and past members of the Plan's Administrative Committee ("Administrative Committee"): Travis Bayne ("Bayne"), Shinichiro Iguchi ("Iguchi"), Rose Marchek ("Marchek"), Patricia Saunders ("Saunders"), Tom Welsh ("Welsh"), Tom Skinta ("Skinta"), Atsuhiko Sato ("Sato"), Deborah Moorer ("Moorer"), Karen Zorumski ("Zorumski"), Dannette Grant ("Grant"), Doris Foster ("Foster"), Beth Casey

("Casey"), Dan Michalak ("Michalak"), Kelly Edwards ("Edwards"), Ken Soucy ("Soucy") and Kitty Antwine ("Antwine") (collectively, the "Individual Defendants", and together with Mitsubishi Chemical, "Defendants"), for breaching their fiduciary duties in the management, operation and administration of the Plan.

INTRODUCTION

1. Plaintiffs are participants in an ERISA defined contribution plan sponsored by Mitsubishi Chemical. Today, 26 U.S.C. § 401(k) and § 403(b) defined contribution plans, where employees bear the market risk and must pay the fees and expenses of the investment options, have become America's primary retirement system. Unlike defined-benefit pensions, which provide set payouts for life and where employer assumes the risks and pays the fees and expenses of the investment, 401(k) accounts rise and fall with financial markets, and therefore, the proliferation of 401(k) plans has exposed workers to, among other things, high fees from Wall Street money managers.[1] These retirement funds are significant to the welfare of the class. Plaintiffs estimates that Defendants have caused significant losses to the Plan since 2017.

2. The marketplace for services for defined contribution plans is established and competitive. Large plans, such as Mitsubishi Chemical's Plan, have the bargaining power to secure high quality, competitively priced administrative and investment management services. As ERISA fiduciaries to the Plan, Defendants are obligated to act for the *exclusive* benefit of participants and beneficiaries in ensuring that Plan expenses are reasonable. 29 U.S.C. § 1104(a)(1). These duties are the "highest known to the law," which must be performed with "an eye single to the interests of the participants and beneficiaries." *Donovan v. Bierwirth*, 680 F.2d 263, 271, 272 n. 8 (2d Cir. 1982); *Chao v. Hall Holding Co*., 285 F.3d 415, 426 (6th Cir. 2001).

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[1] Nancy Trejos, Retirement Wreck, Washington Post (Oct. 12, 2008), available at http://www.washingtonpost.com/wp-dyn/content/article/2008/10/11/AR2008101100177.html.

In discharging these duties, ERISA fiduciaries are held to the standard of financial experts in the field of investment management. *Pfeil v. State St. Bank & Trust Co*., 806 F.3d 377, 388 (6th Cir. 2015); see also *Katsaros v. Cody*, 744 F.2d 270, 275, 279 (2d Cir. 1984); *Liss v. Smith*, 991 F. Supp. 278, 296 (S.D.N.Y. 1998). The law is settled that ERISA fiduciaries have a duty to evaluate fees and expenses when selecting investments as well as a continuing duty to monitor fees and expenses of selected investments and remove imprudent ones. *Tibble v. Edison Int'l*, 135 S. Ct. 1823, 1828 - 1829 (2015); 29 U.S.C. § 1104(a)(1)(A) (fiduciary duty includes "defraying reasonable expenses of administering the Plan"); 29 C.F.R. § 2250.404a-1(b)(i) (ERISA fiduciary must give "appropriate consideration to those facts and circumstances" that "are relevant to the particular investment.")

3. In this case, the fiduciaries to the Plan failed to meet their fiduciary obligations in basic ways. The Plan offered and maintained higher cost share classes when identical lower cost class shares of the same mutual funds were available. This resulted in the participants paying additional unnecessary operating expenses with no value to the participants and resulting in a loss of compounded returns. This is one of the most common and well-known example of an imprudent investment decision.[2] An ERISA fiduciary must discharge his responsibility "with the care, skill, prudence, and diligence" that a prudent person "acting in a like capacity and familiar with such matters" would use. 29 U.S.C. § 1104(a)(1). To do this prudently, a fiduciary must have a viable methodology for selecting and monitoring mutual fund share classes. For a large

[2] The need to monitor share classes is so basic that the U.S. Security and Exchange Commission ("SEC") routinely audits SEC registered investment advisors to make sure that advisors take full advantage of all share class discounts available to their clients. *See* SEC Office of Compliance Inspections and Examinations ("OCIE"), "National Exam Program, Risk Alert," (July 13, 2016) ("OCIE Share Class Initiative"), available at https://www.sec.gov/files/ocie-risk-alert-2016-share-class-initiative.pdf ; *See also* FINRA 2016 Regulatory and Examination Priorities Letter, available at https://www.finra.org/sites/default/files/2016-regulatory-and-examination-priorities-letter.pdf.

plan of approximately $700 million in net assets, such as this Plan, a fiduciary using a viable methodology will monitor the Plan's investment options continuously and to immediately take advantage of share class discounts as they become available. Information regarding share class discounts is made available to the public as part of the online EDGAR database maintained by the SEC. Defendants however failed to monitor the share classes of mutual fund investments and to substitute less expensive share classes of mutual funds from more expensive share classes of the very same mutual fund, thus wasting the assets of the Plan participants. This could have been easily remedied only if the Defendants had a viable review process and methodology, which they neglected to keep and implement in violation of their fiduciary duties.

4. Pertinently, Plaintiffs are not merely second-guessing Defendants' investment decisions with the benefit of hindsight. The information Defendants needed, to make informed and prudent decisions, was readily available to them when the decisions were made. Defendants however failed to make prudent decisions and breached their fiduciary obligations. Plaintiffs, individually and as representatives of a putative class consisting of the Plan's participants and beneficiaries, bring this action on behalf of the Plan under 29 U.S.C. §§ 1132(a)(2) and (3) to enforce Defendants' liability under 29 U.S. C. §1109(a), to make good to the Plan all losses resulting from their breaches of fiduciary duties, and to restore to the Plan any lost profits. Plaintiffs also seek such other equitable or remedial relief for the Plan as the Court may deem appropriate.

JURISDICTION AND VENUE

5. Plaintiffs bring this action pursuant to 29 U.S.C. §1132(a), which provides that participants or beneficiaries in an employee retirement plan may pursue a civil action on behalf

of the plan to remedy breaches of fiduciary duty and other violations of ERISA for monetary and appropriate equitable relief.

6. This Court has exclusive jurisdiction over the subject matter of this action under 29 U.S.C. § 1132(e)(1) and 28 U.S.C. § 1331.

7. This District and Division are the proper venue for this action under 29 U.S.C. § 1132(e)(2) and 28 U.S.C. §1391(b) because it is the district and division in which the subject Plan is administered, where at least one of the alleged breaches took place, and where at least one defendant may be found. The registered agent for the Plan's sponsor is also found in this district.

PARTIES

Plaintiffs

8. Plaintiff Robert Humphries ("Humphries") was a participant in the Plan under 29 U.S.C. § 1002(7) during the Class Period[3] because he and his beneficiaries were eligible to receive benefits under the Plan. During the Class Period, Plaintiff Humphries was subject to administrative and recordkeeping costs alleged below. As a result, Plaintiff Humphries has been financially harmed by Defendants' unlawful conduct. This information is known to Defendants as Defendants have control and possession of all Plan participants' records. Plaintiff Humphries became aware of the alleged breaches only shortly prior to filing the initial Complaint in this action.

[3] Under ERISA, claims for breach of fiduciary duty may be brought for "(1) six years after (A) the date of the last action which constituted a part of the breach or violation, or (B) in the case of an omission the latest date on which the fiduciary could have cured the breach or violation . . . ." 29 U.S.C. § 1113. *See also Tibble v. Edison Int'l*, 135 S. Ct. 1823, 1829 (2015) ("A plaintiff may allege that a fiduciary breached the duty of prudence by failing to properly monitor investments and remove imprudent ones. In such a case, so long as the alleged breach of the continuing duty occurred within six years of suit, the claim is timely."). Accordingly, here, the Class Period begins six years before the date of the filing of the initial Complaint.

9. Plaintiff Dennis Mowry ("Mowry") was a participant in the Plan under 29 U.S.C. § 1002(7) during the Class Period because he and his beneficiaries were eligible to receive benefits under the Plan. During the Class Period, Plaintiff Mowry invested in the MFS Value Fund and Pioneer Bond Fund and was subject to excessive costs alleged below. As a result, Plaintiff Mowry has been financially harmed by Defendants' unlawful conduct. This information is known to Defendants as Defendants have control and possession of all Plan participants' records. Plaintiff Mowry became aware of the alleged breaches only shortly prior to filing the initial Complaint in this action.

The Plan

10. The Plan was established on January 1, 1994. Prior to April 1, 2017, the Plan name was the Mitsubishi Chemical Holdings America, Inc. Employees' Savings Plan. The Plan is a defined contribution plan, within the meaning of 29 U.S.C. § 1002(34), covering substantially all employees of Mitsubishi Chemical and affiliated employers that have adopted the plan, who have met the age and service requirements of the Plan. Throughout the Class period, the Plan had between 2873 and 4656 participants and between $376,728,654 and $700,368,614 in assets.

Defendants

11. Defendant Mitsubishi Chemical, a Delaware corporation, maintains its place of business at 655 Third Avenue, 15th Floor, New York, NY 10017. The Plan's annual Form 5500 Reports filed during the Class Period identify Mitsubishi Chemical as the sponsor and "Plan Administrator" of the Plan.

12. Per Form 5500 Reports filed during the Class Period, the Administrative Committee of the Plan also controls and manages the operation and administration of the Plan.

13. Defendant Bayne serves as the Chief Financial Officer of the Mitsubishi Chemical Holdings Group. He was a member of the Plan's Administrative Committee during the Class Period and participated in meetings held on August 10, 2017, and March 13, 2018. Accordingly, Defendant Bayne exercised discretionary authority and control over the administration of the Plan and the management of its assets, including the selection and monitoring of the Plan's investment options and investment advisors. Therefore, he is a fiduciary under 29 U.S.C. § 1002(21)(A)(i) and (iii).

14. Defendant Iguchi served as a member of the Plan's Administrative Committee during the Class Period and participated in meetings held on August 10, 2017, November 14, 2017, March 13, 2018, and September 11, 2018. Accordingly, Defendant Iguchi exercised discretionary authority and control over the administration of the Plan and the management of its assets, including the selection and monitoring of the Plan's investment options and investment advisors. Therefore, he is a fiduciary under 29 U.S.C. § 1002(21)(A)(i) and (iii).

15. Defendant Marchek serves as the Business Improvement Director of the Polyester Films division at Mitsubishi Chemical. She was a member of the Plan's Administrative Committee during the Class Period and participated in meetings held on November 14, 2017, March 13, 2018 and September 11, 2018. She also served as chairperson of the Administrative Committee from March 2018 onward. Upon information and belief, she resigned from this position in or around 2019 or 2020. Accordingly, Defendant Marchek exercised discretionary authority and control over the administration of the Plan and the management of its assets, including the selection and monitoring of the Plan's investment options and investment advisors. Therefore, she is a fiduciary under 29 U.S.C. § 1002(21)(A)(i) and (iii).

16. Defendant Saunders served as the Human Resources Director at Mitsubishi Chemical. She was a member of the Plan's Administrative Committee during the Class Period and participated in meetings held on August 10, 2017, November 14, 2017 and March 13, 2018. Accordingly, Defendant Saunders exercised discretionary authority and control over the administration of the Plan and the management of its assets, including the selection and monitoring of the Plan's investment options and investment advisors. Therefore, she is a fiduciary under 29 U.S.C. § 1002(21)(A)(i) and (iii).

17. Defendant Welsh serves as the Executive Director of Verbatim Americas LLC, a past affiliate of Mitsubishi Chemical. He was a member of the Plan's Administrative Committee during the Class Period and participated in meetings held on August 10, 2017, November 14, 2017 and March 13, 2018. Accordingly, Defendant Welsh exercised discretionary authority and control over the administration of the Plan and the management of its assets, including the selection and monitoring of the Plan's investment options and investment advisors. Therefore, he is a fiduciary under 29 U.S.C. § 1002(21)(A)(i) and (iii).

18. Defendant Skinta served as the Regional Director of Human Resources and Talent Management at Mitsubishi Chemical. He joined the Administrative Committee as a member in or around March 2018 and participated in meetings held on September 11, 2018, April 24, 2020 and October 28, 2020. Accordingly, Defendant Skinta exercised discretionary authority and control over the administration of the Plan and the management of its assets, including the selection and monitoring of the Plan's investment options and investment advisors. Therefore, he is a fiduciary under 29 U.S.C. § 1002(21)(A)(i) and (iii).

19. Defendant Sato served as a member of the Plan's Administrative Committee during the Class Period. He joined the Administrative Committee in or around September 2018

and participated in meetings held on September 11, 2018, April 24, 2020 and October 28, 2020. Accordingly, Defendant Sato exercised discretionary authority and control over the administration of the Plan and the management of its assets, including the selection and monitoring of the Plan's investment options and investment advisors. Therefore, he is a fiduciary under 29 U.S.C. § 1002(21)(A)(i) and (iii).

20. Defendant Moorer serves as the Vice President of Human Resources at Mitsubishi Tanaba Pharma, an affiliate of Mitsubishi Chemical that also adopted the Plan. She was a member of the Plan's Administrative Committee during the Class Period and participated in meetings held on August 10, 2017, November 14, 2017, March 13, 2018, September 11, 2018, April 24, 2020 and October 28, 2020. Accordingly, Defendant Moorer exercised discretionary authority and control over the administration of the Plan and the management of its assets, including the selection and monitoring of the Plan's investment options and investment advisors. Therefore, she is a fiduciary under 29 U.S.C. § 1002(21)(A)(i) and (iii).

21. Defendant Zorumski served as the Vice President of Administration at YUPO Corporation, an affiliate of Mitsubishi Chemical that also adopted the Plan. She was a member of the Plan's Administrative Committee during the Class Period and participated in meetings held on August 10, 2017, November 14, 2017, September 11, 2018, April 24, 2020 and October 28, 2020. Accordingly, Defendant Zorumski exercised discretionary authority and control over the administration of the Plan and the management of its assets, including the selection and monitoring of the Plan's investment options and investment advisors. Therefore, she is a fiduciary under 29 U.S.C. § 1002(21)(A)(i) and (iii).

22. Defendant Grant was employed with Noltex, LLC, an affiliate of Mitsubishi Chemical that also adopted the Plan. She was a member of the Plan's Administrative Committee

during the Class Period and participated in meetings held on April 24, 2020 and October 28, 2020. Accordingly, Defendant Grant exercised discretionary authority and control over the administration of the Plan and the management of its assets, including the selection and monitoring of the Plan's investment options and investment advisors. Therefore, she is a fiduciary under 29 U.S.C. § 1002(21)(A)(i) and (iii).

23. Defendant Foster serves as a Human Resources Director at Mitsubishi Polyester Film, an affiliate of Mitsubishi Chemical that also adopted the Plan. She was a member of the Plan's Administrative Committee during the Class Period and participated in meetings held on April 24, 2020 and October 28, 2020. Accordingly, Defendant Foster exercised discretionary authority and control over the administration of the Plan and the management of its assets, including the selection and monitoring of the Plan's investment options and investment advisors. Therefore, she is a fiduciary under 29 U.S.C. § 1002(21)(A)(i) and (iii).

24. Defendant Casey was employed with Mitsubishi Polyester Film, an affiliate of Mitsubishi Chemical that also adopted the Plan. She was a member of the Plan's Administrative Committee during the Class Period and participated in meetings held on April 24, 2020 and October 28, 2020. Accordingly, Defendant Casey exercised discretionary authority and control over the administration of the Plan and the management of its assets, including the selection and monitoring of the Plan's investment options and investment advisors. Therefore, she is a fiduciary under 29 U.S.C. § 1002(21)(A)(i) and (iii).

25. Defendant Michalak served as the Chief Financial Officer at Mitsubishi Chemical Advanced Materials, an affiliate of Mitsubishi Chemical that also adopted the Plan. He was a member of the Plan's Administrative Committee during the Class Period and participated in meetings held on March 13, 2018, September 11, 2018, April 24, 2020 and October 28, 2020.

Accordingly, Defendant Michalak exercised discretionary authority and control over the administration of the Plan and the management of its assets, including the selection and monitoring of the Plan's investment options and investment advisors. Therefore, he is a fiduciary under 29 U.S.C. § 1002(21)(A)(i) and (iii).

26. Defendant Edwards serves as the Director of Human Resources at Mitsubishi Chemical Advanced Materials, an affiliate of Mitsubishi Chemical that also adopted the Plan. She was a member of the Plan's Administrative Committee during the Class Period and participated in meetings held on March 13, 2018, April 24, 2020 and October 28, 2020. Accordingly, Defendant Edwards exercised discretionary authority and control over the administration of the Plan and the management of its assets, including the selection and monitoring of the Plan's investment options and investment advisors. Therefore, she is a fiduciary under 29 U.S.C. § 1002(21)(A)(i) and (iii).

27. Defendant Soucy was a Director of Global Strategy and Planning at the Mitsubishi Chemical Group. He was a member of the Plan's Administrative Committee during the Class Period and participated in meetings held on April 24, 2020 and October 28, 2020. Accordingly, Defendant Soucy exercised discretionary authority and control over the administration of the Plan and the management of its assets, including the selection and monitoring of the Plan's investment options and investment advisors. Therefore, he is a fiduciary under 29 U.S.C. § 1002(21)(A)(i) and (iii).

28. Defendant Antwine (formerly, Kitty McLellan) was employed at Mitsubishi Chemical and was a member of the Plan's Administrative Committee during the Class Period. She joined the Administrative Committee in or around March 2018 and participated in meetings held on March 13, 2018, September 11, 2018, April 24, 2020 and October 28, 2020.

Accordingly, Defendant Antwine exercised discretionary authority and control over the administration of the Plan and the management of its assets, including the selection and monitoring of the Plan's investment options and investment advisors. Therefore, she is a fiduciary under 29 U.S.C. § 1002(21)(A)(i) and (iii).

29. Defendants Mitsubishi Chemical, the Administrative Committee, and the Individual Defendants are fiduciaries to the Plan under 29 U.S.C. §1002(21)(A)(i) and (iii) because they have the sole authority to amend or terminate, in whole or part, the Plan, and have discretionary authority to control the operation, management and administration of the Plan, including the selection, monitoring, and removal of the Plan's investment options and their share classes.

30. Though not named as Defendants, certain service providers are fiduciaries to the Plan participants and are parties in interest in the matter. Prudential Trust Company serves as trustee of the Plan. Prudential Insurance Company of America and Prudential Retirement Insurance and Annuity Company serve as custodians to the Plan for certain investments. These entities are collectively referred to as "Prudential". Both the trustee and custodians hold the Plan's investment assets and execute investment transactions. UBS Financial Services Inc. was the Plan's financial consultant from the years 2017 until 2020, later replaced by Sageview Advisory Group, LLC in 2020. These entities are a "party-in-interest" to the Plan, whose services and compensation Defendants had a duty to monitor.

<u>DEFENDANTS' FIDUCIARY OBLIGATIONS</u>

31. ERISA imposes strict fiduciary duties of loyalty and prudence upon Defendants as Plan fiduciaries. The duties owed by an ERISA fiduciary to plan participants are the "highest

known to the law." *See Donovan v. Bierwirth*, 680 F.2d 263, 272 n.8 (2d Cir. 1982) (citing Restatement (Second) of Trusts § 2 cmt. b (1959)). 29 U.S.C. §1104(a) states, in relevant part:

> [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 like aims.

32. 29 U.S.C. § 1104(a)(1)(C) further provides that a fiduciary shall discharge his duties "by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so." Further, a fiduciary's duties include a continuing duty to monitor investments and remove imprudent ones. *Tibble v. Edison Int'l*, 135 S. Ct. 1823, 1829 (2015).

33. 29 U.S.C. §1106(a)(1)(C) and 29 U.S.C. §1108(b)(2) and common law allows a fiduciary of an employee benefit plan to enter into an agreement with a party in interest for the provision of administrative services such as recordkeeping to the Plan "if no more than reasonable compensation is paid therefor." Prudential is a "parties in interest" under 29 U.S.C. §1106(a)(1)(C) and 29 USC § 1002(14).

34. 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. The statute states, in relevant part, that:

> 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.

35. 29 U.S.C. § 1132(a)(2) and common law 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.

DOCUMENTS RELIED UPON FOR THE COMPLAINT'S ALLEGATIONS

36. Plaintiffs have relied upon limited documents provided by Defendants, including disclosures under 29 CFR § 2550.404a-5 ("404a-5"), the Plan's Annual Form 5500 Reports filed during the Class Period (which are "Open to Public Inspection" and available for download from https://www.efast.dol.gov/5500Search/), the Administrative Committee meeting minutes, other publicly available Form 5500 Reports, and mutual fund prospectuses available on SEC's EDGAR database.

FACTUAL ALLEGATIONS

37. In a defined contribution plan, participants' retirement benefits are limited to the value of their own individual accounts. Individual account value is determined solely by

employee and employer contributions plus the amount gained through investment in the options made available in the plan, less fees and expenses. *See* 29 U.S.C. § 1002(34).

Defendants Caused the Plan Participants to Pay Excessive Fees and Lose Returns by Failing to Offer, Monitor, and Investigate Available Lower Cost Mutual Share Classes as Plan Investment Options

38. A mutual fund is a company that pools money from many investors and invests the money in securities such as stocks, bonds, and short-term debt. The combined holdings of the mutual fund are known as its portfolio. Investors buy shares in mutual funds and each share represents an investor's part ownership in the fund and the income it generates. Mutual funds make a profit by charging investors operating expenses, which are expressed as a percentage of the total assets in the fund. Operating expenses include fund management fees, marketing and distribution fees, administrative expenses and other costs.

39. Shares of a single mutual fund may be offered in different "classes," corresponding to different shareholder rights and costs, such as different fee and "load" (i.e. sales) charges. Each class represents an identical interest in the mutual fund's portfolio. All share classes of mutual funds charge fees for the management of the assets of the fund. The cost may differ, but the investment product is identical - the managers, investment styles, and stocks are not merely similar, but identical. The principal difference between the classes is that the mutual fund will charge different marketing, distribution and service expenses depending on the class chosen. Generally, lower class shares are available to larger investors, such as 401(k) plans like the Plan since institutional investors make large fund share purchases, and higher-class shares are typically retail class shares which are available to a broader spectrum of investors. The Department of Labor has stated that "[i]nstitutional mutual funds typically charge lower expense ratios than do the retail funds with similar holdings and risk characteristics. One estimate is that the typical institutional fund has an expense ratio that is 50 basis points lower than comparable

retail funds." U.S. Dep't of Labor Pension & Welfare Ben. Admin., *Study of 401(k) Plan Fees and Expenses* § 2.4.1.3 (Apr. 13, 1998).

40. Defendants had access to these low-cost institutional share classes of mutual funds, as it could easily meet the minimum investment requirements. Instead of monitoring and taking advantage of volume discounts in purchasing mutual fund shares, Defendants instead offered higher cost mutual fund share classes as investment options for the Plan. Thus, the Plan fiduciaries wasted the assets of the Plan by failing to monitor the available share classes and to select the lowest share class of the funds for inclusion in the plan menu. This failure continued from the beginning of the class period until the present, in some cases. It was not until 2021 that Defendants began correcting the share-class problem, by substituting lower-cost, identical share classes of these mutual funds.

41. The following are instances, in which Defendants wasted money by failing to select the lowest-cost share class of the mutual fund as an investment option for the Plan:

42. Defendants chose MFS Value Fund as an investment option available to participants in or prior to 2017. Defendants chose to invest in share class "A" in 2017 ("MEIAX"). As per the Plan's 404a-5 disclosures, as of March 31, 2017, the Plan's chosen share class "A" had the expense ratio of 0.86%. During the same year, other shares classes such as share class "R6" had an expense ratio of 0.49% by end of the year 2017.[4] This option was available to the Defendants and easily identifiable, as it was disclosed in the MFS Value Fund's annual prospectus. Moreover, these prospectuses note that share class "R6" had no investment minimum requirements. Defendants however continued to keep its investments in share class

[4] *See* Form 497K, MFS Value Fund, Summary Prospectus (December 29, 2017), https://www.sec.gov/Archives/edgar/data/798244/000110465917075325/a17-22113_12497k.htm.

"A" in 2018, 2019 and 2020 which had a higher expense ratio between 0.84% to 0.82% during that time. In or around 2021, Defendants switched to share class R6, which then had a lower expense ratio of 0.45%, as ascertained from the Plan's 404a-5 disclosures as of October 31, 2022. This option was available to the Plan in 2017 itself. From the information available in the fund's publicly available prospectus, Defendants should have known of this option. Defendants however failed to fulfil their duties and kept their investments in share classes which had a higher cost to the Plan participants.

43. Defendants chose Prudential Jennison Mid-Cap Growth Fund as an investment option available to participants in or prior to 2017. Defendants chose to invest in share class "Z" in 2017 ("PEGZX"). As per the Plan's 404a-5 disclosures, as of March 31, 2017, the Plan's chosen share class "Z" had the expense ratio of 0.76%. During the same time, another share class "Q" had an expense ratio of 0.58% as of end of the year 2017.[5] This option was available to Defendants and easily identifiable, as it was disclosed in the annual prospectus. Moreover, these prospectuses note that share class "Q" had no investment minimum requirements for retirement plans. Defendants however kept its investments in share class "Z" in 2018, which had a higher expense ratio, causing losses to the Plan participant. In or around 2019, Defendants removed Prudential Jennison Mid-Cap Growth Fund from the Plan.

44. Defendants chose Pioneer Fundamental Growth Fund as an investment option available to participants in or prior to 2017. Defendants chose to invest in share class "Y" in 2017 ("FUNYX"). As per the Plan's 404a-5 disclosures, as of March 31, 2017, the Plan's chosen share class "Y" had the expense ratio of 0.79%. During the same time, another share class "K"

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[5] See Form 497K, Prudential Jennison Mid-Cap Growth Fund, Summary Prospectus (December 27, 2017), https://www.sec.gov/Archives/edgar/data/1022624/000006759017001480/jennisonmidcapgrowthsum497k.htm.

had an expense ratio of 0.67% as of August 1, 2017.[6] This option was available to the Defendants and easily identifiable, as it was disclosed in Pioneer Growth Fund's annual prospectus. Moreover, both classes had the same minimum investment amount. Defendants however continued to keep its investments in share class "Y" in 2018, 2019 and 2020 and kept paying a higher expense ratio of 0.77%. In or around 2021, Defendants removed this investment option from the Plan.

45. Defendants chose Goldman Sachs Small Cap Value Fund as an investment option available to participants in or prior to 2017. Defendants chose to invest in share class "I" in 2017 ("GSSIX"). As per the Plan's 404a-5 disclosures, as of March 31, 2017, the Plan's chosen share class "I" had the expense ratio of 1.01%. During the same year, another share class "R6" had an expense ratio of 0.94% as of end of the year 2017.[7] This option was available to Defendants and easily identifiable, as it was disclosed in the Goldman Sachs Small Cap Value Fund's annual prospectus. Moreover, these prospectuses note that share class "R6" had no investment minimum requirements for retirement plans. Defendants however continued to keep its investments in share class "I" in 2018, 2019 and 2020, which had a higher expense ratio of 0.97%. Defendants should have known of the lower-class option. Defendants failed to fulfil their duties and kept their investment in a share class which had a higher cost to the Plan participants. In or around 2021, Defendants removed the Goldman Sachs Small Cap Value Fund from the Plan.

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[6] See Form 497K, Pioneer Fundamental Growth Fund, Summary Prospectus (August 1, 2017), https://www.sec.gov/Archives/edgar/data/1174520/000117452017000013/fg080117summpro.htm.

[7] *See* Form 497K, Goldman Sachs Small Cap Value Fund, Summary Prospectus (December 29, 2017), https://www.sec.gov/Archives/edgar/data/822977/000119312517383208/d439223d497k.htm.

46. Defendants chose Janus Henderson Flexible Bond Fund as an investment option available to participants in or prior to 2017. Defendants chose to invest in share class "I" in 2017 ("JFLEX"). As per the Plan's 404a-5 disclosures, as of March 31, 2017, the Plan's chosen share class "I" had the expense ratio of 0.56%. During the same year, another share class "N" had an expense ratio of 0.45% as of October 2017.[8] This share class "N" had an expense ratio of 0.44% as of October 2016.[9] This option was available to Defendants in 2017 and easily identifiable, as it was disclosed in the Janus Henderson Flexible Bond's annual prospectus. Moreover, these prospectuses note that share class "N" had no investment minimum requirements for retirement plans. Defendants should have known of this option. Defendants however failed to fulfill their duties and kept their investments in a share class which had a higher cost to the Plan participants. In 2018, Defendants removed the Janus Henderson Flexible Bond Fund from the Plan.

47. Defendants chose Virtus Duff & Phelps Real Estate Securities Fund as an investment option available to participants in or prior to 2017. Defendants chose to invest in share class "I" in 2017 ("PHRIX"). As per the Plan's 404a-5 disclosures, as of March 31, 2017, the Plan's chosen share class "I" had the expense ratio of 1.13%. During the same time, another share class "R6" had an expense ratio of 0.96% as of May 8, 2017.[10] This option was available to Defendants and easily identifiable, as it was disclosed in Virtus Duff & Phelps Real Estate Securities Fund's annual prospectus. Moreover, these prospectuses note that share class "R6"

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8 *See* Form 497K, Janus Henderson Flexible Bond Fund Summary Prospectus (October 27, 2017),
https://www.sec.gov/Archives/edgar/data/277751/000119312517321492/d407849d497k.htm.

9 *See* Form 497K, Janus Henderson Flexible Bond Fund Summary Prospectus (October 28, 2016),
https://www.sec.gov/Archives/edgar/data/277751/000119312517193341/d394342d497k.htm.

10 See Form 497K, Virtus Duff & Phelps Real Estate Securities Fund, Summary Prospectus (May 8, 2017),
https://www.sec.gov/Archives/edgar/data/1005020/000157104917004632/t1701407.htm.

had no investment minimum requirements. Defendants should have known of this option. Defendants however failed to fulfill their duties and kept their investments in a share class which had a higher cost to the Plan participants. In 2018, Defendants removed the Virtus Duff & Phelps Real Estate Securities Fund from the Plan.

48. Defendants chose Pioneer Bond Fund as an investment option available to participants in or prior to 2017. Defendants chose to invest in share class "Y" in 2017 ("PICYX"). As per the Plan's 404a-5 disclosures, as of March 31, 2017, the Plan's chosen share class "Y" had the expense ratio of 0.59%. During the same time, another share class "K" had an expense ratio of 0.47% as of November 2017.[11] This option was available to Defendants and easily identifiable, as it was disclosed in Pioneer Bond Fund's annual prospectus. Moreover, both classes had the same minimum investment amount. Defendants however continued to keep its investments in share class "Y" in 2018, 2019 and 2020 and continued to pay higher expense ratios of 0.59%, 0.47% and 0.46% respectively. During this time, share class "K" had an expense ratio of 0.35% as of November 2018[12], 0.34% as of November 2019[13] and November 2020.[14] Defendants should have known of these other options. Defendants however failed to fulfil their duties and kept their investments in a share class which had a higher cost to the Plan participants.

49. Investing Plan assets in higher share classes harms the Plan's participants because it causes them to pay excess indirect fees which are not tethered to any service provided to Plan participants but rather are tied to the amounts invested by Plan participants. Because the Plan

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11 See Form 497K, Pioneer Bond Fund, Summary Prospectus (November 1, 2017), sec.gov/Archives/edgar/data/276776/000027677617000065/bfsummpro102717.htm.

12 See Form 497K, Pioneer Bond Fund, Summary Prospectus (November 1, 2018), sec.gov/Archives/edgar/data/276776/000027677618000095/bf110118summpro.htm.

13 See Form 497K, Pioneer Bond Fund, Summary Prospectus (November 1, 2019), sec.gov/Archives/edgar/data/276776/000027677619000071/bf110119summpro.htm.

14 See Form 497K, Pioneer Bond Fund, Summary Prospectus (November 1, 2020), sec.gov/Archives/edgar/data/276776/000027677620000216/bf102820summpro.htm.

could have invested in identical mutual funds with a lower share class, Defendants' actions were directly erosive to the Plan's growth. Defendants thus caused Plaintiffs and other Plan participants/ beneficiaries harm by not just forcing them to pay higher fees, but also caused lost yield and returns as a result of those higher fees on the majority of investments offered through the Plan. The erosive effect of excessive fees and the resulting lost returns compounds over time substantially lowering the corpus of participants' retirement investments.

50. In selecting share classes with a higher fee, Defendants demonstrated a lack of basic skill and prudence when selecting investments. A prudent fiduciary must have a viable methodology to monitor and select proper investment options and can easily spot the best share class options for the Plan. As stated by the SEC Office of Compliance Inspections and Examinations, a fiduciary investment advisor "has failed to uphold its fiduciary duty when it causes a client to purchase a more expensive share class of a fund when a less expensive class of that fund is available."[15]

51. The Plan offered and maintained higher cost share classes when identical lower cost class shares of the same mutual funds were available. Simply put, given the choice of two identical investments – with the same assets, investment style, and management – Defendants chose the more expensive product. Defendants thus caused Plan participants/beneficiaries harm by forcing them to pay higher fees and causing lost yield and returns they rely on for retirement income. In doing so, Defendants undermined the very purpose of the Plan to provide income security for participants/beneficiaries.

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[15] "OCIE's 2016 Share Class Initiative", National Exam Program Risk Alert, Securities and Exchange Commission, Office of Compliance Inspections and Examinations, July 13, 2016, available at https://www.sec.gov/ocie/announcement/ocie-risk-alert-2016-shareclass-initiative.pdf.

CLASS ACTION ALLEGATIONS

52. ERISA authorizes any plan participant or beneficiary to bring an action individually on behalf of the plan for appropriate relief under 29 U.S.C. 1109(a) for a plan fiduciary's breach of duty, including all losses resulting from such breach and such other equitable or remedial relief the court may deem appropriate. See 29 U.S.C. § 1132(a)(2).

53. Acting in this representative capacity, and as an alternative to numerous direct individual actions brought by participants on behalf of the Plan under 29 U.S.C. §1132(a)(2), Plaintiffs seek to certify a class action on behalf of participants and beneficiaries of the Plan. Plaintiffs seek to certify the following Class, and to be appointed as a representative ("Named Plaintiff") of the Class:

> All participants in or beneficiaries of the MITSUBISHI CHEMICAL AMERICA EMPLOYEES' SAVINGS PLAN from six years prior to the filing of the initial complaint in this matter through the date of judgment, except the Defendants.

54. This action meets the requirements of Fed. R. Civ. P. 23 and is certifiable as a class action for the following reasons:

a. The members of the Class are so numerous that joinder of all members is impracticable. The disposition of their claims in a class action will provide substantial benefits to the parties and the Court. As of December 31, 2021, the Plan had over 4656 participants with account balances.

b. Common questions of law and fact exist as to all members of the Class and predominate over any questions solely affecting individual members of the Class. Among the questions of law and fact common to the Class are:

- whether Defendants are fiduciaries of the Plan;

- whether Defendants breached their fiduciary duty of prudence with respect to the Plan;
- whether Defendants had a duty to monitor other fiduciaries of the Plan;
- whether Defendants breached their duty to monitor other fiduciaries and parties of interest to the Plan; and
- the extent of damage sustained by Class members and the appropriate measure of damages

55. Plaintiffs' claims are typical of those of the Class because their claims arise from the same event, practice and/or course of conduct as other members of the Class. Plaintiffs will adequately protect the interests of the Class and have retained counsel experienced in class action litigation in general.

56. Plaintiffs have no interests that conflict with those of the Class.

57. Defendants do not have any unique defenses against the Plaintiffs that would interfere with their representation of the Class.

58. A class action is superior to all other available methods for the fair and efficient adjudication of this controversy since joinder of all members is impracticable. Furthermore, as the damages suffered by individual Class members may be relatively small, the expense and burden of individual litigation make it impossible for members of the Class to individually redress the wrongs done to them. There will be no difficulty in the management of this action as a class action.

COUNT I

Breach of Fiduciary Duties
(Against All Defendants)

59. Plaintiffs repeat and re-allege each and every allegation contained above as if fully set forth herein.

60. Defendants failed to discharge their duties under 29 U.S.C. § 1104(a)(1)(A) and (B). They were obligated to discharge their duties to the Plan and its participants with the care, skill, prudence and diligence of a competent investment fiduciary charged with the responsibility for investing millions of dollars of retirement savings on behalf of thousands of investors.

61. Common law and ERISA's duty of prudence required Defendants to give appropriate consideration to those facts and circumstances that, given the scope of its fiduciary investment duties, it knew or should have known were relevant to the particular investments of the Plan and to act accordingly. *See* 29 C.F.R. § 2550.404a-1. The Supreme Court has concluded that this duty is "a continuing duty to monitor [plan] investments and remove imprudent ones." *Tibble*, 135 S. Ct. at 1828.

62. As described above, Defendants failed to act prudently and in the best interest of the Plan and its participants and breached its fiduciary duties in various ways. Specifically, among other failings, Defendants (i) failed to investigate the availability of lower-cost share classes of certain mutual funds; and (ii) failed to delegate its duties prudently, including failing to have a credible basis to conclude that the investment professionals responsible for carrying out its investment strategy were competent to do so successfully, and failing to appropriately monitor and supervise their performance.

63. Defendants knowingly participated in each fiduciary breach of the other Plan fiduciaries, knowing that such acts were a breach, and enabled the other Plan fiduciaries to

commit fiduciary breaches by failing to lawfully discharge their own duties. Defendants knew of the fiduciary breaches of the other Plan fiduciaries and failed to make any reasonable and timely effort under the circumstances to remedy the breaches. Accordingly, each defendant is also liable for the losses caused by the breaches of its co-fiduciaries under 29 U.S.C. § 1105(a).

64. Defendants are liable under 29 U.S.C. § 1109(a) to make good to the Plan any losses to the Plan resulting from the breaches of fiduciary duties alleged in this Count, and for such other equitable or remedial relief the Court deems appropriate. Total Plan losses will be determined at trial after complete discovery in this case and are illustrated herein based upon the limited information that has been available to Plan participants to date.

65. As a direct and proximate result of these breaches, the Plan, Plaintiffs and members of the Putative Class suffered substantial losses in the form of higher fees or lower returns on their investments than they would have otherwise experienced.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs, on behalf of the Plan and all similarly situated Plan participants and beneficiaries, respectfully request that the Court:

A. Determine that the instant action may be maintained as a class action under Rule 23 of the Federal Rules of Civil Procedure, and certifying Plaintiffs as the Class representative;

B. Find and declare that the Defendants breached their fiduciary duties as described above;

C. Find and adjudge that Defendants are liable to make good to the Plan all losses to the Plan resulting from each breach of fiduciary duty, and to otherwise restore the Plan to the position it would have occupied but for the breaches of fiduciary duty;

D. Determine the method by which Plan losses under 29 U.S.C. §1109(a) should be calculated;

E. Order Defendants to provide an accounting necessary to determine the amounts Defendants must make good the Plan under §1109(a);

F. Surcharge against Defendants and in favor of the Plan all amounts involved in any transactions which an accounting reveals were improper, excessive, and/or in violation of ERISA;

G. Award to Plaintiffs and the Class their attorney's fees and costs under 29 U.S.C. §1132(g)(1) and the common fund doctrine;

H. Order the payment of interest to the extent it is allowed by law; and

I. Grant other equitable or remedial relief as the Court deems appropriate.

DEMAND FOR TRIAL BY JURY

Plaintiffs hereby demand a trial by jury of all issues so triable by law.

Dated: June 1, 2026

Respectfully submitted,

POMERANTZ LLP

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