

**UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS**

DESMOND JONES, JANET FLEMING,)
SANDA MOODY and TIFFANI BENOIT,)
individually and on behalf of all others)
similarly situated,)

CIVIL ACTION NO.: 4:24-cv-2105

Plaintiffs,

V.

MEMORIAL HERMANN HEALTH)
SYSTEM, THE BOARD OF DIRECTORS)
OF THE MEMORIAL HERMANN)
HEALTH SYSTEM, THE MEMORIAL)
HERMANN HEALTH SYSTEM)
INVESTMENT COMMITTEE and JOHN)
DOES 1- 30.)

Defendants.

CLASS ACTION COMPLAINT

Plaintiffs, Desri Jones, Janet Fleming, Sanda Moody and Tiffani Benoit (“Plaintiffs”), by and through their attorneys, on behalf of the Memorial Hermann Health System Employees’ Retirement Savings Plan (“403(b) Plan”) and the Memorial Hermann Health System 401(k) Retirement Savings Plan and Trust (“401(k) Plan”) with both the 403(b) Plan and the 401(k) Plan referred to collectively as the “Plan” or “Plans”¹ themselves and all others similarly situated, state and allege as follows:

I. INTRODUCTION

1. This is a class action brought pursuant to §§ 409 and 502 of the Employee Retirement Income Security Act of 1974 (“ERISA”), 29 U.S.C. §§ 1109 and 1132, against the Plans’ fiduciaries, which include the Memorial Hermann Health System (“MHHS” or

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

“Company”) and the Board of Directors of Memorial Hermann Health System and its members during the Class Period (“Board”) and the Memorial Hermann Health System Investment Committee and its members during the Class Period (“Committee”).

2. To safeguard the Plans’ participants and beneficiaries, ERISA imposes strict fiduciary duties of loyalty and prudence upon employers and other plan fiduciaries. Fiduciaries must act “solely in the interest of the participants and beneficiaries,” 29 U.S.C. § 1104(a)(1)(A), with the “care, skill, prudence, and diligence” that would be expected in managing a plan of similar scope. 29 U.S.C. § 1104(a)(1)(B). These twin fiduciary duties are “the highest known to the law.” *Ma Kujanek v. Houston Poly Bag I Ltd.*, 658 F.3d 483 at 489 (5th Circuit 2011), *Martin on Behalf of Cal–Tex Protective Coatings v. Frail*, 2011 WL 13175089 at *14 (W.D. Tex. 2011), *Main v. American Airlines Inc.*, 248 F.Supp.3d 786 at 792 (N.D. Tex. 2017).

3. The Department of Labor has explicitly stated that employers are held to a “high standard of care and diligence” and must, among other duties, both “establish a prudent process for selecting investment options and service providers” and “monitor investment options and service providers once selected to see that they continue to be appropriate choices.” *See*, “*A Look at 401(k) Plan Fees*,” *infra*, at n.3; *see also Tibble v. Edison Int’l*, 135 S. Ct. 1823, 1823 (2015) (*Tibble I*) (reaffirming the ongoing fiduciary duty to monitor a plan’s investment options).

4. Under 29 U.S.C. § 1104(a)(1), a plan fiduciary must give substantial consideration to the cost of investment options and other fees. “Wasting beneficiaries’ money is imprudent. In devising and implementing strategies for the investment and management of trust assets, trustees are obligated to minimize costs.” Uniform Prudent Investor Act (the “UPIA”), § 7.

5. “The Restatement ... instructs that ‘cost-conscious management is fundamental to prudence in the investment function,’ and should be applied ‘not only in making investments but

also in monitoring and reviewing investments.” *Tibble v. Edison Int’l*, 843 F.3d 1187, 1197-98 (9th Cir. 2016) (*en banc*) (quoting Restatement (Third) of Trusts, § 90, cmt. b) (“*Tibble II*”).²

6. Additional fees of only 0.18% or 0.4% can have a large effect on a participant’s investment results over time because “[b]eneficiaries subject to higher fees ... lose not only money spent on higher fees, but also lost investment opportunity; that is, the money that the portion of their investment spent on unnecessary fees would have earned over time.” *Tibble II*, 843 F.3d at 1198 (“It is beyond dispute that the higher the fees charged to a beneficiary, the more the beneficiary’s investment shrinks.”).

7. The Supreme Court recently reiterated that interpreting “ERISA’s duty of prudence in light of the common law of trusts” a fiduciary “has a continuing duty of some kind to monitor investments and remove imprudent ones” and a plaintiff may allege that a fiduciary breached the duty of prudence by failing to properly monitor investments and remove imprudent ones. *Hughes v. Northwestern Univ.*, 142 S.Ct. 737, 741 (2022).

8. At all times during the Class Period, the Plans had at least \$1.4 billion dollars in assets under management. At the Plans’ fiscal year end in 2021, the Plans had \$2,583,504,139 billion dollars in assets under management that were/are entrusted to the care of the Plans’ fiduciaries. The December 31, 2021 Audited Financial Statement of the Memorial Hermann Health System Employees’ Retirement Savings Plan (“403(b) 2021 Auditor Report”) at 13 and the December 31, 2021 Audited Financial Statement of Memorial Hermann Health System 401(k) Retirement Savings Plan and Trust (“401(k) 2021 Auditor Report”) at 13, with both being referred to collectively as the “Auditor Reports.”

² See also U.S. Dep’t of Labor, *A Look at 401(k) Plan Fees*, (Aug. 2013), at 2, available at <https://www.dol.gov/sites/dolgov/files/ebsa/about-ebsa/our-activities/resource-center/publications/a-look-at-401k-plan-fees.pdf> (last visited February 21, 2020) (“You should be aware that your employer also has a specific obligation to consider the fees and expenses paid by your plan.”).

9. The Plans' assets under management make it a jumbo plan in the defined contribution plan marketplace, and among the largest plans in the United States. In 2018, only 82 403(b) Plans out of 18,478 in the Department of Labor Universe or 0.5% of all 403(b) Plans had more than \$1 billion dollars in assets.³ This number remained relatively constant into 2019, where, by that time, only 108 403(b) Plans out of 18,222 available or 0.6% of 403(b) Plans had more than \$1 billion in assets.⁴ As a jumbo plan, the Plans had substantial bargaining power regarding the fees and expenses that were charged against participants' investments. Defendants, however, did not exercise appropriate judgment in scrutinizing each investment option, initially and on an ongoing basis, that was offered in the Plans to ensure they were prudent.

10. The Plans are also large in terms of the number of participants. From 2018 to 2022 it had over 25,000 participants with account balances. For comparison, according to information derived from ERISApedia.com's database, a service that compiles all Form 5500s filed with the Dept. of Labor ("DOL") by retirement plans, in 2020, there were only 194 defined contribution plans (401k, 401a, and 403b) in the country with 20,000 to 29,999 participants with account balances.

11. Plaintiffs allege that during the putative Class Period, Defendants, as "fiduciaries" of the Plans, as that term is defined under ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A), breached the duties they owed to the Plans, to Plaintiffs, and to the other participants of the Plans by, *inter alia*, (1) failing to objectively and adequately review the Plans' investment portfolio, initially and on an ongoing basis, with due care to ensure that each investment option was prudent, in terms of

³ See The BrightScope/ICI Defined Contribution Plan Profile: A Close Look at ERISA 403(b) Plans, 2018 at p. 7., available at <https://www.ici.org/system/files/2022-03/22-ppr-dcplan-profile-403b.pdf>.

⁴ See The BrightScope/ICI Defined Contribution Plan Profile: A Close Look at ERISA 403(b) Plans, 2019 at p. 7., available at <https://www.ici.org/system/files/2023-04/23-ppr-dcplan-profile-403b.pdf>.

risk and performance and (2) failing to control the Plans' Recordkeeping and Administration costs ("RKA").

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

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

IV. JURISDICTION AND VENUE

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

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

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

V. PARTIES

Plaintiffs

17. Plaintiff, Desri Jones (“Jones”), resides in Lubbock, Texas. During her employment, Plaintiff Jones was subject to the excessive RKA costs of the 403(b) Plan described herein and suffered injury to her 403(b) Plan account by paying fees well above reasonable market rates for the same. In addition, she participated in the 403(b) Plan investing in the options offered by the Plan that are challenged in this lawsuit. Plaintiff Jones invested in several funds offered by the 403(b) Plan but she specifically invested in the JPMCB SmartRetirement R6 target date series which includes funds from 2025 through 2060 in five year increments based on an individual’s expected retirement date (“JPMorgan SmartRetirement R6 Series”). She specifically invested in the JPMorgan SmartRetirement 2045 R6 fund, described herein. She suffered injury to her 403(b) Plan account from the significant underperformance of this fund. In addition, Plaintiff Jones suffered injury to her 403(b) Plan account by having to pay for her share of Plan investment advisory fees, which were unreasonable, because fees paid to Strategic Advisors, Inc., Towers Watson Investment Services, and Strategic Advisors, the Plan’s investment advisors, cannot be justified given the underperforming funds in the Plan.

18. Plaintiff, Janet Fleming (“Fleming”), resides in Houston, Texas. During her employment, Plaintiff Fleming was subject to the excessive RKA costs for both the 403(b) and 401(k) Plans described herein and suffered injury to her Plan accounts by paying fees well above reasonable market rates for the same. In addition, she invested in the investment options offered by the Plans that are challenged in this lawsuit. Plaintiff Fleming invested in several funds offered by the Plans but she invested in the JPMCB SmartRetirement R6 Series, specifically the JPMorgan SmartRetirement 2025 R6 fund⁵, described herein. She suffered injury to her Plan

⁵ By August of 2020, the 401(k) Plan had changed the share class of this fund to the Collective Investment Trust (“CIT”) version, namely the JPMorgan Chase Bank SmartRetirement 2025 CF fund. This fund is materially identical to the R6 class except for cost. A CIT is a tax-exempt, pooled investment vehicle available only to qualified retirement plans and certain governmental

accounts from the significant underperformance of this fund in both Plans. In addition, Plaintiff Fleming suffered injury to her Plan accounts by having to pay for her share of investment advisory fees to the Plans' investment advisors, which were unreasonable, given the underperforming funds in the Plans.

19. Plaintiff, Sanda Moody ("Moody"), resides in Houston, Texas. During her employment, Plaintiff Moody was subject to the excessive RKA costs of the 403(b) Plan described herein and suffered injury to her 403(b) Plan account by paying fees well above reasonable market rates for the same. In addition, she participated and invested in the 403(b) Plan investing in the options offered by the Plan that are challenged in this lawsuit. Plaintiff Moody invested in several funds offered by the 403(b) Plan including the JPMCB SmartRetirement R6 Series. She specifically invested in the JPMorgan SmartRetirement R6 2035 fund. She suffered injury to her 403(b) Plan account from the significant underperformance of this fund. In addition, Plaintiff Moody suffered injury to her 403(b) Plan account by having to pay for her share of investment advisory fees to the Plans' investment advisors, which were unreasonable, given the underperforming funds in the Plans.

20. Plaintiff, Tiffani Benoit ("Benoit"), resides in Lake Arthur, Louisiana. During her employment, Plaintiff Benoit was subject to the excessive RKA costs of the 403(b) Plan described herein and suffered injury to her 403(b) Plan account by paying fees well above reasonable market rates for the same. In addition, she participated and invested in the 403(b) Plan investing in the options offered by the Plan that are challenged in this lawsuit. Plaintiff Benoit invested in one of the funds offered by the 403(b) Plan which is contained in the JPMCB SmartRetirement R6 Series, specifically the JPMorgan SmartRetirement Income fund, described

retirement plans (as defined in Internal Revenue Code Section 414(d)). Under the Acts governing the Securities Exchange Commission ("SEC"), a 403(b) plan is prohibited from holding a CIT while a 401(k) Plan may do so.

herein. She suffered injury to her 403(b) Plan account from the significant underperformance of this fund. In addition, Plaintiff Benoit suffered injury to her 403(b) Plan account by having to pay for her share of investment advisory fees to the Plans' investment advisors, which were unreasonable, given the underperforming funds in the Plans.

21. Plaintiffs have standing to bring this action on behalf of the Plans because they participated and invested in the Plans and were injured by Defendants' unlawful conduct. Further, Plaintiffs have standing because their account balances were diminished by having to pay their share of investment advisory fees charged to the Plans for evaluating the Plans' funds, whether specifically identified herein or not. Between 2018 and 2022, the 403(b) Plan paid more than \$2.3 million dollars to Strategic Advisors, Inc for plan advisory services and it also paid Towers Watson Investment Services more than \$429 thousand dollars for Investment advisory services. During the same time period, the 401(k) Plan paid Strategic Advisors more than \$98,000 dollars. These fees were unreasonable given that the Plan fiduciaries' and advisors' performance was abysmal thus making the consulting fees unjustified for the services provided. Plaintiffs are entitled to receive benefits in the amount of the difference between the value of their accounts currently, or as of the time their accounts were distributed, and what their accounts are or would have been worth, but for Defendants' breaches of fiduciary duty as described herein.

22. Plaintiffs did not have knowledge of all material facts (including, among other things, how target date funds and other funds in a retirement plan should perform as compared to their peers and benchmarks) necessary to understand that Defendants breached their fiduciary duties and engaged in other unlawful conduct in violation of ERISA until shortly before this suit was filed.

Defendants

Company Defendant

23. Memorial Hermann Health System is a named fiduciary of the Plans with a principal place of business at 929 Gessner Road, Suite 2700, Houston, Texas (“MHHS”). The December 31, 2021 Form 5500 of the Memorial Hermann Health System Employees’ Retirement Savings Plan (“403(b) 2021 5500”) at 1 and the December 31, 2021 Form 5500 of Memorial Hermann Health System 401(k) Retirement Savings Plan and Trust (“401(k) 2021 Form 5500”) at 1 with both form 5500s being referred to collectively as the “Form 5500s.” MHHS is a large health system of hospital and patient care centers located in the greater Houston area.⁶ The system employs more than 32,000 individuals, 6,700 physicians, maintains 265 care delivery sites, including 17 hospitals. *Id.*

24. Memorial Hermann, directly or acting through its Board of Directors, appointed the Committee to, among other things, ensure that the investments available to the Plans’ participants are appropriate, had no more expense than reasonable and performed well as compared to their peers. The 2021 Investment Policy Statement of Memorial Hermann Health Systems (“IPS”) at 1. As will be discussed below, the Committee fell well short of these fiduciary goals. Under ERISA, fiduciaries with the power to appoint have the concomitant fiduciary duty to monitor and supervise their appointees.

25. Accordingly, MHHS during the putative Class Period is/was a fiduciary of the Plans, within the meaning of ERISA Section 3(21)(A), 29 U.S.C. § 1002(21)(A) because it had a duty to monitor the actions of the Committee.

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

Board Defendants

⁶ <https://www.memorialhermann.org/about-us/president-ceo> last accessed on January 11, 2024.

27. The Board appointed the Committee to, among other things, ensure that the investments available to the Plans' participants are appropriate, had no more expense than reasonable and performed well as compared to their peers. IPS at 1. As will be discussed below, the Committee fell well short of these fiduciary goals. Under ERISA, fiduciaries with the power to appoint have the concomitant fiduciary duty to monitor and supervise their appointees.

28. Accordingly, each member of the Board during the putative Class Period (referred to herein as John Does 1-10) is/was a fiduciary of the Plans, within the meaning of ERISA Section 3(21)(A), 29 U.S.C. § 1002(21)(A) because each had a duty to monitor the actions of the Committee.

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

Committee Defendants

30. As discussed above, MHHS and/or the Board appointed the Committee to, among other things, ensure that the investments available to the Plans' participants are appropriate, had no more expense than reasonable and performed well as compared to their peers. IPS at 1.

31. The IPS goes on to further define the Committee's role in selecting and monitoring the investment choices and fees as needing to be "selected on the basis of ... absolute and relative performance objectives and fees." IPS at 3.

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

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

Additional John Doe Defendants

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

VI. CLASS ACTION ALLEGATIONS⁷

35. Plaintiffs bring this action as a class action pursuant to Rule 23 of the Federal Rules of Civil Procedure on behalf of themselves and the following proposed class (“Class”):⁸

All persons, except Defendants and their immediate family members, who were participants in or beneficiaries of the Plans, at any time between June 4, 2018 through the date of judgment (the “Class Period”).

⁷ Although this is a proposed class action, the allegations in this complaint are alternatively pled in derivative fashion on behalf of the Plan because class certification is not necessarily required for Plaintiffs to prosecute claims on behalf of the Plans and all participants. *See, e.g., In re: Wilmington Trust Corp.*, 2013 WL 4757843, at *3 (D. Del. Sept. 4, 2013) (granting plaintiffs’ motion to proceed derivatively on behalf of all plan participants without class certification, because of the nature of such claims). ERISA Section 502(a), 29 U.S.C. § 1132(a), authorizes pension plan participants to bring suit on behalf of a plan to recover losses to a plan.

⁸ Plaintiffs reserve the right to propose other or additional classes or subclasses in their motion for class certification or subsequent pleadings in this action.

36. The members of the Class are so numerous that joinder of all members is impractical. The 2021 Form 5500s list 32,589 Plans “participants with account balances as of the end of the plan year.” 2021 Form 5500s at 2.

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

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

- A. Whether Defendants are/were fiduciaries of the Plans;
- B. Whether Defendants breached their fiduciary duty of prudence by engaging in the conduct described herein;
- C. Whether the Company and Board Defendants failed to adequately monitor the Committee and other fiduciaries to ensure the Plans were being managed in compliance with ERISA;
- D. The proper form of equitable and injunctive relief; and
- E. The proper measure of monetary relief.

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

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

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

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

VII. THE PLANS

42. The Plans are defined contribution plans covering substantially all eligible employees of MHHS. The Summary Plan Description of the Memorial Hermann Health System 403(b) Plan (“SPD”) at 1. More specifically, the Plans are “defined contribution” or “individual account” plans within the meaning of ERISA § 3(34), 29 U.S.C. § 1002(34), in that the Plans provide for individual accounts for each participant and for benefits based solely upon the amount contributed to those accounts, and any income, expense, gains and losses, and any forfeitures of accounts of the participants which may be allocated to such participant’s account. *Id.* Consequently, retirement benefits provided by the Plans are based solely on the amounts allocated to each individual’s account. *Id.*

Eligibility

43. In general, the Plans cover all employees of MHHS on their date of hire and who are 21 years of age or older. *Id.*

Contributions

44. There are several types of contributions that can be added to a participant's account, including: an employee salary deferral contribution, an employee Roth 401(k) contribution, an employee after-tax contribution, catch-up contributions for employees aged 50 and over, rollover contributions, discretionary profit-sharing contributions and employer matching contributions based on employee pre-tax, Roth 401(k), and employee after-tax contributions. *Id.* at 1-2.

45. With regard to employee contributions, participants can elect to make annual pre-tax and Roth contributions subject to Internal Revenue Service ('IRS') limitations. *Id.* With regard to contributions made by the employer, MHHS will match contributions made by the employee "dollar-for-dollar up to a certain percentage of [their] pay per payroll period, to a maximum limit which is determined annually by the IRS." *Id.* at 2.

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

47. MHHS's employees benefit in other ways from the Plans' matching program. It is well-known that "[o]ffering retirement plans can help in employers' efforts to attract new employees and reduce turnover." *See*, <https://www.paychex.com/articles/employee-benefits/employer-matching-401k-benefits>.

48. Given the size of the Plans, MHHS likely enjoyed a significant tax and cost savings from offering a match.

Vesting

49. Participants are automatically vested in any contributions they made to their accounts themselves and any contributions made by MHHS, for employees hired after January 1, 2015, are subject to a three-year vesting schedule. SPD at 2.

The Plans' Investments

50. In theory, the Committee determines the appropriateness of the Plans' investment offerings and monitors investment performance at least yearly based primarily on the funds 3- and 5-year performance histories as against the appropriate benchmarks. IPS at 5-13. As will be discussed in more detail below, the Committee fell well short of these fiduciary goals.

51. Several funds were available to the Plans' participants for investment each year during the putative Class Period. Specifically, a participant may direct all contributions to selected investments as made available and determined by the Committee.

52. At the Plans' fiscal year end in 2021, the Plans had over \$2.5 billion dollars in assets under management that were/are entrusted to the care of the Plans' fiduciaries. 2021 Auditor Reports at 13.

Payment of the Plans' Expenses

53. During the Class Period, administrative expenses were paid by using the Plans' assets. SPD at 3.

VIII. THE TOTALITY OF CIRCUMSTANCES DEMONSTRATES THAT THE PLAN'S FIDUCIARIES FAILED TO ADMINISTER THE PLAN IN A PRUDENT MANNER

A. Overview

1. ERISA Fiduciaries Are Held to the Highest Standards Regarding Process and Methodology for Evaluating Investments

54. As described in the “Parties” section above, Defendants were fiduciaries of the Plan.

55. ERISA “imposes a ‘prudent person’ standard by which to measure fiduciaries’ investment decisions and disposition of assets.” *Fifth Third Bancorp v. Dudenhoeffer*, 134 S. Ct. 2459, 2467 (2014) (quotation omitted). In addition to a duty to select prudent investments, under ERISA, a fiduciary “has a continuing duty to monitor [plan] investments and remove imprudent ones” that exist “separate and apart from the [fiduciary’s] duty to exercise prudence in selecting investments.” *Tibble I*, 135 S. Ct. at 1828; *see also Hughes*, 142 S. Ct. at 741. As noted above, these fiduciary duties are the highest known to law. *Tatum*, 761 F.3d at 356.

56. Plaintiffs did not have and do not have actual knowledge of the specifics of Defendants’ decision-making process with respect to the Plan, including Defendants’ processes (and execution of such) for selecting, monitoring, and removing the Plan’s investments because this information is solely within the possession of Defendants prior to discovery. *See, Braden v. Wal-mart Stores, Inc.*, 588 F.3d 585, 598 (8th Cir. 2009) (“If Plaintiffs cannot state a claim without pleading facts which tend systematically to be in the sole possession of defendants, the remedial scheme of [ERISA] will fail, and the crucial rights secured by ERISA will suffer.”).

57. In fact, in an attempt to discover the details of the Plans’ mismanagement, Plaintiffs wrote to the Defendants to request, among other things, the Committee’s meeting minutes and any recordkeeping agreements. This request was made on October 18, 2022. By letter dated November 17, 2022, MHHS denied the Plaintiffs’ request for meeting minutes and recordkeeping agreements.

58. Reviewing meeting minutes, when they exist, is the bare minimum needed to peek into a fiduciary's monitoring process. But in most cases, even that is not sufficient. For, "[w]hile the absence of a deliberative process may be enough to demonstrate imprudence, the presence of a deliberative process does not ... suffice in every case to demonstrate prudence. Deliberative processes can vary in quality or can be followed in bad faith. In assessing whether a fiduciary fulfilled her duty of prudence, we ask 'whether a fiduciary employed the *appropriate* methods to investigate and determine the merits of a particular investment,' not merely whether there were any methods whatsoever." *Sacerdote et al. v. New York Univ.*, 9 F.4th 95, 111 (2d Cir. 2021) (emphasis in original).

59. For purposes of this Complaint, Plaintiffs have drawn reasonable inferences regarding these processes and methods based upon several factors.

60. As stated by the DOL: ERISA "requires plan fiduciaries, when selecting and monitoring service providers and plan investments, to act prudently and solely in the interest of the plan's participants and beneficiaries. Responsible plan fiduciaries also must ensure that arrangements with their service providers are 'reasonable' and that only 'reasonable' compensation is paid for services..." DOL 408(b)(2) Regulation Fact Sheet.

61. The duty "...to act solely in the best interest of participants has been a key tenet of ERISA since its passage." "Best Practices for Plan Fiduciaries," at 36, published by Vanguard, 2019.⁹

62. Acting in the sole interest of plan participants is all encompassing. A fiduciary must monitor all investment options in a 401(k) plan as a prudent investment professional. *See* the U.S. Department of Labor, Employee Benefits Security Administration (EBSA)'s "Meeting

⁹ Available at <https://institutional.vanguard.com/iam/pdf/FBPKBK.pdf?cbdForceDomain=false>.

Your Fiduciary Responsibilities,” at 2 (“The duty to act prudently is one of a fiduciary’s central responsibilities under ERISA. It requires expertise in a variety of areas, such as investments.”), available at <https://www.dol.gov/sites/dolgov/files/EBSA/about-ebsa/our-activities/resource-center/publications/meeting-your-fiduciary-responsibilities.pdf>.

63. A prudent investment professional, and hence a fiduciary, must regularly evaluate a fund’s performance history, the portfolio manager’s experience and tenure, changes to the fund’s investment strategy, changes to the underlying assets in the investment, total assets under management within the fund, fees, and other relevant factors.

64. With respect to investment returns, diligent investment professionals monitor the performance of their selected investments using appropriate industry-recognized “benchmarks” and prudently managed equivalents.

65. The measurement of investments against prudently managed alternatives is critical given that these alternatives represent other investments available to a plan, which may increase the likelihood that participants reach/live their preferred lifestyle in retirement.

66. The specific methodologies used to select prudent investments are primarily data driven. Such data is provided by investment research companies like Morningstar, which is the most accepted source of investment performance information, as it has the most robust information on mutual funds, CITs, and other types of investments. Indeed, Morningstar is used and trusted by virtually all financial professionals and fiduciaries.

67. Whether a plan fiduciary enlists the assistance of an investment manager, consultant, or advisor, the plan’s fiduciaries are not relieved of fiduciary liability for selecting and monitoring the plan’s investment options.

68. It is black letter law that a fiduciary’s duty to conduct an “independent investigation into the merits of a particular investment,” is the “most basic of ERISA’s

investment fiduciary duties.” *In re Unisys Savings Plan Litigation*, 74 F.3d 420, 435 (3d Circ. 1996). *Hughes*, 142 S.Ct. at 738 (noting ERISA fiduciaries are required to “conduct their own independent evaluation to determine which investments may be prudently included in the plan’s menu of options.”)

69. Lastly, to the extent plan fiduciaries have adopted an investment policy statement, those fiduciaries “must comply with the plan’s written statements of investment policy, insofar as those written statements are consistent with the provisions of ERISA.” *Lauderdale v. NFP Retirement, Inc.*, 2022 WL 17260510, at * 10 (S.D. Cal. Nov. 17, 2022). That is, the investment policy statement must be written with the sole interest of the plan participant in mind.

2. The Target Date Funds in the Plan

70. At all relevant times, Defendants maintained the authority to exercise control over the Plan’s investments, including the Plan’s Target Date Funds.

71. During the Class Period, the Plan included in its menu of investment offerings the materially underperforming JPMorgan SmartRetirement R6 Series (defined above).

72. In 2021, the Plans held more than \$1.3 billion dollars invested in the JPMorgan SmartRetirement R6 Series. 403(b) 2021 Auditor Report at 13. The chart below details how much the 403(b) Plan had invested in this target date series from 2018 to 2022:

Year	Assets in Target Date Funds ¹⁰
2018	\$691,960,531
2019	\$916,117,829
2020	\$1,027,803,418
2021	\$1,306,138,865
2022	\$1,159,940,828

¹⁰ These amounts are derived from the audited financial statement for the Memorial Hermann Health System Employees’ Retirement Savings Plan on file the U.S. Department of Labor from 2018 through 2022.

With such a large amount invested in the JPMorgan SmartRetirement R6 Series, the Plans would have been able to choose virtually any available target date series for the Plan and negotiated the lowest expense ratios for these investments by the start of the Class Period.

73. JPMorgan has offered Target Date Funds dating as far back as several years before the start of the Class Period. The Plans selected the JPMorgan SmartRetirement R6 Series which are the only target date investing options in the Plan. In other words, participants in the Plan who want to invest in a target date strategy have no choice other than the JPMorgan SmartRetirement R6 Series.

74. Defendants, in particular, the Committee, were obligated under ERISA to carefully evaluate the JPMorgan SmartRetirement R6 Series before selecting them for inclusion in the Plan. The Committee was also under a continuing obligation under ERISA to carefully monitor and scrutinize the performance of the JPMorgan SmartRetirement R6 Series on an ongoing basis thereafter.

75. Beginning in 1994, the market for target date funds exploded with numerous investment managers offering a variety of different target date funds (defined herein as mutual funds and CITs alike).

76. By 2010, multiple investment firms and banks offered target date funds with established and consistent performance histories, stable and experienced management, and discrete changes to the underlying assets and allocations.

77. Established target date investment managers include, but are not limited to, American Funds, Massachusetts Financial Services (“MFS”), TIAA-CREF and T.Rowe Price. T.Rowe has offered target date funds for more than 20 years and American Funds, TIAA-CREF and MFS for approximately 15 years and those target date funds have provided stable investment returns to 401(k) plan participants.

78. The T.Rowe Price Retirement Target Date Series, MFS Lifetime I Target Date Series, the American Funds Target Date R6 Series, the TIAA-CREFF Lifecycle Index Institutional Series are referred to herein as the “Comparator Funds.”

B. The Plan’s Fiduciaries Failed to Adequately Monitor and Remove the JPMorgan SmartRetirement R6 Series

1. The Challenged Investments Materially Underperformed Relative to Comparator Target Date Funds and Indexes

79. From at least the beginning of the Class Period, the JPMorgan JPMorgan SmartRetirement R6 Series has greatly underperformed its peers and relevant benchmarks.

80. This analysis is confirmed when looking at the performance of the 2040 Comparator Funds (to pick a representative target date year) against the benchmark index for the 2040 Target Date Category, namely the Morningstar Lifetime Moderate 2040 Index. As can be seen in the graph below, looking at each fund’s performance on a three-year average, recalculated each quarter, from the end of 2017 to the end of 2021, the JPMorgan SmartRetirement 2040 R6, represented in black, fund performs generally below the index, represented in red, while the 2040 Comparator Funds perform generally above it.

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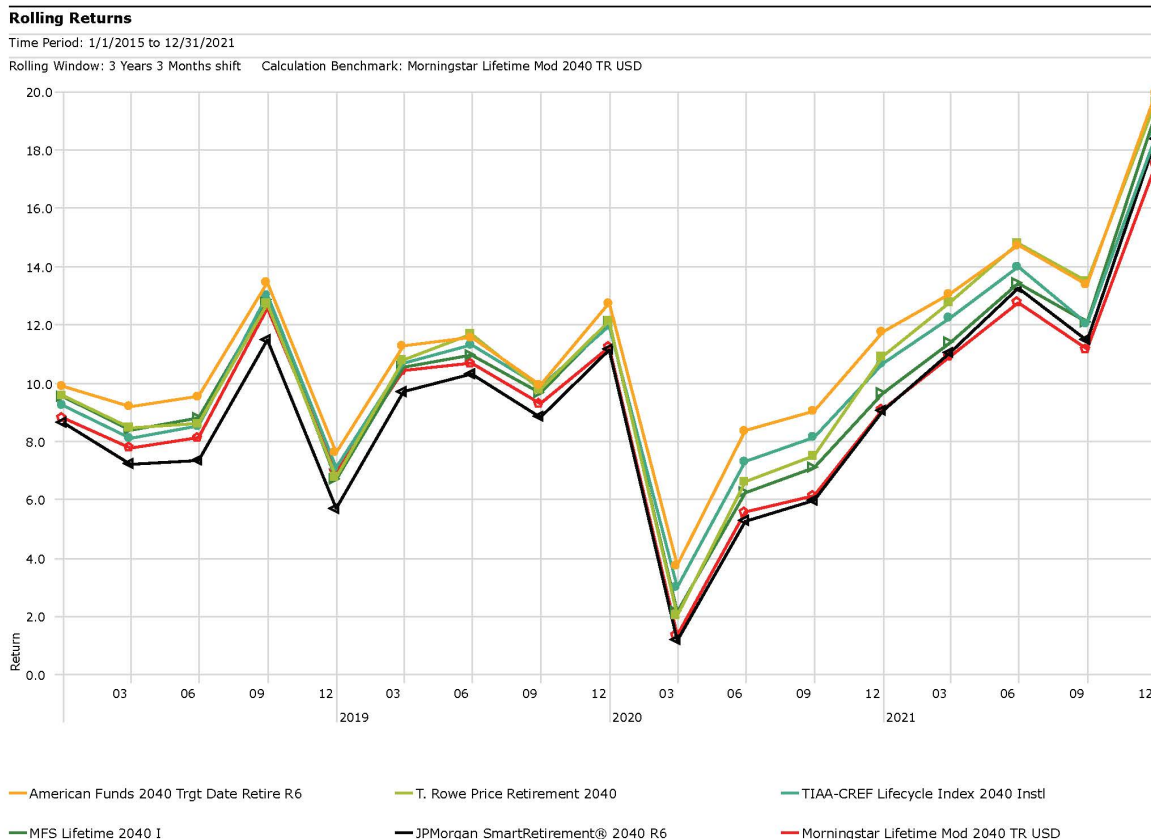
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Source: Morningstar Direct

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81. The continued inclusion of the JPMorgan SmartRetirement R6 Series was in clear violation of the Plan's own IPS. As stated in the IPS, funds must be selected and maintained in the Plan by looking at its "investment results relative to a relevant benchmark index and/or relative to an appropriately defined peer group." IPS at 3. Here, the JPMorgan SmartRetirement R6 Series clearly fell well below the appropriate index and peer group.

82. Accordingly, a prudent fiduciary would have removed the JPMorgan SmartRetirement Series from the Plans as early as the start of the Class Period and replaced with one of the many stable and better performers in the appropriate peer universe.

B. The Totality of the Circumstances Demonstrates that the Plans' Fiduciaries Failed to Appropriately Monitor the Fees Paid by the Plans in a Prudent Manner

83. “The duty to pay only reasonable fees for plan services and to act solely in the best interest of participants has been a key tenet of ERISA since its passage.” “Best Practices for Plan Fiduciaries,” at 36, published by Vanguard, 2019.¹¹

ERISA’s Fee Disclosure Rule

84. In January 2012, the Department of Labor (“DOL”) issued a final regulation under Section 408(b)(2) of ERISA which requires a “covered service provider” to provide the responsible plan fiduciary with certain disclosures concerning fees and services provided to certain of their ERISA governed plans. This regulation is commonly known as the service provider fee disclosure rule, often referred to as the “408(b)(2) Regulation.”¹²

85. The required disclosures must be furnished in advance of a plan fiduciary entering into or extending a contract or arrangement for covered services. The DOL has said that having this information will permit a plan fiduciary to make a more informed decision on whether or not to enter into or extend such contract or arrangement.

86. As stated by the DOL: ERISA “requires plan fiduciaries, when selecting and monitoring service providers and plan investments, to act prudently and solely in the interest of the plan’s participants and beneficiaries. Responsible plan fiduciaries also must ensure that arrangements with their service providers are ‘reasonable’ and that only ‘reasonable’ compensation is paid for services. Fundamental to the ability of fiduciaries to discharge these obligations is obtaining information sufficient to enable them to make informed decisions about

¹¹ Available at <https://institutional.vanguard.com/iam/pdf/FBPK.pdf?cbdForceDomain=false>.

¹² See <https://www.dol.gov/sites/dolgov/files/ebsa/about-ebsa/our-activities/resource-center/fact-sheets/final-regulation-service-provider-disclosures-under-408b2.pdf> (“DOL 408(b)(2) Regulation Fact Sheet”)

an employee benefit plan's services, the costs of such services, and the service providers." DOL 408(b)(2) Regulation Fact Sheet.

87. The 408(b)(2) disclosures in short require a service provider to disclose the services it provides and the fees it collects for such services so that sponsors can determine the reasonableness of the arrangement.

88. A plan's participants do not have access to the disclosures provided to fiduciaries under the 408(b)(2) Regulation.

89. Instead, plan administrators have a separate obligation under 29 CFR § 2550.404a-5 to disclose plan-related information, including fees for certain services to participants. Among other things, fiduciaries are required to provide plan participants "[a] description of the services to which the charges relate (*e.g.*, plan administration, including recordkeeping, legal, accounting services)." 29 CFR § 2550.404a-5(C)(2)(ii)(B).

B. Costs for Recordkeeping Services Vary Little for Plans with a Substantial Number of Participants

90. The term "recordkeeping" is a catchall term for the suite of administrative services typically provided to a defined contribution plan by the plan's "recordkeeper." Recordkeeping and administrative services fees are one and the same and the terms are used synonymously herein and referred to as RKA.

91. Nearly all recordkeepers in the marketplace offer the same range of services and can provide the services at very little cost. In fact, several of the services, such as managed account services, self-directed brokerage, Qualified Domestic Relations Order processing, and loan processing are often a profit center for recordkeepers. Numerous recordkeepers in the marketplace are capable of providing a high level of service and will vigorously compete to win a recordkeeping contract for a jumbo defined contribution plan.

92. There are essential recordkeeping services provided by all national recordkeepers for large plans with substantial bargaining power (like the Plans), which include the following services:

- A. Basic account recordkeeping (e.g. demographic, source, investment and vesting records);
- B. Multi-channel participant and plan sponsor access (e.g. phone, web);
- C. Daily participant transaction accounting (e.g., purchases, redemptions, exchanges);
- D. Payroll service (e.g. hardships, in-service withdrawals, termination distributions);
- E. Participant tax reporting services (e.g., IRS Form 1099-R);
- F. Participant confirmations, statements, and standard notices;
- G. Plan-level reporting and annual financial package (excluding IRS Form 5500);
- H. Participant education (e.g. newsletters, web articles, standard communication materials);
- I. Plan consulting (e.g., preapproved document services, operational materials);
- J. Plan consulting (e.g. preapproved document services, operational compliance support).

93. The Plan's recordkeeping agreement was requested from the Plan fiduciaries on October 18, 2022 but that request was denied on November 17, 2022. However, attached is a standard Fidelity recordkeeping agreement at Appendix "A" ("Standard Agreement"). A review of the Standard Agreement reveals that the services listed there are all for standard services for account recordkeeping, participant access to their accounts, transaction accounting, payroll services tax reporting services, account statements, financial reporting, participant education and plan consulting for operational materials and compliance. *Id.*

94. These services are offered by all recordkeepers for one price (typically at a per capita price), regardless of the services chosen or utilized by the plan. Ancillary services such as QDRO's, participant loans, and self-directed brokerage accounts are normally charged to only participants using those ancillary services.

95. The services chosen by a large plan do not affect the amount charged by recordkeepers for such basic and fungible services. Recordkeepers for large 403(b) and 401(k) plans such as Empower, Voya, Vanguard and Fidelity, among others, invest in technology infrastructure necessary to provide recordkeeping and transaction services to all clients (*e.g.*, website, call center, and some print services). These costs also do not materially change if the recordkeeper gains a new plan or loses an existing plan, and don't vary based on the amount of assets in the plan or in an individual's account.

96. The cost of providing recordkeeping services often depends on the number of participants in a plan. In other words, most of the cost of recordkeeping and administration of a 403(b) and 401(k) plan is directly linked to the number of participant accounts within the plan rather than the amount of assets in a participant's account. Accordingly, plans with large numbers of participants can take advantage of economies of scale by negotiating a lower per-participant recordkeeping fee.

97. The way it works in part, is that each participant's account incurs transactions such as contributions, distributions, asset allocation changes, and less frequently, loans and distributions and participant reports. Each participant's account balance is updated daily, reflecting the aforementioned activities as well as investment returns. In this manner a participant's account is somewhat similar to a simplified brokerage account with only a few investment positions. As a result, the cost of recordkeeping for a participant's account with a

balance of \$500,000 is the same as for a participant whose account balance is \$5,000 in the same plan.

98. When more participants in a plan are on a recordkeeping platform, the recordkeeper allocates its fixed costs over a larger participant base, which reduces the per-participant cost. As a result, the cost to add a new participant to a plan is relatively low. And as the overall number of participants increase, the average cost per participant decreases. *See*, 1998 DOL Study at 4.2.2 (“Basic per-participant administrative charges typically reflect minimum charges and sliding scales that substantially reduce per capita costs as plan size increases.”¹³ ***Because recordkeeping expenses are driven by the number of participants in a plan, the vast majority of plans are charged on a per-participant basis.***¹⁴

99. Accordingly, plans with large numbers of participants can take advantage of economies of scale by negotiating a lower per-participant recordkeeping fee.

100. Although participant servicing for 403(b) and 401(k) plans can vary slightly in the various service levels, the actual cost to a large record keeper with a very robust participant servicing system remains almost constant notwithstanding the level and sophistication of participant servicing the employer has elected for his/her plan. Accordingly, a plan sponsor or fiduciary has the leverage to negotiate favorable rates given that costs of implementation do not change for the service provider.

¹³ *See* <https://www.dol.gov/sites/dolgov/files/EBSA/researchers/analysis/retirement/study-of-401k-plan-fees-and-expenses.pdf>

¹⁴ “[T]he actual cost of administrative services is more dependent on the number of participants in the plan.” There is no “logical or practical correlation between an increase in administrative fees and an increase in plan assets.” Hewitt Associates, LLC, *Be a Responsible Fiduciary: Ask the Right Questions About 401(k) Plan Fees*, Oct. 2008; *see also* Mercer Investment Consulting, Inc., *DC Fee Management – Mitigating Fiduciary Risk and Maximizing Plan Performance* (2013), <https://www.mercer.com/content/dam/mercer/>

101. Recordkeeping and annual account administration add no monetary value to the account and act solely as a necessary expense decreasing investment returns. There is no rational economic reason for the record keeper, or account administrator to receive increased revenues simply based upon increased investment returns, and increased account balances, or employee additional retirement savings' contributions.

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

103. Here, the Plan's recordkeeper Fidelity, as of 2022, set a per participant recordkeeping fee of \$40 per participant. Accordingly, Fidelity will issue a bill to the Plans by multiplying the number of participants by \$40. This bill is paid for using the Plans' assets either through revenue sharing or by simply utilizing available Plan assets. *See*, Required Disclosure Information, MHHS 403(b) Participant Disclosure Notice dated September 12, 2022 at 5.

C. Much Information Regarding the Reasonableness of Fees for Recordkeeping Services Are in the Sole Possession of Defendants

104. As noted above, 408(b)(2) disclosures provided to plan sponsors and fiduciaries are generally not made available to plan participants. The same is true for Plaintiffs and the Plans, as Plaintiffs do not have access to any 408(b)(2) disclosures that may have been received by the Plans' fiduciaries.

105. A plan's fiduciaries must remain informed about overall trends in the marketplace regarding the fees being paid by other plans, as well as the recordkeeping rates that are available.

This will generally include conducting a Request for Proposal (“RFP”) process at reasonable intervals, and immediately if the plan’s recordkeeping expenses have grown significantly or appear high in relation to the general marketplace. More specifically, an RFP should happen at least every three to five years as a matter of course, and more frequently if the plans experience an increase in recordkeeping costs or fee benchmarking reveals the recordkeeper’s compensation to exceed levels found in other, similar plans. *George v. Kraft Foods Glob., Inc.*, 641 F.3d 786, 800 (7th Cir. 2011); *Kruger v. Novant Health, Inc.*, 131 F. Supp. 3d 470, 479 (M.D.N.C. 2015).

106. Cerulli Associates stated in early 2012 that more than half of the plan sponsors asked indicated that they “are likely to conduct a search for [a] recordkeeper within the next two years.” These RFPs were conducted even though many of the plan sponsors indicated that “they have no intention of leaving their current recordkeeper.”¹⁵

107. Generally, any RFPs, if conducted, would not be made available to plan participants. The same is true for Plaintiffs here who do not have direct access to such information and must therefore look at circumstantial evidence showing whether or not an RFP took place in this case.

108. For purposes of this Complaint, Plaintiffs have drawn reasonable inferences regarding these fiduciary processes regarding the monitoring of recordkeeping fees based upon information available to Plaintiffs, such as Rule 404a disclosures, Form 5500s filed with the DOL, market surveys, and other authority.

D. Circumstantial Facts and Evidence Plausibly Show the Plans Paid Unreasonable Fees and/or the Plans’ Fiduciaries Failed to Engage in a Prudent Process to RKA Fees

1. The Standard Fidelity Recordkeeping Services Agreement Offers Routine Services.

¹⁵ “Recordkeeper Search Activity Expected to Increase Within Next Two Years,” *Cerulli Assoc.*, January 8, 2013, <https://www.plansponsor.com/most-recordkeeping-rfps-to-benchmark-fees/>

109. As detailed above, the Recordkeeping Services Agreement was requested from MHHS, but MHHS refused to provide it. However, Fidelity's standard recordkeeping agreement (Appendix "A") reveals that the services listed there are all for standard services for account recordkeeping, participant access to their accounts, transaction accounting, payroll services tax reporting services, account statements, financial reporting, participant education and plan consulting for operational materials and compliance. *Id.* These are all routine services and there's nothing to indicate Fidelity provided any services beyond those services to the Plans.

110. During the Class Period, Fidelity was one of the top recordkeepers nationally as measured by assets being recordkept. For example, in 2020 Fidelity ranked as follows:

2020 TOP PROVIDERS (RECORDKEEPERS)¹⁶

Top 10, by Total 401(k) Assets (\$MM)

1	Fidelity Investments	\$2,037,733
2	Empower Retirement	\$493,577
3	The Vanguard Group	\$454,223
4	Alight Solutions	\$434,737
5	Principal Financial Group	\$322,976
6	Voya Financial	\$211,389
7	T. Rowe Price	\$195,224
8	Prudential Financial, Inc.	\$180,544
9	Bank of America Corporation	\$173,412
10	Charles Schwab	\$162,876

111. The recordkeepers in the top ten are all capable of providing the same quality of service and they must do so to succeed in the very highly competitive 401(k)/403(b) service provider arena.

2. There is No Indication Defendants Negotiated to Reduce the Plan's Recordkeeping Fees During the Class Period

¹⁶ See <https://www.runnymede.com/blog/401k-providers-2020-top-10-lists/>

112. As noted above, 408(b)(2) disclosures are not available to plan participants. By the same token, because 408(b)(2) disclosures are provided from a service provider to its client, the disclosures are not available to any other plan fiduciary either. Accordingly, as noted above, the best way for a plan fiduciary (as opposed to a plan participant) to determine whether a plan is paying reasonable recordkeeping fees is to conduct a RFP.

113. The fact that the Plans paid astronomical amounts for recordkeeping during the Class Period, there is little to suggest that Defendants conducted a RFP at reasonable intervals – or even an effective, prudent one - to determine whether the Plans could obtain better recordkeeping and administrative fee pricing from other service providers given that the market for recordkeeping is highly competitive, with many vendors equally capable of providing a high-level service.

114. At any point in the Class Period, the Plans' fiduciaries could have opted to conduct a RFP to any recordkeeper including any of the above top ten recordkeepers who were peers of Fidelity and capable of providing lower recordkeeping fees. Had Defendants sought an appropriate market rate through an RFP, it's likely either the recordkeeper would have been changed at some point or Fidelity would have agreed to pay its own admitted reasonable rate of \$14-\$21 per participant or less (discussed below) throughout the Class Period.

115. Apart from failing to reduce the Plan's recordkeeping fees through a RFP, the evidence also indicates the Plan's fiduciaries failed to leverage the Plan's massive size to negotiate lower recordkeeping fees.

116. From information obtained through the Plaintiffs' request for Plan documents, the Plaintiffs were supplied with a fee disclosure for the Plan. The fee disclosure reveals that Fidelity charged a per participant RKA rate, as of 2022, of \$40. As discussed below, this rate

was nearly double the reasonable RKA costs for a plan the size of this Plan during the same time period.

117. These rates exceeded, by far, the reasonable rate for a plan the size of the Plan. But importantly, even as the number of Plan participants increased and the Plan's services stayed the same, there was no decrease in the Plan's recordkeeping fees.

3. The Plan's Recordkeeping Fees were/are Unreasonable When Benchmarked Against Other Similarly Situated Plans and Within the Context that Plan Recordkeeping Fees Should Decline as Plan Size Increases

118. At all times during the Class Period a per participant fee of at least \$40 was unreasonable. As noted above, a DOL study concluded that "[b]asic per-participant administrative charges typically reflect minimum charges and sliding scales that substantially reduce per capita costs as plan size increases." Accordingly, the larger the plan, the lower the recordkeeping fee should be.

119. To put things into perspective, when comparing retirement plan data, most publications utilize tranches. For example, the leading publication that collects 403(b) data is BrightScope/ICI. *See* fn. 4. It categorizes plans in the following tranches:

120. *See* The BrightScope/ICI Defined Contribution Plan Profile: A Close Look at

EXHIBIT I.4

Audited ERISA 403(b) Plans and the Universe of ERISA 403(b) Plans by Plan Assets

Distribution of 403(b) plans, participants, and assets by plan assets; 2019

Plan assets	BrightScope audited 403(b) filings			Department of Labor 403(b) universe		
	Plans	Participants Thousands	Assets Billions of dollars	Plans	Participants Thousands	Assets Billions of dollars
Less than \$1M	227	48.1	\$0.1	7,193	209.3	\$2.6
\$1M to \$10M	2,583	705.2	12.3	7,304	987.9	26.1
>\$10M to \$50M	2,069	860.1	48.2	2,329	907.1	52.4
>\$50M to \$100M	518	433.9	36.5	536	450.8	37.7
>\$100M to \$250M	432	754.9	67.4	440	781.4	68.7
>\$250M to \$500M	191	751.8	67.7	196	785.6	69.2
>\$500M to \$1B	111	759.5	77.9	115	801.4	81.1
More than \$1B	108	2,092.0	262.5	109	2,121.6	264.0
All plans	6,239	6,405.6	572.6	18,222	7,045.1	601.8

Note: Audited 403(b) filings generally include plans with 100 participants or more. Assets are fair market value at the year-end of the plan and include loans.

Source: BrightScope Defined Contribution Plan Database

Plans, 2019 at Ex. 1.2, p. 7., available at <https://www.ici.org/system/files/2023-04/23-ppr-dcplan-profile-403b.pdf>. Accordingly, the billion-dollar asset mark is significant as all plans over a billion dollars are considered in a category of their own.

121. The comparisons below demonstrate the unreasonably high Plan fees when looking at the fees of the Plans' peers:

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Plan Name	Plan Year	Assets > \$1 billion	Participants	Cost per participant¹⁷
Deseret 401(k) Plan	2023	\$4,664,327,790	37,570	\$20 ¹⁸
Thermo Fisher Scientific Inc. 401(k) Retirement Plan	2022	\$6,601,217,000	55,419	\$13
General Dynamics Corporation 401(k) Plan 6.0	2022	\$9,629,063,464	59,991	\$25 ¹⁹
Philips North America 401(k) Plan	2022	\$5,170,841,621	30,811	\$23 ²⁰
Hermann Memorial	2022	\$1,674,000,000	30,691	\$40

122. The above chart demonstrates that for plans with more than a billion dollars and 30,000 participants, the Plan had one of the highest recordkeeping fees. As noted above, as of the end of 2020 there were only 194 defined contribution plans with 20,000 to 29,000 participants. The Plan's \$40 per participant fee is nearly twice the average fee of \$20.25 per participant for the four plans listed above. This vast discrepancy between the Plan's recordkeeping fees existed during the Class Period. The below chart illustrates the point:

Plan Name	Plan Year	Assets > \$1b	Participants	Cost per participant
Publicis Benefits Connection 401(k) Plan	2021	Yes	48,148	\$27
Beaumont Health 403(b) Plan	2021	Yes	33,484	\$28 ²¹
Chevron Employee Savings Investment Plan	2020	Yes	33,484	\$26 ²²
TeamHealth 401(k) Plan	2020	Yes	17,237	\$25 ²³

¹⁷ Unless otherwise noted, the participant recordkeeping fees are derived from the various plans' Form 5500 filings.

¹⁸ See the Deseret 401(k) Plan, Summary Plan Description dated February 25, 2023 at pg. 3 attached hereto as Appendix "B." Assets reported are from 2022.

¹⁹ See, the 2022 404(a) Fee Disclosure for the General Dynamics Corporation 401(k) Plan 6.0 at pg. B5 attached hereto as Appendix "C."

²⁰ See the publicly available Audited Financial Statement of the Phillips North America 401(k) Plan.

²¹ See, the 2021 404(a) Fee Disclosure for the Beaumont Health 403(b) Plan at pg. 5 attached hereto as Appendix "D."

²² See the 2020 Summary Plan Description for the Chevron Employees Savings Investment Plan attached hereto as Appendix "E."

Thermo Fisher Scientific Inc. 401(k) Retirement Plan	2019	Yes	42,339	\$10
Deseret 401(k) Plan	2018	Yes	34,938	\$20 ²⁴
Hermann Memorial	2022	Yes	30,691	\$40

123. Dating back to 2018, the Plans' recordkeeping fees remained among the highest for billion dollar plans while consistently having some of the largest numbers of Plan participants, an aspect of the Plan that should have commanded much lower fees. As a point of emphasis, in 2020, there were only 194 defined contribution plans (401k, 401a, and 403b) in the country with 20,000 to 29,999 participants with account balances. (*see supra* ¶ 10) meaning the Plan fiduciaries had tremendous bargaining power.

4. The Plan's Recordkeeping Fees Are Unreasonable When Compared to the Lower Recordkeeping Fees for Similar Services Performed by Fidelity for Similarly Situated Plans and Plans with Less Bargaining Power than the Plan

124. The final factor indicating the Plan overpaid for recordkeeping fees during the Class Period is based on the fact that Fidelity charges, and has charged, lower recordkeeping fees to other plans, much smaller in size to the Plan in terms of the number of participants (and thus plans with less bargaining power than the Plan), for the same routine recordkeeping services it offered to the Plan.

125. In a recent lawsuit where Fidelity's own multi-billion dollar plan with at least 58,000 participants like the Plan was sued, the "parties [] stipulated that if Fidelity were a third party negotiating this fee structure at arms-length, the value of services would range from \$14-\$21 per person per year over the class period, and that the recordkeeping services provided by

²³ See, the 2020 404(a) Fee Disclosure for the Team Health 401(k) Plan at pg. 14 attached hereto as Appendix "F."

²⁴ See the Deseret 401(k) Plan, Summary Plan Description dated March 27, 2018 at pg. 22 attached hereto as Appendix "G."

Fidelity to this Plan are not more valuable than those received by other plans of over \$1,000,000,000 in assets where Fidelity is the recordkeeper.” *Moitoso et al. v. FMR, et al.*, 451 F.Supp.3d 189, 214 (D.Mass. 2020).

126. Fidelity itself defines the relevant marketplace as plans with over a billion dollars in assets confirming the meaningfulness of the billion-dollar asset marker as used herein.

127. Fidelity stipulated as follows:

“The value of the recordkeeping services that Fidelity provided to the Plan in 2014 was \$21 per participant; the value of the recordkeeping services that Fidelity provided to the Plan in 2015 and 2016 was \$17 per participant, per year; and the value of the recordkeeping services that ***Fidelity has provided to the Plan since January 1, 2017 is \$14 per participant, per year.*** Had the Plan been a third-party plan that negotiated a fixed fee for recordkeeping services at arm’s length with Fidelity, it could have obtained recordkeeping services for these amounts during these periods. ***The Plan did not receive any broader or more valuable recordkeeping services from Fidelity than the services received by any other Fidelity-recordkept plan with at least \$1 billion in assets during the Class Period (November 18, 2014 to the present).***”

Moitoso, No. 1:18-cv-12122-WGY, ECF 138-67, ¶ 2 (emphasis added).

128. The significance of the Fidelity stipulation is that the Plan’s demographics matches favorably with the Fidelity plan’s demographics. The Plan had almost double the number of participants that the Fidelity plan had (meaning the Plan should have commanded lower fees) and was also a billion- dollar plan like the Fidelity plan.

129. Given the trend of diminishing recordkeeping fees over the last few years (and as borne out by the diminishing fees described in the Fidelity stipulation and the other plans cited in this complaint), the value of the recordkeeping services provided to the Plan by Fidelity would likely be less than \$14 per participant at present.

130. Looking at several other retirement plans recordkept by Fidelity during the span of the Class Period further demonstrates that plans ranging from around half a billion dollars to over a billion dollars in assets under management, and having over 10,000 plan participants (the

last tranche in the 2019 BrightScope ICI study), were able to obtain recordkeeping fees from Fidelity that were below the fees of the Plan even though the Plan had a greater bargaining advantage with its immense size than all the other plans and should have been able to command much lower recordkeeping fees:

Plans Recordkept by Fidelity					
Plan Name	Plan Year	Assets > \$1b	Assets > \$.4 b	Participants	Cost per participant²⁵
Publicis Benefits Connection 401K Plan	2021	Yes		48,148	\$27
Chevron Employee Savings Investment Plan	2020	Yes		33,484	\$26
Publicis Benefits Connection 401K Plan	2019	Yes		48,353	\$21
Optumcare Management, LLC 401(k) Retirement Savings Plan	2019		\$843,224,007	10,072	\$22
Pacific Architects and Engineers, LLC 401(k) Savings Plan	2019		\$435,391,716	14,698	\$23
Tesla, Inc. 401(k) Plan	2019		\$633,256,831	36,431	\$26
The Dow Chemical Company Employees' Savings Plan	2019	Yes		37,868	\$25
Danaher Corporation & Subsidiaries Savings Plan	2018	Yes		35,757	\$28.00
Publicis Benefits Connection 401K Plan	2018	Yes		42,316	\$28.00
Hermann Memorial	2022	Yes		30,691	\$40

131. The Plan should have been able to obtain per participant recordkeeping fees less than half of what it paid, and as low as \$17 (\$17 being the number Fidelity stipulated to as reasonable) per participant from Fidelity based on its immense size and the routine nature of the recordkeeping services performed by Fidelity. As noted above, Fidelity largely offers the same

²⁵ Unless otherwise noted, these fees are taken from the Form 5500.

services to its 401(k) clients. Any services beyond the routine are billed on top of the core charges. This fee range is consistent with the average recordkeeping fees paid by similar plans in the country as demonstrated in the allegations above.

FIRST CLAIM FOR RELIEF
Breaches of Fiduciary Duty of Prudence
(Asserted against the Committee)

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

133. At all relevant times, the Committee and its members during the Class Period (“Prudence Defendants”) were fiduciaries of the Plans within the meaning of ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A), in that they exercised discretionary authority or control over the administration and/or management of the Plans or disposition of the Plans’ assets.

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

135. The Prudence Defendants breached these fiduciary duties in multiple respects as discussed throughout this Complaint such as failing to select prudent investment options or failing to replace investment options when they became imprudent.

136. The failure to engage in an appropriate and prudent process resulted in saddling the Plan and its participants with imprudent investment options that cost the Plans’ participants potential retirement benefits.

137. As a direct and proximate result of the breaches of fiduciary duties alleged herein, the Plans suffered millions of dollars of losses due to investment return damages. Had Defendants complied with their fiduciary obligations, the Plan would not have suffered these losses, and the Plans' participants would have had more money available to them for their retirement.

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

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

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

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

141. MHHS and the Board Defendants (the "Monitoring Defendants") had the authority to appoint and remove members of the Committee, and the duty to monitor the Prudence Defendants and were aware that the Prudence Defendants had critical responsibilities as fiduciaries of the Plans.

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

143. The Monitoring Defendants also had a duty to ensure that the Prudence Defendants possessed the needed qualifications and experience to carry out their duties; had adequate financial resources and information; maintained adequate records of the information on which they based their decisions and analysis with respect to the Plan's investments; and reported regularly to the Monitoring Defendants.

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

- (a) Failing to monitor and evaluate the performance of the Prudence Defendants or have a system in place for doing so, standing idly by as the Plan suffered significant losses as a result of the Prudence Defendants' imprudent actions and omissions;
- (b) failing to monitor the processes by which the Plans' investments were evaluated; and
- (c) failing to remove Committee members whose performance was inadequate in that they continued to maintain imprudent and poorly performing investments within the Plans all to the detriment of the Plans and Plans' participants' retirement savings.

145. As a consequence of the foregoing breaches of the duty to monitor, the Plans suffered millions of dollars of losses. Had the Monitoring Defendants complied with their

fiduciary obligations, the Plans would not have suffered these losses, and the Plans' participants would have had more money available to them for their retirement.

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

PRAYER FOR RELIEF

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

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

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

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

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

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

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

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

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

I. An award of pre-judgment interest;

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

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

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

Dated: June 4, 2024

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