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7

8 **UNITED STATES DISTRICT COURT**
9 **NORTHERN DISTRICT OF CALIFORNIA**
10

11 TIM DAVIS, GREGOR MIGUEL, and
12 AMANDA BREDLOW, individually and
on behalf of all others similarly situated,

13 Plaintiffs,
14

15 v.

16 SALESFORCE.COM, INC., BOARD OF
DIRECTORS OF SALESFORCE.COM,
17 INC., MARC BENIOFF, THE
INVESTMENT ADVISORY
COMMITTEE, JOSEPH ALLANSON,
18 STAN DUNLAP, and JOACHIM
WETTERMARK,
19

20 Defendants.
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CIVIL ACTION NO.:

CLASS ACTION COMPLAINT

JURY TRIAL DEMANDED

1 Plaintiffs Tim Davis, Gregor Miguel, and Amanda Bredlow (“Plaintiffs”), by
 2 and through their attorneys, on behalf of the Salesforce 401(k) Plan (the “Plan”),¹
 3 themselves and all others similarly situated, state and allege as follows:

4 I. INTRODUCTION

5 1. This is a class action brought pursuant to §§ 409 and 502 of the
 6 Employee Retirement Income Security Act of 1974 (“ERISA”), 29 U.S.C. §§ 1109
 7 and 1132, against the Plan’s fiduciaries, which include Salesforce.com, Inc.
 8 (“Salesforce” or the “Company”), the Board of Directors of Salesforce (“Board”) and
 9 its members during the Class Period, and the Investment Advisory Committee
 10 (“Committee”) and its members during the Class Period for breaches of their
 11 fiduciary duties.

12 2. Defined contribution retirement plans, like the Plan, confer tax benefits
 13 on participating employees to incentivize saving for retirement. As of the end of
 14 2015, Americans had approximately \$6.7 trillion in assets invested in defined
 15 contribution plans. *See* INVESTMENT COMPANY INSTITUTE, *Retirement Assets Total*
 16 *\$24.0 Trillion in Fourth Quarter 2015* (Mar. 24, 2016), available at
 17 https://www.ici.org/research/stats/retirement/ret_15_q4; PLAN SPONSOR, *2015*
 18 *Recordkeeping Survey* (June 2015), available at [http://www.plansponsor.com/2015-](http://www.plansponsor.com/2015-Recordkeeping-Survey/)
 19 *Recordkeeping-Survey/*.

20 3. In a defined contribution plan, participants’ benefits “are limited to the
 21 value of their own investment accounts, which is determined by the market
 22 performance of employee and employer contributions, less expenses.” *Tibble v.*
 23 *Edison Int’l*, 135 S. Ct. 1823, 1826 (2015). Thus, the employer has no incentive to
 24 keep costs low or to closely monitor the Plan to ensure every investment remains

25
 26
 27 ¹ The Plan is a legal entity that can sue and be sued. ERISA § 502(d)(1), 29 U.S.C. § 1132(d)(1).
 28 However, in a breach of fiduciary duty action such as this, the Plan is not a party. Rather, pursuant
 to ERISA § 409, and the law interpreting it, the relief requested in this action is for the benefit of
 the Plan and its participants.

1 prudent, because all risks related to high fees and poorly-performing investments are
2 borne by the participants.

3 4. To safeguard Plan participants and beneficiaries, ERISA imposes strict
4 fiduciary duties of loyalty and prudence upon employers and other plan fiduciaries.
5 29 U.S.C. § 1104(a)(1). These twin fiduciary duties are “the highest known to the
6 law.” *Tibble v. Edison Int’l*, 843 F.3d 1187, 1197 (9th Cir. Dec. 30, 2016) (*en banc*).
7 Fiduciaries must act “solely in the interest of the participants and beneficiaries,” 29
8 U.S.C. § 1104(a)(1)(A), with the “care, skill, prudence, and diligence” that would be
9 expected in managing a plan of similar scope. 29 U.S.C. § 1104(a)(1)(B).

10 5. The Plan had over a billion dollars in assets under management in 2016,
11 \$1.8 billion in assets as of the end of 2017, and over \$2 billion in assets at the end of
12 2018 that were/are entrusted to the care of the Plan’s fiduciaries. The Plan’s assets
13 under management qualifies it as a large plan in the defined contribution plan
14 marketplace, and among the largest plans in the United States. As a large plan, the
15 Plan had substantial bargaining power regarding the fees and expenses that were
16 charged against participants’ investments. Defendants, however, did not try to reduce
17 the Plan’s expenses or exercise appropriate judgment to scrutinize each investment
18 option that was offered in the Plan to ensure it was prudent.

19 6. Plaintiffs allege that during the putative Class Period (March 11, 2014
20 through the date of judgment) Defendants, as “fiduciaries” of the Plan, as that term is
21 defined under ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A), breached the duties they
22 owed to the Plan, to Plaintiffs, and to the other participants of the Plan by, *inter alia*,
23 (1) failing to objectively and adequately review the Plan’s investment portfolio with
24 due care to ensure that each investment option was prudent, in terms of cost; and (2)
25 maintaining certain funds in the Plan despite the availability of identical or similar
26 investment options with lower costs and/or better performance histories.

27 7. To make matters worse, Defendants failed to utilize the lowest cost share
28 class for many of the mutual funds within the Plan, and failed to consider collective

1 trusts, commingled accounts, or separate accounts as alternatives to the mutual funds
2 in the Plan, despite their lower fees.

3 8. It appears that in 2019, *five years* into the Class Period, wholesale
4 changes were made to the Plan wherein certain Plan investment options, some of
5 which are the subject of this lawsuit, were converted to lower class shares.

6 9. These changes were far too little and too late as the damages suffered by
7 Plan participants to that point had already been baked in. There is no reason to not
8 have implemented these changes by the start of the Class Period when the majority of
9 lower-class shares were available. Moreover, these changes may not have cured the
10 Company's fiduciary breaches because the circumstances under which changes were
11 made have not been disclosed to Plaintiffs.

12 10. Defendants' mismanagement of the Plan, to the detriment of participants
13 and beneficiaries, constitutes a breach of the fiduciary duties of prudence and loyalty,
14 in violation of 29 U.S.C. § 1104. Their actions were contrary to actions of a
15 reasonable fiduciary and cost the Plan and its participants millions of dollars.

16 11. Based on this conduct, Plaintiffs assert claims against Defendants for
17 breach of the fiduciary duties of loyalty and prudence (Count One) and failure to
18 monitor fiduciaries (Count Two).

19 II. JURISDICTION AND VENUE

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

24 13. This Court has personal jurisdiction over Defendants because they
25 transact business in this District, reside in this District, and/or have significant
26 contacts with this District, and because ERISA provides for nationwide service of
27 process.
28

14. 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.

III. PARTIES

Plaintiffs

15. Plaintiff Tim Davis (“Davis”) resides in Tillamook, Oregon. During his employment, Plaintiff Davis participated in the Plan investing in the options offered by the Plan and which are the subject of this lawsuit.

16. Plaintiff Gregor Miguel (“Miguel”) resides in Oakland, California. During his employment, Plaintiff Miguel participated in the Plan investing in the options offered by the Plan and which are the subject of this lawsuit.

17. Plaintiff Amanda Bredlow (“Bredlow”) resides in Kirkland, Washington. During her employment, Plaintiff Bredlow participated in the Plan investing in the options offered by the Plan and which are the subject of this lawsuit.

18. Each Plaintiff has standing to bring this action on behalf of the Plan because each of them participated in the Plan and were injured by Defendants’ unlawful conduct. 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.

19. Plaintiffs did not have knowledge of all material facts (including, among other things, the investment alternatives that are comparable to the investments offered within the Plan, comparisons of the costs and investment performance of Plan investments versus available alternatives within similarly-sized plans, total cost comparisons to similarly-sized plans, information regarding other available share

1 classes, and information regarding the availability and pricing of separate accounts
 2 and collective trusts) necessary to understand that Defendants breached their
 3 fiduciary duties and engaged in other unlawful conduct in violation of ERISA until
 4 shortly before this suit was filed. Further, Plaintiffs did not have and do not have
 5 actual knowledge of the specifics of Defendants' decision-making process with
 6 respect to the Plan, including Defendants' processes (and execution of such) for
 7 selecting, monitoring, and removing Plan investments, because this information is
 8 solely within the possession of Defendants prior to discovery. Having never
 9 managed a large 401(k) plan such as the Plan, Plaintiffs lacked actual knowledge of
 10 reasonable fee levels and prudent alternatives available to such plans. Plaintiffs did
 11 not and could not review the Committee meeting minutes (to the extent they exist) or
 12 other evidence of Defendants' fiduciary decision making, or the lack thereof.² For
 13 purposes of this Complaint, Plaintiffs have drawn reasonable inferences regarding
 14 these processes based upon (among other things) the facts set forth herein.

15 **Defendants**

16 **Company Defendant**

17 20. Salesforce is the Plan sponsor with a principal place of business in San
 18 Francisco, California. *See* 2018 Form 5500 at 1. Salesforce describes itself as “a
 19 customer relationship management solution that brings companies and customers
 20 together. It’s one integrated CRM platform that gives all your departments —
 21 including marketing, sales, commerce, and service — a single, shared view of every
 22 customer.”³

23
 24
 25 ² *See Braden v. Wal-mart Stores, Inc.*, 588 F.3d 585, 598 (8th Cir. 2009) (“If Plaintiffs cannot state
 26 a claim without pleading facts which tend systematically to be in the sole possession of defendants,
 27 the remedial scheme of [ERISA] will fail, and the crucial rights secured by ERISA will suffer.”) Indeed,
 28 several weeks prior to filing the instant lawsuit, Plaintiffs requested pursuant to ERISA §104(b)(4) that the Plan administrator produce several Plan governing documents, including any meeting minutes of the relevant Plan investment committee(s). Their request for meeting minutes was denied for the asserted reason that the request went beyond the scope of Section 104(b)(4).

³ *See* <https://www.salesforce.com/products/what-is-salesforce/>

28. The members of the Board of Directors for Salesforce during the Class Period are collectively referred to herein as the “Board Defendants.”

Committee Defendants

29. The Committee’s role with the Plan is to “supervise, monitor and evaluate the investment of Plan assets.” Investment Policy at 4. Among other things, the Committee is charged with the following responsibilities:

- Identifying investment options or funds which it deems appropriate and prudent to make available to Plan participants;
- Selecting qualified investment funds;
- Selecting a qualified Trustee and Recordkeeper, as required;
- Reviewing the investment results of the funds;
- Reviewing that the costs (direct and indirect) of the Plan’s service providers including but not limited to investment funds, trustee, recordkeeper, auditors, attorney, and investment advisers are reasonable and disclosed to the extent required under ERISA Section 408(b)(2).
- Taking appropriate action if objectives are not being met or if policy and guidelines are not being followed.

Id. at 5.

30. Further, “[f]rom time to time, the Committee at its discretion, may add investment options/categories to the current core options.” *Id.* at 7.

31. Additionally, the Committee had monitoring responsibility for the brokerage window. “If permitted by the Committee, participants may direct the investment of their Plan account through an individual brokerage window under the Plan.” *Id.* at 7. Further, “[t]he individual brokerage window will be reviewed periodically as determined by the Committee based on criteria determined by the Committee.” *Id.*

32. Lastly, the Investment Policy gave the Committee great latitude in selecting investment fund types. “The Committee will select investment options that

are liquid, diversified and cost efficient.” *Id.* at 8. Specifically, the “Committee may select registered mutual funds, collective investment trusts or separately managed accounts for the Plan investments.” *Id.*

33. During the Class Period the following Salesforce employees served as members of the Committee:

- Joseph Allanson (“Allanson”) – Executive VP, Chief Accounting Officer
- Stan Dunlap (“Dunlap”) – Senior VP Global Rewards
- Joachim Wettermark (“Wettermark”) - SVP, Treasurer

34. The Committee and each of its members, including Allanson, Dunlap, and Wettermark, were fiduciaries of the Plan 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 Plan assets.

Non-Defendant Fiduciaries

Bridgebay Financial, Inc.

35. Bridgebay Financial, Inc. (“Bridgebay”) was the investment consultant hired to “support[] the Committee through the provision of independent, third party research and analysis. The Investment Consultant produces quarterly reports that integrate the [Investment Policy] with ongoing performance monitoring of the investment options.” Investment Policy at 6.

36. Although Bridgebay is a relevant party and likely to have information relevant to this action, it is not named as a defendant given that the Committee remains responsible for the overall selection and monitoring of all investment options. Plaintiffs reserve the right to name Bridgebay as a defendant in the future if deemed necessary.

IV. THE PLAN

37. “The Plan is a multiple employer defined contribution plan that was established in 2000 by [Salesforce] to provide benefits to eligible employees.”

1 Financial Statements and Supplemental Schedules (attached to 2018 Form 5500)
2 (“Financial Statements”) at 7. With regard to the two participating companies in the
3 Plan, “Salesforce.com, Foundation” contributes 2.7% to the Plan while Salesforce
4 contributes 97.3%. *See* Attachment to 2018 Form 5500, Multiple-Employer Plan
5 Information.

6 38. “The purpose of the plan is to enable eligible Employees to save for
7 retirement.” SPD at 1.

8 39. The Plan is a “defined contribution” or “individual account” plan within
9 the meaning of ERISA § 3(34), 29 U.S.C. § 1002(34), in that the Plan provides for
10 individual accounts for each participant and for benefits based solely upon the
11 amount contributed to those accounts, and any income, expense, gains and losses, and
12 any forfeitures of accounts of the participants which may be allocated to such
13 participant’s account. Consequently, retirement benefits provided by the Plan are
14 based solely on the amounts allocated to each individual’s account.

15 ***Eligibility***

16 40. In general, all employees are eligible to participate in the Plan. SPD at 4.

17 ***Contributions***

18 41. There are several types of contributions that can be added to a
19 participant’s account, including: an employee salary deferral contribution, employer
20 paid bonuses, an employee after-tax contribution, catch-up contributions for
21 employees aged 50 and over, rollover contributions, and employer matching
22 contributions. SPD at 6. Additionally, Salesforce “may make discretionary
23 nonelective contributions in an amount to be determined by the Board of Directors
24 for each Plan Year.” *Id.*

25 42. With regard to employee contributions, the percentage a participant
26 defers “is subject to an annual limit of the lesser of 50.00% of eligible compensation
27 or \$19,000 (in 2019).” *Id.* at 5.

1 depending on years of service (between less than 1 and 5 years of service. *Id.* at 9.
 2 Those with less than a year of service have zero percent vested while those with 5
 3 years of service have 100% vested. *Id.*

4 *The Plan's Investments*

5 49. Several funds were available to Plan participants for investment each
 6 year during the putative Class Period. As of December 31, 2018, the Plan held
 7 twenty-seven investment options which were all mutual funds. Plan participants also
 8 had access to additional investment options through a brokerage link. Financial
 9 Statements at 13.

10 50. The Plan's assets under management for all funds as of December 31,
 11 2018 was \$2,018,134,000 and \$1,800,084,000 as of December 31, 2017. Financial
 12 Statements at 5.

13 **V. CLASS ACTION ALLEGATIONS**

14 51. Plaintiffs bring this action as a class action pursuant to Rule 23 of the
 15 Federal Rules of Civil Procedure on behalf of themselves and the following proposed
 16 class ("Class"):⁴

17 All persons, except Defendants and their immediate
 18 family members, who were participants in or beneficiaries
 19 of the Plan, at any time between March 11, 2014 to the date
 20 of judgment (the "Class Period").⁵

21
 22 52. The members of the Class are so numerous that joinder of all members is
 23 impractical. The 2018 Form 5500 filed with the Dept. of Labor lists 25,849 Plan
 24 "participants with account balances as of the end of the plan year." *Id.* at p. 2.

25
 26
 27 ⁴ Plaintiffs reserve the right to propose other or additional classes or subclasses in their motion for
 class certification or subsequent pleadings in this action.

28 ⁵ Plaintiffs reserve their right to seek modification of the close of the Class Period in the event that
 further investigation/discovery reveals a more appropriate end period.

1 53. Plaintiffs' claims are typical of the claims of the members of the Class.
 2 Like other Class members, Plaintiffs participated in the Plan and have suffered
 3 injuries as a result of Defendants' mismanagement of the Plan. Defendants treated
 4 Plaintiffs consistently with other Class members, and managed the Plan as a single
 5 entity. Plaintiffs' claims and the claims of all Class members arise out of the same
 6 conduct, policies, and practices of Defendants as alleged herein, and all members of
 7 the Class have been similarly affected by Defendants' wrongful conduct.

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

- 11 A. Whether Defendants are fiduciaries of the Plan;
- 12 B. Whether Defendants breached their fiduciary duties of loyalty and
 13 prudence by engaging in the conduct described herein;
- 14 C. Whether the Board Defendants failed to adequately monitor the
 15 Committee and other fiduciaries to ensure the Plan was being
 16 managed in compliance with ERISA;
- 17 D. The proper form of equitable and injunctive relief; and
- 18 E. The proper measure of monetary relief.

19 55. Plaintiffs will fairly and adequately represent the Class, and have
 20 retained counsel experienced and competent in the prosecution of ERISA class action
 21 litigation. Plaintiffs have no interests antagonistic to those of other members of the
 22 Class. Plaintiffs are committed to the vigorous prosecution of this action, and
 23 anticipate no difficulty in the management of this litigation as a class action.

24 56. This action may be properly certified under Rule 23(b)(1). Class action
 25 status in this action is warranted under Rule 23(b)(1)(A) because prosecution of
 26 separate actions by the members of the Class would create a risk of establishing
 27 incompatible standards of conduct for Defendants. Class action status is also
 28 warranted under Rule 23(b)(1)(B) because prosecution of separate actions by the

1 members of the Class would create a risk of adjudications with respect to individual
 2 members of the Class that, as a practical matter, would be dispositive of the interests
 3 of other members not parties to this action, or that would substantially impair or
 4 impede their ability to protect their interests.

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

9 VI. DEFENDANTS' FIDUCIARY STATUS AND 10 OVERVIEW OF FIDUCIARY DUTIES

11 58. ERISA requires every plan to provide for one or more named fiduciaries
 12 who will have "authority to control and manage the operation and administration of
 13 the plan." ERISA § 402(a)(1), 29 U.S.C. § 1102(a)(1).

14 59. ERISA treats as fiduciaries not only persons explicitly named as
 15 fiduciaries under § 402(a)(1), 29 U.S.C. § 1102(a)(1), but also any other persons who
 16 in fact perform fiduciary functions. Thus, a person is a fiduciary to the extent "(i) he
 17 exercises any discretionary authority or discretionary control respecting management
 18 of such plan or exercise any authority or control respecting management or
 19 disposition of its assets, (ii) he renders investment advice for a fee or other
 20 compensation, direct or indirect, with respect to any moneys or other property of such
 21 plan, or has any authority or responsibility to do so, or (iii) he has any discretionary
 22 authority or discretionary responsibility in the administration of such plan." ERISA §
 23 3(21)(A)(i), 29 U.S.C. § 1002(21)(A)(i).

24 60. As described in the Parties section above, Defendants were fiduciaries of
 25 the Plan because:

- 26 (a) they were so named; and/or
- 27 (b) they exercised authority or control respecting management or
- 28 disposition of the Plan's assets; and/or

(c) they exercised discretionary authority or discretionary control respecting management of the Plan; and/or

(d) they had discretionary authority or discretionary responsibility in the administration of the Plan.

61. As fiduciaries, Defendants are/were required by ERISA § 404(a)(1), 29 U.S.C. § 1104(a)(1), to manage and administer the Plan, and the Plan's investments, solely in the interest of the Plan's participants and beneficiaries and with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims. These twin duties are referred to as the duties of loyalty and prudence, and are "the highest known to the law." *Tibble*, 843 at 1197.

62. The duty of loyalty requires fiduciaries to act with an "eye single" to the interests of plan participants. *Pegram v. Herdrich*, 530 U.S. 211, 235 (2000). "Perhaps the most fundamental duty of a [fiduciary] is that he [or she] must display . . . complete loyalty to the interests of the beneficiary and must exclude all selfish interest and all consideration of the interests of third persons." *Pegram*, 530 U.S. at 224 (quotation marks and citations omitted). Thus, "in deciding whether and to what extent to invest in a particular investment, a fiduciary must ordinarily consider *only* factors relating to the interests of plan participants and beneficiaries A decision to make an investment may not be influenced by [other] factors unless the investment, when judged *solely* on the basis of its economic value to the plan, would be equal or superior to alternative investments available to the plan." *Dep't of Labor ERISA Adv. Op. 88-16A*, 1988 WL 222716, at *3 (Dec. 19, 1988) (emphasis added).

63. In effect, the duty of loyalty includes a mandate that the fiduciary display complete loyalty to the beneficiaries, and set aside the consideration of third persons.

64. ERISA also “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 exists “separate and apart from the [fiduciary’s] duty to exercise prudence in selecting investments.” *Tibble v. Edison Int’l*, 135 S. Ct. 1823, 1828 (2015). “[A] fiduciary cannot free himself from his duty to act as a prudent man simply by arguing that other funds . . . could theoretically, in combination, create a prudent portfolio.” *In re Amer. Int’l Grp., Inc. ERISA Litig. II*, No. 08-cv-5722, 2011 WL 1226459, at *4 (S.D.N.Y. Mar. 31, 2011) (quoting *DiFelice v. U.S. Airways, Inc.*, 497 F.3d 410, 418 n.3, 423-24 (4th Cir. 2007)).

65. In addition, ERISA § 405(a), 29 U.S.C. § 1105(a) (entitled “Liability for breach by co-fiduciary”) further provides that:

[I]n 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: (A) if he participates knowingly in, or knowingly undertakes to conceal, an act or omission of such other fiduciary, knowing such an act or omission is a breach; (B) if, by his failure to comply with section 404(a)(1), 29 U.S.C. § 1104(a)(1), in the administration of his specific responsibilities which give rise to his status as a fiduciary, he has enabled such other fiduciary to commit a breach; or (C) if he has knowledge of a breach by such other fiduciary, unless he makes reasonable efforts under the circumstances to remedy the breach.

66. During the Class Period, Defendants did not act in the best interests of the Plan participants. Investment fund options chosen for a plan should not favor the fund provider over the plan's participants. Yet, here, to the detriment of the Plan and their participants and beneficiaries, the Plan's fiduciaries included and retained in the Plan many mutual fund investments that were more expensive than necessary and otherwise were not justified on the basis of their economic value to the Plan.

67. Based on reasonable inferences from the facts set forth in this Complaint, during the Class Period Defendants failed to have a proper system of review in place to ensure that participants in the Plan were being charged appropriate and reasonable fees for the Plan's investment options. Additionally, Defendants failed to leverage the size of the Plan to negotiate for lower expense ratios for certain investment options maintained and/or added to the Plan during the Class Period.

68. As discussed below, Defendants breached fiduciary duties to the Plan and its participants and beneficiaries, and are liable for their breaches and the breaches of their co-fiduciaries under 29 U.S.C. § 1104(a)(1) and 1105(a).

VII. SPECIFIC ALLEGATIONS

A. Improper Management of an Employee Retirement Plan Can Cost the Plan's Participants Millions in Savings

69. Under 29 U.S.C. § 1104(a)(1), a plan fiduciary must provide diversified investment options for a defined-contribution plan while also giving substantial consideration to the cost of those options. "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.

70. "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. Dec. 30, 2016) (*en banc*) (quoting

1 Restatement (Third) of Trust § 90, cmt. b). *See also* U.S. Dep’t of Labor, *A Look at*
 2 *401(k) Plan Fees*, (Aug. 2013), at 2, available at
 3 [https://www.dol.gov/sites/dolgov/files/ebsa/about-ebsa/our-activities/resource-](https://www.dol.gov/sites/dolgov/files/ebsa/about-ebsa/our-activities/resource-center/publications/a-look-at-401k-plan-fees.pdf)
 4 [center/publications/a-look-at-401k-plan-fees.pdf](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)
 5 (“You should be aware that your employer also has a specific obligation to consider
 6 the fees and expenses paid by your plan.”). As the Ninth Circuit described, additional
 7 fees of only 0.18% or 0.4% can have a large effect on a participant’s investment
 8 results over time because “[b]eneficiaries subject to higher fees ... lose not only
 9 money spent on higher fees, but also lost investment opportunity; that is, the money
 10 that the portion of their investment spent on unnecessary fees would have earned over
 11 time.” *Tibble*, 843 F.3d at 1198 (“It is beyond dispute that the higher the fees
 12 charged to a beneficiary, the more the beneficiary’s investment shrinks.”).

13 71. Most participants in 401(k) plans expect that their 401(k) accounts will
 14 be their principal source of income after retirement. Although at all times 401(k)
 15 accounts are fully funded, that does not prevent plan participants from losing money
 16 on poor investment choices of plan sponsors and fiduciaries, whether due to poor
 17 performance, high fees, or both.

18 72. In fact, the Department of Labor has explicitly stated that employers are
 19 held to a “high standard of care and diligence” and must both “establish a prudent
 20 process for selecting investment options and service providers” and “monitor
 21 investment options and service providers once selected to see that they continue to be
 22 appropriate choices,” among other duties. *See “A Look at 401(k) Plan Fees,” supra*.

23 73. The duty to evaluate and monitor fees and investment costs includes fees
 24 paid directly by plan participants to investment providers, usually in the form of an
 25 expense ratio or a percentage of assets under management within a particular
 26 investment. *See* Investment Company Institute (“ICI”), *The Economics of Providing*
 27 *401(k) Plans: Services, Fees, and Expenses*, (July 2016), at 4. “Any costs not paid by
 28

1 the employer, which may include administrative, investment, legal, and compliance
2 costs, effectively are paid by plan participants.” *Id.* at 5.

3 74. The fiduciary task of evaluating investments and investigating
4 comparable alternatives in the marketplace is made much simpler by the advent of
5 independent research from companies like Morningstar, which sorts mutual funds of
6 all kinds into categories “based on the underlying securities in each portfolio...We
7 place funds in a given category based on their portfolio statistics and compositions
8 over the past three years.” *See*
9 http://www.morningstar.com/InvGlossary/morningstar_category.aspx.⁶

10 75. On average, there are lower expense ratios for 401(k) participants than
11 those for other investors. *See The Economics of Providing 401(k) Plans*, at 11.
12 ERISA-mandated monitoring of investments leads prudent and impartial plan
13 sponsors to continually evaluate performance and fees, resulting in great competition
14 among mutual funds in the marketplace. Furthermore, the large average account
15 balances of 401(k) plans, especially the largest ones as measured by assets managed,
16 lead to economies of scale and special pricing within mutual funds. *See id.* at 10.

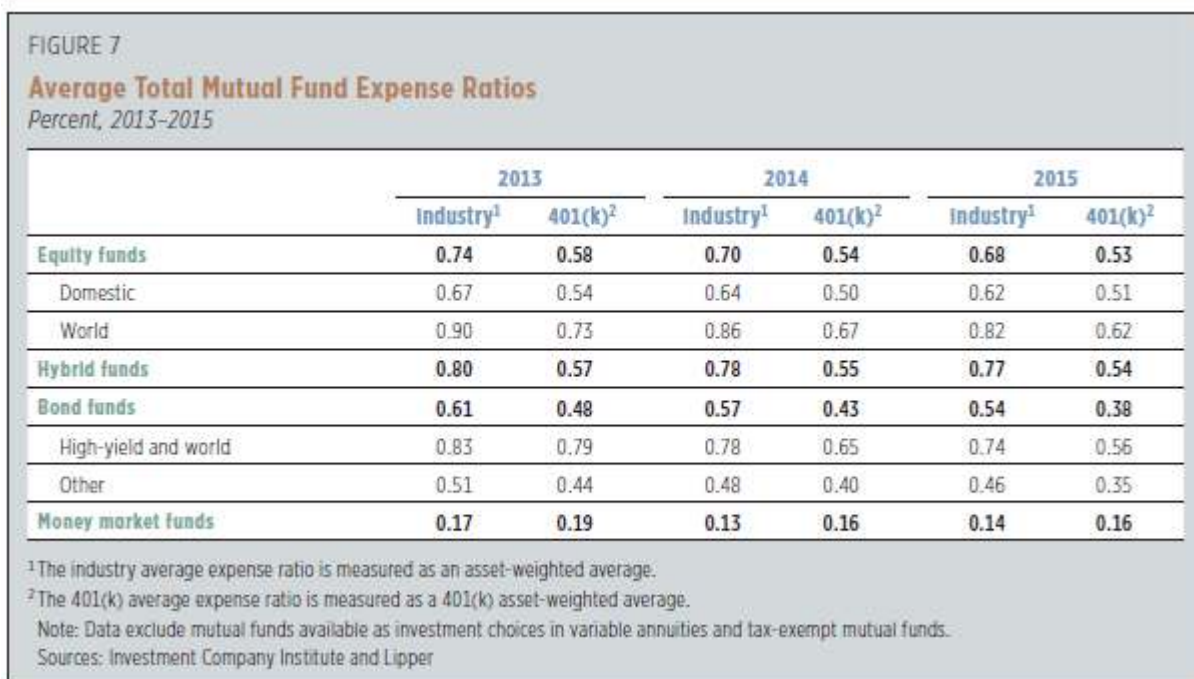
17 76. This has led to falling mutual fund expense ratios for 401(k) plan
18 participants since 2000. In fact, these expense ratios fell 31 percent from 2000 to
19 2015 for equity funds, 25 percent for hybrid funds, and 38 percent for bond funds.
20 *See id.* at 1.

21 77. The most recent comprehensive average mutual fund expense data for
22 plans of different sizes is from 2012, and industry analysts have recognized a marked
23 trend toward lower fees in 401(k)s over the past four years. *See* Anne Tergesen,
24

25 ⁶ As described by Morningstar, these categories “were introduced in 1996 to help investors make
26 meaningful comparisons between mutual funds. Morningstar found that the investment objective
27 listed in a fund’s prospectus often did not adequately explain how the fund actually invested...[we]
28 solved this problem by breaking portfolios into peer groups based on their holdings. The categories
help investors identify the top performing funds, assess potential risk, and build well-diversified
portfolios.” *See The Morningstar Category Classifications* (June 30, 2016), at 7. These categories
are assigned to mutual funds, variable annuities, and separate accounts. *Id.*

1 *401(k) Fees, Already Low, Are Heading Lower*, WALL STREET JOURNAL (May 15,
2 2016), available at [http://www.wsj.com/articles/401-k-fees-already-low-are-heading-](http://www.wsj.com/articles/401-k-fees-already-low-are-heading-lower-1463304601)
3 [lower-1463304601](http://www.wsj.com/articles/401-k-fees-already-low-are-heading-lower-1463304601) (noting precipitous drop in overall 401(k) fees from 2012 to
4 2014).

5 78. The following figure published by the ICI best illustrates that 401(k)
6 plans on average pay far lower fees than regular industry investors, even as expense
7 ratios for all investors continued to drop for the past several years.⁷



19 *Id.* at 12.

20

21 79. Prudent and impartial plan sponsors thus should be monitoring both the
22 performance and cost of the investments selected for their 401(k) plans, as well as
23 investigating alternatives in the marketplace to ensure that well-performing, low cost
24 investment options are being made available to plan participants.

25

26 ⁷ This chart does not account for the strategy of a mutual fund, which may be to mirror an index, a
27 so-called passive management strategy, or may attempt to “beat the market” with more aggressive
28 investment strategies via active management. Active management funds tend to have significantly
higher expense ratios compared to passively managed funds because they require a higher degree of
research and monitoring than funds which merely attempt to replicate a particular segment of the
market.

1 **1. Passively Managed Funds Cost Less Than Actively Managed**
 2 **Funds**

3 80. ERISA is derived from trust law. *Tibble*, 135 S. Ct. at 1828.
 4 Accordingly, the Supreme Court has stated that where ERISA is silent, courts should
 5 seek guidance from trust law. *Varity Corp v. Howe*, 516 U.S. 489, 496-97 (1996).
 6 One such area is the selection of appropriate funds for a plan. Trust law states it
 7 depends on “the type of trustee and the nature of the breach involved, the availability
 8 of relevant data, and other facts and circumstances of the case.” Restatement (Third)
 9 of Trusts § 100 cmt. b(1). To determine whether a fiduciary has selected appropriate
 10 funds for the trust, appropriate comparators may include “return rates of one or more
 11 suitable common trust funds, or suitable index mutual funds or market indexes (with
 12 such adjustments as may be appropriate).” *Id.*

13 81. In this action, each investment option within the Plan charged certain
 14 fees, to be paid by deductions from the pool of assets under management. For
 15 passively managed funds, which are designed to mimic a market index such as
 16 Standard & Poor’s 500, securities were purchased to match the mix of companies
 17 within the index. Because they are simply a mirror of an index, these funds offer
 18 both diversity of investment and comparatively low fees.

19 82. By contrast, actively managed funds, which have a mix of securities
 20 selected in the belief they will beat the market, have higher fees, to account for the
 21 work of the investment managers of such funds and their associates.

22 83. While higher-cost mutual funds may outperform a less-expensive option,
 23 such as a passively-managed index fund, over the short term, they rarely do so over a
 24 longer term. *See Jonnelle Marte, Do Any Mutual Funds Ever Beat the Market?*
 25 *Hardly*, The Washington Post, available at
 26 [https://www.washingtonpost.com/news/get-there/wp/2015/03/17/do-any-mutual-](https://www.washingtonpost.com/news/get-there/wp/2015/03/17/do-any-mutual-funds-ever-beat-the-market-hardly/)
 27 [funds-ever-beat-the-market-hardly/](https://www.washingtonpost.com/news/get-there/wp/2015/03/17/do-any-mutual-funds-ever-beat-the-market-hardly/) (citing a study by S&P Dow Jones Indices which
 28 looked at 2,862 actively managed mutual funds, focused on the top quartile in

1 performance and found most did not replicate performance from year to year); *see*
 2 *also Index funds trounce actively managed funds: Study*, available at
 3 [http://www.cnbc.com/2015/06/26/index-funds-trounce-actively-managed-funds-](http://www.cnbc.com/2015/06/26/index-funds-trounce-actively-managed-funds-study.html)
 4 [study.html](http://www.cnbc.com/2015/06/26/index-funds-trounce-actively-managed-funds-study.html) (“long-term data suggests that actively managed funds “lagged their
 5 passive counterparts across nearly all asset classes, especially over the 10-year period
 6 from 2004 to 2014.”)

7 84. Indeed, investments with high fees on average perform worse than less
 8 expensive investments, even on a pre-fee basis. Javier Gil-Bazo & Pablo Ruiz-Verdu,
 9 *When Cheaper is Better: Fee Determination in the Market for Equity Mutual Funds*,
 10 67 J. Econ. Behav. & Org. 871, 873 (2009) (hereinafter “*When Cheaper is Better*”);
 11 *see also* Jill E. Fisch, *Rethinking the Regulation of Securities Intermediaries*, 158 U.
 12 Pa. L. Rev. 1961, 1967-75 (2010) (summarizing numerous studies showing that “the
 13 most consistent predictor of a fund’s return to investors is the fund’s expense ratio”).

14 **2. Institutional Share Classes Cost Less Than Investor Share** 15 **Classes**

16 85. Many mutual funds offer multiple classes of shares in a single mutual
 17 fund that are targeted at different investors. Generally, more expensive share classes
 18 are targeted at smaller investors with less bargaining power, while lower cost shares
 19 are targeted at institutional investors with more assets, generally \$1 million or more,
 20 and therefore greater bargaining power. There is no difference between share classes
 21 other than cost—the funds hold identical investments and have the same manager.

22 86. Large defined contribution plans such as the Plan have sufficient assets
 23 to qualify for the lowest cost share class available. Even when a plan does not yet
 24 meet the investment minimum to qualify for the cheapest available share class, it is
 25 well-known among institutional investors that mutual fund companies will typically
 26 waive those investment minimums for a large plan adding the fund in question to the
 27 plan as a designated investment alternative. Simply put, a fiduciary to a large defined
 28 contribution plan such as the Plan can use its asset size and negotiating power to

1 invest in the cheapest share class available. For this reason, prudent retirement plan
2 fiduciaries will search for and select the lowest-priced share class available.

3 87. One recent article written by the head of a fiduciary consulting firm
4 described the failure to investigate the availability of and subsequently utilize the
5 lowest-cost share class as an “egregious fiduciary breach[]” that is responsible for
6 “[w]asting plan assets” in a manner that is “clearly imprudent.” Blaine Aikin (exec.
7 chairman of fi360 Inc.), *Recent Class-Action Surge Ups the Ante for 401(k) Advice*,
8 INVESTMENTNEWS (Jan. 21, 2016), available at
9 [http://www.investmentnews.com/article/20160121/BLOG09/160129985/recent-class-](http://www.investmentnews.com/article/20160121/BLOG09/160129985/recent-class-action-surge-ups-the-ante-for-401-k-advice)
10 [action-surge-ups-the-ante-for-401-k-advice](http://www.investmentnews.com/article/20160121/BLOG09/160129985/recent-class-action-surge-ups-the-ante-for-401-k-advice). Indeed, recently a court observed that
11 “[b]ecause the institutional share classes are otherwise *identical* to the Investor share
12 classes, but with lower fees, a prudent fiduciary would know immediately that a
13 switch is necessary. Thus, the ‘manner that is reasonable and appropriate to the
14 particular investment action, and strategies involved...in this case would mandate a
15 prudent fiduciary – who indisputably has knowledge of institutional share classes and
16 that such share classes provide identical investments at lower costs – to switch share
17 classes immediately.” *Tibble, et al. v. Edison Int. et al.*, No. 07-5359, slip op. at 13
18 (C.D. Cal. Aug. 16, 2017).

19 88. This claim is not about the use of “retail mutual funds” versus the use of
20 “institutional mutual funds.” Retail mutual funds are perfectly acceptable and
21 prudent choices under certain circumstances. In some instances, a mutual fund
22 company may only offer retail mutual funds. Or, in other instances, the mutual fund
23 company might restrict institutional share classes in such a manner that would make
24 it impossible to utilize the mutual funds. This claim is instead about utilizing the
25 lowest-cost class of shares that is available to the Plan.

1 **3. Collective Trusts And Separate Accounts Cost Less Than**
 2 **Their Virtually Identical Mutual Fund Counterparts**

3 89. Throughout the Class Period, the investment options available to
 4 participants were almost exclusively mutual funds, which are pooled investment
 5 products.

6 90. Plan fiduciaries such as Defendants here must be continually mindful of
 7 investment options to ensure they do not unduly risk plan participants' savings and do
 8 not charge unreasonable fees. Some of the best investment vehicles for these goals
 9 are collective trusts, which pool plan participants' investments further and provide
 10 lower fee alternatives to even institutional and 401(k) plan specific shares of mutual
 11 funds. As noted *supra*, trust law specifically identifies "one or more suitable
 12 common trust funds" as a comparator to determine whether a trust is invested in
 13 suitable investments. Restatement (Third) of Trusts § 100 cmt. b(1).

14 91. Collective trusts are administered by banks or trust companies, which
 15 assemble a mix of assets such as stocks, bonds and cash. Regulated by the Office of
 16 the Comptroller of the Currency rather than the Securities and Exchange
 17 Commission, collective trusts have simple disclosure requirements, and cannot
 18 advertise nor issue formal prospectuses. As a result, their costs are much lower, with
 19 less or no administrative costs, and less or no marketing or advertising costs. *See*
 20 Powell, Robert, "Not Your Normal Nest Egg," The Wall Street Journal, March 2013,
 21 available at
 22 <http://www.wsj.com/articles/SB10001424127887324296604578177291881550144>.

23 92. Due to their potential to reduce overall plan costs, collective trusts are
 24 becoming increasingly popular; *Use of CITs in DC Plans Booming* (discussing data
 25 showing that among both mid-size and large defined contribution plans, significantly
 26 more assets are held in collective trusts than in mutual funds).⁸ Indeed, as of 2012,
 27 _____

28 ⁸ The criticisms that have been launched against collective trust vehicles in the past no longer apply. Collective trusts use a unitized structure and the units are valued daily; as a result, participants

1 among plans over \$1 billion in size, more assets were held in collective trusts than in
 2 mutual funds. See Investment Company Institute, *A Close Look at 401(k) Plans*, at
 3 21, 23 (Dec. 2014), available at
 4 https://www.ici.org/pdf/ppr_14_dcplan_profile_401k.pdf.

5 93. Thus, a prudent fiduciary managing a large plan will give serious
 6 consideration to the use of separate accounts or collective trusts, and in the majority
 7 of cases, will opt to move out of mutual funds.

8 94. Separate accounts are another type of investment vehicle similar to
 9 collective trusts, which retain their ability to assemble a mix of stocks, bonds, real
 10 property and cash, and their lower administrative costs.

11 95. Separate accounts are widely available to large plans such as the Plan,
 12 and offer a number of advantages over mutual funds, including the ability to negotiate
 13 fees. Costs within separate accounts are typically much lower than even the lowest-
 14 cost share class of a particular mutual fund. By using separate accounts, “[t]otal
 15 investment management expenses can commonly be reduced to one-fourth of the
 16 expenses incurred through retail mutual funds.” U.S. Dep’t of Labor, *Study of 401(k)*
 17 *Plan Fees and Expenses*, at 17 (April 13, 1998), available at
 18 [https://www.dol.gov/sites/dolgov/files/EBSA/researchers/analysis/retirement/study-](https://www.dol.gov/sites/dolgov/files/EBSA/researchers/analysis/retirement/study-of-401k-plan-fees-and-expenses.pdf)
 19 [of-401k-plan-fees-and-expenses.pdf](https://www.dol.gov/sites/dolgov/files/EBSA/researchers/analysis/retirement/study-of-401k-plan-fees-and-expenses.pdf)
 20
 21

22 invested in collective trusts are able to track the daily performance of their investments online. *Use*
 23 *of CITs in DC Plans Booming*; Paula Aven Gladych, *CITs Gaining Ground in 401(k) Plans*,
 24 EMPLOYEE BENEFIT NEWS (Apr. 14, 2016), available at [http://www.benefitnews.com/news/cits-](http://www.benefitnews.com/news/cits-gaining-ground-in-401-k-plans)
 25 [gaining-ground-in-401-k-plans](http://www.benefitnews.com/news/cits-gaining-ground-in-401-k-plans) (hereinafter CITs Gaining Ground). Many if not most mutual fund
 26 strategies are available in collective trust format, and the investments in the collective trusts are
 27 identical to those held by the mutual fund. *Use of CITs in DC Plans Booming; CITs Gaining*
 28 *Ground*. And because collective trusts contract directly with the plan, and provide regular reports
 regarding costs and investment holdings, the Plan has the same level of protection that the
 Investment Company Act provides to individual investors, thus eliminating the need for the
 protections of the Investment Company Act. Further, collective trusts are still subject to state and
 federal banking regulations that provide comparable protections. American Bankers Association,
 ABA Primer on Bank Collective Funds, June 2015, at 1, available at
<https://www.aba.com/advocacy/policy-analysis/primer-bank-collective-investment-funds>.

B. Defendants Breached Their Fiduciary Duties in Failing to Investigate and Select Lower Cost Alternative Funds

96. The Supreme Court recently reaffirmed the ongoing fiduciary duty to monitor a plan's investment options in *Tibble*, 135 S. Ct. at 1823. In *Tibble*, the Court held that "an ERISA fiduciary's duty is derived from the common law of trusts," and that "[u]nder trust law, a trustee has a continuing duty to monitor trust investments and remove imprudent ones." *Id.* at 1828. In so holding, the Supreme Court referenced with approval the Uniform Prudent Investor Act, treatises, and seminal decisions confirming the duty.

97. Under trust law, one of the responsibilities of the Plan's fiduciaries is to "avoid unwarranted costs" by being aware of the "availability and continuing emergence" of alternative investments that may have "significantly different costs." Restatement (Third) of Trusts ch. 17, intro. note (2007); *see also* Restatement (Third) of Trusts § 90 cmt. B (2007) ("Cost-conscious management is fundamental to prudence in the investment function."). Adherence to these duties requires regular performance of an "adequate investigation" of existing investments in a plan to determine whether any of the plan's investments are "improvident," or if there is a "superior alternative investment" to any of the plan's holdings. *Pension Ben. Gaur. Corp. ex rel. St. Vincent Catholic Med. Ctrs. Ret. Plan v. Morgan Stanley Inv. Mgmt.*, 712 F.3d 705, 718-19 (2d Cir. 2013).

98. When large plans, particularly those with a billion or more dollars in assets like the Plan here, have options which approach the retail cost of shares for individual investors or are simply more expensive than the average or median institutional shares for that type of investment, a careful review of the plan and each option is needed for the fiduciaries to fulfill their obligations to the plan participants.

99. The Plan has retained several actively-managed funds as Plan investment options despite the fact that these funds charged grossly excessive fees compared with comparable or superior alternatives, and despite ample evidence available to a

reasonable fiduciary that these funds had become imprudent due to their high costs. Indeed, in 2018, 19 out of 25 core investments, or almost 80% (not including money markets and investments available through brokerage link), were actively managed.

100. During the Class Period, the Plan lost millions of dollars in offering investment options that had similar or identical characteristics to other lower-priced investment options.

101. The funds in the Plan stayed relatively unchanged from 2013 until 2019. Taking 2018 as an example year, almost half of the Plan's core investments (including all but one of the target date funds) were much more expensive than comparable investments found in similarly-sized plans (plans having over a billion dollars in assets). The expense ratios for these funds were in some cases up to **135%** (in the case of the Fidelity Contra Class K) above the median expense ratios in the same category:⁹

Fund	ER ¹⁰	Category	ICI Median Fee ¹¹
JPMorgan SmartRetirement 2020 Institutional	0.66 %	Target Date	0.56%
JPMorgan SmartRetirement 2025 Institutional	0.69%	Target Date	0.56%
JPMorgan SmartRetirement 2030 Institutional	0.70%	Target Date	0.56%

⁹ See BrightScope/ICI Defined Contribution Plan Profile: *A Close Look at 401(k) Plans, 2015* at 69 (March 2018) (hereafter, "ICI Study") available at https://www.ici.org/pdf/ppr_18_dcplan_profile_401k.pdf

¹⁰ The listed expense figures are from 2019.

¹¹ This median fee is taken from plans with over \$1b in assets.

JPMorgan SmartRetirement 2035 Institutional	0.70%	Target Date	0.56%
JPMorgan SmartRetirement 2040 Institutional	0.71%	Target Date	0.56%
JPMorgan SmartRetirement 2045 Institutional	0.72%	Target Date	0.56%
JPMorgan SmartRetirement 2050 Institutional	0.71%	Target Date	0.56%
JPMorgan SmartRetirement 2055 Institutional	0.71%	Target Date	0.56%
JPMorgan SmartRetirement Income Fund Institutional	0.61%	Domestic Equity	0.31%
Fidelity Contra Class K	0.73%	Domestic Equity	0.31%
Fidelity Diversified International Class K	0.69%	International Equity	0.49%

102. The above comparisons understate the excessiveness of fees in the Plan throughout the Class Period. That is because the ICI study was conducted in 2015 when expense ratios would have been higher than today given the downward trend of expense ratios the last few years. Accordingly, the median expense ratios in 2019 utilized by similar plans would be lower than indicated above, demonstrating a greater disparity between the 2019 expense ratios utilized in the above chart for the Plan's current funds and the median expense ratios in the same category.

103. Further, median-based comparisons also understate the excessiveness of the investment management fees of the Plan funds because many prudent alternative funds were available that offered lower expenses than the median.

104. As demonstrated by the chart below, in several instances, Defendants failed to prudently monitor the Plan to determine whether the Plan was invested in the lowest-cost share class available for the Plan's mutual funds, which are identical to the mutual funds in the Plan in every way except for their lower cost.

105. For example, during the Class Period several funds in the Plan had identical lower share counterparts that were never selected by the Plan's fiduciaries. The chart below uses 2019 expense ratios reported as of September 2019, to demonstrate how much more expensive the funds were than their identical counterparts:

Fund in Plan	2019 Exp Ratio	Lower Cost Share Class	2019 Exp. Ratio	% Fee Excess
JPMorgan SmartRetirement 2020 Institutional	0.66 %	JPMorgan Smart Retirement 2020 R6	0.45%	47%
		JPMorgan Smart Retirement 2020 R5	0.55%	20%
JPMorgan SmartRetirement 2025 Institutional	0.69%	JPMorgan Smart Retirement 2025 R6	0.47%	47%
		JPMorgan Smart Retirement 2025 R5	0.57%	21%
JPMorgan SmartRetirement 2030 Institutional	0.70%	JPMorgan Smart Retirement 2030 R6	0.48%	46%
		JPMorgan Smart Retirement 2030 R5	0.58%	21%
JPMorgan SmartRetirement 2035 Institutional	0.70%	JPMorgan Smart Retirement 2035 R6	0.48%	46%
		JPMorgan Smart Retirement 2035 R5	0.58%	21%
JPMorgan SmartRetirement 2040 Institutional	0.71%	JPMorgan Smart Retirement 2040 R6	0.48%	48%
		JPMorgan Smart Retirement 2040 R5	0.59%	20%
JPMorgan SmartRetirement 2045	0.72%	JPMorgan Smart Retirement 2045 R6	0.50%	44%

Institutional		JPMorgan Smart Retirement 2045 R5	0.60%	20%
JPMorgan Smart Retirement 2050 Institutional	0.71%	JPMorgan Smart Retirement 2050 R6	0.49%	45%
		JPMorgan Smart Retirement 2050 R5	0.59%	20%
JPMorgan Smart Retirement 2055 Institutional	0.71%	JPMorgan Smart Retirement 2055 R6	0.49%	45%
		JPMorgan Smart Retirement 2055 R5	0.59%	20%
JPMorgan Smart Retirement Income Fund Institutional	0.61%	JPMorgan Smart Retirement Income Fund R6	0.42%	45%
		JPMorgan Smart Retirement Income Fund R5	0.52%	17%
Fidelity Contra Class K	0.73%	Fidelity Contra Commingled Pool	0.43%	70%
Fidelity Diversified International Class K	0.69%	Fidelity Diversified International Commingled Pool	0.58%	19%

106. The above is for illustrative purposes only. At all times during the Class Period, Defendants knew or should have known of the existence of cheaper share classes and therefore also should have immediately identified the prudence of transferring the Plan's funds into these alternative investments. The JPMorgan Smart Retirement R5 shares were available during the entirety of the Class Period, while the JPMorgan Smart Retirement R6 funds had an inception date of November 2014.

107. As a large plan, the Plan had sufficient assets under management at all times during the Class Period to qualify for lower share classes. Assets under management for funds ranged from \$12m to \$191m in 2018:

Fund in Plan	2018 Assets Under Management
JPMorgan SmartRetirement 2020 Institutional	\$20,959,000
JPMorgan SmartRetirement 2025 Institutional	\$56,841,000
JPMorgan SmartRetirement 2030 Institutional	\$105,720,000
JPMorgan SmartRetirement 2035 Institutional	\$149,758,000
JPMorgan SmartRetirement 2040 Institutional	\$182,232,000
JPMorgan SmartRetirement 2045 Institutional	\$191,127,000
JPMorgan SmartRetirement 2050 Institutional	\$183,385,000
JPMorgan SmartRetirement 2055 Institutional	\$104,786,000
JPMorgan SmartRetirement Income Fund Institutional	\$12,382,000
Fidelity Contra Class K	\$159,651,000
Fidelity Diversified International Class K	\$38,195,000

1 108. A prudent fiduciary conducting an impartial review of the Plan's
2 investments would have identified the cheaper share classes available and transferred
3 the Plan's investments in the above-referenced funds into the lower share classes at
4 the earliest opportunity.

5 109. There is no good-faith explanation for utilizing high-cost share classes
6 when lower-cost share classes are available for the exact same investment. The Plan
7 did not receive any additional services or benefits based on its use of more expensive
8 share classes; the only consequence was higher costs for Plan participants.

9 110. The Plan also incurred excess fees due to Defendants' failure to
10 adequately investigate the availability of collective trusts and/or separate accounts in
11 the same investment style of mutual funds in the Plan. Indeed, the Investment Policy
12 specifically authorizes the Committee to investigate the use of collective trusts or
13 separate accounts. *See* Investment Policy at 8. Because of the Plan's size, it could
14 have reaped considerable cost savings by using collective trusts or separate accounts,
15 but Defendants again failed to investigate this option.

16 111. Unlike mutual funds, which by law must charge the same fee to all
17 investors, separate account fee schedules are subject to negotiation. Industry data
18 shows that actual fee schedules on separate accounts are typically lower than
19 advertised fee schedules, particularly when the plan or investor has a large amount of
20 assets to invest, as did the Plan here.

21 112. In summary, Defendants could have used the Plan's bargaining power to
22 obtain high-quality, low-cost alternatives to mutual funds, in order to negotiate the
23 best possible price for the Plan. By failing to investigate the use of lower cost share
24 classes Defendants caused the Plan to pay millions of dollars per year in unnecessary
25 fees.

26 113. Defendants also failed to consider materially similar but cheaper
27 alternatives to the Plan's investment options. The chart below demonstrates that the
28 expense ratios of the Plan's target date funds were more expensive by multiples of

comparable alternative funds in the same investment style. A reasonable investigation would have revealed the existence of these lower-cost alternatives. The chart below uses 2019 expense ratios as a methodology to demonstrate how much more expensive the Plan's funds were than their alternative fund counterparts.

Fund in Plan	2019¹² Exp. Ratio	Lower Cost Alternative	2019 Exp. Ratio	% Fee Excess
JPMorgan SmartRetirem ent 2020 Institutional	0.66%	Vanguard Inst. Trgt Retire 2020 Instl	0.09%	633%
JPMorgan SmartRetirem ent 2025 Institutional	0.69%	Vanguard Inst. Trgt Retire 2025 Instl	0.09%	667%
JPMorgan SmartRetirem ent 2030 Institutional	0.70%	Vanguard Inst. Trgt Retire 2030 Instl	0.09%	678%
JPMorgan SmartRetirem ent 2035 Institutional	0.70%	Vanguard Inst. Trgt Retire 2035 Instl	0.09%	678%

114. The above is for illustrative purposes only as the significant fee disparities detailed above existed for all years of the Class Period until 2019 for all the target date funds. The Plan expense ratios were multiples of what they should have been given the bargaining power available to the Plan fiduciaries.

¹² Uses fee information as of 3Q 2019.

115. Moreover, the Plan's fiduciaries cannot justify selecting actively managed funds over passively managed ones. As noted above, while higher-cost mutual funds may outperform a less-expensive option such as a passively-managed index fund over the short term, they rarely do so over a longer term. With regard to this action in particular, there is objective evidence that selection of actively managed funds over passively managed ones with materially similar characteristics was unjustified. Comparing the five-year returns of some of the Plan's actively managed funds with those of comparable index (passively managed) funds with lower fees demonstrates that accounting for fees paid, the actively managed funds lagged behind in performance. The chart below indicates the efficiency of the active funds or lack thereof (*i.e.*, the return needed by the actively managed fund to match the returns of the passively managed fund):

Fund Name/ Comparator	Expense Ratio ¹³	Return (5 Year)	Return Deficiency
JPMorgan SmartRetirement Income Fund Inst	0.6 1	4.1	Requires 1.38 % more return to be efficient
TIAA-CREF Lifecycle Index Ret Inc Instl	0.1 0	4.97	

¹³ Expense ratios are as of January 2020.

JPMorgan	0.7	5.57	Requires 1.7 % more return to be efficient
SmartRetirement 2055	1		
Institutional			
TIAA-CREF Lifecycle	0.1	6.74	Requires 4.36 % more return to be efficient
Index 2055	0		
JPMorgan	.71	5.54	Requires 1.65 % more return to be efficient
SmartRetirement 2050			
Institutional			
TIAA-CREF Lifecycle	0.1	9.25	Requires 1.6 % more return to
Index 2050	0		
JPMorgan	0.7	5.54	Requires 1.6 % more return to
SmartRetirement 2045	1		
Institutional			
TIAA-CREF Lifecycle	0.1	6.6	Requires 1.6 % more return to
Index 2045	0		
JPMorgan	0.7	5.56	Requires 1.6 % more return to
SmartRetirement 2040	1		

Institutional			be efficient
TIAA-CREF Lifecycle Index 2040	0.1 0	6.51	
JPMorgan SmartRetirement 2035 Institutional	0.7 0	5.39	Requires 1.56 % more return to be efficient
TIAA-CREF Lifecycle Index 2035	0.1 0	6.29	
JPMorgan SmartRetirement 2030 Institutional	0.7 0	5.28	Requires 1.38 % more return to be efficient
TIAA-CREF Lifecycle Index 2030	0.1 0	6.0	
JPMorgan SmartRetirement 2025 Institutional	0.6 9	5.02	Requires 1.26% more return to be efficient
TIAA-CREF Lifecycle	0.1	5.7	

Index 2025	0		
JPMorgan	0.6	4.71	Requires 1.17 % more return to be efficient
SmartRetirement 2020	6		
Institutional			
TIAA-CREF Lifecycle	0.1	5.37	Requires 3.44 % more return to be efficient
Index 2020	0		
Fidelity Diversified	0.6	4.18	Requires 3.44 % more return to be efficient
International Class K	3		
Vanguard Intl Growth	0.3	8.27	
	2		

116. Defendants' failure to investigate lower cost alternative investments (both actively and passively managed funds) during the Class Period cost the Plan and its participants millions of dollars.

C. Defendants Breached their Duty of Loyalty to the Plan and its Participants

117. Of particular importance to this case, Salesforce is a publicly traded Company. Fidelity Investments, Inc. ("FMR, LLC") owned over 94 million shares of Salesforce as of September 30, 2019. FMR's affiliates, including Fidelity Retirement Services, served as the Plan's recordkeeper and investment manager of some of the

Plan's investments. Further, Fidelity Contrafund is the largest mutual fund investment in Salesforce with 27.1 million shares. The fund has 2.55% of assets invested in Salesforce, which is 3.70% of the firm's outstanding shares. See <https://www.investopedia.com/articles/investing/031816/top-5-mutual-fund-holders-salesforcecom-crm-orcl.asp>. This is significant because at over \$159 million of assets under management, the Contrafund is the largest single actively managed non-target date investment in the Plan by far.

118. Another investment manager under the Plan, JPMorgan Chase, owned over 13 million shares of Salesforce and is the 8th largest owner of Salesforce shares as of December 31, 2019.

119. Having the Plan's investment managers own a portion of the Company created an indisputable conflict of interest for the Plan's fiduciaries. That is because this relationship prevented the Plan's fiduciaries from (1) critically reviewing the fees or performance of the Fidelity and JPMorgan Chase branded investments that are the subject of this lawsuit, and (2) making decisions with an "eye single" to the interests of plan participants. *Pegram v. Herdrich*, 530 U.S. 211, 235 (2000).

FIRST CLAIM FOR RELIEF

Breaches of Fiduciary Duties of Loyalty and Prudence

(Asserted against the Committee Defendants)

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

121. At all relevant times, the Committee Defendants ("Prudence Defendants") were fiduciaries of the Plan 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 Plan or disposition of the Plan's assets.

122. As fiduciaries of the Plan, these Defendants were subject to the fiduciary duties imposed by ERISA § 404(a), 29 U.S.C. § 1104(a). These fiduciary duties

1 included managing the assets of the Plan for the sole and exclusive benefit of Plan
2 participants and beneficiaries, and acting with the care, skill, diligence, and prudence
3 under the circumstances that a prudent person acting in a like capacity and familiar
4 with such matters would use in the conduct of an enterprise of like character and with
5 like aims.

6 123. The Prudence Defendants breached these fiduciary duties in multiple
7 respects as discussed throughout this Complaint. They did not make decisions
8 regarding the Plan's investment lineup based solely on the merits of each investment
9 and what was in the best interest of Plan participants. Instead, the Prudence
10 Defendants selected and retained investment options in the Plan despite the high cost
11 of the funds in relation to other comparable investments. The Prudence Defendants
12 also failed to investigate the availability of lower-cost share classes of certain mutual
13 funds in the Plan. In addition, the Prudence Defendants failed to investigate separate
14 accounts and/or collective trusts as alternatives to mutual funds, even though they
15 generally provide the same investment management services at a lower cost.

16 124. As a direct and proximate result of the breaches of fiduciary duties
17 alleged herein, the Plan suffered millions of dollars of losses due to excessive costs
18 and lower net investment returns. Had Defendants complied with their fiduciary
19 obligations, the Plan would not have suffered these losses, and Plan participants
20 would have had more money available to them for their retirement.

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

26 126. The Prudence Defendants knowingly participated in each breach of the
27 other Defendants, knowing that such acts were a breach, enabled the other
28 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 Salesforce and the Board Defendants)

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

128. Salesforce and the Board Defendants (the “Monitoring Defendants”) had the authority to appoint members of the Committee, and the duty to monitor the Committee. Further, they were aware that the Committee Defendants had critical responsibilities as fiduciaries of the Plan.

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

130. The Monitoring Defendants also had a duty to ensure that the Committee Defendants possessed the needed qualifications and experience to carry out their duties (or used qualified advisors and service providers to fulfill 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.

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

1 (a) Failing to monitor and evaluate the performance of the Committee
2 Defendants or have a system in place for doing so, standing idly by as the Plan
3 suffered significant losses as a result of the Committee Defendants' imprudent
4 actions and omissions;

5 (b) failing to monitor the processes by which Plan investments were
6 evaluated, their failure to investigate the availability of lower-cost share classes, and
7 their failure to investigate the availability of lower-cost separate account and
8 collective trust vehicles; and

9 (c) failing to remove Committee members whose performance was
10 inadequate in that they continued to maintain imprudent, excessively costly, and
11 poorly performing investments within the Plan, all to the detriment of the Plan and
12 Plan participants' retirement savings.

13 132. As a consequence of the foregoing breaches of the duty to monitor, the
14 Plan suffered millions of dollars of losses. Had Monitoring Defendants complied
15 with their fiduciary obligations, the Plan would not have suffered these losses, and
16 Plan participants would have had more money available to them for their retirement.

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

21 **PRAYER FOR RELIEF**

22 145. WHEREFORE, Plaintiffs pray that judgment be entered against
23 Defendants on all claims and requests that the Court awards the following relief:

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

27 B. Designation of Plaintiffs as Class Representatives and designation of
28 Plaintiffs' counsel as Class Counsel;

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

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

9 E. An order requiring the Company Defendants to disgorge all profits
10 received from, or in respect of, the Plan, and/or equitable relief pursuant to 29 U.S.C.
11 § 1132(a)(3) in the form of an accounting for profits, imposition of a constructive
12 trust, or a surcharge against the Company Defendant as necessary to effectuate said
13 relief, and to prevent the Company Defendant's unjust enrichment;

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

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

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

23 I. An award of pre-judgment interest;

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

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

27 L. Such other and further relief as the Court deems equitable and just.
28

JURY DEMAND

Plaintiffs hereby demand a trial by jury.

Dated: March 11, 2020

Respectfully submitted,

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