No. 19-1401

IN THE
Supreme Court of the United States

APRIL HUGHES,
KATHERINE D. LANCASTER, AND JASMINE WALKER,
Petitioners,

v.

NORTHWESTERN UNIVERSITY, ET AL.,
Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Seventh Circuit

JOINT APPENDIX

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September 3, 2021

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PETITION FOR A WRIT OF CERTIORARI FILED: JUNE 19, 2020
CERTIORARI GRANTED: JULY 2, 2021

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TABLE OF CONTENTS

NOTICE

The following documents have been omitted in the printing of this Joint Appendix but may be found in the appendix to the petition for a writ of certiorari in this case:

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 16 C 8157

LAURA L. DIVANE, ET AL.,
Plaintiffs,
v.

NORTHWESTERN UNIVERSITY, ET AL.,
Defendants.

CIVIL DOCKET

Date Filed	#	Docket Text
8/17/16	1	COMPLAINT filed by April Hughes, Laura L. Divane; Jury Demand. Filing fee $400, receipt number 0752-12264218. (Schlichter, Jerome) (Entered: 8/17/2016)
8/17/16	2	CIVIL Cover Sheet (Schlichter, Jerome) (Entered: 8/17/2016)

* * *

Date Filed	#	Docket Text
11/7/16	23	MOTION by Defendants Pamela S. Beemer, Ronald R. Braeutigam, Kathleen Hagerty, Craig A. Johnson, Candy Lee, William H. McLean, Northwestern University, Northwestern University Retirement Investment Committee, Ingrid S. Stafford to

		strike Plaintiffs' Jury Demand (Martin, Craig) (Entered: 11/7/2016)
11/7/16	24	MEMORANDUM by Pamela S. Beemer, Ronald R. Braeutigam, Kathleen Hagerty, Craig A. Johnson, Candy Lee, William H. McLean, Northwestern University, Northwestern University Retirement Investment Committee, Ingrid S. Stafford in support of motion to strike, 23 (Martin, Craig) (Entered: 11/7/2016)
11/7/16	25	NOTICE of Motion by Craig Christopher Martin for presentment of motion to strike, 23 before Honorable Jorge L. Alonso on 11/15/2016 at 09:30 AM. (Martin, Craig) (Entered: 11/7/2016)
11/7/16	26	MOTION by Defendants Ronald R. Braeutigam, Ingrid S. Stafford, Northwestern University, Kathleen Hagerty, Candy Lee, Craig A. Johnson, Northwestern University Retirement Investment Committee, William H. McLean, Pamela S. Beemer to dismiss The Complaint (Martin, Craig) (Entered: 11/7/2016)
11/7/16	27	MEMORANDUM by Pamela S. Beemer, Ronald R. Braeutigam, Kathleen Hagerty, Craig A. Johnson, Candy Lee, William H. McLean, Northwestern University, Northwestern University Retirement Investment Committee, Ingrid S. Stafford in support of motion to dismiss, 26 (Attachments: #1 Index of Exhibits, #2 Exhib-

		it A, #3 Exhibit B, #4 Exhibit C, #5 Exhibit D, #6 Exhibit E, #7 Exhibit F, #8 Exhibit G, #9 Exhibit H, #10 Exhibit I, #11 Exhibit J, #12 Exhibit K, #13 Exhibit L, #14 Exhibit M, #15 Exhibit N) (Martin, Craig) (Entered: 11/7/2016)
11/7/16	28	NOTICE of Motion by Craig Christopher Martin for presentment of motion to dismiss, 26 before Honorable Jorge L. Alonso on 11/15/2016 at 09:30 AM. (Martin, Craig) (Entered: 11/7/2016)
11/15/16	29	MINUTE entry before the Honorable Jorge L. Alonso: Motion hearing held. Defendants' motion to strike Plaintiffs' jury demand 23 is taken under advisement. Plaintiffs' response shall be filed by 12/13/16. Defendants' reply in support shall be filed by 1/3/17. The court will rule electronically. Defendants' motion to dismiss 26 is withdrawn. Plaintiffs are given leave to file an amended complaint by 12/15/16. Defendants' motion to dismiss shall be filed by 1/16/17. Plaintiffs' response shall be filed by 2/13/17. Defendants' reply in support shall be filed by 2/27/17. Parties' oral motion for leave to file in excess of 15 pages is granted as follows: Defendants' motion may be 20 pages and Plaintiffs' response may be 20 pages. Defendants' reply will be 15 pages. The court will rule electronically and set further dates in the ruling. Status

hearing previously set for 12/15/16 is stricken. Parties' Rule 26(a)(1) disclosures shall be served by 12/15/16. Parties' joint discovery plan shall be filed by 12/15/16. Notice mailed by judge's staff (ntf,) (Entered: 11/15/2016)

* * *

11/29/16	32	TRANSCRIPT OF PROCEEDINGS held on 11/15/16 before the Honorable Jorge L. Alonso. Court Reporter Contact Information: Nancy LaBella, 312-435-6890, Nancy_LaBella@ilnd.uscourts.gov. IMPORTANT: The transcript may be viewed at the court's public terminal or purchased through the Court Reporter/Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through the Court Reporter/Transcriber or PACER. For further information on the redaction process, see the Court's web site at www.ilnd.uscourts.gov under Quick Links select Policy Regarding the Availability of Transcripts of Court Proceedings. Redaction Request due 12/20/2016. Redacted Transcript Deadline set for 12/30/2016. Release of Transcript Restriction set for 2/27/2017. (Labella, Nancy) (Entered: 11/29/2016)

* * *

12/13/16	37	MEMORANDUM by Laura L. Divane, April Hughes in Opposition to motion to strike, 23 (Soyars, Sean) (Entered: 12/13/2016)
12/15/16	38	AMENDED complaint by April Hughes, Laura L. Divane, Susan Bona, Katherine D. Lancaster, Jasmine Walker against All Defendants (Schlichter, Jerome) (Entered: 12/15/2016)

* * *

1/3/17	49	REPLY by Defendants Pamela S. Beemer, Ronald R. Braeutigam, Nimalam Chinniah, Kathleen Hagerty, Craig A. Johnson, Candy Lee, William H. McLean, Northwestern University, Northwestern University Retirement Investment Committee, Ingrid S. Stafford, Eugene S. Sunshine to motion to strike, 23 /Defendants' Reply in Support of Their Motion to Strike Plaintiffs' Jury Demand (Martin, Craig) (Entered: 1/3/2017)
1/6/17	50	MOTION by Plaintiffs Susan Bona, Laura L. Divane, April Hughes, Katherine D. Lancaster, Jasmine Walker for leave to file Surreply to Defendants' Reply in Support of Motion to Strike Jury Demand (Attachments: #1 Exhibit Proposed Surreply) (Schlichter, Jerome) (Entered: 1/6/2017)
1/6/17	51	NOTICE of Motion by Jerome J. Schlichter for presentment of motion for leave to file, 50 before Honorable

		Jorge L. Alonso on 1/18/2017 at 09:30 AM. (Schlichter, Jerome) (Entered: 1/6/2017)
1/9/17	52	MINUTE entry before the Honorable Jorge L. Alonso: Plaintiffs' motion for leave to file surreply to Defendants' reply in support of motion to strike jury demand 50 is granted. Motion hearing date of 1/18/17 is stricken. Notice mailed by judge's staff (ntf,) (Entered: 1/9/2017)

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1/9/17	55	SUR-REPLY by Plaintiffs Susan Bona, Laura L. Divane, April Hughes, Katherine D. Lancaster, Jasmine Walker to motion to strike, 23 (Schlichter, Jerome) (Entered: 1/9/2017)

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1/17/17	58	MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM THE AMENDED COMPLAINT (Martin, Craig) (Entered: 1/17/2017)
1/17/17	59	MEMORANDUM by Pamela S. Beemer, Ronald R. Braeutigam, Nimalam Chinniah, Kathleen Hagerty, Craig A. Johnson, Candy Lee, William H. McLean, Northwestern University, Northwestern University Retirement Investment Committee, Ingrid S. Stafford, Eugene S. Sunshine in support of Motion to Dismiss for Failure to State a Claim 58 (Attachments: #1 Index of Exhibits, #2 Exhibit A, #3 Exhibit B, #4 Exhibit C, #5 Exhibit D,

		#6 Exhibit E, #7 Exhibit F, #8 Exhibit G, #9 Exhibit H, #10 Exhibit I, #11 Exhibit J, #12 Exhibit K, #13 Exhibit L, #14 Exhibit M, #15 Exhibit N) (Martin, Craig) (Entered: 1/17/2017)

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1/17/17	61	NOTICE of Motion by Craig Christopher Martin for presentment of Motion to Dismiss for Failure to State a Claim 58, motion to amend/correct, 60 before Honorable Jorge L. Alonso on 1/31/2017 at 09:30 AM. (Martin, Craig) (Entered: 1/17/2017)

* * *

2/13/17	66	MEMORANDUM by Susan Bona, Laura L. Divane, April Hughes, Katherine D. Lancaster, Jasmine Walker in Opposition to Motion to Dismiss for Failure to State a Claim 58 (Attachments: #1 Appendix Index of Exhibits, #2 Exhibit 2009 Retirement Plan document, #3 Exhibit 2009 Voluntary Savings Plan document, #4 Exhibit Pensions & Investments Article re Plans' redesign, #5 Exhibit Retirement Plan Form 5500 Excerpts, 2010-2015, #6 Exhibit Voluntary Savings Plan Form 5500 Excerpts, 2010-2015) (Schlichter, Jerome) (Entered: 2/13/2017)

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2/27/17	70	REPLY by Pamela S. Beemer, Ronald R. Braeutigam, Nimalan Chinniah, Kathleen Hagerty, Craig A. Johnson,

		Candy Lee, William H. McLean, Northwestern University, Northwestern University Retirement Investment Committee, Ingrid S. Stafford, Eugene S. Sunshine to memorandum in opposition to motion, 66 (Attachments: #1 Exhibit O) (Martin, Craig) (Entered: 2/27/2017)

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4/5/17	73	NOTICE by Susan Bona, Laura L. Divane, April Hughes, Katherine D. Lancaster, Jasmine Walker re MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM THE AMENDED COMPLAINT 58 Supplemental Authority Supporting Denial of Motion to Dismiss (Schlichter, Jerome) (Entered: 4/5/2017)

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4/24/17	76	MOTION by Defendants Pamela S. Beemer, Ronald R. Braeutigam, Nimalan Chinniah, Kathleen Hagerty, Craig A. Johnson, Candy Lee, William H. McLean, Northwestern University, Northwestern University Retirement Investment Committee, Ingrid S. Stafford, Eugene S. Sunshine for leave to file a Response To Plaintiffs' Notice Of Supplemental Authority (Attachments: #1 Exhibit A - Proposed Memorandum) (Martin, Craig) (Entered: 4/24/2017)
4/24/17	77	NOTICE of Motion by Craig Christopher Martin for presentment of motion

		for leave to file, 76 before Honorable Jorge L. Alonso on 5/3/2017 at 09:30 AM. (Martin, Craig) (Entered: 4/24/2017)
4/25/17	78	MINUTE entry before the Honorable Jorge L. Alonso: Defendants' motion for leave to file a response to Plaintiffs' notice of supplemental authority 76 is granted. No reply will be allowed unless requested by the Court. Motion hearing date of 5/3/17 is stricken. Notice mailed by judge's staff (ntf,) (Entered: 4/25/2017)

* * *

4/25/17	81	RESPONSE by Defendants Pamela S. Beemer, Ronald R. Braeutigam, Nimalan Chinniah, Kathleen Hagerty, Craig A. Johnson, Candy Lee, William H. McLean, Northwestern University, Northwestern University Retirement Investment Committee, Ingrid S. Stafford, Eugene S. Sunshine to notice of filing, 73 (Martin, Craig) (Entered: 4/25/2017)

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5/11/17	83	NOTICE by All Plaintiffs re MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM THE AMENDED COMPLAINT 58, memorandum in opposition to motion, 66 Second Notice of Supplemental Authority Supporting Denial of Motion to Dismiss (Attachments: #1 Exhibit Henderson v. Emory Univ., No. 16-2920, Doc. 61

		(N.D. Ga. May 10, 2017)) (Schlichter, Jerome) (Entered: 5/11/2017)
5/17/17	84	NOTICE by All Plaintiffs re MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM THE AMENDED COMPLAINT 58, memorandum in opposition to motion, 66 Third Notice of Supplemental Authority Supporting Denial of Motion to Dismiss (Attachments: #1 Exhibit Clark v. Duke Univ., No. 16-1044, Doc. 48 (M.D.N.C. May 11, 2017), #2 Exhibit Am. Compl., Clark v. Duke Univ.) (Schlichter, Jerome) (Entered: 5/17/2017)
5/26/17	85	MOTION by Defendants Pamela S. Beemer, Ronald R. Braeutigam, Nimalan Chinniah, Kathleen Hagerty, Craig A. Johnson, Candy Lee, William H. McLean, Northwestern University, Northwestern University Retirement Investment Committee, Ingrid S. Stafford, Eugene S. Sunshine for leave to file A Response To Plaintiffs' Second And Third Notices Of Supplemental Authority (Attachments: #1 Exhibit A – Defendants' Response To Plaintiffs' Second And Third Notices Of Supplemental Authority) (Martin, Craig) (Entered: 5/26/2017)

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5/30/17	88	MINUTE entry before the Honorable Jorge L. Alonso: Defendants' motion for leave to withdraw the appearance of Monica Perdomo 86 is granted. Attorney Monica Perdomo is given

		leave to withdraw as counsel for Defendants. Defendants' motion for leave to file a response to plaintiffs' second and third notices of supplemental authority 85 is granted. No reply will be allowed unless requested by the Court. Motion hearing date of 6/13/17 is stricken. The Court will not accept any further notices of supplemental authority or responses thereto, except to the extent that the parties wish to bring any additional decisions to Court's attention, they may do so by filing a single-sentence memorandum that provides the citation, with no additional commentary or argument. Notice mailed by judge's staff (ntf,) (Entered: 5/30/2017)
5/30/17	89	RESPONSE by Defendants Pamela S. Beemer, Ronald R. Braeutigam, Nimalan Chinniah, Kathleen Hagerty, Craig A. Johnson, Candy Lee, William H. McLean, Northwestern University, Northwestern University Retirement Investment Committee, Ingrid S. Stafford, Eugene S. Sunshine to notice of filing, 84, notice of filing, 83 // Plaintiffs' second and third notices of supplemental authority (Martin, Craig) (Entered: 5/30/2017)

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6/1/17	95	NOTICE by Pamela S. Beemer, Ronald R. Braeutigam, Nimalan Chinniah, Kathleen Hagerty, Craig A. Johnson, Candy Lee, William H.

		McLean, Northwestern University, Northwestern University Retirement Investment Committee, Ingrid S. Stafford, Eugene S. Sunshine re MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM THE AMENDED COMPLAINT 58 – Defendants' Notice of Supplemental Authority (Attachments: #1 Exhibit A) (Martin, Craig) (Entered: 6/1/2017)

* * *

8/16/17	97	NOTICE by All Plaintiffs re MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM THE AMENDED COMPLAINT 58, memorandum in opposition to motion, 66 Plaintiffs' Fourth Notice of Supplemental Authority Supporting Denial of Motion to Dismiss (Attachments: #1 Tibble v. Edison Int'l, No. 07-5359, Doc. 567 (C.D. Cal. Aug. 16, 2017)) (Schlichter, Jerome) (Entered: 8/16/2017)

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8/31/17	99	NOTICE by Pamela S. Beemer, Ronald R. Braeutigam, Nimalan Chinniah, Kathleen Hagerty, Craig A. Johnson, Candy Lee, William H. McLean, Northwestern University, Northwestern University Retirement Investment Committee, Ingrid S. Stafford, Eugene S. Sunshine re MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM THE AMENDED COMPLAINT 58 – Defendants' Notice of Supplemental Authority

		(Attachments: #1 Exhibit A, #2 Exhibit B) (Martin, Craig) (Entered: 8/31/2017)
9/5/17	100	NOTICE by All Plaintiffs re notice of filing, 99, MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM THE AMENDED COMPLAINT 58, memorandum in opposition to motion, 66 Plaintiffs' Cross-Notice and Fifth Notice of Supplemental Authority Supporting Denial of Motion to Dismiss (Attachments: #1 Tracey v. MIT, No. 16-11620, Doc. 70 (D. Mass. Aug. 31, 2017)) (Schlichter, Jerome) (Entered: 9/5/2017)
9/22/17	101	SUPPLEMENT to Motion to Dismiss for Failure to State a Claim 58 (Attachments: #1 Exhibit A) (Martin, Craig) (Entered: 9/22/2017)
9/22/17	102	NOTICE by All Plaintiffs re MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM THE AMENDED COMPLAINT 58, memorandum in opposition to motion, 66 Plaintiffs' Sixth Notice of Supplemental Authority Supporting Denial of Motion to Dismiss (Attachments: #1 Nicolas v. Trs. of Princeton Univ., No. 17-3695, Doc. 10 (D.N.J. Sept. 19, 2017), #2 Morin v. Essentia Health, No. 16-4397, Doc. 47 (D. Minn. Sept. 14, 2017)) (Schlichter, Jerome) (Entered: 9/22/2017)
9/25/17	103	NOTICE by Pamela S. Beemer, Ronald R. Braeutigam, Nimalan Chinniah, Kathleen Hagerty, Craig

		A. Johnson, Candy Lee, William H. McLean, Northwestern University, Northwestern University Retirement Investment Committee, Ingrid S. Stafford, Eugene S. Sunshine re MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM THE AMENDED COMPLAINT 58, MOTION by Defendants Pamela S. Beemer, Ronald R. Braeutigam, Kathleen Hagerty, Craig A. Johnson, Candy Lee, William H. McLean, Northwestern University, Northwestern University Retirement Investment Committee, Ingrid S. Stafford to strike Plaintiffs 23 – Defendants' Notice of Supplemental Authority (Attachments: #1 Exhibit A) (Martin, Craig) (Entered: 9/25/2017)
10/2/17	104	NOTICE by All Plaintiffs re MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM THE AMENDED COMPLAINT 58, memorandum in opposition to motion, 66 Plaintiffs' Seventh Notice of Supplemental Authority Supporting Denial of Motion to Dismiss (Attachments: #1 Cunningham v. Cornell Univ., No. 16-6525, Doc. 107 (S.D.N.Y. Sept. 29, 2017)) (Schlichter, Jerome) (Entered: 10/2/2017)
10/6/17	105	NOTICE by Pamela S. Beemer, Ronald R. Braeutigam, Nimalan Chinniah, Kathleen Hagerty, Craig A. Johnson, Candy Lee, William H. McLean, Northwestern University, Northwestern University Retirement Investment Committee, Ingrid S.

		Stafford, Eugene S. Sunshine re MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM THE AMENDED COMPLAINT 58 – Defendants' Notice of Supplemental Authority (Attachments: #1 Exhibit A, #2 Exhibit B) (Martin, Craig) (Entered: 10/6/2017)

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1/8/18	113	NOTICE by Pamela S. Beemer, Ronald R. Braeutigam, Nimalan Chinniah, Kathleen Hagerty, Craig A. Johnson, Candy Lee, William H. McLean, Northwestern University, Northwestern University Retirement Investment Committee, Ingrid S. Stafford, Eugene S. Sunshine re MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM THE AMENDED COMPLAINT 58 – Defendants' Notice of Supplemental Authority (Attachments: #1 Exhibit A) (Martin, Craig) (Entered: 1/8/2018)
1/29/18	114	NOTICE by Pamela S. Beemer, Ronald R. Braeutigam, Nimalan Chinniah, Kathleen Hagerty, Craig A. Johnson, Candy Lee, William H. McLean, Northwestern University, Northwestern University Retirement Investment Committee, Ingrid S. Stafford, Eugene S. Sunshine re MOTION by Defendants Pamela S. Beemer, Ronald R. Braeutigam, Kathleen Hagerty, Craig A. Johnson, Candy Lee, William H. McLean, Northwestern University, Northwestern

		University Retirement Investment Committee, Ingrid S. Stafford to strike Plaintiffs 23 – Defendants' Notice of Supplemental Authority (Attachments: #1 Exhibit A, #2 Exhibit B) (Martin, Craig) (Entered: 1/29/2018)

* * *

3/1/18	119	NOTICE by Pamela S. Beemer, Ronald R. Braeutigam, Nimalan Chinniah, Kathleen Hagerty, Craig A. Johnson, Candy Lee, William H. McLean, Northwestern University, Northwestern University Retirement Investment Committee, Ingrid S. Stafford, Eugene S. Sunshine re MOTION by Defendants Pamela S. Beemer, Ronald R. Braeutigam, Kathleen Hagerty, Craig A. Johnson, Candy Lee, William H. McLean, Northwestern University, Northwestern University Retirement Investment Committee, Ingrid S. Stafford to strike Plaintiffs 23 – Defendants' Notice of Supplemental Authority (Attachments: # Exhibit A) (Martin, Craig) (Entered: 3/1/2018)

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4/3/18	121	NOTICE by All Plaintiffs re MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM THE AMENDED COMPLAINT 58, memorandum in opposition to motion, 66 Plaintiffs' Eighth Notice of Supplemental Authority (Attachments: #1 Order re: motion to dismiss, Vellali v. Yale Univ., No.

		16-1345, Doc. 113 (D. Conn. Mar. 30, 2018)) (Schlichter, Jerome) (Entered: 4/3/2018)

* * *

4/24/18	129	MOTION by Plaintiffs Laura L. Divane, April Hughes, Katherine D. Lancaster, Jasmine Walker for leave to file Second Amended Complaint (Schlichter, Andrew) (Entered: 4/24/2018)
4/24/18	130	SEALED EXHIBIT by Plaintiffs Laura L. Divane, April Hughes, Katherine D. Lancaster, Jasmine Walker Exhibit 1 - part 1 regarding MOTION by Plaintiffs Laura L. Divane, April Hughes, Katherine D. Lancaster, Jasmine Walker for leave to file Second Amended Complaint 129 (Attachments: #1 Exhibit 1 part 2, #2 Exhibit 1 part 3, #3 Exhibit 1 part 4, #4 Exhibit 1 part 5, #5 Exhibit 1 part 6, #6 Exhibit 1 part 7, #7 Exhibit 1 part 8, #8 Exhibit 1 part 9, #9 Exhibit 1 part 10, #10 Exhibit 1 part 11) (Schlichter, Andrew) (Entered: 4/24/2018)
4/24/18	131	MEMORANDUM by Laura L. Divane, April Hughes, Katherine D. Lancaster, Jasmine Walker in support of motion for leave to file 129 (Schlichter, Andrew) (Entered: 4/24/2018)
4/24/18	132	to File Second Amended Complaint NOTICE of Motion by Andrew D. Schlichter for presentment of motion

for leave to file 129 before Honorable Jorge L. Alonso on 5/8/2018 at 09:30 AM. (Schlichter, Andrew) (Entered: 4/24/2018)

* * *

4/25/18	138	MEMORANDUM Opinion and Order. The Court grants defendants' motion 23 to strike jury demand and hereby strikes plaintiffs' jury demand. Signed by the Honorable Jorge L. Alonso on 4/25/2018. Notices mailed by judge's staff (ntf,) (Entered: 4/25/2018)

* * *

4/25/18	142	MINUTE entry before the Honorable Michael T. Mason: Status hearing held. Upon further consideration, plaintiff's motion for additional time to complete limited additional fact discovery concerning new claims in the proposed second amended complaint 139 is entered and continued. The Court will set a briefing schedule after the District Court has ruled on plaintiffs' motion to file the second amended complaint. The parties should stop by Judge Mason's chambers after their 5/8/18 hearing before the District Court. The parties' joint motion for leave to conduct limited discovery after the fact discovery deadline 135 is granted. As stated in that motion, the deadline is extended to June 30, 2018 for the limited purpose of allowing the parties to conduct certain remaining depositions, and to

		allow Fidelity and Morningstar to produce certain documents (if necessary). The 5/15/18 motion hearing date is stricken; no appearance is necessary on that date. (rbf,) (Entered: 4/25/2018)

* * *

5/7/18	153	RESPONSE by Pamela S. Beemer, Ronald R. Braeutigam, Nimalan Chinniah, Kathleen Hagerty, Craig A. Johnson, Candy Lee, William H. McLean, Northwestern University, Northwestern University Retirement Investment Committee, Ingrid S. Stafford, Eugene S. Sunshinein Opposition to MOTION by Plaintiffs Laura L. Divane, April Hughes, Katherine D. Lancaster, Jasmine Walker for leave to file Second Amended Complaint 129 (Martin, Craig) (Entered: 5/7/2018)
5/7/18	154	DECLARATION of Casey T. Grabenstein regarding response in opposition to motion, 153 (Attachments: #1 Exhibit A, #2 Exhibit B, #3 Exhibit C, #4 Exhibit D) (Grabenstein, Casey) (Entered: 5/7/2018)

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6/8/18	156	MINUTE entry before the Honorable Jorge L. Alonso: Motion hearing held. Plaintiffs' motion for leave to file second amended complaint 129 is taken under advisement. Plaintiffs' reply in support shall be filed by

		5/10/18. Plaintiffs' motion for leave to file proposed amended complaint under seal 133 is granted. Plaintiffs' motion to withdraw appearance 152 is granted. Attorney Stephen Mark Hoeplinger is given leave to withdraw as counsel for Plaintiffs. Status hearing set for 5/23/18 at 9:30 a.m. Notices mailed by judge's staff (ntf,) (Entered: 5/8/2018)

* * *

5/10/18	159	REPLY by Plaintiffs Susan Bona, Laura L. Divane, April Hughes, Katherine D. Lancaster, Jasmine Walker to motion for leave to file 129 (Schlichter, Andrew) (Entered: 5/10/2018)

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5/25/18	162	MEMORANDUM Opinion and Order. The Court grants defendants' motion to dismiss 58 and denies plaintiffs' motion for leave to amend 129. Plaintiffs' motion for leave to file under seal 133 is denied. All other pending motions are denied as moot. Any pending dates are stricken. Plaintiffs' case is dismissed with prejudice. Civil case terminated. Signed by the Honorable Jorge L. Alonso on 5/25/2018. Notice mailed by judge's staff (ntf,) (Entered: 5/25/2018)
5/25/18	163	ENTERED JUDGMENT on 5/25/2018. Notice mailed by judge's staff (ntf,) (Entered: 5/25/2018)

5/25/18	164	MINUTE entry before the Honorable Michael T. Mason: The District Court has terminated this case 162. Accordingly, the referral to this Court is hereby closed. Judge Michael T. Mason no longer referred to the case. Mailed notice. (rbf,) (Entered: 5/25/2018)

* * *

6/22/18	167	MOTION by Plaintiffs Susan Bona, Laura L. Divane, April Hughes, Katherine D. Lancaster, Jasmine Walker to alter judgment, MOTION by Plaintiffs Susan Bona, Laura L. Divane, April Hughes, Katherine D. Lancaster, Jasmine Walker to amend/correct amended complaint 38, entered judgment 163, Order on Motion to Dismiss for Failure to State a Claim, order on motion to quash, order on motion for leave to file, order on motion for extension of time to complete discovery, memorandum opinion and order, terminated case, 162 (Schlichter, Jerome) (Entered: 6/22/2018)
6/22/18	168	MEMORANDUM by Susan Bona, Laura L. Divane, April Hughes, Katherine D. Lancaster, Jasmine Walker in support of motion to alter judgment, motion to amend/correct, 167 (Schlichter, Jerome) (Entered: 6/22/2018)
6/22/18	169	SEALED DOCUMENT by Plaintiffs Susan Bona, Laura L. Divane, April

		Hughes, Katherine D. Lancaster, Jasmine Walker (Schlichter, Jerome) (Entered: 6/22/2018)
6/22/18	170	NOTICE of Motion by Jerome J. Schlichter for presentment of motion to alter judgment, motion to amend/ correct, 167 before Honorable Jorge L. Alonso on 7/5/2018 at 9:30 AM. (Schlichter, Jerome) (Entered: 6/22/2018)

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6/27/18	173	ORDER. Plaintiffs' motion to file excess pages 165 is granted. Plaintiffs' motion to file under seal 171 is granted in part and denied in part. Document 169 will be kept under seal until July 12, 2018. Plaintiffs' motion to alter or amend the judgment and for leave to file second amended complaint 167 is denied. Any remaining motions are denied as moot. Motion hearing date of 7/5/18 is stricken. [For further details see order.] Signed by the Honorable Jorge L. Alonso on 6/27/2018. Notices mailed by judge's staff (ntf,) (Entered: 6/27/2018)

* * *

7/10/18	179	ORDER. Defendants' motion to seal 174 is granted. Document 169 will remain under seal, and the parties shall file a redacted version (with paragraphs 207, 209 and 250 redacted). Motion hearing date of 7/12/18 is stricken. Plaintiffs' motions to withdraw appearance 176 is granted. Attorney James Redd is given leave

		to withdraw as counsel for Plaintiffs. Defendants' motion for leave to withdraw appearance 177 is granted. Attorney Casey T. Grabenstein is given leave to withdraw as counsel for Defendants. Motion hearing date of 7/24/18 is stricken. [For further details see order.] Signed by the Honorable Jorge L. Alonso on 7/10/2018. Notices mailed by judge's staff (ntf,) (Entered: 7/10/2018)
7/12/18	180	Plaintiffs' Proposed Second Amended Complaint (Redacted Public Version) Filed Pursuant to Court Order at Docket No. 179 by Pamela S. Beemer, Ronald R. Braeutigam, Nimalan Chinniah, Kathleen Hagerty, Craig A. Johnson, Candy Lee, William H. McLean, Northwestern University, Northwestern University Retirement Investment Committee, Ingrid S. Stafford, Eugene S. Sunshine (Amert, Amanda) (Entered: 7/12/2018)
7/18/18	181	NOTICE of appeal by Laura L. Divane, April Hughes, Katherine D. Lancaster, Jasmine Walker regarding orders 173, 138, 163, 162 Filing fee $505, receipt number 0752-14714864. Receipt number: n (Schlichter, Jerome) (Entered: 7/18/2018)

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7/18/18	183	TRANSMITTED to the 7th Circuit the short record on notice of appeal 181. Notified counsel (ek,) (Entered: 7/18/2018)

* * *

7/30/18	185	TRANSCRIPT OF PROCEEDINGS held on 5-8-18 before the Honorable Jorge L. Alonso. Order Number: 31403. Court Reporter Contact Information: Nancy LaBella, 312-435-6890, NLaBella.ilnd@gmail.com. IMPORTANT: The transcript may be viewed at the court's public terminal or purchased through the Court Reporter/ Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through the Court Reporter/ Transcriber or PACER. For further information on the redaction process, see the Court's web site at www.ilnd.uscourts.gov under Quick Links select Policy Regarding the Availability of Transcripts of Court Proceedings. Redaction Request due 8/20/2018. Redacted Transcript Deadline set for 8/30/2018. Release of Transcript Restriction set for 10/29/2018. (Labella, Nancy) (Entered: 7/30/2018)

* * *

1/17/19	187	CERTIFIED copy of order dated 1/17/2019 from the USCA 7th Circuit regarding notice of appeal 181; Appellate case no.: 18-2569: Upon consideration of the APPELLANT'S MOTION TO FILE A PORTION OF THEIR APPENDIX UNDER SEAL, filed on January 14, 2019, by counsel for the appellant, IT IS ORDERED that the motion to seal is DENIED WITHOUT

		PREJUDICE to renewal by any defendant-appellee who believes the documents contained in volume IV of plaintiffs-appellants' appendix must be maintained under seal. Any such motion must explain in detail why the documents are required to be kept under seal in accordance with Baxter v. Abbott Labs., 297 F.3d 544 (7th Cir. 2002). (lf,) (Entered: 1/17/2019)
1/25/19	188	CERTIFIED copy of order dated 1/25/2019 from the 7th Circuit Court of Appeals regarding notice of appeal 181; Appellate case no.: 18-2569. (yap,) (Entered: 1/25/2019)
5/19/20	189	MANDATE of USCA dated 5/19/2020 regarding notice of appeal 181; USCA No.18-2569; No record to be returned. (nsf,) (Entered: 5/19/2020)
5/19/20	190	CERTIFIED COPY OF USCA JUDGMENT dated 3/25/2020 regarding notice of appeal 181; USCA No. 18-2569. (nsf,) (Entered: 5/19/2020)
5/19/20	191	CERTIFIED copy of order dated 5/11/2020 from the Seventh Circuit regarding notice of appeal 181; Appellate case no.: 18-2569. Accordingly, the petition for rehearing is DENIED. (nsf,) (Entered: 5/19/2020)
5/19/20	192	CERTIFIED COPY OF OPINION from the USCA for the 7th Circuit; Argued 5/23/2019; Decided 3/25/2020 in USCA case no. 18-2569 (nsf,) (Entered: 5/19/2020)

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 18-2569

LAURA L. DIVANE, ET AL.,
Plaintiffs-Appellants,
v.

NORTHWESTERN UNIVERSITY, ET AL.,
Defendants-Appellees.

Date Filed	Docket	Text
7/18/18	1	Private civil case docketed. Fee paid. Transcript information sheet due by 8/1/2018. Docketing Statement due for Appellants Laura L. Divane, April Hughes, Katherine D. Lancaster and Jasmine Walker by 7/25/2018. Appellant's brief due on or before 8/27/2018 for Laura L. Divane, April Hughes, Katherine D. Lancaster and Jasmine Walker. [1] [6939337] [18-2569] (FP) [Entered: 7/19/2018 11:48 AM]

* * *

Date Filed	Docket	Text
8/1/18	7	Filed Plaintiffs-Appellants' Statement of the Issues by Appellants Laura L. Divane, April Hughes, Katherine D. Lancaster and Jasmine Walker. [7] [6942330] [18-2569] (Schlichter, Jerome) [Entered: 8/1/2018 5:24 PM]

* * *

11/8/18	15	ORDER: Pursuant to Circuit Rule 33, briefing will proceed as follows: Appellants' brief due on or before 1/14/2019 for Laura L. Divane, April Hughes, Katherine D. Lancaster and Jasmine Walker. Appellees' brief due on or before 3/14/2019 for Pamela S. Beemer, Ronald Braeutigam, Kathleen Hagerty, Northwestern University and Northwestern University Retirement Investment Committee. Appellants' reply brief, if any, is due on or before 3/27/2019 for Appellants Laura L. Divane, April Hughes, Katherine D. Lancaster and Jasmine Walker. JNS [6964438] [18-2569] (PS) [Entered: 11/8/2018 2:26 PM]

* * *

1/14/19	22	Appellant's brief filed by Appellants Laura L. Divane, April Hughes, Katherine D. Lancaster and Jasmine Walker. Paper copies due on 1/25/2019. Electronically Transmitted. [22] [6979050] [18-2569] (CM) [Entered: 1/18/2019 3:44 PM]

* * *

1/14/19	23	Filed Appendix Volumes 1 and 2 by Appellants Laura L. Divane, April Hughes, Katherine D. Lancaster and Jasmine Walker. [23] [6979054] Paper copies due on 1/25/2019. [18-2569] (CM) [Entered: 1/18/2019 3:47 PM]

* * *

1/22/19	27	Non-Party motion filed by AARP, AARP Foundation and Pension Rights Center to file Motion for Leave to File Brief for AARP, AARP Foundation, and Pension Rights Center as Amici Curiae Supporting Plaintiffs-Appellants. [27] [6979298] [18-2569] (Smith, Dara) [Entered: 1/22/2019 3:02 PM]

* * *

1/24/19	29	Motion filed by Appellees Northwestern University, Northwestern University Retirement Investment Committee, Pamela S. Beemer, Ronald Braeutigam and Kathleen Hagerty to Seal Portions of Plaintiffs' Proposed Second Amended Complaint. [29] [6979896] [18-2569] (Martin, Craig) [Entered: 1/24/2019 1:29 PM]
1/24/19	30	Instanter order issued GRANTING motion to file amici brief. [27] The clerk of this court shall file instanter the tendered copies of the amici brief. Amici Curiae AARP, AARP Foundation and Pension Rights Center. WLS [30] [6980008] [18-2569] (ER) [Entered: 1/24/2019 3:25 PM]
1/24/19	31	Amicus brief filed by Amici Curiae AARP Foundation, AARP and Pension Rights Center, per order. Paper copies due on 1/31/2019. Electronically Transmitted. [31] [6980033] [18-2569] (MAN) [Entered: 1/24/2019 4:10 PM]

1/25/19	32	ORDER re: Defendants-appellees' motion to seal portions of plaintiffs' proposed second amended complaint. IT IS ORDERED that the motion to seal is GRANTED. Volume IV of appellants' appendix (document 16-4) shall be maintained under seal in this court. [29] WLS [32] [6980090] [18-2569] (AG) [Entered: 1/25/2019 9:06 AM]
1/25/19	33	SEALED Appendix filed by Appellants Laura L. Divane, April Hughes, Katherine D. Lancaster and Jasmine Walker, per order. [33] [6980259] Paper copies due on 2/1/2019. [18-2569] (CM) [Entered: 1/25/2019 2:19 PM]

* * *

3/14/19	38	Appellee's brief filed by Appellees Pamela S. Beemer, Ronald Braeutigam, Kathleen Hagerty, Northwestern University and Northwestern University Retirement Investment Committee. Paper copies due on 3/22/2019 Electronically Transmitted. [38] [6990934] [18-2569] (DRS) [Entered: 3/15/2019 9:17 AM]
3/14/19	39	Filed Supplemental Appendix by Appellees Pamela S. Beemer, Ronald Braeutigam, Kathleen Hagerty, Northwestern University and Northwestern University Retirement Investment Committee. [39] [6990941] Paper copies due on 3/22/2019 [18-2569] (DRS) [Entered: 3/15/2019 9:31 AM]

* * *

3/21/19	43	Amicus brief filed by Amici Curiae American Benefits Council and The Chamber of Commerce of the United States of America by consent. Paper copies due on 3/28/2019 Electronically Transmitted. [43] [6992467] [18-2569] (CCG) [Entered: 3/21/2019 4:22 PM]

* * *

3/27/19	45	Appellant's reply brief filed by Appellants Laura L. Divane, April Hughes, Katherine D. Lancaster and Jasmine Walker. Paper copies due on 4/3/2019. Electronically Transmitted. [45] [6993466] [18-2569] (DSL) [Entered: 3/27/2019 10:50 AM]
4/12/19	46	Argument set for Thursday, May 23, 2019, at 9:30 a.m. in the Main Courtroom, Room 2721. Each side limited to 20 minutes. [46] [6997843] [18-2569] (GW) [Entered: 4/12/2019 4:33 PM]
5/6/19	47	Filed Appellants Katherine D. Lancaster, April Hughes, Laura L. Divane and Jasmine Walker Citation of Additional Authority, per Circuit Rule 28(e). Argument set for: 5/23/2019. [47] [7002740] [18-2569] (Wolff, Michael) [Entered: 5/6/2019 2:37 PM]
5/13/19	48	Filed Appellees Kathleen Hagerty, Northwestern University, Northwestern University Retirement Investment Committee, Ronald Braeutigam and Pamela S. Beemer Citation of Additional Authority, per Circuit Rule

		28(e). Argument set for: 5/23/2019. [48] [7004106] [18-2569] (Martin, Craig) [Entered: 5/13/2019 10:58 AM]

* * *

5/23/19	53	Case heard and taken under advisement by panel: William J. Bauer, Circuit Judge; Daniel A. Manion, Circuit Judge and Michael B. Brennan, Circuit Judge. [53] [7006677] [18-2569] (CM) [Entered: 5/23/2019 10:18 AM]
5/23/19	54	Case argued by Mr. Michael A. Wolff for Appellants Laura L. Divane, April Hughes and Katherine D. Lancaster and Mr. Craig C. Martin for Appellees Northwestern University, Northwestern University Retirement Investment Committee, Pamela S. Beemer, Ronald Braeutigam and Kathleen Hagerty. [54] [7006678] [18-2569] (CM) [Entered: 5/23/2019 10:18 AM]
3/25/20	55	Filed opinion of the court by Judge Brennan. For the reasons above, we AFFIRM the district court's dismissal of plaintiffs' amended complaint on all counts and AFFIRM the decision to deny plaintiffs' request for leave to further amend the complaint and for a jury trial. William J. Bauer, Circuit Judge; Daniel A. Manion, Circuit Judge and Michael B. Brennan, Circuit Judge. [55] [7070752] [18-2569] (MM) [Entered: 3/25/2020 12:34 PM]
3/25/20	56	ORDER: Final judgment filed per opinion. With costs: yes. [56]

		[7070755] [18-2569] (MM) [Entered: 3/25/2020 12:38 PM]
4/1/20	57	Motion filed by Appellants Laura L. Divane, April Hughes, Katherine D. Lancaster and Jasmine Walker to extend time to file petition for rehearing [57] [7072328] [18-2569] (Soyars, Sean) [Entered: 4/1/2020 8:13 PM]
4/2/20	58	Order issued GRANTING motion to extend time to file petition for rehearing [57] Petition for Rehearing due for Appellants Laura L. Divane, April Hughes, Katherine D. Lancaster and Jasmine Walker by 4/22/2020. WLS [58] [7072485] [18-2569] (VG) [Entered: 4/2/2020 2:49 PM]

* * *

4/22/20	61	Filed Petition for Rehearing and Petition for Rehearing En banc by Appellants Laura L. Divane, April Hughes, Katherine D. Lancaster and Jasmine Walker, per order. Paper copies due on 4/27/2020. [61] [7076625] [18-2569] (MAN) [Entered: 4/23/2020 9:10 AM]

* * *

5/11/20	65	ORDER: Appellants Laura L. Divane, April Hughes, Katherine D. Lancaster and Jasmine Walker Petition for Rehearing and Petition for Rehearing En banc is DENIED. (Chief Judge Wood, Judge Flaum, Judge Scudder and Judge St. Eve did not participate in the consideration of this petition.)

		[65] [7080027] [18-2569] (ER) [Entered: 5/11/2020 10:10 AM]
5/19/20	66	Mandate issued. No record to be returned. [66] [7081799] [18-2569] (PNR) [Entered: 5/19/2020 11:29 AM]
5/19/20		FOR COURT USE ONLY: Certified copy of 3/25/2020 Final Opinion, Final Judgement, 5/11/2020 Rehearing Denial Order, and Mandate sent to the District Court Clerk. [7081806-2] [7081806] [18-2569] (PNR) [Entered: 5/19/2020 11:40 AM]
6/23/20	67	Filed notice from the Supreme Court of the filing of a Petition for Writ of Certiorari. 19-1401 [67] [7089095] [18-2569] (AG) [Entered: 6/24/2020 2:28 PM]

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 16 C 8157

LAURA L. DIVANE, ET AL.,
Plaintiffs,
v.

NORTHWESTERN UNIVERSITY, ET AL.,
Defendants.

Honorable Jorge L. Alonso

AMENDED COMPLAINT—CLASS ACTION

JURY TRIAL DEMANDED

AMENDED COMPLAINT

1. Plaintiffs Laura L. Divane, April Hughes, Susan Bona, Katherine D. Lancaster, and Jasmine Walker individually and as representatives of a class and subclasses of participants and beneficiaries of the Northwestern University Retirement Plan and the Northwestern University Voluntary Savings Plan (herein collectively referred to as the "Plans"), bring this action under 29 U.S.C. §1132(a)(2) on behalf of the Plans against Defendants Northwestern University, Northwestern University Retirement Investment Committee, Pamela S. Beemer, Ronald R. Braeutigam, Kathleen Hagerty, Craig A. Johnson, Candy Lee, William H. McLean, Ingrid S. Stafford,

and Nimalam Chinniah for breach of fiduciary duties under ERISA.[1]

2. ERISA imposes duties on plan fiduciaries that are "the highest known to the law." *George v. Kraft Foods Global, Inc.*, 814 F. Supp. 2d 832, 852 (N.D. Ill. 2011) (Castillo, J.); *Donovan v. Bierwirth*, 680 F.2d 263, 271, 272 n.8 (2d Cir. 1982); 29 U.S.C. §1104(a). Fiduciaries must act with "complete and undivided loyalty to beneficiaries of the trust, and with an eye single to the interests of participants and beneficiaries." *Leigh v. Engle*, 727 F.2d 113, 123 (7th Cir. 1984) (internal quotations and citations omitted). In exercising these duties, ERISA fiduciaries are held to the standard of financial experts in the field of investment management. *See Katsaros v. Cody*, 744 F.2d 270, 275, 279 (2d Cir. 1984); *Liss v. Smith*, 991 F. Supp. 278, 296 (S.D.N.Y. 1998). Fiduciaries must "initially determine, and continue to monitor, the prudence of *each* investment option available to plan participants," *DiFelice v. U.S. Airways, Inc.*, 497 F.3d 410, 423 (4th Cir. 2007) (emphasis original), and must "remove imprudent ones" within a reasonable time, *Tibble v. Edison Int'l*, 135 S. Ct. 1823, 1828-29 (2015).

3. The marketplace for retirement plan services is established and competitive. Billion-dollar-defined contribution plans, like the Plans—which are each among the largest 0.2% of defined contribution plans in the United States—have tremendous bargaining power to demand low-cost administrative and investment management services. As fiduciaries to the Plans, Defendants are obligated to limit the Plans' expenses to a reasonable amount, to ensure that *each*

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[1] The Employee Retirement Income Security Act, 29 U.S.C. §§1001-1461.

fund in the Plans is a prudent option for participants to invest their retirement savings and priced at a reasonable level for the size of the Plans; and to analyze the costs and benefits of alternatives for the Plans' administrative and investment structure. Defendants must make those decisions for the exclusive benefit of participants, and not for the benefit of conflicted third parties, such as the Plans' service providers.

4. Instead of using the Plans' bargaining power to reduce expenses and exercising independent judgment to determine what investments to include in the Plans, Defendants squandered that leverage by allowing the Plans' conflicted third-party service providers—TIAA-CREF and Fidelity—to dictate the Plans' investment lineup, to include hundreds of their proprietary mutual funds in the Plans, to link their recordkeeping services to the placement of those funds in the Plans, and to collect nearly unlimited asset-based compensation from their proprietary products.

5. To remedy these fiduciary breaches, Plaintiffs, individually and as representatives of a class and subclasses of participants and beneficiaries of the Plans, bring this action on behalf of the Plans under 29 U.S.C. §1132(a)(2) to enforce Defendants' personal liability under 29 U.S.C. §1109(a) to make good to the Plans all losses resulting from each breach of fiduciary duty and to restore to the Plans any profits made through Defendants' use of the Plans' assets. In addition, Plaintiffs seek such other equitable or remedial relief for the Plans as the Court may deem appropriate.

JURISDICTION AND VENUE

6. **Subject-matter jurisdiction.** This Court has exclusive jurisdiction over the subject matter of this action under 29 U.S.C. §1132(e)(1) and 28 U.S.C. §1331 because it is an action under 29 U.S.C. §1132(a)(2).

7. **Venue.** This District is the proper venue for this action under 29 U.S.C. §1132(e)(2) and 28 U.S.C. §1391(b) because it is the district in which the subject Plans are administered, where at least one of the alleged breaches took place, and where the Defendants reside or may be found.

8. **Standing.** An action under §1132(a)(2) allows recovery only for a plan, and does not provide a remedy for individual injuries distinct from plan injuries. *LaRue v. DeWolff, Boberg & Assocs.*, 552 U.S. 248, 256 (2008). The plan is the victim of any fiduciary breach and the recipient of any recovery. *Id.* at 254. Section 1132(a)(2) authorizes any participant, fiduciary, or the Secretary of Labor to sue derivatively as a representative of the plan to seek relief on behalf of the plan. 29 U.S.C. §1132(a)(2). As explained in detail below, the Plans suffered millions of dollars in losses caused by Defendants' fiduciary breaches and remain exposed to harm and continued future losses. Those injuries may be redressed by a judgment of this Court in favor of Plaintiffs. To the extent the Plaintiffs must also show an individual injury even though §1132(a)(2) does not provide redress for individual injuries, each Plaintiff has suffered such an injury, in at least the following ways:

a. The named Plaintiffs and all participants in the Plans suffered financial harm as a result of the imprudent or excessive fee options in the Plans because Defendants' inclusion of those options deprived participants of the opportunity to grow their retirement savings by investing in prudent options with reasonable fees, which would have been available in the Plans if Defendants had satisfied its fiduciary obligations. All participants continue to be harmed by the ongoing inclusion of these imprudent and excessive cost options and payment of excessive recordkeeping fees.

b. The named Plaintiffs and all participants in the Plans were financially harmed by Defendants' improper bundling of some of the Plans' investment products, improperly allowing the companies who did recordkeeping for the Plans to require inclusion of their investment products in the Plans, instead of each investment option being independently selected.

c. The named Plaintiffs' individual accounts in the Plans were further harmed by Defendants' breaches of fiduciary duties because one or more of the named Plaintiffs during the proposed class/subclass period (1) invested in the CREF Stock and TIAA Real Estate accounts—which were improperly bundled with TIAA's recordkeeping services and which Defendants also failed to remove from the Plans when it was clear from past poor performance and their excessive fees that they were imprudent investments—at a time when those options underperformed prudent alternatives in which those assets would have been invested had Defendants not breached its fiduciary duties (Plaintiffs Bona, Lancaster, Walker), (2) invested in excessive-cost investment options, including funds that paid revenue sharing to the Plans' recordkeepers and higher-cost share classes of mutual funds priced for small investors when far lower-cost but otherwise identical share classes of the same mutual funds were available to the Plans because of its enormous size (all Plaintiffs), and (3) through the fees charged on their investments in those mutual funds and other investments, paid a portion of the Plans' excessive administrative and recordkeeping fees, which would not have been incurred had Defendants discharged their fiduciary duties to the Plans (all Plaintiffs).

d. Specifically, during the class period, Plaintiff Bona invested in the higher-cost share classes of TIAA-CREF Equity Index, TIAA-CREF Short-Term Bond, and TIAA-CREF High-Yield as well as TIAA Traditional, TIAA Real Estate, CREF Bond Market, CREF Inflation Linked Bond, and CREF Money Market (among others); Plaintiff Divane invested in the higher-cost share classes of Fidelity Contrafund, Fidelity Growth & Income, Fidelity China Region, Vanguard Institutional Index, Vanguard Extended Market Index, Vanguard Total International Stock, and Vanguard Total Bond Market; Plaintiff Hughes invested in the higher-cost share class of Vanguard Institutional Index, as well as TIAA Traditional, CREF Growth, CREF Social Growth, and CREF Equity Growth (among others); Plaintiff Lancaster invested in the TIAA Traditional, CREF Stock, and TIAA Real Estate; Plaintiff Walker invested in the higher-cost share classes of Fidelity Freedom 2020 and TIAA-CREF Lifecycle 2035, as well as CREF Global Equities, TIAA Traditional, CREF Stock, CREF Growth, TIAA Real Estate, and CREF Money Market. Through their investments in these funds, each Plaintiff paid excessive investment management fees and each was assessed a portion of the Plans' excessive administrative and recordkeeping fees. Plaintiffs would not have suffered these losses if Defendants had prudently monitored revenue sharing, solicited competitive bids, consolidated recordkeepers for both Plans, or reduced fees to reasonable levels in accordance with their fiduciary duties under ERISA.

PARTIES

Northwestern University Retirement Plan

9. The Northwestern University Retirement Plan ("Retirement Plan") is a defined contribution, individual account, employee pension benefit plan under 29 U.S.C. §1002(2)(A) and §1002(34).

10. The Retirement Plan is established and maintained under a written document in accordance with 29 U.S.C. §1102(a)(1).

11. The Retirement Plan provides for retirement income for certain employees of Northwestern University. That retirement income depends upon deferrals of employee compensation, employer matching contributions, and performance of investment options net of fees and expenses.

12. As of December 31, 2015, the Retirement Plan had $2.34 billion in net assets and 21,622 participants with account balances. It is among the largest 0.04% of all defined contribution plans in the United States based on total assets. Plans of such great size are commonly referred to as "jumbo plans."

Northwestern University Voluntary Savings Plan

13. The Northwestern University Voluntary Savings Plan ("Voluntary Savings Plan")[2] is a defined contribution, individual account, employee pension benefit plan under 29 U.S.C. §1002(2)(A) and §1002(34).

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[2] Certain plan-related materials such as account statements also refer to the Voluntary Savings Plan as the "Northwestern University 403(b) Supplemental Plan."

14. The Voluntary Savings Plan is established and maintained under a written document in accordance with 29 U.S.C. §1102(a)(1).

15. The Voluntary Savings Plan provides for retirement income for certain employees of Northwestern University. That retirement income depends upon deferrals of employee compensation and performance of investment options net of fees and expenses.

16. As of December 31, 2015, the Voluntary Savings Plan had $530 million in net assets and 12,293 participants with account balances. It is among the largest 0.2% of all defined contribution plans in the United States based on total assets. Plans of such great size are commonly referred to as "jumbo plans."

17. The Retirement Plan is funded by both by participants' deferrals of compensation and contributions by Northwestern on behalf of participants. The Voluntary Savings Plan is funded solely by participants' deferrals of compensation.

18. The Plans allow participants to designate investment options into which their individual accounts are invested. Defendants exercise exclusive discretionary authority and control over the investment options that are offered in the Plans.

Plaintiffs

19. Laura L. Divane resides in Skokie, Illinois, and is a Staff Nurse at Northwestern University Health Service. She is a participant in the Retirement Plan under 29 U.S.C. §1002(7) because she and her beneficiaries are or may become eligible to receive benefits under the Retirement Plan.

20. April Hughes resides in Wauconda, Illinois, and formerly worked as a Research Assistant in the Office of Sponsored Research at Northwestern

University. She is a participant in the Retirement Plan and the Voluntary Savings Plan under 29 U.S.C. §1002(7) because she and her beneficiaries are or may become eligible to receive benefits under the Plans.

21. Susan Bona resides in Lombard, Illinois and formerly worked as a Program Assistant in the Transplant Surgery Department at Northwestern University School of Medicine. She is a participant in the Retirement Plan under 29 U.S.C. §1002(7) because she and her beneficiaries are or may become eligible to receive benefits under the Retirement Plan.

22. Katherine D. Lancaster resides in Chicago, Illinois, and works as a Standard Operating Procedures Coordinator at Northwestern University. She is a participant in the Retirement Plan and the Voluntary Savings Plan under 29 U.S.C. §1002(7) because she and her beneficiaries are or may become eligible to receive benefits under the Plans.

23. Jasmine Walker resides in Des Plaines, Illinois, and previously worked as a Business Manager at the NUANCE Center at Northwestern University. She is a participant in the Retirement Plan and the Voluntary Savings Plan under 29 U.S.C. §1002(7) because she and her beneficiaries are or may become eligible to receive benefits under the Plans.

Defendants

24. Northwestern University ("Northwestern") is a non-profit corporation organized under Illinois law with its principal place of business in Evanston, Illinois.

25. Under Article 11.1 of both the Retirement Plan and Voluntary Savings Plan, Northwestern is designated as the "Plan Administrator" within the

meaning of 29 U.S.C. §1002(16)(A)(i), with responsibility for management of the Plans. Because the Plans name Northwestern as the entity with authority over the management of the Plans, it is a "named fiduciary" within the meaning of 29 U.S.C. §1102(a).

26. Northwestern is a fiduciary to the Plans because it exercised discretionary authority or discretionary control respecting the management of the Plans or exercised authority or control respecting the management or disposition of its assets, and has discretionary authority or discretionary responsibility in the administration of the Plans, as described more fully below. 29 U.S.C. §1002(21)(A)(i) and (iii).

27. The Plans authorize Northwestern to delegate in whole or in part any of its responsibilities to one or more officers or committees of the University.

28. According to Article 11.2 of both Plans, Northwestern delegated to its Executive Vice President all discretionary authority and powers necessary to administer the Plans, other than discretionary authority and power to control and manage the assets of the Plans. These administrative responsibilities include the authority to employ service providers to the Plans and to approve on behalf of Northwestern any contracts related to the administration of the Plans.

29. Nimalam Chinniah has served as Northwestern's Executive Vice President since September 8, 2014. Previously, Eugene S. Sunshine served in that role.

30. Nimalam Chinniah and Eugene S. Sunshine are fiduciaries to the Plans because they exercised discretionary authority or discretionary control respecting the management of the Plans or exercised authority or control respecting the management or

disposition of its assets, and have or had discretionary authority or discretionary responsibility in the administration of the Plans, as described more fully below. 29 U.S.C. §1002(21)(A)(i) and (iii).

31. According to Article 11.3 of both Plans, as authorized by the Board of Trustees, Northwestern's Senior Vice President for Business and Finance established the Northwestern University Retirement Investment Committee (NURIC), effective February 28, 2012.[3] NURIC was granted all discretionary authority and powers necessary to control and manage the assets of the Plans. Article 11.1 of each of the Plans designates NURIC as the named fiduciary with respect to the control or management of the assets of the Plans.

32. Upon information and belief, the current Chair of NURIC is Pamela S. Beemer. Other current NURIC members include: Ronald R. Braeutigam, Kathleen Hagerty, Craig A. Johnson, Candy Lee, William H. McLean, and Ingrid S. Stafford.

33. NURIC and its individual members are fiduciaries to the Plans because they exercised discretionary authority or discretionary control respecting the management of the Plans or exercised authority or control respecting the management or disposition of their assets, and have discretionary authority or discretionary responsibility in the administration of the Plan. 29 U.S.C. §1002(21)(A)(i) and (ii).

34. Because the Northwestern University entities, officers, and individual committee members described above have acted as alleged herein as the agents of

[3] The language of Article 11.3 suggests that the Executive Vice President has now assumed the functions for which the Senior Vice President for Business and Finance was formerly responsible.

Northwestern University, all defendants are collectively referred to hereafter as "Defendants."

ERISA FIDUCIARY STANDARDS

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

> [A] fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and –
>
> (A) for the exclusive purpose of
>
> (i) providing benefits to participants and their beneficiaries; and
>
> (ii) defraying reasonable expenses of administering the plan; [and]
>
> (B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of like character and with like aims.

36. Under ERISA, fiduciaries that exercise any authority or control over plan assets, including the selection of plan investments and service providers, must act prudently and for the *exclusive* benefit of participants in the plan, and not for the benefit of third parties including service providers to the plan such as recordkeepers and those who provide investment products. Fiduciaries must ensure that the amount of fees paid to those service providers is no more than reasonable. DOL Adv. Op. 97-15A; DOL Adv. Op. 97-16A; *see also* 29 U.S.C. §1103(c)(1) (plan assets "shall be held for the exclusive purposes of providing benefits to participants in the plan and

their beneficiaries and defraying reasonable expenses of administering the plan").

37. "[T]he 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 Litig.*, 74 F.3d 420, 435 (3d Cir. 1996); *Katsaros,* 744 F.2d at 279 (fiduciaries must use "the appropriate methods to investigate the merits" of plan investments). Fiduciaries must "initially determine, and continue to monitor, the prudence of *each* investment option available to plan participants." *DiFelice*, 497 F.3d at 423 (emphasis original); *see also* 29 C.F.R. § 2550.404a-1; DOL Adv. Opinion 98-04A; DOL Adv. Opinion 88-16A. Thus, a defined contribution plan fiduciary cannot "insulate itself from liability by the simple expedient of including a very large number of investment alternatives in its portfolio and then shifting to the participants the responsibility for choosing among them." *Hecker v. Deere & Co.*, 569 F.3d 708, 711 (7th Cir. 2009). Fiduciaries have "a continuing duty to monitor investments and remove imprudent ones[.]" *Tibble*, 135 S. Ct. at 1828-29.

38. The general fiduciary duties imposed by 29 U.S.C. §1104 are supplemented by a detailed list of transactions that are expressly prohibited by 29 U.S.C. §1106, and are considered *per se* violations because they entail a high potential for abuse. Section 1106(a)(1) states, in pertinent part, that:

> [A] fiduciary with respect to a plan shall not cause the plan to engage in a transaction, if he knows or should know that such transaction constitutes a direct or indirect –

(A) sale or exchange, or leasing, of any property between the plan and a party in interest;

* * *

(C) furnishing of goods, services, or facilities between the plan and party in interest;

(D) transfer to, or use by or for the benefit of a party in interest, of any assets of the plan . . .

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

> In addition to any liability which he may have under any other provisions of this part, a fiduciary with respect to a plan shall be liable for a breach of fiduciary responsibility of another fiduciary with respect to the same plan in the following circumstances:
>
> (1) if he participates knowingly in, or knowingly undertakes to conceal, an act or omission of such other fiduciary, knowing such act or omission is a breach; [or]
>
> (2) if, by his failure to comply with section 1104(a)(1) of this title 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
>
> (3) if he has knowledge of a breach by such other fiduciary, unless he makes reasonable efforts under the circumstances to remedy the breach.

40. 29 U.S.C. §1132(a)(2) authorizes a plan participant to bring a civil action to enforce a breaching

fiduciary's liability to the plan under 29 U.S.C. §1109. Section 1109(a) provides in relevant part:

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

BACKGROUND FACTS

I. Defined contribution plans, services, and fees.

41. When ERISA was enacted in 1974, defined benefit pension plans were America's retirement system. Such plans are now rarely available to employees in the private sector. "Defined contribution plans dominate the retirement plan scene today." *LaRue v. DeWolff, Boberg & Assocs*., 552 U.S. 248, 255 (2008).

42. Defined contribution plans allow employees to contribute a percentage of their pre-tax earnings to the plan, with the employer often matching those contributions up to a specified percentage. Each participant in the plan has an individual account. Participants direct plan contributions into one or more investment options in a lineup chosen and assembled by the plan's fiduciaries. "[P]articipants' retirement benefits are limited to the value of their own individual investment accounts, which is determined by the market performance of employee and employer contributions, less expenses." *Tibble*, 135 S. Ct. at 1826.

43. The majority of fees assessed to participants in a defined contribution plan are attributable to two general categories of services: plan administration (including recordkeeping), and investment management. These expenses "can sometimes significantly reduce the value of an account in a defined-contribution plan." *Id.*

44. A plan's fiduciaries have control over defined contribution plan expenses. The fiduciaries are responsible for hiring administrative service providers for the plan, such as a recordkeeper, and for negotiating and approving the amount of fees paid to those administrative service providers. The fiduciaries also have exclusive control over the menu of investment options to which participants may direct the assets in their accounts. Those selections each have their own fees, which are deducted from the returns that participants receive on their investments.

45. These fiduciary decisions have the potential to dramatically affect the amount of money that participants are able to save for retirement. According to the U.S. Department of Labor, a 1% difference in fees over the course of a 35-year career makes a difference of *28%* in savings at retirement. U.S. Dep't of Labor, *A Look at 401(k) Plan Fees,* at 1-2 (Aug. 2013).[4] Accordingly, fiduciaries of defined contribution plans must engage in a rigorous process to control these costs and ensure that participants pay no more than a reasonable level of fees. This is particularly true for multi-billion dollar plans like the Plans, which have the bargaining power to obtain the highest level of service and the lowest fees. The fees available to multi-billion dollar retirement plans are orders of magnitude lower than the much higher retail fees available to small investors.

[4] Available at http://www.dol.gov/ebsa/pdf/401kfeesemployee.pdf.

46. The entities that provide services to defined contribution plans have an incentive to maximize their fees by putting their own higher-cost funds in plans and collecting the highest amount possible for recordkeeping. For each additional dollar in fees paid to a service provider, participants' retirement savings are directly reduced by the same amount, and participants lose the potential for those lost assets to grow over the remainder of their careers. Accordingly, participants' retirement security is directly affected by the diligence used by plan fiduciaries to control, negotiate, and reduce the plan's fees.

47. Fiduciaries must be cognizant of providers' self-interest in maximizing fees, and not simply accede to the providers' preferred investment lineup —i.e., proprietary funds that will generate substantial fee revenue for the provider—or agree to the provider's administrative fee quotes without negotiating or considering alternatives. In order to act in the exclusive interest of participants and not in the service providers' interest, fiduciaries must negotiate as if their own money was at stake. Instead of simply accepting the investment funds or fees demanded by these conflicted providers, fiduciaries must consider whether participants would be better served by using alternative investment products or services.

II. Defined contribution recordkeeping.

48. Recordkeeping is a service necessary for every defined contribution plan. The recordkeeper keeps track of the amount of each participant's investments in the various options in the plan, and typically provides each participant with a quarterly account statement. The recordkeeper often maintains a plan website or call center that participants can access to obtain information about the plan and to review their accounts. The recordkeeper may also provide access

to investment education materials or investment advice. These services are largely commodities, and the market for recordkeeping services is highly competitive.

49. There are numerous recordkeepers in the marketplace who are capable of providing a high level of service and who will vigorously compete to win a recordkeeping contract for a jumbo defined contribution plan. These recordkeepers will readily respond to a request for proposal and will tailor their bids based on the desired services (e.g., recordkeeping, website, call center, etc.). In light of the commoditized nature of their services, recordkeepers primarily differentiate themselves based on price, and will aggressively bid to offer the best price in an effort to win the business, particularly for jumbo plans like the Plans

50. Some recordkeepers in the market provide only recordkeeping and administrative services, while others provide both recordkeeping services and investment products. The latter group has an incentive to place their own proprietary products in the plan in order to maximize revenues from servicing the plan. As explained below, when faced with such conflicted fund recommendations, fiduciaries must independently assess whether the provider's investment product is the best choice for the plan, or whether the purpose of providing benefits to participants would be better accomplished by considering other investment managers who may offer superior funds at a better price.

III. Defined contribution investment options.

51. Defined contribution fiduciaries have exclusive control over the particular investment alternatives available in the plan to which participants direct and

allocate their plan accounts, and the returns on which are credited to participants' accounts.

52. Each investment option is typically a pooled investment product, such as a mutual fund, and invests in a diversified portfolio of securities in a broad asset class such as fixed income, bonds, or equities. Fixed income funds may include conservative principal protection options, such as stable value funds, or other diversified portfolios of government or corporate debt securities. Equity funds invest in diversified portfolios of stocks of large, mid, or small domestic or international companies in a particular style such as growth or value (or a blend of the two). Balanced funds invest in a mix of stocks and bonds in varying percentages.

53. Investment options can be passively or actively managed. In a passively managed or "index" fund, the investment manager attempts to match the performance of a given benchmark index by holding a representative sample of securities in that index, such as the S&P 500. In an actively managed fund, the investment manager uses her judgment in buying and selling individual securities (*e.g.*, stocks, bonds, etc.) in an attempt to generate investment returns that surpass a benchmark index, net of fees. Because no stock selection or research is necessary for the manager to track the index and trading is limited, passively managed investments charge significantly lower fees than actively managed funds.

54. Mutual fund fees are usually expressed as a percentage of assets under management, or "expense ratio." For example, if the mutual fund deducts 1% of fund assets each year in fees, the fund's expense ratio would be 1%, or 100 basis points (bps).[5] The

[5] One basis point is equal to 1/100th of one percent (or 0.01%).

fees deducted from a mutual fund's assets reduce the value of the shares owned by fund investors.

55. Many mutual funds offer their investors different share classes. Retail share classes are marketed to individuals with small amounts to invest. Institutional share classes are offered to investors with large amounts to invest, such as large retirement plans. The different share classes of a given mutual fund have the identical manager, are managed identically, and invest in the same portfolio of securities. The only difference is that the retail shares charge significantly higher fees, resulting in retail class investors receiving lower returns. The share classes are otherwise identical in all respects.

56. Some mutual funds engage in a practice known as "revenue sharing." In a revenue-sharing arrangement, a mutual fund pays a portion of its expense ratio to the entity providing administrative and recordkeeping services to a plan. The difference in fees between a mutual fund's retail and institutional share classes is often attributable to revenue sharing. To illustrate, a fund's retail share class may have an expense ratio of 100 bps, including 25 bps of revenue sharing, while the institutional share charges 75 bps, with no or lesser revenue sharing. The presence of revenue sharing thus provides an incentive for administrative service providers to recommend that the fiduciary select higher cost funds, including in-house funds of the administrative service provider that pay the provider revenue sharing. "[V]ery little about the mutual fund industry," including revenue sharing practices, "can plausibly be described as transparent[.]" *Leimkuehler v. Am. United Life Ins. Co.*, 713 F.3d 905, 907 (7th Cir. 2013).

57. The importance of fees in prudent investment selection cannot be overstated. The prudent investor

rule developed in the common law of trusts, which informs ERISA's fiduciary duties, emphasizes "the duty to avoid unwarranted costs[.]" Restatement (Third) of Trusts ch. 17, intro. note (2007); *see Tibble*, 135 S. Ct. at 1828 (analyzing common law of trusts and Restatement (Third) of Trusts §90 in finding a continuing duty to monitor under ERISA). As the Restatement explains, "cost-conscious management is fundamental to prudence in the investment function." Restatement (Third) of Trusts § 90 cmt. b. While a fiduciary may consider higher-cost, actively-managed mutual funds as an alternative to index funds, "active management strategies involve investigation expenses and other transaction costs . . . that must be considered, realistically, in relation to the likelihood of increased return from such strategies." Restatement (Third) of Trusts ch. 17, intro. note; *id.* § 90 cmt. h(2).

58. Academic and financial industry literature demonstrates that high expenses are not correlated with superior investment management. Indeed, funds with high fees on average perform worse than less expensive funds even on a *pre-fee basis*. Javier Gil-Bazo & Pablo Ruiz-Verdu, *When Cheaper is Better: Fee Determination in the Market for Equity Mutual Funds*, 67 J. ECON. BEHAV. & ORG. 871, 873 (2008); *see also* Jill E. Fisch, *Rethinking the Regulation of Securities Intermediaries*, 158 U. PA. L. REV. 1961, 1993 (2010) (summarizing numerous studies showing that "the most consistent predictor of a fund's return to investors is the fund's expense ratio").

> [T]he empirical evidence implies that superior management is not priced through higher expense ratios. On the contrary, it appears that the effect of expenses on after-expense performance (even after controlling for funds' observable characteris-

> tics) is more than one-to-one, which would imply that low-quality funds charge higher fees. Price and quality thus seem to be inversely related in the market for actively managed mutual funds.

Gil-Bazo & Ruiz-Verdu, *When Cheaper is Better*, at 883.

59. In light of this effect of fees on expected returns, fiduciaries must carefully consider whether the added cost of actively managed funds is realistically justified by an expectation of higher returns. Restatement (Third) of Trusts ch. 17, intro. note; *id.* § 90 cmt. h(2). A prudent investor will not select higher-cost actively managed funds without analyzing whether a particular investment manager is likely to beat the overwhelming odds against outperforming its benchmark index over time, net of the fund's higher investment expenses.

IV. Revenue sharing: a practice that can lead to excessive fees if not properly monitored and capped.

60. There are two primary methods for defined contribution plans to pay for recordkeeping and administrative services: "direct" payments from plan assets, and "indirect" revenue sharing payments from plan investments such as mutual funds. Plans may use one method or the other exclusively, or may use a combination of both direct and indirect payments.

61. In a typical direct payment arrangement, the fiduciary contracts with the recordkeeper to obtain administrative services in exchange for a flat annual fee based on the number of participants for which the recordkeeper will be providing services, for example $30 per participant. Jumbo defined contribution plans possess tremendous economies of scale for purposes

of recordkeeping and administrative fees. A plan with 20,000 participants can obtain a much lower fee on a per-participant basis than a plan with 2,000 participants.

62. A recordkeeper's cost for providing services depends on the number of participants in the plan, not the amount of assets in the plan or in an individual account. The cost of recordkeeping a $75,000 account balance is the same as a $7,500 account. Accordingly, a flat price based on the number of participants in the plan ensures that the amount of compensation is tied to the actual services provided and does not grow based on matters that have nothing to do with the services provided, such as an increase in plan assets due to market growth or greater plan contributions by the employee.

63. As an example, a fiduciary of a 20,000 participant, $2 billion plan may issue a request for proposal to several recordkeepers and request that the respondents provide pricing based on a flat rate for a 20,000-participant plan. If the winning recordkeeper offers to provide the specified services at a flat rate of $30 per participant per year, the fiduciary would then contract with the recordkeeper for the plan to pay a $600,000 direct annual fee (20,000 participants at $30/participant). If the plan's assets increase to $3 billion during the course of the contract but the participant level stays constant, the recordkeeper's compensation does not change, because the services provided have not changed.

64. Such a flat per-participant agreement does not necessarily mean, however, that every participant in the plan must pay the same $30 fee from his or her account. The fiduciary could reasonably determine that it is equitable to charge each participant the same $30 (for example, through a quarterly charge of

$7.50 to each account in the plan). Alternatively, the fiduciary could conclude that assessing the same fee to all investors would discourage participants with relatively small accounts from participating in the plan, and that, once the aggregate flat fee for the plan has been determined, a proportional asset-based charge would be best. In that case, the flat per-participant rate of $30 per participant multiplied by the number of participants would simply be converted to an asset-based charge, such that every participant pays the same percentage of his or her account balance. For the $2 billion plan in this example, each participant would pay a direct administrative fee of 0.03% of her account balance annually for record-keeping ($600,000/$2,000,000,000 = 0.0003). If plan assets increase thereafter, the percentage would be adjusted downward so that the *plan* is still paying the same $600,000 price that was negotiated at the plan level for services to be provided to the plan.

65. Defendants use a different method of paying for recordkeeping for the Plans, through "indirect" revenue sharing payments from the plan's mutual funds. Revenue sharing, while not a *per se* violation of ERISA, can lead to excessive fees if not properly monitored and capped.

66. In a revenue sharing arrangement, the mutual fund pays the plan's recordkeeper putatively for providing recordkeeping and administrative services for the fund. However, because revenue sharing payments are asset based, the fees can grow to unreasonable levels if plan assets grow while the number of participants, and thus the services provided, has not increased at a similar rate. The opposite is generally not true. If plan assets decline, participants will not receive a sustained benefit of paying lower fees, because the recordkeeper will demand that the plan

make up the shortfall through additional direct payments.

67. If a fiduciary decides to use revenue sharing to pay for recordkeeping, it is required that the fiduciary (1) determine and monitor the amount of the revenue sharing and any other sources of compensation that the provider has received, (2) compare that amount to the price that would be available on a flat per-participant basis, and (3) control the amount of fees paid through recordkeeping by obtaining rebates of any revenue sharing amounts that exceed the reasonable level of fees.

68. As to the second critical element—determining the price that would be available on a flat per-participant basis—making that assessment for a jumbo plan requires soliciting bids from competing providers. In multi-billion dollar plans with over 10,000 participants, such as the Plans, benchmarking based on fee surveys alone is inadequate. Recordkeeping fees for jumbo plans have declined significantly in recent years due to increased technological efficiency, competition, and increased attention to fees by sponsors of other plans such that fees that may have been reasonable at one time may have become excessive based on current market conditions. Accordingly, the only way to determine the true market price at a given time is to obtain competitive bids. *See George v. Kraft Foods Global, Inc.*, 641 F.3d 786, 800 (7th Cir. 2011) (a 401(k) excessive fee case which denied summary judgment based in part on the opinion of an independent consultant that "'without an actual fee quote comparison'—i.e., a bid from another service provider—[consultant] 'could not comment on the competitiveness of [recordkeeper's] fee amount for the services provided.'").

69. Industry experts recognize that this principle applies fully in the 403(b) context, just as in the 401(k) context. Compared to benchmarking, "the RFP is a far better way to negotiate fee and service improvements for higher education organizations." Fiduciary Plan Governance, LLC, *Buying Power for Higher Education Institutions: When you Have It and When You Don't – Part 2*.[6] Indeed, "[c]onducting periodic due diligence RFPs is a critical part of fulfilling the fiduciary duty." Western PA Healthcare News, *403(b) Retirement Plans: Why a Due Diligence Request for Proposal*.[7] Engaging in in this RFP process "allows plan sponsors . . . to meet their fiduciary obligations, provides leverage to renegotiate services and fees; enhances service and investment opportunities and improves overall plan operation." *Id.* Prudent fiduciaries of defined contribution plans—including 403(b) plans—thus obtain competitive bids for recordkeeping at regular intervals of approximately three years.

V. Bundled services and open architecture.

70. As the prevalence and asset size of defined contribution plans grew, in the shift away from traditional defined benefit pension plans, numerous financial services companies entered this burgeoning retirement plan market. These providers often marketed "bundled" plans, offering to assist in setting up a plan and providing a package of the provider's proprietary investment funds as well as administrative and recordkeeping services. The plans were often

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[6] Available at http://www.fiduciaryplangovernance.com/blog/buying-power-for-higher-education-institutions-when-you-have-it-and-when-you-dont-part-2.

[7] Available at http://www.wphealthcarenews.com/403b-retirement-plans-why-a-due-diligence-request-for-proposal/.

marketed as "free" plans, meaning there were supposedly no additional fees beyond the revenues the provider received from having their investment funds in the plan. These purportedly free plans had a significant condition—in order to obtain the free pricing, the fiduciary had to agree to put the provider's preferred investment lineup in the plan—a group of handpicked funds that would guarantee the provider would receive its desired fee revenue on an ongoing basis. Any deviations from that lineup or removal of funds after the plan was established would require the provider's approval or result in the plan being assessed additional direct fees. Thus, under these closed arrangements, funds were included in some defined contribution plans not based on an independent analysis of their merits or what was in the best interests of participants, but because of the benefits they provided to the plan's service providers.

71. In an open architecture model, a plan is not limited to the recordkeeper's own proprietary investment products, which the provider has an interest in including in the plan because the funds provide it with revenue sharing and investment fees. Instead, the fiduciary is free to reject the recordkeeper's conflicted fund recommendations, can independently assess whether another investment manager offers a superior product at a more attractive price, and can include such funds in the plan's investment lineup. Open architecture also facilitates negotiation of reasonable recordkeeping fees, since the price of the recordkeeping service is more transparent and not obscured by opaque revenue sharing arrangements—through which the investment product provider does not publicize the amount of revenue sharing it kicks back to itself in its separate role as a recordkeeper—

and can be negotiated separately without investment revenue skewing the recordkeeping price. There are recordkeepers in the market that exclusively operate on an open architecture basis in that they do recordkeeping only and do not sell investment products. These providers can offer pricing on a pure per-participant basis, without any revenue sharing component taken from funds in the plan. In light of these benefits, prudent fiduciaries of large defined contribution plans have largely rejected bundling and embraced open architecture platforms.

72. Open, transparent architecture allows for greater control over revenue sharing arrangements if they are used at all, and indeed, allows a fiduciary to eliminate revenue sharing altogether. If revenue sharing payments are used, they can effectively be "kickbacks" to induce recordkeepers to advocate for a fund to be included in the plan's investment lineup or even attempt to dictate its inclusion. An independent assessment of each fund is thus essential and required by ERISA to determine whether the fund should be included in the plan based strictly on its merits as an investment, regardless of whether it provides revenue sharing.

VI. 403(b) plans share common fiduciary duties with 401(k) plans.

73. Defined contribution plans can qualify for favored tax treatment under different sections of the Internal Revenue Code. Plans offered by corporate employers typically qualify under 26 U.S.C. §401(k), and are commonly referred to as 401(k) plans. Tax-exempt organizations, public schools (including state colleges and universities), and churches are eligible to offer plans qualified under §403(b), commonly known as 403(b) plans. 26 U.S.C. §403(b)(1)(A).

74. Plans sponsored by tax-exempt organizations such as private universities, unlike churches and public schools, are subject to Title I of ERISA and its fiduciary requirements, unless the plan satisfies a 1979 "safe-harbor" regulation based on the employer having limited involvement in operating the plan. 29 C.F.R. §2510.3-2(f). To the best of Plaintiffs' knowledge, the Plans have never qualified for the safe harbor, and thus has long been subject to ERISA's fiduciary requirements. In the Plans' annual reports (Forms 5500) filed with the Department of Labor, Defendants have acknowledged that the Plans are subject to ERISA.

75. Although 401(k) plans and 403(b) plans have different historical origins, legislative and regulatory developments over a number of decades largely eroded those differences, as reflected in final 403(b) regulations published by the IRS on July 26, 2007. Sponsors of 403(b) plans were given almost one-and-a-half years to prepare for the effective date of the regulations, January 1, 2009. The regulations required certain employers to become more involved with administering their plans than they had previously, potentially disqualifying those plans from satisfying the ERISA safe harbor and subjecting the plans to ERISA fiduciary requirements for the first time. However, for plans like the Plans that were *already* subject to ERISA's fiduciary requirements because they were never safe-harbor plans, the IRS regulations had no effect on the Plans' status for ERISA fiduciary purposes; ERISA already required Defendants to be actively involved in exercising care, prudence, skill, and diligence in administering the Plans for the exclusive benefit of participants.

76. When §403(b) was first enacted in 1958, plan assets could only be invested in insurance company

annuity contracts. 26 U.S.C. §403(b)(1). In 1974, §403(b) was amended to allow 403(b) plans to invest in custodial accounts holding mutual fund shares. 26 U.S.C. §403(b)(7).

77. Regardless of any differences between 401(k) and 403(b) plans, both types of plans have the same fundamental purpose: allowing employees to save for a secure retirement. The duties of fiduciaries in both are the same: to operate as a financial expert familiar with investment practices, to operate the plan for the exclusive benefit of employees and retirees, and to make sure that fees are reasonable and investments are prudent. Participants in both types of plans depend on their plan fiduciaries to ensure that retirement savings are not depleted by excessive fees or imprudent investments. Accordingly, the historical differences and investment limitations of 403(b) plans do not allow 403(b) fiduciaries to exercise a lesser degree of care or attention to fees and investments than their 401(k) counterparts.

VII. Historical practice of multiple recordkeepers and placement of many investment options in 403(b) plans, which some fiduciaries failed to evaluate as required.

78. As the Department of Labor has recognized, historically, many 403(b) sponsors had treated their plans as a collection of individual contracts under which employees could take various actions without the consent or involvement of the employer or plan administrator, instead of fiduciaries evaluating investment options placed in the plan. Field Assistance Bulletin 2009-02.

79. Some 403(b) plans historically before 2009 included multiple bundled service providers, with each performing the recordkeeping function for its

own investment products in the plan, unlike 401(k) plans which had a single recordkeeper. In fact, "403(b) plan investment options were often 'sold' by record keepers and their representatives rather than offered by plan sponsors as evaluated investments." Fiduciary Plan Governance, LLC, *Legacy Investments in Higher Education: What is a Plan Sponsor's Responsibility to Participants*?[8] Indeed, sponsors of these plans often took a "'hands off' approach to plan oversight." *Id.* This practice resulted in plans having excessive recordkeeping costs and structures involving multiple recordkeepers with each recordkeeper having its own investment options in the plan. This left participants with the task of navigating a haphazard collection of duplicative and overlapping investment options from the various recordkeepers, and ultimately led to them paying excessive and unnecessary fees, both for recordkeeping and for investment products in the plans. *Id.* In some cases the recordkeeper insisted on its own funds being included in the plan without any resistance or analysis of those funds by the fiduciaries.

VIII. TIAA-CREF's bundled 403(b) plan services.

80. TIAA-CREF is an insurance company financial services provider that historically has dominated the market for services to educational institution 403(b) plans, and has heavily marketed to them. TIAA-CREF consists of two companion organizations: Teachers Insurance and Annuity Association of America (TIAA), and College Retirement Equities Fund (CREF). The services that TIAA-CREF provides to 403(b) plans include annuities, mutual funds,

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[8] Available at http://www.fiduciaryplangovernance.com/blog/legacy-investments-in-higher-education-what-is-a-plan-sponsors-responsibility-to-participants.

insurance coverage, trust services, and administrative services.

81. Although TIAA-CREF's marketing materials suggest that it is a "nonprofit" organization, that is misleading. In 1998, Congress revoked both TIAA's and CREF's statuses as tax-deductible 501(c)(3) charitable organizations because TIAA-CREF "competed directly with for-profit insurance companies and mutual fund groups." Reed Abelson, *Budget Deal to Cost T.I.A.A.-C.R.E.F. Its Tax Exemption*, N.Y. Times (July 30, 2007).[9] As a result, they are subject to federal income taxation and are not 501(c)(3) charitable organizations.

82. While CREF is organized as a New York not-for-profit corporation, TIAA is organized as a *for-profit* stock life insurance company. TIAA's "operating surplus" is spent, loaned, and otherwise distributed to some of its subsidiaries as well. An example is Nuveen Investments, a for-profit investment manager, which TIAA acquired in April 2014 for an enterprise value of $6.25 billion. TIAA receives dividends from these for-profit subsidiaries.[10]

83. TIAA owns and controls numerous for-profit subsidiaries, which send dividends to TIAA, including the following subsidiaries for which TIAA files consolidated federal income tax returns:

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[9] Available at http://www.nytimes.com/1997/07/30/business/budget-deal-to-cost-tiaa-cref-its-tax-exemption.html.

[10] Available at https://www.tiaa.org/public/pdf/C16623_where-tiaa-profits-go.pdf.

TIAA Subsidiary	Not-For-Profit Entity	For-Profit Entity
730 Texas Forests Holdings, Inc.		X
Covariance Capital Management, Inc.		X
GreenWood Resources, Inc.		X
JWL Properties, Inc.		X
ND Properties, Inc.		X
Nuveen Asia Investments, Inc.		X
Nuveen Holdings, Inc.		X
Nuveen Investments, Inc.		X
Nuveen Investments Advisers, Inc.		X
Nuveen Investments Holdings, Inc.		X
Nuveen Investments Institutional Services Group, LLC		X
Nuveen Investment Solutions, Inc.		X
Nuveen Securities, LLC		X
Oleum Holding Company, Inc.		X
Rittenhouse Asset Management, Inc.		X
T-C Europe Holdings, Inc.		X
T-C SP, Inc.		X
T-C Sports Co., Inc.		X

TIAA Subsidiary	Not-For-Profit Entity	For-Profit Entity
T-Investment Properties Corp.		X
TCT Holdings, Inc.		X
Teachers Advisors, Inc.		X
Teachers Personal Investors Service, Inc.		X
Terra Land Company		X
TIAA Asset Management Finance Company, LLC		X
TIAA-CREF Life Insurance Company		X
TIAA-CREF Tuition Financing, Inc.		X
TIAA-CREF Trust Company, FSB		X
Westchester Group Asset Management, Inc.		X
Westchester Group Farm Management, Inc.		X
Westchester Group Investment Management Holding, Inc.		X
Westchester Group Investment Management, Inc.		X
Westchester Group Real Estate, Inc.		X

See 2015 Annual Statement of the Teachers Insurance and Annuity Association of America 39, 112-19 (Jan. 26, 2016).[11]

84. Also, consistent with its conduct as a profit-seeking enterprise, the compensation of TIAA's CEO and other executives is greater than or close to the very highest paid executives of some of Wall Street's largest for-profit investment managers and insurance companies, such as J.P. Morgan Chase, Prudential, Deutsche Bank, and Metlife. In 2015, TIAA's CEO received $18 million in compensation,[12] more than the CEOs of Metlife ($14 million) and Deutsche Bank ($5.2 million), and just below the CEOs of J.P. Morgan Chase ($18.2 million) and Prudential ($19.9 million). In fact, TIAA's five highest-ranking "named executive officers" earned a combined total of well over $40 million in compensation in 2015. *Id.* When expressed as a percentage of assets under management, TIAA's CEO had the very highest compensation rate among reporting investment companies.

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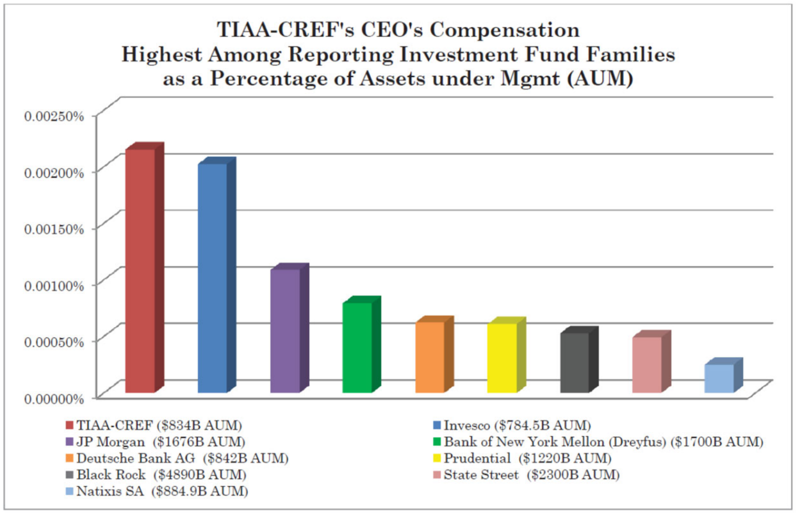
[11] Available at https://www.tiaa.org/public/pdf/tiaa_annual_statement_2015.pdf. This list does not include the hundreds of TIAA's for-profit, joint venture subsidiaries, all of which are controlled by TIAA. *See id.* at 112-19; *see also* https://www.sec.gov/Archives/edgar/data/1429401/000119312510093446/dex21.htm.

[12] TIAA Compensation Disclosures, Executive Compensation Discussion and Analysis 20 (May 2016), available at https://www.tiaa.org/public/pdf/about/governance/exec_comp_policy.pdf.



85. Adding to this, and undercutting any claim that it operates as a non-profit, TIAA's compensation disclosures further state that its employees' compensation and benefits programs are linked to "*profitability*." TIAA Compensation Disclosures (emphasis added).

86. Responding to criticism that TIAA-CREF's CEO and other executives "garnered salaries and bonuses significantly greater than similar pension fund operations," TIAA-CREF responded that such extremely high pay was justified because "the company had to compete for top-level employees with major financial services corporations." Funding Universe, *Teachers Insurance and Annuities Association – College Retirement Equities Fund History.*[13] Critics found this justification dubious because the "flagship CREF Stock Account, an equity portfolio of $59 billion, was primarily indexed to the Russell 3000," meaning that "CREF automatically invested nearly

[13] Available at http://www.fundinguniverse.com/company-histories/teachers-insurance-and-annuity-association-college-retirement-equities-fund-history/.

two of every three dollars in companies held by the benchmark fund," leaving "little for the highly paid officers to manage." *Id.*

87. In benchmarking (and justifying) its executives' compensation packages, TIAA disclosed the following sixteen *for-profit* financial services and insurance companies as the peer group it used for competitive analysis:

The comparator group used in the market competitive analysis consists of the following sixteen companies (the "Peer Group"), which were selected based on being of similar size and complexity in the asset management and insurance industries:

Affiliated Managers Group	Invesco	Principal Financial
Ameriprise Financial	Legg Mason	Prudential Financial
Bank of NY Mellon	Lincoln National	T. Rowe Price
Charles Schwab	MassMutual Financial	Voya Financial
Franklin Resources	MetLife	
The Hartford Financial	Northern Trust	

88. TIAA-CREF provided its 403(b) plan services exclusively on a bundled basis. If a plan wished to offer the TIAA Traditional Annuity, a fixed annuity product, TIAA-CREF required that the CREF Stock Account and Money Market Account also be put in the Plans, and required the Plans to use TIAA as recordkeeper for its proprietary products. Thus, by using TIAA-CREF, Defendants locked the Plans into an arrangement in advance in which certain investments could not be removed from the plan—*even if the funds were not prudent investments or would become imprudent in the future.* By accepting this arrangement, Defendants failed to implement an open architecture platform and use another recordkeeper who could provide the same administrative services at lower cost. Compounding this bundling requirement by TIAA, Defendants used multiple recordkeepers, each with their own investment products, resulting in an inefficient and excessively expensive plan structure, as described in more detail below.

89. There is no shortage of high-quality, low-cost alternatives to TIAA-CREF's products in the defined contribution plan market. For example, many 403(b) plan fiduciaries have recognized that stable value funds are prudent alternatives to TIAA's Traditional Annuity as a conservative principal preservation option, providing superior returns to a money market fund, and can be recordkept by virtually any defined contribution recordkeeper. Other insurance companies, besides TIAA, also offer fixed annuity products. And there are myriad large cap blend mutual fund investments in the market that provide far superior returns to the CREF Stock Account at much lower cost. In light of TIAA-CREF's restrictions and superior alternatives in the market, fiduciaries of 403(b) defined contribution plans must evaluate each investment option and engage in a cost-benefit analysis to determine whether it is prudent and in the exclusive best interest of participants to lock their plans into an arrangement that precludes the removal of imprudent plan investments and results in excessive plan fees. Defendants failed to perform such an evaluation of the funds and services TIAA-CREF required. Defendants also failed to evaluate whether participants would be better served by using superior low-cost alternatives to TIAA-CREF's products given that the Plans could have saved millions of dollars in administrative and investment management costs by hiring a different recordkeeper. As explained below, prudent 403(b) fiduciaries have engaged in this analysis and overhauled their plans for the benefit of participants.

IX. Move to consolidation and open architecture in 403(b) plans.

90. Under the 2007 final regulations that became effective January 1, 2009,[14] certain employers with 403(b) plans were compelled to exercise greater control over their 403(b) plans than they had previously. Among other things, the final regulations required 403(b) plans to be maintained under a "written defined contribution plan" containing all the material terms and conditions for benefits under the plan. DOL separately published revised Form 5500 annual reporting rules effective January 1, 2009, that required large ERISA-covered 403(b) plans to file audited financial statements providing detailed information about the assets in the plan. The regulations are expressly intended to make 403(b) plans more like 401(k) plans.

91. Once the final regulations were published, many 403(b) plan fiduciaries recognized that fulfilling their fiduciary obligations—whether on an ongoing basis or for the first time—required them to engage, if they had not already been doing so, in a comprehensive review of their plans' fees, investment options and structure, and service provider arrangements, to determine whether changes had to be made for the benefit of participants. While the Plans have long been subject to ERISA because the employer match was sufficient for the Plans to be "established or maintained" as ERISA plans under 29 U.S.C. §1002(2)(A)—and, indeed Defendants have informed the Department of Labor in the Plans' Forms 5500 that the Plans are subject to ERISA—even if the

[14] The regulations gave 403(b) plans almost a year and a half to make changes necessary to comply before the regulation became effective January 1, 2009.

Plans had not previously been subject to ERISA, there can be no doubt that 403(b) plan fiduciaries could not just accept investment options provided by the same providers who did recordkeeping for the plan in order to comply with ERISA's requirements that all fees be reasonable and investments be prudent.

92. Once the regulations were published, some non-profit plan sponsors whose 403(b) programs previously qualified for the safe-harbor determined they would have to comply with ERISA's fiduciary requirements by the regulations' effective date of January 1, 2009. As a result, the fiduciaries of many 403(b) plans implemented dramatic overhauls to their plans and acknowledged that these changes were necessary to comply with the IRS regulations and to satisfy their fiduciary obligations under ERISA.

93. For example, the fiduciaries of the Loyola Marymount University (LMU) Defined Contribution Plan, a 403(b) plan, recognized that under the new regulations, "Recordkeeping must be consolidated and/or managed by a single party." *See* LMU 403(b) Retirement Plan Project Overview, at 1.[15] "Keeping two on-going record keepers in 2009 would mean that faculty/staff would pay higher fees and receive reduced services." *Id.* at 2. Beginning in 2008, to assist LMU in assessing the plan's investment options and recordkeeping services, LMU hired an independent third party consultant, Hewitt Associates (n/k/a AonHewitt), to issue a request for proposal to seven different 403(b) recordkeeping providers, including AIG Retirement, Diversified Investment Advisors, Fidelity, ING, Lincoln Financial Group,

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[15] Available at http://www.lmu.edu/AssetFactory.aspx?vid=33038.

Principal Financial Group, and TAA-CREF.[16] LMU consolidated from two recordkeepers to one effective on the date the final regulation became effective, January 1, 2009. Loyola Marymount's fiduciaries recognized that a dual recordkeeper structure would require its employees to pay higher fees for overlapping services, and because consultants, legal counsel, and all of the recordkeeping firms interviewed recommended that LMU use only one record keeper, starting in January 2009. LMU 403(b) Retirement Plan Project Overview, at 2. Moreover, LMU selected Diversified as the new recordkeeper because Diversified "is not an investment manager and therefore, does not require that certain investment options be offered by LMU." *Id.* LMU was therefore able to offer "best in class" funds in each fund category. *Id.* at 6.

94. Similarly, following the new IRS 403(b) regulations, the fiduciaries of the Pepperdine University Retirement Plan recognized the implications of maintaining four different recordkeepers. In order to comply with the regulations and its fiduciary responsibilities, Pepperdine determined that it must make certain changes to the plan, including "Consolidating recordkeeping (by having one fund provider manage administration for multiple providers or by moving to a sole administrator scenario)." *See* Pepperdine University Participant Q & A.[17] Pepperdine retained an independent third party consultant to assist the fiduciaries in issuing a request for proposal to different 403(b) recordkeeping providers. Following the competitive bidding process, effective February 1, 2009,

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[16] *See* http://www.lmu.edu/AssetFactory.aspx?vid=32045.

[17] Available at http://community.pepperdine.edu/hr/content/benefits/fulltime/faq.pdf.

Pepperdine selected Diversified, a recordkeeper which does not offer proprietary investments, as the "sole administrator" and consolidated from four record-keepers (Fidelity, TIAA-CREF, Vanguard and Prudential) to a single recordkeeper. Pepperdine found that the benefits of consolidation included lower costs and more robust services, as well as a streamlined compliance process and simplified data coordination. *Id.* Pepperdine acknowledged that maintaining a multiple-vendor platform was not a "cost-effective, viable option." Paul B. Lasiter, *Single Provider, Multiple Choices*, NACUBO.[18] Recognizing the inefficiencies and overlapping work in a multiple recordkeeper arrangement, Pepperdine determined that costs were "higher in a multivendor arrangement, because each vendor receives only a portion of the ongoing total plan contributions," while a single provider allowed to "realize true economies of scale." *Id.*

95. Pepperdine also recognized that the bundled model demanded by certain providers was not in participants' interest. Using those providers "meant being obligated to offer some or all of that provider's proprietary funds on the plan's investment menu—*whether or not those investments offered participants the best range of choice, value, and relative performance*." *Id.* (emphasis added). Acting in participants' interest required that the fiduciaries instead have the ability to select those "funds that the university—working with an independent financial adviser—could identify as being the 'best options in their respective asset classes.'" *Id.* After weighing and analyzing a variety of factors, Pepperdine determined

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[18] Available at http://www.nacubo.org/Business_Officer_Magazine/Magazine_Archives/March_2010/Single_Provider_Multiple_Choices.html.

that "consolidating with a single vendor has been the straightforward solution to achieving" the objective of acting "for the exclusive benefit of plan participants." *Id.* The benefits of consolidation included "[a] better fiduciary process with ongoing evaluation" of plan investments, "[e]conomies of scale," and "[g]reater transparency of fees and lowered costs for plan participants." *Id.*

96. In the fall of 2008, in response to the new, not yet effective regulations and required changes within the defined contribution industry, Purdue University began a comprehensive review of its defined contribution retirement program. Purdue recognized that "*[t]he primary intent of the regulations was to reduce the difference between Section 403(b) plans, Section 401(k) plans* and Section 457(b) plans; to enhance 403(b) plan compliance; and to establish a more structured retirement program for employees in the non-profit sector." James S. Almond, *403(b) Plan Redesign-Making a Good Retirement Plan Better*, PURDUE UNIVERSITY (emphasis added).[19] Purdue hired an independent third party consultant, Ennis-Knupp & Associates (n/k/a AonHewitt), to assist the fiduciaries in evaluating the investment options, participants' fees, and recordkeeping services, which included developing and issuing an RFP to record-keepers. The "benefits" of Purdue's program enhancements included the transition from five providers (TIAA-CREF, Fidelity, American Century, Lincoln, and VALIC) to a single administrative service provider (Fidelity) with a corresponding significant reduction in recordkeeping expenses. The reformed plan "[p]rovided a transparent investment and adminis-

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[19] Available at http://www.cacubo.org/wp-content/uploads/2016/02/10_403b_Plan_Redesign_Making_a_Good_Retirement_Plan_Better.docx.

trative fee structure" and "[l]everaged plan assets to lower administrative and investment fees, including access to institutional share class funds and a flat administrative fee, instead of administrative fees as a percentage of retirement savings." *Id.* Purdue reduced the number of investment options from 381 to 19, "eliminating redundant investment options with varying levels of expenses" and replacing the menu of duplicative investment options with "a limited menu of pre-screened, broadly diversified investment options." *Id.* Purdue's analysis showed that "reducing administrative and investment plan fees under the new structure for a plan of Purdue's size, would increase participant balances by an estimated *$3-4 million per year* which is then compounded over time." *Id.* (emphasis added).

97. Likewise, the California Institute of Technology (CalTech) TIAA-CREF DC Retirement Plan consolidated from multiple recordkeepers (TIAA-CREF and Fidelity) to a single recordkeeper (TIAA-CREF) effective January 1, 2010, with the assistance of an independent third party consultant, Mercer Investment Consulting. *Caltech Names TIAA-CREF Recordkeeper,* INSTITUTIONAL INVESTOR (Dec. 10, 2009).[20] In selecting a core set of investment options for the plan, CalTech eliminated over 100 Fidelity mutual fund options. Based on disclosures in the plan's Forms 5500 filed with the Department of Labor, between 2013 and 2015, CalTech negotiated over *$15 million* in revenue sharing rebates from TIAA-CREF, which was returned to the plan to benefit participants.

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[20] Available at http://www.institutionalinvestor.com/Article/2355324/Search/Caltech-Names-TIAA-CREF-Record-Keeper.html#/.WBn8Oy0rKpp.

98. Extensive industry literature shows that these sponsors are not outliers, and that similarly situated fiduciaries who have also comprehensively reviewed their plans have been able to reduce recordkeeping and investment management fees, consolidate recordkeepers and investment options, leading to enhanced outcomes and retirement security for their plans' participants.

99. In connection with a plan redesign project at the University of Notre Dame, independent investment consultant Hewitt EnnisKnupp (n/k/a AonHewitt) issued a "403(b) Plan Redesign Working Paper" which set forth 403(b) fiduciary best practices taken in response to the IRS 403(b) regulations. Hewitt EnnisKnupp, *403(b) Plan Redesign Working Paper: University of Notre Dame* (Feb. 2014).[21] Hewitt noted that "[w]ith the issuance of new Internal Revenue Service regulations in 2008, there has been an accelerated evolution of the 403(b) marketplace into something that more closely resembles the private sector 401(k) market." *Id.* at 3.

100. Hewitt noted several areas of plan improvements. *First*, recordkeeper consolidation provided "many benefits to participants," including cost savings. Although the multiple-recordkeeper model had been common in the higher-education marketplace, "[e]xperience and research suggests that this type of administrative structure can be costly and confusing to faculty and staff." *Id.* at 4. "The multiple-recordkeeper model tends to divide participant assets into individual accounts held at separate recordkeepers resulting in costs that are meaningfully

[21] Available at https://workplacecontent.fidelity.com/bin-public/070_NB_PreLogin_Pages/documents/ND_403(b)%20Plan%20Redesign%20 White%20Paper.pdf.

higher than under a single recordkeeper model." *Id.* at 5. Such "[e]xcess fees and misallocated costs are a potential threat to the financial security of many defined contribution plan participants." *Id.*

101. *Second*, Hewitt recommended that plans "unbundl[e]" investment management and administrative services, and to replace revenue sharing arrangements with "explicit, hard dollar administrative fee[s]." *Id.* Hewitt's "experience and research suggests that the transparency gained through an 'unbundled' administrative fee solution with little or no revenue sharing typically results in meaningful fee savings for participants." *Id.* at 6. An unbundled arrangement allows plan fiduciaries "to determine whether or not the internal administrative fee allocations used by the existing bundled recordkeepers is a true representation of the costs of these services." *Id.* An unbundled arrangement also provided opportunities to incorporate "'institutional' share classes of funds" into the investment lineup. *Id.*

102. Further, according to a 2013 survey of 403(b) plans, more than 90% of plans use a single recordkeeper to provide administrative and recordkeeping services to participants. *See* LIMRA Retirement Research, *403(b) Plan Sponsor Research* (2013).[22]

103. Annual surveys by Plan Sponsor Council of America found that in each year from 2010 through 2014, unlike the Northwestern Plans, the overwhelming majority of 403(b) plans—over 80%—have only a single recordkeeper, and provide an average of

[22] Available at http://www.limra.com/uploadedFiles/limracom/LIMRA_Root/Secure_Retirement_Institute/News_Center/Reports/130329-01exec.pdf.

28 investment fund options.[23] An earlier PSCA survey of 403(b) plans found that as of 2009, 57% of 403(b) plan fiduciaries had made changes to their plans as a result of the new 403(b) regulations that became effective January 1, 2009.[24]

104. The majority of plans use a single recordkeeper because a "**multi-recordkeeper platform is inefficient**" and squanders the ability to leverage a plan's bargaining power. The Standard Retirement Services, Inc., *Fixing Your 403(b) Plan: Adopting a Best Practices Approach,* at 2 (Nov. 2009) (emphasis in original).[25] "By selecting a single recordkeeper, plan sponsors can enhance their purchasing power and negotiate lower, transparent investment fees for participants," while allowing participants to "benefit from a more manageable number of institutional-quality investment options to choose from." *Id.* Additional benefits of a single recordkeeper platform include simplifying personnel and payroll data feeds, reducing electronic fund transfers, and avoiding duplication of services when more than one recordkeeper is used.

105. AonHewitt, an independent investment consultant, similarly recognized that "403(b) plan sponsors

[23] Each PSCA survey covers the year prior to the year indicated in the title. PSCA's 2015 Benchmarking Survey of 403(b) Plans, at 32, 65; PSCA's 2014 Benchmarking Survey of 403(b) Plans, at 32, 61; PSCA's 2013 Benchmarking Survey of 403(b) Plans, at 32, 61, 64; PSCA's 2013 Benchmarking Survey of 403(b) Plans, at 32, 61, 64; PSCA's 2012 Benchmarking Survey of 403(b) Plans, at 30, 61, 64; PSCA's 2012 Benchmarking Survey of 403(b) Plans, at 30, 61, 64; PSCA's 2011 Benchmarking Survey of 403(b) Plans, at 28, 55, 59.

[24] PSCA's 2010 Benchmarking Survey of 403(b) Plans at 45.

[25] Available at https://www.standard.com/pensions/publications/14883_1109.pdf.

can dramatically reduce participant-borne costs while improving employees' retirement readiness by" "[c]onsolidating recordkeepers," "[l]everaging aggregate plan size and scale to negotiate competitive pricing, and reducing the number of investment options" and "utilizing an 'open architecture' investment menu[.]" AonHewitt, *How 403(b) Plans Are Wasting Nearly $10 Billion Annually, and What Can Be Done to Fix It* (Jan. 2016).[26]

106. Another independent investment consultant, Towers Watson, also recognized that using multiple recordkeepers makes it "difficult for employers to monitor available choices and provide ongoing oversight" while harming participants through "high investment and administrative costs" and a lack of guidance needed to achieve retirement readiness. Peter Grant and Gary Kilpatrick, *Higher Education's Response to a New Defined Contribution Environment*, TOWERS WATSON VIEWPOINTS, at 2 (2012).[27]

107. The recommendations of these independent, widely used investment consultants are buttressed by other industry literature supporting the fact that the use of a single recordkeeper provides reasonable fees. *See, e.g.,* Kristen Heinzinger, *Paring Down Providers: A 403(b) Sponsor's Experience,* PLANSPONSOR (Dec. 6, 2012) ("One advantage of consolidating to a single provider was an overall drop in administrative fees and expenses. Recordkeeping basis points

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[26] Available at https://retirementandinvestmentblog.aon.com/getattachment/36ff81a4-db35-4bc0-aac1-1685d2a64078/How_403(b)_Plans_are_Wasting_Nearly_$10_Billion_Annually_Whitepaper_FINAL.pdf.aspx.

[27] Available at https://www.towerswatson.com/DownloadMedia.aspx?media=%7B08A2F366-14E3-4C52-BB78-8930F598FD26%7D.

returned to the plan sponsors rather than to the vendor. All plan money aggregated into a single platform, and participants were able to save on fee structure. This also eliminated the complications and confusion of having three different recordkeepers.");[28] Paul B. Lasiter, *Single Provider, Multiple Choices*, BUSINESS OFFICER (Mar. 2010) (identifying, among other things, the key disadvantages of maintaining a multi-provider platform including the fact that it is "cumbersome and costly to continue overseeing multiple vendors.").[29]

108. Use of a single recordkeeper is also less confusing to participants and eliminates excessive, overlapping recordkeeping fees. *Vendor Consolidation in Higher Education: Getting More from Less*, PLAN SPONSOR (July 29, 2010) (recognizing the following benefits, among others: "The plan participant experience is better" because "employees are benefiting from less confusion as a result of fewer vendors in the mix"; "Administrative burden is lessened" by "bringing new efficiencies to the payroll"; and "Costs can be reduced" because "[w]ith a reduced number of vendors in the equation, plan sponsors are better able to negotiate fees" and many are "reporting lower overall cost resulting in an improved cost-per-participant ratio").[30]

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[28] Available at http://www.plansponsor.com/paring-down-providers-a-403b-sponsors-experience/?fullstory=true.

[29] Available at http://www.nacubo.org/Business_Officer_Magazine/Magazine_Archives/March_2010/Single_Provider_Multiple_Choices.html.

[30] Available at http://www.plansponsor.com/vendor-consolidation-in-higher-education/?fullstory=true.

DEFENDANTS BREACHED THEIR FIDUCIARY DUTIES AND COMMITTED PROHIBITED TRANSACTIONS

109. Defendants' longstanding retention of two recordkeepers and hundreds of their proprietary funds—which the recordkeepers required to be included in the Plans—while excluding superior low-cost alternatives from other managers, demonstrates that, in contrast with the comprehensive plan reviews conducted by the similarly situated fiduciaries described above, Defendants failed to adequately engage in a similar analysis. Had Defendants conducted such a review of the Plans, Defendants would not have allowed the Plans to continue to pay excessive administrative fees; would not have maintained an inefficient two-recordkeeper structure; would not have continued to include well over hundreds of investment options in each of the Plans, including duplicative funds in numerous investment styles and higher-cost retail share classes for which identical lower-cost versions of the same funds were available; and would not have retained investment options which had a sustained track record of underperformance. This follows because a prudent process would have produced a different outcome.

I. The Plans' hundreds of investment options and multiple recordkeepers.

110. Prior to October 2016, Defendants included over *240* investment options in the Retirement Plan and over *180* investment options in the Voluntary Savings Plan. For both Plans these options included mutual funds, insurance pooled separate accounts, and insurance company fixed and variable annuity products. The mutual fund options included *retail* share class mutual funds, despite the massive size of the Plans. These retail share class mutual funds

are designed for small individual investors and are identical in every respect to institutional share class funds, except for much higher fees.

111. The investment options were and are offered by TIAA-CREF and the Fidelity Management Trust Company ("Fidelity"). Defendants select investment options into which participants' investments are directed, including those investment options that are removed from the Retirement Plan and the Voluntary Savings Plan.

112. Under the terms of the Retirement Plan, participants are eligible to contribute a discretionary amount of their annual compensation to the Plan and Northwestern makes a matching contribution. Under the terms of the Voluntary Savings Plan, participants may likewise contribute a discretionary amount of their annual compensation to the Plan, but Northwestern makes no matching contribution.

113. As of December 31, 2015, Defendants offered a total of 242 investment options to Retirement Plan participants. In particular, the Retirement Plan offered 39 TIAA-CREF investments and 203 Fidelity investments (including both Fidelity funds and third-party funds offered through Fidelity).

114. These investments are designated by Defendants as available investment alternatives offered under the Retirement Plan.

115. As of December 31, 2015, Defendants offered a total of 187 investment options to Voluntary Savings Plan participants. In particular, the Voluntary Savings Plan offered 39 TIAA-CREF investments and 148 Fidelity investments (including both Fidelity funds and third-party funds offered through Fidelity).

116. These investments are designated by Defendants as available investment alternatives offered under the Voluntary Savings Plan.

117. The TIAA Traditional Annuity offered in both Plans is a fixed annuity contract that returns a contractually specified minimum interest rate. Assets invested in the TIAA Traditional Annuity are held in the general account of TIAA and are dependent on the claims-paying ability of TIAA. The TIAA Traditional Annuity has severe restrictions and penalties for withdrawal if participants wish to change their investments in the Plans.

118. Both Plans include the CREF Stock Account, CREF Global Equities Account, CREF Equity Index Account, CREF Growth Account, CREF Social Choice Account, CREF Money Market Account, CREF Inflation-Linked Bond Account, and CREF Bond Market Account, which are variable annuities that invest in underlying securities for a given investment style. The value of the Plans' investment in these variable annuities changes over time based on investment performance and the expenses of the accounts.

119. The TIAA Real Estate Account is an insurance separate account maintained by TIAA. An insurance separate account is an investment vehicle that aggregates assets from more than one retirement plan for a given investment strategy, but those assets are segregated from the insurance company's general account assets.

120. The remaining TIAA-CREF funds are mutual funds. The TIAA-CREF mutual funds charge varying amounts for investment management, but also charge distribution, marketing, and other expenses, depending on the type of investment and share class.

121. The Fidelity investment options offered to Plan participants are primarily mutual funds that charge varying amounts for investment management

and other expenses, depending on the type of investment and share class.

122. As of December 31, 2015, of the Retirement Plan's $2.34 billion in net assets, TIAA-CREF funds accounted for nearly $1.8 billion and Fidelity funds accounted for nearly $548 million. As of December 31, 2015, of the Voluntary Savings Plan's $530 million in net assets, TIAA-CREF funds accounted for over $360 million and Fidelity funds accounted for over $160 million.

123. In 2016, Defendants eliminated hundreds of mutual funds provided to the Plans' participants and selected a tiered structure comprised of a limited core set of 32 investment options.[31]

124. Tier 1 consists of Blackrock target date mutual funds. Target date funds automatically rebalance their portfolios to become more conservative as the participant gets closer to retirement. The "target date" refers to the participant's expected retirement date, and is often part of the name for the fund. For instance, "2030" target date funds are designed for individuals who intend to retire in the year 2030.

125. Tier 2 includes only five index funds comprising various asset classes and investment styles.

126. Tier 3 includes 26 actively managed investment options, which include mutual funds, variable annuities, and an insurance separate account.

127. Tier 4 consists of a self-directed brokerage window.

128. The Plans' participants could invest in the options offered in Tiers 1–3 beginning July 27, 2016,

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[31] The Plans' target date funds are counted as a single investment option.

and in the Tier 4 self-directed brokerage window as of September 16, 2016. Plan participants were permitted to invest in options available under the previous structure until October 21, 2016.

II. Defendants improperly allowed TIAA-CREF to require the inclusion of its investment products in the Plans and improperly allowed TIAA to require it to provide recordkeeping for its proprietary options.

129. ERISA requires fiduciaries to independently evaluate the prudence of each investment option offered in a defined contribution plan, *DiFelice*, 497 F.3d at 423, and to remove imprudent investments no matter how long they have been in a plan, *Tibble*, 135 S. Ct. at 1828-29.

130. As noted, TIAA-CREF offered its products and services strictly on a bundled basis. If a plan offers the TIAA Traditional Annuity, TIAA-CREF required that the plan also offer its flagship CREF Stock Account and Money Market Account, and to also use TIAA as recordkeeper for its proprietary products. By agreeing to TIAA's mandate that its recordkeeping services had to be linked to including its funds in the Plans, Defendants promoted TIAA's financial interests at the expense of participants and drove excessive and uncapped revenue to TIAA's recordkeeping arm for years.

131. By allowing the Plans to enter such a bundled arrangement with TIAA-CREF, Northwestern agreed to lock its employees into funds which Northwestern did not analyze. It can never be prudent to lock in a fund in a plan for the future no matter what its expenses or its performance. To do so creates a structure which at the outset, and on an ongoing basis, violates ERISA's requirement that fiduciaries must independently monitor investment options on an

ongoing basis and remove those that are imprudent. *Tibble*, 135 S. Ct. at 1828-29. Defendants thus failed to discharge its duty to independently evaluate whether each investment option was prudent for the Plans; whether the use of TIAA as a plan record-keeper was prudent, reasonably priced, and in the exclusive interest of participants; and whether it was prudent to include and retain the CREF Stock and Money Market accounts and the TIAA Traditional in the Plans. Instead of acting solely in the interest of participants, Defendants allowed TIAA's financial interest to dictate the Plans' investment selections and recordkeeping arrangement. Because Defendants allowed CREF Stock to be locked into the Plans, Defendants could not satisfy its duty to evaluate the option for inclusion and retention in the Plans, whether it was prudent at the time of inclusion and whether it should be removed if imprudent. As a result of Defendants' breach in allowing CREF Stock to be retained in the Plans because TIAA-CREF demanded it and not based on an independent and ongoing assessment of the merits of the option, the Plans suffered massive losses compared to prudent alternatives, as discussed in more detail below. *See infra* ¶¶186-208.

132. As noted above, the Plans offer the TIAA Traditional Annuity. This option is a fixed annuity contract that returns a contractually specified minimum interest rate. An example of the restrictions and penalties for withdrawal imposed by this Annuity include a 2.5% surrender charge if a participant withdraws his or her investment in a single lump sum within 120 days of termination of employment. Participants who wish to withdraw their savings without this 2.5% penalty can only do so by spreading their withdrawal over a *ten-year period*.

133. The Plans include TIAA-CREF's proprietary funds, including the CREF Stock Account, CREF Global Equities Account, CREF Equity Index Account, CREF Growth Account, CREF Social Choice Account, CREF Money Market Account, CREF Inflation-Linked Bond Account, and CREF Bond Market Account, which are variable annuities with four layers of expenses that invest in underlying securities for a given investment style.

134. The expense ratio of the CREF variable annuity accounts is made up of multiple layers of expense charges consisting of the following:

a. "administrative expense" charge (24 bps);[32]

b. "distribution expense" charge (9.5 bps);

c. "mortality and expense risk" charge (0.5 bps); and

d. "investment advisory expense" charge (ranging from 4 to 12.5 bps).

135. Two of these four layers of fees charged on the CREF variable annuity accounts, including the CREF Stock Account, are unreasonable for the actual services provided by TIAA-CREF to the Plan's participants, and the other two layers of fees pay for services that provide *no* benefit to the Plan's participants.

a. Administrative expenses (or recordkeeping fees): The administrative fee assessed on each variable annuity option is charged as a percentage of assets, rather than a flat fee per participant. As described above, recordkeeping costs depend on the number of participant accounts that the recordkeeper will service in the plan rather than the size of assets because a higher account balance costs no

[32] Expenses are stated as of May 1, 2014.

more to track than a lower account balance. As a result, as the growth in the Plans' assets outpaced the growth in participants, the fees paid to TIAA-CREF likewise increased even though the services provided did not increase at the same rate, resulting in further unreasonable compensation.

b. Distribution expenses (or 12b-1 fees): Distribution expenses are charged for services performed for marketing and advertising of the fund to potential investors. However, in a retirement plan, the funds are selected by the sponsor. Thus, marketing and distribution services provide no benefit to plan participants and are wholly unnecessary. Being charged for such wholly useless expenses causes a loss of retirement assets to participants with no benefit.

c. Mortality and expense risk charges: Some annuity or insurance providers charge mortality and expense risk charges to compensate the insurance company for the risk it assumes when providing periodic income or payments to the investor over her lifetime, which will vary depending on the value of the underlying investments. However, in the CREF variable annuities in the Plans, the participant does not make the choice of whether to take the account's value in a lump sum or an annuity until retirement. Thus, this charge only benefits a participant if she elects at the time of retirement to annuitize her holdings in the account to provide for periodic income. Prior to annuitizing her account, the participant derives no benefit for paying such a charge, year after year, and TIAA-CREF provides no actual services or incurs any risk to justify the fee until a decision is made at retirement to convert the value of the lump sum to an annuity. Moreover, most participants in retirement plans recordkept by TIAA-CREF do not elect to annuitize their holdings in their variable annuity accounts upon retirement. Yet, *all* participants pay these fees for many years regardless of whether they annuitize their variable annuity account.

d. Investment advisory expense charge (or investment management fees): It is a fundamentally established principle of investment management that larger asset size enables the asset holder to obtain lower investment management fees as a percentage of assets. Fund managers institute breakpoints, whereby the investment management fee is reduced, as asset size goes up, at pre-specified asset thresholds to pass along economies of scale to the investor. For example, if $5 million is a breakpoint, one fee, based on a percentage of assets, will be charged on the first $5 million, and a lesser percentage will be charged on the next portion of the assets, or on all assets. A large investor will therefore be charged a lower fee, on a percentage of assets, than a smaller investor to recognize the economies of scale generated from the higher asset levels. Jumbo plans, such as the Northwestern Plans, can command extremely low fees. Despite this recognized principle, TIAA-CREF has not instituted *any* breakpoints whatsoever on its investment management fees to pass along economies of scale experienced by jumbo plan investors. The Plans' fiduciaries did not obtain the lower investment management fees that come with the Plans' enormous asset size. As a result, the Plans, with billions of dollars invested in CREF variable annuities, pay the same asset-based fee as the smallest clients with a tiny fraction of their total assets, resulting in a windfall to TIAA-CREF and excessive fees paid by Northwestern employees and retirees. The Plans subsidized these efforts for years, often at a loss—compounding their conflict and breaching their duty to participants under ERISA.

136. The excessiveness of this investment management fee is even more egregious because of the way critics have documented how CREF "manages" the CREF Stock Account by investing nearly two out of every three dollars in companies held by its benchmark index, the Russell 3000 Index. *See supra* ¶86.

137. The TIAA Real Estate Account is an insurance company separate account maintained by TIAA. Similar to the CREF variable annuity accounts, the expense ratio of the TIAA Real Estate Account is made up of the same four layers of excessive expenses detailed above, and even adds a fifth layer for a so-called "liquidity guarantee." As of May 1, 2013, these charges consisted of the following:

a. "administrative expense" charge (26.5 bps);

b. "distribution expense" charge (8 bps);

c. "mortality and expense risk" charge (0.5 bps);

d. "liquidity guarantee" (18 bps); and

e. "investment management expense" charge (36.5 bps).

138. The 18 bps "liquidity guarantee" expense of the TIAA Real Estate Account is yet another excessive fee that is not charged by better performing and lower cost mutual funds such as the Vanguard REIT Index (Inst), which has a *total* expense ratio of 8 bps. *See infra* ¶¶210-213.

139. As noted, the TIAA-CREF mutual funds in the Plans charge varying amounts for investment management, but also charge distribution, marketing, and other expenses, depending on the type of

investment and share class. Thus, the Plans' participants are paying for marketing costs of funds which their employer has placed in their retirement plan when such marketing costs provide no benefit to them. Other mutual funds that were available to the Plans do not include such marketing costs.

III. Defendants caused the Plans to pay excessive administrative and recordkeeping fees.

140. As set forth above, the market for defined contribution recordkeeping services is highly competitive. There are numerous recordkeepers in the marketplace who are equally capable of providing a high level of service to large defined contribution plans like the Plans and will readily respond to a request for proposal. These recordkeepers primarily differentiate themselves based on price and vigorously compete for business by offering the best price.

141. Because market rates for recordkeeping services have declined in recent years and because the only way to reliably determine the true market rate for a complex jumbo plan is to obtain an actual fee quote comparison, prudent fiduciaries of jumbo defined contribution plans put their plans' recordkeeping and administrative services out for competitive bidding at regular intervals of approximately three years.

142. As detailed above, extensive industry literature and the experience of similarly situated fiduciaries has shown that multiple recordkeeper platforms are inefficient and result in excessive fees, while the use of a single recordkeeper offers many benefits such as leveraging the plan's participant base to obtain economies of scale to ensure that participants pay only reasonable recordkeeping fees, while also simplifying personnel and payroll data feeds, reducing

electronic fund transfers, and avoiding duplication of services when more than one recordkeeper is used. Instead of leveraging the size of the participant base to take advantage of economies of scale, using multiple recordkeepers eliminates a plan's leverage. Rather than obtaining pricing based on a 30,000-participant plan from one recordkeeper, Defendants spread recordkeeping of participants among two separate recordkeepers, who pushed each of their own products on the Plans. This took away the Plans' ability to obtain favorable pricing and resulted in the Plans including hundreds of investment options that Defendants never reviewed.

143. Despite the long-recognized benefits of a single recordkeeper for a defined contribution plan, Defendants continue to contract with two separate recordkeepers (TIAA-CREF and Fidelity) for the Retirement Plan to date and only consolidated the Voluntary Savings Plan to one recordkeeper (TIAA-CREF) in late 2012. There was no loyal or prudent reason that Defendants failed to engage in such process for the Voluntary Savings Plan long before both 2012 and 2009. There is also no loyal or prudent reason that Defendants continue to maintain a costly and ineffective multiple recordkeeping structure for the Retirement Plan to date. In addition to the uncapped revenue sharing received as payment for these administrative services, the inefficient and costly structure of multiple recordkeepers has caused both Plans' participants to pay excessive and unreasonable fees for recordkeeping and administrative services.

144. The Retirement and the Voluntary Savings Plans' recordkeepers receive compensation for providing such services through per-participant fees

and revenue sharing payments from the Plans' investments.

145. Upon information and belief and industry experts, the amounts of revenue sharing kicked back to the TIAA-CREF recordkeeping entity for the Plans' TIAA-CREF investments are set forth below.

TIAA-CREF Investment	**Revenue Share**
CREF variable annuity contracts	24 bps
Premier share class of TIAA CREF mutual funds	15 bps
Retirement share class of TIAA-CREF mutual funds	25 bps
TIAA Real Estate Account	24-26.5 bps
TIAA Traditional Annuity	15 bps

146. Upon information and belief, Fidelity was and/or is compensated for recordkeeping services based on internal revenue sharing it receives from using higher-cost share classes of Fidelity's mutual funds as opposed to the institutional classes readily available to jumbo plans such as the Plans.

147. In addition, TIAA-CREF and Fidelity also receive and/or received additional indirect compensation, including float, revenue derived from securities lending, distribution fees, mortality and expense charges, surrender charges, spread, and redemption fees.

148. Based on the Plans' features, the nature of the administrative services provided by the Plans' recordkeepers, the number of participants in the Plans combined (approximately 30,000), and the recordkeeping market, a reasonable recordkeeping fee for the Plans would be approximately $1,050,000

in the aggregate for both Plans combined (or a flat fee based on $35 per participant). Even if Defendants had negotiated a reasonable recordkeeping fee for the Retirement and Voluntary Savings Plans separately, the Plans would have paid dramatically less for recordkeeping services.

149. Based on schedules regarding service provider compensation in the Retirement Plan's Forms 5500 filed with the Department of Labor, and upon information regarding the rate of internal revenue share allocated to each of the Plans' recordkeepers from their proprietary investment options, the Retirement Plan paid between $3.3 and $4.1 million (or approximately $153 to $213 per participant) *per year* from 2010 to 2015, over *500%* higher than a reasonable fee for these services, resulting in millions of dollars in excessive recordkeeping fees each year.

150. Based on schedules regarding service provider compensation in the Voluntary Savings Plan's Forms 5500 filed with the Department of Labor, and upon information regarding the rate of internal revenue share allocated to each of the Plans' recordkeepers from their proprietary investment options, the Voluntary Savings Plan paid between $660,000 and $900,000 (or approximately $54 to $87 per participant) per year from 2010 to 2015, over *149%* higher than a reasonable fee for these services, resulting in millions of dollars in excessive recordkeeping fees each year.

151. Upon information and belief, Defendants also failed to conduct a competitive bidding process for the Plans' recordkeeping services. A competitive bidding process for recordkeeping services would have produced a reasonable recordkeeping fee. This competitive bidding process would have enabled Defendants to select a recordkeeper charging reason-

able fees, negotiate a reduction in recordkeeping fees, and rebate the full amount of excess expenses paid by participants for recordkeeping services.

152. Aside from the failures to monitor the amount of revenue sharing payments and to solicit competitive bids, Defendants also failed to adequately negotiate rebates of excessive fee payments to TIAA-CREF and Fidelity. As a specific example, because the multi-billion dollar plans paid the same percentage of asset-based fees as much smaller plans that used TIAA-CREF's products and services, Defendants could have demanded "plan pricing" rebates from TIAA-CREF based on the Plans' economies of scale. Just as with investment management fees, the Plans' size would have enabled Defendants to command a much lower fee. Defendants could have also demanded and obtained similar rebates of all excessive fee payments from Fidelity. Had Defendants adequately negotiated for these rebates, the Plans' recordkeeping fees would have been reduced, avoiding additional losses of retirement savings.

153. The impact of excessive fees on employees' and retirees' retirement assets is dramatic, as the U.S. Department of Labor has found. U.S. Dep't of Labor, *A Look at 401(k) Plan Fees*, at 1-2 (Aug. 2013) (finding that a 1% higher level of fees over a 35-year period makes a 28% difference in retirement assets at the end of a participant's career).[33]

154. Defendants failed to prudently monitor and control the compensation paid for recordkeeping and administrative services, particularly the asset-based revenue sharing received by TIAA-CREF and Fidelity. Therefore, Defendants caused the participants

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[33] Available at http://www.dol.gov/ebsa/pdf/401kfeesemployee.pdf.

in both Plans to pay unreasonable expenses for administration. Had Defendants ensured that participants only paid reasonable fees for administrative and recordkeeping services, Retirement and Voluntary Savings Plan participants would not have lost approximately $30 million of their retirement savings.[34]

IV. Defendant caused the Plans to pay wholly unnecessary and excessive fees by using higher-cost share classes of mutual funds instead of identical versions of the same funds in lower-cost share classes.

155. Jumbo retirement plans have massive bargaining power to negotiate low fees for investment management services. If a plan invests in mutual funds, fiduciaries must review and consider the available share classes. Because the only difference between the various share classes is fees, selecting a higher-cost share class results in the plan paying wholly unnecessary fees. Accordingly, absent some compelling reason to opt for the higher-cost version, prudent fiduciaries will select the lowest-cost share class available to the plan. As a prominent legal counsel to defined contribution fiduciaries explained:

> The fiduciaries also must consider the size and purchasing power of their plan and select the share classes (or alternative investments) that a fiduciary who is knowledgeable about such matters would select under the circumstances. In other words, the "prevailing circumstances"—such as the size of the plan—are a part of a

[34] The Plans' losses have been brought forward to the present value using the investment returns of the S&P 500 index to compensate participants who have not been reimbursed for their losses. This is because the excessive fees participants paid would have remained in the Plans' investments growing with the market.

> prudent decisionmaking process. The failure to understand the concepts and to know about the alternatives could be a costly fiduciary breach.

Fred Reish, *Classifying Mutual Funds*, PLANSPONSOR (Jan. 2011).[35]

156. Given that defined contribution plan fiduciaries are held to the standard of a knowledgeable financial expert, a fiduciary should know the basic principle that asset size matters, and must review a fund's prospectus to determine if a lower-cost chare class of the same fund is available, to avoid saddling the plan with unnecessary fees.

157. Jumbo investors like the Plans can obtain share classes with far lower costs than retail mutual fund shares. In addition, insurance company pooled separate accounts are available that can significantly reduce investment fees charged on mutual fund investments in defined contribution plans.

158. Moreover, lower-cost share classes of mutual fund investment options were readily available to the Plans. Institutional share classes sometimes have a minimum investment threshold to qualify for the institutional rate. However,

> For large 401(k) plans with over a billion dollars in total assets . . . mutual funds will often waive an investment minimum for institutional share classes. It is also common for investment advisors representing large 401(k) plans to call mutual funds and request waivers of the investment minimums so as to secure the institutional shares.

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[35] Available at http://www.plansponsor.com/MagazineArticle.aspx?id=6442476537.

Tibble v. Edison Int'l, No. 07-5359, 2010 U.S. Dist. LEXIS 69119, at *27-28 (C.D. Cal. July 8, 2010), *aff'd* 729 F.3d 1110 (9th Cir. 2013).

159. As further support of the routine waiver of investment minimums for large institutional investors, fiduciaries of other defined contribution plans have successfully negotiated on behalf of their plans less expensive institutional share classes of TIAA-CREF and Fidelity mutual fund options despite not meeting the minimum investment thresholds.

160. Therefore, Defendants knew or should have known that investment providers would have allowed the Plans to provide lower-cost share classes to participants if Defendants had asked.

161. Defendants selected and continue to retain investment options in the Retirement and Voluntary Savings Plans with far higher costs than were and are available for the Plans based on their size. This includes Defendants selecting and continuing to offer far higher-cost share classes even though lower-cost share classes of the *exact same mutual funds* were available. The following table sets forth each higher-cost mutual fund share class that was included in the Plans during the proposed class period for which a significantly lower-cost, but otherwise identical, share class of the same mutual fund was available. The expense ratios identified for the Plans' investment option and the lower-cost share class alternative are based on the earliest date during the proposed class period that the higher-cost fund was included in the Plans:

Plan Mutual Fund	Plan Fee	Identical Lower-Cost Mutual Fund	Identical Lower-Cost Mutual Fund Fee	Plan's Excess Cost
Calvert New Vision Small Cap (A) (CNVAX)	189 bps	Calvert New Vision Small Cap (I) (CVSMX)	92 bps	105.43%
Fidelity Large Cap Growth (FSLGX)	80 bps	Fidelity Advisor Large Cap Growth (Inst) (FLNOX)	68 bps	17.65%
Fidelity Mid Cap Growth (FSMGX)	67 bps	Fidelity Advisor Mid Cap Growth (Inst) (FGCOX)	59 bps	13.56%
Fidelity Spartan 500 Index (Inv) (FSMKX)	10 bps	Fidelity Spartan 500 Index (Adv) (FSMAX)	7 bps	42.86%
Fidelity Stock Selector Small Cap (FDSCX)	75 bps	Fidelity Advisor Stock Selector Small Cap (I) (FCDIX)	62 bps	20.97%
TIAA-CREF Lifecycle 2010 (Retire) (TCLEX)	47 bps	TIAA-CREF Lifecycle 2010 (Inst) (TCTIX)	22 bps	113.64%
TIAA-CREF Lifecycle 2015 (Retire) (TCLIX)	46 bps	TIAA-CREF Lifecycle 2015 (Inst) (TCNIX)	42 bps	9.52%

Plan Mutual Fund	Plan Fee	Identical Lower-Cost Mutual Fund	Identical Lower-Cost Mutual Fund Fee	Plan's Excess Cost
TIAA-CREF Lifecycle 2020 (Retire) (TCLTX)	45 bps	TIAA-CREF Lifecycle 2020 (Inst) (TCWIX)	42 bps	7.14%
TIAA-CREF Lifecycle 2025 (Retire) (TCLFX)	44 bps	TIAA-CREF Lifecycle 2025 (Inst) (TCYIX)	42 bps	4.76%
TIAA-CREF Lifecycle 2030 (Retire) (TCLNX)	44 bps	TIAA-CREF Lifecycle 2030 (Inst) (TCRIX)	19 bps	131.58%
TIAA-CREF Lifecycle 2035 (Retire) (TCLRX)	44 bps	TIAA-CREF Lifecycle 2035 (Inst) (TCIIX)	19 bps	131.58%
TIAA-CREF Lifecycle 2040 (Retire) (TCLOX)	44 bps	TIAA-CREF Lifecycle 2040 (Inst) (TCOIX)	19 bps	131.58%
TIAA-CREF Lifecycle 2045 (Retire) (TTFRX)	44 bps	TIAA-CREF Lifecycle 2045 (Inst) (TTFIX)	19 bps	131.58%
TIAA-CREF Lifecycle 2050 (Retire) (TLFRX)	44 bps	TIAA-CREF Lifecycle 2050 (Inst) (TFTIX)	19 bps	131.58%
TIAA-CREF Lifecycle Retirement Income (Retire) (TLIRX)	65 bps	TIAA-CREF Lifecycle Retirement Income (Inst) (TLRIX)	40 bps	62.50%

Plan Mutual Fund	Plan Fee	Identical Lower-Cost Mutual Fund	Identical Lower-Cost Mutual Fund Fee	Plan's Excess Cost
TIAA-CREF Managed Allocation (Retire) (TITRX)	71 bps	TIAA-CREF Managed Allocation (Inst) (TIMIX)	46 bps	54.35%
TIAA-CREF Small-Cap Blend Index (Retire) (TRBIX)	35 bps	TIAA-CREF Small-Cap Blend Index (Inst) (TISBX)	10 bps	250.00%
TIAA-CREF Small-Cap Equity (Retire) (TRSEX)	78 bps	TIAA-CREF Small-Cap Equity (Inst) (TISEX)	53 bps	47.17%
TIAA-CREF Social Choice Equity (Retire) (TRSCX)	47 bps	TIAA-CREF Social Choice Equity (Inst) (TISCX)	22 bps	113.64%
Vanguard Growth Index (Inv) (VIGRX)	28 bps	Vanguard Growth Index (Inst) (VIGIX)	8 bps	250.00%
Vanguard Mid Cap Index (Inv) (VIMSX)	27 bps	Vanguard Mid Cap Index (Inst) (VMCIX)	8 bps	237.50%
Vanguard PRIMECAP (Inv) (VPMCX)	49 bps	Vanguard PRIMECAP (Adm) (VPMAX)	37 bps	32.43%
Vanguard Small Cap Index (Inv) (NAESX)	28 bps	Vanguard Small Cap Index (Inst) (VSCIX)	8 bps	250.00%

Plan Mutual Fund	Plan Fee	Identical Lower-Cost Mutual Fund	Identical Lower-Cost Mutual Fund Fee	Plan's Excess Cost
Vanguard Value Index (Inv) (VIVAX)	26 bps	Vanguard Value Index (Inst) (VIVIX)	8 bps	225.00%
Vanguard Windsor (Inv) (VWNDX)	33 bps	Vanguard Windsor (Adm) (VWNEX)	20 bps	65.00%
Calvert Balanced Portfolio (A) (CSIFX)	123 bps	Calvert Balanced Portfolio (I) (CBAIX)	72 bps	70.83%
Calvert Capital Accumulation (A) (CCAFX)	176 bps	Calvert Capital Accumulation (I) (CCPIX)	86 bps	104.65%
Calvert International Equity (A) (CWVGX)	180 bps	Calvert International Equity (I) (CWVIX)	106 bps	69.81%
Calvert Small Cap (A) (CCVAX)	169 bps	Calvert Small Cap (I) (CSVIX)	92 bps	83.70%
Domini Social Equity (Inv) (DSEFX)	123 bps	Domini Social Equity (Inst) (DIEQX)	75 bps	64.00%
Fidelity 500 Index (Inv) (FUSEX)	10 bps	Fidelity 500 Index (Prem) (FUSVX)	7 bps	42.86%
Fidelity Balanced (FBALX)	61 bps	Fidelity Balanced (K) (FBAKX)	47 bps	29.79%

Plan Mutual Fund	Plan Fee	Identical Lower-Cost Mutual Fund	Identical Lower-Cost Mutual Fund Fee	Plan's Excess Cost
Fidelity Blue Chip Growth (FBGRX)	93 bps	Fidelity Blue Chip Growth (K) (FBGKX)	74 bps	25.68%
Fidelity Capital Appreciation (FDCAX)	86 bps	Fidelity Capital Appreciation (K) (FCAKX)	68 bps	26.47%
Fidelity Contrafund (FCNTX)	91 bps	Fidelity Contrafund (K) (FCNKX)	78 bps	16.67%
Fidelity Disciplined Equity (FDEQX)	68 bps	Fidelity Disciplined Equity (K) (FDEKX)	51 bps	33.33%
Fidelity Diversified International (FDIVX)	96 bps	Fidelity Diversified International (K) (FDIKX)	77 bps	24.68%
Fidelity Dividend Growth (FDGFX)	92 bps	Fidelity Dividend Growth (K) (FDGKX)	71 bps	29.58%
Fidelity Equity Income II (FEQTX)	69 bps	Fidelity Equity Income II (K) (FETKX)	54 bps	27.78%
Fidelity Equity-Income (FEQIX)	74 bps	Fidelity Equity-Income (K) (FEIKX)	54 bps	37.04%
Fidelity Export & Multinational (FEXPX)	84 bps	Fidelity Export & Multinational K (FEXKX)	64 bps	31.25%

Plan Mutual Fund	Plan Fee	Identical Lower-Cost Mutual Fund	Identical Lower-Cost Mutual Fund Fee	Plan's Excess Cost
Fidelity Freedom 2000 (FFFBX)	51 bps	Fidelity Freedom K 2000 (FFKBX)	43 bps	18.60%
Fidelity Freedom 2005 (FFFVX)	64 bps	Fidelity Freedom K 2005 (FFKVX)	52 bps	23.08%
Fidelity Freedom 2010 (FFFCX)	67 bps	Fidelity Freedom K 2010 (FFKCX)	53 bps	26.42%
Fidelity Freedom 2015 (FFVFX)	68 bps	Fidelity Freedom K 2015 (FKVFX)	54 bps	25.93%
Fidelity Freedom 2020 (FFFDX)	74 bps	Fidelity Freedom K 2020 (FFKDX)	57 bps	29.82%
Fidelity Freedom 2025 (FFTWX)	76 bps	Fidelity Freedom K 2025 (FKTWX)	59 bps	28.81%
Fidelity Freedom 2030 (FFFEX)	79 bps	Fidelity Freedom K 2030 (FFKEX)	61 bps	29.51%
Fidelity Freedom 2035 (FFTHX)	81 bps	Fidelity Freedom K 2035 (FKTHX)	61 bps	32.79%
Fidelity Freedom 2040 (FFFFX)	81 bps	Fidelity Freedom K 2040 (FFKFX)	62 bps	30.65%
Fidelity Freedom 2045 (FFFGX)	82 bps	Fidelity Freedom K 2045 (FFKGX)	62 bps	32.26%
Fidelity Freedom 2050 (FFFHX)	84 bps	Fidelity Freedom K 2050 (FFKHX)	63 bps	33.33%

Plan Mutual Fund	Plan Fee	Identical Lower-Cost Mutual Fund	Identical Lower-Cost Mutual Fund Fee	Plan's Excess Cost
Fidelity Freedom Income (FFFAX)	50 bps	Fidelity Freedom K Income (FFKAX)	42 bps	19.05%
Fidelity Fund (FFIDX)	60 bps	Fidelity Fund (K) (FFDKX)	43 bps	39.53%
Fidelity Global Commodity Stock (FFGCX)	109 bps	Fidelity Global Commodity Stock (I) (FFGIX)	107 bps	1.87%
Fidelity Growth & Income (FGRIX)	74 bps	Fidelity Growth & Income (K) (FGIKX)	53 bps	39.62%
Fidelity Growth Company (FDGRX)	89 bps	Fidelity Growth Company (K) (FGCKX)	72 bps	23.61%
Fidelity Growth Discovery (FDSVX)	75 bps	Fidelity Growth Discovery (K) (FGDKX)	52 bps	44.23%
Fidelity Growth Strategies (FDEGX)	77 bps	Fidelity Growth Strategies (K) (FAGKX)	51 bps	50.98%
Fidelity Independence (FDFFX)	92 bps	Fidelity Independence (K) (FDFKX)	77 bps	19.48%
Fidelity International Discovery (FIGRX)	100 bps	Fidelity International Discovery (K) (FIDKX)	79 bps	26.58%

Plan Mutual Fund	Plan Fee	Identical Lower-Cost Mutual Fund	Identical Lower-Cost Mutual Fund Fee	Plan's Excess Cost
Fidelity International Index (Inv) (FSIIX)	10 bps	Fidelity International Index (Prem) (FSIVX)	7 bps	42.86%
Fidelity International Small Cap (FISMX)	142 bps	Fidelity International Small Cap (I) (FIXIX)	131 bps	8.40%
Fidelity International Small Cap Opportunities (FSCOX)	89 bps	Fidelity International Small Cap Opportunities (I) (FOPIX)	88 bps	1.14%
Fidelity Leveraged Company Stock (FLVCX)	88 bps	Fidelity Leveraged Company Stock (K) (FLCKX)	69 bps	27.54%
Fidelity Long-Term Treasury Bond Index (Inv) (FLBIX)	20 bps	Fidelity Long-Term Treasury Bond Index (Prem) (FLBAX)	10 bps	100.00%
Fidelity Low-Priced Stock (FLPSX)	99 bps	Fidelity Low-Priced Stock (K) (FLPKX)	85 bps	16.47%
Fidelity Magellan (FMAGX)	74 bps	Fidelity Magellan (K) (FMGKX)	58 bps	27.59%
Fidelity Mid-Cap Stock (FMCSX)	64 bps	Fidelity Mid-Cap Stock (K) (FKMCX)	41 bps	56.10%
Fidelity OTC (FOCPX)	104 bps	Fidelity OTC (K) (FOCKX)	88 bps	18.18%

Plan Mutual Fund	Plan Fee	Identical Lower-Cost Mutual Fund	Identical Lower-Cost Mutual Fund Fee	Plan's Excess Cost
Fidelity Overseas (FOSFX)	85 bps	Fidelity Overseas (K) (FOSKX)	66 bps	28.79%
Fidelity Puritan (FPURX)	61 bps	Fidelity Puritan (K) (FPUKX)	47 bps	29.79%
Fidelity Select Gold (FSAGX)	94 bps	Fidelity Select Gold (I) (FGDIX)	91 bps	3.30%
Fidelity Select Materials (FSDPX)	94 bps	Fidelity Select Materials (I) (FMFEX)	93 bps	1.08%
Fidelity Short-Term Treasury Bond Index (Inv) (FSBIX)	20 bps	Fidelity Short-Term Treasury Bond Index (Prem) (FSBAX)	10 bps	100.00%
Fidelity Stock Selector (FDSSX)	86 bps	Fidelity Stock Selector (K) (FSSKX)	66 bps	30.30%
Fidelity Total Market Index (Inv) (FSTMX)	10 bps	Fidelity Total Market Index (Prem) (FSTVX)	7 bps	42.86%
Fidelity Value (FDVLX)	63 bps	Fidelity Value (K) (FVLKX)	46 bps	36.96%
Fidelity Value Discovery (FVDFX)	95 bps	Fidelity Value Discovery (K) (FVDKX)	74 bps	28.38%

Plan Mutual Fund	**Plan Fee**	**Identical Lower-Cost Mutual Fund**	**Identical Lower-Cost Mutual Fund Fee**	**Plan's Excess Cost**
Fidelity Value Strategies (FSLSX)	80 bps	Fidelity Value Strategies (K) (FVSKX)	56 bps	42.86%
TIAA-CREF Equity Index (Retire) (TIQRX)	33 bps	TIAA-CREF Equity Index (Inst) (TIEIX)	9 bps	266.67%
TIAA-CREF Growth & Income (Retire) (TRGIX)	73 bps	TIAA-CREF Growth & Income (Inst) (TIGRX)	52 bps	40.38%
TIAA-CREF High-Yield (Retire) (TIHRX)	65 bps	TIAA-CREF High-Yield (Inst) (TIHYX)	40 bps	62.50%
TIAA-CREF International Equity (Retire) (TRERX)	78 bps	TIAA-CREF International Equity (Inst) (TIIEX)	57 bps	36.84%
TIAA-CREF International Equity Index (Retire) (TRIEX)	35 bps	TIAA-CREF International Equity Index (Inst) (TCIEX)	10 bps	250.00%
TIAA-CREF Large-Cap Growth (Retire) (TILRX)	75 bps	TIAA-CREF Large-Cap Growth (Inst) (TILGX)	50 bps	50.00%
TIAA-CREF Large-Cap Growth Index (Retire) (TRIRX)	34 bps	TIAA-CREF Large-Cap Growth Index (Inst) (TILIX)	9 bps	277.78%

Plan Mutual Fund	Plan Fee	Identical Lower-Cost Mutual Fund	Identical Lower-Cost Mutual Fund Fee	Plan's Excess Cost
TIAA-CREF Large-Cap Value (Retire) (TRLCX)	74 bps	TIAA-CREF Large-Cap Value (Inst) (TRLIX)	49 bps	51.02%
TIAA-CREF Large-Cap Value Index (Retire) (TRCVX)	34 bps	TIAA-CREF Large-Cap Value Index (Inst) (TILVX)	9 bps	277.78%
TIAA-CREF Mid-Cap Growth (Retire) (TRGMX)	77 bps	TIAA-CREF Mid-Cap Growth (Inst) (TRPWX)	52 bps	48.08%
TIAA-CREF Mid-Cap Value (Retire) (TRVRX)	74 bps	TIAA-CREF Mid-Cap Value (Inst) (TIMVX)	49 bps	51.02%
TIAA-CREF Real Estate Securities (Retire) (TRRSX)	81 bps	TIAA-CREF Real Estate Securities (Inst) (TIREX)	56 bps	44.64%
TIAA-CREF S&P 500 Index (Retire) (TRSPX)	33 bps	TIAA-CREF S&P 500 Index (Inst) (TISPX)	8 bps	312.50%
TIAA-CREF Short-Term Bond (Retire) (TISRX)	55 bps	TIAA-CREF Short-Term Bond (Inst) (TISIX)	30 bps	83.33%

Plan Mutual Fund	Plan Fee	Identical Lower-Cost Mutual Fund	Identical Lower-Cost Mutual Fund Fee	Plan's Excess Cost
Fidelity Emerging Europe, Middle East, Africa (EMEA) (FEMEX)	125 bps	Fidelity Emerging Europe, Middle East, Africa (EMEA) (I) (FIEMX)	119 bps	5.04%
Fidelity Japan (FJPNX)	80 bps	Fidelity Japan (I) (FJPIX)	75 bps	6.67%
Fidelity Real Estate Income (FRIFX)	92 bps	Fidelity Real Estate Income (I) (FRIRX)	89 bps	3.37%
Vanguard Growth Index (Signal) (VIGSX)	10 bps	Vanguard Growth Index (Inst) (VIGIX)	8 bps	25.00%
Vanguard Mid Cap Index (Signal) (VMISX)	14 bps	Vanguard Mid Cap Index (Inst Pl) (VMCPX)	6 bps	133.33%
Vanguard Small Cap Index (Signal) (VSISX)	10 bps	Vanguard Small Cap Index (Inst Pl) (VSCPX)	6 bps	66.67%
Vanguard Value Index (Signal) (VVISX)	12 bps	Vanguard Value Index (Inst) (VIVIX)	8 bps	50.00%
Fidelity 500 Index (Inst) (FXSIX)	5 bps	Fidelity 500 Index (Inst Prem) (FXAIX)	3 bps	66.67%

Plan Mutual Fund	Plan Fee	Identical Lower-Cost Mutual Fund	Identical Lower-Cost Mutual Fund Fee	Plan's Excess Cost
Fidelity Conservative Income Bond (FCONX)	40 bps	Fidelity Conservative Income Bond (Inst) (FCNVX)	30 bps	33.33%
Fidelity Emerging Markets Index (Prem) (FPMAX)	22 bps	Fidelity Emerging Markets Index (Inst Prem) (FPADX)	12 bps	83.33%
Fidelity Extended Market Index (Prem) (FSEVX)	7 bps	Fidelity Extended Market Index (Inst Prem) (FSMAX)	6 bps	16.67%
Fidelity Global ex-US Index (Prem) (FSGDX)	18 bps	Fidelity Global ex-US Index (Inst Prem) (FSGGX)	10 bps	80.00%
Fidelity International Index (Prem) (FSIVX)	7 bps	Fidelity International Index (Inst Prem) (FSPSX)	6 bps	16.67%
Fidelity Mid Cap Index (Prem) (FSCKX)	12 bps	Fidelity Mid Cap Index (Inst Prem) (FSMDX)	6 bps	100.00%
Fidelity Small Cap Index (Prem) (FSSVX)	17 bps	Fidelity Small Cap Index (Inst Prem) (FSSNX)	11 bps	54.55%

Plan Mutual Fund	Plan Fee	Identical Lower-Cost Mutual Fund	Identical Lower-Cost Mutual Fund Fee	Plan's Excess Cost
Fidelity Total Market Index (Prem) (FSTVX)	7 bps	Fidelity Total Market Index (Inst Prem) (FSKAX)	5 bps	40.00%
Fidelity U.S. Bond Index (Prem) (FSITX)	12 bps	Fidelity U.S. Bond Index (Inst Prem) (FXNAX)	5 bps	140.00%
Fidelity China Region (FHKCX)	98 bps	Fidelity Advisor China Region I (FHKIX)	93 bps	5.38%
Fidelity Inflation-Protected Index (Prem) (FSIYX)	10 bps	Fidelity Inflation-Protected Index (Inst Prem) (FIPDX)	5 bps	100.00%
Fidelity International Real Estate (FIREX)	114 bps	Fidelity International Real Estate (I) (FIRIX)	109 bps	4.59%
Fidelity Latin America (FLATX)	103 bps	Fidelity Latin America (I) (FLFIX)	101 bps	1.98%
Fidelity Real Estate Index (Prem) (FSRVX)	9 bps	Fidelity Real Estate Index (Inst) (FSRNX)	7 bps	28.57%
Strategic Advisers Core Multi-Manager (FLAUX)	96 bps	Strategic Advisers Core Multi-Manager (F) (FHJSX)	86 bps	11.63%

Plan Mutual Fund	Plan Fee	Identical Lower-Cost Mutual Fund	Identical Lower-Cost Mutual Fund Fee	Plan's Excess Cost
Strategic Advisers International Multi-Manager (FMJDX)	116 bps	Strategic Advisers International Multi-Manager (F) (FMBKX)	107 bps	8.41%
Strategic Advisers Value Multi-Manager (FKMOX)	97 bps	Strategic Advisers Value Multi-Manager (F) (FGWBX)	87 bps	11.49%
Fidelity International Growth (FIGFX)	104 bps	Fidelity International Growth (Z) (FZAJX)	88 bps	18.18%
Fidelity Mega Cap Stock (FGRTX)	68 bps	Fidelity Mega Cap Stock (Z) (FZALX)	54 bps	25.93%
Strategic Advisers Small Mid Cap Multi-Manager (FNAPX)	116 bps	Strategic Advisers Small Mid Cap Multi-Manager (F) (FARMX)	105 bps	10.48%
Vanguard Growth Index (Adm) (VIGAX)	9 bps	Vanguard Growth Index (Inst) (VIGIX)	8 bps	12.50%
Vanguard Mid Cap Index (Adm) (VIMAX)	9 bps	Vanguard Mid Cap Index (Inst Pl) (VMCPX)	6 bps	50.00%

Plan Mutual Fund	Plan Fee	Identical Lower-Cost Mutual Fund	Identical Lower-Cost Mutual Fund Fee	Plan's Excess Cost
Vanguard Small Cap Index (Adm) (VSMAX)	9 bps	Vanguard Small Cap Index (Inst Pl) (VSCPX)	6 bps	50.00%
Vanguard Value Index (Adm) (VVIAX)	9 bps	Vanguard Value Index (Inst) (VIVIX)	8 bps	12.50%
Fidelity Emerging Markets Discovery (FEDDX)	144 bps	Fidelity Emerging Markets Discovery (I) (FEDIX)	143 bps	0.70%
Fidelity Europe (FIEUX)	101 bps	Fidelity Europe (I) (FHJMX)	96 bps	5.21%
Fidelity Total Bond (FTBFX)	45 bps	Fidelity Total Bond (Z) (FBKWX)	36 bps	25.00%

162. These lower-cost share classes have been available to the Retirement Plan and Voluntary Savings Plan for years, some dating back to the early 2000's or before.

163. Further, even after the changes made effective October 2016, Defendants continue to provide higher-cost Vanguard mutual funds that are available, including the Vanguard Total Bond Market Fund, the Vanguard Total International Stock Index Fund, the Vanguard Extended Market Index, and the Vanguard Institutional Index Fund.

164. Because the share classes have identical portfolio managers, underlying investments, and asset allocations, and differ only in cost, Defendants' failure to select the lower-cost share classes for the Plans' mutual fund options demonstrates that Defendants failed to prudently consider and use the size and purchasing power of the Plans when selecting the Plans' investment options.

165. Defendants' use of the higher-cost share classes instead of the available lower-cost versions caused the Plans' participants to lose millions of dollars of their retirement savings due to wholly unnecessary fees.

V. Defendants selected and retained a large number of duplicative investment options, diluting the Plans' ability to pay lower fees and confusing participants.

166. Defendants provided a multitude of duplicative funds in the same investment style, thereby depriving the Plans of their bargaining power associated with offering a single option in each investment style, which significantly reduces investment fees, and leading to what industry experts have described as "decision paralysis" for participants. *See, e.g.*, Michael Liersch, *Choice in Retirement Plans: How Participant Behavior Differs in Plans Offering Advice, Managed Accounts, and Target-Date Investments,* T. ROWE PRICE RETIREMENT RESEARCH, at 2 (Apr. 2009) ("Offering too many choices to consumers can lead to decision paralysis, preventing consumers from making decisions."). For the Retirement and Voluntary Savings Plans, Defendants placed over 240 and 180 investment options in the core lineup of each Plan respectively in the following asset classes: target date and asset allocation funds, large cap domestic equities, mid cap domestic equities, small

cap domestic equities, international equities, fixed income, money market, real estate, and fixed guaranteed annuity.

167. Having such an overwhelming number of investment options also places a monumental burden on the Plans' participants in selecting options in which to invest. Mutual funds are required to offer a prospectus, which is designed to provide material information to potential investors to enable them to make an informed, prudent investment decision. The prospectus sets forth a fund's objectives or goals, investment strategies, principal risks, historical performance, fees and expenses, and fund managers and advisers, among other information. For the Fidelity Freedom Funds alone, the prospectus and supporting materials filed with the SEC span almost *800* printed pages.[36] If a Retirement Plan or Voluntary Savings Plan participant were to review the prospectuses of all the more than 240 or 180 investment options that were placed in the Retirement Plan and the Retirement Plan respectively, they would have to read many thousands of pages of materials. This is a virtually impossible burden. Even for the Plans' fiduciaries, it is inconceivable that they have read the prospectuses and supporting materials of the hundreds of funds they selected and retained for each of the Plans.

168. In comparison to the hundreds of investment options offered in the Retirement Plan and Voluntary Savings Plan, according to Callan Investments Institute's 2015 Defined Contribution Trends survey, defined contribution plans in 2014 had on average

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[36] *See* Fidelity Freedom Funds Prospectus, Form N-1A (May 28, 2016), available at https://www.sec.gov/Archives/edgar/data/880195/000137949116004218/filing717.htm.

15 investment options, excluding target date funds. Callan Investments Institute, *2015 Defined Contribution Trends,* at 28 (2015).[37] This reasonable number of options provides choice of investment style to participants while maintaining a larger pool of assets in each investment style and avoiding confusion.

169. A larger pool of assets in each investment style significantly reduces fees paid by participants. By consolidating duplicative investments of the same investment style into a single investment option, the Plans would then have the ability to command lower-cost investments, such as a low-cost institutional share class of the selected mutual fund option.

170. Fund selections must be the result of a detailed due diligence process that considers factors such as risk, investment return, and expenses of available investment alternatives, and the fiduciary must give "appropriate consideration" to "the role the investment or investment course of action plays . . . in the plan's investment portfolio," 29 C.F.R. §§2550.404a-1(b)(i)-(ii). Fiduciaries cannot discharge their duties "by the simple expedient of including a very large number of investment alternatives in its portfolio and then shifting to the participants the responsibility for choosing among them." *Hecker*, 569 F.3d at 711. Including a large number of alternatives removes the benefit of pooling assets consistent with the size of the Plans. Assembling a haphazard lineup of hundreds of duplicative options, proprietary to the Plans' recordkeepers—and shifting to participants the burden to screen those options—does not reflect a prudent investment selection process.

171. Within each asset class and investment style deemed appropriate for a participant-directed retire-

[37] Available at https://www.callan.com/research/files/990.pdf.

ment plan, prudent fiduciaries must make a reasoned determination and select a prudent investment option. In contrast to the investment lineup assembled by Defendants, prudent fiduciaries do not select and retain numerous duplicative investment options for a single asset class and investment style. When many investment options in a single investment style are included in a plan, fiduciaries lose the bargaining power to obtain lower investment management expenses for that style.

172. Moreover, if a participant puts her assets in each of the funds within a given investment style, as commentators have said they are likely to do,[38] when many actively managed funds are included within the same investment style, this results in those participants effectively having an index return. This is because the investments are spread so broadly over that investment style. Yet the participants will be paying much higher fees for active management than the fees of a passive index fund.

173. In addition, providing multiple options in a single investment style adds unnecessary complexity to the investment lineup and leads to participant confusion. *See* The Standard, *Fixing Your 403(b) Plan: Adopting a Best Practices Approach,* at 2 ("Numerous studies have demonstrated that when people are given too many choices of anything, they lose confidence or make no decision."); Michael Liersch, *Choice in Retirement Plans: How Participant Behavior Differs in Plans Offering Advice, Managed Accounts, and Target-Date Investments*, T. ROWE PRICE

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[38] Ian Ayres & Quinn Curtiss, *Beyond Diversification: The Pervasive Problem of Excessive Fees and Dominated Funds in 401(k) Plans*, 124 YALE L.J. 1476, 1481 (2015) ("It is well established that some investors naively diversify by spreading their plan investments across all fund offerings.").

RETIREMENT RESEARCH, at 2 (Apr. 2009) ("Offering too many choices to consumers can lead to decision paralysis, preventing consumers from making decisions.").[39]

174. Moreover, having many actively managed funds in the Plans within the same investment style results in the Plans effectively having an index fund return even though the Plans are paying fees for active management that are much higher than the fees of a passive index fund.

175. From 2010 to October 2016, the Retirement Plan included duplicative investments in every major asset class and investment style, including balanced/asset allocation (16 options), fixed income and high yield bond (32 options), specialty/focused (41 options), international (36 options), large cap domestic equities (48 options), mid cap domestic equities (15 options), small cap domestic equities (12 options), real estate (2 options), money market (9 options), and target date investments (2 fund families). Over the same period, the Voluntary Savings Plan included duplicative investments in balanced/asset allocation (16 options), fixed income and high yield bond (32 options), specialty/focused (41 options), international (35 options), large cap domestic equities (48 options), mid cap domestic equities (15 options), small cap domestic equities (11 options), real estate (6 options), and money market (9 options), and target date investments (2 fund families). Such a dizzying array of duplicative funds in a single investment style violates the well-recognized industry principle that too many choices harm participants, and leads to "decision paralysis".

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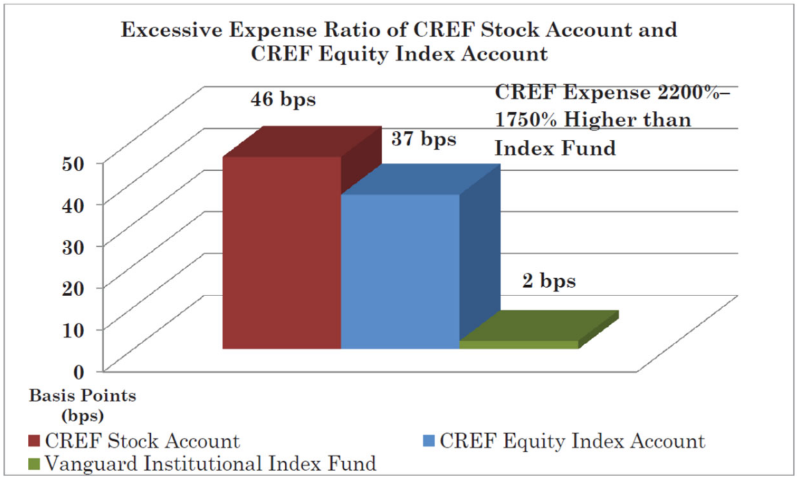
[39] Available at http://www.behavioralresearch.com/Publications/Choice_in_Retirement_Plans_April_2009.pdf.

176. For illustration purposes, Defendants included 14 large cap domestic blend investments for both the Retirement Plan and Voluntary Savings Plan as of December 31, 2015. These investments are summarized below and compared to a far lower-cost alternative: the Vanguard Institutional Index Fund (Instl Plus). The Vanguard Institutional Index Fund (Instl Plus) (VIIIX), by definition, mirrors the market, and has an expense ratio of 2 bps.

Large Cap Blend Investments	**Total Assets**	**Fee**	**Institu-tional Index Fund (VIIIX)**	**Plan's Excess Cost**
CREF Stock Account	$527,984,153	46 bps	2 bps	2200%
CREF Equity Index Account	$52,667,490	37 bps	2 bps	1750%
TIAA-CREF Equity Index (INST) (TIEIX)	$12,606,572	5 bps	2 bps	150%
TIAA-CREF S&P 500 Index (INST) (TISPX)	$25,385,799	6 bps	2 bps	200%
Fidelity Domini Social Equity (INV) (DSEFX)	$949,081	116 bps	2 bps	5700%
Fidelity Disciplined Equity (K) (FDEKX)	$2,251,402	79 bps	2 bps	3850%
Fidelity Dividend Growth (K) (FDGKX)	$4,097,254	57 bps	2 bps	2750%

Large Cap Blend Investments	**Total Assets**	**Fee**	**Institu-tional Index Fund (VIIIX)**	**Plan's Excess Cost**
Fidelity Growth & Income (K) (FGIKX)	$6,419,109	52 bps	2 bps	2650%
Fidelity Large Cap Core Enhanced Index (FLCEX)	$365,500	45 bps	2 bps	2150%
Fidelity Large Cap Stock (FLCSX)	$1,392,162	88 bps	2 bps	4300%
Fidelity Mega Cap Stock (FGRTX)	$738,905	67 bps	2 bps	3250%
Fidelity Spartan 500 Index (INST) (FXSIX)	$38,057,710	4 bps	2 bps	100%
Fidelity Spartan Total Market Index (ADV) (FSTVX)	$16,697,483	5 bps	2 bps	150%
Strategic Advisers Core Multi-Manager (FLAUX)	$23,547	97 bps	2 bps	4750%
Total of Higher-Cost Alternatives	***$689,636,167***			

177. With over *$580 million* held in the CREF Stock Account and the CREF Equity Index Account, these large cap blend options were *23 and 18 times* more expensive than the lower-cost Vanguard option with an expense ratio of 2 bps.



178. Many other large cap index funds are also available at far lower costs than the Plans' large cap blend funds. Had the amounts invested in the Plans' large cap blend options been consolidated into a single large cap blend investment such as the Vanguard Institutional Index Fund (Instl Plus), Plan participants would have avoided losing well in excess of $2.6 million dollars in fees for 2015 alone, and many more millions since 2010.

179. In addition, Defendants selected and continue to retain multiple passively managed index options in the same investment style. In contrast to an actively-managed fund, in which the investment manager selects stocks or bonds in an attempt to generate investment returns in excess of the fund's benchmark, passively managed index funds simply attempt to replicate a market index, such as the S&P

500, by holding a representative sample of securities in the index. Because no stock selection or research is needed, index fund fees are much lower than the fees of actively-managed funds in the same investment style, as set forth in ¶¶57-59, 188-192.

180. For example, in the large cap blend investment style, Defendants provided four separate index funds in each Plan that have similar investment strategies designed to generate investment results that correspond to the return of the U.S. equity market and do not involve stock selection. As another example, Defendants retained five separate index funds for the fixed income and intermediate-term bond investment style.

181. Since index funds merely hold the same securities in the same proportions as the index,[40] having multiple index funds of the same category or investment style in the Plans provides no benefit to participants. As Morningstar CEO Joe Mansueto recently observed, "[b]asic market indexes are virtually interchangeable." Lewis Braham, *Morningstar Announces Free Use of Its Indexes*, Barron's (Nov. 5, 2016).[41] Including multiple similar index funds in the same investment style hurts participants by diluting the Plans' ability to obtain lower rates for a single index fund of that style because the amount of assets in any one such fund is smaller than the aggregate would be. Moreover, multiple managers holding stocks which mimic the S&P 500 or a similar index would pick the same stocks in the same proportions as the index. Thus, there is no value in offering separate index funds in the same investment style.

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[40] Another example of an index is the Dow Jones Industrial Average.

[41] Available at http://www.barrons.com/articles/morningstar-announces-free-use-of-its-indexes-1478322642.

182. Had Defendants combined hundreds of millions of dollars in the Plans' assets from duplicative index funds into a single index fund, as set forth in ¶176, the Plans would have generated higher investment returns, net of fees, and participants would not have lost millions of dollars of retirement assets.

VI. Defendants imprudently and disloyally retained historically underperforming Plan investments.

183. The excessive fees in the Plans' investments were not justified by superior investment returns. Defendants' failure to conduct appropriate due diligence in selecting and monitoring the Plans' investments resulted in options being retained in the Plans despite years of historical underperformance compared to superior lower-cost alternatives, which caused massive losses to the Plans compared to what those assets would have earned if invested in prudent alternatives.

184. As of December 31, 2014, of the Plans' investment options which had at least a five-year performance history, *57%* of those funds—119 out of 208—underperformed their respective benchmarks over the previous five-year period.[42] The same performance chart shows that over *78%* of those underperforming funds—93 out of 119—also underperformed their benchmark over the preceding *ten-*

[42] These results are based on the performance and benchmark for each fund as shown on the Northwestern University 403(b) Retirement Plan and Voluntary Savings Plan Quarterly Investment Notice, Section 3. This figure excludes 25 funds in the Plans (out of the 233) which did not have 5-year performance histories as December 30, 2014. Over half of these funds—13 out of 25—underperformed their benchmarks on a one-year basis and since inception.

year period. The 119 funds that underperformed over the five-year period include the following:

Fund Name	Ticker
Calvert Balanced Portfolio (A)	CSIFX
Calvert Capital Accumulation (A)	CCAFX
Calvert International Equity (A)	CWVGX
Calvert Small Cap (A)	CCVAX
CREF Bond Market	N/A
CREF Equity Index	N/A
CREF Growth	N/A
CREF Inflation-Linked Bond	N/A
CREF Money Market	N/A
CREF Social Choice	N/A
CREF Stock	N/A
Domini Social Equity (INV)	DSEFX
Fidelity Asset Manager 50%	FASMX
Fidelity Asset Manager 60%	FSANX
Fidelity Asset Manager 70%	FASGX
Fidelity Asset Manager 85%	FAMRX
Fidelity Balanced (K)	FBAKX
Fidelity Blue Chip Value	FBCVX
Fidelity Cash Reserves Management	FDRXX
Fidelity Contrafund (K)	FCNKX

Fund Name	Ticker
Fidelity Disciplined Equity (K)	FDEKX
Fidelity Dividend Growth (K)	FDGKX
Fidelity Equity Dividend Income (K)	FETKX
Fidelity Equity-Income (K)	FEIKX
Fidelity Export & Multinational (K)	FEXKX
Fidelity Floating Rate High Income	FFRHX
Fidelity Focused High Income	FHIFX
Fidelity Four in One Index	FFNOX
Fidelity Freedom (K) 2015	FKVFX
Fidelity Freedom (K) 2020	FFKDX
Fidelity Freedom (K) 2025	FKTWX
Fidelity Freedom (K) 2030	FFKEX
Fidelity Freedom (K) 2035	FKTHX
Fidelity Freedom (K) 2040	FFKFX
Fidelity Freedom (K) 2045	FFKGX
Fidelity Freedom (K) 2050	FFKHX
Fidelity Fund (K)	FFDKX
Fidelity Global Balanced	FGBLX
Fidelity Global Commodity Stock	FFGCX
Fidelity Global Strategies	FDYSX
Fidelity Government Income	FGOVX
Fidelity Government Money Market	SPAXX

Fund Name	Ticker
Fidelity Growth Strategies (K)	FAGKX
Fidelity High Income	SPHIX
Fidelity Inflation Protected Bond	FINPX
Fidelity Limited Term Government Fund	FFXSX
Fidelity Intermediate Government Income	FSTGX
Fidelity International Value	FIVLX
Fidelity Japan	FJPNX
Fidelity Large Cap Growth Enhanced Index	FLGEX
Fidelity Latin America	FLATX
Fidelity Magellan (K)	FMGKX
Fidelity Mid-Cap Stock (K)	FKMCX
Fidelity Money Market	SPRXX
Fidelity Money Market Trust Retirement Government Money Market Portfolio	FGMXX
Fidelity NASDAQ Composite Index	FNCMX
Fidelity New Markets Income	FNMIX
Fidelity Puritan (K)	FPUKX
Fidelity Real Estate Income	FRIFX
Fidelity Retirement Money Market	FRTXX
Fidelity Select Banking	FSRBX

Fund Name	Ticker
Fidelity Select Brokerage & Investment Management	FSLBX
Fidelity Select Communications Equipment	FSDCX
Fidelity Select Computers	FDCPX
Fidelity Select Consumer Finance	FSVLX
Fidelity Select Consumer Staples	FDFAX
Fidelity Select Energy	FSENX
Fidelity Select Energy Services	FSESX
Fidelity Select Environment and Alternative Energy	FSLEX
Fidelity Select Financial Services	FIDSX
Fidelity Select Gold	FSAGX
Fidelity Select Industrial Equipment	FSCGX
Fidelity Select Materials	FSDPX
Fidelity Select Money Market	FSLXX
Fidelity Select Natural Gas	FSNGX
Fidelity Select Natural Resources	FNARX
Fidelity Select Technology	FSPTX
Fidelity Select Telecommunications	FSTCX
Fidelity Select Utilities	FSUTX
Fidelity Select Wireless	FWRLX
Fidelity Small Cap Growth	FCPGX

Fund Name	Ticker
Fidelity Small Cap Stock	FSLCX
Fidelity Spartan 500 Index (INST)	FXSIX
Fidelity Spartan Intermediate Treasury Index (ADV)	FIBAX
Fidelity Spartan International Index (ADV)	FSIVX
Fidelity Spartan Long Term Treasury Bond Index (ADV)	FLBAX
Fidelity Spartan Short Term Treasury Index (ADV)	FSBAX
Fidelity Spartan Total Market Index (ADV)	FSTVX
Fidelity Spartan U.S. Bond Index (ADV)	FSITX
Fidelity Stock Selector All Cap (K)	FSSKX
Fidelity Stock Selector Large Cap Value	FSLVX
Fidelity Stock Selector Mid Cap	FSSMX
Fidelity Strategic Dividend & Income	FSDIX
Fidelity Telecom & Utilities	FIUIX
Fidelity Treasury Only Money Mar(K)et	FDLXX
Fidelity US Government Reserves	FGRXX
Fidelity Value (K)	FVLKX
Fidelity Value Strategies (K)	FVSKX

Fund Name	Ticker
TIAA Real Estate	QREARX
TIAA-CREF Equity Index (INST)	TIEIX
TIAA-CREF Growth & Income (INST)	TIGRX
TIAA-CREF High-Yield (INST)	TIHYX
TIAA-CREF Large-Cap Growth Index (INST)	TILIX
TIAA-CREF Large-Cap Value Index (INST)	TILVX
TIAA-CREF Large-Cap Value (INST)	TRLIX
TIAA-CREF Lifecycle 2015 (INST)	TCNIX
TIAA-CREF Lifecycle 2020 (INST)	TCWIX
TIAA-CREF Lifecycle 2025 (INST)	TCYIX
TIAA-CREF Lifecycle 2030 (INST)	TCRIX
TIAA-CREF Lifecycle 2035 (INST)	TCIIX
TIAA-CREF Lifecycle 2040 (INST)	TCOIX
TIAA-CREF Lifecycle 2045 (INST)	TTFIX
TIAA-CREF Lifecycle 2050 (INST)	TFTIX
TIAA-CREF Managed Allocation (INST)	TIMIX
TIAA-CREF Mid-Cap Growth (INST)	TRPWX
TIAA-CREF Mid-Cap Value (INST)	TIMVX
TIAA-CREF S&P 500 Index (INST)	TISPX

Fund Name	Ticker
TIAA-CREF Social Choice Equity (INST)	TISCX
Vanguard Windsor (ADM)	VWNEX

185. Had Defendants conducted a prudent investment review process, many of these options that consistently failed to meet performance objectives would have been eliminated from the Plans or replaced. Defendants' failure to do so caused the Plans substantial losses compared to prudent alternative investments that were available to the Plans. Two funds in particular demonstrate the severe harm to the Plans resulting from Defendants' breaches of fiduciary duties: the CREF Stock Account and TIAA Real Estate Account.

A. CREF Stock Account.

186. The CREF Stock Account is one of the largest investment options, by asset size, in the Plans with nearly $528 million in total assets, and has been offered to participants throughout the period from 2010 to date and many years prior. In its fund fact sheets and participant disclosures, TIAA-CREF classifies the CREF Stock Account as a domestic equity investment in the large cap blend Morningstar category. This option has consistently underperformed over years, and continues to underperform its benchmark and lower-cost actively and passively managed investments that were available to the Plans.

187. TIAA-CREF imposed restrictive provisions on the specific annuities that *must* be provided in the Plans. Under these terms, TIAA-CREF required that the CREF Stock Account be offered to Plan participants, in addition to the TIAA Traditional and the CREF Money Market Account. Plan fiduciaries

provided these mandatory offerings in the Plans without a prudent process to determine whether they were prudent alternatives and in the exclusive best interest of Plan participants and beneficiaries. TIAA-CREF required the CREF Stock Account to be included in the Plans to drive very substantial amounts of revenue sharing payments to TIAA-CREF for recordkeeping services. The CREF Stock Account paid 24 bps for revenue sharing, which exceeded other TIAA-CREF investments by over 50% (15 bps).

188. As understood in the investment community, passively managed investment options should either be used or, at a minimum, thoroughly analyzed and considered in efficient markets such as large capitalization U.S. stocks. This is because it is difficult and either unheard of, or extremely unlikely, to find actively managed mutual funds that outperform a passive index, net of fees, particularly on a persistent basis. This extreme unlikelihood is even greater in the large cap market because such companies are the subject of many analysts' coverage, while smaller stocks are not as widely covered by analysts and thus are subject to potential inefficiencies in pricing.

189. Nobel Prize winners in economics have concluded that virtually no investment manager consistently beats the market over time after fees are taken into account. "Properly measured, the average actively managed dollar must underperform the average passively managed dollar, net of costs." William F. Sharpe, *The Arithmetic of Active Management,* 47 FIN. ANALYSTS J. 7, 8 (Jan./Feb. 1991);[43] Eugene F. Fama & Kenneth R. French, *Luck Versus Skill in the Cross-Section of Mutual Fund Returns*, 65 J. FIN.

[43] Available at http://www.cfapubs.org/doi/pdf/10.2469/faj.v47.n1.7.

1915, 1915 (2010) ("After costs . . . in terms of net returns to investors, active investment must be a negative sum game.").

190. To the extent fund managers show any sustainable ability to beat the market, the outperformance is nearly always dwarfed by mutual fund expenses. Fama & French, *Luck Versus Skill in the Cross-Section of Mutual Fund Returns*, at 1931-34; *see also* Russ Wermers, *Mutual Fund Performance: An Empirical Decomposition into Stock-Picking Talent, Style, Transaction Costs, and Expenses*, 55 J. FIN. 1655, 1690 (2000) ("on a net-return level, the funds underperform broad market indexes by one percent per year").

191. If an individual high-cost mutual fund exhibits market-beating performance over a short period of time, studies demonstrate that outperformance during a particular period is not predictive of whether a mutual fund will perform well in the future. Laurent Barras et al., *False Discoveries in Mutual Fund Performance: Measuring Luck in Estimated Alphas*, 65 J. FIN. 179, 181 (2010); Mark M. Carhart, *On Persistence in Mutual Fund Performance*, J. FIN. 57, 59 (1997) (measuring thirty-one years of mutual fund returns and concluding that "persistent differences in mutual fund expenses and transaction costs explain almost all of the predictability in mutual fund returns"). However, the *worst-performing* mutual funds show a strong, persistent tendency to continue their poor performance. Carhart, *On Persistence in Mutual Fund Performance*, at 57.

192. Accordingly, investment costs are of paramount importance to prudent investment selection, and a prudent investor will not select higher-cost actively managed funds unless there has been a documented process leading to the realistic conclusion that the

fund is likely to be that extremely rare exception, if one even exists, that will outperform its benchmark over time, net of investment expenses.

193. Moreover, the efficiencies of the large cap market hinder an active manager's ability to achieve excess returns for investors.

> [T]his study of mutual funds does not provide any reason to abandon a belief that securities markets are remarkably efficient. Most investors would be considerably better off by purchasing a low expense index fund, than by trying to select an active fund manager who appears to possess a "hot hand." Since active management generally fails to provide excess returns and tends to generate greater tax burdens for investors, the advantage of passive management holds, a fortiori.

Burton G. Malkiel, Returns from Investing in Equity Mutual Funds 1971 to 1991, 50 J. FIN. 549, 571 (1995).[44]

194. Academic literature overwhelmingly concludes that active managers consistently underperform the S&P 500 index.

> Active managers themselves provide perhaps the most persuasive case for passive investing. Dozens of studies have examined the performance of mutual funds and other professional-managed assets, and virtually all of them have concluded that, on average, active managers underperform passive benchmarks . . . The median active fund underperformed the passive index in 12 out of 18 years [for the large-cap fund universe] . . . The bottom line is that, over most periods, the majority of mutual fund investors would have been better off investing in an S&P 500 Index fund.

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[44] Available at http://indeksirahastot.fi/resource/malkiel.pdf.

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>
> Most of the dismal comparisons for active managers are for large-cap domestic managers versus the S&P 500 Index.

Robert C. Jones, *The Active Versus Passive Debate: Perspectives of an Active Quant*, ACTIVE EQUITY PORTFOLIO MANAGEMENT, at 37, 40, 53 (Frank J. Fabozzi ed., 1998).

195. Prudent fiduciaries of large defined contribution plans must conduct an analysis to determine whether actively managed funds, particularly large cap, will outperform their benchmark net of fees. Prudent fiduciaries then make a reasoned decision as to whether it is in participants' best interest to offer an actively managed large cap option for the particular investment style and asset class, in light of the higher costs of active management.

196. Defendants failed to undertake such an analysis, or any analysis, when it allowed the actively managed CREF Stock Account to be included and retained in the Plans. This is particularly true given TIAA-CREF's requirement that the CREF Stock Account be provided in the Plans in order to drive revenue to TIAA-CREF. By allowing the Plans to be bound by this requirement, Defendants failed to conduct an independent evaluation of the prudence of this option, which contradicts every principle of prudent investing because an investment that was no longer prudent could not be removed from the Plans.

197. Additionally, as detailed above in ¶¶134-136, the 46 bps that the CREF Stock Account charged was comprised of four layers of fees that were each unreasonable compared to the actual services provided by TIAA-CREF to the Plans' participants. Defendants failed to analyze whether these fees were appropriate and reasonable in light of the services

provided and given that the Plans invested over *$528 million* in total assets in the CREF Stock Account.

198. Had such an analysis been conducted by Defendants, they would have determined that the CREF Stock Account would not be expected to outperform the large cap index after fees. That is in fact what occurred.

199. Defendants and TIAA-CREF identified the Russell 3000 Index as the appropriate benchmark to evaluate investment results of the CREF Stock Account, as shown in the excerpts below that were provided to the Plans' participants.[45]

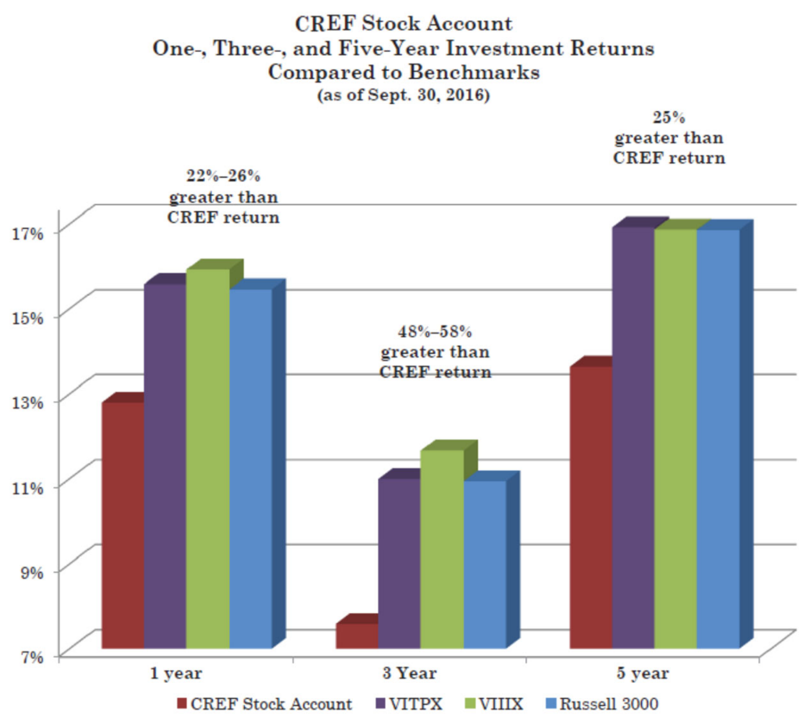
Investment Name / Benchmark	Morningstar Category	Ticker Symbol
CREF Stock Account *Russell 3000 Index*	Large Blend	CSTK#

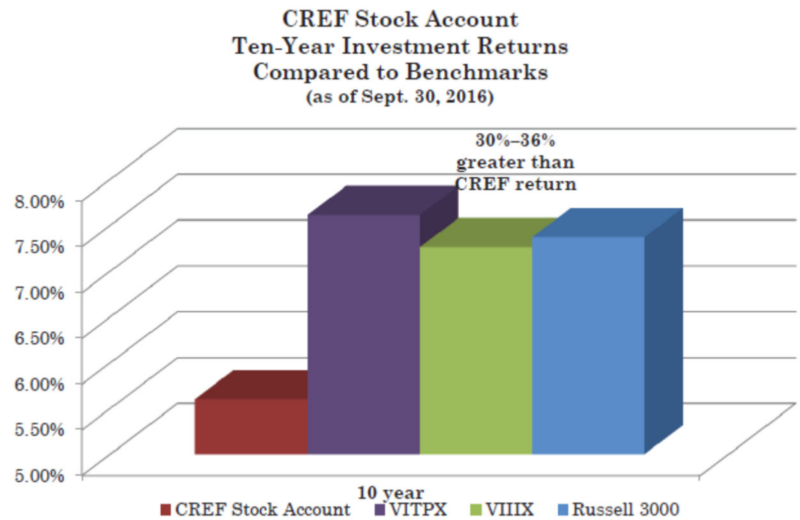
Investment Name *Benchmark*
CREF Stock Account *Russell 3000*

200. The CREF Stock Account did not merely underperform in a single year or two. Historical

[45] Available at https://www.tiaa.org/public/pdf/obiee/101332_Investment_Comparative_Chart.pdf and http://www.northwestern.edu/hr/benefits/retirement-plans/feedisclosure.pdf.

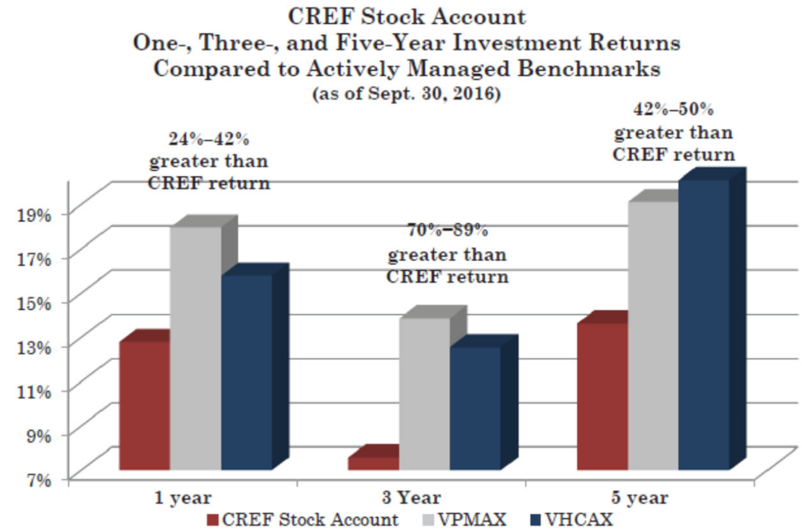
performance of the CREF Stock Account has been persistently poor for many years compared to this identified benchmark index (Russell 3000 Index), and also as compared to available low-cost index funds. The following two charts compare the investment returns of the CREF Stock Account to its benchmark (the Russell 3000) and two other passively managed index funds in the same investment style for the one-, three-, five-, and ten-year periods ending September 30, 2016. For each comparison, the CREF Stock Account dramatically underperformed the benchmarks and index alternatives. The passively managed index funds used for comparison purposes are the Vanguard Total Stock Market Index Fund (Instl Plus) (VITPX) and the Vanguard Institutional Index (Instl Plus) (VIIIX). Like the CREF Stock Account, these options are large cap blend investments.

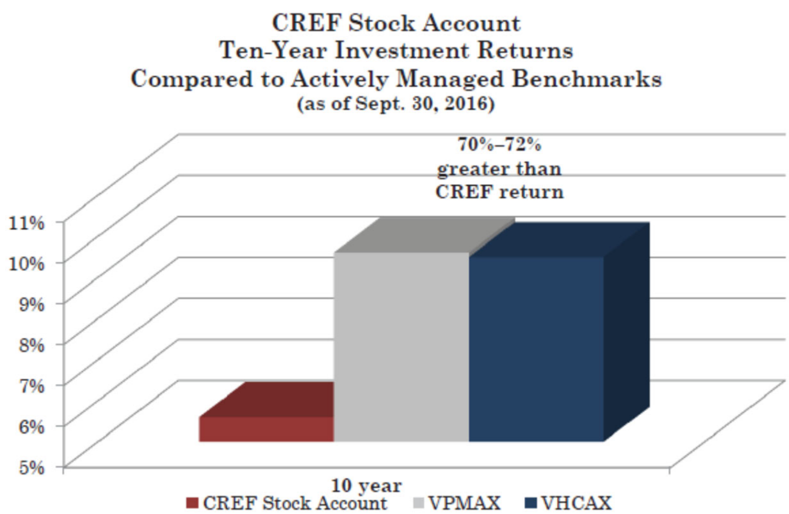




201. The CREF Stock Account, with an expense ratio of 46 bps as of December 31, 2014, was and is dramatically more expensive than far better performing index alternatives: the Vanguard Total Stock Market Index Fund-Instl Plus (2 bps) and the Vanguard Institutional Index-Instl Plus (2 bps).

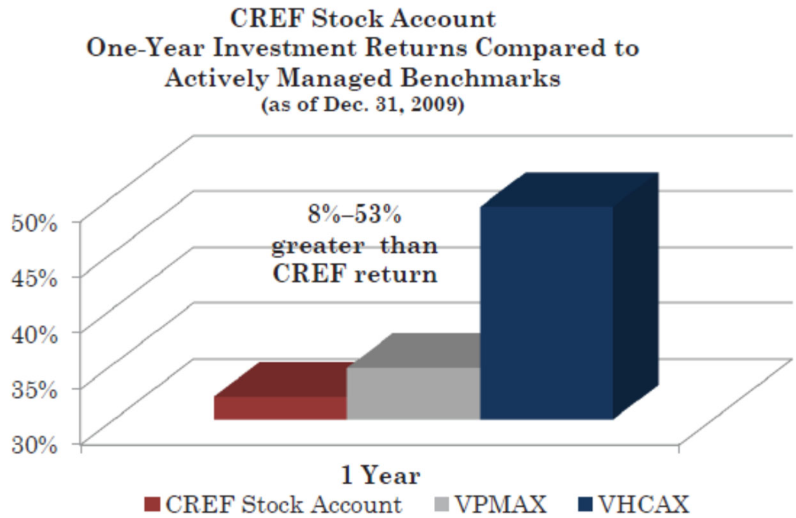
202. Apart from underperforming passively managed index funds, the fund also significantly underperformed comparable actively managed funds over the one-, three-, five-, and ten-year periods ending September 30, 2016. These large cap alternatives with similar underlying asset allocations to the CREF Stock Account include the Vanguard PRIMECAP-Adm (VPMAX) and the Vanguard Capital Opp.-Adm (VHCAX).



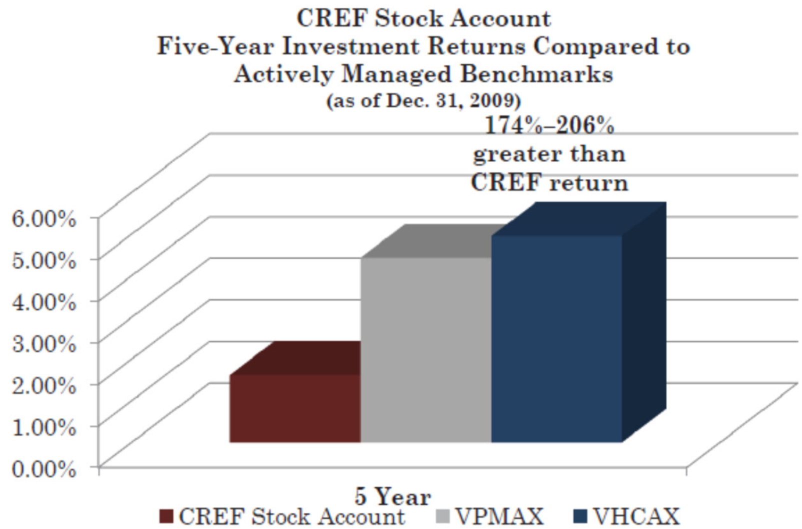


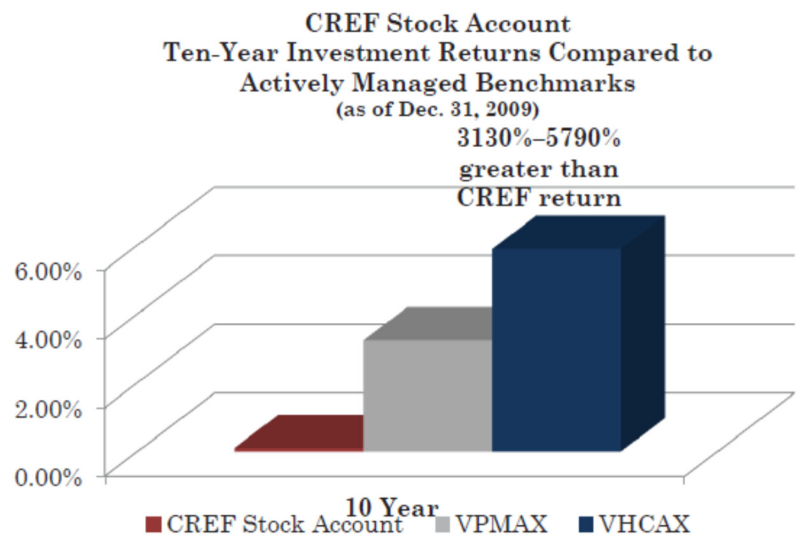
203. This sustained underperformance went back even further. The CREF Stock Account also had a long history of substantial underperformance compared to these actively managed alternatives over

the one-, five-, and ten-year periods ending December 31, 2009.[46]



[46] For the Vanguard PRIMECAP-Adm and Vanguard Capital Opportunity Fund-Adm, the investment returns of the investor share class for ten-year performance were used because the admiral share class for each of these funds was not offered until November 12, 2001. The return since inception for the Vanguard PRIMECAP-Adm was 3.23%, and for the Vanguard Capital Opportunity Fund-Adm, 5.89%.





204. Despite the consistent underperformance, the CREF Stock Account, with an expense ratio of 46 bps as of December 31, 2014, was more expensive than better-performing actively managed alternatives: the Vanguard PRIMECAP-Adm (35 bps) and the Vanguard Capital Opp.-Adm (40 bps).

205. Besides this abysmal long-term underperformance of the CREF Stock Account compared to both index funds and actively managed funds, the fund was recognized as imprudent in the industry. In March 2012, an independent investment consultant, AonHewitt, recognized the imprudence of the CREF Stock Account and recommended to its clients they remove this fund from their retirement plan. AonHewitt, *TIAA-CREF Asset Management*, INBRIEF, at 3 (July 2012).[47] This recommendation was made due to numerous factors, including the historical underperformance, high turnover of asset management executives and portfolio managers, and the fund's over 60 separate underlying investment strategies, greatly reducing the fund's ability to generate excess returns over any substantial length of time. *Id.* at 4-5.

206. The Supreme Court has recently and unanimously ruled that ERISA fiduciaries have "a continuing duty to monitor investments and remove imprudent ones[.]" *Tibble v. Edison Int'l,* 135 S. Ct. 1823, 1829 (2015). In contrast to the conduct of prudent fiduciaries, Defendants failed to conduct a prudent process to monitor the CREF Stock Account and continue to retain the fund despite its continuing to underperform lower-cost investment alternatives that were readily available to the Plans.

207. Prudent fiduciaries of defined contribution plans continuously monitor the investment performance of plan options against applicable benchmarks and peer groups to identify underperforming investments. Based on this process, prudent fiduciaries replace those imprudent investments with better performing and reasonably priced options. Under the standards

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[47] Available at http://system.nevada.edu/Nshe/?LinkServID=82B25D1E-9128-6E45-1094320FC2037740.

used by prudent independent fiduciaries, the CREF Stock Account would have been removed from the Plans.

208. Had Defendants removed the CREF Stock Account and the amounts been invested in any of the passively or actively managed lower-cost alternatives identified in ¶¶200 and 202, participants in the Plans would not have lost millions of dollars in retirement savings. Compared to the returns of the Vanguard PRIMECAP Fund Admiral—one of the Plans' core options after the October 2016 restructuring—the Plans lost in excess of $202 million at the plan level as a result of Defendants retaining the CREF Stock Account in the Plans.[48] The aggregate losses of all putative subclass members may be greater than that figure because the proposed subclass excludes participants (if any) whose CREF Stock Account investment outperformed the prudent alternative identified in the subclass definition, *see infra* ¶228.

B. TIAA Real Estate Account.

209. Defendants selected and retained the TIAA Real Estate Account as one of the real estate investment options in the Plan. The fund has far greater fees than are reasonable, has historically underperformed, and continues to consistently underperform comparable real estate investment alternatives, including the Vanguard REIT Index I (VGSNX).

210. Additionally, as detailed in ¶¶137-138, the 87 bps that the TIAA Real Estate Account charged was comprised of *five* layers of fees that were each

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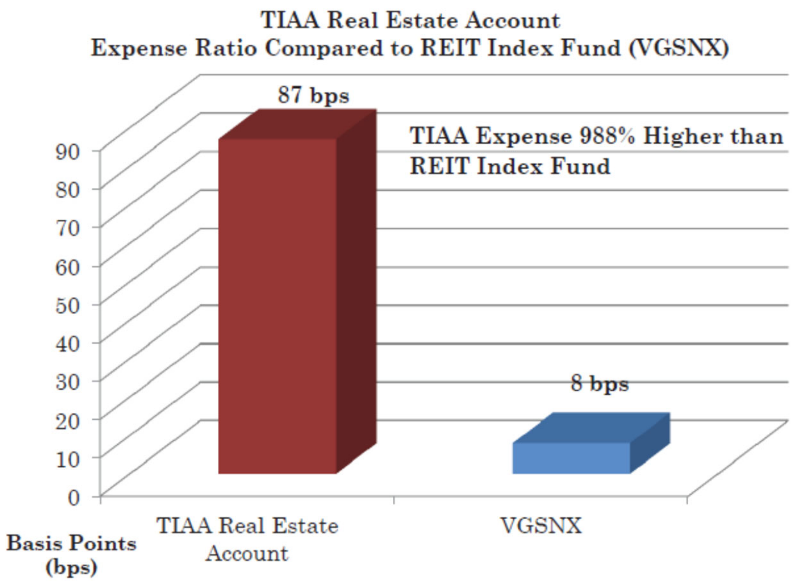
[48] Plan losses have been brought forward to the present value using the investment returns of the lower-cost alternatives to compensate participants who have not been reimbursed for their losses.

unreasonable compared to the actual services provided by TIAA-CREF to the Plans' participants. Defendants failed to analyze whether these fees were appropriate and reasonable in light of the services provided.

211. With an expense ratio of 87 bps as of December 31, 2014, the TIAA Real Estate Account is also over *10 times more expensive* than the Vanguard REIT Index (Instl) with an expense ratio of 8 bps.



212. The TIAA Real Estate Account had a long history of substantial underperformance relative to the Vanguard REIT Index over the one-, five-, and ten-year periods ending December 31, 2009.[49] Despite this, Defendants selected and to this date retained it in the Plans.

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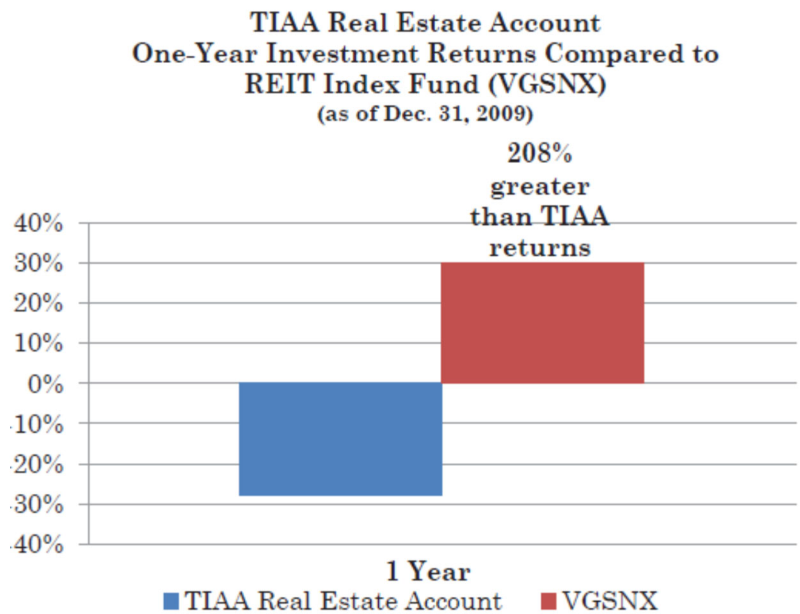
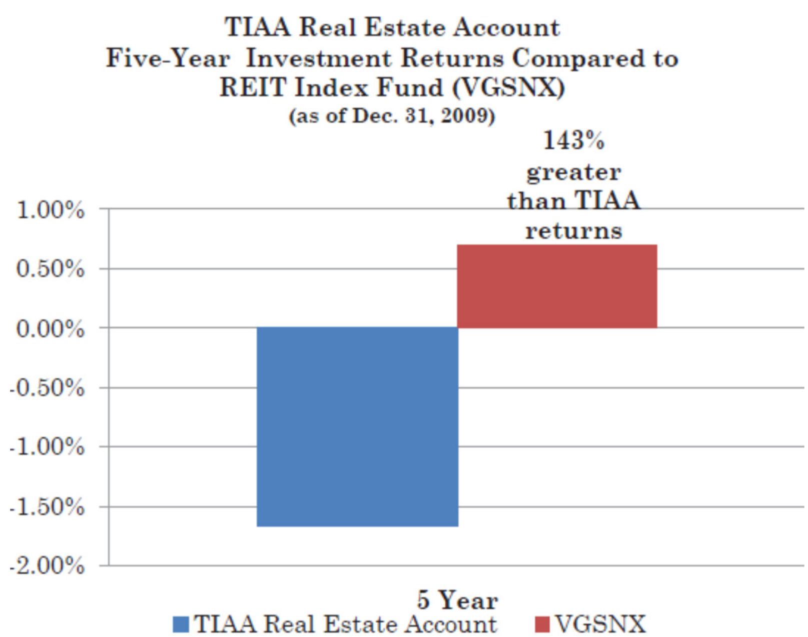
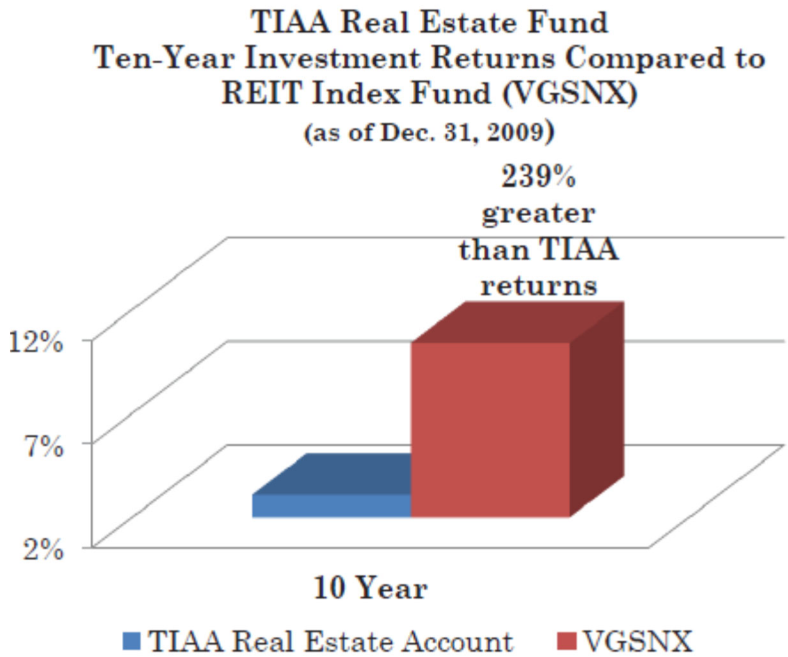
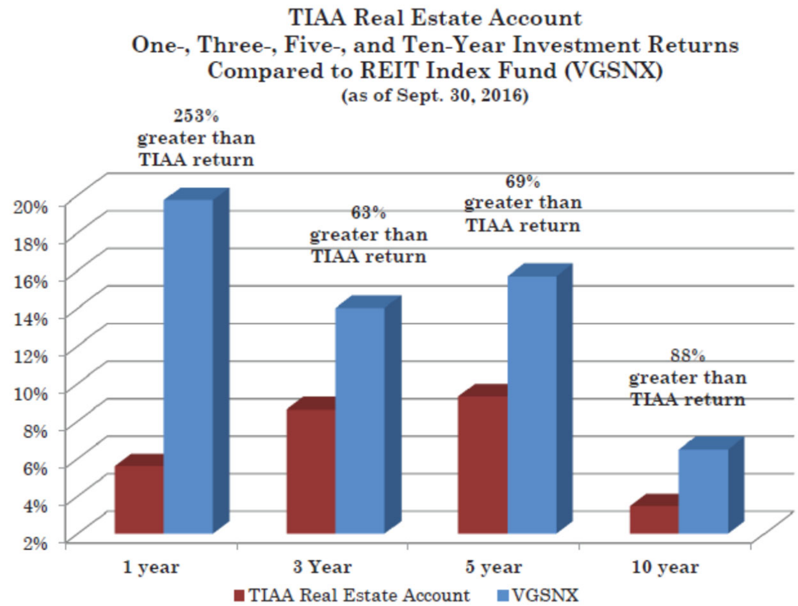
[49] The return of the investor share class was used for ten-year performance because the institutional share class was not offered until December 2, 2003. The return since inception for the Vanguard REIT Index (Instl) was 5.49%.


TIAA Real Estate Account
One-Year Investment Returns Compared to
REIT Index Fund (VGSNX)
(as of Dec. 31, 2009)
208% greater than TIAA returns
40%
30%
20%
10%
0%
-10%
-20%
-30%
-40%
1 Year
TIAA Real Estate Account
VGSNX


TIAA Real Estate Account
Five-Year Investment Returns Compared to
REIT Index Fund (VGSNX)
(as of Dec. 31, 2009)
143% greater than TIAA returns
1.00%
0.50%
0.00%
-0.50%
-1.00%
-1.50%
-2.00%
5 Year
TIAA Real Estate Account
VGSNX



213. This underperformance occurred for years before 2009 and has continued after 2009 to date. The TIAA Real Estate Account significantly underperformed the Vanguard REIT Index I over the one-, three-, five-, and ten-year periods ending September 30, 2016.



214. As the Supreme Court unanimously ruled in *Tibble*, prudent fiduciaries of defined contribution plans continuously monitor plan investment options and replace imprudent investments. *Tibble*, 135 S. Ct. at 1829. In contrast, Defendants failed to conduct such a process and continue to retain the TIAA Real Estate Account as an investment option in the Plans, despite its continued dramatic underperformance and far higher cost compared to available investment alternatives.

215. Had the amounts invested in the TIAA Real Estate Account instead been invested in the lower-cost and better-performing Vanguard REIT Index (Instl), the Plans would not have lost at least $13.6 million in retirement savings at the plan level.[50] The

[50] Losses in the Plans have been brought forward to the present value using the investment returns of the Vanguard REIT Index (Instl) to compensate participants who have not been reimbursed for their losses.

aggregate losses of all putative subclass members may be greater than that figure because the proposed subclass excludes participants (if any) whose TIAA Real Estate Account investment outperformed the prudent alternative identified in the subclass definition, *see infra* ¶228.

VII. Defendants have admitted that the prior structure of the Plans was imprudent and that they allowed excessive fees to be charged to the Plans.

216. Defendants expressly recognized that the Plans paid excessive administrative fees to TIAA-CREF and Fidelity. In an April 4, 2016 letter to the Plans' participants, Defendants explained that Northwestern had "negotiated a credit of fees, called a 'revenue credit,' from both Fidelity and TIAA."[51]

217. A "revenue credit" is a rebate to retirement plan participants to compensate them for overpayments made to plan service providers—in this case, the recordkeepers.

218. Northwestern informed Plan participants that the "modest" credits that each participant would receive would be "based on the proportion of [the participant's] aggregate Northwestern University retirement account balance . . . as of March 31, 2016."[52] The credits, if any, appeared on participants' account statements for the second quarter of 2016. Thus, the effect of the credit was to offset overcharges after March 31, 2016.

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[51] April 4, 2016 letter from Pamela S. Beemer, available at http://www.northwestern.edu/hr/benefits/retirement-plans/2016-Revenue-Credit-Letter.pdf.

[52] *Id.*

219. As Northwestern admitted, the revenue credits were "modest."[53] The amount of the credits did not begin to approach the roughly $30 million that the Plans' participants lost due to being overcharged by TIAA-CREF and Fidelity for record-keeping services from 2010 through 2015, as described *supra* ¶¶148-150, 154.

220. Defendants similarly acknowledged that the structure of the Plans prior to 2016—with *hundreds* of overlapping, duplicative, and costly investment options—caused participants to pay unreasonable investment fees.

221. In a June 2016 letter to the Plans' participants, Defendants acknowledged that the new tiered structure was "designed to be simpler and **allow for informed decisions** to be made based upon an individual's personal investment comfort level and expertise," that would "**enable simpler decision-making**."[54]

222. In an August 2016 "town hall" meeting presentation, Defendants explained that the new tiered structure would: "**[r]educe[] administration fees**," which would in turn "**increase[] participant returns**;" offer a "[s]treamlined menu for all investor types;" and provide "[a]ccess to **lower cost share classes** when available."[55]

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[53] *Id.*

[54] June 2016 letter from Pamela S. Beemer, available at http://www.northwestern.edu/hr/benefits/retirement-plans/2016%20Investment%20Change.pdf.

[55] "What You Need to Know: Changes to the Northwestern University Retirement Plans," available at http://www.northwestern.edu/hr/benefits/retirement-plans/Town%20Hall%20Meetings%20Presentation_Aug2016.pdf.

223. Defendants acknowledged that restructuring the Plans' investment options "**[b]etter aligns us with peers as many have reduced their line-ups, or are in [the] process of doing so.**"[56]

224. Defendants also admitted that the recent shift in the Plans' structures "[p]ositions NURIC to **meet expanded fiduciary responsibilities** based on IRS regulations which now **mandate greater oversight by employers**."[57]

225. Had Defendants used the massive bargaining power afforded them by the Plans' vast assets to obtain revenue credits, reduce administration fees, and obtain lower cost share classes by 2009 (if not years earlier), the Plans' participants would have avoided paying millions of dollars in unreasonable investment and administrative fees, and millions of dollars in performance losses.

226. In restructuring the Plans' investment options, Defendants removed hundreds of unnecessary mutual funds from the Plans. However, they left both the CREF Stock Fund and the TIAA Real Estate Fund as investment options, despite their poor performance history as detailed in ¶¶186-215.

CLASS ACTION ALLEGATIONS

227. 29 U.S.C. §1132(a)(2) authorizes any participant or beneficiary of the Plans to bring an action individually on behalf of the Plans to enforce a breaching fiduciary's liability to the Plans under 29 U.S.C. §1109(a).

228. In acting in this representative capacity and to enhance the due process protections of unnamed participants and beneficiaries of the Plans, as an

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[56] *Id.*

[57] *Id.*

alternative to direct individual actions on behalf of the Plans under 29 U.S.C. §1132(a)(2), Plaintiffs seek to certify this action as a class action on behalf of all participants and beneficiaries of the Plans, with two subclasses. Plaintiffs seek to certify, and to be appointed as representatives of, the following class and subclasses:

Excessive Fee claims and class:

All participants and beneficiaries of the Northwestern University Retirement Plan and the Northwestern University Voluntary Savings Plan, excluding the Defendants and any participant who is a fiduciary to the Plans, who had an account balance at any time between August 17, 2010 through the date of judgment.

CREF Stock Account subclass:

All participants and beneficiaries of the Northwestern University Retirement Plan and the Northwestern University Voluntary Savings Plan, excluding the Defendants and any participant who is a fiduciary to the Plans, who invested in the CREF Stock Account in either of the Plans at any time between August 17, 2010 through the date of judgment and whose investment in the CREF Stock Account underperformed the Russell 3000 Index minus 2 basis points for investment management.

TIAA Real Estate Account subclass:

All participants and beneficiaries of the Northwestern University Retirement Plan and the Northwestern University Voluntary Savings Plan, excluding the Defendants and any participant who is a fiduciary to the Plans, who invested in the TIAA Real Estate Account in either of the Plans at any time between August 17, 2010 date through the date of judgment and whose investment in the TIAA Real Estate Account underperformed the Vanguard REIT Index (Instl).

229. This action meets the requirements of Rule 23 and is certifiable as a class action for the following reasons:

a. The Class includes over 20,000 members and the subclasses include thousands of members, and are thus so large that joinder of all members is impracticable,

b. There are questions of law and fact common to this Class and subclasses because Defendants owed fiduciary duties to the Plans and to all participants and beneficiaries and took the actions and omissions alleged herein as to the Plans and not as to any individual participant. Thus, common questions of law and fact include the following, without limitation: who are the fiduciaries liable for the remedies provided by 29 U.S.C. §1109(a); whether the fiduciaries of the Plans breached their fiduciary duties to the Plans; what are the losses to the Plans resulting from each breach of fiduciary duty; and what Plan-wide equitable and other relief the court should impose in light of Defendants' breach of duty.

c. Plaintiffs' claims are typical of the claims of the Class and subclasses because the Plaintiffs were participants during the time period at issue in this action and all participants in the Plans were harmed by the Plans' excessive fees and other misconduct, as described above; Plaintiffs Lancaster and Walker each invested in the CREF Stock Account during the proposed subclass period and suffered losses, and Plaintiffs Bona, Lancaster, and Walker each invested in the TIAA Real Estate Account during the proposed subclass period and suffered losses.

d. Plaintiffs are adequate representatives of the Class and subclasses because they were participants in the Plans during the Class period, have no interest that is in conflict with the Class or subclasses, are committed to the vigorous representation of the Class and subclasses, and have engaged experienced and competent attorneys to represent the Class and subclasses.

e. Prosecution of separate actions for these breaches of fiduciary duties by individual participants and beneficiaries would create the risk of (A) inconsistent or varying adjudications that would establish incompatible standards of conduct for Defendants in respect to the discharge of its fiduciary duties to the Plans and personal liability to the Plans under 29 U.S.C. §1109(a), and (B) adjudications by individual participants and beneficiaries regarding these breaches of fiduciary duties and remedies for the Plans would, as a practical matter, be dispositive of the interests of the participants and beneficiaries not parties to the adjudication or would substantially impair or impede those participants' and beneficiaries' ability to protect their interests. Therefore, this action should be certified as a class action under Rule 23(b)(1)(A) or (B).

230. A class action is the superior method for the fair and efficient adjudication of this controversy because joinder of all participants and beneficiaries is impracticable, the losses suffered by individual participants and beneficiaries may be small, it would be impracticable for individual members to enforce their rights through individual actions, and the common questions of law and fact predominate over individual questions. Given the nature of the allegations, no class or subclass member has an interest

in individually controlling the prosecution of this matter, and Plaintiffs are aware of no difficulties likely to be encountered in the management of this matter as a class action. Alternatively, then, this action may be certified as a class and subclasses under Rule 23(b)(3) if it is not certified under Rule 23(b)(1)(A) or (B).

231. Plaintiffs' counsel, Schlichter, Bogard & Denton LLP, will fairly and adequately represent the interests of the Class and subclasses and is best able to represent the interests of the Class and subclasses under Rule 23(g).

a. Schlichter, Bogard & Denton has been appointed as class counsel in 17 other ERISA class actions regarding excessive fees in large defined contribution plans. As Chief Judge Michael J. Reagan of the Southern District of Illinois recognized in approving a settlement which was reached on the eve of trial after eight years of litigation, resulting in a $62 million monetary recovery and very substantial affirmative relief to benefit the Plans, the firm had shown "exceptional commitment and perseverance in representing employees and retirees seeking to improve their retirement plans," and "demonstrated its well-earned reputation as a pioneer and the leader in the field" of 401(k) plan excessive fee litigation. *Abbott v. Lockheed Martin Corp.*, No. 06-701, 2015 U.S.Dist. LEXIS 93206, at *4-5 (S.D.Ill. July 17, 2015). In that same case, Judge Reagan recognized that the law firm of "Schlichter, Bogard & Denton has had a humungous impact over the entire 401(k) industry, which has benefited employees and retirees throughout the entire country by bringing sweeping changes to fiduciary practices." *Abbott*, 2015 U.S. Dist. LEXIS 93206, at *9 (internal quotations omitted).

b. Other courts have made similar findings: "It is clear to the Court that the firm of Schlichter, Bogard & Denton is preeminent in the field" "and is the only firm which has invested such massive resources in this area." *George v. Kraft Foods Global, Inc.*, No. 08-3799, 2012 U.S.Dist.LEXIS 166816 at 8 (N.D. Ill. June 26, 2012).

c. "As the preeminent firm in 401(k) fee litigation, Schlichter, Bogard & Denton has achieved unparalleled results on behalf of its clients." *Nolte v. Cigna Corp.*, No. 07-2046, 2013 U.S.Dist.LEXIS 184622 at 8 (C.D. Ill. Oct. 15, 2013).

d. "Litigating this case against formidable defendants and their sophisticated attorneys required Class Counsel to demonstrate extraordinary skill and determination." *Beesley v. Int'l Paper Co.*, No. 06-703, 2014 U.S.Dist.LEXIS 12037 at *8 (S.D. Ill. Jan. 31, 2014). The court also emphasized that "the law firm of Schlichter, Bogard & Denton is the leader in 401(k) fee litigation." *Id.* at *8 (internal quotations omitted).

e. U.S. District Court Judge Baker acknowledged the significant impact of the firm's work by stating that as of 2013 the nationwide "fee reduction attributed to Schlichter, Bogard & Denton's fee litigation and the Department of Labor's fee disclosure regulations approach *$2.8 billion in annual savings* for American workers and retirees." *Nolte*, 2013 U.S. Dist. LEXIS 184622, at *6 (emphasis added).

f. U.S. District Judge Herndon of the Southern District of Illinois, recognized the firm's extraordinary contributions to the retirement industry: "Schlichter, Bogard & Denton and lead attorney Jerome Schlichter's diligence and perseverance, while risking vast amounts of time and money, reflect the finest attributes of a private attorney general . . ." *Beesley*, 2014 U.S. Dist. LEXIS 12037, at *8.

g. The U.S. District Court Judge G. Patrick Murphy recognized the work of Schlichter, Bogard & Denton as exceptional:

> "Schlichter, Bogard & Denton's work throughout this litigation illustrates an exceptional example of a private attorney general risking large sums of money and investing many thousands of hours for the benefit of employees and retirees. No case had previously been brought by either the Department of Labor or private attorneys against large employers for excessive fees in a 401(k) plan. Class Counsel performed substantial work . . . investigating the facts, examining documents, and consulting and paying experts to determine whether it was viable. This case has been pending since September 11, 2006. Litigating the case required Class Counsel to be of the highest caliber and committed to the interests of the participants and beneficiaries of the General Dynamics 401(k) Plans."

Will v. General Dynamics Corp., No. 06-698, 2010 U.S.Dist.LEXIS 123349 at 8-9 (S.D.Ill. Nov. 22, 2010).

h. Schlichter, Bogard & Denton handled the only full trial of an ERISA excessive fee case, resulting in a $36.9 million judgment for the plaintiffs that was affirmed in part by the Eighth Circuit. *Tussey v. ABB, Inc.*, 746 F.3d 327 (8th Cir. 2014). In awarding attorney's fees after trial, the district court concluded that "Plaintiffs' attorneys are clearly experts in ERISA litigation." *Tussey v. ABB, Inc.*, No. 06-4305, 2012 U.S.Dist.LEXIS 157428 at 10 (W.D. Mo. Nov. 2, 2012). Following remand, the district court again awarded Plaintiffs' attorney's fees, emphasizing the significant contribution Plaintiffs' attorneys have made to ERISA litigation, including educating the Department of Labor and federal courts about the importance of monitoring fees in retirement plans:

> "Of special importance is the significant, national contribution made by the Plaintiffs whose litigation clarified ERISA standards in the context of investment fees. The litigation educated plan administrators, the Department of Labor, the courts and retirement plan participants about the importance of monitoring recordkeeping fees and separating a fiduciary's corporate interest from its fiduciary obligations."

Tussey v. ABB, Inc., No. 06-4305, 2015 U.S.Dist. LEXIS 164818 at 7-8 (W.D. Mo. Dec. 9, 2015).

i. In *Spano v. Boeing Co.*, in approving a settlement reached after nine years of litigation which included $57 million in monetary relief and substantial affirmative relief to benefit participants, the court found that "[t]he law firm Schlichter, Bogard & Denton has significantly improved 401(k) plans across the country by bringing cases such as this one, which have educated plan administrators, the Department of Labor, the courts and retirement plan participants about the importance of monitoring recordkeeping fees." No. 06-cv-743, Doc. 587, at 5-6 (S.D.Ill. Mar. 31, 2016) (Rosenstengel, J.) (internal quotations omitted).

j. Recently, in approving a settlement including $32 million plus significant affirmative relief, Chief Judge William Osteen in *Kruger v. Novant Health, Inc.*, No. 14-208, Doc. 61, at 7-8 (M.D.N.C. Sept. 29, 2016) found that "Class Counsel's efforts have not only resulted in a significant monetary award to the class but have also brought improvement to the manner in which the Plans are operated and managed which will result in participants and retirees receiving significant savings[.]"

k. On November 3, 2016, Judge Michael Ponsor of the United States District Court for the District of Massachusetts found that by securing a $30.9 million settlement, Schlichter, Bogard & Denton had achieved an "outstanding result for the class," and "demonstrated extraordinary resourcefulness, skill, efficiency and determination." *Gordan v. Mass Mutual Life Ins., Co.*, No. 14-30184, Doc. 144 at 5 (D. Mass. November 3, 2016).

l. Schlichter, Bogard & Denton is also class counsel in and handled *Tibble v. Edison International*—the first and only Supreme Court case to address the issue of excessive fees in a defined contribution plan—in which the Court held in a unanimous 9-0 decision that ERISA fiduciaries have "a continuing duty to monitor investments and remove imprudent ones[.]" 135 S. Ct. at 1829. Schlichter, Bogard & Denton successfully petitioned for a writ of certiorari, and obtained amicus support from the United States Solicitor General and AARP, among others. Given the Court's broad recognition of an ongoing fiduciary duty, the *Tibble* decision will affect all ERISA defined contribution plans.

m. The firm's work in ERISA excessive fee class actions has been featured in the New York Times, Wall Street Journal, NPR, Reuters, and Bloomberg, among other media outlets. *See, e.g.*, Anne Tergesen, *401(k) Fees, Already Low, Are Heading Lower*, WALL ST. J. (May 15, 2016);[58] Gretchen

[58] Available at http://www.wsj.com/articles/401-k-fees-already-low-are-heading-lower-1463304601.

Morgenson, *A Lone Ranger of the 401(k)'s*, N.Y. TIMES (Mar. 29, 2014);[59] Liz Moyer, *High Court Spotlight Put on 401(k) Plans*, WALL ST. J. (Feb. 23, 2015);[60] Floyd Norris, *What a 401(k) Plan Really Owes Employees*, N.Y. TIMES (Oct. 16, 2014);[61] Sara Randazzo, *Plaintiffs' Lawyer Takes on Retirement Plans*, WALL ST. J. (Aug. 25, 2015);[62] Jess Bravin and Liz Moyer, *High Court Ruling Adds Protections for Investors in 401(k) Plans*, WALL ST. J. (May 18, 2015);[63] Jim Zarroli, *Lockheed Martin Case Puts 401(k) Plans on Trial*, NPR (Dec. 15, 2014);[64] Mark Miller, *Are 401(k) Fees Too High? The High-Court May Have an Opinion*, REUTERS (May 1, 2014);[65] Greg Stohr, *401(k) Fees at Issue as Court Takes Edison Worker Appeal*, BLOOMBERG (Oct. 2, 2014).[66]

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[59] Available at http://www.nytimes.com/2014/03/30/business/a-lone-ranger-of-the-401-k-s.html?_r=0.

[60] Available at http://www.wsj.com/articles/high-court-spotlight-put-on-401-k-plans-1424716527.

[61] Available at http://www.nytimes.com/2014/10/17/business/what-a-401-k-plan-really-owes-employees.html?_r=0.

[62] Available at http://blogs.wsj.com/law/2015/08/25/plaintiffs-lawyer-takes-on-retirement-plans/.

[63] Available at http://www.wsj.com/articles/high-court-ruling-adds-protections-for-investors-in-401-k-plans-1431974139.

[64] Available at http://www.npr.org/2014/12/15/370794942/lockheed-martin-case-puts-401-k-plans-on-trial.

[65] Available at http://www.reuters.com/article/us-column-miller-401fees-idUSBREA400J220140501.

[66] Available at http://www.bloomberg.com/news/articles/2014-10-02/401-k-fees-at-issue-as-court-takes-edison-worker-appeal.

COUNT I

Breach of Fiduciary Duties— 29 U.S.C. §1104(a)(1)(A) & (B)

Locking the Plan into CREF Stock Account and TIAA Recordkeeping

232. Plaintiffs restate and incorporate the allegations in the preceding paragraphs.

233. Defendants were required to discharge their duties with respect to the Plans solely in the interest of, and for the exclusive purpose of providing benefits to, Plans' participants and beneficiaries, defraying reasonable expenses of administering the Plans, and acting with the care, skill, prudence, and diligence required by ERISA.

234. Defendants were required to independently assess "the prudence of *each* investment option" for the Plans on an ongoing basis, *DiFelice*, 497 F.3d at 423, and to act prudently and solely in the interest of the Plans' participants in deciding whether to maintain a recordkeeping arrangement, DOL Adv. Op. 97-16A. Defendants were also required to remove investments that were no longer prudent for the Plans, as the Supreme Court recently confirmed. *Tibble*, 135 S. Ct. at 1828-29.

235. By allowing TIAA-CREF to mandate the inclusion of the CREF Stock Account and Money Market Account in the Plans, as well as the TIAA Traditional Annuity, and to require that it provide recordkeeping for its proprietary options, Defendants committed the Plans to an imprudent arrangement in which certain investments had to be included and could not be removed from the plan *even if they were no longer prudent investments*, and prevented the Plans from using alternative recordkeepers who could provide superior services at a lower cost. In so doing,

Defendants abdicated their duty to independently assess the prudence of each option in the Plans on an ongoing basis, and to act prudently and solely in the interest of participants in selecting the Plans' recordkeeper. By allowing TIAA-CREF to dictate these terms, Defendants favored the financial interests of TIAA-CREF in receiving a steady stream of revenues from TIAA-CREF's proprietary funds over the interest of participants.

236. Because Defendants shackled the Plans with the CREF Stock Account and TIAA recordkeeping services without engaging in a reasoned decision-making process as to the prudence of those options, Defendants are liable to make good to the Plans all losses resulting from its breach. 29 U.S.C. §1109(a). As described in detail above, the Plans suffered massive losses from the inclusion of the CREF Stock Account in the Plans compared to what those assets would have earned if invested in prudent alternative investments that were available to the Plans, and also suffered losses from paying TIAA recordkeeping fees that far exceeded market rates.

237. Total Plan losses will be determined after complete discovery in this case and are continuing.

238. Defendants are personally liable under 29 U.S.C. §1109(a) to make good to the Plans any losses to the Plans resulting from the breaches of fiduciary duties alleged in this Count and is subject to other equitable or remedial relief as appropriate.

239. Each Defendant knowingly participated in the breach of the other Defendants, knowing that such acts were a breach, enabled the other Defendants to commit a breach by failing to lawfully discharge its own fiduciary duties, knew of the breach by the other Defendants and failed to make any reasonable

effort under the circumstances to remedy the breach. Thus, each defendant is liable for the losses caused by the breach of its co-fiduciary under 29 U.S.C. §1105(a).

COUNT II

Prohibited transactions—29 U.S.C. §1106(a)(1)

Locking the Plan into CREF Stock Account and TIAA Recordkeeping

240. Plaintiffs restate and incorporate the allegations contained in the preceding paragraphs.

241. Section 1106(a)(1) prohibits transactions between a plan and a "party in interest," and provides as follows:

> [A] fiduciary with respect to a plan shall not cause the plan to engage in a transaction, if he knows or should know that such transaction constitutes a direct or indirect –
>
> > (A) sale or exchange, or leasing, of any property between the plan and a party in interest;
> >
> > * * *
> >
> > (C) furnishing of goods, services, or facilities between the plan and party in interest;
> >
> > (D) transfer to, or use by or for the benefit of a party in interest, of any assets of the plan . . .

29 U.S.C. §1106(a)(1).

242. Congress defined "party in interest" to encompass "those entities that a fiduciary might be inclined to favor at the expense of the plan beneficiaries," such as employers, other fiduciaries, and service providers. *Harris Tr. & Sav. Bank v. Salomon Smith Barney, Inc.,* 530 U.S. 238, 242 (2000); 29 U.S.C. §1002(14)(A)-(C). As a service provider to the Plans, TIAA-CREF is a party in interest. 29 U.S.C. §1002(14)(B).

243. By allowing the Plans to be locked into an unreasonable arrangement that required the Plans to include the CREF Stock Account and to use TIAA as the recordkeeper for its proprietary products even though the fund was no longer a prudent option for the Plans due to its excessive fees and poor performance, and even though TIAA's recordkeeping fees were unreasonable for the services provided, Defendants caused the Plans to engage in transactions that it knew or should have known constituted an exchange of property between the Plan and TIAA-CREF prohibited by 29 U.S.C. §1106(a)(1)(A), a direct or indirect furnishing of services between the Plans and TIAA-CREF prohibited by 29 U.S.C. §1106(a)(1)(C), and a transfer of the Plans' assets to TIAA-CREF prohibited by 29 U.S.C. §1106(a)(1)(D). These transactions occurred each time the Plans paid fees to TIAA-CREF in connection with the Plans' investments in the CREF Stock Account and other proprietary options that paid revenue sharing to TIAA.

244. Total Plan losses will be determined after complete discovery in this case and are continuing.

245. Under 29 U.S.C. §1109(a), Defendants are personally liable to restore all losses to the Plans resulting from these prohibited transactions, and to provide restitution of all proceeds of these prohibited transactions, and are subject to other appropriate equitable or remedial relief.

COUNT III

Breach of Fiduciary Duties—
29 U.S.C. §1104(a)(1)(A) & (B)

Unreasonable Administrative Fees

246. Plaintiffs restate and incorporate the allegations contained in the preceding paragraphs.

247. Defendants were required to discharge its duties with respect to the Plans solely in the interest of, and for the exclusive purpose of providing benefits to the Plans' participants and beneficiaries, defraying reasonable expenses of administering the Plans, and acting with the care, skill, prudence, and diligence required by ERISA.

248. If a defined contribution plan overpays for recordkeeping services due to the fiduciaries' "failure to solicit bids" from other recordkeepers, the fiduciaries have breached their duty of prudence. *See George,* 641 F.3d at 798-99. Similarly, failing to "monitor and control recordkeeping fees" and "paying excessive revenue sharing" as a result of failures to "calculate the amount the Plan was paying . . . through revenue sharing," to "determine whether [the recordkeeper's] pricing was competitive," and to "leverage the Plan's size to reduce fees," while allowing the "revenue sharing to benefit" a third-party recordkeeper "at the Plan's expense," is a breach of fiduciary duties. *Tussey,* 746 F.3d at 336.

249. Defendants' process for monitoring and controlling the Plans' recordkeeping fees was a fiduciary breach in that Defendants failed to adequately monitor the amount of the revenue sharing received by the Plans' recordkeepers, determine if those amounts were competitive or reasonable for the services provided to the Plans, or use the Plans' size to reduce fees or obtain sufficient rebates to the Plans for the excessive fees paid by participants. Moreover, Defendants failed to solicit bids from competing providers on a flat per-participant fee basis. As the Plans' assets grew, the asset-based revenue sharing payments to the Plans' recordkeepers grew, even though the services provided by the recordkeepers remained the same. This caused the record-

keeping compensation paid to the recordkeepers to exceed a reasonable fee for the services provided. This conduct was a breach of fiduciary duties.

250. By allowing TIAA-CREF and Fidelity to put their proprietary investments in the Plans without scrutinizing those providers' financial interest in using funds that provided them a steady stream of revenue sharing payments, Defendants failed to act in the exclusive interest of participants.

251. In contrast to the comprehensive plan reviews conducted by similarly situated 403(b) plan fiduciaries which resulted in consolidation to a single recordkeeper and significant fee reductions, Defendants failed to engage in a timely and reasoned decision-making process to determine whether the Plans would similarly benefit from consolidating the Plans' administrative and recordkeeping services under a single provider. Instead, Defendants continued to contract with two separate recordkeepers. This failure to consolidate the recordkeeping services until late 2012 for the Voluntary Savings Plan and to this date for the Retirement Plan eliminated the Plans' ability to obtain the same services at a lower cost with a single recordkeeper. Defendants' failure to "balance the relevant factors and make a reasoned decision as to the preferred course of action—under circumstances in which a prudent fiduciary would have done so"—and, indeed, *did* so—was a breach of fiduciary duty. *George*, 641 F.3d at 796.

252. Total losses to the Plans will be determined after complete discovery in this case and are continuing.

253. Defendants are personally liable under 29 U.S.C. §1109(a) to make good to the Plans any losses to the Plans resulting from the breaches of fiduciary

duties alleged in this Count and is subject to other equitable or remedial relief as appropriate.

254. Each Defendant knowingly participated in the breach of the other Defendants, knowing that such acts were a breach, enabled the other Defendants to commit a breach by failing to lawfully discharge its own fiduciary duties, knew of the breach by the other Defendants and failed to make any reasonable effort under the circumstances to remedy the breach. Thus, each defendant is liable for the losses caused by the breach of its co-fiduciary under 29 U.S.C. §1105(a).

COUNT IV

Prohibited transactions—29 U.S.C. §1106(a)(1) Administrative Services and Fees

255. Plaintiffs restate and incorporate the allegations contained in the preceding paragraphs.

256. As service providers to the Plans, TIAA-CREF and Fidelity are parties in interest. 29 U.S.C. §1002(14)(B).

257. By causing the Plans to use TIAA-CREF and Fidelity as the Plans' recordkeepers from year to year, Defendants caused the Plans to engage in transactions that Defendants knew or should have known constituted an exchange of property between the Plans and TIAA-CREF and Fidelity prohibited by 29 U.S.C. §1106(a)(1)(A), a direct or indirect furnishing of services between the Plans and TIAA-CREF and Fidelity prohibited by 29 U.S.C. §1106(a)(1)(C), and a transfer of the Plans' assets to, or use by or for the benefit of TIAA-CREF and Fidelity prohibited by 29 U.S.C. §1106(a)(1)(D). These transactions occurred each time the Plans paid fees to TIAA-CREF and Fidelity and in connection with the Plans' investments in funds that paid revenue sharing to TIAA-CREF and Fidelity.

258. Total losses to the Plans will be determined after complete discovery in this case and are continuing.

259. Under 29 U.S.C. §1109(a), Defendants are personally liable to restore all losses to the Plans resulting from these prohibited transactions, and to provide restitution of all proceeds from these prohibited transactions, and are subject to other appropriate equitable or remedial relief.

COUNT V

Breach of Fiduciary Duties— 29 U.S.C. §1104(a)(1)(A) & (B)

Unreasonable Investment Management Fees, Unnecessary Marketing and Distribution (12b-1) Fees and Mortality and Expense Risk Fees, and Performance Losses

260. Plaintiffs restate and incorporate the allegations contained in the preceding paragraphs.

261. Defendants are responsible for selecting prudent investment options, ensuring that those options charge only reasonable fees, and taking any other necessary steps to ensure that the Plans' assets are invested prudently. Defendants had a continuing duty to evaluate and monitor the Plans' investments on an ongoing basis and to "remove imprudent ones" regardless of how long a fund has been in the plan. *Tibble,* 135 S. Ct. at 1829.

262. These duties required Defendants to independently assess whether each option was a prudent choice for the Plans, and not simply to follow the recordkeepers' fund choices or to allow the recordkeepers to put nearly their entire investment lineups in the Plans' menus. *DiFelice*, 497 F.3d at 423; *see Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 590, 595-96 (8th Cir. 2009).

263. In making investment decisions, Defendants were required to consider all relevant factors under the circumstances, including without limitation alternative investments that were available to the Plans, the recordkeepers' financial interest in having their proprietary investment products included in the Plans, and whether the higher cost of actively managed funds was justified by a realistic expectation of higher returns. *Braden*, 588 F.3d at 595-96; *Tatum v. RJR Pension Inv. Comm.*, 761 F.3d 346, 360 (4th Cir. 2014); 29 C.F.R. § 2550.404a-1(b); Restatement (Third) of Trusts ch. 17, intro. note; *id.* § 90 cmt. h(2).

264. Defendants selected and retained for years as the Plans' investment options mutual funds and insurance company variable annuities with high expenses and poor performance relative to other investment options that were readily available to the Plans at all relevant times.

265. Many of these options included unnecessary layers of fees that provided no benefit to participants but significant benefits to TIAA-CREF, including marketing and distribution (12b-1) fees and "mortality and expense risk" fees.

266. Rather than prudently consolidating the Plans' hundreds of investment options into a core lineup in which prudent investments were selected for a given asset class and investment style, as is the case with most defined contribution plans, Defendants retained multiple investment options in each asset class and investment style until October 2016, thereby depriving the Plans of their ability to qualify for lower cost share classes of certain investments, while violating the well-known principle for fiduciaries that such a high number of investment options causes participant confusion and inaction. In addi-

tion, as a fiduciary required to operate as a prudent financial expert, *Katsaros,* 744 F.2d at 279. Defendants knew or should have known that providing numerous actively managed duplicative funds in the same investment style would produce a "shadow index" return before accounting for much higher fees than index fund fees, thereby resulting in significant underperformance. The Plans' investment offerings included the use of mutual funds and variable annuities with retail expense ratios far in excess of other lower-cost options available to the Plans. These lower-cost options included lower-cost share class mutual funds with the identical investment manager and investments, lower-cost insurance company variable annuities and insurance company pooled separate accounts. Nearly all of the Plans' options were the recordkeepers' own proprietary investments. Thus, the use of these funds was tainted by the recordkeepers' financial interest in including these funds in the Plan, which Defendants failed to adequately consider. In so doing, Defendants failed to make investment decisions based solely on the merits of the investment funds and what was in the interest of participants. Defendants therefore failed to discharge its duties with respect to the Plans solely in the interest of the participants and beneficiaries and for the exclusive purpose of providing benefits to participants and their beneficiaries and defraying reasonable expenses of administering the Plans. This was a breach of fiduciary duties.

267. Defendants failed to engage in a prudent process for monitoring the Plans' investments and removing imprudent ones within a reasonable period. This resulted in the Plans continuing to offer excessively expensive funds with inferior historical performance compared to superior low-cost alternatives

that were available to the Plans. As of December 31, 2014, of the Plans' investment options which had at least a five-year performance history, *fifty-seven percent* of those funds—119 out of 208—underperformed their respective benchmarks over the previous 5-year period

268. CREF Stock Account: Defendants included and retained the CREF Stock Account despite its excessive cost and historical underperformance compared to both passively managed investments and actively managed investments of the benchmark, the Russell 3000 Index, which Defendants and TIAA told participants was the appropriate benchmark. *See supra* ¶199. The 46 bps charged by the CREF Stock Account included *four* layers of fees that were each unreasonable compared to the actual services provided by TIAA-CREF. *See supra* ¶¶134-136. Defendants failed to analyze whether these fees were appropriate and reasonable in light of the services provided.

269. TIAA Real Estate Account: Defendants included and retained the TIAA Real Estate Account despite its excessive fees and historical underperformance compared to lower-cost real estate investments. The 87 bps that the TIAA Real Estate Account charged was comprised of *five* layers of fees that were each unreasonable compared to the actual services provided by TIAA-CREF to the Plans' participants. *See supra* ¶¶137-138. Defendants failed to analyze whether these fees were appropriate and reasonable in light of the services provided.

270. Had Defendants engaged in a prudent investment review process, it would have concluded that these options were causing the Plans to lose tens of millions of dollars of participants' retirement savings in excessive and unreasonable fees and

underperformance relative to prudent investment options available to the Plans, and thus should be removed from the Plans or, at a minimum, frozen to new investments.

271. Total losses to the Plans will be determined after complete discovery in this case and are continuing.

272. Defendants are personally liable under 29 U.S.C. §1109(a) to make good to the Plans any losses to the Plans resulting from the breaches of fiduciary duties alleged in this Count and are subject to other equitable or remedial relief as appropriate.

273. Each Defendant knowingly participated in the breach of the other Defendants, knowing that such acts were a breach, enabled the other Defendants to commit a breach by failing to lawfully discharge its own fiduciary duties, knew of the breach by the other Defendants and failed to make any reasonable effort under the circumstances to remedy the breach. Thus, each defendant is liable for the losses caused by the breach of its co-fiduciary under 29 U.S.C. §1105(a).

COUNT VI

Prohibited transactions—29 U.S.C. §1106(a)(1)

Investment Services and Fees

274. Plaintiffs restate and incorporate herein the allegations of the preceding paragraphs.

275. As the Plans' providers of investment services, TIAA-CREF and Fidelity are parties in interest. 29 U.S.C. §1002(14)(B).

276. By including investment options managed by TIAA-CREF and Fidelity in which nearly all of the Plans' $2.87 billion in assets were invested, Defendants caused the Plans to engage in transactions that Defendants knew or should have known

constituted an exchange of property between the Plans and TIAA-CREF and Fidelity prohibited by 29 U.S.C. §1106(a)(1)(A); a direct or indirect furnishing of services between the Plans and TIAA-CREF and Fidelity prohibited by 29 U.S.C. §1106(a)(1)(C); and transfers of the Plans' assets to, or use by or for the benefit of TIAA-CREF and Fidelity prohibited by 29 U.S.C. §1106(a)(1)(D). These transactions occurred each time the Plans paid fees to TIAA-CREF and Fidelity in connection with the Plans' investments in TIAA-CREF and Fidelity options.

277. Total losses to the Plans will be determined after complete discovery in this case and are continuing.

278. Under 29 U.S.C. §1109(a), Defendants are personally liable to restore all losses to the Plans resulting from these prohibited transactions, and to provide restitution of all proceeds of these prohibited transactions, and are subject to other appropriate equitable or remedial relief.

COUNT VII

Failure to Monitor Fiduciaries

279. Plaintiffs restate and incorporate the allegations contained in the preceding paragraphs.

280. This Count alleges breach of fiduciary duties against Northwestern University, Nimalam Chinniah, and Eugene S. Sunshine.

281. Northwestern University is the Plan Administrator of the Plans under 29 U.S.C. §1002(16)(A)(i) and a named fiduciary under 29 U.S.C. §1102(a) with overall authority to control and manage the operation and administration of the Plans.

282. Northwestern delegated certain of its fiduciary responsibilities for administrative matters to its Executive Vice President, Nimalam Chinniah, and

previously Eugene S. Sunshine. Having delegated those duties, Northwestern remained responsible for monitoring its delegee, the Executive Vice President, to ensure that the delegated tasks were being performed prudently and loyally.

283. Northwestern, through its Board of Trustees, authorized the Senior Vice President for Business and Finance (a role now fulfilled by the Executive Vice President), to create NURIC, and to confer or delegate to NURIC all discretionary authority and powers necessary to control and manage the assets of the Plans. Northwestern and the Executive Vice President remained responsible for monitoring NURIC and its members to ensure that the delegated tasks were being performed prudently and loyally.

284. If a monitoring fiduciary knows or should know that the monitored fiduciaries are not properly performing their fiduciary obligations, the monitoring fiduciary must take prompt and effective action to protect the plan and participants.

285. Defendants Northwestern University, Nimalam Chinniah, and Eugene S. Sunshine breached their fiduciary monitoring duties by, among other things:

a. Failing to monitor their appointees, to evaluate their performance, or to have a system in place for doing so, and standing idly by as the Plans suffered enormous losses as a result of its appointees' imprudent actions and omissions with respect to the Plans;

b. Failing to monitor their appointees' fiduciary process, which would have alerted any prudent fiduciary to the potential breach because of the excessive administrative and investment management fees and consistently underperforming investments in the Plans in violation of ERISA;

c. Failing to ensure that the monitored fiduciaries had a prudent process in place for evaluating the Plans' administrative fees and ensuring that the fees were competitive, including a process to identify and determine the amount of all sources of compensation to the Plans' recordkeepers and the amount of any revenue sharing payments; a process to prevent the recordkeepers from receiving revenue sharing that would increase the recordkeepers' compensation to unreasonable levels even though the services provided remained the same; and a process to periodically obtain competitive bids to determine the market rate for the services provided to the Plans;

d. Failing to ensure that the monitored fiduciaries considered the ready availability of comparable and better performing investment options that charged significantly lower fees and expenses than the Plans' investments; and

e. Failing to remove appointees whose performance was inadequate in that they continued to maintain imprudent, excessively costly, and poorly performing investments, all to the detriment of Plan participants' retirement savings.

286. Had Defendants Northwestern University, Nimalam Chinniah, and Eugene S. Sunshine discharged their fiduciary monitoring duties prudently as described above, the Plans would not have suffered these losses. Therefore, as a direct result of the breaches of fiduciary duty alleged herein, the Plans, the Plaintiffs, and the other Class members, lost tens of millions of dollars of retirement savings.

JURY TRIAL DEMANDED

287. Pursuant to Fed.R.Civ.P. 38 and the Constitution of the United States, Plaintiffs demand a trial by jury.

PRAYER FOR RELIEF

For these reasons, Plaintiffs, on behalf of the Plans and all similarly situated Plan participants and beneficiaries, respectfully request that the Court:

- Find and declare that Defendants have breached their fiduciary duties as described above;
- Find and adjudge that Defendants are personally liable to make good to the Plans all losses to the Plans resulting from each breach of fiduciary duty, and to otherwise restore the Plans to the position they would have occupied but for the breaches of fiduciary duty;
- Determine the method by which losses to the Plans under 29 U.S.C. §1109(a) should be calculated;
- Order the Defendants to pay the amount equaling all sums received by the conflicted recordkeepers as a result of recordkeeping and investment management fees;
- Order Defendants to provide all accountings necessary to determine the amounts Defendants must make good to the Plans under §1109(a);
- Remove the fiduciaries who have breached their fiduciary duties and enjoin them from future ERISA violations;
- Surcharge against Defendants and in favor of the Plans all amounts involved in any transactions which such accounting reveals were improper, excessive and/or in violation of ERISA;
- Reform the Plans to include only prudent investments;
- Reform the Plans to obtain bids for recordkeeping and to pay only reasonable recordkeeping expenses;

- Certify the Class and subclasses, appoint the Plaintiffs as class representatives of the Class and subclasses, and appoint Schlichter, Bogard & Denton LLP as Class Counsel for the Class and subclasses;
- Award to the Plaintiffs and the Class and subclasses their attorney's fees and costs under 29 U.S.C. §1132(g)(1) and the common fund doctrine;
- Order the payment of interest to the extent it is allowed by law; and
- Grant other equitable or remedial relief as the Court deems appropriate.

December 15, 2016 Respectfully submitted,

/s/ Jerome J. Schlichter
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[Certificate of Service Omitted]

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 16 C 8157

LAURA L. DIVANE, ET AL.,
Plaintiffs,
v.

NORTHWESTERN UNIVERSITY, ET AL.,
Defendants.

PLAINTIFFS' MOTION FOR LEAVE TO FILE SECOND AMENDED COMPLAINT

* * *

EXHIBIT 1

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 16 C 8157

LAURA L. DIVANE, ET AL.,
Plaintiffs,
v.

NORTHWESTERN UNIVERSITY, ET AL.,
Defendants.

Honorable Jorge L. Alonso

AMENDED COMPLAINT—CLASS ACTION

JURY TRIAL DEMANDED

SECOND AMENDED COMPLAINT

1. Plaintiffs Laura L. Divane, April Hughes, Katherine D. Lancaster, and Jasmine Walker individually and as representatives of a class and subclasses of participants and beneficiaries of the Northwestern University Retirement Plan and the Northwestern University Voluntary Savings Plan (herein collectively referred to as the "Plans"), bring this action under 29 U.S.C. §1132(a)(2) on behalf of the Plans against Defendants Northwestern University, Northwestern University Retirement Investment Committee, Pamela S. Beemer, Ronald R. Braeutigam, Kathleen Hagerty, Craig A. Johnson,

Candy Lee, William H. McLean, Ingrid S. Stafford, and Nimalam Chinniah for breach of fiduciary duties under ERISA.[1]

2. ERISA imposes duties on plan fiduciaries that are "the highest known to the law." *George v. Kraft Foods Global, Inc.*, 814 F. Supp. 2d 832, 852 (N.D. Ill. 2011) (Castillo, J.); *Donovan v. Bierwirth*, 680 F.2d 263, 271, 272 n.8 (2d Cir. 1982); 29 U.S.C. §1104(a). Fiduciaries must act with "complete and undivided loyalty to beneficiaries of the trust, and with an eye single to the interests of participants and beneficiaries." *Leigh v. Engle*, 727 F.2d 113, 123 (7th Cir. 1984) (internal quotations and citations omitted). In exercising these duties, ERISA fiduciaries are held to the standard of financial experts in the field of investment management. *See Katsaros v. Cody*, 744 F.2d 270, 275, 279 (2d Cir. 1984); *Liss v. Smith*, 991 F. Supp. 278, 296 (S.D.N.Y. 1998). Fiduciaries must "initially determine, and continue to monitor, the prudence of *each* investment option available to plan participants," *DiFelice v. U.S. Airways, Inc.*, 497 F.3d 410, 423 (4th Cir. 2007) (emphasis original), and must "remove imprudent ones" within a reasonable time, *Tibble v. Edison Int'l*, 135 S. Ct. 1823, 1828-29 (2015).

3. The marketplace for retirement plan services is established and competitive. Billion-dollar-defined contribution plans, like the Plans—which are each among the largest 0.2% of defined contribution plans in the United States—have tremendous bargaining power to demand low-cost administrative and investment management services. As fiduciaries to the Plans, Defendants are obligated to limit the Plans'

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[1] The Employee Retirement Income Security Act, 29 U.S.C. §§1001-1461.

expenses to a reasonable amount, to ensure that *each* fund in the Plans is a prudent option for participants to invest their retirement savings and priced at a reasonable level for the size of the Plans; and to analyze the costs and benefits of alternatives for the Plans' administrative and investment structure. Defendants must make those decisions for the exclusive benefit of participants, and not for the benefit of conflicted third parties, such as the Plans' service providers.

4. Instead of using the Plans' bargaining power to reduce expenses and exercising independent judgment to determine what investments to include in the Plans, Defendants squandered that leverage by allowing the Plans' conflicted third-party service providers—TIAA-CREF and Fidelity—to dictate the Plans' investment lineup, to include hundreds of their proprietary mutual funds in the Plans, to link their recordkeeping services to the placement of those funds in the Plans, and to collect nearly unlimited asset-based compensation from their proprietary products.

5. To remedy these fiduciary breaches, Plaintiffs, individually and as representatives of a class and subclasses of participants and beneficiaries of the Plans, bring this action on behalf of the Plans under 29 U.S.C. §1132(a)(2) to enforce Defendants' personal liability under 29 U.S.C. §1109(a) to make good to the Plans all losses resulting from each breach of fiduciary duty and to restore to the Plans any profits made through Defendants' use of the Plans' assets. In addition, Plaintiffs seek such other equitable or remedial relief for the Plans as the Court may deem appropriate.

JURISDICTION AND VENUE

6. **Subject-matter jurisdiction.** This Court has exclusive jurisdiction over the subject matter of this action under 29 U.S.C. §1132(e)(1) and 28 U.S.C. §1331 because it is an action under 29 U.S.C. §1132(a)(2).

7. Venue. This District is the proper venue for this action under 29 U.S.C. §1132(e)(2) and 28 U.S.C. §1391(b) because it is the district in which the subject Plans are administered, where at least one of the alleged breaches took place, and where the Defendants reside or may be found.

8. Standing. An action under §1132(a)(2) allows recovery only for a plan, and does not provide a remedy for individual injuries distinct from plan injuries. *LaRue v. DeWolff, Boberg & Assocs.*, 552 U.S. 248, 256 (2008). The plan is the victim of any fiduciary breach and the recipient of any recovery. *Id.* at 254. Section 1132(a)(2) authorizes any participant, fiduciary, or the Secretary of Labor to sue derivatively as a representative of the plan to seek relief on behalf of the plan. 29 U.S.C. §1132(a)(2). As explained in detail below, the Plans suffered millions of dollars in losses caused by Defendants' fiduciary breaches and remain exposed to harm and continued future losses. Those injuries may be redressed by a judgment of this Court in favor of Plaintiffs. To the extent the Plaintiffs must also show an individual injury even though §1132(a)(2) does not provide redress for individual injuries, each Plaintiff has suffered such an injury, in at least the following ways:

a. The named Plaintiffs and all participants in the Plans suffered financial harm as a result of the imprudent or excessive fee options in the Plans because Defendants' inclusion of those options deprived participants of the opportunity to grow their retirement savings by investing in prudent options with reasonable fees, which would have been available in the Plans if Defendants had satisfied their fiduciary obligations. All participants continue to be harmed by the ongoing inclusion of these imprudent and excessive cost options and payment of excessive recordkeeping fees.

b. The named Plaintiffs and all participants in the Plans were financially harmed by Defendants' improper bundling of some of the Plans' investment products, improperly allowing the companies who did recordkeeping for the Plans to require inclusion of their investment products in the Plans, instead of each investment option being independently selected.

c. The named Plaintiffs' individual accounts in the Plans were further harmed by Defendants' breaches of fiduciary duties because one or more of the named Plaintiffs during the proposed class/subclass period (1) invested in the CREF Stock and TIAA Real Estate accounts—which were improperly bundled with TIAA's recordkeeping services and which Defendants also failed to remove from the Plans when it was clear from past poor performance and their excessive fees that they were imprudent investments—at a time when those options underperformed prudent alternatives in which those assets would have been invested had Defendants not breached its fiduciary duties (Plaintiffs Lancaster and Walker), (2) invested in excessive-cost investment options, including funds that paid revenue sharing to the Plans' recordkeepers and higher-cost share classes of mutual funds priced for small investors when far lower-cost but otherwise identical share classes of the same mutual funds were available to the Plans because of its enormous size (all Plaintiffs), and (3) through the fees charged on their investments in those mutual funds and other investments, paid a portion of the Plans' excessive administrative and recordkeeping fees, which would not have been incurred had Defendants discharged their fiduciary duties to the Plans (all Plaintiffs).

d. Specifically, during the class period, Plaintiff Divane invested in the higher-cost share classes of Fidelity Contrafund, Fidelity Growth & Income, Fidelity China Region, Vanguard Institutional Index, Vanguard Extended Market Index, Vanguard Total International Stock, and Vanguard Total Bond Market; Plaintiff Hughes invested in the higher-cost share class of the Vanguard Extended Market Index, as well as the TIAA Traditional Annuity (among others); Plaintiff Lancaster invested in the TIAA Traditional Annuity, CREF Stock, and TIAA Real Estate; Plaintiff Walker invested in the higher-cost share classes of Fidelity Freedom 2020 and TIAA-CREF Lifecycle 2035, as well as CREF Global Equities, TIAA Traditional, CREF Stock, CREF Growth, TIAA Real Estate, and CREF Money Market. Through their investments in these funds, each Plaintiff paid excessive investment management fees and each was assessed a portion of the Plans' excessive administrative and recordkeeping fees. Plaintiffs would not have suffered these losses if Defendants had prudently monitored revenue sharing, solicited competitive bids, consolidated recordkeepers for both Plans, or reduced fees to reasonable levels in accordance with their fiduciary duties under ERISA.

PARTIES

Northwestern University Retirement Plan

9. The Northwestern University Retirement Plan ("Retirement Plan") is a defined contribution, individual account, employee pension benefit plan under 29 U.S.C. §1002(2)(A) and §1002(34).

10. The Retirement Plan is established and maintained under a written document in accordance with 29 U.S.C. §1102(a)(1).

11. The Retirement Plan provides for retirement income for certain employees of Northwestern University. That retirement income depends upon deferrals of employee compensation, employer matching contributions, and performance of investment options net of fees and expenses.

12. As of December 31, 2016, the Retirement Plan had $2.5 billion in net assets and 22,374 participants with account balances. It is among the largest 0.04% of all defined contribution plans in the United States based on total assets. Plans of such great size are commonly referred to as "jumbo plans."

Northwestern University Voluntary Savings Plan

13. The Northwestern University Voluntary Savings Plan ("Voluntary Savings Plan")[2] is a defined contribution, individual account, employee pension benefit plan under 29 U.S.C. §1002(2)(A) and §1002(34).

14. The Voluntary Savings Plan is established and maintained under a written document in accordance with 29 U.S.C. §1102(a)(1).

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[2] Certain plan-related materials such as account statements also refer to the Voluntary Savings Plan as the "Northwestern University 403(b) Supplemental Plan."

15. The Voluntary Savings Plan provides for retirement income for certain employees of Northwestern University. That retirement income depends upon deferrals of employee compensation and performance of investment options net of fees and expenses.

16. As of December 31, 2016, the Voluntary Savings Plan had $585 million in net assets and 13,388 participants with account balances. It is among the largest 0.2% of all defined contribution plans in the United States based on total assets. Plans of such great size are commonly referred to as "jumbo plans."

17. The Retirement Plan is funded by both by participants' deferrals of compensation and contributions by Northwestern on behalf of participants. The Voluntary Savings Plan is funded solely by participants' deferrals of compensation.

18. The Plans allow participants to designate investment options into which their individual accounts are invested. Defendants exercise exclusive discretionary authority and control over the investment options that are offered in the Plans.

Plaintiffs

19. Laura L. Divane resides in Skokie, Illinois, and is a Staff Nurse at Northwestern University Health Service. She is a participant in the Retirement Plan under 29 U.S.C. §1002(7) because she and her beneficiaries are or may become eligible to receive benefits under the Retirement Plan.

20. April Hughes resides in Wauconda, Illinois, and formerly worked as a Research Assistant in the Office of Sponsored Research at Northwestern University. She is a participant in the Retirement Plan and the Voluntary Savings Plan under 29 U.S.C. §1002(7) because she and her beneficiaries are

or may become eligible to receive benefits under the Plans.

21. Katherine D. Lancaster resides in Chicago, Illinois, and works as a Standard Operating Procedures Coordinator at Northwestern University. She is a participant in the Retirement Plan and the Voluntary Savings Plan under 29 U.S.C. §1002(7) because she and her beneficiaries are or may become eligible to receive benefits under the Plans.

22. Jasmine Walker resides in Des Plaines, Illinois, and previously worked as a Business Manager at the NUANCE Center at Northwestern University. She is a participant in the Retirement Plan and the Voluntary Savings Plan under 29 U.S.C. §1002(7) because she and her beneficiaries are or may become eligible to receive benefits under the Plans.

Defendants

23. Northwestern University ("Northwestern") is a non-profit corporation organized under Illinois law with its principal place of business in Evanston, Illinois.

24. Under Article 11.1 of both the Retirement Plan and Voluntary Savings Plan, Northwestern is designated as the "Plan Administrator" within the meaning of 29 U.S.C. §1002(16)(A)(i), with responsibility for management of the Plans. Because the Plans name Northwestern as the entity with authority over the management of the Plans, it is a "named fiduciary" within the meaning of 29 U.S.C. §1102(a).

25. Northwestern is a fiduciary to the Plans because it exercised discretionary authority or discretionary control respecting the management of the Plans or exercised authority or control respecting the management or disposition of its assets, and has discretionary authority or discretionary responsibility

in the administration of the Plans, as described more fully below. 29 U.S.C. §1002(21)(A)(i) and (iii).

26. The Plans authorize Northwestern to delegate in whole or in part any of its responsibilities to one or more officers or committees of the University.

27. According to Article 11.2 of both Plans, Northwestern delegated to its Executive Vice President all discretionary authority and powers necessary to administer the Plans, other than discretionary authority and power to control and manage the assets of the Plans. These administrative responsibilities include the authority to employ service providers to the Plans and to approve on behalf of Northwestern any contracts related to the administration of the Plans.

28. Nimalam Chinniah has served as Northwestern's Executive Vice President since September 8, 2014. Previously, Eugene S. Sunshine served in that role.

29. Nimalam Chinniah and Eugene S. Sunshine are fiduciaries to the Plans because they exercised discretionary authority or discretionary control respecting the management of the Plans or exercised authority or control respecting the management or disposition of its assets, and have or had discretionary authority or discretionary responsibility in the administration of the Plans, as described more fully below. 29 U.S.C. §1002(21)(A)(i) and (iii). Mr. Sunshine has conceded his status as a fiduciary to the Plans, including the relevant legacy defined contribution Plans, beginning at the time he joined Northwestern in 1997. Rough Draft of Deposition of

Eugene Sunshine ("Sunshine Dep.") at 53:21-23; 82:2-6; 83:1-6, attached hereto as Exhibit 1.[3]

30. According to Article 11.3 of both Plans, as authorized by the Board of Trustees, Northwestern's Senior Vice President for Business and Finance established the Northwestern University Retirement Investment Committee (NURIC).[4] NURIC was granted all discretionary authority and powers necessary to control and manage the assets of the Plans. Article 11.1 of each of the Plans designates NURIC as the named fiduciary with respect to the control or management of the assets of the Plans.

31. Pamela S. Beemer is and has been since its formation the Chair of NURIC. The other current NURIC members are Ronald R. Braeutigam, Kathleen Hagerty, Craig A. Johnson, Candy Lee, William H. McLean, and Ingrid S. Stafford.

32. NURIC and its individual members are fiduciaries to the Plans because they exercised discretionary authority or discretionary control respecting the management of the Plans or exercised authority or control respecting the management or disposition of their assets, and have discretionary authority or discretionary responsibility in the administration of the Plan. 29 U.S.C. §1002(21)(A)(i) and (ii). Further, the NURIC members that have given depositions in this case have admitted their status as fiduciaries to

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[3] Mr. Sunshine was deposed on April 18. As of this filing, Plaintiffs do not have access to a final version of Mr. Sunshine's deposition transcript, and for that reason, have attached the rough draft of Mr. Sunshine's deposition transcript.

[4] The language of Article 11.3 suggests that the Executive Vice President has now assumed the functions for which the Senior Vice President for Business and Finance was formerly responsible.

the Plans. Deposition of Pamela Beemer ("Beemer Dep.") at 25:9-16, attached hereto as Exhibit 2; Deposition of Ronald Braeutigam ("Braeutigam Dep.") at 23:14-18, attached hereto as Exhibit 3; Deposition of Will McLean ("McLean Dep.") at 36:1-4, attached hereto as Exhibit 4; Deposition of Ingrid Stafford ("Stafford Dep.") at 123:19-21, attached hereto as Exhibit 5.

33. Because the Northwestern University entities, officers, and individual committee members described above have acted as alleged herein as the agents of Northwestern University, all defendants are collectively referred to hereafter as "Defendants."

34. NURIC operates and performs its fiduciary duties pursuant to a charter dated February 28, 2102 (the "Charter"). NU-00004494, attached hereto as Exhibit 6. In controlling and managing the assets of the Plans, the Charter requires NURIC to, among other things, document its decision-making process in writing. *Id.* at 497[5] ("The Committee shall document its decision-making process in writing."). The Charter also grants NURIC the "discretionary powers and authority necessary to supervise and manage the investment Plan assets," including the authority to develop and implement an investment policy statement, "select, change, or remove" investment sponsors and investment funds, monitor investment sponsors and funds, and review "fee service agreements" with Plan service providers. *Id.* at 496.

ERISA FIDUCIARY STANDARDS

35. ERISA imposes strict fiduciary duties of loyalty and prudence upon the Defendants as fiduciaries of

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[5] Page number citations identify the last three digits of the Bates number stamped on the documents attached.

the Plans. 29 U.S.C. §1104(a), states, in relevant part, that:

> [A] fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and –
>
> (A) for the exclusive purpose of
>
> (i) providing benefits to participants and their beneficiaries; and
>
> (ii) defraying reasonable expenses of administering the plan; [and]
>
> (B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of like character and with like aims.

36. NURIC's Charter expressly requires Committee members to adhere to these standards, and incorporates language from 29 U.S.C. §1104(a) in setting forth the duties and responsibilities of NURIC members. Ex. 6 at 497.

37. Under ERISA, fiduciaries that exercise any authority or control over plan assets, including the selection of plan investments and service providers, must act prudently and for the *exclusive* benefit of participants in the plan, and not for the benefit of third parties including service providers to the plan such as recordkeepers and those who provide investment products. Fiduciaries must ensure that the amount of fees paid to those service providers is no more than reasonable. DOL Adv. Op. 97-15A; DOL Adv. Op. 97-16A; *see also* 29 U.S.C. §1103(c)(1) (plan assets "shall be held for the exclusive purposes of providing benefits to participants in the plan and

their beneficiaries and defraying reasonable expenses of administering the plan").

38. "[T]he 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 Litig.*, 74 F.3d 420, 435 (3d Cir. 1996); *Katsaros,* 744 F.2d at 279 (fiduciaries must use "the appropriate methods to investigate the merits" of plan investments). Fiduciaries must "initially determine, and continue to monitor, the prudence of *each* investment option available to plan participants." *DiFelice*, 497 F.3d at 423 (emphasis original); *see also* 29 C.F.R. § 2550.404a-1; DOL Adv. Opinion 98-04A; DOL Adv. Opinion 88-16A. Thus, a defined contribution plan fiduciary cannot "insulate itself from liability by the simple expedient of including a very large number of investment alternatives in its portfolio and then shifting to the participants the responsibility for choosing among them." *Hecker v. Deere & Co.*, 569 F.3d 708, 711 (7th Cir. 2009). Fiduciaries have "a continuing duty to monitor investments and remove imprudent ones[.]" *Tibble*, 135 S. Ct. at 1828-29.

39. In addition to the duties of loyalty and prudence, fiduciaries are required to act "in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent" with ERISA. 29 U.S.C. §1104(a)(1)(D). An investment policy statement, or "IPS," is a governing plan document within the meaning of 29 U.S.C. §1104(a)(1)(D). *See* 29 C.F.R. §2509.94-2 (1994), replaced by 29 C.F.R. §2509.08-2(2) (2008) ("Statements of investment policy issued by a named fiduciary authorized to appoint investment managers would be part of the 'documents and instruments governing the plan' within the meaning of ERISA

Sec. 404(a)(1)(D)."). "Fiduciaries who are responsible for plan investments governed by ERISA must comply with the plan's written statements of investment policy, insofar as those written statements are consistent with the provisions of ERISA." *Cal. Ironworkers Field Pension Trust v. Loomis Sayles & Co*., 259 F.3d 1036, 1042 (9th Cir. 2001). A "failure to follow written statements of investment policy constitutes a breach of fiduciary duty." *Id.* (citing *Dardaganis v. Grace Capital, Inc*., 889 F.2d 1237, 1241-42 (2d Cir. 1989)). A violation of investment guidelines is an independent breach of fiduciary duty, regardless of whether the action was otherwise prudent. *See* 29 U.S.C. §1104(a)(1)(D).

40. The general fiduciary duties imposed by 29 U.S.C. §1104 are supplemented by a detailed list of transactions that are expressly prohibited by 29 U.S.C. §1106, and are considered *per se* violations because they entail a high potential for abuse. Section 1106(a)(1) states, in pertinent part, that:

> [A] fiduciary with respect to a plan shall not cause the plan to engage in a transaction, if he knows or should know that such transaction constitutes a direct or indirect –
>
> (A) sale or exchange, or leasing, of any property between the plan and a party in interest;
>
> * * *
>
> (C) furnishing of goods, services, or facilities between the plan and party in interest;
>
> (D) transfer to, or use by or for the benefit of a party in interest, of any assets of the plan . . .

41. ERISA also imposes explicit co-fiduciary liabilities on plan fiduciaries. 29 U.S.C. §1105(a) provides a cause of action against a fiduciary for knowingly

participating in a breach by another fiduciary and knowingly failing to cure any breach of another fiduciary:

> In addition to any liability which he may have under any other provisions of this part, a fiduciary with respect to a plan shall be liable for a breach of fiduciary responsibility of another fiduciary with respect to the same plan in the following circumstances:
>
> (1) if he participates knowingly in, or knowingly undertakes to conceal, an act or omission of such other fiduciary, knowing such act or omission is a breach; [or]
>
> (2) if, by his failure to comply with section 1104(a)(1) of this title 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
>
> (3) if he has knowledge of a breach by such other fiduciary, unless he makes reasonable efforts under the circumstances to remedy the breach.

42. 29 U.S.C. §1132(a)(2) authorizes a plan participant to bring a civil action to enforce a breaching fiduciary's liability to the plan under 29 U.S.C. §1109. Section 1109(a) provides in relevant part:

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

may deem appropriate, including removal of such fiduciary.

BACKGROUND FACTS

I. Defined contribution plans, services, and fees.

43. When ERISA was enacted in 1974, defined benefit pension plans were America's retirement system. Such plans are now rarely available to employees in the private sector. "Defined contribution plans dominate the retirement plan scene today." *LaRue v. DeWolff, Boberg & Assocs.*, 552 U.S. 248, 255 (2008).

44. Defined contribution plans allow employees to contribute a percentage of their pre-tax earnings to the plan, with the employer often matching those contributions up to a specified percentage. Each participant in the plan has an individual account. Participants direct plan contributions into one or more investment options in a lineup chosen and assembled by the plan's fiduciaries. "[P]articipants' retirement benefits are limited to the value of their own individual investment accounts, which is determined by the market performance of employee and employer contributions, less expenses." *Tibble*, 135 S. Ct. at 1826.

45. The majority of fees assessed to participants in a defined contribution plan are attributable to two general categories of services: plan administration (including recordkeeping), and investment management. These expenses "can sometimes significantly reduce the value of an account in a defined-contribution plan." *Id.*

46. A plan's fiduciaries have control over defined contribution plan expenses. The fiduciaries are responsible for hiring administrative service providers

for the plan, such as a recordkeeper, and for negotiating and approving the amount of fees paid to those administrative service providers. The fiduciaries also have exclusive control over the menu of investment options to which participants may direct the assets in their accounts. Those selections each have their own fees, which are deducted from the returns that participants receive on their investments.

47. These fiduciary decisions have the potential to dramatically affect the amount of money that participants are able to save for retirement. According to the U.S. Department of Labor, a 1% difference in fees over the course of a 35-year career makes a difference of *28%* in savings at retirement. U.S. Dep't of Labor, *A Look at 401(k) Plan Fees,* at 1-2 (Aug. 2013).[6] Accordingly, fiduciaries of defined contribution plans must engage in a rigorous process to control these costs and ensure that participants pay no more than a reasonable level of fees. This is particularly true for multi-billion dollar plans like the Plans, which have the bargaining power to obtain the highest level of service and the lowest fees. The fees available to multi-billion dollar retirement plans are orders of magnitude lower than the much higher retail fees available to small investors.

48. The entities that provide services to defined contribution plans have an incentive to maximize their fees by putting their own higher-cost funds in plans and collecting the highest amount possible for recordkeeping. For each additional dollar in fees paid to a service provider, participants' retirement savings are directly reduced by the same amount, and participants lose the potential for those lost

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[6] Available at http://www.dol.gov/ebsa/pdf/401kfeesemployee.pdf.

assets to grow over the remainder of their careers. Accordingly, participants' retirement security is directly affected by the diligence used by plan fiduciaries to control, negotiate, and reduce the plan's fees.

49. Fiduciaries must be cognizant of providers' self-interest in maximizing fees, and not simply accede to the providers' preferred investment lineup —i.e., proprietary funds that will generate substantial fee revenue for the provider—or agree to the provider's administrative fee quotes without negotiating or considering alternatives. In order to act in the exclusive interest of participants and not in the service providers' interest, fiduciaries must negotiate as if their own money was at stake. Instead of simply accepting the investment funds or fees demanded by these conflicted providers, fiduciaries must consider whether participants would be better served by using alternative investment products or services.

II. Defined contribution recordkeeping.

50. Recordkeeping is a service necessary for every defined contribution plan. The recordkeeper keeps track of the amount of each participant's investments in the various options in the plan, and typically provides each participant with a quarterly account statement. The recordkeeper often maintains a plan website or call center that participants can access to obtain information about the plan and to review their accounts. The recordkeeper may also provide access to investment education materials or investment advice. These services are largely commodities, and the market for recordkeeping services is highly competitive.

51. There are numerous recordkeepers in the marketplace who are capable of providing a high level of service and who will vigorously compete to

win a recordkeeping contract for a jumbo defined contribution plan. These recordkeepers will readily respond to a request for proposal and will tailor their bids based on the desired services (e.g., recordkeeping, website, call center, etc.). In light of the commoditized nature of their services, recordkeepers primarily differentiate themselves based on price, and will aggressively bid to offer the best price in an effort to win the business, particularly for jumbo plans like the Plans.

52. Some recordkeepers in the market provide only recordkeeping and administrative services, while others provide both recordkeeping services and investment products. The latter group has an incentive to place their own proprietary products in the plan in order to maximize revenues from servicing the plan. As explained below, when faced with such conflicted fund recommendations, fiduciaries must independently assess whether the provider's investment product is the best choice for the plan, or whether the purpose of providing benefits to participants would be better accomplished by considering other investment managers who may offer superior funds at a better price.

III. Defined contribution investment options.

53. Defined contribution fiduciaries have exclusive control over the particular investment alternatives available in the plan to which participants direct and allocate their plan accounts, and the returns on which are credited to participants' accounts.

54. Each investment option is typically a pooled investment product, such as a mutual fund, and invests in a diversified portfolio of securities in a broad asset class such as fixed income, bonds, or equities. Fixed income funds may include conserva-

tive principal protection options, such as stable value funds, or other diversified portfolios of government or corporate debt securities. Equity funds invest in diversified portfolios of stocks of large, mid, or small domestic or international companies in a particular style such as growth or value (or a blend of the two). Balanced funds invest in a mix of stocks and bonds in varying percentages.

55. Investment options can be passively or actively managed. In a passively managed or "index" fund, the investment manager attempts to match the performance of a given benchmark index by holding a representative sample of securities in that index, such as the S&P 500. In an actively managed fund, the investment manager uses her judgment in buying and selling individual securities (*e.g.*, stocks, bonds, etc.) in an attempt to generate investment returns that surpass a benchmark index, net of fees. Because no stock selection or research is necessary for the manager to track the index and trading is limited, passively managed investments charge significantly lower fees than actively managed funds.

56. Mutual fund fees are usually expressed as a percentage of assets under management, or "expense ratio." For example, if the mutual fund deducts 1% of fund assets each year in fees, the fund's expense ratio would be 1%, or 100 basis points (bps).[7] The fees deducted from a mutual fund's assets reduce the value of the shares owned by fund investors.

57. Many mutual funds offer their investors different share classes. Retail share classes are marketed to individuals with small amounts to invest. Institutional share classes are offered to investors with large

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[7] One basis point is equal to 1/100th of one percent (or 0.01%).

amounts to invest, such as large retirement plans. The different share classes of a given mutual fund have the identical manager, are managed identically, and invest in the same portfolio of securities. The only difference is that the retail shares charge significantly higher fees, resulting in retail class investors receiving lower returns. The share classes are *otherwise identical in all respects*.

58. Many of the investment options in the Plans are or have been during the class period in retail or high-priced share classes instead of in far lower-priced share classes of identical mutual funds available to large investors such as the Plans. See ¶¶181-183. The only material difference between high-priced options offered to the Plans' participants and lower-priced options that are available but were not offered to the Plans' participants is the amount of the fees charged.

59. Some mutual funds engage in a practice known as "revenue sharing." In a revenue-sharing arrangement, a mutual fund pays a portion of its expense ratio to the entity providing administrative and recordkeeping services to a plan. The difference in fees between a mutual fund's retail and institutional share classes is often attributable to revenue sharing. To illustrate, a fund's retail share class may have an expense ratio of 100 bps, including 25 bps of revenue sharing, while the institutional share charges 75 bps, with no or lesser revenue sharing. The presence of revenue sharing thus provides an incentive for administrative service providers to recommend that the fiduciary select higher cost funds, including in-house funds of the administrative service provider that pay the provider revenue sharing. "[V]ery little about the mutual fund industry," including revenue sharing practices, "can plausibly be described as

transparent[.]" *Leimkuehler v. Am. United Life Ins. Co.*, 713 F.3d 905, 907 (7th Cir. 2013).

60. The importance of fees in prudent investment selection cannot be overstated. The prudent investor rule developed in the common law of trusts, which informs ERISA's fiduciary duties, emphasizes "the duty to avoid unwarranted costs[.]" Restatement (Third) of Trusts ch. 17, intro. note (2007); *see Tibble*, 135 S. Ct. at 1828 (analyzing common law of trusts and Restatement (Third) of Trusts §90 in finding a continuing duty to monitor under ERISA). As the Restatement explains, "cost-conscious management is fundamental to prudence in the investment function." Restatement (Third) of Trusts § 90 cmt. b. While a fiduciary may consider higher-cost, actively-managed mutual funds as an alternative to index funds, "active management strategies involve investigation expenses and other transaction costs . . . that must be considered, realistically, in relation to the likelihood of increased return from such strategies." Restatement (Third) of Trusts ch. 17, intro. note; *id.* § 90 cmt. h(2).

61. Academic and financial industry literature demonstrates that high expenses are not correlated with superior investment management. Indeed, funds with high fees on average perform worse than less expensive funds even on a *pre-fee basis*. Javier Gil-Bazo & Pablo Ruiz-Verdu, *When Cheaper is Better: Fee Determination in the Market for Equity Mutual Funds*, 67 J. ECON. BEHAV. & ORG. 871, 873 (2008); *see also* Jill E. Fisch, *Rethinking the Regulation of Securities Intermediaries*, 158 U. PA. L. REV. 1961, 1993 (2010) (summarizing numerous studies showing that "the most consistent predictor of a fund's return to investors is the fund's expense ratio").

> [T]he empirical evidence implies that superior management is not priced through higher expense ratios. On the contrary, it appears that the effect of expenses on after-expense performance (even after controlling for funds' observable characteristics) is more than one-to-one, which would imply that low-quality funds charge higher fees. Price and quality thus seem to be inversely related in the market for actively managed mutual funds.

Gil-Bazo & Ruiz-Verdu, *When Cheaper is Better*, at 883.

62. In light of this effect of fees on expected returns, fiduciaries must carefully consider whether the added cost of actively managed funds is realistically justified by an expectation of higher returns. Restatement (Third) of Trusts ch. 17, intro. note; *id.* § 90 cmt. h(2). A prudent investor will not select higher-cost actively managed funds without analyzing whether a particular investment manager is likely to beat the overwhelming odds against outperforming its benchmark index over time, net of the fund's higher investment expenses.

IV. Revenue sharing: a practice that can lead to excessive fees if not properly monitored and capped.

63. There are two primary methods for defined contribution plans to pay for recordkeeping and administrative services: "direct" payments from plan assets, and "indirect" revenue sharing payments from plan investments such as mutual funds. Plans may use one method or the other exclusively, or may use a combination of both direct and indirect payments.

64. In a typical direct payment arrangement, the fiduciary contracts with the recordkeeper to obtain administrative services in exchange for a flat annual fee based on the number of participants for which the recordkeeper will be providing services, for example \$30 per participant. Jumbo defined contribution plans possess tremendous economies of scale for purposes of recordkeeping and administrative fees. A plan with 20,000 participants can obtain a much lower fee on a per-participant basis than a plan with 2,000 participants.

65. A recordkeeper's cost for providing services depends on the number of participants in the plan, not the amount of assets in the plan or in an individual account. The cost of recordkeeping a \$75,000 account balance is the same as a \$7,500 account. Accordingly, a flat price based on the number of participants in the plan ensures that the amount of compensation is tied to the actual services provided and does not grow based on matters that have nothing to do with the services provided, such as an increase in plan assets due to market growth or greater plan contributions by the employee.

66. As an example, a fiduciary of a 20,000 participant, \$2 billion plan may issue a request for proposal to several recordkeepers and request that the respondents provide pricing based on a flat rate for a 20,000-participant plan. If the winning recordkeeper offers to provide the specified services at a flat rate of \$30 per participant per year, the fiduciary would then contract with the recordkeeper for the plan to pay a \$600,000 direct annual fee (20,000 participants at \$30/participant). If the plan's assets increase to \$3 billion during the course of the contract but the participant level stays constant, the recordkeeper's

compensation does not change, because the services provided have not changed.

67. Such a flat per-participant agreement does not necessarily mean, however, that every participant in the plan must pay the same $30 fee from his or her account. The fiduciary could reasonably determine that it is equitable to charge each participant the same $30 (for example, through a quarterly charge of $7.50 to each account in the plan). Alternatively, the fiduciary could conclude that assessing the same fee to all investors would discourage participants with relatively small accounts from participating in the plan, and that, once the aggregate flat fee for the plan has been determined, a proportional asset-based charge would be best. In that case, the flat per-participant rate of $30 per participant multiplied by the number of participants would simply be converted to an asset-based charge, such that every participant pays the same percentage of his or her account balance. For the $2 billion plan in this example, each participant would pay a direct administrative fee of 0.03% of her account balance annually for recordkeeping ($600,000/$2,000,000,000 = 0.0003). If plan assets increase thereafter, the percentage would be adjusted downward so that the *plan* is still paying the same $600,000 price that was negotiated at the plan level for services to be provided to the plan.

68. Defendants have used a different method of paying for recordkeeping for the Plans, through "indirect" revenue sharing payments from the plan's mutual funds. Revenue sharing, while not a *per se* violation of ERISA, can lead to excessive fees if not properly monitored and capped.

69. In a revenue sharing arrangement, the mutual fund pays the plan's recordkeeper putatively for providing recordkeeping and administrative services

for the fund. However, because revenue sharing payments are asset-based, the fees can grow to unreasonable levels if plan assets grow while the number of participants, and thus the services provided, has not increased at a similar rate. The opposite is generally not true. If plan assets decline, participants will not receive a sustained benefit of paying lower fees, because the recordkeeper will demand that the plan make up the shortfall through additional direct payments.

70. If a fiduciary decides to use revenue sharing to pay for recordkeeping, it is required that the fiduciary (1) determine and monitor the amount of the revenue sharing and any other sources of compensation that the provider has received, (2) compare that amount to the price that would be available on a flat per-participant basis, and (3) control the amount of fees paid through recordkeeping by obtaining rebates of any revenue sharing amounts that exceed the reasonable level of fees.

71. As to the second critical element—determining the price that would be available on a flat per-participant basis—making that assessment for a jumbo plan requires soliciting bids from competing providers. In multi-billion dollar plans with over 10,000 participants, such as the Plans, benchmarking based on fee surveys alone is inadequate. Recordkeeping fees for jumbo plans have declined significantly in recent years due to increased technological efficiency, competition, and increased attention to fees by sponsors of other plans such that fees that may have been reasonable at one time may have become excessive based on current market conditions. Accordingly, the only way to determine the true market price at a given time is to obtain competitive bids. *See George v. Kraft Foods Global, Inc.*, 641

F.3d 786, 800 (7th Cir. 2011) (a 401(k) excessive fee case which denied summary judgment based in part on the opinion of an independent consultant that "'without an actual fee quote comparison'—i.e., a bid from another service provider—[consultant] 'could not comment on the competitiveness of [record-keeper's] fee amount for the services provided.'").

72. Industry experts recognize that this principle applies fully in the 403(b) context, just as in the 401(k) context. Compared to benchmarking, "the RFP is a far better way to negotiate fee and service improvements for higher education organizations." Fiduciary Plan Governance, LLC, *Buying Power for Higher Education Institutions: When you Have It and When You Don't – Part 2*.[8] Indeed, "[c]onducting periodic due diligence RFPs is a critical part of fulfilling the fiduciary duty." Western PA Healthcare News, *403(b) Retirement Plans: Why a Due Diligence Request for Proposal*.[9] Engaging in this RFP process "allows plan sponsors . . . to meet their fiduciary obligations, provides leverage to renegotiate services and fees; enhances service and investment opportunities and improves overall plan operation." *Id.* Prudent fiduciaries of defined contribution plans—including 403(b) plans—thus obtain competitive bids for recordkeeping at regular intervals of approximately three years.

V. Bundled services and open architecture.

73. As the prevalence and asset size of defined contribution plans grew, in the shift away from tradi-

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[8] Available at http://www.fiduciaryplangovernance.com/blog/buying-power-for-higher-education-institutions-when-you-have-it-and-when-you-dont-part-2.

[9] Available at http://www.wphealthcarenews.com/403b-retirement-plans-why-a-due-diligence-request-for-proposal/.

tional defined benefit pension plans, numerous financial services companies entered this burgeoning retirement plan market. These providers often marketed "bundled" plans, offering to assist in setting up a plan and providing a package of the provider's proprietary investment funds as well as administrative and recordkeeping services. The plans were often marketed as "free" plans, meaning there were supposedly no additional fees beyond the revenues the provider received from having their investment funds in the plan. These purportedly free plans had a significant condition—in order to obtain the free pricing, the fiduciary had to agree to put the provider's preferred investment lineup in the plan—a group of handpicked funds that would guarantee the provider would receive its desired fee revenue on an ongoing basis. Any deviations from that lineup or removal of funds after the plan was established would require the provider's approval or result in the plan being assessed additional direct fees. Thus, under these closed arrangements, funds were included in some defined contribution plans not based on an independent analysis of their merits or what was in the best interests of participants, but because of the benefits they provided to the plan's service providers.

74. Thus, under these closed arrangements, funds were often included in defined contribution plans not based on an independent analysis of their merits or what was in the best interests of participants, but because of the benefits they provided to the plan's service providers. In the Northwestern Plans, that is what the Northwestern Defendants established and maintained until October 2016—plans with essentially closed, not open architecture, as the Plans' fund lineups consisted almost exclusively of funds

that are proprietary funds of the two recordkeepers, TIAA and Fidelity.

75. Prudent fiduciaries of jumbo defined contribution plans have rejected closed architecture and bundling of recordkeepers' proprietary products in a plan and have demanded an open architecture model for the plan's investment platform. In an open architecture model, a plan is not limited to the recordkeeper's own proprietary investment products, which the provider has an interest in including in the plan because the funds provide it with investment fees.

76. In an open architecture model, a plan is not limited to the recordkeeper's own proprietary investment products, which the provider has an interest in including in the plan because the funds provide it with revenue sharing and investment fees. Instead, the fiduciary is free to reject the recordkeeper's conflicted fund recommendations, can independently assess whether another investment manager offers a superior product at a more attractive price, and can include such funds in the plan's investment lineup. Open architecture also facilitates negotiation of reasonable recordkeeping fees, since the price of the recordkeeping service is more transparent and not obscured by opaque revenue sharing arrangements—through which the investment product provider does not publicize the amount of revenue sharing it kicks back to itself in its separate role as a recordkeeper—and can be negotiated separately without investment revenue skewing the recordkeeping price. There are recordkeepers in the market that exclusively operate on an open architecture basis in that they do recordkeeping only and do not sell investment products. These providers can offer pricing on a pure per-participant basis, without any revenue sharing component taken from funds in the plan. In light of

these benefits, prudent fiduciaries of large defined contribution plans have largely rejected bundling and embraced open architecture platforms.

77. Open, transparent architecture allows for greater control over revenue sharing arrangements if they are used at all, and indeed, allows a fiduciary to eliminate revenue sharing altogether. If revenue sharing payments are used, they can effectively be "kickbacks" to induce recordkeepers to advocate for a fund to be included in the plan's investment lineup or even attempt to dictate its inclusion. An independent assessment of each fund is thus essential and required by ERISA to determine whether the fund should be included in the plan based strictly on its merits as an investment, regardless of whether it provides revenue sharing.

78. TIAA-CREF offered its 403(b) services to the Plans exclusively on a bundled basis. As a result, participants in the Plans were required to pay for services they did not use, as confirmed by the testimony of TIAA's corporate representative. *See, e.g.,* Deposition of Elena Zanussi ("Zanussi Dep.") at 89:18-91:20; 93:5-94:16, attached hereto as Exhibit 7.

79. Further, if a plan wishes to offer the TIAA Traditional Annuity, TIAA-CREF has required that the CREF Stock Account and Money Market Account also be offered to participants, and has required the plan to use TIAA as recordkeeper for its proprietary products. In this way, fiduciaries have locked their plans into arrangements in which certain investments cannot be removed, *even if funds are not prudent investments*, in violation of accepted prudent fiduciary practices.

80. There are thousands of alternatives to TIAA-CREF's products in the defined contribution plan

market from many other investment managers. Many 403(b) plan fiduciaries have recognized that stable value funds are prudent alternatives to TIAA's Traditional Annuity because they provide superior returns to a money market fund and can be recordkept by virtually any defined contribution recordkeeper. Other insurance companies also offer fixed annuity products. And there are myriad large cap blend mutual fund investments in the market that provide far superior returns to the CREF Stock Account at much lower cost.

VI. 403(b) plans share common fiduciary duties with 401(k) plans.

81. Defined contribution plans can qualify for favored tax treatment under different sections of the Internal Revenue Code. Plans offered by corporate employers typically qualify under 26 U.S.C. §401(k), and are commonly referred to as 401(k) plans. Tax-exempt organizations, public schools (including state colleges and universities), and churches are eligible to offer plans qualified under §403(b), commonly known as 403(b) plans. 26 U.S.C. §403(b)(1)(A).

82. Plans sponsored by tax-exempt organizations such as private universities, unlike churches and public schools, are subject to Title I of ERISA and its fiduciary requirements, unless the plan satisfies a 1979 "safe-harbor" regulation based on the employer having limited involvement in operating the plan. 29 C.F.R. §2510.3-2(f).

83. To the best of Plaintiffs' knowledge, the Plans have never qualified for the safe harbor, and thus have long been subject to ERISA's fiduciary requirements. In the Plans' annual reports (Forms 5500) filed with the Department of Labor, Defendants have acknowledged that the Plans are subject to ERISA.

84. Although 401(k) plans and 403(b) plans have different historical origins, legislative and regulatory developments over a number of decades largely eroded those differences, as reflected in final 403(b) regulations published by the IRS on July 26, 2007. Sponsors of 403(b) plans were given almost one-and-a-half years to prepare for the effective date of the regulations, January 1, 2009. The regulations required certain employers to become more involved with administering their plans than they had previously, potentially disqualifying those plans from satisfying the ERISA safe harbor and subjecting the plans to ERISA fiduciary requirements for the first time. However, for plans like the Plans that were *already* subject to ERISA's fiduciary requirements because they were never safe-harbor plans, the IRS regulations had no effect on the Plans' status for ERISA fiduciary purposes; ERISA already required Defendants to be actively involved in exercising care, prudence, skill, and diligence in administering the Plans for the exclusive benefit of participants.

85. When §403(b) was first enacted in 1958, plan assets could only be invested in insurance company annuity contracts. 26 U.S.C. §403(b)(1). In 1974, §403(b) was amended to allow 403(b) plans to invest in custodial accounts holding mutual fund shares. 26 U.S.C. §403(b)(7).

86. Regardless of any differences between 401(k) and 403(b) plans, both types of plans have the same fundamental purpose: allowing employees to save for a secure retirement. The duties of fiduciaries in both are the same: to operate as a financial expert familiar with investment practices, to operate the plan for the exclusive benefit of employees and retirees, and to make sure that fees are reasonable and investments are prudent. Participants in both

types of plans depend on their plan fiduciaries to ensure that retirement savings are not depleted by excessive fees or imprudent investments. Accordingly, the historical differences and investment limitations of 403(b) plans do not allow 403(b) fiduciaries to exercise a lesser degree of care or attention to fees and investments than their 401(k) counterparts.

VII. Historical practice of multiple recordkeepers and placement of many investment options in 403(b) plans, which some fiduciaries failed to evaluate as required.

87. As the Department of Labor has recognized, historically, many 403(b) sponsors had treated their plans as a collection of individual contracts under which employees could take various actions without the consent or involvement of the employer or plan administrator, instead of fiduciaries evaluating investment options placed in the plan. Field Assistance Bulletin 2009-02.

88. Some 403(b) plans historically before 2009 included multiple bundled service providers, with each performing the recordkeeping function for its own investment products in the plan, unlike 401(k) plans which had a single recordkeeper. In fact, "403(b) plan investment options were often 'sold' by record keepers and their representatives rather than offered by plan sponsors as evaluated investments." Fiduciary Plan Governance, LLC, *Legacy Investments in Higher Education: What is a Plan Sponsor's Responsibility to Participants*?[10] Indeed, sponsors of these plans often took a "'hands off' approach to plan oversight." *Id.* This practice resulted in plans having

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[10] Available at http://www.fiduciaryplangovernance.com/blog/legacy-investments-in-higher-education-what-is-a-plan-sponsors-responsibility-to-participants.

excessive recordkeeping costs and structures involving multiple recordkeepers with each recordkeeper having its own investment options in the plan. This left participants with the task of navigating a haphazard collection of duplicative and overlapping investment options from the various recordkeepers, and ultimately led to them paying excessive and unnecessary fees, both for recordkeeping and for investment products in the plans. *Id.* In some cases the recordkeeper insisted on its own funds being included in the plan without any resistance or analysis of those funds by the fiduciaries.

89. Northwestern's representatives have conceded that monitoring the performance of the hundreds of investment options in the Plans was unmanageable, and that reducing the number of investment options would have resulted in significant cost savings and reduced participant confusion. *See, e.g.,* Deposition of Anne Fish ("Fish Dep.") at 112:12-113:15, attached hereto as Exhibit 8; Ex. 2, Beemer Dep. at 313:4-316:14; Ex. 5, Stafford Dep. at 187:1-190:15. Indeed, the investment policy statement that was ultimately adopted by the Plans in 2015 expressly listed streamlining of the Plans' investment menu as a goal, and provided that NURIC was responsible for determining "a process to methodically and systematically migrate the current plans' assets into a streamlined and pared down fund menu[.]" NU-00015055 at 056, attached hereto as Exhibit 9.

90. Northwestern's consultant for the Plans, Straightline Group, LLC ("Straightline"), has also made clear that reducing the number of investment options would have led to cost savings and reduced participant confusion. *See, e.g.*, STLN002334, December 9, 2011 NURIC Committee Meeting Minutes, attached hereto as Exhibit 10; NU-00005212,

December 9, 2011 Straightline Presentation, attached hereto as Exhibit 11.

VIII. TIAA-CREF's bundled 403(b) plan services.

91. TIAA-CREF is an insurance company financial services provider that historically has dominated the market for services to educational institution 403(b) plans, and has heavily marketed to them. TIAA-CREF consists of two companion organizations: Teachers Insurance and Annuity Association of America (TIAA), and College Retirement Equities Fund (CREF). The services that TIAA-CREF provides to 403(b) plans include annuities, mutual funds, insurance coverage, trust services, and administrative services.

92. Although TIAA-CREF's marketing materials suggest that it is a "nonprofit" organization, that is misleading. In 1998, Congress revoked both TIAA's and CREF's statuses as tax-deductible 501(c)(3) charitable organizations because TIAA-CREF "competed directly with for-profit insurance companies and mutual fund groups." Reed Abelson, *Budget Deal to Cost T.I.A.A.-C.R.E.F. Its Tax Exemption*, N.Y. Times (July 30, 2007).[11] As a result, they are subject to federal income taxation and are not 501(c)(3) charitable organizations.

93. While CREF is organized as a New York not-for-profit corporation, TIAA is organized as a *for-profit* stock life insurance company. TIAA's "operating surplus" is spent, loaned, and otherwise distributed to some of its subsidiaries as well. An example is Nuveen Investments, a for-profit investment manager, which TIAA acquired in April 2014

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[11] Available at http://www.nytimes.com/1997/07/30/business/budget-deal-to-cost-tiaa-cref-its-tax-exemption.html.

for an enterprise value of $6.25 billion. TIAA receives dividends from these for-profit subsidiaries.[12]

94. TIAA owns and controls numerous for-profit subsidiaries, which send dividends to TIAA, including the following subsidiaries for which TIAA files consolidated federal income tax returns:

TIAA Subsidiary	**Not-For-Profit Entity**	**For-Profit Entity**
730 Texas Forests Holdings, Inc.		X
Covariance Capital Management, Inc.		X
GreenWood Resources, Inc.		X
JWL Properties, Inc.		X
ND Properties, Inc.		X
Nuveen Asia Investments, Inc.		X
Nuveen Holdings, Inc.		X
Nuveen Investments, Inc.		X
Nuveen Investments Advisers, Inc.		X
Nuveen Investments Holdings, Inc.		X
Nuveen Investments Institutional Services Group, LLC		X
Nuveen Investment Solutions, Inc.		X
Nuveen Securities, LLC		X

[12] Available at https://www.tiaa.org/public/pdf/C16623_where-tiaa-profits-go.pdf.

TIAA Subsidiary	Not-For-Profit Entity	For-Profit Entity
Oleum Holding Company, Inc.		X
Rittenhouse Asset Management, Inc.		X
T-C Europe Holdings, Inc.		X
T-C SP, Inc.		X
T-C Sports Co., Inc.		X
T-Investment Properties Corp.		X
TCT Holdings, Inc.		X
Teachers Advisors, Inc.		X
Teachers Personal Investors Service, Inc.		X
Terra Land Company		X
TIAA Asset Management Finance Company, LLC		X
TIAA-CREF Life Insurance Company		X
TIAA-CREF Tuition Financing, Inc.		X
TIAA-CREF Trust Company, FSB		X
Westchester Group Asset Management, Inc.		X
Westchester Group Farm Management, Inc.		X
Westchester Group Investment Management Holding, Inc.		X
Westchester Group Investment Management, Inc.		X

TIAA Subsidiary	Not-For-Profit Entity	For-Profit Entity
Westchester Group Real Estate, Inc.		X

See 2015 Annual Statement of the Teachers Insurance and Annuity Association of America 39, 112-19 (Jan. 26, 2016).[13]

95. Also, consistent with its conduct as a profit-seeking enterprise, the compensation of TIAA's CEO and other executives is greater than or close to the very highest paid executives of some of Wall Street's largest for-profit investment managers and insurance companies, such as J.P. Morgan Chase, Prudential, Deutsche Bank, and Metlife. In 2015, TIAA's CEO received $18 million in compensation,[14] more than the CEOs of Metlife ($14 million) and Deutsche Bank ($5.2 million), and just below the CEOs of J.P. Morgan Chase ($18.2 million) and Prudential ($19.9 million). In fact, TIAA's five highest-ranking "named executive officers" earned a combined total of well over $40 million in compensation in 2015. *Id.* When expressed as a percentage of assets under management, TIAA's CEO had the very highest compensation rate among reporting investment companies.

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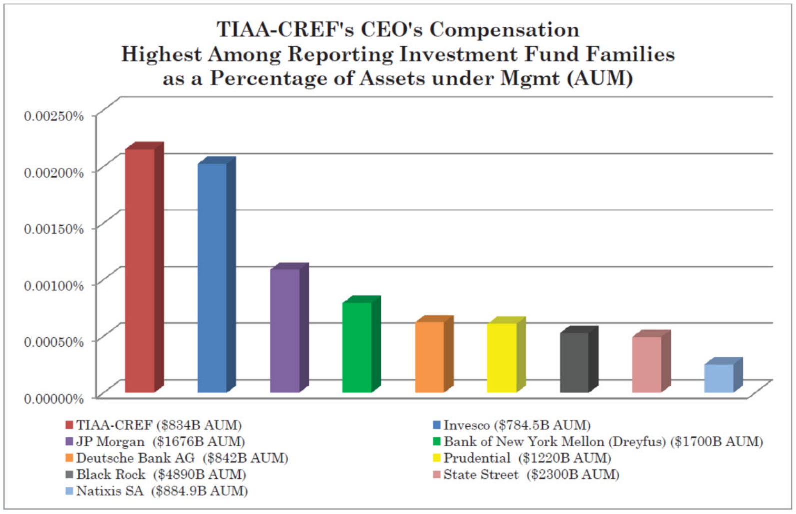
[13] Available at https://www.tiaa.org/public/pdf/tiaa_annual_statement_2015.pdf. This list does not include the hundreds of TIAA's for-profit, joint venture subsidiaries, all of which are controlled by TIAA. *See id.* at 112-19; *see also* https://www.sec.gov/Archives/edgar/data/1429401/000119312510093446/dex21.htm.

[14] TIAA Compensation Disclosures, Executive Compensation Discussion and Analysis 20 (May 2016), available at https://www.tiaa.org/public/pdf/about/governance/exec_comp_policy.pdf.



96. Adding to this, and undercutting any claim that it operates as a non-profit, TIAA's compensation disclosures further state that its employees' compensation and benefits programs are linked to "*profitability*." TIAA Compensation Disclosures (emphasis added).

97. Responding to criticism that TIAA-CREF's CEO and other executives "garnered salaries and bonuses significantly greater than similar pension fund operations," TIAA-CREF responded that such extremely high pay was justified because "the company had to compete for top-level employees with major financial services corporations." Funding Universe, *Teachers Insurance and Annuities Association - College Retirement Equities Fund History*.[15] Critics found this justification dubious because the "flagship CREF Stock Account, an equity portfolio of $59 billion, was primarily indexed to the Russell 3000," meaning that "CREF automatically invested

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[15] Available at http://www.fundinguniverse.com/company-histories/teachers-insurance-and-annuity-association-college-retirement-equities-fund-history/.

nearly two of every three dollars in companies held by the benchmark fund," leaving "little for the highly paid officers to manage." *Id*.

98. In benchmarking (and justifying) its executives' compensation packages, TIAA disclosed the following sixteen *for-profit* financial services and insurance companies as the peer group it used for competitive analysis:

The comparator group used in the market competitive analysis consists of the following sixteen companies (the "Peer Group"), which were selected based on being of similar size and complexity in the asset management and insurance industries:

Affiliated Managers Group	Invesco	Principal Financial
Ameriprise Financial	Legg Mason	Prudential Financial
Bank of NY Mellon	Lincoln National	T. Rowe Price
Charles Schwab	MassMutual Financial	Voya Financial
Franklin Resources	MetLife	
The Hartford Financial	Northern Trust	

99. TIAA-CREF provided its 403(b) plan services exclusively on a bundled basis. If a plan wished to offer the TIAA Traditional Annuity, a fixed annuity product, TIAA-CREF required that the CREF Stock Account and Money Market Account also be put in the Plans, and required the Plans to use TIAA as recordkeeper for its proprietary products. Thus, by using TIAA-CREF, Defendants locked the Plans into an arrangement in advance in which certain investments could not be removed from the plan—*even if the funds were not prudent investments or would become imprudent in the future*. By accepting this arrangement, Defendants failed to implement an open architecture platform and use another recordkeeper who could provide the same administrative services at lower cost. Compounding this bundling requirement by TIAA, Defendants used multiple recordkeepers, each with their own investment products, resulting in an inefficient and excessively

expensive plan structure, as described in more detail below.

100. There is no shortage of high-quality, low-cost alternatives to TIAA-CREF's products in the defined contribution plan market. For example, many 403(b) plan fiduciaries have recognized that stable value funds are prudent alternatives to TIAA's Traditional Annuity as a conservative principal preservation option, providing superior returns to a money market fund, and can be recordkept by virtually any defined contribution recordkeeper. Other insurance companies, besides TIAA, also offer fixed annuity products. And there are myriad large cap blend mutual fund investments in the market that provide far superior returns to the CREF Stock Account at much lower cost. In light of TIAA-CREF's restrictions and superior alternatives in the market, fiduciaries of 403(b) defined contribution plans must evaluate each investment option and engage in a cost-benefit analysis to determine whether it is prudent and in the exclusive best interest of participants to lock their plans into an arrangement that precludes the removal of imprudent plan investments and results in excessive plan fees. Defendants failed to perform such an evaluation of the funds and services TIAA-CREF required. Defendants also failed to evaluate whether participants would be better served by using superior low-cost alternatives to TIAA-CREF's products given that the Plans could have saved millions of dollars in administrative and investment management costs by hiring a different recordkeeper. As explained below, prudent 403(b) fiduciaries have engaged in this analysis and overhauled their plans for the benefit of participants.

IX. Move to consolidation and open architecture in 403(b) plans.

101. Under the 2007 final regulations that became effective January 1, 2009,[16] certain employers with 403(b) plans were compelled to exercise greater control over their 403(b) plans than they had previously. Among other things, the final regulations required 403(b) plans to be maintained under a "written defined contribution plan" containing all the material terms and conditions for benefits under the plan. DOL separately published revised Form 5500 annual reporting rules effective January 1, 2009, that required large ERISA-covered 403(b) plans to file audited financial statements providing detailed information about the assets in the plan. The regulations are expressly intended to make 403(b) plans more like 401(k) plans.

102. Once the final regulations were published, many 403(b) plan fiduciaries recognized that fulfilling their fiduciary obligations—whether on an ongoing basis or for the first time—required them to engage, if they had not already been doing so, in a comprehensive review of their plans' fees, investment options and structure, and service provider arrangements, to determine whether changes had to be made for the benefit of participants. While the Plans have long been subject to ERISA because the employer match was sufficient for the Plans to be "established or maintained" as ERISA plans under 29 U.S.C. §1002(2)(A)—and, indeed Defendants have informed the Department of Labor in the Plans' Forms 5500 that the Plans are subject to ERISA—even if the

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[16] The regulations gave 403(b) plans almost a year and a half to make changes necessary to comply before the regulation became effective January 1, 2009.

Plans had not previously been subject to ERISA, there can be no doubt that 403(b) plan fiduciaries could not just accept investment options provided by the same providers who did recordkeeping for the plan in order to comply with ERISA's requirements that all fees be reasonable and investments be prudent.

103. Once the regulations were published, some non-profit plan sponsors whose 403(b) programs previously qualified for the safe-harbor determined they would have to comply with ERISA's fiduciary requirements by the regulations' effective date of January 1, 2009. As a result, the fiduciaries of many 403(b) plans implemented dramatic overhauls to their plans and acknowledged that these changes were necessary to comply with the IRS regulations and to satisfy their fiduciary obligations under ERISA.

104. For example, the fiduciaries of the Loyola Marymount University (LMU) Defined Contribution Plan, a 403(b) plan, recognized that under the new regulations, "Recordkeeping must be consolidated and/or managed by a single party." *See* LMU 403(b) Retirement Plan Project Overview, at 1.[17] "Keeping two on-going record keepers in 2009 would mean that faculty/staff would pay higher fees and receive reduced services." *Id*. at 2. Beginning in 2008, to assist LMU in assessing the plan's investment options and recordkeeping services, LMU hired an independent third party consultant, Hewitt Associates (n/k/a AonHewitt), to issue a request for proposal to seven different 403(b) recordkeeping providers, including AIG Retirement, Diversified

[17] Available at http://www.lmu.edu/AssetFactory.aspx?vid=33038.

Investment Advisors, Fidelity, ING, Lincoln Financial Group, Principal Financial Group, and TAA-CREF.[18] LMU consolidated from two recordkeepers to one effective on the date the final regulation became effective, January 1, 2009. Loyola Marymount's fiduciaries recognized that a dual recordkeeper structure would require its employees to pay higher fees for overlapping services, and because consultants, legal counsel, and all of the recordkeeping firms interviewed recommended that LMU use only one record keeper, starting in January 2009. LMU 403(b) Retirement Plan Project Overview, at 2. Moreover, LMU selected Diversified as the new recordkeeper because Diversified "is not an investment manager and therefore, does not require that certain investment options be offered by LMU." *Id.* LMU was therefore able to offer "best in class" funds in each fund category. *Id.* at 6.

105. Similarly, following the new IRS 403(b) regulations, the fiduciaries of the Pepperdine University Retirement Plan recognized the implications of maintaining four different recordkeepers. In order to comply with the regulations and its fiduciary responsibilities, Pepperdine determined that it must make certain changes to the plan, including "Consolidating recordkeeping (by having one fund provider manage administration for multiple providers or by moving to a sole administrator scenario)." *See* Pepperdine University Participant Q & A.[19] Pepperdine retained an independent third party consultant to assist the fiduciaries in issuing a request for proposal to different 403(b) recordkeeping providers. Following the

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[18] *See* http://www.lmu.edu/AssetFactory.aspx?vid=32045.

[19] Available at http://community.pepperdine.edu/hr/content/benefits/fulltime/faq.pdf.

competitive bidding process, effective February 1, 2009, Pepperdine selected Diversified, a recordkeeper which does not offer proprietary investments, as the "sole administrator" and consolidated from four recordkeepers (Fidelity, TIAA-CREF, Vanguard and Prudential) to a single recordkeeper. Pepperdine found that the benefits of consolidation included lower costs and more robust services, as well as a streamlined compliance process and simplified data coordination. *Id.* Pepperdine acknowledged that maintaining a multiple-vendor platform was not a "cost-effective, viable option." Paul B. Lasiter, *Single Provider, Multiple Choices*, NACUBO.[20] Recognizing the inefficiencies and overlapping work in a multiple recordkeeper arrangement, Pepperdine determined that costs were "higher in a multivendor arrangement, because each vendor receives only a portion of the ongoing total plan contributions," while a single provider allowed to "realize true economies of scale." *Id.*

106. Pepperdine also recognized that the bundled model demanded by certain providers was not in participants' interest. Using those providers "meant being obligated to offer some or all of that provider's proprietary funds on the plan's investment menu—*whether or not those investments offered participants the best range of choice, value, and relative performance*." *Id.* (emphasis added). Acting in participants' interest required that the fiduciaries instead have the ability to select those "funds that the university—working with an independent financial adviser—could identify as being the 'best options in their

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[20] Available at http://www.nacubo.org/Business_Officer_Magazine/Magazine_Archives/March_2010/Single_Provider_Multiple_Choices.html.

respective asset classes.'" *Id.* After weighing and analyzing a variety of factors, Pepperdine determined that "consolidating with a single vendor has been the straightforward solution to achieving" the objective of acting "for the exclusive benefit of plan participants." *Id.* The benefits of consolidation included "[a] better fiduciary process with ongoing evaluation" of plan investments, "[e]conomies of scale," and "[g]reater transparency of fees and lowered costs for plan participants." *Id.*

107. In the fall of 2008, in response to the new, not yet effective regulations and required changes within the defined contribution industry, Purdue University began a comprehensive review of its defined contribution retirement program. Purdue recognized that "*[t]he primary intent of the regulations was to reduce the difference between Section 403(b) plans, Section 401(k) plans* and Section 457(b) plans; to enhance 403(b) plan compliance; and to establish a more structured retirement program for employees in the non-profit sector." James S. Almond, *403(b) Plan Redesign-Making a Good Retirement Plan Better*, PURDUE UNIVERSITY (emphasis added).[21] Purdue hired an independent third party consultant, EnnisKnupp & Associates (n/k/a AonHewitt), to assist the fiduciaries in evaluating the investment options, participants' fees, and recordkeeping services, which included developing and issuing an RFP to recordkeepers. The "benefits" of Purdue's program enhancements included the transition from five providers (TIAA-CREF, Fidelity, American Century, Lincoln, and VALIC) to a single administrative service provider (Fidelity) with a

[21] Available at http://www.cacubo.org/wp-content/uploads/2016/02/10_403b_Plan_Redesign_Making_a_Good_Retirement_Plan_Better.docx.

corresponding significant reduction in recordkeeping expenses. The reformed plan "[p]rovided a transparent investment and administrative fee structure" and "[l]everaged plan assets to lower administrative and investment fees, including access to institutional share class funds and a flat administrative fee, instead of administrative fees as a percentage of retirement savings." *Id.* Purdue reduced the number of investment options from 381 to 19, "eliminating redundant investment options with varying levels of expenses" and replacing the menu of duplicative investment options with "a limited menu of pre-screened, broadly diversified investment options." *Id.* Purdue's analysis showed that "reducing administrative and investment plan fees under the new structure for a plan of Purdue's size, would increase participant balances by an estimated *$3-4 million per year* which is then compounded over time." *Id.* (emphasis added).

108. Likewise, the California Institute of Technology (CalTech) TIAA-CREF DC Retirement Plan consolidated from multiple recordkeepers (TIAA-CREF and Fidelity) to a single recordkeeper (TIAA-CREF) effective January 1, 2010, with the assistance of an independent third party consultant, Mercer Investment Consulting. *Caltech Names TIAA-CREF Recordkeeper,* INSTITUTIONAL INVESTOR (Dec. 10, 2009).[22] In selecting a core set of investment options for the plan, CalTech eliminated over 100 Fidelity mutual fund options. Based on disclosures in the plan's Forms 5500 filed with the Department of Labor, between 2013 and 2015, CalTech negotiated over *$15 million* in revenue sharing rebates from

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[22] Available at http://www.institutionalinvestor.com/Article/2355324/Search/Caltech-Names-TIAA-CREF-Record-Keeper.html#/.WBn8Oy0rKpp.

TIAA-CREF, which was returned to the plan to benefit participants.

109. Extensive industry literature shows that these sponsors are not outliers, and that similarly situated fiduciaries who have also comprehensively reviewed their plans have been able to reduce recordkeeping and investment management fees, consolidate recordkeepers and investment options, leading to enhanced outcomes and retirement security for their plans' participants.

110. In connection with a plan redesign project at the University of Notre Dame, independent investment consultant Hewitt EnnisKnupp (n/k/a AonHewitt) issued a "403(b) Plan Redesign Working Paper" which set forth 403(b) fiduciary best practices taken in response to the IRS 403(b) regulations. Hewitt EnnisKnupp, *403(b) Plan Redesign Working Paper: University of Notre Dame* (Feb. 2014).[23] Hewitt noted that "[w]ith the issuance of new Internal Revenue Service regulations in 2008, there has been an accelerated evolution of the 403(b) marketplace into something that more closely resembles the private sector 401(k) market." *Id.* at 3.

111. Hewitt noted several areas of plan improvements. *First*, recordkeeper consolidation provided "many benefits to participants," including cost savings. Although the multiple-recordkeeper model had been common in the higher-education marketplace, "[e]xperience and research suggests that this type of administrative structure can be costly and confusing to faculty and staff." *Id.* at 4. "The multiple-recordkeeper model tends to divide participant assets

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[23] Available at https://workplacecontent.fidelity.com/bin-public/070_NB_PreLogin_Pages/documents/ND_403(b)%20Plan%20Redesign%20 White%20Paper.pdf.

into individual accounts held at separate recordkeepers resulting in costs that are meaningfully higher than under a single recordkeeper model." *Id.* at 5. Such "[e]xcess fees and misallocated costs are a potential threat to the financial security of many defined contribution plan participants." *Id.*

112. *Second*, Hewitt recommended that plans "unbundl[e]" investment management and administrative services, and to replace revenue sharing arrangements with "explicit, hard dollar administrative fee[s]." *Id.* Hewitt's "experience and research suggests that the transparency gained through an 'unbundled' administrative fee solution with little or no revenue sharing typically results in meaningful fee savings for participants." *Id.* at 6. An unbundled arrangement allows plan fiduciaries "to determine whether or not the internal administrative fee allocations used by the existing bundled recordkeepers is a true representation of the costs of these services." *Id.* An unbundled arrangement also provided opportunities to incorporate "'institutional' share classes of funds" into the investment lineup. *Id.*

113. Further, according to a 2013 survey of 403(b) plans, more than 90% of plans use a single recordkeeper to provide administrative and recordkeeping services to participants. *See* LIMRA Retirement Research, *403(b) Plan Sponsor Research* (2013).[24]

114. Annual surveys by Plan Sponsor Council of America found that in each year from 2010 through 2014, unlike the Northwestern Plans, the overwhelming majority of 403(b) plans—over 80%—have only a single recordkeeper, and provide an average

[24] Available at http://www.limra.com/uploadedFiles/limracom/LIMRA_Root/Secure_Retirement_Institute/News_Center/Reports/130329-01exec.pdf.

of 28 investment fund options.[25] An earlier PSCA survey of 403(b) plans found that as of 2009, 57% of 403(b) plan fiduciaries had made changes to their plans as a result of the new 403(b) regulations that became effective January 1, 2009.[26]

115. The majority of plans use a single recordkeeper because a "**multi-recordkeeper platform is inefficient**" and squanders the ability to leverage a plan's bargaining power. The Standard Retirement Services, Inc., *Fixing Your 403(b) Plan: Adopting a Best Practices Approach,* at 2 (Nov. 2009) (emphasis in original).[27] "By selecting a single recordkeeper, plan sponsors can enhance their purchasing power and negotiate lower, transparent investment fees for participants," while allowing participants to "benefit from a more manageable number of institutional-quality investment options to choose from." *Id.* Additional benefits of a single recordkeeper platform include simplifying personnel and payroll data feeds, reducing electronic fund transfers, and avoiding duplication of services when more than one recordkeeper is used.

116. AonHewitt, an independent investment consultant, similarly recognized that "403(b) plan sponsors

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[25] Each PSCA survey covers the year prior to the year indicated in the title. PSCA's 2015 Benchmarking Survey of 403(b) Plans, at 32, 65; PSCA's 2014 Benchmarking Survey of 403(b) Plans, at 32, 61; PSCA's 2013 Benchmarking Survey of 403(b) Plans, at 32, 61, 64; PSCA's 2013 Benchmarking Survey of 403(b) Plans, at 32, 61, 64; PSCA's 2012 Benchmarking Survey of 403(b) Plans, at 30, 61, 64; PSCA's 2012 Benchmarking Survey of 403(b) Plans, at 30, 61, 64; PSCA's 2011 Benchmarking Survey of 403(b) Plans, at 28, 55, 59.

[26] PSCA's 2010 Benchmarking Survey of 403(b) Plans at 45.

[27] Available at https://www.standard.com/pensions/publications/14883_1109.pdf.

can dramatically reduce participant-borne costs while improving employees' retirement readiness by" "[c]onsolidating recordkeepers," "[l]everaging aggregate plan size and scale to negotiate competitive pricing, and reducing the number of investment options and "utilizing an 'open architecture' investment menu[.]" AonHewitt, *How 403(b) Plans Are Wasting Nearly $10 Billion Annually, and What Can Be Done to Fix It* (Jan. 2016).[28]

117. Another independent investment consultant, Towers Watson, also recognized that using multiple recordkeepers makes it "difficult for employers to monitor available choices and provide ongoing oversight" while harming participants through "high investment and administrative costs" and a lack of guidance needed to achieve retirement readiness. Peter Grant and Gary Kilpatrick, *Higher Education's Response to a New Defined Contribution Environment*, TOWERS WATSON VIEWPOINTS, at 2 (2012).[29]

118. The recommendations of these independent, widely used investment consultants are buttressed by other industry literature supporting the fact that the use of a single recordkeeper provides reasonable fees. *See, e.g.,* Kristen Heinzinger, *Paring Down Providers: A 403(b) Sponsor's Experience,* PLANSPONSOR (Dec. 6, 2012) ("One advantage of consolidating to a single provider was an overall drop in administrative fees and expenses. Recordkeeping

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[28] Available at https://retirementandinvestmentblog.aon.com/getattachment/36ff81a4-db35-4bc0-aac1-1685d2a64078/How_403(b)_Plans_are_Wasting_Nearly_$10_Billion_Annually_Whitepaper_FINAL.pdf.aspx.

[29] Available at https://www.towerswatson.com/DownloadMedia.aspx?media=%7B08A2F366-14E3-4C52-BB78-8930F598FD26%7D.

basis points returned to the plan sponsors rather than to the vendor. All plan money aggregated into a single platform, and participants were able to save on fee structure. This also eliminated the complications and confusion of having three different recordkeepers.");[30] Paul B. Lasiter, *Single Provider, Multiple Choices*, BUSINESS OFFICER (Mar. 2010) (identifying, among other things, the key disadvantages of maintaining a multi-provider platform including the fact that it is "cumbersome and costly to continue overseeing multiple vendors.").[31]

119. Use of a single recordkeeper is also less confusing to participants and eliminates excessive, overlapping recordkeeping fees. *Vendor Consolidation in Higher Education: Getting More from Less*, PLAN SPONSOR (July 29, 2010) (recognizing the following benefits, among others: "The plan participant experience is better" because "employees are benefiting from less confusion as a result of fewer vendors in the mix"; "Administrative burden is lessened" by "bringing new efficiencies to the payroll"; and "Costs can be reduced" because "[w]ith a reduced number of vendors in the equation, plan sponsors are better able to negotiate fees" and many are "reporting lower overall cost resulting in an improved cost-per-participant ratio").[32]

120. At its first ever meeting on December 9, 2011, Straightline, the consultant for the Plans at

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[30] Available at http://www.plansponsor.com/paring-down-providers-a-403b-sponsors-experience/?fullstory=true.

[31] Available at http://www.nacubo.org/Business_Officer_Magazine/Magazine_Archives/March_2010/Single_Provider_Multiple_Choices.html.

[32] Available at http://www.plansponsor.com/vendor-consolidation-in-higher-education/?fullstory=true.

that time, stated that recordkeeper "[c]onsolidation is inevitable," and identified the fundamental benefits of consolidating the Plans' recordkeepers from a multivendor arrangement to a single recordkeeper or lead recordkeeper arrangement. The benefits identified to NURIC included "cost savings" for the Plans and their participants as well as "simplified compliance" for the fiduciaries. Ex. 7 at 224.

121. Northwestern's representatives have repeatedly agreed that recordkeeper consolidation results in cost savings for participants. *E.g.*, Ex. 8, Fish Dep. at 162:5-24; Ex. 2, Beemer Dep. at 233:7-16; Ex. 4, McLean Dep. 172:16-20.

DEFENDANTS BREACHED THEIR FIDUCIARY DUTIES AND COMMITTED PROHIBITED TRANSACTIONS

122. Defendants' longstanding retention of two recordkeepers and hundreds of their proprietary funds—which the recordkeepers have required to be included in the Plans—while excluding superior low-cost alternatives from other managers, demonstrates that, in contrast with the comprehensive plan reviews conducted by the similarly situated fiduciaries described above, Defendants failed to adequately engage in a similar analysis. Had Defendants conducted such a review of the Plans, Defendants would not have allowed the Plans to continue to pay excessive administrative fees; would not have maintained an inefficient two-recordkeeper structure; would not have continued to include well over hundreds of investment options in each of the Plans, including duplicative funds in numerous investment styles and higher-cost retail share classes for which identical lower-cost versions of the same funds were available; and would not have retained investment options which had a sustained track record of under-

performance. This follows because a prudent process would have produced a different outcome.

I. The Plans' hundreds of investment options and multiple recordkeepers.

123. Prior to October 2016, Defendants included over *240* investment options in the Retirement Plan and over *180* investment options in the Voluntary Savings Plan. For both Plans these options included mutual funds, insurance pooled separate accounts, and insurance company fixed and variable annuity products. The mutual fund options included *retail* share class mutual funds, despite the massive size of the Plans. These retail share class mutual funds are designed for small individual investors and are identical in every respect to institutional share class funds, except for much higher fees.

124. The investment options were and are offered by TIAA-CREF and the Fidelity Management Trust Company ("Fidelity"). Defendants select investment options into which participants' investments are directed, including those investment options that are removed from the Retirement Plan and the Voluntary Savings Plan.

125. Under the terms of the Retirement Plan, participants are eligible to contribute a discretionary amount of their annual compensation to the Plan and Northwestern makes a matching contribution. Under the terms of the Voluntary Savings Plan, participants may likewise contribute a discretionary amount of their annual compensation to the Plan, but Northwestern makes no matching contribution.

126. As of December 31, 2015, Defendants offered a total of 242 investment options to Retirement Plan participants. In particular, the Retirement Plan offered 39 TIAA-CREF investments and 203 Fidelity

investments (including both Fidelity funds and third-party funds offered through Fidelity).

127. These investments are designated by Defendants as available investment alternatives offered under the Retirement Plan.

128. As of December 31, 2015, Defendants offered a total of 187 investment options to Voluntary Savings Plan participants. In particular, the Voluntary Savings Plan offered 39 TIAA-CREF investments and 148 Fidelity investments (including both Fidelity funds and third-party funds offered through Fidelity).

129. These investments are designated by Defendants as available investment alternatives offered under the Voluntary Savings Plan.

130. The TIAA Traditional Annuity offered in both Plans is a fixed annuity contract that returns a contractually specified minimum interest rate. Assets invested in the TIAA Traditional Annuity are held in the general account of TIAA and are dependent on the claims-paying ability of TIAA. The TIAA Traditional Annuity has severe restrictions and penalties for withdrawal if participants wish to change their investments in the Plans.

131. Both Plans include the CREF Stock Account, CREF Global Equities Account, CREF Equity Index Account, CREF Growth Account, CREF Social Choice Account, CREF Money Market Account, CREF Inflation-Linked Bond Account, and CREF Bond Market Account, which are variable annuities that invest in underlying securities for a given investment style. The value of the Plans' investment in these variable annuities changes over time based on investment performance and the expenses of the accounts.

132. The TIAA Real Estate Account is an insurance separate account maintained by TIAA. An insurance separate account is an investment vehicle that aggregates assets from more than one retirement plan for a given investment strategy, but those assets are segregated from the insurance company's general account assets.

133. The remaining TIAA-CREF funds are mutual funds. The TIAA-CREF mutual funds charge varying amounts for investment management, but also charge distribution, marketing, and other expenses, depending on the type of investment and share class.

134. The Fidelity investment options offered to Plan participants are primarily mutual funds that charge varying amounts for investment management and other expenses, depending on the type of investment and share class.

135. As of December 31, 2015, of the Retirement Plan's $2.34 billion in net assets, TIAA-CREF funds accounted for nearly $1.8 billion and Fidelity funds accounted for nearly $548 million. As of December 31, 2015, of the Voluntary Savings Plan's $530 million in net assets, TIAA-CREF funds accounted for over $360 million and Fidelity funds accounted for over $160 million.

136. In 2016, Defendants eliminated hundreds of mutual funds provided to the Plans' participants and selected a tiered structure comprised of a limited core set of 32 investment options.[33]

137. Tier 1 consists of Blackrock target date mutual funds. Target date funds automatically rebalance their portfolios to become more conservative as the participant gets closer to retirement.

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[33] The Plans' target date funds are counted as a single investment option.

The "target date" refers to the participant's expected retirement date, and is often part of the name for the fund. For instance, "2030" target date funds are designed for individuals who intend to retire in the year 2030.

138. Tier 2 includes only five index funds comprising various asset classes and investment styles.

139. Tier 3 includes 26 actively managed investment options, which include mutual funds, variable annuities, and an insurance separate account.

140. Tier 4 consists of a self-directed brokerage window.

141. The Plans' participants could invest in the options offered in Tiers 1-3 beginning July 27, 2016, and in the Tier 4 self-directed brokerage window as of September 16, 2016. Plan participants were permitted to invest in options available under the previous structure until October 21, 2016.

142. As set forth above, Northwestern representatives have agreed that having hundreds of investment options in the Plans caused participants to pay higher fees and expenses than they would have paid had the number of investment options been reduced. *E.g.*, Ex. 2, Beemer Dep. at 314:2-316:20. Moreover, fiduciaries to the Plans have admitted that they were long aware of the fact that having hundreds of investment options increases fees paid by participants. *Id*.

143. Fiduciaries to the Plans have also conceded that it was not possible to effectively manage the hundreds of investment options that were in the Plans prior to 2016, and that they were aware prior to NURIC's formation in 2011 that the number of investment options in the Plans needed to be reduced in order to meet their fiduciary obligations. *E.g.*, Ex.

2, Beemer Dep. at 313:23-314:1; 314:3-5; Ex. 8, Fish Dep. at 119:19-120:3; 165:7-23. Nevertheless, Defendants allowed hundreds of investment options to remain in the Plans until 2016, which caused participants to pay significantly higher fees than would have been required had the Plans' investment options been reduced earlier. Ex. 2, Beemer Dep. at 314:2-316:20; Ex. 3, Braeutigam Dep. at 96:22-97:17.

II. Defendants improperly allowed TIAA-CREF to require the inclusion of its investment products in the Plans and improperly allowed TIAA to require it to provide recordkeeping for its proprietary options.

144. ERISA requires fiduciaries to independently evaluate the prudence of each investment option offered in a defined contribution plan, *DiFelice*, 497 F.3d at 423, and to remove imprudent investments no matter how long they have been in a plan, *Tibble*, 135 S. Ct. at 1828-29.

145. As noted, TIAA-CREF offered its products and services strictly on a bundled basis. If a plan offers the TIAA Traditional Annuity, TIAA-CREF required that the plan also offer its flagship CREF Stock Account and Money Market Account, and to also use TIAA as recordkeeper for its proprietary products. By agreeing to TIAA's mandate that its recordkeeping services had to be linked to including its funds in the Plans, Defendants promoted TIAA's financial interests at the expense of participants and drove excessive and uncapped revenue to TIAA's recordkeeping arm for years.

146. Because Northwestern lacked an adequate fiduciary process to review the Plans' investments, it was not until August 27, 2016 that Northwestern representatives discovered that this lock-in arrange-

ment was in place. TIAA_NORTHWESTERN-00040924, attached hereto as Exhibit 12.

147. Defendants could have avoided the additional expense associated with a lock-in arrangement. As TIAA's corporate representative has confirmed, Retirement Choice and Retirement Choice Plus annuity contracts allow plan sponsors and plan fiduciaries, not TIAA, to determine whether to include the CREF Stock Account, CREF Money Market Fund, and the TIAA Traditional Annuity as plan investments. Ex. 7, Zanussi Dep. at 170:1-171:12. These options were available to Northwestern, and could have been included in the Plans. *Id.* at 178:3-12. Yet Northwestern never elected to use Retirement Choice or Retirement Choice Plus annuity contracts, and instead allowed the Plans and their participants to remain locked in to contracts with TIAA that prevented the removal of the CREF Stock Account, CREF Money Market Fund, and the TIAA Traditional Annuity regardless of whether they were prudent investments.

148. By allowing the Plans to enter such a bundled arrangement with TIAA-CREF, Northwestern agreed to lock its employees into funds which Northwestern did not analyze. It can never be prudent to lock in a fund in a plan for the future no matter what its expenses or its performance. To do so creates a structure which at the outset, and on an ongoing basis, violates ERISA's requirement that fiduciaries must independently monitor investment options on an ongoing basis and remove those that are imprudent. *Tibble*, 135 S. Ct. at 1828-29. Defendants thus failed to discharge their duties to independently evaluate whether each investment option was prudent for the Plans; whether the use of TIAA as a plan recordkeeper was prudent, reasonably priced, and in

the exclusive interest of participants; and whether it was prudent to include and retain the CREF Stock and Money Market accounts and the TIAA Traditional Annuity in the Plans. Instead of acting solely in the interest of participants, Defendants allowed TIAA's financial interest to dictate the Plans' investment selections and recordkeeping arrangement. Because Defendants allowed CREF Stock to be locked into the Plans, Defendants could not satisfy their duties to evaluate the option for inclusion and retention in the Plans, whether it was prudent at the time of inclusion and whether it should be removed if imprudent. As a result of Defendants' breach in allowing CREF Stock to be retained in the Plans because TIAA-CREF demanded it and not based on an independent and ongoing assessment of the merits of the option, the Plans suffered massive losses compared to prudent alternatives, as discussed in more detail below. *See infra* ¶¶211-233.

149. As noted above, the Plans offer the TIAA Traditional Annuity. This option is a fixed annuity contract that returns a contractually specified minimum interest rate. An example of the restrictions and penalties for withdrawal imposed by this Annuity include a 2.5% surrender charge if a participant withdraws his or her investment in a single lump sum within 120 days of termination of employment. Participants who wish to withdraw their savings without this 2.5% penalty can only do so by spreading their withdrawal over a *ten-year period*.

150. The Plans include TIAA-CREF's proprietary funds, including the CREF Stock Account, CREF Global Equities Account, CREF Equity Index Account, CREF Growth Account, CREF Social Choice Account, CREF Money Market Account, CREF Inflation-Linked Bond Account, and CREF Bond Market

Account, which are variable annuities with four layers of expenses that invest in underlying securities for a given investment style.

151. The expense ratio of the CREF variable annuity accounts is made up of multiple layers of expense charges consisting of the following:

a. "administrative expense" charge (24 bps);[34]

b. "distribution expense" charge (9.5 bps);

c. "mortality and expense risk" charge (0.5 bps); and

d. "investment advisory expense" charge (ranging from 4 to 12.5 bps).

152. Two of these four layers of fees charged on the CREF variable annuity accounts, including the CREF Stock Account, are unreasonable for the actual services provided by TIAA-CREF to the Plan's participants, and the other two layers of fees pay for services that provide *no* benefit to the Plan's participants.

a. Administrative expenses (or recordkeeping fees): The administrative fee assessed on each variable annuity option is charged as a percentage of assets, rather than a flat fee per participant. As described above, recordkeeping costs depend on the number of participant accounts that the recordkeeper will service in the plan rather than the size of assets because a higher account balance costs no more to track than a lower account balance. As a result, as the growth in the Plans' assets outpaced the growth in participants, the fees paid to TIAA-CREF likewise increased even though the services

[34] Expenses are stated as of May 1, 2014.

provided did not increase at the same rate, resulting in further unreasonable compensation.

b. Distribution expenses (or 12b-1 fees): Distribution expenses are charged for services performed for marketing and advertising of the fund to potential investors. However, in a retirement plan, the funds are selected by the sponsor. Thus, marketing and distribution services provide no benefit to plan participants and are wholly unnecessary. Being charged for such wholly useless expenses causes a loss of retirement assets to participants with no benefit.

c. Mortality and expense risk charges: Some annuity or insurance providers charge mortality and expense risk charges to compensate the insurance company for the risk it assumes when providing periodic income or payments to the investor over her lifetime, which will vary depending on the value of the underlying investments. However, in the CREF variable annuities in the Plans, the participant does not make the choice of whether to take the account's value in a lump sum or an annuity until retirement. Thus, this charge only benefits a participant if she elects at the time of retirement to annuitize her holdings in the account to provide for periodic income. Prior to annuitizing her account, the participant derives no benefit for paying such a charge, year after year, and TIAA-CREF provides no actual services or incurs any risk to justify the fee until a decision is made at retirement to convert the value of the lump sum to an annuity. Moreover, most participants in retirement plans recordkept by TIAA-CREF do not elect to annuitize their holdings in their variable annuity accounts upon retirement. Yet, *all* participants pay these fees for many years regardless of whether they annuitize their variable annuity account.

d. Investment advisory expense charge (or investment management fees): It is a fundamentally established principle of investment management that larger asset size enables the asset holder to obtain lower investment management fees as a percentage of assets. Fund managers institute breakpoints, whereby the investment management fee is reduced, as asset size goes up, at pre-specified asset thresholds to pass along economies of scale to the investor. For example, if $5 million is a breakpoint, one fee, based on a percentage of assets, will be charged on the first $5 million, and a lesser percentage will be charged on the next portion of the assets, or on all assets. A large investor will therefore be charged a lower fee, on a percentage of assets, than a smaller investor to recognize the economies of scale generated from the higher asset levels. Jumbo plans, such as the Northwestern Plans, can command extremely low fees. Despite this recognized principle, TIAA-CREF has not instituted *any* breakpoints whatsoever on its investment management fees to pass along economies of scale experienced by jumbo plan investors. The Plans' fiduciaries did not obtain the lower investment management fees that come with the Plans' enormous asset size. As a result, the Plans, with billions of dollars invested in CREF variable annuities, pay the same asset-based fee as the smallest clients with a tiny fraction of their total assets, resulting in a windfall to TIAA-CREF and excessive fees paid by Northwestern employees and retirees. The

Plans subsidized these efforts for years, often at a loss—compounding their conflict and breaching their duty to participants under ERISA.

153. The excessiveness of this investment management fee is even more egregious because of the way critics have documented how CREF "manages" the CREF Stock Account by investing nearly two out of every three dollars in companies held by its benchmark index, the Russell 3000 Index. *See supra* ¶86.

154. The TIAA Real Estate Account is an insurance company separate account maintained by TIAA. Similar to the CREF variable annuity accounts, the expense ratio of the TIAA Real Estate Account is made up of the same four layers of excessive expenses detailed above, and even adds a fifth layer for a so-called "liquidity guarantee." As of May 1, 2013, these charges consisted of the following:

a. "administrative expense" charge (26.5 bps);

b. "distribution expense" charge (8 bps);

c. "mortality and expense risk" charge (0.5 bps);

d. "liquidity guarantee" (18 bps); and

e. "investment management expense" charge (36.5 bps).

155. The 18 bps "liquidity guarantee" expense of the TIAA Real Estate Account is yet another excessive fee that is not charged by better performing and lower cost mutual funds such as the Vanguard REIT Index (Inst), which has a *total* expense ratio of 8 bps. *See infra* ¶¶210-238.

156. As noted, the TIAA-CREF mutual funds in the Plans charge varying amounts for investment management, but also charge distribution, marketing, and other expenses, depending on the type of

investment and share class. Thus, the Plans' participants are paying for marketing costs of funds which their employer has placed in their retirement plan when such marketing costs provide no benefit to them. Other mutual funds that were available to the Plans do not include such marketing costs.

III. Defendants caused the Plans to pay excessive administrative and recordkeeping fees.

157. As set forth above, the market for defined contribution recordkeeping services is highly competitive. As Northwestern's representatives have conceded, there are numerous recordkeepers in the marketplace who are equally capable of providing a high level of service to large defined contribution plans like the Plans and will readily respond to a request for proposal. *E.g.*, Ex. 4, McLean Dep. at 198:11-19. These recordkeepers primarily differentiate themselves based on price and vigorously compete for business by offering the best price.

158. Because market rates for recordkeeping services have declined in recent years and because the only way to reliably determine the true market rate for a complex jumbo plan is to obtain an actual fee quote comparison, prudent fiduciaries of jumbo defined contribution plans put their plans' recordkeeping and administrative services out for competitive bidding at regular intervals of approximately three years.

159. As detailed above, extensive industry literature and the experience of similarly situated fiduciaries has shown that multiple recordkeeper platforms are inefficient and result in excessive fees, while the use of a single recordkeeper offers many benefits such as leveraging the plan's participant base to obtain economies of scale to ensure that participants pay only

reasonable recordkeeping fees, while also simplifying personnel and payroll data feeds, reducing electronic fund transfers, and avoiding duplication of services when more than one recordkeeper is used. Instead of leveraging the size of the participant base to take advantage of economies of scale, using multiple recordkeepers eliminates a plan's leverage. Rather than obtaining pricing based on a 30,000-participant plan from one recordkeeper, Defendants spread recordkeeping of participants among two separate recordkeepers, who pushed each of their own products on the Plans. This took away the Plans' ability to obtain favorable pricing and resulted in the Plans including hundreds of investment options that Defendants never reviewed.

160. Northwestern's representatives and consultants agree that multiple recordkeeper platforms are more expensive and require participants to incur greater costs than single recordkeeper platforms. Ex. 8, Fish Dep. at 184:14-190:16; Ex. 4, McLean Dep. at 173:7-176:16.

161. Despite the long-recognized benefits of a single recordkeeper for a defined contribution plan, Defendants continue to contract with two separate recordkeepers (TIAA-CREF and Fidelity) for the Plans. Indeed, Northwestern's representatives have stated that NURIC has selected Fidelity to serve as the Plans' lead recordkeeper effective July 1, 2018 at the earliest. Ex. 8, Fish Dep. at 159:16-19. In addition to the uncapped revenue sharing that has been received as payment for these administrative services, the inefficient and costly structure of multiple recordkeepers has caused both Plans' participants to pay excessive and unreasonable fees for recordkeeping and administrative services.

162. The Retirement and the Voluntary Savings Plans' recordkeepers receive compensation for providing such services through per-participant fees and revenue sharing payments from the Plans' investments.

163. Upon information and belief and industry experts, the amounts of revenue sharing kicked back to the TIAA-CREF recordkeeping entity for the Plans' TIAA-CREF investments are set forth below.

TIAA-CREF Investment	**Revenue Share**
CREF variable annuity contracts	24 bps
Premier share class of TIAA-CREF mutual funds	15 bps
Retirement share class of TIAA-CREF mutual funds	25 bps
TIAA Real Estate Account	24-26.5 bps
TIAA Traditional Annuity	15 bps

164. Upon information and belief, Fidelity was and/or is compensated for recordkeeping services based on internal revenue sharing it receives from using higher-cost share classes of Fidelity's mutual funds as opposed to the institutional classes readily available to jumbo plans such as the Plans.

165. In addition, TIAA-CREF and Fidelity also receive and/or received additional indirect compensation, including float, revenue derived from securities lending, distribution fees, mortality and expense charges, surrender charges, spread, and redemption fees.

166. Based on the Plans' features, the nature of the administrative services provided by the Plans' recordkeepers, the number of participants in the

Plans combined (approximately 30,000), and the recordkeeping market, a reasonable recordkeeping fee for the Plans would be approximately $1,050,000 in the aggregate for both Plans combined (or a flat fee based on $35 per participant). Even if Defendants had negotiated a reasonable recordkeeping fee for the Retirement and Voluntary Savings Plans separately, the Plans would have paid dramatically less for recordkeeping services.

167. Based on schedules regarding service provider compensation in the Retirement Plan's Forms 5500 filed with the Department of Labor, and upon information regarding the rate of internal revenue share allocated to each of the Plans' recordkeepers from their proprietary investment options, the Retirement Plan paid between $3.3 and $4.1 million (or approximately $153 to $213 per participant) *per year* from 2010 to 2015, over *500%* higher than a reasonable fee for these services, resulting in millions of dollars in excessive recordkeeping fees each year.

168. Based on schedules regarding service provider compensation in the Voluntary Savings Plan's Forms 5500 filed with the Department of Labor, and upon information regarding the rate of internal revenue share allocated to each of the Plans' recordkeepers from their proprietary investment options, the Voluntary Savings Plan paid between $660,000 and $900,000 (or approximately $54 to $87 per participant) per year from 2010 to 2015, over *149%* higher than a reasonable fee for these services, resulting in millions of dollars in excessive recordkeeping fees each year.

169. Defendants failed to conduct a competitive bidding process for the Plans' recordkeeping services prior to August 2015. This fact is confirmed by the testimony of Northwestern representatives, who

have been unable to identify any recordkeeping bids that have been obtained from any provider of recordkeeping services before 2015, and have confirmed that no bids were submitted to NURIC prior to that date. *E.g.*, Ex. 2, Beemer Dep. at 341:10-22.

170. The bidding process Defendants performed for the Plans' recordkeeping services was flawed because the bidding was limited to the Plans' two incumbent recordkeepeers: Fidelity and TIAA. As Northwestern's representatives have conceded, Defendants failed to conduct a full request for proposals, and did not obtain any bids from the non-incumbent recordkeeping providers that Defendants' consultant, Straightline, expressly identified as suitable candidates. Ex. 2, Beemer Dep. at 266:6-269:4; Ex. 3, Braeutigam Dep. at 36:23-39:17; Ex. 5, Stafford Dep. at 192:22-193:5; Ex. 4, McLean Dep. at 197:6-199:3.

171. A truly competitive bidding process for recordkeeping services—one in which providers other than the two incumbents were allowed to bid—would have produced a reasonable recordkeeping fee. This competitive bidding process would have enabled Defendants to select a recordkeeper that charged reasonable fees, negotiate a reduction in recordkeeping fees, and rebate the full amount of excess expenses paid by participants for recordkeeping services.

172. Aside from the failures to monitor the amount of revenue sharing payments and to solicit competitive bids, Defendants also failed to adequately negotiate rebates of excessive fee payments to TIAA-CREF and Fidelity. As a specific example, because the multi-billion dollar plans paid the same percentage of asset-based fees as much smaller plans that used TIAA-CREF's products and services, Defendants

could have demanded "plan pricing" rebates from TIAA-CREF based on the Plans' economies of scale. Just as with investment management fees, the Plans' size would have enabled Defendants to command a much lower fee. Defendants could have also demanded and obtained similar rebates of all excessive fee payments from Fidelity. Had Defendants adequately negotiated for these rebates, the Plans' recordkeeping fees would have been reduced, avoiding additional losses of retirement savings.

173. The impact of excessive fees on employees' and retirees' retirement assets is dramatic, as the U.S. Department of Labor has found. U.S. Dep't of Labor, *A Look at 401(k) Plan Fees*, at 1-2 (Aug. 2013) (finding that a 1% higher level of fees over a 35-year period makes a 28% difference in retirement assets at the end of a participant's career).[35]

174. Defendants failed to prudently monitor and control the compensation paid for recordkeeping and administrative services, particularly the asset-based revenue sharing received by TIAA-CREF and Fidelity. Defendants did not know the amount of the recordkeeping fees that the Plans were paying, did not know the amount of the asset-based revenue sharing payments that were being made to the Plans' recordkeepers, and did not attempt to monitor these fees or obtain competitive bids for recordkeeping services. *E.g.*, Ex. 4, McLean Dep. at 30:16-20; 104:17-19; 105:8-9; Ex. 5, Stafford Dep. at 111:23-112:8. Therefore, Defendants caused the participants in both Plans to pay unreasonable expenses for administration. Had Defendants ensured that participants only paid reasonable fees for administrative and record-

[35] Available at http://www.dol.gov/ebsa/pdf/401kfeesemployee.pdf.

keeping services, Retirement and Voluntary Savings Plan participants would not have lost approximately $30 million of their retirement savings.[36]

IV. Defendant caused the Plans to pay wholly unnecessary and excessive fees by using higher-cost share classes of mutual funds instead of identical versions of the same funds in lower-cost share classes.

175. Jumbo retirement plans have massive bargaining power to negotiate low fees for investment management services. If a plan invests in mutual funds, fiduciaries must review and consider the available share classes. Because the only difference between the various share classes is fees, selecting a higher-cost share class results in the plan paying wholly unnecessary fees. Accordingly, absent some compelling reason to opt for the higher-cost version, prudent fiduciaries will select the lowest-cost share class available to the plan. As a prominent legal counsel to defined contribution fiduciaries explained:

> The fiduciaries also must consider the size and purchasing power of their plan and select the share classes (or alternative investments) that a fiduciary who is knowledgeable about such matters would select under the circumstances. In other words, the "prevailing circumstances"—such as the size of the plan—are a part of a prudent decisionmaking process. The failure to understand the concepts and to know about the alternatives could be a costly fiduciary breach.

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[36] The Plans' losses have been brought forward to the present value using the investment returns of the S&P 500 index to compensate participants who have not been reimbursed for their losses. This is because the excessive fees participants paid would have remained in the Plans' investments growing with the market.

Fred Reish, *Classifying Mutual Funds*, PLANSPONSOR (Jan. 2011).[37]

176. Given that defined contribution plan fiduciaries are held to the standard of a knowledgeable financial expert, a fiduciary should know the basic principle that asset size matters, and must review a fund's prospectus to determine if a lower-cost chare class of the same fund is available, to avoid saddling the plan with unnecessary fees.

177. Jumbo investors like the Plans can obtain share classes with far lower costs than retail mutual fund shares. In addition, insurance company pooled separate accounts are available that can significantly reduce investment fees charged on mutual fund investments in defined contribution plans.

178. Moreover, lower-cost share classes of mutual fund investment options were readily available to the Plans. Institutional share classes sometimes have a minimum investment threshold to qualify for the institutional rate. However,

> For large 401(k) plans with over a billion dollars in total assets . . . mutual funds will often waive an investment minimum for institutional share classes. It is also common for investment advisors representing large 401(k) plans to call mutual funds and request waivers of the investment minimums so as to secure the institutional shares.

Tibble v. Edison Int'l, No. 07-5359, 2010 U.S. Dist. LEXIS 69119, at *27-28 (C.D. Cal. July 8, 2010), *aff'd* 729 F.3d 1110 (9th Cir. 2013).

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[37] Available at http://www.plansponsor.com/MagazineArticle.aspx?id=6442476537.

179. As further support of the routine waiver of investment minimums for large institutional investors, fiduciaries of other defined contribution plans have successfully negotiated on behalf of their plans less expensive institutional share classes of TIAA-CREF and Fidelity mutual fund options despite not meeting the minimum investment thresholds.

180. Therefore, Defendants knew or should have known that investment providers would have allowed the Plans to provide lower-cost share classes to participants if Defendants had asked.

181. Defendants selected and continue to retain investment options in the Retirement and Voluntary Savings Plans with far higher costs than were and are available for the Plans based on their size. This includes Defendants selecting and continuing to offer far higher-cost share classes even though lower-cost share classes of the *exact same mutual funds* were available. The following table sets forth each higher-cost mutual fund share class that was included in the Plans during the proposed class period for which a significantly lower-cost, but otherwise identical, share class of the same mutual fund was available. The expense ratios identified for the Plans' investment option and the lower-cost share class alternative are based on the earliest date during the proposed class period that the higher-cost fund was included in the Plans:

Plan Mutual Fund	Plan Fee	Identical Lower-Cost Mutual Fund	Identical Lower-Cost Mutual Fund Fee	Plan's Excess Cost
Calvert New Vision Small Cap (A) (CNVAX)	189 bps	Calvert New Vision Small Cap (I) (CVSMX)	92 bps	105.43%
Fidelity Large Cap Growth (FSLGX)	80 bps	Fidelity Advisor Large Cap Growth (Inst) (FLNOX)	68 bps	17.65%
Fidelity Mid Cap Growth (FSMGX)	67 bps	Fidelity Advisor Mid Cap Growth (Inst) (FGCOX)	59 bps	13.56%
Fidelity Spartan 500 Index (Inv) (FSMKX)	10 bps	Fidelity Spartan 500 Index (Adv) (FSMAX)	7 bps	42.86%
Fidelity Stock Selector Small Cap (FDSCX)	75 bps	Fidelity Advisor Stock Selector Small Cap (I) (FCDIX)	62 bps	20.97%
TIAA-CREF Lifecycle 2010 (Retire) (TCLEX)	47 bps	TIAA-CREF Lifecycle 2010 (Inst) (TCTIX)	22 bps	113.64%
TIAA-CREF Lifecycle 2015 (Retire) (TCLIX)	46 bps	TIAA-CREF Lifecycle 2015 (Inst) (TCNIX)	42 bps	9.52%

Plan Mutual Fund	Plan Fee	Identical Lower-Cost Mutual Fund	Identical Lower-Cost Mutual Fund Fee	Plan's Excess Cost
TIAA-CREF Lifecycle 2020 (Retire) (TCLTX)	45 bps	TIAA-CREF Lifecycle 2020 (Inst) (TCWIX)	42 bps	7.14%
TIAA-CREF Lifecycle 2025 (Retire) (TCLFX)	44 bps	TIAA-CREF Lifecycle 2025 (Inst) (TCYIX)	42 bps	4.76%
TIAA-CREF Lifecycle 2030 (Retire) (TCLNX)	44 bps	TIAA-CREF Lifecycle 2030 (Inst) (TCRIX)	19 bps	131.58%
TIAA-CREF Lifecycle 2035 (Retire) (TCLRX)	44 bps	TIAA-CREF Lifecycle 2035 (Inst) (TCIIX)	19 bps	131.58%
TIAA-CREF Lifecycle 2040 (Retire) (TCLOX)	44 bps	TIAA-CREF Lifecycle 2040 (Inst) (TCOIX)	19 bps	131.58%
TIAA-CREF Lifecycle 2045 (Retire) (TTFRX)	44 bps	TIAA-CREF Lifecycle 2045 (Inst) (TTFIX)	19 bps	131.58%
TIAA-CREF Lifecycle 2050 (Retire) (TLFRX)	44 bps	TIAA-CREF Lifecycle 2050 (Inst) (TFTIX)	19 bps	131.58%
TIAA-CREF Lifecycle Retirement Income (Retire) (TLIRX)	65 bps	TIAA-CREF Lifecycle Retirement Income (Inst) (TLRIX)	40 bps	62.50%

Plan Mutual Fund	Plan Fee	Identical Lower-Cost Mutual Fund	Identical Lower-Cost Mutual Fund Fee	Plan's Excess Cost
TIAA-CREF Managed Allocation (Retire) (TITRX)	71 bps	TIAA-CREF Managed Allocation (Inst) (TIMIX)	46 bps	54.35%
TIAA-CREF Small-Cap Blend Index (Retire) (TRBIX)	35 bps	TIAA-CREF Small-Cap Blend Index (Inst) (TISBX)	10 bps	250.00%
TIAA-CREF Small-Cap Equity (Retire) (TRSEX)	78 bps	TIAA-CREF Small-Cap Equity (Inst) (TISEX)	53 bps	47.17%
TIAA-CREF Social Choice Equity (Retire) (TRSCX)	47 bps	TIAA-CREF Social Choice Equity (Inst) (TISCX)	22 bps	113.64%
Vanguard Growth Index (Inv) (VIGRX)	28 bps	Vanguard Growth Index (Inst) (VIGIX)	8 bps	250.00%
Vanguard Mid Cap Index (Inv) (VIMSX)	27 bps	Vanguard Mid Cap Index (Inst) (VMCIX)	8 bps	237.50%
Vanguard PRIMECAP (Inv) (VPMCX)	49 bps	Vanguard PRIMECAP (Adm) (VPMAX)	37 bps	32.43%

Plan Mutual Fund	Plan Fee	Identical Lower-Cost Mutual Fund	Identical Lower-Cost Mutual Fund Fee	Plan's Excess Cost
Vanguard Small Cap Index (Inv) (NAESX)	28 bps	Vanguard Small Cap Index (Inst) (VSCIX)	8 bps	250.00%
Vanguard Value Index (Inv) (VIVAX)	26 bps	Vanguard Value Index (Inst) (VIVIX)	8 bps	225.00%
Vanguard Windsor (Inv) (VWNDX)	33 bps	Vanguard Windsor (Adm) (VWNEX)	20 bps	65.00%
Calvert Balanced Portfolio (A) (CSIFX)	123 bps	Calvert Balanced Portfolio (I) (CBAIX)	72 bps	70.83%
Calvert Capital Accumulation (A) (CCAFX)	176 bps	Calvert Capital Accumulation (I) (CCPIX)	86 bps	104.65%
Calvert International Equity (A) (CWVGX)	180 bps	Calvert International Equity (I) (CWVIX)	106 bps	69.81%
Calvert Small Cap (A) (CCVAX)	169 bps	Calvert Small Cap (I) (CSVIX)	92 bps	83.70%
Domini Social Equity (Inv) (DSEFX)	123 bps	Domini Social Equity (Inst) (DIEQX)	75 bps	64.00%

Plan Mutual Fund	Plan Fee	Identical Lower-Cost Mutual Fund	Identical Lower-Cost Mutual Fund Fee	Plan's Excess Cost
Fidelity 500 Index (Inv) (FUSEX)	10 bps	Fidelity 500 Index (Prem) (FUSVX)	7 bps	42.86%
Fidelity Balanced (FBALX)	61 bps	Fidelity Balanced (K) (FBAKX)	47 bps	29.79%
Fidelity Blue Chip Growth (FBGRX)	93 bps	Fidelity Blue Chip Growth (K) (FBGKX)	74 bps	25.68%
Fidelity Capital Appreciation (FDCAX)	86 bps	Fidelity Capital Appreciation (K) (FCAKX)	68 bps	26.47%
Fidelity Contrafund (FCNTX)	91 bps	Fidelity Contrafund (K) (FCNKX)	78 bps	16.67%
Fidelity Disciplined Equity (FDEQX)	68 bps	Fidelity Disciplined Equity (K) (FDEKX)	51 bps	33.33%
Fidelity Diversified International (FDIVX)	96 bps	Fidelity Diversified International (K) (FDIKX)	77 bps	24.68%
Fidelity Dividend Growth (FDGFX)	92 bps	Fidelity Dividend Growth (K) (FDGKX)	71 bps	29.58%

Plan Mutual Fund	Plan Fee	Identical Lower-Cost Mutual Fund	Identical Lower-Cost Mutual Fund Fee	Plan's Excess Cost
Fidelity Equity Income II (FEQTX)	69 bps	Fidelity Equity Income II (K) (FETKX)	54 bps	27.78%
Fidelity Equity-Income (FEQIX)	74 bps	Fidelity Equity-Income (K) (FEIKX)	54 bps	37.04%
Fidelity Export & Multinational (FEXPX)	84 bps	Fidelity Export & Multinational K (FEXKX)	64 bps	31.25%
Fidelity Freedom 2000 (FFFBX)	51 bps	Fidelity Freedom K 2000 (FFKBX)	43 bps	18.60%
Fidelity Freedom 2005 (FFFVX)	64 bps	Fidelity Freedom K 2005 (FFKVX)	52 bps	23.08%
Fidelity Freedom 2010 (FFFCX)	67 bps	Fidelity Freedom K 2010 (FFKCX)	53 bps	26.42%
Fidelity Freedom 2015 (FFVFX)	68 bps	Fidelity Freedom K 2015 (FKVFX)	54 bps	25.93%
Fidelity Freedom 2020 (FFFDX)	74 bps	Fidelity Freedom K 2020 (FFKDX)	57 bps	29.82%

Plan Mutual Fund	Plan Fee	Identical Lower-Cost Mutual Fund	Identical Lower-Cost Mutual Fund Fee	Plan's Excess Cost
Fidelity Freedom 2025 (FFTWX)	76 bps	Fidelity Freedom K 2025 (FKTWX)	59 bps	28.81%
Fidelity Freedom 2030 (FFFEX)	79 bps	Fidelity Freedom K 2030 (FFKEX)	61 bps	29.51%
Fidelity Freedom 2035 (FFTHX)	81 bps	Fidelity Freedom K 2035 (FKTHX)	61 bps	32.79%
Fidelity Freedom 2040 (FFFFX)	81 bps	Fidelity Freedom K 2040 (FFKFX)	62 bps	30.65%
Fidelity Freedom 2045 (FFFGX)	82 bps	Fidelity Freedom K 2045 (FFKGX)	62 bps	32.26%
Fidelity Freedom 2050 (FFFHX)	84 bps	Fidelity Freedom K 2050 (FFKHX)	63 bps	33.33%
Fidelity Freedom Income (FFFAX)	50 bps	Fidelity Freedom K Income (FFKAX)	42 bps	19.05%
Fidelity Fund (FFIDX)	60 bps	Fidelity Fund (K) (FFDKX)	43 bps	39.53%

Plan Mutual Fund	Plan Fee	Identical Lower-Cost Mutual Fund	Identical Lower-Cost Mutual Fund Fee	Plan's Excess Cost
Fidelity Global Commodity Stock (FFGCX)	109 bps	Fidelity Global Commodity Stock (I) (FFGIX)	107 bps	1.87%
Fidelity Growth & Income (FGRIX)	74 bps	Fidelity Growth & Income (K) (FGIKX)	53 bps	39.62%
Fidelity Growth Company (FDGRX)	89 bps	Fidelity Growth Company (K) (FGCKX)	72 bps	23.61%
Fidelity Growth Discovery (FDSVX)	75 bps	Fidelity Growth Discovery (K) (FGDKX)	52 bps	44.23%
Fidelity Growth Strategies (FDEGX)	77 bps	Fidelity Growth Strategies (K) (FAGKX)	51 bps	50.98%
Fidelity Independence (FDFFX)	92 bps	Fidelity Independence (K) (FDFKX)	77 bps	19.48%
Fidelity International Discovery (FIGRX)	100 bps	Fidelity International Discovery (K) (FIDKX)	79 bps	26.58%
Fidelity International Index (Inv) (FSIIX)	10 bps	Fidelity International Index (Prem) (FSIVX)	7 bps	42.86%

Plan Mutual Fund	Plan Fee	Identical Lower-Cost Mutual Fund	Identical Lower-Cost Mutual Fund Fee	Plan's Excess Cost
Fidelity International Small Cap (FISMX)	142 bps	Fidelity International Small Cap (I) (FIXIX)	131 bps	8.40%
Fidelity International Small Cap Opportunities (FSCOX)	89 bps	Fidelity International Small Cap Opportunities (I) (FOPIX)	88 bps	1.14%
Fidelity Leveraged Company Stock (FLVCX)	88 bps	Fidelity Leveraged Company Stock (K) (FLCKX)	69 bps	27.54%
Fidelity Long-Term Treasury Bond Index (Inv) (FLBIX)	20 bps	Fidelity Long-Term Treasury Bond Index (Prem) (FLBAX)	10 bps	100.00%
Fidelity Low-Priced Stock (FLPSX)	99 bps	Fidelity Low-Priced Stock (K) (FLPKX)	85 bps	16.47%
Fidelity Magellan (FMAGX)	74 bps	Fidelity Magellan (K) (FMGKX)	58 bps	27.59%
Fidelity Mid-Cap Stock (FMCSX)	64 bps	Fidelity Mid-Cap Stock (K) (FKMCX)	41 bps	56.10%
Fidelity OTC (FOCPX)	104 bps	Fidelity OTC (K) (FOCKX)	88 bps	18.18%

Plan Mutual Fund	Plan Fee	Identical Lower-Cost Mutual Fund	Identical Lower-Cost Mutual Fund Fee	Plan's Excess Cost
Fidelity Overseas (FOSFX)	85 bps	Fidelity Overseas (K) (FOSKX)	66 bps	28.79%
Fidelity Puritan (FPURX)	61 bps	Fidelity Puritan (K) (FPUKX)	47 bps	29.79%
Fidelity Select Gold (FSAGX)	94 bps	Fidelity Select Gold (I) (FGDIX)	91 bps	3.30%
Fidelity Select Materials (FSDPX)	94 bps	Fidelity Select Materials (I) (FMFEX)	93 bps	1.08%
Fidelity Short-Term Treasury Bond Index (Inv) (FSBIX)	20 bps	Fidelity Short-Term Treasury Bond Index (Prem) (FSBAX)	10 bps	100.00%
Fidelity Stock Selector (FDSSX)	86 bps	Fidelity Stock Selector (K) (FSSKX)	66 bps	30.30%
Fidelity Total Market Index (Inv) (FSTMX)	10 bps	Fidelity Total Market Index (Prem) (FSTVX)	7 bps	42.86%
Fidelity Value (FDVLX)	63 bps	Fidelity Value (K) (FVLKX)	46 bps	36.96%

Plan Mutual Fund	Plan Fee	Identical Lower-Cost Mutual Fund	Identical Lower-Cost Mutual Fund Fee	Plan's Excess Cost
Fidelity Value Discovery (FVDFX)	95 bps	Fidelity Value Discovery (K) (FVDKX)	74 bps	28.38%
Fidelity Value Strategies (FSLSX)	80 bps	Fidelity Value Strategies (K) (FVSKX)	56 bps	42.86%
TIAA-CREF Equity Index (Retire) (TIQRX)	33 bps	TIAA-CREF Equity Index (Inst) (TIEIX)	9 bps	266.67%
TIAA-CREF Growth & Income (Retire) (TRGIX)	73 bps	TIAA-CREF Growth & Income (Inst) (TIGRX)	52 bps	40.38%
TIAA-CREF High-Yield (Retire) (TIHRX)	65 bps	TIAA-CREF High-Yield (Inst) (TIHYX)	40 bps	62.50%
TIAA-CREF International Equity (Retire) (TRERX)	78 bps	TIAA-CREF International Equity (Inst) (TIIEX)	57 bps	36.84%
TIAA-CREF International Equity Index (Retire) (TRIEX)	35 bps	TIAA-CREF International Equity Index (Inst) (TCIEX)	10 bps	250.00%

Plan Mutual Fund	Plan Fee	Identical Lower-Cost Mutual Fund	Identical Lower-Cost Mutual Fund Fee	Plan's Excess Cost
TIAA-CREF Large-Cap Growth (Retire) (TILRX)	75 bps	TIAA-CREF Large-Cap Growth (Inst) (TILGX)	50 bps	50.00%
TIAA-CREF Large-Cap Growth Index (Retire) (TRIRX)	34 bps	TIAA-CREF Large-Cap Growth Index (Inst) (TILIX)	9 bps	277.78%
TIAA-CREF Large-Cap Value (Retire) (TRLCX)	74 bps	TIAA-CREF Large-Cap Value (Inst) (TRLIX)	49 bps	51.02%
TIAA-CREF Large-Cap Value Index (Retire) (TRCVX)	34 bps	TIAA-CREF Large-Cap Value Index (Inst) (TILVX)	9 bps	277.78%
TIAA-CREF Mid-Cap Growth (Retire) (TRGMX)	77 bps	TIAA-CREF Mid-Cap Growth (Inst) (TRPWX)	52 bps	48.08%
TIAA-CREF Mid-Cap Value (Retire) (TRVRX)	74 bps	TIAA-CREF Mid-Cap Value (Inst) (TIMVX)	49 bps	51.02%
TIAA-CREF Real Estate Securities (Retire) (TRRSX)	81 bps	TIAA-CREF Real Estate Securities (Inst) (TIREX)	56 bps	44.64%

Plan Mutual Fund	Plan Fee	Identical Lower-Cost Mutual Fund	Identical Lower-Cost Mutual Fund Fee	Plan's Excess Cost
TIAA-CREF S&P 500 Index (Retire) (TRSPX)	33 bps	TIAA-CREF S&P 500 Index (Inst) (TISPX)	8 bps	312.50%
TIAA-CREF Short-Term Bond (Retire) (TISRX)	55 bps	TIAA-CREF Short-Term Bond (Inst) (TISIX)	30 bps	83.33%
Fidelity Emerging Europe, Middle East, Africa (EMEA) (FEMEX)	125 bps	Fidelity Emerging Europe, Middle East, Africa (EMEA) (I) (FIEMX)	119 bps	5.04%
Fidelity Japan (FJPNX)	80 bps	Fidelity Japan (I) (FJPIX)	75 bps	6.67%
Fidelity Real Estate Income (FRIFX)	92 bps	Fidelity Real Estate Income (I) (FRIRX)	89 bps	3.37%
Vanguard Growth Index (Signal) (VIGSX)	10 bps	Vanguard Growth Index (Inst) (VIGIX)	8 bps	25.00%
Vanguard Mid Cap Index (Signal) (VMISX)	14 bps	Vanguard Mid Cap Index (Inst Pl) (VMCPX)	6 bps	133.33%
Vanguard Small Cap Index (Signal) (VSISX)	10 bps	Vanguard Small Cap Index (Inst Pl) (VSCPX)	6 bps	66.67%

Plan Mutual Fund	Plan Fee	Identical Lower-Cost Mutual Fund	Identical Lower-Cost Mutual Fund Fee	Plan's Excess Cost
Vanguard Value Index (Signal) (VVISX)	12 bps	Vanguard Value Index (Inst) (VIVIX)	8 bps	50.00%
Fidelity 500 Index (Inst) (FXSIX)	5 bps	Fidelity 500 Index (Inst Prem) (FXAIX)	3 bps	66.67%
Fidelity Conservative Income Bond (FCONX)	40 bps	Fidelity Conservative Income Bond (Inst) (FCNVX)	30 bps	33.33%
Fidelity Emerging Markets Index (Prem) (FPMAX)	22 bps	Fidelity Emerging Markets Index (Inst Prem) (FPADX)	12 bps	83.33%
Fidelity Extended Market Index (Prem) (FSEVX)	7 bps	Fidelity Extended Market Index (Inst Prem) (FSMAX)	6 bps	16.67%
Fidelity Global ex-US Index (Prem) (FSGDX)	18 bps	Fidelity Global ex-US Index (Inst Prem) (FSGGX)	10 bps	80.00%

Plan Mutual Fund	Plan Fee	Identical Lower-Cost Mutual Fund	Identical Lower-Cost Mutual Fund Fee	Plan's Excess Cost
Fidelity International Index (Prem) (FSIVX)	7 bps	Fidelity International Index (Inst Prem) (FSPSX)	6 bps	16.67%
Fidelity Mid Cap Index (Prem) (FSCKX)	12 bps	Fidelity Mid Cap Index (Inst Prem) (FSMDX)	6 bps	100.00%
Fidelity Small Cap Index (Prem) (FSSVX)	17 bps	Fidelity Small Cap Index (Inst Prem) (FSSNX)	11 bps	54.55%
Fidelity Total Market Index (Prem) (FSTVX)	7 bps	Fidelity Total Market Index (Inst Prem) (FSKAX)	5 bps	40.00%
Fidelity U.S. Bond Index (Prem) (FSITX)	12 bps	Fidelity U.S. Bond Index (Inst Prem) (FXNAX)	5 bps	140.00%
Fidelity China Region (FHKCX)	98 bps	Fidelity Advisor China Region I (FHKIX)	93 bps	5.38%
Fidelity Inflation-Protected Index (Prem) (FSIYX)	10 bps	Fidelity Inflation-Protected Index (Inst Prem) (FIPDX)	5 bps	100.00%

Plan Mutual Fund	Plan Fee	Identical Lower-Cost Mutual Fund	Identical Lower-Cost Mutual Fund Fee	Plan's Excess Cost
Fidelity International Real Estate (FIREX)	114 bps	Fidelity International Real Estate (I) (FIRIX)	109 bps	4.59%
Fidelity Latin America (FLATX)	103 bps	Fidelity Latin America (I) (FLFIX)	101 bps	1.98%
Fidelity Real Estate Index (Prem) (FSRVX)	9 bps	Fidelity Real Estate Index (Inst) (FSRNX)	7 bps	28.57%
Strategic Advisers Core Multi-Manager (FLAUX)	96 bps	Strategic Advisers Core Multi-Manager (F) (FHJSX)	86 bps	11.63%
Strategic Advisers International Multi-Manager (FMJDX)	116 bps	Strategic Advisers International Multi-Manager (F) (FMBKX)	107 bps	8.41%
Strategic Advisers Value Multi-Manager (FKMOX)	97 bps	Strategic Advisers Value Multi-Manager (F) (FGWBX)	87 bps	11.49%
Fidelity International Growth (FIGFX)	104 bps	Fidelity International Growth (Z) (FZAJX)	88 bps	18.18%

Plan Mutual Fund	Plan Fee	Identical Lower-Cost Mutual Fund	Identical Lower-Cost Mutual Fund Fee	Plan's Excess Cost
Fidelity Mega Cap Stock (FGRTX)	68 bps	Fidelity Mega Cap Stock (Z) (FZALX)	54 bps	25.93%
Strategic Advisers Small Mid Cap Multi-Manager (FNAPX)	116 bps	Strategic Advisers Small Mid Cap Multi-Manager (F) (FARMX)	105 bps	10.48%
Vanguard Growth Index (Adm) (VIGAX)	9 bps	Vanguard Growth Index (Inst) (VIGIX)	8 bps	12.50%
Vanguard Mid Cap Index (Adm) (VIMAX)	9 bps	Vanguard Mid Cap Index (Inst Pl) (VMCPX)	6 bps	50.00%
Vanguard Small Cap Index (Adm) (VSMAX)	9 bps	Vanguard Small Cap Index (Inst Pl) (VSCPX)	6 bps	50.00%
Vanguard Value Index (Adm) (VVIAX)	9 bps	Vanguard Value Index (Inst) (VIVIX)	8 bps	12.50%
Fidelity Emerging Markets Discovery (FEDDX)	144 bps	Fidelity Emerging Markets Discovery (I) (FEDIX)	143 bps	0.70%
Fidelity Europe (FIEUX)	101 bps	Fidelity Europe (I) (FHJMX)	96 bps	5.21%

Plan Mutual Fund	Plan Fee	Identical Lower-Cost Mutual Fund	Identical Lower-Cost Mutual Fund Fee	Plan's Excess Cost
Fidelity Total Bond (FTBFX)	45 bps	Fidelity Total Bond (Z) (FBKWX)	36 bps	25.00%

182. These lower-cost share classes have been available to the Retirement Plan and Voluntary Savings Plan for years, some dating back to the early 2000's or before.

183. Further, even after the changes made effective October 2016, Defendants continue to provide higher-cost Vanguard mutual funds than are available, including the Vanguard Total Bond Market Fund, the Vanguard Total International Stock Index Fund, the Vanguard Extended Market Index, and the Vanguard Institutional Index Fund.

184. Because the share classes have identical portfolio managers, underlying investments, and asset allocations, and differ only in cost, Defendants' failure to select the lower-cost share classes for the Plans' mutual fund options demonstrates that Defendants failed to prudently consider and use the size and purchasing power of the Plans when selecting the Plans' investment options.

185. Defendants' use of the higher-cost share classes instead of the available lower-cost versions caused the Plans' participants to lose millions of dollars of their retirement savings due to wholly unnecessary fees.

V. Defendants selected and retained a large number of duplicative investment options, diluting the Plans' ability to pay lower fees and confusing participants.

186. Defendants provided a multitude of duplicative funds in the same investment style, thereby depriving the Plans of their bargaining power associated with offering a single option in each investment style, which significantly reduces investment fees, and leading to what industry experts have described as "decision paralysis" for participants. *See, e.g.*, Michael Liersch, *Choice in Retirement Plans: How Participant Behavior Differs in Plans Offering Advice, Managed Accounts, and Target-Date Investments,* T. ROWE PRICE RETIREMENT RESEARCH, at 2 (Apr. 2009) ("Offering too many choices to consumers can lead to decision paralysis, preventing consumers from making decisions."). For the Retirement and Voluntary Savings Plans, Defendants placed over 240 and 180 investment options in the core lineup of each Plan respectively in the following asset classes: target date and asset allocation funds, large cap domestic equities, mid cap domestic equities, small cap domestic equities, international equities, fixed income, money market, real estate, and fixed guaranteed annuity.

187. Having such an overwhelming number of investment options also places a monumental burden on the Plans' participants in selecting options in which to invest. Mutual funds are required to offer a prospectus, which is designed to provide material information to potential investors to enable them to make an informed, prudent investment decision. The prospectus sets forth a fund's objectives or goals, investment strategies, principal risks, historical performance, fees and expenses, and fund managers and

advisers, among other information. For the Fidelity Freedom Funds alone, the prospectus and supporting materials filed with the SEC span almost *800* printed pages.[38] If a Retirement Plan or Voluntary Savings Plan participant were to review the prospectuses of all the more than 240 or 180 investment options that were placed in the Retirement Plan and the Retirement Plan respectively, they would have to read many thousands of pages of materials. This is a virtually impossible burden. Even for the Plans' fiduciaries, it is inconceivable that they have read the prospectuses and supporting materials of the hundreds of funds they selected and retained for each of the Plans.

188. In comparison to the hundreds of investment options offered in the Retirement Plan and Voluntary Savings Plan, according to Callan Investments Institute's 2015 Defined Contribution Trends survey, defined contribution plans in 2014 had on average 15 investment options, excluding target date funds. Callan Investments Institute, *2015 Defined Contribution Trends,* at 28 (2015).[39] This reasonable number of options provides choice of investment style to participants while maintaining a larger pool of assets in each investment style and avoiding confusion.

189. A larger pool of assets in each investment style significantly reduces fees paid by participants. By consolidating duplicative investments of the same investment style into a single investment option, the Plans would then have the ability to command lower-

[38] *See* Fidelity Freedom Funds Prospectus, Form N-1A (May 28, 2016), available at https://www.sec.gov/Archives/edgar/data/880195/000137949116004218/filing717.htm.

[39] Available at https://www.callan.com/research/files/990.pdf.

cost investments, such as a low-cost institutional share class of the selected mutual fund option.

190. Fund selections must be the result of a detailed due diligence process that considers factors such as risk, investment return, and expenses of available investment alternatives, and the fiduciary must give "appropriate consideration" to "the role the investment or investment course of action plays . . . in the plan's investment portfolio," 29 C.F.R. §§2550.404a-1(b)(i)-(ii). Fiduciaries cannot discharge their duties "by the simple expedient of including a very large number of investment alternatives in its portfolio and then shifting to the participants the responsibility for choosing among them." *Hecker*, 569 F.3d at 711. Including a large number of alternatives removes the benefit of pooling assets consistent with the size of the Plans. Assembling a haphazard lineup of hundreds of duplicative options, proprietary to the Plans' recordkeepers—and shifting to participants the burden to screen those options—does not reflect a prudent investment selection process.

191. Within each asset class and investment style deemed appropriate for a participant-directed retirement plan, prudent fiduciaries must make a reasoned determination and select a prudent investment option. In contrast to the investment lineup assembled by Defendants, prudent fiduciaries do not select and retain numerous duplicative investment options for a single asset class and investment style. When many investment options in a single investment style are included in a plan, fiduciaries lose the bargaining power to obtain lower investment management expenses for that style.

192. Moreover, if a participant puts her assets in each of the funds within a given investment style, as

commentators have said they are likely to do,[40] when many actively managed funds are included within the same investment style, this results in those participants effectively having an index return. This is because the investments are spread so broadly over that investment style. Yet the participants will be paying much higher fees for active management than the fees of a passive index fund.

193. In addition, providing multiple options in a single investment style adds unnecessary complexity to the investment lineup and leads to participant confusion. *See* The Standard, *Fixing Your 403(b) Plan: Adopting a Best Practices Approach,* at 2 ("Numerous studies have demonstrated that when people are given too many choices of anything, they lose confidence or make no decision."); Michael Liersch, *Choice in Retirement Plans: How Participant Behavior Differs in Plans Offering Advice, Managed Accounts, and Target-Date Investments*, T. ROWE PRICE RETIREMENT RESEARCH, at 2 (Apr. 2009) ("Offering too many choices to consumers can lead to decision paralysis, preventing consumers from making decisions.").[41]

194. Moreover, having many actively managed funds in the Plans within the same investment style results in the Plans effectively having an index fund return even though the Plans are paying fees for active management that are much higher than the fees of a passive index fund.

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[40] Ian Ayres & Quinn Curtiss, *Beyond Diversification: The Pervasive Problem of Excessive Fees and Dominated Funds in 401(k) Plans*, 124 YALE L.J. 1476, 1481 (2015) ("It is well established that some investors naively diversify by spreading their plan investments across all fund offerings.").

[41] Available at http://www.behavioralresearch.com/Publications/Choice_in_Retirement_Plans_April_2009.pdf.

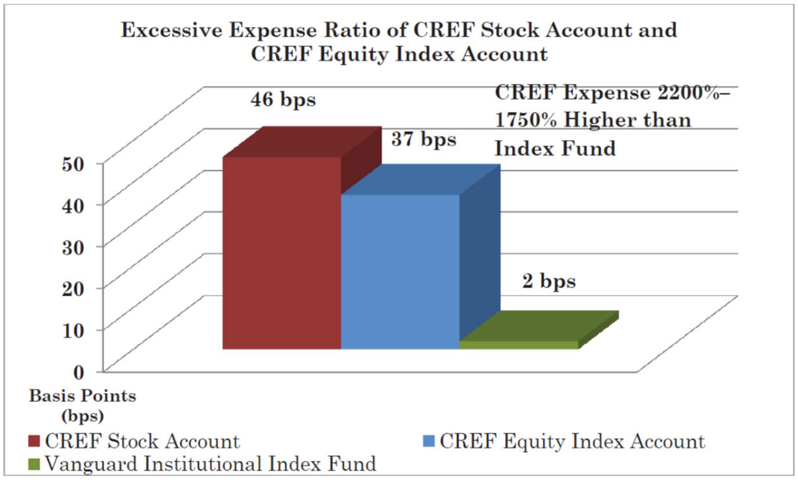
195. From 2010 to October 2016, the Retirement Plan included duplicative investments in every major asset class and investment style, including balanced/ asset allocation (16 options), fixed income and high yield bond (32 options), specialty/focused (41 options), international (36 options), large cap domestic equities (48 options), mid cap domestic equities (15 options), small cap domestic equities (12 options), real estate (2 options), money market (9 options), and target date investments (2 fund families). Over the same period, the Voluntary Savings Plan included duplicative investments in balanced/asset allocation (16 options), fixed income and high yield bond (32 options), specialty/focused (41 options), international (35 options), large cap domestic equities (48 options), mid cap domestic equities (15 options), small cap domestic equities (11 options), real estate (6 options), and money market (9 options), and target date investments (2 fund families). Such a dizzying array of duplicative funds in a single investment style violates the well-recognized industry principle that too many choices harm participants, and leads to "decision paralysis".

196. For illustration purposes, Defendants included 14 large cap domestic blend investments for both the Retirement Plan and Voluntary Savings Plan as of December 31, 2015. These investments are summarized below and compared to a far lower-cost alternative: the Vanguard Institutional Index Fund (Instl Plus). The Vanguard Institutional Index Fund (Instl Plus) (VIIIX), by definition, mirrors the market, and has an expense ratio of 2 bps.

Large Cap Blend Investments	Total Assets	Fee	Institu-tional Index Fund (VIIIX)	Plan's Excess Cost
CREF Stock Account	$527,984,153	46 bps	2 bps	2200%
CREF Equity Index Account	$52,667,490	37 bps	2 bps	1750%
TIAA-CREF Equity Index (INST) (TIEIX)	$12,606,572	5 bps	2 bps	150%
TIAA-CREF S&P 500 Index (INST) (TISPX)	$25,385,799	6 bps	2 bps	200%
Fidelity Domini Social Equity (INV) (DSEFX)	$949,081	116 bps	2 bps	5700%
Fidelity Disciplined Equity (K) (FDEKX)	$2,251,402	79 bps	2 bps	3850%
Fidelity Dividend Growth (K) (FDGKX)	$4,097,254	57 bps	2 bps	2750%
Fidelity Growth & Income (K) (FGIKX)	$6,419,109	52 bps	2 bps	2650%
Fidelity Large Cap Core Enhanced Index (FLCEX)	$365,500	45 bps	2 bps	2150%

Large Cap Blend Investments	Total Assets	Fee	Institu-tional Index Fund (VIIIX)	Plan's Excess Cost
Fidelity Large Cap Stock (FLCSX)	$1,392,162	88 bps	2 bps	4300%
Fidelity Mega Cap Stock (FGRTX)	$738,905	67 bps	2 bps	3250%
Fidelity Spartan 500 Index (INST) (FXSIX)	$38,057,710	4 bps	2 bps	100%
Fidelity Spartan Total Market Index (ADV) (FSTVX)	$16,697,483	5 bps	2 bps	150%
Strategic Advisers Core Multi-Manager (FLAUX)	$23,547	97 bps	2 bps	4750%
Total of Higher-Cost Alternatives	***$689,636,167***			

197. With over *$580 million* held in the CREF Stock Account and the CREF Equity Index Account, these large cap blend options were *23 and 18 times* more expensive than the lower-cost Vanguard option with an expense ratio of 2 bps.



198. Many other large cap index funds are also available at far lower costs than the Plans' large cap blend funds. Had the amounts invested in the Plans' large cap blend options been consolidated into a single large cap blend investment such as the Vanguard Institutional Index Fund (Instl Plus), Plan participants would have avoided losing well in excess of $2.6 million dollars in fees for 2015 alone, and many more millions since 2010.

199. In addition, Defendants selected and continue to retain multiple passively managed index options in the same investment style. In contrast to an actively-managed fund, in which the investment manager selects stocks or bonds in an attempt to generate investment returns in excess of the fund's benchmark, passively managed index funds simply attempt to replicate a market index, such as the S&P 500, by holding a representative sample of securities in the index. Because no stock selection or research is needed, index fund fees are much lower than the fees of actively-managed funds in the same investment style, as set forth in ¶¶60-62, 213-217.

200. For example, in the large cap blend investment style, Defendants provided four separate index funds in each Plan that have similar investment strategies designed to generate investment results that correspond to the return of the U.S. equity market and do not involve stock selection. As another example, Defendants retained five separate index funds for the fixed income and intermediate-term bond investment style.

201. Since index funds merely hold the same securities in the same proportions as the index,[42] having multiple index funds of the same category or investment style in the Plans provides no benefit to participants. As Morningstar CEO Joe Mansueto recently observed, "[b]asic market indexes are virtually interchangeable." Lewis Braham, *Morningstar Announces Free Use of Its Indexes*, Barron's (Nov. 5, 2016).[43] Including multiple similar index funds in the same investment style hurts participants by diluting the Plans' ability to obtain lower rates for a single index fund of that style because the amount of assets in any one such fund is smaller than the aggregate would be. Moreover, multiple managers holding stocks which mimic the S&P 500 or a similar index would pick the same stocks in the same proportions as the index. Thus, there is no value in offering separate index funds in the same investment style.

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203. In January 2015, NURIC's second consultant, CAPTRUST, observed that an overwhelming amount of fund duplication existed in the Plans, despite the

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[42] Another example of an index is the Dow Jones Industrial Average.

[43] Available at http://www.barrons.com/articles/morningstar-announces-free-use-of-its-indexes-1478322642.

fact that NURIC was advised years earlier that such duplication should be eliminated as it was wasting the Plans' participants money. CAPTRUST_NW-02793, attached hereto as Exhibit 14. The Plans' fund duplication, which is shown below, was imprudent and inconsistent with fiduciary "best practice[s]." *Id.* at 803.

INVESTMENT OPTIONS

Current Options - Sample

Asset Class	Fidelity	TIAA-CREF	Total
Capital Preservation	8	3	219
Fixed Income / Bond	27	6	
Balanced	8	1	
Target Date / Allocation	2	2	
Domestic Equities / Stocks	64	22	
Foreign Equities / Stocks	26	4	
Specialty	40	0	
Real Estate	4	2	
Total Options	**179**	**40**	

Best Practice - Sample

Asset Class	Fidelity	TIAA-CREF	Total
Capital Preservation	1	2	20 - 25
Fixed Income / Bond	2 - 4	2 - 4	
Balanced	1	1	
Target Date / Allocation	1	1	
Domestic Equities / Stocks	4 - 8	4 - 8	
Foreign Equities / Stocks	2 - 3	2 - 3	
Specialty	0	0	
Real Estate	1	1	

* * *

205. At its January 25, 2012, meeting, Straight-line provided NURIC with a list identifying the Plans' under-utilized investments. NU-00004503, attached hereto as Exhibit 15. Many of the investments identified at that meeting were being utilized by less than 20 of the Plans' more than 30,000 combined participants with balances.

206. Despite the overwhelming fund duplication that existed in the Plans, as well as the under-utilization or non-utilization of many of the Plans' investments, NURIC did not remove a single fund from the Plans' lineups prior to the consolidation of the Plans' lineups in 2016.

207. Had Defendants combined hundreds of millions of dollars in the Plans' assets from duplicative index funds into a single index fund, as set forth in ¶196, the Plans would have generated higher investment returns, net of fees, and participants would not have lost millions of dollars of retirement assets.

VIII. Defendants imprudently and disloyally retained historically underperforming Plan investments.

208. The excessive fees in the Plans' investments were not justified by superior investment returns. Defendants' failure to conduct appropriate due diligence in selecting and monitoring the Plans' investments resulted in options being retained in the Plans despite years of historical underperformance compared to superior lower-cost alternatives, which caused massive losses to the Plans compared to what those assets would have earned if invested in prudent alternatives.

209. As of December 31, 2014, of the Plans' investment options which had at least a five-year performance history, *57%* of those funds—119 out of 208—underperformed their respective benchmarks over the previous five-year period.[44] The same per-

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[44] These results are based on the performance and benchmark for each fund as shown on the Northwestern University 403(b) Retirement Plan and Voluntary Savings Plan Quarterly Investment Notice, Section 3. This figure excludes 25 funds in the

formance chart shows that over *78%* of those underperforming funds—93 out of 119—also underperformed their benchmark over the preceding *ten-year* period. The 119 funds that underperformed over the five-year period include the following:

Fund Name	Ticker
Calvert Balanced Portfolio (A)	CSIFX
Calvert Capital Accumulation (A)	CCAFX
Calvert International Equity (A)	CWVGX
Calvert Small Cap (A)	CCVAX
CREF Bond Market	N/A
CREF Equity Index	N/A
CREF Growth	N/A
CREF Inflation-Linked Bond	N/A
CREF Money Market	N/A
CREF Social Choice	N/A
CREF Stock	N/A
Domini Social Equity (INV)	DSEFX
Fidelity Asset Manager 50%	FASMX
Fidelity Asset Manager 60%	FSANX
Fidelity Asset Manager 70%	FASGX

Plans (out of the 233) which did not have 5-year performance histories as December 30, 2014. Over half of these funds—13 out of 25—underperformed their benchmarks on a one-year basis and since inception.

Fund Name	Ticker
Fidelity Asset Manager 85%	FAMRX
Fidelity Balanced (K)	FBAKX
Fidelity Blue Chip Value	FBCVX
Fidelity Cash Reserves Management	FDRXX
Fidelity Contrafund (K)	FCNKX
Fidelity Disciplined Equity (K)	FDEKX
Fidelity Dividend Growth (K)	FDGKX
Fidelity Equity Dividend Income (K)	FETKX
Fidelity Equity-Income (K)	FEIKX
Fidelity Export & Multinational (K)	FEXKX
Fidelity Floating Rate High Income	FFRHX
Fidelity Focused High Income	FHIFX
Fidelity Four in One Index	FFNOX
Fidelity Freedom (K) 2015	FKVFX
Fidelity Freedom (K) 2020	FFKDX
Fidelity Freedom (K) 2025	FKTWX
Fidelity Freedom (K) 2030	FFKEX
Fidelity Freedom (K) 2035	FKTHX
Fidelity Freedom (K) 2040	FFKFX
Fidelity Freedom (K) 2045	FFKGX
Fidelity Freedom (K) 2050	FFKHX
Fidelity Fund (K)	FFDKX

Fund Name	Ticker
Fidelity Global Balanced	FGBLX
Fidelity Global Commodity Stock	FFGCX
Fidelity Global Strategies	FDYSX
Fidelity Government Income	FGOVX
Fidelity Government Money Market	SPAXX
Fidelity Growth Strategies (K)	FAGKX
Fidelity High Income	SPHIX
Fidelity Inflation Protected Bond	FINPX
Fidelity Limited Term Government Fund	FFXSX
Fidelity Intermediate Government Income	FSTGX
Fidelity International Value	FIVLX
Fidelity Japan	FJPNX
Fidelity Large Cap Growth Enhanced Index	FLGEX
Fidelity Latin America	FLATX
Fidelity Magellan (K)	FMGKX
Fidelity Mid-Cap Stock (K)	FKMCX
Fidelity Money Market	SPRXX
Fidelity Money Market Trust Retirement Government Money Market Portfolio	FGMXX
Fidelity NASDAQ Composite Index	FNCMX

Fund Name	Ticker
Fidelity New Markets Income	FNMIX
Fidelity Puritan (K)	FPUKX
Fidelity Real Estate Income	FRIFX
Fidelity Retirement Money Market	FRTXX
Fidelity Select Banking	FSRBX
Fidelity Select Brokerage & Investment Management	FSLBX
Fidelity Select Communications Equipment	FSDCX
Fidelity Select Computers	FDCPX
Fidelity Select Consumer Finance	FSVLX
Fidelity Select Consumer Staples	FDFAX
Fidelity Select Energy	FSENX
Fidelity Select Energy Services	FSESX
Fidelity Select Environment and Alternative Energy	FSLEX
Fidelity Select Financial Services	FIDSX
Fidelity Select Gold	FSAGX
Fidelity Select Industrial Equipment	FSCGX
Fidelity Select Materials	FSDPX
Fidelity Select Money Market	FSLXX
Fidelity Select Natural Gas	FSNGX
Fidelity Select Natural Resources	FNARX

Fund Name	Ticker
Fidelity Select Technology	FSPTX
Fidelity Select Telecommunications	FSTCX
Fidelity Select Utilities	FSUTX
Fidelity Select Wireless	FWRLX
Fidelity Small Cap Growth	FCPGX
Fidelity Small Cap Stock	FSLCX
Fidelity Spartan 500 Index (INST)	FXSIX
Fidelity Spartan Intermediate Treasury Index (ADV)	FIBAX
Fidelity Spartan International Index (ADV)	FSIVX
Fidelity Spartan Long Term Treasury Bond Index (ADV)	FLBAX
Fidelity Spartan Short Term Treasury Index (ADV)	FSBAX
Fidelity Spartan Total Market Index (ADV)	FSTVX
Fidelity Spartan U.S. Bond Index (ADV)	FSITX
Fidelity Stock Selector All Cap (K)	FSSKX
Fidelity Stock Selector Large Cap Value	FSLVX
Fidelity Stock Selector Mid Cap	FSSMX
Fidelity Strategic Dividend & Income	FSDIX

Fund Name	Ticker
Fidelity Telecom & Utilities	FIUIX
Fidelity Treasury Only Money Mar (K)et	FDLXX
Fidelity US Government Reserves	FGRXX
Fidelity Value (K)	FVLKX
Fidelity Value Strategies (K)	FVSKX
TIAA Real Estate	QREARX
TIAA-CREF Equity Index (INST)	TIEIX
TIAA-CREF Growth & Income (INST)	TIGRX
TIAA-CREF High-Yield (INST)	TIHYX
TIAA-CREF Large-Cap Growth Index (INST)	TILIX
TIAA-CREF Large-Cap Value Index (INST)	TILVX
TIAA-CREF Large-Cap Value (INST)	TRLIX
TIAA-CREF Lifecycle 2015 (INST)	TCNIX
TIAA-CREF Lifecycle 2020 (INST)	TCWIX
TIAA-CREF Lifecycle 2025 (INST)	TCYIX
TIAA-CREF Lifecycle 2030 (INST)	TCRIX
TIAA-CREF Lifecycle 2035 (INST)	TCIIX
TIAA-CREF Lifecycle 2040 (INST)	TCOIX
TIAA-CREF Lifecycle 2045 (INST)	TTFIX
TIAA-CREF Lifecycle 2050 (INST)	TFTIX

Fund Name	Ticker
TIAA-CREF Managed Allocation (INST)	TIMIX
TIAA-CREF Mid-Cap Growth (INST)	TRPWX
TIAA-CREF Mid-Cap Value (INST)	TIMVX
TIAA-CREF S&P 500 Index (INST)	TISPX
TIAA-CREF Social Choice Equity (INST)	TISCX
Vanguard Windsor (ADM)	VWNEX

210. Had Defendants conducted a prudent investment review process, many of these options that consistently failed to meet performance objectives would have been eliminated from the Plans or replaced. Defendants' failure to do so caused the Plans substantial losses compared to prudent alternative investments that were available to the Plans. Two funds in particular demonstrate the severe harm to the Plans resulting from Defendants' breaches of fiduciary duties: the CREF Stock Account and TIAA Real Estate Account.

C. CREF Stock Account.

211. The CREF Stock Account is one of the largest investment options, by asset size, in the Plans with nearly $528 million in total assets, and has been offered to participants throughout the period from 2010 to date and many years prior. In its fund fact sheets and participant disclosures, TIAA-CREF classifies the CREF Stock Account as a domestic equity investment in the large cap blend Morningstar category. This option has consistently underperformed over years, and continues to underperform

its benchmark and lower-cost actively and passively managed investments that were available to the Plans.

212. TIAA-CREF imposed restrictive provisions on the specific annuities that *must* be provided in the Plans. Under these terms, TIAA-CREF required that the CREF Stock Account be offered to Plan participants, in addition to the TIAA Traditional and the CREF Money Market Account. Plan fiduciaries provided these mandatory offerings in the Plans without a prudent process to determine whether they were prudent alternatives and in the exclusive best interest of Plan participants and beneficiaries. TIAA-CREF required the CREF Stock Account to be included in the Plans to drive very substantial amounts of revenue sharing payments to TIAA-CREF for recordkeeping services. The CREF Stock Account paid 24 bps for revenue sharing, which exceeded other TIAA-CREF investments by over 50% (15 bps).

213. As understood in the investment community, passively managed investment options should either be used or, at a minimum, thoroughly analyzed and considered in efficient markets such as large capitalization U.S. stocks. This is because it is difficult and either unheard of, or extremely unlikely, to find actively managed mutual funds that outperform a passive index, net of fees, particularly on a persistent basis. This extreme unlikelihood is even greater in the large cap market because such companies are the subject of many analysts' coverage, while smaller stocks are not as widely covered by analysts and thus are subject to potential inefficiencies in pricing.

214. Nobel Prize winners in economics have concluded that virtually no investment manager consistently beats the market over time after fees are

taken into account. "Properly measured, the average actively managed dollar must underperform the average passively managed dollar, net of costs." William F. Sharpe, *The Arithmetic of Active Management,* 47 FIN. ANALYSTS J. 7, 8 (Jan./Feb. 1991);[45] Eugene F. Fama & Kenneth R. French, *Luck Versus Skill in the Cross-Section of Mutual Fund Returns*, 65 J. FIN. 1915, 1915 (2010) ("After costs . . . in terms of net returns to investors, active investment must be a negative sum game.").

215. To the extent fund managers show any sustainable ability to beat the market, the outperformance is nearly always dwarfed by mutual fund expenses. Fama & French, *Luck Versus Skill in the Cross-Section of Mutual Fund Returns*, at 1931–34; *see also* Russ Wermers, *Mutual Fund Performance: An Empirical Decomposition into Stock-Picking Talent, Style, Transaction Costs, and Expenses*, 55 J. FIN. 1655, 1690 (2000) ("on a net-return level, the funds underperform broad market indexes by one percent per year").

216. If an individual high-cost mutual fund exhibits market-beating performance over a short period of time, studies demonstrate that outperformance during a particular period is not predictive of whether a mutual fund will perform well in the future. Laurent Barras et al., *False Discoveries in Mutual Fund Performance: Measuring Luck in Estimated Alphas*, 65 J. FIN. 179, 181 (2010); Mark M. Carhart, *On Persistence in Mutual Fund Performance*, J. FIN. 57, 59 (1997) (measuring thirty-one years of mutual fund returns and concluding that "persistent differences in mutual fund expenses and transaction costs

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[45] Available at http://www.cfapubs.org/doi/pdf/10.2469/faj.v47.n1.7.

explain almost all of the predictability in mutual fund returns"). However, the *worst-performing* mutual funds show a strong, persistent tendency to continue their poor performance. Carhart, *On Persistence in Mutual Fund Performance*, at 57.

217. Accordingly, investment costs are of paramount importance to prudent investment selection, and a prudent investor will not select higher-cost actively managed funds unless there has been a documented process leading to the realistic conclusion that the fund is likely to be that extremely rare exception, if one even exists, that will outperform its benchmark over time, net of investment expenses.

218. Moreover, the efficiencies of the large cap market hinder an active manager's ability to achieve excess returns for investors.

> [T]his study of mutual funds does not provide any reason to abandon a belief that securities markets are remarkably efficient. Most investors would be considerably better off by purchasing a low expense index fund, than by trying to select an active fund manager who appears to possess a "hot hand." Since active management generally fails to provide excess returns and tends to generate greater tax burdens for investors, the advantage of passive management holds, a fortiori.

Burton G. Malkiel, Returns from Investing in Equity Mutual Funds 1971 to 1991, 50 J. FIN. 549, 571 (1995).[46]

219. Academic literature overwhelmingly concludes that active managers consistently underperform the S&P 500 index.

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[46] Available at http://indeksirahastot.fi/resource/malkiel.pdf.

> Active managers themselves provide perhaps the most persuasive case for passive investing. Dozens of studies have examined the performance of mutual funds and other professional-managed assets, and virtually all of them have concluded that, on average, active managers underperform passive benchmarks . . . The median active fund underperformed the passive index in 12 out of 18 years [for the large- cap fund universe] . . . The bottom line is that, over most periods, the majority of mutual fund investors would have been better off investing in an S&P 500 Index fund.
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> ****
>
> Most of the dismal comparisons for active managers are for large-cap domestic managers versus the S&P 500 Index.

Robert C. Jones, *The Active Versus Passive Debate: Perspectives of an Active Quant*, ACTIVE EQUITY PORTFOLIO MANAGEMENT, at 37, 40, 53 (Frank J. Fabozzi ed., 1998).

220. Prudent fiduciaries of large defined contribution plans must conduct an analysis to determine whether actively managed funds, particularly large cap, will outperform their benchmark net of fees. Prudent fiduciaries then make a reasoned decision as to whether it is in participants' best interest to offer an actively managed large cap option for the particular investment style and asset class, in light of the higher costs of active management.

221. Defendants failed to undertake such an analysis, or any analysis, when it allowed the actively managed CREF Stock Account to be included and retained in the Plans. This is particularly true given TIAA-CREF's requirement that the CREF Stock

Account be provided in the Plans in order to drive revenue to TIAA-CREF. By allowing the Plans to be bound by this requirement, Defendants failed to conduct an independent evaluation of the prudence of this option, which contradicts every principle of prudent investing because an investment that was no longer prudent could not be removed from the Plans.

222. Additionally, as detailed above in ¶¶151-153, the 46 bps that the CREF Stock Account charged was comprised of four layers of fees that were each unreasonable compared to the actual services provided by TIAA-CREF to the Plans' participants. Defendants failed to analyze whether these fees were appropriate and reasonable in light of the services provided and given that the Plans invested over *$528 million* in total assets in the CREF Stock Account.

223. Had such an analysis been conducted by Defendants, they would have determined that the CREF Stock Account would not be expected to outperform the large cap index after fees. That is in fact what occurred.

224. Defendants and TIAA-CREF identified the Russell 3000 Index as the appropriate benchmark to evaluate investment results of the CREF Stock Account, as shown in the excerpts below that were provided to the Plans' participants.[47]

[47] Available at https://www.tiaa.org/public/pdf/obiee/101332_Investment_Comparative_Chart.pdf and http://www.northwestern.edu/hr/benefits/retirement-plans/feedisclosure.pdf.

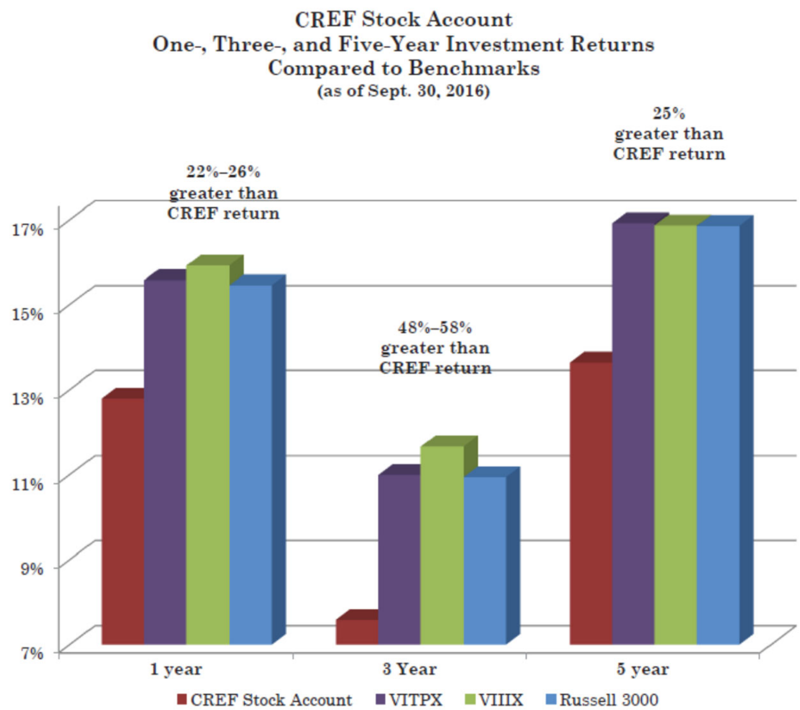
Investment Name / Benchmark	Morningstar Category	Ticker Symbol
CREF Stock Account *Russell 3000 Index*	Large Blend	CSTK#

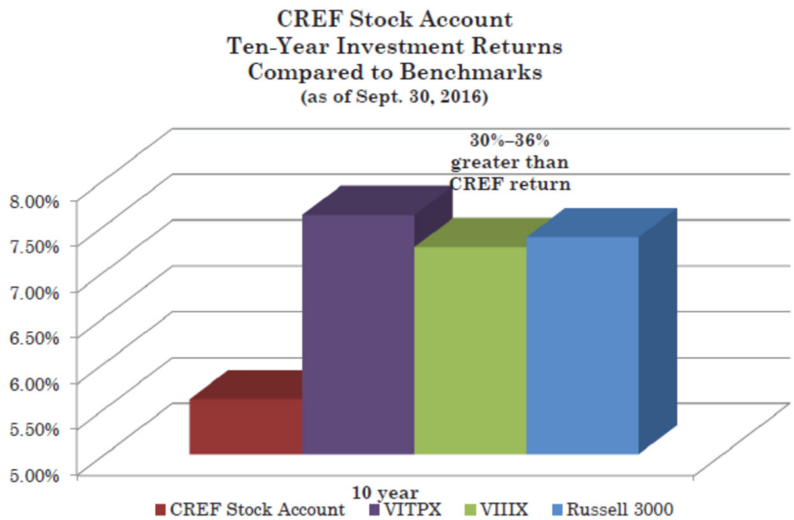
Investment Name
Benchmark

CREF Stock Account
Russell 3000

225. The CREF Stock Account did not merely underperform in a single year or two. Historical performance of the CREF Stock Account has been persistently poor for many years compared to this identified benchmark index (Russell 3000 Index), and also as compared to available low-cost index funds. The following two charts compare the investment returns of the CREF Stock Account to its benchmark (the Russell 3000) and two other passively managed index funds in the same investment style for the one-, three-, five-, and ten-year periods ending September 30, 2016. For each comparison, the CREF Stock Account dramatically underperformed the

benchmarks and index alternatives. The passively managed index funds used for comparison purposes are the Vanguard Total Stock Market Index Fund (Instl Plus) (VITPX) and the Vanguard Institutional Index (Instl Plus) (VIIIX). Like the CREF Stock Account, these options are large cap blend investments.

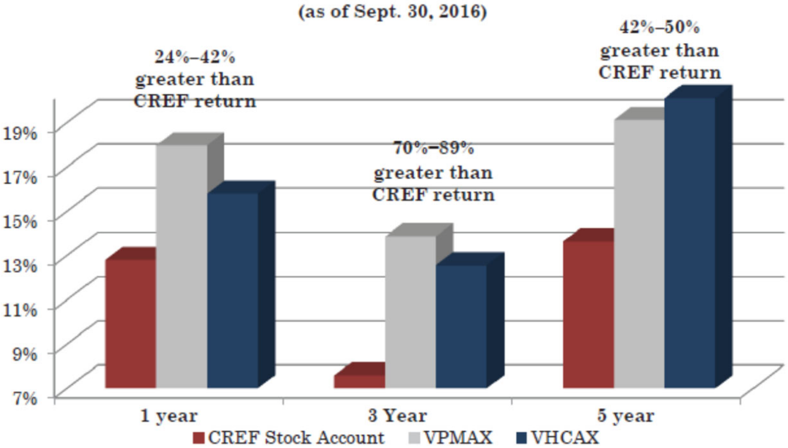




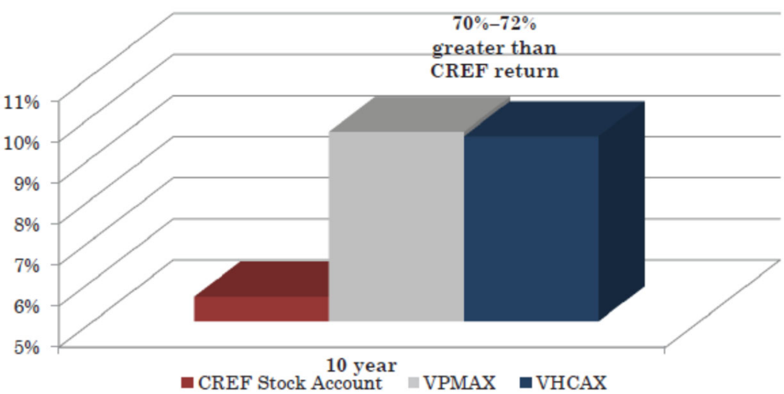
226. The CREF Stock Account, with an expense ratio of 46 bps as of December 31, 2014, was and is dramatically more expensive than far better performing index alternatives: the Vanguard Total Stock Market Index Fund-Instl Plus (2 bps) and the Vanguard Institutional Index-Instl Plus (2 bps).

227. Apart from underperforming passively managed index funds, the fund also significantly underperformed comparable actively managed funds over the one-, three-, five-, and ten-year periods ending September 30, 2016. These large cap alternatives with similar underlying asset allocations to the CREF Stock Account include the Vanguard PRIMECAP-Adm (VPMAX) and the Vanguard Capital Opp.-Adm (VHCAX).

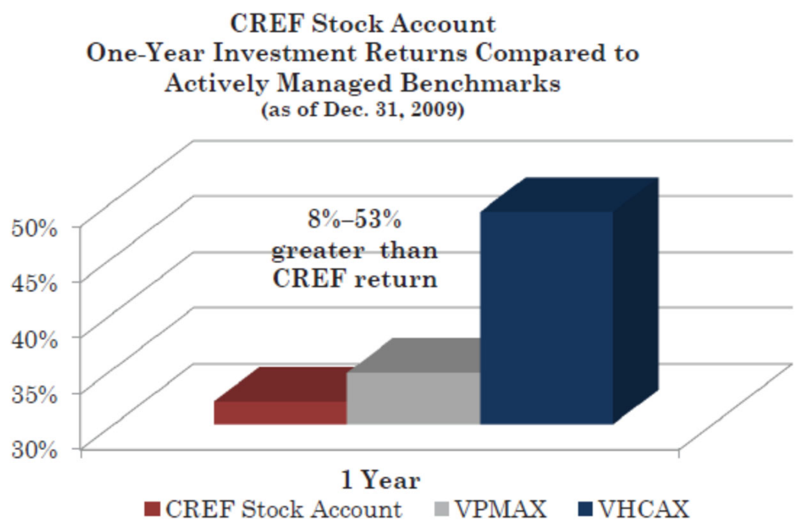
CREF Stock Account
One-, Three-, and Five-Year Investment Returns
Compared to Actively Managed Benchmarks
(as of Sept. 30, 2016)



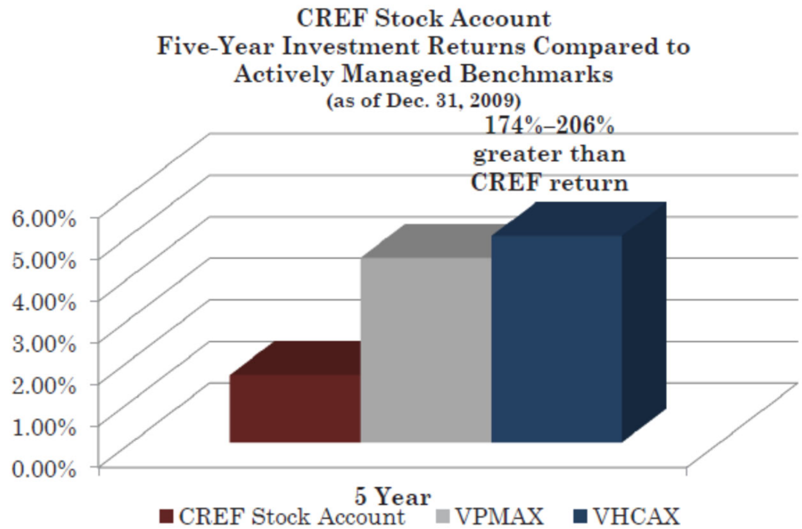
CREF Stock Account
Ten-Year Investment Returns
Compared to Actively Managed Benchmarks
(as of Sept. 30, 2016)

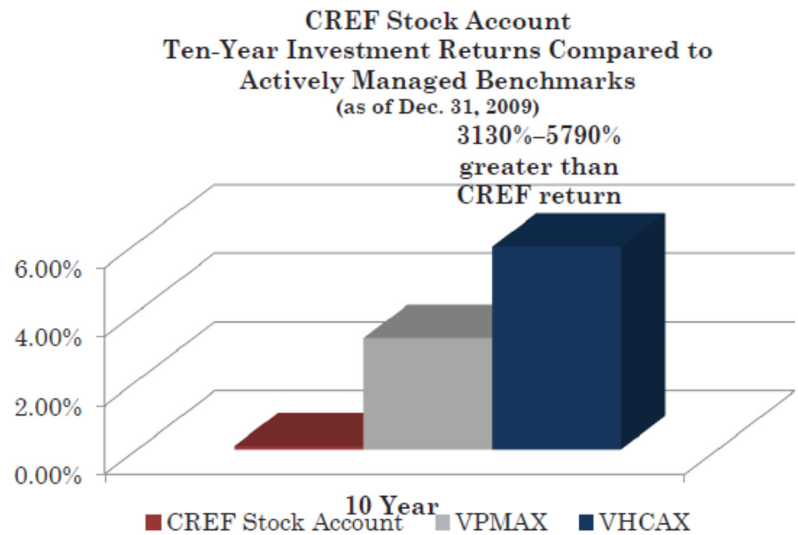


228. This sustained underperformance went back even further. The CREF Stock Account also had a long history of substantial underperformance compared to these actively managed alternatives over the one-, five-, and ten-year periods ending December 31, 2009.[48]



[48] For the Vanguard PRIMECAP-Adm and Vanguard Capital Opportunity Fund-Adm, the investment returns of the investor share class for ten-year performance were used because the admiral share class for each of these funds was not offered until November 12, 2001. The return since inception for the Vanguard PRIMECAP-Adm was 3.23%, and for the Vanguard Capital Opportunity Fund-Adm, 5.89%.





229. Despite the consistent underperformance, the CREF Stock Account, with an expense ratio of 46 bps as of December 31, 2014, was more expensive than better-performing actively managed alternatives: the Vanguard PRIMECAP-Adm (35 bps) and the Vanguard Capital Opp.-Adm (40 bps).

230. Besides this abysmal long-term underperformance of the CREF Stock Account compared to both index funds and actively managed funds, the fund was recognized as imprudent in the industry. In March 2012, an independent investment consultant, AonHewitt, recognized the imprudence of the CREF Stock Account and recommended to its clients they remove this fund from their retirement plan. AonHewitt, *TIAA-CREF Asset Management*, INBRIEF, at 3 (July 2012).[49] This recommendation was made due to numerous factors, including the historical underperformance, high turnover of asset management executives and portfolio managers, and the fund's over 60 separate underlying investment strategies, greatly reducing the fund's ability to generate excess returns over any substantial length of time. *Id.* at 4-5.

231. The Supreme Court has recently and unanimously ruled that ERISA fiduciaries have "a continuing duty to monitor investments and remove imprudent ones[.]" *Tibble v. Edison Int'l,* 135 S. Ct. 1823, 1829 (2015). In contrast to the conduct of prudent fiduciaries, Defendants failed to conduct a prudent process to monitor the CREF Stock Account and continue to retain the fund despite its continuing to underperform lower-cost investment alternatives that were readily available to the Plans.

232. Prudent fiduciaries of defined contribution plans continuously monitor the investment performance of plan options against applicable benchmarks and peer groups to identify underperforming investments. Based on this process, prudent fiduciaries replace those imprudent investments with better performing and reasonably priced options. Under the

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[49] Available at http://system.nevada.edu/Nshe/?LinkServID=82B25D1E-9128-6E45-1094320FC2037740.

standards used by prudent independent fiduciaries, the CREF Stock Account would have been removed from the Plans.

233. Had Defendants removed the CREF Stock Account and the amounts been invested in any of the passively or actively managed lower-cost alternatives identified in ¶¶225 and 227, participants in the Plans would not have lost millions of dollars in retirement savings. Compared to the returns of the Vanguard PRIMECAP Fund Admiral—one of the Plans' core options after the October 2016 restructuring—the Plans lost in excess of $202 million at the plan level as a result of Defendants retaining the CREF Stock Account in the Plans.[50] The aggregate losses of all putative subclass members may be greater than that figure because the proposed subclass excludes participants (if any) whose CREF Stock Account investment outperformed the prudent alternative identified in the subclass definition, *see infra* ¶286.

D. TIAA Real Estate Account.

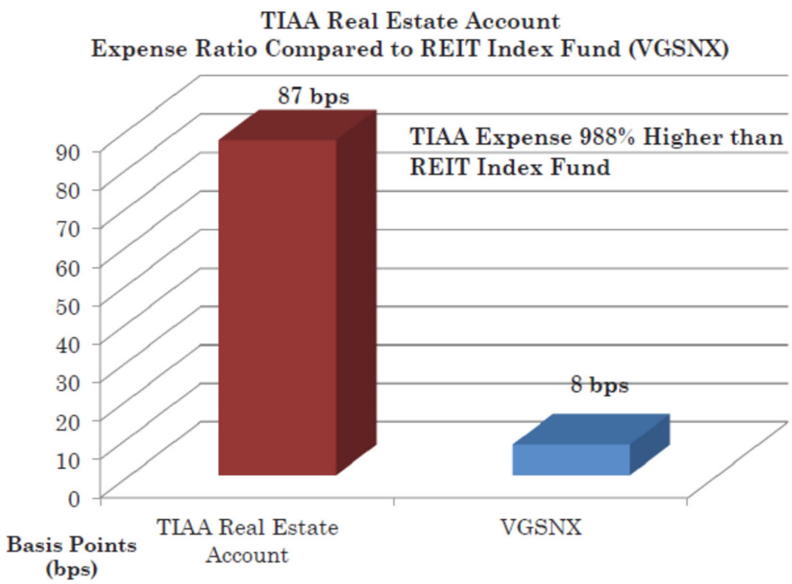
234. Defendants selected and retained the TIAA Real Estate Account as one of the real estate investment options in the Plan. The fund has far greater fees than are reasonable, has historically underperformed, and continues to consistently underperform comparable real estate investment alternatives, including the Vanguard REIT Index I (VGSNX).

235. Additionally, as detailed in ¶¶154-155, the 87 bps that the TIAA Real Estate Account charged was comprised of *five* layers of fees that were each

[50] Plan losses have been brought forward to the present value using the investment returns of the lower-cost alternatives to compensate participants who have not been reimbursed for their losses.

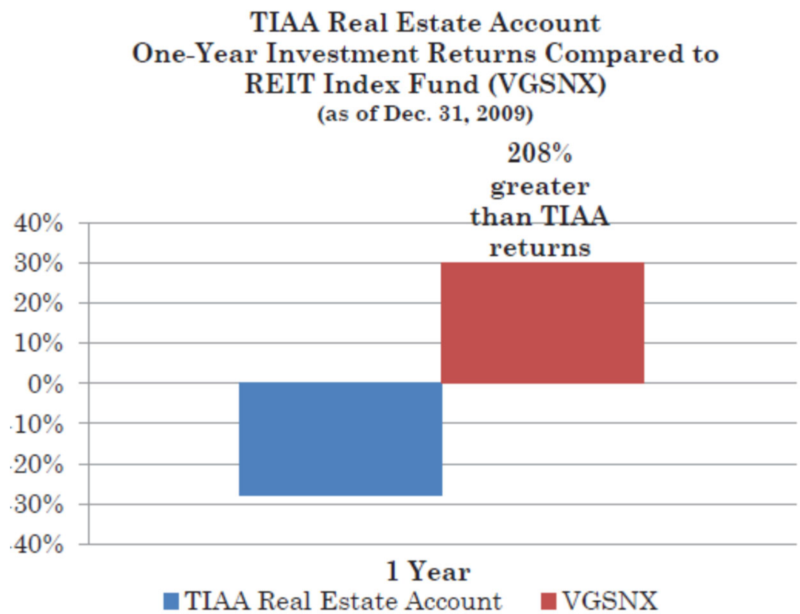
unreasonable compared to the actual services provided by TIAA-CREF to the Plans' participants. Defendants failed to analyze whether these fees were appropriate and reasonable in light of the services provided.

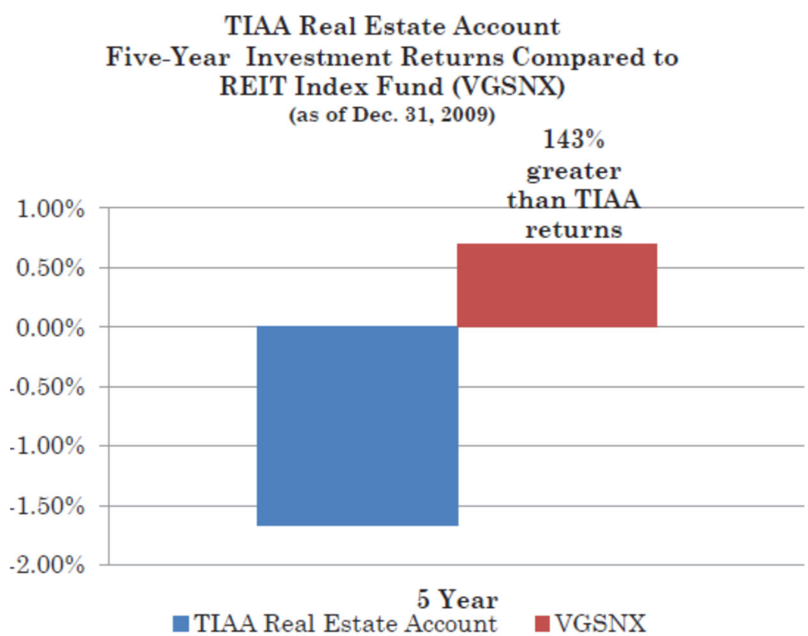
236. With an expense ratio of 87 bps as of December 31, 2014, the TIAA Real Estate Account is also over *10 times more expensive* than the Vanguard REIT Index (Instl) with an expense ratio of 8 bps.

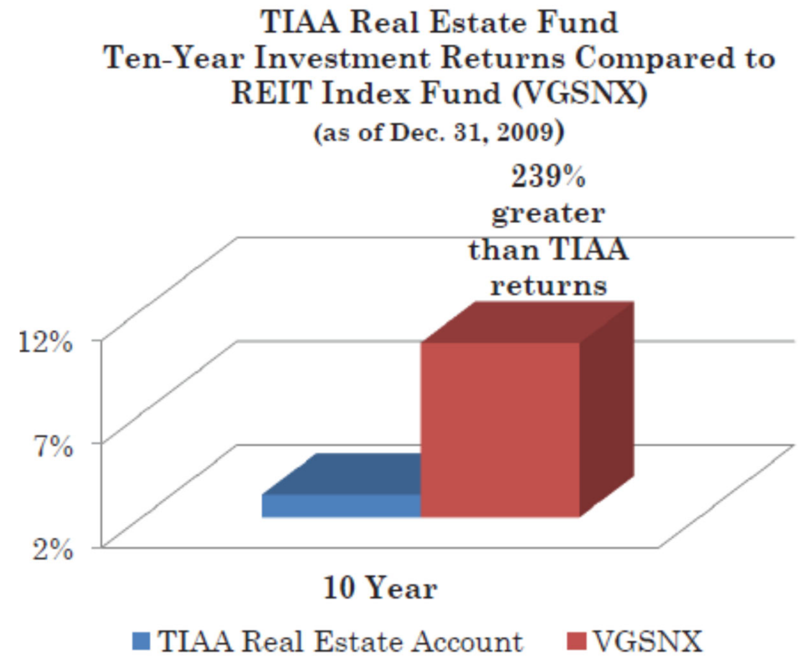


237. The TIAA Real Estate Account had a long history of substantial underperformance relative to the Vanguard REIT Index over the one-, five-, and ten-year periods ending December 31, 2009.[51] Despite this, Defendants selected and to this date retained it in the Plans.

[51] The return of the investor share class was used for ten-year performance because the institutional share class was not offered until December 2, 2003. The return since inception for the Vanguard REIT Index (Instl) was 5.49%.

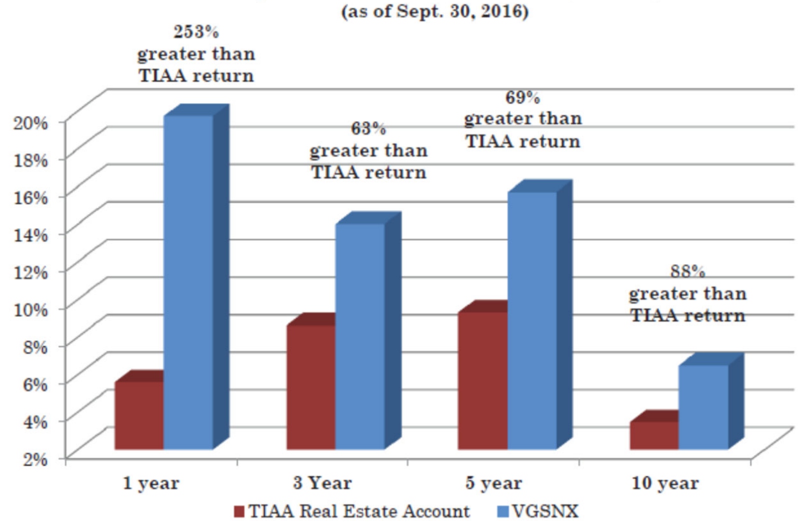

TIAA Real Estate Account
One-Year Investment Returns Compared to
REIT Index Fund (VGSNX)
(as of Dec. 31, 2009)
208% greater than TIAA returns
40%
30%
20%
10%
0%
-10%
-20%
-30%
-40%
1 Year
TIAA Real Estate Account
VGSNX


TIAA Real Estate Account
Five-Year Investment Returns Compared to
REIT Index Fund (VGSNX)
(as of Dec. 31, 2009)
143% greater than TIAA returns
1.00%
0.50%
0.00%
-0.50%
-1.00%
-1.50%
-2.00%
5 Year
TIAA Real Estate Account
VGSNX



238. This underperformance occurred for years before 2009 and has continued after 2009 to date. The TIAA Real Estate Account significantly underperformed the Vanguard REIT Index I over the one-, three-, five-, and ten-year periods ending September 30, 2016.

TIAA Real Estate Account
One-, Three-, Five-, and Ten-Year Investment Returns
Compared to REIT Index Fund (VGSNX)
(as of Sept. 30, 2016)



239. Northwestern's representatives, including NURIC member William McLean, have acknowledged this significant underperformance. Ex. 4, McLean Dep. at 291:19-292:3.

240. In addition to significantly underperforming and having higher costs than other available investment alternatives, the TIAA Real Estate Account is also the riskiest option currently in the Plans, as NURIC's advisor has acknowledged. *Id.* at 289:14-15.

241. As the Supreme Court unanimously ruled in *Tibble*, prudent fiduciaries of defined contribution plans continuously monitor plan investment options and replace imprudent investments. *Tibble*, 135 S. Ct. at 1829. In contrast, Defendants failed to conduct such a process and continue to retain the TIAA Real Estate Account as an investment option in the Plans, despite its continued dramatic underperformance and far higher cost compared to available investment alternatives.

242. Had the amounts invested in the TIAA Real Estate Account instead been invested in the lower-cost and better-performing Vanguard REIT Index (Instl), the Plans would not have lost at least $13.6 million in retirement savings at the plan level.[52] The aggregate losses of all putative subclass members may be greater than that figure because the proposed subclass excludes participants (if any) whose TIAA Real Estate Account investment outperformed the prudent alternative identified in the subclass definition, *see infra* ¶286.

IX. Defendants violated the Plans' Investment Policy Statement

243. As set forth above, an investment policy statement provides fiduciaries with a framework for ensuring that fiduciary best practices are followed and that prudent decisions are made with respect to retirement plan investments. For that reason, investment policy statements include risk and return objectives and various quantitative and qualitative constraints within which investments must perform to remain options for plan participants.

244. At a minimum, an investment policy statement must set forth clear criteria for how funds are selected, as well as clear criteria describing how a plan's investments will be monitored and removed if they become imprudent.

* * *

246. Nevertheless, NURIC did not formally implement or adopt an investment policy statement for the

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[52] Losses in the Plans have been brought forward to the present value using the investment returns of the Vanguard REIT Index (Instl) to compensate participants who have not been reimbursed for their losses.

Plans until June 2015 (the "IPS"). Ex. 9; *see also* Ex. 8, Fish Dep. at 95:16-18; 101:16-24; 125:14-22.

247. Notwithstanding the fact that NURIC did not formally adopt an investment policy statement until 2015, some Northwestern representatives have testified that NURIC monitored the Plans' investments pursuant to a draft of the IPS that was not formally adopted. Ex. 3, Braeutigam Dep. at 91:3-93:1; Ex. 4, McLean Dep. at 82:18-83:19; Ex. 8, Fish Dep. at 95:16-96:18. However, this is inconsistent with the written records of meeting minutes and other materials, which do not show that Defendants used a draft IPS to monitor investment options.

248. In any case, Defendants' failure to formally adopt a framework for evaluating the Plans' investments is inconsistent with fiduciary best practices and underscores Defendants' lack of procedural prudence in evaluating each of the Plans' investments as required by ERISA.

249. Moreover, Defendants have violated the IPS that was adopted in June 2015, which governs the selection, monitoring, and removal of the Plans' investment options and establishes, among other things, criteria for evaluating the investment performance of each of the Plans' investment options for selection and continued retention in the Plans.

250. Specifically, the Plans' June 2015 IPS states that "all investments" in the Plans should meet the following standards for selection:

> Investment performance should be competitive with an appropriate style-specific benchmark and the median return for an appropriate, style-specific peer group[.]

Ex. 9 at 057.

251. The Plans' June 2015 IPS also provides that "all investments" in the Plans should meet the following standards:

> Specific risk and risk-adjusted return measures should be reviewed by the Committee and be within a reasonable range relative to appropriate, style-specific benchmark and peer group.

Id.

252. The Plans' June 2015 IPS additionally provides that "[f]ees and fee structures should be competitive compared with similar investments reasonably available to the Plan[.]" *Id.*

253. Moreover, the Plans' June 2015 IPS states that "[t]he process of monitoring investment performance relative to specified guidelines will be consistently applied" and that "[m]onitoring will utilize the same investment selection criteria used in the original selection analysis." *Id.* at 058. The Plans' June 2015 IPS further states that the Committee is responsible for "[p]eriodically monitoring the service providers and investment consultant." *Id.* at 056.

254. The Plans' June 2015 IPS additionally states that:

> Service providers should be monitored on a regular basis or more frequently if applicable. Administrative and/or recordkeeping service providers may be benchmarked against, but not limited, industry averages and/or other provider quotes. . . . The monitoring of plan provider(s) is to ensure that total plan costs and services are competitive and reasonable.

Id.

255. Finally, the Plan's June 2015 IPS states that it "will be reviewed periodically, and, if appropriate, may be amended to reflect changes in the capital

markets, Plan objectives, or other facts relevant to the Plans." *Id*. at 055.

256. Defendants failed to abide by the above criteria. As an initial matter, Defendants failed to abide by the IPS provision requiring "all investments" to be competitive with style-specific benchmarks and peer groups, because there were no such benchmarks for the CREF Stock Account or the TIAA Real Estate Account, as Northwestern representatives have conceded. *E,g,*, Ex. 3, Braeutigam Dep. at 192:3-193:2; 208:10-209:6; 213:16-18; 44:14-47:21; 170:22-173:1; 179:6-192:19; 208:10-214:6.

257. This testimony is supported by a concession from TIAA itself, which stated in correspondence with Northwestern that the CREF Stock Account "is an incredibly unique investment vehicle, with no comparable benchmarks[.]" NU-00114018, attached hereto as Exhibit 17.

258. In failing to benchmark either the CREF Stock Account or the TIAA Real Estate Account, Defendants have failed to ensure that these investment options are either "competitive with an appropriate style-specific benchmark" or that these options' "[s]pecific risk and risk-adjusted return measures [are] reviewed by the Committee [to be] within a reasonable range relative to appropriate, style-specific benchmark and peer group." Defendants failed to take appropriate action and remove the CREF Stock and TIAA Real Estate Accounts to prevent further losses to participants' retirement savings, directly violating the June 2015 IPS.

259. Defendants additionally violated the provisions of the June 2015 IPS requiring periodic monitoring of the fees charged by service providers. As Northwestern's representatives have testified, there was no

regular monitoring of all of the Plans' hundreds of investment options that took place until those investment options were significantly reduced in late 2016. *E.g.*, Ex. 8, Fish Dep. at 111:9-113:3 ("Q: You weren't seeing performance data on a granular level for each one of these 250 funds [in the Plans] and talking about each fund option . . . at every meeting that was going on, correct? A: Right. Because there's no way we could do that in two hours.").

260. Given the comparatively high fees associated with the CREF Stock Account and TIAA Real Estate Accounts, as described above, Defendants also violated the provisions of the June 2015 IPS requiring fees to "competitive compared with similar investments reasonably available to the Plan[.]" Ex. 14 at 057.

261. Defendants additionally violated the provisions of the June 2015 IPS requiring monitoring of service plan providers, as no in-depth benchmarking of recordkeeping fees was performed, no competitive request-for-proposals process was undertaken, and no recordkeeping bids were obtained from non-incumbent recordkeepers. *See* Ex. 8, Fish Dep. at 192:11-19; *see also* Ex. 3, Braeutigam Dep. at 34:14-35:14.

262. Finally, Defendants violated the provision of the June 2015 IPS requiring that the IPS itself be reviewed periodically, as NURIC meeting minutes do not reflect any such periodic review, and Northwestern representatives have been unable to identify any such review that occurred.

263. Even if Defendants did in some respects use a draft IPS prior to June 2015, furthermore, Defendants violated that IPS for reasons above stated above. NU-00004693, attached hereto as Exhibit 18 (containing the provisions described above).

X. Defendants have admitted that the prior structure of the Plans was imprudent and that they allowed excessive fees to be charged to the Plans.

264. Defendants expressly recognized that the Plans paid excessive administrative fees to TIAA-CREF and Fidelity. In an April 4, 2016 letter to the Plans' participants, Defendants explained that Northwestern had "negotiated a credit of fees, called a 'revenue credit,' from both Fidelity and TIAA."[53]

265. A "revenue credit" is a rebate to retirement plan participants to compensate them for overpayments made to plan service providers—in this case, the recordkeepers.

266. Northwestern informed Plan participants that the "modest" credits that each participant would receive would be "based on the proportion of [the participant's] aggregate Northwestern University retirement account balance . . . as of March 31, 2016."[54] The credits, if any, appeared on participants' account statements for the second quarter of 2016. Thus, the effect of the credit was to offset overcharges after March 31, 2016.

267. As Northwestern admitted, the revenue credits were "modest."[55] The amount of the credits did not begin to approach the roughly $30 million that the Plans' participants lost due to being overcharged by TIAA-CREF and Fidelity for recordkeeping services from 2010 through 2015, as described *supra* ¶¶166-168, 174.

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[53] April 4, 2016 letter from Pamela S. Beemer, available at http://www.northwestern.edu/hr/benefits/retirement-plans/2016-Revenue-Credit-Letter.pdf.

[54] *Id.*

[55] *Id.*

268. Defendants similarly acknowledged that the structure of the Plans prior to 2016—with *hundreds* of overlapping, duplicative, and costly investment options—caused participants to pay unreasonable investment fees.

269. In a June 2016 letter to the Plans' participants, Defendants acknowledged that the new tiered structure was "designed to be simpler and **allow for informed decisions** to be made based upon an individual's personal investment comfort level and expertise," that would "**enable simpler decision-making**."[56]

270. In an August 2016 "town hall" meeting presentation, Defendants explained that the new tiered structure would: "**[r]educe[] administration fees**," which would in turn "**increase[] participant returns**;" offer a "[s]treamlined menu for all investor types;" and provide "[a]ccess to **lower cost share classes** when available."[57]

271. Defendants acknowledged that restructuring the Plans' investment options "**[b]etter aligns us with peers as many have reduced their line-ups, or are in [the] process of doing so.**"[58]

272. Defendants also admitted that the recent shift in the Plans' structures "[p]ositions NURIC to **meet expanded fiduciary responsibilities** based

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[56] June 2016 letter from Pamela S. Beemer, available at http://www.northwestern.edu/hr/benefits/retirement-plans/2016%20Investment%20Change.pdf.

[57] "What You Need to Know: Changes to the Northwestern University Retirement Plans," available at http://www.northwestern.edu/hr/benefits/retirement-plans/Town%20Hall%20Meetings%20Presentation_Aug2016.pdf.

[58] *Id.*

on IRS regulations which now **mandate greater oversight by employers**."[59]

273. As noted above, Defendants have repeatedly conceded in deposition testimony that the Plans' structure resulted in higher fees being charged to participants, and was overwhelming and confusing to participants. *See, e.g.,* Ex. 8, Fish Dep. at 64:4-23; *see also* Ex. 2, Beemer Dep. at 314:6-316:4, 317:17-318:10.

274. Had Defendants used the massive bargaining power afforded them by the Plans' vast assets to obtain revenue credits, reduce administration fees, and obtain lower cost share classes by 2009 (if not years earlier), the Plans' participants would have avoided paying millions of dollars in unreasonable investment and administrative fees, and millions of dollars in performance losses.

275. In restructuring the Plans' investment options, Defendants removed hundreds of unnecessary mutual funds from the Plans. However, they left both the CREF Stock Fund and the TIAA Real Estate Fund as investment options, despite their poor performance history as detailed in ¶¶211–242.

IX. Defendants allowed TIAA to use highly confidential personal information of Northwestern employees and retirees to sell TIAA's investment products and wealth management services.

276. Private, confidential information that recordkeepers obtain about plan participants is information of value belonging to the plan and its participants. This information is a plan asset.

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[59] *Id.*

277. TIAA used its position as recordkeeper for the Plans to obtain access to participants, learning their ages, length of employment, and time until retirement age, the size of their accounts, and their choices of investments, and used that information for its benefit to market and sell lucrative investment products, insurance, mortgages, 529 plans, IRAs, and wealth management products to participants as they neared retirement and before retirement. Such practices have been documented by former TIAA employees in multiple recent reports in the New York Times that have scrutinized TIAA's sales practices.[60]

278. One recent New York Times article, dated November 9, 2017, states that New York's attorney general has issued subpoenas to TIAA for documents related to its "dubious" sales practices. *Id.* The article goes on: "TIAA has previously said it puts its clients first and has maintained that because its 855 financial advisers and consultants do not receive commissions on the products they sell they are unbiased. But former employees and TIAA regulatory filings challenge this view, pointing out that the company awards bonuses to sales personnel when they steer customers into more expensive in-house products and services." *Id.* The article also describes how TIAA's role as a recordkeeper provides TIAA with access to sell individuals additional investment

[60] Gretchen Morgenson, *The Finger-Pointing at the Finance Firm TIAA*, N.Y. Times, Oct. 21, 2017, https://www.nytimes.com/2017/10/21/business/the-finger-pointing-at-the-finance-firm-tiaa.html; *see also* Gretchen Morgenson, *TIAA Receives New York Subpoena on Sales Practices*, N.Y. Times, Nov. 9, 2017, https://www.nytimes.com/2017/11/09/business/tiaa-subpoena.html; and Tara Siegel Bernard, If you Bought In To TIAA Based On Reputation, Check Your Accounts, N.Y. Times, Nov. 13, 2017, https://www.nytimes.com/2017/11/13/your-money/tiaa-403b.html.

products through IRAs. "Most of TIAA's clients invest with the firm because their employers have hired it to administer their workers' retirement plans . . . The company earns a record-keeping fee from the institutions whose accounts it oversees, but can generate far more revenue when investors buy its annuities and funds. This presents the potential for conflict." *Id*.

279. Another recent New York Times article describes how TIAA's marketing of its original non-profit legacy and its business practices have been called into question after several legal filings including a whistle-blower complaint have accused the company of pushing its salespeople to promote its higher fee products and services.[61] The article describes how the whistleblower suit asserts that TIAA advisers had been instructed to sell products by exploiting customer fears. The whistleblower suit itself contends, among other things, that TIAA implemented a fraudulent scheme in 2011 to convert "unsuspecting retirement plan clients from low-fee, self-managed accounts to TIAA-CREF managed accounts" which were considerably more costly.[62]

280. Other plans prohibit TIAA from using its position in a plan to sell investment products and services. Prudent fiduciaries protect participant account information from being exploited for commercial purposes and take affirmative steps to prohibit service providers from using confidential participant

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[61] Tara Siegel Bernard, If you Bought In To TIAA Based On Reputation, Check Your Accounts, N.Y. Times, Nov. 13, 2017, https://www.nytimes.com/2017/11/13/your-money/tiaa-403b.html.

[62] Gretchen Morgenson, *The Finger-Pointing at the Finance Firm TIAA*, N.Y. Times, Oct. 21, 2017, https://www.nytimes.com/2017/10/21/business/the-finger-pointing-at-the-finance-firm-tiaa.html.

information to solicit participants with various products outside of the plan (and unrelated to the service provider's function in servicing the plan). Specifically, prudent fiduciaries establish clear limits on the proper use of confidential participant information. For example, the plan sponsor of the Denver City & County Deferred Compensation Plan (a plan recordkept by TIAA), expressly prohibits TIAA from cross-selling its products to Denver plan participants.[63] In this way, the fiduciaries of the Denver plan ensure that TIAA acts solely as a third-party recordkeeper for the plan and prevent TIAA from exploiting its recordkeeping position by using participant information to sell participants TIAA's other products and services.

281. TIAA marketed several products and services to Plaintiffs Lancaster, Walker, and Hughes, including estate planning services, IRAs, term life insurance policies, home mortgages, and personal finance and wealth management services.

282. Defendants could and should have prohibited TIAA from using its position as recordkeeper to the Plans to market and sell investment products, but they failed to do so. The value of TIAA's use of its position as a recordkeeper to the Plans to market and sell lucrative products to soon-to-be-retired participants and retired participants was substantial, conveying a stamp of approval by Defendants of TIAA.

283. Multiple Northwestern representatives, including NURIC members Ronald Braeutigam, Pamela

[63] James Comtois, *TIAA clients cautious after N.Y. probe of sales practices*, Pensions&Investments, December 11, 2017, available at: http://www.pionline.com/article/20171211/PRINT/171219961/tiaa-clients-cautious-after-ny-probe-of-sales-practices.

Beemer, Will McLean, and Ingrid Stafford, and NURIC secretary Anne Fish, have testified that Northwestern was aware that TIAA was marketing and selling TIAA's products and services to the Plans' participants as a result of TIAA's access to the participants' information as the Plans' recordkeeper, but that Defendants did nothing to prevent this or otherwise protect participants' sensitive financial information from being exploited by TIAA. Ex. 8, Fish Dep. at 296:14-297:21; Ex. 2, Beemer Dep. at 348:8-23; Ex. 3, Braeutigam Dep. at 298:2-299:10; Ex. 5, Stafford Dep. at 248:15-251:7; Ex. 15 McLean Dep at. 311:16-312:24.

284. Defendants allowed TIAA to market and sell its services and investment products outside the Plans, benefitting TIAA enormously. While obligated to run the plan for the sole benefit of participants, Defendants instead enabled TIAA to benefit, and obtained no benefit to the Plans from this.

CLASS ACTION ALLEGATIONS

285. 29 U.S.C. §1132(a)(2) authorizes any participant or beneficiary of the Plans to bring an action individually on behalf of the Plans to enforce a breaching fiduciary's liability to the Plans under 29 U.S.C. §1109(a).

286. In acting in this representative capacity and to enhance the due process protections of unnamed participants and beneficiaries of the Plans, as an alternative to direct individual actions on behalf of the Plans under 29 U.S.C. §1132(a)(2), Plaintiffs seek to certify this action as a class action on behalf of all participants and beneficiaries of the Plans, with two subclasses. Plaintiffs seek to certify, and to be appointed as representatives of, the following class and subclasses:

Excessive Fee claims and class:

All participants and beneficiaries of the Northwestern University Retirement Plan and the Northwestern University Voluntary Savings Plan, excluding the Defendants and any participant who is a fiduciary to the Plans, who had an account balance at any time between August 17, 2010 through the date of judgment.

CREF Stock Account subclass:

All participants and beneficiaries of the Northwestern University Retirement Plan and the Northwestern University Voluntary Savings Plan, excluding the Defendants and any participant who is a fiduciary to the Plans, who invested in the CREF Stock Account in either of the Plans at any time between August 17, 2010 through the date of judgment and whose investment in the CREF Stock Account underperformed the Russell 3000 Index minus 2 basis points for investment management.

TIAA Real Estate Account subclass:

All participants and beneficiaries of the Northwestern University Retirement Plan and the Northwestern University Voluntary Savings Plan, excluding the Defendants and any participant who is a fiduciary to the Plans, who invested in the TIAA Real Estate Account in either of the Plans at any time between August 17, 2010 date through the date of judgment and whose investment in the TIAA Real Estate Account underperformed the Vanguard REIT Index (Instl).

287. This action meets the requirements of Rule 23 and is certifiable as a class action for the following reasons:

a. The Class includes over 20,000 members and the subclasses include thousands of members, and are thus so large that joinder of all members is impracticable,

b. There are questions of law and fact common to this Class and subclasses because Defendants owed fiduciary duties to the Plans and to all participants and beneficiaries and took the actions and omissions alleged herein as to the Plans and not as to any individual participant. Thus, common questions of law and fact include the following, without limitation: who are the fiduciaries liable for the remedies provided by 29 U.S.C. §1109(a); whether the fiduciaries of the Plans breached their fiduciary duties to the Plans; what are the losses to the Plans resulting from each breach of fiduciary duty; and what Plan-wide equitable and other relief the court should impose in light of Defendants' breach of duty.

c. Plaintiffs' claims are typical of the claims of the Class and subclasses because the Plaintiffs were participants during the time period at issue in this action and all participants in the Plans were harmed by the Plans' excessive fees and other misconduct, as described above; Plaintiffs Lancaster and Walker each invested in the CREF Stock Account and TIAA Real Estate Account during the proposed subclass period and suffered losses.

d. Plaintiffs are adequate representatives of the Class and subclasses because they were participants in the Plans during the Class period, have no interest that is in conflict with the Class or subclasses, are committed to the vigorous representation of the Class and subclasses, and have engaged experienced and competent attorneys to represent the Class and subclasses.

e. Prosecution of separate actions for these breaches of fiduciary duties by individual participants and beneficiaries would create the risk of (A) inconsistent or varying adjudications that would establish incompatible standards of conduct for Defendants in respect to the discharge of its fiduciary duties to the Plans and personal liability to the Plans under 29 U.S.C. §1109(a), and (B) adjudications by individual participants and beneficiaries regarding these breaches of fiduciary duties and remedies for the Plans would, as a practical matter, be dispositive of the interests of the participants and beneficiaries not parties to the adjudication or would substantially impair or impede those participants' and beneficiaries' ability to protect their interests. Therefore, this action should be certified as a class action under Rule 23(b)(1)(A) or (B).

288. A class action is the superior method for the fair and efficient adjudication of this controversy because joinder of all participants and beneficiaries is impracticable, the losses suffered by individual participants and beneficiaries may be small, it would be impracticable for individual members to enforce their rights through individual actions, and the common questions of law and fact predominate over individual questions. Given the nature of the allegations, no class or subclass member has an interest in individually controlling the prosecution of this matter, and Plaintiffs are aware of no difficulties likely to be encountered in the management of this matter as a class action. Alternatively, then, this action may be certified as a class and subclasses under Rule 23(b)(3) if it is not certified under Rule 23(b)(1)(A) or (B).

289. Plaintiffs' counsel, Schlichter, Bogard & Denton LLP, will fairly and adequately represent the interests of the Class and subclasses and is best able to represent the interests of the Class and subclasses under Rule 23(g).

a. Schlichter, Bogard & Denton has been appointed as class counsel in 20 other ERISA class actions regarding excessive fees in large defined contribution plans. As Chief Judge Michael J. Reagan of the Southern District of Illinois recognized in approving a settlement which was reached on the eve of trial after eight years of litigation, resulting in a $62 million monetary recovery and very substantial affirmative relief to benefit the Plans, the firm had shown "exceptional commitment and perseverance in representing employees and retirees seeking to improve their retirement plans," and "demonstrated its well-earned reputation as a pioneer and the leader in the field" of 401(k) plan excessive fee litigation. *Abbott v. Lockheed Martin Corp.*, No. 06-701, 2015 U.S.Dist.LEXIS 93206, at *4-5 (S.D.Ill. July 17, 2015). In that same case, Judge Reagan recognized that the law firm of "Schlichter, Bogard & Denton has had a humungous impact over the entire 401(k) industry, which has benefited employees and retirees throughout the entire country by bringing sweeping changes to fiduciary practices." *Abbott*, 2015 U.S. Dist. LEXIS 93206, at *9 (internal quotations omitted).

b. Other courts have made similar findings: "It is clear to the Court that the firm of Schlichter, Bogard & Denton is preeminent in the field" "and is the only firm which has invested such massive resources in this area." *George v. Kraft Foods Global, Inc.*, No. 08-3799, 2012 U.S.Dist.LEXIS 166816 at 8 (N.D. Ill. June 26, 2012).

c. "As the preeminent firm in 401(k) fee litigation, Schlichter, Bogard & Denton has achieved unparalleled results on behalf of its clients." *Nolte v. Cigna Corp.*, No. 07-2046, 2013 U.S.Dist.LEXIS 184622 at 8 (C.D. Ill. Oct. 15, 2013).

d. "Litigating this case against formidable defendants and their sophisticated attorneys required Class Counsel to demonstrate extraordinary skill and determination." *Beesley v. Int'l Paper Co.*, No. 06-703, 2014 U.S.Dist.LEXIS 12037 at *8 (S.D. Ill. Jan. 31, 2014). The court also emphasized that "the law firm of Schlichter, Bogard & Denton is the leader in 401(k) fee litigation." *Id.* at *8 (internal quotations omitted).

e. U.S. District Court Judge Baker acknowledged the significant impact of the firm's work by stating that as of 2013 the nationwide "fee reduction attributed to Schlichter, Bogard & Denton's fee litigation and the Department of Labor's fee disclosure regulations approach *$2.8 billion in annual savings* for American workers and retirees." *Nolte*, 2013 U.S. Dist. LEXIS 184622, at *6 (emphasis added).

f. U.S. District Judge Herndon of the Southern District of Illinois, recognized the firm's extraordinary contributions to the retirement industry: "Schlichter, Bogard & Denton and lead attorney Jerome Schlichter's diligence and perseverance, while risking vast amounts of time and money, reflect the finest attributes of a private attorney general..." *Beesley*, 2014 U.S. Dist. LEXIS 12037, at *8.

g. The U.S. District Court Judge G. Patrick Murphy recognized the work of Schlichter, Bogard & Denton as exceptional:

> "Schlichter, Bogard & Denton's work throughout this litigation illustrates an exceptional example of a private attorney general risking large sums of money and investing many thousands of hours for the benefit of employees and retirees. No case had previously been brought by either the Department of Labor or private attorneys against large employers for excessive fees in a 401(k) plan. Class Counsel performed substantial work . . . investigating the facts, examining documents, and consulting and paying experts to determine whether it was viable. This case has been pending since September 11, 2006. Litigating the case required Class Counsel to be of the highest caliber and committed to the interests of the participants and beneficiaries of the General Dynamics 401(k) Plans."

Will v. General Dynamics Corp., No. 06-698, 2010 U.S.Dist.LEXIS 123349 at 8-9 (S.D.Ill. Nov. 22, 2010).

h. Schlichter, Bogard & Denton handled the only full trial of an ERISA excessive fee case, resulting in a $36.9 million judgment for the plaintiffs that was affirmed in part by the Eighth Circuit. *Tussey v. ABB, Inc.*, 746 F.3d 327 (8th Cir. 2014). In awarding attorney's fees after trial, the district court concluded that "Plaintiffs' attorneys are clearly experts in ERISA litigation." *Tussey v. ABB, Inc.*, No. 06-4305, 2012 U.S.Dist.LEXIS 157428 at 10 (W.D. Mo. Nov. 2, 2012). Following remand, the district court again awarded Plaintiffs' attorney's fees, emphasizing the significant contribution Plaintiffs' attorneys have made to ERISA litigation, including educating the Department of

Labor and federal courts about the importance of monitoring fees in retirement plans:

> "Of special importance is the significant, national contribution made by the Plaintiffs whose litigation clarified ERISA standards in the context of investment fees. The litigation educated plan administrators, the Department of Labor, the courts and retirement plan participants about the importance of monitoring recordkeeping fees and separating a fiduciary's corporate interest from its fiduciary obligations."

Tussey v. ABB, Inc., No. 06-4305, 2015 U.S.Dist. LEXIS 164818 at 7-8 (W.D. Mo. Dec. 9, 2015).

i. In *Spano v. Boeing Co.*, in approving a settlement reached after nine years of litigation which included $57 million in monetary relief and substantial affirmative relief to benefit participants, the court found that "[t]he law firm Schlichter, Bogard & Denton has significantly improved 401(k) plans across the country by bringing cases such as this one, which have educated plan administrators, the Department of Labor, the courts and retirement plan participants about the importance of monitoring recordkeeping fees." No. 06-cv-743, Doc. 587, at 5-6 (S.D.Ill. Mar. 31, 2016) (Rosenstengel, J.) (internal quotations omitted).

j. Recently, in approving a settlement including $32 million plus significant affirmative relief, Chief Judge William Osteen in *Kruger v. Novant Health, Inc.*, No. 14-208, Doc. 61, at 7-8 (M.D.N.C. Sept. 29, 2016) found that "Class Counsel's efforts have not only resulted in a significant monetary award to the class but have also brought improvement to the manner in which the Plans are operated and managed which will result in participants and retirees receiving significant savings[.]"

k. On November 3, 2016, Judge Michael Ponsor of the United States District Court for the District of Massachusetts found that by securing a $30.9 million settlement, Schlichter, Bogard & Denton had achieved an "outstanding result for the class," and "demonstrated extraordinary resourcefulness, skill, efficiency and determination." *Gordan v. Mass Mutual Life Ins., Co.*, No. 14-30184, Doc. 144 at 5 (D. Mass. November 3, 2016).

l. Schlichter, Bogard & Denton is also class counsel in and handled *Tibble v. Edison International*—the first and only Supreme Court case to address the issue of excessive fees in a defined contribution plan—in which the Court held in a unanimous 9-0 decision that ERISA fiduciaries have "a continuing duty to monitor investments and remove imprudent ones[.]" 135 S. Ct. at 1829. Schlichter, Bogard & Denton successfully petitioned for a writ of certiorari, and obtained amicus support from the United States Solicitor General and AARP, among others. Given the Court's broad recognition of an ongoing fiduciary duty, the *Tibble* decision will affect all ERISA defined contribution plans.

m. The firm's work in ERISA excessive fee class actions has been featured in the New York Times, Wall Street Journal, NPR, Reuters, and Bloomberg, among other media outlets. *See, e.g.*, Anne Tergesen, *401(k) Fees, Already Low, Are Heading Lower*, WALL ST. J. (May 15, 2016);[64] Gretchen Morgenson, *A Lone Ranger of the 401(k)'s*, N.Y.

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[64] Available at http://www.wsj.com/articles/401-k-fees-already-low-are-heading-lower-1463304601.

TIMES (Mar. 29, 2014);[65] Liz Moyer, *High Court Spotlight Put on 401(k) Plans*, WALL ST. J. (Feb. 23, 2015);[66] Floyd Norris, *What a 401(k) Plan Really Owes Employees*, N.Y. TIMES (Oct. 16, 2014);[67] Sara Randazzo, *Plaintiffs' Lawyer Takes on Retirement Plans*, WALL ST. J. (Aug. 25, 2015);[68] Jess Bravin and Liz Moyer, *High Court Ruling Adds Protections for Investors in 401(k) Plans*, WALL ST. J. (May 18, 2015);[69] Jim Zarroli, *Lockheed Martin Case Puts 401(k) Plans on Trial*, NPR (Dec. 15, 2014);[70] Mark Miller*, Are 401(k) Fees Too High? The High-Court May Have an Opinion*, REUTERS (May 1, 2014);[71] Greg Stohr, *401(k) Fees at Issue as Court Takes Edison Worker Appeal*, BLOOMBERG (Oct. 2, 2014).[72]

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65 Available at http://www.nytimes.com/2014/03/30/business/a-lone-ranger-of-the-401-k-s.html?_r=0.

66 Available at http://www.wsj.com/articles/high-court-spotlight-put-on-401-k-plans-1424716527.

67 Available at http://www.nytimes.com/2014/10/17/business/what-a-401-k-plan-really-owes-employees.html?_r=0.

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70 Available at http://www.npr.org/2014/12/15/370794942/lockheed-martin-case-puts-401-k-plans-on-trial.

71 Available at http://www.reuters.com/article/us-column-miller-401fees-idUSBREA400J220140501.

72 Available at http://www.bloomberg.com/news/articles/2014-10-02/401-k-fees-at-issue-as-court-takes-edison-worker-appeal.

COUNT I

Breach of Fiduciary Duties—29 U.S.C. §1104(a)(1)(A) & (B)

Locking the Plan into CREF Stock Account and TIAA Recordkeeping

290. Plaintiffs restate and incorporate the allegations in the preceding paragraphs.

291. Defendants were required to discharge their duties with respect to the Plans solely in the interest of, and for the exclusive purpose of providing benefits to, Plans' participants and beneficiaries, defraying reasonable expenses of administering the Plans, and acting with the care, skill, prudence, and diligence required by ERISA.

292. Defendants were required to independently assess "the prudence of *each* investment option" for the Plans on an ongoing basis, *DiFelice*, 497 F.3d at 423, and to act prudently and solely in the interest of the Plans' participants in deciding whether to maintain a recordkeeping arrangement, DOL Adv. Op. 97-16A. Defendants were also required to remove investments that were no longer prudent for the Plans, as the Supreme Court recently confirmed. *Tibble*, 135 S. Ct. at 1828-29.

293. By allowing TIAA-CREF to mandate the inclusion of the CREF Stock Account and Money Market Account in the Plans, as well as the TIAA Traditional Annuity, and to require that it provide recordkeeping for its proprietary options, Defendants committed the Plans to an imprudent arrangement in which certain investments had to be included and could not be removed from the plan *even if they were no longer prudent investments*, and prevented the Plans from using alternative recordkeepers who could provide superior services at a lower cost. In so doing, Defendants abdicated their duty to indepen-

dently assess the prudence of each option in the Plans on an ongoing basis, and to act prudently and solely in the interest of participants in selecting the Plans' recordkeeper. By allowing TIAA-CREF to dictate these terms, Defendants favored the financial interests of TIAA-CREF in receiving a steady stream of revenues from TIAA-CREF's proprietary funds over the interest of participants.

294. Because Defendants shackled the Plans with the CREF Stock Account and TIAA recordkeeping services without engaging in a reasoned decision-making process as to the prudence of those options, Defendants are liable to make good to the Plans all losses resulting from its breach. 29 U.S.C. §1109(a). As described in detail above, the Plans suffered massive losses from the inclusion of the CREF Stock Account in the Plans compared to what those assets would have earned if invested in prudent alternative investments that were available to the Plans, and also suffered losses from paying TIAA recordkeeping fees that far exceeded market rates.

295. Total Plan losses will be determined after complete discovery in this case and are continuing.

296. Defendants are personally liable under 29 U.S.C. §1109(a) to make good to the Plans any losses to the Plans resulting from the breaches of fiduciary duties alleged in this Count and is subject to other equitable or remedial relief as appropriate.

297. Each Defendant knowingly participated in the breach of the other Defendants, knowing that such acts were a breach, enabled the other Defendants to commit a breach by failing to lawfully discharge its own fiduciary duties, knew of the breach by the other Defendants and failed to make any reasonable effort under the circumstances to remedy the breach. Thus, each defendant is liable for the

losses caused by the breach of its co-fiduciary under 29 U.S.C. §1105(a).

COUNT II

Prohibited transactions—29 U.S.C. §1106(a)(1) Locking the Plan into CREF Stock Account and TIAA Recordkeeping

298. Plaintiffs restate and incorporate the allegations contained in the preceding paragraphs.

299. Section 1106(a)(1) prohibits transactions between a plan and a "party in interest," and provides as follows:

> [A] fiduciary with respect to a plan shall not cause the plan to engage in a transaction, if he knows or should know that such transaction constitutes a direct or indirect –
>
> > (A) sale or exchange, or leasing, of any property between the plan and a party in interest;
> >
> > * * *
> >
> > (C) furnishing of goods, services, or facilities between the plan and party in interest;
> >
> > (D) transfer to, or use by or for the benefit of a party in interest, of any assets of the plan . . .

29 U.S.C. §1106(a)(1).

300. Congress defined "party in interest" to encompass "those entities that a fiduciary might be inclined to favor at the expense of the plan beneficiaries," such as employers, other fiduciaries, and service providers. *Harris Tr. & Sav. Bank v. Salomon Smith Barney, Inc.,* 530 U.S. 238, 242 (2000); 29 U.S.C. §1002(14)(A)-(C). As a service provider to the Plans, TIAA-CREF is a party in interest. 29 U.S.C. §1002(14)(B).

301. By allowing the Plans to be locked into an unreasonable arrangement that required the Plans

to include the CREF Stock Account and to use TIAA as the recordkeeper for its proprietary products even though the fund was no longer a prudent option for the Plans due to its excessive fees and poor performance, and even though TIAA's recordkeeping fees were unreasonable for the services provided, Defendants caused the Plans to engage in transactions that it knew or should have known constituted an exchange of property between the Plan and TIAA-CREF prohibited by 29 U.S.C. §1106(a)(1)(A), a direct or indirect furnishing of services between the Plans and TIAA-CREF prohibited by 29 U.S.C. §1106(a)(1)(C), and a transfer of the Plans' assets to TIAA-CREF prohibited by 29 U.S.C. §1106(a)(1)(D). These transactions occurred each time the Plans paid fees to TIAA-CREF in connection with the Plans' investments in the CREF Stock Account and other proprietary options that paid revenue sharing to TIAA.

302. Total Plan losses will be determined after complete discovery in this case and are continuing.

303. Under 29 U.S.C. §1109(a), Defendants are personally liable to restore all losses to the Plans resulting from these prohibited transactions, and to provide restitution of all proceeds of these prohibited transactions, and are subject to other appropriate equitable or remedial relief.

COUNT III

Breach of Fiduciary Duties—29 U.S.C. §1104(a)(1)(A) & (B)

Unreasonable Administrative Fees

304. Plaintiffs restate and incorporate the allegations contained in the preceding paragraphs.

305. Defendants were required to discharge its duties with respect to the Plans solely in the interest

of, and for the exclusive purpose of providing benefits to the Plans' participants and beneficiaries, defraying reasonable expenses of administering the Plans, and acting with the care, skill, prudence, and diligence required by ERISA.

306. If a defined contribution plan overpays for recordkeeping services due to the fiduciaries' "failure to solicit bids" from other recordkeepers, the fiduciaries have breached their duty of prudence. *See George,* 641 F.3d at 798-99. Similarly, failing to "monitor and control recordkeeping fees" and "paying excessive revenue sharing" as a result of failures to "calculate the amount the Plan was paying . . . through revenue sharing," to "determine whether [the recordkeeper's] pricing was competitive," and to "leverage the Plan's size to reduce fees," while allowing the "revenue sharing to benefit" a third-party recordkeeper "at the Plan's expense," is a breach of fiduciary duties. *Tussey,* 746 F.3d at 336.

307. Defendants' process for monitoring and controlling the Plans' recordkeeping fees was a fiduciary breach in that Defendants failed to adequately monitor the amount of the revenue sharing received by the Plans' recordkeepers, determine if those amounts were competitive or reasonable for the services provided to the Plans, or use the Plans' size to reduce fees or obtain sufficient rebates to the Plans for the excessive fees paid by participants. Moreover, Defendants failed to solicit bids from competing providers on a flat per-participant fee basis. As the Plans' assets grew, the asset-based revenue sharing payments to the Plans' recordkeepers grew, even though the services provided by the recordkeepers remained the same. This caused the recordkeeping compensation paid to the recordkeepers to exceed a reasonable fee for the services provided. This conduct was a breach of fiduciary duties.

308. By allowing TIAA-CREF and Fidelity to put their proprietary investments in the Plans without scrutinizing those providers' financial interest in using funds that provided them a steady stream of revenue sharing payments, Defendants failed to act in the exclusive interest of participants.

309. In contrast to the comprehensive plan reviews conducted by similarly situated 403(b) plan fiduciaries which resulted in consolidation to a single recordkeeper and significant fee reductions, Defendants failed to engage in a timely and reasoned decision-making process to determine whether the Plans would similarly benefit from consolidating the Plans' administrative and recordkeeping services under a single provider. Instead, Defendants continued to contract with two separate recordkeepers. This failure to consolidate the recordkeeping services until late 2012 for the Voluntary Savings Plan and to this date for the Retirement Plan eliminated the Plans' ability to obtain the same services at a lower cost with a single recordkeeper. Defendants' failure to "balance the relevant factors and make a reasoned decision as to the preferred course of action—under circumstances in which a prudent fiduciary would have done so"—and, indeed, *did* so—was a breach of fiduciary duty. *George*, 641 F.3d at 796.

310. Total losses to the Plans will be determined after complete discovery in this case and are continuing.

311. Defendants are personally liable under 29 U.S.C. §1109(a) to make good to the Plans any losses to the Plans resulting from the breaches of fiduciary duties alleged in this Count and is subject to other equitable or remedial relief as appropriate.

312. Each Defendant knowingly participated in the breach of the other Defendants, knowing that

such acts were a breach, enabled the other Defendants to commit a breach by failing to lawfully discharge its own fiduciary duties, knew of the breach by the other Defendants and failed to make any reasonable effort under the circumstances to remedy the breach. Thus, each defendant is liable for the losses caused by the breach of its co-fiduciary under 29 U.S.C. §1105(a).

COUNT IV

Prohibited transactions—29 U.S.C. §1106(a)(1) Administrative Services and Fees

313. Plaintiffs restate and incorporate the allegations contained in the preceding paragraphs.

314. As service providers to the Plans, TIAA-CREF and Fidelity are parties in interest. 29 U.S.C. §1002(14)(B).

315. By causing the Plans to use TIAA-CREF and Fidelity as the Plans' recordkeepers from year to year, Defendants caused the Plans to engage in transactions that Defendants knew or should have known constituted an exchange of property between the Plans and TIAA-CREF and Fidelity prohibited by 29 U.S.C. §1106(a)(1)(A), a direct or indirect furnishing of services between the Plans and TIAA-CREF and Fidelity prohibited by 29 U.S.C. §1106(a)(1)(C), and a transfer of the Plans' assets to, or use by or for the benefit of TIAA-CREF and Fidelity prohibited by 29 U.S.C. §1106(a)(1)(D). These transactions occurred each time the Plans paid fees to TIAA-CREF and Fidelity and in connection with the Plans' investments in funds that paid revenue sharing to TIAA-CREF and Fidelity.

316. Total losses to the Plans will be determined after complete discovery in this case and are continuing.

317. Under 29 U.S.C. §1109(a), Defendants are personally liable to restore all losses to the Plans resulting from these prohibited transactions, and to provide restitution of all proceeds from these prohibited transactions, and are subject to other appropriate equitable or remedial relief.

COUNT V

Breach of Fiduciary Duties—29 U.S.C. §1104(a)(1)(A) & (B)

Unreasonable Investment Management Fees, Unnecessary Marketing and Distribution (12b-1) Fees and Mortality and Expense Risk Fees, and Performance Losses

318. Plaintiffs restate and incorporate the allegations contained in the preceding paragraphs.

319. Defendants are responsible for selecting prudent investment options, ensuring that those options charge only reasonable fees, and taking any other necessary steps to ensure that the Plans' assets are invested prudently. Defendants had a continuing duty to evaluate and monitor the Plans' investments on an ongoing basis and to "remove imprudent ones" regardless of how long a fund has been in the plan. *Tibble,* 135 S. Ct. at 1829.

320. These duties required Defendants to independently assess whether each option was a prudent choice for the Plans, and not simply to follow the recordkeepers' fund choices or to allow the recordkeepers to put nearly their entire investment lineups in the Plans' menus. *DiFelice*, 497 F.3d at 423; *see Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 590, 595-96 (8th Cir. 2009).

321. In making investment decisions, Defendants were required to consider all relevant factors under the circumstances, including without limitation

alternative investments that were available to the Plans, the recordkeepers' financial interest in having their proprietary investment products included in the Plans, and whether the higher cost of actively managed funds was justified by a realistic expectation of higher returns. *Braden*, 588 F.3d at 595-96; *Tatum v. RJR Pension Inv. Comm.*, 761 F.3d 346, 360 (4th Cir. 2014); 29 C.F.R. § 2550.404a-1(b); Restatement (Third) of Trusts ch. 17, intro. note; *id.* § 90 cmt. h(2).

322. Defendants selected and retained for years as the Plans' investment options mutual funds and insurance company variable annuities with high expenses and poor performance relative to other investment options that were readily available to the Plans at all relevant times.

323. Many of these options included unnecessary layers of fees that provided no benefit to participants but significant benefits to TIAA-CREF, including marketing and distribution (12b-1) fees and "mortality and expense risk" fees.

324. Rather than prudently consolidating the Plans' hundreds of investment options into a core lineup in which prudent investments were selected for a given asset class and investment style, as is the case with most defined contribution plans, Defendants retained multiple investment options in each asset class and investment style until October 2016, thereby depriving the Plans of their ability to qualify for lower cost share classes of certain investments, while violating the well-known principle for fiduciaries that such a high number of investment options causes participant confusion and inaction. In addition, as a fiduciary required to operate as a prudent financial expert, *Katsaros,* 744 F.2d at 279, Defendants knew or should have known that providing numerous

actively managed duplicative funds in the same investment style would produce a "shadow index" return before accounting for much higher fees than index fund fees, thereby resulting in significant underperformance. The Plans' investment offerings included the use of mutual funds and variable annuities with retail expense ratios far in excess of other lower-cost options available to the Plans. These lower-cost options included lower-cost share class mutual funds with the identical investment manager and investments, lower-cost insurance company variable annuities and insurance company pooled separate accounts. Nearly all of the Plans' options were the recordkeepers' own proprietary investments. Thus, the use of these funds was tainted by the recordkeepers' financial interest in including these funds in the Plan, which Defendants failed to adequately consider. In so doing, Defendants failed to make investment decisions based solely on the merits of the investment funds and what was in the interest of participants. Defendants therefore failed to discharge its duties with respect to the Plans solely in the interest of the participants and beneficiaries and for the exclusive purpose of providing benefits to participants and their beneficiaries and defraying reasonable expenses of administering the Plans. This was a breach of fiduciary duties.

325. Defendants failed to engage in a prudent process for monitoring the Plans' investments and removing imprudent ones within a reasonable period. This resulted in the Plans continuing to offer excessively expensive funds with inferior historical performance compared to superior low-cost alternatives that were available to the Plans. As of December 31, 2014, of the Plans' investment options which had at least a five-year performance history, *fifty-seven percent* of those funds—119 out of 208—under-

performed their respective benchmarks over the previous 5-year period

326. CREF Stock Account: Defendants included and retained the CREF Stock Account despite its excessive cost and historical underperformance compared to both passively managed investments and actively managed investments of the benchmark, the Russell 3000 Index, which Defendants and TIAA told participants was the appropriate benchmark. *See supra* ¶224. The 46 bps charged by the CREF Stock Account included *four* layers of fees that were each unreasonable compared to the actual services provided by TIAA-CREF. *See supra* ¶¶151-153. Defendants failed to analyze whether these fees were appropriate and reasonable in light of the services provided.

327. TIAA Real Estate Account: Defendants included and retained the TIAA Real Estate Account despite its excessive fees and historical underperformance compared to lower-cost real estate investments. The 87 bps that the TIAA Real Estate Account charged was comprised of *five* layers of fees that were each unreasonable compared to the actual services provided by TIAA-CREF to the Plans' participants. *See supra* ¶¶154-155. Defendants failed to analyze whether these fees were appropriate and reasonable in light of the services provided.

328. Had Defendants engaged in a prudent investment review process, it would have concluded that these options were causing the Plans to lose tens of millions of dollars of participants' retirement savings in excessive and unreasonable fees and underperformance relative to prudent investment options available to the Plans, and thus should be removed from the Plans or, at a minimum, frozen to new investments.

329. Total losses to the Plans will be determined after complete discovery in this case and are continuing.

330. Defendants are personally liable under 29 U.S.C. §1109(a) to make good to the Plans any losses to the Plans resulting from the breaches of fiduciary duties alleged in this Count and are subject to other equitable or remedial relief as appropriate.

331. Each Defendant knowingly participated in the breach of the other Defendants, knowing that such acts were a breach, enabled the other Defendants to commit a breach by failing to lawfully discharge its own fiduciary duties, knew of the breach by the other Defendants and failed to make any reasonable effort under the circumstances to remedy the breach. Thus, each defendant is liable for the losses caused by the breach of its co-fiduciary under 29 U.S.C. §1105(a).

COUNT VI

Prohibited transactions—29 U.S.C. §1106(a)(1)

Investment Services and Fees

332. Plaintiffs restate and incorporate herein the allegations of the preceding paragraphs.

333. As the Plans' providers of investment services, TIAA-CREF and Fidelity are parties in interest. 29 U.S.C. §1002(14)(B).

334. By including investment options managed by TIAA-CREF and Fidelity in which nearly all of the Plans' $2.87 billion in assets were invested, Defendants caused the Plans to engage in transactions that Defendants knew or should have known constituted an exchange of property between the Plans and TIAA-CREF and Fidelity prohibited by 29 U.S.C. §1106(a)(1)(A); a direct or indirect furnishing of services between the Plans and TIAA-CREF and

Fidelity prohibited by 29 U.S.C. §1106(a)(1)(C); and transfers of the Plans' assets to, or use by or for the benefit of TIAA-CREF and Fidelity prohibited by 29 U.S.C. §1106(a)(1)(D). These transactions occurred each time the Plans paid fees to TIAA-CREF and Fidelity in connection with the Plans' investments in TIAA-CREF and Fidelity options.

335. Total losses to the Plans will be determined after complete discovery in this case and are continuing.

336. Under 29 U.S.C. §1109(a), Defendants are personally liable to restore all losses to the Plans resulting from these prohibited transactions, and to provide restitution of all proceeds of these prohibited transactions, and are subject to other appropriate equitable or remedial relief.

COUNT VII

Breach of Fiduciary Duties—29 U.S.C. §1104(a)(1)(A) & (B)

Defendants' Use of Retail Share Classes

337. Plaintiffs restate and incorporate the allegations contained in the preceding paragraphs.

338. Defendants were required to independently assess "the prudence of *each* investment option" for the Plans on an ongoing basis, *DiFelice*, 497 F.3d at 423, and to remove investments that were not or no longer were prudent for the Plans. *Tibble*, 135 S. Ct. at 1828-29.

339. Jumbo investors like the Plans that have billions of dollars in assets can obtain share classes with far lower costs than retail mutual fund shares that are appropriate for much smaller investors.

340. Defendants as fiduciaries of two multi-billion dollar retirement savings plans had enormous

bargaining leverage in the investment marketplace. Defendants squandered this leverage by including dozens and dozens of retail investment options in the Plans even though the Plans qualified for the *identical* versions of these same funds offered in lower-cost share classes.

341. Defendants also failed to engage in a prudent process for monitoring the Plans' investments and removing imprudent ones within a reasonable period. This resulted in the Plans continuing to offer excessively expensive funds in higher-cost share classes despite the fact that the Plans were eligible to include identical, lower-cost versions of these same funds *with absolutely no difference in liquidity*.

342. Under ERISA, each and every investment option is required to be prudent. Despite this, throughout the entire proposed class dozens of the investment options in both Plans were retail funds, or investment options that had lower-cost identical funds available.

343. The Plans' widespread use of these higher-cost options when identical, lower-cost options were readily available—as set forth individually in ¶¶179-85—demonstrates a sustained failure of process on the part of the Defendants to ensure that each option in the Plans was prudent.

344. A prudent fiduciary under the circumstances would have reviewed prospectuses and immediately switched upon learning that a lower-cost share class was available.

345. Total losses to the Plans will be determined after complete discovery in this case and are continuing.

346. Defendants are personally liable under 29 U.S.C. §1109(a) to make good to the Plans any losses

to the Plans resulting from the breaches of fiduciary duties alleged in this Count and are subject to other equitable or remedial relief as appropriate.

347. Each Defendant knowingly participated in the breach of the other Defendants, knowing that such acts were a breach, enabled the other Defendants to commit a breach by failing to lawfully discharge its own fiduciary duties, knew of the breach by the other Defendants and failed to make any reasonable effort under the circumstances to remedy the breach. Thus, each Defendant is liable for the losses caused by the breach of its co-fiduciary under 29 U.S.C. §1105(a).

COUNT VIII

Breach of Fiduciary Duties—29 U.S.C. §1104(a)(1)(D)

Violation of the Plans' Investment Policy Statement

348. Plaintiffs restate and incorporate the allegations contained in the preceding paragraphs.

349. Defendants violated the provisions of the Plans' IPS in violation of 29 U.S.C. §1104(a)(1)(D).

350. Defendants violated the Plans' IPS by including and retaining the CREF Stock and TIAA Real Estate Accounts in the Plans even though Defendants admittedly failed to compare the performance of either of these investment options against appropriate style-specific benchmarks.

351. Defendants additionally violated the Plans' IPS by failing to:

a. Monitor and evaluate the performance and prudence of each investment offered in the Plans;

b. Monitor plan costs;

c. Monitor and evaluate for reasonableness the compensation paid by the Plans' participants to the Plans' recordkeepers; and

d. Periodically review the IPS.

352. Defendants are personally liable under 29 U.S.C. §1109(a) to make good to the Plans any losses to the Plans resulting from the breaches of fiduciary duties alleged in this Count and are subject to other equitable or remedial relief as appropriate.

353. Each Defendant knowingly participated in the breaches of the other Defendants, knowing that such acts were breaches, enabled the other Defendants to commit breaches by failing to lawfully discharge its own fiduciary duties, knew of the breaches by the other Defendants and failed to make any reasonable effort under the circumstances to remedy the breaches. Thus, each Defendant is liable for the losses caused by the breaches of its co-fiduciaries under 29 U.S.C. §1105(a).

COUNT IX

Breach of Fiduciary Duties—29 U.S.C. §1104(a)(1)(A) & (B)

Defendants Allowed TIAA to Profit from Its Role as Recordkeeper and Failed to Protect Valuable Plan Assets

354. Plaintiffs restate and incorporate the allegations contained in the preceding paragraphs.

355. Defendants were required to discharge their duties with respect to the Plans solely in the interest of, and for the exclusive purpose of providing benefits to, the Plans' participants, defraying the reasonable expenses of administering the Plans, and acting with the care, skill, prudence, and diligence required by ERISA.

356. Defendants were required to independently assess "the prudence of *each* investment option" for the Plans on an ongoing basis, *DiFelice*, 497 F.3d at 423, and to act prudently and solely in the interest of the Plans' participants in deciding whether to maintain a recordkeeping arrangement, DOL Adv. Op. 97-16A.

357. As detailed in ¶¶276-84 above, Defendants breached this duty by enabling TIAA to use its position as the Plans' recordkeeper to obtain access to participants, gaining valuable, private, and sensitive information including participants' contact information, their choices of investments, the asset size of their accounts, their employment status, age, and proximity to retirement, among other things. Defendants allowed TIAA to use this valuable and confidential information to sell TIAA products and wealth management services to the Plans' participants, and failed to even attempt to determine the value of this marketing benefit. This information was particularly valuable to TIAA given that it had already been endorsed by Defendants, having been selected as recordkeeper.

358. Defendants were aware of TIAA's misuse of participant information in this regard and did nothing prevent that misuse. Among other things, Defendants failed to establish safeguards to prevent such misuse from occurring as other prudent fiduciaries have done (*supra* ¶280). Defendants thus allowed TIAA to exploit its position as recordkeeper, contrary to the best interests of participants. By permitting TIAA to utilize valuable information about the Plans' participants—information and data that Defendants should have protected as Plan assets—and to use that information to market and sell financial products to the Plans' participants

outside of their investments already in the Plans, Defendants failed to act in the best interests of the Plans' participants, and breached their fiduciary duties.

359. Had Defendants acted as prudent fiduciaries, they would have prohibited TIAA from using confidential and valuable participant account information for purposes other than providing recordkeeping services to the Plans' participants. Instead, Defendants enabled TIAA to use information it obtained from serving as recordkeeper to target participants for TIAA's benefit.

360. Defendants are personally liable under 29 U.S.C. §1109(a) to make good to the Plans any losses to the Plans resulting from the breaches of fiduciary duties alleged in this Count, and are subject to other equitable or remedial relief as appropriate.

361. Each Defendant (i) knowingly participated in the breaches of the other Defendants, knowing that such acts were breaches; (ii) enabled the other Defendants to commit breaches by failing to lawfully discharge its own fiduciary duties; and (iii) knew of the breaches by the other Defendants and failed to make any reasonable effort to remedy the breaches. Thus, each Defendant is liable for the losses caused by the breach of its co-fiduciaries under 29 U.S.C. §1105(a).

COUNT X

Prohibited transactions—29 U.S.C. §1106(a)(1)

Defendants Allowed TIAA to Profit from Its Role as Recordkeeper and Failed to Protect Valuable Plan Assets

362. Plaintiffs restate and incorporate the allegations contained in the preceding paragraphs.

363. As the Plans' provider of investment services, TIAA-CREF is a party in interest. 29 U.S.C. §1002(14)(B).

364. As detailed in ¶¶276-84 above, Defendants failed to protect vital and confidential participant information from being used by the Plans' record-keeper TIAA-CREF to aggressively market a variety of TIAA's financial products to Northwestern plan participants.

365. Defendants were aware of TIAA's misuse of participant information in this regard and did nothing prevent that misuse. Among other things, Defendants failed to establish safeguards to prevent such misuse from occurring as other prudent fiduciaries have done (*supra* ¶280). Defendants thus allowed TIAA to exploit its position as recordkeeper, contrary to the best interests of participants. By permitting TIAA to utilize valuable information about the Plans' participants—information and data that Defendants should have protected as Plan assets—and to use that information to market and sell financial products to the Plans' participants outside of their investments already in the Plans, Defendants failed to act in the best interests of the Plans' participants, and breached their fiduciary duties.

366. By allowing TIAA to utilize valuable information about the Plans' participants to market and sell financial products to the Plans' participants, Defendants caused the Plans to engage in transactions that the Defendants knew or should have known constituted an exchange of property between the Plan and TIAA-CREF prohibited by 29 U.S.C. §1106(a)(1)(A), a direct or indirect furnishing of services between the Plan and TIAA-CREF prohibited by 29 U.S.C. §1106(a)(1)(C), and a transfer of

Plan assets to TIAA-CREF prohibited by 29 U.S.C. §1106(a)(1)(D). These transactions occurred each time Defendants permitted TIAA to harvest information from the Plans' records for purposes other than to provide recordkeeping services to the Plans or used the Plans' participant information to sell outside retirement products and wealth management services to the Plans' participants.

367. Under 29 U.S.C. §1109(a), Defendants are liable for restoring all losses to the Plans resulting from these prohibited transactions, and are subject to other appropriate equitable or remedial relief.

COUNT XI

Failure to Monitor Fiduciaries

368. Plaintiffs restate and incorporate the allegations contained in the preceding paragraphs.

369. This Count alleges breach of fiduciary duties against Northwestern University, Nimalam Chinniah, and Eugene S. Sunshine.

370. Northwestern University is the Plan Administrator of the Plans under 29 U.S.C. §1002(16)(A)(i) and a named fiduciary under 29 U.S.C. §1102(a) with overall authority to control and manage the operation and administration of the Plans.

371. Northwestern delegated certain of its fiduciary responsibilities for administrative matters to its Executive Vice President, Nimalam Chinniah, and previously Eugene S. Sunshine. Having delegated those duties, Northwestern remained responsible for monitoring its delegee, the Executive Vice President, to ensure that the delegated tasks were being performed prudently and loyally.

372. Northwestern, through its Board of Trustees, authorized the Senior Vice President for Business and Finance (a role now fulfilled by the Executive

Vice President), to create NURIC, and to confer or delegate to NURIC all discretionary authority and powers necessary to control and manage the assets of the Plans. Northwestern and the Executive Vice President remained responsible for monitoring NURIC and its members to ensure that the delegated tasks were being performed prudently and loyally.

373. If a monitoring fiduciary knows or should know that the monitored fiduciaries are not properly performing their fiduciary obligations, the monitoring fiduciary must take prompt and effective action to protect the plan and participants.

374. Defendants Northwestern University, Nimalam Chinniah, and Eugene S. Sunshine breached their fiduciary monitoring duties by, among other things:

a. Failing to monitor their appointees, to evaluate their performance, or to have a system in place for doing so, and standing idly by as the Plans suffered enormous losses as a result of its appointees' imprudent actions and omissions with respect to the Plans;

b. Failing to monitor their appointees' fiduciary process, which would have alerted any prudent fiduciary to the potential breach because of the excessive administrative and investment management fees and consistently underperforming investments in the Plans in violation of ERISA;

c. Failing to ensure that the monitored fiduciaries had a prudent process in place for evaluating the Plans' administrative fees and ensuring that the fees were competitive, including a process to identify and determine the amount of all sources of compensation to the Plans' recordkeepers and the amount of any revenue sharing payments; a process to prevent the recordkeepers from receiving revenue sharing that would increase the recordkeepers' compensation to unreasonable levels even though the services provided remained the same; and a process to periodically obtain competitive bids to determine the market rate for the services provided to the Plans;

d. Failing to ensure that the monitored fiduciaries considered the ready availability of comparable and better performing investment options that charged significantly lower fees and expenses than the Plans' investments; and

e. Failing to remove appointees whose performance was inadequate in that they continued to maintain imprudent, excessively costly, and poorly performing investments, all to the detriment of Plan participants' retirement savings.

375. Had Defendants Northwestern University, Nimalam Chinniah, and Eugene S. Sunshine discharged their fiduciary monitoring duties prudently as described above, the Plans would not have suffered these losses. Therefore, as a direct result of the breaches of fiduciary duty alleged herein, the Plans, the Plaintiffs, and the other Class members, lost tens of millions of dollars of retirement savings.

JURY TRIAL DEMANDED

376. Pursuant to Fed.R.Civ.P. 38 and the Constitution of the United States, Plaintiffs demand a trial by jury.

PRAYER FOR RELIEF

For these reasons, Plaintiffs, on behalf of the Plans and all similarly situated Plan participants and beneficiaries, respectfully request that the Court:

- Find and declare that Defendants have breached their fiduciary duties as described above;
- Find and adjudge that Defendants are personally liable to make good to the Plans all losses to the

Plans resulting from each breach of fiduciary duty, and to otherwise restore the Plans to the position they would have occupied but for the breaches of fiduciary duty;

- Determine the method by which losses to the Plans under 29 U.S.C. §1109(a) should be calculated;
- Order the Defendants to pay the amount equaling all sums received by the conflicted recordkeepers as a result of recordkeeping and investment management fees;
- Order Defendants to provide all accountings necessary to determine the amounts Defendants must make good to the Plans under §1109(a);
- Remove the fiduciaries who have breached their fiduciary duties and enjoin them from future ERISA violations;
- Surcharge against Defendants and in favor of the Plans all amounts involved in any transactions which such accounting reveals were improper, excessive and/or in violation of ERISA;
- Reform the Plans to include only prudent investments;
- Reform the Plans to obtain bids for recordkeeping and to pay only reasonable recordkeeping expenses;
- Certify the Class and subclasses, appoint the Plaintiffs as class representatives of the Class and subclasses, and appoint Schlichter, Bogard & Denton LLP as Class Counsel for the Class and subclasses;
- Award to the Plaintiffs and the Class and subclasses their attorney's fees and costs under 29 U.S.C. §1132(g)(1) and the common fund doctrine;

- Order the payment of interest to the extent it is allowed by law; and
- Grant other equitable or remedial relief as the Court deems appropriate.

April 24, 2018 Respectfully submitted,

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[Certificate of Service Omitted]

EXHIBIT 2

[Videotaped 30(b)(1) Deposition of
PAMELA SUE BEEMER]

[April 6, 2018]

* * *

[22]

* * *

Q. When you did come to Northwestern in 2007, what was the title that you accepted?

A. The title at that time was associate vice-president for human resources.

Q. And what were your job duties and responsibilities at that point?

A. I was the -- essentially the chief human resource officer, so I had broad responsibilities for all aspects of human resources, from talent acquisition to compensation programming and administration, certainly benefits and retirement, unemployment, learning and organization development, payroll, among other things.

Q. Benefits and retirement, I assume, included the retirement plans at Northwestern?

A. Yes.

Q. Were you the principal person who bore responsibility for those plans when you came in [23] 2007?

A. Well, when you say principal, there was a director of benefits that reported to me, and that person had day-to-day responsibility to administer those programs effectively.

Q. And who was that person?

A. His name was Tom Evans.

Q. And how long was Mr. Evans employed in that role, while after -- let me ask you a different question.

You arrived in 2007. Do you know when Tom Evans left Northwestern in the position that you just described?

A. I believe Tom left sometime in 2008.

Q. And then at some point after he left, Anne Fish was hired, correct?

A. Correct.

Q. Into Mr. Evans' old position?

A. Correct.

Q. And do you recall when she was hired?

A. I believe it was early in 2009.

Q. Okay. So there was some period between Mr. Evans' departure and Ms. Fish's arrival when you didn't have someone filling that position?

[24]

A. I had an interim director during that period of time.

Q. And do you recall who that was?

A. I believe her name was Moeen O'Toole.

Q. And do you know roughly how long Ms. O'Toole would have served as interim director?

A. Well, from the time Tom left to Anne's joining. So it was a matter of months.

Q. Do you know if it was more than a year, less than a year?

A. I don't recall exactly, but I believe it's less than a year.

Q. Okay. Continuing on from there, did you at some point after you arrived have a change in job title at Northwestern?

A. My title changed to vice-president and chief human resource officer in September of 2014.

Q. And with that change, did there come additional or different responsibilities?

A. No.

Q. So is that the position you currently hold, the title you currently hold?

A. Yes.

Q. Fair to say you still have responsibility [25] in your current position for benefits, including retirement plans at Northwestern?

A. I provide oversight and supervise the director of benefits who is responsible for effectively administering and communicating the retirement plans.

Q. And the director of benefits is Ms. Fish?

A. That's correct.

Q. In your current role, do you consider yourself a fiduciary to the Northwestern plans?

A. Yes.

Q. And prior to the formation of NURIC – that's committee which we'll talk about -- did you consider yourself a fiduciary to the Northwestern plans?

A. Yes.

Q. We've talked about your degree from Michigan State in 1981. Do you have any other educational formal degrees that you've received throughout your career?

A. Yes.

Q. And what would that be?

A. I have a Master's in Labor Relations and Human Resources that I completed in 1997.

* * *

[34]

A. Well, any chief HR officer has responsibility for ensuring that the processes of hiring and staffing, supporting the institution, and ensuring that we have appropriate talent, that we are compensating people effectively.

What I didn't mention before is that the office of equal opportunity and access also reported to me, so preparing affirmative action plans, ensuring appropriate investigation of claims of discrimination or other protected classes were handled appropriately.

I've also had the director of the conflict of interest office report to me and had responsibility for the staff conflict of interest. Policy development, all of the personnel record-keeping, all of the systems associated with human resource management, impacting and creating a framework for how we ensure continuing development of our staff, looking at our tuition benefit reduction discounting programs and workshops and leadership development.

We partner with the provost office on working to resolve employee relations matters affecting faculty and staff. We were involved [35] in -- I was involved in employee relations matters and discussing appropriate disciplinary and sanctioning issues, union negotiations, and certainly the benefits and retirement plan.

Q. It's a lot on your plate?

A. Yes.

Q. And that's remained relatively consistent throughout your time at Northwestern?

A. Yes.

Q. So with all that under your umbrella, fair to say that benefits is, you know, not the majority of what you do on a day-to-day basis?

A. Are you talking today, or are you talking always?

Q. I'm talking about over the course of the last 11 years since you've been at Northwestern.

A. I would say that because my experience in the benefits and retirement area have – have been a hallmark of my experience, that I have continued to be engaged in the benefits and retirement space. It's very complicated. It's a huge financial investment of the organization, and so I have, along with my other duties, I have paid attention to the retirement and the benefits [36] activities, cost structures, and opportunities that they present.

Q. Fair enough. And I guess what I'm asking is if you look at a list of the things you do, like what you would prepare for your performance evaluation, for example, benefits isn't going to be the majority of what you're doing on a year-to-year basis; is that fair?

A. It might depend on the year, but in general, I would say that's probably true.

Q. And then within benefits, the retirement plans are just a subset, correct? There's a lot of other benefits issues that exist for Northwestern besides just the retirement plans?

A. There are other benefit programs.

Q. Right. So retirement plans -- and just correct me if I'm wrong here, I just want to make sure I'm understanding this correctly. Retirement plans are a subset of benefits which is a subset of your overall responsibilities; is that fair?

A. That's fair.

Q. Okay. Do you have a way of estimating what percentage of your time is dedicated to retirement plans?

[37]

A. It varies, depending on what the issues are. If in a given year we are focusing on implementing a new system or upgrading a system, and that requires specific attention, then that year, the amount of time that I might be devoting to other areas of my responsibility may be less.

I, on an ongoing basis, make judgments about where my leadership and my attention needs to be focused. So to give some overall statement about that that spans a number of years, that's difficult to do. It's difficult to say.

Q. To be clear, except for that period where you had Mr. Evans retiring or leaving and Ms. Fish coming in, I guess you had an interim person, you've had somebody else who's been primarily responsible on a day-to-day basis for administering the retirement plans; is that fair?

A. So the day-to-day administration and advisory services on a day-to-day basis were managed within the individuals on the benefits team. During that time, I was on point with regard to restating the plan, because I did not have a resource to do that.

Q. When you say restating the plan, what do [38] you mean by that?

A. Shortly after my arrival, we determined that we needed to make some changes to our retirement plans, and those changes involved a significant increase in the investment from the university. And so I proposed modifications to the plan to be a safe harbor plan, to equalize the benefits formula between faculty and staff. And I was involved in developing the new plan documents and in the communication of those changes.

Q. If you could just walk through what the changes that you felt needed to happen shortly after you arrived were.

A. I'm not sure I can recall all of them, but one of the objectives was to be responsive to staff who were asking that they have the same formula as the faculty for their contributions. And my -- upon my arrival, there were two retirement plans, one for the faculty, one for the staff, and we were able to develop one plan that had the same formula and the same opportunities for investment among all of our population.

Q. And when you say that the changes required additional investment on the part of [39] Northwestern, what do you mean by that?

A. The cost to Northwestern in terms of matching contributions was in the magnitude of roughly 7- to $8 million. And so in order for that to be adopted, I needed to get support from my boss and others for that significant investment, increase in investment.

Q. So when you arrived in 2007, you felt like there needed to be this change to the retirement plans to equalize things for faculty and staff, which required a pretty significant additional investment from Northwestern.

Anything else that you felt needed to be addressed when you arrived with the retirement plans as they existed?

A. Well, because there were new regulations, there was certainly some compliance things we thought we could address. I'm sure that there were other plan design features and some administrative improvements that we were seeking to resolve.

Q. Okay. Let's just start with the administrative improvements. What were those that you felt should be resolved?

[40]

A. I don't know that I can speak directly to what they were. My recollection was that there were some administrative efficiencies that we were hoping to achieve around information flowing electronically to the vendors. As opposed to us manually doing it or having to manually sign forms on behalf of participants, we were looking to enhance the enrollment process using a web-based process.

I took the opportunity to learn about how the plan was operating and whether there were any service issues or lack of attention by the vendors around certain plan features.

And so we were looking to become more efficient and more effective in administering the programs.

Q. Did you, in fact, implement changes that allowed the plans to be more efficient and effective?

A. Yes.

Q. Okay. And what was the time period generally during which those changes were implemented?

A. Well, we continue to do that on an [41] ongoing basis. So it wasn't just one defined period of time for which we attended to that. We, on an ongoing basis, are in dialogue with our retirement vendors around ways to improve.

Q. And those were changes that you pushed forward beginning when you arrived in 2007?

A. Yes.

Q. Okay. And then you mentioned plan design elements. What changes did you see that needed to be accomplished with regard to plan design elements?

A. I don't recall specific issues, but I know we had discussions about loans, and we also had discussions about -- and this would be in a 457 plan withdrawal provisions.

Q. With regard to loans, do you recall what those discussions entailed?

A. Administratively, my recollection is that they were requiring the individuals who wanted to take a loan to get sign-offs, wet signatures, from staff in the benefits office.

* * *

[230]

* * *

Q. Sure. Is it your testimony that investment reviews of all 260 options can take place even where those reviews are not reflected by the committee meetings' minutes?

MS. AMERT: Object to form.

You can answer.

BY THE WITNESS:

A. If Straightline – I'm sorry. Strike that.

If Captrust in our discussions of agenda items were to indicate that there were no red flags to bring to the attention of the committee, and there were items that the committee had planned to discuss or additional information to provide, that wouldn't necessarily have been reflected in the minutes.

* * *

[231]

* * *

Q. And I understand that. I appreciate your testimony there.

And setting aside what might have happened, at least as you sit here today, you don't recall any meeting at which you and members of the committee went through each of the pre-streamlined investment options and looked at – I'll just choose one metric, and that's revenue sharing, is that fair, for each revenue sharing for each of the 250 funds and discussed each one of the revenue sharing amounts for each one of those funds?

MS. AMERT: Object to form.

You can answer.

BY THE WITNESS:

A. I don't recall.

* * *

[232]

Q. So we can take a look at documents, Ms. Beemer, in a minute, but as a starting point, there's no dispute that having a single record-keeper or a master record-keeper or lead record-keeper, whatever you want to call it, has advantages to having a multiple record-keeper system; is that correct?

MS. AMERT: Object to form.

You can answer.

BY THE WITNESS:

A. Your question is, are there advantages to having a single or lead record-keeper over a multi-vendor record-keeper arrangement?

BY MR. SCHLICHTER:

Q. Yes.

A. I believe there are advantages.

Q. And one of those advantages -- and, again, we can go through the documents that say that, but one of the advantages is that having a single record-keeper or a master or lead record-keeper arrangement is less costly to participants than having a dual record-keeper arrangement; is that fair?

[233]

MS. AMERT: Object to form.

You can answer.

BY THE WITNESS:

A. Generally, I think that's a possibility, yes.

BY MR. SCHLICHTER:

Q. Okay. And, in fact, it's not just a possibility, but as Captrust and Straightline and others have identified, that is, in fact, what you expect when you go from a dual or multivendor record-keeper arrangement to a single record-keeper or to a lead record-keeper arrangement?

MS. AMERT: Object to form.

You can answer.

BY THE WITNESS:

A. That is what we expect.

* * *

[266]

BY MR. SCHLICHTER:

Q. Do you recall anyone else in the committee insisting on outreach beyond TIAA and Fidelity?

A. I don't recall.

Q. There were other entities that Straightline identified as being capable of conducting record-keeping services for the Northwestern plans; is that true?

MS. AMERT: Objection. Foundation.

You can answer.

BY THE WITNESS:

A. I don"t recall.

BY MR. SCHLICHTER:

Q. In fact, you worked with entities besides TIAA and Fidelity who record-kept 403(b) assets in your prior employment history, true?

A. Yes.

Q. And you knew there to be other entities besides TIAA or Fidelity who were in the space, correct?

MS. AMERT: Object to form.

You can answer.

[267]

BY THE WITNESS:

A. Yes.

BY MR. SCHLICHTER:

Q. I think we've mentioned Vanguard and Lincoln as two?

A. Two of many others.

Q. And there was no downside to the committee or Northwestern in getting proposals returned from entities besides TIAA and Fidelity, correct?

MS. AMERT: Object to form.

You can answer.

BY THE WITNESS:

A. Not to my knowledge.

BY MR. SCHLICHTER:

Q. Is the fact that only two firms submitted bids and they were the two incumbent firms suggestive of a less competitive RFP process than had the process been opened up to more bidders?

MS. AMERT: Object to form.

You can answer.

BY THE WITNESS:

A. I don't believe so.

[268]

BY MR. SCHLICHTER:

Q. You believe that the process as existed which involved bids from two entities was as competitive as it would have been had more entities, such as the entities that Straightline identified, been included?

MS. AMERT: Objection. Foundation.

You can answer.

BY THE WITNESS:

A. I believe the process was extremely competitive. Both organizations wanted to maintain our business, and they knew that each other was vying for the opportunity to be lead or sole.

BY MR. SCHLICHTER:

Q. And is it your testimony that no other entities besides TIAA and Fidelity could have recordkept the university's 403(b) plan?

A. I'm sorry. Would you restate that.

Q. Is it your testimony here today that no other entities besides TIAA and Fidelity could have recordkept the university's 403(3) plan?

A. I did not say that.

Q. Would you agree with that statement?

A. No.

[269]

Q. There are other entities certainly who perform these services; we can agree on that at least?

A. True.

Q. Other entities could have performed the same services that TIAA and Fidelity are performing; isn't that true?

A. No.

Q. How is that not true?

A. The majority of our assets in the retirement plans are with TIAA-Cref, and certain of their funds are proprietary funds for which other record-keepers cannot record-keep them.

Q. So you're saying that because TIAA had proprietary funds in the plans, you couldn't have moved away from TIAA as a record-keeper to another record-keeper for that reason; is that -- am I understanding that correctly?

A. To another sole record-keeper, that's correct.

* * *

[310]

* * *

Q. Again, I think we looked at it. Those documents that Captrust prepares now are roughly 100 pages, and that's with a much more streamlined array.

So do you think it's feasible for Captrust to annual -- or to quarterly prepare multi-hundred-page documents and for the committee to quarterly review 5-, 6-, 700-page documents concerning each of 250-odd investment options that are in the plans?

MS. AMERT: Object to form.

You can answer.

BY THE WITNESS:

A. I believe that the score card that's being used by Captrust is a very effective mechanism to review the investment performance and other considerations to effectively monitor our funds. And if Northwestern decided to have way many more than we currently do, I'm confident that the committee would evaluate them to meet their [311] fiduciary responsibility and that Captrust would assist us in that process.

BY MR. SCHLICHTER:

Q. You don't dispute that you thought streamlining was a good thing as early as 2011? Is that a fair statement?

A. Yes.

Q. It's fair that you dispute it, or it's fair you agree that you didn't think -- we've got too many double negatives. Let me --

A. Right. Right. Thank you.

Q. You would agree that in 2011, you thought streamlining was a good thing, fair?

A. Yes.

Q. Okay. And would you agree that in or around October of 2011, the main focus of fiduciaries for the plan was on fund reduction?

MS. AMERT: Objection. Vague and compound.

But you can answer it if you understand the question.

BY THE WITNESS:

A. Well, I think the minutes reflect that there were a number and variety of issues that NURIC was considering during that time.

BY MR. SCHLICHTER:

Q. Do you recall saying in 2011 that, “We have to significantly reduce the number of investment funds”?

MS. AMERT: Objection. Asked and answered.

You can answer it again.

BY THE WITNESS:

A. I believe I also answered that.

BY MR. SCHLICHTER:

Q. Let’s go to NU00042035.

A. Is that part of the deposition, or is that a different one?

Q. Different one.

A. Okay. NU --

Q. 000422035. And the document I am going to ask you to look at is on Page 2 of the pdf.

MS. AMERT: Do you see that document, Pam?

MR. SCHLICHTER: I’m going to --

THE WITNESS: I'm not finding it.

MS. AMERT: I’m not finding it anywhere.

THE WITNESS: What’s the number?

MR. SCHLICHTER: 00422035, two zeroes.

THE WITNESS: 00.

MR. SCHLICHTER: If I said three zeroes, I [313] meant two.

THE WITNESS: All right. 2035?

BY MR. SCHLICHTER:

Q. 422035. So this is an e-mail chain involving you, Anne Fish, Sonya Brown, Thomas Kline. And if you look at the bottom of Page 1, there's an e-mail from you to Thomas Kline dated November of 2011 -- November 16th, more specifically, 2011 -- and on the top of page 2, you say, "With regard to the second question, we are holding our retirement investment committee meeting in the next few weeks, and we will be discussing our investment lineup strategy. We do have to significantly reduce the number of investment funds. And I envision that we will have defined set of much fewer investment fund offerings that we will closely monitor to meet our fiduciary responsibility."

Do you see that?

A. I do.

Q. Do you dispute that you wrote that?

A. No. I wrote that.

Q. And do you agree that at that time, that was your opinion?

[314]

A. At that time, that was my opinion.

Q. Okay. If you could -- strike that.

Do you agree that providing oversight to more than 250 funds is not feasible?

A. I don’t think it’s practical.

Q. And do you agree that having reduced investment options, a reduced array, lowers administrative costs to participants?

MS. AMERT: Objection. Foundation. I don’t understand the context for reduced.

But you can answer if you understand the question.

MR. SCHLICHTER: I'll restate it.

BY MR. SCHLICHTER:

Q. Do you agree that streamlining lowers administrative cost to participants?

A. I think it has the potential for that.

Q. And beyond having the potential, does it, in fact, do that, and has it been shown to do that by consultants to the committee?

A. Including Straightline and Captrust.

MS. AMERT: I’m sorry, Andy. Are you asking her about streamlining in general or streamlining of Northwestern’s plans exclusively?

[315]

MR. SCHLICHTER: Streamlining in general.

BY THE WITNESS:

A. In general in the whole universe of 403(b) plans?

BY MR. SCHLICHTER:

Q. Streamlining from an investment array like Northwestern’s to a consolidated investment array is what I’m referring to.

A. I can't speak to in general what might happen when employers or plan fiduciaries make those decisions.

Q. You understood, though, as early as 2011 that streamlining, going to a smaller investment array, would reduce administrative costs to plan participants, true?

MS. AMERT: Now you're speaking specifically about Northwestern's plans, correct?

MR. SCHLICHTER: Yes.

BY THE WITNESS:

A. Among other things, yes.

BY MR. SCHLICHTER:

Q. Okay. It would also give access to lower-priced share classes? That would be another benefit of streamlining?

[316]

A. Presumably.

Q. And that would also, presumably, lower costs to plan participants, correct?

A. Correct.

Q. Now, the goal of streamlining was to have a best in class plan. That term appears in several documents. Is that right?

A. Yes.

Q. Was there any divergence among committee members from the beginning, to your knowledge, on the view that streamlining was something that should be accomplished by the committee?

MS. AMERT: Object to form.

You can answer that if you understand it.

BY THE WITNESS:

A. The committee, to my recollection, unanimously supported moving to a reduced fund lineup for a variety of reasons, one of which was the potential for lower costs to plan participants, but there were other reasons as well.

BY MR. SCHLICHTER:

Q. There were various materials circulated to the committee showing that fewer options can lead to greater participation among plan [317] participants. Do you happen to recall any of those documents that mention that concept?

A. I remember discussing at committee meetings information about the experience in our plan around individuals who made an election sometime in their career at Northwestern and then never changed it.

And the committee was interested in ensuring that whatever changes were made, were made such that individuals could have information that was easy to understand, that clearly articulated the asset classes and the risk profiles of it, and that there was a clear understanding about how any changes that were made would be mapped and what they could anticipate in terms of the timing and the reasons behind it.

Q. What I'm referring to is the concept of investor confusion where, if you have too many options, participants are intimidated and don't actually end up selecting anything or participating. Is that the concept that you're familiar with?

A. Yes, and there was conversation at NURIC about that.

[318]

Q. Okay. Was that a concern that members on the committee had, to your knowledge, that led them to believe that streamlining was an attractive goal to have for the committee?

MS. AMERT: Objection. Calls for speculation.

You can answer.

MR. SCHLICHTER: To your knowledge.

BY THE WITNESS:

A. To my knowledge, that was one of the considerations, yes.

BY MR. SCHLICHTER:

Q. All right. Now, let's go to zero -- NU00015608. This is a PowerPoint?

A. Yes, this is one we looked at before.

Q. And this is -- we looked at this one, yes. And I'd like to ask you to scroll down to slide number 7.

MS. AMERT: Slide C0?

BY THE WITNESS:

A. Yeah.

BY MR. SCHLICHTER:

Q. Slide C0. Okay. So it says --

A. Which one?

Q. It has "Where we are today."

[319]

A. Okay.

Q. So --

A. Okay. So this is -- this is a TIAA document that they brought to some meeting that we attended; is that right?

Q. October of 2011, yes.

A. And who was in this meeting again?

Q. Well, we can look at the document right before it, but covering those, if you want to look NU00015607, this was a document that was sent to you, Anne Fish, and Sonya Brown by Julie Cavalage?

A. Right. What we don't know was who was actually in attendance. So -- okay.

Q. Right. If you look at Page 7, "Where we are today" of the pdf?

A. 5, 6, 7. Yes.

Q. Okay. I would like to walk through those dates. First of all, it says in September 2010, "Northwestern expresses need to simplify menu." Do you have any reason to disagree that statement, that that happened in September of 2010?

A. I don't specifically recall that.

Q. All right. Did you -- do you remember correcting TIAA saying that this chart was [320] incorrect?

A. I have no basis to dispute it.

Q. Okay. October 2010 talks about Dave – who's Dave Laun (phonetic); do you know?

A. I don't know.

Q. All right. September 2011, says, "Follow up on menu simplification, implementation timeline, and next steps."

Then if you flip to the next page, titled "Weighing the Current Menu," do you see that?

A. I do. I have it up here.

Q. All right. So you have the scale, and on the one side, on the left side, is today's menu. And you see all the options there. And on the right side, you see "Today's Marketplace," and it says, "Average menu size 18.3 choices."

Do you see that?

A. I do.

Q. You would agree that the menu that was in place prior to consolidation was significantly larger than the average menu size for similar plans; would you not?

A. According to this report.

Q. And this was prepared by TIAA, correct? [321] That's --

A. Well, the slide is a TIAA-Cref slide deck, but the asterisk says the Vanguard Group.

Q. Right. Well, I think that --

A. So I'm not sure how to interpret that.

Q. And I think -- I think that what that means is that the information comes from the Vanguard Group, from a report prepared by the Vanguard Group, but the deck was certainly circulated by Julie Cavalage who is at TIAA, correct?

A. Right. Uh-huh.

Q. All right. So you then look at the next slide, and here in the second box, you're talking about consol- -- or they're talking about consolidating Fidelity and TIAA-Cref data to one plan menu. So we're talking about a process, and the next box is "consolidation approaches to reduce fund count."

All of this is designed to simplify the menu of investment options. That's what this slide is all about, if you look at the title, "Menu Simplification," correct?

MS. AMERT: Objection to foundation. She has [322] testified she doesn't recall this slide or – and she didn't prepare it.

You can certainly testify based on whatever you know about it.

BY THE WITNESS:

A. I don't know what this is intended to convey.

BY MR. SCHLICHTER:

Q. Okay. Let's take a look at Captrust Review -- Captrust Reviews.

A. Is this in this slide that --

Q. Separate document.

A. It's separate? Okay.

Q. Yeah, a separate document.

A. All right.

Q. It's the one that we looked at with the six reviews.

A. Whoops. Okay. I'm sorry, what was the number again?

MS. AMERT: It's under C, the second document that's under C, captrustreviews.pdf.

THE WITNESS: Oh, okay. Thank you.

MS. AMERT: And this is one where you're going to want to get access to the bookmarks, I think.

[323]

THE WITNESS: Whoops. Oh. Okay.

MS. AMERT: You're almost --

THE WITNESS: I think I got it.

MS. AMERT: You're only -- you only have to deal with the iPad for a little bit longer.

THE WITNESS: Okay. We're good. Thank you. Just don't make me laugh. Okay. 15063.

BY MR. SCHLICHTER:

Q. Okay. So here, we have a document with a number of Captrust quarterly reviews. First of all, the first document here is dated 9 -- for the ending, I should say, 9/30/16, if you look at the top right-hand corner of the first page. Do you see that?

A. I do.

Q. Okay. Do you specifically recall, as you sit here today, any of these documents that predate this first review which is for the third quarter of 2016?

MS. AMERT: Object to form.

You can answer that if you understand it.

BY THE WITNESS:

A. I'm not sure.

[324]

BY MR. SCHLICHTER:

Q. Okay. Do you know why Captrust would have begun to produce this type of quarterly review document beginning in the third quarter of 2016?

A. I don't recall.

Q. This was around the time that the funds were consolidated and streamlined into a smaller investment array, correct?

A. So this would have been during the period of this quarter that ended in 9/30, we would have closed and mapped, if I'm remembering correctly the dates, and so it seems to me it was towards the end of September that we made all the changes.

Q. Is Cref stock currently in the plan?

A. Yes.

Q. Has it been in the plan since you first joined Northwestern in 2007?

A. As far as I know, yes.

Q. Is it required to be in the plan by TIAA?

MS. AMERT: Object to form.

You can answer.

BY THE WITNESS:

A. I don't believe it's required.

[325]Page 325

BY MR. SCHLICHTER:

Q. So to the best of your knowledge, it is not required to be in the plan?

A. To the best of my knowledge.

Q. What is the benchmark that is currently used for Cref stock?

MS. AMERT: I just want to clarify because you're short-forming this as Cref stock. You're talking about the Cref stack account that is an investment option in the plan currently, Andy?

MR. SCHLICHTER: Yes.

BY THE WITNESS:

A. There are benchmarks, I believe, identified for each one of our investment options.

MR. SCHLICHTER: And they --

BY THE WITNESS:

A. I can't speak to what specifically is the benchmark for Cref stock.

BY MR. SCHLICHTER:

Q. So you can't say what the benchmark is that -- that, for example, Captrust uses for Cref stock?

A. I'm sure it would be reported in one of their reviews.

* * *

[338]

* * *

BY MR. SCHLICHTER:

Q. Well, as chairperson of the committee, if you don't know, who else would know?

A. There are committee members who are very intimately informed about investment and appropriate benchmarks. And those committee members are very engaged in the dialogue around appropriate use of benchmarks, whether one or multiple benchmarks should be used with regard to the evaluation of the performance of the funds.

Q. Can you articulate the difference between a REIT and an investment fund that invests directly in real estate?

A. I believe that the real estate fund that we offer through TIAA, "we" meaning Northwestern in the retirement plan, that they do direct investing. They buy buildings, they buy property, vineyards, and all kinds of things. My understanding of a REIT is that that is a collection or a trust where [339] they buy securities on behalf of investors.

Q. Do you have any understanding of what cash drag means?

A. Cash drag? No.

Q. Do you have an understanding of whether or not there is anything else in the TIAA Real Estate account besides direct investments in real estate?

A. I don't know.

Q. If, as you say, the TIAA Real Estate account does make direct investments in real estate, do you believe it would be appropriate to benchmark it to an equity fund that makes no such investments?

MS. AMERT: Object to form.

You can answer.

BY THE WITNESS:

A. I would rely on others on the committee to make that determination.

BY MR. SCHLICHTER:

Q. You couldn't say one way or the other whether --

A. I couldn't say one way or the another.

Q. Would it be appropriate to benchmark the [340] TIAA Real Estate account if it does make direct investments in real estate against a large cap stock equity index?

MS. AMERT: Object to form.

You can answer that.

BY THE WITNESS:

A. I couldn't – couldn't say one way or the other.

* * *

BY MR. SCHLICHTER:

Q. Are you aware of any investment option having been removed from the plans at any point because of imprudence?

A. Because of --

Q. Imprudence.

MS. AMERT: Object to form.

You could answer.

BY THE WITNESS:

A. Not that I'm aware.

[341]

BY MR. SCHLICHTER:

Q. Are you aware of any investment option being removed from the plan at any point because of excessive fees?

MS. AMERT: Object to form.

You can answer.

BY THE WITNESS:

A. Not that I'm aware.

BY MR. SCHLICHTER:

Q. Are you aware of any RFP being conducted for fee -- strike that.

Are you aware of any RFP being conducted in connection with record-keeping services prior to 2015 by Northwestern?

A. Is the retirement plan --

Q. Yes.

A. -- record-keeping?

Q. Yes.

A. Not during the time I've been at Northwestern.

Q. So that's from 2007 forward, correct?

A. Correct.

* * *

[346]

* * *

Q. So you're saying it's your understanding that TIAA would market its wealth management services to plan participants with balances of over $1 million?

A. Yes.

Q. Any other services that you're aware of that TIAA marketed to plan participants at Northwestern?

A. I know that TIAA has programs that are targeted to certain audiences, whether it be women in investing, whether it be millenials. So they have a number of programs designed to provide assistance to plan participants.

Q. And to be clear, I'm not talking about assistance as much as I'm talking about revenue-generating opportunities that TIAA is presenting to plan participants.

A. Oh, you're talking about revenue-generating opportunities?

Q. For TIAA, yes.

A. So I know that TIAA does offer other [347] products.

Q. And what products are those?

A. I know that they offer life insurance products.

Q. And they've offered those to some plan participants, correct?

A. That's my understanding.

Q. And what other products?

A. I know that they will assist individuals, I | believe in the wealth management space, with identifying resources for estate planning and other planning around how to think about utilizing their resources to meet their objectives in and beyond retirement.

Q. Has the committee or have you ever approached TIAA about its marketing of its non-record-keeping services that generate dollars for TIAA to plan participants?

A. Yes, I have.

Q. And what have you said?

A. I have indicated to them my expectation that when they are speaking with a plan participant, that that conversation should be focused on the plan participant's retirement, [348] planning, savings, goals, and allocation and assistance with distribution, and it should not focus on other products or services unless the participant raises the question.

Q. And when did you have that conversation?

A. I don't know exactly. I can tell you it was a number of years ago.

Q. Has -- and has Northwestern done anything in particular to bar TIAA from marketing its services to plan participants since that conversation?

A. I don't know what you mean by bar. We're a major client. If we tell them we do not want them to use those opportunities to sell their products, I believe they will do all they can to honor that.

Q. What about not using opportunities, but using contact information that it has from servicing as record-keeper to market its products?

A. I can't speak to whether they do that.

Q. Have you had any conversations with them about that?

A. I don't recall specifically.

Q. Is TIAA a non-profit?

[349]

A. No.

Q. You agree that TIAA's pricing has always been way higher than Fidelity's?

MS. AMERT: Object to form.

You can answer that question.

BY THE WITNESS:

A. I can't speak to always.

BY MR. SCHLICHTER:

Q. Fair enough. Since you've been at Northwestern? How about that?

A. Well, I think we've seen today that the pricing has varied between the two of them pretty significantly.

Q. Okay. And do you agree that the TIAA pricing has been way out of line versus Fidelity in the past since you've been at Northwestern?

MS. AMERT: Object to form.

You can answer that.

BY THE WITNESS:

A. I would not characterize it as way out of line. The nature and depth of the services were quite different between the two organizations. They have become much closer as the environment of 403(b) plans has evolved in recent years.

* * *

EXHIBIT 4

[Videotaped Deposition of WILLIAM MCLEAN]

[March 29, 2018]

* * *

[30]

Q. Okay. During this time -- again, pre-NURIC -- did you have any exposure to revenue sharing amounts that were being assessed by TIAA or Fidelity?

MR. MARTIN: Object to the form of the question. Sorry.

BY MR. SCHLICHTER:

Q. Was that a no?

A. Say the question one more time.

Q. Yeah. During this time, did you have any exposure to revenue sharing amounts that were being charged by TIAA or Fidelity?

A. Did I have exposure as – you're talking about as a -- a participant or as a decision-maker?

Q. I'll ask it a different way.

Were you aware of the revenue sharing amounts that were being charged by TIAA and Fidelity at that time?

A. No.

Q. Were you aware of what revenue sharing was at that time?

A. I can't remember what I knew at that time or not, to be honest with you.

[31]

Q. Okay. Had you been exposed to revenue sharing in your role as chief investment officer at Northwestern or in your prior roles with your prior employers?

MR. MARTIN: Object – I'm sorry to object -- but object to the form of the question. I think the objection is foundation. I think revenue sharing is a loaded term, and maybe foundationally you may want to just ask him what it means. I'm sorry, but it's – I'm just going to keep objecting.

MR. SCHLICHTER: That's fair.

BY MR. SCHLICHTER:

Q. Do you know what revenue sharing means?

A. No.

Q. Do you -- okay.

A. I mean I know what the premise is, but I don't know what the context you're asking me. It means a number of things to me when I hear the term.

Q. Fair enough. Let me ask it this way: Are you aware that some recordkeepers in the defined contribution space obtain payment from fund managers via a process called revenue [32] sharing whereby the managers give some of the assets that they receive from managing funds to the recordkeepers?

A. What period are you talking about?

Q. Well, let's start with pre-NURIC.

A. No.

Q. Okay. What about post-NURIC?

A. I was aware of that.

Q. That was something that came out from time to time in committee meetings?

A. I wouldn't say that.

Q. You don't happen to know who was involved in negotiating the agreements that were reached with TIAA and Fidelity prior to NURIC being formed?

A. I do not.

Q. And did you happen to see those agreements at any point prior to NURIC being formed?

A. Nope.

Q. And so I assume because of that you weren't involved in any discussions around a per-participant fee that was being charged by TIAA or being charged by Fidelity?

[33]

A. Correct.

Q. Okay. During this period prior to NURIC being formed, did you consider yourself a fiduciary for the Northwestern plans?

MR. MARTIN: Object to the form of the question. Calls for a legal conclusion. You may answer.

THE WITNESS: Not in a formal sense.

BY MR. SCHLICHTER:

Q. The meetings that you were part of, the conversations you were a part of with that and Fidelity during this time, do you know if minutes were taken of those meetings and conversations, either by TIAA and Fidelity or by Northwestern?

A. I do not.

Q. And have you seen any copies of minutes or agendas related to those discussions pre-NURIC with TIAA and Fidelity and Northwestern?

A. Minutes? I've seen no minutes of those meetings.

Q. Have you seen other transcriptions or summaries related to those meetings?

[34]

A. Only thing I've seen is follow-up questions.

Q. Follow-up questions from Northwestern to TIAA and Fidelity?

A. TIAA following up on questions.

Q. Okay. Do you recall what those questions were about?

A. I don't.

Q. Would you say those conversations that you were involved with that you got brought into took place once a year, five times a year, less than once a year?

A. Once a year.

Q. So this wasn't something you were involved with on a day-to-day, week-to-week, or month-to-month basis?

A. No.

Q. At this time pre-NURIC, were you aware of how many options were in the Northwestern plans?

A. As an employee I was aware.

Q. And were you invested in the plans as an employee?

A. Yes.

[35]

Q. So you were aware that there were more than 200 plan options at that time?

A. Yes.

Q. But you certainly were involved in monitoring all of those options prior to NURIC?

A. Correct.

Q. Now, do you recall how you got invited to join NURIC?

A. Gene Sunshine invited me.

Q. And did Mr. Sunshine, in his conversations with you around that topic, give you any color on why he was asking you to be a part of the committee?

A. Not that I recall what the color was, no. He was my boss.

Q. I was going to say did he give you a choice?

A. He asked me. Yeah.

Q. So he asked you to join and you joined?

A. Mm-hmm.

Q. And that was -- the request took place sometime in 2011. Is that fair?

A. It would have been '11, '12, sometime in there. I don't recall the exact date.

[36]

Q. Okay. Once you joined NURIC, how did your role in relation to the plans change at that point?

A. I became a fiduciary.

Q. And did the level of involvement you had with the plans at that point increase, decrease, or stay the same?

A. It increased.

Q. What more were you doing in connection with the plans once you joined NURIC?

A. Regular committee meetings, informal conversations. Lots of things.

Q. The informal conversations, were those taking place outside of committee meetings?

A. Absolutely.

Q. And who were those taking place with?

A. Place with other committee members, potentially vendors, our attorneys, our investment counselors, a whole host of people.

Q. What sort of topics were you discussing with, say, third parties who weren't involved in the committee or with Northwestern?

A. The usual -- the things we were responsible for doing; everything from things [37] related to selecting managers to setting up a diverse portfolio to monitoring the fees to monitoring the performance, all the things that we're in charge with doing as fiduciaries.

Q. Did you have communications at this point when NURIC is getting off the ground in 2011/2012 with TIAA or CREF – I'm sorry – TIAA or Fidelity?

A. I'm sure they presented to the committee.

Q. Outside the context of the committee meetings, do you recall any communications around this time with TIAA or Fidelity that you were having informally?

A. I don't recall any.

Q. Do you recall if any others were having those types of communications with TIAA or Fidelity around that time?

A. I can't speak for them.

Q. Do you know whose idea it was to form the committee?

A. I don't.

* * *

[82]

* * *

Q. And the first sentence says, "Mr. Schmitt went through the draft investment policy statement focusing on the background and plan objectives, purpose of the document, investment objectives, roles and responsibilities, monitoring of service providers, selection of asset classes, and the selection and monitoring of investment options."

A. Mm-hmm.

Q. "There was much discussion on content." Do you see that?

A. Mm-hmm.

Q. Does this refresh your recollection about whether an investment policy statement was adopted prior to 2015?

A. Say that again.

Q. Does this refresh your recollection about whether an investment policy statement was adopted prior to 2015?

A. Yeah.

Q. And how does it refresh your recollection?

A. Well, as I said earlier, the committee [83] discussed a policy back in 2012 and drafted it -- and I think it's in some minutes -- and it acted as a document that we used. It was slightly different from the one that was adopted here in 2015.

Q. Okay. The one in 2012, though, wasn't formally adopted?

A. I don't know. I don't know that to be a fact.

Q. Okay.

A. I know we operated under the -- all the premises that were in it.

Q. When you say "operated under all the premises that were in it," do you mean that that investment policy statement guided the committee's decisionmaking with respect to the various topics contained therein?

A. It reflected best practices at the time, and that's what we attempted to do.

Q. Okay. One of the things we discussed a few minutes ago that StraightLine was to do was to create a watch list. Do you recall a watch list ever being created by StraightLine or the committee at any point during your tenure?

[84]

A. I don't recall.

Q. Do you recall ever seeing a watch list circulated at any point during your tenure?

A. I don't recall.

Q. Do you recall ever having any discussions about a watch list?

A. We discussed the importance of having one.

Q. And is there, in fact, a watch list today?

A. CAPTRUST monitors.

Q. There's a scorecard, right?

A. CAPTRUST has a scorecard, correct.

Q. And if you fall below a certain number, then you're on the watch list. Is that an accurate way to look at it?

A. They have a different criteria for putting somebody on the watch list.

Q. Okay. That's one of the criteria, correct?

A. What is?

Q. If you fall below a certain numerical threshold.

A. I don't think it's numerical.

[85]

Q. Okay.

A. There are many factors that go into putting somebody on the watch list.

Q. Do you review those scorecards when they're circulated to the committee?

A. We do.

Q. And do you personally?

A. Sure.

Q. Okay. Let's take a look at STLN000985.

MR. MARTIN: Just for my own benefit, is STLN -- maybe for everybody's benefit – Does this mean it's produced by StraightLine?

MR. SCHLICHTER: Exactly.

MR. MARTIN: Do you mind if I educate him for a second?

So these are Bates numbers. So the ones that say NU are produced by Northwestern. This comes from StraightLine's documents, presumably, in response to a subpoena or something.

MR. SCHLICHTER: That's right.

THE WITNESS: Okay.

* * *

[102]

Q. And who specifically?

A. And -- We also met with TIAA-CREF and we met with Fidelity. We met with staff, Anne Fish, and so there was constant conversation about what was going on the interim period between StraightLine and CAPTRUST.

Q. Who did you talk to specifically during that period, you personally?

A. I don't recall.

Q. Did you personally talk to TIAA and/or Fidelity during that period?

A. I don't recall.

Q. Did you personally look at each of the 250-some-odd funds and investment options during that period?

A. I don't know if I -- I don't recall if I did or not.

Q. Do you recall if you looked at the benchmarks for each one of those 250 funds during that period?

A. I don't recall.

Q. Do you know if any other committee members did that?

A. I don't know. I can't speak for them.

[103]

Q. Do you know if any committee members looked at revenue sharing amounts for the 250-some-odd funds during that period?

A. I don't know. I can't speak to what they do.

Q. Do you know if they conducted analyses of the type that CAPTRUST is now performing which looked at things like style drift and comparisons against peer group funds?

MR. MARTIN: Object to the form.

THE WITNESS: I don't know what they did.

BY MR. SCHLICHTER:

Q. Are you aware of any documents that reflect any analysis of any type of the 250 some odd funds that were then in the plans during that time when there was no consultant?

A. I'm not aware of the documents.

Q. And as you sit here today, you're not aware, are you, of any specific monitoring of that kind that took place by any member of the committee?

MR. MARTIN: Object to the form of the question.

THE WITNESS: Repeat the question.

[104]

MR. SCHLICHTER: Laura, if you wouldn't mind?

(Record read back.)

THE WITNESS: I'm aware that monitoring took place. I'm just not aware of the specific meetings and who they were with.

BY MR. SCHLICHTER:

Q. How were you aware that monitoring of the type that CAPTRUST now performs was then being conducted?

A. Because I looked at some of it. I did some of it.

Q. So what did --

A. But I didn't look at all 250.

Q. Okay. What did you do specifically?

A. I would look at returns, benchmarks of managers.

Q. You didn't look at revenue sharing, though, did you?

A. No.

Q. And you weren't aware of revenue sharing during that period. Is that fair?

MR. MARTIN: The period being -- sorry.

MR. SCHLICHTER: While there was no consultant to the plan.

[105]

MR. MARTIN: After NURIC is formed?

MR. SCHLICHTER: After NURIC is formed.

MR. MARTIN: But before StraightLine is on board?

MR. SCHLICHTER: No. This is actually after StraightLine is terminated but before CAPTRUST is brought in.

THE WITNESS: I wasn't looking at revenue sharing.

BY MR. SCHLICHTER:

Q. Do you know what other committee members were doing in that regard during that period?

A. I don't.

Q. Let's talk about StraightLine's termination. Do you know why they were terminated?

A. They were terminated for several reasons.

Q. Can you say why?

A. One was the discovery of a FINRA violation.

* * *

[170]

* * *

[Q.] Why don't we take a look at NU-000015197.

MR. MARTIN: 000015?

MR. SCHLICHTER: 15197.

THE WITNESS: Got it.

MR. MARTIN: Your lawyer is slower. Do you see it? 15197?

MR. SCHLICHTER: Yeah. 15197.

BY MR. SCHLICHTER:

Q. So if you look at the top of this document -- the first page, I should say – it's a document from CAPTRUST dated February of 2016.

A. Mm-hmm.

Q. And if you scroll to the second page or just swipe left, the heading on the second page is of Evaluation of Providers (Recordkeepers). And there are some scenarios that are set forth here on Page 2. Do you see that?

A. Yeah.

Q. One is that multiple provider scenario, which is the status quo at this time. And second is the master/lead administrator, which is ultimately what I think we can agree [171] Northwestern is moving toward. And then the third is the single provider. Do you see that?

A. Yeah.

Q. Okay. Was it your understanding throughout your time on NURIC that these were the three options for what could be done in terms of a recordkeeping arrangement?

A. Certainly my understanding from late 2015 through today, that these were scenarios we could embark on.

Q. Okay. If you flip to Page 4 of the PDF, here we have some advantages, which I think you were referring to before. There's also some disadvantages listed. But these are sort of the pros and the cons of each of these different models of recordkeeping. Do you recall reviewing this document?

A. Yes.

Q. Okay. If you go to Page 6, there are some -- The document is titled Summary of Administrative Expenses at the top. Do you see that?

A. Mm-hmm.

Q. So this identifies what the [172] per-participant recordkeeping charges would be for TIAA and for Fidelity in each one of these three scenarios. Do you see that?

A. I see it.

Q. And I think we can agree that moving away from the status quo as existed at this point in early 2016 would result in some pretty significant cost savings on a per-participant basis?

MR. MARTIN: Object to the form of the question.

BY MR. SCHLICHTER:

Q. Would you agree with that statement?

A. I would agree that this page suggests that we could gain some economies if we changed.

Q. And, in fact, moving away from the prior dual recordkeeper arrangement has, in fact, resulted in cost savings, some of which have already been realized, correct?

A. Yes.

Q. Now, if you would go to, Mr. McLean, Document NU-00014663.

MR. MARTIN: 14663. Four zeros 1463?

MR. SCHLICHTER: I'm sorry. I said four [173] zeroes. I meant three 0s. Sorry. Three zeros, 14663.

THE WITNESS: 663.

MR. SCHLICHTER: Yes. 14663, three 0s.

MR. MARTIN: Hang on one second. Okay.

BY MR. SCHLICHTER:

Q. This is another CAPTRUST presentation; Jim Strodel and Barry Schmitt on the first page. The second page has as a heading Recordkeeping Scenarios. First question is whether you recall receiving this document?

A. I don't recall receiving it, but.

Q. Do you recall having reviewed it?

A. I don't recall having reviewed it, but I expect I probably did.

Q. Okay. So this is a similar document. It sets forth various scenarios for recordkeeping with the plan. And as you can see on Page 2, it says the "Current new structure based on decisions made through October 19, 2015." So the options, if you kind of scroll to Page 3, the first scenario that's set forth is keeping the status quo, the current structure of having dual recordkeepers. And there's some [174] pros and cons that are listed here. Do you see that?

A. Yes.

MR. MARTIN: Object to the form.

MR. SCHLICHTER: Okay.

MR. MARTIN: It says keep current new structure. I'm not sure where -- if I'm on the right page.

MR. SCHLICHTER: That's right.

THE WITNESS: You are.

BY MR. SCHLICHTER:

Q. And then under Scenario 2 on the next page, it's a single recordkeeper option. If you look at the second to the last bullet under the pros it says "best cost structure." Do you see that, the second to the last bullet under pros?

A. Mm-hmm.

Q. Do you agree that moving to a single record-keeper model provides a plan with the best cost structure?

A. That's one aspect of Scenario 2. Single recordkeeper generally has a lower cost structure.

Q. Okay. If you go to Scenario 3A, this [175] is choosing a lead recordkeeper but maintaining the other aspects of the current structure. What this says under pros, if you look at the last bullet, is it would be more cost-effective than Scenario 1, which is the status quo. Under cons it would be less cost-effective than Scenario 2, which is a single record-keeper?

A. Mm-hmm.

Q. Was that generally your understanding, that having a lead-recordkeeper-type arrangement as described here would be more cost-effective than the status quo but less cost-effective than going to a full single recordkeeper model?

A. That's my general understanding of the way it worked, yeah.

Q. Okay. For 3B, which is the next page, this is a scenario in which you have Fidelity as your lead recordkeeper, and then you're limiting TIAA-CREF investments to TIAA's fixed and variable annuity products, and they're listed here. Again, the pros, this is more cost-effective than the status quo; but it's, again, listed in the cons, less cost-effective than having a sole recordkeeper, just one [176] record-keeper model. Was that generally consistent with your understanding of what the pricing options would be?

A. Yes.

Q. Scenario 3C, this is the last 3 scenario, I promise, is choosing the lead recordkeeper, being Fidelity, and completely freezing investments into TIAA-CREF. The pros are more cost-effective than Scenario 1, the status quo; con is less cost-effective than Scenario 2, single recordkeeper. And then the bullet above that says, "No compelling reason for the strategy over and above Scenario 2," which is the single recordkeeper scenario. Do you see that?

A. I see it.

Q. Do you know why CAPTRUST said there was no compelling reason for this strategy over and above Scenario 2; that is, the single recordkeeper model?

A. I don't know why they said that.

Q. Okay. Then the next page, which is page – we've gotten to Page 8 on this PDF is a pricing slide?

[177]

A. Mm-hmm.

Q. And this gives some pricing arrangements basically the same pricing that we saw in the prior document. And I think as we agreed with the prior document, this shows that moving away from a dual recordkeeper model results in cost savings. You would agree with that statement?

A. Say it again.

Q. This slide here on Page 8 shows that moving away from the current dual recordkeeper model results in cost savings, which is what we agreed with on the last presentation?

A. Yep.

Q. Would you agree with that here as well?

A. Mm-hmm.

* * *

[194]

Q. It's, instead, a meeting with Miss Fish, Miss Brown, and Fidelity in Boston. And if you'll note, the second heading there under Roman II is Multi-Vendor Capabilities (Plan Sponsor). Do you see that?

A. Mm-hmm.

Q. Master Administrator. If you look at the timing of that, this is from Fidelity itself, which is one of the largest administrators in the marketplace. They say the timing is approximately 12 to 16 weeks to implement. That's three to four months. Do you see that?

A. Mm-hmm.

Q. Instead it's taken almost -- Well, it's already taken two years, and we're talking about going into close to two and a half years.

A. This is apples to oranges. This is saying how long it would take them to implement it once a decision was made. What we're talking about here is a committee process that took several years, but it was process that needed to happen.

Q. Well, the committee --

[195]

A. These are two different things. You brought up something totally different.

Q. Well, the decision was made to go to master recordkeeper arrangement in February of 2016?

A. A lead recordkeeper.

Q. A lead --

A. The recommendation was made to move to lead recordkeeper model in 2016.

Q. And Fidelity was identified as that lead recordkeeper who was going to be the party that was going to perform around that time?

A. No. That's not what that said. That said we identified we would go to a lead recordkeeper. Then we had to go through the process of selecting the lead recordkeeper.

Q. Right. But if you look --

A. And that took a good year. I mean that takes time.

Q. So you're saying it took a year for the --

A. I don't know what it took, but you can look in the minutes. It tells you when we decided from the –

[196]

Q. Do you think a year for an RFP is a reasonable amount of time?

A. It can be, yeah.

Q. Okay. And this RFP, you didn't have non-incumbents bidding, correct?

A. We had the two lead players in the business.

Q. You had TIAA and you had Fidelity?

A. Correct.

Q. And there were no nonincumbents who submitted bids or who were solicited, correct?

A. I'm not aware of others, but there could have been.

Q. You believe there could have been others that were solicited?

A. What I'm saying is Anne Fish, Pam Beemer could have had conversations with other people. I don't know.

Q. Let's look at NU-00067874.

MR. MARTIN: How many zeros?

MR. SCHLICHTER: Three and then 67874.

THE WITNESS: Got it.

BY MR. SCHLICHTER:

Q. Okay. If you look at Page 2, this is a [197] document reflecting meeting minutes from August 6, 2015. Your name is at the top. Page 2 has at the bottom a heading called Other Business. Do you see that?

A. Mm-hmm.

Q. If you look at the second paragraph under that heading it says, "A discussion ensued about other potential recordkeepers in the marketplace. CAPTRUST stated that Fidelity and TIAA-CREF are the leaders for higher-ed institutions and that they do not recommend inviting any other providers."

Next paragraph says, "CAPTRUST will work with the two recordkeepers together pricing proposal information and organize the presentations for the November meeting." Do you see that?

A. Yeah.

Q. Does that refresh your recollection about how many providers were solicited?

A. It confirms my understanding.

Q. That there were two?

A. Yeah.

Q. Now –

[198]

A. But that doesn't mean -- This just says what CAPTRUST recommended. It doesn't say whether or not Anne or Pam talked to others. I don't know. This is what CAPTRUST recommended.

Q. Are you aware of whether others participated in --

A. I'm not aware.

Q. Let me finish my question. Others participated in the RFP process?

A. I'm not aware.

Q. You don't have any knowledge, as you sit here today, of other recordkeepers participating in that process and giving bids?

A. I do not.

Q. Now, there were, in fact, other recordkeepers who had the capability of providing those types of services to the Northwestern plan, correct?

A. It's possible.

Q. In fact, those recordkeepers were specifically identified for the committee by StraightLine. Do you recall that?

A. StraightLine might have said here are the players that are out there. I don"t recall [199] them ever saying that they were all -- They just mentioned there are lots of players out there. We knew that.

Q. Well, let's look at NU-00005046.

MR. MARTIN: 00005046.

BY MR. SCHLICHTER:

Q. Document titled Request For Proposals, Fee and Service Benchmarking, August 8, 2013?

A. Mm-hmm.

Q. If you can scroll down, swipe over to Executive Summary. This is Page 7 of the PDF. In fact, they didn't just say that there were other players out there. They listed six bidding providers who could provide bids on the services that would be requested?

A. Mm-hmm.

Q. Correct?

A. It looks like that's what StraightLine put in.

Q. But none of those bidding providers ultimately were solicited to prepare bids for the RFP that was ultimately conducted. Is that fair?

MR. MARTIN: Object. Argumentative.

[200]

THE WITNESS: I don't know.

BY MR. SCHLICHTER:

Q. Do you have any reason to dispute that any of these other recordkeepers couldn't have performed the recordkeeping services that would have been necessary?

MR. MARTIN: Object to the form of the question.

THE WITNESS: In my professional opinion, these firms are not up to the standards of the two incumbents.

BY MR. SCHLICHTER:

Q. Why is that?

A. They don't have the same market share; they don't have the same ability. They don't have -- they just -- You know, we feel like we have the two best.

Q. Now, in your professional experience, you're not dealing with 403(b) recordkeepers?

A. That's fair.

Q. You're dealing with investment managers, correct?

A. (Nodding head.)

Q. So any professional experience you have [201] would be the result of you being told what the marketplace is by consultants, correct?

A. No. That also by understanding that you can look at a marketplace, whether it's investment managers or whether it's custodians or consultants. And when you see two incumbents or two market share leaders, they're dominant. They're dominant for a reason. And there are only a handful of people usually in those businesses. Take custody, for example. There's two to three custodians in the world that we could work with. And it's -- So I'm using my professional judgment to say this is very analogous. That's all.

Q. When you say that they have dominant market share --

A. In higher ed.

Q. In higher ed, what is that based on?

A. Based on studies we've seen and discussed.

Q. So what study are you referring?

A. I don't have it in front of me.

* * *

[286]

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Q. Relative to the other options, do you feel as though this had a high-risk profile or a low-risk profile or somewhere in the middle?

A. I think relative to -- It had a different risk profile.

Q. Are you aware of what CAPTRUST believed was the risk profile of TIAA Real Estate relative to the other plan options?

A. No.

Q. Are you aware that, in fact, CAPTRUST felt that this was the most risky option within the plans?

A. It depends on how you define "risk." Some people define it as liquidity, some people define it as standard deviation, downside risk. I mean -- And I would say on CAPTRUST they may have had that view, but that doesn't mean the committee has to have that view or I have to have that view. We all talk about it, we all have different views on it. I certainly would argue that you go through a financial crisis and you're down 2 percent, you did a heck of a lot better than the stock portfolio.

[287]

Q. Are you aware that in 2010 they were not the 99th percentile performer, but actually the 100th worst possible percentile performer in their peer group?

MR. MARTIN: Object.

THE WITNESS: What peer group? What peer group?

BY MR. SCHLICHTER:

Q. Their peer group that was identified by TIAA.

MR. MARTIN: Object to the form of the question.

THE WITNESS: Not aware of that.

BY MR. SCHLICHTER:

Q. Would that change your view about the performance?

A. I'd have to see it.

Q. If CAPTRUST felt that this was the riskiest option in the portfolio, if there was no ability to benchmark this option, and if the performance at this time was not just below average, but was literally at the 100th percentile level with 1 being the best and 100 being the worst, would that cause concern in [288] terms of whether or not this fund was, in fact, a prudent option for plan participants?

MR. MARTIN: Object. It calls for speculation.

THE WITNESS: First off, you're mixing peers. You're talking 2010 to 2011 performance on one hand; you're talking CAPTRUST, and we didn't even hire until 2015. So I don't really know what performance you're talking about. You're not apples to apples in terms of your question.

BY MR. SCHLICHTER:

Q. Okay. Well, CAPTRUST, as you said, came on in 2015?

A. Yep.

Q. And as soon as they began ranking risk profiles, would you agree that they started ranking TIAA Real Estate as the riskiest?

A. I don't recall that.

Q. Let's look at NU-00015063, if you wouldn't mind.

MR. MARTIN: How many zeros?

MR. SCHLICHTER: Three zeros. 15063 after that.

BY MR. SCHLICHTER:

[289]

Q. And this is the third quarter review prepared by CAPTRUST in 2016. If you wouldn't mind flipping to 15080, which is going to be in the presentation Page 18 and also in the PDF 18.

A. Mm-hmm.

Q. So if you look at this chart it says Plan Investment Review/Plan Menu, the bottom axis is Expected Risk and the other axis is Expected Return?

A. Yes.

Q. And where does TIAA Real Estate fall on the expected risk axis relative to the other options?

A. Looks like to me it's the highest expected risk.

Q. Fair enough.

A. It's also the highest expected return.

Q. Now, in the 2010 to 2011 period, you mention that there was some turmoil in the real estate market?

A. No.· I said the turmoil was in the financial crisis, which was 2006/2007. I said the five-year number, the 2011 number reflected that turmoil because they were invested during [290] that period in real estate. If you take this chart on 18, you'd run a sharp ratio risk return. That's how you'd balance whether it was a good – It's a good chart, actually.

Q. If you flip to Page 32 of the PDF and of the presentation.

A. Mm-hmm.

Q. This is CAPTRUST giving someone 3-, 5-, and 10-year performance figures for TIAA Real Estate?

A. Mm-hmm.

Q. The benchmark it uses was the NCREIF Property Index?

A. Mm-hmm.

Q. Are you familiar with that index?

A. Mm-hmm.

Q. What does that index consist of, sir?

A. It's a property index of all types: multifamily, office, industrial, retail.

Q. Do you know whether it's located on the coasts or if it's geographically diversified?

A. It's geographically diversified.

Q. Is that the same as TIAA Real Estate?

A. I don't know their geographic portfolio [291] right now.

Q. This is the benchmark or these are the benchmarks that CAPTRUST chooses for TIAA Real Estate?

A. Mm-hmm.

Q. Again, Northwestern's communicating the S&P 500 as the benchmark for TIAA Real Estate, correct?

A. That was that 2017 plan document we did.

Q. It was in there that way?

A. Yeah.

Q. Okay.

A. That's 2016. I don't know what we had in '15 or '16.

Q. Okay. Well, I'll represent to you that wasn't the only time that the S&P 500 was used.

A. Okay.

Q. But if you look at the performance of TIAA Real Estate on a 1-, 3-, 5-, and 10-year basis as compared to these two benchmarks – one being NCREIF and one being the Morningstar Specialty-Real Estate Universe -- what does the performance of TIAA Real Estate look like?
[292]

A. They've underperformed.

Q. Pretty dismally, fair?

A. They've underperformed.

MR. MARTIN: Object to the form of the question. Characterization.

BY MR. SCHLICHTER:

Q. Let's look at the 10-year underperformance. It's about 380 basis points relative to the NCREIF property index?

A. Mm-hmm.

Q. And it's give or take 200 -- looks like 207 basis points relative to the Morningstar?

A. Mm-hmm.

Q. It's for a 10-year period. For a 5-year period, it's more than 500 basis points for the Morningstar index, and it's nearly 200 basis points for NCREIF.

A. Mm-hmm.

Q. And for the 3-year we're over 400 for Morningstar and over 250 for NCREIF, correct?

A. Mm-hmm.

Q. And then for 1-year we're 1,000 basis points below -- actually, 1100 basis points below for Morningstar and more than 350 below [293] for NCREIF.

If you saw these types of returns for an investment option in Northwestern's endowment, would that have concern for you?

MR. MARTIN: Object to the form of the question. Calls for a speculation.

THE WITNESS: I would -- It would be something we would take a look at among many other factors.

BY MR. SCHLICHTER:

Q. And yet this didn't appear on the watch list in any quarterly review or any meeting minute or in any other document that was prepared for the committee; is that right?

A. I'm not aware of it.

Q. Do you believe that this sort of performance won its place in the watch list?

MR. MARTIN: Object to the form of the question.

THE WITNESS: I think a lot of factors would have to go into something being put on the watch list.

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[298]

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Q. Well, is there any reason why those two funds shouldn't be scored, to your knowledge?

A. Well, I think in the case of the quarterly liquidity fund, the real estate fund, it's -- you know, you're not going to have the same kind of mechanisms because you don't have the same kind of pricing feedback because you're talking about illiquid asset versus liquidity assets.

Q. How does that affect the ability to appear on a scorecard?

A. Because the scoring is based on performance, is part of the – it's part of the criteria going in the scorecard.

Q. What are the other criteria, to your knowledge?

A. To be on the scorecard?

Q. Mm-hmm.

A. They lack qualitative factors like the manager, sale of the firm, is the portfolio manager still intact, that sort of thing.

[299]

Q. So I just want to make sure I understand. Did you ask at any point or did anyone ask why TIAA Real Estate or CREF Stock were appearing on this or any other scorecard?

A. I don't recall.

* * *

BY MR. SCHLICHTER:

Q. Just one -- a couple clean-up questions on that scorecard issue. Was it your understanding that in order to be marked for review, a fund or plan option needed to get below a certain score on the CAPTRUST scorecard?

A. We haven't had one other than Wells Fargo to sort of get to that area. I think, you know, for a marketing presentation it looks good to have a scoring system that does it. I just [300] think when it gets there, it means the committee has to redouble the efforts to look at it. We're so new with CAPTRUST, you know, we've had these funds for, you know, 18 months, two years. It's not shocking to me that we only have, you know, Wells Fargo. The others are doing pretty well.

Q. And with regard to CAPTRUST scoring system, when they first got involved, they circulated a scoring system explanation of sorts. And what that says -- and I can show it to you if you like -- but what it says – I'm going to read from it. "In order to remain in good standing, an option should total greater than 80 points under the scoring system. Options that total between 70 and 79 points will be marked for closer ongoing review by the committee. Options that score below 70 points will be considered for termination."

And you can recall from the Wells Fargo entry on that -- on those minutes said 77?

A. Yep.

Q. Is that generally consistent with your understanding of how the scoring system that [301] CAPTRUST has at least works?

A. Yes. Generally. I think we'll take a look at anything between 70 and 80, they will. If something is below 70, then we'll have a deeper conversation, but there's going to be a conversation. But, you know, we have to – I think we have to watch the ones over 90, too. There's lots of issues going on. Just because it has a score, sometimes it can be misleading. I think we have to, you know, we watch them all.

Q. And, again, you're not aware of any basis as to why CREF Stock and TIAA Real Estate would have been excluded from that scoring system?

A. No.

Q. Okay. On revenue credits -- So in 2016, there is a distribution of some revenue credits to plan participants, correct?

MR. MARTIN: 2000 when?

MR. SCHLICHTER: '16.

THE WITNESS: Sounds right. Sounds like the right date.

* * *

[310]

Q. Were you aware of whether or not TIAA was performing other services for plan participants at any point during your tenure with Northwestern?

A. My understanding is that both TIAA and Fidelity would offer counseling services for an additional fee that some of our employees took advantage of.

Q. Setting aside those counseling services, which required an additional fee, what about things like wealth management? Do you know if TIAA was offering its wealth management services to employees and other plan participants?

A. I'm not aware of that. Obviously I'm not a TIAA user, so I don't --

Q. Any particular reason why you're not a TIAA user?

A. I like the Fidelity funds that are in there, but.

Q. Do you think that the TIAA funds are too expensive for your taste?

A. No, no. I think it's just -- I just gravitated towards their technology platform, [311] the visuals, a lot of things. Just a matter of taste.

Q. Are you aware --

A. I think the survey suggests it's kind of -- although I guess when you think about it, the surveys had suggested the older people were heavily in TIAA and the younger people were Fidelity. And now I'm older. I can't think I'm younger anymore. I think of myself as younger. Sorry.

MR. MARTIN: Too much self-reflection in the deposition.

THE WITNESS: Sorry. Sorry. I'll give you back 30 seconds.

BY MR. SCHLICHTER:

Q. Okay. Did you become aware at any point either during your service on the committee or before when you were informally involved in discussions of TIAA approaching folks with balances of over half a million dollars to offer them wealth management services?

A. I was not aware of that.

Q. Are you aware of that practice more [312] generally -- not just limited to Northwestern -- but more generally in this space?

A. No.

Q. Have you read any of the recent media coverage about TIAA and some of the issues that they're having?

A. A little bit, yeah.

Q. New York Times article, for example?

A. Yep.

Q. Has that caused you or anyone else in the committee to do any additional investigation into some of the practices that are discussed in those media articles?

A. We're going to have some conversations as a committee.

Q. You have had conversations?

A. We have had conversations since that article. We circulated the article. We had some conversations.

Q. Have you asked TIAA whether or not they're soliciting plan participants regarding additional services that they can provide those participants?

A. I have not.

[313]

Q. As a wealth -- as a wealth management professional, chief investment officer, you would appreciate that the provision of wealth management services that TIAA could provide to particularly high net worth individuals could be a fairly lucrative business arrangement for them. Is that accurate?

MR. MARTIN: Object. It calls for speculation.

THE WITNESS: I don't know that business model that well, to be honest with you.

BY MR. SCHLICHTER:

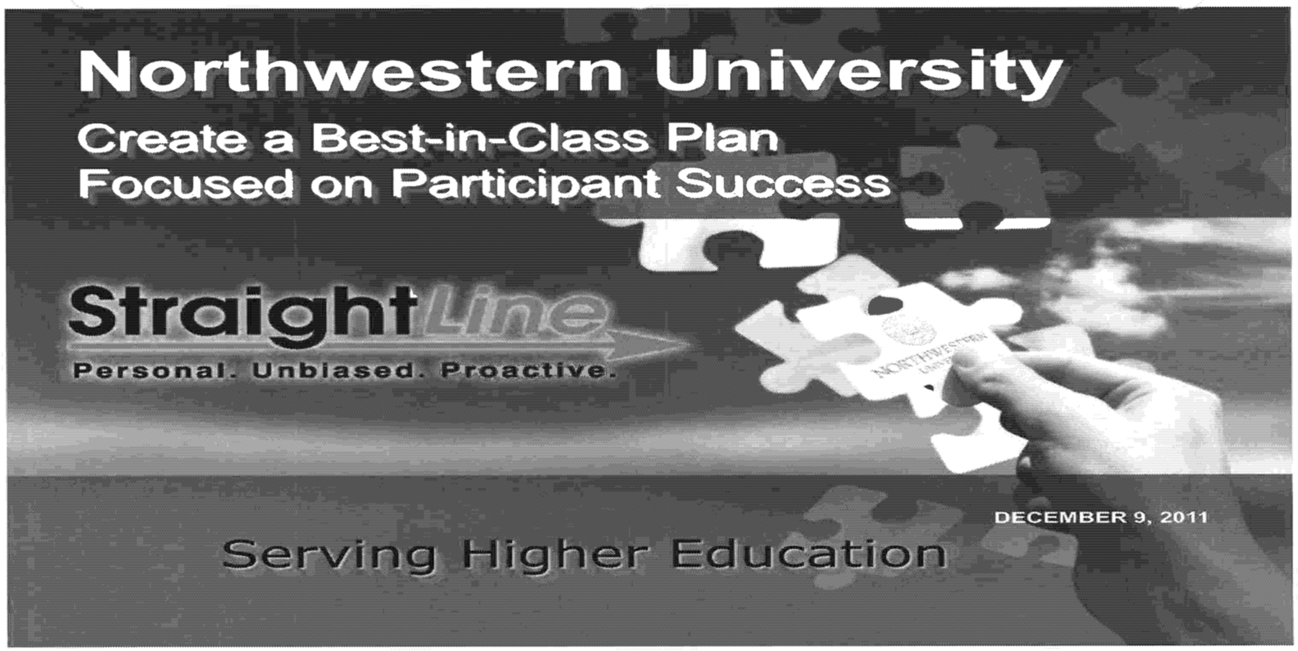
Q. Well, providing wealth management services for individuals with balances of over half a million dollars could result in some significant revenue for TIAA potentially at least?

MR. MARTIN: Object to the form.

THE WITNESS: I don't know how -- I don't have a basis to really answer that. Could.

* * *

EXHIBIT 11


Northwestern University
Create a Best-in-Class Plan
Focused on Participant Success
StraightLine
Personal. Unbiased. Proactive.
DECEMBER 9, 2011
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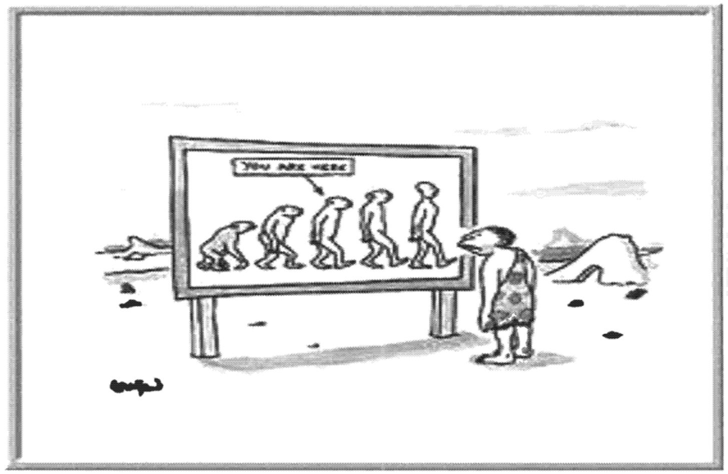
Topics for Discussion

The Evolution of the 403(b)



Topics for Discussion

Investment Policy Statement

- Summarizes all pertinent plan information
- Guide for current and future plan investment decisions
- Main Components
  - Plan information – summary of current circumstances, plan responsibilities, etc.
  - Plan objectives & risk attitudes
  - Asset class selection, constraints, restrictions
  - Selection, monitoring, reporting and control procedures
- Annual Review

Topics for Discussion

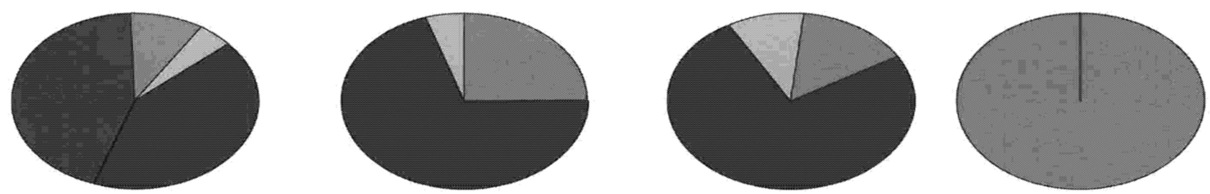
Asset Gatherer vs. Independent Recordkeeper

Insurance Companies Core Business: Insurance

Mutual Fund Companies Core Business: Asset Management

Broker-Dealers Core Business: Securities Transactions

Recordkeepers Core Business: Retirement



Insurance Companies:
- P&C 42.5%
- Health & Welfare 45.5%
- Retirement 10%
- IRA 5%

Mutual Fund Companies:
- Funds 70%
- IRA 5%
- Retirement 25%

Broker-Dealers:
- Securities Trading 75%
- IRA 10%
- Retirement 15%

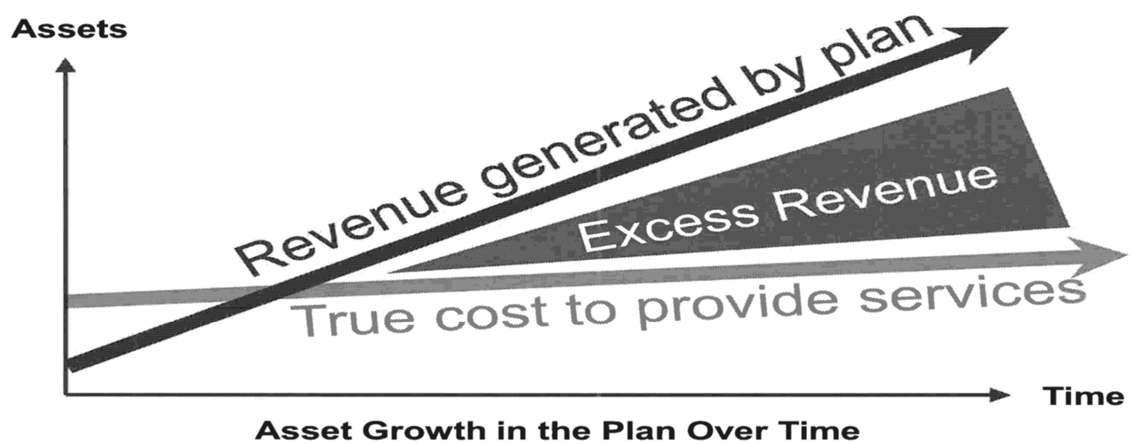
Recordkeepers:
- Retirement 100%

Fund Selection – The Possibilities are Endless

AllianceBernstein	Dodge & Cox Funds	Janus	Payden
American Century Investments	Eaton Vance Investment Managers	Prudential JennisonDryden	PIMCO
American Funds	Federated.	MFS Investment Management	Principal Funds
BlackRock	Fidelity Investments	Manning & Napier Advisors, Inc.	Prudential
BNY Mellon Asset Management	Franklin Templeton Investments	Morley Financial Services, Inc.	Russell Investments
Calamos	Harbor Funds.	Munder Capital Management	Sentinel Investments
Columbia Management.	The Hartford	Natixis	T. Rowe Price Invest With Confidence
DWS Investments	Invesco Aim	Oakmark	Thornburg Investments
Davis Advisors	Ivy Funds	OppenheimerFunds The Right Way to Invest	Vanguard Investments
Dimensional	J.P. Morgan Asset Management	Pacific Life	Victory Funds

**The fund companies noted above represent only a small portion of available fund companies you may choose from.

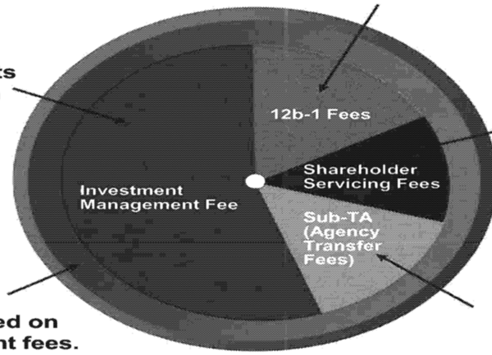
Understanding Recordkeeper Economics



ERISA Account Construction

12b-1: Distribution expenses paid by mutual funds from fund assets. Includes commissions to brokers, marketing expenses and other administrative services.

Investment Management: Fees for managing investment assets. Charged as a percentage of the assets invested and deducted from the investment return.

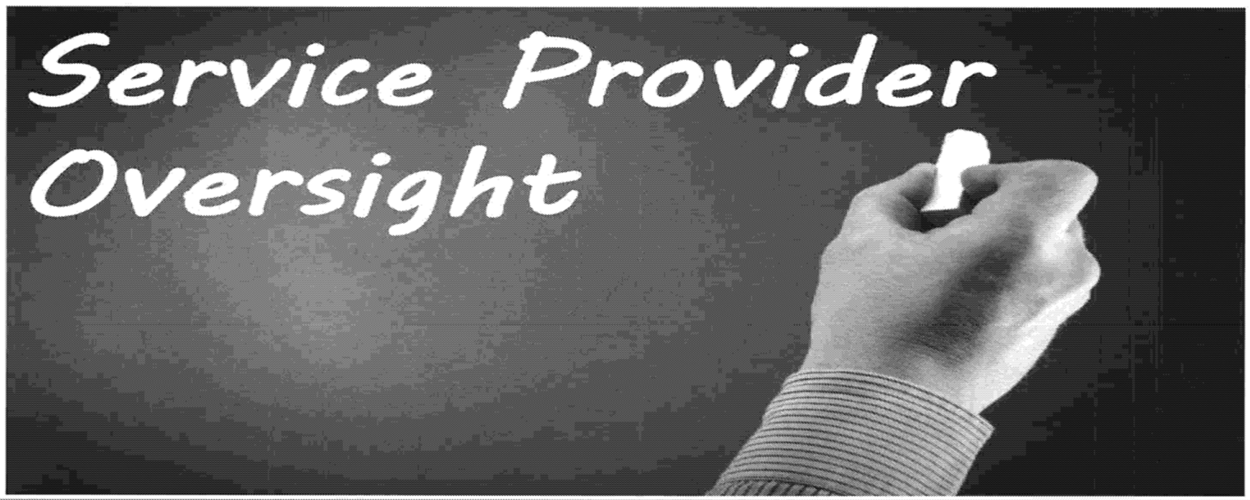


Shareholder Servicing: Revenue shared by the mutual fund company with the service provider.

Asset / Wrap Fee: Additional fees layered on top of total investment fees.

Sub-TA: Brokerage firms and mutual funds often contract recordkeeping and other services related to participant shares to a third party called a sub-transfer agent.

Topics for Discussion



403(b) Service Provider Components

Consolidation is Inevitable

Benefits

- Simplified Compliance
- Cost Savings
  - Time & Resources
- Economies of Scale
- Enhanced Participant Experience
  - Simplified Processes
  - Sales vs. Education
  - "Best of the Best"

Potential Drawbacks

- Participant Resistance
- Legacy Plan Restrictions & Termination Fees
- Back-Loaded Investment fees
- Individual vs. Group Contracts

Consolidation Case Studies

PURDUE
UNIVERSITY

MICHIGAN STATE UNIVERSITY

Topics for Discussion

Investment Pathway Construction

- Passive/Index Funds
- Target Date or Lifestyle Funds
- Actively Managed Funds
- Professional Management Options
- Proper Qualified Default Investment Alternative

Investment Pathway Construction

- Investment Selection
  - Investment Style
  - Short & Long-Term Performance
  - Expense Ratios
  - Manager Tenure
  - Volatility
- Investment Monitoring
- Watch List
- Fund Replacement

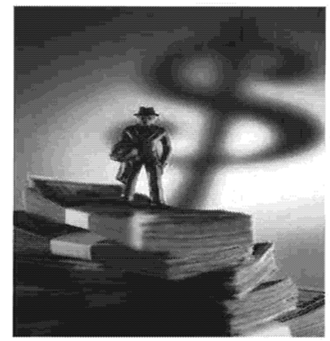
The Investment Selection Dilemma

Performance vs. Protection

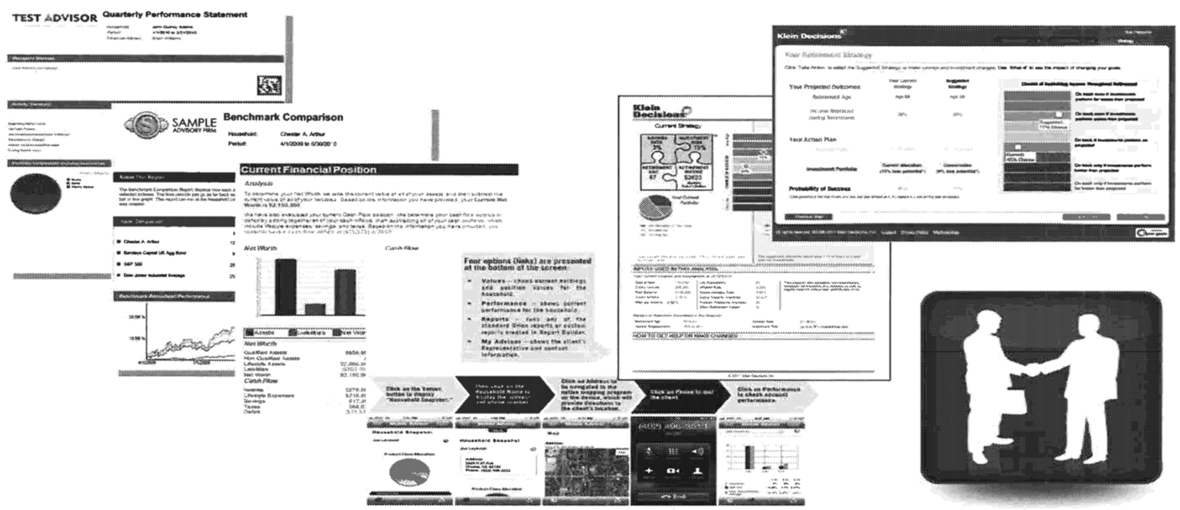
Topics for Discussion

Effective Platforms for Interaction

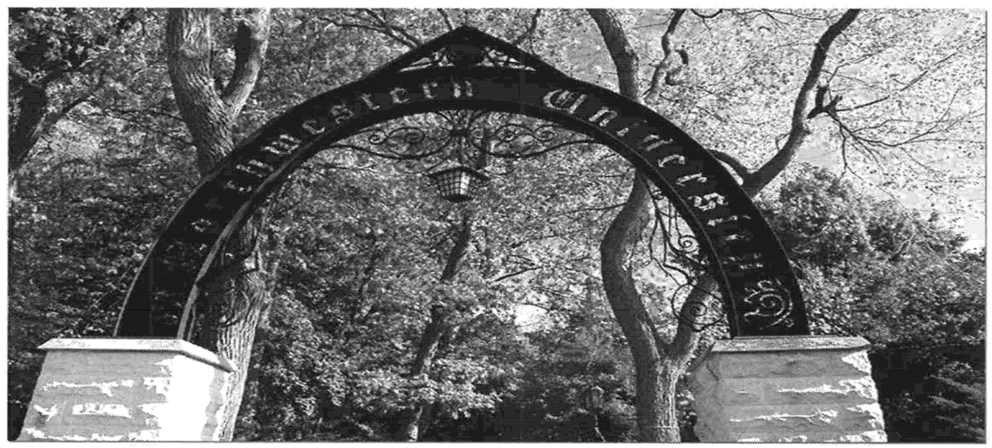
- **Education Policy Statement**
- **Onsite & Online Education**
- **Enhanced Websites**
- **Frequent Communication**
- **Access to Personalized Information**



Personalized Resources



Thank You!



UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 16 C 8157

LAURA L. DIVANE, ET AL.,
Plaintiffs,
v.

NORTHWESTERN UNIVERSITY, ET AL.,
Defendants.

Honorable Jorge L. Alonso

SECOND AMENDED COMPLAINT—
CLASS ACTION

JURY TRIAL DEMANDED

[PROPOSED] SECOND AMENDED COMPLAINT

1. Plaintiffs Laura L. Divane, April Hughes, Katherine D. Lancaster, and Jasmine Walker individually and as representatives of a class and subclasses of participants and beneficiaries of the Northwestern University Retirement Plan and the Northwestern University Voluntary Savings Plan (herein collectively referred to as the "Plans"), bring this action under 29 U.S.C. §1132(a)(2) on behalf of the Plans against Defendants Northwestern University, Northwestern University Retirement Investment Committee, Pamela S. Beemer, Ronald R. Braeutigam, Kathleen Hagerty, Craig A. Johnson, Candy Lee, William H. McLean, Ingrid S. Stafford,

and Nimalan Chinniah for breach of fiduciary duties under ERISA.[1]

* * *

BACKGROUND FACTS

* * *

IX. Move to consolidation and open architecture in 403(b) plans.

* * *

120. At its first ever meeting on December 9, 2011, Straightline, the consultant for the Plans at that time, stated that recordkeeper "[c]onsolidation is inevitable," and identified the fundamental benefits of consolidating the Plans' recordkeepers from a multivendor arrangement to a single recordkeeper or lead recordkeeper arrangement. Straightline informed Northwestern in 2011 that "there was no need to have two recordkeepers" and recommended a single recordkeeper and a move to an "open architecture" platform. The benefits identified to NURIC included "cost savings" for the Plans and their participants as well as "simplified compliance" for the fiduciaries.

* * *

DEFENDANTS BREACHED THEIR FIDUCIARY DUTIES AND COMMITTED PROHIBITED TRANSACTIONS

* * *

III. Defendants caused the Plans to pay excessive administrative and recordkeeping fees.

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[1] The Employee Retirement Income Security Act, 29 U.S.C. §§1001-1461.

* * *

161. Despite the long-recognized benefits of a single recordkeeper for a defined contribution plan, and its consultant's recommendations, Defendants continue to contract with two separate recordkeepers (TIAA-CREF and Fidelity) for the Plans. Indeed, Northwestern's representatives have stated that NURIC has selected Fidelity to serve as the Plans' lead recordkeeper effective July 1, 2018 at the earliest. Defendants could have moved to a single recordkeeper years earlier—Fidelity informed Northwestern in 2011 that it had the capability to administer the Plans' as the sole recordkeeper or Master Administrator, a process that could have been implemented within 12-16 weeks. In addition to the uncapped revenue sharing that has been received by TIAA and Fidelity as payment for the Plans' administrative services, the inefficient and costly structure of multiple recordkeepers has caused both Plans' participants to pay excessive and unreasonable fees for recordkeeping and administrative services.

162. An example of Defendants' imprudence in failing to make a reasoned decision whether to use a single recordkeeper is shown by the testimony of Defendant Sunshine. Even though Sunshine was the only person authorized to execute recordkeeping agreements on behalf of the Plans from 1997-2014, he could not state whether the Plans had multiple recordkeepers and did not know the names of the Plans' recordkeepers.

* * *

167. Defendants' consultant, Straightline, informed NURIC in December 2011 that revenue sharing can result in excess recordkeeping compensation if not properly monitored. Despite that warning, that is precisely what occurred in the Plans.

* * *

171. Defendants' consultant, Straightline, notified Defendants that the amount of revenue sharing payments to TIAA for recordkeeping services, an average of $150 per participant per year, "appears excessive." Straightline further admitted that TIAA received "considerable excess revenue" for its services compared to the market.

172. Testimony of Northwestern personnel further demonstrates Defendants' failure to prudently monitor whether the revenue sharing payments to TIAA and Fidelity were reasonable and competitive. NURIC secretary Anne Fish, a fiduciary to the Plans, does not recall ever reviewing benchmarking data for the Plans' recordkeeping fees. NURIC Chair Pamela Beemer does not recall evaluating the amount of revenue sharing paid by each of the Plans' investment options prior to 2012.

173. Defendants failed to conduct a competitive bidding process for the Plans' recordkeeping services prior to August 2015. This fact is confirmed by the testimony of Northwestern representatives, who have been unable to identify any recordkeeping bids that have been obtained from any provider of recordkeeping services before 2015, and have confirmed that no bids were submitted to NURIC prior to that date.

174. The bidding process Defendants performed for the Plans' recordkeeping services was flawed because the bidding was limited to the Plans' two incumbent recordkeepeers: Fidelity and TIAA. As Northwestern's representatives have conceded, Defendants failed to conduct a full request for proposals, and did not obtain any bids from the non-incumbent recordkeeping providers that Defendants'

consultant, Straightline, expressly identified as suitable candidates.

175. A truly competitive bidding process for recordkeeping services—one in which providers other than the two incumbents were allowed to bid—would have produced a reasonable recordkeeping fee. This competitive bidding process would have enabled Defendants to select a recordkeeper that charged reasonable fees, negotiate a reduction in recordkeeping fees, and rebate the full amount of excess expenses paid by participants for recordkeeping services.

176. Even the flawed bidding process that Defendants conducted, however, demonstrates that the lack of a competitive bidding process prior to August 2015 caused the Plans to grossly overpay for recordkeeping services compared to the rates Defendants could have negotiated if they had obtained bids before that date. Until 2015, the Plans never paid TIAA less than $150 per participant per year. When Defendants finally solicited bids in 2015, TIAA drastically reduced its fee from $150 per participant to $66 per participant as an initial bid, then to $42 per participant.

177. Aside from the failures to monitor the amount of revenue sharing payments and to solicit competitive bids, Defendants also failed to adequately negotiate rebates of excessive fee payments to TIAA-CREF and Fidelity. The Plans' consultant, Straightline, observed in 2011 that Defendants had failed to adequately monitor the Plans' investment options and "there was no negotiation with the recordkeeper to reduce those fees." As another specific example, because the multi-billion dollar plans paid the same percentage of asset-based fees as much smaller plans that used TIAA-CREF's products and services,

Defendants could have demanded "plan pricing" rebates from TIAA-CREF based on the Plans' economies of scale. Just as with investment management fees, the Plans' size would have enabled Defendants to command a much lower fee. Defendants could have also demanded and obtained similar rebates of all excessive fee payments from Fidelity. However, the only such discussions that occurred during the relevant period were initiated by Fidelity, and Defendants ultimately accepted Fidelity's offer of $65 per participant. Had Defendants adequately negotiated for these rebates, the Plans' recordkeeping fees would have been reduced, avoiding additional losses of retirement savings.

* * *

IV. Defendant caused the Plans to pay wholly unnecessary and excessive fees by using higher-cost share classes of mutual funds instead of identical versions of the same funds in lower-cost share classes.

* * *

189. Because the share classes have identical portfolio managers, underlying investments, and asset allocations, and differ only in cost, Defendants' failure to select the lower-cost share classes for the Plans' mutual fund options demonstrates that Defendants failed to prudently consider and use the size and purchasing power of the Plans when selecting the Plans' investment options. The chairperson of NURIC, Defendant Beemer, admits she does not know whether retail share classes have higher fees than institutional shares of the same funds.

* * *

VII. Defendants violated the Plans' Investment Policy Statement

* * *

264. Defendants additionally violated the provisions of the June 2015 IPS requiring periodic monitoring of the fees charged by service providers. As Northwestern's representatives have testified, there was no regular monitoring of all of the Plans' hundreds of investment options that took place until those investment options were significantly reduced in late 2016. Northwestern's representatives admitted "there's no way" they could have discussed or reviewed so many options at each meeting.

* * *

June 22, 2018 Respectfully submitted,

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[Certificate of Service Omitted]

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 16 C 8157

LAURA L. DIVANE, ET AL.,
Plaintiffs,
v.

NORTHWESTERN UNIVERSITY, ET AL.,
Defendants.

Judge Jorge L. Alonso

ORDER

Plaintiffs' motion to file excess pages [165] is granted. Plaintiffs' motion to file under seal [171] is granted in part and denied in part. Document [169] will be kept under seal until July 12, 2018. Plaintiffs' motion to alter or amend the judgment and for leave to file second amended complaint [167] is denied. Any remaining motions are denied as moot. Motion hearing date of 7/5/18 is stricken.

STATEMENT

The Court recently entered judgment in favor of defendants and against plaintiffs. Plaintiffs have moved the Court to alter or amend the judgment by reinstating their case and allowing them to file another amended complaint [169]. They seek leave to file their proposed amended complaint [169] under seal.

The Court first considers plaintiffs' motion [171] to file docket entry [169] under seal. Litigation in federal court is presumptively public, and people who "call on the courts . . . must accept the openness that goes with subsidized dispute resolution." *Union Oil Co. of Cal. v. Leavell*, 220 F.3d 562, 568 (7th Cir. 2000). "[O]nly trade secrets, information covered by a recognized privilege (such as the attorney-client privilege), and information required by statute to be maintained in confidence . . . is entitled to be kept secret." *Baxter Int'l v. Abbott Labs.*, 297 F.3d 544, 546 (7th Cir. 2002). Here, plaintiffs have not argued that the document requested to be sealed contains trade secrets, privileged information or other information required to be kept secret. This is perhaps not a surprise, because the plaintiffs are attempting to keep under seal information produced in discovery by defendants. Because the plaintiffs have not made the requisite showing, the motion is denied in part. Nonetheless, the motion is granted in part. The Court will keep document [169] under seal until July 12, 2018 to allow defendants an opportunity to show that the document should be kept under seal. If defendants believe they have good cause for keeping the filing under seal, they have leave to file their own motion to keep the document under seal, and such motion may be noticed up for hearing on July 12, 2018. If defendants do not file such a motion, the document will be unsealed on July 12, 2018.

Next, plaintiffs move to alter or amend the judgment, pursuant to Rule 59(e) of the Federal Rules of Civil Procedure. To obtain relief under Rule 59(e), a party must "demonstrate a manifest error of law or fact or present newly discovered evidence." *Vesely v. Armslist LLC*, 762 F.3d 661, 666 (7th Cir. 2014). Such a motion is not, however, a second bite at the apple. A Rule 59(e) motion is "not to be used to 'rehash' previously rejected arguments," *Vesely*, 762 F.3d at 666, and "it certainly does not allow a party to . . . advance arguments that could and should have been presented to the district court prior to the judgment." *Moro v. Shell Oil Co.*, 91 F.3d 872, 876 (7th Cir. 1996).

The Court appreciates that plaintiffs disagree fundamentally with this Court's decision. It is often the case when a district court issues an opinion that one side likes the opinion better than does the other. Plaintiffs' arguments, though, are all arguments that they either already made or that they could have made before. The Court does not agree with plaintiffs on the merits any more than it did the day it issued its opinion. Accordingly, plaintiffs' motion to alter or amend the judgment is denied.

Because the Court is denying plaintiffs' motion to alter or amend the judgment, it also denies plaintiffs' request for leave to amend. This case remains closed.

SO ORDERED. **ENTERED: June 27, 2018**

/s/ JORGE ALONSO

HON. JORGE ALONSO
United States District Judge