UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

CAMILLE WILLIAMS HERRON, BRADLEY DOLEMAN, JOHN LOMBARDI, and RYAN MILLER, individually and on behalf of all others similarly situated,

Plaintiffs,

v.

MARATHON PETROLEUM COMPANY, LP, the BOARD OF DIRECTORS OF MARATHON PETROLEUM COMPANY, the MARATHON PETROLEUM COMPANY SAVINGS PLAN INVESTMENT COMMITTEE, and JOHN DOES 1-25,

Defendants.

CIVIL ACTION NO.: ______________

CLASS ACTION COMPLAINT

Plaintiffs Camille Williams Herron, Bradley Doleman, John Lombardi, and Ryan Miller ("Plaintiffs"), by and through their attorneys, on behalf of the Marathon Petroleum Company Thrift Plan (the "Plan"),[1] themselves and all others similarly situated, allege as follows:

I. INTRODUCTION

1. This is a class action brought pursuant to §§ 409 and 502 of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1109 and 1132, against the Plan's fiduciaries, which include Marathon Petroleum Company ("Marathon" or "Company") and

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

the Board of Directors of Marathon Petroleum Company during the Class Period[2] ("Board"), and the Marathon Petroleum Company Savings Plan Investment Committee ("Investment Committee") and its members, for breaches of their fiduciary duties during the Class Period.

2. To safeguard Plan participants and beneficiaries, ERISA imposes strict fiduciary duties of loyalty and prudence upon employers and other plan fiduciaries. Fiduciaries must act "solely in the interest of the participants and beneficiaries," 29 U.S.C. § 1104(a)(1)(A), with the "care, skill, prudence, and diligence" that would be expected in managing a plan of similar scope. 29 U.S.C. § 1104(a)(1)(B). These twin fiduciary duties are "the highest known to the law." *Griffin v. Flagstar Bancorp, Inc.*, 492 F. App'x 598, 603 (6th Cir. 2012).

3. The U.S. Department of Labor ("DOL") has explicitly stated that employers are held to a "high standard of care and diligence" and must, among other duties, both "establish a prudent process for selecting investment options and service providers" and "monitor investment options and service providers once selected to see that they continue to be appropriate choices."[3]

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

5. Additional fees of only 0.18% or 0.4% can have a large impact on a participant's investment results over time because "[b]eneficiaries subject to higher fees … lose not only money

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[2] The "Class Period" is defined as December 28, 2015 through the date of judgment.

[3] U.S. Dep't of Labor, *A Look at 401(k) Plan Fees*, (Aug. 2013), at n.3, available at A Look at 401(k) Plan Fees (dol.gov) (last visited December 27, 2021).

[4] *See also A Look at 401(k) Plan Fees*, at 2 ("You should be aware that your employer also has a specific obligation to consider the fees and expenses paid by your plan.").

spent on higher fees, but also lost investment opportunity; that is, the money that the portion of their investment spent on unnecessary fees would have earned over time." *Tibble v. Edison Int'l*, 843 F.3d 1187, 1198 (9th Cir. 2016) ("It is beyond dispute that the higher the fees charged to a beneficiary, the more the beneficiary's investment shrinks.").

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

7. At all times during the Class Period, the Plan had at least $2 billion in assets under management. The number of participants has climbed and as of year-end for 2019 and 2020, the Plan had net assets of more than $5 billion and $6 billion, respectively, which were, and continue to be, entrusted to the care of the Plan's fiduciaries, including Defendants.

8. The Plan's assets under management qualifies it as a jumbo plan in the defined contribution plan marketplace. As a jumbo plan, the Plan had substantial bargaining power regarding the fees and expenses that were charged against participants' investments. Defendants, however, failed to exercise appropriate judgment and permitted administrative fees and expenses to balloon.

9. Plaintiffs allege that during the putative Class Period, Defendants, as "fiduciaries" of the Plan, as that term is defined under ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A), breached the duties they owed to the Plan, to Plaintiffs, and to the other participants of the Plan by failing to adequately monitor and control the Plan's recordkeeping costs.

10. Defendants' mismanagement of the Plan, to the detriment of participants and beneficiaries, constitutes a breach of the fiduciary duty of prudence, in violation of 29 U.S.C. §

1104. Their actions were contrary to actions of a reasonable fiduciary and cost the Plan and its participants millions of dollars.

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

II. JURISDICTION AND VENUE

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

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

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

III. PARTIES

Plaintiffs

15. Plaintiff Camille Williams Herron ("Herron"), resides in Cypress, Texas. During her employment, Plaintiff Herron participated in the Plan investing in the options offered by the Plan and which are the subject of this lawsuit.

16. Plaintiff Bradley Doleman ("Doleman") resides in Markham, Illinois. During his employment, Plaintiff Doleman participated in the Plan paying the recordkeeping and

administrative costs associated with the Plan and investing in the options offered by the Plan, including DFA Emerging Markets Value I Fund, and which are the subject of this lawsuit.

17. Plaintiff John Lombardi ("Lombardi"), resides in Canton, Ohio. During his employment, Plaintiff Lombardi participated in the Plan paying the recordkeeping and administrative costs associated with the Plan and investing in the options offered by the Plan and which are the subject of this lawsuit.

18. Plaintiff Ryan Miller ("Miller") resides in Columbus, Ohio. During his employment, Plaintiff Miller participated in the Plan paying the recordkeeping and administrative costs associated with the Plan and investing in the options offered by the Plan and which are the subject of this lawsuit.

19. Each Plaintiff has standing to bring this action on behalf of the Plan because each of them participated in the Plan and were injured by Defendants' unlawful conduct. Plaintiffs are entitled to receive benefits in the amount of the difference between the value of their accounts currently, or as of the time their accounts were distributed, and what their accounts are or would have been worth, but for Defendants' breaches of fiduciary duty as described herein.

20. Plaintiffs did not have knowledge of all material facts (including, among other things, comparisons of the costs of services to the Plan to similarly-sized plans) necessary to understand that Defendants breached their fiduciary duties and engaged in other unlawful conduct in violation of ERISA until shortly before this suit was filed.

Defendants

Company Defendant

21. Marathon is an Ohio corporation, the Plan sponsor, and a named fiduciary, with a principal place of business being 539 South Main Street, Findlay, Ohio 45840. *See* December 31, 2020 Form 5500 filed with the DOL ("2020 Form 5500") at 1.

22. Marathon's website describes the Company as

> a leading, integrated, downstream energy company headquartered in Findlay, Ohio. The company operates the nation's largest refining system. MPC's marketing system includes branded locations across the United States, including Marathon brand retail outlets. MPC also owns the general partner and majority limited partner interest in MPLX LP, a midstream company that owns and operates gathering, processing, and fractionation assets, as well as crude oil and light product transportation and logistics infrastructure.[5]

23. The Company, acting through its Board of Directors, appointed fiduciaries of the Plan, including the Investment Committee. Under ERISA, fiduciaries with the power to appoint have the concomitant fiduciary duty to monitor and supervise their appointees.

24. Marathon, through its Board, had a fiduciary duty to monitor and supervise the Plan's fiduciaries, including the Investment Committee and its members during the Class Period, but, as set forth in detail below, the Investment Committee failed to carry out these fiduciary duties prudently.

25. Marathon also made discretionary decisions to make employer matching contributions to the Plan each year. Specifically, the Plan Document provides: "Each Participating Employer will, for any given pay period, match the Pre-Tax Contributions, After-Tax Contributions, and Roth Deferral Contributions, of its Active Members up to a maximum of 6% of Compensation, at the rate of $1.17 per dollar contributed; provided, however…." Marathon

[5] *See* https://www.marathonpetroleum.com/content/documents/fact_sheets/About_MPC_FactSheet.pdf (last visited Dec. 27, 2021).

Petroleum Thrift Plan, amended and restated effective August 1, 2020 ("2020 Plan Document") at 12-13.

26. For the foregoing reasons, at all times during the Class Period, Marathon was a fiduciary of the Plan within the meaning of ERISA Section 3(21)(A), 29 U.S.C. § 1002(21)(A), because it exercised discretionary authority over management or disposition of Plan assets and because it exercised discretionary authority to appoint and/or monitor the other fiduciaries, which had control over Plan management and/or authority or control over management or disposition of Plan assets.

Board Defendants

27. Marathon, acting through its Board of Directors, appointed Plan fiduciaries, including the Investment Committee. Under ERISA, fiduciaries with the power to appoint have the concomitant fiduciary duty to monitor and supervise their appointees.

28. The individual members of the Board during the Class Period, who are not named as defendants, include the following: John P. Surma, Abdulaziz F. Alkhayyal, Evan Bayh, Charles E. Bunch, Jonathan Z. Cohen, Steven A. Davis, Edward G. Galante, Michael J. Hennigan, Kim K.W. Rucker, Frank M. Semple, J. Michael Stice, Susan Tomasky.

29. Accordingly, the Board and each of its members during the Class Period is or was a fiduciary of the Plan within the meaning of ERISA Section 3(21)(A), 29 U.S.C. § 1002(21)(A), because each exercised discretionary authority over management or disposition of Plan assets and because each exercised discretionary authority to appoint and/or monitor the other fiduciaries, which had control over Plan management and/or authority or control over management or disposition of Plan assets.

30. "Subject to any required Board or stockholder approval, the [Compensation and Organization Development] Committee shall create, amend and terminate CEO, Designated

Position, and employee benefit plans. The Committee shall have the authority to appoint and terminate the named fiduciary or fiduciaries of such plans, unless such fiduciaries are specified in the constituent plan documents." Compensation Committee Charter, ¶ 11.

31. Plaintiffs reserve the right to amend their pleading to name as defendants the individual members of the Board during the Class Period.

Investment Committee Defendant

32. The Investment Committee's role is defined in the Marathon Petroleum Thrift Plan, as amended and restated effective August 1, 2020 ("2020 Plan Document") at Article XXI as follows:

> 21.04 Investment Committee
>
> With respect to investment matters, an Investment Committee shall meet, from time to time, but in no event less frequently than annually, and shall be responsible (i) for reviewing and monitoring the performance of any investment managers that have been appointed and in developing appropriate guidelines and investment strategies for such investment managers, and (ii) for carrying out the Plan's investment policy, in selecting and reviewing appropriate investment options, and in addressing any related investment matters. The Investment Committee shall also review from time to time the Plan's record keeping, trust, and other administrative contracts and arrangements and related third-party service providers, and may act (where authorized), or otherwise recommend to the Plan Administrator or the Company, to amend, terminate, or change any such contracts, arrangements or third-party service providers. The Investment Committee shall consist of the Plan Administrator, and any other officers or employees of the Company or the Corporation or any affiliate thereof whom the Plan Administrator may appoint, from time to time, to serve on the Investment Committee. The Plan Administrator is also authorized to obtain the services of legal counsel, outside consultants, and other appropriate persons, as they deem necessary or appropriate, to assist the Investment Committee in performing its responsibilities. Any fees, charges, and/or costs associated with the retention of such services shall be paid by the Company.

33. Even though Marathon's website lists the names of the members of the Board of Directors and both members for its four other committees (Audit Committee, Compensation and Organization Development Committee, Corporate Governance and Nominating Committee and

Sustainability and Public Policy Committee) and attaches copies of those committees' charters, the website does not mention the Investment Committee, list its members or attach a charter for the Investment Committee.

34. Thus, Plaintiffs do not have access to documents and information sufficient to identify any members of the Investment Committee during the Class Period.

35. Upon information and belief, the Investment Committee is charged with ensuring fees paid to service providers and other expenses are reasonable.

36. On information and belief, the Investment Committee exercised this discretionary authority throughout the Class Period.

37. Accordingly, the Investment Committee and each of its members were fiduciaries of the Plan during the Class Period, within the meaning of ERISA Section 3(21)(A), 29 U.S.C. § 1002(21)(A), because each exercised discretionary authority over management or disposition of Plan assets. Plaintiffs reserve the right to amend their pleading to name the individual members of the Investment Committee as defendants in this action.

38. As alleged in detail below, the Investment Committee failed to properly discharge its fiduciary duties and responsibilities.

John Doe Defendants

39. To the extent that there are additional officers, employees and/are contractors of Marathon who are/were fiduciaries of the Plan during the Class Period, or were hired as an investment manager for the Plan during the Class Period, the identities of whom are currently unknown to Plaintiffs, Plaintiffs reserve the right, once their identities are ascertained, to seek leave to join them to the instant action. Thus, without limitation, unknown "John Doe" Defendants 1-25 include, but are not limited to, Marathon officers, employees and/or contractors who are/were

fiduciaries of the Plan within the meaning of ERISA Section 3(21)(A), 29 U.S.C. § 1002(21)(A) during the Class Period.

IV. CLASS ACTION ALLEGATIONS

40. Plaintiffs bring this action as a class action pursuant to Rule 23 of the Federal Rules of Civil Procedure on behalf of themselves and the following proposed class ("Class"):[6]

> All persons, except Defendants and their immediate family members, and the Court and Court staff handling this matter, who were participants in or beneficiaries of the Plan, at any time between December 28, 2015 through the date of judgment (the "Class Period").

41. The members of the Class are so numerous that joinder of all members is impractical. As of December 31, 2019, the Plan had 47,180 "participants with account balances…." 2019 Form 5500, at 2.

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

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

A. Whether Defendants are/were fiduciaries of the Plan;

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

B. Whether Defendants breached their fiduciary duty of prudence by engaging in the conduct described herein;

C. Whether the Defendants responsible for appointing other fiduciaries failed to adequately monitor their appointees to ensure the Plan was being managed in compliance with ERISA;

D. The proper form of equitable and injunctive relief; and

E. The proper measure of monetary relief.

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

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

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

V. THE PLAN

47. The Plan is a defined contribution or individual account plan as described in Section 404(c) of ERISA and Department of Labor Regulations 2550.404c-1. 2020 Summary Plan description at 1.

48. The Plan was originally adopted on July 1, 2011. Its most recent amendment was effective as of August 1, 2020. 2020 Plan Document at Article XXV.

49. An "account" with respect to any participant in the Plan is the aggregate of his or her pre-tax and post-tax contribution accounts, Roth Deferral Contributions, and Rollover Contributions or Direct Plan Transfer Contributions, and such other accounts or sub-accounts as may be established by the Admin. Committee. 2020 Plan Doc., Article V.

50. Retirement benefits provided by the Plan are based solely on the amounts contributed to a participant account, and any income or gains (or losses) on such contributions, less any expense that may be allocated to such participant's account.

51. Jonathan M. Osborne has been appointed by Marathon as the Plan Administrator. The 2020 Plan Document states, "The Company shall appoint such assistant administrators as may be deemed necessary. The Plan Administrator shall be the named fiduciary under the Plan for all purposes other than for purposes of the control or management of the assets of the Plan." 2020 Plan Doc., Article XXI.

52. Fidelity Management Trust Company ("Fidelity Trust") is the Plan's trustee and the custodian for the majority of the Plan's investments. *See* 2020 Plan Document, Article XVIII. The 2020 Plan Document describes its duties as follows:

> The Trustee shall be the named fiduciary with respect to the control or management of the assets of the Plan. The Trustee may appoint an investment manager for purposes of the management of all or a portion of the trust assets. An investment manager who is appointed by the Trustee must evidence to the Trustee that it

> satisfies the eligibility requirements to be an investment manager under ERISA, must accept the appointment in writing, and must acknowledge, in writing, that it is a fiduciary with respect to the Plan. The Trustee may also remove an investment manager who was previously appointed. Notwithstanding the preceding, the provisions of Sections 8.02 and 21.04 regarding the participant-directed investment of Plan accounts and related matters shall apply.

53. Fidelity Investments Institutional ("Fidelity Inst.") has been the recordkeeper for the Plan throughout the Class Period. *See* Form 5500s, at Schedule C.

Eligibility

54. In general, any employee who is employed as a non-bargaining employee or a collectively bargained employee covered by a collective bargaining agreement, which provides for participation in the Plan and is actively employed, being paid by Marathon, is eligible to participate in the Plan. 2020 Plan Documents, at 2-4.

Contributions and Vesting

55. Eligible employees may participate in the by electing to make contributions in conformity with procedures established by the Plan administrator. *See* 2019 Auditor's Report, at 5. The amount of the employer matching contribution percentage is determined annually by Marathon, up to a maximum of 6% of Compensation, at the rate of $1.17 per dollar contributed. *Id.* Employer contributions vest upon the earliest of reaching three years of service, upon age 65, or as a result of death, disability or retirement, or termination or partial termination of the Plan. *Id.* at 5.

56. Like other companies that sponsor defined contribution plans for their employees, Marathon has enjoyed a significant tax and cost savings by providing matching contributions to Plan participants. Employers are generally permitted to take tax deductions for their contributions to 401(k) plans at the time when the contributions are made. *See generally*, https:/www.irs.gov/retirement-plans/plan-sponsor/401k-plan-overview.

57. Marathon also benefits in other ways from the Plan's matching contributions. It is well-known that "[o]ffering retirement plans can help in employers' efforts to attract new employees and reduce turnover." Paychex, *Employer Benefits of 401(k) Plans*.[7]

Payment of Plan Expenses

58. Very little information is disclosed to the Class Members concerning the payment of the costs, expenses, and fees incurred in administering this Plan. The Class members' statements do not contain a line item showing the costs to their account for payment of these costs, expenses, and fees incurred in administering this Plan. *See*, *e.g.*, 2020 Disclosure.

59. According to recent Plan disclosures, the Plan has discretion to charge each Plan participant: (a) asset-based fees; (b) plan administrative fees and expense; and (c) individual fees and expenses. Required Disclosure Information, Marathon Petroleum Thrift Plan ("2020 Disclosure"), at B4 (Sept. 2020). However, the 2020 Disclosure fails to state the actual amount of plan administrative fees and expenses that has been or will be incurred by each participant. The 2020 Disclosure states,

> Plan administrative expenses fees may include recordkeeping, legal, accounting, trustee and other administrative fees and expenses associated with maintaining the Plan. Some plans may deduct these fees and expenses from individual accounts in the Plan. Based on the information and direction of Fidelity had on file at the time this Notice was prepared, no Plan administrative fees will be deducted directly as a transaction viewable in account history from accounts in the Plan. *However, the Plan's administrative services may be paid for through offsets and/or payments associated with one of more of the Plan's Investment options.* Please keep in mind that fees are subject to change.

[7] Available at: https://www.paychex.com/articles/employee-benefits/employer-advantages-of-401k-plans

60. The 2020 Disclosure also states: "Some of the administrative services performed for the Plan were underwritten from the total operating expenses of the Plan's investment options."

61. The 2020 Plan Document only states: "All costs, expenses, and fees incurred in administering this Plan, to the extent not paid by the Company, shall be incurred by members."

VI. THE PLAN'S FEES DURING THE CLASS PERIOD WERE UNREASONABLE

A. The Totality of Circumstances Demonstrate That the Plan Fiduciaries Failed to Administer the Plan in a Prudent Manner

62. As described above, Defendants were fiduciaries of the Plan.

63. ERISA "imposes a 'prudent person' standard by which to measure fiduciaries' investment decisions and disposition of assets." *Fifth Third Bancorp v. Dudenhoeffer*, 134 S. Ct. 2459, 2467 (2014) (quotation omitted).

64. Plaintiffs did not have and do not have actual knowledge of the specifics of Defendants' decision-making process with respect to the Plan, including Defendants' processes (and execution of such) for selecting and monitoring the Plan's recordkeeper, because this information is solely within the possession of Defendants prior to discovery. *See Braden*, 588 F.3d at 598 ("If Plaintiffs cannot state a claim without pleading facts which tend systematically to be in the sole possession of defendants, the remedial scheme of [ERISA] will fail, and the crucial rights secured by ERISA will suffer.")

65. For purposes of this Complaint, Plaintiffs have drawn reasonable inferences regarding these processes based upon the numerous factors set forth below.

B. Defendants Failed to Adequately Monitor the Plan's Recordkeeping Expenses

66. The term "recordkeeping" is a catchall term for the suite of administrative services typically provided to a defined contribution plan by the plan's "recordkeeper." Nearly all

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

67. It is well-established that plan fiduciaries have an obligation to monitor and control recordkeeping fees in order to ensure that such fees remain reasonable. *See*, *e.g.*, *Tussey v. ABB, Inc.*, 746 F.3d 327, 336 (8th Cir. 2014) (holding that fiduciaries of a 401(k) plan "breach[] their fiduciary duties" when they "fail[] to monitor and control recordkeeping fees" incurred by the plan). Excessive expenses "decrease [an account's] immediate value" and "depriv[es] the participant of the prospective value of funds that would have continued to grow if not taken out in fees." *Sweda v. Univ. of Pennsylvania*, 923 F.3d 320, 328 (3d Cir. 2019). No matter the method of payment or fee collection, the fiduciary must understand the total amount paid the recordkeeper and per-participant fees and determine whether pricing is competitive. *See Tussey*, 746 F.3d at 336. Thus, defined contribution plan fiduciaries have an ongoing duty to ensure that the recordkeeper's fees are reasonable.

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

69. Although utilizing a revenue sharing approach is not per se imprudent, unchecked, it is devastating for Plan participants. "At worst, revenue sharing is a way to hide fees. Nobody

sees the money change hands, and very few understand what the total investment expense pays for. It's a way to milk large sums of money out of large plans by charging a percentage-based fee that never goes down (when plans are ignored or taken advantage of). In some cases, employers and employees believe the plan is 'free' when it is in fact expensive." Justin Pritchard, *Revenue Sharing and Invisible Fees*, available at: https://www.cccandc.com/p/revenue-sharing-and-invisible-fees (last visited October 14, 2021).

70. As another industry expert noted: "If you don't establish tight control, the growth of your plan's assets over time may lead to higher than reasonable amounts getting paid to service providers. This is because most revenue sharing is asset-based. If a recordkeeper's workload is about the same this year as last, why should they get more compensation just because the market had a big year and inflated the asset base? In a large plan, this phenomenon can lead to six figure comp bloat over time. That's bad for plan participants and bad for fiduciaries." Jim Phillips, *(b)est Practices: What Do You Know About Revenue Sharing?*, PLANSPONSOR.com (June 6, 2014).

71. Another problem is that "revenue sharing is not equivalent among all funds; some funds pay no revenue sharing and others pay different revenue-sharing rates. The issue then arises that it may not be fair for some participants to pay a higher expense ratio because revenue sharing is built in. Another concern is that plan participants who invest in more expensive, revenue-sharing funds are bearing a disproportionate amount of the plan's administrative costs compared with their coworkers who have chosen funds without revenue sharing." Jennifer DeLong, *Coming to Grips with Excess Revenue Sharing,* Context, The AllianceBernstein Blog on Investing (June 2014). Thus, prior to the Class Period, AllianceBernstein noted, "the prevalence of revenue sharing is decreasing as more plans rethink their strategies for making plan fees more transparent." *Id.*

72. As recognized prior to the Class Period, the best practice is a flat price based on the number of participants in a plan, which ensures that the amount of compensation will be tied to

the actual services provided and that the recordkeeping fees will not fluctuate or change based upon, *e.g.*, an increase in assets in the plan. Indeed, in May 2014, AllianceBernstein advised: "DC plans and their fiduciaries may be better served to modify or change the plan design a bit, and it might be wise to consider removing excess revenue sharing from the picture altogether. One route to that solution would be to consider share classes or investment vehicles with lower—or no—revenue-sharing rates." Daniel Noto, *Rethinking Revenue Sharing*, AllianceBernstein (May 2014).[8]

73. In this case, using revenue sharing to pay for recordkeeping resulted in a worst-case scenario for the Plan's participants because it saddled Plan participants with above-market recordkeeping and administrative fees.

74. As demonstrated in the chart below, the Plan's per participant administrative and recordkeeping fees were unreasonable when benchmarked against similar plans.

Year	Participants	Direct Comp. to Fidelity	Indirect Comp. to Fidelity	Total Comp.	Fees Per Participant	Fees In Excess of $35 Per Participant
2019	47,180	$980,618.00	$1,507,380.00	$2,487,998	$52.73	$17.73
2018	29,984	$1,149,374.00	$618,479.00	$1,767,853	$58.96	$23.96
2017	28,946	$1,477,634.00	$774,583.00	$2,252,217	$77.81	$42.81
2016	28,415	$381,036.00	$739,473.00	$1,120,509	$39.43	$4.443
2015	11,481	$391,066.00	$733,261.00	$1,124,327	$97.93	$62.93

75. The excessiveness of the Plan's recordkeeping and administrative expenses in the above chart is readily apparent when compared to the amount similar plans have paid for recordkeeping and administrative costs.

76. The per participant recordkeeping fees averaged **$65.37** during the Class Period.

[8] Available at: https://www.alliancebernstein.com/Research-Publications/CMA-created-content/Institutional/Instrumentation/DC_RethinkingRevenueSharing.pdf (last visited Sept. 22, 2020).

77. From the years 2015 through 2018, based upon the information available to Plaintiffs, which was equally or even more easily available to Defendants during the Class Period, it was possible for the Plan to negotiate recordkeeping fees for not more than between $20 and $35 per participant.

78. The table below illustrates that the annual recordkeeping fees to recordkeepers by comparable plans of similar sizes of assets under management in 2018, compared to the average annual recordkeeping fees paid by the Plan (as identified in the table above).

Comparable Plans' RK&A Fees from Recordkeepers in 2018[9]					
Plan	**Participants**	**Net Assets**	**Recordkeeping Fees**	**Per Participant Fee**	**Recordkeeper**
Marathon Petroleum Company Thrift Plan	**29,984**	**$3,083,163,964**	**$1,767,853**	**$58.96**	**Fidelity**
Sutter Health Retirement Income Plan	13,248	$448,119,989	$460,727	$35	Fidelity
Fortive Retirement Savings Plan	13,502	$1,603,610,831	$472,673	$35	Fidelity
The Tax Sheltered Annity Plan of Texas Children's Hospital	13,950	$993,649,270	$416,395	$30	Fidelity
DHL Retirement Savings Plan	14,472	$806,883,596	$483,191	$33	Fidelity
Dollar General Corp. 401(k) Savings and Retirement Plan	19,118	$355,768,325	$349,756	$18	Voya
The Rite Aid 401(k) Plan	31,330	$2,668,142,111	$930,019	$30	Alight Financial
The Savings and Investment Plan	34,303	$2,682,563,818	$1,130,643	$33	Vanguard

[9] Price calculations are based on Form 5500 information filed by the respective plans for the year 2018, if available or more recent year if not available.

Kaiser Permanente Supplemental Savings and Retirement Plan	47,358	$3,104,524,321	$1,298,775	$27	Vanguard
Sutter Health 403(B) Savings Plan	73,358	$3,681,162,013	$1,908,133	$26	Fidelity
Google LLC 401(K) Savings Plan	82,725	$11,786,824,293	$1,434,851	$17	Vanguard

79. In 2014, NEPC, LLC, a consulting group, reported a significant reduction in median administrative fees to $70 per participant. In 2016, NEPC, LLC reported that for individual account plans with $1 billion in assets, administrative fees had dropped to $37 per participant.

80. More recently, NEPC conducted its 14th Annual Survey titled the NEPC 2019 Defined Contribution Progress Report (referenced above) which took a survey of various defined contribution plan fees.[10] The sample size and respondents included 121 Defined Contribution Plans broken up as follows: 71% Corporate; 20% Healthcare, and 9% Public, Not-for-Profit and other. The average plan had $1.1 billion in assets and 12,437 participants. The median plan had $512 million in assets and 5,440 participants. *See* Report at 1.

81. NEPC's survey found that plans with over 15,000 participants paid on average $40 or less in per participant recordkeeping, trust and custody fees. *See* Report at 10.

82. The Plan's total recordkeeping costs are clearly unreasonable as some authorities have recognized that reasonable rates for large plans typically average around $35 per participant, with costs coming down every day.[11]

[10] Available at https://www.nepc.com/insights/2019-dc-plan-and-fee-survey.

[11] Case law is in accord that large plans can bargain for low recordkeeping fees. *See, e.g.*, *Spano v. Boeing*, No. 06-743, Doc. 466, at 26 (S.D. Ill. Dec. 30, 2014) (plaintiffs' expert opined market rate of $37–$42, supported by defendants' consultant's stated market rate of $30.42–$45.42 and defendant obtaining fees of $32 after the class period); *Spano*, Doc. 562-2 (Jan 29, 2016) (declaration that Boeing's 401(k) plan recordkeeping fees have been $18 per participant for the past two years); *George* v. *Kraft Foods Glob., Inc.*, 641 F.3d 786, 798 (7th Cir. 2011) (plaintiffs' expert opined market rate of $20–$27 and plan paid record-keeper $43–$65); *Gordon v. Mass Mutual*, No. 13-30184, Doc. 107-2 at ¶10.4 (D. Mass. June 15,

83. For example, in 2020, following extensive review and negotiation, the University of Chicago ERISA fiduciaries reduced annual recordkeeping fees on their two 403(b) plans to $21-$44 per participant. Another example is Fidelity – a recordkeeper for hundreds of plans, including the Plan at issue in this case – which recently stipulated in a lawsuit that a plan with tens of thousands of participants and over a billion dollars in assets could command recordkeeping fees as low as $14-21. *See Moitoso v. FMR LLC*, 451 F. Supp. 3d 189, 204 (D. Mass. Mar. 27, 2020).

84. In order to make an informed evaluation as to whether a recordkeeper or other service provider is receiving no more than a reasonable fee for the services provided to a plan, a prudent fiduciary must identify all fees, including direct compensation and revenue sharing being paid to the plan's recordkeeper. To the extent that a plan's investments pay asset-based revenue sharing to the recordkeeper, prudent fiduciaries monitor the amount of the payments to ensure that the recordkeeper's total compensation from all sources does not exceed reasonable levels, and require that any revenue sharing payments that exceed a reasonable level be returned to the plan and its participants.

85. Further, a plan's fiduciaries must remain informed about overall trends in the marketplace regarding the fees being paid by other plans, as well as the recordkeeping rates that are available. This will generally include conducting a Request for Proposal ("RFP") process at reasonable intervals, and immediately if the plan's recordkeeping expenses have grown significantly or appear high in relation to the general marketplace. More specifically, an RFP should happen at least every three to five years as a matter of course, and more frequently if the plans experience an increase in recordkeeping costs or fee benchmarking reveals the

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2016) (401(k) fee settlement committing the Plan to pay not more than $35 per participant for recordkeeping).

recordkeeper's compensation to exceed levels found in other, similar plans. *George v. Kraft Foods Glob., Inc.*, 641 F.3d 786, 800 (7th Cir. 2011) (the plan's consultant stated that "without an actual fee quote comparison," *i.e.*, a bid from another service provider, it could not comment on the reasonableness of fee amounts for the services provided); *Kruger v. Novant Health, Inc.*, 131 F. Supp. 3d 470, 479 (M.D.N.C. 2015); *see also* NEPC 2019 Defined Contribution Progress Report at 10 ("Best Practice is to compare fees and services through a record keeping vendor search Request for Proposal process).

86. While the Plan has stayed with the same recordkeeper over the course of the Class Period and paid the same relative amount in recordkeeping fees, there is little to suggest that Defendants conducted a RFP at reasonable intervals – or certainly at any time prior to 2015 through the present - to determine whether the Plan could obtain better recordkeeping and administrative fee pricing from other service providers given that the market for recordkeeping is highly competitive, with many vendors equally capable of providing a high-level service.

87. Given the size of the Plan's assets during the Class Period and total in addition to the general trend towards lower recordkeeping expenses in the marketplace as a whole, the Plan could have obtained recordkeeping services that were comparable to or superior to the typical services provided by the Plan's recordkeeper at a lower cost.

C. Defendants Retained at Least One Underperforming Fund in the Plan from 2015 to 2020

88. Another indication of Defendants' lack of a prudent process to monitor Plan funds during the Class Period was their failure to remove the DFA Emerging Markets Value I Fund, which consistently underperformed both its benchmark index and lower-cost funds in the same category that measured their performance against the same benchmark index.

89. The DFA Emerging Markets Value I Fund underperformed as follows as of June 30, 2020:

FUND	NET EXPENSE RATIO	AVERAGE ANNUAL RETURN (%)		
		3Y	5Y	10Y
DFEVX **DFA Emerging Markets Value I**	**0.46%**	5.39	8.02	5.09
Benchmark Relative Performance (MORNINGSTAR EM TME GR USD)		9.57	9.99	6.86
DFETX **DFA Emerging Markets II**	**0.36%**	8.23	8.80	6.24
Benchmark Relative Performance (MORNINGSTAR EM TME GR USD)		9.57	9.99	6.86
VEMIX **Vanguard Emerging Mkts Stock Idx Instl**	**0.10%**	9.62	8.71	6.06
Benchmark Relative Performance (MORNINGSTAR EM TME GR USD)		9.57	9.99	6.86

90. As detailed in the chart above, the less expensive comparator fund, Vanguard Emerging Mkts Stock Index Institutional, outperformed DFA Emerging Markets Value I Fund over the critical 3-, 5-, and 10-year periods as of September 30, 2021. A prudent fiduciary should have been aware of better preforming lower-cost alternatives and replaced the DFA Emerging Markets Value I Fund with a lower-cost, better performing alternative. Defendants' failure to do so is a clear indication that the Plan lacked a prudent process for monitoring the cost and performance of the funds in the Plan.

91. Given the clear underperformance of the DFA Emerging Markets Value I Fund relative to its benchmark during the last ten years, and its above-median and average expense ratio, it should have been replaced during the Class Period.

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

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

93. At all relevant times, Defendants Investment Committee and its members ("Prudence Defendants") were fiduciaries of the Plan within the meaning of ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A), in that they exercised discretionary authority or control over the administration and/or management of the Plan or disposition of the Plan's assets.

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

95. The Prudence Defendants breached these fiduciary duties in multiple respects as discussed throughout this Complaint. They did not make decisions regarding the Plan's investment lineup based solely on the merits of each investment and what was in the best interest of the Plan's participants. Instead, the Prudence Defendants selected and retained investment options in the Plan despite the high cost of the funds in relation to other comparable investments.

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

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

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

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

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

100. The Board Defendants and Marathon (the "Monitoring Defendants") had the authority and obligation to monitor the Committee and was aware that the Committee had critical responsibilities as a fiduciary of the Plan.

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

102. The Monitoring Defendants also had a duty to ensure that the Committee possessed the needed qualifications and experience to carry out its duties; had adequate financial resources

and information; maintained adequate records of the information on which it based its decisions and analysis with respect to the Plan's investments; and reported regularly to the Monitoring Defendants.

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

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

(b) failing to monitor the processes by which the Plan's investments were evaluated; and

(c) failing to remove the Committee as a fiduciary whose performance was inadequate in that it continued to maintain imprudent, excessively costly, and poorly performing investments within the Plan, and caused the Plan to pay excessive recordkeeping fees, all to the detriment of the Plan and the retirement savings of the Plan's participants.

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

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

PRAYER FOR RELIEF

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

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

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

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

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

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

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

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

H. Other equitable relief to redress Defendants' illegal practices and to enforce the provisions of ERISA as may be appropriate, including appointment of an independent fiduciary or

fiduciaries to run the Plan and removal of Plan's fiduciaries deemed to have breached their fiduciary duties;

I. An award of pre-judgment interest;

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

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

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

Date: December 28, 2021

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