UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO

Peter Schaf, individually and as a representative of a class of similarly situated persons, and on behalf of the Seventh Amended and Restated Owens-Illinois, Inc. Long-Term Savings Plan and Eighth Amended and Restated Owens-Illinois, Inc. Stock Purchase and Savings Program, Plaintiff, v. O-I Glass, Inc. and Owens-Illinois Employee Benefits Committee, Defendants.	Case No. 3:22-cv-01240-JZ **AMENDED COMPLAINT** **CLASS ACTION**

NATURE OF THE ACTION

1. Plaintiff Peter Schaf, individually and as a representative of the Class described herein, and on behalf of the Seventh Amended and Restated Owens-Illinois, Inc. Long-Term Savings Plan and Eighth Amended and Restated Owens-Illinois, Inc. Stock Purchase and Savings Program (together, the "Plans"), the assets of which are held jointly in the Owens-Illinois Master Savings Program Trust (the "Trust"), bring this action under the Employee Retirement Income Security Act of 1974, as amended, 29 U.S.C. § 1001, *et seq.* ("ERISA"), against Defendants O-I Glass, Inc. ("O-I Glass") and Owens-Illinois Employee Benefits Committee (the "Committee") (collectively, "Defendants"). Defendants breached their fiduciary duties with respect to the Plans in violation of ERISA, to the detriment of the Plans, their participants, and their beneficiaries. Plaintiff brings this action to remedy this unlawful conduct, recover losses to the Plans, and obtain other appropriate relief.

INTRODUCTION

2. As of the second quarter of 2022, Americans had approximately $9.3 trillion in assets invested in defined contribution plans, such as 401(k) and 403(b) plans.[1] Since the passage of Section 401(k) of the Internal Revenue Code in 1978 only 15% of private-sector workers have access to pension plans, meaning 401(k) type plans have replaced pensions to become the most common retirement program for American workers.[2]

3. The potential for disloyalty and imprudence is much greater in defined contribution plans than in defined benefit plans. "In a defined-benefit plan, retirees receive a fixed payment each month, and the payments do not fluctuate with the value of the plan or because of the plan fiduciaries' good or bad investment decisions." *Thole v. U. S. Bank N.A.*, 140 S. Ct. 1615, 1618 (2020). Because the sponsor is responsible for making sure that the plan is sufficiently capitalized, the sponsor bears all risks related to excessive fees and investment underperformance and has every incentive to keep costs low and promptly remove imprudent investments. *See Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 439 (1999). But in a defined contribution plan, participants' benefits "are limited to the value of their own investment accounts, which is determined by the market performance of employee and employer contributions, less expenses." *Tibble v. Edison Int'l*, 575 U.S. 523, 525 (2015); *see also Thole*, 140 S. Ct. at 1618 (noting that in defined contribution plans, retirees' level of benefits "can turn on the plan fiduciaries' particular investment decisions"). Thus, because all risks related to high

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[1] *See* Investment Company Institute, *Retirement Assets Total $33.7 Trillion in Second Quarter 2022* (Sept. 15, 2022), *available at* https://www.ici.org/statistical-report/ret_22_q2 (last visited October 31, 2022).
[2] *See The Demise of the Defined-Benefit Plan*, INVESTOPEDIA, (Nov. 28, 2021), *available at* https://www.investopedia.com/articles/retirement/06/demiseofdbplan.asp (last visited Oct. 31, 2022); CNBC, *How 401(k) Accounts Killed Pensions to Become One of the Most Popular Retirement Plans for U.S. Workers* (Mar. 24, 2021), *available at* https://www.cnbc.com/2021/03/24/how-401k-brought-about-the-death-of-pensions.html (last visited Oct. 31, 2022).

fees and poorly performing investments are borne by participants, the sponsor has no direct stake in keeping costs low or closely monitoring the plan to ensure every investment remains prudent.

4. The real-life effect of such imprudence on workers can be severe. According to one study, the average working household with a defined contribution plan will lose $154,794 to fees and lost returns over a 40-year career.[3] Put another way, excessive fees can force an employee to work an extra five to six years to make up for the imprudent management of a retirement plan.

5. To safeguard retirement plan participants, ERISA imposes strict fiduciary duties of loyalty and prudence upon plan sponsors and other plan fiduciaries. 29 U.S.C. § 1104(a)(1). These twin fiduciary duties are "the highest known to the law." *Gregg v. Transp. Workers of Am. Int'l*, 343 F.3d 833, 841 (6th Cir. 2003). 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).

6. Contrary to these fiduciary duties, Defendants have failed to administer the Plans in the best interest of participants and failed to employ a prudent process for managing the Plans. Instead, Defendants have managed the Plans and maintained an investment lineup unlike any similarly sized plan in the nation, including offering a mutual fund target date series present in ***no*** other similarly sized plan. Throughout the statutory period, the Plans' lineup has consisted solely of investments managed by Defendants' former affiliate, Harbor Capital Advisors (the

[3] *See* Melanie Hicken, *Your Employer May Cost You $100K in Retirement Savings*, CNN Money (Mar. 27, 2013), *available at* http://money.cnn.com/2013/03/27/retirement/401k-fees/ (last visited Oct. 31, 2022).

"Harbor funds"), or the Plans' former recordkeeper (the "legacy New York Life funds"),[4] regardless of the funds' merit or appropriateness for inclusion. Included in this lineup is a target date mutual fund series managed by Harbor, which was launched in 2009 and immediately added to the Plans, despite having no track record of successful performance. Harbor intended to eventually offer these target date funds to the general public, but Defendants first used the Plans' assets as seed capital to establish the series—even going so far as to make the funds the Plans' default investment option. This strategy failed, however, as the funds were never able to establish the successful track record that prudent fiduciaries of other plans typically require before putting retirement assets at risk, and the series was eventually liquidated, but not before participants' assets fell victim to this failed experiment.

7. Defendants' hands-off approach to managing the Plans has cost participants millions of dollars in excess fees. For plans with between $250 million and $1 billion in assets, like the Plans, the average asset-weighted total plan costs are between 0.37% and 0.40%.[5] In contrast, the Plans' total costs exceeded the average by 50% or more, ranging from 0.60% to 0.65% of the Plans' assets throughout the statutory period. The Plans' excessive fees are entirely due to the blind retention of Harbor funds and the legacy New York Life funds. For example, the MainStay S&P 500 index fund, one of the legacy New York Life funds, serves as the Plans' only passively managed investment option and carries an annual expense ratio of 0.33%, more than

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[4] In 2014, John Hancock acquired New York Life's Retirement Plan Services business. As successor to New York Life, John Hancock continues to be the Plans' recordkeeper and the legacy New York Life funds remain in the Plans.

[5] INVESTMENT COMPANY INSTITUTE, The BrightScope/ICI Defined Contribution Plan Profile: A Close Look at 401(k) Plans, 2019, at 49 (Sept. 2022), *available at* https://www.ici.org/system/files/2022-09/22-ppr-dcplan-profile-401k.pdf (last visited Oct. 31, 2022) (hereinafter "2019 ICI Study"). The Investment Company Institute is the leading trade association for the mutual fund industry. *Id.* at 80. The report's measure of average total plan costs is derived from audited Form 5500 reports for more than 58,000 private-sector 401(k) plans for the 2019 plan year. *Id.* at ii. The measure of a plan's fees is derived from the fees reported on the Form 5500 reports as well as the fees paid through investment expense ratios. *Id.* at 3.

ten times the expense ratios of other S&P 500 index funds available to the Plans.

8. Defendants' absent monitoring of the Plans has not only led to the retention of overpriced funds, but also the retention of underperforming funds. For example, the Harbor Mid Cap Value Fund, one of the Plans' largest holdings, trailed its prospectus benchmark by 3.92% *per year* over the five-year period ending 2021.

9. By retaining solely Harbor funds and the legacy New York Life funds as investment options within the Plans in lieu of superior alternative options utilized by similarly situated fiduciaries, Defendants have failed to act in the best interest of participants and exercise appropriate care, costing participants millions of dollars in excess fees and investment underperformance.

10. Based on this conduct, Plaintiff asserts claims against Defendants for breach of their fiduciary duties (Count One). Plaintiff also asserts a claim against Defendant O-I Glass, Inc. for its failure to monitor fiduciaries (Count Two).

JURISDICTION AND VENUE

11. Plaintiff brings this action pursuant to 29 U.S.C. § 1132(a)(2) and (3), which provide that participants in an employee retirement plan may pursue a civil action on behalf of the plan to remedy breaches of fiduciary duties and other prohibited conduct, and to obtain monetary and appropriate equitable relief as set forth in 29 U.S.C. §§ 1109 and 1132.

12. This case presents a federal question under ERISA, and therefore this Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1331 and 29 U.S.C. § 1132(e)(1).

13. Venue is proper pursuant to 29 U.S.C. § 1132(e)(2) and 28 U.S.C. § 1391(b) because this is the district where the Plans are administered, where the breaches of fiduciary duties giving rise to this action occurred, and where Defendants may be found.

THE PARTIES

PLAINTIFF

14. Plaintiff Peter Schaf resides in Perrysburg, Ohio and was a participant in the Eighth Amended and Restated Owens-Illinois, Inc. Stock Purchase and Savings Program, the assets of which are invested in the Owens-Illinois Master Savings Program Trust, until October, 2016. As a participant, Plaintiff Schaf invested in multiple investments managed by Harbor Capital Advisors and has been financially injured by the unlawful conduct described herein. Plaintiff Schaf's account would be worth more today had Defendants not violated ERISA as described herein.

THE PLANS

Owens-Illinois Master Savings Program Trust

15. The Plans' investments are held in the Owens-Illinois Master Savings Program Trust administered by the Committee. Prior to 2015, New York Life Trust Company served as the Plans' trustee, and New York Life Retirement Plan Services managed recordkeeping. Since 2015, when New York Life's retirement unit was acquired by John Hancock, John Hancock has served as trustee and recordkeeper to the Plans and the Trust.[6]

16. The Trust has held approximately $520 million to $670 million in assets, comprised of the assets of the Long-Term Savings Plan and Stock Purchase and Savings Program.

The Owens-Illinois, Inc. Long-Term Savings Plan and Owens-Illinois, Inc. Stock Purchase and Savings Program

17. The Seventh Amended and Restated Owens-Illinois, Inc. Long-Term Savings

[6] D. Mercardo, *John Hancock Buys New York Life's Retirement Unit*, InvestmentNews, (Dec. 22, 2014), *available at* https://www.investmentnews.com/john-hancock-buys-new-york-lifes-retirement-unit-new-york-life-acquires-block-of-john-hancocks-life-insurance-biz-60294 (last visited Oct. 31, 2022).

Plan (the "Long-Term Savings Plan") and Eighth Amended and Restated Owens-Illinois, Inc. Stock Purchase and Savings Program (the "Stock Purchase and Savings Program") (together, the "Plans") were established by Owens-Illinois, Inc. on May 1, 1988 and July 1, 1969, respectively.

18. The Plans are "employee pension benefit plan[s]" within the meaning of 29 U.S.C. § 1002(2)(A) and "defined contribution plan[s]" within the meaning of 29 U.S.C. § 1002(34) covering all eligible current and former U.S. hourly and salaried employees of O-I Glass and certain of its subsidiaries and affiliates, including Plaintiff. The Plans are qualified plans under 26 U.S.C. § 401 and are of the type commonly referred to as "401(k) plans."

19. The Long-Term Savings Plan has held approximately $230 million to $300 million in assets and approximately 3,500 to 4,200 active participants with balances at any time during the relevant period. The Stock Purchase and Savings Program has held approximately $300 million to $400 million in assets and approximately 2,000 to 2,200 active participants with balances at any time during the relevant period.

20. Participants may direct a portion of their earnings to their accounts in the Plans, and participants also may receive contributions from O-I Glass and participating subsidiaries and affiliates as their employer. Participant contributions are held in trust.

21. Participants in Plans may direct the investment of their account assets from among the lineup of designated investment alternatives (i.e., investment options).[7] Because the Committee determines the designated investment alternatives that are offered, the investment lineup maintained by the Committee is critical to participants' investment results and, ultimately, the retirement benefits they receive.

22. The Plans' assets are commingled within the Trust and Defendants treat the Trust

[7] Participants in a defined contribution plan are limited in their investment choices to the lineup of options offered by their plan. *See* 2019 ICI Study at 13.

as a unified pool of assets for investment purposes. As a result, the Plans' investment menus are identical and have consisted of ten actively managed Harbor asset class funds, one actively managed Harbor target date fund series, a stable value option managed by New York Life, an S&P 500 index fund managed by New York Life subsidiary MainStay Investments, and O-I Glass, Inc. common stock. The default investment for both Plans was the Harbor target date fund series until its ultimate liquidation in 2022.

DEFENDANTS

O-I Glass, Inc.

23. Defendant O-I Glass, Inc., the successor entity to Owens-Illinois, Inc. ("Owens-Illinois"), is one of the world's leading manufacturers of glass containers and is headquartered in Toledo, Ohio.

24. O-I Glass is the "plan sponsor" within the meaning of 29 U.S.C. § 1002(16)(B) and has the ultimate authority to control and manage the operation and administration of the Plans. Because O-I Glass exercises discretionary authority or control with respect to management and administration of the Plans and disposition of the Plans' assets, O-I Glass is a functional fiduciary under 29 U.S.C § 1002(21)(A).

25. O-I Glass is also a fiduciary because it has authority to appoint and remove members of the Committee. It is well accepted that the authority to appoint, retain, and remove plan fiduciaries constitutes discretionary authority or control over the management or administration of the plan, and thus confers fiduciary status under 29 U.S.C. 29 U.S.C. § 1002(21)(A). *See* 29 C.F.R. § 2509.75-8 (D-4).

26. The responsibility for appointing and removing members of such a committee carries with it an accompanying duty to monitor the appointed fiduciaries, and to ensure that they

are complying with the terms of the Plans and ERISA's statutory mandates. 29 § 2509.75-8 (FR-17). Furthermore, this monitoring duty carries with it a responsibility to "take required corrective action" upon discovery of possible deficiencies. *In re Williams Co. ERISA Litig.*, No. 02-153 (N.D. Okla. Aug. 22, 2003) (DOL Amicus Brief, at 5, 8-9).

Owens-Illinois Employee Benefits Committee

27. O-I Glass delegates a portion of its fiduciary responsibilities for administering the Plans to the Owens-Illinois Employee Benefits Committee. Among other things, the Committee is responsible for maintaining the Plans' investment lineup, including monitoring the Plans' designated investment alternatives and making changes as appropriate. The Committee is therefore a functional fiduciary pursuant to 29 U.S.C. § 1002(21)(A). According to the Plans' Forms 5500, the Committee is also the "plan administrator" of each plan within the meaning of 29 C.F.R. § 2509.75-8 at D-3. Thus, the Committee is also a named fiduciary pursuant to 29 U.S.C. § 1102(a).

28. Each Defendant identified above as a fiduciary to the Plans is also subject to co-fiduciary liability under 29 U.S.C. § 1105(a)(1)-(3) because it enabled other fiduciaries to commit breaches of fiduciary duties, failed to comply with 29 U.S.C. § 1104(a)(1) in the administration of its duties, and/or failed to remedy other fiduciaries' breaches of their duties, despite having knowledge of the breaches.

HARBOR CAPITAL ADVISORS SALE

29. Harbor Capital Advisors ("Harbor") serves as the investment manager for all of the Plans' actively managed investment options. Harbor was formed as a subsidiary of Owens-Illinois, Inc. in 1983 to manage the assets of Owens-Illinois' pension plans and began offering mutual funds to the general public in 1987. In 2001, after mounting fears of further litigation

over its manufacture of asbestos insulation and to reduce the company's debt, Owens-Illinois sold Harbor and its wholly owned subsidiaries to Netherlands-based Robeco Groep N.V. for approximately $500 million, "subject to certain downward adjustments principally for changes in revenues based on sales or redemptions of shares of the Harbor Fund[s]."[8] By maintaining the Harbor Funds in the Plans, Owens-Illinois was able to receive a higher sale price as removing them would have reduced the Harbor Funds' assets and, in turn, the cash consideration paid to Owens-Illinois.

30. Indeed, Owens-Illinois stated in SEC filings following the sale that Harbor "will continue to have responsibility for advising the pension funds of Owens-Illinois[,]" including the Plans.[9] At the time of the sale, the then-president of Harbor explained that "[t]he only change is the parent company."[10] This was confirmed by chairman and chief executive officer of Owens-Illinois, stating at the time of the sale that "[Owens-Illinois] will have a significant ongoing relationship with Harbor Capital Advisors, and we expect this business to grow and perform very well with . . . its new parent [company]."[11] Since the sale, Harbor has continued to manage the assets of the Plans and O-I Glass' defined benefit plans.

ERISA FIDUCIARY DUTIES

31. ERISA imposes strict fiduciary duties of loyalty and prudence upon fiduciaries of retirement plans. 29 U.S.C. § 1104(a)(1) states, in relevant part:

> [A] fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and—

[8] Owens-Illinois, Inc. Form 8-K (Mar. 21, 2001), *available at* https://www.sec.gov/Archives/edgar/data/812074/000091205701504431/a2042242zex-99_1.txt

[9] *Id.*

[10] Christine Williamson, *Purchase by Robeco: Sale of Harbor Capital Won't Lead to Broader Changes for Manager*, Pensions & Investments (Apr. 2, 2001), *available at* https://www.pionline.com/article/20010402/PRINT/104020705/purchase-by-robeco-sale-of-harbor-capital-won-t-lead-to-broader-changes-for-manager.

[11] Owens-Illinois, Inc. Form 8-K (Mar. 21, 2001).

(A) for the exclusive purpose of

(i) providing benefits to participants and their beneficiaries; and

(ii) defraying reasonable expenses of administering the plan;

(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 . . . .

32. These statutory parameters of loyalty and prudence impose a fiduciary standard that is considered "the highest known to law." *Gregg*, 343 F.3d at 841.

DUTY OF LOYALTY

33. The duty of loyalty requires fiduciaries to act with "an eye single" to the interests of plan participants. *Pegram v. Herdrich*, 530 U.S. 211, 235 (2000); *Gregg*, 343 F.3d at 840 (citation omitted). "Perhaps the most fundamental duty of a [fiduciary] is that he [or she] must display . . . complete loyalty to the interests of the beneficiary and must exclude all selfish interest and all consideration of the interests of third persons." *Pegram*, 530 U.S. at 224 (quoting G Bogert et al., *Law of Trusts and Trustees* § 543 (rev. 2d ed. 1980)). Thus, "in deciding whether and to what extent to invest in a particular investment, a fiduciary must ordinarily consider *only* factors relating to the interests of plan participants and beneficiaries . . . . A decision to make an investment may not be influenced by non-economic factors unless the investment, when judged *solely* on the basis of its economic value to the plan, would be equal or superior to alternative investments available to the plan." U.S. Dep't of Labor ERISA Adv. Op. 88-16A, 1988 WL 222716, at *3 (Dec. 19, 1988) (emphasis added).

DUTY OF PRUDENCE

34. ERISA also "imposes a 'prudent person' standard by which to measure fiduciaries' investment decisions and disposition of assets." *Fifth Third Bancorp v.*

Dudenhoeffer, 573 U.S. 409, 419 (2014) (quotation omitted); *Gregg*, 343 F.3d at 840 (quotation omitted). This includes "a continuing duty to monitor [plan] investments and remove imprudent ones" that exists "separate and apart from the [fiduciary's] duty to exercise prudence in selecting investments." *Tibble v. Edison Intern.*, 575 U.S. 523, 529 (2015). If an investment is imprudent, the plan fiduciary "must dispose of it within a reasonable time." *Id.* at 530 (quotation omitted). Fiduciaries therefore may be held liable for either "assembling an imprudent menu of investment options" or for failing to monitor the plan's investment options to ensure that each option remains prudent. *Pfeil v. State Street and Bank Trust Co.*, 671 F.3d 585, 599-600 (6th Cir. 2012) (abrogated on other grounds by *Fifth Third Bancorp v. Dudenhoeffer*, 573 U.S. 409 (2014)). It is no defense to the imprudence of some investments that others may have been prudent; a meaningful mix and range of investment options does not insulate plan fiduciaries from liability for breach of fiduciary duty. *See Hughes v. Northwestern University*, 142 S. Ct. 737, 742 (2022).

DEFENDANTS' VIOLATIONS OF ERISA

I. DEFENDANTS BREACHED THEIR FIDUCIARY DUTIES MANAGING THE PLANS

35. As discussed below, Defendants constructed and maintained an investment lineup for the Plans unlike that of any similarly sized plan in the country. Defendants' passive retention of Harbor funds and legacy New York Life funds resulted in unnecessarily high costs and material underperformance for the Plans. Defendants' process for evaluating and monitoring the Plans' investments is virtually nonexistent and failed to properly consider alternative investments and control the Plans' costs, all in violation of ERISA's fiduciary standards.

A. Defendants Maintain an Investment Lineup for the Plans Unlike Any Other Plan in the Country

36. As of the end of 2016 and at the beginning of the statutory period, Defendants offered fourteen designated investment alternatives within the Plans: ten actively managed

Harbor asset class funds, one actively managed Harbor target date fund series, a stable value option managed by New York Life, an S&P 500 index fund managed by New York Life subsidiary MainStay Investments, and O-I Glass, Inc. common stock. As of the end of 2020, Defendants have made no changes to the Plans' investment lineup.[12] Throughout the statutory period the Harbor funds have accounted for between 66% and 72% of the Plans' assets. Excluding O-I Glass, Inc. stock from the Plans' total assets, Harbor funds have comprised between 75% and 79% of participants' investments during the relevant period.

37. This significant presence of Harbor funds within the Plans is at odds with Harbor's standing in the retirement plan landscape as well as the broader mutual fund marketplace. To illustrate, *no* plan other than the Plans and Harbor's own defined contribution plan invest in the Harbor target date funds.[13] Of the roughly 4,000 defined contribution plans of similar size, *i.e.* with more than $250 million in assets, just five plans other than the Plans invest in the Harbor High-Yield Bond and Harbor International Growth funds, while only three such plans invest in the Harbor Mid Cap Growth fund.[14] In the general mutual fund marketplace as of the end of 2015, Harbor maintained a paltry 0.66% industry market share, which had declined to 0.27% by the end of 2021. Of Harbor's inconsequential industry market share, 71% is attributed to a single fund: Harbor Capital Appreciation. Despite the industry's disfavor with Harbor's other investment strategies, Defendants have entrusted Harbor with *all* actively managed asset classes within the Plans. In other words, the fiduciaries of similarly sized defined contribution

[12] In 2019 the Harbor Target Retirement 2015 fund was liquidated while the Harbor Target Retirement 2060 fund was added to the Plans. These are default actions resulting from the inclusion of the target date series in the Plans, and not overt modifications to their investment lineup.
[13] As of year-end 2020, the Harbor Capital Advisors, Inc. 401(k) Plan held just $68 million in assets which is approximately 10% of the amount of assets held by the Plans.
[14] Harbor Mid Cap Growth fund underwent a name and strategy change in 2021 and is now known as the Harbor Disruptive Innovation fund. *See* March 1, 2021 Harbor Funds Supplement to Summary Prospectus, *available at* https://www.sec.gov/Archives/edgar/data/793769/000119312521166202/d163378d497k.htm.

plans have almost uniformly rejected Harbor's strategies, and the Plans are a singular outlier among peer plans.

38. Defendants' fixation on funds otherwise rejected by similarly situated fiduciaries includes the ongoing retention of the legacy New York Life funds. For example, the MainStay S&P 500 index fund, the Plans' singular passively managed investment option, is held by *one* other plan with more than $250 million in assets, and *no* other plans with more than $400 million in assets. Indeed, New York Life's own defined contribution plans ceased to offer the MainStay S&P 500 index fund to participants in 2016.

39. The Harbor and legacy New York Life funds' entrenched status within the Plans is due to the absence of an appropriate process for monitoring the Plans' lineup. Instead, Defendants are beholden to a history of disloyalty, favoring the interests of former corporate affiliate Harbor and former party-in-interest New York Life to the detriment of the Plans' participants. Despite divesting Harbor Capital Advisors over twenty years ago, and John Hancock acquiring New York Life's Retirement Plan Services business in 2014, Defendants' ongoing process for monitoring the Plans' funds grants the former affiliate and recordkeeper undue preference and leeway for continued retention in the Plans' lineup.

40. The fiduciaries of Harbor Capital Advisor's own 401(k) plan recognize the imprudence of maintaining an all-Harbor-funds lineup. In addition to offering Harbor funds to participants, the Harbor 401(k) plan offers five index funds managed by Fidelity and a suite of target date funds managed by Vanguard. That is to say, Harbor itself acknowledges that its range of offerings are inappropriate to serve as a defined contribution plan's only investment options. Apart from the MainStay S&P 500 index fund and the New York Life Anchor stable value fund, Defendants have done just that.

41. The absence of a process in managing the Plans in line with Defendants' fiduciary duties has had dire consequences for participants, in the form of the Harbor and legacy New York Life funds' excessive fees and prolonged underperformance in comparison to superior, readily available market alternatives managed in a similar investment style that are overwhelmingly favored by disinterested fiduciaries managing comparably sized plans.

B. Defendants' Failure to Monitor the Plans' Investments Caused Participants to Incur Excessive Fees

42. The Harbor funds in the Plans are actively managed and serve as the only actively managed investment available to participants. While a fiduciary may consider higher-cost, actively managed mutual funds as an alternative to lower-cost alternatives, "[a]ctive strategies . . . entail investigation and analysis expenses and tend to increase general transaction costs . . . . [T]hese added costs . . . must be justified by realistically evaluated return expectations." Restatement (Third) of Trusts § 90 cmt. h(2); *see also id.* § 90 cmt. b ("[C]ost-conscious management is fundamental to prudence in the investment function."). As discussed below, the Harbor funds did not earn their fees. *See infra* at § I.C.

43. Because the Plans are laden with high-cost Harbor funds, the Plans' expenses are significantly higher than other comparable retirement plans. Throughout the statutory period, annual investment expenses paid by participants ranged from 0.60% to 0.65% of the Plans' assets,[15] consistently higher than the average 401(k) plan.[16] For example, the average 401(k) plan with $250 million to $1 billion in assets had total plan costs between 0.39% and 0.44% in 2016, down to between 0.37% and 0.40% in 2019, the most recent year for which average total plan

[15] For purposes of determining total plan cost, the Plans' assets exclude Owens-Illinois company stock as individual securities do not carry investment expense ratios.

[16] Total plan cost, as determined by the BrightScope/ICI Defined Contribution Plan annual profiles, "includes asset-based investment management fees, asset-based administrative and advice fees, and other fees (including insurance charges) from the Form 5500 and audited financial statements of ERISA-covered DC plans." 2019 ICI Study at 47.

cost data is available.[17] Thus, throughout the statutory period the Plans' investment expenses were around 45% to 75% higher than the total expenses, inclusive of investment and administrative fees, incurred by the average similarly sized 401(k) plan.

44. The Plans' excessive fees are due to the high costs of the Harbor and legacy New York Life funds. In 2019, the most recent year for which average fee data is available, each of the Harbor funds charged fees that exceeded the average expense ratio for funds within the same asset class category among plans with $250 million to $1 billion, some by as much as 126%.[18] Moreover, even in comparison to other *actively* managed funds, each of the Harbor funds charged high fees relative to non-Harbor alternatives used by similarly sized plans. When looking solely at the industry's largest actively managed funds invested in similar styles to the Harbor funds, the excessive fees range as high as 100% above average:

[17] Total plan cost in 2016, as determined by BrightScope averaged 0.44% for plans with $250 million to $500 million in assets, and 0.39% for plans with $500 million to $1 billion in assets. Total plan cost for 2019, as determined by BrightScope, averaged 0.40% for plans with $250 million to $500 million in assets, and 0.37% for plans with $500 million to $1 billion in assets.

[18] Each Harbor fund is compared to the average expense ratio of mutual funds within the same asset class held by plans of similar size. For example, the Harbor Large Cap Value fund's expense ratio, a domestic equity mutual fund, is compared to the average expense ratio of domestic equity mutual funds held by plans with between $250 million and $1 billion in assets.

Harbor Fund (Ticker)	ICI/BrightScope Category / Morningstar Global Category	Fund Net Expense Ratio (2019)	Average 401(k) Fund Expense Ratio[19]	Percentage Fee Excess Over 401(k) Average	Average Actively Managed Expense Ratio (2019)[20]	Percentage Fee Excess Over Actively Managed Avg.
Harbor Bond (HBFRX)	Domestic Bond / U.S. Fixed Income	0.43%	0.34%	35%	0.28%	54%
Harbor High-Yield Bond (HNHYX)	Domestic Bond / U.S. Fixed Income	0.56%	0.34%	82%	0.28%	100%
Harbor Target-Date Funds	Target Date / Target Date	0.66% - 0.79%	0.35%	89% - 126%	0.53%	25% - 49%
Harbor Large Cap Value (HNLVX)	Domestic Equity / U.S. Equity Large Cap	0.61%	0.39%	56%	0.42%	45%
Harbor Capital Appreciation (HNACX)	Domestic Equity / U.S. Equity Large Cap	0.58%	0.39%	49%	0.42%	38%
Harbor Mid Cap Growth (HNMGX)	Domestic Equity / U.S. Equity Mid Cap	0.81%	0.39%	108%	0.59%	37%
Harbor Mid Cap Value (HNMVX)	Domestic Equity / U.S. Equity Mid Cap	0.77%	0.39%	97%	0.59%	31%
Harbor Small Cap Growth (HNSGX)	Domestic Equity / U.S. Equity Small Cap	0.80%	0.39%	105%	0.70%	14%
Harbor Small Cap Value (HNVRX)	Domestic Equity / U.S. Equity Small Cap	0.80%	0.39%	105%	0.70%	14%
Harbor Int'l Growth (HNGFX)	International Equity / Global Equity Large Cap	0.77%	0.51%	41%	0.63%	22%
Harbor Int'l (HNINX)	International Equity / Global Equity Large Cap	0.67%	0.51%	31%	0.63%	6%

45. Defendants' failure to monitor the funds' investment expenses has led to their continued presence in the Plans, in breach of their fiduciary duties and to the detriment of participants.

46. The Plans' excessive fees are not limited to their actively managed investments

[19] For plans with $250 million to $1 billion in assets as of 2019, the most recent data available. Average 401(k) fund expense ratios represent the averages of expense ratios for funds in each respective asset class for plans with $250 million to $500 million in assets and plans with $500 million to $1 billion in assets. Average numbers are shown for the asset classes of domestic equity, international equity, domestic bond, and non-target date balanced funds. 2019 ICI Study at 54.

[20] The "Actively Managed Average Expense Ratio" consists of the average annual report expense ratio of the least expensive share class of the twenty largest actively managed mutual funds by assets under management managed within the same asset class and in a similar investment style. Averages are calculated separately for U.S. equity large cap, U.S. equity mid cap, U.S. equity small cap, global equity large cap, U.S. fixed income, and target date funds.

but extend to their singular index fund as well. Because index funds are passive investment options which attempt to mimic the performance of a market index rather than make subjective determinations about the merits of particular stocks or bonds, the most important factor for a prudent investor to consider in selecting an index fund is fees.[21] The MainStay S&P 500 index fund, a New York Life product and the Plans' only passively managed investment, charged a 0.29% expense ratio in 2019. Given both the size of the Plans and the amount invested within this option, a plethora of significantly lower-cost options were available. Each index fund below possesses an investment objective of producing returns that mimic or correspond to the performance of common stocks as represented by the S&P 500 index and incurs similar risks in employing this objective:[22]

Index Fund (Ticker)	Fund Net Expense Ratio (2019)	MainStay S&P 500 Index Percentage Fee Excess
MainStay S&P 500 Index I (MSPIX)	0.29%	n/a
Fidelity 500 Index (FXAIX)	0.015%	1,833%
Schwab S&P 500 Index (SWPPX)	0.02%	1,350%
Vanguard Institutional Index I (VINIX)	0.035%	729%

47. A prudent fiduciary acting in the best of interest of participants would not have continued to offer the MainStay S&P 500 index fund with fees over *nineteen times* higher than

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[21] *See* Gail Marks-Jarvis, *Step-by-Step Guidance on Shopping for Index Funds*, Chicago Tribune (Aug. 16, 2015), *available at* http://www.chicagotribune.com/business/yourmoney/ct-marksjarvis-0816-biz-20150814-column.html.

[22] "The [MainStay S&P 500 Index Fund] seeks investment returns that correspond to the total return performance ... of common stocks in the aggregate, as represented by the S&P 500 index." June 10, 2022 MainStay S&P 500 Index Fund Summary Prospectus, *available at* https://www.sec.gov/Archives/edgar/data/1469192/000174177322002170/c497k.htm; "The [Fidelity 500 Index Fund] seeks to provide investment results that correspond to the total return performance of common stocks publicly traded in the United States" through investment "in common stocks included in the S&P 500 Index[.]" April 29, 2022 Fidelity 500 Index Summary Prospectus, *available at* https://www.sec.gov/Archives/edgar/data/819118/000137949122001856/filing797440298.htm; "The [Schwab S&P 500 Index Fund]'s goal is to track the total return of the S&P 500 Index." May 19, 2022 Schwab S&P 500 Index Fund Summary Prospectus, *available at* https://www.sec.gov/Archives/edgar/data/904333/000110465922062546/tm2215662-13_497k.htm; "The [Vanguard Institutional Index Fund] seeks to track the performance of a benchmark index [the S&P 500] that measures the investment return of large-capitalization stocks." April 29, 2022 Vanguard Institutional Index Summary Prospectus, *available at* https://www.sec.gov/Archives/edgar/data/862084/000168386322003937/f11987d1.htm.

other readily available index funds tracking the performance of the S&P 500 index. Defendants' continued retention of this fund demonstrates their failure to properly monitor the Plans' investment expenses, and that Defendants' fiduciary processes "have been tainted by failure of effort, competence, or loyalty," supporting "a claim for breach of fiduciary duty." *Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 596 (8th Cir. 2009); *see also Moreno v. Deutsche Bank Americas Holding Corp.*, 2016 WL 5957307, at *6 (S.D.N.Y. Oct. 13, 2016) (offering "index funds . . . [that] charged fees that were excessive compared with similar investment products" supported breach of fiduciary duty claim).

C. Defendants Failed to Remove Underperforming Funds

48. Defendants' failed monitoring efforts are also displayed through their imprudent retention of underperforming funds.

49. In large part because of the high fees charged by the Harbor funds, they tend to underperform. This underperformance has cost the Plans tens of millions of dollars in lost benefits that participants would otherwise have in their accounts had the Plans' investments been managed in a prudent and impartial manner. A prudent fiduciary offering high-fee options like the Harbor funds would continuously monitor whether the extra fees were justified by a reasonable expectation of increased returns. *See Tibble*, 575 U.S. at 529 (fiduciaries possess "a continuing duty to monitor [plan] investments and remove imprudent ones" that exists "separate and apart from the [fiduciary's] duty to exercise prudence in selecting investments"). Yet Defendants failed to do so, instead maintaining an investment lineup whose actively managed funds were entirely managed by former-affiliate Harbor despite prolonged underperformance in comparison to benchmarks and superior marketplace alternatives managed in a similar investment style.

HARBOR ASSET CLASS FUNDS

50. Defendants' decision to use Harbor as the Plans' exclusive manager for all actively managed funds was not the result of an objective fund-by-fund evaluation to determine the most suitable option within each asset class. To the contrary, while a handful of Harbor funds had demonstrated positive performance relative to their prospectus benchmarks[23] as of the end of 2016 and the beginning of the class period, several exhibited chronic long-term underperformance since inception.

Fund (Ticker)	Annualized Performance vs. Prospectus Benchmark Since Inception (as of 12/31/16)
Harbor High-Yield Bond Ret. (HNHYX)	-1.88%
Harbor Large Cap Value Ret. (HNLVX)	-0.86%
Harbor Mid Cap Growth Ret. (HNMGX)	-1.40%
Harbor Mid Cap Value Ret. (HNMVX)	-1.86%

As confirmed by their overall rejection among comparably sized plans, a prudent and loyal fiduciary would not have included or retained these funds in their investment lineup. Defendants, however, made a portfolio-wide decision to utilize only Harbor funds for the Plans' actively managed investments.

51. The underperformance of the Harbor asset class funds extends throughout the statutory period as well. To illustrate, an example of an imprudently retained investment fund is Harbor International, the Plans' sole core international investment. Throughout the statutory period, this fund has consistently and materially trailed its prospectus benchmark as well as less expensive funds that share the same prospectus benchmark and have nearly identical investment

[23] Prospectus benchmarks are chosen by portfolio managers to gauge the performance of a portfolio against its investing universe. Portfolio managers generally choose a benchmark that is aligned with the investing universe of their mutual fund. *See Using Benchmarks in Investing*, INVESTOPEDIA, https://www.investopedia.com/articles/investing/032516/how-use-benchmark-evaluate-portfolio.asp (last visited Oct. 31, 2022).

strategies, objectives, and risks as Harbor International. That is, like the Harbor fund, each fund is benchmarked against the MSCI EAFE index, is within the Foreign Large Blend Morningstar category, and predominantly invests in a mix of growth and value large cap equities from countries within the Morgan Stanley Capital International Europe, Australasia and Far East Index. Despite this consistent underperformance, the fund has remained in the Plans. Illustrated below are five-year rolling returns, spanning ten years of performance, for the Harbor International fund, its prospectus benchmark, and superior market alternatives:

Fund (Ticker)	**Net Expense Ratio (Current)**	**2016 (5-Year Return)**	**2017 (5-Year Return)**	**2018 (5-Year Return)**	**2019 (5-Year Return)**	**2020 (5-Year Return)**	**2021 (5-Year Return)**
Harbor Int'l Ret. (HNINX)[24]	0.69%	4.89%	5.25%	-1.92%	3.61%	6.66%	8.57%
MSCI EAFE NR USD	*n/a*	*6.53%*	*7.90%*	*0.53%*	*5.67%*	*7.45%*	*9.55%*
JPMorgan Int'l Equity R6 (JNEMX)	0.50%	5.59%	7.01%	-0.01%	6.32%	9.53%	11.63%
MFS Inst. Int'l Equity (MIEIX)	0.67%	6.90%	7.84%	1.91%	8.06%	10.35%	13.45%
T. Rowe Price Overseas Stock I (TROIX)	0.66%	6.74%	8.25%	0.79%	6.02%	8.47%	10.38%

52. Moreover, this underperformance versus the fund's prospectus benchmark and comparable market alternatives is the product of Harbor International fund managers' lack of skill and not the funds' respective risk profiles. This is demonstrated through an analysis of the funds' "alpha," which is a statistical metric used to by investment professionals to measure a manager's skill on a risk-adjusted basis. Positive alpha demonstrates skill, an alpha of zero demonstrates zero skill, and negative alpha shows the manager made decisions that were worse than simply tracking the benchmark.[25] In other words, lower alpha corresponds to a lower degree of fund manager skill. As shown in the following chart, Harbor International's material

[24] The Retirement share class for Harbor International has an inception date of 3/1/2016. For the years prior to this date, return data for Harbor International Institutional (HAINX) is incorporated.

[25] *See Alpha*, INVESTOPEDIA, https://www.investopedia.com/terms/a/alpha.asp (last visited Oct. 31, 2022).

underperformance relative to its comparators is not the product of the fund's risk profile, but rather the lack of skill exhibited by the fund's managers:

Fund (Ticker)	2016 (5-Year Alpha)	2017 (5-Year Alpha)	2018 (5-Year Alpha)	2019 (5-Year Alpha)	2020 (5-Year Alpha)	2021 (5-Year Alpha)
Harbor Int'l Ret. (HNINX)	-1.29	-2.21	-2.38	-1.95	-0.68	-1.05
JPMorgan Int'l Equity R6 (JNEMX)	-0.59	-0.51	-0.47	0.48	1.95	1.75
MFS Inst. Int'l Equity (MIEIX)	0.89	0.65	1.35	2.54	3.10	3.99
T. Rowe Price Overseas Stock I (TROIX)	0.80	1.13	0.23	0.46	0.85	0.42

53. A prudent fiduciary would have removed the Harbor International fund from the Plans given its significant underperformance leading up to and throughout the statutory period. The fact that Defendants retained this fund despite its negative alpha and consistent underperformance versus its prospectus benchmark and superior alternatives in the marketplace supports an inference that Defendants' process for monitoring the Plans' investments was in breach of their fiduciary duties.

54. Another illustrative example of Defendants' flawed monitoring process is the ongoing retention of the Harbor Mid Cap Value fund. Just as with Harbor International, Harbor Mid Cap Value has, with little exception, trailed its prospectus benchmark and less expensive funds that share the same prospectus benchmark and have nearly identical investment strategies, objectives, and risks over all relevant five-year periods, spanning ten years of performance. That is, like the Harbor fund, each comparator fund is benchmarked against the Russell Mid Cap Value index, is within the U.S. mid-cap value Morningstar Category, invests in securities that result in the fund's market capitalization falling within the range of mid-cap securities, and seeks to invest in companies whose stock price may not reflect its value or are otherwise undervalued relative to the earnings potential of the fund's respective securities. Despite this consistent underperformance, the Harbor fund has remained in the Plans:

Fund (Ticker)	Net Expense Ratio (Current)	2016 (5-Year Return)	2017 (5-Year Return)	2018 (5-Year Return)	2019 (5-Year Return)	2020 (5-Year Return)	2021 (5-Year Return)
Harbor Mid Cap Value Ret. (HNMVX)[26]	0.78%	17.09%	15.65%	3.42%	4.99%	5.41%	7.30%
Russell Mid Cap Value TR USD	*n/a*	*15.70%*	*14.68%*	*5.44%*	*7.62%*	*9.73%*	*11.22%*
American Century Mid Cap Value R6 (AMDVX)	0.62%	16.59%	15.68%	6.81%	9.00%	9.70%	9.76%
JHancock Disciplined Value Mid Cap R6 (JVMRX)	0.75%	17.21%	16.65%	5.72%	8.69%	9.50%	11.63%
Victory Sycamore Established Value R6 (VEVRX)	0.54%	15.57%	16.42%	7.50%	10.50%	12.02%	13.96%

55. As reflected in the above chart, the Harbor Mid Cap Value fund's returns were greater than the returns of its prospectus benchmark on a rolling five-year basis as of 2016 and 2017. However, this was not due to a consistent multi-year pattern of sustained outperformance, but a singular year of favorable performance in 2013, when the fund return was 10.61% greater than the benchmark return. The following chart reflects the return of the Mid Cap Value fund relative to its benchmark on a calendar-year basis between 2010 and 2020:

2010	2011	2012	2013	2014	2015	2016	2017	2018	2019	2020
-4.15%	-2.38%	0.65%	10.61%	-0.60%	-0.84%	-1.00%	-1.31%	-5.32%	-4.03%	-8.68%

Outside of one significant outlier year, the fund's performance has consistently and often dramatically lagged its benchmark. This would tend to suggest that the outsized 2013 performance was the product of luck, rather than skilled fund management. *See* Eugene F. Fama & Kenneth R. French, *Luck versus Skill in the Cross-Section of Mutual Fund Returns,* 65 J. OF FIN. 1915, 1916 (2010) ("The challenge is to distinguish skill from luck. Given the multitude of funds, many have extreme returns by chance. A common approach to this problem is to test for persistence in fund returns, that is, whether past winners continue to produce high returns and

[26] The Retirement share class for Harbor Mid Cap Value has an inception date of 3/1/2016. For the years prior to this date, return data for Harbor Mid Cap Value Institutional (HAMVX) is incorporated.

losers continue to underperform.”).

56. This lack of skill in the management of the Harbor Mid Cap Value fund is further supported by an analysis of the fund’s alpha. The Harbor Mid Cap Value fund’s inferior alpha persists even in the brief period of competitive performance to its prospectus benchmark and marketplace alternatives, illustrating that the fund incurred excessive risk in an attempt to generate returns commensurate with its peers:

Fund (Ticker)	2016 (5-Year Alpha)	2017 (5-Year Alpha)	2018 (5-Year Alpha)	2019 (5-Year Alpha)	2020 (5-Year Alpha)	2021 (5-Year Alpha)
Harbor Mid Cap Value Ret. (HNMVX)	0.09	-0.05	-2.23	-3.28	-4.99	-4.84
American Century Mid Cap Value R6 (AMDVX)	2.51	2.53	1.50	1.49	0.74	-0.43
JHancock Disciplined Value Mid Cap R6 (JVMRX)	0.81	1.46	0.14	0.85	-0.14	0.50
Victory Sycamore Established Value R6 (VEVRX)	0.70	2.06	2.09	2.91	2.52	2.76

HARBOR TARGET DATE FUNDS

57. Yet another example of an imprudent investment is the suite of Harbor target date funds, which for many years served as the Plans’ default investment option. The Harbor target date funds were created in 2009 and were Harbor’s first foray into the management of a suite of target date funds. Despite Harbor’s lack of experience managing funds in this strategy and the lack of an established track record of successful performance for the funds themselves, Defendants added the Harbor target date funds to the Plans immediately after their inception. This was contrary to commonly observed principles of prudent investment, which typically require several years of demonstrated success before investing in a new strategy. Here, however, Defendants allowed the Plans’ assets to serve as “seed money” to further the business interests of Harbor, to the detriment of participants. *See Miller v. Astellas US LLC*, 2021 WL 1387948, at *6 (N.D. Ill. Apr. 13, 2021) (plausible breach where plan assets were used as “seed money” for new

investment products).[27]

58. In addition to their imprudent selection in 2009, the Harbor target date funds were imprudently retained during the statutory period. The Harbor target date funds utilize a proprietary fund-of-funds structure, where each vintage of the suite invests in a portfolio of underlying Harbor asset class funds, compounding their imprudence. Leading up to and throughout the statutory period, the Harbor target date funds have trailed appropriate benchmark indices and other less expensive target date funds available within the marketplace employing similar investment strategies. That is, each target date series employs a "through retirement" glidepath, invests solely in other actively managed mutual funds, are closed architecture, meaning they invest only in other funds managed by the target date series sponsor, and allocate comparable amounts to risky assets, such as equities, along their respective glidepaths. A performance comparison of the Harbor Target Retirement 2040 fund illustrates the suite's shortcomings:

Fund (Ticker)	Net Expense Ratio (Current)	2016 (5-Year Return)	2017 (5-Year Return)	2018 (5-Year Return)	2019 (5-Year Return)	2020 (5-Year Return)	2021 (5-Year Return)
Harbor Target Retirement 2040 Inst. (HARYX)	0.72%	8.66%	9.10%	3.48%	7.48%	11.28%	11.81%
Composite 2040 Index	*n/a*	*8.70%*	*9.03%*	*3.61%*	*7.00%*	*10.30%*	*n/a*[28]

[27] The funds' prospectuses indicate that although Harbor eventually intended to offer its target date funds to the general marketplace, they were only offered to the Plans and Harbor's own plan. *See* March 1, 2020 Harbor Funds Prospectus at 57, *available at* https://www.sec.gov/Archives/edgar/data/793769/000119312520048528/d850565d485bpos.htm

[28] Composite index returns are shown in the Harbor target date funds' prospectuses. No composite index returns as of 2021 are available, as the funds liquidated prior to the issuance of the 2022 prospectus. The funds' composite index is periodically updated to reflect the asset allocation of each target date fund, and thus mitigates the ability to assess the implications of Harbor's asset allocation decisions on the funds' performance. This is particularly important, as asset allocation explains approximately 90% of the variability of a fund's returns over time. *See* Roger G. Ibbotson & Paul D. Kaplan, *Does Asset Allocation Policy Explain 40, 90, or 100 Percent of Performance?*, 56 FIN. ANALYSTS J. 23 (2019).

S&P Target Date Through 2040 TR USD[29]	*n/a*	*10.66%*	*11.52%*	*5.12%*	*8.48%*	*11.36%*	*12.81%*
American Funds 2040 Target Date Retire R6 (RFGTX)	0.36%	11.46%	12.45%	6.05%	9.30%	12.99%	14.75%
JHancock Multimanager 2040 Lifetime R6 (JLIIX)	0.59%	10.25%	11.30%	4.68%	8.20%	12.49%	13.81%
TIAA-CREF Lifecycle 2040 I (TCOIX)	0.44%	10.88%	11.88%	4.79%	8.51%	11.84%	13.17%

59. The prolonged lackluster performance of the Harbor target date funds led to their liquidation and dissolution by Harbor effective January 2022. Nevertheless, Defendants retained them in the Plans up until their ultimate liquidation. This continued retention until the Harbor target date funds' demise further demonstrates Defendants' imprudence. *See Baker v. John Hancock Life Ins. Co. (USA)*, 2020 WL8575183, at *1 (D. Mass. July 23, 2020) (retaining underperforming proprietary funds until they closed demonstrates breach). Throughout their entire existence, the Harbor target date funds were held by *no* other similarly sized plan in the country.[30]

60. At no time throughout the statutory period have Defendants removed a single Harbor fund from the Plans, apart from target date funds' liquidation. Given their high costs, poor performance, and lack of utilization among fiduciaries of other similarly sized plans, it was imprudent to retain these funds in the Plans. Defendants continued retention of the Harbor funds is indicative of a monitoring process steeped in failure. This ongoing retention is indicative of

[29] The S&P Target Date Through Index is a meaningful benchmark for the Harbor target date funds. This index is constructed by looking at target date suites with $100 million or more in assets that employ a "through" glide path, like the Harbor target date funds, and uses the resulting peer group average asset allocation to determine the weighted return of the typical target date fund within each vintage. *See S&P Target Date Index Series Methodology*, June 2022, https://www.spglobal.com/spdji/en/documents/methodologies/methodology-sp-target-date.pdf.

[30] As of year-end 2020, the Harbor Capital Advisors, Inc. 401(k) Plan held just $68 million in assets which is approximately 10% of the amount of assets held by the Plans.

Defendants' breaches of their fiduciary duties.

D. Defendants are Beholden to Former Affiliate Harbor Capital Advisors

61. Defendants' management and monitoring of the Plans displays their continued devotion to former affiliate Harbor Capital Advisors. As discussed, Harbor was formed to manage the pension assets of Owens-Illinois in 1983 before expanding its investment management services to the general public in 1987. Since then, Harbor has continued to manage the assets of the Plans as well as O-I Glass' various pension plans totaling over $1.3 billion. O-I Glass is not the only former affiliate for which Harbor manages pension assets, however.

62. In stark contrast to the management of the Plans, another former affiliate of Owens-Illinois and Harbor, Libbey, Inc. ("Libbey"), appears to have employed an appropriate process in the managing of its defined contribution plan despite its former ties to Defendants and Harbor.

63. Libbey, also a glass production company headquartered in Toledo, was acquired by Owens-Illinois in 1935. Libbey remained an Owens-Illinois affiliate until 1993 when it was spun off. Notably, this spin-off occurred after the creation of Harbor but prior to its eventual purchase by Robeco Groep N.V. As with Owens-Illinois, Libbey's defined benefit pension assets are managed by Harbor. In fact, the only two entities for which Harbor manages defined benefit assets, represented by the participating plans in the Harbor Capital Group Trust for Defined Benefit Plans, are Owens-Illinois and Libbey. Thus, prior to Libbey's spin-off, its pension assets were managed by Harbor as an Owens-Illinois affiliate, but Libbey did not share in any of the proceeds from the Robeco Groep N.V. sale.

64. This distinction is apparent through a review of O-I Glass' and Libbey's respective defined contribution plans. As discussed, the Plans are comprised solely of Harbor funds as well as two investments associated with legacy recordkeeper New York Life.

Meaningfully, and despite Harbor's management of Libbey's defined benefit plans, Libbey's defined contribution plan offers a singular Harbor fund to participants, has removed three additional Harbor funds since 2014, and otherwise features investments from leading firms including American Funds, BlackRock, Dodge & Cox, JPMorgan, and Vanguard.

65. Despite Owens-Illinois' and Libbey's former affiliation with Harbor, Libbey appears to have effectively reviewed its defined contribution plan investment lineup and determined that Harbor funds are not appropriate to serve as the sole actively managed investments within its plan. Conversely, Defendants' have failed to prudently review the Plans' investment lineup and continue to operate with blind loyalty to Harbor. There is no apparent participant-centered reason for the Plans to have been managed in this manner, indicating that the Plans were managed in breach of Defendants' fiduciary duties.

II. PLAINTIFF LACKED KNOWLEDGE OF DEFENDANTS' CONDUCT AND PRUDENT ALTERNATIVES

66. Plaintiff did not have knowledge of all material facts (including, among other things, the actions of similarly situated fiduciaries, including those of Libbey, Inc. and Harbor Capital Advisors, the availability of less expensive investment alternatives, the costs of the Plans' investments compared to those in similarly sized plans, and investment performance versus other available alternatives in 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 the suit was filed. Further, Plaintiff does not have actual knowledge of the details of Defendants' decision-making processes with respect to the Plans (including Defendants' specific processes for monitoring and evaluating the Plans' investments and any ongoing relationships with Harbor Capital Advisors) because this information is solely within the possession of Defendants prior to discovery. For purposes of this Complaint, Plaintiff has drawn

reasonable inferences regarding these processes based upon (among other things) the facts set forth above.

CLASS ACTION ALLEGATIONS

67. 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 obtain for the Plans the remedies provided by 29 U.S.C. § 1109(a). Plaintiff seeks certification of this action as a class action pursuant to this statutory provision and Fed. R. Civ. P. 23.

68. Plaintiff asserts his claims in Counts I-II on behalf of a class of participants and beneficiaries of the Plans (the "Class") defined as follows:[31]

> All participants and beneficiaries of the Seventh Amended and Restated Owens-Illinois, Inc. Long-Term Savings Plan and Eighth Amended and Restated Owens-Illinois, Inc. Stock Purchase and Savings Program, the assets of which are jointly held in the Owens-Illinois Master Savings Program Trust, at any time on or after July 14, 2016, excluding any persons with responsibility for the Plans' investment or administrative functions.

69. Numerosity: The Class is so numerous that joinder of all Class members is impracticable. The Plans had approximately 5,400 to 6,200 participants at all relevant times during the applicable period.

70. Typicality: Plaintiff's claims are typical of the Class members' claims. Like other Class members, Plaintiff's assets were invested in the Owens-Illinois Master Savings Program Trust and suffered financial harm as a result of Defendants' mismanagement of the Plans. Defendants treated Plaintiff consistently with other Class members with regard to the Plans. Defendants' investment decisions were in breach of their fiduciary duties and affected all of the Plans' participants similarly.

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[31] Plaintiff reserves the right to propose other or additional classes or subclasses in their motion for class certification or subsequent pleadings in this action.

71. Adequacy: Plaintiff will fairly and adequately protect the interests of the Class. Plaintiff's interests are aligned with the Class that he seeks to represent, and Plaintiff has retained counsel experienced in complex class action litigation, including ERISA litigation. Plaintiff does not have any conflicts of interest with any Class members that would impair or impede their ability to represent such Class members.

72. Commonality: Common questions of law and fact exist as to all Class members and predominate over any questions solely affecting individual Class members, including but not limited to:

a. Whether Defendants are fiduciaries with respect to the Plans;

b. Whether Defendants breached their fiduciary duties by engaging in the conduct described herein;

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

d. The proper measure of monetary relief.

73. Class certification is appropriate under Fed. R. Civ. P. 23(b)(1)(A) because prosecuting separate actions against Defendants would create a risk of inconsistent or varying adjudications with respect to individual Class members that would establish incompatible standards of conduct for Defendants.

74. Class certification is also appropriate under Fed R. Civ. P. 23(b)(1)(B) because adjudications with respect to individual Class members, as a practical matter, would be dispositive of the interests of the other persons not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests. Any award of prospective equitable relief by the Court would be dispositive of non-party participants' interests. The accounting and restoration of the property of the Plans that would be required under 29

U.S.C. § 1109 and 1132 would be similarly dispositive of the interests of other participants.

75. Class certification is also appropriate under Fed. R. Civ. P. 23(b)(3) because questions of law and fact common to the Class predominate over any questions affecting individual class members, and because a class action is superior to other available methods for the fair and efficient adjudication of this litigation. Defendants' conduct as described in this Complaint applied uniformly to all members of the Class. Class members do not have an interest in pursuing separate actions against Defendants, as the amount of each Class member's individual claims is relatively small compared to the expense and burden of individual prosecution, and Plaintiff is unaware of any similar claims brought against Defendants by any Class members on an individual basis. Class certification also will obviate the need for unduly duplicative litigation that might result in inconsistent judgments concerning Defendants' practices. Moreover, management of this action as a class action will not present any likely difficulties. In the interests of justice and judicial efficiency, it would be desirable to concentrate the litigation of all Class members' claims in a single forum.

COUNT I
Breach of Fiduciary Duties
29 U.S.C. § 1104(a)(1)(A)-(B)

76. As alleged above, Defendants are fiduciaries with respect to the Plans and are subject to ERISA's fiduciary duties.

77. 29 U.S.C. § 1104 imposes fiduciary duties of prudence and loyalty upon Defendants in connection with the administration of the Plans and monitoring of the Plans' investments.

78. The scope of the fiduciary duties and responsibilities of Defendants includes managing the assets of the Plans for the sole and exclusive benefit of their participants and

beneficiaries, and acting with appropriate care, skill, diligence, and prudence. Further, Defendants are directly responsible for ensuring that the Plans' fees are reasonable, selecting and retaining prudent investment options, evaluating and monitoring the Plans' investments on an ongoing basis and eliminating imprudent ones, and taking all necessary steps to ensure that the Plans' assets are invested prudently. This includes "a continuing duty to monitor investments and remove imprudent ones[.]" *Tibble*, 135 S. Ct. at 1829.

79. As described throughout the Complaint, Defendants failed to prudently and objectively monitor the Plans' proprietary investments to ensure that each of the Plans' proprietary investments were and remained appropriated for the Plans. Defendants uniquely maintained and failed to monitor an investment lineup consisting solely of actively managed funds managed by Harbor Capital Advisors and an index fund and stable value fund managed by legacy recordkeeper New York Life despite the availability of superior alternative investments from other firms that would have cost the Plans' participants significantly less.

80. Based on the conduct described above and throughout this Complaint, it is evident that Defendants did not make investment decisions for the Plans based solely on the merits of each investment and what was in the interest of the Plans' participants. Instead, Defendants' conduct and decisions were influenced by their unwarranted preference for Harbor and Harbor funds. Through their actions and omissions, Defendants failed to discharge their duties with respect to the Plans solely in the interest of their participants and beneficiaries and defraying reasonable expenses of administering the Plans, in violation of their fiduciary duties under 29 U.S.C. § 1104(a)(1)(A).

81. Further, each of the actions and omissions described in paragraph 79 above and elsewhere in this Complaint demonstrate that Defendants failed to discharge their duties with

respect to the Plans with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would have used in the conduct of an enterprise of like character and with like aims, in violation of 29 U.S.C § 1104(a)(1)(B).

82. As a consequence of Defendants' fiduciary breaches, the Plans and their participants suffered millions of dollars in losses. Defendants are liable, under § 1109 and 1132, to make good to the Plans all such losses resulting from the aforementioned fiduciary breaches.

83. Each Defendant 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 time effort under the circumstances to remedy the breaches. Accordingly, each Defendant is also liable for the losses caused by the breaches of its co-fiduciaries under 29 U.S.C. § 1105(a).

COUNT II
Failure to Monitor Fiduciaries

84. The Committee and its members (as well as O-I Glass, Inc.) are fiduciaries of the Plans with responsibilities relating to the monitoring of the Plans' investment options.

85. O-I Glass, Inc. is responsible for appointing and removing members of the Committee. O-I Glass, Inc. therefore has a fiduciary responsibility to monitor the performance of the Committee and its members.

86. A monitoring fiduciary must ensure that its appointed fiduciaries are performing their fiduciary obligations, including those with respect to the investment and monitoring of the Plans' assets, and must take prompt and effective action to protect the Plans and participants when they fail to perform their fiduciary obligations in accordance with ERISA.

87. O-I Glass, Inc. breached its 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 Plans suffered significant losses as a result of the Committee's imprudent actions and omissions;

b. Failing to monitor the processes by which the Plans' investments were monitored and retained, which would have alerted a prudent fiduciary to the breaches of fiduciary duties outlined above; and

c. Failing to remove Committee members whose performance was inadequate in that they retained imprudent, excessively costly, and poorly performing investments within the Plans, all to the detriment of the Plans and participants' retirement savings.

88. As a consequence of the foregoing breaches of the duty to monitor, the Plans suffered millions of dollars per year in losses due to excessive fees and investment performance.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff Peter Schaf, individually, as a representative of the Class described herein, and on behalf of the Plans, pray for relief as follows:

A. A determination that this action may proceed as a class action under Rule 23(b)(1), or in the alternative, Rule 23(b)(3) of the Federal Rules of Civil Procedure;

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

C. A declaration that Defendants breached their fiduciary duties under ERISA;

D. An order compelling Defendants to personally make good to the Plans all losses that the Plans incurred as a result of the breaches of fiduciary duties described herein, and to restore the Plans to the position they would have been in but for this unlawful conduct;

E. An order enjoining Defendants from any further violations of ERISA;

F. Other equitable relief to redress Defendants' illegal practices and to enforce the provisions of ERISA as may be appropriate;

G. An award of pre-judgment interest;

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

I. An award of such other and further relief as the Court deems equitable and just.

Dated: November 30, 2022

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