

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
Southern Division**

MARTONE CONSTRUCTION MANAGEMENT,)
INC., as Plan Administrator for the Martone)
Construction Management, Inc. Defined Benefit)
Pension Plan and the Martone Construction)
Management, Inc. 401(k) Profit Sharing Plan,)

Plaintiff,)

v.)

THOMAS F. BARRETT, INC. d/b/a NATIONAL)
EMPLOYERS RETIREMENT TRUST;)

Serve:)

Thomas F. Barrett)
Room 303)
6400 Goldsboro Road)
Bethesda, MD 00000)
Montgomery County, MD)

or)

Thomas F. Barrett)
4701 Sangamore Rd. Ste. S205)
Bethesda, MD 20816-2508)
Montgomery County, MD)

NATIONAL EMPLOYERS RETIREMENT)
TRUST;)

Serve:)

Thomas F. Barrett)
Room 303)
6400 Goldsboro Road)
Bethesda, MD 00000)
Montgomery County, MD)

or)

Thomas F. Barrett)
4701 Sangamore Rd. Ste. S205)
Bethesda, MD 20816-2508)
Montgomery County, MD)

Case No.:

SANDY SPRING BANK;)
Serve:)
Daniel J. Schrider)
17801 Georgia Ave.)
Olney, MD 20832)
Montgomery County, MD)
and)
ACORN FINANCIAL ADVISORY SERVICES,)
Serve:)
James Gambaccini)
1875 Campus Commons Drive)
Suite 100)
Reston, VA 20191)
Defendants.)

COMPLAINT

Plaintiff Martone Construction Management, Inc. hereby submits this Complaint against Defendants Thomas F. Barrett, Inc., National Employees Retirement Trust, Sandy Spring Bank, and Acorn Financial Advisory Services (collectively, “Defendants”). In support of its Complaint, Plaintiff states as follows:

PARTIES

1. Martone Construction Management, Inc. (“Martone”) or (“Plaintiff”) is a District of Columbia corporation with its principal place of business at 5165 MacArthur Blvd. NW, Washington, DC 20016.

2. Martone sponsors two benefit plans for its employees: The Martone Construction Management, Inc. Defined Benefit Pension Plan (the “Defined Benefit Plan”), and the Martone Construction Management, Inc. 401(k) Profit Sharing Plan (the “401(k) Plan”) (collectively, the “Plans”). These Plans previously were named the Martone Construction Corp. Pension Plan and the Martone Construction Corp. 401(k) Profit Sharing Plan, respectively.

3. The Plans are employee pension benefit plans under the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 et seq (“ERISA”), governed by ERISA pursuant to 29 U.S.C. §§ 1002(2)–(3), 1003(a).

4. Under the Plans, Martone is the named Plan Sponsor and the named Plan Administrator and fiduciary.

5. The Defined Benefit Plan and the 401(k) Plan each file a separate Form 5500 with the Department of Labor.

6. Thomas F. Barrett, Inc., d/b/a National Employers Retirement Trust (“NERT”), is a Maryland corporation. Thomas F. Barrett, Inc. and NERT have their principal place of business at 4701 Sangamore Road, Suite 205, in Bethesda, Maryland. Thomas F. Barrett, Inc. and NERT are sometimes referred to as “NERT Administrator.”

7. Sandy Spring Bank is a Maryland corporation with its principal place of business at 17801 Georgia, Ave. in Olney, Maryland. Sandy Spring Bank is the Directed Trustee for NERT and is sometimes referred to as “NERT Trustee.”

8. Acorn Financial Advisory Services is a Virginia corporation with its principal place of business at 1875 Campus Commons Drive, in Reston, Virginia. Acorn Financial Advisory Services is purportedly an Investment Advisor to NERT and is sometimes referred to as “NERT Advisor.” The NERT Administrator, NERT Advisor, and NERT Trustee are collectively referred to herein as “NERT Defendants.”

9. Martone retained NERT Administrator to provide certain administrative services for the Plan.

10. Martone brings this action based upon NERT Defendants' breaches of their obligations under ERISA and other law and agreements, which have caused loss and injury to the Plan.

JURISDICTION AND VENUE

11. This Court has federal subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1331 and 29 U.S.C. § 1132(e)(1), as this action arises under ERISA. The Court has supplemental jurisdiction under any state law claims under 28 U.S.C. § 1367.

12. In addition and in the alternative, the Court has jurisdiction over Plaintiff's claims pursuant to 28 U.S.C. § 1132(a) and (e), because the amount in controversy exceeds \$75,000 and this action is among citizens of different states, as Plaintiff is a citizen of Washington D.C. and Defendants are citizens of Maryland and Virginia.

13. This Court has personal jurisdiction over Defendants. ERISA allows for nationwide service of process pursuant to 29 U.S.C. § 1132(e)(2), and Defendants are each a resident of the United States. Further, Defendants are each subject to personal jurisdiction and service in Maryland, as Defendants NERT Administrator and NERT Trustee are residents and citizens of Maryland with their principal place of business in Maryland, and Defendant NERT Advisor is subject to personal jurisdiction and service in Maryland due to its agreements and relationship with NERT Administrator in Maryland and services allegedly provided in connection with NERT Administrator which relationship was based in Maryland.

14. Venue is proper in this District and this Division under 29 U.S.C. § 1132(e)(2), because Defendants administered the Plans in this District and Division, the breaches took place in this District and Division, and most Defendants reside and may be found in this District and Division. Venue is also proper in this Court under 28 U.S.C. § 1391(b)(1) and (2), because most

Defendants reside in this District and Division and a substantial part of the events or omissions giving rise to the claims asserted herein occurred in this District and Division where NERT Administrator is located and a substantial part of the funds that are the subject of this action were situated in this District and Division.

FACTS

I. Background.

15. Martone is a commercial general contractor located in the District of Columbia. Lawrence Martone is the founder and President of Martone.

16. On or about January 1, 2006, Martone created the 401(k) Plan for its employees.

17. On or about January 1, 2009, Martone created the Defined Benefit Plan for its employees.

18. Thomas F. Barrett, Inc. and NERT provide certain employee retirement plan administration services, as NERT Administrator.

19. Martone engaged NERT Administrator to provide certain administrative services for the Plans. NERT Administrator provided certain recordkeeping and administrative functions for the Plans. NERT Administrator, together with NERT Trustee, was also responsible for making trades with the investment funds of the Plans at the direction of Martone or 401(k) Plan participants.

20. NERT Administrator sent Martone periodic invoices listing the services provided and the amounts owed by Martone for those services that were due from Martone, which only included Administration fees. Martone paid NERT Administrator for these services pursuant to the invoices.

II. NERT Defendants' Improper Investment Fees And Failure to Provide Services.

21. On February 21, 2020, Thomas F. Barrett ("Mr. Barrett") at NERT Administrator informed Mr. Martone that NERT Defendants had been charging investment fees to Martone since the time Martone engaged them, in the amount of 0.85% of the Plans' assets.

22. The investment fees had not been listed on any of the invoices that NERT Administrator sent to Martone from the inception of the relationship through that time. NERT Administrator had never sent Martone any invoice, statement, or other document reflecting any such investment fees. Nor has NERT Advisor or NERT Trustee ever sent Martone or the Plan any invoice or statement.

23. The only time that an investment fee appeared on any "invoice" was on April 24, 2020 – after Martone decided to transfer the Defined Benefit Plan assets, as discussed below – when NERT Administrator sent Martone a letter stating that there were "Outstanding Invoices" for the Defined Benefit Plan (\$8,290.00) and the 401(k) Plan (\$4,524.00), which NERT Administrator said were "WAIVED."

24. The investment fees do not appear on NERT Administrator's online account statements. Martone regularly reviewed the Plan's online account statements, which showed starting balance, contributions, forfeitures, gains and losses, distributions, and ending balance. NERT Administrator's account statements did not give any information regarding any investment fees paid from the Plans' assets.

25. Martone reasonably believed that the only fees that NERT Defendants charged were those that had been disclosed by NERT Administrator to Martone and included in the invoices sent to Martone. Martone did not know that NERT Defendants failed to make disclosures of investment fees or any other fees that were purportedly charged.

26. NERT Defendants had not provided any investment advice to Martone or to the Plans, so Martone had no reason to believe that NERT Defendants were charging investment fees.

27. NERT Defendants have also not provided other services to Martone or the Plans to which they were entitled. For example, NERT has a self-directed Key Advisor account through TD Ameritrade, which would have allowed Martone the ability to control its own trades and provided additional access to NERT Advisors' services. NERT Defendants did not inform Martone that this service was available prior to February 2020, and when Mr. Martone asked to register for this account NERT Administrator ignored his requests.

28. Martone demanded that NERT Administrator refund the investment fees, which Martone estimated to be approximately \$350,000 - \$400,000, because NERT Defendants had not provided services that would warrant these fees.

29. In response, on February 21, 2020, Mr. Barrett sent Martone a document, dated July 15, 2019, captioned "408(b)2 Plan Sponsor Disclosure" (hereinafter the "Plan Sponsor Disclosure") (a copy attached hereto as **Exhibit 1**).

30. Upon information and belief, this Plan Sponsor Disclosure was not provided to Martone at any time prior to February 21, 2020. Martone has no record of receiving the Plan Sponsor Disclosure on July 15, 2019 or at any time prior to February 21, 2020.

31. The Disclosure is not addressed to Martone or the Plans, but rather was generally written to all Plan Sponsors and Employers to whom NERT Defendants provide services. Accordingly, the Disclosure lists all of the fees that NERT Defendants charge for the various services they may provide, not just those specific to the Martone Plans. (**Exhibit 1**).

32. The Plan Sponsor Disclosure does not indicate which services are provided to which Plan Sponsors. In particular, the Plan Sponsor Disclosure does not indicate what specific services were provided to Martone or the Plans.

33. Further the Plan Sponsor Disclosure included lists of services that were supposed to be provided by each the NERT Administrator, the NERT Trustee (Sandy Springs Bank) and the NERT Advisor (Acorn Financial Advisory Services) and fees relating to each service. Prior to receiving the Plan Sponsor Disclosure, Martone had no knowledge of any services that were purportedly provided by the NERT Advisor or fees relating to same, and had never received any communication from either the NERT Advisor or NERT Trustee.

34. All of Martone's dealings were directly with NERT Administrator. Martone never communicated directly with NERT Trustee or NERT Advisor, and relied upon NERT Administrator notwithstanding how NERT Administrator may have delegated these duties to the other NERT Defendants.

35. Martone requested an accounting from NERT Administrator of all fees since the Plan's inception, including a list of every fee transaction and the details of those transactions.

36. Mr. Barrett responded that NERT Defendants did not keep a record of such fees and transactions, and that instead the fees "are charged to NERT Plans at a global level over all plans[.]" NERT Defendants have never provided an accounting of such fees.

III. NERT Defendants' Failure to Follow Martone's Instructions, Including Failure to Trade Certain Investment Funds at Martone's Requests.

37. In addition, NERT Administrator ignored many of Martone's requests regarding timing of trades, lack of timely transactions, and communication regarding investment options.

38. For example, on or about February 28, 2020, at a time when the market was in volatile decline, Martone instructed NERT Administrator to trade certain investment funds. NERT Administrator ignored this instruction.

39. By the following Friday, March 6, 2020, NERT Administrator still had not responded to Martone's instruction from the week before.

40. On Friday, March 6, 2020, Martone sent NERT Administrator new instructions to trade certain investment funds that day, stating in an email: "Please get me out today."

41. NERT Defendants failed to respond to Martone's trade instructions on March 6, 2020.

42. On Monday, March 9, 2020, Martone again contacted NERT Administrator and requested the trade. Again, NERT Defendants did not make the trade.

43. NERT Administrator told Martone that NERT Defendants only conducted trades on Wednesdays.

44. Based upon NERT Defendants' failure to execute the trades that Martone requested, the loss as shown on NERT's website was \$391,904 by March 10, 2020, it was \$674,709 by March 11, 2020, and it was almost \$800,000 by March 15, 2020. Martone was unable to check the Plans' account on March 12-13, 2020, because NERT's website was not working properly those days.

45. NERT Defendants' position that they only make trades on Wednesdays is unreasonable, contrary to industry standards, and in breach of the obligations they owed to Martone and the Plans.

46. NERT's Plan Sponsor Disclosure specifically states that the NERT Trustee, as the Directed Trustee, will make investments as directed by the Plan, and that the NERT Trustee will

“[v]erify and settle nightly NSCC trades *by the following business day.*” (Plan Sponsor Disclosure, **Exhibit 1** p. 2) (emphasis added).

47. Because of NERT Defendants’ failure to timely make the requested trades when requested, the Plans incurred market losses.

48. NERT Administrator repeatedly failed to timely respond to Martone’s other communications or provide information regarding the account. NERT Administrators’ failure to communicate and respond to Martone impaired Martone’s ability to direct the Plans’ assets.

IV. NERT Defendants Refused to Transfer Funds from the Defined Benefit Plan as Instructed by Martone.

49. In or around April 2020, Martone decided to transfer administration duties of the plans to another service provider, Benetech Inc. (“Benetech”), and requested NERT Defendants to transfer the Defined Benefit Plan assets.

50. On April 24, 2020, Martone completed the required forms to terminate the NERT Defendants’ services for the Defined Benefit Plan in order to transfer that Plan’s assets.

51. On April 29, 2020, NERT Administrator informed Martone that the request to transfer the Defined Benefit Plan assets was denied. NERT Administrator claimed that the Defined Benefit Plan and the 401(k) Plan were a “paired” defined benefit/defined contribution plan and that NERT Defendants would not transfer the funds of the Defined Benefit Plan without also transferring the 401(k) Plan funds and completing a 30-day blackout notice.

52. However, the Plan documents do not reference a pairing of the Plans and each Plan filed separate Form 5500s each year since inception.

53. On July 30, 2020, Martone sent NERT Administrator an allocation document attempting to reallocate his funds to cash in order to transfer the funds out of NERT’s fund options,

and sent NERT Administrator another transfer request to transfer the funds of the Defined Benefit Plan to Charles Schwab Corporation (“Schwab”).

54. On July 31, 2020, NERT Administrator again refused to transfer the funds in the Defined Benefit Plan, claiming that NERT could only transfer the funds for both of the Plans and that NERT Defendants would not transfer the funds unless Martone issued a blackout notice with respect to the 401(k) plan.

55. NERT Administrator continued to request a blackout notice from Martone between August 2020 and December 1, 2020.

56. On December 1, 2020, Martone explained to NERT Administrator that the blackout notice was not required to transfer the Defined Benefit Plan funds. Martone again requested that NERT Defendants transfer the funds from the Defined Benefit Plan to Schwab.

57. On or about January 2, 2021, Mr. Martone suffered a serious brain injury and was temporarily incapacitated.

58. During this time, NERT Defendants failed to transfer the funds from the Defined Benefit Plan to Schwab as Martone had requested.

59. On December 16, 2022, Martone again asked NERT Administrator to transfer the Defined Benefit Plan assets to Schwab. On December 21, 2022, December 29, 2022, and January 9, 2023, Martone followed up with NERT Administrator seeking a reply.

60. NERT Administrator finally responded to Martone on January 9, 2023, stating that NERT Defendants could not complete the transfer of the Defined Benefit Plan without the 401(k) Plan, calling it a “dual plan” arrangement.

61. The Plans had never been paired plans and, in any event, the Plans had been restated in 2020 and were not paired.

62. On January 10, 2023, Martone again communicated with NERT Administrator regarding its refusal to transfer the funds in the Defined Benefit Plan to Schwab and asked NERT Administrator to justify why they had not made the transfer.

63. After this request was sent, NERT Defendants still failed to transfer the funds or justify their failure to do so.

V. NERT Defendants Transferred the Funds of Both Plans.

64. On February 3, 2023, counsel for Martone sent a letter to Thomas F. Barrett and Vincent Barrett of NERT. That letter stated that NERT was in violation of their obligations to the Plans by disregarding Martone's instructions to transfer the Defined Benefit Plan assets and wrongly retaining those assets and demanded that NERT Defendants transfer the assets of the Defined Benefit Plan to Schwab.

65. The February 3, 2023 letter also contained certain other requests, including a demand that NERT Administrator provide a copy of any contract between Martone and NERT Defendants, provide an accounting of all fees paid by Martone or the Plans to NERT Defendants, and a demand that NERT Defendants refund all investment fees paid by Martone to NERT Defendants. NERT Administrator failed to respond to any of these demands.

66. On February 7, 2023, NERT Administrator informed Martone that its request was received and that the "transfer of plans assets are being processed."

67. Counsel for Martone responded to NERT Administrator on February 7, 2023, reiterating that Martone has only requested and authorized the transfer of the Defined Benefit Plan assets, and asking NERT Administrator to confirm that just this Plan's assets were being transferred.

68. On February 8, 2023, NERT Administrator informed Martone that the Defined Benefit Plan assets had been wired to Schwab.

69. For almost three (3) years, Martone had instructed NERT Administrator to transfer the Defined Benefit Plan assets and NERT Defendants failed to do so, stating that they could not transfer the Defined Benefit Plan assets without also transferring the 401(k) assets and issuing a blackout notice. For almost three years, NERT Defendants wrongfully and in violation of their obligation to the Plans failed to follow Martone's instructions and wrongly retained the assets. Nevertheless, on February 8, 2023, NERT transferred the Defined Benefit Plan assets, separate from the 401(k) Plan and with no blackout notice.

70. On February 9, 2023, and with no advance notice to Martone, NERT Defendants purported to transfer the 401(k) Plan assets, via a check made payable to "Larry Martone, Trustee, Martone Construction Management, Inc. 401(k) PS Plan," and sent via U.S. mail to Benetech. This letter and check were received on or about February 14, 2023. In the accompanying letter, NERT Administrator stated that they had determined that they could no longer serve as custodian of the 401(k) plan. Despite NERT Administrator's previous insistence that a blackout notice was required, NERT Defendants did not issue or prepare a blackout notice with respect to this transfer.

71. NERT Defendants' unauthorized conversion of all of the 401(k) Plan assets to cash and transfer of them on February 9, 2023, with no advance notice to Martone or to Plan participants and in blatant disregard of Martone's instructions and of the rights and interests of Plan participants, is in breach of NERT Defendants' duties and will cause loss to the Plans and injury to the Plan participants.

72. On February 10, 2023, counsel for Martone again wrote to NERT Administrator, asking for a response to the other issues raised in the February 3, 2023, letter, including Martone's

request for any contract documents, an accounting of fees, and a refund of investment fees. To date, NERT Administrator has not responded to any of these requests.

COUNT I
Breach of Fiduciary Duty under ERISA,
29 U.S.C. § 1132(a)(2) and 29 U.S.C. § 1109

73. Plaintiff incorporates by reference paragraphs 1 through 72 as though they were fully set forth herein.

74. Plaintiff, as the Plan Administrator and fiduciary, seeks to recover losses to the Plans and other appropriate relief resulting from Defendants' actions, pursuant to ERISA, 29 U.S.C. § 1132(a)(2).

75. Each of the NERT Defendants was a fiduciary with respect to the Plans under ERISA. Specifically, NERT Advisor purportedly rendered investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of the Plans. 29 U.S.C. § 1002(21)(A). NERT Trustee was a fiduciary because it was a trustee. 29 U.S.C. § 1002(21)(A); 29 U.S.C. § 1103(a); DOL Field Assistance Bulletin No. 2004-03 (concluding a directed trustee is still a fiduciary under ERISA). NERT Administrator was also a fiduciary because it exercised discretionary authority or control respecting management of the Plans and the administration of the Plans, and it exercised authority or control respecting management or disposition over Plan assets, as evidenced by NERT Administrator deducting fees from the Plans' assets.

76. As fiduciaries, the NERT Defendants owed certain duties to the Plans and participants and beneficiaries under ERISA, including both a duty of loyalty and a duty of care, to the extent they acted as a fiduciary.

77. The “Prudent man standard of care” compels a fiduciary to act “solely in the interest of the participants and (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 [person] acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims; (C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and (D) in accordance with the documents and instruments governing the plan as such documents and instruments are consistent with the provisions of this chapter and subchapter.” 29 U.S.C. § 1104(a)(1).

78. The NERT Defendants breached their fiduciary duties, as described in detail above by, among other things:

- a. NERT Administrator and NERT Trustee failed to follow Martone’s instructions with respect to Plan assets, including with respect to rebalancing the Plans’ assets and making trades as instructed by Martone in a timely manner, resulting in market losses;
- b. NERT Administrator and NERT Trustee failed to make trades within one business day, as set forth in NERT Defendants’ own document and in accordance with a reasonable standard of care, resulting in market losses;
- c. NERT Administrator and NERT Trustee failed to transfer the Defined Benefit Plan assets to Schwab as requested, and retaining those assets from the time of Martone’s original transfer request until February 8, 2023;

- d. The NERT Defendants charged investment fees to the Plans, when no investment advisory services or other services were provided beyond those that appeared on the NERT Administrator's invoices and such fees were not timely and properly disclosed as required by 29 CFR § 2550.408b-2, and Martone reasonably believed that the only fees the Plans paid were those that appeared on the invoices sent by NERT Administrator, and the NERT Defendants did not display any investment fees on any of the Plans' statements;
- e. Upon information and belief, NERT Defendants continued to charge investment fees from the time that Martone requested that NERT Defendants transfer the Defined Benefit Plan funds until the time the funds were actually transferred, almost three years later;
- f. NERT Advisor did not provide any investment advice to Martone, the Plan, or Plan participants, despite apparently receiving investment advisory fees for such services;
- g. NERT Defendants failed to facilitate, communicate, or allow Martone and the Plan to fully invest in and participate in the market, such as through having a self-directed Key Advisor account through TD Ameritrade, which would have allowed Martone to select from a wider selection of investments and allowed Martone to trade at any time (while NERT Defendants purported to make trades only on Wednesdays) and would have provided additional access to NERT Advisor – despite having charged the Plans a fee that should purportedly have included this and other services;

- h. NERT Administrator and NERT Trustee liquidated and transferred the 401(k) Plan Assets, which was not authorized by Martone and contrary to Martone's instructions; and
- i. NERT Administrator failed to timely communicate with Martone or respond to Martone's communications and follow Martone's instructions.

79. The NERT Defendants' actions described above breach their fiduciary duties of care and duty of loyalty, in that NERT Defendants failed to operate the Plans such as to defray the reasonable expenses of administering the Plans, failed to act with the care, skill, prudence and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of like character with like aims, and failed to act in accordance with the Plan Administrator's instructions or with the Plan documents and agreements and the requirements of ERISA.

80. As a result of the NERT Defendants' actions and breaches, Plaintiff and the Plans have incurred losses, including but not limited to the decrease in value of Plan assets and improper payments out of Plan assets, resulting in a loss to the Plans and causing injury to participants and beneficiaries.

81. Plaintiff requests an accounting including, *inter alia*, all direct and indirect compensation charged to Martone and/or the Plans, all transactions with respect to Plan assets, and a valuation of investment funds that NERT Defendants did not trade as instructed, to ascertain the losses to the Plans.

82. Pursuant to ERISA, 29 U.S.C. § 1109 and § 1132(a)(2), NERT Defendants must make good to the Plans the losses resulting from their breaches, and restore to the Plans any profits

which have been made through use of the Plans' assets, as well as other equitable or remedial relief as the Court may deem appropriate.

83. Further, pursuant to ERISA, 29 U.S.C. § 1105, each Defendant is liable for the breaches of each other Defendant as co-fiduciary, insofar as each knowingly participated in the acts or omissions of the other fiduciaries, knowing such acts or omissions were a breach; each Defendant, by failing to comply with § 1104(a)(1) in the administration of its specific responsibilities which give rise to its status of fiduciary, enabled such other fiduciaries to commit a breach; and/or each Defendant had knowledge of the breach by such other fiduciaries and did not make reasonable efforts to remedy the breach.

84. Plaintiff seeks an order requiring NERT Defendants to make good all losses to the Plans resulting from their breaches, to restore to the Plans any profits which have been made through their use of Plan assets, to provide an accounting, and such other equitable and remedial relief as the Court deems appropriate.

85. Plaintiff also requests an award against NERT Defendants of Plaintiff's reasonable attorneys' fees and costs, pursuant to Section 502(g)(1) of ERISA, 29 U.S.C. § 1132(g)(1).

COUNT II
For Equitable Relief under ERISA, 29 U.S.C. § 1132(a)(3)

86. Plaintiff incorporates by references paragraphs 1 through 85 as though they were fully set forth herein.

87. Plaintiff brings this claim under ERISA, 29 U.S.C. § 1132(a)(3), to obtain appropriate equitable relief to redress the NERT Defendants' violations of ERISA and of the terms of the Plans and to enforce the provisions of ERISA and the terms of the Plans.

88. As set forth above, the NERT Defendants breached their duties under ERISA and the Plans by, among other things:

- a. NERT Administrator and NERT Trustee failed to follow Martone's instructions with respect to Plan assets, including with respect to rebalancing the Plans' assets and making trades as instructed by Martone in a timely manner, resulting in market losses;
- b. NERT Administrator and NERT Trustee failed to make trades within one business day, as set forth in NERT Defendants' own document and in accordance with a reasonable standard of care, resulting in market losses;
- c. NERT Administrator and NERT Trustee failed to transfer the Defined Benefit Plan assets to Schwab as requested, and retaining those assets from the time of Martone's original transfer request until February 8, 2023;
- d. The NERT Defendants charged investment fees to the Plans, when no investment advisory services or other services were provided beyond those that appeared on the NERT Administrator's invoices and such fees were not timely and properly disclosed as required by 29 CFR § 2550.408b-2, and Martone reasonably believed that the only fees the Plans paid were those that appeared on the invoices sent by NERT Administrator, and the NERT Defendants did not display any investment fees on any of the Plans' statements;
- e. Upon information and belief, NERT Defendants continued to charge investment fees from the time that Martone requested that NERT Defendants transfer the Defined Benefit Plan funds until the time the funds were actually transferred, almost three years later;
- f. NERT Advisor did not provide any investment advice to Martone, the Plan, or Plan participants, despite apparently receiving investment advisory fees for such

services;

- g. NERT Defendants failed to facilitate, communicate, or allow Martone and the Plan to fully invest in and participate in the market, such as through having a self-directed Key Advisor account through TD Ameritrade, which would have allowed Martone to select from a wider selection of investments and allowed Martone to trade at any time (while NERT Defendants purported to make trades only on Wednesdays) and would have provided additional access to NERT Advisor – despite having charged the Plans a fee that should purportedly have included this and other services;
- h. NERT Administrator and NERT Trustee liquidated and transferred the 401(k) Plan Assets, which was not authorized by Martone and contrary to Martone’s instructions; and
- i. NERT Administrator failed to timely communicate with Martone or respond to Martone’s communications and follow Martone’s instructions.

89. As a result of the NERT Defendants’ actions and breaches, Martone and the Plans have incurred losses, including but not limited to the decrease in value of Plan assets and improper payments out of Plan assets, resulting in a loss to the Plans and causing injury to participants and beneficiaries, all to the benefit and unjust enrichment of Defendants.

90. Plaintiff seeks equitable relief to redress such violations of the terms of ERISA and of the Plans including, but not limited to, an accounting (as described above), an order that NERT Defendants disgorge any ill-gotten gains or payments they received, equitable restitution, an equitable surcharge holding NERT Defendants liable for the loss to the Plans and for any profits

the Plans would have accrued in the absence of such breach, and any other remedies to put Plaintiff in the position it would have attained but for the NERT Defendants' breaches.

91. Pursuant to Section 502(g)(1) of ERISA, 29 U.S.C. § 1132(g)(1), Plaintiff requests an award against NERT Defendants of Plaintiff's reasonable attorneys' fees and costs.

COUNT III
Common Law Breach of Fiduciary Duty

92. Plaintiff incorporates by reference paragraphs 1 through 91 as though they were fully set forth herein.

93. In addition and in the alternative to its claims under ERISA, Plaintiff asserts this claim against NERT Defendants for breach of fiduciary duty.

94. NERT Defendants each owed a fiduciary duty to Plaintiff and the Plans, in that NERT Defendants did not deal on equal terms with Plaintiff, NERT Defendants occupied a position of special trust and confidence with respect to Plaintiff, and NERT Defendants exercised control and discretion over the funds in the Plans, including the investment thereof. Further, NERT Advisor was also a fiduciary as it purportedly rendered investment advice for a fee or other compensation, direct or indirect, with respect to Plan funds. NERT Trustee was also a fiduciary because it was a trustee. NERT Administrator was also a fiduciary because it exercised discretionary authority or control respecting management of the Plans and the administration of the Plans, and it exercised authority or control respecting management or disposition over Plan assets, as evidenced by NERT Administrator deducting fees from the Plans' assets.

95. NERT Defendants had duties to Plaintiff to manage and invest the Plans' funds, at the direction of Plaintiff, reasonably and prudently with due care and in accordance with the Plans, contracts, and applicable law.

96. NERT Defendants breached their fiduciary duties by, among other things:

- a. NERT Administrator and NERT Trustee failed to follow Martone's instructions with respect to Plan assets, including with respect to rebalancing the Plans' assets and making trades as instructed by Martone in a timely manner, resulting in market losses;
- b. NERT Administrator and NERT Trustee failed to make trades within one business day, as set forth in NERT Defendants' own document and in accordance with a reasonable standard of care, resulting in market losses;
- c. NERT Administrator and NERT Trustee failed to transfer the Defined Benefit Plan assets to Schwab as requested, and retaining those assets from the time of Martone's original transfer request until February 8, 2023;
- d. The NERT Defendants charged investment fees to the Plans, when no investment advisory services or other services were provided beyond those that appeared on the NERT Administrator's invoices and such fees were not timely and properly disclosed as required by 29 CFR § 2550.408b-2, and Martone reasonably believed that the only fees the Plans paid were those that appeared on the invoices sent by NERT Administrator, and the NERT Defendants did not display any investment fees on any of the Plans' statements;
- e. Upon information and belief, NERT Defendants continued to charge investment fees from the time that Martone requested that NERT Defendants transfer the Defined Benefit Plan funds until the time the funds were actually transferred, almost three years later;

- f. NERT Advisor did not provide any investment advice to Martone, the Plan, or Plan participants, despite apparently receiving investment advisory fees for such services;
- g. NERT Defendants failed to facilitate, communicate, or allow Martone and the Plan to fully invest in and participate in the market, such as through having a self-directed Key Advisor account through TD Ameritrade, which would have allowed Martone to select from a wider selection of investments and allowed Martone to trade at any time (while NERT Defendants purported to make trades only on Wednesdays) and would have provided additional access to NERT Advisor – despite having charged the Plans a fee that should purportedly have included this and other services;
- h. NERT Administrator and NERT Trustee liquidated and transferred the 401(k) Plan Assets, which was not authorized by Martone and contrary to Martone’s instructions; and
- i. NERT Administrator failed to timely communicate with Martone or respond to Martone’s communications and follow Martone’s instructions.

97. As a result of the NERT Defendants’ actions and breaches, Plaintiff and the Plans have incurred losses, including but not limited to the decrease in value of Plan assets and improper payments out of Plan assets, resulting in a loss to the Plans and causing injury to participants and beneficiaries, all to the benefit and unjust enrichment of Defendants.

98. Because NERT Defendants’ breaches of fiduciary duty were willful, malicious, intentional, and/or recklessly indifferent towards Plaintiff’s rights, Plaintiff is also entitled to an

award of punitive damages and all costs, expenses, and attorneys' fees incurred by Plaintiff in these proceedings.

COUNT IV
Unjust Enrichment

99. Plaintiff incorporates by references paragraphs 1 through 98 as though they were fully set forth herein.

100. In addition and in the alternative to its claims under ERISA, Plaintiff asserts this claim against NERT Defendants for unjust enrichment.

101. Plaintiff is entitled to a money judgment against NERT Defendants because Plaintiff conferred the benefit of payment to NERT Defendants for services, which Defendants failed to perform.

102. Plaintiff conferred upon NERT Administrator and NERT Advisor the benefit of payment of certain fees for services including investment advisory services, but NERT Administrator and NERT Advisor did not provide investment advice or perform any other such services for Plaintiff.

103. Plaintiff conferred upon NERT Administrator and NERT Trustee the benefit of payment of certain fees for services which included, among other things, their obligation to follow Plaintiff's instructions to make trades on a timely basis by the following business day, transferring the Plan assets as instructed, allowing access to a self-directed TD Ameritrade account, and otherwise communicating with Plaintiff and following Plaintiff's instructions with respect to the management of the Plan and Plan assets, but NERT Administrator and NERT Trustee did not perform these services.

104. NERT Defendants accepted and retained such payments and benefits under circumstances that are inequitable because NERT Defendants did not perform the aforementioned

services.

105. Accordingly, Plaintiff is entitled to compensation and full restitution of all amounts in which NERT Defendants have been unjustly enriched at Plaintiff's expense.

COUNT V
Negligence

106. Plaintiffs incorporate by reference paragraphs 1-105 as though they were fully set forth herein.

107. In addition and in the alternative to its claims under ERISA, Plaintiff asserts this claim against NERT Defendants for common law negligence.

108. NERT Defendants had duties to Plaintiff to hold, manage, and invest the Plans' assets with the care, skill, prudence and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use in the matter.

109. NERT Defendants breached these duties by, among other things:

- a. NERT Administrator and NERT Trustee failed to follow Martone's instructions with respect to Plan assets, including with respect to rebalancing the Plans' assets and making trades as instructed by Martone in a timely manner, resulting in market losses;
- b. NERT Administrator and NERT Trustee failed to make trades within one business day, as set forth in NERT Defendants' own document and in accordance with a reasonable standard of care, resulting in market losses;
- c. NERT Administrator and NERT Trustee failed to transfer the Defined Benefit Plan assets to Schwab as requested, and retaining those assets from the time of Martone's original transfer request until February 8, 2023;

- d. The NERT Defendants charged investment fees to the Plans, when no investment advisory services or other services were provided beyond those that appeared on the NERT Administrator's invoices, and such fees were not timely and properly disclosed, and Martone reasonably believed that the only fees the Plans paid were those that appeared on the invoices sent by NERT Administrator, and the NERT Defendants did not display any investment fees on any of the Plans' statements;
- e. Upon information and belief, NERT Defendants continued to charge investment fees from the time that Martone requested that NERT Defendants transfer the Defined Benefit Plan funds until the time the funds were actually transferred, almost three years later;
- f. NERT Advisor did not provide any investment advice to Martone, the Plan, or Plan participants, despite apparently receiving investment advisory fees for such services;
- g. NERT Defendants failed to facilitate, communicate, or allow Martone and the Plan to fully invest in and participate in the market, such as through having a self-directed Key Advisor account through TD Ameritrade, which would have allowed Martone to select from a wider selection of investments and allowed Martone to trade at any time (while NERT Defendants purported to make trades only on Wednesdays) and would have provided additional access to NERT Advisor – despite having charged the Plans a fee that should purportedly have included this and other services;

- h. NERT Administrator and NERT Trustee liquidated and transferred the 401(k) Plan Assets, which was not authorized by Martone and contrary to Martone's instructions; and
- i. NERT Administrator failed to timely communicate with Martone or respond to Martone's communications and follow Martone's instructions.

110. As a result of NERT Defendants' actions, Plaintiff and the Plans have been injured, including in that the Plans have paid fees for services they did not receive, the Plans suffered investment losses and loss of value, and Plan funds have been depleted.

111. NERT Defendants manifested a knowing and reckless indifference toward, and disregard of, the rights of the Plans and participants and beneficiaries, entitling Plaintiff to an award of punitive damages.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully requests that this Court enter judgment in its favor and award it the following relief:

- 1. An order requiring Defendants to make good to the Plans all losses resulting from their breaches, pursuant to ERISA § 502(a)(2);
- 2. An order requiring Defendants to restore to the Plans any profits which have been made through use of Plan assets, pursuant to ERISA § 502(a)(2);
- 3. An accounting of, *inter alia*, all direct and indirect compensation charged to Martone and/or the Plans, all transactions with respect to Plan assets, and a valuation of investment funds that NERT did not trade as instructed;
- 4. Such other equitable relief or remedial relief as the Court may deem appropriate pursuant to ERISA § 502(a)(2) and 502(a)(3), including but not limited to equitable restitution or

surcharge, in an amount according to proof, including the investment fees paid by Martone, loss in value to Plan assets, and any other losses or damages incurred by the Plans;

5. Any other damages or relief in an amount according to proof, including the investment fees paid by Martone, loss in value to Plan assets, and any other losses or damages incurred by the Plans;

6. An award of punitive damages;

7. Pre and post judgment interest, as afforded by law;

8. Award Plaintiff reasonable attorneys' fees and costs of suit incurred herein, pursuant to ERISA § 502(g) and/or any other basis afforded by law; and

9. Such other equitable and legal relief as is appropriate.

Respectfully submitted,

HUSCH BLACKWELL LLP

/s/ Michael J. Schrier

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JURY DEMAND

Plaintiff demands a trial by jury on any claims and/or issues of fact so triable.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 17th of February, 2023, I served a copy of this COMPLAINT, by CERTIFIED MAIL upon:

U.S. Secretary of Labor
U.S. Department of Labor
Office of the Solicitor
Room N-4611
200 Constitution Avenue, N.W.
Washington, D.C. 20210

U.S. Secretary of the Treasury
U.S Department of the treasury
Office of the General Counsel
Room 3000
1500 Pennsylvania Avenue, N.W.
Washington, D.C. 20220

/s/ Michael J. Schrier