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9 Attorneys for Plaintiff:
 10 Konstantina Dimou

11 **UNITED STATES DISTRICT COURT**
 12 **SOUTHERN DISTRICT OF CALIFORNIA**

13 KONSTANTINA DIMOU,
 14 individually and as a representative of
 15 a class of participants and beneficiaries
 16 on behalf of the Thermo Fisher
 17 Scientific Inc. 401(k) Retirement Plan,

18 Plaintiff,

19 v.

20 THERMO FISHER SCIENTIFIC
 21 INC.; THE MANAGEMENT
 22 PENSION COMMITTEE OF THE
 23 THERMO FISHER SCIENTIFIC INC.)
 24 401(K) RETIREMENT PLAN; and
 25 DOES 1 to 10 inclusive,

26 Defendants.

27 '23CV1732 TWR JLB

28 **CLASS ACTION COMPLAINT**
AND DEMAND FOR JURY TRIAL

CLASS ACTION COMPLAINT AND DEMAND FOR JURY TRIAL

PARTIES

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2 4. The Thermo Fisher Plan is a defined contribution, individual account,
3 employee pension benefit plan under 29 U.S.C. § 1002(2)(A) and § 1002(34) and is
4 subject to the provisions of ERISA pursuant to 29 U.S.C. § 1003(a).

5
6 5. Defendant Thermo Fisher is a corporation organized under the laws of
7 the State of Delaware. It is a publicly traded New York Stock Exchange company
8 that supplies analytical instruments, life sciences solutions, specialty diagnostics,
9 laboratory, pharmaceutical and biotechnology services. It maintains offices in South
10 San Francisco and Carlsbad, California, among other national and international
11 locations, and employs more than 30,000 individuals.

12
13 6. Thermo Fisher is both the Plan sponsor under 29 U.S.C. § 1002(16)(B)
14 and the Plan administrator under 29 U.S.C. § 1002(16)(A) with broad authority over
15 the administration and management of the Plan.

16
17 7. The Committee was created by Thermo Fisher to assist in the
18 management of the Plan and was delegated with authority to, among other things,
19 direct the trustee, T. Rowe Price Trust Company, with respect to the crediting and
20 distribution of the Plan assets.

21
22 8. Thermo Fisher and the Committee (together “Defendants”) are both
23 named fiduciaries of the Plan and each exercised discretionary authority and
24 discretionary control over the management and administration of the Plan with
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1 respect to the matters alleged herein and were fiduciaries of the Plan within the
2 meaning of 29 U.S.C. § 1002(21)(A).

3 9. Plaintiff is a resident of California, was previously employed by
4 Thermo Fisher in Carlsbad, California, and has been a participant of the Plan since
5 2021.
6

7 10. The defendants sued by the fictitious names DOES 1 through 10,
8 inclusive, are Plan fiduciaries unknown to Plaintiff who exercise or exercised
9 discretionary authority or discretionary control respecting the management of the
10 Plan, exercise or exercised authority or control respecting the management or
11 disposition of its assets, or have or had discretionary authority or discretionary
12 responsibility in the administration of the Plan and are responsible or liable in some
13 manner for the conduct alleged in the complaint. Plaintiff will amend this complaint
14 to allege the true names and capacities of such fictitiously named defendants when
15 they are ascertained.
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20 **FACTUAL ALLEGATIONS COMMON TO ALL CAUSES OF ACTION**

21 11. As required by 29 U.S.C. § 1102(a)(1), the Thermo Fisher Plan is
22 maintained under a written document, amended and restated effective January 1,
23 2017.
24

25 12. In accordance with 29 U.S.C. § 1103(a), the assets of the Thermo Fisher
26 Plan are held in a trust fund.
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1 13. The Plan is funded by a combination of wage withholdings by Plan
2 participants and Company contributions that are deposited into the Plan’s trust fund.
3 Upon their deposit into the Plan’s trust fund, all participant contributions and
4 Company contributions become assets of the Plan.
5

6 14. As an individual account, defined contribution retirement plan, the
7 Thermo Fisher Plan “provides for an individual account for each participant and for
8 benefits solely upon the amount contributed to the participant’s account, and any
9 income, expenses, gains and losses, and any forfeiture of accounts of other
10 participants which may be allocated to such participant’s account.” 29 U.S.C. §
11 1002(34).
12
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14 15. Participant accounts are each charged with an allocation of the
15 administrative expenses paid by the Plan, which are shared by participants equally.
16 The administrative expenses paid by the Thermo Fisher Plan each year for
17 recordkeeping fees, advisory fees, annual report fees, and legal fees, have ranged
18 from \$340,000 to \$1,373,830 over the past 6 years.
19
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21 16. All participant accounts have been charged with administrative
22 expenses, on at least a quarterly basis, for at least the past 6 years. The deduction of
23 administrative expenses from participant accounts reduces the funds available to
24 participants for distribution and/or investing.
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27 17. Participants in the Thermo Fisher Plan are immediately vested in their
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1 own contributions, along with any income or losses on those balances. Participants
2 become 100% vested in the Company's matching contributions, plus any income or
3 losses on those balances, after two years of service.
4

5 18. When a participant has a break in service prior to full vesting of the
6 Company's matching contributions, the participant forfeits the balance of unvested
7 Company contributions in his or her individual account and Defendants exercise
8 discretionary authority and control over how these Plan assets are thereafter
9 reallocated.
10

11 19. In this regard, the governing Plan documents provide that "the
12 Company shall allocate and use all or a portion of the amount of a Participant's
13 benefit forfeited under the Plan either to pay reasonable expenses of the Plan (to the
14 extent not paid by the Employer) or to reduce its Discretionary Contributions,
15 Special Contributions, Matching Contributions and/or other contributions payable
16 under the Plan, for the Plan Year in which the forfeiture occurs or any prior or future
17 Plan Year, as determined by the Company."
18
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21 20. Although the governing Plan documents expressly authorize the use of
22 the forfeited funds to pay Plan expenses, and thereby reduce or eliminate the
23 amounts charged to the participants' individual accounts to cover such expenses,
24 Defendants have consistently declined to use any of these Plan assets for such
25 purposes over at least the past 6 years.
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1 21. Instead, Defendants have consistently chosen to utilize the forfeited
2 funds in the Plan exclusively for the Company's own benefit, to the detriment of the
3 Plan and its participants, by using these Plan assets solely to reduce future Company
4 contributions to the Plan.
5

6 22. In 2022, Company contributions to the Plan were reduced by
7 \$5,934,000 as a result of Defendants' reallocation of forfeited nonvested account
8 balances for the Company's own benefit, leaving a balance of \$3,773,000 in the
9 forfeiture account, none of which was used to pay Plan expenses.
10

11 23. In 2021, Company contributions to the Plan were reduced by
12 \$5,518,000 as a result of Defendants' reallocation of forfeited nonvested account
13 balances for the Company's own benefit, leaving a balance of \$1,471,000 in the
14 forfeiture account, none of which was used to pay Plan expenses.
15
16

17 24. In 2020, Company contributions to the Plan were reduced by
18 \$4,285,000 as a result of Defendants' reallocation of forfeited nonvested account
19 balances for the Company's own benefit, leaving a balance of \$69,000 in the
20 forfeiture account, none of which was used to pay Plan expenses.
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22

23 25. In 2019, Company contributions to the Plan were reduced by
24 \$4,142,000 as a result of Defendants' reallocation of forfeited nonvested account
25 balances for the Company's own benefit, leaving a balance of \$772,000 in the
26 forfeiture account, none of which was used to pay Plan expenses.
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1 30. In acting in this representative capacity and to enhance the due process
2 protections of unnamed participants and beneficiaries of the Plan, as an alternative
3 to direct individual actions on behalf of the Plan under 29 U.S.C. § 1132(a)(2),
4 Plaintiff seeks to certify this action as a class action on behalf of all the Thermo
5 Fisher Plan participants and beneficiaries. Plaintiff seeks to certify the following
6 class:
7

8
9 All participants and beneficiaries of the Thermo Fisher Plan from
10 September 19, 2017 through the date of judgment, excluding
11 Defendants and members of the Committee of the Thermo Fisher
12 Plan.
13

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

17 a. The class includes over 30,000 members and is so large that
18 joinder of all its members is impracticable.
19

20 b. There are questions of law and fact common to the class because
21 Defendants owed fiduciary duties to the Plan and to all participants and beneficiaries
22 and took the actions alleged herein as to the Plan and not as to any individual
23 participant. Thus, common questions of law and fact include the following, without
24 limitation: Who are the fiduciaries liable for the remedies provided by 29 U.S.C. §
25 1109(a)? Did the fiduciaries of the Plan breach their fiduciary duties to the Plan with
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1 respect to their management and allocation of Plan assets? Did fiduciaries of the
2 Plan engage in prohibited transactions with Plan assets? Did fiduciaries of the Plan
3 violate the anti-inurement provision of ERISA by using Plan assets for their own
4 benefit? What are the losses to the Plan resulting from each alleged breach of
5 ERISA? What Plan-wide equitable and other relief should the Court impose to
6 remedy Defendants' alleged breaches?
7

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9 c. Plaintiff's claims are typical of the claims of the class because
10 Plaintiff was a participant of the Plan during the class period and all participants in
11 the Plan were harmed by the same alleged misconduct by Defendants.
12

13 d. Plaintiff is an adequate representative of the class because she
14 was a participant of the plan during the class period, has no interests that conflict
15 with any other members of the class, is committed to the vigorous representation of
16 the class, and has engaged experienced and competent attorneys to represent the
17 class.
18

19
20 e. Prosecution of separate actions for these breaches of fiduciary
21 duties and prohibited transactions by individual participants and beneficiaries would
22 create the risk of (A) inconsistent or varying adjudications that would establish
23 incompatible standards of conduct for Defendants with respect to their discharge of
24 their fiduciary duties to the Plan and personal liability to the Plan under 29 U.S.C. §
25 1109(a), and (B) adjudications by individual participants and beneficiaries regarding
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1 these breaches of fiduciary duties, prohibited transactions, and remedies for the Plan
2 would, as a practical matter, be dispositive of the interests of the participants and
3 beneficiaries not parties to the adjudication or would substantially impair or impede
4 those participants' and beneficiaries' ability to protect their interests. Therefore, this
5 action should be certified as a class action under Rule 23(b)(1)(A) or (B).
6

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8 32. A class action is the superior method for the fair and efficient
9 adjudication of this controversy because joinder of all participants and beneficiaries
10 is impracticable, the losses suffered by individual participants and beneficiaries may
11 be small and impracticable for individual members to enforce their rights through
12 individual actions, and the common questions of law and fact predominate over
13 individual questions. Given the nature of the allegations, no class member has an
14 interest in individually controlling the prosecution of this matter, and Plaintiff is
15 aware of no difficulties likely to be encountered in the management of this matter as
16 a class action. Alternatively, then, this action may be certified as a class under Rule
17 23(b)(3) if it is not certified under Rule 23(b)(1)(A) or (B).
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21 33. Plaintiff's counsel, Hayes Pawlenko LLP, will fairly and adequately
22 represent the interests of the Class and is best able to represent the interests of the
23 class under Rule 23(g).
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FIRST CLAIM

BREACH OF FIDUCIARY DUTY OF LOYALTY

(29 U.S.C. 1104(a)(1)(A))

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5 34. Plaintiff realleges and incorporates herein by reference each and every
6 allegation contained in the preceding paragraphs of this Complaint as though fully
7 set forth herein.
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9 35. Pursuant to 29 U.S.C. § 1104(a)(1)(A), Defendants were required to
10 discharge their duties to the Thermo Fisher Plan “solely in the interest of the
11 participants and beneficiaries” and “for the exclusive purpose of: (i) providing
12 benefits to participants and their beneficiaries; and (ii) defraying reasonable
13 expenses of administering the plan.”
14
15

16 36. Defendants have continually breached this duty of loyalty with respect
17 to their control and management of the Plan’s assets over the past 6 years by
18 choosing to utilize forfeited funds in the Plan exclusively for the benefit of the
19 Company rather than solely in the interest of the participants and beneficiaries.
20

21 37. Instead of acting solely in the interest of Plan participants by utilizing
22 forfeited funds in the Plan to reduce or eliminate the administrative expenses charged
23 to their individual accounts, Defendants chose to use these Plan assets for the
24 exclusive purpose of reducing its own future contributions to the Plan, thereby
25 saving the Company millions of dollars each year at the expense of the Plan which
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1 received decreased Company contributions and its participants and beneficiaries
2 who were forced to incur avoidable expense deductions to their individual accounts.

3 38. As a direct and proximate result of Defendants' fiduciary breaches
4 described herein, the Plan suffered injury and loss for which they are personally
5 liable and are subject to appropriate equitable relief, pursuant to 29 U.S.C. § 1109,
6 including, without limitation, the disgorgement of all ill-gotten profits to Defendants
7 resulting from the breach of their duty of loyalty.
8

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

19 **BREACH OF FIDUCIARY DUTY OF PRUDENCE**

20 **(29 U.S.C. 1104(a)(1)(B))**

21 40. Plaintiff realleges and incorporates herein by reference each and every
22 allegation contained in the preceding paragraphs of this Complaint as though fully
23 set forth herein.
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1 41. Pursuant to 29 U.S.C. § 1104(a)(1)(B), Defendants were required to
2 discharge their duties with respect to the Thermo Fisher Plan “with the care, skill,
3 prudence, and diligence under the circumstances then prevailing that a prudent man
4 acting in a like capacity and familiar with such matters would use in the conduct of
5 an enterprise of a like character and with like aims.”
6

7 42. Defendants have continuously breached their duty of prudence under
8 29 U.S.C. § 1104(a)(1)(B) over the past 6 years by continually declining to use any
9 forfeited funds in the plan to reduce or eliminate the administrative expenses charged
10 to participant accounts, and instead using such Plan assets exclusively to reduce its
11 own contributions to the Plan.
12

13 43. Defendants failed to engage in a reasoned and impartial decision-
14 making process to determine that using the forfeited funds in the Plan to reduce the
15 Company’s own contribution expenses, as opposed to the administrative expenses
16 charged to participant accounts, was in the best interest of the Plan’s participants or
17 was prudent, and failed to consider whether participants would be better served by
18 another use of these Plan assets after considering all relevant factors.
19

20 44. By declining to use forfeited funds in the Plan to reduce or eliminate
21 the administrative expenses charged to participant accounts, and instead using such
22 Plan assets exclusively to reduce the Company’s own contribution expenses,
23 Defendants caused the Plan to receive fewer contributions that would otherwise have
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1 increased Plan assets and caused participants to incur expense deductions from their
2 individual accounts that would otherwise have been covered in whole or in part by
3 utilizing the forfeited funds to pay Plan expenses.
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5 45. As a direct and proximate result of Defendants' fiduciary breaches
6 described herein, the Plan suffered injury and loss for which Defendants are
7 personally liable and are subject to appropriate equitable relief, pursuant to 29 U.S.C.
8 § 1109, including, without limitation, the disgorgement of all ill-gotten profits to
9 Defendants resulting from the breach of their duty of prudence.
10

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

21 **BREACH OF ERISA'S ANTI-INUREMENT PROVISION**

22 **(29 U.S.C. 1103(c)(1))**

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24 47. Plaintiff realleges and incorporates herein by reference each and every
25 allegation contained in the preceding paragraphs of this Complaint as though fully
26 set forth herein.
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1 48. Pursuant to 29 U.S.C. § 1103(c)(1), “the assets of a plan shall never
2 inure to the benefit of any employer and shall be held for the exclusive purpose of
3 providing benefits to participants in the plan and their beneficiaries and defraying
4 reasonable expenses of administering the plan.”

5
6 49. The balance in a participant’s accounts that a participant forfeits when
7 incurring a break in service prior to full vesting of the Company’s contributions to
8 the participant’s account is an asset of the Thermo Fisher Plan.

9
10 50. By electing to utilize these Plan assets as a substitute for the Company’s
11 own future contributions to the Plan, thereby saving the Company millions of dollars
12 in contribution expenses, Defendants failed to use these Plan assets for the exclusive
13 purpose of providing benefits to participants and/or defraying Plan expenses and
14 instead caused the assets of the plan to inure to the benefit of the employer in
15 violation of 29 U.S.C. 1103(c)(1).
16
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18 51. Each Defendant is personally liable under 29 U.S.C. § 1109(a) to make
19 good to the Plan any losses to the Plan resulting from violation of ERISA’s anti-
20 inurement provision as alleged in this claim and to restore to the Plan all profits
21 secured through their use of Plan assets, and is subject to other equitable or remedial
22 relief as appropriate.
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FOURTH CLAIM

PROHIBITED TRANSACTIONS

(29 U.S.C. 1106(a)(1))

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5 52. Plaintiff realleges and incorporates herein by reference each and every
6 allegation contained in the preceding paragraphs of this Complaint as though fully
7 set forth herein.
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9 53. 29 U.S.C. § 1106(a)(1) provides that “[a] fiduciary with respect to a
10 plan shall not cause the plan to engage in a transaction, if he knows or should know
11 that such transaction constitutes a direct or indirect . . . exchange . . . of any property
12 between the plan and a party in interest . . . or use by or for the benefit of a party in
13 interest, of any assets of the plan.”
14
15

16 54. Thermo Fisher and the Committee are parties in interest, as that term is
17 defined under 29 U.S.C. §1002 (14), because they are Plan fiduciaries and because
18 Thermo Fisher is the employer of Plan participants.
19

20 55. By electing to use forfeited funds in the Plan as a substitute for future
21 employer contributions to the Plan, and thereby saving the Company millions of
22 dollars in contribution expenses, Defendants caused the Plan to engage in
23 transactions that constituted a direct or indirect exchange of existing Plan assets for
24 future employer contributions and/or a use of Plan assets by or for the benefit of a
25 party in interest.
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1 in contribution expenses, Defendants delt with the assets of the plan in their own
2 interest and for their own account.

3 61. As a result of this prohibited conduct, Defendants caused the Plan to
4 suffer losses in the amount of the Plan assets that were substituted for future
5 employer contributions and the lost investment returns on those assets.
6

7 62. Each Defendant is personally liable under 29 U.S.C. § 1109(a) to make
8 good to the Plan any losses to the Plan resulting from the prohibited conduct alleged
9 in this claim, to restore to the Plan all assets and profits obtained through the use of
10 Plan assets and is subject to other equitable or remedial relief as appropriate.
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13 **SIXTH CLAIM**

14 **FAILURE TO MONITOR FUDICIARIES**

15 63. Plaintiff realleges and incorporates herein by reference each and every
16 allegation contained in the preceding paragraphs of this Complaint as though fully
17 set forth herein.
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19 64. This claim is asserted against Thermo Fisher only.

20 65. Thermo Fisher oversaw the overall governance of the Plan and had the
21 authority to delegate fiduciary responsibilities.
22

23 66. Thermo Fisher created the Committee to assist in the management of
24 the Plan and delegated to the Committee the authority and discretion to direct the
25 trustee with respect to the crediting and distribution of the Plan assets.
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1 described above;

- 2 • find and adjudge that Defendants are personally liable to make good
3 to the Plan all losses to the Plan resulting from each violation of
4 ERISA described above, and to otherwise restore the Plan to the
5 position it would have occupied but for these violations;
6
7 • order the disgorgement of all assets and profits secured by
8 Defendants as a result of each violation of ERISA described above;
9
10 • determine the method by which Plan losses under 29 U.S.C. § 1109
11 should be calculated;
12
13 • order Defendants to provide all accounting necessary to determine
14 the amounts Defendants must make good to the Plan under 29
15 U.S.C. § 1109(a);
16
17 • remove the fiduciaries who have breached their fiduciary duties and
18 enjoin them from future ERISA violations;
19
20 • surcharge against Defendants and in favor of the Plan all amounts
21 involved in any transactions which such accounting reveals were
22 improper, excessive and/or in violation of ERISA;
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24 • certify the class, appoint Plaintiff as a class representative, and
25 appoint Hayes Pawlenko LLP as class counsel;
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- award to Plaintiff and the class their attorneys’ fees and costs under 29 U.S.C. § 1132(g)(1) and the common fund doctrine;
- order the payment of interest to the extent it is allowed by law; and
- grant other equitable or remedial relief as the Court deems appropriate.

DEMAND FOR JURY TRIAL

Plaintiff hereby demands trial of these claims by jury to the extent authorized by law.

DATED: September 19, 2023

HAYES PAWLENKO LLP

By: /s/Matthew B. Hayes
Matthew B. Hayes
Kye D. Pawlenko
Attorneys for Plaintiffs