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21 *Attorneys for Plaintiff*

22 UNITED STATES DISTRICT COURT  
 23 NORTHERN DISTRICT OF CALIFORNIA  
 24 OAKLAND DIVISION

25 DENNIS M. LORENZ, as an individual  
26 and on behalf of all others similarly  
27 situated,

28 Plaintiff,

v.

SAFEWAY, INC.; SAFEWAY  
BENEFIT PLANS COMMITTEE;  
GREAT-WEST FINANCIAL RPS  
LLC; and DOES 1 through 50,  
inclusive,

Defendants.

CASE NO.:

**CLASS ACTION COMPLAINT**

1. ERISA Breach of Fiduciary Duty
2. ERISA Prohibited Transactions





1 12. Previously, the recordkeeper for the Plan was JPMRPS, an affiliate of  
2 JPM. JPMRPS was likewise a party in interest under ERISA while serving as  
3 recordkeeper. In September 2014, Great-West and/or an affiliate acquired the  
4 record-keeping business of JPMRPS. The combined entity does business under the  
5 name Empower and is one of the largest service providers in the U.S. defined  
6 contribution market, with nearly 7 million participants as of the closing of the  
7 acquisition.

8 13. Does 1-50 are entities and individuals who are additional fiduciaries of  
9 the Plan and/or parties in interest with respect to the Plan in connection with the  
10 conduct and transactions alleged in this Complaint.

#### 11 **IV. THE JPM TARGET DATE FUNDS**

12 14. Target date funds are investment funds designed to allow retirement  
13 plan participants to invest in a single fund with a professionally-managed, broadly-  
14 diversified portfolio that becomes more conservative as the participant approaches  
15 retirement age, typically by shifting the proportion of the fund investing in stocks as  
16 compared to bonds. Typically, a retirement plan offers a variety of target date funds  
17 referencing dates at five-year intervals (e.g. a 2020 fund, a 2025 fund, etc.) and a  
18 participant who chooses to invest in such funds is invested in a single fund with a  
19 target date that corresponds to that participant's anticipated retirement age.

20 15. Prior to 2011, the Plan offered as investment options target date funds  
21 managed by Blackrock Institutional Trust Company called the Lifepath Index  
22 Funds.

23 16. Starting in 2011 and continuing to the present, the Plan has offered as  
24 investment options target date funds managed by JPM. These funds are: JPMCB  
25 Smartretire Passiveblend 2015, JPMCB Smartretire Passiveblend 2020, JPMCB  
26 Smartretire Passiveblend 2025, JPMCB Smartretire Passiveblend 2030, JPMCB  
27 Smartretire Passiveblend 2035, JPMCB Smartretire Passiveblend 2040, JPMCB  
28 Smartretire Passiveblend 2045, JPMCB Smartretire Passiveblend 2050, and JPMCB

1 Smartretire Passiveblend Income (collectively the “JPM Smartretire Passiveblend  
2 Funds”).

3 17. At the time the Safeway Defendants selected the JPM Smartretire  
4 Passiveblend Funds, JPMRPS served as the recordkeeper for the Plan and non-  
5 defendant JPMorgan Chase Bank, N.A. (“Chase”) was the trustee of the Plan.  
6 JPMRPS and Chase were, at the time, affiliates of JPM. In September 2014, Great-  
7 West and/or an affiliate acquired the record-keeping business of JPMRPS and  
8 became the recordkeeper for the Plan.

9 18. At the time the Safeway Defendants selected the JPM Smartretire  
10 Passiveblend Funds, these funds had just been introduced into the retirement  
11 investment products market and had no track record of results.

12 **V. THE EXCESSIVE FEES OF THE JPM SMARTRETIRE**  
13 **PASSIVEBLEND FUNDS**

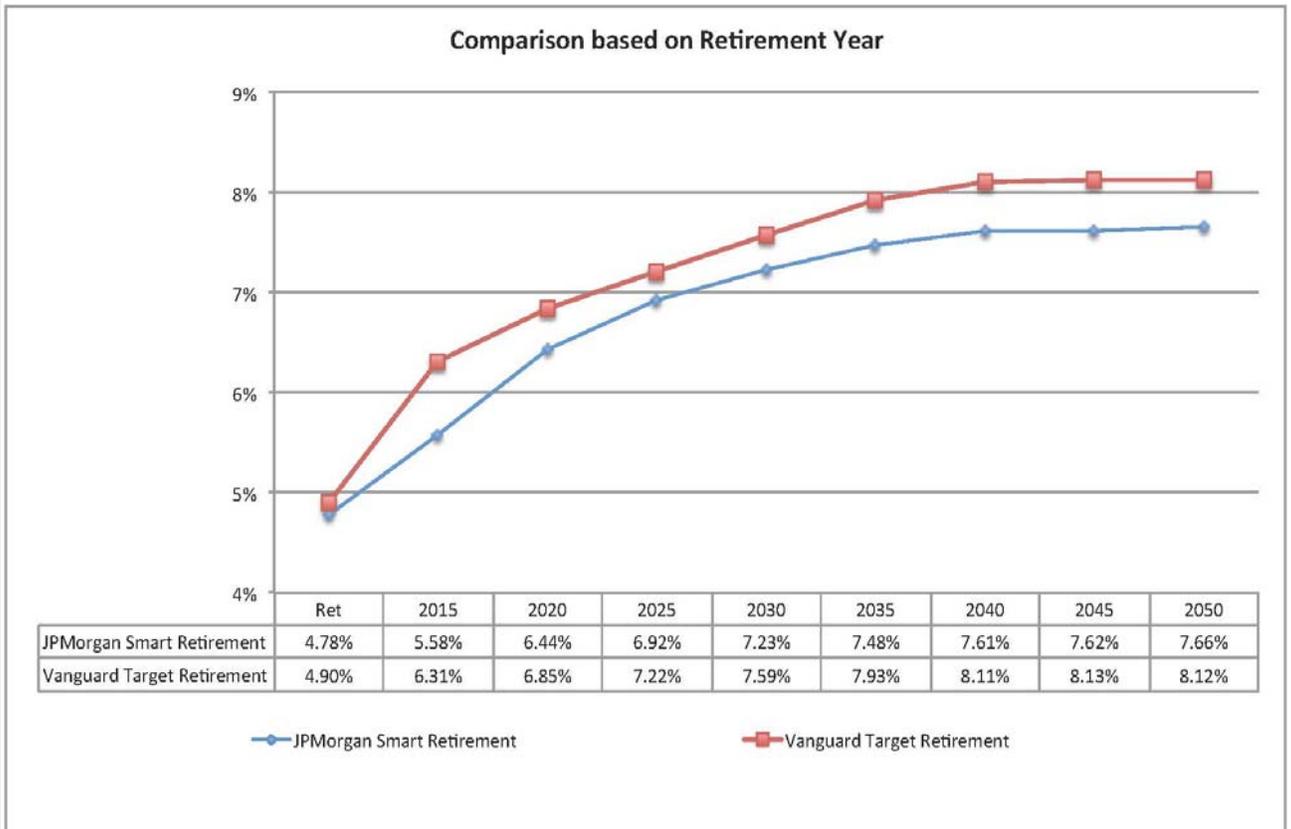
14 19. During the relevant times, the JPM Smartretire Passiveblend Funds  
15 charged participants in the Plan who invested in such funds between 47 and 50 basis  
16 points (0.47% - .50%) of the amount invested as a management fee.

17 20. By comparison, the Blackrock Lifepath Index funds which were  
18 replaced by the JPM Smartretire Passiveblend Funds charged only a 13 basis point  
19 fee.

20 21. Alternatives to the JPM Smartretire Passiveblend Funds that were  
21 readily available as of 2011 also charged substantially lower fees. Target date funds  
22 offered by Vanguard, for example, charge about a 15 basis point fee. The Vanguard  
23 target date funds are a popular investment option in 401(k) plans, with a market  
24 share of approximately 27 percent as of 2015, which made it the largest provider of  
25 target date funds.

26 22. Net of management fees, the Vanguard target date funds substantially  
27 outperformed the comparable JPM Smartretire Passiveblend Funds, as shown in the  
28 table below (average of five-year return per fund for the period ending in 2015):

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**VI. REVENUE SHARING TO JPMRPS / GREAT-WEST**

23. The management fee charged to participants for investing in the JPM Smartretire Passiveblend Funds included a 20 basis point revenue sharing payment to JPMRPS and later Great-West. This revenue sharing payment was purportedly compensation to JPMRPS / Great-West for record-keeping services in connection with the Plan but, as set forth below, resulted in compensation to JPMRPS / Great-West far in excess of reasonable compensation for such services.

24. The excessiveness of these revenue sharing payments is illustrated by the fact that the amount invested in the JPM Smartretire Passiveblend Funds (and thus the revenue sharing payments made to JPMRPS / Great-West) more than doubled between 2011 and 2014. At the same time, the number of participants in the Plan (and other related 401(k) plans that offered the JPM Smartretire Passiveblend Funds) actually decreased.

1           25. The Plan offered the JPM Smartretire Passiveblend Funds through a  
2 collective trust, the Safeway Inc. Defined Contribution Plans Master Trust, in which  
3 the Plan and two other plans (the Vons Companies, Inc. Pharmacists 401(k) Plan  
4 and the Dominicks Finer Foods, LLC 401(k) Retirement Plan for Union Employees)  
5 held their investments.

6           26. As shown below, the total amounts invested in the JPM Smartretire  
7 Passiveblend Funds through the Safeway Inc. Defined Contribution Plans Master  
8 Trust increased greatly from 2011 through 2014:

	<b>2011</b>	<b>2012</b>	<b>2013</b>	<b>2014</b>
<b>2015</b>	18,054,681	19,794,989	21,701,311	24,350,028
<b>2020</b>	23,131,987	28,861,951	35,339,858	43,053,629
<b>2025</b>	19,324,173	24,110,732	32,225,022	41,359,913
<b>2030</b>	14,643,308	19,831,420	26,310,034	33,855,085
<b>2035</b>	13,165,543	17,414,630	24,262,579	30,486,593
<b>2040</b>	10,246,266	13,044,064	18,094,659	22,064,219
<b>2045</b>	13,897,710	18,275,268	25,349,788	29,000,104
<b>2050</b>	303,294	1,673,355	4,971,998	8,948,585
<b>Income</b>	7,177,639	8,123,322	9,648,738	11,682,471
<b><u>Total</u></b>	<b><u>119,944,601</u></b>	<b><u>151,129,731</u></b>	<b><u>197,903,987</u></b>	<b><u>244,800,627</u></b>

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18           27. During this same time period, the number of participants with account  
19 balances in the three 401(k) plans invested through the Safeway Inc. Defined  
20 Contribution Plans Master Trust steadily declined, with a total of 41,363 participants  
21 with account balances in 2011, 40,533 in 2012, 40,059 in 2013, and 38,126 in 2014.

22           28. In other words, JPMRPS / Great-West received greater and greater  
23 revenue for providing the same services (in fact, more than double the revenue in  
24 2014 than in 2011) to a smaller number of participants.

25           29. And the revenue sharing payments generated from the JPM Smartretire  
26 Passiveblend Funds were far from the sole source of JPMRPS / Great-West's  
27 compensation for record-keeping services. These companies also received revenue  
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1 sharing payment from other investments offered through the Plan and direct  
2 payments from the Plan for record-keeping services.

3 30. The Safeway Defendants could have obtained record-keeping services  
4 at a much lower rate, had they: (1) negotiated a per-participant payment for record  
5 keeping rather than an asset-based charge (*i.e.* payment based on a percentage of  
6 monies invested); or (2) negotiated a lower asset-based charge when it became clear  
7 that the amounts invested in the JPM Smartretire Passiveblend Funds were growing  
8 so quickly so as to generate a windfall for JPMRPS / Great-West.

9 **VII. THE SAFEWAY DEFENDANTS' BREACHES OF FIDUCIARY DUTY**

10 31. ERISA § 404(a)(1), 29 U.S.C. § 1104(a)(1), requires that plan  
11 fiduciaries, such as the Safeway Defendants, discharge their duties solely in the  
12 interests of plan participants and beneficiaries and with the care, skill, prudence, and  
13 diligence under the circumstances that a prudent person acting in a like capacity and  
14 familiar with such matters would use in the conduct of a similar enterprise.

15 32. In the context of selecting investment options for plan participants, the  
16 duty of prudence requires that plan fiduciaries investigate the relative performance  
17 and fees of available investment options and, based on a thorough investigation,  
18 make an informed and reasonable choice of which of those investment options to  
19 make available to plan participants.

20 33. The Safeway Defendants breached the duty of prudence in connection  
21 with selecting the JPM Smartretire Passiveblend Funds because, among other things,  
22 these funds charged higher fees than comparable, readily-available funds, had no  
23 meaningful record of performance so as to indicate that higher performance would  
24 offset this difference in fees, and was managed by a company affiliated with the  
25 Plan's recordkeeper, JPMRPS, and trustee, Chase.

26 34. Had the Safeway Defendants conducted an adequate investigation of  
27 available alternatives, without the influence of JPMRPS and Chase, they would have  
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1 selected target date funds with an established record of performance and lower fees,  
2 such as the Vanguard target date funds.

3 35. Had they done so, Plaintiff and the members of the putative class would  
4 have achieved higher investment returns because they would have paid lower fees.

5 36. In this context, the duty of prudence also requires that plan fiduciaries  
6 like the Safeway Defendants investigate whether revenue sharing is a reasonable  
7 and cost-effective way to pay for administrative services incurred in connection with  
8 a plan, such as record-keeping services.

9 37. Specifically, the Employee Benefits Security Administration of the  
10 U.S. Department of Labor Plan has opined that, in the context of a revenue sharing  
11 arrangement, “the responsible plan fiduciaries must assure that the compensation the  
12 plan pays directly or indirectly to [the service provider] for services is reasonable,  
13 taking into account the services provided to the plan as well as all fees or  
14 compensation received by [the service provider] in connection with the investment  
15 of plan assets, including revenue sharing.” Advisory Opinion 2013-03A (July 3,  
16 2013).

17 38. This same opinion makes it clear that the duty of plan fiduciaries to  
18 assure the reasonableness of compensation received by a service provider is a  
19 continuing one. “Under section 404(a)(1) of ERISA, the responsible plan fiduciaries  
20 must act prudently and solely in the interest of the plan participants and  
21 beneficiaries both in deciding whether to enter into, or *continue*, [the revenue  
22 sharing arrangement].” *Id.*(emphasis added).

23 39. The Safeway Defendants breached the duty of prudence in connection  
24 with agreeing to the revenue sharing arrangement for the JPM Smartretire  
25 Passiveblend Funds because a reasonable investigation would have found that a per-  
26 participant fee for record keeping services as opposed to an asset-based revenue  
27 sharing arrangement would have resulted in lower fees.

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1           40. This breach of prudence is further evidenced by the fact that the  
2 Safeway Defendants agreed to revenue sharing payments for other investment  
3 options offered by the Plan, but the percentage amount of such payments for the  
4 JPM Smartretire Passiveblend Funds was substantially higher than most of these  
5 other options. In 2011, for example, JPMRPS received a five basis point revenue  
6 sharing payment from the American Funds Europacific Growth-R fund, a ten basis  
7 point revenue sharing payment from the Dodge & Cox Stock fund and the RS  
8 Partners-Y fund, and a fifteen basis point revenue sharing payment from the  
9 Forward Growth-Institutional Fund. Only two of the funds offered by the Plan (the  
10 Pimco Total Return and Chesapeake Core Growth fund) involved a higher revenue  
11 sharing payment than the JPM Smartretire Passiveblend Funds.

12           41. This breach of duty became even more pronounced as the amounts  
13 invested in the JPM Smartretire Passiveblend Funds, and thus the revenue paid out  
14 to JPMRPS / Great-West, more than doubled between 2011 and 2014, while the  
15 total number of active participants (*i.e.* those with account balances) in the plans  
16 investing in these funds decreased. Thus, JPMRPS / Great-West received more and  
17 more money for performing the same services for a smaller number of participants,  
18 assuring a windfall to JPMRPS / Great-West at the expense of participants in the  
19 Plan.

20           42. The Safeway Defendants took no action to reduce the percentage paid  
21 under the revenue sharing arrangement to account for the ever-increasing amounts  
22 held in the JPM Smartretire Passiveblend Funds.

23           43. Had the Safeway Defendants complied with their fiduciary duties with  
24 respect to the revenue sharing, Plaintiff and the members of the putative class would  
25 have achieved higher investment returns because they would have paid lower fees.

#### 26           **VIII. DEFENDANTS' PROHIBITED TRANSACTIONS**

27           44. JPMRPS / Great-West was and is a “party in interest” with respect to  
28 the Plan pursuant to ERISA § 3(14)(B), 29 U.S.C. § 3(14)(B), as a “person

1 providing services to such plan.” Specifically, JPMRPS / Great-West provided  
2 record-keeping services for the Plan.

3 45. ERISA § 406(a)(1)(C), 29 U.S.C. § 1106(a)(1)(C), prohibits a plan  
4 fiduciary from causing the plan to engage in a transaction that constitutes any  
5 furnishing of goods, services, or facilities between the plan and a party in interest to  
6 that plan.

7 46. The revenue sharing arrangement set forth above constitutes a  
8 transaction prohibited by this section, as it involves among other things the  
9 exchange of services by JPMRPS / Great-West to the Plan.

10 47. ERISA § 408(b)(2), 29 U.S.C. § 1008(b)(2), provides for certain  
11 exemptions to the prohibition on the specified transactions. Any applicable  
12 exemption, however, requires that the compensation received by the party in interest  
13 be reasonable.

14 48. The revenue sharing arrangement described above does not qualify for  
15 any exemption under ERISA § 408(b)(2), 29 U.S.C. § 1008(b)(2), because JPMRPS  
16 / Great-West received more than reasonable compensation for the record-keeping  
17 services they provided. This is evidenced by, among other things, the facts that such  
18 record-keeping services could have been provided at a lower cost if they were  
19 calculated on a per-participant basis as opposed to on an asset-based basis and that  
20 the amounts invested in the JPM Smartretire Passiveblend Funds, and thus the  
21 revenues sharing payments for those funds, more than doubled while the number of  
22 participants with account balances in the Plan and related plans decreased.

23 **IX. CLASS ALLEGATIONS**

24 49. Plaintiff brings this action as a class action under Rules 23(a) and  
25 23(b)(1) or, in the alternative, 23(b)(3) of the Federal Rules of Civil Procedure on  
26 behalf of a class of similarly-situated person (“the Class”):  
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1 All participants in the Plan who invested in any of the JPM Smartretire  
2 Passiveblend Funds from the time these funds were first offered by the Plan in  
3 2011 until the time of trial (the “Class Period”).

4 50. The members of the Class are so numerous that joinder of all members  
5 is impracticable. As of the year ending 2011, the Plan had 38,199 participants with  
6 account balances. A large number of these participants were invested in one of the  
7 JPM Smartretire Passiveblend Funds.

8 51. Common questions of law and fact exist as to all members of the Class  
9 and predominate over questions solely affecting individual members of the Class.  
10 Among such questions are:

11 (a) Whether the Safeway Defendants breached their fiduciary duties with  
12 respect to the decision to initially offer, and continue to offer, the JPM  
13 Smartretire Passiveblend Funds;

14 (b) Whether the Safeway Defendants breached their fiduciary duties with  
15 respect to agreeing to the revenue sharing arrangement with JPMRPS / Great-  
16 West with respect to the JPM Smartretire Passiveblend Funds and for  
17 continuing that arrangement;

18 (c) Whether Defendants engaged in a transaction prohibited by ERISA by  
19 causing the Plan to enter a transaction by which a party in interest to the Plan  
20 received compensation for providing services to the Plan;

21 (d) Whether any exemption to ERISA’s prohibition on certain transactions  
22 apply, and specifically whether the compensation received by JPMRPS /  
23 Great-West for record-keeping services was reasonable; and

24 (e) The remedies to which the Class and Plan are entitled as a result of  
25 Defendants’ breaches of fiduciary duty and engaging in transactions  
26 prohibited by ERISA.

27 52. There are no substantial individual questions among the Class members  
28 as to the merits of this action.

1           53. Plaintiff's claims are typical of the claims of the members of the Class,  
2 as Plaintiff and all members of the Class were harmed by Defendants' common  
3 course of wrongful conduct with respect to the entire slate of JPM Smartretire  
4 Passiveblend Funds offered to participants in the Plan.

5           54. Plaintiff has been injured by the breaches of fiduciary duty and  
6 prohibited transactions alleged above and is committed to fairly, adequately, and  
7 vigorously representing and protecting the interests of the members of the Class.

8           55. Plaintiff has retained counsel competent and experienced in ERISA  
9 class actions.

10          56. Neither Plaintiff nor his counsel have any interests that conflict with  
11 those of the Class and Plaintiff is otherwise an adequate representative of the Class.

12          57. Class certification is appropriate pursuant to Fed. R. Civ. Proc. 23(b)(1)  
13 because the prosecution of separate actions by individual members of the Class  
14 would create a risk of inconsistent or varying adjudications which would establish  
15 incompatible standards of conduct for Defendants, and/or because adjudications  
16 regarding individual members of the Class would as a practical matter be dispositive  
17 of the interests of non-party members of the Class.

18          58. In the alternative, class certification is appropriate under Fed. R. Civ.  
19 Proc. 23(b)(3) because common issues of law and fact predominate over questions  
20 affecting only individual members of the Class. The only individualized issues will  
21 be the amount of damage each member of the Class incurred from the misconduct  
22 alleged above and such damages can be readily calculated based on business records  
23 maintained by Defendants and/or the Plan.

24          59. A class action is superior to other available methods for the fair and  
25 efficient adjudication of this controversy. Defendants injured Plaintiff and the  
26 members of the Class by causing them to pay excessive and improper fees, thus  
27 diminishing their investment returns. This diminution of returns is, on an individual  
28 level, small and difficult to detect but in the aggregate is substantial. Individual

1 participants who have invested in the JPM Smartretire Passiveblend Funds have an  
2 insufficient stake in the outcome of this matter to devote substantial resources to  
3 pursue it.

4 60. The names and address of members of the Class are available from  
5 Defendants and/or the Plan. The identity of class members is readily ascertainable  
6 and adequate notice can easily be provided to members of the Class if required.

7 **X. CLAIMS FOR RELIEF**

8 **COUNT ONE – THE SAFEWAY DEFENDANTS’ BREACHES OF**  
9 **FIDUCIARY DUTY**

10 61. Plaintiff repeats and realleges each of the allegations in the foregoing  
11 paragraphs as if fully set forth in this Count One.

12 62. ERISA § 404(a)(1), 29 U.S.C. § 1104(a)(1), requires that plan  
13 fiduciaries discharge their duties to the plan solely in the interests of plan  
14 participants and beneficiaries and with the care, skill, prudence, and diligence under  
15 the circumstances that a prudent person acting in a like capacity and familiar with  
16 such matters would use in the conduct of a similar enterprise.

17 63. The Safeway Defendants breached the duty of prudence in connection  
18 with selecting the JPM Smartretire Passiveblend Funds as investment options  
19 because, among other things, these funds charged higher fees than comparable  
20 funds, had no meaningful record of performance so as to indicate that higher  
21 performance would offset this difference in fees, and was managed by a company  
22 affiliated with the Plan’s recordkeeper, JPMRPS, and trustee, Chase.

23 64. The duty of prudence also requires that plan fiduciaries investigate  
24 whether revenue sharing is a reasonable and cost-effective way to pay for  
25 administrative services incurred in connection with a plan, such as record-keeping  
26 services.

27 65. The Safeway Defendants breached the duty of prudence in connection  
28 with agreeing to the revenue sharing arrangement for the JPM Smartretire

1 Passiveblend Funds because that arrangement resulted in excessive fees for record-  
2 keeping services as compared to a per-participant fee for such services.

3 66. This breach of duty became even more pronounced as the amounts  
4 invested in the JPM Smartretire Passiveblend Funds, and thus the revenue paid out  
5 to JPMRPS / Great-West, more than doubled between 2011 and 2014, while the  
6 total number of active participants in the plans investing in these funds decreased.  
7 The Safeway Defendants took no action to reduce the asset-based charge under the  
8 revenue sharing arrangement to account for the ever-increasing amounts held in the  
9 JPM Smartretire Passiveblend Funds.

10 67. The Safeway Defendants' breaches caused Plaintiff and the members of  
11 the Class to pay excessive and/or improper fees, thus reducing their investment  
12 returns.

13 68. Under ERISA § 409, 29 U.S.C. § 1109, and 502(a), the Safeway  
14 Defendants are liable to make good to Plaintiff, the Class, and the Plan the losses  
15 they experienced because of the Safeway Defendants' breaches of fiduciary duty.  
16 And under ERISA § 502(a)(1) & (2), 29 U.S.C. § 1132(a)(1) & (2), Plaintiff as a  
17 participant in the Plan may bring a civil action to establish this liability.

18 69. Further, under ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3), the Court  
19 may also award equitable relief to Plaintiff, the Class, and the Plan to prevent the  
20 continuation of the Safeway Defendants' breaches of their fiduciary duties.

## 21 **COUNT II – DEFENDANTS' PROHIBITED TRANSACTIONS**

22 70. JPMRPS / Great-West was and is a "party in interest" with respect to  
23 the Plan pursuant to ERISA § 3(14)(B), 29 U.S.C. § 3(14)(B), as a "person  
24 providing services to such plan."

25 71. ERISA § 406(a)(1)(C), 29 U.S.C. § 1106(a)(1)(C), prohibits a plan  
26 fiduciary from causing the plan to engage in a transaction that constitutes any  
27 furnishing of goods, services, or facilities between the plan and a party in interest to  
28 that plan.



1 F. A Declaration that the Safeway Defendants and JPMRPS / Great-West  
2 and each of them engaged in transactions prohibited by ERISA not subject to any  
3 exemption;

4 G. An Order compelling the Safeway Defendants and Great-West to  
5 reimburse Plaintiff, the members of the Class, and the Plan for any compensation  
6 received by JPMRPS / Great-West as a result of transactions prohibited by ERISA;

7 H. An Order enjoining the Safeway Defendants and Great-West from  
8 continuing to engage in transactions prohibited by ERISA;

9 I. An Order awarding costs under 29 U.S.C. § 1132(g);

10 J. An Order awarding attorneys' fees under 29 U.S.C. § 1132(g) or as  
11 provided by law;

12 K. An Order for other appropriate equitable relief against Defendants; and

13 L. Such other and further relief as the Court may deem just and proper.  
14

15 Dated: August 25, 2016

Respectfully submitted,

17 /s/ Kyle G. Bates

18  
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