IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

LINDA MCLAIN and
COLLEEN GAMER
individually on behalf of themselves
and those similarly situated

Case No.: 3:16-CV-00502

Plaintiffs,

CLASS ACTION
COMPLAINT

v.

SAMUEL POPPELL and
EMERALD COAST EYE
INSTITUTE, LLC f/k/a EMERALD
COAST EYE INSTITUTE, PA

Defendants
_____/

COMPLAINT

Plaintiffs Linda McLain and Colleen Gamer ("Plaintiffs," "McLain," or "Gamer") bring this action against Samuel Poppell and Emerald Coast Eye Institute, LLC f/k/a Emerald Coast Eye Institute, PA (hereinafter "ECEI," "Poppell," or collectively "Defendants") on behalf of themselves and on behalf of similarly situated 401(k) plan participants. Based on personal knowledge and information obtained from investigation by counsel and discovery in this matter, Plaintiffs allege as follows:

INTRODUCTION

1. Plaintiff Linda "Lynn" McLain (hereinafter "McLain") is currently a

resident of Davidson County, Tennessee. McLain was employed as Practice Administrator of ECEI until she was terminated on or about July 17, 2015. McLain was a participant, as defined in ERISA § 3(7), 29 U.S.C. § 1002(7), in the ECEI 401(k) Retirement Plan ("the ECEI Plan" or "Plan") during the relevant time period. The ECEI Plan is a defined contribution plan subject to ERISA. At all relevant times, prior to her termination, Ms. McLain had 401k funds allocated to the ECEI Plan.

2. Plaintiff Colleen Gamer (hereinafter "Gamer") is a resident of Okaloosa County, Florida. She was previously employed with ECEI as Clinical Director until on or about July 17 2015, when she was terminated. Gamer was a participant, as defined in ERISA § 3(7), 29 U.S.C. § 1002(7), in the ECEI Plan. At all relevant times, prior to her termination, Ms. Gamer had 401k funds allocated to the ECEI Plan.

3. Defendant Emerald Coast Eye Institute, LLC (hereinafter "ECEI"), is a Delaware corporation with its principal place of business in Okaloosa County, Florida. ECEI provides eye care services and surgeries in Fort Walton Beach, Destin, and Crestview offices. ECEI regularly conducts and transacts business in Okaloosa County, Florida. ECEI, LLC was formerly known as Emerald Coast Eye Institute, PA. However, on or about January 29, 2010, the business name was transitioned from ECEI, PA to ECEI, LLC. Throughout the name change ECEI

retained the same employees, business address, and even bank account numbers.

4. Defendant Samuel Poppell (hereinafter "Poppell") is a resident of Okaloosa County, Florida. He is the founder, principal, and registered agent of ECEI. Poppell was the trustee and fiduciary of the ECEI Plan. At all relevant times, Poppell selected and controlled the investments held in the ECEI Plan.

5. Plaintiffs McLain and Gamer sue on their own behalf, and, as specified below, on behalf of participants in and beneficiaries of the ECEI plan. Plaintiffs and the class have exhausted administrative remedies. On June 7, 2016, Plaintiff McLain made a demand on Defendants on behalf of herself and the other participants of the plan requesting Defendants remedy the losses caused by Defendants' wrongful actions. However, Defendants have never responded to Plaintiff McLain's letter or remedied the damages caused by their breaches of fiduciary duties.

JURISDICTION AND VENUE

6. The Court has subject matter jurisdiction over this matter pursuant to ERISA § 502(e)(2), 29 U.S.C. § 1132(e)(2), and 28 U.S.C. § 1331.

7. Venue is proper in this district because Defendants reside in this District, Defendants conduct business in this District, and the harm complained of herein emanated from this District.

FACTUAL ALLEGATIONS

The 401(k) Plan

8. At all times relevant to this Complaint, the ECEI Plan involved in this matter was an employee benefit plan within the meaning of ERISA.

9. At all times relevant to this Complaint, the ECEI Plan was a "defined contribution" or "individual account" plan within the meaning of ERISA because, among other reasons, the plans provided for individual accounts for each participant and for benefits based solely upon the amount contributed to the participant's account, as well as any income, expenses, gains and losses, and forfeitures of accounts of other participants that could be allocated to such participants' accounts.

10. At all times relevant to this Complaint, the participants in the ECEI Plan were limited to the investments selected for the plan by Defendants.

11. Plaintiffs McLain and Gamer were participants in the ECEI Plan at all relevant times until their terminations in or around July 2015 or until the ECEI Plan was terminated in or around October 2015.

Defendants' Duties

12. ERISA defines a fiduciary as someone who "(i) exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of

its assets, (ii) renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) has any discretionary authority or discretionary responsibility in the administration of such plan." ERISA § 3(21)(A)(i), 29 U.S.C. § 1002(21)(A)(i). People and entities are fiduciaries pursuant to ERISA not only when they are named as fiduciaries under ERISA § 402(a)(1), 29 U.S.C. § 1102(a)(1), but also when they perform such fiduciary functions. Investment managers are also ERISA fiduciaries. ERISA defines in relevant part an "investment manager" as one who: "has the power to manage, acquire, or dispose of any asset of a plan"; is "registered as an investment adviser"; is a bank; or has acknowledged in writing that he or she is a fiduciary with respect to the plan. ERISA § 3(38), 29 U.S.C. § 1002(38). ERISA's mandate that fiduciaries operate with an "eye single" to the interests of plan participants and beneficiaries. *See, e.g., John Blair Communications, Inc. Profit Sharing Plan v. Telemundo Group, Inc. Profit Sharing Plan*, 26 F.3d 360, 367 (2d Cir. 1994). ERISA's fiduciary duties are, of course, "the highest known to the law." *Donovan v. Bierwirth*, 680 F.2d 263, 272 n.2 (2d Cir. 1982).

13. At all times relevant, Defendants served as Investment Advisor, Investment Manager, Trustee and/or Custodian of the ECEI Plan. Defendants were fiduciaries to the ECEI Plan who possessed investment discretion and made

investment decisions relating to the ECEI Plan. The participants did not possess the ability to direct the manner in which the Defendants entities invested or allocated the ECEI Plan's assets.

14. One critical aspect of ERISA's duty of prudence is the duty to diversify. ERISA requires that a fiduciary "diversify[] 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." 29 U.S.C. § 1104(a)(C). Defendants were keenly aware of their duties as fiduciaries. In fact, third party administrator and record-keeper of the ECEI Plan, Warren Averett, provided Defendants a Department of Labor brochure entitled "Meeting Your Fiduciary Duties", which stated, in part:

> Fiduciaries have important responsibilities and are subject to standards of conduct because they act on behalf of participants in a retirement plan and their beneficiaries. These responsibilities include:
>
> - Acting solely in the interest of plan participants and their beneficiaries and with the exclusive purpose of providing benefits to them;
> - Carrying out their duties prudently;
> - Following the plan documents (unless inconsistent with ERISA)
> - Diversifying plan investments; and
> - Paying only reasonable plan expenses.
>
> The duty to act prudently is one of a fiduciary's central responsibilities under ERISA. It requires expertise in a variety of areas, such as investments. Lacking that expertise, a fiduciary will want to hire someone with that professional knowledge to carry out the investment and other functions.

Fiduciary Investment Standards under ERISA

15. Under ERISA, "[a] fiduciary must discharge his responsibilities 'with the care, skill, prudence, and diligence' that a prudent person 'acting in a like capacity and familiar with such matters' would use." *Tibble v. Edison Int'l*, 135 S. Ct. 1823, 1828, 191 L. Ed. 2d 795 (2015) (quoting § 1104(a)(1)).

16. One critical aspect of ERISA's duty of prudence is the duty to diversify. ERISA requires that a fiduciary "diversify[] 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." 29 U.S.C. § 1104(a)(C). The duty to diversify requires, among other things, diversity not only among specific securities but also among industries or sectors. *In re Unisys Savings Plan Litig*., 74 F.3d at 438.

17. Prudent investment management requires that securities portfolios be diversified because diversification reduces risk without reducing expected returns. Principles of diversification enable an investment portfolio to take maximum advantage of market conditions in specific sectors and to protect against downturns in one particular sector.

18. When a portfolio is concentrated in a specific security, or even a specific sector, the value of the portfolio can drop sharply if that sector experiences a general downturn. If the portfolio, however, is composed of multiple securities across multiple sectors, some may go down in value while others may remain

stable or go up. Different types of fixed income categories will generally not lose value at the same rate or at the same time.

19. Correlation is an industry standard that measures how different securities move in tandem. A diversified portfolio should consist of a portfolio of securities that do not move in unison. Two securities that are perfectly correlated is a 1. Two securities that are perfectly inversely correlated is -1. Two securities that have no correlation is 0 – often referred to as low correlation.

20. Modern Portfolio Theory ("MPT"), the industry standard for prudent portfolio management for over twenty years, employs the use of correlations for identifying categories and sectors that are loosely correlated and do not move in tandem. Creating a diversified portfolio of fixed income securities from multiple sectors and sub-sectors, and multiple categories, which have low correlations, is the foundation of MPT.

21. Financial professionals generally assert that asset allocation is the most important determinant of variability of returns, accounting for more than 90 percent of the differences in performance across portfolios. This assertion stems from the well-known studies by Brinson, Hood, and Beebower which state, "…investment policy dominates investment strategy (market timing and security selection), explaining on average 93.6 percent of the variation in total plan return."[1]

[1] Ibbotson Associates, ed. Stocks, Bonds, Bills, and Inflation 2005 Yearbook. Chicago: Ibbotson

In simple terms, asset allocation is simply the mix of stocks, bonds, cash, and other investments in a portfolio.

22. Under ERISA, fiduciaries have the duty to investigate alternative investments to determine if other investments are available which might deliver appropriate benefits for less risk.

23. Not only do ERISA fiduciaries have the duty to select prudent investments and the duty to diversify from the outset, but because fiduciary duty under ERISA is "derived from the common law of trusts," *Central States, Southeast & Southwest Areas Pension Fund v. Central Transport, Inc.*, 472 U.S. 559, 570, a trustee under ERISA "has a continuing duty" – "separate and apart from the duty to exercise prudence in selecting investments at the outset" - "to monitor trust investments and remove imprudent ones." *Tibble v. Edison Int'l*, 135 S. Ct. 1823, 1825, 191 L. Ed. 2d 795 (2015).

24. Undertaking some kind of investigation regarding the merits of the securities held in an ERISA Plan or belief that one's actions are in the best interest of the plan is insufficient to satisfy the duties of prudence and diversification under ERISA, if the means themselves were not prudent or appropriate, particularly where application of prudent means could have avoided undue risk. *See GIW Indus., Inc. v. Trevor, Stewart, Burton & Jacobsen, Inc.*, 895 F.2d 729, 732–33

Associates, 2005.

(11th Cir. 1990) ("even though appellant investigated market conditions before making its investment decision, it did not employ the proper methods to structure the investment to fit the specific needs of [the] Fund . . . .") (citing *Donovan v. Mazzola*, 716 F.2d 1226, 1232 (9th Cir.1983) (cert. denied, 464 U.S. 1040 (1984) (the question is whether the trustees, at the time they engaged in the challenged transactions, "employed the appropriate methods to investigate the merits of the investment and to structure the investment")).

Defendants' Actions Breached their Duties under ERISA

25. During the relevant time period, Defendants, through Defendant Poppell, selected the investments for the ECEI Plan and directed the allocation of the Plan assets to those investments. Defendants, through Defendant Poppell, also directed all changes in Plan investments and allocation among those investments during the relevant time period.

26. Poppell was not a licensed or registered investment advisor or financial professional, and he did not maintain certifications in any investment related area. He had no meaningful expertise, education, or professional knowledge in finance, investment management, or portfolio management.

27. On multiple occasions Defendants rejected suggestions and recommendations, including from Warren Averett, to retain a qualified investment advisor or manager to manage the ECEI Plan portfolio.

28. Defendants improperly allocated and managed the ECEI Plan. Defendants failed to prudently invest the ECEI Plan, failed to diversify Plan investments, and failed to properly monitor and remove inappropriate holdings. For instance, Defendants chose to significantly concentrate the ECEI Plan assets in a single holding, VirnetX (VHC), and further failed to remove this holding as it continued to lose value. The ECEI Plan's non-cash investments were at times entirely concentrated, or nearly entirely concentrated, in VirnetX.

29. On information and belief, Defendants learned of VirnetX through online message boards and unqualified or speculative investment blog-type websites. Defendants did not conduct sufficient or adequate due diligence of VirnetX or many of the other securities purchased in the ECEI Plan portfolio.

30. VirnetX has widely been identified as, referred to as, and accused of being a "Patent Troll."[2] Patent Trolls are companies that exist primarily or exclusively to pursue aggressive patent-infringement lawsuits against other companies.

31. On information and belief, VirnetX has either never sold any actual product or only sold a *de minimis* amount of actual product. In fact, VirnetX has

[2] James Bessen, et al., *The Private and Social Costs of Patent Trolls*, 34 REGULATION 4 (Winter 2011-2012); John Paczkowski, *VirnetX Holding Soon to Be Holding $105.75 Million of Microsoft's Money*, All Things D (March 17, 2010), *available at* http://allthingsd.com/20100317/virnetx-holding-soon-to-be-holding-105-75-million-of-microsofts-money/ (last accessed Sept. 18, 2016); Rhodri Marsden, *How VirnetX beat Apple: The Strange Case of the Patent Trolls*, The Independent (Feb. 17, 2016) available at http://www.independent.co.uk/life-style/gadgets-and-tech/how-virnetx-beat-apple-the-strange-case-of-the-patent-trolls-a6880036.html (last accessed Sept. 18, 2016); Jeff John Roberts, *After $625M Win in Apple Trial, Patent Firm Moves to Shut Down FaceTime*, Fortune (May 26, 2016) available at http://fortune.com/2016/05/26/facetime-injunction/ (last accessed Sept. 18, 2016).

little, if any, ongoing Research and Development, and the company owned only a handful of patents in 2012. Before VirnetX became a publicly traded company, many of its supposedly valuable patents lay dormant for a decade or more. VirnetX's primary business has been acting as a patent troll, acquiring dozens of patents and attempting to bring litigation against alleged violators of those patents. Indeed, during the time the ECEI Plan was concentrated in VirnetX, the value of VirnetX's stock largely hinged upon the outcome of litigation with the Apple Company, a fact well known to Poppell. As such, VirnetX's business model was inherently speculative and prone to extreme volatility.

32. As of December 31, 2014, the ECEI Plan's total exposure to VirnetX was in excess of 50%, with the remaining holdings concentrated in cash equivalents. By the end of 2014, the ECEI Plan's position in VirnetX had already declined in value by $543,235.91 since Defendants' initial purchase.

33. On or about the morning of September 16, 2014, VirnetX stock plummeted in value by nearly 50%. Through the filing of this Complaint, VirnetX's share prices have declined over 90% compared to the share price on June 1, 2012.

34. A portfolio concentrated in VirnetX would have performed radically different from every generally accepted investment benchmark. During that same time period that VirnetX's shares declined in value by over 90%, the Nasdaq

experienced gains of approximately 90%, the S&P 500 experienced gains of approximately 67%, and the Dow Jones experienced gains of approximately 49%. A concentrated investment in VirnetX grossly underperformed virtually every recognized benchmark during the time period from 2012 to the present.

35. Exposing the substantial majority of the ECEI Plan's investment assets to a single security in a single sector is per se a violation of ERISA's duty of prudence and duty to diversify because such a high exposure to the technology sector, and even worse just one company within the technology sector, exponentially increased the "risk of large losses" in the event of a general downturn in the technology market or a VirnetX specific downturn caused specific issues relating to the company's business.

36. Defendants knew at the time they made these investments how poorly diversified and allocated they were. The portfolio allocations selected by Defendants otherwise failed to comply with prudent investment standards.

37. The ECEI Plan's portfolio was improperly allocated and managed, including being overweighted to equities and other higher risk investments without appropriate asset allocation or diversification to hedge against unnecessary risks. The Plan also held an outsized cash position which failed to hedge against the significant risks of the concentrated VirtnetX holding.

38. Defendants knew or should have known that in taking such significant risks they were not acting in the best interest of plan participants and their beneficiaries, particularly in light of the fact that numerous class members were at or near retirement age.

39. Defendants either intentionally concentrated the ECEI Plan's assets in investments they knew to be volatile and risky, or at minimum, were negligent and not reasonably prudent in researching and understanding the risks of investments or even understanding or applying basic investment principles such as asset allocation and diversification. Defendants further failed to conduct adequate due diligence or obtain appropriate education and/or certifications necessary to appropriately manage the ECEI Plan's portfolio. Defendants additionally failed to monitor and remove imprudent investments.

40. In or around October 2015, Defendants terminated the ECEI Plan.

41. As a result of Defendants' actions, Plaintiffs and members of the class suffered significant losses. In particular, the ECEI Plan suffered actual losses in excess of $600,000, and additional underperformance damages estimated to be in excess of $500,000.

Defendants' Wrongful and Retaliatory Termination of Plaintiffs who were Acting as Whistleblowers

42. Plaintiffs McLain and Gamer each separately complained regarding the Defendants' the mismanagement of the ECEI Plan and the Defendants' failure

to meet their fiduciary duty to the plan, plan participants, and their beneficiaries. Following their complaints, McLain and Gamer were both terminated.

43. After noting the losses experienced by the ECEI Plan in the fall of 2014, Plaintiff McLain contacted the ECEI Plan's third party administrator to express concerns relating to losses suffered by the Plan – and therefore by the participants.

44. In or around February 2015, Plaintiff McLain scheduled a telephone call with Warren Averett, specifically Gene Barker ("Barker") and Ilona Borish ("Borish"), to address her continued concerns specifically regarding the prudent management, fiduciary duty, and diversification requirements of ERISA. After Plaintiff McLain's phone call, Borish spoke with Poppell. At that time, Borish informed Poppell of the concerns raised by Plaintiff McLain regarding the management of the ECEI Plan. At that time, on or about February 19, 2015, Borish noted to Poppell that the investments in the ECEI Plan were not diversified and that they were "in cash and in one specific security VIRNETX." Borish reminded Poppell that "[a]s trustee of the plan, you are investing all assets of all participants and have a fiduciary obligation to invest prudently." Borish again suggested Defendants retain a properly credentialed investment advisor to manage the ECEI Plan.

45. In or around late June 2015, Plaintiff McLain delivered the ECEI Plan statements to employees pursuant to Defendants' instructions. As a number of plan participants began to complain, Plaintiff McLain communicated those concerns to Defendants. Poppell became upset and threatened to close the ECEI Plan altogether (an action he ultimately pursued). At that time, Plaintiff McLain again reached out to the third party administrators at Warren Averett and suggested an additional meeting to address the concerns with the management of the ECEI Plan.

46. On or about June 28, 2015, Plaintiff Gamer confronted Poppell regarding the mismanagement of the ECEI Plan and the significant losses the Plan had incurred under Poppell's management. When Plaintiff Gamer inquired as to when Poppell would remedy the situation caused by his imprudent management, Poppell became angry and terminated the conversation.

47. After inquiring as to the ECEI Plan at the end of June, Plaintiff Gamer was terminated on July 17 2015.

48. In or around July 2015, Plaintiff McLain again contacted Warren Averett in an effort to inquire as to the administration of the ECEI Plan and the consistency of Defendants' management with Defendants' duties under ERISA. In response to McLain's inquiries, on or about July 16, 2015, Borish emailed Poppell with a number of recommendations, including meeting with employees to address their concerns. Borish *again* provided Poppell with a copy of the Department of

Labor brochure titled "Meeting Your Fiduciary Responsibilities" and recommended that Poppell read the brochure *again*. Borish also suggested several alternatives to Poppell continuing to serve as the trustee of the plan, and Borish again recommended that Poppell meet with an outside investment advisor regarding "changing the current operations of your plan."

49. The next morning, July 17, 2015, Defendants also terminated Plaintiff McLain. Significantly, both Plaintiffs McLain and Gamer were terminated by Defendants on this same date after challenging Poppell's management of the Plan.

50. Defendants' decisions to terminate Plaintiffs McLain and Gamer were intended primarily to retaliate against Plaintiffs McLain and Gamer for exercising their rights under ERISA and/or to interfere with Plaintiffs' ability to attain their vested rights.

CLASS ALLEGATIONS

51. **Class Definition**. Plaintiffs brings this matter as a class action pursuant to Federal Rules of Civil Procedure 23(a), (b)(1), (b)(2), and, in the alternative, (b)(3). Plaintiffs file this case on behalf of the following proposed class:

> All participants of the ECEI plan, as well as beneficiaries of those plans, who were invested directly or indirectly in the ECEI Plan between the date on which Poppell became Trustee and assumed investment management for the ECEI Plan and the date in October 2015 on which the ECEI Plan was terminated. Excluded from the Class are the jurists to whom this case is assigned, as well as their

respective staffs; counsel who appear in this case, as well as their respective staffs, including experts they employ; the Defendants in this matter; any person, firm, trust, corporation, officer, director, or other individual or entity in which a Defendant has a controlling interest; and the legal representatives, agents, affiliates, heirs, successors-in-interest, or assigns of any such excluded party.[3]

52. **Numerosity**. The members of this Class are so numerous that joinder of all members is impracticable. While the exact number of members is unknown to Plaintiffs at this time, and can be ascertained only through discovery, Plaintiffs reasonably believe that more than twenty individuals are members or beneficiaries of the ECEI Plan during the Class Period.

53. **Commonality**. The claims of Plaintiffs and the proposed Class have a common origin and share a common basis. All Class members suffered from the same misconduct complained of herein, and they all suffered injury as a result of the breaches of duties and violations of ERISA that form the basis of this lawsuit. Proceeding as a class is particularly appropriate here because the ECEI Plan's assets are held in one the same Fidelity brokerage account. Furthermore, common questions of law and fact exist as to all members of the class. The many questions of law and fact common to the Class include, but are not limited to:

a. whether the Defendants are fiduciaries under ERISA;

[3] This Class definition is not intended to circumscribe the relevant time period for this action. Conduct relevant to Plaintiffs injuries may have occurred outside of the class period.

b. whether the Defendants breached their fiduciary duties under ERISA;

c. whether the Defendants actions complained of herein injured plan participants and their beneficiaries who had invested in the ECEI Plan.

54. **Typicality**. Plaintiffs' claims are typical of the claims of the members of the Class because their class claims are substantively identical to the claims of the class members. If each member of the Class were to bring and prosecute these claims individually, each member of the Class would necessarily be required to prove the instant claims upon the same material and substantive facts and would seek the same type of relief.

55. **Adequacy**. Plaintiffs will fairly and adequately protect the interests of the Class members. Plaintiffs have no interests that are, or would be, antagonistic to or in conflict with those of the members of the Class. Plaintiffs will vigorously protect the interests of the members of the Class. Moreover, Plaintiffs have retained counsel who are competent and experienced in class actions, ERISA, and securities litigation matters. The undersigned counsel have and will devote the time and other resources necessary to litigate this case as effectively as possible.

56. **Rule 23(b)(1)(A) and (B) requirements**. Class certification in this ERISA action is warranted under Federal Rule of Civil Procedure 23(b)(1)(A)

because prosecution of separate actions by members of the Class would create a risk of establishing incompatible standards of conduct for Defendants. Certification also is warranted under Federal Rule of Civil Procedure 23(b)(1)(B) because prosecution of separate actions by individual Class members would, as a practical matter, be dispositive of the interests of the other members not parties to the actions, or substantially impair or impede their ability to protect their interests.

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

58. **Rule 23(b)(3) requirements**. In the alternative, certification under Federal Rule of Civil Procedure 23(b)(3) is appropriate because questions of law and fact common to members of the Class predominate over any questions (if any) affecting only individual Class members. Moreover, a class action is superior to other available methods for the fair and efficient adjudication of this controversy.

COUNT I: VIOLATION OF ERISA §§ 404(a)(1)(B) and (C)
BREACH OF DUTIES OF PRUDENCE AND DIVERSIFICATION
(BY ALL PLAINTIFFS AGAINST ALL DEFENDANTS)

59. Plaintiffs reallege and incorporate by reference paragraphs 1-58 as if set forth fully herein.

60. Defendants were fiduciaries, as discussed above, for the Plan and their participants, including Plaintiffs and the proposed Class.

61. A fiduciary must comply with the duty of prudence, which includes, *inter alia*, the duty to diversify and to monitor and remove improper investments. In carrying out these duties, fiduciaries must comply with the care, skill, prudence, and diligence of a prudent person under the circumstances then prevailing.

62. The U.S. Department of Labor ("DOL") and case law have interpreted this duty. In order to comply with the duty of prudence, a fiduciary must give "appropriate consideration to those facts and circumstances that, given the scope of such fiduciary's investment duties, the fiduciary knows or should know are relevant to the particular investment or investment course of action involved, including the role that the investment or investment course of action plays in that portion of the plan's investment portfolio with respect to which the fiduciary has investment duties." 29 C.F.R. § 2550.404a-1(b)(1) "Appropriate consideration," according to DOL regulations, includes but is not necessarily limited to: "(i)[a] determination by the fiduciary that the particular investment or investment course of action is reasonably designed, as part of the portfolio (or whether applicable, that portion of the plan portfolio with respect to which the fiduciary has investment duties), to further the purposes of the plan, taking into consideration the risk of loss and the opportunity for gain (or other return) associated with the investment or

investment course of action; and (ii) [c]onsideration of the following factors …: (A) [t]he composition of the portfolio with regard to diversification, (B) [t]he liquidity and current return of the portfolio relative to the anticipated cash flow requirements of the plan; and (c) [t]he projected return of the portfolio relative to the funding objectives of the plan." 29 C.F.R. § 2550.404a-1(b)(2).

63. Defendants' conduct with respect to the ECEI Plan violated in numerous ways their fiduciary duties of prudence and diversification as alleged above.

64. Defendants' actions directly and proximately caused substantial financial harm to Plaintiffs and the proposed Class. As a result of this wrongdoing, Defendants are liable for all resulting loss and damage.

COUNT II: ERISA RETALIATION UNDER 29 U.S.C. § 1140
(PLAINTIFFS LYNN MCLAIN AND COLLEEN GAMER INDIVIDUALLY AGAINST ALL DEFENDANTS)

65. Plaintiffs reallege and incorporate by paragraphs 1-58 as if set forth fully herein.

66. Plaintiffs were participants in the ECEI Plan which was governed by ERISA, and Plaintiffs and/or their family members participated in ECEI's health insurance plan.

67. Plaintiffs engaged in protected activities by complaining and participating in inquiries relating to the ECEI Plan and Defendants' failure to fulfill their fiduciary duties relating to the ECEI Plan.

68. As a result, Defendants terminated Plaintiffs McLain and Gamer. Plaintiffs' complaints were a direct and proximate cause of their termination. Defendants specifically intended to retaliate against Plaintiff and violated ERISA. 29 U.S.C. § 1140.

69. Plaintiffs McLain and Gamer seek appropriate equitable and other relief to redress Defendants' violations and to enforce the applicable provisions of ERISA and the governing plans. 29 U.S.C. § 1132(a)(3).

COUNT III: WRONGFUL TERMINATION UNDER FLORIDA'S WHISTLE-BLOWER ACT
(PLAINTIFFS LYNN MCLAIN AND COLLEEN GAMER INDIVIDUALLY AGAINST ALL DEFENDANTS)

70. Plaintiffs reallege and incorporate by paragraphs 1-58 as if set forth fully herein.

71. At all times relevant, Plaintiffs were entitled to the protections of the Florida Whistle-Blower Act as employees of Defendants, who were "employers" as that term is defined by Section 448.101(1), Florida Statutes.

72. The foregoing facts and circumstances demonstrate that Defendants have violated Section 448.102, Florida Statutes, by unlawfully retaliating against

Plaintiffs McLain and Gamer because of their above-referenced statutorily protected activity.

73. Plaintiffs McLain and Gamer have been damaged as a direct and proximate result of the actions of Defendants. Such damages, which are both past and future, include loss of employment, wages, raises in increments in such wages, and the loss of non-salary benefits and emoluments of employment. Additionally, Plaintiffs have suffered and will continue to suffer mental anguish, pain and suffering, humiliation, embarrassment, and mental and emotional distress.

74. Plaintiffs have further been required to retain attorneys to assist them in asserting their claims and protecting their rights.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully pray for relief as follows:

A. A determination that this action is a proper class action and certification of the proposed Class, with Plaintiffs as class representative and its counsel as Class Counsel, pursuant to Federal Rule of Civil Procedure 23.

B. A declaration that the Defendants, and each of them, have breached their ERISA duties to the Plaintiffs and the Class.

C. An order compelling the Defendants to make good to the Plaintiffs and the Class their plans the losses resulting from Defendants' breaches of their fiduciary duties; and to disgorge to the Plaintiffs and the Class all monies the

Defendants made through their wrongful use of the Plaintiffs and the Class's assets;

D. Imposition of a Constructive Trust on any amounts by which any Defendant was unjustly enriched at the expense of the Plaintiffs and the Class, and their plans as a result of the aforementioned ERISA violations;

E. An amount equal to the amount of any losses to the Plaintiffs and the Class, and the ERISA plans included in the Class to be allocated among the participants' individual accounts within the plans in proportion to the accounts' losses;

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

G. An award of attorneys' fees pursuant to 29 U.S.C. § 1132(g) and other law;

H. An award for equitable restitution and other appropriate equitable and injunctive relief against the Defendants;

I. For Plaintiffs McLain and Gamer's individual 29 U.S.C. § 1140 claims, any and all wages and economic benefits lost as a result of Defendants' ERISA violations, including Plaintiffs' wrongful discharge under ERISA, including but not limited to reinstatement, back pay, front pay, and any other appropriate equitable relief pursuant to 29 U.S.C. § 1132(a)(3) to redress Defendants' violations and to enforce the terms of the governing ERISA plans;

J. For Plaintiffs McLain and Gamer's individual claims under Florida's Whistle-Blower Act, Plaintiffs demand damages for lost wages, benefits, and other remuneration; reinstatement or back pay in the event reinstatement is not awarded; reinstatement of full fringe benefits and seniority rights; damages for mental and emotional distress; compensatory damages; interest – including pre-judgment interest on lost wages; costs; attorneys' fees; and such other relief as this Court deems appropriate; and

K. An award of such other and further relief as the Court deems just and proper.

JURY DEMAND

Plaintiffs hereby demand a trial by jury on all issues so triable.

Dated: September 30, 2016

/s/ Michael C. Bixby

Michael C. Bixby, Esq.
Florida Bar No. 111367
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