# 23-1082 (L), 23-1172 (XAP)

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

JOSEPH VELLALI, individually and as representative of a class of participants and beneficiaries on behalf of the Yale University Retirement Account Plan, NANCY S. LOWERS, individually and as representative of a class of participants and beneficiaries on behalf of the Yale University Retirement Account Plan, JAN M. TASCHNER, individually and as representative of a class of participants and beneficiaries on behalf of the Yale University Retirement Account Plan, JAMES MANCINI, individually and as representative of a class of participants and beneficiaries on behalf of the Yale University Retirement Account Plan,

*Plaintiffs-Appellants-Cross-Appellees*,

RANAY P. CIRILLO, individually and as representative of a class of participants and beneficiaries on behalf of the Yale University Retirement Account Plan, TARA HEARD, individually and as representative of a class of participants and beneficiaries on behalf of the Yale University Retirement Account Plan,

*Plaintiffs*,

v.

YALE UNIVERSITY, MICHAEL A. PEEL,
THE RETIREMENT PLAN FIDUCIARY COMMITTEE,

*Defendants-Appellees-Cross-Appellants.*

On Appeal from the United States District Court for the
District of Connecticut, No. 3:16-cv-1345-AWT

## PRINCIPAL AND RESPONSE BRIEF AND SPECIAL APPENDIX OF DEFENDANTS-APPELLEES-CROSS-APPELLANTS

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## CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Defendant-Appellee-Cross-Appellant Yale University states that it has no corporate parents, and there is no publicly held corporation that owns more than 10 percent of its stock.

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# INTRODUCTION

Plaintiffs brought this case under the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1001 *et seq.*, to challenge the management of Yale University's retirement plan (the Plan). The Plan offers participants a variety of investment options – including annuities, which have long been a standard feature of university retirement plans. The university and the Plan's administrators (collectively, Yale) employ robust, industry-leading procedures for administering and safeguarding the Plan, and they have repeatedly negotiated reductions in fees charged by third-party service providers.

Nonetheless, in 2016, Plaintiffs sued Yale, alleging that Yale violated ERISA's fiduciary duties and engaged in prohibited transactions. In a kitchen-sink complaint, Plaintiffs attacked Yale's administration of the Plan in a variety of ways. They alleged (among other things) that Yale paid excessively high fees for recordkeeping services, failed to monitor Plan investments, offered too many investments, failed to select lower-cost share classes of some funds, and allowed one investment provider to offer a bundle of investment options instead of only the options Plaintiffs preferred.

The district court dismissed several of Plaintiffs' fiduciary-breach claims and granted Yale summary judgment on the prohibited-transaction

claims. Then, after a four-week trial, the jury returned a verdict for Yale on Plaintiffs' remaining claims. The trial evidence showed that Yale's recordkeeping fees were among the lowest of its peers and that Yale carefully monitored and managed the Plan's investment options. The jury found that Plaintiffs failed to prove any losses on their recordkeeping claim and failed to prove any breach of fiduciary duty on their other claims. The district court entered judgment for Yale.

Now Plaintiffs want a do-over, but there is no reason for the Court to give them one. Plaintiffs' main argument on appeal is to attack the jury instructions on damages. But the jury found for each claim that Plaintiffs failed to prove either breach or loss – which come before damages. So there is no need for this Court to review the damages instructions. Moreover, the instructions are correct. They stated that Yale could reduce the potential damages by showing that a prudent fiduciary "could have" made the same decision that Yale made. Plaintiffs proposed a "would have" standard, but that standard would hold plan fiduciaries liable for objectively reasonable decisions, contrary to ERISA.

Plaintiffs make a hodgepodge of other arguments about other jury instructions, the verdict form, evidentiary rulings at trial, and the summary-judgment ruling. Plaintiffs forfeited most of those arguments by failing to

raise them below, and the arguments are wrong. The district court carefully formulated the jury instructions and verdict form, following this Court's precedents, and none of the district court's evidentiary decisions is an abuse of discretion or prejudicial plain error. On the summary-judgment ruling, although the district court used a legal standard this Court later rejected, the claims at issue fail under the correct standard.

The Court therefore should affirm the judgment. If the Court remands for a trial on any issue, it should address Yale's conditional cross-appeal and instruct that the trial be conducted before the court, not a jury.

## JURISDICTIONAL STATEMENT

The district court had jurisdiction over this action under 28 U.S.C. § 1331. It entered final judgment on July 13, 2023. SA137.[1]

Plaintiffs timely filed a notice of appeal on July 25, 2023. A200. Defendants timely filed a notice of conditional cross-appeal on August 14, 2023. B112-13. This Court has jurisdiction under 28 U.S.C. § 1291.

## STATEMENT OF THE ISSUES

1. Whether Plaintiffs are entitled to a new trial on their claim of imprudence based on recordkeeping fees.

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[1] SA__ citations are to the Special Appendix filed with Plaintiffs' Opening Brief; A__ citations are to the Appendix filed with that brief; and B__ citations are to the Supplemental Appendix filed with this brief.

2. Whether Plaintiffs are entitled to a new trial on their claims of imprudence based on investment monitoring, share-class selection, and bundling.

3. Whether Plaintiffs are entitled to a new trial on all claims because witnesses and defense counsel characterized the Plan as "generous" and defense counsel stated that this litigation was "lawyer-driven."

4. Whether the Court should reverse the grant of summary judgment to Yale on Plaintiffs' prohibited-transaction claims.

5. Whether, if the case is remanded, Plaintiffs are entitled to a jury trial.

## STATEMENT OF THE CASE

Plaintiffs represent a class of Plan participants. SA41. They alleged that Yale violated ERISA's duties of prudence and of loyalty and engaged in prohibited transactions. A55-188. The United States District Court for the District of Connecticut, Hon. Alvin W. Thompson, dismissed two of Plaintiffs' imprudence claims and all of their disloyalty claims for failure to state a claim, SA1-40, and granted Yale summary judgment on the prohibited-transaction claims, SA41-111. A jury returned a verdict in favor of Yale on Plaintiffs' four remaining imprudence claims. SA121-27.

### A. ERISA's Requirements

ERISA "represents a careful balanc[e]" between protecting plan participants and beneficiaries and giving employers the flexibility they need to design and administer their plans. *Fifth Third Bancorp v. Dudenhoeffer*, 573 U.S. 409, 424-25 (2014) (internal quotation marks omitted). ERISA does not require employers to provide any particular level of benefit or even to offer benefit plans in the first place. *Lockheed Corp. v. Spink*, 517 U.S. 882, 887 (1996). Instead, it imposes duties on plan fiduciaries once an employer has decided to offer a benefit plan. 29 U.S.C. § 1001(b).

ERISA's duty of prudence requires a plan fiduciary to act "'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*, 575 U.S. 523, 528 (2016) (quoting 29 U.S.C. § 1104(a)(1)(B)). Prudence under ERISA "is measured according to" an "objective prudent person standard." *Chao v. Merino*, 452 F.3d 174, 182 (2d Cir. 2006) (internal quotation marks omitted). "ERISA does not impose a duty to take any particular course of action if another approach seems preferable," so long as the fiduciary follows a prudent process. *Id.* (internal quotation marks omitted).

ERISA's duty of loyalty requires a fiduciary to act "solely in the interest of the participants and beneficiaries" and "for the exclusive purpose" of

"providing benefits to participants and their beneficiaries" or "defraying reasonable expenses of administering the plan." 29 U.S.C. § 1104(a)(1)(A).

ERISA also prohibits a fiduciary from entering a transaction with "a party in interest" for plan services unless those services are necessary to administer the plan and the service provider's compensation is reasonable. 29 U.S.C. §§ 1106(a), 1108; *see Cunningham v. Cornell Univ.*, 86 F.4th 961, 975 (2d Cir. 2023).

To obtain damages in an ERISA fiduciary-breach case, the plaintiff must establish that the defendant breached its fiduciary duties, that the breach caused a loss to the plan, and the amount of that loss. *Cunningham*, 86 F.4th at 981. Then the burden shifts to the defendant to prove that the damages are less than the claimed loss because "some or all of the loss would have still occurred" had the fiduciary been prudent. *Id.*; *see* pp. 22-23*, infra*.

### B. Yale's Plan

The Plan was established under 26 U.S.C. § 403(b), SA43, which provides favorable tax treatment to retirement plans for universities and other nonprofit organizations.

The Plan is open to eligible faculty and staff at Yale University. SA43. It is a defined-contribution plan, where the value of a participant's account at retirement depends on the amount contributed and the performance of

the investments chosen. *LaRue v. DeWolff, Boberg & Assocs., Inc.*, 552 U.S. 248, 250 n.1 (2008). For each participant, Yale automatically contributes an amount equal to 5% of the participant's eligible compensation and matches the participant's contributions up to another 5%. B243-45 (Tr. 1086:20-1088:4).

Plan participants choose from a range of investment options. SA43. The Plan offers annuities provided by the Teachers Insurance and Annuity Association (TIAA). SA43. Annuities are long-term insurance contracts that, starting at retirement, guarantee regular payments for the lives of the beneficiaries. *NationsBank of N.C., N.A. v. Variable Annuity Life Ins.*, 513 U.S. 251, 254, 262 (1995). Many participants choose annuities because the guaranteed payments provide certainty in retirement. B373 (Tr. 2732:3-11).

TIAA is the principal provider of annuities to university retirement plans, and its annuities accounted for 78% of Plan assets in 2010. B157, 223 (Tr. 388:18-20, 904:2-24). The Plan also offers mutual funds from TIAA and Vanguard. SA43, 50.

Until 2012, Michael A. Peel, the university's vice president of human resources, administered the Plan with the assistance of the benefits department. B235-26, 274, 276 (Tr. 1082:12-1083:23, 1293:6-8, 1301:11-17). In

2012, Peel delegated management of the Plan to the Retirement Plan Fiduciary Committee (the Committee). B182-83 (Tr. 488:25-489:22).

At first, TIAA and Vanguard each were responsible for recordkeeping the accounts on their investment platforms. SA44. That was because TIAA would not allow others to recordkeep its annuities, and TIAA did not have the ability to recordkeep Vanguard funds. B157, 226, 303-04 (Tr. 388:13-17, 937:1-4, 1568:19-1569:20). In 2015, after TIAA became able to recordkeep both TIAA and Vanguard investments, Yale switched to TIAA as the Plan's only recordkeeper. B304-07 (Tr. 1569:20-1572:19).

### C. Plaintiffs' Lawsuit

Plaintiffs sued Yale for violating ERISA. A168-85. The complaint was a cookie-cutter complaint almost identical to complaints that Plaintiffs' counsel filed against other universities.[2]

Plaintiffs alleged that Yale acted imprudently by (1) offering too many investment options to participants, SA8; (2) allowing TIAA and Vanguard to charge unreasonable investment-management fees, SA11; (3) allowing

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[2] *See, e.g.*, Compl., *Cunningham v. Cornell Univ.*, No. 16-cv-6525, 2017 WL 4358769 (S.D.N.Y. Sept. 29, 2017), *aff'd*, 86 F.4th 961; Compl., *Cates v. Trs. of Colum. Univ.*, No. 16-cv-6524, 2021 WL 4839619 (S.D.N.Y. Oct. 13, 2021); Compl., *Sacerdote v. N.Y. Univ.*, 328 F. Supp. 3d 273 (S.D.N.Y. 2018) (No. 16-cv-6284), *aff'd*, 9 F.4th 95 (2d Cir. 2021).

TIAA and Vanguard to charge unreasonable recordkeeping fees, SA5; (4) failing to appropriately monitor the Plan's investment options and remove underperforming options, SA3; (5) failing to select lower-cost share classes for some investment options, SA10; and (6) agreeing to TIAA's requirement that the Plan offer other TIAA products in addition to TIAA annuities, SA3. Plaintiffs alleged that each act also breached the duty of loyalty, SA27, and that Yale engaged in prohibited transactions by allowing Vanguard and TIAA to charge unreasonable or unnecessary fees, SA30.

### D. Pre-Trial Proceedings

Yale moved to dismiss the complaint. The district court granted the motion as to the claim that the Plan offered too many options, SA24-25; the claim that investment fees were too high for certain options, SA26; and all claims of disloyalty, SA30; and denied the motion on the other claims, SA40. The court then certified a class of all Plan participants and beneficiaries between August 9, 2010, and the date of the judgment, July 13, 2023 (the class period). B14.

Following discovery, the district court granted Yale summary judgment on Plaintiffs' prohibited-transaction claims. SA106-08. The court explained that to bring a prohibited-transaction claim, the plaintiff must show that the transaction involved "self-dealing or other disloyal conduct" by the

fiduciary "with intent to benefit a party of interest," and Plaintiffs did not make that showing. SA108-09. The court did not reach Yale's other arguments on the prohibited-transaction claims, SA107, and denied the motion on the remaining imprudence claims, SA111.

Before trial, Yale moved to strike Plaintiffs' jury demand, arguing that Plaintiffs did not have a right to a jury trial on the remaining claims because the claims sound in equity. Add., *infra*, 1a. The court denied the motion. *Id.* It recognized Plaintiffs' action would be heard by a court of equity at common law, but determined that Plaintiffs had a jury-trial right because they sought legal relief. *Id.* at 5a, 7a.

### E. Trial

The district court held a four-week jury trial on Plaintiffs' four remaining imprudence claims.

On the recordkeeping claim, Plaintiffs argued that Yale failed to adequately monitor and control recordkeeping fees. B127-29 (Tr. 40:23-42:20). But the evidence showed that no matter what process Yale used, it could not have consolidated to a single recordkeeper before 2015, because most of the Plan's assets were invested in TIAA annuities, and TIAA did not allow others to recordkeep those investments (and TIAA could not recordkeep Vanguard investments until 2015). B157, 226, 303-05 (Tr. 388:13-21; 937:1-4,

1568:19-1570:1). The evidence also showed that Yale's fees were among the lowest of its peer group. *E.g.*, B267 (Tr. 1209:1-8). Plaintiffs' experts could not identify any comparable university paying the $35-40 per participant annual fees that they claimed Yale should have paid. B146-47, 152, 161-65, 168-71, 351-52 (Tr. 370:1-371:3, 383:7-14, 403:16-407:4, 428:21-431:2, 2509:23-2510:7).

On the investment-monitoring claim, Plaintiffs argued that Yale failed to adequately monitor Plan investments and remove underperforming investments. B123-26 (Tr. 36:7-39:19). But the evidence showed that Yale employed experienced and qualified personnel who formally reviewed every investment option annually; carefully scrutinized each option's investment strategy, performance, and costs; and retained only the options that remained prudent for the Plan. B182-87, 246-50, 310-15, 403 (Tr. 488:25-493:16, 1119:3-1123:20, 1578:17-1583:18, 3160:2-9).

On the share-classes claim, the evidence showed that Yale was "incessant" about pursuing the lowest-cost share classes. B256-57 (Tr. 1147:25-1148:7). Yale was one of the first TIAA clients to obtain lower-cost share classes from TIAA. A525-56 (Tr. 1555:4-1556:19); B288, 299 (Tr. 1388:13-22, 1562:1-21). And Yale always obtained the lowest-cost share classes for which it qualified, except for one situation where the lower-cost share class

would have imposed costs on participants that did not invest in that fund. B258-64, 382 (Tr. 1149:7-1155:15, 2799:14-17).

On the bundling claim, Plaintiffs argued that Yale should not have agreed to offer TIAA's full suite of products as a condition of offering TIAA's most popular traditional annuity products. B129 (Tr. 42:7-15). Plaintiffs presented virtually no evidence on this claim, including no evidence that any other fiduciary in Yale's circumstances would have viewed offering the full suite of TIAA options as imprudent. Instead, the evidence showed that TIAA's investments complemented each other by offering participants better risk-adjusted returns than if Yale had offered only TIAA's traditional annuities. B321-22, 331-32 (Tr. 1990:21-1991:22; 2068:2-2069:2).

Throughout the trial, Plaintiffs' counsel repeatedly championed their own role in bringing lawsuits against Yale and other universities. They asserted that their pursuit of "lawsuits like this one" caused recordkeeping fees to decrease over the last 15 years. B391 (Tr. 3101:20-22). And, beginning in their opening statement, they repeatedly asserted that Yale changed its practices only "after this lawsuit was filed." *E.g.*, A473 (Tr. 727:4-7); B126, 194, 205 (Tr. 39:3-6, 679:17-24, 754:15-17).

The jury returned a verdict in favor of Yale on all claims. On the recordkeeping claim, the jury found that Plaintiffs proved that Yale

breached the duty of prudence and that the breach caused the Plan a loss, but that the amount of "loss proved by plaintiffs[] is $0" and the damages were $0. SA121-22 (verdict form). On the remaining claims, the jury found no breaches of fiduciary duty and for that reason did not reach the issues of loss or damages. SA123-27 (verdict form). The district court entered judgment in favor of Yale. SA137-38.

## SUMMARY OF THE ARGUMENT

Plaintiffs had a full and fair opportunity to present their claims to a jury, and the jury rejected them. Plaintiffs provide no persuasive reason to overturn the jury's verdict.

I. Plaintiffs are not entitled to a new trial on their recordkeeping claim.

A. Plaintiffs' primary argument is that the district court erred in its damages instructions. One instruction stated that, if the jury found that Plaintiffs had proven breach, a resulting loss, and the amount of that loss, Yale could reduce or eliminate the damages by showing that a prudent fiduciary "could have" made the same decision that Yale did. Plaintiffs wanted a "would have" standard instead.

This Court need not decide that issue, because the jury concluded that Plaintiffs' claim failed before it even reached damages. Before the jury could

consider Yale's burden on damages, it first had to find that Plaintiffs proved that Yale breached its duty of prudence, that the breach caused a loss, and the amount of the loss. Here, the jury found that Plaintiffs failed to prove any amount of loss, so there was no need to reach damages.

Plaintiffs argue that the verdict is inconsistent because the jury found the breach caused a loss but no amount of loss. Plaintiffs did not raise that argument below, and the verdict is easily reconcilable. Plaintiffs bore separate burdens on loss and the amount of loss, and the jury apparently determined that they met the first burden but not the second.

B. The damages instructions are correct. Even if a fiduciary breached its fiduciary duty, it is not liable for damages if its decision was objectively reasonable. As the Supreme Court recognized in *Hughes v. Northwestern University*, 595 U.S. 170 (2022), and this Court recognized in *Chao v. Merino*, 452 F.3d 174 (2d Cir. 2006), a prudent fiduciary can choose from a range of reasonable options.

Plaintiffs' proposed "would have" standard would require a fiduciary to show that there was one single best decision that a prudent fiduciary would have made. That standard would hold fiduciaries liable even though they made objectively reasonable decisions. That would be contrary to

ERISA, would be near-impossible to satisfy in most cases, and would give windfalls to plaintiffs.

C. Even if the "would have" instruction were correct, this Court should affirm. The evidence at trial conclusively demonstrated that a prudent fiduciary in Yale's position would not have used a different recordkeeper or achieved lower fees because a different arrangement simply was not possible before 2015.

D. Plaintiffs raise other challenges to the district court's jury instructions and verdict form on the recordkeeping claim. They forfeited those arguments by failing to raise them before the district court, and they have not shown either plain error or prejudice.

On the jury instructions, Plaintiffs contend that the placement of two sentences of damages instructions may have confused the jury about how to determine breach and which party bore the burden of proof on loss and damages. But Plaintiffs proposed the placement of those instructions. Further, the district court gave careful instructions on each element, and viewing the instructions as a whole, there was no reasonable likelihood of confusion.

On the verdict form, Plaintiffs argue that the loss and damages questions were confusing or duplicative. But the verdict form accurately stated

the law, and the court was well within its broad discretion in choosing the particular wording on the verdict form.

II. Plaintiffs are not entitled to a new trial on the other imprudence claims.

A. Plaintiffs again argue that the district court's placement of certain damages instructions – a placement they requested – could have confused the jury about the legal standard for proving breach. But the district court gave lengthy and correct instructions on the element of breach. And the verdict on the recordkeeping claim – where the jury found breach but no amount of loss – demonstrates that the jury understood those instructions.

B. Plaintiffs next challenge the district court's instruction that the jury could not find that Yale breached its fiduciary duties solely because it was not using an investment policy statement, investment committee, or outside consultant at the start of the class period. That instruction was accurate, because ERISA does not require a fiduciary to take those actions. The court gave the instruction because it was concerned about potential prejudice from evidence that Yale started taking those actions during the class period. The court was well within its discretion in giving a curative instruction on that point.

C. Plaintiffs argue that the district court should have allowed them to elicit testimony from their expert about the number of investment options in the Plan, even though the district court dismissed the too-many-options claim before trial. Plaintiffs did not make an offer of proof about how that testimony was relevant to their remaining claims, so their argument is reviewed only for prejudicial plain error. Plaintiffs have not met that standard: The evidence would have been cumulative, and it was (at best) background information that would not have proven any claim at trial.

D. Plaintiffs argue that the district court should have let them present damages opinions from two experts. Those experts calculated damages based on the assumption that Yale should have unilaterally transferred participants' assets out of certain TIAA annuities to other investments. But the excluded opinions relate to loss and damages issues that the jury never reached because it found no breach on the investment-monitoring and bundling claims. Also, as the district court explained, Yale could not transfer the assets without the participants' consent. The court thus did not err in excluding the testimony.

III. Plaintiffs argue that they are entitled to a new trial on all claims because witnesses and defense counsel called the Plan "generous" and defense counsel referred to this litigation as "lawyer-driven." These were only

a handful of remarks over the course of a four-week trial with a 3,600-page transcript, and Plaintiffs objected to just two of them. None was inaccurate or prejudicial to Plaintiffs. Further, Plaintiffs' counsel opened the door to Yale's "lawyer-driven" comments by repeatedly championing their pursuit of ERISA litigation against Yale and other universities.

Plaintiffs also challenge the district court's instruction that class members could not opt out of the class, but that instruction was accurate and did not cause Plaintiffs any prejudice.

IV. Plaintiffs argue that the Court should reverse summary judgment on their prohibited-transactions claims, because the district court used a legal standard that this Court later disavowed in *Cunningham v. Cornell Univ.*, 86 F.4th 961 (2d Cir. 2023). But here, as in *Cunningham*, the error was harmless.

Plaintiffs acknowledged that their prohibited-transaction claims were based on the same facts as their recordkeeping and investment-monitoring claims – and the jury rejected those claims at trial. Further, Plaintiffs point to no evidence establishing that Yale paid unreasonable fees or received unnecessary services, which is required for a prohibited-transaction claim.

For all of those reasons, the Court should affirm.

V. If the Court reverses and remands for a new trial, it should instruct that the judge, not a jury, be the trier of fact. A plaintiff has a right to a jury trial if, at common law, the plaintiff's claim would have been heard in a court of law or the remedy sought is legal. ERISA's fiduciary duties are derived from the law of trusts, and at common law, an action by a beneficiary against a trustee for breach of fiduciary duty was within the exclusive jurisdiction of the courts of equity. Further, Plaintiffs seek to be made whole for any losses caused by Yale's breach, which is an equitable remedy, not a legal remedy. Plaintiffs thus do not have a right to a jury trial on their fiduciary-breach claims.

## ARGUMENT

### I. PLAINTIFFS ARE NOT ENTITLED TO A NEW TRIAL ON THEIR RECORDKEEPING CLAIM

Plaintiffs seek (Br. 18-34) a new trial on their recordkeeping claim. They primarily challenge the district court's damages instructions, but also take issue with other jury instructions and the verdict form. Plaintiffs' arguments are mistaken.

*Standard of Review*

The Court reviews preserved objections to the district court's jury instructions *de novo*, "bearing in mind that a trial court has discretion in the style and wording of jury instructions." *Emamian v. Rockefeller Univ.*, 971

F.3d 380, 389 (2d Cir. 2020) (internal quotation marks omitted). A new trial is required only if any instructional error was not harmless. *Holzapfel v. Town of Newburgh, N.Y.*, 145 F.3d 516, 521 (2d Cir. 1998). The Court reviews forfeited objections to the district court's jury instructions for plain error. *Emamian*, 971 F.3d at 388; *see* Fed. R. Civ. P. 51(d)(2).

The Court reviews preserved objections to the district court's formulation of the verdict form for abuse of discretion, and forfeited objections for plain error. *Emamian*, 971 F.3d at 390.

The plain-error doctrine is "invoked with extreme caution in the civil context." *Emamian*, 971 F.3d at 388 (internal quotation marks omitted). To constitute plain error, the district court's decision "must affect substantial rights, contravene an established rule of law, and go to the very essence of the case." *Id.* (internal quotation marks omitted). Only a prejudicial error can affect substantial rights. *Keeling v. Hars*, 809 F.3d 43, 54 (2d Cir. 2015).

### A. Because Plaintiffs Did Not Prove Loss, The Court Need Not Address The Damages Instructions

Plaintiffs' primary challenge (Br. 20-27) is to the district court's damages instructions, which stated:

> If the Plaintiffs meet their burden to establish breach and an amount of loss, then it is the Defendants' burden to show, by a preponderance of the evidence, that less than the entire amount of the loss should be

> awarded as damages because some or all of the potential damages were not caused by the breach of fiduciary duty.

SA197-198. The court further explained that:

> Even if a fiduciary failed to follow a prudent process in arriving at a decision, the fiduciary may not be found liable if a prudent fiduciary *could have* made the same decision anyway.

SA196-97 (emphasis added); *see* SA122 (verdict form). In Plaintiffs' view (Br. 20-27), the second instruction is incorrect because Yale could reduce the potential damages only if it established that a prudent fiduciary "would have" made the same decision.

Any error in a damages instruction is "irrelevant" if the jury finds that the plaintiff failed to prove the other elements of the claim at issue. *King v. Brando*, 304 F. App'x 19, 21 (2d Cir. 2008) (summary order); *see, e.g.*, *Knight v. State Univ. of N.Y.*, 880 F.3d 636, 643 (2d Cir. 2018). Here, the jury found that Plaintiffs failed to carry their burden of proving an amount of loss, and proof of loss is a necessary prerequisite for shifting the burden to Yale to demonstrate that some or all of the loss is not recoverable as damages. *Cunningham*, 86 F.4th at 981-82; *Sacerdote v. N.Y. Univ.*, 9 F.4th 95, 113 (2d Cir. 2021). Because the jury had no need to address damages, this Court need not address the damages instructions.

1. This Court has specified the framework for litigating a claim for damages for a breach of ERISA's duty of prudence. *Cunningham*, 86 F.4th at 981-82 (citing *Sacerdote*, 9 F.4th at 113). The plaintiff has the burden to establish that the defendant breached a fiduciary duty, that the breach caused a loss to the Plan, and the amount of that loss. *Id.* at 981 (citing 29 U.S.C. § 1109(a)). To establish a breach that caused a loss for an excessive-fees claim, the plaintiff must show that the defendant failed to follow a prudent process and that a fiduciary that had followed a prudent process could have paid lower fees. *Id.* To establish the amount of loss, the plaintiff must show "that there was a prudent alternative to the allegedly imprudent fees paid"; the amount of loss is the difference between that option and the fees actually paid. *Id.* at 981-82 (internal quotation marks omitted).

If the plaintiff makes those showings, the burden shifts to the defendant to show that the damages are less than the claimed loss. The defendant can do that by showing that "some or all of the loss would have still occurred" if the fiduciary had been prudent. *Cunningham*, 86 F.4th at 981 (internal quotation marks omitted). That step reflects the principle that even if a fiduciary followed an imprudent process, it is not liable for damages if it can show the "objective reasonableness" of its decision. *Id*. at 982. For example, if a plaintiff proves that the defendant used an imprudent process

and paid $100 in fees and that a fiduciary following a prudent process could have paid $10 in fees, the defendant then has the opportunity to show that a fiduciary following a prudent process could have paid fees greater than $10. *Sacerdote*, 9 F.4th at 113-14 (using this example). If the defendant carries that burden, the amount of damages is the difference between the amount proved by the defendant and amount actually paid. Thus, even if a plaintiff identifies a prudent option that would result in lower fees, the defendant is permitted to identify another prudent option to reduce or eliminate the damages.[3]

2. The district court's jury instructions and verdict form in this case followed this Court's framework. First, the court gave a lengthy instruction on the legal standards for breach, explaining that Plaintiffs bore the burden on that element. SA190-95; *see* pp. 45-46, *infra* (discussing the breach instructions in detail). Second, the court instructed the jury on the standards both for determining whether the breach caused a loss and for determining "the amount of the loss," explaining that Plaintiffs bore the burden on both.

[3] This Court adopted this burden-shifting framework in *Sacerdote*, but other courts have held that the burden always should remain on the plaintiff, *see, e.g.*, *Willett v. Blue Cross & Blue Shield of Ala.*, 953 F.2d 1335, 1343-44 (11th Cir. 1992). Yale recognizes that the panel is bound by *Sacerdote* but reserves the right to challenge the burden-shifting framework *en banc*. *See* Dkt. 563 at 1 n.4.

SA195-96. Third, the court explained that if Plaintiffs established breach and resulting loss, the burden shifted to Yale to prove that the damages were "less than the entire amount of the loss." SA196-97.

The verdict form followed the same approach. For each claim, it first addressed breach, asking whether "the plaintiffs [had] proven by a preponderance of the evidence that the defendants breached their duty of prudence." *E.g.*, SA121 (question I.A). Then, on loss, it asked whether "the plaintiffs [had] proven" that the defendants' breach "resulted in a loss to the Plan," and if the answer is "yes," it asked the jury to fill in the amount of "the loss proved by the plaintiffs." *E.g.*, SA122 (question I.B). And then on damages, the verdict form asked the jury to fill in "the amount of damages" that "the defendants have established." *E.g.*, SA122 (question I.C).

The verdict form included two special interrogatories. Those asked whether "the defendants [had] proven" that "a fiduciary following a prudent process could have made the same decisions" as the defendants, SA122 (question II.A), and, "[i]f the plaintiffs [had] proven that the defendants have failed to follow a prudent process," whether "the defendants [had] proven" that "no loss to the Plan resulted from that failure," SA122 (question II.B).

For the recordkeeping claim, the jury found a breach and that the breach resulted in a loss. SA121-22. Then, the jury specified that the "loss proved by the plaintiffs" was "$0." SA122. At that point, the jury did not need to go any further – Plaintiffs' failure to establish an amount of loss was fatal to their claim. But because the court had not instructed the jury to stop at that point, the jury went ahead and specified that the "amount of damages" also was "$0," and that a prudent fiduciary could have made the same decisions as Yale. SA122. Nonetheless, Plaintiffs' claim failed when they did not meet their burden on loss, before any burden-shifting occurred.

3. Plaintiffs do not make any arguments about the sufficiency of the evidence, and the jury's findings are amply supported by the trial record. Plaintiffs elicited testimony that Yale could have taken additional steps to monitor and control recordkeeping fees, *e.g.*, A454-60 (Tr. 542:3-548:24), and that if Yale had taken those steps, the service providers may have been willing to negotiate on pricing, *e.g.*, A494-95 (Tr. 810:14-811:17). The jury apparently relied on that evidence to determine that Yale could have used a different process and could have paid less as a result, which is reflected in the jury's findings on breach and on whether the breach resulted in a loss. *See* SA121-22.

To prove the amount of loss for their recordkeeping claim, Plaintiffs had to show that there was a "prudent alternative" fee that Yale actually could have paid. *Cunningham*, 86 F.4th at 981. That is where Plaintiffs' evidence failed. They relied on the testimony of their expert Al Otto, who gave three possible loss numbers: $27.2 million, $28.7 million, or $41.5 million. B338-41 (Tr. 2451:13-2454:20).

Yale demonstrated that Otto had no reliable basis for any of those numbers. His $28.7 million estimate was based on a 2012 presentation that Yale's outside consultant gave to Yale, in which the consultant referred to fees paid by an unnamed "University A." B208, 211-12, 338-39 (Tr. 814:5-23, 817:23-818:12, 2451:19-2452:17). Otto acknowledged that he did not know what recordkeeping services "University A" was receiving, B355-58 (Tr. 2535:16-2538:11), and the consultant testified that Yale was not comparable to "University A," in part because "Yale was receiving significantly more services," B213-14 (Tr. 819:12-820:23).

Otto's other two estimates – $27.2 million and $41.5 million – were based on the opinion of Plaintiffs' other fees expert, Ty Minnich, that an annual fee of $40 per participant would have been "reasonable." B339-40, 346 (Tr. 2452:18-2453:10; 2504:13-25). But Minnich acknowledged he did not employ any scientific methodology to arrive at that number; he instead

chose $40 as an appropriate fee and then looked for examples to support it. B152-53, 174 (Tr. 383:24-384:5, 454:4-20). In selecting those examples, Minnich did not include plans similar to Yale's during the relevant time period; no example from before 2016 was a university plan or used TIAA as a recordkeeper. B146-47 (Tr. 370:13-371:3). Otto, for his part, testified that he was not aware of any plan that paid TIAA $40 per participant annually for recordkeeping throughout the class period. B351-52 (Tr. 2509:23-2510:2). And TIAA's representative testified that TIAA would not have agreed to that fee. B370 (Tr. 2710:17-19).

In finding the amount of loss to be $0, the jury apparently rejected Otto's and Minnich's opinions as unreliable.[4] Plaintiffs did not present any other evidence to quantify losses. So, as the verdict form shows, the jury found that Plaintiffs had not proven any amount of loss. That finding means that their recordkeeping claim failed, and there was no need to consider Yale's burden on damages. *See Sacerdote*, 9 F.4th at 112 (explaining that the question of damages is "distinct from, and subsequent to," whether the

[4] Otto's and Minnich's opinions have been rejected in at least one other university ERISA case. *See Cunningham*, 86 F.4th at 982 (affirming district court's exclusion of Otto's and Minnich's opinions because "neither offered any cognizable methodology in support of their conclusions").

plaintiffs satisfied their burden of proof on loss). This Court thus need not address the damages instructions. *See Knight*, 880 F.3d at 643.

4. Plaintiffs argue (Br. 33) that the jury's findings are inconsistent because the jury found that Yale's breach caused a loss to the Plan but that the amount was $0. They speculate (*id.*) that the jury must have initially found a loss amount greater than zero, but then wrote in $0 upon finding that Yale met its burden on damages.

Plaintiffs have forfeited this argument. To preserve an argument that a verdict was inconsistent, a party must "object to the verdict prior to the excusing of the jury." *Anderson Grp. v. City of Saratoga Springs*, 805 F.3d 34, 46 (2d Cir. 2015) (internal quotation marks omitted). Plaintiffs did not do that, *see* B434 (Tr. 3819:21-24), so the Court's review is for plain error, *Anderson Grp.*, 805 F.3d at 49. Even when a claim of inconsistency is preserved, the Court "make[s] every attempt to reconcile the jury's findings" and will order a new trial only if the findings are "ineluctably inconsistent." *Ferreira v. City of Binghamton*, 975 F.3d 255, 277 (2d Cir. 2020) (internal quotation marks omitted).

There is no plain error here; the verdict is easily reconcilable. The verdict indicates that the jury determined that Yale did not follow a prudent process with respect to recordkeeping fees, and that it was possible for

Yale's breach to have caused some loss to the Plan – essentially, that Yale could have done something more to lower fees. *See* SA122. To make those findings, the jury only needed to find that the Plan could have paid some lesser amount (which could have been *de minimis*), *see* SA196; the amount of loss was to be established at the next step.

Then Plaintiffs separately had the burden of proving the amount of loss by identifying what a prudent fiduciary actually could have paid and how much money Yale would have saved if it had paid that much. *Sacerdote*, 9 F.4th at 113-14. The verdict reflects the jury's determination that Plaintiffs failed to put on reliable evidence about a prudent alternative option and its associated cost savings. That is, the jury apparently accepted Plaintiffs' evidence that Yale could have done more to investigate lowering recordkeeping fees but rejected Otto's and Minnich's testimony about the amount of fee reductions Yale could have achieved. And as a result, Plaintiffs' recordkeeping claim failed at the element of loss.

**B. The Damages Instructions Are Correct**

If the Court addresses the damages instructions, it should hold that the instructions are correct.

1. As noted, the district court instructed the jury that Yale could eliminate damages by showing that "a prudent fiduciary *could have* made the

same decision [that Yale made] anyway." SA197 (emphasis added). Plaintiffs argue for a "would have" standard – so that Yale would have to show that a hypothetical fiduciary that followed a prudent process "would have" come to the same ultimate decision that Yale did. Opening Br. 20-28; *see* DOL *Amicus* Br. 2.

Under the "could have" standard, Yale could show that its decision was within the range of objectively reasonable decisions that a hypothetical prudent fiduciary could have made. Under the "would have" standard, Yale would have been required to show that a hypothetical prudent fiduciary would have made the exact same decision Yale made.

The "could have" standard is correct. Although ERISA allows a plaintiff to obtain injunctive relief for a breach of fiduciary duty, the plaintiff can recover damages only for losses to the plan that "result[] from" the breach. 29 U.S.C. § 1109(a). A failure to follow a prudent process by itself does not produce a loss to the plan; the plan incurs a loss only if the procedural shortcoming leads to a substantively imprudent decision.

An ERISA defendant thus cannot be held liable for damages when it has made an "objectively reasonable" decision, even if its process was imprudent. *Roth v. Sawyer-Cleator Lumber Co.*, 16 F.3d 915, 919 (8th Cir. 1994); *see, e.g.*, *Renfro v. Unisys Corp.*, 671 F.3d 314, 322 (3d Cir. 2011);

*Kuper v. Iovenko*, 66 F.3d 1447, 1460 (6th Cir. 1995), *abrogated on other grounds by Fifth Third Bancorp v. Dudenhoeffer*, 573 U.S. 409 (2014); *Brock v. Robbins*, 830 F.2d 640, 646-47 (7th Cir. 1987); *see also Fink v. Nat'l Sav. & Tr. Co.*, 772 F.2d 951, 962 (D.C. Cir. 1985) (Scalia, J., concurring in part and dissenting in part) (a fiduciary that made "objectively prudent investments," even "through prayer, astrology or just blind luck," is not liable for damages). This Court recognized that principle in *Cunningham*, when it noted (in the context of a recordkeeping-fee claim) that the defendant ultimately would not be liable if it could establish "the objective reasonableness of [the] improvidently paid fees." 86 F.4th at 982.

There often is a range of objectively reasonable decisions an ERISA fiduciary can make, rather than only one best decision. ERISA's duty of prudence requires a plan fiduciary to act prudently "under the circumstances then prevailing." 29 U.S.C. § 1104(a)(1)(B). As the Supreme Court has explained, "[b]ecause the content of the duty of prudence turns on the circumstances . . . prevailing at the time the fiduciary acts, the appropriate inquiry will necessarily be context specific." *Hughes*, 595 U.S. at 177 (internal quotation marks omitted). "[T]he circumstances facing an ERISA fiduciary will implicate difficult tradeoffs, and courts must give due regard to

the range of reasonable judgments a fiduciary may make based on her experience and expertise." *Id.* This Court made the same point in *Chao*, when it explained that ERISA does not require a prudent fiduciary "to take any particular course of action if another approach seems preferable." 452 F.3d at 182 (internal quotation marks omitted).

For example, in determining which investment options to offer from among the thousands of offerings on the market, a fiduciary considers factors such as the number of participants; their objectives, risk tolerances, and preferences; the size of their accounts; the expected return of each option; potential future market and economic trends; and the appropriate mix of options. Given the enormous number of considerations and options – many with "uncertain outcomes" – "any number" of plan lineups could be objectively reasonable. *Tatum v. RJR Pension Inv. Comm.*, 761 F.3d 346, 377 (4th Cir. 2014) (Wilkinson, J., dissenting). As long as the fiduciary's decision falls within the range of objectively reasonable outcomes, the fiduciary is not liable for damages.

Only the "could have" standard gives "due regard to the range of reasonable judgments a fiduciary may make." *Hughes*, 595 U.S. at 177. The "would have" standard, by contrast, requires the defendant to show that any hypothetical prudent fiduciary would have made the exact same decision

that the defendant made. It "substitute[s] for the fiduciary's duty to make a *prudent* decision a duty to make the *best possible* decision, something ERISA has never required." *Tatum*, 761 F.3d at 378 (Wilkinson, J., dissenting). Plaintiffs' standard thus is inconsistent with the flexibility inherent in ERISA's prudent-person standard.[5]

The "would have" standard would impose damages liability on fiduciaries that made objectively reasonable decisions. Treating only one best option as objectively reasonable sets up a near "impossible standard," because "[n]o investor invariably makes the optimal decision, assuming we know what that decision even is." *Tatum*, 761 F.3d at 377 (Wilkinson, J., dissenting). That would result in windfalls to plaintiffs and their lawyers. It also would "encourage opportunistic litigation to challenge even the most sensible financial decisions," *id.* – the costs of which would be borne by plans and participants, and which would serve only to "discourage employers from offering [ERISA] plans in the first place," *Conkright v. Frommert*, 559 U.S. 506, 517 (2010) (internal quotation marks omitted).

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[5] Plaintiffs argue (Br. 25-27) that ERISA's flexibility is relevant only to liability, not to damages, and that it should be more difficult for an imprudent fiduciary to reduce the damages than for a prudent fiduciary to show that it acted reasonably. But the imprudent fiduciary already faces a harder task because the burden of proof has shifted to it on damages. Nothing in ERISA supports heightening the substantive standard as well.

Further, the "would have" standard is skewed by hindsight. As Plaintiffs acknowledge (Br. 26), the subsequent performance of each option will inevitably color the factfinder's views about whether the fiduciary made the best possible decision. But "[b]ecause the fiduciary's obligation is to exercise care prudently and with diligence under the circumstances then prevailing, [its] actions are not to be judged from the vantage point of hindsight." *Chao*, 452 F.3d at 182 (internal quotation marks omitted). A fiduciary should not be exposed to liability because a plaintiff with "20-20 hindsight" thinks that a different decision would have been "better." *White v. Marshall & Ilsley Corp.*, 714 F.3d 980, 990 (7th Cir. 2013), *abrogated on other grounds by Dudenhoeffer*, 573 U.S. 409.

2. Plaintiffs make essentially four arguments in support of a "would have" standard. Each is incorrect.

a. First, Plaintiffs argue (Br. 20-21) that this Court already has endorsed the "would have" standard. But the Court has not squarely addressed the issue, and the reasoning in its decisions supports the "could have" standard.

This Court has recognized that fiduciaries should not be held liable when they make objectively reasonable decisions. For example, in *In re Citigroup*, the plaintiffs argued that the defendant was imprudent in failing

to divest from Citigroup stock before the 2008 financial crisis, because it should have known about Citigroup's exposure to the subprime market. 662 F.3d 128, 140-41 (2d Cir. 2011), *abrogated on other grounds by Dudenhoeffer*, 573 U.S. 409. The Court affirmed the dismissal of the claim because even if the defendant had known all the facts that the plaintiffs alleged it should have known, it "would not have been compelled to conclude" that it needed to divest from Citigroup stock. *Id.* at 141. In other words, the defendant could not be liable because it reasonably could have acted the way it did. And this Court further recognized that a *range* of decisions may be prudent, when it stated that "ERISA does not impose a duty to take any particular course of action if another approach seems preferable." *Chao*, 452 F.3d at 182 (internal quotation marks omitted).

Plaintiffs rely (Br. 20) on *Sacerdote*'s statement that the burden shifts to the defendant to prove damages because "it makes little sense to have the plaintiff hazard a guess as to what the fiduciary would have done had it not breached its duty" when the fiduciary has "superior access" to that information. 9 F.4th at 113 (internal quotation marks omitted). That language explains only the rationale for burden-shifting, not the standard the defendant must meet after the burden has shifted. *See id.* Plaintiffs also point to (Br. 21) this Court's statement in *Donovan v. Bierwirth*, 754 F.2d 1049 (2d

Cir. 1985), that "the measure of loss applicable under ERISA" requires "a comparison of what the Plan actually earned on the [imprudent] investment with what the Plan would have earned had the funds been available for other Plan purposes." *Id.* at 1056. But that language addresses how loss is calculated (and the district court followed that language faithfully, *see* SA196); it says nothing about a defendant's burden on damages. Further, neither statement addresses the issue here, because both refer to what the defendant would have done, not (as the damages instructions asked) what a hypothetical fiduciary would have done.

b. Second, Plaintiffs misconstrue (Br. 21-25) the "could have" standard, arguing that it allows fiduciaries to limit their liability "based on remote and speculative possibilities that could have happened." That is incorrect. To eliminate damages under the "could have" standard, the defendant must show, by a preponderance of the evidence, that its decision was an objectively reasonable decision that a hypothetical prudent fiduciary could have reached. That standard of proof cannot be satisfied with mere speculation. *See Jackan v. N.Y. State Dep't of Lab.*, 205 F.3d 562, 566 (2d Cir. 2000). Plaintiffs' hypothetical (Br. 21) about a person with "no discernable athletic ability" who "could have become a superstar professional athlete" is

inapt, because it ignores that an ERISA defendant must show that its decision was objectively reasonable.

Relatedly, Plaintiffs argue (Br. 22) that the "could have" standard "does not answer the question of whether the defendant's imprudent conduct caused damages" because even if "the hypothetical prudent fiduciary *could* have made the same ultimate decision," it remains possible that the fiduciary "*would not* have made the same decision." That is just a restatement of their position that a prudent fiduciary can make only one prudent decision. It ignores that a prudent fiduciary could make a range of objectively reasonable decisions, and if the defendant made a decision within that range, there is no resulting harm. 29 U.S.C. § 1109(a); *see* pp. 30-33, *supra*.

c. Third, Plaintiffs mistakenly suggest (Br. 21) that their "would have" standard is rooted in trust law. In trust law, the test for damages is whether the harm "would have occurred in the absence of a breach of trust." *Restatement (Third) of Trusts* § 100 cmt. e (2012). Courts apply this test by asking whether *the defendant* would have made the same decision had it not breached, not whether a *hypothetical fiduciary* would have made the same decision. *See, e.g., Brotherston v. Putnam Invs., LLC*, 907 F.3d 17, 39 (1st Cir. 2018); *Bussian v. RJR Nabisco, Inc.*, 223 F.3d 286, 300 (5th Cir. 2000);

*Est. of Stetson*, 345 A.2d 679, 690 (Pa. 1975); *see also* DOL *Amicus* Br. 21 n.7.

The instructions in this case, by contrast, focus on the conduct of a hypothetical prudent fiduciary – not Yale. SA197. If the inquiry is based on a hypothetical prudent fiduciary, the "could have" standard is correct, because only that standard accounts for the range of decisions a hypothetical prudent fiduciary could make. *See* pp. 30-33, *supra.* So the law of trusts does not shed light on the issue here.

d. Finally, Plaintiffs (Br. 22-25) contend that the "would have" standard has been endorsed by other courts of appeals. Only the Fourth Circuit has addressed the issue (in *Tatum*), and it has not clearly adopted the standard urged by Plaintiffs.[6]

The Fourth Circuit issued two decisions in *Tatum*, and its ultimate rule is not at all clear. The plaintiff challenged the fiduciary's decision to liquidate and divest a single-stock fund on a six-month timeline. 761 F.3d at 351. The district court concluded that the fiduciary breached the duty of prudence by failing to investigate whether that stock was appropriate to

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[6] Plaintiffs cite (Br. 22) *Roth*, *Brotherston,* and *Bussian*, but those cases addressed the standards for breach or loss, not the defendant's burden on damages. *See Roth*, 16 F.3d at 919; *Brotherston*, 907 F.3d at 33; *Bussian*, 223 F.3d at 300.

divest. *Id.* at 359-60. The court nonetheless entered judgment for the fiduciary because it determined that a hypothetical prudent fiduciary could have decided to divest the stock in the same timeframe as the fiduciary. *Id.* at 357.

The Fourth Circuit vacated, holding that the fiduciary could avoid monetary liability only if it could show "that a prudent fiduciary *would have* made the same decision." *Tatum*, 761 F.3d at 364. Judge Wilkinson dissented, explaining that a "would have" standard ignores that fiduciaries can choose from a range of objectively reasonable decisions, and would hold fiduciaries liable for damages "for objectively prudent investment decisions." *Id.* at 372-78 (Wilkinson, J., dissenting).

On remand, the district court concluded that a prudent fiduciary would have made the same divestment decision on the same timeframe as the fiduciary because the six-month divestment period was "long enough" and "reasonable." *Tatum v. R.J. Reynolds Tobacco Co.*, No. 02-cv-373, 2016 WL 660902, at *26 (M.D.N.C. Feb. 18, 2016). On appeal, the Fourth Circuit affirmed, rejecting the argument that the district court failed to correctly apply the "would have" standard. *Tatum v. RJR Pension Inv. Comm.*, 855 F.3d 553, 560-61 (4th Cir. 2017). Judge Diaz dissented because, in his view,

the district court's reasoning "smacks of 'could have' rather than 'would have.'" *Id.* at 570 (Diaz, J., dissenting).

Plaintiffs argue (Br. 22) that the Fourth Circuit endorsed their "would have" standard, under which a defendant must prove that there was one decision that every hypothetical prudent fiduciary would have made. Although one could read the first *Tatum* decision that way, the second *Tatum* decision affirmed an understanding of the "would have" standard that is more nuanced and allows fiduciaries more flexibility. Indeed, that standard operates more like the district court's "could have" standard in this case. *See* 855 F.3d at 560-61; *id.* at 570 (Diaz, J., dissenting).

Plaintiffs therefore are wrong in asserting that the Fourth Circuit has adopted their extreme standard. And the uncertainty in the Fourth Circuit's standard – combined with the fact that Plaintiffs' claim here failed on the loss element – underscores that this Court should not address the issue in this case.

### C. Any Instructional Error Was Harmless

An instructional error warrants a new trial only if the error was prejudicial. *Holzapfel*, 145 F.3d at 521. An instructional error is harmless where the evidence on the relevant issue is "overwhelming," *Renz v. Grey Advertising, Inc.*, 135 F.3d 217, 224 (2d Cir. 1997), such that the Court is

"convinced that the error did not influence the jury's verdict," *United States v. Masotto*, 73 F.3d 1233, 1239 (2d Cir. 1996).

Here, even if Plaintiffs' proposed "would have" instruction is correct, any error is harmless because the overwhelming evidence at trial showed that Yale made the same decisions on recordkeeping fees that a prudent fiduciary would have made. Plaintiffs argued that Yale acted imprudently because it did not take enough steps to try to reduce recordkeeping fees, such as regularly soliciting bids for recordkeeping services. *E.g.*, B428 (Tr. 3710:6-8). Plaintiffs further argued that if Yale had not been imprudent, it would have transitioned to a per-participant pricing model earlier than it did and would have been able to achieve lower recordkeeping fees than it did. *E.g.*, B210 (Tr. 816:10-23).

But the unrebutted evidence showed that Yale transitioned to a per-participant pricing model at the earliest time it could. Until 2015, Yale followed the industry standard practice by paying its recordkeepers under an asset-based fee model, where the amount of fees depended on the amount of assets in each account. B188-89, 328 (Tr. 507:24-508:6; 2063:5-10). In 2015, TIAA made a flat per-participant fee model option available, and Yale was among the first universities (and the first Ivy League university) to transition to per-participant pricing. B302, 366 (Tr. 1567:8-22, 2671:10-19). The

evidence also showed that Yale could not have switched to a recordkeeper other than TIAA, because most of the funds in the Plan were invested in TIAA annuities, and TIAA did not allow other recordkeepers to recordkeep its annuities. B157, 226 (Tr. 388:13-17, 937:1-4). So a hypothetical prudent fiduciary would not have transitioned to per-participant fees any sooner than Yale did.

The trial record also showed that Yale ultimately paid the same recordkeeping fees that a hypothetical prudent fiduciary would have paid. *See, e.g.*, B219-20, 284-85 (Tr. 898:15-899:2, 1381:18-1382:21). In 2012, Yale secured from TIAA what was at the time one of the lowest rates for recordkeeping services. B267 (Tr. 1209:1-8). In 2014, Yale initiated a new round of negotiations, ultimately obtaining further reductions of TIAA's fees in 2016, which Yale persuaded TIAA to apply retroactively to the beginning of 2015. B378 (Tr. 2792:5-13). Yale obtained yet another cut in fees from TIAA in 2019. B378-79 (Tr. 2792:14-2793:4). Plaintiffs did not put on any evidence showing that any plan similar to Yale's Plan paid lower recordkeeping fees for comparable services during the class period. *See* pp. 26-27, *supra*.

The record thus conclusively established that a hypothetical prudent fiduciary would have made the same decisions that Yale made.

### D. Plaintiffs' Remaining Arguments Are Forfeited And Meritless

Plaintiffs argue (Br. 27-32) that they are entitled to a new trial on the recordkeeping claim because of other supposed errors in the jury instructions and verdict form. Plaintiffs did not raise these arguments below, so Plaintiffs must demonstrate plain error and prejudice. *Emamian*, 971 F.3d at 390; Fed. R. Civ. P. 51(d)(2).

The district court "has discretion in the style and wording of jury instructions." *Emamian*, 971 F.3d at 389. The Court reviews the district court's charge "in its entirety" rather than scrutinizing it "strand-by-strand." *Id.* Even for a preserved claim of instructional error, the Court does not order a new trial "unless, taken as a whole, the jury instructions gave a misleading impression or inadequate understanding of the law." *Boyce v. Soundview Tech. Grp.*, 464 F.3d 376, 390 (2d Cir. 2006) (internal quotation marks omitted). Here, Plaintiffs have not shown error, much less plain error or prejudice.

1. Plaintiffs make (Br. 28) two additional arguments about the damages instructions. The instructions stated in relevant part: "Even if a fiduciary failed to follow a prudent process, a fiduciary may not be found liable if a prudent fiduciary could have made the same decision anyway. Put another way, a fiduciary that does not conduct an adequate investigation

breaches the duty of prudence only if an adequate investigation would compel the fiduciary to conclude that another course of action was required." SA196-97. The district court gave those instructions after its instructions on loss and amount of loss, *see* SA195-96, and before its other instructions on damages, *see* SA197-98.

Plaintiffs challenge the placement of these instructions. First, they argue (Br. 28) that putting these two sentences between the loss instructions and other damages instructions could have suggested to the jury that it was *Plaintiffs*' burden to rule out that a prudent fiduciary "could have" made the same decision. Second, they argue (*id.*) that the instructions' reference to "breach[]" (in the second sentence) could have suggested that if Yale satisfied its burden on damages, then the jury should find that Yale had not breached its fiduciary duties.

Plaintiffs have not shown plain error or prejudice. To start, *Plaintiffs* requested this placement of the instructions. Yale proposed this language (to explain that a fiduciary is not liable if its decision was objectively reasonable) and suggested that it go in the breach section of the instructions. B410, 413-14 (Tr. 3609:5, 3612:13-3613:2). Plaintiffs objected, insisting that the language be "separated out in a separate section" to make clear that Yale bore the burden on damages. B408-09 (Tr. 3607:24-3608:16). The

court agreed with Plaintiffs, B417-19 (Tr. 3616:5-3618:9), and put the language after the loss instructions (without changing the reference to "breach[]"), SA196-97. Plaintiffs did not further object (except on the "would"/"could" issue). *See* A195-97. Given that Plaintiffs asked for this placement of the instructions, they cannot now complain that it is reversible error. *See United States v. Kosinski*, 976 F.3d 135, 153 (2d Cir. 2020).

There also was no reasonable possibility of juror confusion. With respect to Plaintiffs' first argument (about who has the burden of proof), the district court instructed the jury that "the Defendants have the burden of proof" on damages. SA196-97. The verdict form expressly reminded the jury that Yale had the burden on damages by asking the jury what "amount of damages" "[t]he *defendants* have established." SA122 (emphasis added). Given those repeated instructions that Yale bore the burden on damages, the jury could not reasonably have thought that Plaintiffs had the burden on this issue.

With respect to Plaintiffs' second argument (about the reference to "breach[]"), there is no reasonable possibility of juror confusion. Plaintiffs did not object to the reference to "breach[]" in this instruction. The district court gave five pages of instructions on the breach element that thoroughly

explained ERISA's prudent-person standard. *See* SA190-95. The court explained that the standard "focuses on a fiduciary's conduct, not on its results," giving "due regard" to the "difficult tradeoffs" that a fiduciary may need to consider, and without the benefit of hindsight. SA191-92. And it explained the standards for prudence specifically with respect to fees and selecting and monitoring investments. SA192-95. In context, the court's stray reference to "breach[]" in the damages instructions was not "prejudicial in light of the charge as a whole." *Emamian*, 971 F.3d at 389 (internal quotation marks omitted).

The jury's verdict confirms that it was not confused. The jury found that Yale breached its duties on the recordkeeping claim but that Yale proved that a prudent fiduciary could have made the same recordkeeping decisions as it did. SA121-22. If the jury had understood the instructions to mean that a finding that a prudent fiduciary could have made the same decision as Yale meant no breach of the duty of prudence, it would have found no breach in the first place. Plaintiffs thus have not shown prejudicial plain error.

2. Plaintiffs contend (Br. 30-31) that the verdict form was "unnecessarily complex" and "inherently confusing" because one question asked the jury to enter a dollar figure for the amount of loss, while another asked the

jury to enter a dollar figure for the amount of damages. *See* SA122 (questions I.B and I.C). They argue (*id.*) that the verdict form should have only asked the jury for a single dollar figure on damages.

The district court did not plainly err, and Plaintiffs were not prejudiced. The verdict form was consistent with *Sacerdote*, which explains that a plaintiff must first prove an amount of loss and only then does the burden shift to the defendant to prove that some or all of that amount should not be awarded as damages. 9 F.4th at 113-14. The amounts for loss and damages thus can be different, and there is no reason why the verdict form should not have included separate lines for each. Indeed, Plaintiffs themselves requested that the Court provide the jury with the example from *Sacerdote* during its jury charge, A197-98, underscoring that they understood that loss and damages are different.

Relatedly, Plaintiffs argue (Br. 31) that the verdict form was confusing because it asked the jury to enter a dollar figure for the "loss" proved by Plaintiffs and a dollar figure for the "amount of damages" proved by Yale. Plaintiffs contend (*id.*) that the loss question should have "mirror[ed] the language" in the damages question by asking the jury to enter "the amount of losses."

The district court "has discretion in the style and wording of jury instructions." *Emamian*, 971 F.3d at 389. And there was no plain error or confusion. The court separately and thoroughly instructed the jury how to quantify loss and damages. SA196-98. The verdict form was clear that it was asking the jury to quantify the amount of losses that Plaintiffs proved, because it provided the jury with a blank line preceded by a dollar sign in which the jury could input the "loss proved by the plaintiffs." SA122. The jury could only have understood this question to be asking for "the amount of losses" proved by Plaintiffs.

3. Plaintiffs contend (Br. 30-31) that when the verdict form asked whether Plaintiffs had proved a loss and an amount of loss, it also should have instructed the jury not to consider Yale's contrary evidence. *See* SA122 (question I.B). That was not error; the jury was allowed to consider Yale's contrary evidence. *See, e.g.*, *Zsa Zsa Jewels, Inc. v. BMW of N. Am., LLC*, No. 15-cv-6519, 2023 WL 3455057, at *16 (E.D.N.Y. May 15, 2023).

4. Finally, Plaintiffs argue (Br. 31-32) that the questions on loss, damages, and the special interrogatories were unnecessarily duplicative because they "all dealt with the same subject: [Yale's] burden regarding damages." *See* SA122 (questions I.B, I.C., II.A, and II.B). But each addresses a

separate question, and each accurately states the law. Plaintiffs do not argue that there was anything substantively wrong with the questions other than on the "would have"/"could have" issue. Given the district court's broad discretion to formulate jury instructions and the verdict form, merely being duplicative is not error, much less reversible plain error. *See Emamian*, 971 F.3d at 390.

## II. PLAINTIFFS ARE NOT ENTITLED TO A NEW TRIAL ON THEIR REMAINING IMPRUDENCE CLAIMS

Plaintiffs attempted to prove at trial that Yale was imprudent by failing to sufficiently monitor investment options; failing to use the lowest-cost share classes available; and agreeing to include a bundle of TIAA investment products in the Plan, as opposed to only certain TIAA annuities. But the evidence at trial showed that Yale had a robust process for monitoring investments; that Yale incessantly sought the lowest-cost share classes available; and that it was not imprudent for Yale to offer the full suite of TIAA products. After hearing all of that evidence, the jury found on each claim that Yale did not breach its duty of prudence and did not answer any questions on loss or damages.

Plaintiffs now argue (Br. 34-50) that they are entitled to a new trial on those claims, challenging the jury instructions on damages, a curative

instruction about Yale's actions during the class period, and two evidentiary decisions. None provides a basis for overturning the jury's verdict.

*Standard of Review*

The Court reviews forfeited objections to the district court's jury instructions for plain error. *Emamian*, 971 F.3d at 388; *see* Fed. R. Civ. P. 51(d)(2). The Court reviews the district court's decision to give a curative instruction for abuse of discretion. *Manley v. AmBase Corp.*, 337 F.3d 237, 250 (2d Cir. 2003).

The Court reviews the district court's decision to exclude evidence without an offer of proof for plain error. *See* Fed. R. Evid. 103(a)(2), (e). Further, an evidentiary error is "only reversible if it also affects a party's substantial rights," which "occurs when, for example, the district court excludes a party's primary evidence in support of a material fact, and failure to prove that fact defeats the party's claim." *Boyce*, 464 F.3d at 385 (internal quotation marks omitted).

The Court reviews *de novo* an evidentiary ruling based on a legal conclusion, such as the interpretation of a contract. *See Schering Corp. v. Pfizer, Inc.*, 189 F.3d 218, 224 (2d Cir. 1999).

### A. There Was No Reversible Error In The Damages Instructions

For the monitoring, share-class, and bundling claims, Plaintiffs repeat two arguments that they made about the damages instructions in the context of the recordkeeping claim. First, they repeat (Br. 37) their "would have" argument. But there is no need to address that issue because the jury found no breach of fiduciary duty and thus never reached loss or damages. SA123-27; *see Knight*, 880 F.3d at 643. And the instructions are correct in any event. *See* pp. 29-34, *supra.*

Second, they repeat their argument (Br. 36) that the placement of certain damages instructions – a placement they requested – confused the breach and damages elements, which they say infected the jury's no-breach findings. Plaintiffs did not raise this argument below, *see* A195-97, so they must show plain error and prejudice, *Emamian*, 971 F.3d at 388-89. They have not shown either.

As previously noted, Plaintiffs themselves requested the placement of the instructions that they now complain is confusing. B408-09 (Tr. 3607:24-3608:16); *see* pp. 44-45, *supra*. The instructions were robust, especially on breach, and as a whole they accurately conveyed the law. *See* pp. 45-46, *supra*. And the jury's verdict on the recordkeeping claim confirms that it

was not confused and understood breach and damages to be different. *See* p. 46, *supra*.

Further, there is no need for the Court to even consider this issue. The jury found no breach on the monitoring, share-class, and bundling claims and thus had no need to consider the damages instructions. The district court specifically instructed the jury: "You do not need to consider the element of loss with respect to a particular claim if you find that the Defendants did not breach their duty of prudence with respect to that claim." SA195; *see Knight*, 880 F.3d at 643 (courts presume juries follow instructions). The jury found no breach, *e.g.*, SA123; the court's instructions told it to go no further, SA195; and the jury did not answer any loss or damages questions, *e.g.*, SA123. Viewing the instructions as whole, the court's reference to "breach[]" in the damages instructions does not amount to reversible plain error. *See Emamian*, 971 F.3d at 389.

### B. The District Court Did Not Abuse Its Discretion By Giving The Jury A Curative Instruction

Plaintiffs next challenge (Br. 38-43) the district court's curative instruction about evidence of Yale's actions during the class period. Because Plaintiffs objected to this instruction, A191-95, the Court's review is for abuse of discretion, *see Manley*, 337 F.3d at 250.

The district court did not abuse its discretion. During trial, Plaintiffs elicited testimony that Yale did not use an investment policy statement (IPS), investment committee, or external consultant at the beginning of the class period, but adopted those measures during the class period. B137, 140, 194-95 (Tr. 128:19-22; 131:5-10; 679:17-680:3). That is evidence of "subsequent remedial measures," which cannot not be used "to prove negligence or culpable conduct" – so it could not be used to show that Yale breached its duties by not initially adopting those measures. *In re Joint E. Dist. & S. Dist. Asbestos Litig.*, 995 F.2d 343, 345 (2d Cir. 1993) (citing Fed. R. Evid. 407). The district court was concerned that this evidence had the potential to unfairly prejudice Yale because there was a risk that the jury would have found Yale liable based solely on its failure to take those actions initially. B422 (Tr. 3623:5-19).

The district court admitted the evidence but gave a "curative instruction" to mitigate the potential prejudice to Yale. B422 (Tr. 3623:5-9). The court instructed the jury that it could not find that Yale acted imprudently "based solely on the absence of" an IPS, investment committee, or external consultant "at some point during the class period," because ERISA "does not require fiduciaries" to take those measures. SA194-95.

The court had discretion to fashion curative or limiting instructions to ensure that evidence is used only for permissible purposes and to guard against unfair prejudice. *Manley*, 337 F.3d at 250. The instruction here was well within the court's broad discretion. It accurately states the law: ERISA does not require a fiduciary to take "any particular course" so long as the fiduciary's decision meets the prudent-person standard. *Chao*, 452 F.3d at 182. In particular, ERISA does not require fiduciaries to adopt an IPS, engage an external consultant, or use an investment committee. *See Falberg v. Goldman Sachs Grp.*, No. 22-2689-cv, 2024 WL 619297, at *3 (2d Cir. Feb. 14, 2024) (summary order); *Taylor v. United Techs. Corp.*, No. 06-cv-1494, 2009 WL 535779, at *10 (D. Conn. Mar. 3, 2009); *Ferguson v. Ruane Cunniff & Goldfarb Inc.*, No. 17-cv-6685, 2019 WL 4466714, at *11-12 (S.D.N.Y. Sept. 18, 2019). And the court reasonably concluded that the instruction was necessary because of the potential for prejudice. B398, 422 (Tr. 3124:8-19, 3623:5-19).

Plaintiffs argue (Br. 42-43) that the instruction was not necessary because the court already had given an instruction about subsequent remedial measures. But that instruction addressed evidence that Yale consolidated to a single recordkeeper and reduced recordkeeping fees, not other

measures. SA183. And even if the curative instruction was not strictly necessary, the court still had discretion to give it. *Manley*, 337 F.3d at 250.

Plaintiffs also contend (Br. 43) that the instruction unfairly "singl[ed] out key pieces of evidence from Plaintiffs' case" and "created the impression that much of Plaintiffs' evidence was not even probative." But the instruction does not say this evidence is irrelevant – only that the evidence cannot by itself establish a fiduciary breach. *See* SA194-95. Besides, *Plaintiffs* elicited the testimony about Yale's actions during the class period, and they should have realized that the evidence could trigger the need for a curative instruction. B137, 140, 194-95 (Tr. 128:19-22; 131:5-10; 679:17-680:2).

Plaintiffs further argue (Br. 39-41) that even if fiduciaries are not generally required to use an IPS, investment committee, or external consultant, Yale's initial failure to use these measures could show a breach of its duty to monitor plan investments under the facts of this case. But the court did not preclude use of the evidence for all purposes – only as the "sole[]" basis for finding a breach. SA194.

Further, Plaintiffs' theory is untenable in light of the evidence at trial. The evidence demonstrated that both before and after the Committee was established in 2012, Yale regularly monitored the Plan's investment options and had a rigorous process for assessing whether they remained prudent.

B182-83, 246-48, 388 (Tr. 488:25-489:22; 1119:3-1121:20, 3086:14-17). The evidence also demonstrated that Yale did not need to hire an external consultant earlier than it did because it had sufficient in-house expertise. B233, 279, 290-92 (Tr. 1074:11-20, 1308:11-25, 1448:3-1450:15). Plaintiffs therefore could not have established a fiduciary breach solely based on evidence that Yale did not adopt an IPS, use an investment committee, or engage an external consultant until later in the class period.

### C. The District Court Did Not Err By Excluding Certain Evidence About The Number Of Investment Options

Plaintiffs next challenge (Br. 43-46) the district court's exclusion of certain evidence about the number of investment options in Yale's Plan. They did not preserve this objection below, and they have not shown prejudicial plain error.

In their complaint, Plaintiffs alleged that Yale imprudently offered too many investment options to Plan participants. SA24-25. The district court dismissed that claim because Plaintiffs had not alleged that any participant was harmed by the number of options. *Id.* Plaintiffs do not challenge that decision on appeal.

Nonetheless, Plaintiffs repeatedly presented evidence about the number of investment options in the Plan at trial, in order to argue that Yale could not effectively monitor that many investments. This began during

Plaintiffs' opening statement, when their counsel argued that "[f]or many years all of the responsibility for monitoring over 100 funds" was delegated to "a single employee in the HR department." B119 (Tr. 32:2-6); *see* B125, 127 (Tr. 38:9-15, 40:16-22) (repeating that Yale offered "more than 100 funds").

Plaintiffs then elicited testimony from multiple witnesses about the number of investment options in the Plan. They first elicited testimony from their standard-of-care expert, Wendy Dominguez, that "any investment professional applying a process" would not "select more than 100 funds for a plan." SA139. Plaintiffs attempted to continue to question Dominguez on this topic and Yale objected on relevance grounds. SA139-40. The district court sustained the objection but did not strike Dominguez's previous testimony. *Id.* Plaintiffs then abandoned this line of questioning without making an offer of proof – *i.e.*, without explaining what Dominguez's testimony would have been or its relevance. *Id.*

Plaintiffs then returned to the subject when cross-examining Hugh Penney, a Plan fiduciary, eliciting testimony that there were "more than a hundred funds" in the Plan in 2010, B185 (Tr. 491:13-20), and asking him whether it is "more difficult to monitor over a hundred funds than it would be to monitor 11 or 12 funds," B202 (Tr. 740:18-19).

Plaintiffs now argue (Br. 43-46) that they should have been able to continue examining Dominguez about the number of investment options. Plaintiffs did not make an offer of proof, so their argument is reviewed only for plain error. Fed. R. Evid. 103(a)(2), (e).

Plaintiffs have not met that demanding standard for two reasons. First, any additional testimony about the number of investment options in the Plan would have been "cumulative" given the other "testimony to the same effect." *Conn. Res. Recovery Auth. v. Occidental Petroleum Corp.*, 705 F.2d 31, 37 (2d Cir. 1983). The jury heard from Dominguez herself, Penney, and others on this point. The district court thus acted well within its discretion, *see* Fed. R. Evid. 403, and Plaintiffs suffered no prejudice from its exclusion, *Conn. Res. Recovery Auth.*, 705 F.2d at 37; *see Draddy v. Weston Trawling Co.*, 344 F.2d 945, 946-47 (2d Cir. 1965).

Second, the exclusion of this additional testimony was harmless because it related to at most background facts. The too-many-options claim was no longer in the case. The most Plaintiffs say (Br. 45) is that the additional Dominguez evidence was "relevant to present a complete picture of [Yale's] investment-related fiduciary process." They do not contend that the evidence itself showed that Yale failed to monitor investments; selected in-

appropriate share classes; or imprudently agreed to a bundling arrangement with TIAA. So even by Plaintiffs' own account, the excluded testimony was not "primary evidence in support of a material fact" necessary to their claims at trial. *Boyce*, 464 F.3d at 385 (internal quotation marks omitted).

### D. The District Court Did Not Err By Excluding Certain Expert Opinions On Loss

At trial, Plaintiffs sought to argue that Yale offered certain TIAA annuities that they viewed as imprudent, and therefore that Yale should have unilaterally transferred participants' assets out of those annuities to other investments without the participants' consent. SA112-20. The district court found that Yale could not have unilaterally transferred the assets, SA115-20, and it therefore excluded loss opinions from Plaintiffs' experts that were premised on Yale making unilateral transfers, SA128-36. Plaintiffs argue (Br. 46-50) that the court erred in excluding those opinions.

The Court need not reach this issue. As Plaintiffs admit (Br. 46-47), the excluded expert testimony concerned "loss or damages" for their monitoring and bundling claims. But the jury found no breach on those claims; it determined that Yale did not act imprudently by offering the TIAA annuities. SA123, 126. The jury never reached loss or damages, *id.*, so any claimed error would be harmless, *see Knight*, 880 F.3d at 643.

In any event, the district court's exclusion of the evidence was correct. The court explained that Yale lacked the authority to unilaterally transfer assets from the TIAA annuities to other investments. SA116. The documents governing Yale's Plan allowed Yale to unilaterally transfer assets only "to the extent permitted" under the contracts between the participants and TIAA, SA116 (internal quotation marks omitted), and those contracts made clear that only participants, and not Yale, can transfer assets, *see* B17-111. Specifically, each contract provided that only the participant and TIAA are parties to the contract, B17; that the participant owns the contract and can exercise all rights under the contract "without the consent of any other person," B54; and that all benefits under the contract "cannot be forfeited," B56. Taken together, these provisions made clear that the participant is in control of the assets, not Yale. SA116.

Plaintiffs also argue (Br. 49-50) that even if Yale did not have authority under the Plan's governing documents and the underlying contracts to unilaterally transfer participants' assets, ERISA compelled Yale to do it anyway. Plaintiffs provide no evidence that any fiduciary anywhere has ever transferred plan participants' assets without their consent in the way that they contend Yale should have here. *See Sacerdote*, 328 F. Supp. 3d 273, 303-04 (S.D.N.Y. 2018). And they cite no authority for their assertion that

ERISA *requires* fiduciaries to breach contracts between plan participants and providers. SA119. The district court thus correctly excluded this evidence.

## III. PLAINTIFFS' REMAINING ARGUMENTS FOR A NEW TRIAL FAIL

Plaintiffs contend (Br. 50-56) that they are entitled to a new trial on all claims because witnesses and defense counsel remarked that Yale's Plan is "generous" and defense counsel mentioned that this litigation was "lawyer-driven," and because the court instructed the jury that "class members were not given a choice as to whether to be a member of the class." None of their arguments warrants a new trial.

*Standard of Review*

The Court reviews the district court's decision to overrule an objection to counsel's argument to the jury for abuse of discretion. *Matthews v. CTI Container Transp. Int'l, Inc.*, 871 F.2d 270, 278 (2d Cir. 1989). If a party fails to make a contemporaneous objection, then the Court's review is for plain error. *Marcic v. Reinauer Transp. Cos.*, 397 F.3d 120, 124 (2d Cir. 2005). The Court reviews the district court's limiting instruction for abuse of discretion. *See Manley*, 337 F.3d at 250.

### A. Evidence And Argument About The Plan's Generosity Do Not Warrant A New Trial

Plaintiffs contend (Br. 51) that a handful of comments about the Plan's generosity caused them to suffer undue prejudice and warrant a new trial. Plaintiffs point to just a few brief comments throughout the course of a four-week trial with a transcript spanning over 3,600 pages.

Attorneys generally are allowed to comment on the evidence in their arguments to the jury. *See United States v. Jaswal*, 47 F.3d 539, 544 (2d Cir. 1995). "[B]ecause attorneys are given wide latitude in formulating their arguments to the jury, rarely will an attorney's conduct so infect a trial with undue prejudice or passion as to require reversal." *Patterson v. Balsamico*, 440 F.3d 104, 119 (2d Cir. 2006) (internal quotation marks and brackets omitted). Challenged comments to the jury warrant a new trial only if they "irreparably taint" the proceeding. *Id.* at 120. Further, where (as here) the district court instructed the jury that counsel's statements were not evidence, SA170, "[i]solated comments in the context of an otherwise proper summation do not warrant a new trial," *Air China, Ltd. v. Kopf*, 473 F. App'x 45, 51 (2d Cir. 2012) (summary order) (citing *Anastasio v. Schering Corp.*, 838 F.2d 701, 706 (3d Cir. 1988)).

Plaintiffs point (Br. 51) to four comments in the record about the generosity of Yale's Plan, none of which they contemporaneously objected to on

relevance or prejudice grounds. First, Yale elicited testimony that Yale employees considered the Plan to be a generous benefit. SA149. Plaintiffs objected to this question solely for lack of foundation, and did not object to the question once Yale's counsel rephrased it. *Id.* Second, Plaintiffs point to Yale's counsel's two passing mentions of the generosity of Yale's Plan during opening statements. A336-37 (Tr. 49:16-17, 61:9-10). Once again, Plaintiffs failed to object to these comments. Third, Yale's counsel mentioned the generosity of the Plan in passing during closing arguments. A607 (Tr. 3744:24-25). Plaintiffs did not object to this comment either.[7]

Plaintiffs have not demonstrated that allowing this testimony and argument was error that prejudiced them. The evidence showed that Yale's Plan *is* generous – Yale automatically enrolls all eligible employees and automatically makes contributions, and as a result each participant receives on average over 90% of his or her final salary each year in retirement. B254

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[7] Plaintiffs suggest (Br. 51-52) that they objected to these comments, but they did not. They cite (Br. 52) an objection they made to defense counsel's argument that the case was "lawyer-driven," not to any comment on Yale's generosity. SA200. They also cite (Br. 51) a limiting instruction they proposed for one exhibit, *see* SA144, 146-47, and an objection they made to a Yale demonstrative, SA157-59, but neither was related to comments about Yale's generosity.

(Tr. 1145:9-17). Plaintiffs argue (Br. 53-54) that this evidence was irrelevant, but they did not object at trial, and the evidence was relevant, because it directly rebutted Plaintiffs' argument that Yale was not interested in "protect[ing] the financial future of its employees." B123 (Tr. 36:7-11) (opening statement). There was no error here, let alone prejudicial plain error that could warrant overturning the jury's verdict.

### B. Comments That The Litigation Was "Lawyer-Driven" Do Not Warrant A New Trial

Plaintiffs argue (Br. 52-53) that the district court should have sustained their objections to evidence and argument suggesting that this case was "lawyer-driven." They point (Br. 52) to one piece of evidence: testimony that defense counsel elicited from one of the named plaintiffs, James Mancini, that he joined this lawsuit only after seeing an advertisement placed by Plaintiffs' counsel in the local newspaper. *See* SA141-43. And they point to one statement that defense counsel made in closing argument, where she said that this lawsuit "is a lawyer-driven, manufactured, and packaged case." A607 (Tr. 3744:13-15).

To begin with, Plaintiffs' counsel "open[ed] the door" to this evidence and argument by consistently putting themselves at the center of the case. *Paolitto v. John Brown E. & C., Inc.*, 151 F.3d 60, 66 (2d Cir. 1998); *see* Roger C. Park & Aviva Orenstein, *Trial Objections Handbook 2d* § 1:6 (2023) ("[A]n

attorney who initiates the presentation of evidence about an impermissible subject cannot claim error when the opponent 'fights fire with fire' by offering evidence on the same subject."). Plaintiffs' counsel repeatedly argued that they caused Yale to change its behavior by prosecuting this lawsuit. B126 (Tr. 39:3-6) (opening statement: Yale "didn't make any real changes to the investment lineup" until "three years after this lawsuit was filed"); B194 (Tr. 679:17-24) (eliciting testimony that Yale did not use an investment consultant until "after this lawsuit was filed"); B205 (Tr. 754:15-17) (same for Yale's decision to limit participant contributions to a certain account); B324 (Tr. 1994:2-10) (same for Yale's adoption of an IPS). Indeed, the district court "noticed" that Plaintiffs' counsel asked so many questions of the type "This was done . . . after this lawsuit was filed, right?" that it made the court "uncomfortable." B398-400 (Tr. 3124:8-3126:8).

Plaintiffs' counsel also tried to take credit for reducing recordkeeping fees. Specifically, they asked Ben Polak, formerly Yale's Provost and a member of the Committee, whether he was "aware that lawsuits like this one" contributed to the decrease in recordkeeping fees starting in 2009. B391 (Tr. 3101:20-22).

Plaintiffs' counsel also was unabashed and specific about their hands-on role in packaging this litigation. For example, Plaintiffs' counsel elicited

testimony from their standard-of-care expert Dominguez that counsel – not Dominguez – selected the investment funds she analyzed. B132 (Tr. 108:4-8) (in response to a question, Dominguez stated that the "22 funds [she] looked at" came from "a list" she was "given" "by counsel"; Plaintiffs' counsel then asked, "By my firm?" and Dominguez answered "Yes").

Thus, defense counsel's single comment that this litigation was "lawyer-driven" was accurate and permissible. Plaintiffs' counsel "readily discussed" their role at the center of this litigation throughout trial, so "[t]here is no basis for concluding that defense counsel's reference[]" to that role prejudiced Plaintiffs. *Valentin v. County of Suffolk*, 342 F. App'x 661, 663 (2d Cir. 2009) (summary order); *see Paolitto*, 151 F.3d at 66.

Even if Plaintiffs' counsel had not opened the door to this topic, and the evidence and comment were somehow inaccurate or harmful, this is not the "rare[]" case where "an attorney's conduct so infect[s] a trial with undue prejudice or passion as to require reversal." *Patterson*, 440 F.3d at 119. The *one* line of questioning that Yale elicited about how this lawsuit came about and the *one* comment in Yale's counsel's closing argument did not "irreparably taint" the trial in view of the record as a whole. *Id.*

### C. The District Court's Class-Action Instruction Was Not Prejudicial Error

Plaintiffs challenge (Br. 54-56) the district court's instruction that "class members were not given a choice as to whether to be a member of the class," SA187, which the court gave to limit jury speculation, A600 (Tr. 3605:1-3). Plaintiffs objected to this instruction, A190, so the Court's review is for abuse of discretion, *Uzoukwu v. City of New York*, 805 F.3d 409, 414 (2d Cir. 2015).

There was no abuse of discretion. Plaintiffs do not dispute that the district court's instruction is substantively correct because the court certified the class under Rule 23(b)(1), B12-14, which does not allow class members to opt out, *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 361 (2011). Instead, they speculate (Br. 54-55) that the jury could have understood this instruction as an additional reason to believe that the case was lawyer-driven.

Putting aside that Plaintiffs opened the door to arguments about the case being "lawyer-driven," the district court did not abuse its discretion by giving the instruction. The court determined the instruction was "necessary" to "eliminate the possibility of speculation." A600 (Tr. 3605:1-3). And the next instruction made clear that the jury should not draw a negative inference from the fact that class members could not opt out. It said: "The

fact that this case is proceeding as a class action does not indicate that the claims made on behalf of the class have merit or do not have merit." SA187. The district court was best positioned to determine what instructions were needed to prevent speculation, and its instructions were complete and accurate.

## IV. THE COURT SHOULD AFFIRM THE DISMISSAL OF THE PROHIBITED-TRANSACTION CLAIMS

Plaintiffs brought three prohibited-transaction claims, alleging that Yale's payment of recordkeeping and investment-management fees to TIAA and Vanguard were transactions prohibited by ERISA. The district court granted Yale summary judgment on the claims on the ground that Plaintiffs failed to point to evidence of self-dealing or other disloyal conduct. That ground is incorrect after *Cunningham*, but the claims fail regardless.

*Standard of Review*

The Court reviews the district court's grant of summary judgment *de novo* and may affirm "on any basis for which there is a record sufficient to permit conclusions of law, including grounds upon which the district court did not rely." *Leon v. Murphy*, 988 F.2d 303, 308 (2d Cir. 1993).

### A. Plaintiffs' Prohibited-Transaction Claims Fail Under *Cunningham*

Plaintiffs contend that Yale's payments of fees to TIAA and Vanguard were transactions prohibited by 29 U.S.C. § 1106(a). Under that section, a fiduciary "shall not cause the plan to engage in a transaction, if he knows or should know that such transaction constitutes a . . . furnishing of goods, services, or facilities between the Plan and the party in interest." 29 U.S.C. § 1106(a). Because the statute, as written, "would appear to prohibit payments by a plan to any entity providing it with any services," courts have read this statute in a variety of narrow ways to "avoid[] absurd results." *Cunningham*, 86 F.4th at 973-74. The district court here read the statute as prohibiting only transactions that involve self-dealing or disloyal conduct. SA106-09.

In *Cunningham*, issued after the district court's summary-judgment decision, this Court rejected that standard. The Court instead held that a prohibited-transaction claim requires the plaintiff to prove that the transaction was "unnecessary or involved unreasonable compensation." 86 F.4th at 975 (internal quotation marks and emphasis omitted). Although the district court had not used that standard in dismissing the prohibited-transaction claim in that case, the *Cunningham* Court nevertheless affirmed, concluding that the plaintiff had failed "to allege in the first instance that the

transactions were unnecessary or that the compensation was unreasonable." *Id.* at 978-79.

The Court similarly should affirm here. "[T]he subsequent jury verdict in [Yale's] favor means that" the prohibited-transaction claims "would necessarily have failed." *Wilson v. Hanrahan*, 804 F. App'x 58, 61 (2d Cir. 2020) (summary order); *see Patrolmen's Benevolent Ass'n of N.Y. v. City of New York*, 310 F.3d 43, 54-55 (2d Cir. 2002).

In their complaint, Plaintiffs relied on the same factual allegations to support their imprudence claims and their prohibited-transaction claims. *See, e.g.*, A102-59. They alleged that the payments Yale made to TIAA and Vanguard for recordkeeping services were too high and that certain payments Yale made to TIAA and Vanguard for investment-management services were either not necessary (because Yale should not have offered the relevant investment option) or too high (because a lower-cost option was available). *See id.* They contended that the recordkeeping and investment-management payments were both imprudent (for their fiduciary-breach claims) and unreasonable or unnecessary (for their prohibited-transactions claims). *E.g.*, *compare* A173-75 (claim for breach of fiduciary duties for "Unreasonable Administrative Fees"), *with* A175-76 (same for prohibited-transaction claim). Plaintiffs acknowledged in their summary-judgment briefing

that their prohibited-transaction and imprudence claims "aris[e] from the same facts." Dkt. 299-1, at 38.

But as to Plaintiffs' imprudence claims based on investment-monitoring, share classes, and bundling, the jury determined that Yale did not breach its duties. SA123-27. The jury thus necessarily determined that Yale's conduct with respect to the investment options in the Plan, including its payments for investment-management services, was necessary and reasonable. *See Hughes*, 595 U.S. at 177. And as to the recordkeeping claim, it is undisputed that recordkeeping services are necessary for the Plan, and the jury found that Plaintiffs failed to prove an alternative amount that Yale could have paid. SA122. Plaintiffs thus could not have proven that Yale's recordkeeping fees were unreasonable.

**B. Plaintiffs' Arguments Lack Merit**

Plaintiffs contend (Br. 58) that the jury's verdict supports a remand, arguing that "jury's finding of a loss to the Plan" on the recordkeeping claim means there is "necessarily a genuine dispute as to whether the recordkeepers received unreasonable compensation for their services." But the jury determined that Plaintiffs had not proven any amount of loss for that claim. SA122; *see* pp. 26-27, *supra*. To show that Yale's fees were unreasonable at summary judgment, Plaintiffs relied on the same evidence from Otto and

Minnich that the jury rejected at trial. *See* Dkt. 299-1, at 40. Plaintiffs' prohibited-transaction claims thus necessarily would have failed.

Plaintiffs do not point to any other facts that support their prohibited-transaction claims. For example, the *Cunningham* Court explained that a plaintiff can prove a prohibited-transaction claim by presenting evidence that the fees paid were "so disproportionately large that they could not have been the product of arm's-length bargaining." 86 F.4th at 978-79 (internal quotation marks omitted). Plaintiffs do not point to any such evidence here. Instead, as explained, their only theory was that Yale could have paid lower recordkeeping fees, and the evidence at trial completely refuted their experts' testimony on that point. *See* pp. 26-27, *supra*. Plaintiffs thus give the Court no reason to disturb the district court's summary-judgment decision.

## V. IN THE EVENT OF A REMAND, THE JUDGE RATHER THAN A JURY SHOULD SERVE AS TRIER OF FACT

If the Court remands any portion of this case for a new trial, it should instruct that the new trial be held before the judge rather than a jury.

*Standard of Review*

The Court reviews the district court's denial of a motion to strike a jury demand *de novo*. *Brown v. Sandimo Materials*, 250 F.3d 120, 125 (2d Cir. 2001).

### A. Plaintiffs Bring An Equitable Claim And Seek Equitable Relief

A district court should strike a jury demand if "there is no federal right to a jury trial" for the claims at issue. Fed. R. Civ. P. 39(a)(2). ERISA does not create a right to a jury trial. *See DeFelice v. Am. Int'l Life Assur. Co. of N.Y.*, 112 F.3d 61, 64 (2d Cir. 1997). The only potential source of a jury-trial right is the Seventh Amendment, which preserves the right to trial by jury "where legal rights" – as opposed to equitable rights – "are at stake." *Chauffeurs, Teamsters & Helpers, Local No. 391 v. Terry*, 494 U.S. 558, 565 (1990).

To determine whether a Seventh Amendment jury-trial right exists, a court compares the action at issue to "18th-century actions brought in the courts of England prior to the merger of the courts of law and equity." *Terry*, 494 U.S. at 565 (internal quotation marks omitted). If the action would have been brought in a court of equity, the court then "examine[s] the remedy sought and determine[s] whether it is legal or equitable in nature." *Id.*

ERISA's fiduciary duties are "derived from the common law of trusts." *Dudenhoeffer*, 573 U.S. at 416 (internal quotation marks omitted). Historically, "an action by a trust beneficiary against a trustee for breach of fiduciary duty" was "within the exclusive jurisdiction of the courts of equity." *Terry*, 494 U.S. at 567. Plaintiffs' claims therefore would have been heard by a court of equity. Add., *infra*, 5a.

Plaintiffs also seek equitable relief. They asked the district court for an order requiring Yale to "make good to the Plan all losses to the Plan resulting from each breach of fiduciary duty." A185-86. The Supreme Court has held that this remedy is equitable, not legal. *CIGNA Corp. v. Amara*, 563 U.S. 421, 441 (2011). The Court explained that "[e]quity courts possessed the power to provide relief in the form of monetary 'compensation' for a loss resulting from a trustee's breach of duty." *Id.* The Court further explained that this type of "make-whole" relief against a trustee was "called a 'surcharge,' [and] was exclusively equitable." *Id.* at 442 (internal quotation marks omitted); *see N.Y. State Psychiatric Ass'n v. United-Health Grp.*, 798 F.3d 125, 134 (2d Cir. 2015) (under *Amara*, when "a plan participant brings suit against [an ERISA fiduciary] for breach of fiduciary duty relating to the terms of the plan," the remedy of "surcharge" "constitutes equitable relief" (internal quotation marks omitted)).

Plaintiffs here seek exactly the type of relief that the Supreme Court described in *Amara*. In fact, they expressly called their requested relief a "[s]urcharge." A186. So they are not entitled to a jury trial, as many district

courts that have evaluated substantively similar claims by ERISA plaintiffs have held[8] – including in other cases against university 403(b) plans.[9]

### B. The District Court Erred In Concluding That Plaintiffs' Requested Relief Is Legal

The district court held that Plaintiffs are seeking legal and not equitable relief. Add., *infra*, 7a. It relied on *Pereira v. Farace*, 413 F.3d 330 (2d Cir. 2005), in which this Court held that an order for compensatory damages is legal relief, even when the claim is for breach of fiduciary duty, unless the plaintiff seeks recovery of a specific, identified sum of money within the defendant's possession. *Id.* at 340.

But *Pereira* is not consistent with the Supreme Court's later decision in *Amara*. *Pereira* relied on *dictum* from *Great-West Life & Annuity Insurance v. Knudson*, 534 U.S. 204 (2002). *Great-West* involved a claim by a fiduciary, who sued a beneficiary on behalf of an insurance plan to obtain reimbursement for money that the plan had advanced to the beneficiary after an accident. *Id.* at 207-09. Because the underlying dispute was an effort

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[8] *See, e.g.*, *Perez v. Silva*, 185 F. Supp. 3d 698, 703 (D. Md. 2016); *Bauer-Ramazani v. TIAA-CREF*, No. 09-cv-190, 2013 WL 6189802, at *11 (D. Vt. Nov. 27, 2013); *In re YRC Worldwide, Inc. ERISA Litig.*, No. 09-cv-2593, 2010 WL 4920919, at *4 (D. Kan. Nov. 29, 2010).

[9] *Tracey v. Mass. Inst. of Tech.*, 395 F. Supp. 3d 150, 154 (D. Mass. 2019) (collecting cases).

to "impose personal liability on [the beneficiary] for a contractual obligation to pay money," the Supreme Court concluded that the claim was "quintessentially an action at law." *Id.* at 210. The Court then noted that "generally" requests for equitable relief are those that seek "particular funds or property in the defendant's possession" rather than those that seek "to impose personal liability on the defendant." *Id.* at 214. The *Pereira* Court reasoned that this language "reconfigur[ed] the legal landscape of restitution," by announcing a virtually categorical "rule that a defendant must possess the funds at issue" for monetary relief to be equitable. 413 F.3d at 340.

*Pereira*'s reading of *Great-West* is no longer tenable in light of *Amara*. The *Amara* Court expressly held that "[t]he surcharge remedy extended to a breach of trust committed by a fiduciary encompassing any violation of duty imposed upon that fiduciary." 563 U.S. at 442. The Court further explained that, "insofar as an award of make-whole relief is concerned," the fact that the defendant "is analogous to a trustee makes a critical difference." *Id.* *Amara* thus completely undermines *Pereira*'s rule for determining whether relief is equitable, which is based entirely on whether the defendant is being compelled to disgorge specific funds and expressly does not consider whether the defendant is a fiduciary. 413 F.3d at 340 (rejecting

argument that *Great-West* applies to "only non-fiduciary defendants"). Because *Pereira*'s "rationale [was] overruled, implicitly or expressly, by the Supreme Court" in *Amara*, it no longer is binding. *Nicholas v. Goord*, 430 F.3d 652, 659 (2d Cir. 2005).

The district court concluded that *Pereira* remains viable after *Amara*, but it was mistaken. It reasoned that *Amara* and *New York State Psychiatric Association* are limited to situations where the plaintiffs are seeking to be made whole for benefits owed to them "under the plan" – *i.e.*, where the plaintiffs are seeking recovery from the specific assets in the plan, as opposed to the defendant's general assets. Add., *infra*, 7a-15a. But the Supreme Court's reasoning in *Amara* was not limited to that situation. On the contrary, the Court held that surcharge "extend[s] to a breach of trust committed by a fiduciary encompassing *any* violation of duty imposed upon that fiduciary." 563 U.S. at 442 (emphasis added); *see id.* at 441 ("Equity courts possessed the power to provide relief in the form of monetary 'compensation' for a loss resulting from a trustee's breach of duty."). The district court's reading of *Amara* thus was unduly cramped, and its jury-trial holding should be reversed.

## CONCLUSION

The Court should affirm the judgment of the district court. If the Court vacates and remands any part of the judgment for a new trial, that trial should be before the district court, not a jury.

Dated: March 7, 2024

Respectfully submitted,

/s/ *Nicole A. Saharsky*

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## CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g), undersigned counsel certifies that this brief:

(i) complies with the type-volume limitation of Circuit Rule 32.1(a)(4)(A) because it contains 16,488 words, including footnotes and excluding the parts of the brief exempted by Rule 32(f); and

(ii) complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared using Microsoft Office Word 2016 and is set in Century Schoolbook font in a size equivalent to 14 points or larger.

Dated: March 7, 2024

s/ *Nicole A. Saharsky*
Nicole A. Saharsky

# ADDENDUM

**UNITED STATES DISTRICT COURT**
**DISTRICT OF CONNECTICUT**

| | |
|---|---|
| JOSEPH VELLALI, NANCY S. LOWERS, JAN M. TASCHNER, and JAMES MANCINI, individually and as representatives of a class of participants and beneficiaries on behalf of the Yale University Retirement Account Plan,<br><br>Plaintiffs,<br><br>v.<br><br>YALE UNIVERSITY, MICHAEL A. PEEL, and THE RETIREMENT PLAN FIDUCIARY COMMITTEE,<br><br>Defendants. | Civil No. 3:16-cv-1345(AWT) |

**RULING ON MOTION TO STRIKE JURY DEMAND**

The defendants have moved to strike the plaintiffs' jury demand. For the reasons set forth below, the defendants' motion is being denied.

## I. FACTUAL BACKGROUND

Plaintiffs Joseph Vellali, Nancy S. Lowers, Jan M. Taschner and James Mancini, individually and as representatives of a class of participants and beneficiaries in Yale University's 403(b) Retirement Account Plan (the "Plan"), bring this action under 29 U.S.C. § 1132(a)(2) on behalf of the Plan against defendants Yale University, Michael A. Peel, and the Retirement

Plan Fiduciary Committee for violations of the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 et seq. ("ERISA"). The class is all participants and beneficiaries of the Yale University Retirement Account Plan from August 9, 2010, through the date of judgment, excluding the defendants.

The plaintiffs allege in their Amended Complaint (ECF No. 57) that the defendants violated ERISA in three ways: (1) by breaching their fiduciary duties of prudence and loyalty (Counts I, III, and V), (2) by engaging in transactions prohibited by ERISA (Counts II, IV, and VI), and (3) with respect to Yale and Peel, by failing to monitor members of the Retirement Plan Fiduciary Committee to ensure compliance with ERISA's standards (Count VIII). (There is no Count VII.)

At this stage in the case, the remaining claims are those in Counts I, III, and V that the defendants breached their fiduciary duty of prudence.

In the prayer for relief, the plaintiffs request that the court, inter alia:

- Find and declare that Defendants have breached their fiduciary duties as described above;
- Find and adjudge that Defendants are personally liable to make good to the Plan all losses to the Plan resulting from each breach of fiduciary duty, and to otherwise restore the Plan to the position it would have occupied but for the breaches of fiduciary duty;
- Determine the method by which Plan losses under 29 U.S.C. §1109(a) should be calculated;
- Order the Defendants to pay the amount equaling

all sums received by the conflicted recordkeepers as a result of recordkeeping and investment management fees;

- Order Defendants to provide all accountings necessary to determine the amounts Defendants must make good to the Plan under §1109(a);
- Remove the fiduciaries who have breached their fiduciary duties and enjoin them from future ERISA violations;
- Surcharge against Defendants and in favor of the Plan all amounts involved in any transactions which such accounting reveals were improper, excessive and/or in violation of ERISA;
- Reform the Plan to include only prudent investments;
- Reform the Plan to obtain bids for recordkeeping and to pay only reasonable recordkeeping expenses;

. . .

- 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.

Am. Comp. at 131.

## II. DISCUSSION

In Pereira v. Farace, the court reviewed the two-step process that must be followed in determining whether a party has a right to a jury trial. 413 F.3d 330 (2d Cir. 2005). "In deciding whether a particular action is a suit at law that triggers this important protection, we are instructed to apply the two-step test set forth in Granfinanciera, 42 U.S. at 42, 109 S.Ct. 2782." Id. at 337 (citing Granfinanciera, S.A. v. Nordberg, 492 U.S. 33 (1989)). "First, we ask whether the action would have been deemed legal or equitable in 18th century

England." Id. (emphasis in original) (internal citations and quotation marks omitted). "Second, we examine the remedy sought and determine whether it is legal or equitable in nature." Id. (emphasis in original) (internal citations and quotation marks omitted). Finally, "[w]e then balance the two, giving greater weight to the latter." Id. (internal citations and quotation marks omitted).

As to the first step of the analysis, in Pereira the court "accept[ed] the district court's statement that as a 'general rule' breach of fiduciary duty claims were historically within the jurisdiction of equity courts." Id. at 338 (citing Chauffeurs, Teamsters and Helpers, Local No. 391 v. Terry, 494 U.S. 558, 567 (citing 2 J. Story, Commentaries on Equity Jurisprudence § 960, at 266 (13th ed. 1886) and Restatement (Second) of Trusts § 199(c) (1959))). The court rejected an argument by the defendants there, based on Ross v. Bernhard, 396 U.S. 531 (1970), that the general rule did not apply and held that the claims for breach of fiduciary duty "would have been equitable in 18th century England and thus that step one of Granfinanciera weighs against a jury trial." Id. at 339; see also Cunningham v. Cornell University, 2018 WL 4279466 at *2 ("Here, the breach of the fiduciary duty of prudence derives from the law of trusts that was heard in equity." (citing Cent. States, Se. & Sw. Areas Pension Fund v/ Cent. Transp., Inc., 472

U.S. 559, 570 (1985); see also Restatement (First) of Trusts § 174 (1935) (duty to exercise care and skill that a person of ordinary prudence would in dealing with his own property))).

Similarly, the court concludes here that this step of the analysis weighs against a jury trial.

"The second step of the Granfinanciera test focuses on the nature of the relief sought. It calls upon us to decide whether the 'type of relief [sought] was available in equity courts as a general rule.'" Pereira, 413 F.3d at 339 (alteration in original) (internal citations omitted) (quoting Rego v. Westvaco Corp., 319 F.3d 140, 145 (4th Cir. 2003)).

In Pereira, the district court had "determine[d] that the Trustee had, in fact, actually 'limited his relief to restitution,' which is equitable in nature." Id. (emphasis in original). "In so doing the district court concluded that the fact that the officers and directors never personally possessed any of the disputed funds [does] not militate that the relief [is] not equitable." Id. (alteration in original) (internal citations and quotation marks omitted). "On appeal, defendants . . . emphasize[d] that, because they never possessed the funds in question and thus were not unjustly enriched, the remedy sought against them cannot be considered equitable." Id. The court agreed and concluded that "the remedy sought was legal and thus [the defendants] were entitled to a jury trial." Id.

In reaching this conclusion in Pereira, the court placed great weight on the Supreme Court's decision in Great-West Life & Annuity Insurance Company v. Knudson, 534 U.S. 204 (2002). There, the Supreme Court stated that "'for restitution to lie in equity, the action generally must seek not to impose personal liability on the defendant, but to restore to the plaintiff particular funds or property in the defendant's possession.'" Id. at 340 (quoting Great-West, 534 U.S. at 214). The court observed: "Nor can we ignore the Supreme Court's inclusion of footnote 2, highlighting a single exception to its rule that a defendant must possess the funds at issue for the remedy of equitable restitution to lie against him." Id. (quoting Great-West 534 U.S. at 214 n. 2 (That "limited exception" is for "an accounting of profits," which, of course, is not relevant to this case. Id.)). "Finally, Justice Ginsburg's dissent in Great-West offers further guidance by pointing out that restitution is measured by a defendant's 'unjust gain, rather than [by a plaintiff's] loss.'" Id. (quoting Great-West, 534 U.S. at 229 (Ginsburg, J., dissenting) (citing 1 D. Dobbs, Law of Remedies § 12.1(1), at 9)).

Consequently, the court held in Pereira "that the district court improperly characterized the Trustee's damages as restitution. Plaintiff's claim is for compensatory damages—a legal claim." Id.

Here, the prayer for relief in the Amended Complaint includes requests that are clearly requests for equitable relief, but it also includes a request that the court find and adjudge that the defendants "are personally liable to make good to the Plan all losses to the Plan resulting from each breach of fiduciary duty . . . ." Am. Compl. at 131. When "a 'legal claim is joined with an equitable claim, the right to jury trial on the legal claim, including all issues common to both claims, remains intact.'" Tull v. U.S., 481 U.S. 412, 425 (quoting Curtis v. Loether, 415 U.S. 189, 196 (1974)); see also Cunningham, 2018 WL 4279466 at *4 (holding that "The beneficiaries' claim for money damages against the fiduciaries——a legal claim—— . . . will be tried to a jury. The beneficiaries' claims for . . . equitable relief will be tried to the Court.").

Based on the analysis in Pereira, this particular remedy, i.e., compensatory damages for which the defendants would be personally liable as opposed to restoring to the plaintiffs' particular funds or property that is in the defendants' possession, is legal in nature. This legal remedy is requested with respect to all of the plaintiffs' claims.

Because greater weight is accorded to the second step of the Granfinanciera test, and the plaintiffs seek a remedy that is legal in nature, the court concludes that the plaintiffs have

the right to a jury trial in this case on their claims for money damages. See Pereira, 413 F.3d at 340-41.

In support of their argument that all the plaintiffs' requested remedies are equitable in nature, the defendants maintain that Great-West is not applicable in a case brought against a fiduciary. The defendants argue: "Great-West did not consider an action against a fiduciary for breach of fiduciary duty. It involved a completely different type of ERISA claim: a claim by a fiduciary against a beneficiary for what, in essence, was a breach of contract." Defs.' Mem. Supp. Mot. Strike Jury Demand (ECF No. 416) at 4 (emphasis in original). This position was considered and rejected in Pereira. There, the court stated:

> The Trustee contends that the holding of Great-West is inapplicable here because Great-West involved only non-fiduciary defendants. In Callery, the Tenth Circuit rejected this same argument. 392 F.3d at 409. That court found that, while the "distinction made in Strom ... based on the status of the defendant as a fiduciary ... may have been compelling before Great-West, [it is] not so now."

Pereira, 413 F.3d at 340 (quoting Callery v. U.S. Life Ins. Co. in City of New York, 392 F.3d 401, 409 (2004)).

The defendants argue further, however, that Pereira should not be followed in light of subsequent decisions in Cigna Corp. v. Amara, 563 U.S. 421 (2011), and New York State Psychiatric Ass'n, Inc. v. United Health Group, 798 F.3d 125 (2d Cir. 2015).

The defendants assert that "[i]n Amara, the Supreme Court explained that 'the fact that the defendant in this case . . . is analogous to a trustee' made 'a **critical difference**' to whether 'make-whole' monetary relief was equitable or legal in nature." Defs.' Mem. Supp. Mot. Strike Jury Demand at 5-6 (emphasis added) (quoting Amara, 563 U.S. at 442). In light of the discussion leading up to the language in Amara relied upon by the defendants, the court does not agree with their reading of Amara.

In Amara, the Court stated that Mertens v. Hewitt Associates, 508 U.S. 248 (1993), involved "a claim seeking money damages brought by a beneficiary against a private firm that provided a trustee with actuarial services." Amara, 563 U.S. at 439. The Court "found that the plaintiff sought nothing other than compensatory damages against a nonfiduciary. And [it] held that such a claim, traditionally speaking, was legal, not equitable in nature." Id. (internal citations and quotation marks omitted).

The Court stated that "[i]n Great-West, we considered a claim brought by a fiduciary against a tort-award-winning beneficiary seeking monetary reimbursement for medical outlays that the plan had previously made on the beneficiary's behalf." Id. The Court observed: "But we noted that the money in question was not the 'particular' money that the tort defendant had paid.

And, traditionally speaking, relief that sought a lien or a constructive trust was legal relief, not equitable relief, unless the funds in question were 'particular funds or property in the defendant's possession.'" Id. (quoting Great-West, 534 U.S. at 213).

In Amara, the Court stated that there, "the District Court injunctions require the plan administrator to pay to already retired beneficiaries money owed them under the plan as reformed. But the fact that this relief takes the form of a money payment does not remove it from the category of traditionally equitable relief." Id. at 441. The reference to "this relief" is thus a reference to the payment of money owed the beneficiaries under the plan. The Court explained that the fact that there would be a money payment did not remove this relief from the category of traditionally equitable relief because "[e]quity courts possessed the power to provide relief in the form of monetary 'compensation' for a loss resulting from a trustee's breach of duty, or to prevent the trustee's unjust enrichment." Id. The Court explained further that "prior to the merger of law and equity this kind of monetary remedy against a trustee, sometimes called a 'surcharge,' was 'exclusively equitable.'" Id. at 441-42 (citations omitted). Thus, the point being made by the Court was that this kind of remedy was sometimes called a surcharge and was exclusively equitable.

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It was in this context that the Court stated the following, portions of which are relied upon by the defendants here:

> The surcharge remedy extended to a breach of trust committed by a fiduciary encompassing any violation of a duty imposed upon that fiduciary. Thus, insofar as an award of make-whole relief is concerned, the fact that the defendant in this case, unlike the defendant in Mertens, is analogous to a trustee makes a critical difference.

Id. at 442 (internal citations omitted). Two points are noted with respect to what the Court actually said (and did not say) in Amara. First, while the Court stated that the surcharge remedy extended to a breach of trust committed by a fiduciary, it did not say that a surcharge was the only remedy for a breach of trust committed by a fiduciary. Second, the reason the fact that the defendant in Amara was analogous to a trustee, while the defendant in Mertens was not, was a "critical difference" is that a surcharge remedy extended to the breach of trust committed by the fiduciary defendant in Amara but did not extend to the breach of trust committed by the nonfiduciary defendant in Mertens.

With respect to New York State Psychiatric Ass'n, the defendants argue that "the Second Circuit has explicitly recognized that a request for 'monetary compensation' for 'any losses resulting' from a defendant's alleged violations of ERISA 'closely resembles' the surcharge remedy and is 'true equitable

relief.'" Defs.' Mem. Supp. Mot. Strike Jury Demand at 6 (quoting New York State Psychiatric Ass'n, 798 F.3d at 135). However, New York State Psychiatric Ass'n was also a suit for a breach of fiduciary duty relating to the terms of a plan. Thus, the court stated that "where, as here, a plan participant brings suit against a 'plan fiduciary (whom ERISA typically treats as a trustee)' for breach of fiduciary duty relating to the terms of a plan, any resulting injunction coupled with 'surcharge'——'monetary "compensation" for a loss resulting from a [fiduciary's] breach of duty, or to prevent the [fiduciary's] unjust enrichment'——constitutes equitable relief under § 502(a)(3)." New York State Psychiatric Ass'n, 798 F.3d at 134 (emphasis added)(quoting Amara 563 U.S. at 439).

After considering Pereira and Amara in light of the decisions in Mertens v. Hewitt Associates, 508 U.S. 248 (1993), Great-West Life & Annuity Ins. Co. v. Knudson, 234 U.S. 204 (2002), Sereboff v. Mid Atlantic Medical Services, Inc., 547 U.S. 356 (2006), US Airways, Inc. v. McCutchen, 569 U.S. 88 (2013), and Montanile v. Board of Trustees of Nat. Elevator Industry health Benefit Plan, 577 U.S. 136 (2016), the court concludes that the critical distinction is whether the plaintiff is seeking to recover specifically identifiable funds or other property within the defendant's control or is seeking recovery out of the defendant's general assets.

Mertens involved "a claim seeking money damages brought by a beneficiary against a private firm that provided a trustee with actuarial services." Amara, 563 U.S. at 439. The Supreme Court "found that the plaintiff sought nothing other than compensatory damages against a nonfiduciary. And [it] held that such a claim, traditionally speaking, was legal, not equitable in nature." Id. (internal citations and quotation marks omitted).

The Court also discussed Great-West in Amara. The Court stated that "[i]n Great-West, we considered a claim brought by a fiduciary against a tort-award-winning beneficiary seeking monetary reimbursement for medical outlays that the plan had previously made on the beneficiary's behalf." Id. "But [the Court] noted that the money in question was not the 'particular' money that the tort defendant had paid. And, traditionally speaking, relief that sought a lien or a constructive trust was legal relief, not equitable relief, unless the funds in question were 'particular funds or property in the defendant's possession.'" Id. (quoting Great-West, 534 U.S. at 213).

"In Sereboff, [the Court] held that both the basis for the claim and the remedy sought were equitable. The plan there sought reimbursement from beneficiaries who had retained their settlement fund in a separate account." Montanile, 577 U.S. at 143 (citing Sereboff, 547 U.S. at 359-60). "The underlying

remedies that the plan sought . . . were equitable, because the plan 'sought specifically identifiable funds that were within the possession and control' of the beneficiaries—not recovery from the beneficiaries' 'assets generally.'" Montanile, 577 U.S. at 144 (quoting Sereboff, 547 U.S. 362-363).

US Airways, Inc. v. McCutchen involved a claim by a plan administrator against a beneficiary to enforce a reimbursement provision of the plan. The Court concluded that "as in Sereboff, '[t]he nature of the recovery requested' by the plan 'was equitable because [it] claimed specifically identifiable funds within the [beneficiaries'] control—that is, a portion of the settlement they had gotten.'" Montanile, 577 U.S. at 144 (alteration in original)(quoting US Airways, 569 U.S. at 95).

In Montanile, the plan had "an equitable lien by agreement that attached to Montanile's settlement fund when he obtained title to that fund." Montanile, 577 U.S. at 144. The Court observed:

> [T]he nature of the Board's underlying remedy would have been equitable had it immediately sued to enforce the lien against the settlement fund then in Montanile's possession. That does not resolve this case, however. Our prior cases do not address whether a plan is still seeking an equitable remedy when the defendant, who once possessed the settlement fund, has dissipated it all, and the plan seeks to recover out of the defendant's general assets.

Id. (emphasis in original). The Court concluded that:

> Absent specific exceptions not relevant here, "where a person wrongfully dispose[d] of the property of another but the property cannot be traced to any product, the other . . . cannot enforce a constructive trust or lien upon any part of the wrongdoer's property." The plaintiff had "merely a personal claim against the wrongdoer"——a quintessential action at law.

Id. at 145-46 (quoting Restatement of Restitution § 215(1) at 866).

Thus, these cases reflect that the material distinction in this context, for purposes of determining whether a remedy is equitable or legal in nature, is between those situations where a plaintiff seeks to recover "particular funds or property in the defendant's possession," and those situations where the plaintiff seeks to recover damages out of the defendant's assets generally. Great-West, 534 U.S. at 213.

**III. CONCLUSION**

For the reasons set forth above, the defendants' Motion to Strike the Jury Demand (ECF No. 415) is hereby DENIED.

It is so ordered.

Dated this 17th day of March 2023, at Hartford, Connecticut.

/s/AWT
Alvin W. Thompson
United States District Judge

**UNITED STATES DISTRICT COURT**

**DISTRICT OF CONNECTICUT**

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|---|---|---|
| **JOSEPH VELLALI,**<br>**NANCY S. LOWERS,**<br>**JAN M. TASCHNER, and**<br>**JAMES MANCINI*****, individually and as representatives of a class of participants and beneficiaries on behalf of the Yale University Retirement Account Plan,***<br><br>**Plaintiffs,**<br><br>**v.**<br><br>**YALE UNIVERSITY,**<br>**MICHAEL A. PEEL, and**<br>**THE RETIREMENT PLAN FIDUCIARY COMMITTEE,**<br><br>**Defendants.** | : | **CASE NO. 3:16-cv-1345 (AWT)** |

**JUDGMENT**

This action came before the Court for a trial by jury before the Honorable Alvin W. Thompson, United States District Judge.

Previously, on March 30, 2018, the Court entered an Order on Defendants' Motion to Dismiss, which was granted in part and denied in part.

On, October 21, 2022, the Court entered an Order on Defendants' Motion for Summary Judgment, which was granted in part and denied in part.

The remaining issues having been duly tried, the jury returned its verdict on June 28, 2023 in favor of the defendants on all claims.

It is therefore;

**ORDERED, ADJUDGED AND DECREED** that judgment is hereby entered in favor of defendants Yale University, Michael A. Peel, and The Retirement Plan Fiduciary Committee, and the case is closed.

Dated at Hartford, Connecticut, this 13th day of July, 2023.

DINAH MILTON KINNEY, Clerk

By /s/ Linda S. Ferguson
Linda S. Ferguson
Deputy Clerk

EOD: 713/2023

**CERTIFICATE OF SERVICE**

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the appellate CM/ECF system on March 7, 2024. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ *Nicole A. Saharsky*
Nicole A. Saharsky