UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

STUART KROHNENGOLD, et al., Plaintiffs, v. NEW YORK LIFE INSURANCE CO., et al. Defendants.	Case No. 1:21-cv-01778-JMF

DEFENDANTS' RESPONSE TO PLAINTIFFS' NOTICE OF SUPPLEMENTAL AUTHORITY

Defendants submit this response to Plaintiffs' Notice of Supplemental Authority (ECF No. 56) concerning *Kong v. Trader Joe's Co.*, No. 20-56415, 2022 WL 1125667 (9th Cir. Apr. 15, 2022). *Kong*, a one-page, unpublished, non-precedential opinion from the Ninth Circuit Court of Appeals, does not support Plaintiffs' Opposition to Defendants' Motion to Dismiss the Amended Complaint.

Like Plaintiffs' prior submission of supplemental authority (ECF No. 54), *Kong* addresses none of the core issues raised by Defendants' motion to dismiss, including standing, statute of repose, prohibited transactions, anti-inurement, or use of the Fixed Dollar Account as a default investment. *See, e.g.*, Defendants' Response to Plaintiffs' Notice of Supplemental Authority, Feb. 2, 2022 (ECF No. 55), at 1–2. Even as to the one, narrow issue addressed by the Ninth Circuit panel in its unreported decision, *Kong* does not counsel against dismissal here. In *Kong*, unlike here, plaintiffs alleged that the at-issue plan had offered ***retail*** share classes of certain investments rather than institutional share classes throughout the ***entire*** class period. *Kong*, 2022 WL 1125667, at *1; *see also Kong*, No. 20-05790, 2020 WL 7062395, at *1 (C.D.

Cal. Nov. 30, 2020). The Ninth Circuit rejected defendants' "revenue sharing" defense for continuous use of funds with retail share classes. 2022 WL 1125667, at *1. By contrast, here the Plans[1] were at all times invested in ***institutional*** share classes of the MainStay Funds, and cheaper share classes of certain of those funds were added to the Plans less than ***one or four months*** after they became available. *See* Defs.' Mem. at 19—20.[2] Plaintiffs' actual allegations here, unlike in *Kong*, fail to permit a reasonable inference of breach where the Plans were always invested in institutional—not retail—share classes, and the very short delay in moving to even lower-cost share classes is consistent with the administrative time necessary to implement a change. *Cf. Wildman v. Am. Century Servs., LLC*, 362 F. Supp. 3d 685, 709 (W.D. Mo. 2019) (delay of one year in switching to newly-available lower-cost share classes was not imprudent because the switch takes time for plans).

Dated: April 20, 2022

Respectfully submitted,

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[1] Capitalized terms have the same meaning as in Defendants' Memorandum Of Law In Support Of Their Motion To Dismiss ("Defs.' Mem."), ECF No. 42.

[2] *Kong* fails entirely to even address the holding by a different panel of the Ninth Circuit, identified in Defs.' Mem. at 19, affirming a decision that "merely alleging that a Plan offers retail-class rather than institutional-class funds is insufficient to state a claim for breach of the duty of prudence . . . ." *White v. Chevron Corp.*, No. 16-0793, 2017 WL 2352137, at *14 (N.D. Cal. May 31, 2017) (dismissing claim), *aff'd*, 752 F. App'x 453 (9th Cir. 2018).

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