UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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Stuart Krohnengold, Wayne Antoine, Lee Webber, Anthony Medici, Joseph Bendrihem, Larry Gilbert, and Rafael Musni, as representatives of a class of similarly situated persons, and on behalf of the New York Life Insurance Employee Progress Sharing Investment Plan, and the New York Life Insurance Company Agents Progress Sharing Plan,

Plaintiffs,

v.

New York Life Insurance Company; the Fiduciary Investment Committee; the Board of Trustees; Katherine O'Brien; Anthony R. Malloy; Yie-Hsin Hung; Arthur A. Seter; Scott L. Lenz; Robert J. Hynes; and John and Jane Does 1-20,

Defendants.

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Case No. 1:21-cv-01778 - JMF

PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

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INTRODUCTION

ERISA's bedrock principles, the fiduciary duties outlined in 29 U.S.C. § 1104, require that plan fiduciaries choose and manage a 401(k) plan's investments prudently and loyally. The fiduciaries charged with managing New York Life's ("NYL") 401(k) Plans – all high-level NYL executives, hand-picked by its CEO – failed their employees by using the Plans' assets to enrich NYL, rather than investing their retirement savings prudently and loyally, as ERISA requires. The Complaint explains how Defendants improperly favored NYL's own funds when investing the Plans' assets, knowing that these funds performed poorly and were excessively expensive. In addition, the fiduciary defendants automatically invest 100% of all new participant retirement contributions in a NYL stable value product called the Fixed Dollar Account ("FDA").

On its face, the FDA is not an appropriate default investment for most NYL employees, especially for those in their 20s, 30s or 40s. Unlike target date funds or balanced funds, the FDA does not provide a mix of asset classes which is necessary to properly grow a participant's 401(k) savings into a meaningful retirement "nest egg." In other words, for most employees whose 401(k) contributions are defaulted into the FDA, they will not obtain the benefits of their long-term investment horizon because the FDA's low returns will not allow them to accumulate adequate retirement savings. Prudent and loyal fiduciaries know this, and, not surprisingly, Defendants' choice of a principal-preserving product as the Plans' default investment is a stark outlier among defined contribution plans. In fact, currently just 1% of these plans choose a principal-preserving product as their default investment. If Defendants had not acted in NYL's interest, but had selected a prudent default option, such as a target date fund or balanced fund, the Plans' participants would have hundreds of million dollars more in retirement savings. The conflicted fiduciary defendants also selected and retained several expensive and underperforming MainStay Funds (NYL's mutual fund family) as Plan investments, which caused substantial losses to participant retirement savings.

FACTUAL BACKGROUND

NYL sponsors two 401(k) Plans, one for its employees and one for its insurance agents (together the "Plans"). Amended Complaint ¶ 48 ("Compl."), ECF No. 38. Both Plans automatically enroll all new eligible employees or agents, and both automatically invest 100% of all participant contributions in the Fixed Dollar Account ("FDA") unless and until the employee affirmatively changes his/her investment election into another fund offered by the Plans. *Id.* ¶¶ 67-68. However, participants' choices are limited to the investment options chosen by the Fiduciary Investment Committee ("Committee"), which has sole authority to select, retain and remove the investment options available to Plan participants. *Id.* ¶¶ 26, 31, 52. Members of the Committee are appointed by NYL's Chief Executive Officer ("CEO"), who may also remove or replace any member at any time. *Id.* ¶ 27. At all relevant times, the Committee members have been high-level NYL executives whose compensation and promotions are tied to NYL's financial performance, which is impacted by revenue and profits generated by the FDA and the MainStay Funds. *Id.* ¶ 28.

The Plans' assets – $4.35 billion in 2019 – represent one of the largest pools of 401(k) assets in the country. *Id.* ¶¶ 57-58. Due to the Plans' enormous size, the Committee selecting the Plans' investments had substantial bargaining power in the retirement market and should have been able to secure superior investment products at extraordinarily low cost. *Id.* ¶ 58. Instead, they selected and retained several NYL proprietary funds for the Plans' investments, including the FDA, which they chose as the Plans' default investment. *Id.* ¶¶ 5, 8. The FDA is offered through a "group annuity contract" whereby all assets invested in the FDA are transferred to NYL's general corporate account, which means that the Plans' assets may be used for NYL's general business purposes. *Id.* ¶¶ 70, 72. The Committee selected the FDA even though it did not provide the necessary mix of asset classes necessary to grow Plan participants' retirement savings. *E.g.*, *id.* ¶¶ 41, 45-47, 61-66. In addition, the Committee invested the Plans in several mutual funds managed

by NYL (the "MainStay Funds") even though the funds were far more expensive than similar (and sometimes identical) investments available to the Plans, and underperformed NYL's own self-chosen fund performance benchmarks. *Id.* ¶¶ 55, 102-37.

HISTORY AND PURPOSE OF ERISA

ERISA imposes strict fiduciary standards that are derived from the common law of trusts, including the fiduciary duties of loyalty and prudence. *Varity Corp. v. Howe*, 516 U.S. 489, 497, 506 (1996). The Second Circuit has described ERISA's fiduciary duties as "the highest known to the law." *Nicolaou v. Horizon Media, Inc.*, 402 F.3d 325, 331 (2d Cir. 2005) (quoting *Donovan v. Bierwirth*, 680 F.2d 263, 272 n.8 (2d Cir. 1982)). These exacting standards were adopted because "the crucible of congressional concern was misuse and mismanagement of plan assets … [and] ERISA was designed to prevent these abuses in the future." *Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 140 n.8 (1985) (pension plans are often "abused by those responsible for their management who manipulate them for their own purposes or make poor investments with them").

ERISA's prohibited transactions rules provide further protection for retirement assets by "categorically barring certain transactions deemed 'likely to injure the pension plan.'" *Harris Tr. & Sav. Bank v. Salomon Smith Barney, Inc.*, 530 U.S. 238, 241-42 (2000); 29 U.S.C. § 1106. While Congress provided limited exemptions to these prohibited transaction rules, the defendant bears the burden to establish that all conditions of a claimed exemption are satisfied. 29 U.S.C. § 1108; *Bekker v. Neuberger Berman Grp. LLC*, 2018 WL 4636841, at *8 (S.D.N.Y. Sept. 27, 2018) (§ 1108 exemption is an affirmative defense defendants must prove). Even if a prohibited transaction qualifies for an exemption, the fiduciary's decisions concerning the transaction are still subject to ERISA fiduciary standards. *See* 42 Fed. Reg. 18,734 (Mar. 31, 1977).

ARGUMENT

A plaintiff must show by a preponderance of the evidence that subject matter jurisdiction

exists. *APWU v. Potter,* 343 F.3d 619, 623 (2d Cir.2003). The Court may examine evidence outside of the pleadings and has considerable latitude in making factual determinations. *Id*. Where there is a factual challenge to jurisdiction, plaintiffs are "entitled to jurisdictional discovery in order to develop the factual record requisite for" showing that the court has jurisdiction. *Texas Intern. Magnetics, Inc. v. BASF Aktiengesellschaft*, 31 Fed. Appx. 738, 739 (2d Cir. 2002).

A Rule 12(b)(6) motion is governed by Rule 8(a) notice pleading standards, which require "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). When evaluating ERISA claims under Rule 12(b)(6), courts "must be attendant to ERISA's remedial purpose and evident intent to prevent through private civil litigation 'misuse and mismanagement of plan assets.'" *Russell*, 473 U.S. at 140 n.8, 142 n.9. As the Second Circuit recently stated, "'ERISA plaintiffs generally lack the inside information necessary to make out their claims in detail unless and until discovery commences.' So, as is true in many contexts, a claim under ERISA may withstand a motion to dismiss based on sufficient circumstantial factual allegations to support the claim, even if it lacks direct allegations of misconduct." *Sacerdote v. New York Univ.*, 2021 WL 3610355, at *5 (2d Cir. Aug. 16, 2021).

I. Plaintiffs May Properly Challenge the FDA as An Inappropriate Default Investment for the NYL Plans

A. <u>Defendants' Article III standing challenge is based on disputed factual issues that cannot be resolved without discovery.</u>

Defendants' assertion that Plaintiffs do not have Article III standing to challenge the FDA as an inappropriate default investment is based on factual assertions – contrary to the Complaint's allegations – that the Plaintiffs voluntarily **chose** to invest in the FDA. Where, as here, there is a factual challenge to jurisdiction, Plaintiffs are "entitled to jurisdictional discovery in order to develop the factual record requisite for such a showing." *Texas Int'l Magnetics,* 31 F.App'x at 739. Further, Plaintiffs are not required to make a *prima facie* showing of jurisdiction in order to get

discovery; they are only required to show that there is some basis for the assertion of jurisdiction. *Hollins v. U.S. Tennis Ass'n*, 469 F.Supp.2d 67, 71 (E.D.N.Y. 2006). And the court should "give the plaintiff 'ample opportunity to secure and present evidence relevant to the existence of jurisdiction.'" *APWU*, 343 F.3d at 619.

Plaintiffs have made the required showing that there is a basis for jurisdiction. The Complaint alleges that Plaintiffs Antoine, Webber and Krohnengold did not choose to invest their accounts in the FDA, but instead their 401(k) contributions were automatically invested 100% in the FDA when they first began participating in the Employee Plan. Compl. ¶¶ 15-17. Further, all three state under oath that they did not affirmatively choose to invest 100% of their 401(k) contributions in the FDA. Exs. 1, 2, 3. And the Employee Progress Sharing Plan's ("EPSI") Summary Plan Description ("SPD") is consistent with Plaintiffs' allegations and sworn statements: it explains that all contributions "will be invested in the Fixed Dollar Option, the Plan's default investment option, until you ***change*** your investment elections." Ex. 4 at 1 (emphasis added). In other words, the "investment elections" for all participants are automatically set to be 100% invested in the FDA, unless and until the participant ***affirmatively chooses*** a different investment. This means if Plaintiffs did ***nothing*** concerning their investments, the initial "investment election" would be 100% in the FDA.

Additionally, the SPD states that the only two ways to change the Plans' automatic 100% investment in the FDA are to log on to the Plan's website or call the NYL Benefits Center. Ex. 4 at 2. Plaintiffs Antoine and Webber have attested that, at the start of their employment, they did not log on to the website nor did they call the Benefits Center to affirmatively elect the FDA. Exs. 1 at ¶ 5; Ex. 2 at ¶ 4. This is further evidence that they did not voluntarily elect to invest 100% of their contributions in the FDA. Similarly, at the time Mr. Krohnengold began participating in the

Plan, participants could not make investment selections via the internet. Thus, his attestation that he did not call the Benefits Center to voluntarily choose a 100% investment in the FDA likewise indicates that his "investment election" resulted from the Plan's automatic settings. Ex. 3 at ¶ 5. For these reasons, Plaintiffs Antoine, Webber and Krohnengold have established a basis to obtain discovery to determine whether (as they recall), their Plan contributions were automatically invested 100% in the FDA when they began employment.

The Declaration of the Plans' Administrator, Maria Mauceri, does not indicate that she has any personal knowledge of the choices made by Plaintiffs nor the mechanism they allegedly used to elect a 100% allocation into the FDA. *See* ECF No. 44 ("Mauceri Decl."). Instead, Ms. Mauceri states, in conclusory fashion, that Plaintiffs "affirmatively chose to allocate 100% of [their] contributions to the EPSI Plan account to the Fixed Dollar Account." *Id.* ¶¶ 6-8. Yet the evidence she cites is ***not*** from NYL's records or electronic systems, rather she obtained it from another entity, "Alight." *Id.* And while the Alight screenshots Mauceri attaches include the words "PSP Investment Elections" in the upper left-hand corner, nothing in her Declaration establishes that the screenshot would look any different if a participant's "election" was voluntary versus by default.[1] *See* Mauceri Decl.; Exs. 1, 2, 3. As discussed above, because all participant accounts are automatically set up to invest 100% in the FDA, it appears that the screenshots Mauceri attaches would look the same whether Plaintiffs had voluntarily chosen a 100% allocation to the FDA, or if Plaintiffs had done ***nothing*** and the Plan's automatic "investment election" just remained in place. And presumably there should be either call records or electronic records showing the method by which each Plaintiff purportedly chose to invest 100% of his contributions in the FDA. But no

[1] Discovery is also warranted because Mauceri's statements that all plaintiffs were ***not*** automatically enrolled into the EPSI Plan appears to conflict with the SPD's statement that "[e]nrollment in the Plan is generally automatic." *Compare* Mauceri Decl. ¶¶ 6-12 *with* Ex. 4 at 1.

such records are provided. In fact, Ms. Mauceri's Declaration provides no information about what records Alight has in its possession showing the method by which Plaintiffs allegedly chose to invest 401(k) contributions entirely in the FDA. *See* Mauceri Decl. Plaintiffs therefore are entitled to discovery concerning the online and call records that track affirmative investment elections made by Plan participants and depositions of Alight and Ms. Mauceri. *APWU*, 343 F.3d at 619.

B. The monitoring claims related to the FDA are timely.

The Supreme Court has stated that a fiduciary's duty of prudence includes an ongoing duty to revisit plan investments and remove imprudent ones. *Tibble v. Edison Int'l*, 575 U.S. 523, 529 (2015). Here, the Complaint alleges that Defendants had a continuing duty to monitor the FDA and ensure it was an appropriate default investment that provides exposure to stocks and bonds, which is necessary for the asset accumulation needs of the Plans' population as a whole. Compl. ¶¶ 61-63, 74-77, 154. It further alleges that, from March 2015 to the present, Defendants failed to monitor and replace the FDA with an appropriate default investment and failed to reinvest the assets previously defaulted to the FDA in an appropriate default investment. *Id.* ¶¶ 85, 145-56, Count I. Moreover, because Defendants maintained the FDA as the Plans' default, Plaintiff Antoine's Plan contributions were automatically invested 100% in the FDA during the last six years. Ex. 1. These monitoring claims are timely under *Tibble*, 575 U.S. at 530 (the duty to monitor is "separate and apart from the duty to exercise prudence in selecting investments at the outset…. So long as the alleged breach of the continuing duty occurred within six years of suit, the claim is timely."). Defendants wrongly assert that, if Plaintiffs' retirement savings were ***first*** defaulted into the FDA outside the limitations period, Plaintiffs cannot challenge Defendants' actions ***after*** March 2015 in connection with the Plans' default investment. Defendants' Memorandum at 6-7 ("Defs Mem"). But this argument is precisely what the Supreme Court rejected in *Tibble* when it reversed dismissal of fiduciary breach claims simply because the ***initial*** selection of the challenged

investments occurred six years prior to suit. *Tibble,* 575 U.S. at 524 (emphasis added). And Defendants' own authority, *Bona v. Barasch*, 2003 WL 1395932, at *19 (S.D.N.Y. March 20, 2003), recognizes that an ERISA fiduciary has a duty to "divest" imprudent investments.

II. The Complaint Plausibly States ERISA Claims for Fiduciary Breach

The Complaint's allegations plausibly state fiduciary breach claims in connection with the Committee's investment of the Plans' assets in NYL's own proprietary funds, including the use of the FDA as the Plans' default investment and the MainStay Funds as plan investments.

A. The Complaint plausibly alleges that Defendants breached their fiduciary duties by retaining the FDA as the default investment.

The Complaint contains substantial allegations that give rise to an inference of imprudence in connection with the FDA. The Complaint alleges that an ERISA fiduciary must consider the unique issues related to default investments, including Department of Labor's ("DOL") published findings that default investments "often will be long-term investments" and thus they should be "designed to provide long-term appreciation and capital preservation through a mix of equity and fixed income exposures" such as to target date funds, balanced funds, or managed accounts. Compl. ¶¶ 45-47, 74. It further alleges that prevailing retirement industry norms and Modern Portfolio Theory indicate that investing 100% of all participants' retirement savings in the FDA over a long-term horizon is not appropriate (nor prudent) because a principal-preservation investment will ***not*** grow the participants' "retirement savings to create a sufficient 'nest egg' to retire comfortably." *Id.* ¶¶ 75-78. The Complaint explains that a prudent default investment must "serve the long-term asset accumulation needs of the participant population as a whole." *Id.* ¶ 63. It also alleges that Defendants should have considered "that participants who did not make investment elections were of varying ages and a large portion were decades away from retirement . . . ." *Id.* ¶ 154; *see also* ¶¶ 61, 63-65. But here, Defendants failed to adequately consider the

interests of participants in their 20s, 30s, and 40s, for whom investing 100% of their retirement savings in the FDA is imprudent. *Id.* ¶¶ 66, 81-85, 154. By investing the retirement savings of younger participants entirely in a low-return stable value product ***for decades***, Defendants caused participants to forgo hundreds of millions of dollars in lost retirement savings. *Id.* ¶ 10 ("if Defendants had selected a prudent default investment, such as a diversified suite of target date funds, the Plan participants would have earned hundreds of million more in retirement savings"); *see also* ¶¶ 83-85, 155.

Plaintiffs further allege that few other plan fiduciaries choose a principal preservation product like the FDA as the default investment. *Id.* ¶ 7. In fact, Callan, an independent consulting firm, reports that in 2015, just 7.7% of defined contribution plans used a stable value or money market fund as their default investment[2], and by 2019, just ***1%*** of plans used a used a stable value or money market fund as the default investment.[3] As a result, the Plans' outsized allocation to the FDA is a "stark outlier among 401(k) plans." Compl. ¶ 82. These allegations are sufficient to plead that Defendants breached their fiduciary duties when selecting and retaining the FDA as the Plans' default investment because they failed to consider whether the FDA met the long-term asset accumulation needs" of the Plan population as a whole. *Id.* ¶ 154; *see also* ¶¶ 45, 63, 74-78.

Toomey v. DeMoulas Super Mkts., Inc., 2020 WL 3412747, at *1 (D. Mass. Apr. 16, 2020) is instructive. *Toomey* concerned a 401(k) plan in which participants were automatically invested in a portfolio that consisted of 70% fixed income securities and 30% equity securities. *Id*. Toomey alleged that this automatic allocation for all participant accounts is "inappropriate even for participants nearing retirement, but [is] especially inappropriate for participants in their twenties,

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[2] Callan Investment Institute, *2016 Defined Contribution Trends*, attached hereto as Ex. 6 at 22.

[3] Callan Investment Institute, *2020 Defined Contribution Trends,* attached hereto as Ex. 7 at 21.

thirties, and forties, who are decades away from retiring." *Id.* The court held that *Toomey's* allegations, that a prudent fiduciary would not invest all participants in such a conservative allocation, supported an inference of imprudence. *Id.* at *3. Plaintiffs here asserts similar claims.

Defendants misconstrue the Complaint as alleging that the FDA can never be a prudent default option for any plan. Not true – Plaintiffs allege that, for a diverse participant population (like the one here), the FDA is not an appropriate default investment option because it does not meet "the long-term asset accumulation needs of the participant population ***as a whole***." Compl. ¶ 63 (emphasis added). These allegations do, however, leave open the possibility that the FDA could be an appropriate default investment for a plan population where most participants were very close to retirement age. But that is not the case here. Just like the *Toomey* court recognized, Plaintiffs are not seeking "a ruling that an ERISA plan must follow any specific path." 2020 WL 3412747, at *3. Rather, plaintiffs alleged that defendants "were imprudent in their consideration of (or their failure to consider) the participants' varying interests. . . ." *Id.* And Defendants acknowledge that a chosen default investment must be tailored to the "makeup of the plan's participant population," yet they assert that the FDA is so tailored because they speculate that employees or agents of an insurance company "may prefer" to invest in an insurance product. Defs Mem 11. However, the subjective preference of participants for an insurance product (of which there is no evidence) is not a legitimate basis to select the FDA given that "the benefits to participants" referred to in § 1104 do ***not*** include ''nonpecuniary benefits.'' *Fifth Third Bancorp v. Dudenhoeffer*, 573 U.S. 409, 421 (2014); Compl. ¶ 96.

Nor does the DOL's acknowledgment that a plan ***may*** determine that a stable value fund is appropriate as the default mean that the FDA is appropriate here where the "participants who did not make investment elections were of varying ages and a large portion were decades away from

retirement." Compl. ¶ 154. Indeed, DOL's multi-year study of default investments resulted in DOL's articulating its view (concerning default investments generally) that

> stable value funds will not over the long-term produce rates of return as favorable as those generated by products, portfolios and services included as qualified default investment alternatives, thereby decreasing the likelihood that participants invested in capital preservation products will have adequate retirement savings.

72 Fed. Reg. 60,452, 60,460-62 (Oct. 24, 2007) (to be codified at 29 C.F.R. pt. 2550). DOL did not include stable value products as a Qualified Default Investment Alternative ("QDIA") because, for most plans with participants of diverse ages, a stable value fund will not provide adequate retirement savings for the entire plan population. *Cf. id.* at 60,461 (while certain "investment option[s] may be appropriate for individuals actively electing to direct their own investments, the Department believes that when an investment is a default investment, the investment should provide for" ***both*** capital preservation as well as capital appreciation).

The Complaint also alleges facts sufficient to infer that Defendants' choice of the FDA as the default investment was not based on the best interest of Plan participants; rather Defendants were motivated by NYL's business interests. The Complaint explains that the FDA is offered through a "group annuity contract" through which participants' retirement savings are transferred and maintained in NYL's general account. Compl. ¶ 70. The Plans transferred $2.36 billion in assets to NYL's general corporate account by investing in the FDA – a "massive investment" that "provides the Company with enormous profits and billions of dollars to be used for its own business purposes." *Id.* ¶ 6; *see also id.* ¶¶ 66-69, 81-82. These allegations are sufficient to support the inference that Defendants' selection and retention of the FDA was motivated by NYL's business interest in accessing billions of dollars of Plan assets for its business purposes.

Defendants also contend that the Vanguard target date funds and the Vanguard balanced fund are not appropriate comparators for the FDA because they do not employ similar investment

strategies. Defs Mem 11-13. Defendants are wrong – Plaintiffs do not allege that the FDA was an imprudent default investment option because it underperformed similar stable value funds. They allege that the FDA was an inappropriate default investment for the Plans' population as a whole because it fails to meet the needs of all participants, the majority of which need to grow their retirement savings through exposure to a mix of asset classes. ¶¶ 61, 63, 154. As such, comparing the FDA to other stable value products would make no sense because other stable value products would also be inappropriate default investments for the Plans, which have diverse plan populations in terms of age. Instead, the appropriate comparators are investment products that are suitable long-term investments for the entire Plan population, which DOL identified as those that provide a mix of both capital preservation and appreciation asset classes. 72 Fed. Reg. at 60,462-63 (rationale for not selecting a stable value fund as a qualified default investment in 29 U.S.C. § 2550.404c–5(e)(4)); *see also* Compl. ¶ 44. Both the Vanguard Target Retirement funds (target date funds) and the Vanguard Balanced Index Fund (balanced fund) offer a mix of asset classes, and, not surprisingly, are widely used by 401(k) plans as the default investment option. Compl. ¶ 84 n.2.

In short, while the QDIA regulation addressed the requirements for plan fiduciaries to avail themselves of the safe harbor, it also sets forth the DOL's view concerning relevant considerations for selecting the default investment for a plan, including whether the investment provides both capital preservation and long-term capital appreciation. *Id.* ¶ 46; 72 Fed. Reg. at 60,460-64.

B. The Complaint alleges myriad facts which plausibly state fiduciary breach claims against the Defendants in connection with the MainStay Funds.

Defendants suggest that Plaintiffs' claims concerning the MainStay Funds (NYL's proprietary mutual funds) are solely based on the fact that "the Plans offered NY Life-affiliated investment options . . ." Defs Mem 9. Not so – the Complaint contains numerous factual allegations indicating that Defendants' fiduciary process for selecting and monitoring the MainStay Funds

was imprudent and disloyal. For example, the Complaint alleges that: (i) Defendants retained the MainStay funds over cheaper funds that were similar, and sometimes identical, in terms of investment strategy (*e.g., Compl.* ¶¶ 110-15, 118-25); (ii) after the MainStay Funds suffered prolonged under-performance, other investors exited, but Defendants retained these funds as Plan investments (*id.* ¶¶ 102, 107, 116-17, 137); and (iii) the problems with the MainStay Funds were evident in their lack of popularity with other retirement plans (*id.* ¶¶ 117, 127, 130, 137). Courts routinely sustain fiduciary breach claims based on far less specific allegations. *E.g.*, *Sacerdote*, 2021 WL 3610355, at *5-8 (sustaining fiduciary breach claims based on availability of cheaper share classes); *Urakhchin v. Allianz Asset Mgmt. of Am., L.P.*, 2016 WL 4507117, at *6 (similar); *Terraza v. Safeway, Inc.*, 241 F.Supp.3d 1057, 1075-81 (N.D. Cal. 2017) (similar).

In *Beach v. JP Morgan,* this Court denied a similar motion to dismiss where the complaint alleged that the JP Morgan defendants breached their fiduciary duties by including proprietary funds with excessive fees in the 401(k) plan they managed. No. 17-563, ECF Nos. 73, 80 attached as Ex. 5 (Furman, J.) (S.D.N.Y Mar. 29, 2018) (denying motion to dismiss for fiduciary breach and prohibited transaction claims). Here, like in *Beach*, the Complaint alleges that Defendants breached their duties of loyalty and prudence by including proprietary funds with excessive fees. Indeed, in *Beach*, this Court rejected the very same arguments Defendants lodge here – that the "fiduciary duty claim . . . fails because the use of affiliated fund options has been expressly permitted by Congress and the [DOL]." Defs Mem 1. These exemptions are defenses to prohibited transaction claims, ***not*** fiduciary breach claims. *Beach*, ECF No. 80 at 4-5 ("Nor does prohibited transaction exemption, or PTE, 77-3, immunize defendants from plaintiffs' claims of self-dealing"); 42 Fed. Reg. at 18,734 (PTE 77-3 will not immunize fiduciaries from fiduciary breach).

Nor does Defendants' replacement of some (but not all) proprietary funds support

dismissal. *Sacerdote*, 2021 WL 3610355, at *5 ("Fiduciaries cannot shield themselves from liability – much less discovery – simply because the alleged imprudence inheres in fewer than all of the fund options."). *Contra* Defs Mem 9-10. Numerous courts hold that it is inappropriate at the pleading stage to consider other potential lawful explanations for defendants' failure to remove expensive, poor performing funds. *E.g.*, *Davis v. Washington Univ.*, 960 F.3d 478 (8th Cir. 2020) (reversing dismissal where defendant "identified one plausible inference, but it is not the only one."). In fact, Plaintiffs plead other more plausible inferences – that Defendants retained the challenged funds because they were the worst performers and thus needed the Plans' assets the most. Compl. ¶¶ 95, 137. In any event, "Rule 8 does not require a plaintiff to plead facts tending to rebut all possible lawful explanations for a defendant's conduct." *Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 596 (8th Cir. 2009).

1. *Defendants retained the NYL MainStay Funds even though they were more expensive than numerous similar or identical funds.*

Tibble holds that plan fiduciaries must systematically review a plan's investments, including all fees and costs associated with those investments. 575 U.S. at 1828-29. Under trust law – which *Tibble* acknowledges is the touchstone for the evaluation of fiduciary breach claims – "cost-conscious management is fundamental to prudence in the investment function." *Id.* citing Restatement (Third) of Trusts § 90 cmt. b (Am. L. Inst. 2007). Defendants wrongly assert that Plaintiffs' fiduciary breach claims are based solely on identifying "one or two" cheaper funds in the marketplace. This is easily refuted by review of the Complaint, which alleges that: (1) the MainStay Funds were more expensive than similar and materially identical fund options in which the Plans were eligible to invest[4] (Compl. ¶¶ 112-13, 119, 125); (2) the MainStay Funds charged

[4] That Defendants fixed some (but not all) of their blatant instances of imprudence, such as failing to invest in the cheapest share class in which the Plans were eligible to invest, cannot shield them

fees that were substantially higher than the ***average*** fees paid by 401(k) plans of similar size for similar investments[5] (*Id.* ¶¶ 114, 120, 123-24); and (3) the challenged MainStay Funds charged up to ***38*** times ***more*** in fees than the funds that ultimately replaced them (*id.* ¶¶ 121, 131-34).

For example, the MainStay Epoch U.S. All Cap Fund charges 89 basis points ("bps") in fees. *Id.* ¶ 112. The average fee paid by similar plans for domestic equity funds is just 36 bps, meaning the MainStay Fund's fee is ***2.5 times higher than average***. *Id.* ¶ 114. Additionally, Defendants could have chosen a separate account fund offered by Epoch Investment Partners that uses an ***identical*** strategy but with 33% less in fees. *Id.* ¶ 112. Defendants also failed to ensure that the Plans were invested in the cheapest share class of the MainStay Epoch All Cap Fund for which they were eligible to invest. *Id.* ¶ 113. That Defendants failed to ensure that the Plan did not overpay for the exact same investment strategy and in some instances the exact same fund is indicative of imprudence. *Sacerdote,* 2021 WL 3610355, at *6-8. For the MainStay Income Builder Fund and MainStay MacKay International Fund, the Complaint similarly alleges that the Plans were forced to pay many times more than the average costs paid by other investors for "effectively the same fund." *Id.* ¶ 110; *see also id.* ¶¶ 119, 125.

Numerous courts hold that allegations that plan fiduciaries failed to ensure its plan was invested in the cheapest share class in which it was eligible to invest are sufficient to survive a motions to dismiss. *See Sacerdote*, 2021 WL 3610355, at *5-8; *see also Sweda v. Univ. of Pa.*,

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from liability, nor from discovery into their fiduciary process. *C.f. Sacerdote*, 2021 WL 3610355, at *7 ("Fiduciaries cannot shield themselves from liability – much less discovery – simply because the alleged imprudence inheres in fewer than all of the fund options").

[5] *Wehner v. Genentech, Inc.*, 2021 WL 507599, at *7 (N.D. Cal. Feb. 9, 2021) does not hold that survey fee information is inadequate to infer breach. *Contra* Defs Mem 19. Rather the *Wehner* court dismissed claims based on high fees because *Wehner* did not identify any allegedly cheaper comparable funds. 2021 WL 507599, at *7. But here, Plaintiffs identify numerous other comparable funds *and* cite published surveys about industry averages. *E.g.*, Compl. ¶¶ 120, 123.

923 F.3d 320, 332 n.7 (3d Cir. 2019), *cert. denied*, 140 S.Ct. 2565 (2020); *In re Omnicom ERISA Litig.*, 2021 WL 3292487, at *13 (S.D.N.Y. Aug. 2, 2021).

It is equally well-established that allegations that "funds offered by the Plans were more expensive than similar alternatives" are sufficient to state a claim. *Karpik v. Huntington Bancshares Inc.*, 2019 WL 7482134, at *5 (S.D. Ohio Sept. 26, 2019); *see also Falberg v. Goldman Sachs Grp.*, 2020 WL 3893285, at *9 (S.D.N.Y. July 9, 2020) (sustaining claims that Defendants "failed to consider superior, cost-effective pooled investment alternatives…including separate accounts . . . ."); *Becker v. Wells Fargo*, 2021 WL 1909632, at *5 (D. Minn. May 12, 2021) (same).[6] These outcomes are not surprising given the well-established law that prudent fiduciaries ***must*** consider "similar products being offered with significantly different costs." Restatement (Third) of Trusts ch. 17, intro. note (Am. L. Inst. 2007). Further, Defendants' reliance on the *White* dismissal of fiduciary breach claims based on the failure to invest in the cheapest eligible share class has been expressly foreclosed by the recent *Sacerdote* decision. *See supra* note 5. Likewise, Defendants' reliance on *Hecker v. Deere & Co*., 556 F.3d 575, 586 (7th Cir. 2009), is misplaced. *Hecker* involved generalized allegations of high fees, which is distinguishable from cases like this one, which involve allegations of "different versions of the same investment . . . available to the Plan that have lesser fees." *Kruger v. Novant Health, Inc.*, 131 F.Supp.3d 470, 476 (M.D.N.C. 2015) (distinguishing *Hecker* where complaint alleged that defendant invested an ERISA plan in more expensive fund vehicles of the same investment strategy).

Finally, Defendants' primary authority, *Patterson*, is inapposite because "unlike *Patterson*,

[6] *See also In re M&T Bank Corp. ERISA Litig.*, 2018 WL 4334807, at *9 (W.D.N.Y. Sept. 11, 2018); *Leber v. Citigroup 401(K) Plan*, 2014 WL 4851816, at *4 (S.D.N.Y. Sept. 30, 2014); *Moreno v. Deutsche Bank Americas Holding Corp.*, 2016 WL 5957307, at *6 (S.D.N.Y. Oct. 13, 2016); *Krueger v. Ameriprise Fin., Inc.*, 2012 WL 5873825, at *10-11 (D. Minn. Nov. 20, 2012).

Plaintiff [here] alleged several other indicia of imprudence." *Falberg*, 2020 WL 3893285, at *10. Here the Complaint alleges that, while other investors exited the MainStay funds after poor performance, Defendants retained them. Compl. ¶¶ 116-17. *See also In re Omnicom*, 2021 WL 3292487, at *12 (allegations of "large net outflows from the [challenged fund] throughout the duration of the class period" are facts that sufficiently infer that defendants "failed to monitor the situation closely enough or ignored the underperformance"). And when Defendants belatedly replaced some of the MainStay Funds with non-proprietary funds in the same asset class, Plan participants were able to obtain ***huge*** reductions in fees. Compl. ¶ 121 (MainStay Small Cap charged 3700% more in fees than its replacement – 98 bps vs. 2.6 bps); ¶ 131-34 (MainStay Retirement Funds charged 920% more than its replacement – 83 bps vs. 9 bps). These facts support an inference that Defendants failed to monitor the NYL Plans' fees closely.

2. *The MainStay Funds consistently underperformed NYL's own hand-picked benchmarks or other comparable funds.*

The MainStay Funds were not just expensive – they performed poorly. As the Complaint details, several of NYL's proprietary funds repeatedly underperformed NYL's ***own selected benchmarks***, causing well over $50 million in lost retirement savings to Plaintiffs and the Class:

MainStay Fund	NYL Selected Benchmark	Underperformance	10-Year Underperf	Class Period Losses
Epoch All Cap Fund	Russell 3000	1, 3, 5, 10 yr annualized	- 2.5 %	$ 46 million
	Russell 1000[7]	1, 3, 5, 10 yr annualized	- 2.7 %	$ 50 million
Income Builder Fund	Blended Benchmark	1, 3, 5, yr annualized	1.0 %	$ 12 million
	Global Allocation[8]	1, 3, 5, 10 yr annualized	- 0.1 %	$18 million
Epoch Small Cap	Russell 2000	1, 3, 5, 10 yr annualized	- 2.8 %	$ 11 million
	Russell 2500	1, 3, 5, 10 yr annualized	- 3.6 %	$ 11 million

[7] The Complaint mistakenly deleted the footnote which stated Morningstar benchmarks the MainStay Epoch U.S. All Cap Fund against the Russell 1000. *See* Compl. at ¶ 102.

[8] The Complaint mistakenly deleted the footnote stating that Morningstar benchmarks the MainStay Income Builder Fund against the Morningstar Global Allocation Index. *Id.*

Compl. ¶¶ 102, 107. Because Defendants do not contend that the above benchmarks are ***not*** meaningful benchmarks (nor could they since they picked them, *id.* ¶ 103-07), the Complaint's underperformance allegations are sufficient to state plausible claims of imprudence. *See, e.g.*, *Becker*, 2021 WL 1909632, at *5 (stating that plaintiffs plausibly stated a claim by using defendants' own benchmarks); *Cunningham v. Cornell Univ.*, 2017 WL 4358769, at *7 (S.D.N.Y. Sept. 29, 2017) (holding that alleging the challenged "funds underperformed over one, five and ten year periods and that lower-cost, higher performing investments were available plausibly states a claim [of imprudence]."); *Sacerdote,* 2017 WL 3701482, at *10 (S.D.N.Y. 2017) (same).

Nonetheless, Defendants attempt to avoid the holdings above by wrongly asserting the underperformance alleged in the Complaint was not "substantial or consistent." Defs Mem 15. But this argument is wrong both factually and legally. While Defendants state that ¶ 102 of the Complaint shows that the three MainStay Funds "outperformed the pleaded comparators over the prior ten years or modestly underperformed them," this is not true. In reality, two funds (the Epoch All Cap and Small Cap Funds) underperformed both of their benchmarks, and the third (the Income Builder Fund) underperformed one of its two benchmarks over the prior ten years. *Id.*; *see* Table *supra.* And Defendants' argument that the 10-year annualized underperformance shown in ¶ 102 is modest ignores the power of compounding losses. For example, the MainStay Small Cap Fund's average annualized underperformance of -3.6% results in total compounded underperformance of ***negative 31%*** over that 10-year period. *See Falberg*, 2020 WL 3893285, at *9 (rejecting argument that investment loss was too marginal given that "even a 1% difference in net returns each year can reduce a participant's savings by over a fourth by retirement").

Defendants also contend that three funds profiled in Complaint ¶ 102 outperformed their benchmarks "almost half of the time." Defs Mem 15-16. Again, this is wrong; a simple review of

the performance data they provide indicates that these three funds outperformed just 34% of the time (only 11 out of 32 total benchmarking periods show outperformance) – far short of "almost half." *See* Defs Mem 15. Thus, Defendants' own alternative performance data confirms the Complaint's allegations that the challenged MainStay funds consistently underperformed the benchmarks they were supposed to beat. These facts are sufficient to infer imprudence. *See, e.g.*, *Becker*, 2021 WL 1909632, at *5 (holding as sufficient allegations that investments underperformed the "very benchmarks that Defendants themselves selected for comparison").[9]

Relatedly, Defendants' myopic focus on the 10-year annualized underperformance figures in the Complaint also ignores that all three MainStay Funds in ¶ 102 underperformed their benchmarks on a 1, 3 and 5 year basis and lost between $68-78 million during the Class Period. Compl. ¶¶ 102, 107. Allegations such as these have been found to plausibly state claims of imprudence. *In re Omnicom*, 2021 WL 3292487, at *12 (denying motion to dismiss in part based on allegations that the challenged funds underperformed index funds on a trailing 3 and 5 year annualized basis); *Braden*, 588 F.3d at 596 (imprudence plausibly alleged where the challenged funds underperformed their benchmarks for multiple years); *Becker*, 2021 WL 1909632, at *5 (allegations that multi-year periods of underperformance are sufficient to plausibly allege fiduciary breach claims). In short, Plaintiffs' underperformance allegations plausibly state imprudence.

The Complaint also pleads numerous facts that, taken together, are sufficient to plausibly infer imprudence regarding the five MainStay Retirement Funds. When these funds were selected for the Plans, they received little interest from other investors – attracting just $0.36 billion in assets, compared to Vanguard, which had attracted $124 billion to its target date funds at that time.

[9] While Defendants' alternative data shows that the International Equity Fund outperformed its benchmarks five out of six years (Defs Mem 16), the fact that Defendants failed to invest the Plan in the cheapest share class for which the Plan was eligible is indicative of improper management.

Compl. ¶ 127. The reason for Vanguard's immense popularity was obvious: it charged just 15 bps, while the MainStay Retirement Funds charged 114 bps in 2012. Compl. ¶ 128. As Morningstar explained, Vanguard's "low-cost model" "translates to better results in the long run" – a statement later confirmed by the fact that the expensive MainStay Retirement Funds did in fact underperform the Vanguard funds on a trailing 1, 3, 5 and 10 year basis. Compl. ¶¶ 128-29.[10]

In response, Defendants' primary argument is that the Vanguard Target Retirement Funds are not proper comparators because "[i]ndex funds are not appropriate comparators for actively managed funds . . . ." Defs Mem 17 (citing *Meiners* and *Patterson*[11]). But as Judge McMahon recently explained, "the overwhelming trend with district courts in this Circuit is to defer deciding the question of whether two funds are proper comparators until after discovery." *In re Omnicom*, 2021 WL 3292487, at *13. Regardless, the Complaint contains allegations demonstrating that the Vanguard funds are appropriate comparators, which were missing in the *Meiners* and *Patterson* complaints. *See supra* note 11. Namely, Plaintiffs allege that the MainStay and Vanguard funds share the same asset allocation strategy (also referred to as a glidepath). *Compare* Compl. ¶ 133 *with In re Omnicom*, 2021 WL 3292487, at *13 (holding two funds were comparable where they have the same glidepath). Plaintiffs further allege that Vanguard's funds are comparable because Defendants mapped the MainStay Retirement Funds into the Vanguard funds. Compl. ¶ 134. ERISA's regulations state that to maintain certain protections (and Defendants' documents indicate that they seek to maintain those protections) when mapping assets from one investment to another, the new investment must have "characteristics relating to risk and rate of return" that

change." 29 U.S.C. § 1104(c)(4)(B)(ii) (emphasis added).

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[10] The MainStay 2010 Fund underperformed the Vanguard funds on a 1, 3, and 5 year basis.

[11] *Meiners v. Wells Fargo & Co.*, 898 F.3d 820, 822 (8th Cir. 2018); *Patterson v. Morgan Stanley*, 2019 WL 4934834, at *10 (S.D.N.Y. Oct. 7, 2019).

Defendants also ignore the Complaint's allegations that stem beyond underperformance, such as the fact that the MainStay Retirement Funds had few assets under management, indicating that outside investors did not have confidence in the funds. *E.g.*, Compl. ¶¶ 127-30. In fact, for one of the MainStay Funds, the Plans' investments constituted almost half of its total invested assets indicating that the Plans' substantial assets were propping up this fund. Compl. ¶¶ 116-117

Finally, *Patterson* is of no help to Defendants because the annual underperformance of the MainStay Epoch All Cap and Small Cap Funds range between -2.5 to -3.6%, which far exceeds the underperformance of "less than one percentage point" the *Patterson* court found unpersuasive. 2019 WL 4934834, at *10. Moreover, because the *Patterson* parties did not brief the importance of compounding underperformance, the court there did not consider that underperformance of even 1% per year can cause substantial underperformance over 10 years. *See discussion supra*. Defendants also improperly attack Plaintiffs' allegations as if each must, in isolation, support an inference of imprudence. While many of the allegations alone do indeed support an inference of imprudence, the Complaint's multiple, specific allegations must be evaluated together as to whether all circumstances alleged support an inference of imprudence. *Braden*, 588 F.3d at 594.

III. The Complaint Plausibly Pleads Prohibited Transaction Claims Under ERISA.

"[E]ach prohibition enumerated in § 1106 is aimed at rooting out conflicts of interest and preventing self-dealing." *Falberg*, 2020 WL 3893285, at *12. Here, Plaintiffs plausibly allege that the Committee Defendants caused the Plans to engage in several prohibited transactions, namely: (1) the Plans' purchase of property from NYL when investing in the FDA and MainStay Funds; (2) NYL's furnishing of services to the Plans; and (3) transferring the Plans' assets to NYL through fees for investments in the FDA and MainStay Funds, which violated ERISA § 1106(a)(1)(A), (C) and (D) respectively. Compl. ¶¶ 53-54, 69, 70, 94, 101, 158-64. This Court and others in this District have found similar allegations sufficient to plausibly allege prohibited transaction claims

for investing in proprietary funds. Ex. 5, ECF No. 80 at 5-6; *Falberg*, 2020 WL 3893285, at *12-13; *Moreno*, 2016 WL 5957307, at *6-7.

The Complaint also plausibly alleges the Committee members improved their compensation and promotion opportunities by investing the Plans' assets in NYL funds which drove revenues to NYL and supported its business ventures in violation of § 1106(b). *E.g.*, Compl. ¶¶ 5, 8, 28, 29(4), 94-95, 108, 111, 169-78. Similar claims routinely withstand motions to dismiss. *See, e.g.*, *Falberg*, 2020 WL 3893285, at *14 (sustaining § 1106(b) claim because "Plaintiff's allegations give rise to the suggestion that Defendants offered the GS Funds and kept offering the GS Funds despite underperformance and higher fees in order to collect those fees through their subsidiaries."); *Krueger*, 2012 WL 5873825, at *16 (sustaining § 1106(b) claims that the proprietary funds "allowed Ameriprise to benefit both financially, through fees paid by the options to Ameriprise, and commercially, by increasing the assets under management . . . .").

Defendants wrongly suggest that Counts II and III fail because "DOL's long-held position" is that the practice of financial institutions offering proprietary investment products through their 401(k) plans is "common and permissible" and it would be "contrary to normal business practice" for an "insurer to purchase the products of another company for its own in-house plans." Defs Mem 20 (quoting 56 Fed. Reg. 10,724, 10,730 (Mar. 13, 1991); H.R. Conf. Rep. No. 93-1280, reprinted in 1974 U.S.C.C.A.N. at 5096). But H.R. Conf. Rep. No. 93-1280 at 5096 actually refers to "purchasing life insurance, health insurance, or annuities from the employer that maintains the plan." By contrast, the section applicable to the Plans' investment in affiliated financial products recognizes that "it generally is inappropriate for" the financial institution "to make the decisions with respect to investment in a pooled fund because of a potential conflict of interest." *Id.*

A. <u>The conditions of PTE 77-3 and § 1108(b)(5) are not met.</u>

Defendants incorrectly assert that they are not liable for Plaintiffs' prohibited transaction

claims because the Complaint must allege facts indicating that Defendants fail to meet the conditions of prohibited transaction exemption ("PTE") 77-3 and § 1108(b)(5). Defs Mem 9, 21. This argument was rejected in *Beach* because the prohibited transaction exemptions are affirmative defenses and ERISA plaintiffs need not plead around those defenses at the pleading stage. Ex. 5, ECF No. 80 at 5-6 (PTE 77-3 and reasonable compensation exemption "are affirmative defenses . . . and thus do not provide grounds for dismissal at this stage of the litigation unless they are clear from the face of the complaint, which is not the case here."); *see also Marshall v. Snyder*, 572 F.2d 894, 900 (2d Cir. 1978) (rejecting argument that for "prohibited transactions involv[ing] self-dealing the party representing the beneficiaries of the fiduciary whose self-dealing transaction is challenged must prove the unfairness of the transaction").

Although the Complaint does not ***have*** to plead around the conditions of PTE 77-3 or § 1108(b)(5), Plaintiffs nonetheless allege facts sufficient to infer that the challenged transactions do ***not*** qualify for these exemptions. Ex. 5, ECF No. 80 at 5-6. For example, the Complaint alleges that other investors pay less in fees to invest in the exact same MainStay Funds as the Plans. Compl. ¶¶ 113, 119, 125. This eliminates satisfaction of PTE 77-3's requirement that "all other dealings" between the plan and the mutual fund "are on a basis no less favorable to the plan" than with other fund investors. 42 Fed. Reg. at 18,734-35. And the Complaint likewise establishes that the conditions of § 1108(b)(5) are not met for the FDA because the Plan's investment in the FDA was not based on "good faith" negotiations by the fiduciary Defendants (*e.g.*, Compl. ¶¶ 4-9, 70-83, 108-12). As explained above, Plaintiffs allege that Defendants did ***not*** act in good faith when selecting the FDA for the Plan; rather, Defendants funneled 54% of the Plans' assets ($2.36 billion) into NYL's flagship product to further NYL's business interests. Compl. ¶¶ 6, 59, 81, 97-100. Because acting in good faith is the hallmark of establishing "adequate consideration" – one of the

necessary conditions for § 1108(b)(5) – dismissal of the prohibited transaction claims must be denied. *Henry v. Champlain Enters., Inc.*, 445 F.3d 610, 619 (2d Cir. 2006).

B. The Complaint plausibly alleges that Defendants engaged in self-dealing.

Defendants contend that Count III fails because "[o]fficers of a corporation often are trustees of its benefit plan" and 29 U.S.C. § 1108(c)(3) expressly permits a corporate officer or employee to serve as a Plan fiduciary. Defs Mem 22. That ERISA ***allows*** officers of a corporation to be fiduciaries does not mean that such officers may act in the corporation's interest when wearing their fiduciary hat. *Pegram v. Herdrich*, 530 U.S. 211, 224 (2000); *see also* Bogert's Trusts and Trustees § 255 (2d ed. 2009) (same); 29 U.S.C. § 1104(a)(1)(A). Instead, they must scrupulously avoid acting in a manner which favors their own interests over that of participants. *Leigh v. Engle*, 727 F.2d 113, 124-27 (citation omitted); *see also Donovan*, 680 F.2d at 271 (same); *Grindstaff v. Green*, 133 F.3d 416, 430 (6th Cir. 1998) (same). Here, the 1106(b) claims are not predicated merely on Defendants' dual role as high level executives and fiduciaries; rather, Plaintiffs allege that Defendants retained the NYL funds ***to benefit*** NYL even though they were imprudent, excessively expensive and poor performing. *E.g.*, Compl ¶ 4-9, 70-83, 108-37.

IV. The Co-fiduciary Liability Claims Should Not be Dismissed.

Defendants' sole argument concerning the co-fiduciary claims is that Plaintiffs failed to plead any antecedent breaches for which a co-fiduciary can be liable. Defs Mem 23. As discussed above, this is incorrect. Accordingly, the co-fiduciary claims should be sustained.

V. Plaintiffs Plausibly Allege an Anti-inurement Violation.

ERISA's "anti-inurement" provision, 29 U.S.C. § 1103(c), provides that "the assets of a plan shall never inure to the benefit of any employer." An employer violates ERISA's anti-inurement provision when it commingles a plan's assets with its own assets. *Chao v. Stuart*, 2005 WL 1693939, at *6-7 (S.D. Tex. July 20, 2005) (holding that plan assets improperly inure to an

employer's benefit when the plan's assets are commingled with the employer's corporate assets); *Walsh v. Satori Grp., Inc.*, 2021 WL 2072237, at *4 (E.D. Pa. May 24, 2021) (same); *Acosta v. Finishing Pros., LLC*, 2018 WL 6603641, at *5 (D. Colo. Nov. 20, 2018) (same). Section 1103(c) "appl[ies] the law of trusts to discourage abuses such as self-dealing, imprudent investment, and misappropriation of plan assets, by employers and others." *Raymond B. Yates, M.D., P.C. Profit Sharing Plan v. Hendon*, 541 U.S. 1, 23 (2004). Furthermore, commingling the Plans' assets with corporate assets (i.e., their general account's assets) violates a trustee's duty "to keep the trust property separate from his own property." Restatement (Second) of Trusts § 179 cmt. a (1959).

By investing in the FDA, Defendants transferred billions of dollars of employee retirement savings to NYL's general account. Compl. ¶¶ 2, 70-73, 194-95. This is a *prima facie* violation of 29 U.S.C. § 1103(c) and offends a trustee's duty to segregate a trust's assets from its own. Defendants could have chosen an insurance arrangement that would not have violated ERISA's anti-inurement provision by segregating the Plan's assets into a "separate account." *See* 29 C.F.R. § 2550.401c-1(d)(2)(a)-(b). Thus, Defendants' reliance on *Dupree* is misplaced because there the insurer segregated the plan's assets from its own by using a separate account. *Dupree v. Prudential Ins. Co. of Am.*, 2007 WL 2263892, at *7, (S.D. Fla. Aug. 7, 2007), as amended (Aug. 10, 2007) (noting "***[n]one of these assets*** transferred from the Plan to this umbrella account are available to Prudential to pay the claims of any other claimant or for any purpose other than meeting the obligations of paying retirement benefits for the Plan") (emphasis added). As such, holding that the transfer of assets to NYL's general account through the FDA is an improper inurement would not render the exemptions allowing employers to provide services to their own plans meaningless.

CONCLUSION

For these reasons, the Motion to Dismiss should be denied in its entirety.

Dated: August 27, 2021

Respectfully submitted,

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