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APPENDIX A

25-511-cv

Carlisle v. Bd of Trs. Of the Am. Fed'n of the N.Y.
State Teamsters Conf. Pension & Ret. Fund

**UNITED STATES COURT OF APPEALS FOR
THE SECOND CIRCUIT**

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF THE APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 21st day of November, two thousand twenty-five.

Present:

GUIDO CALABRESI,
DENNY CHIN,
EUNICE C. LEE,
Circuit Judges.

ROBERT CARLISLE, individually and as a representative of a class of similarly situated persons, on behalf of the NEW YORK STATE TEAMSTERS CONFERENCE PENSION AND RETIREMENT FUND,

Plaintiff-Appellant,

v.

25-511-cv

THE BOARD OF TRUSTEES OF THE AMERICAN FEDERATION OF THE NEW YORK STATE TEAMSTERS CONFERENCE PENSION AND RETIREMENT FUND; JOHN BULGARO; BRIAN K. HAMMOND; PAUL A. MARKWITZ; GEORGE F. HARRIGAN; MARK D. MAY; MICHAEL S. SCALZO, SR.; ROBERT SCHAEFFER; MARK GLADFELTER; SAMUEL D. PILGER; DANIEL W. SCHMIDT; TOM J. VENTURA; MEKETA INVESTMENT GROUP, INC.; and HORIZON ACTUARIAL SERVICES, LLC,

Defendants-Appellees.

FOR PLAINTIFF-APPELLANT:

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(Robert J. Kriner & Donaldson-Smith LLP, Wilmington, DE, *on the brief*).

FOR DEFENDANTS-APPELLEES THE BOARD OF TRUSTEES OF THE AMERICAN FEDERATION OF THE NEW YORK STATE TEAMSTERS CONFERENCE PENSION AND RETIREMENT FUND; JOHN BULGARO; BRIAN K. HAMMON; PAUL A. MARKWITZ; GEORGE F. HARRIGAN; MARK D. MAY; MICHAEL S. SCALZO, SR.; ROBERT SCHAEFFER; MARK GLADFELTER; SAMUEL D. PILGER; DANIEL W. SCHMIDT; and TOM J. VENTURA:

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FOR DEFENDANT-APPELLEE MEKETA INVESTMENT GROUP, INC.:

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FOR DEFENDANT-APPELLEE HORIZON ACTUARIAL SERVICES, LLC:

EDWARD J. MEEHAN, Groom Law Group, Chartered, Washington, D.C.

Appeal from a judgment of the United States District Court for the Northern District of New York (Brenda K. Sannes, *Chief Judge*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the district court is **AFFIRMED**.

Plaintiff-Appellant Robert Carlisle appeals an order of the district court (Sannes, *C.J.*) dismissing his putative class action complaint (the “Complaint”) pursuant to Federal Rule of Civil Procedure 12(b)(6). Carlisle is a participant in the New York State Teamsters Conference Pension and Retirement Fund (the “Plan”), a multiemployer defined-benefit pension plan governed by the Employee Retirement Income Security Act of 1974, as amended 29 U.S.C. § 1001, *et seq.* (“ERISA”). Carlisle brought claims, individually and on behalf of other Plan participants, against the Plan’s Board of Trustees and various past and current trustees (the “Trustees”), the Plan’s financial advisor Meketa Investment Group, Inc. (“Meketa”), and the Plan’s actuary Horizon Actuarial Services, LLC (“Horizon”). He also sued them all (“Defendants”) collectively for breach of fiduciary duties under ERISA. We assume the parties’ familiarity with the underlying facts, the procedural history of the case, and the issues on appeal, which we refer to only as necessary to explain our decision.

On appeal, Carlisle asserts that the district court erred in concluding that the Complaint fails plausibly

to allege that Defendants breached fiduciary duties under ERISA by “gambl[ing]” on high-risk investments in an “imprudent attempt to address the Plan’s rapidly deteriorating funding condition.” Appellant’s Opening Br. At 1. Defendants argue that dismissal was warranted for lack of subject matter jurisdiction or, as the district court found, for failure to state a claim. We conclude that the district court properly dismissed the Complaint on the ground that it fails plausibly to allege breach of fiduciary duty against any of the Defendants. Accordingly, we affirm.

I. Subject Matter Jurisdiction

Defendants contend that there is no subject matter jurisdiction, either because Carlisle lacked Article III standing when he filed the Complaint or because his claims have since been mooted. We conclude that subject matter jurisdiction exists here.

First, we find that Carlisle met the requirements for Article III standing when he filed the Complaint. “To establish standing under Article III of the Constitution, a plaintiff must demonstrate (1) that he or she suffered an injury in fact that is concrete, particularized, and actual or imminent, (2) that the injury was caused by the defendant, and (3) that the injury would likely be redressed by the requested judicial relief.” *Thole v. U.S. Bank, N.A.*, 590 U.S. 538, 540 (2020). On appeal, no party seriously contests that Carlisle pled an injury in fact by alleging that his pension benefits were suspended by the Plan due to

its poor financial condition. Defendants, citing *Thole*, nevertheless contend that Carlisle lacked Article III standing because the relief sought in the Complaint would only redress harm to the Plan, not harm to Carlisle as an individual plan participant. Defendants' reliance on *Thole* is misplaced. That case – which recognized that an ERISA plan participant who never suffered “Any monetary injury” does not establish an injury in fact, *id.* at 540-41 – nowhere held that a remedy that redress harm to an ERISA plan cannot also redress harm to a participant. Here, the Complaint sought equitable and injunctive relief to improve the Plan's financial condition and, consequently, to improve Carlisle's prospects of receiving his pension benefits. Thus, Carlisle pled a redressable injury sufficient to confer Article III standing.

Second, we find that Carlisle's claims are not moot. “If an intervening circumstance deprives the plaintiff of a personal stake in the outcome of the lawsuit, at any point during litigation, the action can no longer proceed and must be dismissed as moot.” *Genesis Healthcare Corp. v. Symczyk*, 569 U.S. 66, 72 (2013) (citation modified). Defendants assert that Carlisle's claims were mooted by the Plan's receipt of funding from the federal government pursuant to the American Rescue Plan Act of 2021. This led to the restoration of Carlisle's pension benefits. But under the “collateral source” rule, courts are prohibited from considering benefits received from third parties in determining the extent of a plaintiff's recovery.

Cunningham v. Rederiet Vindeggen A/S, 333 F.2d 308, 316 (2d Cir. 1964); *see, e.g., Ebert v. City of New York*, No. 04-cv-9971, 2006 WL 3627103, at *1-2 (S.D.N.Y. June 26, 2006).¹

II. Failure to State a Claim

We therefore turn to whether the Complaint was properly dismissed for failure to state a claim upon which relief can be granted. “We review *de novo* a district court’s dismissal of a complaint pursuant to Rule 12(b)(6), construing the complaint liberally, accepting all factual allegations in the complaint as true, and drawing all reasonable inferences in the plaintiff’s favor.” *Mazzei v. The Money Store*, 62 F.4th 88, 92 (2d Cir. 2023) (citation omitted). “To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face.” *Ascroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citation modified). “The plausibility standard is not akin to a probability requirement, but it asks for more than a sheer

¹ In addition to Article III standing and mootness, Defendants argue that the Complaint fails for a third “threshold problem[]” that ERISA, as amended by the Multiemployer Pension Reform Act of 2014 (“MPRA”), bars claim brought by plan participants “affected by” a suspension of benefits. Trustees’ Br. At 3, 5 (citing 29 U.S.C. § 1085(9)(I)(iii)). That is a merits issue and not a question of subject matter jurisdiction. *See, e.g. Carlson v. Principal Fin. Grp.*, 320 F.3d 301, 306 (3d Cir. 2003). Because we affirm based on the Complaint’s failure plausibly to allege breach of fiduciary duty, we need not reach this or any other merits issue.

possibility that a defendant has acted unlawfully.” *Id.* (citation modified). “[T]he tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions.” *Id.*

We conclude that the allegations in the Complaint, construed in the light most favorable to Carlisle, are inadequate to state a claim. Carlisle does not sufficiently allege that Horizon had fiduciary duties under ERISA. And while the Trustees and Meketa were ERISA fiduciaries, Carlisle does not plausibly allege that they breached their fiduciary duties.

A. Whether Horizon was an ERISA Fiduciary

To state a fiduciary breach claim under ERISA, a plaintiff must establish that the defendant was acting as a fiduciary of the plan when it took the actions subject to the complaint. *See, e.g. Massaro v. Palladino*, 19 F.4th 197, 211 (2d Cir. 2021). An ERISA fiduciary is one who (i) exercises discretionary authority or discretionary control respecting management of a plan or its assets, (ii) renders investment advice to the plan for a fee, or (iii) has any discretionary authority or discretionary responsibility in the administration of the plan. 29 U.S.C. § 1002(21)(A); *see, e.g., Forgione v. Gaglio*, No. 13-cv-9061, 2015 WL 718270, at *6 (S.D.N.Y. Feb. 13, 2015).

As Carlisle admits, “a plan actuary is not typically a fiduciary” under ERISA. Appellant’s Reply Br. At 22-23. And, we conclude that Carlisle’s allegations do not establish that Horizon ever acted a fiduciary. At

most, Carlisle's allegations establish that Horizon's actions enabled the Trustees and Meketa to proceed with investments in high-risk asset classes. That is not enough to make Horizon a fiduciary. None of the Complaint's factual allegations establish that Horizon exerted control over the Plan's investment strategy. Nor does Carlisle plausibly allege in any non-conclusory fashion that Horizon became a fiduciary by giving the Plan "investment advice for a fee." Accordingly, we conclude that the facts alleged in the Complaint do not establish that Horizon became an ERISA fiduciary.

B. Whether the Trustees or Meketa Breached Their Fiduciary Duties Under ERISA.

1. Duty of Prudence

The duty of prudence under ERISA requires that a fiduciary act "with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims." 29 U.S.C. § 1104(a)(1)(B). "We judge a fiduciary's actions based upon information available to the fiduciary at the time of each investment decision and not from the vantage point of hindsight. *In re Citigroup ERISA Litig.*, 662 F.3d 128, 140 (2d Cir. 2011) (citation modified).

We conclude that that the Complaint does not plausibly allege that the Trustees or Meketa breached

the duty of prudence. The Complaint criticizes investment decisions by the Trustees and Meketa to allocate relatively high amounts of Plan assets to private market investments. It does not, however, support a reasonable inference that these decisions were imprudent based on information available “at the time of each investment decision.” To be sure, the Complaint alleges that the fiduciaries were aware of the notable risk, volatility, and illiquidity associated with such asset classes. And it asserts that other, similarly situated ERISA plans favored stabler investments. But those allegations do not indicate that the Plan fiduciaries did more than engage in the normal practice of weighing “tradeoffs” and selecting from a “range of reasonable judgments” in the circumstances. *Hughes v. Nw. Univ.*, 595 U.S. 170, 177 (2022). Nor does Carlisle adequately allege that the Plan’s investment strategy constituted such an extreme outlier from “peer” multiemployer plans that it was imprudent.²

At best, the Complaint suggests the possibility that Meketa was a “conflicted” fiduciary because it served a dual role as both the Plan’s nondiscretionary

² Carlisle points out that in another ERISA case proceeding on a substantially similar theory of fiduciary breached based on high-risk investments, the district court found that the complaint passed 12(b)(6) muster. See *Snitzer v. Bd. Of Trs. of the Am. Fed’n of Musicians & Emps.’ Pension Fund*, No. 17-cv-5361 (S.D.N.Y. Apr. 26, 2018) (unpublished oral ruling). The district court took notice of this bench decision but declined to reach the same result. *Snitzer* is, of course, in no way controlling.

investment advisor and its private markets investments manager. Appellant's Br. At 45. But the Complaint's allegations do not suffice to establish the plausibility of a conflict. For example, Carlisle offers no details that would show that Meketa could expect to be paid less than the flat fee it received for serving as the Plan's private markets investments manager if it did not maintain a certain allocation of private market investments. Nor do Carlisle's references to Meketa's dealings with other ERISA plans in other circumstances shed any significant light on its incentives for advising this Plan.

We find Carlisle's remaining allegations insufficient to state a claim for breach of the duty of prudence for substantially the same reasons articulated by the district court.

2. Duty of Loyalty

Carlisle alleges that Meketa's engagement in its dual role also constituted a breach of the duty of loyalty by both the Trustees and Meketa. For reasons akin to those discussed in the context of the duty of prudence, we conclude that Carlisle does not sufficiently allege that Meketa's dual role breached the fiduciaries' duty of loyalty. Fiduciaries "do not violate their duties ... by taking action which, after careful and impartial investigation, they reasonably conclude best to promote the interests of participants ... simply because it incidentally benefits ... themselves." *Donovan v. Bierwith*, 680 F.2d 263, 271 (2d Cir. 1982); see, e.g. *Brown v. Daiken Am., Inc.*, No

18-cv-11091, 2021 WL 1758898, at *5 (S.D.N.Y. May 4, 2021). Here, the Complaint does not plausibly allege that Meketa’s dual role or the fiduciaries’ investment decisions were for the purpose of benefiting Meketa or any party other than the Plan.

Nor do we find any merit in Carlisle’s assertion that the Trustees breached their duty of loyalty by hiring and retaining Horizon. Nothing about Horizon’s alleged support of the fiduciaries’ investment strategy would independently establish that the fiduciaries acted for the purpose of providing benefits to a party other than the Plan.

Accordingly, we conclude that the Complaint fails to state a claim for breach of the duty of loyalty.³

* * *

³ On appeal, Carlisle argues that the fiduciaries violated the duty of loyalty by engaging in “prohibited transactions,” citing 29 U.S.C. § 1106 and *Cunningham v. Cornell University*, 604 U.S. 693 (2025). As the Supreme Court explained in the *Cunningham*, Section 1106 of ERISA “supplements” the duty of loyalty by “categorically barring” self-dealing transactions between an ERISA plan and a fiduciary and/or party in interest. *Id.* at 697. But a section 1106 prohibited-transactions claim is still a distinct and separate claim from breach of the duty of loyalty under ERISA. *See Cunningham v. Cornell Univ.*, 86 F.4th 961, 970 (2d Cir. 2023), *rev’d on other grounds*, 604 U.D. 693. Because the Complaint does not plead or otherwise mention a prohibited-transactions claim, no such claim is properly before this Court.

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We have considered all of Carlisle's remaining arguments and find them to be without merit. For the foregoing reasons, the judgement of the district court is **AFFIRMED**.

FOR THE COURT:

Catherine O'Hagan Wolfe,

Clerk of Court


Catherine O'Hagan Wolfe

APPENDIX B

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK**

ROBERT CARLISLE, individually and as representative of a class of similarly situated persons, on behalf of the New York State Teamsters Conference Pension and Retirement Fund,

Plaintiff,

v. 8:21-cv-00455 (BKS/DJS)

THE BOARD OF TRUSTEES OF THE AMERICAN FEDERATION OF THE NEW YORK STATE TEAMSTERS CONFERENCE PENSION AND RETIREMENT FUND; JOHN BULGARO; BRIAN K. HAMMOND; PAUL A. MARKWITZ; GEORGE F. HARRIGAN; MARK D. MAY; MICHAEL S. SCALZO, SR.; ROBERT SCHAEFFER; MARK GLADFELTER; SAMUEL D. PILGER; DANIEL W. SCHMIDT; TOM J. VENTURA; MEKETA INVESTMENT GROUP, INC.; and HORIZON ACTUARIAL SERVICES, LLC,

Defendants.

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**Hon. Brenda K. Sannes, Chief United States
District Judge:**

MEMORANDUM-DECISION AND ORDER

Plaintiff Robert Carlisle brings this proposed class action, individually and as a representative of a class of similarly situated persons, on behalf of the New York State Teamsters Conference Pension and

Retirement Fund (the "Plan" or the "Fund") under the Employment Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 et seq., alleging (1) breach of fiduciary duty in violation of ERISA §§ 404(a)(1)(A)-(D), 29 U.S.C. §§ 1104(a)(1)(A)-(D); and (2) breach of the fiduciary duty of prudence in violation of ERISA §§ 405(a)(1) and (2), 29 U.S.C. §§ 1105(a)(1) and (2). (See generally Dkt. No. 1).¹ Plaintiff names as Defendants the Board of Trustees of the New York State Teamsters Conference Pension and Retirement Fund, four current Union Trustees, four current Employer Trustees, and three former Trustees (collectively "the Trustees"). (Dkt. No. 1, ¶ 20). Plaintiff also names as Defendants Meketa Investment Group, Inc. ("Meketa"), which provided investment consulting services and investment management services to the Plan, and Horizon Actuarial Services, LLC ("Horizon"), the Plan's actuary. (Dkt. No. 1, ¶¶ 21-22). Presently before the Court are the Defendants' motions under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6) to dismiss the Complaint. (Dkt. Nos. 102, 124, 125). Plaintiff opposes Defendants' motions. (Dkt. Nos. 140, 141, 142). The Court heard oral [*3] argument on July 28, 2023. For the reasons that follow, having considered the extensive briefing and argument in this matter, including the replies, sur-replies, and

¹ Plaintiff seeks to represent the following class: "All participants and beneficiaries of the New York State Teamsters Conference Pension and Retirement Fund through the date of judgment." (Dkt. No. 1, ¶ 118).

letter motions, (Dkt. Nos. 145, 147, 148, 149, 154, 155, 160, 161), as well as the supplemental motion papers, (Dkt. Nos. 179, 180, 181, 186, 187, 204, 205), Defendants' motions to dismiss under Rule 12(b)(1) are denied and Defendants' motions to dismiss under Rule 12(b)(6) are granted.

II. BACKGROUND²

The Parties

Plaintiff is a current participant in the Plan, which "is a defined benefit, non-contributory, multi-employer joint-trust pension plan subject to ERISA."³ (Dkt. No. 1, ¶¶ 19, 24). "The purpose of the Plan is to provide pension benefits to members of unions that have agreements to make contributions to the Fund." (Id. ¶ 24). The Plan is funded by employer contributions and investment returns and, as of May

² Unless otherwise noted, these facts are drawn from the Complaint, (Dkt. No. 1), and documents the Court may consider, see *supra* Section IV.B. The Court assumes the truth of, and draws reasonable inferences from, the well-pleaded factual allegations. *Faber v. Metro. Life Ins. Co.*, 648 F.3d 98, 104 (2d Cir. 2011).

³ As the Second Circuit has explained, "[m]ultiemployer plans like the Fund[] are often referred to as 'Taft-Hartley' plans because they are established and maintained 'pursuant to Section 302(c) of the Taft-Hartley Act of 1947 (otherwise known as the Labor Management Relations Act [or LMRA]),'" 29 U.S.C. § 186(c). *Massaro v. Palladino*, 19 F.4th 197, 201 (2d Cir. 2021) (quoting **32BJ N. Pension Fund v. Nutrition Mgmt. Servs. Co.**, 935 F.3d 93, 96 n.3 (2d Cir. 2019)).

2017, had 180 participating union employers. (*Id.* ¶ 25). As of December 31, 2018, the Plan held \$1.467 billion in total assets and had 33,606 participants.⁴ (*Id.* ¶ 24-25). Plaintiff seeks to certify, and to be appointed as representative of, the following class:

All participants and beneficiaries of the New York State Teamsters [*4] Conference Pension and Retirement Fund through the date of judgment.

(*Id.* ¶ 118). The Complaint defines the "class period" as 2014 to the present. (*Id.* ¶ 10).

The Plan's assets are held in a trust under the Agreement and Declaration of Trust, as amended, and the Plan is maintained in accordance with numerous collective bargaining agreements between unions and employers. (*Id.* ¶¶ 23-24). The Defendant Board of Trustees is responsible for maintaining the Plan, and serves as the Plan Sponsor.⁵ (*Id.* ¶ 19). The Board of Trustees is comprised of an equal number of

⁴ This number includes active participants, retired or separated participants receiving benefits, other retired or separated participants entitled to benefits, and beneficiaries of deceased participants who are receiving or are entitled to receive benefits. (Dkt. No. 1, ¶ 24).

⁵ ERISA defines "the term 'plan sponsor'. . . in the case of a plan established or maintained by two or more employers or jointly by one or more employers and one or more employee organizations, [as] the association, committee, joint board of trustees, or other similar group of representatives of the parties who establish or maintain the plan." *29 U.S.C. § 1002(16)(B)(iii)*.

union and employer Trustees, all of whom are Defendants in this case.⁶ (*Id.* ¶ 20).

Meketa is a global investment consulting and advisory firm. (*Id.* ¶ 21). During the class period, Meketa served as the Plan's "nondiscretionary investment consultant" and as the Plan's "discretionary manager for the Plan's private market alternative investments, including PE and certain other alternatives."⁷ (*Id.* ¶¶ 12, 28).

Horizon, an actuarial consulting firm, is the Plan's "enrolled actuary." (*Id.* ¶ 22). "Horizon has a professional duty to provide actuarial services consistent with relevant generally accepted standards for professional responsibility [*5] and ethics." (*Id.* ¶ 50 (citing § 901.20 Standards of performance of actuarial services, 20 C.F.R. Ch. VIII (4-1-12 Edition), (b) *Professional duty*)).

⁶The four Union Trustees are John A. Bulgaro (Co-Chairman), Brian K. Hammond, George F. Harrigan, and Mark D. May. (*Id.* ¶ 20). The current Employer Trustees are Michael S. Scalzo, Sr. (Co-Chairman), Mark A. Gladfelter, Samuel D. Pilger, and Daniel W. Schmidt. (*Id.* ¶ 20). All are named as Defendants in this case. Plaintiff has also named as Defendants three former trustees, Paul A. Markwitz, Robert Schaeffer, and Tom J. Ventura. (*Id.* ¶ 20).

⁷The Complaint does not identify the "certain other alternatives" that Meketa purportedly managed. (*Id.* ¶ 28).

B. Deterioration of the Plan's Financial Condition

During 2008, the Plan lost more than \$822 million, reducing the value of its assets from \$2.244 billion to \$1.488 billion. (Dkt. No. 102-5, at 2; *see* Dkt. No. 140-28 (2016 Plan Application to Department of Treasury for Approval of Suspension of Benefits ("As was the case for most other pension funds, the unprecedented global financial crises of 2008 had a devastating effect on the Plan.")). In April 2008, the Plan notified participants that "its funding status was in the 'Endangered Status' (yellow zone)" "under the *Pension Protection Act of 2006, [(PPA)] Pub. L. 109-280, 120 Stat. 780*" "for the Plan Year beginning January 1, 2008"—meaning that the Plan was less than 80% funded. (Dkt. No. 1, ¶ 33). The PPA required "Endangered" plans "to develop a Funding Improvement Plan ('FIP'), aimed at avoiding accumulating additional funding deficiencies and increasing a plan's funded percentage in accordance with certain benchmarks at the close of the [ten-year] Funding Improvement Period." (Id. ¶ 34 (citing *26 U.S.C. § 432*)).

The Plan was expected to be 76% funded in 2008. (Id. ¶ 35). An FIP was developed with the [*6] aim of increasing the Plan's funded percentage to 84% within 10 years. (Id.). Horizon "employed an 8.5% investment return assumption to project the 84% funded point in 10 years." (Id.). "Internal Plan Documents show that the 8.5% assumption was an 'actuarial return target' to chase with high risk

assets, not an independently determined actuarial return assumption by the Plan's actuary in accordance with applicable professional standards." (Id.).

The Plan's funding level, however, continued to decline and by 2010, the Plan "was only 62.9% funded," and, as it was less than 65% funded, it entered "'Critical Status' (red zone) under the PPA," which meant that the Plan would be required to operate "under a Rehabilitation Plan ('RP') to improve funding and preserve plan assets and benefits." (Id. ¶ 36). Having determined, "based on the advice and recommendation of the Plan's actuaries and their use of reasonable actuarial assumptions," "that it would not be reasonably possible for the Plan to emerge from critical status under the PPA by the end of its [ten-year] rehabilitation period," (id. ¶ 37; Dkt. No. 140-27, at 2), the Trustees were "permitted to adopt a rehabilitation plan that include[d] [*7] reasonable measures designed to allow the pension fund to emerge from critical status at a later time or forestall possible insolvency," (Dkt. No. 1, ¶ 37).

By the time the rehabilitation plan went into effect on January 1, 2013, the Plan's funding level had decreased from 62.9% to 45.6% and "[i]nvestment returns for the Plan year 2013 were just over 5%." (Id. ¶ 38). In a Summer 2013 newsletter to Plan participants, the Board of Trustees acknowledged that the "most important question from participants and beneficiaries is whether there will be sufficient money to pay pension benefits that have been earned

and promised" and stated that: "The simple answer is: Yes!" (*Id.* ¶ 39). The Board of Trustees made a similar statement in the Fall 2014 newsletter to participants. (*Id.* ¶ 40). In both newsletters, the Board of Trustees assured participants that: "Based on the best information and advice from the Plan's actuarial and investment professionals, the Trustees have taken the necessary steps to ensure that there will be sufficient assets to pay pensions." (*Id.* ¶¶ 39-40). "In Plan year 2015, the Plan was 45.6 percent funded." (*Id.* ¶ 42).

In January 2016, the Plan's actuary "certified the Plan[, [*8] then 45.8% funded,] as being in 'Critical and Declining' status" under the recently enacted *Multiemployer Pension Reform Act of 2014* ("MPRA"), which replaced the PPA, signifying that the Plan was "projected to become insolvent." (*Id.* ¶ 43). The MPRA "established new options for trustees" and allowed, under certain circumstances, a multiemployer plan facing insolvency, i.e. the inability to pay benefits when due, to apply to the Department of Treasury for permission to reduce pension benefits. (*Id.* ¶¶ 41-44).

"On August 31, 2016, the Plan filed an application under MPRA for reduction of pension benefits." (*Id.* ¶ 44). The Plan subsequently withdrew the application and submitted a revised application addressing the Department of Treasury's preference that "the [Plan] use a different mortality table" and request for a "better" explanation from Plan actuaries regarding "the use of lower investment assumptions." (*Id.* ¶ 44). On September 13, 2017, the Department of Treasury

approved the application and benefit reductions were "implemented as of October 1, 2017." (*Id.* ¶ 45). The reductions included "a 29% reduction for retired participants, and a 19% reduction for active participants, in addition to the reductions implemented under the [Rehabilitation [*9] Plan]." (*Id.* ¶ 46). On average, a retired participant's benefits were cut from \$5,000 to between \$2,000 and \$3,500. (*Id.* ¶ 46). Plaintiff's "vested monthly pension benefit payments were cut and have continued to be cut by 19% each month since 2017." (Dkt. No. 140, at 32 (memorandum of law)). "As of late 2017, the Plan was projected to be insolvent by 2026." (*Id.* ¶ 43).

C. Investments

1. Plan Investment Policy Statement

"The Plan's Investment Policy Statement ('IPS') provides '[t]he investment strategy of the [Plan] is designed to ensure the prudent investment of funds in such a manner as to provide real growth of assets over time while protecting the value of the assets from undue volatility or risk of loss.'" (Dkt. No. 1, ¶ 48). According to the IPS, the Plan's "'Risk Objectives' are: 'To accept a level of market risk consistent with moderate interim volatility without sacrificing the potential for long-term real growth of assets'; 'To use extensive diversification to minimize exposure to company and industry-specific risks in the aggregate investment portfolio'; and 'To avoid extreme levels of volatility that could adversely affect the Plan's

participants." (*Id.*). This "Risk Objective' [*10] is 'Within the constraints outlined above, to achieve the highest real return possible.'" (*Id.*).

2. Actuarial Return Target and Investment Strategy

From in or about 2007 to the present, in an endeavor to improve the Plan's "dangerous and worsening financial condition," the Trustees, Meketa, and Horizon utilized an "8.5% 'actuarial return target.'" (Dkt. No. 1, ¶¶ 11, 31; *see id.* ¶ 11 (alleging that in 2007, Horizon increased the actuarial assumption from 8.0% to 8.5%)). The Complaint alleges that Defendants pursued this target by following "an extraordinary, high-risk, high-cost investment and funding strategy." (*Id.* ¶ 31). The Complaint alleges that Horizon increased the actuarial target from 8% to 8.5% in 2007, (*id.* ¶ 11), and seems to allege that Defendants began "chas[ing] high risk assets" in 2008, (*id.* ¶ 35).

In March 2014, Meketa advised the Trustees that "[i]n order to continue to assume the Fund's 8.5% target return, the Fund must be significantly invested in asset classes that are expected to outperform 8.5% over long-term periods." (*Id.* ¶ 55). However, "the 8.5% 'actuarial return target' exceeded Meketa's 20-year capital market assumptions for all but the riskiest asset classes." [*11] (*Id.* ¶ 56). Meketa also advised the Trustees that because "[t]he expected returns for many asset classes [were] not conducive to achieving [the] goal [of] [a long term target return

between 7.5% and 8.5%], "investing a larger portion of a plan's assets in" "higher returning" but "riskier asset classes may be the only way to achieve a plan's targeted return." (*Id.*) (internal quotation marks omitted). Meketa further advised that there were risks and downsides to this strategy, including a "high degree of volatility," the likelihood that the "asset classes with high expected returns" would "underperform their 'safer' counterparts in the short term," "[h]igher management fees (1.5% to 2.5% per year on committed capital, plus performance fees),"⁸ danger of illiquidity, and "[l]ack of transparency." (*Id.* ¶¶ 56-57).

Although the Trustees had been advised that emerging markets equity ("EME") and private equity ("PE") investments were risky, volatile, carried greater fees, and posed a danger of illiquidity, Defendants "maintained" an allocation of approximately 14% of Plan assets to EME and 18.5% to PE—together, approximately 30% of Plan assets. (*Id.* ¶¶ 31, 67). By contrast, according to a chart [*12] Meketa provided to the Trustees in 2014, peer Taft-Hartley plans allocated 2% to EME and 4% to PE. (*Id.* ¶ 67). The percentage of Plan assets invested in "high risk alternative investments" increases to 50% when the Plan's investments in infrastructure and natural resources are included:

⁸The Complaint does not indicate discuss fees for lower-risk or other asset classes, thus the Court has no point of reference.

<u>Asset Class</u>	<u>2014</u>	<u>2015</u>	<u>2016</u>	<u>2017</u>	<u>2018</u>	<u>2019</u>	<u>2020 Q2 (6/30)</u>
Emerging Markets Equity	15.4%	15.6%	14.7%	15.6%	13.5%	15.0%	15.0%
Private Equity	17%	19.6%	19.9%	18.3%	20.6%	20.0%	21.2%
Infrastructure	6.1%	8.1%	7.9%	6.4%	6.7%	4.6%	4.7%
Natural Resources	7.8%	7.3%	8.9%	9.5%	10.1%	8.8%	8.4%
Total	46.3%	50.6%	51.4%	49.8%	50.9%	48.4%	49.3%

(*Id.* ¶¶ 60-61).

3. Emerging Markets Equity

Although "[t]he average Taft-Hartley plan had 4.5% of assets in EME,"⁹ "during the Class Period, Defendants maintained 13.5% to 15.6% of the Plan's assets in EME." (*Id.* ¶ 63). During the class period, the Plan's total EME investments ranged from \$147.5 million to \$221.5 million, and the management fees on these investments ranged from \$933,400 to \$2.137 million per year. (*Id.* ¶ 78).

From 2014 to 2016, Meketa advised the Trustees, with respect to EME performance, that "emerging market economic growth has been slower than expected and more varied"; "[t]he recent increase in real interest rates [*13] and reduction in global liquidity, along with declining demand from China, will likely create headwinds for emerging market growth"; that "[u]ncertainties around global demand (particularly from emerging markets) . . . will likely cause heightened volatility"; "[r]elative to the peer universe, the Fund is significantly underweight domestic and international developed market

⁹ The Complaint does not provide a timeframe for this representation.

equities, and is significantly overweight to emerging markets and private equity"; "Pension Funds that performed strongly in 2013 had large allocations to domestic and developed international equities, They also had smaller allocations to emerging markets debt and emerging markets equity." (*Id.* ¶¶ 65-67) Further, Meketa recommended that "long term investors allocate to emerging market equities according to the following guidelines: Minimum allocation: 10% of total equities allocation to emerging markets. Base case: most long term investors allocate 20-25% of total equities allocation. Needing high returns: consider 30% or more of total equities allocation to emerging markets." (*Id.* ¶ 71).

In February 2016, Meketa, which also served as the investment consultant to the American Federation of Musicians & Employers [*14] Pension Fund ("AFM-EPF"), another Taft-Hartley plan, "advised the AFM-EPF that discretionary portfolios" it managed for other clients were completely out of EME due to global uncertainty and China conditions unless constrained to maintain such an allocation" and that there was a "significant downside risk and limited upside potential of EMEs in the then-current environment." (*Id.* ¶ 75). Meketa "recommended the AFM-EPF substantially [] de-risk from EME and recue its EME allocation by 40%." (*Id.* ¶ 75). Meketa had previously "advised the AFM-EPF that the reason it underperformed its Taft-Hartley peers was due to its overweight allocations to EME and PE and underweight allocations to domestic equities." (*Id.*).

From 2013 to 2015, the Plan's EME investments included investments in EME funds managed by Aberdeen, Dimensional, and Vontobel. (*Id.* ¶ 78). In 2016, "Vontobel was removed from the Plan," but despite Meketa's reports from 2014 to 2016 that there had been "slower than expected" economic growth in emerging markets, that "estimates for emerging markets excluding China" had fallen, and that "[g]rowth in emerging markets economies could be uneven going forward," from 2016 to 2018, the Trustees [*15] added two EME funds, the SSgA/MSCI index (investing \$35 million in 2016), and GQG Partners (investing \$36 million in 2017 and adding \$28 million in 2018). (*Id.* ¶¶ 76-77). The Complaint includes a table showing the "total Plan EME investment performance as reported by MEketa for the Class Period compared to the S&P, DJIA, and VBIAX returns."

Figure 2: Plan EME Investment Performance vs. S&P, DJIA, and VBIAX Returns. (*Id.*).

	PY 2014	PY 2015	PY 2016	PY 2017	PY 2018	PY 2019	PY 2020
Plan EME	2.0%	-10.9%	10.6%	34.2%	-15.4%	19.3%	-7.6% (as of end Q2)
S&P 500	11.39%	-0.73%	9.54%	19.42%	-6.24%	28.88%	-4.4% (as of end Q2)
DJIA	7.52%	-2.23%	13.42%	25.08%	-5.63%	22.34%	-9.9% (as of end Q2)
Vanguard Blncd. Idx Fd. Adm. (VBIAX)	10%	0.51%	8.77%	13.89%	-2.86%	21.79%	-0.8% (as of end Q2)

(*Id.* ¶ 81). "[T]he Plan lost approximately \$31 million in value on the EME assets" during the class period. (*Id.* ¶ 79). The Complaint does not provide the

investment performance of the Plan as a whole during the class period.

4. Private Equity and Private Market Alternatives

"The Plan's alternative private market investments include PE, Natural Resources and Infrastructure." (Dkt. No. 1, ¶ 84). Meketa was the investment manager for the Plan's Private Markets Portfolio. [*16] (*Id.* ¶ 12). During the class period, the Trustees and Meketa allocated 17-21.2% of Plan assets to PE investments, 4.6%-8.1% to infrastructure investments, and 7.3%-10.1% to natural resources investments. (*Id.* ¶ 61). In May 2014, Meketa provided a chart to Trustees showing that the Plan's PE investments comprised 15% of its equity allocation while its "U.S. Peer Group's" PE investments comprised 4% of their equity allocations. (*Id.* ¶ 67). There is no comparative information regarding natural resources or infrastructure. Meketa reported the Plan's gross return of investment with respect to PE, natural resources, and infrastructure as follows:¹⁰

¹⁰ The return percentages are drawn from tables in the Complaint purporting to contain data from Meketa's yearly reports regarding the Plan's PE, natural resources, and infrastructure portfolios for 2014 through 2019. (Dkt. No. 1, ¶¶ 88-93). There are three tables for each year—one for PE, one for natural resources, and one for infrastructure. (*Id.*). Each table lists the "number of partnerships," amount of "committed capital," "capital called," "distributions," and "reported value,"

	2014	2015	2016	2017	2018	2019
PE	12.9%	12.3%	12.2%	12.7%	12.9%	12.6%
Natural Resources	0.8%	-0.1%	1.8%	1.8%	1.1%	0.0%
Infrastructure	5.5%	7.2%	7.8%	8.7%	8.8%	8.4%

(*Id.* ¶¶ 88-93).¹¹

According to a 2015 report on the actuarial assumptions for the New York State Teacher's Retirement System, the "Target Asset Allocation for the New York State Teacher's Retirement System fund as of 2015 was set to 7.0% for PE with a permitted range of 4-12%." (*Id.* ¶ 100).

Regarding the drawbacks of PE investments, the Complaint alleges the following:

identifies the "total value multiplier," and the "gross IRR" and "net IRR." (*Id.*). While the investment return percentages are relevant, the Complaint fails to explain the relevance of the other data points.

11 "Meketa reported the following returns for the Plan's domestic equities and various indices for the Class Period":

	2014	2015	2016	2017	2018	2019
Plan	12.2%	0.8%	13.2%	20.6%	-4.8%	30.5%
Russell 3000	12.6%	0.5%	12.7%	21.1%	-5.2%	31.0%
Benchmark Plus Invest	16.3%	5.0%	14.6%	22.0%	-2.8%	30%
S&P 500	13.7%	1.4%	12.0%	21.8%	-4.4%	31.5%
Loomis Sayles Small Cap Value	5.3%	-2.9%	26.3%	9.7%	-16.0%	24.5%
Russell 2000 Value	4.2%	-7.5%	31.7%	7.8%	-12.9%	22.4%
Russell 2000	4.9%	-4.4%	21.3%	14.6%	-11.0%	25.5%
SSGA Russell 1000	13.2%	0.9%	12.0%	21.7%	-4.7%	31.4%
Russell 1000	13.2%	0.9%	12.1%	21.7%	-4.8%	31.4%

(*Id.* ¶ 94). However, the Complaint does not indicate what percentage of Fund assets were invested in "domestic equities and various indices."

- A May 2020 Stanford study of returns for 571 pension plans confirmed that over the last ten years, the mean performance in PE (11.3%) matched returns of U.S. public equity. (*Id.* ¶ 97).

- A May 2020 study by Cliffwater "made clear that there is no difference in returns between PE and US stocks in [a] sample of the largest 66 pension plans over the past ten years." (*Id.* ¶ 98).

- A June 2020 paper from the University of Oxford's Journal of Investing reported that "large pension funds have earned roughly \$1.5 (net of fees) per \$1 invested in private equity funds," yielding a return "about the same as the returns in public equity." (*Id.* ¶ 96).

- Meketa's June 2020 "Disclosure Brochure" states:

Private market investments involve a significant degree of risk and are suitable only for sophisticated clients who have no immediate need [*18] for liquidity of the amount invested and who can afford a risk of loss of all or a substantial part of such investment.

* * *

There is no assurance that such investments will be profitable and there is a substantial risk that associated losses and expenses will exceed income and gains.

(*Id.* ¶ 86).

The "ongoing pandemic and accompanying financial crisis" "has exposed the Plan to further risk of losses" as a result of Defendants "'significantly overweight'" allocation of "Plan assets to high risk illiquid alternatives investments." (*Id.* ¶¶ 102-07 (citing commentators and papers discussing COVID-19's impact on PE firms, including bankruptcy, negative impacts on revenues, costs, and profitability, and projections of volatility and defaults)).

D. Post-Complaint Restoration of Benefits¹²

On January 28, 2022, the Board of Trustees applied, on behalf of the Plan, to the Pension Benefit Guaranty Corporation ("PBGC"), for special financial assistance pursuant to the *American Rescue Plan Act of 2021 ("ARPA")*, 29 U.S.C. § 1432.¹³ (Dkt. No. 163, at 1). Under the ARPA, a multiemployer plan whose application is approved receives, with no repayment obligation, 29 U.S.C. § 1432(a)(2), funds sufficient (1) to pay pension benefits through 2051, *id.* § 1432(j)(1), and (2) to restore all suspended [*19] benefits to participants, retroactively in a lump-sum payment,

¹² These facts are drawn from the parties' notices and status reports regarding the Plan's application for special financial assistance and their supplemental briefing and are relevant to the parties' arguments on standing and mootness. See *supra* note 2.

¹³ The Board of Trustees subsequently withdrew its application to make "adjustments it its initial filing," (Dkt. No. 167, ¶ 2), and submitted a revised application to the PBGC on July 21, 2022, (Dkt. No. 172, at 1).

id. § 1432(k)(1)-(2). A plan that receives special financial assistance is barred from implementing future benefits reductions under the MPRA. 29 U.S.C. § 1432(m)(6).

On November 18, 2022, the PBGC approved the Plan's application. (Dkt. No. 176, at 1). On December 9, 2022, the Plan received more than \$900 million in special financial assistance from the federal government, (Dkt. No. 179-1, at 10; Dkt. No. 179-2, ¶ 4), and "restored benefits for all participants to pre-MPRA reduction levels." (Dkt. No. 179-2, ¶ 5; Dkt. No. 179-3, at 1). Plaintiff's monthly benefit payment was "increased . . . from \$821.01 per month to \$907.83 per month," "the amount that was in effect prior to the Fund's reduction of benefits in 2017." (Dkt. No. 179-1, at 10; Dkt. No. 179-2, ¶ 6). In addition, in March 2023, the Fund provided "participants with lump sum payments reflecting the amount of MPRA benefit reduction between October 1, 2017, and the December 1, 2022, restoration." (Dkt. No. 179-2, ¶ 7). Plaintiff received a check for \$5,382.84 "representing the total benefit reduction he experienced from October 1, 2017 until the December 2022 restoration." (Dkt. No. 179-1, at 10; Dkt. [*20] No. 179-2, ¶ 8). Neither Plaintiff nor any beneficiary was repaid with interest.¹⁴ (Dkt. No. 181, at 9; Dkt. No. 181-1, at 3). Plaintiff claims he is entitled to \$1,127.70 in interest and that "the aggregate interest damages for all Plan participants

¹⁴ The MPRA does not provide for the payment of interest. 29 U.S.C. § 4262(k)(2).

exceeds \$70 million." (Dkt. No. 181, at 9; Dkt. No. 181-1, at 3).

III. MOTION TO DISMISS - FED. R. CIV. P. 12(b)(1)

Defendants move to dismiss the Complaint under *Rule 12(b)(1)* on the ground that the funding the Plan received under the ARPA and the restoration of Plaintiff's benefits have rendered Plaintiff's claims moot, and that, in any event, Plaintiff lacks standing. Plaintiff opposes Defendants' motion.

A. Standard of Review

"A court faced with a motion to dismiss pursuant to both *Rules 12(b)(1)* and *12(b)(6)* must decide the jurisdictional question first because a disposition of a *Rule 12(b)(6)* motion is a decision on the merits and, therefore, an exercise of jurisdiction." *Mann v. New York State Court of Appeals, No. 21-cv-49, 2021 U.S. Dist. LEXIS 209018, at *8, 2021 WL 5040236, at *3 (N.D.N.Y. Oct. 29, 2021)* (citation omitted). "In resolving a motion to dismiss under *Rule 12(b)(1)*, the district court must take all uncontroverted facts in the complaint (or petition) as true, and draw all reasonable inferences in favor of the party asserting jurisdiction." *Tandon v. Captain's Cove Marina of Bridgeport, Inc., 752 F.3d 239, 243 (2d Cir. 2014)* (citation omitted). The Court may also "refer to evidence outside the pleadings" and "take judicial [*21] notice of documents in the public record, including state court filings." *Krajisnik Soccer Club, Inc. v. Krajisnik Football Club, Inc., No. 20-cv-*

1140, 2021 U.S. Dist. LEXIS 99456, at *5, 2021 WL 2142924, at *2 (N.D.N.Y. May 26, 2021) (citations omitted).

B. Mootness

Defendants argue that this action is moot and Plaintiff no longer possesses a concrete stake in the outcome of this litigation because his benefits have been restored and the corpus of the Plan has been made whole. (Dkt. No. 179-1; Dkt. No. 187). Plaintiff opposes Defendants' motion, arguing, among other things, that this action is not moot because the collateral source rule applies and permits double recovery.¹⁵ (Dkt. No. 181).

Where a party "los[es] a stake in ongoing litigation," the question is not "whether the party losing its stake in the litigation has lost its *standing* but . . . whether the action has become *moot*." *Klein ex rel. Qlik Techs., Inc. v. Qlik Techs., Inc.*, 906 F.3d 215, 220-21 (2d Cir. 2018) (emphases in original). To avoid an action becoming moot, "the plaintiff 'must have suffered, or be threatened with, an actual injury traceable to the defendant and likely to be redressed by a favorable judicial decision.'" *Bank v. Caribbean Cruise Line, Inc.*, 606 F. App'x 28, 29 (2d Cir. 2015) (summary order) (quoting *Spencer v. Kemna*, 523 U.S. 1, 7, 118 S. Ct. 978, 140 L. Ed. 2d 43 (1998)). Although

¹⁵ As the Court concludes that the collateral source rule applies, it need not reach Plaintiff's arguments regarding interest.

"[t]he burden of establishing standing falls on the plaintiff," the "burden of showing mootness . . . falls on a defendant." *Mhany Mgmt., Inc. v. Cnty. of Nassau*, 819 F.3d 581, 603 (2d Cir. 2016) (citing *Friends of the Earth, Inc. v. Laidlaw Env't Servs.*, 528 U.S. 167, 191-92, 120 S. Ct. 693, 145 L. Ed. 2d 610 (2000)).

"Federal courts regularly apply the 'collateral source rule,' which [*22] permits a plaintiff to recover damages from a tortfeasor though the plaintiff has already received compensation for its injuries from a third-party and even when such an award would lead to double recovery." *In re State St. Bank & Tr. Co. Erisa Litig.*, 579 F. Supp. 2d 512, 517 (S.D.N.Y. 2008); see *Hartnett v. Reiss S.S. Co.*, 421 F.2d 1011, 1016 (2d Cir. 1970) ("The general rule in the federal courts is that the collateral source rule is applied."). "According to this doctrine, which is an established exception to the general rule that damages in a negligence action must be compensatory, a wrongdoer is not permitted to reduce a plaintiff's recovery because of benefits which the latter may have received from another source." *Cunningham v. Rederiet Vindeggen A/S*, 333 F.2d 308, 316 (2d Cir. 1964); see *Ebert v. City of New York*, No. 04-cv-9971, 2006 U.S. Dist. LEXIS 43337, at *3, 2006 WL 3627103, at *1 (S.D.N.Y. June 26, 2006) ("The collateral source rule is a substantive rule of law that bars a tortfeasor from reducing the quantum of damages owed to a plaintiff by the amount of recovery the plaintiff receives from other sources of

compensation that are independent of (or collateral to) the tortfeasor." (quoting *Davis v. Odeco, Inc.*, 18 F.3d 1237, 1243 (5th Cir. 1994)).

"The collateral source rule 'is based on the reality that benefits paid by a third party—a collateral source—will amount to a windfall for the plaintiff if they are not deducted, and for the defendant if they are deducted.'" *Sass v. MTA Bus Co.*, 6 F. Supp. 3d 238, 255 (E.D.N.Y. 2014) (quoting *Norris v. N.Y.C. Coll. of Tech.*, No. 07-cv-853, 2009 U.S. Dist. LEXIS 107821, at *3, 2009 WL 3841970, at *1 (E.D.N.Y. Nov. 18, 2009)). In general, the collateral source rule allows any windfall to fall in the plaintiff's [*23] favor: "the principle of justice underlying the collateral source rule, is that it is the innocent victim rather than the guilty tortfeasor who is the preferable recipient of any windfall caused by outside compensation." *Yankee Gas Servs. Co. v. UGI Utilities, Inc.*, 852 F. Supp. 2d 229, 254-55 (D. Conn. 2012); see also *Williams v. Sec'y of Navy*, 853 F. Supp. 66, 72 (E.D.N.Y. 1994) (explaining that under the collateral source rule, courts decline "to use funds obtained from a source unconnected with the culpable party to reduce that party's liability").

However, "the rationale for the collateral source rule disappears 'when the [defendant] is the source of the benefit—that is, where the source of the benefit is not collateral." *Norris*, 2009 U.S. Dist. LEXIS 107821, at *4, 2009 WL 3841970, at *1 (quoting *EEOC v. Yellow Freight Sys., Inc.*, 2001 U.S. Dist. LEXIS 20240, at *4, 2001 WL 1568322, at *1 (S.D.N.Y. Dec.

6, 2001)). Courts have, for example, deducted unemployment compensation from plaintiffs' back pay awards where the defendants themselves funded the unemployment benefits. *See, e.g., Stratton v. Dep't for the Aging for City of New York*, 922 F. Supp. 857, 866 & n.8 (S.D.N.Y. 1996) (deducting unemployment benefits from the plaintiff's back pay award, noting that although the "Plaintiff's unemployment benefits were paid directly to her by the New York State Department of Labor," because the defendant made "payments for the unemployment compensation claims paid out to its former employees, rather than making contributions to the state unemployment insurance fund," the collateral source rule was inapplicable); [*24] *Williams v. Sec'y of Navy*, 853 F. Supp. 66, 72 (E.D.N.Y. 1994) (approving deduction of unemployment compensation from back pay, explaining that while "unemployment insurance, coming from a collateral source (a public agency), should not serve to reduce a culpable employer's liability," the rationale behind the collateral source rule was inapplicable because the defendant reimbursed the public agency "in an amount equal to unemployment compensation paid to its employees").

Defendants' argument that the application of the collateral source rule "would run afoul of the central purpose of ERISA," (Dkt. No. 179-1, at 20-22), has been largely rejected. Courts have applied the collateral source rule in ERISA cases, finding it to be "consistent with 'ERISA's essentially remedial purpose of protecting beneficiaries of pension plans.'"

State St. Bank, 579 F. Supp. 2d at 518 (quoting *Salovaara v. Eckert*, 222 F.3d 19, 31 (2d Cir. 2000)); see also *Merriam v. Demoulas*, No. 11-cv-10577, 2013 U.S. Dist. LEXIS 77600, at *7, 2013 WL 2422789, at *3 (D. Mass. June 3, 2013) (rejecting the defendants' argument that the plaintiff participants in ERISA profit-sharing plan lacked standing to pursue breach of fiduciary duty claims because a restorative payment had cured the \$46 million loss that formed the basis of the plaintiffs' injury, explaining that a "plaintiff does not lose standing to sue a tortfeasor just because a third party has already compensated her for the injury"). [*25] Indeed, the Second Circuit has relied on the principles of the collateral source rule in finding an ERISA fiduciary liable for losses caused by her breach even though others previously restored the plan's losses. *Chao v. Merino*, 452 F.3d 174, 176 (2d Cir. 2006).

In *Merino*, the Secretary of Labor sued the defendant for breaching her fiduciary duties by allowing the ERISA fund "to deal with a known embezzler" who caused the fund more than \$350,000 in losses. 452 F.3d at 176. The district court rejected the defendant's argument that she was entitled to a "setoff, against the loss she caused" of amounts third parties (employers and a national union organization) gave to the fund to restore the losses. *Id.* The Second Circuit affirmed, finding "no rational basis for a setoff," explaining that "[t]he underlying purposes of ERISA would not be furthered by awarding an errant fiduciary credit for [double] contributions made by an

employer or others concerned about continuing health care coverage for employees." *Id.* It further explained that "[a]lthough the ultimate goal of *ERISA* § 409(a) is 'the restoration of the trust beneficiaries to the position they would have occupied but for the breach of trust,' the express language of that section makes the breaching fiduciary liable [*26] not directly for losses to beneficiaries, but for 'losses to the plan.'" *Id.* at 185 (citations omitted) (emphasis in original) (first quoting *Donovan v. Bierwirth*, 754 F.2d 1049, 1056 (2d Cir. 1985); and then quoting 29 U.S.C. § 1109(a)). Although the Second Circuit did not expressly cite the collateral source rule in deciding *Merino*, the principles on which it relied in finding the defendant remained liable for the losses attributable to her fiduciary breach, despite the restoration of those losses by third parties, have provided meaningful guidance to courts applying "the collateral source rule in the ERISA context." *Merriam*, 2013 U.S. Dist. LEXIS 77600, at *8, 2013 WL 2422789, at *3 (citing *Merino*, 452 F.3d at 184-85); see also *Beta Grp., Inc. v. Steiker, Greenapple, & Croscut, P.C.*, No. 15-cv-213, 2018 U.S. Dist. LEXIS 9069, at *7-8, 2018 WL 461097, at *3 (D.R.I. Jan. 18, 2018) (finding the "collateral source rule readily applies in the ERISA context" and noting that "courts have recognized that payments made by a fiduciary or plan sponsor to correct errors connected to the operation of an ERISA-governed plan do not rescind or set off fiduciaries' capacity to recover from actual wrongdoers" (citing *Merino*, 452 F.3d at 184-85)).

Applying these principles to the present case, the Court concludes that the collateral source rule applies to the federal government's payment of more than \$900 million to the Plan and that this payment does not impair Plaintiff's capacity to recover from the alleged wrongdoers or moot this action. Defendants present [*27] no argument or evidence that the source of the funds are from anyone other than a third party. This case is unlike *Williams*, 853 F. Supp. at 72, for example, where the defendant itself reimbursed the public unemployment insurance agency for unemployment benefits paid to the plaintiff. In this case, the Plan received more than \$900 million from the federal government but is not required to reimburse any of it. Therefore, because the source of the payment that led to the restoration of Plaintiff's benefits was wholly independent of Defendants, it was a collateral source. See *Barkanic v. Gen. Admin. of Civ. Aviation of the People's Republic of China*, 923 F.2d 957, 964 n. 8 (2d Cir. 1991) ("The collateral source rule prohibits courts from considering benefits received from third parties in determining the extent of the plaintiff's recovery.").

Citing *Gervis v. Berg*, No. 00-cv-3362, 2006 U.S. Dist. LEXIS 108705, 2006 WL 8445730 (E.D.N.Y. Sept. 13, 2006), Defendants assert that the federal government's \$900 million payment to the Plan is akin to an "insurance payment made by or on behalf of the defendant" and argue that therefore that payment is not a collateral source and that it should be "offset against anything the defendants might

otherwise owe the plaintiff." (Dkt. No. 179-1, at 17). In *Gervis*, the court found "certain of [the] Plaintiffs' claims moot" because "their injuries were cured when" they were reimbursed for their [*28] investment losses by the Securities Investor Protection Corporation ("SIPC"), an "independent nonprofit, membership corporation created by the federal *Securities Investor Protection Act.*" 2006 U.S. Dist. LEXIS 108705, at *9, *13, 2006 WL 8445730, at *3, *5. Because the SIPC was paid for by member securities broker-dealers, including one of the tortfeasors in *Gervis*, the court concluded that the source of the funds was not a collateral source. 2006 U.S. Dist. LEXIS 108705, at *15, 2006 WL 8445730, at *5 (explaining that although "[p]ayments from an insurance policy are considered collateral source payments when the plaintiff maintains the insurance policy completely independent of the defendants," because one of the wrongdoers responsible for the plaintiffs' injuries was a "member broker" of the SIPC, which was "akin to an insurance program funded by payments made by its member brokers" the collateral source rule was inapplicable (citing *Restatement (Second) of Torts § 920A*)). Here, by contrast, there is no evidence that any Defendant contributed to the funds the federal government provided to the Plan.

To the extent Defendants argue that because the Plan itself restored Plaintiff's benefits, the collateral source rule is inapplicable, their argument is without merit. (Dkt. No. 179-1, at 19). The focal inquiry is the

source of the funds, not who supplied them to the plaintiff. [*29] See *Ebert*, 2006 U.S. Dist. LEXIS 43337, at *9-10, 2006 WL 3627103, at *3 (observing that "the source of the funds may be determined to be collateral or independent, even though the . . . tortfeasor supplies such funds" and explaining that "[a]pplication of the collateral source rule depends less upon the source of funds than upon the character of the benefits received") (quotation marks omitted); *Fullam v. Cnty. of Nassau*, No. 07-cv-07, 2008 U.S. Dist. LEXIS 52191, at *7-8, 2008 WL 11417737, at *3 (E.D.N.Y. July 7, 2008) (concluding that "the collateral source rule prohibits consideration of the disability payments received by the Plaintiff," explaining that "there is no evidence that the disability pension was provided by the [defendant] in order to offset tort liability" and that "the disability pension can be collateral despite the fact that it has been provided by the . . . tortfeasor"). Indeed, it appears that the payment made to the Plan was funded by taxpayers and that Defendants in no way contributed to those funds. Cf. *Gervis*, 2006 U.S. Dist. LEXIS 108705, at *15, 2006 WL 8445730, at *5 (concluding that because "the SIPC payments [were] not wholly independent of the tortfeasors," they were not a collateral source). The Court therefore finds the funds the federal government provided to the Plan is a collateral source and does not moot Plaintiff's claim in this case.¹⁶

¹⁶ The Court finds Defendants' arguments concerning the "one satisfaction rule" and "direct benefit" rule unhelpful at this

C. Standing¹⁷

junction. The "one satisfaction rule" provides that "when a plaintiff receives a settlement from one defendant, a nonsettling defendant is entitled to a credit of the settlement amount against any judgment obtained by the plaintiff against the nonsettling defendant as long as both the settlement and judgment represent common damages." *Singer v. Olympia Brewing Co.*, 878 F.2d 596, 600 (2d Cir. 1989). Defendants provide no authority for applying the "one satisfaction rule," which largely governs a determination of whether a set-off is warranted, at the motion to dismiss stage, and to a party who is neither a joint tortfeasor nor, like the SIPC in *Gervis*, funded by a joint tortfeasor or defendant. *Gervis*, 2006 U.S. Dist. LEXIS 108705, at *16, 2006 WL 8445730, at *5-6. As to the "direct benefits" rule, Defendants largely rely on treatises which refer to payments made by a tortfeasor or individual acting for a joint tortfeasor. (See, e.g., Dkt. No. 179-1, at 23 n.14 (citing Restatement (Second) of Torts § 920A(1) (1979) ("A payment made by a tortfeasor or by a person acting for him to a person whom he has injured is credited against his tort liability, as are payments made by another who is, or believes he is, subject to the same tort liability.")); Dkt. No. 179-1, at 24 n.15 (citing Dan B. Dobbs & Caprice L. Roberts, *Law of Remedies: Damages, Equity, Restitution* 488 (3d ed. 2018))). As discussed, there is no basis for inferring that when the federal government provided \$900 million to the Plan it was acting for a joint tortfeasor.

¹⁷ Because "[t]he existence of federal jurisdiction ordinarily depends on the facts as they exist when the complaint is filed," *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 569 n.4, 112 S. Ct. 2130, 119 L. Ed. 2d 351, (1992) (quoting *Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826, 830, 109 S. Ct. 2218, 104 L. Ed. 2d 893 (1989)), the Court must also consider whether Plaintiff had standing at the time he brought this suit.

The Plan argues that Plaintiff lacks Article III standing [*30] because the remedy he seeks, the restoration of investment losses, will not redress the harm Plaintiff allegedly suffered—the reduction in his pension benefits. (Dkt. No. 124-1, at 16). Plaintiff responds that his alleged injury, the 19% reduction in his benefits, is redressable because if he "wins this lawsuit, any damages collected will be" used to: (1) "repay participants directly"; (2) restore "in whole or part" the previously imposed reductions to vested benefits payments"; or (3) "to limit the amount of future benefits cuts, or all three." (Dkt. No. 140, at 33).

"Article III of the Constitution limits federal courts' jurisdiction to certain 'Cases' and 'Controversies'" and "[o]ne element of the case-or-controversy requirement is that plaintiffs must establish they have standing to sue." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 408, 133 S. Ct. 1138, 185 L. Ed. 2d 264 (2013) (citation and internal quotation marks omitted). "[T]he irreducible constitutional minimum contains three elements." *Lujan*, 504 U.S. at 560. To establish standing, (1) "the plaintiff must have suffered an 'injury in fact'—an invasion of a legally protected interest," (2) "there must be a causal connection between the injury and the conduct complained of," and (3) "it must be likely, as opposed to merely speculative, that the injury will be redressed [*31] by a favorable decision." *Id.* at 560-61 (citations and internal quotation marks omitted). "The party invoking federal jurisdiction

bears the burden of establishing these elements." *Whalen v. Michael Stores Inc.* ("*Whalen I*"), 153 F. Supp. 3d 577, 580 (E.D.N.Y. 2015), *aff'd*, 689 F. App'x 89 (2d Cir. 2017) (quoting *Lujan*, 504 U.S. at 561). "The redressability prong does not demand that court-ordered relief completely redress all injury." *Dean v. Town of Hempstead*, 527 F. Supp. 3d 347, 406 (E.D.N.Y. 2021); *see Larson v. Valente*, 456 U.S. 228, 244 n.15, 102 S. Ct. 1673, 72 L. Ed. 2d 33 (1982) ("[A] plaintiff satisfies the redressability requirement when he shows that a favorable decision will relieve a discrete injury to himself. He need not show that a favorable decision will relieve his every injury.").

The Complaint provides two facts regarding Plaintiff: (1) he is a "current participant in the Plan as defined by 29 U.S.C. § 1002(7)";¹⁸ and (2) he has been a participant in the Plan since prior to 2014. (Dkt. No. 1, ¶ 18). Although the Complaint alleges that on or about October 1, 2017, the "Plan implemented massive benefit reductions, including a 29% reduction for retired participants, and a 19% reduction for active participants," (*id.* ¶ 46), it does not indicate whether Plaintiff falls into either category of participant. However, in a memorandum

¹⁸ ERISA defines the term "participant" as "any employee or former employee of an employer, or any member or former member of an employee organization, who is or may become eligible to receive a benefit of any type from an employee benefit plan which covers employees of such employer or members of such organization, or whose beneficiaries may be eligible to receive any such benefit." 29 U.S.C. § 1002(7).

of law, Plaintiff represents that he is an "active Fund participant[]" and that his vested pension benefits have been cut by 19%. (Dkt. No. 140, at 32). [*32] These allegations are sufficient to show that Plaintiff was injured "in a personal and individual way," such that he "has a personal stake in the controversy." *Baur v. Veneman*, 352 F.3d 625, 632 (2d Cir. 2003) (explaining that courts must "assess whether the injury 'affect[s] the plaintiff in a personal and individual way,' to confirm that the plaintiff has a personal stake in the controversy") (internal citation omitted) (quoting *Lujan*, 504 U.S. at 560 n.1); cf., *Thole v. United States Bank N.A.*, 590 U.S. 538, 547, 140 S. Ct. 1615, 207 L. Ed. 2d 85 (2020) (finding the plaintiffs, who alleged breach of fiduciary duty with respect to their defined-benefit plan, lacked Article III standing as they had "received all of their vested pension benefits so far, and they are legally entitled to receive the same monthly pension benefits for the rest of their lives, and therefore had "no concrete stake in this dispute"). At issue here is the third element—whether the reduction in Plaintiff's benefits "will be redressed by a favorable decision" in this matter. *Lujan*, 504 U.S. at 561.

Here, Defendants assert that because the MPRA does not permit benefit restoration until the Plan's actuary certifies that the plan "is projected to avoid insolvency indefinitely," (Dkt. No. 124-1, at 17-18

(citing *29 U.S.C. § 1085(e)(9)(E)(i)(II)*),¹⁹ even if Plaintiff were to recover assets on behalf of the Plan, given that the Plan's liabilities [*33] currently exceed assets by more than \$1 billion, "the recovery would barely move the needle" and "[i]t would be pure speculation to suggest the Plan could restore some or all of the benefit reductions and still avoid insolvency if Plaintiff were to prevail in this lawsuit." (*Id.* at 18). Defendants further assert that, in any event, because the MPRA places the decision to provide benefit improvements within the discretion of the Board of Trustees, "whether [a] recovery would result in an increase in pension benefits would be entirely speculative." (*Id.* (citing *29 U.S.C. § 1085(e)(9)(E)(i)*) ("The Plan Sponsor may, in its sole discretion, provide benefit improvements while any suspension of benefits under the plan remains in effect.")).

A redressability inquiry "focuses . . . on whether the injury that a plaintiff alleges is likely to be redressed through the litigation." *Sprint Commc'ns Co., L.P. v. APCC Servs., Inc.*, 554 U.S. 269, 286-87, 128 S. Ct. 2531, 171 L. Ed. 2d 424 (2008). "[R]edressability—has been interpreted to mean that a plaintiff's standing depends on the form of relief requested." *MacIssac v. Town of Poughkeepsie*, 770 F. Supp. 2d 587, 593 (S.D.N.Y. 2011) (citing *Friends of*

¹⁹ Defendants further note that the MPRA permits benefit restorations if the "benefit reductions are scheduled to expire by their terms," but such "condition" is not relevant here. (Dkt. No. 124-1, at 17).

the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 185, 120 S. Ct. 693, 145 L. Ed. 2d 610 (2000)). To satisfy the redressability requirement, a plaintiff must establish that "it is likely and not merely speculative that the plaintiff's injury will be remedied by the relief plaintiff seeks in bringing suit[]." *Sprint Commc'ns Co.*, 554 U.S. at 273-74 (internal [*34] quotation marks omitted) (citing *Lujan*, 504 U.S. at 560-61).

ERISA "does not provide a remedy for individual injuries distinct from plan injuries." *LaRue v. DeWolff, Boberg & Assocs., Inc.*, 552 U.S. 248, 256, 128 S. Ct. 1020, 169 L. Ed. 2d 847 (2008); 29 U.S.C. § 1132(a)(2). Accordingly, not only must Plaintiff bring his ERISA claims in a derivative capacity on behalf of the Plan under § 1132(a)(2), but any relief Plaintiff may obtain will "inur[e] to the Plan" and will only indirectly benefit individual participants. *L.I. Head Start Child Dev. Servs., Inc. v. Economic Opportunity Comm'n of Nassau Cnty.*, 710 F.3d 57, 66 (2d Cir. 2013). Here, Plaintiff seeks: (1) a declaration that Defendants breached their fiduciary duties under ERISA; (2) an order directing Defendants to "restore all losses to the Plan which resulted from the breaches of fiduciary duty"; (3) a disgorgement of profits made by Defendants; (4) a constructive trust over any assets received by any breaching fiduciary in connection with their violations of ERISA; (5) an order directing "the Plan to allocate its assets prudently"; (6) an order attaching "any breaching fiduciary's" "accounts in or benefits from the Plan"; (7) the appointment of an

independent fiduciary "to administer the Plan and manage the Plan's investments and/or selection of investments and/or to oversee the divestment of the Plan's imprudent investments and reduction of investment management costs"; (8) "a full accounting of [*35] all fees paid . . . by the Plan"; (9) an award of prejudgment and postjudgment interest; (10) an award of attorneys' fees and costs; and (11) "all such other remedial or equitable relief as the Court deems appropriate." (Dkt. No. 1, ¶ 154).²⁰ Taken together, Plaintiff's factual allegations of ongoing financial harm as a result of Defendants' continued investment strategy, (*see, e.g.*, Dkt. No. 1, ¶¶ 61 (chart showing "Plan's investment allocations to EMEs, PE and other alternatives" from 2014 through the second quarter of 2020 ranged from 50.6% to 55.1%), 71 (showing allocation Plan EME assets ranging from 26.4% to

²⁰ These requests for relief are consistent with ERISA. See 29 U.S.C. § 1109(a) (providing that a breaching fiduciary "shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary."); 29 U.S.C. § 1132(a)(3) (permitting ERISA participants "(A) to enjoin any act or practice which violates any provision of [ERISA] or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of [ERISA] or the terms of the plan"); *see also* *Watson v. Consol. Edison of N.Y.*, 594 F. Supp. 2d 399, 407 (S.D.N.Y. 2009) (citing *Varity Corp. v. Howe*, 516 U.S. 489, 512, 116 S. Ct. 1065, 134 L. Ed. 2d 130 (1996) (noting that ERISA section 502(a)(3) serves "as a safety net, offering appropriate equitable relief for injuries caused by violations that § 502 does not elsewhere adequately remedy").

27.5% of total Plan equities assets from 2014 through the second quarter of 2020)), which the Court accepts as true at this stage, suffice to show that an injunction or other equitable relief regarding the management of the Plan going forward would remedy the alleged ongoing harm. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 108, 118 S. Ct. 1003, 140 L. Ed. 2d 210 (1998) ("If respondent had alleged a continuing violation or the imminence of a future violation, the injunctive relief requested would remedy that alleged harm.").

Further, even accepting Defendants' argument that Plaintiff's injuries cannot be redressed completely and that there are obstacles [*36] to benefit restoration or improvement, because Plaintiff's requested relief, if granted, would improve the Plan's financial condition, Plaintiff sufficiently alleges redressability. *See Planned Parenthood of N.Y. City, Inc. v. United States HHS*, 337 F. Supp. 3d 308, 323 (S.D.N.Y. 2018) ("Even if we were to accept defendants' argument that plaintiff's injuries will not be completely redressed unless it actually receives TPP funds, restoring plaintiff to a position where it can better compete for such funds must at least constitute partial redress, which is all that is required for purposes of Article III standing." (citing *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 151-53, 130 S. Ct. 2743, 177 L. Ed. 2d 461 (2010) (holding that farmers had standing to challenge restrictions on an agency's ability to deregulate a genetically engineered product even though their ultimate goal of

deregulation could not be achieved without further agency action)); *see also Massachusetts v. E.P.A.*, 549 U.S. 497, 526, 127 S. Ct. 1438, 167 L. Ed. 2d 248 (2007) (finding redressability where relief sought would reduce further risk of injury "to some extent"); *Lujan*, 504 U.S. at 569 n.4 ("The redressability element of the Article III standing requirement and the 'complete relief' referred to by *Rule 19* are not identical."); *Shalom Pentecostal Church v. Acting Sec'y U.S. Dep't of Homeland Sec.*, 783 F.3d 156, 161-62 (3d Cir. 2015) (holding that redressability is based on the "availability of relief at a given step, rather than the likelihood of achieving the ultimate goal"). Thus, the Court concludes Plaintiff has adequately shown [*37] redressability. Accordingly, Defendants' motion to dismiss for lack of standing under *Rule 12(b)(1)* is denied.

IV. MOTION TO DISMISS - FED. R. CIV. P. 12(b)(6)

A. Standard of Review

To survive a motion to dismiss under *Rule 12(b)(6)* for failure to state a claim, "a complaint must provide 'enough facts to state a claim to relief that is plausible on its face.'" *Mayor & City Council of Balt. v. Citigroup, Inc.*, 709 F.3d 129, 135 (2d Cir. 2013) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)). The plaintiff must provide factual allegations sufficient "to raise a right to relief above the speculative level."

Id. (quoting *Twombly*, 550 U.S. at 555). The Court must accept as true all factual allegations in the complaint and draw all reasonable inferences in the plaintiff's favor. See *EEOC v. Port Auth.*, 768 F.3d 247, 253 (2d Cir. 2014) (citing *ATSI Commc'ns, Inc. v. Shaar Fund, Ltd.*, 493 F.3d 87, 98 (2d Cir. 2007)). However, "the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions." *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009).

The Second Circuit has "cautioned that 'the nature of ... allegations under ERISA calls for particular care in applying this ... inquiry in order to ensure that the ... [c]omplaint alleges *nonconclusory* factual content raising a plausible inference of misconduct and does not rely on the vantage point of hindsight.'" *Sacerdote v. New York Univ.* ("*Sacerdote II*"), 9 F.4th 95, 107 (2d Cir. 2021) (emphases in original) (quoting *Pension Ben. Guar. Corp. ex rel. St. Vincent Cath. Med. Centers Ret. Plan v. Morgan Stanley Inv. Mgmt. Inc.* ("*PBGC*"), 712 F.3d 705, 718 (2d Cir. 2013)). However, because "ERISA plaintiffs generally lack the inside information necessary to make out their claims [*38] in detail unless and until discovery commences," *id.* (quoting *PBGC*, 712 F.3d at 718), an ERISA claim "may withstand a motion to dismiss based on sufficient circumstantial factual allegations to support the claim, even if it lacks direct allegations of misconduct," *id.*

B. Materials Outside the Complaint

The parties have submitted approximately fifty exhibits in connection with the pending motions. (See Dkt. Nos. 102-3 to 102-5, 124-3 to 124-12, 125-3 to 125-12, 140-1 to 140-31, 144). There are no exhibits attached to the Complaint.

As an initial matter, because the Court may refer to evidence outside the pleadings in considering a *Rule 12(b)(1)* motion to dismiss for lack of standing and mootness, *Krajisnik Soccer Club, Inc., 2021 U.S. Dist. LEXIS 99456, at *5, 2021 WL 2142924, at *2*, to the extent these submissions are relevant to standing and mootness, the Court has considered them. However, to the extent the parties seek the Court's consideration of these submissions in connection with the *Rule 12(b)(6)* motions, further analysis is required.²¹

"Generally, consideration of a motion to dismiss under *Rule 12(b)(6)* is limited to consideration of the complaint itself." *Faulkner v. Beer, 463 F.3d 130, 134 (2d Cir. 2006)*. However, considering "materials outside the complaint is not entirely foreclosed on a

²¹ As the submissions the parties filed as part of the parties' notices and status reports regarding the Plan's application for special financial assistance and their supplemental briefing, (Dkt. Nos. 163, 176, 179-1, 179-2, 179-3, 181, 181-1), are relevant only to standing and mootness, and the parties do not offer them in any other context, the Court has not construed them as offered in connection with the *Rule 12(b)(6)* motions.

12(b)(6) motion." *Id.* A complaint "is deemed to include any written instrument attached [*39] to it as an exhibit or any statements or documents incorporated in it by reference." *Nicosia v. Amazon.com, Inc.*, 834 F.3d 220, 230 (2d Cir. 2016) (quoting *Chambers v. Time Warner, Inc.*, 282 F.3d 147, 152 (2d Cir. 2002)). "Where a document is not incorporated by reference, the court may nevertheless consider it where the complaint relies heavily upon its terms and effect, thereby rendering the document integral to the complaint." *Id.* (quoting *DiFolco v. MSNBC Cable L.L.C.*, 622 F.3d 104, 111 (2d Cir. 2010) (internal quotation marks omitted)). Even where a document is integral to the complaint, it must be "clear" that "no dispute exists regarding the authenticity or accuracy of the document" and that "there exist no material disputed issues of fact regarding the relevance of the document." *Faulkner*, 463 F.3d at 134. "[I]f material is not integral to or otherwise incorporated in the complaint, it may not be considered unless the motion to dismiss is converted to a motion for summary judgment and all parties are 'given a reasonable opportunity to present all the material that is pertinent to the motion.'" *Id.* (quoting *Fed. R. Civ. P. 12(d)*).

The Complaint relies on the terms and effects of: the 2015 Horizon Survey of Capital Market Assumptions, (Dkt. No. 102-3; Dkt. No. 1, ¶ 51); the Fall 2014 New York State Teamsters Benefit Fund's Newsletter, (Dkt. No. 102-5; Dkt. No. 1, ¶ 40); the Plan's Rehabilitation Plan (as [*40] amended and

restated), (Dkt. No. 140-27; Dkt. No. 1, ¶ 37); the 2018 Form 5500, Annual Return/Report of Employee Benefit Plan, (Dkt. No. 125-9; Dkt. No. 1, ¶ 25); and the Plan's May 15, 2017, revised MPRA Application ("2017 MPRA Application"), (Dkt. No. 124-4; Dkt. No. 1, ¶ 45). With the exception of the 2017 MPRA Application, there is no dispute as to the accuracy or authenticity of these documents. The Court may therefore consider these exhibits. The authenticity of the 2017 MPRA Application does not appear to be at issue but Horizon disputes Plaintiff's interpretation of, *inter alia*, the "Assumed Annual Investment Return" contained therein. (Dkt. No. 145, at 5; *see also* Dkt. No. 124-4, at 47-48 (Horizon's "certification" of the Plan's "critical and declining status" stating that the "Assumed Annual Investment Return" was "6.75 per year through 12/21/2025 and 7.50% thereafter")). Accordingly, the Court does not consider the 2017 MPRA Application.

In addition, because the Complaint quotes from and includes links to the Summer 2013 New York State Teamsters Benefit Fund's Newsletter, (Dkt. No. 1, ¶ 39), and the June 2020 Meketa Disclosure Brochure, (*id.* ¶ 86), the Court considers these [*41] documents. *See Lowell v. Lyft, Inc.*, 352 F. Supp. 3d 248, 263 n.5 (S.D.N.Y. 2018) ("Courts may take judicial notice of publically [sic] available websites when the authenticity is not in dispute."). Plaintiffs also submit as exhibits pleadings, documents, transcripts, and orders from other court proceedings. (Dkt. Nos. 140-8, 140-10 to 140-16, 140-

29 to 140-31). While the Court may take judicial notice of publicly filed documents, the Court does so only to the extent they "establish the fact of such litigation and related filings." *Global Network Commc'ns, Inc. v. City of New York*, 458 F.3d 150, 157 (2d Cir. 2006). The Court does not consider these exhibits "for the truth of the matters asserted in the other litigation." *Kramer v. Time Warner Inc.*, 937 F.2d 767, 774 (2d Cir. 1991).

Plaintiff has filed two declarations by Plaintiff's counsel, both of which contain facts not alleged in the Complaint. (Dkt. Nos. 140-1, 144). Horizon vigorously opposes any consideration of these "hearsay declarations" and requests that the Court either decline to consider them or grant limited discovery on the alleged facts in Plaintiff's counsel's declarations. (Dkt. No. 146, 147 (letter motions)). Plaintiff opposes discovery. (Dkt. No. 148). As the declarations contain facts outside the Complaint, the Court excludes them from consideration. *See Kopec v. Coughlin*, 922 F.2d 152, 155 (2d Cir. 1991) (finding the district court erred in considering affidavit containing [*42] facts outside the complaint on motion to dismiss).

Plaintiff has also filed excerpts from the Fund's Application to the Department of the Treasury for Approval of Suspension of Benefits under the MPRA, (Dkt. No. 140-28), and the March 18-19, 2020, Meketa Fund Evaluation Report, in his opposition to the Fund Defendants' motion to dismiss, (Dkt. No. 140-20). Although the Complaint refers to both documents, (Dkt. No. 1, ¶¶ 44 (referring to the Application for

Suspension of Benefits), 87 (referring to the Meketa Report)), the Court declines to consider them at this juncture. With respect to the Application for Suspension of Benefits, the Complaint alleges that the Plan filed an Application and later withdrew it after the Treasury requested additional information. (Dkt. No. 1, ¶ 44). This minor reference is insufficient to support a conclusion that Plaintiff relied heavily on the terms and effects of the Application in drafting the Complaint. Moreover, as noted, Plaintiff only provided an excerpt from the Application. (See Dkt. No. 140-28 (containing pages 15 to 18 of Application)). The Court therefore declines to consider it. The Court also declines to consider the Meketa Fund Evaluation [*43] Report. (Dkt. No. 140-20). Again, Plaintiff only provided an excerpt of the Report. More problematic, however, is the fact that the excerpt Plaintiff provided contains a table showing "Allocation vs. Targets and Policy," listing the current balances and allocations for the Plan's investments, while the Complaint cites the Report in connection with "disclaimers" Meketa purportedly made to the Trustees. (*Id.* at 3). The "disclaimers" are not reflected in the excerpt provided. Accordingly, the Court has no basis for considering this document.

Horizon filed a copy of the June 2020 Actuarial Standards of Practice, No. 27. (Dkt. No. 102-4). The Complaint references the Actuarial Standards of Practice, No. 27, Section 3.6(e), (Dkt. No. 1, ¶ 51), but does not indicate what year Plaintiff is referring to. Moreover, the June 2020 version indicates that a

number of changes and amendments were made, (Dkt. No. 102-4, at 6 ("Summary of Notable Changes")). As there is a question as to whether the parties are relying on the same version of ASOP No. 27, the Court declines to consider the copy Horizon filed, (Dkt. No. 102-4), and relies instead on the allegations in the Complaint.

The Complaint does not [*44] incorporate any of the remaining exhibits by reference or rely heavily on their terms and effects. Despite their filing of numerous exhibits on a *Rule 12(b)(6)* motion, the Plan Defendants, Meketa, and Plaintiff provided little briefing regarding the ground on which the Court could properly consider these exhibits. They assert that because the Complaint contains "facts [that] are based on documents given by the Plan to Plaintiff in response to Plaintiff's statutory requests for Fund documents," and "[b]ecause ERISA permits a participant to request plan records prior to filing a lawsuit, courts routinely take notice of materials that a plan provides to a plaintiff through that process." (Dkt. No. 124-1, at 8, n.1 (citing Dkt. No. 1, ¶ 18); Dkt. No. 125-1, at 9 n.1; Dkt. No. 140, at 9 n.1). The only case the parties cite, however, is *Patterson v. Stanley, No. 16-cv-6568, 2019 U.S. Dist. LEXIS 174832, at *10, 2019 WL 4934834, at *4 (S.D.N.Y. Oct. 7, 2019)*, which broadly refers to documents that were referenced in the complaint, that the plaintiff relied on in bringing suit, or that were entitled to judicial notice, but contains no discussion of an ERISA pre-filing process that renders all documents provided subject to

judicial notice. As the parties identify no other basis on which consideration of these documents would [*45] be proper on a motion to dismiss, and the Court declines to convert the motion to one for summary judgment, the Court excludes all remaining documents. *Fed. R. Civ. P. 12(d)*.

C. ERISA Breach of Fiduciary Duty Claims

Defendants seek dismissal of Plaintiff's breach of fiduciary duty claims on the grounds that: (1) Plaintiff, as a person affected by a benefit suspension, is not a proper plaintiff and does not have a cause of action for breach of fiduciary duty under ERISA; (2) Plaintiff fails to allege that Horizon, the Plan's actuary, is a fiduciary; (3) ERISA's statute of repose bars Plaintiff's duty of loyalty claim; and (4) Plaintiff fails to state claims of breach of fiduciary duty in connection with the duties of loyalty, prudence, and diversification, and with respect to Plan documents or co-fiduciary liability. Plaintiff opposes Defendants' motions.

1. The MPRA Did Not Eliminate Plaintiff's Breach of Fiduciary Duty Claim

Defendants argue that, by its terms, *29 U.S.C. § 1085(e)(9)(I)(iii)* ("clause (iii)") of the MPRA, which is entitled "Restricted cause of action" and provides that "[a] participant or beneficiary affected by a benefit suspension . . . shall not have a cause of action under this subchapter" precludes Plaintiff, as a [*46] participant affected by a benefit suspension

under MRPA, from bringing *any* breach of fiduciary claim under ERISA. (Dkt. No. 124-1, at 20-21). Plaintiff opposes Defendants' motion, arguing that while this provision may preclude him from bringing a breach of fiduciary claim in connection with the suspension of benefits, it does not otherwise limit his right to bring a breach of fiduciary claim under ERISA. (Dkt. No. 140, at 38-41). The Court agrees with Plaintiff.

It is undisputed that Plaintiff is a participant within the meaning of ERISA and that, as such, he is entitled to bring a civil action alleging breach of fiduciary duty under *Title I of ERISA*.²² 29 U.S.C. §§ 1132(a)(2), (3); 29 U.S.C. §§ 1104(a)(1)(A)-(D), 1105(a)(1) and (2). Thus, Defendants' argument that clause (iii) completely eradicates this right of action for all participants and beneficiaries affected by a benefit suspension is dubious. Further, clause (iii) falls under subparagraph "(I) Judicial Review," which

²² The statutory provisions authorizing Plaintiff's claims are set forth in Title I, also known as Subchapter I, of ERISA, 29 U.S.C. §§ 1001-1191. See *Pension Ben. Guar. Corp. v. Scherling*, 905 F.2d 173, 175 n.6 (8th Cir. 1990) ("Although ERISA as passed was divided into four 'titles,' upon codification into Title 29 of the United States Code, the 'titles' were re-named 'subchapters' in order to fit with the scheme of the Code."); see also *Pension Benefit Guar. Corp. v. Bank One, N.A.*, 34 F. Supp. 2d 608, 610 n.1 (S.D. Ohio 1998) (explaining that "in the codified version, ERISA is currently divided into three subchapters with Title IV of ERISA codified as subchapter III; Title I of ERISA is codified in subchapter I").

articulates the circumstances under which a plan sponsor can challenge the "denial of an application for suspension of benefits," 29 U.S.C. § 1085(e)(9)(I)(i) ("clause (i)"), and specifies the "Timing of action" for "challenging a suspension of benefits" as well as applicable "Standards of Review," 29 U.S.C. § 1085(e)(9)(I)(ii) ("clause (ii)"). While [*47] clause (i) of this "Judicial Review" subparagraph states that a "plan sponsor" can challenge the denial of an application for suspension of benefits, clause (ii) does not identify who can bring an action "challenging a suspension of benefits." 29 U.S.C. § 1085(e)(9)(I)(i), (ii). Clause (iii), however, states that "[a] participant or beneficiary affected by a benefit suspension under this paragraph *shall not* have a cause of action under this subchapter." 29 U.S.C. § 1085(e)(9)(I)(iii) (emphasis added). Read in its entirety, therefore, clause (iii) seems to restrict participants and beneficiaries from bringing a breach of fiduciary claim—a cause of action they are otherwise entitled to bring under Title I of ERISA, 29 U.S.C. § 1132(a)(2)—challenging the denial or approval of an application for suspension of benefits. Defendants have not adequately addressed how this isolated clause in a broad statutory scheme could be read as anything but limited to causes of actions challenging the denial or approval of an application for suspension of benefits. Indeed, in considering the "overall context" of ERISA, see *Moya v. United States Dep't of Homeland Sec.*, 975 F.3d 120, 131 n.7 (2d Cir. 2020) ("It is appropriate to draw on the 'overall context' of a statute only when doing so is helpful to understand

the meaning of the specific provisions at issue."), the Court notes that [*48] the interests ERISA protects are readily identifiable as ERISA itself explains that its "principal goal is to 'protect . . . the interests of participants in employee benefit plans and their beneficiaries,'" *Gerosa v. Savasta & Co.*, 329 F.3d 317, 328 (2d Cir. 2003) (quoting 29 U.S.C. § 1001(b)). Thus, in any event, it is unlikely that Congress intended to eliminate all of a participant or beneficiary's rights under ERISA through a single clause in a judicial review provision governing actions concerning the suspension of benefits. See *Whitman v. Am. Trucking Assoc'ns*, 531 U.S. 457, 468, 121 S. Ct. 903, 149 L. Ed. 2d 1 (2001) ("Congress, we have held, does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes."). Accordingly, as Plaintiff does not seek to challenge the suspension of benefits in this case, the Court concludes that § 1085(e)(9)(I)(iii) does not otherwise prohibit Plaintiff from bringing his Title I ERISA claims.

2. Horizon is Not an ERISA Fiduciary

Horizon moves to dismiss on the ground that the Complaint fails to allege it is a fiduciary with respect to the Plan and that provision of actuarial services is not an ERISA fiduciary function. (Dkt. No. 102-1, at 11-17). Plaintiff opposes dismissal, arguing that Horizon acted as a fiduciary by exercising [*49] authority and control over management of plan assets, 29 U.S.C. §

1002(21)(A)(i), and by rendering investment advice for a fee, 29 U.S.C. § 1002(21)(A)(ii). (Dkt. No. 142, at 14-25). Horizon's motion is granted.

"To state a claim for breach of fiduciary duty under ERISA, Plaintiffs must adequately allege that (1) Defendants were fiduciaries of the plan who, (2) while acting within their capacities as plan fiduciaries, (3) engaged in conduct constituting a breach of an ERISA fiduciary duty." *Gearren v. McGraw-Hill Cos., Inc.*, 690 F. Supp. 2d 254, 261 (S.D.N.Y. 2010) (citing 29 U.S.C. § 1109), *aff'd*, 660 F.3d 605 (2d Cir. 2011). Thus, "[i]n every case charging breach of ERISA fiduciary duty, . . . the threshold question is not whether the actions of some person employed to provide services under a plan adversely affected a plan beneficiary's interest, but whether that person was acting *as a fiduciary* (that is, was performing a fiduciary function) when taking the action subject to complaint." *Massaro v. Palladino*, 19 F.4th 197, 211 (2d Cir. 2021) (emphasis in original) (quoting *Pegram v. Herdrich*, 530 U.S. 211, 226, 120 S. Ct. 2143, 147 L. Ed. 2d 164 (2000)).

Under ERISA, a fiduciary is one who (i) "exercises any discretionary authority or discretionary control respecting management of [a] plan or exercises any authority or control respecting management or disposition of its assets"; (ii) "renders investment advice for a fee or other compensation, direct or indirect, with respect to any [*50] moneys or other property of such plan, or has any authority or responsibility to do so"; or (iii) "has any discretionary

authority or discretionary responsibility in the administration of [a] plan." *Forgione v. Gaglio*, No. 13-cv-9061, 2015 U.S. Dist. LEXIS 21644, at *17-18, 2015 WL 718270, at *6 (S.D.N.Y. Feb. 13, 2015) (quoting 29 U.S.C. § 1002(21)(A)). "In contrast to 'traditional trust law,' 'ERISA . . . defines 'fiduciary' . . . in *functional* terms of control and authority over the plan[.]" 2015 U.S. Dist. LEXIS 21644, at *18, 2015 WL 718270, at *6 (emphasis in original) (quoting *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 262, 113 S. Ct. 2063, 124 L. Ed. 2d 161 (1993)).

a. Authority and Control Over Management of Plan Assets

Plaintiff alleges that Horizon exercised authority and control over the management of Plan assets by "setting an ASOP 27-compliant 6.75% to 7.5% for true actuarial purposes" but "setting and maintaining the unreasonably optimistic assumed 8.5% return as the target for the management of decisions for investment purposes." (Dkt. No. 142, at 16). Plaintiff argues that Horizon "had a central role in the asset management by setting and maintaining the assumed 8.5% return based on the extraordinary asset allocation policy to serve as the target for the investment decisions." (*Id.* at 17). Even drawing all inferences in Plaintiff's favor, because Plaintiff's allegations solely concern Horizon's provision of actuarial services to the Plan, (see Dkt. No. [*51] 1, ¶ 11 (alleging that "Horizon, as the Plan's enrolled actuary, in 2007, recklessly increased the actuarial return assumption from 8% to 8.5%" and "continued to use this . . . 8.5% actuarial

return assumption), they fail to plausibly allege that Horizon had any discretion, authority, or control over the management of the Plan, *see Forgione, 2015 U.S. Dist. LEXIS 21644, at *26-27, 2015 WL 718270, at *9* (finding the plaintiffs failed to plausibly allege the defendant actuary was a fiduciary where allegations of discretion and authority were conclusory and "the only work that [the defendant actuary] is alleged to have done is actuarial, *viz.*, the preparation of annual valuation reports").

While Plaintiff alleges that the Trustees relied on Horizon's actuarial "information and advice" in taking "the necessary steps to ensure that there will be assets to pay pensions," (Dkt. No. 1, ¶ 38), without facts suggesting anything more than that Horizon's actuarial calculations influenced and supported the Plan's allegedly aggressive investment strategy, there is no basis to infer that Horizon exercised any control over the Trustee's or Meketa's investment decisions.

In *Allen v. Credit Suisse Securities (USA) LLC*, 895 F.3d 214, 217 (2d Cir. 2018), the plaintiffs sued a number of banks for breach of ERISA fiduciary duty, alleging that the defendant [*52] banks had "fraudulently manipulated benchmark rates to maximize the profit they reaped from" foreign exchange ("FX") transactions and that they were "performing a fiduciary function when they executed FX transactions for the plans." *Id.* at 223, 225. The Second Circuit concluded that the "facts alleged do not show that defendants exercised the control over

Plan assets necessary to establish ERISA functional fiduciary status," *id. at 218*, where "the transactions at issue were initiated not by the banks but at the discretion of the Plans' independent investment managers," and there were "[n]o allegations" indicating that the defendant banks "were able to exercise any control over the Plans' trustees' or investment managers' decisions to enter into FX transactions with defendants," *id. at 225*. The Second Circuit explained that the "relationship" between the banks and the plan was akin to "'salesmanship,' with defendants 'matching the customer's desires'—as conveyed by their investment managers—with available inventory,' but otherwise lacking 'authority to exercise control unilaterally over a portion of a plan's assets.'" *Id. at 224* (quoting *Farm King Supply, Inc. Integrated Profit Sharing & Tr. v. Edward D. Jones & Co.*, 884 F.2d 288, 292 (7th Cir. 1989)).

In this case, while the actuarial relationship between Horizon and the Plan, the Trustees, [*53] and Meketa was not one of "salesmanship," *Allen* illustrates that influence, without allegations of control over the decision-making or plan assets, is insufficient to show control over the management of plan assets. *See e.g., Apogee Enters. v. State St. Bank & Trust Co.*, No. 09-cv-1899, 2010 U.S. Dist. LEXIS 977716, at *5, 2010 WL 3632697, at *2 (S.D.N.Y. Sept. 17, 2010) (concluding that the plaintiffs failed to allege facts showing CitiStreet was a fiduciary under ERISA where complaint alleged only that it prepared "investment

reports" for the "Plan's Investment Committee" containing "rates of return for [plan investments] . . . asset listings [with] descriptions of all securities held in the portfolio . . . [and] strategy statements or prospectuses that describe the investment strategies currently in place").

Plaintiff further argues that "[a]s an enrolled actuary of a Taft-Hartley plan, Horizon was required to determine a reasonable actuarial return assumption in accordance with accepted professional actuarial standards" and "independent from the investment desires or aspirations of the Trustees" or Meketa. (Dkt. No. 142, at 11). According to Plaintiff, Horizon violated actuarial standards and "knew or should have known the 8.5% was grossly excessive and unreasonable under accepted actuarial standards" and "failed to account for [*54] the extraordinary excessive cost and risk in the Plan's portfolio." (Dkt. No. 1, ¶¶ 11, 35, 55, 111, 142). These allegations of actuarial violations and wrongdoing, however, are insufficient to show authority and control over Plan assets. *See Allen, 895 F.3d at 225-26* (rejecting the plaintiff's argument that fraud in the defendant banks' "conduct of FX transactions" supported their fiduciary claims, explaining that the "alleged wrongdoing did not afford defendants the control over the Plans' assets necessary to make them ERISA functional fiduciaries"). Indeed, the Second Circuit, "as well as sister circuits," have held that "wrongdoing in performing non-fiduciary services does not transform the alleged wrongdoer into a

fiduciary." *Allen*, 895 F.3d at 225 (citing inter alia *Reich v. Lancaster*, 55 F.3d 1034, 1049 (5th Cir. 1995) (stating that, in absence of "actual decision making power," "even miscreant professionals . . . who provide necessary services to ERISA plans" are not automatically fiduciaries)).

b. Investment Advice for a Fee

In order to plead that a defendant is a fiduciary because it provided "investment advice for a fee," a plaintiff must plead facts sufficient to demonstrate that '(1) the defendant provided individualized investment advice; (2) on a regular basis; (3) pursuant [*55] to a mutual agreement, arrangement, or understanding that (4) the advice would serve as a primary basis for the plan's investment decisions; and (5) the advice was rendered for a fee.'" *Walker v. Merrill Lynch & Co. Inc.*, 181 F. Supp. 3d 223, 233-34 (S.D.N.Y. 2016) (quoting *F.W. Webb Co. v. State St. Bank & Trust Co.*, 2010 U.S. Dist. LEXIS 82759, at *25, 2010 WL 3219284, at *8 (S.D.N.Y. Aug. 12, 2010)).

The Complaint alleges that Horizon provided the Trustees and Meketa an "8.5% actuarial investment return assumption" and an "8.5% 'actuarial return target'" causing the Plan to "chase this . . . return assumption with extraordinary allocations of Plan assets to the riskiest asset classes." (Dkt. No. 1, ¶¶ 10-11). Plaintiff cites no caselaw that would support a conclusion that determining the actuarial return

assumption for the investments the Plan made or intended to make, and providing that actuarial determination to the Plan, constitutes rendering investment advice for a fee under ERISA. Nor does Plaintiff allege facts showing that Horizon provided anything other than actuarial services and determinations; there are no facts that would allow a plausible inference that Horizon provided "individualized investment advice" "pursuant to mutual agreement, arrangement, or understanding" that Horizon's "advice would serve as a primary basis for the plan's investment decisions." *Walker*, 181 F. Supp. 3d at 233-34; see *Gerosa v. Savasta*, 189 F. Supp. 2d 137, 141 (S.D.N.Y. 2002) (granting [*56] motion to dismiss by the fund's actuary, where the plaintiffs failed to allege that fund's actuary "was engaged to perform, or did perform, anything other than actuarial services"), *rev'd on other grounds by Gerosa v. Savasta & Co.*, 329 F.3d 317 (2d Cir. 2003).

Because the Complaint fails to allege Horizon is a fiduciary under ERISA, Plaintiff's claim of co-fiduciary liability under 29 U.S.C. § 1105(a)²³ also

²³ ERISA provides that fiduciary is liable for the breach of another fiduciary if he or she (1) participates knowingly in, or knowingly undertakes to conceal, and act or omission of such other fiduciary, knowing such act or omission is a breach; or (2) enables another fiduciary to commit a breach; or (3) has knowledge of a breach by such other fiduciary, unless he makes reasonable efforts to remedy the breach. 29 U.S.C. § 1105(a).

fails. Accordingly, Horizon's motion to dismiss the Complaint is granted.

**3. The Duty of Loyalty Claim
Against Meketa May Not Be
Dismissed as Barred by the Statute
of Repose**

Meketa asserts that Plaintiff's duty of loyalty claim must be dismissed as barred by ERISA's six-year statute of repose because the Trustees hired Meketa as discretionary investment manager in 2011, approximately nine years before Plaintiff filed the Complaint. (Dkt. No. 125-1, at 26 (citing *29 U.S.C. § 1113(1)(A)*). As relevant here, ERISA's limitations period requires suits for breach of fiduciary duty to be brought within six years of "the date of the last action which constituted a part of the breach or violation." *29 U.S.C. § 1113(1)*; see *Browe v. CTC Corp.*, 15 F.4th 175, 190 (2d Cir. 2021) (explaining that "§ 1113(1)'s "six-year limitations period is a statute of repose that begins running either on the date of the last action constituting a breach" (citing *Intel Corp. Inv. Policy Comm. v. Sulyma*, 589 U.S. 178, 180, 140 S. Ct. 768, 206 L. Ed. 2d 103 (2020))). Relying on the [*57] "continuing duty" principle discussed in *Tibble v. Edison International*, 575 U.S. 523, 529-30, 135 S. Ct. 1823, 191 L. Ed. 2d 795 (2015), Plaintiff argues that while "Meketa's initial unseemly pitch" occurred more than six years ago, because "Meketa had a direct continuing conflict in its dual role," as investment consultant and discretionary investment

manager, "simultaneously every day thereafter," his claim is timely. (Dkt. No. 141, at 25).

In *Tibble*, the defendants allegedly breached the "duty of prudence by offering higher priced retail-class mutual funds when the same investments were available as lower priced institutional-class mutual funds." 575 U.S. at 527. The initial selection of funds, however, occurred more than six years prior to the filing of the complaint. *Id.* The Supreme Court held that the claim was not barred, explaining that because the duty of prudence imposed a "continuing duty . . . to monitor trust investments and remove imprudent ones," "so long as the alleged breach of the continuing duty occurred within six years of suit, the claim is timely." *Id.* at 530.

Meketa argues that *Tibble* is inapplicable because it concerned the duty of prudence and that Plaintiff has failed to cite caselaw supporting the proposition that the duty of loyalty required Meketa "continually to revisit the propriety [*58] of its [discretionary investment manager] pitch." (Dkt. No. 154, at 12). There are no facts in the Complaint indicating when the alleged "pitch" occurred, when the Trustees hired Meketa as discretionary investment manager or under what terms, or whether Meketa served as discretionary investment manager throughout entirety of the relevant time period. Meketa relies on a chart in the Complaint reflecting its annual compensation and "Service Code Type" for each year beginning in 2009 and ending in 2018 in support of its assertion that the "pitch" and "dual role" began in

2011. (Dkt. No. 1, ¶ 110). While the chart indicates that Meketa's compensation increased from \$258,410 in 2010 to \$1,399,116 in 2011, the chart does not reflect the addition of "[i]nvestment management fees" to the "Service Code Type" of compensation Meketa received until 2014. (*Id.*). Thus, the Court cannot say it is clear from the face of the Complaint that the "date of the last action which constituted a part of the breach or violation" occurred more than six years prior to filing. *29 U.S.C. § 1113(1)(A)*; see *Abraha v. Colonial Parking, Inc.*, *243 F. Supp. 3d 179, 189-90 (D.D.C. 2017)* (denying motion to dismiss on the ground that it was not clear from "the face of the Complaint" that the plaintiffs' breach of fiduciary [*59] duty claims were time-barred). However, to the extent Plaintiff seeks to assert a duty of loyalty claim arising from Meketa's conduct prior to October 21, 2014, such claim is barred by the statute of repose. In any event, for the reasons discussed below the Court concludes that the Complaint fails to state a claim that Meketa or the Trustees breached their duty of loyalty.

4. The Complaint Fails to Plausibly Allege a Duty of Loyalty Claim against the Trustees or Meketa

Defendants assert the duty of loyalty claim must be dismissed because the Complaint fails to allege that the Trustees or Meketa acted with the purpose of providing benefits to themselves or someone else. (Dkt. No. 125-1, at 25-29; Dkt. No. 124-1, at 30 n.22).

Plaintiff opposes dismissal of the breach of loyalty claim. (Dkt. No. 141, at 23-28; Dkt. No. 140, 31 n. 17).

Under *ERISA* § 404(a)(1)(A), a fiduciary must act for the "exclusive purpose of . . . providing benefits to participants and their beneficiaries[] and defraying reasonable expenses of administering the plan." 29 U.S.C. § 1104(a)(1)(A). The duty of loyalty requires that "decisions must be made with an eye single to the interests of the participants and beneficiaries." *Donovan v. Bierwirth*, 680 F.2d 263, 271 (2d Cir. 1982). "To plausibly plead a duty of loyalty [*60] claim under ERISA, a plaintiff must allege facts showing that the fiduciary in question acted purposely—or with the 'goal'—of "providing benefits to itself or someone else." *Brown v. Daikin Am., Inc.*, No. 18-cv-11091, 2021 U.S. Dist. LEXIS 85195, at *15, 2021 WL 1758898, at *5 (S.D.N.Y. May 4, 2021) (quoting *Sacerdote v. New York Univ.* ("*Sacerdote I*"), No. 16-cv-6284, 2017 U.S. Dist. LEXIS 137115, at *10-11, 2017 WL 3701482, at *5 (S.D.N.Y. Aug. 25, 2017), vacated on other grounds by *Sacerdote II*, 9 F.4th 95).

Plaintiff argues that Meketa (1) made an "unseemly pitch," using its position as the Plan's nondiscretionary investment consultant to recommend itself for the position of "private assets manager," and (2) acted for the purpose of benefitting itself when it recommended that the Plan pursue an 8.5% actuarial return target and make imprudently large allocations of Plan assets to EME, PE, and private market alternatives, the very assets it

managed as the Plan's private assets manager. (Dkt. No. 141, at 23-28; *see* Dkt. No. 1, ¶ 109). Plaintiff alleges that the Trustees breached their duty of loyalty by hiring and allowing Meketa to operate in a dual, conflicted role. (Dkt. No. 1, ¶ 131).

The Complaint alleges that Meketa operated under conflict of interest because it advised the Trustees concerning the "high-risk, high-cost asset allocation," as the Plan's investment consultant, while also serving as the asset manager for the Plan's "Private Markets Portfolio," which include [*61] its EME, PE, and other private market investments. (Dkt. No. 1, ¶¶ 12, 109). In this dual role, the "Plan fees paid to Meketa soared from \$250,000 to \$1.4 million annually" and required the Plan to pay a monitoring firm \$180,000 per year to monitor Meketa in its role as investment consultant. (*Id.* ¶ 12). Plaintiff argues that Meketa's roles as investment consultant and manager of the Plan's private market alternatives, for which it was entitled to "a substantially greater fee," combined with Meketa's advocacy for allocating funds to the "private market alternatives" it managed allows an inference of imprudence.

Even assuming the timeliness of Plaintiff's claim that Meketa's "unseemly pitch," as the Plan's investment consultant, for the position of private market assets manager breached the duty of loyalty, because the Complaint fails to allege facts allowing a plausible inference that the Trustees or Meketa acted for the purpose of providing benefits to Meketa, it fails

to allege a breach of the duty of loyalty. "[A] plaintiff does not adequately plead a claim simply by making a conclusory assertion that a defendant failed to act 'for the exclusive purpose of' providing benefits to [*62] participants and defraying reasonable administration expenses; instead, to implicate the concept of 'loyalty,' a plaintiff must allege plausible facts supporting an inference that the defendant acted for the purpose of providing benefits to itself or someone else." *Sacerdote I*, 2017 U.S. Dist. LEXIS 137115, at *15, 2017 WL 3701482, at *5. Although, "allegations of affiliation do not state a claim for breach of the duty of loyalty standing alone, 'an allegation of such affiliation can be coupled with other circumstantial factual allegations to suggest plausibly that a fiduciary acted . . . disloyally.'" *Carrigan v. Xerox Corp.*, No. 21-cv-1085, 2022 U.S. Dist. LEXIS 70428, at *27, 2022 WL 1137230, at *9 (D. Conn. Apr. 18, 2022) (quoting *Bekker v. Neuberger Berman Grp. LLC*, No. 16-cv-6123, 2018 U.S. Dist. LEXIS 166690, at *15, 2018 WL 4636841, at *6 (S.D.N.Y. Sept. 27, 2018)).

The Complaint provides no factual details regarding the pitch itself. It does not, as noted, contain any facts indicating when Meketa made the pitch, i.e., before or after Defendants began pursuing the allocation strategy at issue, what Meketa offered when making the "pitch," who made the hiring decision, or what the terms were involved in Meketa's hiring in a second role. However, as circumstantial factual allegations may allow a plausible inference of

a breach of duty of loyalty where an ERISA complaint lacks allegations referring to a fiduciary's knowledge, methods, or investigations, *PBGC*, 712 F.3d at 718, the Court considers whether the circumstantial allegations [*63] allow an inference of breach of loyalty.

Here, Plaintiff alleges that Meketa used its position as investment consultant to advocate for its hiring as manager of the Plan's private markets portfolio, the "Plan fees paid to Meketa soared from \$250,000 to \$1.4 million annually" after it hired Meketa as its private markets manager, and Meketa recommended, as the Plan's investment consultant, that the Plan make significant allocations of Plan assets to PE and other private market alternatives under Meketa's management, for which Meketa collected "management fees." (Dkt. No. 1 ¶¶ 12, 109). But none of these allegations allow a plausible inference that the Trustees or Meketa acted for the purpose of providing benefits to Meketa or someone else. Indeed, courts have rejected attempts to infer a conflict of interest from the fact that a defendant had dual roles with respect to a plan. *See Brown*, 2021 U.S. Dist. LEXIS 85195, at *15, 2021 WL 1758898, at *5 ("Plaintiffs attempt to *infer* a conflict of interest from the fact that John Hancock held dual roles with respect to the Plan. But . . . that fact alone does not demonstrate that [Defendant] . . . [acted] towards its own benefit or even John Hancock's."). Courts have also rejected, as insufficient, claims that [*64] a defendant breached the duty of loyalty by favoring

financial interest of a service provider that incidentally benefit that provider, explaining that a plaintiff must allege that a "defendants' actions were *for the purpose of* providing benefits to themselves or someone else and did not simply have that incidental effect." *Cunningham v. Cornell Univ.*, No. 16-cv-6525, 2017 U.S. Dist. LEXIS 162420, at *4, *14, 2017 WL 4358769, at *1, *4 (S.D.N.Y. Sept. 29, 2017) (dismissing claim that the defendants breached the duty of loyalty by favoring the financial interests of "conflicted third-party service providers" "in receiving a steady stream of revenue from [service provider's] proprietary funds over the interests of participants by allowing [service provider] to mandate the inclusion of its own funds in the Plans" explaining that "these claims do not support an inference that defendants' actions were *for the purpose of* providing benefits to themselves or someone else and did not simply have that incidental effect") (internal quotation marks omitted), *aff'd*, 86 F.4th 961 (2d Cir. 2023); *McCaffree Financial Corp. v. ADP, Inc.*, No. 20-cv-5492, 2023 U.S. Dist. LEXIS 56362, at *53-54, 2023 WL 2728787, at *16 (D.N.J. Mar. 31, 2023) (finding complaint failed to plead breach of duty of loyalty claim where allegations that the defendants "purportedly" gave "Voya 'carte blanche' in designing the Plan's investment menu [permitting] Voya to extract the most fees possible without considering Voya's conflicts [*65] of interest" and that "a significant portion of the Plan [was] invested in Voya-managed investment options, which are proprietary funds" suggested conflict of interest but did not allege

"include[] facts suggesting that Defendants engaged Voya Financial as recordkeeper, or included Voya's proprietary investments . . . for the purpose of—rather than merely having the effect of—benefiting Voya"). Thus, as the Complaint contains only generalized allegations that Meketa had a conflict of interest and sought a dual role for the purpose of increasing its fees, and contains no facts alleging that the Trustees hired, or Meketa promoted itself, for the purpose of benefitting Meketa, it fails to state a breach of the duty of loyalty claim. *See Brown, 2021 U.S. Dist. LEXIS 85195, at *5, 15, 2021 WL 1758898, at *1, *5* (rejecting the plaintiffs' "attempt to *infer* a conflict of interest from the fact that John Hancock," the plan's trustee, and manager of five of the investment funds at issue, held "dual roles with respect to the Plan," and concluding that the complaint contained "no plausible facts showing that Daikin," a defined contribution plan "selected" the funds at issue "for the purpose of benefitting itself or John Hancock"); *cf., Kohari v. MetLife Grp., Inc., No. 21-cv-6146, 2022 U.S. Dist. LEXIS 136505, at *29, 2022 WL 3029328, at *9 (S.D.N.Y. Aug. 1, 2022)* (denying motion to dismiss [*66] duty of loyalty claim where the plaintiffs alleged that the defendant MetLife fiduciaries not only selected and retained proprietary investments but that "[e]ach of the MetLife Index Funds charge an annual operating expense that is paid to MetLife and deducted from the rate of return of the fund, and MetLife also claims a tax deduction called the Dividend Received Deduction . . . on dividends received on the assets owned by

MetLife on behalf of the Plan") (internal quotation marks omitted). Accordingly, the duty of loyalty claim is dismissed.

5. The Complaint Fails to Plausibly Allege a Duty of Prudence Claim²⁴

Plaintiff alleges that Defendants breached the duty of prudence by (a) setting an "unreasonable and grossly excessive" 8.5% actuarial return target; (b) deviating from allocation strategies used by peer funds and allocating a significant portion of Plan

²⁴ Much of Plaintiff's argument centers on *Snitzer v. Board of Trustee of the American Federation of Musicians and Employers' Pension Fund*, No. 17-cv-5361, and the court's denial of the defendants' motion to dismiss the complaint, see Transcript of Oral Argument & Bench Decision, *Snitzer*, No. 17-cv-05361, (S.D.N.Y. Apr. 26, 2018), ECF No. 90. In *Snitzer*, the plaintiff asserted that the plan's "trustees breached their fiduciary duty by investing substantial percentages of the fund in emerging markets equity and private equity, the first of which is very volatile and risky, and the second of which is illiquid." *Id.*, ECF No. 90, at 40. The district court found that the plaintiff's allegations that "this fund was significantly overweighted in volatile and illiquid assets classes (specifically EME and private equity) vis-a-vis its Taft-Hartley peers, nudges plaintiff's claim across the line from possible to plausible." *Id.*, ECF No. 90, at 41-42. Although the claims in *Snitzer* appear very similar to the claims Plaintiff asserts in this case, because the bench decision contains minimal factual analysis and cites no legal authority in its analysis or disposition of the breach of fiduciary claims, the Court finds it of little guidance. The Court therefore takes notice of the *Snitzer* decision but has engaged in an independent analysis, which has led it to a different conclusion regarding the plausibility of Plaintiff's breach of fiduciary duty claims.

assets to EME, PE, and private market investments despite evidence that these investments presented a high risk of volatility and illiquidity; (c) continuing to allocate significant percentages to EME, PE, [*67] and other private market investments even though peer plans with greater allocations to domestic equities were better performing; and (d) relying on Meketa, despite its conflict of interest as both investment consultant and private markets manager. (Dkt. No. 1). Defendants seek dismissal on the ground that Plaintiff's allegations are largely conclusory and that allegations of risky investments and comparisons to "peer funds," without additional factual allegations, are insufficient to state a plausible claim for relief. (Dkt. No. 124-1, at 22-30; Dkt. No. 125-1, at 12-25).

The duty of prudence "requires that the fiduciary act 'with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims.'" *Id.* (quoting 29 U.S.C. § 1104(a)(1)(B)). "The prudence of a fiduciary 'is measured according to the objective prudent person standard developed in the common law of trusts.'" *Sacerdote II*, 9 F.4th at 107 (quoting *Katsaros v. Cody*, 744 F.2d 270, 279 (2d Cir. 1984)). The Second Circuit instructs that "[u]nder that common-law standard, and consistent with ERISA's instruction that fiduciaries act in a prudent manner 'under [*68] the circumstances then prevailing,' '[w]e

judge a fiduciary's actions based upon information available to the fiduciary at the time of each investment decision and not from the vantage point of hindsight." *PBGC*, 712 F.3d at 716 (first quoting 29 U.S.C. § 1104(a)(1)(B); and then quoting *In re Citigroup ERISA Litig.*, 662 F.3d 128, 140 (2d Cir. 2011)). "In other words, 'this standard focuses on a fiduciary's conduct in arriving at an investment decision, not on its results, and asks whether a fiduciary employed the appropriate methods to investigate and determine the merits of a particular investment.'" *Kohari*, 2022 U.S. Dist. LEXIS 136505, at *20, 2022 WL 3029328, at *6 (quoting *PBGC*, 712 F.3d at 716); see also *Ferguson v. Ruane Cunniff & Goldfarb Inc.*, No. 17-cv-6685, 2019 U.S. Dist. LEXIS 160112, at *14, 2019 WL 4466714, at *5 (S.D.N.Y. Sept. 18, 2019) ("[C]ourts analyze a fiduciary's process to determine prudence, not outcome.").

"A claim for breach of the duty of prudence will 'survive a motion to dismiss if the court, based on circumstantial factual allegations, may reasonably infer from what is alleged that the process was flawed' or 'that an adequate investigation would have revealed to a reasonable fiduciary that the investment at issue was improvident.'" *Sacerdote II*, 9 F.4th at 108 (quoting *PBGC*, 712 F.3d at 718). Thus, the omission of "factual allegations referring directly to [the fiduciary's] knowledge, methods, or investigations at the relevant times . . . is not fatal to a claim" so long as circumstantial factual allegations allow a plausible inference [*69] of flawed process.

PBGC, 712 F.3d at 718; see also *Kohari*, 2022 U.S. Dist. LEXIS 136505, at *22, 2022 WL 3029328, at *7 (observing that "[t]he inquiry into a plan fiduciary's decision-making process is necessarily 'context specific,' and 'requires assessing the allegations of the complaint as a whole' to determine whether the 'facts alleged are suggestive of, rather than merely consistent with, a finding of misconduct'" (first quoting *Fifth Third Bancorp v. Dudenhoeffer*, 573 U.S. 409, 425, 134 S. Ct. 2459, 189 L. Ed. 2d 457 (2014); and then quoting *PBGC*, 712 F.3d at 719)).

Plaintiff alleges that the Trustees and Meketa breached their fiduciary duty to participants by allocating "over 50% of the Fund's assets to the highest risk asset classes," which "was far beyond what any other Taft-Hartley plan did," hiring Meketa "in a dual conflicted role," relying "on Horizon's assumed 8.5% return after the MPRA Applications" showed that "the ASOP-27 compliant return assumption for the Plan was . . . below 7.5%," and continuing to pursue the "high-risk class allocation" even after learning that "[t]he risky portfolio performed worse than peer plans over both the short- and long-term." (Dkt. No. 140, at 25-29).

The Trustees move to dismiss on the ground that "[t]he Complaint . . . is bereft of any allegations that the Board failed to meet regularly, failed to consider relevant information about investments, [*70] failed to obtain expert investment inputs, or failed to follow expert advice—the hallmarks of a flawed process." (Dkt. No. 124-1, at 22). The Trustees argue that "[t]he

challenged investment strategy in this case dovetailed" with the Plan's "long-term investment strategy," which was crafted to address the liabilities of Fund and "extend[ed] for decades in the future." (*Id.* at 24). The Trustees assert that the Complaint "makes no effort to examine how [the] challenged investments fit and operated within the broader investment portfolio," and in the context of the "Fund's challenging circumstances." (*Id.* at 26-27). Finally, the Trustees argue that the Complaint fails to identify "any relevant benchmarks" or "comparator funds" that would show "that a prudent fiduciary in like circumstances would have acted differently." (Dkt. No. 124-1, at 27-30 (quoting *Meiners v. Wells Fargo & Co.*, 898 F.3d 820, 822 (8th Cir. 2018))).

The omission of allegations regarding the Trustees' process in deciding to pursue an investment strategy involving the allocation of Plan assets to EME, PE, and "other private market investments" to "chase" an 8.5% investment return, is not necessarily "fatal," when the complaint contains circumstantial factual allegations that allow [*71] a plausible inference of procedural imprudence. *PBGC*, 712 F.3d at 719 (explaining that circumstantial factual allegations may be sufficient if, for example, the complaint were to "allege facts sufficient to raise a plausible inference that the investments at issue were so plainly risky at the relevant times that an adequate investigation would have revealed their imprudence"). Thus, when considering claims regarding the risk-profile of a portfolio as a whole,

"the prudence of each investment is not assessed in isolation but, rather, as the investment relates to the portfolio as a whole." *Sacerdote II*, 9 F.4th at 109. However, the general "principle that a portfolio should be assessed holistically does not preclude critical assessment of individual funds." *Id.* (citing *Sweda v. Univ. of Pennsylvania*, 923 F.3d 320, 330 (3d Cir. 2019)).

i. 8.5% "Actuarial Return Target"

The Complaint alleges that the Plan's 8.5% "actuarial return target" was "unreasonable and grossly excessive." (Dkt. No. 1, ¶ 50). In support of his argument that Defendants' utilization of 8.5% as an investment return target was imprudent, Plaintiff cites Horizon's 2015 survey of investment professionals, which indicated that "the probability of achieving an 8% return over a 10-year period was less than 1/3," (*id.* ¶ 51), and Horizon's [*72] capital market surveys during the class period, which showed "continuing decline in the probability of achieving a 7.50% return for a benchmark multiemployer plan portfolio from 40.6% in 2014 to 33.6% in 2019," (*id.* ¶ 54.a.). But these surveys post-date the class period and thus do not allow a plausible inference that Defendants' use of an 8.5% return target in, for example, 2014, at the start of the class period, was imprudent as neither the Trustees nor Meketa would have had access to such information at the time.²⁵ See

²⁵ The Complaint also alleges that "Meketa knew as the investment consultant to another Taft-Hartley plan with a

PBGC, 712 F.3d at 723 (concluding the complaint failed to "allege facts plausibly showing that" fiduciary "knew, or should have known, at the relevant times, that the securities . . . were imprudent investments" even though "the whole world knows (in hindsight) that many subprime mortgages turned out to be disastrous investments").

ii. Allocation Strategy

Plaintiff alleges it was imprudent for the Trustees and Meketa to allocate up to 50% of Plan assets to "high-risk" investments—such as investments in EME and PE—that pose a risk of volatility and illiquidity, have higher management fees, and lack transparency. (Dkt. No. 1 ¶¶ 56-57). According to the Complaint, in May 2014, Meketa advised [***73**] that compared to its "U.S. Peer Group" of "U.S. Taft-Hartley Peers," the Plan had a 16% equity allocation to EME and 15% equity allocation to PE, while its "Peers" had 2% equity allocation to EME and 4% equity allocation to PE. (*Id.* ¶ 67). Plaintiff argues

similarly high-risk asset allocation significantly overweight in EME and PE (the American Federation of Musicians & Employers Pension Fund ('AFM-EPF'), that the AFM-EPF's actuary, Milliman, refused the trustees' request to increase the 7.5% actuarial return assumption based on the plan's high risk asset allocation." (Dkt. No. 1, ¶ 56). The Complaint contains no allegations regarding when this occurred with respect to the AFM-EPF plan and provides no additional factual details. This allegation, therefore, fails to provide any basis for concluding that Meketa was aware of this information during the relevant time period.

that an inference of imprudence can be drawn from these allegations. The Complaint provides no additional facts regarding the Plan's "Peers," such as the size or financial condition of the other plans, the number of plans represented, or the risks levels of the "peer" plans' other investments. Without more, these facts allow only the inference of the "mere possibility of misconduct." *PBGC*, 712 F.3d at 718; see *Smith v. CommonSpirit Health*, 37 F.4th 1160, 1167 (6th Cir. 2022) ("A side-by-side comparison of how two funds performed in a narrow window of time, with no consideration of their distinct objectives, will not tell a fiduciary which is the more prudent long-term investment option."); see also, e.g., *Barchock v. CVS Health Corp.*, 886 F.3d 43, 52 (1st Cir. 2018) (finding it was "unreasonable to infer solely from the complaint's allegation that" because fiduciary "departed radically" from the "annual arithmetic means of cash-equivalent allocations by like funds" that the fiduciary was a "'severe outlier' from all other such funds when it came to asset allocation decisions"); [*74] cf. *Meiners*, 898 F.3d at 823 ("The fact that one fund with a different investment strategy ultimately performed better does not establish anything about whether the Wells Fargo TDFs were an imprudent choice at the outset."); *PBGC*, 712 F.3d at 726 ("The allegation that Morgan Stanley's investments created risk 'well in excess' of the risk inherent in the benchmark is a conclusory assertion, unsupported by any factual allegation other than the Amended Complaint's comparison of

mortgage-backed securities in the Portfolio and in the [benchmark].").²⁶

The Complaint alleges that in February 2016, Meketa advised the AFM-EPF plan that the "discretionary portfolios" it managed for "other clients were completely out of [EME] due to global uncertainty and China conditions unless constrained to make such an allocation" and recommended that the "AFM-EPF substantially to de-risk from EME and recue its EME allocation by 40%." (Dkt. No. 1, ¶ 75). Again, the Complaint contains no factual allegations concerning the comparability of the AFM-EPF plan and the Plan at issue, or the EME funds in which AFM-EPF had invested. The Complaint alleges that both plans invested in EMEs, but provides no facts regarding the individual funds that made up AFM-EPF's [*75] EME investment or showing what percentage of plan assets AFM-EPF allocated to EME funds. Thus, the Complaint fails to allow a plausible inference that Meketa or the Trustees were imprudent in continuing its 16% "equity allocation" to EME. Moreover, without facts concerning the percentage of "equity allocation" the AFM-EPF plan

²⁶ The Complaint also contains a table with "data from the Wilshire Trust Universe Comparison Service for other Taft-Hartley plans," which, Plaintiff contends, "reflects that the Plan's aggressive asset allocation is an extreme outlier." (Dkt. No. 1, ¶ 62). The Complaint does not explain what the "Wilshire Trust Universe Companion Service" offers, what "other Taft-Hartley plans" are included, or what the numbers within the table represent.

made to EME investments, the Court has no means of determining what impact of the "recu[ing]" an "EME allocation by 40%" would have on the overall allocation. Thus, this allegation fails to allow an inference of procedural imprudence by Meketa or the Trustees.

iii. Risk, Volatility, and Illiquidity

Plaintiff argues that the high risk of EME and PE investments were well known to the Trustees and Meketa. According to the Complaint, Meketa advised the Trustees that EME investments had "risks of high volatility, "[s]ignificant short-term relative performance risk," "high cost, "[m]ore expensive higher management fees, trading cost, custody costs, etc." (Dkt. No. 1, ¶ 57). Meketa advised that PE investments carried "the risks of '[i]lliquidity,' as well as '[h]igher management fees" and "[l]ack of transparency." (*Id.* ¶ 58). The Complaint does not allege when Meketa [*76] provided this advice.

In 2014, "Meketa advised: Relative to the peer universe the fund is significantly underweight domestic and international developed market equities, and is significantly overweight to emerging markets and private equity." (*Id.* ¶ 59). Meketa's 2014 reports advised "emerging market economic growth has been slower than expected and more varied," outlined the factors that that would "likely" negatively impact EME, including disappointing growth in China, increase in interest rates, and

reduction in liquidity. (*Id.* ¶ 65). Meketa further advised that "[u]ncertainties around global demand (Particularly from emerging markets), stimulative monetary policy, and geopolitical tensions will likely cause heightened volatility." (*Id.*). Meketa advised that "Pension Funds that performed strongly in 2013 had large allocations to domestic and developed international equities" and smaller allocations to EME. (*Id.* ¶ 66). Meketa advised that the Plan "returned 9.6%, gross of fees" exceeding "the 8.5% return expectation" and that although "[c]ompared to peers . . . this return ranked below the median return," "[t]his was not surprising given the Fund's relatively large allocation to [EME] [*77] and debt compared to peers." (*Id.* ¶ 67). In 2015, Meketa advised that the "strong US dollar has hurt emerging market returns," and that as EME is a "high risk asset class," "drawdowns can be severe," that emerging markets have experienced "significant volatility," and that EME have "[l]ess diversification benefit versus 15-20 years ago. Event and political risk." (*Id.* ¶ 71). In 2016, Meketa advised that EME had "recently experienced lower investment returns, due in part to slowing growth in China, declining commodity prices, and a stronger U.S. dollar" and that "[g]rowth in emerging markets economies could be uneven going forward, with commodity export-dependent economies particularly hurt by a sustained slowdown in global growth and prices." (*Id.* ¶ 72).

As an initial matter, the Court notes that there are no factual allegations regarding when the Trustees or

Meketa began implementing the investment strategy at issue in this case. As the Complaint cites reports from March 2014 referring to the Plan's "significantly overweight" with respect to EME and PE, it is reasonable to conclude that the strategy began prior to March 2014. (*See, e.g., id.* ¶ 66 (Meketa March 2014 report referring [*78] to the Plan as "significantly overweight" as to EME and PE)). Further, there are no factual allegations in the Complaint regarding the Trustees or Meketa's knowledge, the methods they employed, or investigations they conducted when they began implementing the allocation strategy at issue. However, a "claim for breach of fiduciary duty under ERISA may survive a motion to dismiss—even absent any well-pleaded factual allegations relating directly to the methods employed by the ERISA fiduciary—if the complaint 'allege[s] facts that, if provide, would show that an adequate investigation would have revealed to a reasonable fiduciary that the investment at issue was improvident.'" *PBGC, 712 F.3d at 718* (quoting *In re Citigroup, 662 F.3d at 141*). Thus, the Court considers whether, as Plaintiff argues, the Complaint adequately alleges that a prudent fiduciary in 2014 would have known that allocating 30% to 50% of a Plan's assets to EME and PE investments was improvident due to their risky nature and volatility.

The Complaint alleges that the reports by Meketa in 2014 through 2016 warned of EME volatility, slower growth than expected, that growth in emerging market economies may be uneven in the

future, and that there was less diversification benefit, [*79] reported lower investment returns, and acknowledged that pension funds with "large allocations to domestic and developed international equities" "performed strongly in 2013." However, none of these generalized allegations regarding EME risk factors allow a plausible inference that the specific EME funds in which the Plan invested, Aberdeen, Dimensional, Vontobel, SSgA, or GQG,²⁷ were imprudent. *See PBGC, 712 F.3d at 721-22* ("The most glaring problem with St. Vincent's allegations, however, is that the Amended Complaint does not allege any such surrounding circumstances that might make this inference plausible, and fails to connect the alleged 'warning signs' [regarding high-risk mortgage securities] to any specific characteristics of the securities in the Portfolio."); *see also Anderson v. Intel Corp. Inv. Policy Comm., No. 19-cv-04618, 2021 U.S. Dist. LEXIS 12496, at *40, 2021 WL 229235, at *11 (N.D. Cal. Jan. 21, 2021)* ("The Court therefore finds that although Plaintiffs have plausibly alleged that there was some evidence available in 2011 that hedge funds and private equity funds carried risks and that a prudent fiduciary could have found that evidence, that small body of evidence is insufficient on its own to support a claim for breach

²⁷ Nor are there any facts alleged that would allow an inference that when Vontobel was removed from the Plan in 2016, it was imprudent for the Trustees to add another EME fund, SSgA, investing \$35 million, or imprudent to invest \$64 million to GQG Partners in 2017 and 2018. (Dkt. No. 1, ¶¶ 76-77).

of the duty of prudence by the Investment Committee."). Further, none of Meketa's reports contained any warnings [*80] about investments in PE, natural resources, or infrastructure. Thus, the Complaint fails to allege facts that would allow a plausible inference that the Trustee's or Meketa's decision to invest approximately 30% of Plan assets in EME and PE was imprudent in 2014 or beyond. See *PBGC, 712 F.3d at 722 & n.20* (finding the complaint failed to allege facts showing "how risky those unspecified [sub-prime mortgage backed] investments became relative to their price, nor does it allege any facts suggesting that a prudent investor at the time would have viewed this unspecified risk as high enough to render the investments imprudent," noting "[f]or instance, the Amended Complaint does not allege that the ratings of the relevant securities fell below the ratings-agency benchmarks established by plan documents . . . nor does it allege facts plausibly showing that the securities were improvidently risky according to some other metric or method used by prudent investors at the time").

iv. Relative Performance

"In some cases, it would be reasonable to infer from a decline in the price of a security, combined with other alleged facts, that the security no longer was a sound investment." *PBGC, 712 F.3d at 721*. As to performance, Plaintiff alleges that [*81] from 2014 to 2020, the Plan's EME investments "generally substantially lagged the S&P 500, the Dow Jones Industrial Average ("DJIA"), and the Vanguard

Balanced Index Fund." (Dkt. No. 1, ¶ 81). The "investment performance" percentages in the table on which Plaintiff relies, *see supra* Figure 2, indicate that the "Plan's EME investments" performed worse than these three funds in 2014, 2015, 2018, and 2019, performed within the same range in 2016, and performed better in 2017.²⁸ (Dkt. No. 1, ¶ 81). However, the Complaint fails to allege any facts that would allow a plausible inference that the S&P 500, the DJIA, or the Vanguard funds are appropriate benchmarks or comparators against which to measure the performance of Plan's EME investments. *Patterson, 2019 U.S. Dist. LEXIS 174832, at *36, 2019 WL 4934834, at *11* (rejecting at pleading stage, the plaintiffs' "conclusory assertion that the Global Real Estate Fund did not perform as well as a supposedly comparable investment opportunity" observing that the complaint "lacks any detail as to the extent of the investment's shortcomings or why the Global Real Estate Fund is a comparable investment"); *Anderson, 2021 U.S. Dist. LEXIS 12496, at *30, 2021 WL 229235, at *8* (finding the plaintiffs' allegations that the funds at issue "'underperformed peer balanced funds,' such as the Vanguard [*82] Balanced Fund and the LifeStrategy Moderate Growth Fund," deficient, explaining that

²⁸ The table showing these return percentages also shows 2020 "as of end of Q2" and indicates that the Plan EME investments returns fell within the range of Plaintiff's proffered alternative investments. (Dkt. No. 1, ¶ 81 (Plan (-7.6%); the S&P 500 (-4.4%), the DJIA (-9.9%), and the VBIAX (-0.8%)).

"simply labeling funds as 'comparable' or 'a peer' is insufficient to establish that those funds are meaningful benchmarks against which to compare the performance of the Intel Funds" and that a because the complaint "failed to provide sufficient allegations to support their claim that these other funds are adequate benchmarks against which to compare the" funds at issue).

Further, even assuming the S&P 500, the DJIA, or the Vanguard funds are appropriate benchmarks or comparators, because the allegations regarding Plan's EME investments show underperformance during a relatively short time period, (Dkt. No. 1, ¶ 81), they are insufficient to allow an inference of an imprudent investment strategy. *See Patterson, 2019 U.S. Dist. LEXIS 174832, at *31-32, 2019 WL 4934834, at *10* (observing that district courts in the Second Circuit "have recognized that allegations of consistent, ten-year underperformance may support a duty of prudence claim" (citing *Sacerdote I, 2017 U.S. Dist. LEXIS 137115, at *30, 2017 WL 3701482, at *10*)). Plaintiff's allegations are limited to a six-to-seven-year time period, and show only four years of underperformance, (Dkt. No. 1, ¶ 81), which is insufficient to allow a plausible inference that Defendants' allocation strategy [*83] was imprudent, *see Patterson, 2019 U.S. Dist. LEXIS 174832, at *32-33, 2019 WL 4934834, at *11* (finding the plaintiffs' allegation that the "Mid Cap Fund lagged behind its alleged comparators in 2011, 2012, and 2014, it outperformed all of Plaintiffs' suggested

alternative investments in 2013" did "not give rise to the inference that Defendants' decision to retain that investment offering was imprudent").

The Complaint alleges that from 2014 to 2019, the Plan's gross return on investment for its "Aggregate Private Equity Program" met or exceeded Meketa's annual "capital markets assumptions" for PE, but that the gross return on investment failed to meet Meketa's annual "capital markets assumptions" for its "Aggregate" Natural Resources and Infrastructure Programs during these years. (Dkt. No. 1, ¶¶ 88-93). The Complaint does not identify any benchmark or comparator funds or investments. Thus, the Court has no way of evaluating the performance of the Plan's PE, natural resources, or infrastructure investments.

v. Excessive Fees

Meketa argues that to the extent the Complaint alleges that the costs or fees of EME and PE investments are too high, it "fails to identify a meaningful benchmark for evaluating the costs of the Fund's emerging and private-market investments. [*84] (Dkt. No. 125-1, at 22). The Court agrees. As to fees, the Complaint alleges "the high risk of private markets investments demands a premium, such as a 3% premium above the S&P 500 or a 4% premium above the Russell 3000." (Dkt. No. 1, ¶ 96). However, as the Complaint does not enumerate the "premiums" for any private markets investment, there is no way to calculate how much a

3% or 4% increase would represent. The Complaint alleges that the combined EME fees for 2014 to 2020 ranged between \$993,400 to \$2.137 million, but provides no allegations regarding the fees associated with the Plan's PE, Natural Resources, or Infrastructure investments. (*Id.* ¶ 80); *see Bekker, 2018 U.S. Dist. LEXIS 166690, at *17, 2018 WL 4636841, at *7* ("Plaintiff compares the VEF's fees unfavorably to those charged by the VIIIIX, but does not allege that the two funds employed similar operations or investment strategies, nor does Plaintiff proffer any other facts to make the comparison of the funds' fees meaningful and plausibly suggestive of a fiduciary breach."); *Anderson, 2021 U.S. Dist. LEXIS 12496, at *34, 2021 WL 229235, at *9* ("Without factual allegations to support Plaintiffs' claim that the complaint compares fees incurred by the Intel Funds with a meaningful benchmark, the Court cannot discern whether Plaintiffs are comparing funds [*85] that have different 'aims, different risks, and different potential rewards that cater to different investors.'" (quoting *Davis v. Wash. Univ., 960 F.3d 478, 485 (8th Cir. 2020)*). Thus, the Complaint's allegations regarding the high costs of EME and private-market investments are conclusory and fail to raise a plausible inference of imprudence.

vi. Conflicted Role

Plaintiff argues that the allegations regarding Meketa's role as investment consultant and private markets manager and its "potentially conflicting interest" in "advising the Plan on asset allocations"

and recommending a "bet-the-house allocation strategy" involving "an outsized private markets investment allocation"—are sufficient to allege breach of fiduciary duty. (Dkt. No. 141, at 17). The Court notes that although "the duties of prudence and loyalty are 'conceptually distinct from one another,' the 'analysis of the duty of loyalty may inform the analysis of the duty of prudence and vice versa.'" *Kohari*, 2022 U.S. Dist. LEXIS 136505, at *28, 2022 WL 3029328, at * 9 (quoting *Vellali v. Yale Univ.*, 308 F. Supp. 3d 673, 688 (D. Conn. 2018)). As this argument re-hashes the above arguments, all of which the Court have found fail to allow a plausible inference of imprudence or disloyalty the Court concludes that Plaintiff's duty of prudence claim is duplicative of his duty of loyalty claim. Plaintiff fails to [*86] allege a non-duplicative duty of prudence claim. *Cf. Cunningham v. USI Ins. Servs., LLC*, No. 21-cv-1819, 2022 U.S. Dist. LEXIS 54392, at *17, 2022 WL 889164, at *6 (S.D.N.Y. Mar. 25, 2022) (concluding that "because Plaintiff essentially 'recast[s] purported breaches of the duty of prudence as disloyal acts,'" she fails to sufficiently state a claim for breach of the duty of loyalty" (quoting *Rosen v. Prudential Ret. Ins. & Annuity Co.*, 718 F. App'x 3, 7 (2d Cir. 2017))).

vii. Collective Allegations

Finally, the Court considers the Complaint as a whole in evaluating whether the allegations are sufficient to sustain a breach of duty of prudence claim. Plaintiff fails to show any allegation alone or in

combination is sufficient to state a duty of prudence claim. Plaintiff alleges that: (1) that the 8.5% target asset allocation is excessively high; (2) that Defendants' attempted to "chase" an 8.5% return target by allocating 30-50% of Plan funds to high-risk, high-cost EME and PE investments that underperformed peer funds during the class period; and (3) Meketa operated in a conflicted role. As explained above, the Complaint lacked factual allegations that would allow a "plausible inference that that the investments at issue were so plainly risky at the relevant times that an adequate investigation would have revealed their imprudence, or that a superior alternative investment was readily apparent [*87] such that an adequate investigation would have uncovered that alternative." *PBGC*, 712 *F.3d* at 719.²⁹ Accordingly, Defendants' motion to dismiss the duty of prudence claim is granted.

²⁹ There is no suggestion that Plaintiff lacked access to Plan documents or reports providing information from which "to fashion a suitable complaint." *PBGC*, 712 *F.3d* at 723. The Complaint routinely cites "internal Plan documents" and forms, and provides detailed allegations regarding the Plan's investment allocations to "EMEs, PE and other alternatives during the stated years," but almost no information regarding the Plan's investment allocations to other asset classes or investment options. See *id.* (observing that the plaintiff had "access, without discovery to plan documents and reports" but failed to allege "any factual matter about how a prudent investor would have viewed the Portfolio's securities at the relevant times, and in the relevant circumstances").

6. The Complaint Fails to Plausibly Allege A Lack of Diversification Claim

Defendants move to dismiss Plaintiff's claim of lack of diversification on the ground that "the Complaint makes no effort to examine how th[e] challenged investments fit and operated within the broader investment portfolio." (Dkt. No. 124-1, at 26-27; Dkt. No. 125-1, at 30-31). Plaintiff opposes dismissal of his diversification claim (Dkt. No. 141, at 29).

ERISA requires a plan fiduciary to "diversify[] the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so." *PBGC*, 712 F.3d at 724 (quoting 29 U.S.C. § 1104(a)(1)(C)). "The 'duty to diversify is not measured by hard and fast rules or formulas." *Id.* at 717 (quoting *In re Unisys Sav. Plan Litig.*, 74 F.3d 420, 438 (3d Cir. 1996)). "Instead, 'a prudent fiduciary must consider the facts and circumstances of each case.'" *Id.* (quoting *In re Unisys*, 74 F.3d at 438). The Second Circuit has instructed that the factors to be considered "[i]n deciding whether the diversification requirement was breached" "include (1) the purposes of the plan; (2) the amount of plan assets; [*88] (3) financial and industrial conditions; (4) the type of investment . . . ; (5) distribution as to geographic[al] location; (6) distribution as to industries; [and] (7) the dates of maturity." *Id.* (quoting *In re Unisys*, 74 F.3d at 438).

Plaintiff asserts that "[p]rudent diversification means having reasonable allocations to the right asset categories and having diverse holdings within those categories" and that "[w]hat Meketa and the . . . Trustees did is exactly the opposite." (Dkt. No. 141, at 29). The Complaint lacks allegations regarding the amount of plan assets during the relevant time period, the types of investments Defendants made, distribution as to geographical locations or industries, dates of maturity, and contains no facts concerning the investment of the remaining 50% to 70% of Plan assets. Thus, even assuming an ERISA plaintiff need not allege each of the above factors, the paucity of factual allegations regarding the Plan's non-EME and PE investments prohibit a plausible inference of lack of diversification. Accordingly, Plaintiff's lack of diversification claim is dismissed.

7. The Complaint Fails to Plausibly Allege a Violation of Plan Documents

Plaintiff alleges that Defendants violated *ERISA* § 1104(a)(1)(D), which [*89] requires fiduciaries to act in accordance with plan documents, by failing to "avoid dangerous volatility risk." (Dkt. No. 141, at 28 (citing Dkt. No. 1, ¶ 48)). "The plain meaning of this provision is that if the terms of the plan documents and instruments are consistent with ERISA, a plan trustee has a fiduciary duty to adhere to those terms." *Cement & Concrete Workers Dist. Council Pension Fund v. Ulico Cas. Co.*, 387 F. Supp. 2d 175, 185 (E.D.N.Y. 2005). As the Complaint fails to identify any provision of a Plan document that Defendants

have violated, but instead generally cites the statutory provision, the Court finds Plaintiff has failed to state a plausible claim for relief. Indeed, even with respect to volatility, the Plan's Investment Policy Statement instructs that investments should "avoid extreme levels of volatility that could adversely affect the Plan's participants." (Dkt. No. 1, ¶ 48). As discussed, the Complaint does not adequately allege facts regarding volatility, much less allowing an inference that the asset allocations at issue exposed the Plan to "extreme levels of volatility." Accordingly, Plaintiff's claim based on violation of Plan documents is dismissed.

8. There is No Basis for Co-Fiduciary Liability

"ERISA . . . renders a fiduciary liable for the breach of another fiduciary [***90**] if he or she (1) participates knowingly in, or knowingly undertakes to conceal, and act or omission of such other fiduciary, knowing such act or omission is a breach; or (2) enables another fiduciary to commit a breach; or (3) has knowledge of a breach by such other fiduciary, unless he makes reasonable efforts to remedy the breach." *In re Morgan Stanley ERISA Litig.*, 696 F. Supp. 2d 345, 367 (S.D.N.Y. 2009) (citing 29 U.S.C. § 1105(a)). However, "[c]laims for breach of the duty to monitor and for co-fiduciary liability require antecedent breaches in order to be viable." *In re Citigroup Erisa Litig.*, 104 F. Supp. 3d 599, 617 (S.D.N.Y. 2015) (citing *In re Nokia Erisa Litig.*, No. 10-cv-3306, 2011 U.S. Dist. LEXIS 101265, at *23-24,

*2011 WL 7310321, at *5-6 (S.D.N.Y. Sept. 6, 2011)*),
aff'd sub nom. Muehlgay v. Citigroup Inc., 649 F.
App'x 110 (2d Cir. 2016). The Complaint fails to allege
a breach of fiduciary duty, the co-fiduciary duty
claims are therefore dismissed.

V. CONCLUSION

For these reasons, it is hereby

ORDERED that Horizon's letter motions (Dkt.
Nos. 146, 147) are granted in part and denied in part;
and it is further

ORDERED that Defendants' motions to dismiss
(Dkt. Nos. 102, 124, 125, 179) under *Rule 12(b)(1)* are
DENIED; and it is further

ORDERED that Defendants' motions to dismiss
(Dkt. Nos. 102, 124, 125) under *Rule 12(b)(6)* are
GRANTED; and it is further

ORDERED that the Complaint is **DISMISSED**
and the Clerk is directed to close this case.

IT IS SO ORDERED.

Dated: February 7, 2025

Syracuse, New York



Brenda K. Sannes
Chief U.S. District Judge

APPENDIX C

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW
YORK**

**CASE NO.
JURY TRIAL DEMANDED**

ROBERT CARLISLE, individually and as
representative of a class of similarly situated persons,
on behalf of the New York State Teamsters
Conference Pension and Retirement Fund,

Plaintiff,

v.

THE BOARD OF TRUSTEES OF THE AMERICAN
FEDERATION OF THE NEW YORK STATE
TEAMSTERS CONFERENCE PENSION AND
RETIREMENT FUND; JOHN BULGARO; BRIAN K.
HAMMOND; PAUL A. MARKWITZ; GEORGE F.
HARRIGAN; MARK D. MAY; MICHAEL S. SCALZO,
SR.; ROBERT SCHAEFFER; MARK GLADFELTER;
SAMUEL D. PILGER; DANIEL W. SCHMIDT; TOM
J. VENTURA; MEKETA INVESTMENT GROUP,
INC.; and HORIZON ACTUARIAL SERVICES, LLC,

Defendants.

CLASS ACTION COMPLAINT

Plaintiff, Robert Carlisle (“Carlisle” or “Plaintiff”),
by and through his attorneys, and on behalf of New
York State Teamsters Conference Pension and
Retirement Fund (“Plan”), himself a Plan

participant, and all others similarly situated, alleges as follows:

I. NATURE OF ACTION AND INTRODUCTION

1. This is a class action brought pursuant to the Employee Retirement Income Security Act, 29 U.S.C. §§ 1001-1461 (“ERISA”). The action asserts claims for breaches of fiduciary duties and other violations of ERISA §§ 502, 29 U.S.C. §1132(a)(2) and (3), against the Plan’s fiduciaries, which include: (1) Board of Trustees of the New York State Teamsters Conference Pension and Retirement Fund (“Board of Trustees”); (2) current and former Trustees John Bulgaro, Brian K. Hammond, Paul A. Markwitz, Mark D. May, Michael S. Scalzo, Sr., Robert Schaeffer, Mark Gladfelter, Samuel D. Pilger, Daniel W. Schmidt, and Tom J. Ventura (the “Trustee Defendants”); (3) Meketa Investment Group, Inc. (“Meketa”); and (4) Horizon Actuarial Services, LLC (“Horizon”) (collectively, “Defendants”).

2. Under ERISA, a person is a fiduciary to the extent the person: (1) exercises any discretionary authority or control over management of the Plan or the management or disposition of its assets; (2) renders investment advice regarding Plan assets for a fee or other compensation, or has the authority or responsibility to do so; or (3) has any discretionary authority or control over Plan administration. ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A).

3. ERISA imposes strict fiduciary duties of loyalty and prudence upon Plan fiduciaries. Under 29 U.S.C. § 1104(a), ERISA provides:

(a) Prudent Man Standard of Care

(1) . . . a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and –

(A) for the exclusive purpose of

(i) providing benefits to participants and their beneficiaries; and

(ii) defraying reasonable expenses of administering the plan; [and]

(B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of like character and with like aims;

(C) by diversifying the investments of the plan so as to minimize the risk of large losses unless under the circumstances it is clearly prudent not to do so; and

(D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with [ERISA].

4. 29 U.S.C. § 1103(c)(1) provides that Plan assets shall be held for the exclusive purposes of providing benefits to participants in the Plan and their beneficiaries and defraying reasonable expenses of administering the Plan.

5. ERISA also imposes co-fiduciary liabilities on Plan fiduciaries. 29 U.S.C. § 1105(a) provides a cause of action against a fiduciary for knowingly participating in a breach by another fiduciary and knowingly failing to cure any breach of duty:

In addition to any liability which he may have under any other provisions of this part, a fiduciary with respect to a plan shall be liable for a breach of fiduciary responsibility of another fiduciary with respect to the same plan in the following circumstances:

(1) if he participates knowingly in, or knowingly undertakes to conceal, an act or omission of such other fiduciary, knowing such act or omission is a breach; [or]

(2) if, by his failure to comply with section 1104(a)(1) of this title in the administration of his specific responsibilities which give rise to his status as a fiduciary, he has enabled such other fiduciary to commit a breach; or

(3) if he has knowledge of a breach by such other fiduciary, unless he makes reasonable efforts under the circumstances to remedy the breach.

6. Under ERISA, fiduciaries are required to determine the prudence of each investment of Fund's assets and to monitor and review the investments, risk tolerance and exposure of the Fund on a continuing basis to determine the continued prudence of the asset allocations, risk, and expenses, under the particular circumstances facing the plan. The duty to conduct an independent investigation into the merits of a particular investment is a basic aspect of the fiduciary duties under ERISA. Fiduciaries must use appropriate methods to investigate the merits of plan investments. Fiduciaries must initially determine, and continue to monitor, the prudence of each investment option in the Plan. The continuing duty includes the duty to remove imprudent investments and to evaluate the costs of investment managers versus the result produced by the managers to ensure that there is a net financial benefit to the Fund versus alternatives such as low-cost passive index strategies. The continuing duty also includes the duty to monitor and manage the risk of the Plan's investments to maintain an efficient investment portfolio which appropriately diversifies and avoids excessive imprudent risk exposure to the Plan's assets and returns in accordance with the circumstances facing the Plan. The continuing duty exists separate and apart from the duty to exercise prudence in selecting the investments and investment managers and costs at the outset. The monitoring must be done in a manner that is reasonable and appropriate for the particular investments, courses of action, strategies and risk tolerance of the Plan.

7. 29 U.S.C. §1132(a)(2) of ERISA authorizes a participant to bring a civil action under 29 U.S.C. §1109, which provides:

Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary. A fiduciary may also be removed for a violation of section 1111 of this title.

8. Section 1132 (a)(3) authorizes a participant to bring a civil action “(A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to address such violations or (ii) to enforce any provisions and his subchapter or the terms of the plan.”

9. Plaintiff claims, as alleged herein, the Trustee Defendants have:

(a) failed to act solely in the interest of the participants and beneficiaries of the Plan for the exclusive purpose of providing them

benefits, in violation of ERISA §404(a)(1)(A), 29 U.S.C. §1104(a)(1)(A);

(b) failed to act with the care, skill, prudence and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims, in violation of ERISA §404(a)(1)(B), 29 U.S.C. §1104(a)(1)(B);

(c) failed to diversify the investments of the Plan so as to minimize the risk of large losses, ERISA § 404(a)(1)(C), 29 U.S.C. §1104 (a)(1)(C); and

(d) failed to act in accordance with the documents and instruments governing the Plan, ERISA § 404(a)(1)(D), 29 U.S.C. § 1104(a)(1)(D). Defendants breached their fiduciary duties to the Plan and its participants and are liable to restore all losses to the Plan resulting from their breaches, as alleged more particularly herein.

10. Plaintiff claims, as alleged herein, from 2014 and continuing (“Class Period”), the Board of Trustees and the Trustee Defendants imprudently deployed and maintained the Plan assets in an extraordinary high risk, high cost asset allocation to chase a grossly excessive and unreasonable 8.5% “actuarial return target,” as the Plan remained in dangerous and worsening financial condition and required near-term

investment returns to improve. The deployment and maintenance of the extraordinary asset allocation resulted in substantial losses to the Plan and worsening of the Plan's already dangerous financial condition.

11. Plaintiff claims, as alleged herein, during the Class Period, the Plan's enrolled actuary Horizon breached its fiduciary duties in exercising discretion or control over Plan management and assets and rendering investment advice for compensation. Horizon, as the Plan's enrolled actuary, in 2007, recklessly increased the actuarial return assumption from 8% to 8.5%. Within months of the increase in the assumption, the Plan was certified as being in "endangered status" for the Plan Year beginning January, 2008. Nevertheless, Horizon continued to use this grossly excessive and unreasonable 8.5% actuarial return assumption for the Plan, knowing the Plan would chase this unrealistic return assumption with extraordinary allocations of Plan assets to the riskiest asset classes. The 8.5% assumption was not a reasonable actuarial return assumption determined independently in accordance with professional actuarial standards. Horizon abdicated its duties as the Plan's actuary independently to determine reasonable actuarial assumptions in accordance with accepted professional standards, and imprudently participated in providing investment advice to the Plan to chase the imprudent extraordinary high risk, high cost asset allocation.

12. Plaintiff claims, as alleged herein, during the Class Period, Meketa, the Plan's investment consultant and alternatives asset manager, breached its fiduciary duties in exercising authority or control over Plan management and assets and providing investment consulting services and investment management services for compensation. Meketa used its position as the Plan's nondiscretionary investment consultant to recommend itself for the position of the Plan's paid discretionary investment manager; advised the Trustees as the Plan's nondiscretionary investment consultant the only way to strive to achieve the "actuarial return target" was with extraordinary significantly overweighted allocations of Plan assets to the highest risk asset classes including Emerging Markets Equities ("EME") and Private Equity ("PE") and other private market alternatives under Meketa's discretionary management; and directly and substantially benefited by the imprudent asset allocation at the unfair expense of the Plan and the participants. As alleged herein, in providing investment advice to the Trustees concerning the Plan's extraordinary high risk, high cost asset allocation in its capacity as nondiscretionary investment consultant, and also providing discretionary alternatives investment management to the Plan for additional compensation, Meketa had and exploited a material conflict of interest at the expense of the Plan. Plan fees paid to Meketa soared from \$250,000 to \$1.4 million annually. Further, as a result of the conflicts created by the Plan's Trustees' hiring of Meketa as

investment manager for the Private Markets Portfolio, it was necessary for the Plan to hire a firm to monitor Meketa in the role as investment manager at an additional cost to the Plan. This additional cost would not have been necessary if the Trustees had hired someone other than Meketa as an investment manager for the Private Markets Portfolio. Further, the Plan was required to bear the approximately \$180,000 per year expense for the monitoring firm, Fiduciary Counselors, Inc. ("FC"), an additional fiduciary to monitor Meketa as investment manager. The Trustee Defendants did not hire FC to monitor Meketa in its role as financial consultant.

13. To remedy these fiduciary breaches and other violations of ERISA, Plaintiff, individually and as a representative of a class of Plan participants and their beneficiaries, brings this action on behalf of the Plan under ERISA §§ 502 and 409, 29 U.S.C. §§ 1132, 1109, to recover and obtain all losses resulting from each breach of fiduciary duty. In addition, Plaintiff seeks such other equitable or remedial relief for the Plan as the Court may deem appropriate and just under all of the circumstances.

14. Plaintiff brings this action on behalf of the Plan to recover the following relief:

a. declaratory judgment holding that the acts of Defendants described herein violate ERISA and applicable law;

b. a permanent injunction against Defendants prohibiting the practices described herein and

affirmatively requiring them to act in the best interests of the Plan and its participants;

c. equitable, legal, or remedial relief for all losses and/or compensatory damages;

d. attorneys' fees, costs and other recoverable expenses of litigation; and

e. such other and additional legal or equitable relief that the Court deems appropriate and just under all of the circumstances.

II. JURISDICTION AND VENUE

15. This Court has exclusive jurisdiction over the subject matter of this action under 29 U.S.C. § 1132(e)(1) and 28 U.S.C. § 1331 because it is an action under 29 U.S.C. §§ 1132(a)(2) and (3).

16. This District is the proper venue for this action under 29 U.S.C. § 1132(e)(2) and 28 U.S.C. § 1391(b), because the Plan and Meketa can be found in the District. Meketa resides and can be found in the District. The Plan can be found in the District because it does extensive business with many Plan investments situated in the District.

17. Plaintiff has standing to bring this lawsuit on behalf of the Plan under § 1132(a)(2) and (3). The Plan is the victim of a fiduciary breach and will be the recipient of any recovery. Section 1132(a)(2) authorizes any participant or beneficiary to sue as a representative of the Plan to seek relief on behalf of the Plan. Section 1132(a)(3) authorizes any

participant or beneficiary to sue as a representative of the Plan to enjoin any act or practice that violates ERISA or to obtain other appropriate equitable relief to redress violations and/or enforce the provisions of ERISA. As explained in detail below, the Plan suffered substantial investment losses and lost returns and harm caused by Defendants' fiduciary breaches and remains exposed to harm and continued future losses. Those injuries may be redressed by a judgment of this Court in favor of Plaintiff.

III. PARTIES

A. Plaintiff

18. Plaintiff Robert Carlisle is a citizen of Potsdam, New York and a current participant in the Plan as defined by 29 U.S.C §1002(7). Carlisle has been a participant in the Plan since prior to 2014. Plaintiff, through his undersigned counsel, requested and obtained internal Plan documents pursuant to ERISA § 104(b)(4), 29 U.S.C. § 1024(b)(4). The allegations herein are based on, among other things, the internal Plan documents.

B. Defendants

19. Defendant, the Board of Trustees of the New York State Teamsters Conference Pension and Retirement Fund, is the Plan Sponsor, pursuant to 29 U.S.C. § 1002(16)(B).

20. The Trustee Defendants are the Plan's named fiduciaries with authority to manage and control the administration and operation of the Fund and the

Plan. The Trustee Defendants exercised authority and control over Plan management assets and thus are Plan fiduciaries in doing so. The Defendant Trustees are adult individuals who currently and/or formerly serve(d) as Trustees to the Plan. The Plan is a multiemployer jointly administered Plan, with an equal number of union Trustees and employer Trustees. The current Union Trustees are John A. Bulgaro (Co-Chairman), Brian K. Hammond, George F. Harrigan and Mark D. May. The current Employer Trustees are Michael S. Scalzo, Sr. (Co-Chairman), Mark A. Gladfelter, Samuel D. Pilger and Daniel W. Schmidt. Trustee Defendants also include the following former Trustees: Paul A. Markwitz; Robert Schaeffer; and Tom J. Ventura.

21. Meketa is a global investment consulting and advisory firm incorporated under the laws of the Commonwealth of Massachusetts. In April 2019, Meketa combined with Pension consulting Alliance, LLC. Meketa continues to be a privately held firm with Co-CEOs Steve McCourt and Peter Wooley, each of whom holds a 14% ownership position. Jim Meketa is the Founder and Chairman Emeritus, and holds a 24% ownership position. Meketa is a registered investment advisor (SEC#: 801-14519). Meketa holds itself out as providing services to corporations, financial intermediaries, multiemployer plans, public funds, private wealth clients, endowments, foundations, and healthcare organizations. The contact information included in Meketa's reports to the Plan during the Class Period lists 7 offices:

Boston; Portland; Dan Diego; Chicago; Miami; New York; and London. The New York location is 48 Wall St., 11th Floor, New York, NY 10005. Prior to and during the Class Period, Meketa provided both nondiscretionary investment consulting services and discretionary investment management services to the Plan for compensation. Meketa was a fiduciary to the Plan because it rendered investment advice to the Plan for a fee and exercised discretion and authority over Plan assets as an investment manager.

22. Horizon is an actuarial consulting firm incorporated under the laws of the state of Delaware. Horizon provides actuarial solutions to multiemployer benefit plans. Horizon claims to serve over 120 pension and health and welfare plan in various industries, including construction, trucking, professional sports, hospitality, entertainment, retail food, and communication. Horizon's services include actuarial valuations, PPA compliance, actuarial projections, withdrawal liability, plan design and implementation, rate setting and vendor marketing, and second opinion actuarial review. Horizon has a principal place of business located at 1040 Crown Pointe Parkway, Suite 560, Atlanta, GA 30338, and it maintains offices throughout the United States. Horizon is the Plan's enrolled actuary. During the Class Period, as alleged herein, Horizon exercised authority or control over Plan assets and management, and rendered investment advice for a fee, and thus was a fiduciary.

IV. THE PLAN AND ITS ADVISORS

23. The name of the Plan is the New York State Teamsters Conference Pension and Retirement Fund. The Plan has been assigned the Plan Number 074, and its Employer Identification Number (EIN) is 16-6063585. The Plan assets are held in a trust under the Agreement and Declaration of Trust, as amended.

24. Established in 1954, the Plan is a defined benefit, non-contributory, multi-employer joint-trust pension plan subject to ERISA. In this action, pursuant to ERISA § 409, and the law interpreting it, the relief requested is for the benefit of the Plan and its participants and their beneficiaries. The Plan is maintained in accordance with numerous collective bargaining agreements between unions and employers. The purpose of the Plan is to provide pension benefits to members of unions that have agreements to make contributions to the Plan. The Plan is funded by employer contributions and Plan investment returns.

25. According to the Plan's Form 5500 for fiscal year 2018, as of December 31, 2018, the Plan held \$1,467,462,730 in total assets, with 33,606 participants, inclusive of active participants, retired or separated participants receiving benefits, other retired or separated participants entitled to benefits, and beneficiaries of deceased participants who are receiving or are entitled to receive benefits. As of May 2017, the Plan had 180 participating union employers.

26. The Plan Sponsor is the Board of Trustees of the New York State Teamsters Conference Pension and Retirement Fund, located at 151 Northern Concourse, Syracuse, New York 13212-4047. The Plan's named fiduciaries are the Trustees. The Board of Trustees includes an equal number of Union Trustees (4) and Employer Trustees (4). The current Union Trustees are John A. Bulgaro (Co-Chairman), Brian K. Hammond, George F. Harrigan, and Mark D. May. The current Employer Trustees are Michael S. Scalzo, Sr. (Co-Chairman), Mark A. Gladfelter, Samuel D. Pilger, and Daniel W. Schmidt. The Board of Trustees' mailing address is P.O. Box 4928, Syracuse, New York 13221-4928.

27. The Plan fiscal year is the calendar year, i.e., January 1 to December 31.

28. Meketa is the Plan's nondiscretionary financial consultant. Meketa also is the Plan's discretionary manager for the Plan's private market alternative investments, including PE and certain other alternatives.

29. Fiduciary Counselors, Inc. is the Plan's monitor of Meketa in Meketa's role as discretionary investment manager for the Plan's Private Markets Portfolio. According to the Plan's Form 5500s, for the Class Period, FC was compensated by the Plan as follows:

121a

<u>r</u>	<u>Yea</u>	<u>Compensat</u> <u>ion</u>	<u>Servi</u> <u>ce</u> <u>Code(s)</u>	<u>Service</u> <u>Code Type</u>
4	201	\$180,530	27; 50	Investm ent Advisory (plan); Direct payment from the plan
5	201	\$180,543	27; 50	Investm ent Advisory (plan); Direct payment from the plan
6	201	\$180,125	27; 50	Investm ent Advisory (plan); Direct payment from the plan
7	201	\$182,858	27; 50	Investm ent Advisory

			(plan); Direct payment from the plan
8	201 \$181,453	27; 50	Investm ent Advisory (plan); Direct payment from the plan
Tot al	\$905,509		

30. Horizon is the Plan's enrolled actuary.

V. SUBSTANTIVE ALLEGATIONS

31. During the Class Period, the Board of Trustees, the Trustees and their advisors imprudently deployed and maintained the Plan's assets in an extraordinary, high-risk, high-cost investment and funding strategy to chase an unreasonable and grossly excessive 8.5% "actuarial return target," as the Plan was in dangerous and worsening financial condition, in breach of their fiduciary duties under ERISA. Defendants persisted with the extraordinary risk in the face of continuing evidence the return assumptions were not reasonable or reliable,

volatility and near term losses in high risk asset classes such as EME posed a danger to the Plan's financial condition even if higher returns were achieved in later years, the Plan faced massive illiquidity risk on the 35-40% of Plan assets in PE and other private market alternatives, the Plan's funded status continued to decline, and the Plan's financial condition further deteriorated.

**A. Dangerous Financial
Condition of Plan**

32. From 2010 – 2017, the Plan's funded percentage steadily declined until the Department of Treasury approved extraordinary benefit cuts pursuant to the Multiemployer Pension Reform Act of 2014 ("MPRA):

<u>Year</u>	<u>Funded Percentage</u>
2010	62.88%
2011	61.97%
2012	52.25%
2013	45.6%
2014	46.5%
2015	45.6%
2016	45.8%
2017	45.2%

2018	57.0%
2019	55.8%

1. Critical Status Under The PPA

33. The Pension Protection Act of 2006, Pub. L. 109-280, 120 Stat. 780. (“PPA”) imposed new funding requirements on single-employer and multiple employer defined benefit plans, requiring funding certifications based upon the funded level of the plan. In April 2008, the Plan provided notice to participants the Plan certified its funding status was in the “Endangered Status” (yellow zone) under the PPA for the Plan Year beginning January 1, 2008. “Endangered” meant that the Plan was less than eighty percent funded.

34. The PPA requires the sponsor of an endangered plan to develop a Funding Improvement Plan (“FIP”), aimed at avoiding accumulating additional funding deficiencies and increasing a plan’s funded percentage in accordance with certain benchmarks as of the close of the Funding Improvement Period. *See* 26 U.S.C. § 432. The Plan’s FIP was required to be designed to have the Plan achieve certain mandatory funding benchmarks by the end of a ten-year Funding Improvement Period.

35. The Plan was expected to be 76% funded in 2008. The FIP was designed to increase the Plan’s funded percentage 8%, to 84% within 10 years. Horizon, the Plan’s enrolled actuary, employed an

8.5% investment return assumption to project the 84% funded point in 10 years. Horizon knew or should have known the 8.5% investment return assumption in the FIP funding and actuarial projections was grossly excessive and unreasonable—particularly for an already “endangered” plan— and it grossly inflated the Plan’s funding projections. Internal Plan documents show that the 8.5% assumption was an “actuarial return target” to chase with high risk assets, not an independently determined actuarial return assumption by the Plan’s actuary in accordance with applicable professional standards.

36. By Plan year 2010, the Plan was only 62.9% funded. Accordingly, the Plan entered “Critical Status” (red zone) under the PPA, meaning that the Plan was less than sixty five percent (< 65%) funded for the Plan year. “Critical status” required the Plan to begin operating under a Rehabilitation Plan (“RP”) to improve funding and preserve plan assets and benefits.

37. On May 6, 2010, the Board of Trustees adopted a RP, effective January 1, 2011. RP is required to enable plans to emerge from “critical status” by the end of set rehabilitation period unless the Plan “determines that, based on reasonable actuarial assumptions and upon exhaustion of all reasonable measures,” the Plan is not reasonably expected to emerge from critical status by the end of the rehabilitation period, in which case, the Plan was permitted to adopt a rehabilitation plan that includes reasonable measures designed to allow the pension

fund to emerge from critical status at a later time or forestall possible insolvency. The Plan's Rehabilitation Plan stated:

After consideration of various alternatives and exhaustion of all reasonable measures, the Trustees have determined that it would not be reasonably possible for the Fund to emerge from critical status under the PPA by the end of its rehabilitation period. This conclusion is based on the advice and recommendation of the Fund's actuaries and their use of reasonable actuarial assumptions.

Id. The Plan's rehabilitation period began on January 1, 2013 (*see* The New York State Teamsters Conference Pension and Retirement Fund, Status Certification Report and Actuarial Certification for the Plan Year Beginning January 1, 2013). (REHABILITATION PLAN FOR THE NEW YORK STATE TEAMSTERS CONFERENCE PENSION AND RETIREMENT FUND Effective January 1, 2011 Amended and Restated December 15, 2010, <https://www.nystpensionfund.org/media/1061/final-rehabilitation-plan.pdf>)

38. By January 1, 2013, the Plan was 45.6% funded, a decrease of more than 7% from 2010. Investment returns for Plan year 2013 were just over 5%.

39. The Board of Trustees told participants in the Plan's Summer 2013 newsletter:

While the NYS Fund certainly faces major headwinds, the most important question from participants and beneficiaries is whether there will be sufficient money to pay pension benefits that have been earned and promised. The simple answer is: Yes! Based on the best information and advice from the Fund's actuarial and investment professionals, the Trustees have taken the necessary steps to ensure that there will be assets to pay pensions.

New York State Teamsters Benefit Funds Newsletter, Summer 2013, available at <https://www.nystpensionfund.org/media/1056/2013-summer-newsletter.pdf> (last visited Sept. 20, 2020).

40. In the Fall 2014 Plan newsletter, the Trustees stated:

Every year, the question participants and beneficiaries ask the most is whether there will be sufficient money to pay pension benefits that have been earned and promised. The simple answer remains: Yes! Based on the best information and advice from the Fund's actuarial and investment professionals, the Trustees have taken the necessary steps to ensure that there will be sufficient assets to pay pensions.

New York State Teamsters Benefit Funds Newsletter, Fall 2014 Plan newsletter, available at

<https://www.nystpensionfund.org/media/1057/2014-fall-newsletter.pdf> (last visited Sept. 24, 2020).

2. Critical and Declining Status

41. The Multiemployer Pension Reform Act of 2014 (“MPRA”) established new options for trustees of multiemployer plans in jeopardy of insolvency. The MPRA provided new certification levels: Safe (green), Safe due to special rule (olive), Endangered (yellow), Seriously endangered (orange), Projected to be critical in any of 5 succeeding years (pink), Critical (red), and Critical and declining (gray).

42. As of Plan year 2015, the Plan was 45.6% funded.

43. On January 7, 2016, the Plan gave notice its actuary certified the Plan as being in “Critical and Declining” status under the MPRA. The funded percentage of the Plan was 45.8%. Under the MPRA, a plan is “critical and declining” if it is projected to become insolvent as provided under ERISA § 305(b)(6). The MPRA permits a plan in “critical and declining” status to seek authorization from the Department of Treasury to suspend earned benefits to combat projected insolvency. The Plan is considered insolvent if it is unable to pay benefits (at least equal to the federally guaranteed limit) when due. As of late 2017, the Plan was projected to be insolvent by 2026.

44. On August 31, 2016, the Plan filed an application under MPRA for reduction of pension

benefits. The original application was withdrawn. In a notice from the Plan, the Trustees noted Treasury preferred the Fund use a different mortality table and asked that Fund actuaries better explain the use of lower investment assumptions. New York State Teamsters Conference Pension and Retirement Fund, “Pension Fund to Withdraw and Refile MPRA Application to Address Two Actuarial Issues Identified by Treasury Dept.,” available at https://d3n8a8pro7vhm.cloudfront.net/teamstersforademocraticunion/pages/9328/attachments/original/1491583115/NYS_Fund_withdrawal-and-refile-notice.pdf?1491583115 (last visited Sept. 24, 2020).

45. On May 15, 2017, the Plan submitted a revised MPRA application. The revised application was approved by Treasury on September 13, 2017, with benefit reductions implemented as of October 1, 2017.

3. Benefit Reductions

46. The Plan implemented massive benefit reductions, including a 29% reduction for retired participants, and a 19% reduction for active participants, in addition to the reductions implemented under the RP. The average cut for a retired participant was approximately \$2,000 to \$3,500, from \$5,000.

**B. Imprudent Extraordinary,
High-Risk, High-Cost Asset
Allocation To Chase Excessive and
Unreasonable 8.5% “Actuarial
Return Target”**

47. Internal Plan documents show during the Class Period, the Trustees and their advisors imprudently deployed and maintained a high-risk, high-cost asset allocation with an extraordinary percentage of the Plan’s assets in the highest risk and costliest asset classes, to chase a grossly excessive and unreasonable 8.5% “actuarial return target,” as the Plan’s financial condition worsened and the Plan required returns failed to improve.

48. The Plan’s Investment Policy Statement (“IPS”) provides “[t]he investment strategy of the [Plan] is designed to ensure the prudent investment of funds in such a manner as to provide real growth of assets over time while protecting the value of the assets from undue volatility or risk of loss.” The IPS “Risk Objectives” are: “To accept a level of market risk consistent with moderate interim volatility without sacrificing the potential for long-term real growth of assets”; “To use extensive diversification to minimize exposure to company and industry-specific risks in the aggregate investment portfolio”; and “To avoid extreme levels of volatility that could adversely affect the Plan’s participants”. The IPS “Risk Objective” is “Within the constraints outlined above, to achieve the highest real return possible.”

49. Defendants' adoption of the high-risk, high-cost asset allocation in order to chase a grossly excessive and unreasonable 8.5% "actuarial return target conflicted with these provisions of the Plan's IPS.

**1. Grossly Excessive and
Imprudent 8.5% Actuarial Return
Target**

50. As the Plan's enrolled actuary, Horizon has a professional duty to provide actuarial services consistent with relevant generally accepted standards for professional responsibility and ethics. § 901.20 Standards of performance of actuarial services, 20 CFR Ch. VIII (4-1-12 Edition), (b) *Professional duty*. Additionally, in performing its duties, Horizon is required to ensure that "...the actuarial assumptions are reasonable individually and in combination..." § 901.20 Standards of performance of actuarial services, 20 CFR Ch. VIII (4-1-12 Edition), (e) *Assumptions, calculations and recommendations*. During the Class Period, Horizon determined and used an 8.5% actuarial return assumption for the Plan. Horizon knew or should have known the 8.5% was grossly excessive and unreasonable under accepted actuarial standards. Horizon knew or should have known the 8.5% failed to account for the extraordinary excessive cost and risk in the Plan's portfolio.

51. Professional actuarial standards require that the investment return assumption be "reasonable."

Actuarial Standards of Practice No. 27 – Selection of Economic Assumptions for Measuring Pension Obligations, Section 3.6, Selecting a Reasonable Assumption. In turn, reasonability requires that the assumption exhibit no significant bias, i.e., it is not significantly optimistic or pessimistic. ASOP No. 27, Section 3.6 (e). Horizon knew or should have known the 8.5% assumption used during the Class Period exhibited significant bias, in particular given the published results of its very own “Horizon Survey of Capital Market Assumptions.” For example, the Horizon Survey, 2015 Edition, states the probability of achieving an 8% return over a 10-year period was less than 1/3 based on its survey of investment professionals.

https://www.horizonactuarial.com/uploads/3/0/4/9/30499196/horizon_cma_survey_2015_v0731.pdf. Use of the 10 year projection in the Horizon survey (vs. the 20 year projection) is appropriate given the critical funded status and negative cash flows. In 2015, the probability of achieving an 8.5% return was likely barely more than 25%. Via simple extrapolation of published probabilistic results.

52. Actuaries are ultimately responsible for selecting assumptions not otherwise mandated by law or set by third parties. Indeed, Horizon acknowledges its responsibility in selecting the 8.5% assumption:

The investment return assumption used for purposes of the ERISA funding valuation is a reasonable estimate of the long-term net investment return for the Plan’s assets and,

in combination with the other assumptions used, provides our best estimate of anticipated experience under the Plan. The valuation interest rate was chosen based on our professional judgement, the Plan's asset allocation and investment policy, past experience, and the results of Horizon Actuarial's 2016 Survey of Capital Market Assumptions. New York State Teamsters Conference Pension and Retirement Fund, Actuarial Valuation as of January 1, 2016, Appendix B, Actuarial Assumptions and Methods, Interest Rates.

53. While Horizon's language on the investment assumption selection purportedly complies with the disclosure requirements of ASOP No. 27, Section 4.1.2, it lacks sufficient detail for another actuary to assess its reasonableness as required under Section 4.1.1. This lack of disclosure is presumably because the 8.5% assumption simply cannot be justified:

a. Section 3.8.3 (a) of ASOP No. 27 requires the actuary to explicitly consider the Plan's Investment Policy, which is not disclosed elsewhere in the Actuarial Report;

b. Section 3.8.3 (d) of ASOP No. 27 cautions against anticipating superior investment manager performance: "The actuary should not assume that superior or inferior returns will be achieved, net

of investment expenses, from an active investment management strategy compared to a passive investment management strategy unless the actuary believes, based on relevant supporting data, that such superior or inferior returns represent a reasonable expectation over the measurement period.” Horizon provides no such supporting relevant data to justify expected returns.

c. Section 3.8.3 (g) of ASOP No. 27 cautions that the timing of expected contributions and benefit payments may affect the plan’s liquidity needs and investment opportunities. Since the Plan is poorly funded, with significant negative cashflows, Horizon should have considered these factors instead of selecting an assumption which represented “...a reasonable estimate of the long-term net investment return...”

Given Horizon’s material deviation from the requirements set forth in ASOP No. 27, Horizon further erred in not disclosing this deviation, as required under Section 4.3 (b).

54. Finally, Horizon failed to reduce its 8.5% assumption during the Class Period, which is contrary to prevailing actuarial practice which saw

routine, predictable, and justified reductions in assumed investment returns.

a. Horizon's own capital market surveys during this time period showed a continued decline in the probability of achieving a 7.50% return for a benchmark multiemployer plan portfolio, from 40.6% in 2014 to 33.6% in 2019.

b. Assumption surveys from Deloitte illustrate declines in the average investment return assumptions used in corporate financial reporting from 7.10% in Fiscal 2014 to 6.54% in Fiscal 2018, with approximately 1/3 of respondents lowering their assumptions each year. Fortune 500 companies with defined benefit plans.

c. Assumption surveys from Willis Towers Watson show similar declines in average assumed investment returns from 6.95% in 2016 to 6.49% in 2019. Survey of 1,000 + companies with global operations, US assumptions only.

55. Internal Plan documents obtained by Plaintiff show the 8.5% assumption was in fact an "actuarial return target." The Trustees and their advisors imprudently determined and maintained the Plan's extraordinary high risk, high cost asset allocation to chase the grossly excessive and unreasonable 8.5%

“actuarial return target.” Meketa advised the Trustees in March 2014: “In order to continue to assume the Fund’s 8.5% target return, the Fund must be significantly invested in asset classes that are expected to outperform 8.5% over long-term periods.” In May 2014, Meketa advised: “The overweight to emerging markets equities and private equities enable the Fund to assume an 8.5% expected return.” Horizon knew or should have known an 8.5% actuarial investment return assumption to project the Plan’s actuarial funding and liabilities was unreasonable and unsupportable by an actuary independently determining the assumption under applicable professional standards, and determining and employing an 8.5% “actuarial return target” to construct an extraordinary high risk, high cost asset allocation was imprudent and misleading in the Plan’s dangerous financial condition.

56. Internal Plan documents show the 8.5% “actuarial return target” exceeded Meketa’s 20-year capital markets assumptions for all but the riskiest asset classes, EME and PE. In presenting its long-term expected return assumptions for asset classes, Meketa told the Trustees: “The expected returns for many asset classes are not conducive to achieving [the] goal [of] [a long term target return between 7.5% and 8.5%]... [and] [a]s a result, [the Plan] allocates more heavily to the higher returning asset classes in order to increase the likelihood of reaching the 8.5% target return.” Meketa’s accompanying chart shows only EME and PE as exceeding the “8.5% Target.”

Similarly, Meketa advised: “Given the historically low interest rates, investing a larger portion of a plan’s assets in riskier asset classes may be the only way to achieve a plan’s targeted return....” Meketa also knew as the investment consultant to another Taft-Hartley plan with a similarly high-risk asset allocation significantly overweight in EME and PE (the American Federation of Musicians & Employers Pension Fund (“AFM-EPF”), that the AFM-EPF’s actuary, Milliman, refused the trustees’ request to increase the 7.5% actuarial return assumption based on the plan’s high risk asset allocation.

57. Internal Plan documents show the Trustees and their advisors knew EME and PE exposed the Plan assets to the known danger of extreme volatility and illiquidity and lack of transparency. Meketa advised the Trustees: “Based on Meketa Investment Groups long-term expectations, only a handful of asset classes are priced to produce returns above 8% per year [and] [a]ll of these asset classes incorporate a high degree of volatility.” Meketa advised: “all asset classes with high expected returns are likely to underperform their ‘safer’ counterparts over relatively frequent short term horizons.” Concerning, EME, Meketa highlighted the risks of high volatility – “Significant short-term relative performance risk – and high cost – “More expensive (higher management fees, trading cost, custody costs, etc.)”. Near term losses posed a significant danger to the Plan’s financial condition, even if greater returns were achieved in later years.

58. Concerning PE, Meketa highlighted the risks of “Illiquidity”, “Higher management fees (1.5% to 2.5% per year on committed capital, plus performance fees)” and “Lack of transparency.” Meketa’s reports as investment consultant and alternatives asset manager also stated under “Disclaimer”: “This report does not contain all the information necessary to fully evaluate the potential risks of any of the investments described herein. Because of inherent uncertainties involved in the valuations of investments that are not publicly traded, any estimated fair values shown in this report may differ significantly from the values that would have been used had a ready market for the underlying securities existed, and the differences could be material. Note that for unlisted securities the valuations may be lagged by one or more calendar quarters, or may reflect the original cost.”

59. During the Class Period, 30% or more of the Plans’ assets were allocated to EMEs and PE. In March 2014, Meketa advised: “Relative to the peer universe, the Fund is significantly underweight domestic and international developed market equities, and is significantly overweight to emerging markets and private equity.”

60. In addition, the Trustees and their advisors maintained significant allocations to other high-risk private market alternatives classes managed by Meketa, including infrastructure, and natural resources. During the Class Period, the EME and PE investments together with the Plan’s other high risk

alternative investments constituted more than 50% of the Plan's assets.

61. The following chart shows the Plan's investment allocations to EMEs, PE and other alternatives during the stated years:

<u>Asset Class</u>	<u>2014</u>	<u>2015</u>	<u>2016</u>	<u>2017</u>	<u>2018</u>	<u>2019</u>	<u>2020 Q2 (6/30)</u>
Hedge (incl. underlying hedge)	4.3%	5.0%	5.8%	4.6%	4.6%	5.5%	5.8%
Private Equity	17%	19.6%	19.9%	18.3%	20.6%	20.0%	21.2%
Infrastructure	6.1%	8.1%	7.9%	6.4%	6.7%	4.6%	4.7%
Natural Resources	7.8%	7.3%	8.9%	9.5%	10.1%	8.8%	8.4%
Emerging Market	15.4%	15.6%	14.7%	15.6%	13.5%	15.0%	15.0%

Equities							
Total	5						
al	0.6	5.6	7.2	4.4	5.5	3.9	5.1
	%	%	%	%	%	%	%

62. The following is data from the Wilshire Trust Universe Comparison Service for other Taft-Hartley plans, which reflects that the Plan's aggressive asset allocation is an extreme outlier:

Year	U.S. Equities	Intl Equities	U.S. Fixed Inc	Real Estate	Alternatives	Cash
2013						
Large	45	12	23	3	12	3
Small	51	8	30	0	0	3
2014						
Large	48	12	19	3	12	3
Small	51	9	27	3	0	3
2015						
Large	46	12	24	3	13	3
Small	48	9	32	1	0	4
2016						
Large	47	11	22	3	13	3
Small	49	9	30	1	0	4

2. Extraordinary Percentage of Plan Assets Allocated High-Risk, High-Cost Volatile EME

63. To chase the excessive 8.5% "actuarial return target," Defendants maintained an extraordinary percentage of the Plan's assets in high-risk, high-cost volatile EME, grossly over-exposing the Plan's assets to high risk and volatility, as the Plan remained in dangerous financial condition. The average Taft-Hartley plan had 4.5% of assets in EME. Nonetheless, during the Class Period, Defendants maintained

13.5% to 15.6% of the Plan's assets in EME, to "enable the Fund to assume an 8.5% [actuarial] return."

64. As alleged above, Defendants knew volatility in the "significantly overweight" EME asset class was a mortal enemy to the Plan in its dangerous condition, as near term losses lower the base for subsequent compounding even if high returns occur in later years, particularly where, as here, the Plan required significant cash outflows. According to Meketa's capital markets assumptions, EME was the highest risk asset class in terms of volatility.

65. During the Class Period, EME continued to experience high volatility. In January, 2014 Meketa advised: "So far in 2013, economic growth in most developed economies has been close to expectations, while emerging market economic growth has been slower than expected and more varied"; "The recent increase in interest rates and reduction in liquidity will likely weigh on growth in emerging markets"; "China growth in 2013 has disappointed, resulting in lower demand for commodities and other emerging markets goods"; "The recent increase in real interest rates and reduction in global liquidity, along with declining demand from China, will likely create headwinds for emerging market growth"; "Uncertainties around global demand (particularly from emerging markets), stimulative monetary policy, and geopolitical tensions will likely cause heightened volatility".

66. In March 2014, Meketa repeated the advice concerning continued headwinds and heightened volatility in emerging markets. Meketa further advised the Plan’s significantly overweight allocation to EME was hurting the Plan’s returns. Meketa advised: “Relative to the peer universe, the Fund is significantly underweight domestic and international developed market equities, and is significantly overweight to emerging markets and private equity.” Meketa advised: “Pension Funds that performed strongly in 2013 had large allocations to domestic and developed international equities, . . . They also had smaller allocations to emerging markets debt and emerging markets equity, which returned -9.0 and -2.6%, respectively.”

67. In May 2014, Meketa advised” “Pension Funds that performed strongly in 2013 had large allocations to domestic and developed international equities, which gained 33.6% and 22.8%, respectively. They also had smaller allocations to emerging markets debt and emerging markets equity, which returned -9.0 and -2.6%, respectively.” Meketa provided the following comparison:

Pension Fund vs. U.S. Taft-Hartley Peers
Equity Allocation

	Current Policy	U.S. Peer Group	Difference	10-Year Index Return ¹	20-Year Expected Return
Total Equities	55%	50%	+5%	-	
Domestic Equity	18	32	-14	7.4%	8.2%
International Developed Equity	6	12	-6	6.9%	9.0%
International Emerging Markets Equity	16	2	+14	11.2%	12.0%
Private Equity	15	4	+11	13.2%	10.5%

Meketa advised: “Relative to the peer universe, the Fund is significantly underweight domestic and

international developed market equities, and is significantly overweight to emerging markets and private equity.” Meketa advised: “In 2013, the Pension & Retirement Fund returned 9.6%, gross of fees (these numbers will be revised as private market figures become available). This return, on an absolute basis, exceeded the 8.5% return expectation. Compared to peers however, this return ranked below the median return of the peer group. This was not surprising given the Fund’s relatively large allocation to emerging markets equity and debt compared to peers.”

68. In August, 2014, Meketa advised: “Forecast for GDP in major economies recently increased, while estimates for emerging markets excluding China fell.”

69. A September 2014 IMF Staff Discussion Note observed: “the IMF’s October 2014 [WEO] envisage EM medium-term growth at 3 percentage points below where it was predicted to be when the forecast was made in 2010 . . . ,” and “[t]he IMF’s medium-term outlook for Ems was progressively marked down by more than a half percentage point per year between 2010 and 2013, suggesting continued deterioration in sentiment toward Ems growth prospects.” *IMF Staff Discussion Note, Emerging Market Volatility: Lessons from the Taper Tantrum* (September 2014) (p. 15). A September 2014 IMF Working Paper likewise observed:

Most emerging markets started to experience a broad-based economic slowdown

within three years of the Lehman fallout. Emerging Asia was the first region to decelerate, with growth slowing down in about 90 percent of the countries in early 2011. Other regions lost steam shortly after, with more than 80 percent of Middle East and South Africa group facing a slowdown by the end of 2011. Latin America and EM Europe decelerated soon after, mostly in late 2012-early 20 13....Considering all regions, by 2012Q3 over 85 percent of the Ems in our sample were decelerating simultaneously

IMF Working Paper: Growth Surprises and Synchronized Slowdowns in Emerging Markets -An Empirical Investigation, Ghada Fayad and Robert Perilli (September 2014) at p. 8. The IMF Paper further observed:

Average real GDP growth in emerging markets was revised down by 1.1 percentage points between the publication of the IMF's [WEO] in the Fall of 2012 and its sequel in the Fall of 2013. This compares to a trimming of less than 0.4 percent for advanced economies..., indicating that the EM slowdown was also influenced by domestic and idiosyncratic factors. In addition, downward revisions in near-term growth were accompanied by revisions in the medium term growth forecast, suggesting that part of the slowdown reflected a reexamination of potential output. For instance, WEO's

medium term projection (gauged as the five-year ahead growth forecast) was revised down by 0.7 percentage points for emerging markets, against a 0.1 percent revision for advanced economies, during this period.

(Id. at 9.)

70. The Plan's EME exposure was in fact greater than the 15% of the Plan assets in dedicated EME investments. For example, in January 2015, Meketa advised: Plan's investment in Artisan Global Value "[r]ecently... trailed the MSCI World Index due to a 10% cash position and holdings in emerging markets equities." The Plan's Private Markets Portfolio also included a \$15 million investment in Actis Emerging Markets 3, L.P.

71. In November, 2015, Meketa advised: "The current environment of strong US dollar has hurt emerging market returns"; "Emerging market equity is a high risk asset class and, correspondingly, drawdowns can be severe"; "Emerging markets have experienced significant volatility around a generally outperforming trend"; "Emerging market countries have a history of being at the center of financial crises"; "The risks [in EME] still remain. Higher level of volatility. Less diversification benefit versus 15-20 years ago. Event and political risk." Meketa further advised: "Institutional investors have made significant allocations to emerging market equities in the past 10 years. -Average allocation for pension funds is 4.5%"; "Meketa... recommends long term

investors allocate to emerging market equities according to the following guidelines: Minimum allocation: 10% of total equities allocation to emerging markets. Base case: most long-term investors allocate 20-25% of total equities allocation. Needing high returns: consider 30% or more of total equities allocation to emerging markets.” The Plan’s allocation to its dedicated EME investments of total equities during the class period as a percent were as follows:

Plan EME Assets as a % of Total Plan Equities Assets						
<u>2014</u>	<u>2015</u>	<u>2016</u>	<u>2017</u>	<u>2018</u>	<u>2019</u>	<u>2020 Q2 (6/30)</u>
26.4%	27.4%	26.4%	26.4%	26.4%	26.1%	27.5%

72. In January 2016, Meketa advised: “Emerging markets have recently experienced lower investment returns, due in part to slowing growth in China, declining commodity prices, and a stronger U.S. dollar”; “Additionally, several emerging economies recently began cutting interest rates. If another major decline in growth occurs, central banks would have few tools available to stimulate growth. Growth in emerging markets economies could be uneven going forward, with commodity export-dependent economies particularly hurt by a sustained slowdown

in global growth and prices. The future of China's economy is a key consideration in emerging markets.”

73. Meketa knew on January 26, 2016, Thomas E. Perez, then-Secretary of the U.S. Department of Labor, filed an action under ERISA against fiduciaries of the IAM Pension Fund, a Taft-Hartley, multi-employer, defined benefit pension plan, alleging the trustees, among other things, failed to loyally and prudently select the plan's service providers and created conflicts of interest by, among other things, hiring Meketa, an independent plan investment consultant, as a discretionary private markets portfolio manager. *Perez v. Roach, Jr. et al*, District of Columbia District Court, Case No. 1:16-cv-00120. The complaint alleged Meketa, as financial consultant, prepared a strategic investment plan, which, among other things, recommended the plan hire an additional discretionary private markets investment manager. *Id.* ¶¶57 The Trustees ultimately hired Meketa in that role and hired the plan's other financial consultant, Segal Advisors, Inc., to monitor Meketa in Meketa's role as investment manager, for which the plan paid Segal additional compensation. *Id.* ¶¶62-64. The complaint alleged the trustees “knew that hiring Meketa as Investment Manager... of the Private Markets Portfolio would create multiple conflicts given Meketa's many roles with the Fund... [, a]s a result of the conflicts created by the [trustees'] hiring of Meketa as investment manager..., it was necessary for the Fund to hire a firm to monitor Meketa in this role at an additional

cost to the Fund... [and] [t]his additional cost would not have been necessary if the [t]rustees had hired someone other than Meketa as investment manager...” *Id.* ¶¶63-64

74. While serving as independent investment consultant for the AFM-EPF, Meketa made a similar, unseemly pitch to serve as the AFF-EPF discretionary PE manager, which the AFM-EPF counsel characterized as reflecting Meketa’s “bad judgment.” Meketa did not meaningfully disclose the *Perez* allegations to the AFM-EPF); rather, Meketa refused to give the AFM-EPA “any solid information” and instead provided “contradictory” information that was “carefully worded and misleading.” The AFM-EPF trustees rejected Meketa’s unseemly pitch so serve in the dual role.

75. Meanwhile, in early February 2016, Meketa advised the AFM-EPF the discretionary portfolios managed by Meketa for other clients were completely out of emerging markets equities due to global uncertainty and China conditions unless constrained to maintain such an allocation. Meketa also advised the AFM-EPF of the significant downside risk and limited upside potential of EMEs in the then-current environment and recommended the AFM-EPF substantially to de-risk from EME and recue its EME allocation by 40%. Meketa had previously advised the AFM-EPF that the reason it underperformed its Taft-Hartley peers was due to its overweight allocations to EME and PE and underweight allocations to domestic equities.

76. Vontobel was removed from the Plan in 2016. The Trustees added another EME fund, SSgA/MSCI index, investing \$35 million on August 31, 2016.

77. On April 26, 2017, the Trustees added another actively managed EME fund, GQG Partners, investing \$36 million. On April 28, 2018, the Trustees added \$28 million to the GQG EME investment.

78. The following chart shows the Plan's EME asset values reported to the Trustees by Meketa during the Class period:

	Total EME (\$ million)	Aberdeen (\$ million)	Dimensio nal (\$ million)	Vontobe l (\$ million)	SSgA (\$ millio n)	GQG (\$ million)
12/31/2013	229.2	107.9	47.3	74.1	-	-
11/30/2014	221.5	100.1	38.5	82.9	-	-
12/31/2014	209.6	94.0	37.3	78.3	-	-
12/31/2015	186.7	81.1	34.0	71.6	-	-
12/31/2016	170.6	94.0	42.6	0	34.0	-
1/31/2017	179.5	98.6	45.1	-	35.8	-
12/31/2017	192.8	66.0	44.0	-	46.7	36.1
6/30/2017	200.8	79.7	50.0	-	40.2	30.9
1/31/2018	208.0	71.1	46.9	-	50.6	39.5
6/30/2018	177.7	33.7	40.3	-	43.5	60.2
10/31/2018	157.3	31.1	34.8	-	39.3	52.2
12/31/2018	163.4	32.4	36.3	-	39.8	55.0
3/31/2019	180.5	35.8	39.5	-	43.7	61.5
7/31/2019	184.1	37.0	38.8	-	43.2	65.1
12/31/2019	195.1	39.1	41.7	-	47.1	67.4
3/31/2020	147.5	28.9	28.5	-	35.8	54.2
6/30/2020	180.3	35.2	36.1	-	42.6	66.4

79. The Plan's extraordinary EME allocation continued to experience high volatility resulting in lost returns during the Class Period. Based on the EME asset values reported by Meketa, the asset transfers listed in Meketa's reports and the removal of Vontobel from the Plan portfolio (assuming the approximately \$13.2 million Vontobel market value balance as of 3/31/2016 of \$73.2 million after transfers from Vontobel to other Plan investments remained somewhere in the Plan but was not transferred to the Plan's dedicated EME investments), the Plan ***lost approximately \$31 million*** in value on the EME assets from January 1, 2014 through June 30, 2020. (73.2-35)

80. The following chart shows the yearly management fees for the dedicated EME investments:

	Aberdeen (\$ thousand)	Vontobel (\$ thousand)	Dimensiona 1 (\$ thousand)	SSgA (\$ thousand)	GQG (\$ thousand)	TOTAL (\$ million)
2014	944.8	756.8	435.4	-	-	2.137
2015	722.1	655.3	279.8	-	-	1,657.2
2016	837.8	149.4	244.8	-	-	1,232.0
2017	633.2	-	324.6	67.6	112.1	1,137.5
2018	356.8	-	337.4	70.8	261.2	1,026.2
2019	310.1	-	284.0	39.3	360	993.4
2020	331.9 (est.)	-	304.1 (est.)	70.6 (est.)	437.8(est.)	1,144 (est.)

81. The Plan's EME investments generally substantially lagged the S&P 500, the Dow Jones Industrial Average ("DJIA"), and the Vanguard Balanced Index Fund ("VBIAX"). The following table shows total Plan EME investment performance as reported by Meketa for the Class Period compared to the S&P, DJIA, and VBIAX returns:

	<u>PY</u> <u>2014</u>	<u>PY</u> <u>2015</u>	<u>PY</u> <u>2016</u>	<u>PY</u> <u>2017</u>	<u>PY</u> <u>2018</u>	<u>PY</u> <u>2019</u>	<u>PY 2020</u>
Plan EME	2.0%	-10.9%	10.6%	34.2%	-15.4%	19.3%	-7.6%
							(as of end Q2)
S&P 500	11.39%	-0.73%	9.54%	19.42%	-6.24%	28.88%	-4.4%
							(as of end Q2)
DJIA	7.52%	-2.23%	13.42%	25.08%	-5.63%	22.34%	-9.9%
							(as of end Q2)
Vanguard Blncd. Idx Fd. Adm. (VBIAX)	10%	0.51%	8.77%	13.89%	-2.86%	21.79%	-0.8%
							(as of end Q2)

82. The Plan had \$229.2 million in dedicated EME investments as of January 1, 2014, and had \$221.5 million in dedicated EME investments as of November 30, 2014. \$229.2 million invested on January 1, 2014 in Vanguard Balanced Index Fund Admiral Shares (VBIAX) would have a value as of October 12, 2020 of \$411.2 million (gross of fees). \$221.5 million invested in VBIAX on November 30, 2014 would have a value of \$362.1 million (gross of fees) as of October 12, 2020.

83. The Trustees and their advisors knew the EME investments were losing vital returns for the Plan, which remained in dangerous and worsening financial condition. Prudent fiduciaries would not have allocated and maintained 13% to more than 15% of Plan assets to EME, particularly with the other extraordinarily overweight allocations to other high risk illiquid assets in the dangerous financial circumstances facing the Plan where near term returns were vital to recovery. The Trustees and their advisors imprudently did so, resulting in substantial losses of returns in the Class Period.

3. Extraordinary Allocation of Plan Assets To High-Risk, High Cost Dark Private Market Alternatives

84. The Plan's extraordinary significantly overweight allocation to EME was particularly imprudent given the extraordinary substantially overweight allocation of Plan assets to PE and other private market alternatives. As alleged above, 50% of the Plan's assets were allocated to EME and PE and other private market alternatives during the Class Period. The extraordinary overweight allocation of Plan assets to high risk, high cost, illiquid alternative investments, as with the significant overweight EME allocation, was to chase the 8.5% "actuarial return target," as the Plan remained in dangerous and worsening financial condition. Further, the heavy allocation of Plan assets to illiquid alternatives has exposed the Plan to additional risk of losses in the pandemic-related financial crisis, as alternative

private market investments have been hit with redemption requests by investors and some portfolio companies have been crushed and failing.

85. The Plan's alternative private market investments include PE, Natural Resources and Infrastructure. Meketa provided quarterly reports to the Trustees regarding the alternatives. FC provided a report annually to the Trustees concerning FC's review of Meketa's services in Meketa's capacity as an investment manager for the Plan's PE, Natural Resources and Infrastructure portfolios.

86. The significantly overweight allocation of Plan assets to private alternatives investments constituted an imprudent high risk for the Plan, particularly given the Plan's significantly overweight allocation to high risk, high cost EME and the Plan's dangerous financial condition. Meketa's current Form ADV, Part 2A Brochure filed with the SEC includes the following:

Private market investments involve a significant degree of risk and are suitable only for sophisticated clients who have no immediate need for liquidity of the amount invested and who can afford a risk of loss of all or a substantial part of such investment.

* * *

There is no assurance that such investments will be profitable and there is a

substantial risk that associated losses and expenses will exceed income and gains.

* * *

. . . the performance of any private market investment is subject to numerous factors which are neither predictable nor within our or our client's (as the case may be) control.

* * *

Private market investments require a commitment by clients for an extended period of time to contribute substantial amounts of capital, if and when called and often on short notice. Clients who are unwilling or unable to comply with their capital contribution obligations risk forfeiture of a portion, and possibly all, of their investments. Furthermore, clients will generally not be permitted to transfer their interests in such investments without the consent of the private market investment manager, which generally may be granted or withheld in the private market investment manager's sole discretion, and upon satisfaction of certain other conditions, including compliance with applicable federal, state, and non-U.S. securities laws.

The structure of private market investments precludes investors and their representatives (including us) from actively

participating in the investment decisions and management of the private market investment manager or its affiliates that manage the investments. Clients are required to rely entirely upon the judgement and the ability of the private market investment manager in making underlying investments and neither clients nor we will be able to evaluate the risks and economic merits of potential investment opportunities that come to the attention of the private market investment manager.

There generally will be little or no publicly available information regarding private market investments, their investment managers, or their prospects. Many investment recommendations and/or investment decisions made by us will be based on information from non-public sources, and we often will be required to make investment recommendations and/or investment decisions without complete information or in reliance upon information provided by private market investment managers and other third parties that is impossible or impracticable to verify.

Meketa, Disclosure Brochure (Form ADV, Part 2A) (June 2020), at 6-7, available at https://files.adviserinfo.sec.gov/IAPD/Content/Common/crd_iapd_Brochure.aspx?BRCHR_VRSN_ID=651318 (last visited Oct. 13, 2020) (emphasis added).

87. Likewise, Meketa's quarterly reports to the Trustees as investment consultant and alternatives manager stated the following disclaimers:

The data are provided for informational purposes only, **may not be complete, and cannot be relied upon for any purpose other than for discussion.**

Meketa Investment Group has prepared this report on the basis of sources believed to be reliable. The data are based on matters as they are known as of the date of preparation of the report, and not as of any future date, and will not be updated or otherwise revised to reflect information that subsequently becomes available.

* * *

In general, the valuation numbers presented in this report are prepared by the custodian bank for listed securities, and by the fund manager or appropriate General Partner in the case of unlisted securities. The data used in the market comparison sections of this report are sourced from various databases. These data are continuously updated and are subject to change.

This report does not contain all the information necessary to fully evaluate the potential risks of any of the investments described herein. Because

of inherent uncertainties involved in the valuations of investments that are not publicly traded, any estimated fair values shown in this report may differ significantly from the values that would have been used had a ready market for the underlying securities existed, and the differences could be material. Note that for unlisted securities the valuations may be lagged by one or more calendar quarters, or may reflect original cost.

See, e.g., Meketa Fund Evaluation Report, Investment Review, Mar. 10-13, 2014, at pp. 2, 164(emphasis added); Meketa Fund Evaluation Report, Investment Review, Oct. 30-31, 2017, at pp. 2, 86 (emphasis added). Similarly:

INFORMATION USED TO PREPARE THIS REPORT WAS OBTAINED FROM INVESTMENT MANAGERS, CUSTODIANS, AND OTHER EXTERNAL SOURCES. WHILE WE HAVE EXERCISED REASONABLE CARE IN PREPARING THIS REPORT, WE CANNOT GUARANTEE THE ACCURACY OF ALL SOURCE INFORMATION CONTAINED HEREIN.

See, e.g., Meketa Fund Evaluation Report, Investment Review, Oct. 30-31, 2018, at p. 111(emphasis added); Meketa Fund Evaluation Report, Investment Review, Mar. 18-19, 2020, at p. 96 (emphasis added).

88. Meketa reported the following for the Plan's PE, Natural Resources and Infrastructure portfolios as of December 31, 2014, as follows:

Aggregate Private Equity Program		
Number of Partnerships	of	67
Committed Capital		\$406.3 million
Capital Called		\$328.5 million
Distributions		\$231.3 million
Reported Value		\$236.8 million
Total Value Multiple		1.4x
Gross IRR		12.9%
Net IRR		12.3%

Aggregate Natural Resources Program		
Number of Partnerships	of	19
Committed Capital		\$126.7 million
Capital Called		\$92.0 million
Distributions		\$20.2 million
Reported Value		\$75.6 million

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Total Multiple	Value	1.0x
Gross IRR		0.8%
Net IRR		1.2%

Aggregate Infrastructure Program		
Number of Partnerships		14
Committed Capital		\$128.1 million
Capital Called		\$124.0 million
Distributions		\$69.9 million
Reported Value		\$85.3 million
Total Multiple	Value	1.3x
Gross IRR		5.5%
Net IRR		5.1%

Meketa's 2014 capital markets assumptions for the portfolios were: PE 9.8%; Natural Resources 8.5%; Infrastructure 8.3%; Public U.S. Equity 7.8%.

89. Meketa reported the following for the Plan's PE, Natural Resources and Infrastructure portfolios as of December 31, 2015, as follows:

160a

Aggregate Private Equity Program		
Number of Partnerships		78
Committed Capital		\$454.4 million
Capital Called		\$359.7 million
Distributions		\$279.4 million
Reported Value		\$237.1 million
Total Value Multiple		1.4x
Gross IRR		12.3%
Net IRR		11.7%

Aggregate Natural Resources Program		
Number of Partnerships		23
Committed Capital		\$150.6 million
Capital Called		\$107.4 million
Distributions		\$25.3 million
Reported Value		\$81.6 million
Total Value Multiple		1.0x
Gross IRR		-0.1%

161a

Net IRR	-0.5%
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Aggregate Infrastructure Program		
Number of Partnerships	of	19
Committed Capital		\$147.4 million
Capital Called		\$136.8 million
Distributions		\$82.8 million
Reported Value		\$103.5 million
Total Value Multiple		1.3x
Gross IRR		7.2%
Net IRR		6.8%

Meketa's 2015 capital markets assumptions for the portfolios were: PE 9.6%; Natural Resources 8.5%; Infrastructure 8.3%; Public U.S. Equity 7.8%.

90. Meketa reported the following for the Plan's PE, Natural Resources and Infrastructure portfolios as of December 31, 2016, as follows:

Aggregate Private Equity Program		
Number of Partnerships	of	84

162a

Committed Capital	\$475.5 million
Capital Called	\$392.7 million
Distributions	\$336.5 million
Reported Value	\$238.1 million
Total Value Multiple	1.5x
Gross IRR	12.2%
Net IRR	11.6%

Aggregate Natural Resources Program	
Number of Partnerships	26
Committed Capital	\$160.1 million
Capital Called	\$126.9 million
Distributions	\$32.2 million
Reported Value	\$103.6 million
Total Value Multiple	1.1x
Gross IRR	1.8%
Net IRR	1.4%

Aggregate Infrastructure Program		
Number of Partnerships		21
Committed Capital		\$154.4 million
Capital Called		\$146.1 million
Distributions		\$110.8 million
Reported Value		\$97.2 million
Total Value Multiple		1.4x
Gross IRR		7.8%
Net IRR		7.4%

Meketa's 2016 capital markets assumptions for the portfolios were: PE 9.4%; Natural Resources 8.4%; Infrastructure 8.1%; U.S. Equity 7.8%.

91. Meketa reported the following for the Plan's PE, Natural Resources and Infrastructure portfolios as of December 31, 2017, as follows:

Aggregate Private Equity Program		
Number of Partnerships		90
Committed Capital		\$497.8 million
Capital Called		\$426.3 million

164a

Distributions	\$411.2 million
Reported Value	\$239.5 million
Total Value Multiple	1.5x
Gross IRR	12.7%
Net IRR	12.2%

Aggregate Natural Resources Program	
Number of Partnerships	31
Committed Capital	\$170.7 million
Capital Called	\$144.0 million
Distributions	\$40.1 million
Reported Value	\$116.7 million
Total Value Multiple	1.1x
Gross IRR	1.8%
Net IRR	3.4%

Aggregate Infrastructure Program	
Number of Partnerships	23

165a

Committed Capital	\$159.3 million
Capital Called	\$155.0 million
Distributions	\$153.2 million
Reported Value	\$81.7 million
Total Value Multiple	1.5x
Gross IRR	8.7%
Net IRR	8.3%

Meketa's 2017 capital markets assumptions for the portfolios were: PE 9.4%; Natural Resources 8.4%; Infrastructure 8.4%; U.S. Equity 7.5%.

92. Meketa reported the following for the Plan's PE, Natural Resources and Infrastructure portfolios as of December 31, 2018, as follows:

Aggregate Private Equity Program	
Number of Partnerships	98
Committed Capital	\$536.3 million
Capital Called	\$459.1 million
Distributions	\$467.0 million
Reported Value	\$252.0 million

166a

Total Value Multiple	1.5x
Gross IRR	12.9%
Net IRR	12.4%

Aggregate Natural Resources Program	
Number of Partnerships	35
Committed Capital	\$188.2 million
Capital Called	\$155.8 million
Distributions	\$51.7 million
Reported Value	\$111.7 million
Total Value Multiple	1.0x
Gross IRR	1.1%
Net IRR	0.8%

Aggregate Infrastructure Program	
Number of Partnerships	25
Committed Capital	\$167.0 million
Capital Called	\$165.8 million

167a

Distributions	\$170.4 million
Reported Value	\$84.1 million
Total Value Multiple	1.5x
Gross IRR	8.8%
Net IRR	8.4%

Meketa's 2018 capital markets assumptions for the portfolios were: PE 8.3%; Natural Resources 8.7%; Infrastructure 7.3%; U.S. Equity 7.3%.

93. Meketa reported the following for the Plan's PE, Natural Resources and Infrastructure portfolios as of December 31, 2019, as follows:

Aggregate Private Equity Program	
Number of Partnerships	106
Committed Capital	\$578.7 million
Capital Called	\$503.5 million
Distributions	\$525.6 million
Reported Value	\$275.3 million
Total Value Multiple	1.59x
Gross IRR	12.6%

168a

Net IRR	
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Aggregate Natural Resources Program	
Number of Partnerships	40
Committed Capital	\$212.7 million
Capital Called	\$165.3 million
Distributions	\$58.7 million
Reported Value	\$109.0 million
Total Value Multiple	1.01x
Gross IRR	0.0%
Net IRR	

Aggregate Infrastructure Program	
Number of Partnerships	28
Committed Capital	\$191.8 million
Capital Called	\$176.8 million
Distributions	\$213.5 million
Reported Value	\$57.1 million

169a

Total Multiple	Value	1.53x
Gross IRR		8.4%
Net IRR		

Meketa's 2019 capital markets assumptions for the portfolios were: PE 9.6%; Natural Resources 9.1%; Infrastructure 8.0%; U.S. Equity 8.1%.

94. Meketa reported the following returns for the Plan's domestic equities and various indices for the Class Period:

	2019 (%)	2018 (%)	2017 (%)	2016 (%)	2015 (%)	2014 (%)
Plan	30.5	-4.8	20.6	13.2	0.8	12.2
Russell 3000	31.0	-5.2	21.1	12.7	0.5	12.6
Benchmark Plus Invest	30	-2.8	22.0	14.6	5.0	16.3
S&P 500	31.5	-4.4	21.8	12.0	1.4	13.7

Loom is Sayles Small Cup Value	2 4.5	- 16.0	9 .7	2 6.5	- 2.9	5 .3
Russe ll 2000 Value	2 2.4	- 12.9	7 .8	3 1.7	- 7.5	4 .2
Russe ll 2000	2 5.5	- 11.0	1 4.6	2 1.3	- 4.4	4 .9
SSGA Russell 1000	3 1.4	- 4.7	2 1.7	1 2.0	0 .9	1 3.2
Russe ll 1000	3 1.4	- 4.8	2 1.7	1 2.1	0 .9	1 3.2

95. Investment risk requires a reward premium. The high risk of private markets investments demands a premium, such as a 3% premium above the S&P 500 or a 4% premium above the Russell 3000.

96. In a recent paper from the University of Oxford's Journal of Investing, one commentator on private equity noted that large pension funds have earned roughly \$1.5 (net of fees) per \$1 invested in private equity funds. The paper concluded that since 2006, this return is about the same as the returns in public equity. *An Inconvenient Fact: Private Equity Returns & The Billionaire Factory*, Ludovic

Phalippou, University of Oxford Said Business School (June 2020), at 4, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3623820 (last visited Sept. 21, 2020). According to Phalippou, the private equity funds that began in the period from 2006 through 2015 returned about 11% a year, roughly in line with stocks, and for that return, investors paid some \$230 billion in performance fees, most of which went to a relatively few individuals, mostly founders of large PE firms. *Id.* at 3.

97. Similarly, results from a recent Stanford study of returns for 571 pension plans confirmed that over the last ten years, the mean performance in PE (11.3%) matched returns of U.S. public equity. *The Return Expectations of Institutional Investors*, Aleksandar Andonov and Joshua Rauh, Stanford Graduate School of Business (May 2020).

98. Another study by Cliffwater collected the Comprehensive Annual Financial Reports of 66 state pension plans. The study shows the past ten years' returns broken down by "major asset classes." Cliffwater found that the average pension fund return is 9.7% and PE as an asset class performed at 14.3%. Stocks were split between US and non-US. US stocks were at 14.1%. The study made clear that there is no difference in returns between PE and US stocks in this sample of the largest 66 pension plans over the past ten years. *Long-Term State Pension Performance, 2000 to 2019* (May 2020), available at <https://cliffwater.com/research> (last visited Sept. 22, 2020).

99. With respect to Taft-Hartley pension plans, investment management firm Goldman Sachs Group, Inc. notes the following concerning private equity investments:

Private equity . . . investments are speculative, highly illiquid, involve a high degree of risk, have high fees and expenses that could reduce returns, and subject to the possibility of partial or total loss of capital; they are, therefore, intended for experienced and sophisticated long-term investors who can accept such risks.

https://www.gsam.com/content/gsam/us/en/institutions/our-clients/taft-hartley.html#tabpanel_d92=dGFicGFuZWxfZDkyXzEvcHVibGljLzE__ (last visited Sept. 20, 2020).

100. Aon Hewitt's Target Asset Allocation for the New York State Teacher's Retirement System fund as of 2015 was set to 7.0%, for PE with a permitted range of 4-12%. *Report on the 2015 Recommended Actuarial Assumptions, New York State Teacher's Retirement System, Office of the Actuary*, October 19, 2015, page 30.

101. Prudent fiduciaries would not have allocated 17-23% of Plan assets to high risk illiquid PE investments, particularly together with the other extraordinary allocations of Plan assets to other high risk investments, in the dangerous condition of the Plan seeking to improve its funding condition and

with the availability of liquid U.S. equities at far less cost.

102. Further, the Trustees' and their advisors' "significantly overweight" allocation of Plan assets to high risk illiquid alternatives investments has exposed the Plan to further risk of losses in the ongoing pandemic and accompanying financial crisis. The pandemic and its formal consequences have precipitated investor redemption requests and have damaged and in some cases doomed private investment portfolio companies.

103. One commentator, PitchBook, noted that PE exit activity in 2020 Q2 collapsed as PE firms sharply marked down portfolio companies and chose to hold investments. Wylie Fernyhough, PitchBook, *US PE Breakdown Q2 2020*, available at <https://pitchbook.com/news/reports/q2-2020-us-pe-breakdown> (last visited Sept. 24, 2020). PitchBook noted "PE firms sharply marked-down portfolio companies during the second quarter of 2020," and:

Heavy debt loads and the pandemic crisis forced several portfolio companies into bankruptcy. Other portfolio companies may be headed that way, as credit rating agencies downgraded hundreds of PE-backed companies. PE holding times are likely to balloon as we saw during the global financial crisis as sponsors put off exiting until the future is clearer.

104. IFC similarly noted the negative impact COVID-19 is having on PE funds, especially in the emerging markets, due to the reduction in activity and growth prospects of fund portfolio companies. *Impacts of the COVID-19 Crisis on Private Equity Funds in Emerging Markets*, International Finance Corporation, available at https://www.ifc.org/wps/wcm/connect/publications_ext_content/ifc_external_publication_site/publications_listing_page/covid-19-impact-funds-emerging-markets (last visited Sept. 24, 2020). IFC notes that the pandemic is affecting the short-term (one year) and medium-term (two to three years) growth prospects of funds' portfolio companies, which are generally experiencing negative impacts on revenues, costs, and profitability. IFC believes heightened risk aversion could lead to heavy growth in borrowing, bankruptcies, and defaults. "The combination of demand shocks reducing income availability and supply shocks disrupting global value chains is impacting entire business lines and sectors. . . ." IFC noted in the short term, returns for PE funds in emerging markets will take a hit due to significant write-downs in portfolio companies' valuations, exchange rate volatility, and challenges in exiting investments. *Id.*

105. McKinsey also noted in a recent paper that the global PE portfolio had declined roughly 20% as of March 31. *A rolling disruption: COVID-19's implications for private equity and portfolio companies*, McKinsey & Company (Sept. 2020),

available at <https://www.mckinsey.com/industries/private-equity-and-principal-investors/our-insights/a-rolling-disruption-covid-19s-implications-for-private-equity-and-portfolio-companies> (last visited Sept. 24, 2020). McKinsey noted about 50% of the PE industry’s assets under management are in vulnerable sectors, and concluded that “[a]t the end of the day, investors should brace for increased volatility, downgrades, and defaults” with private equity. *Id.*

106. Another report by McKinsey noted that valuations amidst the pandemic “[f]or the most part . . . are lower because the performance of business, at a time when demand has been collapsing, is uncertain and public equity multiples are volatile,” and PE exits have “all but stopped” due to the pandemic. Alastair Green, Ari Oxman, and Laurens Seghers, *Preparing for private-equity exits in the COVID-19 era*, McKinsey & Company (June 11, 2020), available at <https://www.mckinsey.com/industries/private-equity-and-principal-investors/our-insights/preparing-for-private-equity-exits-in-the-covid-19-era> (last visited Sept. 26, 2020).

107. Bain & Company noted a sharp drop-off in buyout and exit transactions, and that drop-offs in investments should be expected as 2020 continues. Bain also noted heightened illiquidity, with exit transactions falling 72% between the beginning of 2020 through April, as funds ride out the storm before even thinking about selling. Bain noted that 83% of general partners indicated in a survey that they do

not expect to exit any of their portfolio companies over the next year. Hugh MacArthur, Graham Elton, and Brenda Rainey, *Covid-19 Hits Private Equity: The Early Data is Not Pretty*, Bain & Company (May 15, 2020), at pp. 1, 7, available at <https://www.bain.com/insights/covid-19-hits-private-equity-the-early-data-is-not-pretty/#:~:text=The%20numbers%20through%20April%20show,%2C%20fund%2Draising%20and%20returns> (last visited Sept. 25, 2020). Bain noted that returns will lag in a downturn because mark-to-market calculations are not immediate, and that it is “difficult to value companies in this environment, given the disruption to company cash flows, market volatility and the lack of comparable transactions.” *Id.* at 11.

108. The Trustees and their advisors imprudently exposed an extraordinary percentage of the Plan assets to the highest risk classes including PE and EMEs, as the Plan has remained in dangerous and in fact declining financial condition. The high risk illiquid PE investments did not generate returns worth the high cost and risk and are particularly exposed to losses in the current financial crisis.

C. Conflicted Investment Consultant

109. During the Class Period, Meketa provided to the Plan both nondiscretionary investment consulting and at the recommendation of Meketa, discretionary alternatives asset management services for the Plan’s Private Markets

Portfolio. This was an imprudent, conflicted structure for Meketa to recommend for the Trustees to approve and upon which to have relied. Meketa had a clear conflict of interest in advising the Trustees concerning a high-risk, high-cost asset allocation to chase the grossly excessive 8.5% “actuarial return target,” while also serving as the alternatives asset manager for compensation in addition to the management fees charged by the managed investments. In addition, by using its position as the Plan’s nondiscretionary investment consultant to recommend itself to the Plan as private markets asset manager at a substantially greater fee, Meketa exploited its fiduciary position at the unfair expense of the Plan. Further, the conflicts created by the Trustees’ hiring of Meketa as investment manager for the Plan’s Private Markets Portfolio required the Plan to hire another firm to monitor Meketa in that role at a substantial additional expense to the Plan.

110. The following table reflects Meketa’s compensation and function for the period 2010-2017, as reflected in the Plan’s Form 5500s.

Year	Compensation	Service Codes	Service Code Type (respectively)
2009	\$263,926	27	Investment Advisory

0	201	\$258,410	27, 68	Investment Advisory; Soft dollars commissions
1	201	\$1,399,116	27, 68	Investment Advisory; Soft dollars commissions
2	201	\$1,423,341	27, 68	Investment Advisory; Soft dollars commissions
3	201	\$1,380,897	27, 68	Investment Advisory; Soft dollars commissions
4	201	\$1,401,196	27, 50, 52	Investment Advisory (plan); Direct payment from the plan; Investment management fees paid indirectly by the plan

5	201	\$1,382,023	27, 50, 52	Investment Advisory (plan); Direct payment from the plan; Investment management fees paid indirectly by the plan
6	201	\$259,614	27, 50, 52	Investment Advisory (plan); Direct payment from the plan; Investment management fees paid indirectly by the plan
7	201	\$259,700	27, 50, 52	Investment Advisory (plan); Direct payment from the plan;

			Investment management fees paid indirectly by the plan
2018	\$256,594	27,50,52	Investment Advisory (plan); Direct payment from the plan; Investment management fees paid indirectly by the plan

D. Complicit Actuary

111. Horizon, the Plan's actuary during the Class Period, in the particular circumstances alleged herein, exercised control and discretion over Plan assets and management and rendered investment advice in exchange for compensation. Horizon's use of a grossly-excessive unreasonable 8.5% annual return assumption as the Plan's independent actuary to generate funding and liability projections to show future improvement of the Plan's financial condition was unreasonable and discordant with reality and market conditions and not in accordance with

professional standards. In doing so, Horizon was complicit with the Trustees' and Meketa's imprudent asset allocations in order to continue its compensation from the Plan.

112. According to the National Association of State Retirement Administrators (NASRA), a public fund survey has found that 96% of surveyed public pension plans have lowered investment rate of return assumptions since 2010, with reductions resulting in a decline in the average return assumption from 7.52 percent in fiscal year 2010 to 7.20 percent in fiscal year 2020. NASRA Issue Brief: Public Pension Plan Investment Return Assumptions Updated February 2020, available at <https://www.nasra.org/files/Issue%20Briefs/NASRAInReturnAssumptBrief.pdf> (last visited Sept. 20, 2020).

113. According to a Milliman 2018 Public Pension Funding Study, “[actuarial return] rates have continued to move lower each year, with a median of 7.25% and ranges from 5% to 8.10%.

114. Actuarial industry professionals recognize that the trend for assumed interest rates is lowering them. David Pitts, owner of Independent Actuarial Services, recently testified with respect to actuarial interest rates:

“[T]here has been a downward trend in the assumption selection process for both Taft-Hartleys and public sector pensions. . . . The various trends within the different subsectors of the actuarial world

to lower interest rates, which would have been the fairly quick lowering of interest rates in the private plan sector, followed much more slowly by the lowering of interest rates in the Taft-Hartley and public sectors.”

115. Horizon employed an 8.5% annual return assumption for the Plan’s actuarial projections and valuations. Horizon departed from industry trends and reality apparently to support and justify the extraordinary high risk, high-cost asset allocation to chase the 8.5% “actuarial return target,” with the Plan in dangerous financial condition. In doing so, Horizon exercised discretion over Plan assets and provided investment advice in exchange for compensation, imposing fiduciary status and duties on Horizon. Horizon knew or should have known that the 8.5% return assumption was unreasonable and grossly inflated projected improvement, to enable the Trustees to justify and support the extraordinary high risk, high cost imprudent asset allocation.

E. Resulting Losses

116. As alleged herein, Defendants’ imprudently deployment and maintenance of an extraordinary high risk asset allocation to chase a grossly excessive and unreasonable 8.5% “actuarial return target.” This imprudent gamble with the Plan assets resulted in substantial losses and lost returns to and worsening financial condition and funded status of the Plan in already dangerous financial

condition. The Plan's worsening financial condition led to massive benefit reductions to Plan participants.

VI. CLASS ACTION ALLEGATIONS

117. Pursuant to 29 U.S.C. §1132(a)(2), ERISA authorizes any participant or beneficiary of the Plan to bring an action individually on behalf of the Plan to enforce fiduciary liability to the Plan under 29 U.S.C. §1109(a). Further, ERISA Section 1132(a)(3) authorizes any participant or beneficiary to sue as a representative of the Plan to enjoin any act or practice that violates ERISA or to obtain other appropriate equitable relief to redress violations and/or enforce the provisions of ERISA.

118. In acting in this representative capacity and to enhance the due process protections of unnamed participants and beneficiaries of the Plan, as an alternative to direct individual actions on behalf of the Plan under 29 U.S.C. § 1132(a)(2) and (3), Plaintiff seeks to certify this action as a class action on behalf of all participants and beneficiaries of the Plan. Plaintiff seeks to certify, and to be appointed as representatives of, the following class (the "Class"):

All participants and beneficiaries of the New York State Teamsters Conference Pension and Retirement Fund through the date of judgment.

119. Excluded from the Class are Defendants and any Plan fiduciaries. Plaintiff reserves the right

to modify, change, or expand the Class definition based upon discovery and further investigation.

120. This action meets the requirements of Rule 23 and is certifiable as a class action for the following reasons.

121. ***Numerosity:*** The Class is so numerous that joinder of all members is impracticable. While the exact number and identities of individual members of the Class is unknown at this time, such information being in the sole possession of Defendants and obtainable by Plaintiff only through the discovery process, Plaintiff believes, and on that basis allege, that many thousands of persons comprise the Class. On the basis of Form 5500 filed with the DOL for the Plan year ending December 31, 2018, the Class includes at least 33,606 Plan participants, inclusive of active participants, retired or separated participants receiving benefits, other retired or separated participants entitled to benefits, and beneficiaries of deceased participants who are receiving or are entitled to receive benefits.

122. ***Existence and Predominance of Common Questions of Fact and Law:*** Common questions of law and fact exist as to all members of the Class because Defendants owed fiduciary duties to the Plan and to all participants and beneficiaries, and took the actions and omissions alleged herein as to the Plan and not as to any individual participant. These questions predominate over the questions affecting individual Class Members. These common

legal and factual questions include, but are not limited to:

- a. who are the fiduciaries liable for the remedies provided by 29 U.S.C. § 1109(a);
- b. to whom are the fiduciaries liable for the remedies provided by 29 U.S.C. §1109(a);
- c. whether Defendants were fiduciaries to the Plan under ERSIA;
- d. whether Defendants breached fiduciary duties to the Plan, participants, and beneficiaries in violation of ERISA;
- e. if so, the amount of damages or monetary relief that should be provided to the Plan and its participants; and
- f. what Plan-wide equitable and other relief should be imposed in light of Defendants' breaches.

Given that Defendants have engaged in a common course of conduct as to Plaintiff and the Class, similar or identical injuries and violations are involved and common questions far outweigh any potential individual questions.

123. **Typicality:** All of Plaintiff's claims are typical of the claims of the Class because Plaintiff was a participant during the Class Period and all Plan participants were harmed by the uniform acts and conduct of Defendants discussed herein. Plaintiff, all Class Members, and the Plan sustained monetary and

economic injuries arising out of Defendants' breaches of their fiduciary duties to the Plan.

124. ***Adequacy:*** Plaintiff is an adequate representative for the Class because his interests do not conflict with the interests of the Class that he seeks to represent; he was a participant in the Plan during the Class Period; and he is committed to vigorously representing the Class. Plaintiff's retained counsel, Chimicles Schwartz Kriner & Donaldson-Smith, is highly competent and experienced in complex class action litigation – including ERISA and other complex financial class actions – and counsel intend to prosecute this action vigorously. The interests of the Class will be fairly and adequately protected by Plaintiff and his counsel.

125. ***Superiority:*** A class action is the superior method for the fair and efficient adjudication of this controversy because joinder of all Plan participants and beneficiaries is impracticable, the losses suffered by individual participants and beneficiaries may be small, and it would be impracticable for individual members to enforce their rights through individual actions. Even if Class Members could afford individual litigation, the court system could not. Individualized litigation presents a potential for inconsistent or contradictory judgments. Individualized litigation increases the delay and expense to all parties, and to the court system, presented by the complex legal and factual issues of the case. By contrast, the class action device presents far fewer management difficulties and provides the

benefits of a single adjudication, an economy of scale, and comprehensive supervision by a single court. Upon information and belief, members of the Class can be readily identified and notified based on, *inter alia*, the records (including databases, e-mails, etc.) that Defendants maintain regarding the Plan. Given the nature of the allegations, no Class Member has an interest in individually controlling the prosecution of this matter, and Plaintiff is aware of no difficulties likely to be encountered in the management of this matter as a class action.

126. Prosecution of separate actions by individual participants and beneficiaries for the breaches of fiduciary duties would create the risk of inconsistent or varying adjudications that would establish incompatible standards of conduct for Defendants regarding their fiduciary duties and personal liability to the Plan under 29 U.S.C. §1109(a), and adjudications by individual participants and beneficiaries regarding the breaches of fiduciary duties and remedies for the Plan would, as a practical matter, be dispositive of the interests of the participants and beneficiaries not parties to the adjudication or would substantially impair or impede those participants' and beneficiaries' ability to protect their interests. Therefore, this action should be certified as a class action under Fed. R. Civ. P. 23(b)(1)(A) or (B). Alternatively, then this action may be certified as a class action under Rule 23(b)(3) if it is not certified under Rule 23(b)(1)(A) and (B).

127. Defendants have acted or refused to act on grounds generally applicable to Plaintiff and the other members of the Class, thereby making appropriate final injunctive relief and declaratory relief, as described below, with respect to the Class as a whole.

COUNT I

Violations of ERISA § 404(a)(1)(A)-(D)

(Against the Board of Trustees and the Trustee Defendants)

128. Plaintiff repeats and realleges each of the allegations set forth in the foregoing paragraphs as if fully set forth herein.

129. As fiduciaries of the Plan, the Board of Trustees and the Trustee Defendants were required, pursuant to ERISA §404(a)(1), to act solely in the interest of the participants and beneficiaries of the Plan “(A) for the exclusive purpose of: (i) providing benefits to participants and their beneficiaries; and (ii) defraying reasonable expenses of administering the plan” (B) to discharge their duties “with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims,” (C) to diversify the investments of the Plan so as to minimize the risk of large losses, ERISA § 404(a)(1)(C), 29 U.S.C. §1104 (a)(1)(C), and (D) to act in accordance with the

documents and instruments governing the Plan, ERISA § 404(a)(1)(D), 29 U.S.C. § 1104(a)(1)(D), including the Plan's Investment Policy Statement.

130. The Board of Trustees and the Trustee Defendants were required to manage the Fund and its assets for the benefit of the participants under the particular circumstances of the Fund toward recovery.

131. The Board of Trustees and the Trustee Defendants breached their fiduciary duties under ERISA to invest the Fund assets prudently and to monitor and manage risk in the Fund's investments. As alleged herein, during the period the Fund has been in dangerous financial condition, the Board of Trustees and the Trustee Defendants imprudently approved and maintained an extraordinary allocation of Plan assets to the highest risk asset classes despite the known high volatility and illiquidity, to chase a grossly excessive and unreasonable 8.5% "actuarial return target," as the Plan's condition continued to decline. The Board of Trustees and the Trustee Defendants also breached their fiduciary duties by imprudently hiring Meketa as the Plan's Private Markets Portfolio manager, which created a conflict of interest with Meketa's role as the Plan's financial consultant and required the Plan to incur a substantial additional expense for a monitoring firm. The Trustee did not hire the monitor firm, FC, to monitor Meketa's role as investment consultant. The Trustees breached their fiduciary duties by relying on

Meketa for investment consulting in the face of Meketa's conflict.

132. By the foregoing, the Board of Trustees and the Trustee Defendants (a) failed to act solely in the interest of the participants and beneficiaries of the Plans for the exclusive purpose of providing them benefits, in violation of ERISA §404(a)(1)(A), 29 U.S.C. §1104(a)(1)(A); (b) failed to act with the care, skill, prudence and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims, in violation of ERISA §404(a)(1)(B), 29 U.S.C. §1104(a)(1)(B); (c) failed to diversify the investments of the Plan so as to minimize the risk of large losses, ERISA § 404(a)(1)(C), 29 U.S.C. §1104(a)(1)(C); and (d) failed to act in accordance with the documents and instruments governing the Plan, ERISA § 404(a)(1)(D), 29 U.S.C. § 1104(a)(1)(D), including the Plan's IPS.

133. As a result of their breaches, the Board of Trustees and the Trustee Defendants caused the Plan to suffer losses for which they are liable.

COUNT II

Violations of ERISA § 404(a)(1)(A)-(D)

(Against Meketa)

134. Plaintiff repeats and realleges each of the allegations set forth in the foregoing paragraphs as if fully set forth herein.

135. As alleged herein, during the Class Period, Meketa exercised discretion or control over Plan assets and rendered investment advice to the Plan. Meketa had a direct conflict of interest in serving as the Plan's investment consultant and as an investment manager, simultaneously.

136. Meketa formulated and provided asset allocations including extraordinary allocations of Plan assets to the highest risk asset classes knowing that the Plan was in dangerous financial condition in urgent need of near-term returns to chase a grossly excessive and unreasonable 8.5% "actuarial return target." Meketa had a material conflict of interest in doing so. Meketa benefited in its role as investment manager for the Plan's Private Markets Portfolio by the extraordinary high risk, high cost asset allocations to EME, PE and other private market alternative investments, at the expense of the Plan and its participants.

137. As a fiduciary of the Plan, Meketa was required, pursuant to ERISA §404(a)(1), to act solely in the interest of the participants and beneficiaries of the Plan "(A) for the exclusive purpose of: (i) providing benefits to participants and their beneficiaries; and (ii) defraying reasonable expenses of administering the plan" (B) to discharge their duties "with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims," (C) to diversify the

investments of the Plan so as to minimize the risk of large losses, ERISA § 404(a)(1)(C), 29 U.S.C. §1104 (a)(1)(C), and (D) to act in accordance with the documents and instruments governing the Plan, ERISA § 404(a)(1)(D), 29 U.S.C. § 1104(a)(1)(D), including the Plan's IPS.

138. By the foregoing, and as alleged more particularly herein, Meketa (a) failed to act solely in the interest of the participants and beneficiaries of the Plans for the exclusive purpose of providing them benefits, in violation of ERISA §404(a)(1)(A), 29 U.S.C. §1104(a)(1)(A); (b) failed to act with the care, skill, prudence and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims, in violation of ERISA §404(a)(1)(B), 29 U.S.C. §1104(a)(1)(B); (c) failed to diversify the investments of the Plan so as to minimize the risk of large losses, ERISA § 404(a)(1)(C), 29 U.S.C. §1104 (a)(1)(C); and (d) failed to act in accordance with the documents and instruments governing the Plan, ERISA § 404(a)(1)(D), 29 U.S.C. § 1104(a)(1)(D), including the Plan's IPS.

139. As a result of its breaches, Meketa caused the Plan to suffer losses for which it is liable.

COUNT III

**Violations of ERISA § 404(a)(1)(A)-(D)
(Against Horizon)**

140. Plaintiff repeats and realleges each of the allegations set forth in the foregoing paragraphs as if fully set forth herein.

141. As alleged herein, Horizon actively and knowingly participated in the imprudent approval and maintenance of the Plan's extraordinary high risk, high cost asset allocation to chase a grossly excessive and unreasonable 8.5% "actuarial return target" in the Plan's dangerous and worsening financial condition. Horizon determined and approved a grossly excessive and unreasonable 8.5% actuarial return assumption. An independent actuary applying applicable professional standards would not have determined an 8.5% actuarial return assumption for the Plan.

142. As a fiduciary of the Plan, Horizon was required, pursuant to ERISA §404(a)(1), to act solely in the interest of the participants and beneficiaries of the Plan "(A) for the exclusive purpose of: (i) providing benefits to participants and their beneficiaries; and (ii) defraying reasonable expenses of administering the plan" (B) to discharge their duties "with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a

like character and with like aims,” (C) to diversify the investments of the Plan so as to minimize the risk of large losses, ERISA § 404(a)(1)(C), 29 U.S.C. §1104 (a)(1)(C), and (D) to act in accordance with the documents and instruments governing the Plan, ERISA § 404(a)(1)(D), 29 U.S.C. § 1104(a)(1)(D), including the Plan’s IPS.

143. By the foregoing, and as alleged more particularly herein, Horizon (a) failed to act solely in the interest of the participants and beneficiaries of the Plans for the exclusive purpose of providing them benefits, in violation of ERISA §404(a)(1)(A), 29 U.S.C. §1104(a)(1)(A); (b) failed to act with the care, skill, prudence and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims, in violation of ERISA §404(a)(1)(B), 29 U.S.C. §1104(a)(1)(B); (c) failed to diversify the investments of the Plan so as to minimize the risk of large losses, ERISA § 404(a)(1)(C), 29 U.S.C. §1104 (a)(1)(C); and (d) failed to act in accordance with the documents and instruments governing the Plan, ERISA § 404(a)(1)(D), 29 U.S.C. § 1104(a)(1)(D), including the Plan’s IPS.

144. As a result of its breaches, Horizon caused the Plan to suffer losses for which it is liable.

COUNT IV

Violations of ERISA § 1105(a)

(Against All Defendants)

145. Plaintiff repeats and realleges each of the allegations set forth in the foregoing paragraphs as if fully set forth herein.

146. ERISA §405(a), 29 U.S.C. §1105(a), imposes liability on a fiduciary, in addition to any liability which the fiduciary may have had under any other provision of ERISA, if:

(1) the fiduciary participates knowingly in or knowingly undertakes to conceal an act or omission of such other fiduciary knowing such act or omission is a breach;

(2) the fiduciary fails to comply with ERISA §404(a)(1) in the administration of the specific responsibilities which give rise to the status as a fiduciary, the fiduciary has enabled such other fiduciary to commit a breach; or

(3) the fiduciary knows of a breach by another fiduciary and fails to make reasonable efforts to remedy it.

147. Defendants, who are fiduciaries within the meaning of ERISA, and, by the nature of their fiduciary duties with respect to the Plan, knew of each breach of fiduciary duty alleged herein arising out of the imprudent extraordinary investment of the assets of the Plan in the highest risk asset classes, and

knowingly participated in, breached their own duties enabling other breaches, and/or took no steps to remedy these and the other fiduciary breaches.

148. Defendants knew that the Plan's asset allocation had a substantial and unreasonable percentage of assets allocated to EMEs, PE and other private markets alternative investments, which exposed the Plan to reckless and unreasonable risk and caused substantial injury to the Plan in lost returns. Defendants also knew that the Plan's asset allocation was an extreme outlier compared to allocation of other Taft-Hartley plans. The Defendants also knew that the Plan's overly-risky asset allocation conflicted with the Plan's IPS "Risk Objectives:" "To accept a level of market risk consistent with moderate interim volatility without sacrificing the potential for long-term real growth of assets"; "To use extensive diversification to minimize exposure to company and industry-specific risks in the aggregate investment portfolio"; and "To avoid extreme levels of volatility that could adversely affect the Plan's participants".

149. Despite this knowledge, Defendants failed to act to remedy the several violations of ERISA, as alleged in Counts I-III.

150. As such, Defendants are liable for the breaches by the other Defendants pursuant to ERISA §405(a)(1) and (2).

151. Had Defendants discharged their fiduciary monitoring duties prudently as described

above, the losses suffered by the Plan would have been minimized or avoided. Therefore, as a direct result of the breaches of fiduciary duty alleged herein, the Plan, the Plaintiff, and the other Class members have suffered losses.

PRAYER FOR RELIEF

152. By virtue of the violations set forth in the foregoing paragraphs, Plaintiff and the members of the Class are entitled to sue each of the Defendants pursuant to ERISA §502(a)(2), 29 U.S.C. §1132(a)(2), for relief on behalf of the Plan as provided in ERISA §409, 29 U.S.C. §1109, including for (a) recovery of losses to the Plan, (b) the recovery of any profits resulting from the breaches of fiduciary duty, and (c) such other equitable or remedial relief as the Court may deem appropriate.

153. By virtue of the violations set forth in the foregoing paragraphs, Plaintiff and the members of the Class are entitled, pursuant to ERISA §502(a)(3), 29 U.S.C. §1132(a)(3), to sue any of the Defendants for any appropriate equitable relief to redress the wrongs described above.

154. WHEREFORE, Plaintiff, on behalf the Plan, himself and the Class, pray that judgment be entered against Defendants on all claims, and request that the Court award the following relief:

A. A declaration that the Defendants breached their fiduciary duties under ERISA;

B. An Order compelling each fiduciary found to have breached his/her/its fiduciary duties to the Plan jointly and severally to restore all losses to the Plan which resulted from the breaches of fiduciary duty or by virtue of liability pursuant to ERISA §405;

C. An Order requiring (a) the disgorgement of profits made by any Defendant, (b) a declaration of a constructive trust over any assets received by any breaching fiduciary in connection with their breach of fiduciary duties or violations of ERISA, (c) an Order requiring the Plan to allocate its assets prudently, or (d) any other appropriate equitable a monetary relief, whichever is in the best interest of the Plan;

D. Ordering, pursuant to ERISA §206(d)(4), that any amount to be paid to or necessary to satisfy any breaching fiduciary's liability can be satisfied, in whole or in part, by attaching their accounts in or benefits from the Plan;

E. Appointing an independent fiduciary, at the expense of the breaching fiduciaries, to administer the Plan and manage the Plan's investments and/or selection of investments and/or to oversee the divestment of the Plan's imprudent investments and reduction of investment management costs;

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APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF COLUMBIA

Civil Action No.

THOMAS E. PEREZ, Secretary of Labor
United States Department of Labor
200 Constitution Avenue, NW
Room N-4611
Washington, DC 20210

Plaintiff,

v.

ROBERT L. ROACH, JR.
5204 Kenstan Dr.
Temple Hills, MD 20748

WARREN L. MART
655 Maybrook Dr.
Huntingtown, MD 20639-3923

BURTON C. TREBOUR
53 Fairway Blvd.
Jamesburg, NH 08831-2711

ALFRED C. NELSON
2550 Blue Ridge Ave.
Cocoa, FL 32926-7405

202a

LYNN D. TUCKER, JR.
6646 Fountains Blvd. Apt. 11
West Chester, OH 45069-6112

PHILLIP J. GRUBER
12922 Tipperary Lane
Plainfield, IL 60585-2835

GARY R. ALLEN
189 Oxleigh Way
Folsom, CA 95630-8410

ROBERT G. MARTINEZ, JR.
7817 Bursey Ct.
North Richland Hills, TX 76182-8731

THOMAS W. CONNERY
23 Applethorn Ct.
Colts Neck, NJ 07722-2016
and

**THE NATIONAL PENSION PLAN A/K/A THE
IAM NATIONAL PENSION FUND**
1200 CONNECTICUT AVE., N.W., SUITE 300
WASHINGTON, D.C. 20036

Defendants.

COMPLAINT FOR ERISA VIOLATIONS

Plaintiff Thomas E. Perez, Secretary of the United States Department of Labor (the "Secretary), alleges:

1. This action is filed under the Employee Retirement Income Security Act of 1974 (“ERISA”), as amended, 29 U.S.C. §§ 1001, *et seq.*, against fiduciaries to the National Pension Plan a/k/a the IAM National Pension Fund (“the Fund”), an ERISA-covered plan for members of the International Association of Machinists & Aerospace Workers (the “Union”).

2. Defendants Robert L. Roach, Jr.; Warren L. Mart; Burton C. Trebour; Alfred C. Nelson; Lynn D. Tucker, Jr.; Philip J. Gruber; Gary R. Allen; Robert G. Martinez, Jr.; Thomas W. Connery (hereinafter collectively referred to as the “Trustees”) are present and past trustees of the Fund. The Trustees, among other things, failed to loyally and prudently select the fund’s service providers, routinely ignored required procedures written in the Fund’s governing plan documents, created conflicts of interest, unlawfully solicited and accepted gratuities from service providers, spent and permitted others to spend Fund assets lavishly on unnecessary trips, parties, and inordinately expensive food and wine, failed to prudently, and loyally monitor and control Fund costs, and generally engaged in a pattern of conduct in which they disregarded their fiduciary duties.

3. By these actions and others, the Defendants failed to protect the interests of the Fund and its participants and beneficiaries. Each Defendant committed violations, or knowingly participating in violations, of ERISA’s fundamental

fiduciary duties of loyalty and prudence and deliberately failed to follow the Fund's governing documents, in violation of ERISA §§ 404(a)(1)(A), (B), and (D), 29 U.S.C. §§ 1104(a)(1)(A), (B), and (D), and engaged in prohibited transactions in violation of ERISA §§ 406(b)(1), (2) and (3), 29 U.S.C. §§ 1106 (b)(1), (2) and (3).

JURISDICTION AND VENUE

4. This action arises under ERISA and is brought by the Secretary to obtain relief under ERISA §§ 409 and 502, 29 U.S.C. §§ 1109 and 1132, to redress violations and enforce the provisions of Title I of ERISA.

5. This Court has subject matter jurisdiction over this action pursuant to ERISA §§ 502(e)(1), 29 U.S.C. § 1132(e)(1).

6. Venue with respect to this action lies in this District pursuant to ERISA § 502(e)(2), 29 U.S.C. § 1132(e)(2).

PARTIES

7. The Secretary, pursuant to ERISA §§ 502(a)(2) and (5), 29 U.S.C. §§ 1132(a)(2) and (5), has the authority to enforce the provisions of Title I of ERISA by, among other means, filing and prosecuting claims against fiduciaries who breach their duties under Title I of ERISA.

8. Robert Roach, at relevant times, was a Fund Trustee and Co-chair of the Board of Trustees

and a member of the Fund's Investment Committee. As such, Roach was a fiduciary to the Fund under ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A), and party in interest to the Fund under ERISA § 3(14), 29 § 1002(14)(A).

9. Warren Mart and Burton Trebour, at relevant times, were Fund Trustees and Co-chairs of the Board of Trustees, and also members of the Fund's Investment Committee. As such, Mart and Trebour were fiduciaries to the Fund under ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A), and parties in interest to the Fund under ERISA § 3(14)(A), 29 U.S.C. § 1002(14)(A).

10. Alfred Nelson, Lynn Tucker, Philip Gruber, Gary Allen, Robert Martinez, and Thomas Connery at relevant times, were Trustees of the Fund and, as such, were fiduciaries to the Fund under ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A), and parties in interest to the Fund under ERISA § 3(14)(A), 29 U.S.C. § 1002(14)(A). Collectively, these individuals, with Roach, Mart and Trebour, are referred to as the "Trustees."

11. The Fund is an employee benefits plan as defined by ERISA § 3(3), 29 U.S.C. § 1002(3), and is subject to ERISA pursuant to ERISA § 4(a)(1), 29 U.S.C. § 1003(a)(1). The Fund is administered in the District of Columbia and is joined as a party defendant pursuant to Rule 19(a) of the FED. R. Civ. P. solely to ensure that complete relief can be granted.

GENERAL ALLEGATIONS

The Fund

12. The Fund is a Taft-Hartley, multi-employer, defined benefit pension plan for the benefit of the members of the Union and their beneficiaries. It is governed by the IAM National Pension Fund Amended and Restated Agreement and Declaration of Trust (“Trust Agreement”).

13. The Fund, at relevant times, was controlled by a Board of Trustees and an Investment committee. The Board of Trustees is the Plan Sponsor and Plan Administrator, and the Trustees are named fiduciaries under ERISA. The Trust Agreement states that the Trustees “shall meet at least once a year and at such other times as they deem it necessary to transact their business.” The Board of Trustees set the location of their meetings.

14. The Investment Committee, at relevant times, oversaw the Fund’s investment program. The Investment Committee, consisting of the two Co-chairmen of the Board of Trustees, Trebour and Mart, and, subsequently Trebour and Roach, had the discretion to exercise the authority of the Trustees under the Trust Agreement, including hiring and firing investment managers and investment consultants. Investment Committee meetings occurred twice a year. The Board of Trustees ratified or could retroactively change the actions of the Investment Committee.

The Fund's Service Providers

15. For approximately thirty years beginning in the early 1980's, the Fund used two investment consultants: Segal Advisors, Inc. ("Segal") and Meketa Investment Group ("Meketa").

16. Segal Advisors conducted investment manager searches and due diligence reviews for the Fund.

17. During that time, Meketa performed asset allocation reviews, monitoring, and reviews of investment managers, made recommendations regarding investment managers and asset allocations, and authored the Fund's Five Year Strategic Investment Plans.

18. Beginning in approximately 1998, KRA Capital Management ("KRA") was the Fund's domestic REIT (Real Estate Investment Trust) investment manager. KRA was a two-person investment company, whose only two clients were the Fund and the IAM Grand Lodge Plan.

19. On January 27, 2004, Trustees Trebour and Mart hired Amalgamated Bank as a Qualified Professional Asset Manager ("QPAM") and investment manager of the IAM Private Equity, LLC, the entity the Fund established to house its private equity and other private investments (hereinafter, "Private Markets portfolio"). On January 20, 2004, Amalgamated contracted with Meketa to act as its sub-advisor for the Fund's Private Markets portfolio.

20. On April 10, 2010, Trustee Trebour and Mart executed an Investment Manager Agreement with Meketa, to become investment manager of the Private Markets portfolio, thereby eliminating Amalgamated in that role. The Board of Trustees ratified the Investment Committee's action.

21. On May 28, 2010, Trustees Trebour and Mart executed a contract with Cliffwater, LLC to act as investment manager of the Fund's hedge fund portfolio. The Board of Trustees ratified the Investment Committee's action.

Imprudent Hiring of Graystone Consulting

22. Effective September 1, 2013, after a length process involving two separate candidate reviews that both concluded that Graystone Consulting ("Graystone") was an inferior candidate, the Fund retained Graystone to serve as its investment consultant.

23. In hiring Graystone, the Trustees disregarded Fund procedures, ignored their specially hired consultant's prudent recommendation, chose Graystone even though it had not been recommended by their consultant, and paid Graystone's higher fees, without any prudent process or basis for doing so. As a result, the Fund expended approximately \$125,000 more in fees per year for Graystone than the highest fee candidate recommended by the Trustees consultant. The record demonstrates that the Trustees' decision was not supported by any prudent

analysis, let alone any analysis justifying paying Graystone's higher fees for the services offered.

24. Graystone was hired despite the disapproval of both the Fund's Chief Investment Officer ("CIO") and an outside firm that was retained by the Fund specifically to review and supplement the CIO's extensive search and to recommend an investment consultant for the Fund.

25. In the early part of 2012, the Trustees instructed the Fund's investment staff to undertake a search for an investment consultant. On May 22, 2012, Monte Tarbox ("Tarbox"), who was then the CIO for the Fund, advised the Board that a Request for Proposals ("RFP") was being issued with the goal of hiring a General Investment Consultant for the Fund. Twelve firms were identified as potential consultants and the RFP was distributed to those firms by email between June 1 and June 4, 2012. All twelve candidates responded by the June 28, 2012 deadline.

26. Tarbox and his staff completed their search and analysis of the original twelve firms and, in a memorandum dated August 14, 2012, presented their findings to Trustees Roach and Trebour, who constituted the Fund's Investment Committee and were Co-chairs of the Board of Trustees on that date.

27. In reviewing the candidates, Tarbox and his staff used 13 criteria, including:

- a) Experience and expertise of consultants assigned to the Fund;

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- b) Ability to communicate difficult financial topics;
- c) Firm's experience with private assets and hedge funds;
- d) Independence of the firm and impact of any affiliated company relationships;
- e) Organizational stability, ownership broadly shared, succession plan in place;
- f) Stable senior staff;
- g) Depth of the team dedicated to research and manager analysis;
- h) Sophisticated client base;
- i) Clarity and sophistication of performance reports.
- j) Analytical strength of underlying performance report;
- k) Risk Measurement capabilities;
- l) Insight demonstrated in asset allocation, manager search, and other reports;
- m) Evidence of innovative advice and thought leadership.

28. Applying the criteria in paragraph [26], Tarbox and his staff assigned each candidate a numeric rating ranging from the lowest score of 39 points to the highest score of 57 points. Of the twelve

firms, Graystone was ranked ninth, receiving the fourth lowest total score of 46 points. When Tarbox presented the findings to the Board, he expressed his opinion that Graystone was one of the least qualified firms.

29. Despite Graystone's low score and Tarbox's personal disapproval, the Board requested reference checks of the four firms receiving the top four scores and Graystone. Tarbox and his staff conducted reference checks request by the Board.

30. The August 14, 2012 memorandum from Tarbox and his staff also recommended that the Trustees retain an independent firm to review the RFP responses and to offer its own advice to the Trustees about the selection of a consultant.

31. On October 1, 2012, the Fund engaged Gallagher Fiduciary Advisors, LLC ("Gallagher") to advise the Trustees and assist with respect to the selection of an investment consultant for the Fund. Gallagher was first contacted to discuss the assignment within two weeks of Tarbox submitting the August 14, 2012 report. Gallagher received and reviewed the RFP submissions from all of the candidates on Tarbox's list. Gallagher was instructed by or on behalf of the Board to start fresh with its own analysis.

32. The agreement between Gallagher and the Fund provided that Gallagher was to serve as an independent expert hired to "independently evaluate all proposals, rank the top candidates . . . and arrive

at a list of at least three finalists.” Gallagher was also to “personally interview at least three finalists,” and “attend a meeting at which finalist candidates personally present their proposal to the Board of Trustees, assist in the Board’s deliberations and make recommendations as requested.”

33. In October 2012, pursuant to its agreement with the Fund, Gallagher made a presentation to the Board detailing its search process and criteria. During the presentation, Gallagher specifically noted that it would interview four to five candidates in early to mid-November 2012 and present three finalists to the Board in or about the first week of December 2012.

34. Gallagher did not have the Tarbox candidates issues new response packages, but did ask supplemental questions of the candidates and inquired about substantive changes to the firms from the time of each firm’s original submission. Gallagher also invited two additional firms to submit proposals, but both firms declined because of pre-existing relationships with the Fund.

35. Beginning in October 2012, Gallagher reviewed the documents received from the Tarbox review and the supplemental materials forwarded by the candidates, had several face-to-face meetings with candidates, and spoke with Fund counsel, Trustees and Staff.

36. On December 14, 2012, Gallagher met with the Board and made a presentation regarding a

list of five semi-finalists it had selected. Graystone was not among the five semi-finalists. While the list contained five firms, Gallagher's presentation noted that one of the five semi-finalists had been eliminated after Gallagher's face-to-face interviews were conducted. Following Gallagher's presentation, each of the semi-finalists presented its consulting proposal to the Board.

37. During the December 14 presentation, Gallagher informed the Board that Graystone was among the bottom five firms that were eliminated from consideration after Gallagher's initial review. Among Gallagher's concerns about Graystone were (i) many regional offices creates risk of inconsistent advice across client base; (ii) business model entails numerous potential conflicts which the Fund could be required to monitor; (iii) poor performance of active investment managers; (iv) loss of client base; (v) high fees; (vi) disappointing returns experienced with another multi-billion dollar defined benefit plan; and (vii) limited experience with large plans.

38. Following Gallagher's presentation at the December 14 meeting, Gallagher was questioned by the Trustees as to why Graystone had been excluded from the list of semi-finalists. In response Gallagher again stated the concerns set forth in its presentation. Gallagher highlighted the potential institutional-related conflicts, Graystone's poor selection of investment managers and Graystone's high fees.

39. As directed by the Board, Gallagher added Graystone to the interview process and conducted an interview of John Granger or Graystone.

40. The Board did not express any interest in any other candidate that had not qualified as a semi-finalist.

41. On January 23, 2013, the Trustees convened a meeting for an updated presentation from Gallagher and a formal presentation from Graystone. Co-chairman Roach attended Gallagher's October 2012 presentation where Gallagher made clear that only 4-5 finalists would be interviewed by Gallagher. Nevertheless, Roach stated during the January 23 meeting that "all candidates should have been given the opportunity to meet with Gallagher." Graystone was the only candidate not in the semi-finalist list that the Board insisted be interviewed by both Gallagher and the Board.

42. At the January 23 meeting, Gallagher provided an updated semi-finalist list, which had now been pared down to three of the original five semi-finalists and Graystone. Gallagher's updated report noted that Graystone was added at the insistence of the Trustees and Gallagher repeated some or all of its concerns about Graystone's qualifications.

43. Following Gallagher's updated presentation at the January 23 meeting, Graystone made its formal presentation to the Board.

44. From January to March 2013, Gallagher continued to advise the Fund in connection with the RFP process and the search for an outside investment consultant. During that time, Gallagher selected the finalists that would make presentations to Board. This list included three of the original semi-finalists and Graystone. Graystone was included at the insistence of the Board and over Gallagher's objection. On March 8, 2013, the Board met with Gallagher, Graystone, and NEPC, Marquette & Associates, and Wurts & Associates, the other three finalists.

45. The fee bids for the final four on March 8, 2013 were:

NEPC	\$400,000
Marquette & Associates	\$450,000
Wurts & Associates	\$775,000
Graystone	\$1,100,000

46. Before the conclusion of the March 8th meeting, the Board selected Wurts and Graystone as the two finalists.

47. Between March and June 2013, discussions continued among the Board, Gallagher and the finalists, Wurts and Graystone. On May 22, 2013, Graystone adjusted its fee bid down to \$900,000, while Wurts remained \$125,000 lower at \$775,000.

48. At a meeting of the Board, on June 3, 2013, the Board selected Graystone as the new General Investment Consultant. A majority of six Trustees, including Roach, Gruber, Tucker, Martinez, Allen and Connery voted in favor of hiring Graystone. Trustees Trebour, Henry Eickelberg and Tawfiq Popatia voted against hiring Graystone. Trustee Nelson abstained from the vote.

49. The minutes of that meeting disclose that the Board discussed a personal relationship between IAM President R. Thomas Buffenbarger and J. Weldon Granger, who is the father of John Granger, the Graystone representative who manages the Fund's account. J. Weldon Granger and his firm are currently one of the recommended counsels on *www.goiam.org*, the Union's website.

50. The minutes do not discuss the relative merits of Graystone over any other candidate other than non-specific comments by Roach regarding being able to trust the service provider. There is nothing in the minutes discussing why the Board could not trust Wurts, or any of the other finalists, or the advise of its CIO Monte Tarbox, or its paid professional consultant Gallagher. Nor is there anything in the Board minutes addressing the specific concerns about the Graystone that were raised by Gallagher in the reports it was hired to produce.

51. Sometime in mid-July 2013, the Fund's agreement with Gallagher was amended to compensate Gallagher for the extra research and

interviews the Trustees insisted Gallagher complete in connection with adding Graystone first as a semi-finalist and then a finalist. The amendment provided that the Fund would pay Gallagher \$20,000 in addition to the initial \$40,000 fee.

Additional Imprudent and Improper Hiring Practices

52. For over thirty years, the Investment Committee used a consultant to conduct a search for qualified investment managers, vet the candidates, and narrow the field of candidates. The narrowed list of candidates was presented to the Investment Committee, which selected the candidate to hire. The Board of Trustees later ratified the hiring decision. This approach was set forth in the Fund's governing documents and used when new asset classes were recommended and when investment managers were terminated.

53. The Fund's Manager Monitoring Policy, dated March 22, 2005, states that the Trustees are responsible for selecting investment managers and that there are three steps which must be followed in selecting a new investment manager: 1) Defining a Role – managers can be hired to fulfill a new roll or replace an incompetent manager; 2) Conducting a Search – Trustees will hire an investment consultant to conduct a search, the consultant will disclose any potential conflicts of interest before performing the search, and the consultant is expected to provide the Trustees with a list of recommended investment

managers; and 3) Selecting a Manager – Trustees are responsible for selection. The Fund's Policy was not followed in the hiring of three of the Fund's service providers, Meketa, KRA and Cliffwater.

54. The Trustees and Board did not use a prudent process in hiring certain of the Fund's service providers, including not following the procedures set forth in the Fund's Manager Monitoring Policy, dated March 22, 2005. In hiring Meketa, KRA, and Cliffwater, there was no search or bidding process. The Investment Committee considered only a single investment manager candidate, retained Segal Advisors to conduct a due diligence review on the one candidate, and then approved the hire. The Trustees and Board also failed to conduct an analysis or review whether the fees charged by these service providers were reasonable. The Board of Trustees, at a later date, ratified the Investment Committee's hiring decisions. The method of hiring was not authorized by any Fund policy or any Fund document.

Meketa's Expanded Role with the Fund

55. From February 2004 until in or about April 2010, Meketa acted as sub-advisor to Amalgamated Bank, the Fund's QPAM and investment manager of the IAM Private Equity, LLC, the entity the Fund established to house its Private Markets portfolio.

The 2008 Strategic Investment Plan Recommendations

56. As part of its investment consultant role with the Fund, Meketa prepared the Fund's 2008-2012 Strategic Investment Plan ("2008 Investment Plan"). The 2008 Investment Plan included, among other things, a recommendation that the Fund hire a second QPAM. The 2008 Investment Plan was submitted to and approved by the Investment Committee in or about April 2008.

Segal Advisors' Due Diligence Reviews

57. To implement the 2008 Investment Plan recommendation to hire a second QPAM, the Investment Committee (Trebour and Mart), in 2009, retained Segal Advisors to conduct a due diligence review on Cliffwater LLC's ability to serve as a QPAM for the Fund. The Investment Committee did not follow the procedures in the Manager Monitoring Policy for hiring investment managers.

58. On September 18, 2009, the Investment Committee received Segal Advisors' due diligence report concluding that Cliffwater could serve as a QPAM.

59. On September 22, 2009, Mary Cusick, the Fund's Chief Investment Officer, notified members of the Fund's investment team that Trustee and Investment Committee member Mart did not want Cliffwater for the second QPAM and investment manager role. Instead, Mart wanted the Fund to

replace Amalgamated with Meketa as the Private Markets portfolio QPAM and not hire a Second QPAM.

60. On December 11, 2009, Toby Thompson, a member of the Fund's investment team, requested that Segal Advisors prepare a due diligence report on Meketa's qualifications as the Private Markets Investment Manager/QPAM.

61. Thompson also requested that Segal Advisors negotiate a fee with Meketa and conduct monitoring of Meketa as Investment Manager/QPAM of the Private Markets portfolio for additional compensation to Segal Advisors.

62. At the time Thompson contacted Segal Advisors to prepare a diligence report on Meketa, the Fund, the Investment Committee and the Trustees knew that hiring Meketa as Investment Manager/QPAM of the Private Markets portfolio would create multiple conflicts given Meketa's many roles with the Fund.

63. As a result of the conflicts created by the Investment Committee and the Trustees' hiring of Meketa as investment manager for the Private Markets portfolio, it was necessary for the Fund to hire a firm to monitor Meketa in this role at an additional cost to the Fund. This additional cost would not have been necessary if the Trustees had hired someone other than Meketa as investment manager for the Private Markets portfolio.

64. On January 20, 2010, Segal Advisors submitted a proposal to the Fund for conducting a due diligence review of Meketa, negotiating a fee with Meketa, and monitoring Meketa as Investment Manager/QPAM of the Private Markets portfolio on an ongoing basis. Segal Advisors quoted a fee of \$20,000 to conduct the due diligence review and fee negotiation, and \$470,000 a year to monitor Meketa. If Meketa were hired, Segal Advisors would gain this additional \$470,000 in compensation and the Investment Committee and Trustees knew or should have known about this conflict of interest that they created.

65. The Investment Committee approved the proposal on or about January 26, 2010, without an analysis of the reasonableness of Segal Advisors' proposed fees or whether it was appropriate to have Segal Advisors perform this dual role where if it approved the selection of Meketa, it gained additional fees for monitoring Meketa.

66. Mart and Trebour executed an Investment Manager Agreement with Meketa on April 10, 2010. It rolled into a single retainer agreement Meketa's investment management role for the Private Markets portfolio and Meketa's work under the Consulting Agreement (assistance in developing investment policy statements, assistance in developing investment guidelines, annual reviews, monitoring performance, asset allocation study and reviews, investment manager searches, and five year Strategic Investment Plans). The Agreement granted

Meketa discretionary authority over Fund assets, and Meketa acknowledged that it was a fiduciary to the Fund.

67. Amalgamated was terminated at QPAM of the Private Markets portfolio.

68. Segal Advisors received \$470,000 per year to monitor Meketa. Neither the Fund staff, nor the Investment Committee, nor the Trustees conducted an analysis regarding the reasonableness of the fees that they determined to pay Segal Advisors.

69. The Board of Trustees unanimously ratified the Investment Committee's hiring of Meketa and Segal Advisors. When hiring Meketa as an investment manager, the Investment Committee and Board of Trustees did not use a prudent process, including not following the procedures set forth in the Fund's Manager Monitoring Policy for hiring investment managers.

70. Moreover, the Trustees never met with Segal Advisors or discussed any of its opinions or due diligence before they ratified the Investment Committee's decision to hire Meketa. Nor did they question Mart and Trebour as to what process they used before hiring Meketa. The Board was provided only with Segal Advisors' March 18, 2010 due diligence memorandum. The Board was neither provided with Segal Advisors' March 1, 2010 draft due diligence memorandum, which included Segal Advisors' areas of concern, nor confirmed that drafts

had been shared with the Fund's staff and that changes had been made to the March 1 draft. The Board did not question or discuss the March 18 memorandum with Segal Advisors.

Trustees' Imprudent and Improper Expenditures of Fund Assets

71. The Trustees caused the Fund to pay for unnecessary, lavish parties and dinners for its Trustees and service providers as well as trips for Board meetings. For Example:

- a) An October 3, 2011 dinner paid for by the Fund featured bottles of wine prices as high as \$1,185 and included Trebour, six Fund staff members, and two service providers.
- b) On March 14, 2011, the Fund paid a \$1,954.39 Investment Committee (Mart and Trebour) dinner bill, including two bottles of wine at \$125 a bottle and two bottles of wine costing \$375 a bottle.
- c) The Fund paid in excess of \$90,000 for two Fund holiday parties, one in 2009 and one in 2010.
- d) The Fund paid \$2,680.23 for a retirement party for a Fund Employee on August 13, 2008.

72. The Fund's Amended and Restated Trust Agreement grants the Trustees the power and

authority to pay “reasonable and necessary expenses.” Under the Fund’s Investment Policy Statements, the Trustees were to monitor and control operating costs “at every level” of the Fund.

73. The Board of Trustees also scheduled quarterly meetings at resort destinations and expensive hotels during peak times of the year, including meetings in and traveled to such locations as Hawaii, Beverly Hills and Martha’s Vineyard.

74. The Board of Trustees was presented with a schedule of bills paid by the Fund regarding reimbursement for attendance at meetings and related expenses. The Trustees consistently approved the reimbursements. They did not assess whether the extravagant expenses for dinners, travel, and holiday parties were reasonable, necessary to the administration of the Fund, or benefitted the Fund’s participants and beneficiaries.

75. The Fund’s Trustees and staff and their families also accepted gratuities from the Fund’s investment managers.

76. The Fund’s investment managers hosted and paid for dinner and parties at the Board of Trustees meetings. For example, on May 5, 2010, Benchmark Plus, an investment manager for the Fund, hosted and paid for a dinner in Honolulu, Hawaii for the Fund’s Trustees and Fund employees and their families.

77. The Fund’s investment managers also hosted and paid for dinners for the Fund’s Trustees,

the staff, and service providers such as the Fund's counsel. For example, on November 21, 2008, KRA and another investment manager for the Fund hosted a dinner for the Fund's Trustees and employees at the Bellagio Hotel in Las Vegas.

78. The Fund Director also instructed Fund employees to contact the Fund's service providers and investment managers to solicit contributions to the Fund's holiday party raffle. Investment managers, including Meketa, made contributions.

Trebour Receives Compensation from the Fund

79. Trebour, a trustee, requested and received compensation from the Fund to travel to and attend Trustee meetings.

80. The Trust Agreement states that the Trustees shall not receive compensation from the Fund "except as may be allowed by ERISA and as may be authorized by the remaining Trustees" and that "The Trustees shall establish the conditions for the payment of compensation (if any) and for the reimbursement of expenses."

81. For Trebour's benefit, the Trustees entered into the IAM National Pension Fund Agreement for Compensation of Trustee (the "Compensation Agreement"), effective October 1, 2004. Mart signed the Compensation Agreement on behalf of the union-side Trustees, and to avoid a conflict of interest, another employer-side trustee signed instead of Trebour.

82. The Compensation Agreement, states in pertinent part:

4. During the term of this Agreement, the Compensated Trustee will not receive any pay, fees, or any other compensation from an employer or association of employers whose employees are participants in the Fund of from an employee organization whose members are participants in the Fund.

83. Trebour invoiced the Fund \$250 per meeting and later \$750 per day to travel and attend meetings, including Investment Committee and Board of Trustee meetings. The Board of Trustees increased from one to four days the maximum number of days that Trebour could be compensated per meeting.

84. Contrary to the terms and conditions of the Compensation Agreement, Trebour was receiving compensation from a contributing employer and from an employer whose employees were participants in the Fund (Port Imperial Ferry Corporation), and also was receiving compensation from an employee organization whose members participated in the Fund (the Union).

Fiduciary Obligations Under ERISA

85. Also known as the prudence and loyalty requirements, the provisions of ERISA § 404 require fiduciaries to:

- a) act solely in the interest of the participants and beneficiaries of the Plan for the exclusive purpose of providing them benefits, as required by ERISA § 404(a)(1)(A), 29 U.S.C. § 1104(a)(1)(A);
- b) act with the care, skill, prudence and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims, as required by ERISA § 404(a)(1)(B), 29 U.S.C. § 1104(a)(1)(B); and
- c) act in accordance with the documents and instruments governing the Plan, as required by ERISA § 404(a)(1)(B), 29 U.S.C. § 1104(a)(1)(D).

86. The strict liability provisions contained in ERISA § 406(b) prohibit fiduciaries from:

- 1) dealing with the assets of the Fund in their own interest or for their own account, in violation of ERISA § 406(b)(1), 29 U.S.C. § 1106(b)(1);
- 2) acting in transactions involving the Fund on behalf of a party adverse to the interests of the Fund or the interests of the participants or beneficiaries, in violation of

ERISA § 406(b)(2), 29 U.S.C. § 1106(b)(2);
and

3) receiving consideration for his own personal account from a party dealing with the Fund in connection with a transaction involving assets of the Fund, in violation of ERISA § 406(b)(3), 29 U.S.C. § 1106(b)(3).

FIRST CLAIM FOR RELIEF

**(Against Trustees Roach, Allen, Tucker,
Martinez, Gruber and Connery)**

87. Pursuant to Rule 10(c), Fed. R. Civ. P., the Secretary adopts and incorporates by reference the averments and allegations of paragraphs 1 through 52 and 86 through 87 inclusive.

88. Trustees Roach, Allen, Tucker, Martinez, Gruber and Connery constituted the six vote majority necessary to retain Graystone as the Fund's investment consultant.

89. The Trustees caused the Fund to unnecessarily expend Fund assets on two sham searches for an investment consultant.

90. The Trustees wasted Fund assets by instructing CIO Tarbox and his investment staff to conduct an RFP. When Tarbox eliminated Graystone from contention, the Trustees insisted that Graystone be given further consideration. The Trustees ultimately ignored the recommendation of the Fund's CIO because he eliminated Graystone from consideration.

91. The Trustees wasted Fund assets retaining the services of Gallagher to review and supplement Tarbox' RFP, and to recommend an investment consultant for the Fund. When Gallagher reported that Graystone was near the bottom of the list of candidates, the Trustees insisted that Gallagher reconsider Graystone, interview Graystone and invite Graystone to make a presentation directly to the Board, thereby stripping the process of all neutrality and independence.

92. When Gallagher continued to rank Graystone near the bottom of the list of candidates, Trustees Roach, Allen, Tucker, Martinex, Gruber and Connery ignored Gallagher's findings and selected Graystone as the Fund's investment consultant at a fee of \$900,000 per year. That amount was \$125,000 per year more than the bid of Wurts & Associates, one of the highest ranked candidates and a firm recommended by both Tarbox and Gallagher.

93. The Trustee's selection of Graystone was not based on a prudent and loyal process because they deliberately and knowingly disregarded the recommendations of the Fund's Chief Investment Office and the recommendation of an independent third-party reviewer, Gallagher, and in doing so wasted assets of the Fund.

94. By this conduct, the Trustees demonstrated that they never intended to retain any firm other than Graystone for reasons other than the

strict independent criteria relief upon by the Fund's CIO and the Fund's expert independent consultant.

95. By their conduct described above, Trustees Roach, Allen, Tucker, Martinez, Gruber and Connery breached their fiduciary duties of loyalty and prudence, in violation of ERISA §§ 404(a)(1)(A) and (B), 29 U.S.C. §§ 1104(a)(1)(A) and (B).

96. Pursuant to ERISA § 409(a), 29 U.S.C. § 1109(a), Trustees Roach, Allen, Tucker, Martinez, Gruber and Connery are jointly and severally liable for any losses that the Fund incurred as a result of their conduct and are subject to appropriate equitable and remedial relief, and they are subject to injunctive and other appropriate equitable relief under ERISA § 502(a)(5), 29 U.S.C. § 1132(a)(5).

SECOND CLAIM FOR RELIEF

(Co-Fiduciary Liability Against Trustees Roach, Gruber, Tucker, Martinez, Allen and Connery)

97. Pursuant to Rule 10(c), Fed R. Civ. P., the Secretary adopts and incorporates by reference the averments and allegations of paragraphs 1 through 52 and 86 through 97 inclusive.

98. Trustees Roach, Gruber, Tucker, Martinez, Allen and Connery, each of whom was an ERISA fiduciary, knowingly participated in each other's breach of fiduciary duties with respect to the selection of Graystone as the Fund's General Investment Manager. Therefore, they each are liable

as co-fiduciaries for the breaches of each other, pursuant to ERISA § 405(a)(1), 29 U.S.C. § 1105(a)(1).

99. Trustees Roach, Gruber, Tucker, Martinez, Allen and Connery, by failing to comply with their own ERISA § 404(a)(1)(A) and (B), 29 U.S.C. § 1104(a)(1)(A) and (B), responsibilities of loyalty and prudence, enabled their co-fiduciaries to commit fiduciary breaches in connection with Fund assets. Trustees Roach, Gruber, Tucker, Martinez and Connery knew of each other's fiduciary breaches and failed to take reasonable steps to remedy them. Therefore, they are each liable as co-fiduciaries for the breaches of each other, pursuant to ERISA §§ 405(a)(2) and (3), 29 U.S.C. §§ 1105(a)(2) and (3).

THIRD CLAIM FOR RELIEF
(Against Trustees Trebour and Mart)

100. Pursuant to Rule 10(c), Fed. R. Civ. P., the Secretary adopts and incorporates by reference the averments and allegations of paragraphs 1 through 87 inclusive.

101. Trebour and Mart, as Co-chairs of the Board of Trustees and the members of the Fund's Investment Committee, failed to use a competitive search and bidding process in contravention of the Fund's Manager Monitoring Policy, when retaining service providers and investment managers for the Fund.

102. Trebour and Mart hired Meketa (for Private Markets), KRA (for Global REIT), and Cliffwater (for Hedge Funds) as investment managers

with no search, bidding, or competitive hiring process. Trebour and Mart also hired Meketa to expand the Alternative Investment Program and develop the Concentrated Managers Program, and fired Segal Advisors to monitor Meketa, with no search, bidding, competitive hiring process, or fee analysis.

103. In addition, Trebour and Mart created a conflict of interest when they retained Meketa to act as both as an investment manager of the Private Markets portfolio as well as the Fund's investment consultant. Trebour and Mart created a conflict whereby they placed Meketa in a position to affect its own compensation from the Fund. Trebour and Mart also caused the Fund to incur additional fees and cost by hiring Meketa because of the additional monitoring necessary as a result of Meketa's conflicts.

104. Trebour and Mart also caused the Fund to pay additional fees and costs to retain Segal Advisors to conduct due diligence and monitoring on Meketa. Segal Advisors had a direct financial interest in Meketa being retained as investment manager – a \$470,000 per year monitoring fee. Trebour and Mart knew that the due diligence process of Segal Advisors, therefore, could be compromised and unreliable.

105. By the conduct described above, Trebour and Mart breached their duties of loyalty, prudence, and adherence to the Fund's governing documents, in violation of ERISA §§ 404(a)(1)(A), (B), and (D), 29 U.S.C. §§ 1104(a)(1)(A), (B), and (D).

106. Pursuant to ERISA § 409(a), 29 U.S.C. § 1109(a), Trebour and Mart are jointly and severally liable for any losses that the Fund incurred, are liable to disgorge any profits that they received, as a result of their conduct and are subject to appropriate equitable and remedial relief, and they are subject to injunctive and other appropriate and equitable relief under ERISA § 502(a)(5), 29 U.S.C. § 1132(a)(5).

FOURTH CLAIM FOR RELIEF

**(Co- Fiduciary Liability Against Trustees
Trebour and Mart)**

107. Pursuant to Rule 10(c), Fed. R. Civ. P., the Secretary adopts and incorporates by reference the averments and allegations of paragraphs 1 through 87 and 102 through 107 inclusive.

108. Trustees Trebour and Mart, who were ERISA fiduciaries, knowingly participated in each other's breach of fiduciary duties with respect to the selection of Meketa (for Private Markets), KRA (for Global REIT), and Cliffwater (for Hedge Funds) as investment managers for the Fund, and with respect to the hiring of Segal Advisors to conduct due diligence on and monitor Meketa. Therefore, they each are liable as co-fiduciaries for the breaches of each other, pursuant to ERISA § 405(a)(1), 29 U.S.C. § 1105(a)(1). Trustees Trebour and Mart, by failing to comply with their own ERISA § 404(a)(1)(A) and (B), 29 U.S.C. § 1104(a)(1)(A) and (B), responsibilities of loyalty and prudence, enabled their co-fiduciaries to

commit fiduciary breaches in connection with Fund assets. Trustees Trebour and Mart knew of each other's fiduciary breaches and failed to take reasonable steps to remedy them. Therefore, they each are liable as co-fiduciaries for the breaches of each other, pursuant to ERISA §§ 405(a)(2) and (3), 29 U.S.C. §§ 1105(a)(2) and (3).

FIFTH CLAIM FOR RELIEF

**(Against Trustees Mart, Trebour, Nelson,
Tucker, Gruber, Roach and Allen)**

109. Pursuant to Rule 10(c), Fed. R. Civ. P., the Secretary adopts and incorporates by reference the averments and allegations of paragraphs 1 through 87 inclusive.

110. The Trustees authorized the hiring of the Fund's service providers Meketa, KRA, and Cliffwater with no search or competitive bidding process and no analysis of the reasonableness of their fees. They failed to prudently select the Fund's service providers, failed to comply with the Fund's Manager Monitoring Policy, and cause and permitted service providers to operate under conflicts of interest.

111. The Trustees permitted Fund staff and Fund Trustees to expend Fund assets on lavish dinners, parties and travel. They accrued expenses that were unreasonable and unnecessary to the administration of the Fund and did not benefit the Fund's participants and beneficiaries. They were responsible for monitoring and controlling the Fund's

expenses but utterly failed to do so. They also failed to stop the practice of having investment managers host and pay for dinners and cocktail parties at Board of Trustees meetings.

112. They also improperly, and contrary to the Fund's Trust Agreement permitted Trebour to receive fees to attend Trustee meetings.

113. By their conduct described above, the Trustees Trebour, Mart, Nelson, Tucker, Gruber, Roach, and Allen breached their fiduciary duties of loyalty, prudence, and adherence to Fund documents, in violation of ERISA §§ 404(a)(1)(A), (B) and (D), 29 U.S.C. §§ 1104(a)(1)(A), (B) and (D) and violated ERISA §§ 406(b)(1), (2) and (3), 29 U.S.C. §§ 1106(b)(1), (2) and (3) in spending unreasonable fees on parties and travel.

114. Pursuant to ERISA § 409(a), 29 U.S.C. § 1109(a), Trustees Trebour, Mart, Nelson, Tucker, Gruber, Roach, and Allen are jointly and severally liable for any losses that the Fund incurred, are liable to disgorge any profits that they received, as a result of their conduct and are subject to appropriate equitable and remedial relief, and they are subject to injunctive and other appropriate equitable relief under ERISA § 502(a)(5), 29 U.S.C. §1132(a)(5).

SIXTH CLAIM FOR RELIEF**(Co-Fiduciary Liability Against Trustees Mart, Trebour, Nelson, Tucker, Gruber, Roach and Allen)**

115. Pursuant to Rule 10(c), Fed. R. Civ. P., the Secretary adopts and incorporates by reference the averments and allegations of paragraphs 1 through 87 and 111 through 115 inclusive.

116. Trebour and Mart, each of whom was an ERISA fiduciary, knowingly participated in each other's breaches of fiduciary duties. Therefore, they each are liable as co-fiduciaries for the breaches of each other, pursuant to ERISA § 405(a)(1), 29 U.S.C. § 1105(a)(1).

117. Trebour and Mart, by failing to comply with their own ERISA § 404(a) fiduciary responsibilities of loyalty, prudence, and adherence to plan documents, enabled their co-fiduciaries to commit fiduciary breaches in connection with Fund assets. Therefore, they each are liable as co-fiduciaries for the breaches of each other, pursuant to ERISA § 405(a)(2), 29 U.S.C. § 1105(a)(2).

118. Trebour and Mart knew of each other's fiduciary breaches and failed to take reasonable steps to remedy them. Therefore, they are each liable as co-fiduciaries for the breaches of each other, pursuant to ERISA § 405(a)(3), 29 U.S.C. § 1105(a)(3).

119. Trustees Trebour, Mart, Nelson, Tucker, Gruber, Roach, and Allen, by failing to fulfill their

ERISA § 404(a) duties to loyally and prudently select and monitor the Fund staff and other Fund fiduciaries, enabled one of more of their co-fiduciaries to commit fiduciary breaches. Therefore, they are liable as co-fiduciaries under §§ 405(a)(2) for the breaches of fiduciary duty committed by each other and all of their co-fiduciaries as described above.

PRAYER FOR RELIEF

WHEREFORE, the Secretary of Labor prays that this Court enters an order:

1. Requiring Defendants to restore to the Fund any losses that the Fund suffered and to disgorge any fees, salaries, compensation, and any financial benefits they realized as a result of the violations described in the Complaint;
2. Requiring the Fund to implement reforms to ensure that the wrongdoing alleged in this Complaint does not recur;
3. Enjoining Defendants from further violations of ERISA; and
4. Granting such other relief as may be equitable, just and proper.

Dated: January 24, 2016

For the Secretary of Labor

M. PATRICIA SMITH
Solicitor of Labor

238a

G. WILLIAM SCOTT
Associate Solicitor of Labor
Plan Benefits Security Division

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APPENDIX E

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ANDREW SNITZER and PAUL LIVANT,
et al.,

Plaintiffs,

v.

17 Civ. 5361 (VEC)

THE BOARD OF TRUSTEES OF THE AMERICAN
FEDERATION OF MUSICIANS and EMPLOYERS'
PENSION FUND,
et al.,

Defendants.

New York, N.Y.
April 26, 2018
10:00 a.m.

Before:

HON. VALERIE E. CAPRONI

District Judge

APPEARANCES

CHIMICLES & TIKELLIS LLP

Attorneys for Plaintiffs

BY: STEVEN A. SCHWARTZ

ROBERT J. KRINER JR.

SHEPHERD FINKELMAN MILLER & SHAH LLC

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Attorneys for Defendants

BY: ZACHARY N. LEEDS
JANI K. RACHELSON

PROSKAUER ROSE LLP
Attorneys for Defendants

BY: DEIDRE A. GROSSMAN
STEVEN A. SUTRO

(Case called)

(In open court)

MR. SCHWARTZ: Good morning, your honor. Steve Schwartz from Chimicles & Tikellis for the Plaintiffs.

THE COURT: Good morning.

MR. KRINER: Your Honor, Robert Kriner from Chimicles & Tikellis for the Plaintiffs.

THE COURT: Good morning.

MS. RUBINOW: Good morning, your Honor. Laurie Rubinow, Shepherd Finkelman Miller & Shah, for the plaintiffs.

THE COURT: Are you all with the same firm? I wasn't listening to the firm.

MR. KRINER: Mr. Schwartz and I are with Chimicles & Tikellis.

MS. RUBINOW: And Shepherd Finkelman Miller & Shah. Thank you.

THE COURT: For the defendants?

MR. LEEDS: Zachary Leeds, Cohen Weiss and Simon.

THE COURT: You all can sit down. Plaintiffs can sit down.

MS. RACHELSON: Jani Rachelson, Cohen Weiss and Simon, same firm.

MR. RUMELD: Myron Rumeld from Proskauer Rose. Good morning.

MS. GROSSMAN: Deidre Grossman, Proskauer Rose. Good morning.

MR. SUTRO: Steven Sutro, Proskauer Rose.

THE COURT: All right. Good morning, everybody. OK. Proskauer, or defendants, this is your motion.

MR. RUMELD: Yes, it is. Can I proceed from here, or do you want me at the lectern?

THE COURT: Wherever you are more comfortable. If you are going to proceed from them, you are going to have to pull a microphone so it's somewhere close to you.

MR. RUMELD: Thank you. Good morning, your Honor. In order to withstand a motion to dismiss, the plaintiff must allege facts that if proven would support an interference that the plan fiduciaries engaged in an imprudent process.

There are two significant caveats to that general rule that apply in ERISA investment loss cases like this one. First, as the Second Circuit said in *Pension Benefit Guaranty Corporation v. Morgan Stanley*, the allegations must be evaluated in context; and, second – and relatedly to this notion of context – the riskiness of any particular investment shouldn't be evaluated

in isolation but, rather, the evaluation should be in the context of all the plan's investments.

THE COURT: Of course.

MR. RUMELD: Agreed, of course. But in this case we have a great deal of contextual facts even at the motion to dismiss stage which really results from the fact that before the original complaint was filed the plaintiffs had access to all the investment reports that were cited in the original complaint, and then in response to our motion to dismiss, the complaint was amended before we moved again; and the amended complaint then made reference to all the minutes that we had produced in the interim.

So, we have all of those contextual facts that are documented, that the court wouldn't normally have access to in a typical motion to dismiss. And, as indicated in our papers, these contextual facts remove any plausible inference of fiduciary breach because they show, first of all, that with respect to each of the principal claims in this case, the challenged decisions were the product of abundant process – prudence claims are really claims that focus on process – and that process included detailed consultation with qualified professionals, in particular Makita the investment consultant and Milliman the plan actuary.

This is not a case where one can draw an inference that just because there were losses experienced with certain investments that this means somebody was asleep at the switch.

THE COURT: I don't read the plaintiffs' complaint to be that. The original complaint was close to that, but that's not how I read the current complaint.

I read the current complaint as saying that the fiduciaries were simply acting imprudent in overweighting the fund with risky investments. That's sort of – I got your claim sort of generally.

MR RUMELD: OK.

THE COURT: So I guess one question I would have for the defendants is: Is it fair game for me to consider the fact that your plan appears to be out of whack relative to peer plans in terms of how heavily weighted it was in two particularly risky types of investments: Emerging markets and private equity.

MR. RUMELD: So, I think that's one of those areas where the reference to contextual facts comes in. It's certainly fair game for you to consider that.

THE COURT: OK.

MR. RUMELD: But it's also fair game for you to consider that the trustees got contemporaneous advice from their experts that showed that this was not the normal situation. If they continued to seek investment returns of seven and a half percent per year – which was the investment assumption – they have a report from their actuary that said this fund is going to be circling the drain eventually for the very simple reason – which is also well documented – that the plan's expenses, the cost of paying benefits – which is something that happens in mature plans where there are a lot of retirees relative to the number of active people – this plan was going to continue to run a deficit even if it got seven and a half percent returns.

THE COURT: The trustees were in a difficult position with this fund, there is no question about it;

and that seems clear from the minutes. And they still I guess are in a difficult position, though maybe it's getting a little better now. But they were in a difficult position.

But even trustees in a difficult position, that doesn't absolve them from all decision making.

MR. RUMELD: I agree. And I think for the purposes of evaluating whether they acted prudently, there isn't one answer to the exclusion of others to what to do in a situation like that. Their job is to conduct an evaluation, consult with the appropriate professionals; and if their decision is among the prudent decisions that one could have in those circumstances, then I think your Honor is supposed to let the case go and realize that there isn't a basis for finding a breach of fiduciary duty.

We have referred in our papers to the stochastic model. I had to get a little bit of an education myself on this, but as the report itself says the model runs 10,000 scenarios for each allocation policy there being considered, and after running those 10,000 scenarios with an eight percent rate of return and a seven and a half percent rate of return and a nine percent rate of return it basically says that over an extended period of time – which is the relevant period of time for a fund like this – it also said, incidentally, that under any of the models there was no risk of the plan going insolvent in the very short term. There is definitely a greater risk of going down more when more aggressive, but in the short term there was no risk of the plan going insolvent, and in the long term there were many more scenarios under which the seven and a half percent targeted allocation model

was going to run the plan under. And, while, yes, it was taking on more risk, there were actually fewer scenarios in which the plan was going to go under if it pursued a nine percent rate of return.

Now, there is no question that we've had some unfortunate circumstances in that the international emerging market equities had a couple of bad years after they put some money in – though actually after they added more, the recent year has been very, very good, as we indicate in our papers, and that clearly made the situation –

THE COURT: It's very good from a lower level.

MR. RUMELD: From a lower level, yes. But again we're taking –

THE COURT: This is the problem of looking at one year returns. Right? You can have great one year returns, but if you look at it over five years it's horrible.

MR. RUMELD: I completely agree, your Honor. And if you review the paperwork, all of the reports from Makita were focused on 20 year return periods and prepared the allocation model looking at the 20 return period.

And, among other things, if you flip the pages of the report, it's not just the targeted returns. It talks about, for example, the probability of achieving a seven and a half percent rate of return, and it shows that there is a higher probability over a 20 year period of achieving a seven and a half percent rate of return than there is with the models that are targeting a lower level of return, and that's because in longer

periods of time aggressive investments tend to do better.

Now, it's also true if we kind of proceed from the overall riskiness of the portfolio to why specifically emerging market equities, there is numerous quotations and references to Makita statements, and it's right in Makita's reports themselves. They endorse these products at the beginning, at the middle, at the end, and they were specifically questioned by the trustees: Are you sure we're supposed to be putting more money in emerging market equities if our two funds haven't been doing well the last couple of years? And their very clear statements and their thought-out statements explain that, if anything, the losses they've experienced in the last year or two makes these securities undervalued by the market right now. And there was a concern that domestic equities may have priced themselves out. You know, there are ways to look at price range ratios; there are objective metrics that consultants use.

But the point is there can't be any question about process here. In the typical case you get a complaint, the complaint points to investment losses. If there are extensive investment losses over a period of time, or there's funds that are offered that charge a lot more than comparable funds that perform better net of those fees, the court is entitled to say, look, it's reasonable to question whether somebody was asleep at the switch here or not doing their job, so we have to send the parties off to discovery.

But here we have the benefit of these reports, and before we all get – you know, we have done a lot of

discovery already somewhat voluntarily. When we met with you last time we told you about that. And we have already produced, I don't know, tens of thousands of documents, and we're on the verge of producing tens of thousands of e-mails, and after that we're going to be doing lots and lots of depositions. And I think if your Honor looks at that PBGC case – and after the PBGC case that case really got an endorsement from the Supreme Court in the Dudenhoffer case – there is a legitimate concern by the Second Circuit and Supreme Court that we're not supposed to open the door to this kind of discovery unless at the pleadings stage there is really some there there; I mean you can say that there is a rational inference to be drawn, not that we chose bad investment but that we weren't doing our job in how we chose them.

Now, let me just transition, because although your Honor didn't mention it, I think it's fair to say that the complaint in addition to accusing us of taking on too much risk also accuses us of investing in actively managed funds to the exclusion of the passive index funds.

THE COURT: I was just about to get to that.

MR. RUMELD: OK, so then my timing is good.

THE COURT: Your timing was impeccable.

MR. RUMELD: OK. So here too this is one of those things that if you only look at the reports and you don't have anything else, you can say, hmm, here are all these actively managed funds, they didn't out perform the index funds. I will say parenthetically that I think it's absurd to be talking about what three index funds would have done. I mean, sure, with the

benefit of hindsight we would have all left our money in the stock market the last five years and we would have done very nicely. To compare that to a portfolio, a billion and a half dollar portfolio, with over a dozen different investments vehicles, and to suggest that it could have possibly been more prudent to be just in three; I think that's kind of ridiculous.

But getting back to the question on index versus active, what we see here with this more robust record is, one, there was a movement towards index funds. The fund has substantially more index funds and substantially less money invested in active managers than it did when Makita was first hired. They told them when they got hired this is one of the things we're going to do for you; we focused on the fees, and they acted that way.

On the other hand, we don't see this whole scale shift to index funds, because Makita specifically and repeatedly – and repeatedly in response to questions from trustees and their counsel specifically on this issue – said, look, there are some areas of the economy like large cap domestic equities where the market is very efficient and we don't really believe active managers outperform the index funds in the long run so why not save the basis points. But there are other segments of the economy that are less efficient like small cap or international securities where there is a lot of friction, and there is a lot less efficient trading of information, and in these areas you either need to maintain actively managed funds or have some mixture of the two.

So, what you see when you look at the fund's portfolio that with some of these other parts of the

economy, some of these other sectors, there is a mixture of actively managed funds and passively managed funds.

You also see – because there is an accusation that there is an absence of process to review how these guys are doing – I think we had like a dozen different exhibits cited in our papers where specific investment managers were reviewed, some were replaced. There is this allegation that if we held on to managers for a longer period of time we must not be doing our job. But in each of those cases Makita gives an explanation that it sometimes takes a longer period of time in which to evaluate managers, or a certain manager isn't really expected to match the benchmark because he's not just investing the same as the indexes; he's doing something a little differently.

But the point is every one of these managers was vetted, and the decision – it wasn't the absence of a decision when they kept an investment manager; it was a decision to keep him based on the advices of Makita.

THE COURT: So I read the plaintiffs' argument to be it was standardless, that is, there was no – aside from what Makita said – and I read all of the exhibits that you pointed me to on this –

MR. RUMELD: Thank you.

THE COURT: This is an issue of great interest to me personally in term of how you make a decision whether to stay with an investment manager or just go to the index funds. I was hoping for some great insight; I did not get that.

What I got was that Makita – there is no question that there were times when there were trustees who said: Why are we still with this manager? You know, they're way off the benchmark or whatever. And Makita's response was something like you just said. And they would go forward then with it.

But there was no – at least I couldn't tell from the minutes that you gave me – that you wanted me to decide on – what the trustees really were using aside from what Makita said. And it wasn't clear that Makita had a standard either as opposed to kind of a gut feeling that we need to hang in with this manager for a year or two more. But it was not clear to me that there was any kind of standard, leading to the question of whether a fiduciary needs a standard.

MR. RUMELD: So, let me try and respond in a couple of components here. And I don't want to get into a battle of semantics with your Honor, because "standard" could mean a few different things.

So, for example, there is an allegation in the responding papers that Makita said after three to five years we should be making a decision to get rid of the manager if he's not performing well.

If you read what that paragraph says in the minutes, they don't say that. They say in general three to five years is a benchmark you would be looking at, but every single manager you have to evaluate in the context of what is going on, so maybe in three to five years but not necessarily.

I give that as an example, your Honor, because –

THE COURT: I don't know what that means.

MR. RUMELD: Well, the point is that every circumstance has to be evaluated individually so there isn't – the advice they got from their professional is don't have a hard and fast rule. Historically the biggest mistakes that multi employer funds make is when they bolt from an investment manager because he has two or three years of bad performance, and they exit him right before he rebounds, because the consultants would say you really have to evaluate over a market cycle.

It helps to keep in mind here that Makita comes onboard in 2010 or so; most of these managers that were being criticized in the papers were managers that Makita originally added to this fund so they haven't been there for a long time. If Makita recommended them, that means they were managers that they had already vetted internally and were comfortable with.

Now, if a manager – if the leading guy passes away or retires and there is an issue whether they are the same smalls in that fund, then that's a reason to get rid of the fund. But if the manager is actually managing consistently with the investment philosophy that Makita endorsed, then Makita's advice sometimes is, look, just because this investment philosophy hasn't panned out for the last year or two doesn't mean that this doesn't make sense. We can't make decisions in the review mirror; we have to make decisions going forward.

And, frankly, that's the same point about the emerging market equities. I don't think there is any question that if we evaluated whether to stay in, let alone increase emerging market equities, based on its

performance in the first couple of years, everybody would have exited the emerging market equities.

But what Makita says is we are looking at these investments, we are looking at the future, we're looking at the economy, we are looking at the populations of these countries that are growing, they're looking at all of these factors – which they understand completely much better than I do – and they're saying, look, if we look into the future, we think this is what we think, and we're not going to be guided by the past. That's the same analysis that's going on with these managers.

So, getting back to your question is there a standard, I would say there is a process, and the process is these folks meet every quarter. By the way, if you sort of look at the various minutes, there isn't just a board of trustees minutes. There is a board of trustees, there is investment committee, there is strategic planning, there is communication, and there are three or four committees that I don't think would deem sufficiently relevant to this case yet to get involved with.

These are folks that meet extensively on a quarterly basis, and every single quarter Makita prepares one of these reports, and it does report on every single manager broken up by sector. And, if you look at the reports, you will see at the end there is a set of specific recommendations, including recommendations to keep a manager who they call to the trustees' attention and say, yeah, he's not doing well but we think we should let it ride for a while.

And if you look at the history of Artisan, the emerging market manager that performed poorly and

was eventually let go, there was a period of time where the trustees were challenging Makita and said what about this, and they said not yet; we don't see anything fundamentally wrong with what they're doing; but if they continue to perform badly, we'll take another look. And that's what happened. With the benefit of hindsight, I'm sure the trustees would say the same thing, gee, we should have gotten rid of these guys a year or two earlier.

But there is a process. And I am a little resistant to use the word "standard," because I think what we're reading Makita to be saying is don't get locked into a hard and fast rule; every single situation needs to be judged by its circumstances.

So, I think the important word here is that there is a process. There is a consistent process of getting reports from Makita, soliciting their advice, and then reacting to their advice in deciding what to do.

I also point out that some of the minutes reflect the fact that the trustees specifically asked for some more reporting from Makita. There is a reference to 2012, 2013. In fact, there is support that the plaintiffs cite for the proposition that the trustees were aware that there wasn't a process. That's not what those minutes say. What the minutes say is the trustees asked Makita to provide additional information about some of the managers and to come in and give their global view about the economy. So they asked for more process. That doesn't mean there wasn't a process before that. We have all those reports before that.

So, you know, obviously we are asking for a lot at a very early stage of a case, and it's a little bit

frustrating for me since our two firms represent hundreds of multi-employer plans, so somebody like Jani Rachelson goes to these meetings all the time. So, there is a certain body of information that one has from doing this that we can't possibly capture in the papers.

But I do think that this fund has an extraordinarily robust, documented record of what it did, and we think it really would be a crying shame to put these trustees through what could be years of extensive discovery when we don't really think there is any reason to think that there was something wrong with their process. There may have been something wrong with some of the outcomes, and even there the jury may still be out.

Let me just to close say what you said before is true, this fund is still in trouble. There are some serious issues that have to be decided, whether to support certain pieces of legislation that may allow funds like these to have some other remedy if the investments are doing a little better. They haven't gone into that critical and declining status yet even though we were very close. Maybe we will stay out of it. There is a whole question whether that's a good or bad thing because clinical declining status actually creates an opportunity that some people may think is a good idea. We would just prefer if the trustees could just continue to focus on what their real job is and not be preoccupied by this litigation.

THE COURT: I think we need more musician, young musicians, that's what we need.

OK. Who is arguing for the plaintiff?

MR. SCHWARTZ: Good morning, your Honor. Steve Schwartz. And I agree we do need more young musicians.

Before I get into the EMEs and the private equity and how they took money from domestic equities to fund that, I want to step back to talk about where the problem started. The problem really starts with the target return, the goal of what the return is, because that drives all the investment decisions.

Now, in 2014 defendant Brockmeyer gave an interview to I think it was Allegra Magazine, and he said something that we agree with. He said that he spends a lot more time on investment issues than a lot of the other trustees, and the best return is typically 7.5 percent even though in a few funds we've lowered the investment target to 7.25, and that in seeking returns we've got to protect against significant downside.

That actually is something we agree with, a statement by one of the key defendants, and it tells you what the metric is. And the problem that started all these problems was that the fund's target return was 7.5 percent; they had the shortfall coming out of the '08 recession because of the '08 recession losses and because of the demographics of the music industry which we don't have to get into even though it's very interesting; and faced with that problem what they decided to do was set a new target return of 8 percent, and it wasn't an analysis that when given the opportunities in the market, given what's available, given the realities of the market – because the market is the same for someone who is in a hole and someone who is doing really well – they set the 8

percent number simply because that's the long-term 20-year number they needed to get out of the hole. It was a reverse engineering process. So, they go to Makita and say let's ratchet up the target return from seven and a half to a 8 percent, give us some ideas on how we could get this extra market return.

So it's not just the active managers trying to beat the market. They try to start to beat the market by changing the target return. And all the decisions about EMEs and private equity is really derivative of that attempt to ratchet up the target return. And as we go over time what we will see is when I go through it that when it didn't work initially and they dug the hole even deeper, they just ratchet up the target return from 8 to 9 percent. And going from seven and a half to 9 percent is a massive shift in what you think you're going to get, and that is very much like the gambler who is doubling down or tripling down trying to take riskier and riskier bets.

THE COURT: Is your contention that given historic returns and for purposes of a Taft-Hartley plan, aiming at a nine percent return is just kind of per se too risky, that no fiduciary does that?

MR. SCHWARTZ: Your Honor –

THE COURT: No reasonable fiduciary return is the seven and a half percent that we're all used to, because that's just what you're going to get and aiming at a higher return is necessarily too risky for a pension fund?

MR. SCHWARTZ: No, we are not making a per se argument on the target return. We're also not making a per se argument on can you never use active managers. We're not making per se arguments.

As Mr. Rumeld pointed out in the Pension Benefit Guaranty case and other cases, you have to look at everything in context. And as held in the *Sacerdote v. NYU* case – which is about to go to trial – you can't parse each claim individually.

So, what we have tried to present to your Honor – I think we have done it – is present a compelling case giving the reasons why they got into the wrong philosophy and made a mistake, the specific investment decisions that were a mistake given specific warnings about those investments and what would happen if there were short term losses, then doubling down, and then a tripling down, with the overlay of all the active managers which created its own risks all in an attempt to beat the market.

So, we have a comprehensive set of facts or, in the parlance or the lingo of the Pension Benefit Guaranty case, we have all these surrounding circumstances where we think each of them individually is very compelling – and I do think seven and a half to nine percent, given the statement from one of the key trustees, I think that is a really strong claim. But then they acted on it, and they acted on it like a drunken gambler chasing losses, and those combination of facts to me even under any standard – whether it's a heightened standard under Pension Benefit Guaranty, under the usual plausibility standard that was used in the *Sacerdote v. NYU* case, under a summary judgment standard, if we looked at this kind of like summary judgment because we have all these documents, no matter what the standard is, we have a compelling narrative here where all of our claims fit together with various facts, both target returns, specific decisions, next set of decisions where

they double down, decisions where they triple down, and to me when you combine all of those and add in some of the questionable disclosures that they made, I think we have a compelling case that there is something wrong here, and what was wrong was while I don't think the process was good at all – and we do have process allegations here – I think your Honor did hit the nail on the head, that the decisions themselves are just a combination of risky bet taking that really doesn't make sense. And it's not hindsight that they dug their hole even deeper by making those decisions, because they were told by Makita and by Milliman at the outset that given where the fund is – and the problems with the fund was going to be funding down the road, not this year or next year – that if you didn't do well in the short term – and doing well can mean either making gains or it can mean not having bad losses – but if you did poorly in the short term, because of the power of compounding over the next ten, 20 years you're not going to dig yourself out of the hole.

So, I appreciate that maybe EMEs did OK during one of the more recent years, but if you take a four year period, if you want to get seven and a half percent and you get zero, zero, seven and a half and seven and a half for each four years, it averages to seven and a half percent per year, but that is a much different result than if it was seven and a half each year because of the power of compounding, and that's how they dug themselves in the hole even more by starting out with the EMEs.

THE COURT: Do I correctly understand your argument about the active managers, that your beef is there did not seem to be from the trustees'

perspective – other than listening to Makita – and it was not clear to me, are you claiming that Makita had some kind of a conflict, that they shouldn't have been listening to Makita anyway?

MR. SCHWARTZ: Well, I don't say that they shouldn't have listened to Makita anyway. There is a conflict which is not a central part of our litigation but we point it out, that because Makita wanted to get a more lucrative position, there was a financial incentive for Makita to do what the trustees wanted to do and to not push hard against the trustees' desire to ratchet up the target return.

Now we cited in our papers that it was the trustees that directed Makita to raise the target return, and then when Makita makes recommendations they're fitting the recommendations into the target return. It's just like if someone comes to me and says, Steve, try to make \$50 million the next two years but not from the practice of law but from investing. Well, if that's what I'm trying to do, I'm not going to do an index fund, I'm not going to do an actively managed Fidelity fund, I'm going to have to start making crazy bets to do that.

So, there is a noncentral but there is something that at least the trustees should have been cognizant of that Makita may have some reasons to not push as hard as they should. And this comes into play where Makita in fact – along with First Eagle, another one of their advisors – while the trustees were ratcheting up the EMEs up to 15 percent compared to four and a half percent on the typical fund – Makita was divesting its portfolio of EMEs, and First Eagle was also doing that and saying we're in a – I would like to

say unusual but it's happened in other cases – where Makita's so-called advice was the opposite of what Makita was actually doing with its own money, and that to me raises a very serious question. It's one of those –

THE COURT: Well, it raises a question about their advice, but Makita isn't a defendant in this case.

MR. SCHWARTZ: Right. But the defendants knew that Makita made the opposite bet with its own money, because they were told that at the meetings, and the defendants knew that First Eagle made the opposite bet because, they were told that in its meetings, and that's from their notes.

So, what we have is a trustees who know Makita is making the opposite bet, and they are taking their EMEs which started at six percent in the initial investment, which was higher than the four and a half of the typical fund, and when they ratcheted it to 11, and they ratchet to 15, but their advisors are making a different bet with their own money, that to me is one of those surrounding circumstances under the Pension Benefit Guaranty case where a decision that looks very reckless if you just look at the decision looks even more reckless when you know that, that the advisers are making the opposite bet. It makes it more reckless when you know from the Brockmeyer interview that they're really stretching the target return.

So, there is a combination of reasons for each of the claims that we raise, all of which interrelate with each other and hold together and provide support for each other which really I think drives home the point that these trustees, no matter what kind of advice

they may have gotten, they're making very, very outsized risky bets that made very little context in terms of the position of the fund, when they were told that if you lose money or don't do well in the early years, you're going to never dig out of the hole because of the way you dig out of a hole in this context is to have compounding over many years. And with all of the riskier bets necessarily comes a higher degree of volatility, and that's what they got caught in. They got caught in the trap where the volatility of the EMEs and the private equity put them in a bigger hold, and they would be in a better –

THE COURT: I'm sorry, let me interrupt for a second. So your complaint is about both private equity and EME.

MR. SCHWARTZ: Yes.

THE COURT: And what is your complaint relative to firing active managers? Did I correctly understand your complaint that your real complaint seemed to be that the trustees didn't really have a standard for making decisions?

MR. SCHWARTZ: They didn't have a standard. They started with a hundred percent, which I don't even know how someone starts at a hundred percent given the body.

THE COURT: A hundred percent active managers.

MR. SCHWARTZ: Yeah, they start with a hundred, and so while I appreciate they went from a hundred percent to 70 percent beginning to end of the time period that's within the statute of limitations, our case starts at the beginning where it was a

hundred percent and stayed at a hundred percent for a while. That decision in and of itself to me is indefensible to have a hundred percent in active management.

Then what you see is that the process – there is no standard for the process. And there was a case that they cited which I think is very helpful for us where they talked about the process they had in that case, and the gist of it is that for each – I will pull the case in a second – for each manager they had a series of five categories of how each active manager was doing, whether it should be a strong hold, weak hold, watch, negative. And the problem.

THE COURT: This is what these trustees did.

MR. SCHWARTZ: No, no, not these trustees. This is in a case, and I will pull the case in a few minutes when I find it. I apologize.

But these trustees the active managers did poorly, and we know from the e-mails from plan counsel they didn't do poorly for one year, three years or five years. The numbers were ugly, and plan counsel acknowledge they were ugly, and if we actually transparently conveyed that information to participants, there would be a riot, and they would get sued just like they have been sued.

What the trustees did was when they were faced with managers who had done poorly over a number of years, the response was, well, we will give them a little more time and we will wait; and then after more years they finally switched, often times from going from one active manager to another active manager, which doesn't make sense.

One good example is for active manager Next Century, there was several years of underperformance from the time they hired Next Century. They actually did I guess a good thing from a process point of view of bringing in the guy from Next Century to give a presentation, and a trustee asked him, well, how much longer should we give you before we can see if your strategy works; and he said one year. Well, they don't ditch Next Century for two years after that.

So, even when the active manager said all I need is one year, if I haven't performed, then, yes, you should get rid of me, after another year of bad performance they didn't get rid of him; they waited around for a whole other year until they ditched Next Century.

And that's kind of an example of what is the process and standards. The standards was basically we will get rid of them when we get around to it, as opposed to stepping back and saying does using active managers really make sense; is there any way that we're ever going to really not only find the rare active manager that can somehow beat the market but we are the ones who are going to be smart enough to identify that smart unicorn active manager.

And when you've made the same mistake not one year or three years but for five or six years, that to me says that there is no really process that's going on there; and we just get into fact questions that just cannot be resolved on a motion to dismiss.

And even with respect to the EMEs, they start out – they actually made the decision to go into the EMEs based on Makita's recommendation that there were

going to be inefficiencies and an active manager can find those inefficiencies and get an above-market return. They made the decision to go to six percent EMEs before they identified these magical active managers.

Then they find the two active managers that start, Dimensional and Artisan. Artisan does poorly, as Mr. Rumeld mentioned, but Dimensional did poorly too. And the response was since Artisan did worse poorly, to ditch Artisan and to send the money from Artisan to Dimensional which had been underperforming, and eventually they sent that piece of the money from Dimensional to Dry House which also did poorly.

So, basically they are doing a whack a mole game from going from one active manager to the other active manager, not really stepping back and saying, well, if all the literature says there are just very few magical active managers that can truly beat the market, maybe the fundamental thing of what we are doing is wrong.

THE COURT: But isn't it the literature more – it's more sophisticated than that? It's not that – there clearly are segments where it makes no sense to be in an active managed fund. Blue chip stocks, for example, it's just insane to do that, although there are managers who do that.

I thought the trustees' argument was a little more nuanced than that, it is as to certain segments of the market an index fund doesn't really make sense because there is a lot of variance in terms of how well different advisors do; it's not an efficient, incredibly deep and liquid market; and, therefore, having active managers who could actually do the individual

research, etc., is more important in certain markets than in others. And I'm not sure that that is contrary to the accepted body of financial thought relative to index funds.

MR. SCHWARTZ: I disagree but only partially. The literature is very broad based; it's not just the S&P 500. And the place where they got hurt was with the midcap stocks where the literature is just as appropriate as it is with the S&P 500.

And if you take a look at the board minutes – and I think your Honor identified what the real issue was – Makita said to them we think this is a sector, midcaps, where we think there are inefficiencies and we think some managers can identify those inefficiencies and do better than the market in good times, and in bad times hedge against even worse losses. And that was basically it. That was the pitch from Makita, and that was it.

There was no elongated discussion, elongated presentation which gave a fair balance of here are the pluses of going active, here are the minutes, this is what the literature shows over many studies over a long period of time, and so when you make a choice by very careful.

And when you step back and say, well, did these particular trustees, did they really understand what they were doing, well, we talked about in paragraph 129 where another one of the key trustees, Gagliardi, he was asked a specific question from one of the plan participants why do you keep on trying to outguess the market with active managers. And I wont read the answer to you. His answer was nonsense, but his

answer reflects a complete lack of understanding of what the real choices that you identified.

Is it possible that there could be some specific sector where someone has real sector-specific and manager-specific information where it might make sense? Warren Buffet says no, but I'm not going to say that you have to make that decision on a motion to dismiss. But these managers did not go into that kind of detail and analysis. And even at the end of the day when they've lost their bets and gotten their clocks cleaned, one of the key members of one of the key subcommittees still has no way to respond to that question from a plan participant, when you think that would be an issue that he was all over and had a complete understanding.

And I don't want to harp too much on plan counsel's email e-mail about how the active managers work, but it's not a record where it could have been better; it's an ugly record, and the underperformance you could have said it was an ugly record one, two, three years before they made any moves. And going from a hundred to 70 percent, that is not that big of a shift. If they would have gone from a hundred percent to 30 percent, then I think it would be much harder for me to say, well, at least they were making some reasoned decisions.

But going from a hundred to 70 is basically meaning at some point way too late you're getting rid of the low hanging fruit. But I think that one of the critical parts of the active manager claim that it's consistent with our claim they're making very risky bets with the emerging markets and equities and the private equity, and pretty much everything they did

during this time period was one outsized risky bet on top of another outsized risky bet, and they kept on increasing it and ratcheting it up over time.

You don't see those facts in the Pension Benefit Guaranty case. In that case there was one investment mortgage backed securities, there were some rumblings that were some risks with that, but a lot of people invested in those too. It was not the same kind of inform this is really, really risky. There was no fund specific circumstances about short term returns in that case. And there was one investment decision which started I think at 10 percent, and then it decreased over time. There is no doubling and tripling down in the Pension Benefit Guaranty case. And the loss that occurred was a one-time market crash where everyone got it slaughtered in that market crash. In contrast with the EMEs, it was not a one-time market crash. In fact, when they lost initially, they just kept on doubling and tripling down, and they dug deeper holes as they doubled down. And did it have a period where it did well more recently? Yeah, but the volatility can quick right back, but the problem is they've already lost that money and the compounding for that money, and they will never get it back.

What they did is they took the bread-and-butter domestic equities, and they stole from that to fund these two bets, and so it's the combination of factors, and as the cases say, the combination of factors is the way that courts should review these on a motion to dismiss.

THE COURT: OK, thank you.

MR. RUMELD: Can I just reply very briefly?

THE COURT: Briefly.

MR. RUMELD: I think there is one theme I want to discuss in reply here, which is, there is an essential equivocation in Mr. Schwartz's comments as to whether he is blaming the trustees for following the advise of their consultants.

Now, in my book, if you fire an investment manager contrary to the advise of your investment consultant, I think you're much more likely to get into trouble if the investments go in one direction after that, than if you follow the advise of the investment consultant.

What did our consultants say? If you look at this Exhibit 27, the stochastic model I referred to before, on page 13 there is a chart that shows what is going to happen over a long period of time under various annual rates of return. And for the seven and a half percent rate of return it shows that within 20 years, 2034, the fund will be 49 percent funded, meaning it has less than half the money it needs to pay benefits. And a couple of pages earlier they talk about financial measures and they say 80 percent is used as a proxy for a plan headed towards financial health; 50 percent used as proxy for "plan headed toward financial peril, a/k/a tipping point."

THE COURT: 50 percent what?

MR. RUMELD: 50 percent funded. So, they get a report from their actuary that says if we let it ride, if we keep investing consistent with the seven and a half percent assumption, we're telling you that within a 20 year period you will be less than 50 percent funded, and less than 50 percent funded means headed toward financial peril, passing the tipping point.

So I would submit to you, your Honor, that no matter what isolated quotation from Chris Brockmeyer they can refer to, if you are presented from your actuary with a piece of paper that says if you just keep doing what you're doing, your fund is going down the tubes, these are times for extraordinary measures. And that's what happened, OK?

THE COURT: I think the question though is whether the extraordinary measures were too extraordinary for the actions of the fiduciaries.

So, look, I am sympathetic to the situation the trustees found themselves in, but when I hear the emerging markets, they ultimately put how much –

MR. SCHWARTZ: 15 percent.

THE COURT: -- 15 percent, and private equity at 10 percent or nine percent?

MR. SCHWARTZ: 18 percent.

THE COURT: 18 percent. That's just – I mean again if understand the situation the fund was in, but that is extraordinarily risky. I mean, yes, if that risk pays off, mazel tov, but the reason that it's risky is that you also have a risk that you're not going to get that return, that you're going to lose money. That's why the investment is risky.

MR. RUMELD: Yeah. And with respect, your Honor, that's why we hire professionals who can evaluate risk in the aggregate.

THE COURT: Let me ask you something. If your fund had been 75 percent in emerging markets and 20 percent in private equity because Makita said that will get you fully funded in 15 years, would the

plaintiff be able to say that's a breach of fiduciary duty, that is simply too risky, you can't put an ERISA fund in that level of risk?

MR. RUMELD: I think under those circumstances some of the other metrics that appear in those reports, including likelihood of going under in the short term because of a short-term risk would have pointed against doing that, because obviously there is some point at which you are taking on too much risk because you're not going to be there for the long term.

But if you look at these reports, they have probability of achieving seven and a half percent, probability of a negative return over a 20 percent period, probability of what they call those three stigma events, something happening. And actually even if you look at the report where they go to the nine percent target and the 15 percent, the movement on the margin is really relatively small if you look at those risk factors.

At the end of the day I ask that your Honor focus on the process. There is nothing wrong with the process, with taking these extraordinary circumstances, asking your consultant what to do, being presented with four or five choices, and actually picking amongst the more conservative of these choices – because if you look at that report with the various asset allocation models, yeah, 15 percent sounds extraordinarily high, but the other choices had more risk attached to them. They actually took the more conservative of the nine percent approaches there.

So, we all have our own stigmas about certain investments being risky. Oh, and by the way, the

notion pulling away from domestic equities, let's be real here, domestic equities are incredibly volatile. All we have to do is look back the last week or the last month to know that. Domestic equities aren't the safe investments.

THE COURT: Well, they're volatile in the short term; they're not volatile in the long term.

MR. RUMELD: And also when they move from eight percent to nine percent, they didn't steal from domestic equities, that's false. When they went to eight percent, they moved some of the domestic equities, but they moved from one equity investment to another that their consultant said had a better chance in the long term of getting them the returns they needed.

In any event, my point is it's not imprudent to follow the advice of your consultant. If they want to make case that Makita didn't know what they were doing, or Milliman didn't know what they were doing, those folks will be happy to defend themselves, I promise. But there is only once instance in these papers that was cited where the trustees did not follow Makita's advice, and that was in 2016 when they suggested derisking – not just only emerging market equities but all of the equities because of this situation in China – it was described as a temporary measure. The trustees felt it was too much like market timing and didn't do it, and the truth of the matter is if they had followed Makita's advice they would have been in worse shape because the equities did very well in that period of time.

But if you look at any of the advise before then or after, they're consistently recommending to keep and

increase the investments in emerging market equities.

So, it may sound weird to be this heavily invested, but I think the question for your Honor is did these guys follow or not follow the advise of their consultants, can I really say there was a breach of fiduciary duty or a breach of the process? Thank you, your Honor.

THE COURT: Thank you.

MR. SCHWARTZ: Can I make one quick point about that stochastic modeling?

THE COURT: No.

OK, I'm prepared to rule on the defendants' motion to dismiss. The motion is granted in part and denied in part. As to Courts One and Two the motion is denied; as to Count Three, the motion is granted.

Much of the defendants' brief reads like a motion for summary judgement, and we're just not at that stage. I reviewed all of the material that the defendant submitted – based on their argument that the court can consider such materials without converting the motion to a motion for summary judgement if the plaintiff relies on them and if the actual documents contradict plaintiffs' allegations. I do not find that the materials to contradict the complaint, Although I will say that the gestalt of the board minutes is likely to cause the plaintiffs difficulty at trial or at summary judgment.

Plaintiffs' allegations come down to three main complaints: First, the trustees breached their fiduciary duty by investing substantial percentages of the fund in emerging markets equity and private

equity, the first of which is very volatile and risky, and the second of which is illiquid; Second, without standards to evaluate the value of active management for various classes of assets within the fund, they opted to use actively managed funds rather than passive index funds which are cheaper, and they failed to take prudent action against underperforming investment managers; and, third, they failed to keep the plan participants fully informed about the fund.

Before shifting to defendants' specific arguments, let me say that I do not find Pension Benefit Guaranty Corp. v. Morgan Stanley to be an impediment to the complaint. Schnitzer has alleged specific information that was available to the fund regarding the near term risk of investing in emerging market equities, which he argues, should have caused a prudent fiduciary to limit the fund's near term exposure to such investments. Far from doing so, he argues, the fund doubled down and increased the percentage of the fund invested in an asset class that was losing money and that a prudent fiduciary would have recognized at the time was likely to continue to do so for the near future.

Defendants argue, in essence, that the decision to invest substantial funds in emerging markets and private equity was not a breach of their fiduciary duty but was instead a reasoned decision by the trustees to increase the probably returns to the fund, even though that meant taking on additional risk to maintain the long term solvency of the fund.

As to active management, they argue that many portions of the fund are passively managed and that

the decision to use active managers is not per se a breach of fiduciary duty. As to providing plan participants with information about the fund, they argue that much of plaintiffs' complaint is about internal discussions that ultimately were resolved in terms of full transparency and, in any event, plaintiff has neither alleged causation nor harm from the failure THO disclose.

At the motion to dismiss stage, defendants' arguments are not compelling. The Court is not unsympathetic to the positions the trustees found themselves in after the 2008 recession. They were highly motivated to adopt an investment strategy that increased the probability that the fund would be solvent in the out years. The question is whether the strategy they adopted was so risky that it is outside the bounds of what a prudent fiduciary would do. In that regard, the fact that this fund was significantly overweighted in volatile and illiquid asset classes (specifically EME and private equity) vis-à-vis its Taft-Hartley peers, nudges plaintiffs' claim across the line from possible to plausible. Similarly, as to plaintiffs' complaint about active management, it is again clear from the materials presented that the issue of investment management fees was of concern to the trustees. It appears that at many of the investment committee meetings, one or more investment managers came under fire for consistently underperforming the relevant standard. Sometimes, but rarely, the manager was dismissed; more generally, Makita persuaded the board stay the court and not change managers. There was also discussion at committee meetings which clearly reflects Makita's view of the world – that active management is

worthwhile for certain asset classes where there is a “substantial spread between percentile rankings.” That’s from Defendant’s Exhibit 56. Although, I believe I saw something like that in numerous different meetings. Although the defendants are correct there is nothing per se wrong with active management, plaintiffs’ complaint that is fiduciaries the trustees should have some criteria they use to decide whether active management was actually worth the cost and for deciding to fire active managers who were not doing a good job. Plaintiff alleges there were no standards and nothing in the defendants’ documents demonstrates that were there.

I’m saying standards. Maybe process would be a better word.

Plaintiff’s argument – given the financial industry literature that he cutes – is, again, plausible.

Finally, I agree with the defendants that plaintiffs’ allegations regarding nondisclosure do not include allegations showing plaintiffs were harmed. I do not view this as a fatal because nondisclosure is not a stand-alone claim. Instead, it’s just one of three ways in which plaintiff alleges the trustees violated ERISA. Keeping those allegations in Counts One and Two will have no impact on discovery, because regardless of whether it’s a stand-alone claim, the evidence of trustees trying to hide the ball from the fund’s beneficiaries is relevant to the ERISA claims of breach of fiduciary duty and is therefore a fair target for discovery.

In sum, plaintiff has plausibly alleged an ERISA violation, albeit one that will have a tough row to hoe to get past summary judgment.

As to Count Three of the amended complaint, it is dismissed. Plaintiff responded to defendants' motion relative to that count only in a footnote. That is not adequate to preserve the claim. See *In Re Crude Oil Commodity Litigation*, 06 Civ. 6677. It appears at 207 WL 1589482 at page 3.

OK. You have a schedule for discovery, correct?

MR. KRINER: We do.

THE COURT: Do you need anything further from me at this stage?

MR. SCHWARTZ: Not from plaintiffs, your Honor.

MR. RUMELD: No, your Honor. Thank you.

THE COURT: Thank you all.

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APPENDIX F

29 U.S.C. 1104(a)(1) provides:

Fiduciary duties

(a) Prudent man standard of care

(1) Subject to sections 1103(c) and (d), 1342, and 1344 of this title, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and –

(A) for the exclusive purpose of:

(i) providing benefits to participants and their beneficiaries; and

(ii) defraying reasonable expenses of administering the plan;

(B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;

(C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and

(D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this subchapter and subchapter III of this chapter.