SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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WAYNE WONG, JERIANN JALOZA, JENNIFER DIMEGLIO, JATANIA MOTA, and AMERICANS FOR FAIR TREATMENT, INC.,

Plaintiffs,

Index No. 652297/2023

Motion Seq. No. 1

-against-

NEW YORK CITY EMPLOYEES' RETIREMENT SYSTEM, TEACHERS' RETIREMENT SYSTEM OF THE CITY OF NEW YORK, and BOARD OF EDUCATION RETIREMENT SYSTEM OF THE CITY OF NEW YORK,

Defendants.

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MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS

Dated: New York, New York
August 7, 2023

HON. SYLVIA O. HINDS-RADIX
Corporation Counsel of the City of New York
Daniel Matza-Brown, Of Counsel
Daniel R. Whitman, Of Counsel
100 Church Street
New York, New York 10007
(212) 356-1000

GROOM LAW GROUP, CHARTERED
David N. Levine
Samuel I. Levin
Allison A. Itami (*pro hac vice* forthcoming)
1701 Pennsylvania Ave., NW, Suite 1200
Washington, DC 20006
(202) 861-5436

Attorneys for Defendants

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

PRELIMINARY STATEMENT 1

FACTUAL AND LEGAL BACKGROUND 3

A. The retirement benefits guaranteed to 639,000 plan members, and the four members challenging an investment decision that has no impact on their benefits 3

B. The legislative and regulatory framework governing the Plans' discretionary investment decisions 4

C. The Plans' multi-year fiduciary considerations of whether or not (and, if so, how) to sell their fossil-fuel holdings 6

D. The poor financial performance of fossil-fuel securities over the past decade, and the prevalence of large investors opting to stop investing in those securities 8

ARGUMENT 12

A. Plaintiffs lack standing because they face no injury in fact. 12

B. In any event, Plaintiffs have not stated any cause of action. 14

1. The Complaint and documents incorporated by reference state no cause of action. 15

2. Regardless of whether the Complaint is facially defective, the Meketa and BlackRock reports are documentary evidence compelling dismissal under CPLR 3211(a)(1). 19

C. Justiciability concerns weigh heavily against judicial intervention in public pension funds' discretionary investment decisions. 20

CONCLUSION 24

TABLE OF AUTHORITIES

Cases **Page(s)**

Ashkenazy v. Gindi,
No. 656277/2020, 2022 WL 2663505 (N.Y. Sup. Ct. July 10, 2022).. 15

Baird v. Norton,
266 F.3d 408 (6th Cir. 2001).. 13

Beckman Coulter, Inc. v. Jabil Circuit Inc.,
208 A.D.3d 1126 (1st Dep't 2022)... 15

Berardi v. Berardi,
108 A.D.3d 406 (1st Dep't 2013)... 15

Godfrey v. Spano,
13 N.Y.3d 358 (2009) 13

Griffin v. Vale,
291 A.D.2d 353 (1st Dep't 2002)... 16

Hefter v. Elderserve Health, Inc.,
134 A.D.3d 673 (2d Dep't 2015) 19

Hunzinger v. Costello,
No. 653086/2012, 2019 WL 1571591 (N.Y. Sup. Ct. Apr. 11, 2019)...................................... 15

In re World Trade Ctr. Lower Manhattan Disaster Site Litig.,
30 N.Y.3d 377 (2017) 13

Matter of Bank of New York,
35 N.Y.2d 512 (1974) 16

Matter of JPMorgan Chase Bank N.A.,
122 A.D.3d 1274 (4th Dep't 2014) 16, 19

Mental Hygiene Legal Serv. v. Daniels,
33 N.Y.3d 44 (2019) 13

Omnicom Group Inc. Shareholder Derivative Litig.,
43 A.D.3d 766 (1st Dep't 2007)... 17

Pension Ben. Guar. Corp. ex rel. St. Vincent Cath. Med. Centers Ret. Plan v. Morgan Stanley Inv. Mgmt. Inc.,
712 F.3d 705 (2d Cir. 2013)... 22

Philip S. Schwartzman, Inc. v. Pliskin, Rubano, Baum & Vitulli,
215 A.D.3d 699 (2d Dep't 2023) 19

PSM Holding Corp. v. Nat'l Farm Fin. Corp.,
No. 05-cv-8891, 2013 WL 12080306 (C.D. Cal. Oct. 8, 2013) 21

Roulan v. Cnty. of Onondaga,
21 N.Y.3d 902 (2013) 14

Rudder v. Pataki,
93 N.Y.2d 273 (1999) 14

Sgaglione v. Levitt,
37 N.Y.2d 507 (1975) 20, 21

Silver v. Pataki,
96 N.Y.2d 532 (2001) 13

Skillgames, LLC v. Brody,
1 A.D.3d 247 (1st Dep't 2003) 15, 16

Smith v. CommonSpirit Health,
37 F.4th 1160 (6th Cir. 2022) 21

Soc'y of Plastics Indus. v. County of Suffolk,
77 N.Y.2d 761 (1991) 12, 13, 21

Thole v. U.S. Bank N.A.,
140 S. Ct. 1615 (2020) 3, 12, 13, 14

Town of Verona v. Cuomo,
44 Misc. 3d 1225(A) (Sup. Ct. Albany Cnty. 2014) 12, 13

Tron v. Condello,
427 F. Supp. 1175 (S.D.N.Y. 1976) 21

Rules

CPLR 3016(b) 15, 19

CPLR 3211(a) 14, 15, 19, 20

Statutes, Regulations, and Legislation

11 NYCRR § 136-1.6 6

11 NYCRR § 136-1.9 6

2022 N.Y. SB 8532 .... 5, 6

Ins. Law § 314(b)(2) 6

N.Y.C. Admin. Code § 13-103(b) 4

N.Y.C. Admin. Code § 13-107 4

N.Y. Educ. Law § 2590-b(1)(a)(1), (2) 4, 5

Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights, 87 Fed. Reg. 73,822 (Dec. 1, 2022) 18

PRELIMINARY STATEMENT

The Plaintiffs (four public employees and an advocacy group) have sued three New York City public pension plans to challenge their decision to stop investing in certain fossil-fuel companies. Plaintiffs concede the decision does not impact them—at all. They will get paid the same retirement benefits no matter how well, or poorly, the pension plans' investment choices play out. They will get paid the same benefits no matter how *this lawsuit* plays out. Plaintiffs face no harm, and this lawsuit's outcome—win or lose—will have no impact on their pensions.

Simply put, Plaintiffs are wasting the Court's time. The Court should swiftly end that drain on resources by dismissing the Complaint, with prejudice, for lack of standing. To do so, the Court need only follow a recent U.S. Supreme Court case involving nearly identical facts.

Plaintiffs' lawsuit fails for other reasons, too. For one, their legal theory is premised on the radical, absurd notion that courts may *force* public pension funds to invest in a particular industry if it performs well enough—whether that be mainstream media companies, crypto-currencies, global hedge funds, or fossil-fuel producers. Of course, Plaintiffs do not cite any decision in which the courts of this state have overruled public pension funds' discretionary judgments about which companies or industries to invest in or which to avoid.

The total lack of precedent supporting Plaintiffs' legal theory is no mere happenstance. Public pension funds exercise judgment every day about which companies and industries to invest in or not. Texas divested from pornography in 2006. Tennessee divested from marijuana in 2019. Those decisions, and countless other discretionary decisions that public pension funds make daily, do not end up in court because courts are not the right place to challenge them.

The City's pension funds are publicly accountable, by design. Displeased but uninjured members have various avenues to air their grievances about the funds' investment choices. They

can appeal to the plans' trustees, which include not only elected officials and appointees, but also representatives of the employees who comprise the membership of the funds. They can appeal to the legislators whose laws cabin the funds' investment options. Or they can appeal to the State's Department of Financial Services, which has legislatively-delegated oversight of the pension funds. New York law reflects this structure, and does not permit private lawsuits by uninjured plan members to challenge fund administrators' investment judgments.

And the Complaint fails for another, separate reason—Plaintiffs have not plausibly alleged that the pension plans' divestment decisions were careless, disloyal, or imprudent. Rather, the Complaint teeters on three fundamentally inaccurate contentions: (i) that fossil-fuel stocks have fared well in recent history; (ii) that the pension plans' divestment decisions were made without analysis of whether the decisions were consistent, as a financial matter, with their fiduciary duties; and (iii) that climate-change-related financial risks, such as those detailed by oil companies in their own SEC filings, are somehow "unrelated" to "relevant" financial risk-reward considerations. Stripped of those implausible allegations—each of which is flatly contradicted by public filings and the very news reports upon which Plaintiffs rely—the Complaint contains no allegations from which a reasonable factfinder could infer a breach of fiduciary duty.

Finally, justiciability principles weigh heavily against judicial intervention. Permitting courts to overrule public pension funds' discretionary investment decisions would run afoul of clear precedent reserving such investment judgments to the publicly accountable officials legally charged with administering the funds. And allowing this suit to proceed would open the door to countless such challenges by numerous unharmed plaintiffs who hold different beliefs about how fund assets should be invested, with no perceptible limit on such lawsuits and no check against vexatious litigation. The Court should dismiss the Complaint.

FACTUAL AND LEGAL BACKGROUND

A. The retirement benefits guaranteed to 639,000 plan members, and the four members challenging an investment decision that has no impact on their benefits

The defendants (the "Plans") are three public employee-retirement systems: New York City Employees' Retirement System ("NYCERS"), Teachers' Retirement System of the City of New York ("TRS"), and Board of Education Retirement System of the City of New York ("BERS"). The Plans administer "defined benefit plans" on behalf of approximately 639,000 members (Compl. ¶¶ 14-16). Four of those members—out of 639,000—have sued the Plans in this action (*id.* ¶¶ 9-12, ¶¶ 14-16).

Because they participate in defined-benefit plans, the four individual Plaintiffs here will receive a "fixed payment each month" when they retire. *Thole v. U.S. Bank N.A.*, 140 S. Ct. 1615, 1618 (2020). The fixed payments they will receive when they retire "do not fluctuate with the value of the plan or because of the plan fiduciaries' good or bad investment decisions." *Id.*

The four individual Plaintiffs do not claim that the Plans have denied them any benefits. Nor do they allege that the Plans will be unable to pay their benefits when they ultimately retire (which they allege will happen between 2027 and 2048, respectively, *see* Compl. ¶¶ 9-12). Rather, they correctly acknowledge that any shortfall between the Plans' assets and the benefits ultimately owed must be covered by contributions from the government (Compl. ¶ 46).

The fifth Plaintiff, Americans For Fair Treatment, Inc. ("AFFT"), is an Oklahoma non-profit corporation (Compl. ¶ 13) that advises public employees about their "best options to leave [their] union."[1] Despite offering "absolutely free!" membership[2] and spending sizeable sums on

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[1] https://americansforfairtreatment.org/opt-out/, *archived at* https://perma.cc/D8KB-J6MA.

[2] https://americansforfairtreatment.org/apply-to-become-a-member/, *archived at*

"advertising and promotion",[3] the organization's membership includes only 14 of the approximately 639,000 members in the Plans (Compl. ¶¶ 13-16). Three of the four individual Plaintiffs allege they are members of AFFT (*id.* ¶¶ 19-12).

Plaintiffs allege that the Plans held approximately $147 billion in assets as of June 30, 2022 (*see* Compl. ¶¶ 14-16). This lawsuit challenges the Plans' divestment decisions regarding less than 3% of those assets (*see id.* ¶¶ 4, 14-16). As Plaintiffs concede, the Plans report that they were 78.1% funded, 80.4% funded, and 94.1% funded, respectively, in 2020 (*id.* ¶ 45). The average funding level of United States public pension plans in 2020 was 56.2%.[4]

B. The legislative and regulatory framework governing the Plans' discretionary investment decisions

Each Plan is governed by a board of trustees (Compl. ¶¶ 14-16). The board of each Plan is composed of a combination of elected officials, appointees of elected officials, and employee representatives. N.Y.C. Admin. Code § 13-103(b) (NYCERS board is eight publicly elected officials and three union representatives); *id.* § 13-507 (TRS board is one publicly elected official, three appointees of a publicly elected official, and three teacher-members elected by TRS contributors); Compl. ¶ 16 and N.Y. Educ. Law § 2590-b(1)(a)(1), (2) (BERS board includes one publicly elected official, 19 appointees of publicly elected officials, five members elected by Community Education Councils, and two employee-members).

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https://perma.cc/SZ29-A642.

[3] Americans For Fair Treatment Inc., Form 990 for Period Ending September 2021, at 10, https://projects.propublica.org/nonprofits/display_990/472593565/IRS%2F472593565_202109_990_2022082920303219.

[4] Federal Reserve, *State and Local Government Pension Funding Ratios, 2002-2020* (Dec. 16, 2022), https://www.federalreserve.gov/releases/z1/dataviz/pension/funding_ratio/table/, *archived at* https://perma.cc/66HB-5KLG.

The Plans and their trustees are governed by New York statute and regulation. Section 177 of the Retirement and Social Security Law ("RSSL") establishes that "the trustee or trustees of a fund shall have the power to invest the moneys thereof" in certain eligible investments. That law enumerates eight categories of assets that the Plans may invest in. RSSL § 177. These include certain "securities in which the trustees of a savings bank may invest," *id.* § 177(1); any "equity securities" of United States corporations registered on a national stock exchange, *id.* § 177(2); stocks of corporations, *id.* § 177(7); and foreign equity securities, *id.* § 177(8). The law also limits the percentage of a Plan's total assets that may be invested in each of these eight enumerated categories. *E.g.*, *id.* § 177(2) (purchase of equity securities of domestic companies may not exceed 15% per year).

Section 177 contains a catch-all provision that permits, subject to certain limitations, additional investments that "do not qualify or are not permitted under" the eight enumerated categories. RSSL § 177(9). Investments made pursuant to the catch-all provision must be made prudently and "for the exclusive benefit of the participants and beneficiaries," and "shall, to the extent reasonably possible" and consistent with the "exclusive benefit" and prudence requirements, "benefit the overall economic health" of this state. *Id*. Nothing in Section 177 mandates investment in any particular category of investment—much less a particular sector—or prohibits any consideration of the impact of investments, such as on "the overall economic health" this state. *Id.*

Section 177 was last amended in late 2022, well after the Plans made the fossil-fuel divestment decisions at issue in this lawsuit (2022 N.Y. SB 8532). That amendment did nothing to undo or push back against the divestment decisions, nor to limit similar decisions in the future. *See id.* Other divestment decisions have likewise prompted no legislative pushback—including

defendant NYCERS's 2016 divestment from gun-retailer stocks, the Plans' divestment from Russian securities in 2022, and a state employee-retirement fund's divestment from Russian companies in 2022.[5]

The Insurance Law delegates to the commissioner of the New York State Department of Financial Services ("DFS") the oversight of public retirement and pension systems, including the authority to promulgate standards regarding their investment policies and practices. Ins. Law § 314(b)(2). Pursuant to this provision, DFS promulgated 11 NYCRR § 136-1.6, which provides rules for the "discharge of fiduciary responsibilities" of the administrative heads of retirement systems. This regulation provides that Plans' administrative heads are "fiduciaries" and therefore must "act solely in the interests of the members and beneficiaries of the systems they administer," including by performing their responsibilities "in a manner consistent with those of a reasonably prudent person exercising care, skill and caution." *Id.* § 136-1.6(a). Another regulation, 11 NYCRR § 136-1.9, empowers DFS to bring enforcement actions for breaches of fiduciary duties by plan administrators, executives, or employees. *Id.* It creates no private right of action. *Id.*

C. The Plans' multi-year fiduciary considerations of whether or not (and, if so, how) to sell their fossil-fuel holdings

Citing articles from *The New York Times* and *Politico*, the Complaint alleges that in early 2018, then-Mayor Bill de Blasio and then-Comptroller Scott Stringer "announced their plan to have all City pension plans fully divest fossil fuel-related assets within five years," and that, in

[5] *See* Liz Moyer, *New York City Pension Fund to Divest Itself of Gun Retailer Stock*, The New York Times (July 14, 2016), https://nyti.ms/474Y5Rm; Office of the New York City Comptroller, *Fourth Largest Pension System in the U.S. Votes To Divest From Russia* (March 24, 2022), https://on.nyc.gov/3DsS3wu; Office of the New York State Comptroller, *DiNapoli Orders Divestment of Russia Holdings* (March 25, 2022), https://www.osc.state.ny.us/press/releases/2022/03/dinapoli-orders-divestment-russia-holdings.

presenting their plan, they did not "discuss, cite, or refer" to "any financial analysis or study indicating that the wholesale divestment of fossil fuel holdings would be in the interest of plan participants and beneficiaries" (Compl. ¶¶ 21-22). The Complaint then alleges that, in 2021, the Plans' trustees "chose to withdraw indiscriminately all of their investments in any publicly traded fossil fuel security" and, furthermore, that their public statements "following the votes" indicated that "the financial interests of Plaintiffs and other plan participants and beneficiaries" may not have "been considered at all" (*see id*. ¶¶ 3, 24-25).

In reality, the *Times* and *Politico* articles cited in the Complaint say that the Mayor's proposal "was not actually to divest, but to simply study its effects" and that the boards of three of the five City pension funds "approved the study" of a potential divestment.[6] In particular, the *Times* article explains that resolutions approved by the boards of NYCERS, TRS, and BERS in 2018 "called for the boards to hire a consultant to study the issue and its impact on risk and return" and to "initiate a process for determining a prudent divestment strategy in keeping with the fiduciary duty to responsibly manage the funds."[7] As discussed in more detail below, the Plans commissioned analyses from two outside investment firms, which concluded the Plans could divest prudently and in accordance with their fiduciary duties, and issued lengthy reports detailing multiple options for the Plans to prudently divest (*see* Argument Section B.2, *infra*). Two other City pension funds opted not to study the issue (*see* Compl. ¶¶ 22, 52).

After extensive study and consideration, in 2021, the Plans voted to divest their portfolios from investments in certain fossil-fuel companies. The 2021 divestment announcement—which

[6] Danielle Muoio, *Divesting from Big Oil a tough sell — even in the bluest cities and states*, Politico (Mar. 7, 2018), https://politi.co/3Q8wf0E.

[7] William Neuman, *To Fight Climate Change, New York City Takes On Oil Companies*, The New York Times (Jan. 10, 2018) (quotation marks omitted), https://nyti.ms/3OC6RiV.

Plaintiffs selectively quote without attribution (Compl. ¶¶ 23-25)—stated that the decision to stop investing in certain fossil-fuel companies followed "an extensive and thorough fiduciary process to prudently assess the portfolio's exposure to fossil fuel stranded asset risk and industry decline and other financial risks stemming from climate change."[8] The announcement further explained that this process involved "independent investment consultants who conducted investment analyses showing the risks posed by fossil fuel companies and the prudent nature of the divestment actions adopted by the Boards" (*id.*). The announcement stated that the identification of fossil-fuel securities that would no longer remain in the Plans' investment mix was "based on demonstrated risk from fossil fuel reserves and business activity," and included the "majority" of the Plans' fossil-fuel holdings (*id.*).

D. The poor financial performance of fossil-fuel securities over the past decade, and the prevalence of large investors opting to stop investing in those securities

Plaintiffs allege that fossil-fuel stocks have delivered "exceptional returns" for shareholders and outperformed the broader market "by orders of magnitude" in 2022 (Compl. ¶ 43). In particular, Plaintiffs allege that, in 2022, the S&P 500 Energy Sector index "rose 58 percent, and was the only segment of the S&P 500 index that did not experience a loss for the year" (*id.*). But, as the article Plaintiffs selectively quote explains, this event was unprecedented and it occurred because of "the Russian invasion of Ukraine" and "the econom[ic] recover[y] from the pandemic."[9]

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[8] City of New York, *Mayor de Blasio, Comptroller Stringer, and Trustees Announce Estimated $4 Billion Divestment from Fossil Fuels* (Jan. 25, 2021), https://on.nyc.gov/3DpwOvu.

[9] Joe Toppe, *S&P Energy Sector's Record 2022 Performance 'Built on Downfall of Others'*, Fox Bus. (Dec. 30, 2022), https://fxn.ws/3Y7iHoa.

By contrast, in the five-year period preceding the Plans' 2021 decisions to stop investing in fossil-fuel companies, these same energy stocks lost more than 35% of their value, while the broader stock market increased in value by more than 50%.[10] Moreover, through early August 2023, energy stocks have lost 1.3% in 2023, while the broader stock market has gained 17.2%. *See id.* As a result, over the last ten years—including their record performance in 2022—energy stocks have returned a mere 0.58% annually, while the broader stock market has returned a robust 10.5% annually. *See id.*

As of early August 2023, a decade-long comparison of the S&P 500 versus the S&P 500 Energy Sector index looked like this[11]:

Index Name	Index Level	10 Yr Return Annualized
S&P 500 Launch Date: Mar 04, 1957	4,576.73	10.37%
S&P 500 Energy (Sector) Launch Date: Jun 28, 1996	665.88	0.81%

[10] *See* S&P 500 Energy Sector Returns, https://www.spglobal.com/spdji/en/indices/equity/sp-500-energy-sector/ (reflecting a price of $448 on December 31, 2015 and a price of $286 on December 31, 2020); S&P 500 Index Returns, https://www.spglobal.com/spdji/en/indices/equity/sp-500 (reflecting a price of $2,044 on December 31, 2015 and $3,756 on December 31, 2020).

[11] This graphical historical comparison of fossil fuel stocks with the broader market can be readily generated by the Court, or by anyone else interested in the relevant facts, at https://www.spglobal.com/spdji/en/indices/equity/sp-500/#overview. At that site, simply click on the words "10 YEAR," then click the plus sign next to the word "COMPARE," then select "S&P 500 Energy (Sector)" (or any other fossil-fuel index), and click "APPLY."

This stock-market data shows that $100 invested in the broader stock market in 2013 would be worth about $232 in early 2021, while that same $100 invested in fossil-fuel production companies would be worth about $42 (*id.*).

Tellingly, all of the largest publicly traded fossil-fuel companies have disclosed to their investors in filings with the U.S. Securities and Exchange Commission ("SEC") that climate change poses material risks and contingencies to their businesses.[12] In addition to the mounting environmental risks to operations and infrastructure that face many industries, the fossil-fuel companies' financial disclosures recognize climate-related risks that are unique to their core business of selling fossil fuels—that is, the risk that worldwide "emissions-related laws and related regulations and the effects of operating in a potentially carbon-constrained environment" will increase costs and "reduce demand" for their core products. Chevron Corp. 2019 Form 10-K at 20; *accord* Exxon Mobil Corp. 2019 Form 10-K at 3; ConocoPhillips 2019 Form 10-K at 24; Schlumberger Ltd. 2019 10-K at 9.

It is little surprise that these potentially enormous risks to the industry, coupled with the industry's poor stock-market performance over the past decade, have prompted numerous institutional investors, including pension funds, to stop investing in fossil-fuel companies. As Chevron noted in its public filings, "[s]ome stakeholders, including but not limited to sovereign wealth, pension, and endowment funds, have been divesting and promoting divestment of or screening out of fossil fuel equities."[13] Chevron also recognizes the potentially compounding impacts of such divestments, wherein divestment prompts further "negative investor sentiment

[12] Exxon Mobil Corp., 2019 Form 10-K, at 3, https://bit.ly/44zym1Z; Chevron Corp., 2019 Form 10-K, at 20, https://bit.ly/3rEqNIH; ConocoPhillips 2019 Form 10-K, at 24, https://bit.ly/3Y5jhTo; Schlumberger Ltd. 2019 Form 10-K, at 9, https://bit.ly/3Optxmd.

[13] Chevron Corp., 2022 Form 10-K, at 24-25, https://bit.ly/43xcDXa.

toward Chevron and to the diversion of investment to other industries," which would in turn have "a negative impact on [Chevron's] stock price and [its] access to and costs of capital" (*id.*).

Like Chevron, Plaintiff AFFT has publicly acknowledged that many pension funds have decided to stop investing in fossil-fuel companies. Two months before filing this lawsuit, AFFT issued a news release describing the Plans' 2021 decisions to stop investing in fossil fuels as part of a broader trend "[a]cross all pension systems."[14] The news release requested that pension fund members contact AFFT if they "fear" that their fund's divestment from fossil fuels "might impact" their "potential retirement" (*id.*). AFFT's request for member input focused only on divestment from fossil fuels, and said nothing about public funds' various divestments from other sectors, such as marijuana, pornography, or Russian companies.[15]

AFFT's news release also acknowledged that, worldwide, more than $40 trillion in assets were "'committed to divestment,'" representing "'almost two thirds of the entirety of global pension fund assets under management.'" (AFFT News Release). Despite AFFT's public acknowledgment of widespread divestment across the globe, the Complaint alleges that "Funds Across the Country" have rejected divestment, citing examples of five public pension funds

[14] Brigette Herbst, *The Complex Case for Not Breaking Up with Fossil Fuels*, AFFT (Mar. 8, 2023) ("AFFT News Release"), https://americansforfairtreatment.org/2023/03/08/the-complex-case-for-not-breaking-up-with-fossil-fuels/, *archived at* https://perma.cc/RJ24-BHK3.

[15] *See, e.g.*, Andy Sher, *Tennessee pension fund investments in marijuana company generates smoke*, Chattanooga Times Free Press (Aug. 1, 2019), https://www.timesfreepress.com/news/2019/aug/01/tennessee-pension-fund-investments-marijuana-compa/, *archived at* https://perma.cc/5J9J-DGDM; Teacher Retirement System of Texas, TRS Board of Trustees Meeting, at 239 (Feb. 2020) (noting ongoing policy of "[n]o investments in adult entertainment"), https://www.trs.texas.gov/TRS%20Documents/board_book_feb2020.pdf, *archived at* https://perma.cc/28CW-ULGC; n.5, *supra*.

(including two City funds) opting not to divest from fossil fuels in 2017 and 2019 (Compl. ¶¶ 22, 35-39, 52).

ARGUMENT

Two fatal failings require dismissal of this lawsuit. First, Plaintiffs face no injury, and thus lack standing. Second, regardless of standing, Plaintiffs have not stated any cause of action for multiple independent reasons, including that their Complaint rests entirely upon three demonstrably false contentions and, furthermore, they make the critical concession that the Plans might be able to maintain an appropriate investment mix without buying back any fossil-fuel stocks whatsoever. Finally, justiciability limits strongly support dismissal on any of these grounds.

A. Plaintiffs lack standing because they face no injury in fact.

Plaintiffs lack standing because, as they concede, the Plans' divestment decision has no impact, at all, on Plaintiffs' retirement benefits. Relying on the same injury-in-fact limitation that applies in New York courts, the U.S. Supreme Court explicitly held that members in defined-benefit plans—like the Plans at issue here—lack standing to sue for alleged losses of plan assets that do not impact the retirement benefits that participants will ultimately receive. *Thole*, 140 S. Ct. at 1619.

Mirroring federal law, standing under New York law requires that the plaintiff face an injury in fact, which serves to "define the proper role of the judiciary." *Soc'y of Plastics Indus. v. County of Suffolk*, 77 N.Y.2d 761, 772-73 (1991) (under both federal and state law, the "core requirement" of an injury in fact "ensures that the party seeking review has some concrete interest in prosecuting the action"); *see Matter of Town of Verona v. Cuomo*, 44 Misc. 3d 1225(A) (Sup. Ct. Albany Cnty. 2014) (Ceresia, J.) (finding no "significant difference" between injury-in-fact requirement under New York and federal law), *aff'd on other grounds*, 136 A.D.3d

36 (3d Dep't 2015); *accord Baird v. Norton*, 266 F.3d 408, 417 n.5 (6th Cir. 2001). The injury must be both "concrete" and "particularized." *Mental Hygiene Legal Serv. v. Daniels*, 33 N.Y.3d 44, 50 (2019). A tenuous, ephemeral, or conjectural harm is insufficient to support standing. *Id.* By faithfully enforcing these requirements, courts avoid adjudicating "generalized grievances more appropriately addressed by the representative branches." *Society of Plastics Indus.*, 77 N.Y.2d at 773.

Without an injury in fact, a plaintiff cannot seek relief from the courts of this state. *Silver v. Pataki*, 96 N.Y.2d 532, 539 (2001); *In re World Trade Ctr. Lower Manhattan Disaster Site Litig.*, 30 N.Y.3d 377, 384 (2017) (standing "goes to the jurisdiction of the court").[16] An uninjured plaintiff's complaints, whatever they may be, must be addressed to a different branch of government. *Rudder v. Pataki*, 93 N.Y.2d 273, 280 (1999) (without injury, a litigant's grievances "are little more than an attempt to legislate through the courts").

In this lawsuit, Plaintiffs face no injury in fact, and thus lack standing.[17] As in *Thole*, because Plaintiffs are participants in a "defined-benefit plan" they will, upon retirement, "receive a fixed payment each month, and the payments do not fluctuate with the value of the plan or because of the plan fiduciaries' good or bad investment decisions." 140 S. Ct. at 1618; *see* Compl. ¶ 46. Accordingly, regardless of the outcome of the Plans' decisions to stop investing in certain fossil-fuel companies, or the result of this lawsuit, Plaintiffs will "receive the exact same

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[16] The one narrow exception to the particularized-injury requirement is taxpayer standing, which Plaintiffs—two of whom are not even City residents—have not alleged, and which plainly would not apply to the Plans' discretionary investment decisions in any event. *See, e.g.*, *Godfrey v. Spano*, 13 N.Y.3d 358, 373 (2009).

[17] The institutional Plaintiff AFFT asserts no basis for standing other than the alleged injuries to its 14 members who are Plan participants (Compl. ¶ 13). AFFT lacks standing because its 14 members, including the individual Plaintiffs in this action, face no injury in fact. *See Mental Hygiene Legal Serv.*, 33 N.Y.3d at 54.

monthly benefits"—neither "a penny more," nor "a penny less." *Id*. at 1619. They therefore have "no concrete stake" in this lawsuit. *Id.*

It may be possible that an injury to a pension plan's overall assets would be so severe as to threaten its very existence. In such cases, there may exist a sufficiently imminent harm to future retirees that is adequate to confer standing. *See, e.g.*, *Thole*, 140 S. Ct. at 1621-22 (leaving open whether plan participants could sue if plan's asset management was "so egregious that it substantially increased the risk that the plan and the employer would fail and be unable to pay" future benefits); *Roulan v. Cnty. of Onondaga*, 21 N.Y.3d 902, 905 (2013) ("speculative financial loss" is insufficient to confer standing).

Here, however, Plaintiffs make no allegation that they will be deprived of any benefits upon retirement. To the contrary, they expressly admit that the City must, and will, cover any shortfall between Plan assets and the benefits owed to them (Compl. ¶ 46). Plaintiffs do not even try to allege that the Plans' decisions to stop investing in fossil fuels will ultimately render the Plans, or the City, unable to pay their future retirement benefits. Nor could they: even by Plaintiffs' own tally, the divested assets made up just 2.7% of the Plans' portfolios (Compl. ¶¶ 4, 14-16), far too little to impact the Plans' long-term viability, regardless of the relative performance of the divested assets versus those that have replaced them.

Simply put, the Court should dismiss the Complaint for the independent reason that a plaintiff has no standing to challenge investment decisions that, like here, have no impact on the guaranteed retirement benefits the plaintiff will ultimately receive. *See Thole*, 140 S. Ct. at 1619; CPLR 3211(a)(2), (a)(3).

B. In any event, Plaintiffs have not stated any cause of action.

Regardless of standing, the Complaint must be dismissed for a second, independent reason: Plaintiffs fail to state any cause of action.

On a motion to dismiss, the Court is to decide whether, assuming the truth of the facts alleged, a complaint states the elements of a cognizable cause of action. *Ashkenazy v. Gindi*, No. 656277/2020, 2022 WL 2663505, *60-62 (N.Y. Sup. Ct. July 10, 2022) (Masley, J.) (citing *Skillgames, LLC v. Brody*, 1 A.D.3d 247, 250 (1st Dep't 2003). Factual allegations that consist of "bare legal conclusions," or that are "inherently incredible or clearly contradicted by documentary evidence," are not entitled to such consideration. *Id.*

Here, Plaintiffs must also plead their claims with particularity. CPLR 3016(b). Plaintiffs' three causes of action all involve a supposed breach of fiduciary duty, premised on the allegation that the Plans violated their duties of loyalty and due care by ceasing their investments in fossil fuels (Compl. ¶¶ 47-61). Breaches of fiduciary duty must be pled with particularity. *Berardi v. Berardi*, 108 A.D.3d 406, 406-07 (1st Dep't 2013); CPLR 3016(b) (allegations must be "stated in detail").

Plaintiffs state no cause of action because the Complaint is deficient on its face, *see* CPLR 3211(a)(7), or, alternatively, because undeniable documentary evidence compels dismissal under CPLR 3211(a)(1).

1. The Complaint and documents incorporated by reference state no cause of action.

Plaintiffs have failed to state a cause of action because they have not plausibly alleged, with particularity, any facts from which a reasonable factfinder could infer the Plans' carelessness or disloyalty. CPLR 3016(b); CPLR 3211(a)(7); *see Hunzinger v. Costello*, No. 653086/2012, 2019 WL 1571591, *7 (N.Y. Sup. Ct. Apr. 11, 2019) (Masley, J.) (under Rule 3016(b), plaintiff must allege particularized facts sufficient to permit a "reasonable inference of the alleged misconduct"); *accord Beckman Coulter, Inc. v. Jabil Circuit Inc.*, 208 A.D.3d 1126, 1127 (1st Dep't 2022).

The Complaint rests on three key substantive contentions: that fossil-fuel stocks have performed well historically; that the Plans divested without financial analysis; and that climate-related risks are "unrelated" to "relevant" risk-return considerations. These demonstrably false allegations are legally insufficient to state a cause of action because they are each flatly contradicted by documents cited in the Complaint itself, and by indisputable and judicially noticeable documents like historical stock-market indices.

First, there is no basis for Plaintiffs' allegation that fossil-fuel stocks performed well during the pertinent time period. At the time the divestment decisions were actually made in early 2021 (Compl. ¶ 3), fossil-fuel stocks had underperformed the rest of the market, by large margins, for more than five years (*see* n.10 and n.11 and accompanying text and image, *supra*). While fossil-fuel stocks rebounded in 2022 due to war in Ukraine (*see* n.9 and accompanying text, *supra*), that later event cannot be used to show that the Plans' 2021 divestment decisions were somehow careless or disloyal. *Matter of Bank of New York*, 35 N.Y.2d 512, 519 (1974) (rejecting "hindsight" criticism of investment decisions); *Griffin v. Vale*, 291 A.D.2d 353, 354 (1st Dep't 2002) ("hindsight" analysis is insufficient to show breach of fiduciary duty); *Matter of JPMorgan Chase Bank N.A.*, 122 A.D.3d 1274, 1277 (4th Dep't 2014) (allegations regarding after-the-fact performance of investments are "insufficient to state a cause of action for breach of fiduciary duty").

Plaintiffs' reliance on market performance *after* the 2021 divestment decisions violates the "well settled" law forbidding precisely that sort of Monday-morning quarterbacking. *JPMorgan Chase Bank N.A.*, 122 A.D.3d at 1277. Under that settled law, what matters is the information available to the trustees at the time of their decision. The information available at the

time was that fossil-fuel stocks had performed poorly prior to 2021, not that those same stocks would surge in 2022, anomalously, following the invasion of Ukraine.

Second, Plaintiffs' claim that the divestment was made without financial analysis is directly contradicted by the very same newspaper articles Plaintiffs cite for that proposition, as well as numerous other publicly available documents regarding the lengthy lead-up to the divestment vote (*see, e.g.*, n..6-8, *supra*). The articles cited in the Complaint make clear, for example, that the Mayor's 2018 announcement reflected an intent to study whether, and to what extent, the Plans should stop investing in fossil-fuel companies consistent with their fiduciary obligations, and that decisions to divest in 2021 were based on the studies of "independent investment consultants who conducted investment analyses showing the risks posed by fossil fuel companies . . . ." (*id.*). Even on a motion to dismiss, the Court need not accept false allegations that rest on newspapers articles whose contents directly contradict those allegations. *Matter of Omnicom Group Inc. Shareholder Derivative Litig.*, 43 A.D.3d 766, 768 (1st Dep't 2007).

Third, there is no factual basis for Plaintiffs' allegation that "climate change" considerations are somehow "unrelated" to sound decision-making about whether a fund should keep investing in fossil-fuel companies. Fossil-fuel companies all recognize, in their SEC filings and elsewhere, that climate-change-related risks *are* material financial risks bearing on their long-term financial performance and profitability (*see* n.12 and accompanying text, *supra*). And recent Department of Labor regulations—which Plaintiffs bafflingly cite *in support of* their lawsuit (Compl. ¶ 41)—confirm this very fact, expressly acknowledging that "a fiduciary may reasonably conclude that climate-related factors, such as a corporation's exposure to the real and potential economic effects of climate change … can be relevant to a risk/return analysis of an

investment or investment course of action." Department of Labor, *Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights*, 87 Fed. Reg. 73,822, 73,832 (Dec. 1, 2022) ("DOL Regulation").[18]

Once these three core contentions are stripped from the Complaint, no "facts" are left to support Plaintiffs' bare and conclusory assertions that the Plans were careless, disloyal, or imprudent. Plaintiffs have thus failed to plausibly allege any facts demonstrating a breach of fiduciary duty, nor have they pled one with particularity.

Furthermore, even if the Court were to accept Plaintiffs' demonstrably false allegations dispatched above, the Complaint still fails to state a cause of action, for multiple additional reasons.

First, Plaintiffs attack only "wholesale" divestment (*see* Compl. ¶¶ 4, 35), and the documents cited in the Complaint make clear that the Plans voted to divest only a "majority" of their fossil-fuel holdings, not all of them.[19] Second, Plaintiffs fail to plausibly allege—as they must—that the Plans' current portfolio does not "equally serve" the Plans' financial interests, as compared to the investment mix that the Plaintiffs prefer. DOL Regulation, 87 Fed. Reg. at 73,837; *see* RSSL § 177(9)(c). To the contrary, Plaintiffs expressly concede the possibility that an "independent fiduciary" could analyze the Plans' current investment portfolios and conclude

[18] Although the DOL Regulation is issued in the context of the Employee Retirement Income Security Act (ERISA) and public pension funds are not subject to ERISA, the DOL Regulation addresses the same principles of prudence and loyalty at issue here, as Plaintiffs concede (*see* Compl. at 9, n.*).

[19] The Plans' public disclosures of their largest investments confirm that they maintain investments in some fossil fuel companies. *E.g.*, NYCERS, *Annual Comprehensive Financial Report*, at 154 (2022) (NYCERS holds more than one millions shares of Phillips 66 and Valero Energy Corporation), https://www.nycers.org/sites/main/files/file-attachments/acfr.pdf?1671738525.

that *no* fossil-fuel stocks need to be repurchased at all (Compl., Prayer For Relief ¶ 6). That concession is fatal, particularly in light of Plaintiffs' failure to allege anywhere in their Complaint—with particularity or otherwise—that a sound and prudent investment mix *must* contain fossil-fuel stocks.

Lastly, Plaintiffs have not pled any facts showing they suffered damages "directly caused by" the alleged breach of fiduciary duty, as is required to state a breach of fiduciary duty claim. *JPMorgan Chase Bank N.A.*, 122 A.D.3d at 1277. And any harm that Plaintiffs might suffer in the future is wholly speculative and thus insufficient to state a claim. *See Philip S. Schwartzman, Inc. v. Pliskin, Rubano, Baum & Vitulli*, 215 A.D.3d 699, 702 (2d Dep't 2023) (allegation of "speculative damages" is insufficient to support a cause of action for breach of fiduciary duty).

For all of these reasons, Plaintiffs have failed to adequately plead a breach of fiduciary duty claim. The Court may dismiss the Complaint on any of these bases, pursuant to CPLR 3016(b) and 3211(a)(7), regardless of standing.

2. Regardless of whether the Complaint is facially defective, the Meketa and BlackRock reports are documentary evidence compelling dismissal under CPLR 3211(a)(1).

As indicated in the documents cited and quoted in the Complaint, the Plans commissioned analyses from two outside investment firms to assess whether, and how, the Plans could divest from fossil-fuel investments prudently and in accordance with their fiduciary duties. Both firms concluded that the Plans could do so, and issued lengthy reports detailing multiple options for the Plans to divest (*see* NYSCEF Doc. No. 16, at 3, 35-36; NYSCEF Doc. No. 19 at 2, 12-14). The authenticity of these reports cannot reasonably be disputed. *See Hefter v. Elderserve Health, Inc.*, 134 A.D.3d 673, 675 (2d Dep't 2015). Redacted versions of the reports—disclosed by the Comptroller's office in response to FOIL requests shortly after the

Plans voted to divest in early 2021—have been available on public websites since March 2021.[20] Those redacted versions match the unredacted versions filed with the Court.

These reports constitute undeniable documentary evidence compelling dismissal of the Complaint under CPLR 3211(a)(1) for at least two reasons. First, the reports disprove Plaintiffs' core allegation that the Plans divested without financial analysis. Second, the reports confirm that an independent analysis could conclude that no fossil-fuel investments need to be added to have a portfolio that equally serves the Plan's financial interests, as compared to the investment mix that Plaintiffs prefer (*see supra* at 18-19).

C. Justiciability concerns weigh heavily against judicial intervention in public pension funds' discretionary investment decisions.

It is worth emphasizing *why* it is so important for the Court to reject this contrived lawsuit. Anything less than outright dismissal would permit any uninjured plan member to litigate vague, fact-bare attacks on public pension funds' discretionary investment decisions, at significant expense and with no workable limit on such claims.

The Court of Appeals has made clear that neither plaintiffs nor courts are entitled to "assess the market worthiness of securities in which [public pension funds] may invest." *Sgaglione v. Levitt*, 37 N.Y.2d 507, 513 (1975). That discretionary assessment rests "solely" with

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[20] The copies disclosed under FOIL were redacted to protect trade-secret information regarding the Plans' investment strategies at the time. A March 2021 article included links to redacted versions of all six reports. *See Tom Sanzillo*, *Major investment advisors BlackRock and Meketa provide a fiduciary path through the energy transition*, Institute for Energy Economics And Financial Analysis (March 22, 2021), https://ieefa.org/resources/major-investment-advisors-blackrock-and-meketa-provide-fiduciary-path-through-energy. The Internet Archive website confirms that the redacted copies of the reports linked in that article have been available online since mid-2021. *See* https://web.archive.org/web/20210325174654/https://ieefa.org/wp-content/uploads/2021/03/BlackRock-Phase-Three.pdf; https://web.archive.org/web/20210711225208/http://ieefa.org/wp-content/uploads/2021/03/Meketa-Phase-Three.pdf.

the trustees as the public officials legally charged with that responsibility, and—to a more limited extent—with the state legislators who may "expand or restrict" the classes of eligible fund investments. *Id.* at 512-13.

That rule makes perfect sense, particularly in a case where the plaintiffs face no actual injury (Argument Section A, *supra*). Investing is, after all, an "art" and not a "science." *PSM Holding Corp. v. Nat'l Farm Fin. Corp.*, No. 05-cv-8891, 2013 WL 12080306, at *29 n.185 (C.D. Cal. Oct. 8, 2013), *aff'd in part*, 884 F.3d 812 (9th Cir. 2018). Administering a public pension fund involves countless judgments and predictions about the future, diversification across various risk-return profiles, and hedging risks across a wide range of industries and investment products. Those judgment-laden choices fall to financial experts—including, among others, internal investment staff, and multiple third-party consultants (in addition to the outside consultants retained to study divestment here). It is not the judiciary's role to "second-guess" the judgments of these experts. *Smith v. CommonSpirit Health*, 37 F.4th 1160, 1162 (6th Cir. 2022); *Tron v. Condello*, 427 F. Supp. 1175, 1188 n.13 (S.D.N.Y. 1976) (explaining that, following *Sgaglione*, New York courts have held that they "should not substitute their investment judgment for that of the trustees").

Judicially overruling those experts would remove the Plans' investment decisions from these established avenues of accountability. If uninjured members are dissatisfied with the Plans' investment choices or financial returns, they are empowered to express their views to the nonjudicial branches of government. *See Soc'y of Plastics Indus.*, 77 N.Y.2d at 773. They can urge the Plans' trustees to re-invest in fossil-fuel stocks. They can work to elect trustees who share their views on how best to invest the Plans' assets. They can lobby legislators to amend the law that presently cabins the Plans' permissible investment mix. *See* RSSL § 177. They can take

the matter to DFS, which possesses legislatively-delegated authority to investigate alleged breaches of fiduciary duty. By contrast, if this lawsuit yielded a judgment that forced the Plans to buy back fossil-fuel stocks, that judicially-coerced investment could very well result in a sizeable loss of Plan assets. New Yorkers would have little recourse against such losses, because the publicly accountable actors charged with the Plans' management and oversight—including the trustees and the Legislature—would not have been responsible for those losses.

Judicial restraint is also necessary to avoid a potential deluge of lawsuits, for which there is no discernible limit. The defendant Plans have 639,000 members, embracing a diverse range of views about how to best invest Plan assets. If this lawsuit is permitted to proceed, any of those 639,000 members could sue to challenge any investment decision they dislike, no matter how small. The particular Plaintiffs here dislike fossil-fuel divestment; but other members could argue that it was a breach of fiduciary duty for the Plans *not to divest from fossil fuels sooner*, which would have avoided the losses suffered during fossil-fuel stocks' historically poor performance from 2014 to 2020 (*see* n.10 and n.11 and accompanying text and image, *supra*). Any investment decision could be attacked in court, years after the fact and with perfect hindsight, at great time and expense to the Plans and the judiciary. *See Pension Ben. Guar. Corp. ex rel. St. Vincent Cath. Med. Centers Ret. Plan v. Morgan Stanley Inv. Mgmt. Inc.*, 712 F.3d 705, 719 (2d Cir. 2013) (noting the heightened risk in breach of fiduciary duty cases that "a plaintiff with a largely groundless claim will simply take up the time of a number of other people, with the right to do so representing an *in terrorem* increment of the settlement value, rather than a reasonably founded hope that the discovery process will reveal relevant evidence") (cleaned up).

The Plans, like many other public and private funds worldwide, have decided it is no longer worth the financial risk to continue their prior, modest investments in the volatile, historically underperforming stocks of fossil-fuel companies. Not everyone will agree with that risk assessment. This disagreement reflects divergent views about how quickly—if at all—society will decrease its reliance on fossil fuels. Fossil-fuel companies, for their part, publicly acknowledge significant regulatory risks to their businesses (*see* n.12 and accompanying text, *supra*). But they also contend that their long-term financial outlook is positive based on predictions that humans will keep burning fossil fuels at a steady clip for many, many decades to come.[21]

Fossil-fuel companies are free to bet that their industry will continue to make money even in the face of expanding regulation, ever-rising temperatures, and the increasingly intense global impacts of climate change. But public pension funds are not required to bankroll that bet. And that is a decision appropriately left to the funds, their trustees, and the financial experts who advise the funds' investment decisions—not the courts.

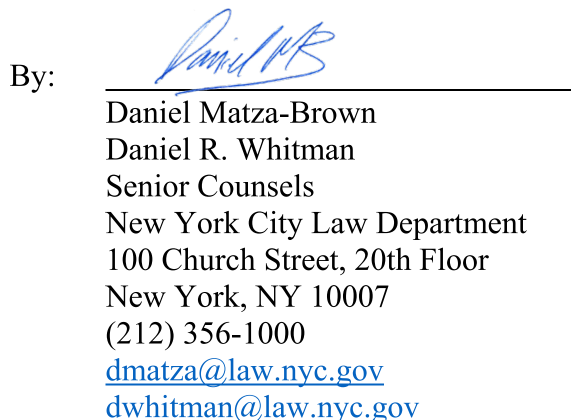
[21] *See, e.g.*, ExxonMobil, *Advancing Climate Solutions Progress Report*, at 27 (2023) (predicting positive growth rates for oil and gas from 2010 through 2050), https://corporate.exxonmobil.com/-/media/global/files/advancing-climate-solutions-progress-report/2023/2023-advancing-climate-solutions-progress-report.pdf, *archived at* https://perma.cc/CC6J-J2QY.

CONCLUSION

The Court should dismiss the Complaint with prejudice.

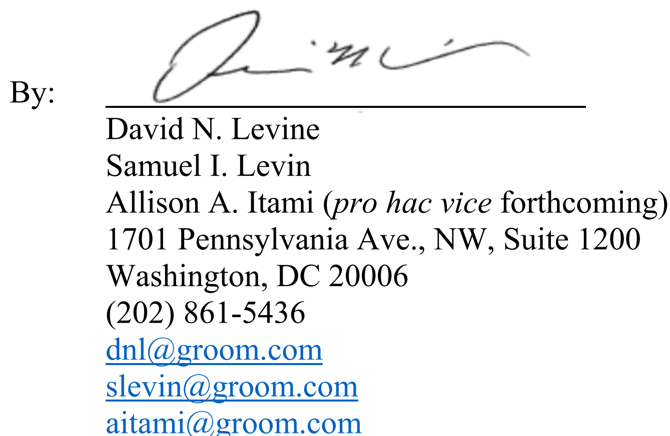
Dated: New York, New York
August 7, 2023

HON. SYLVIA O. HINDS-RADIX
Corporation Counsel of the City of New York



By: ______________________
Daniel Matza-Brown
Daniel R. Whitman
Senior Counsels
New York City Law Department
100 Church Street, 20th Floor
New York, NY 10007
(212) 356-1000
dmatza@law.nyc.gov
dwhitman@law.nyc.gov

GROOM LAW GROUP, CHARTERED



By: ______________________
David N. Levine
Samuel I. Levin
Allison A. Itami (*pro hac vice* forthcoming)
1701 Pennsylvania Ave., NW, Suite 1200
Washington, DC 20006
(202) 861-5436
dnl@groom.com
slevin@groom.com
aitami@groom.com

Attorneys for Defendants

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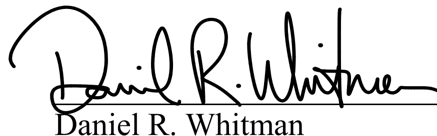

Daniel R. Whitman