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

WAYNE WONG; JERIANN JALOZA; JENNIFER DIMEGLIO; JATANIA MOTA; AND AMERICANS FOR FAIR TREATMENT,

Plaintiffs,

-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.

Index No. 652297/2023

Motion Seq. No.

OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

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INTRODUCTION

Plaintiffs' detailed Complaint—the allegations of which must be accepted as true for the purposes of the instant motion—adequately pleads Defendants' breaches of their fiduciary duties under New York common law and state insurance regulations. Defendants 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"), do not dispute that, as trustees of the Qualified Pension Plans (the "Plans") of which Plaintiffs are participants, they owe Plaintiffs fiduciary duties. Nor do Defendants dispute that these duties of undivided loyalty and care are the "highest [duties] known to the law." *Donovan v. Bierwirth*, 680 F.2d 263, 272 n.8 (2d Cir. 1982); ¶¶ 17-20.[1] Thus, under New York common law and section 136-1.6 of the New York Insurance Regulations, Defendants are duty-bound to prudently manage the Plans with a singular focus on selecting investments that best serve Plaintiffs' retirement needs. The Complaint amply alleges how Defendants failed in those duties by openly, serially, and egregiously dividing their loyalties between Plaintiffs' interests and a social and political climate-change agenda that Defendants allowed to dictate how they administered the Plans. Their motion to dismiss should therefore be denied.

Plaintiffs—including a New York City subway train operator, a veteran New York City public school teacher, and a therapist who provides therapy to special needs children—along with hundreds of thousands of other active and retired New York City municipal employees and their families, depend on the Plans as a primary source of income in retirement. ¶ 2. They have paid into the Plans for years, and are legally entitled to pension benefits when they retire. Yet for nearly three years, Defendants have abused their control over Plan assets by divesting the Plans of

[1] References to ¶ __ are to the Complaint (NYSCEF 2).

approximately $4 billion of lucrative holdings in companies involved in the extraction of fossil fuels all in order "to promote [Defendants'] climate agenda at the expense of Plan participants' financial interests." ¶ 32; *see also* ¶¶ 21-34, 51-52. Defendants' decision to elevate unrelated policy goals over the financial health of the Plans is flatly inconsistent with their fiduciary responsibilities—as trustees of two other New York City pension funds and numerous funds throughout the country have concluded—and it jeopardizes the retirement security of Plan participants. ¶¶ 1, 3-4, 35-46.

Against this backdrop, Defendants' two arguments for dismissal—a purported lack of standing, and failure to adequately allege fiduciary breaches—are without merit.

Plaintiffs have standing to sue. Defendants challenge only their injury-in-fact. But Plaintiffs' injury—rooted deep in the common law and repeatedly affirmed by the New York Court of Appeals—is Defendants' breaches of fiduciary duties, regardless of the pecuniary losses suffered by Plaintiffs. *E.g.*, *Mitzner v. Jarcho*, 44 N.Y.2d 39, 44 (1978). And Plaintiffs have in any event alleged financial harms. Plaintiffs' standing is also established by New York doctrine ensuring judicial review when a party is adversely affected by lawless government action. Defendants' contrary arguments are based on a United States Supreme Court decision applying the federal courts' more restrictive standing requirements in the context of a claim under the Employee Retirement Income Security Act ("ERISA"), which the Court expressly distinguished from a claim governed by the common law of trusts, as here.

Plaintiffs have also adequately alleged a breach of the duty of loyalty. They allege multiple statements and actions by Defendants that show that Defendants exercised their authority as Plan fiduciaries to advance their own political and policy objectives ahead of Plaintiffs' retirement interests. *E.g.*, ¶¶ 25, 33-34. Instead of addressing or even acknowledging these allegations, Defendants attack a straw man, repeatedly assailing three supposedly "demonstrably false

allegations" of the Complaint that in truth are *not* key to the Complaint, in some instances were not alleged at all, and to the extent alleged must be accepted as true. Defendants' insistence on attacking a fictionalized version of the Complaint demonstrates how damning the actual Complaint is.

Plaintiffs have similarly stated a claim for breach of the duty of care. The Complaint is replete with detailed allegations that Defendants' process for deciding to divest was flawed and imprudent. ¶¶ 21, 24, 52. The alleged impetus and timing of the divestment, and statements of other fiduciaries who considered and rejected it, support a clear inference that Defendants breached their duty of care. ¶¶ 26-27, 35-41.

As a last-ditch argument, Defendants seek dismissal based on documentary evidence lobbed in with their motion—reports they contend were prepared by financial analysts to inform Defendants' divestment decision. But for documentary evidence to be given effect at this stage it must "utterly refute[]" Plaintiffs' allegations. *Kolchins v. Evol. Markets, Inc.*, 128 A.D.3d 47, 58 (1st Dep't 2015). Defendants' unauthenticated, undated, draft reports fall far short of this standard. Among other flaws, the reports say nothing about who received or reviewed them, the process Defendants employed to assess their content, how the draft reports influenced Defendants' divestment decision (if at all), and what other documents and considerations (if any) lay behind the decision.

Finally, Defendants advance the offensive proposition that the hundreds of thousands of participants in their Plans cannot access the courts or obtain judicial relief even if Defendants egregiously breach their fiduciary duties. But courts routinely adjudicate fiduciary breach claims. Defendants' motion should be denied.

FACTUAL BACKGROUND

In January 2018, former Mayor Bill de Blasio and former Comptroller Scott Stringer announced a plan for Defendants to divest billions of dollars in holdings in companies in the fossil fuel business in order to make New York City a leader in the "Fight Against Climate Change." ¶ 21. On January 25, 2021, Defendants' trustees voted to implement the Mayor's plan and divest $4 billion in fossil fuel securities. ¶ 23. Although the trustees' deliberations and vote were conducted behind closed doors, Defendants subsequently described their decision in the press as an expression of their "collective commitment to environmental responsibility." ¶ 25. By December 2021, Defendants had sold off nearly $3 billion in fossil fuel assets, and another $1 billion was divested in the first quarter of 2022. ¶ 30.

This divestment decision is the centerpiece of a broader constellation of actions Defendants have taken to use Plan assets to further a climate-change agenda at the expense of Plaintiffs' financial interests. ¶ 29. They have, by turns, threatened to terminate their relationship with one of their asset managers unless the manager becomes more aggressive in pursuing Defendants' climate goals; devoted billions of dollars of Plan assets to investments in "climate change solutions;" and committed to achieving net-zero carbon emissions in their asset portfolios to "decarbonize the market" and "keep fossil fuels in the ground." ¶¶ 28, 32-34.

Plaintiffs' and Plan participants' retirement interests have been the collateral damage of Defendants' divestment actions. During the period in which Defendants divested the Plans of fossil fuel holdings, the energy companies from which Defendants were divesting delivered exceptional returns for their investors. ¶¶ 43-44. The Plans lost out on those gains, further exacerbating the Plans' chronic underfunding. ¶ 45.

To make the plans whole and put a stop to Defendants' reckless, policy-driven abuse of Plan assets, Plaintiffs filed this suit.

STANDARD OF REVIEW

A motion to dismiss for failure to state a claim pursuant to CPLR 3211(a)(7) "must be denied if from the pleadings' four corners[] factual allegations are discerned which taken together manifest any cause of action cognizable at law." *511 W. 232nd Owners Corp. v. Jennifer Realty Co.*, 98 N.Y.2d 144, 152 (2002). The pleadings are given a "liberal construction," and courts shall "accept the facts alleged in the pleading as true[,] and accord the opponent of the motion . . . the benefit of every possible favorable inference [to] determine only whether the facts as alleged fit within any cognizable legal theory." *Leon v. Martinez*, 84 N.Y.2d 83, 87-88 (1994). Where a defendant's motion "merely dispute[s] some of the factual allegations in the complaint" and does not "'conclusively establish that the [plaintiff] has no cause of action,'" the motion must be denied. *Alsol Enters., Ltd. v. Premier Lincoln-Mercury, Inc.*, 11 A.D.3d 493, 494 (2d Dep't 2004) (quoting *Rovello v. Orofino Realty Co., Inc.*, 40 N.Y.2d 633, 636 (1976)). Similarly, under CPLR 3211(a)(1), documentary evidence from outside the pleadings that merely raises a factual dispute does not justify dismissal; rather, the documents must "establish conclusively that plaintiff has no cause of action." *Rovello*, 40 N.Y.2d at 636.

ARGUMENT

I. Plaintiffs Have Standing to Sue

New York "has no analogue in the State Constitution" to the "case or controversy" provision of the federal Constitution, which means standing in New York courts is a prudential, rather than constitutional matter. *Soc'y of Plastics Indus., Inc. v. Cnty. of Suffolk*, 77 N.Y.2d 761, 772 (1991). Thus, New York's standing doctrine does not "mirror[] federal law," as Defendants argue. Mot. 12. And "actions not maintainable in Federal courts" may often still "be brought in [New York] courts." *Venditti v. Inc. Vill. of Brookville*, 96 A.D.2d 887, 888 (2d Dep't 1983). While Plaintiffs must generally "meet the threshold burden of establishing that [they] ha[ve]

suffered an 'injury in fact,'" *Mental Hygiene Legal Serv. v. Daniels*, 33 N.Y.3d 44, 50 (2019), standing "rest[s] in part on policy considerations" that guide courts' assessment of whether plaintiffs have suffered such an injury, *Soc'y of Plastics*, 77 N.Y.2d at 772.

Plaintiffs' allegations establish multiple independently sufficient grounds for standing.[2]

A. Plaintiffs Have Been Injured In Fact By Defendants' Disloyal Acts

Under the common law of trusts—which governs the administration of public pension systems in New York—a pension beneficiary suffers a cognizable injury when a fiduciary breaches its duty of loyalty, regardless of any pecuniary loss. *Mitzner*, 44 N.Y.2d at 44. This is because "[t]he standard of loyalty in trust relations does not permit a trustee to create or to occupy a position in which he has interests to serve other than the interest of the trust estate . . . [A court therefore] stops the inquiry when the [divided loyalty] is disclosed and sets aside the transaction or refuses to enforce it." *City Bank Farmers Tr. Co. v. Cannon*, 291 N.Y. 125, 131-32 (1943); *Matter of Rothko*, 84 Misc. 2d 830, 847 (Sur. Ct. N.Y. Cnty 1975). Put another way, the cognizable harm Plaintiffs have suffered is the violation, standing on its own, of their entitlement to Defendants' absolute loyalty.

Defendants do not dispute that, under New York trust principles, they owe Plaintiffs a fiduciary duty of loyalty to manage the Plans "solely in [Plaintiffs'] interest[s]." *Matter of Heller*, 6 N.Y.3d 649, 655 (2006) (quoting Restatement (Second) of Trusts § 170(1)). And Plaintiffs'

[2] As noted, Defendants challenge only the injury-in-fact element of standing. In any event, Plaintiffs satisfy the other elements: as Plan beneficiaries, they are within the zone of interests protected by the common law duties and insurance regulations sued under, and as such are affected in a manner different from the public at large. *Soc'y of Plastics*, 77 N.Y.2d at 772. Relatedly, Defendants raise no distinct challenge to Plaintiff AFFT's associational standing, arguing only that it lacks standing "because its 14 members, including the individual Plaintiffs in this action, face no injury in fact." Mot. 13 n.17. But those members were injured, as discussed herein, and AFFT therefore has associational standing for reasons Defendants tacitly concede. *Soc'y of Plastics*, 77 N.Y.2d at 775.

Complaint is filled with allegations that Defendants abused this by prioritizing their own policy agenda to combat climate change over Plaintiffs' financial interests. ¶¶ 22-46. These allegations alone are sufficient to give Plaintiffs standing.

Defendants base their standing argument on a single U.S. Supreme Court decision that—by a 5-4 vote—found plaintiffs lacked federal constitutional standing to bring an ERISA claim for fiduciary breach to restore plan assets because they had not alleged that the plan would fail to meet its obligations, and so lacked any concrete interest in monetary relief the court could award. Mot. 12-14 (citing *Thole v. U. S. Bank N.A.*, 140 S. Ct. 1615, 1619-22 (2020)).

But the rationale of *Thole* supports standing here. The crux of the Court's decision was the majority's conclusion that the common law of trusts, which *does* apply in this case, did not govern the outcome under ERISA. "[T]rust law," the Court said, "informs but does not control interpretation of ERISA," because under ERISA, "a defined-benefit plan is more in the nature of a contract." *Id.* at 1619-20. And because the "trust-law analogy . . . d[id] not fit th[e] case," the *Thole* plaintiffs could not base standing on the trust principle that a suit can be brought regardless of financial injury. *Id*. at 1620. As explained in Justice Sotomayor's opinion for the four dissenters—who would have applied trust law even in an ERISA case—"Petitioners' equitable interest," and therefore standing, "finds ample support in traditional trust law." *Id.* at 1625. Those principles of the common law of trusts apply here and establish standing based on the harm to Plaintiffs' equitable interests. *Mitzner*, 44 N.Y.2d at 44.

Further, even if *Thole* had not distinguished common law trust standards, "state courts dealing with state questions clearly are not bound by the same standing limitations applicable to federal jurisdictions." *Suffolk Hous. Servs. v. Town of Brookhaven*, 91 Misc. 2d 80, 88 (Sup. Ct. Spec. Term Suffolk Cnty. 1977). The *Thole* decision is therefore doubly distinguishable: It applied

federal standing principles that do not apply here, and it applied them to a federal statute that differs from New York common law in respects the Court expressly recognized as material to its decision.

Finally, even if a showing of harm were necessary, Plaintiffs have alleged that, too. Defendants admit that where "an injury to a pension plan's overall assets would be so severe as to threaten its very existence . . . there may exist a sufficiently imminent harm to future retirees that is adequate to confer standing." Mot. 14. And here, Plaintiffs allege that Defendants have "chronic and severe underfunding" problems. ¶¶ 45. NYCERS has only enough assets to cover 78.1 percent of its accrued liabilities, an "underfunding ratio below the 80 percent threshold" at which pension plans are deemed at risk of default under federal law. *Id*. TRS is hardly better, with a funding ratio of 80.4 percent. *Id*. And BERS's funding ratio, at 94.1 percent, still falls below the level recommended by the Government Finance Officers Association. *Id*.

Plaintiffs also allege that the City's budget is under significant and growing strain, and that over the next four years alone the City's payments to the Plans will have to increase by nearly *370 percent*, reaching *$4.07 billion* by 2027. ¶ 46. If the City's finances were to deteriorate further, Defendants would not be able to count on the City to make up the shortfalls. The risk is not hypothetical. In the 1970s, New York City came perilously close to bankruptcy, an eventuality that Defendants at the time recognized would mean "there would not be sufficient cash flow for the City to be able to continue its contributions to the pension funds." *Withers v. Teachers' Ret. Sys. of City of New York*, 447 F. Supp. 1248, 1252 (S.D.N.Y. 1978). This would have cost Defendants a "major and indispensable source" of funding, rendering them unable to pay the benefits owed. *Id*. Recent warnings about the City's fiscal stability confirm there is no ironclad guarantee City funds will always be there. ¶ 46. Defendants' assertion that Plaintiffs "concede" that Defendants' divestment actions have "no impact, at all, on Plaintiffs' retirement benefits," Mot. 12, is directly contrary to the Complaint's allegations, ¶¶ 42-46. Thus, although Plaintiffs are not required to allege

pecuniary harm, they have in fact done so, which establishes standing even under Defendants' overly narrow formulation of the standard.

B. Plaintiffs Have Standing To Challenge Government Action Affecting Them

Plaintiffs also have standing for the independent reason that they sue to challenge wrongful government action that affects them. As the First Department recently explained, the injury-in-fact requirement is satisfied "when a government agency seeks to act in a manner adversely affecting a party." *Stevens v. New York State Div. of Crim. Just. Servs.*, 206 A.D.3d 88, 99 (1st Dep't 2022) (quoting *Dairylea Coop., Inc. v. Walkley*, 38 N.Y.2d 6, 11-12 (1975)). This suffices to establish that the plaintiff has a "genuine stake" in the litigation for standing purposes. *Id*. In *Stevens*, the mere "heightened risk" of a police encounter was sufficient. *Id*. Here, as explained above, Defendants' actions in violating their fiduciary duties adversely affect Plaintiffs and increase the risk that their pension benefits will not be paid. Plaintiffs unquestionably have a "genuine stake" in this litigation.

Plaintiffs also have standing as citizen-taxpayers pursuant to N.Y. Gen. Mun. Law § 51. As Defendants' own authority explains, applying the parallel state-taxpayer statute, a citizen-taxpayer is permitted to "challenge an allegedly unlawful expenditure of [government] funds [even] without a showing of injury in fact when such claims have a sufficient nexus to [government] fiscal activities." *Town of Verona v. Cuomo*, 136 A.D.3d 36, 43 (3d Dep't 2015). Here, Plaintiffs are taxpayers, as Defendants implicitly concede, Mot. 13, and allege claims directly tied to government fiscal activities—specifically, the "waste" of municipal "funds" by pursuing a divestment program in breach of fiduciary duties. N.Y. Gen. Mun. Law § 51; ¶ 46.

If Plaintiffs did not have standing to sue here, then as a practical matter no one would, leaving Defendants' breach of their fiduciary duties unchallengeable and uncorrectable.[3] That outcome is a nonstarter: "[W]here a denial of standing would pose in effect an impenetrable barrier to any judicial scrutiny" of official government action, it is the Court's "duty . . . to open rather than close the door to the courthouse." *Saratoga Cnty. Chamber of Com., Inc. v. Pataki*, 100 N.Y.2d 801, 814-15 (2003) (finding taxpayer standing). Defendants administer some of the largest municipal retirement systems in the country. ¶ 14. It is imperative that Plaintiffs' case proceed to enable judicial review of actions affecting hundreds of thousands of New Yorkers. Defendants' claim that the Court is powerless to intervene has no basis in law.

II. The Complaint Sufficiently Alleges Defendants' Breaches Of Fiduciary Duties.

On the merits, Defendants contend that Plaintiffs have failed to allege a claim for fiduciary breach because "the Complaint is deficient on its face," or "alternatively, because undeniable documentary evidence compels dismissal." Mot. 15. But Defendants' arguments ignore both the well-pleaded allegations of the Complaint and New York pleading standards, which require that Plaintiffs' allegations be accepted as true and "every possible favorable inference" be drawn in their favor. *Martinez*, 84 N.Y.2d at 88.

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[3] While the New York Superintendent of Financial Services has oversight authority over Defendants, her role is purely investigative. Ins. Law § 314(b)(3); Comp. Codes R. & Regs. tit. 11, § 136-1.9(c). The Attorney General, for her part, is the legal adviser for the New York State Employees' Retirement System (NYSERS), Retire. & Soc. Sec. Law § 14, which also plans to divest from fossil fuels, ¶ 39; Office of the New York State Comptroller, Press Release: New York State Pension Fund Sets 2040 Net Zero Carbon Emissions Target (Dec. 9, 2020). It is inconceivable the Attorney General would sue over Defendants' divestment actions that are comparable to NYCERS' actions that presumably received her imprimatur. Thus, the "Attorney General, the traditional guardian of the public interest and trust beneficiaries," has been effectively "defrocked" of her ability to sue Defendants. *Consumers Union of U.S., Inc. v. State*, 5 N.Y.3d 327, 352 (2005). "[O]nly [Plaintiffs] remain to champion" the Plans' integrity. *Id.*

Defendants cannot and do not contest that they owe fiduciary duties to Plaintiffs under both the common law (Count I) and New York Insurance Regulations (Count II). Defendants dispute only the sufficiency of the allegations that they breached these duties. But Defendants attack straw men and rely on "facts" of Defendants' own invention. As for the documents from outside the Complaint that Defendants dump into the record, they come nowhere close to "conclusively" foreclosing Plaintiffs' claims—if anything, they bolster them, and at minimum raise fact issues not resolvable at this stage. *Rovello*, 40 N.Y.2d at 636.[4]

A. In Alleging That Defendants Pursued Their Divestment Strategy For The Principal Purpose Of Addressing Climate Change, The Complaint Adequately Pleads A Breached Of The Duty Of Loyalty

Defendants owe Plaintiffs a "duty of undivided and undiluted loyalty." *Matter of Wallens*, 9 N.Y.3d 117, 122 (2007) (quoting *Birnbaum v. Birnbaum*, 73 N.Y.2d 461, 466 (1989)). This duty requires Defendants to "single-mindedly pursue the interests" of Plan beneficiaries when managing the Plans, *Birnbaum*, 73 N.Y.2d at 466, and to do so for the "exclusive purpose" of providing pension benefits to which these beneficiaries are entitled, *Mitzner*, 44 N.Y.2d at 45 n.4. The duty of loyalty is breached whenever a fiduciary "exercise[s] a power . . . to further some interest of [her] own or . . . person[s] other than" the beneficiary. *Matter of Bruches*, 67 A.D.2d 456, 462 (2d Dep't 1979) (quoting Restatement (Second) of Trusts § 187 cmt. g). The duty of loyalty is an "inflexible rule of fidelity," *Birnbaum*, 73 N.Y.2d at 466, and the "highest [duty] known to the law." *Donovan*, 680 F.2d at 272 n.8. Claims for breach of the duty of loyalty ordinarily "require a fact-intensive assessment of [the fiduciary's] conduct, [and are] not properly disposed of at the pre-answer stage." *Am. Int'l Grp., Inc. v. Greenberg*, 23 Misc. 3d 278, 288 (Sup. Ct. N.Y. Cnty. 2008).

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[4] Defendants have not moved to dismiss Count III of the Complaint, Plaintiffs' claim for declaratory relief. Nor do they dispute that there is a live controversy between the parties. Count III should therefore proceed.

Plaintiffs' allegations adequately plead the many ways that Defendants breached this duty by placing their own policy goals ahead of Plaintiffs' retirement interests. From its inception, Mayor de Blasio made clear that Defendants' divestment strategy was undertaken with the purpose of ensuring that New York City is "Leading the Fight Against Climate Change." ¶ 21. Those were the words emblazoned on the event banner when the former Mayor and Comptroller "announced a two-pronged attack against the fossil-fuel industry." *Id*. Tellingly, Defendants initially "expressed wariness" at the proposal, and trustees of the NYCPPF and NYCFPF openly stated that the former Mayor's project was inconsistent with trustees' fiduciary duties. ¶ 22.

Nonetheless, after a three-year pressure campaign by the former Mayor and Comptroller, Defendants acquiesced, and, in a closed-door meeting, voted to divest their holdings in fossil fuels. ¶¶ 23-24. Defendants' statements after they emerged from the meeting reflect that Defendants were not acting "solely in the interest of the [Plan] beneficiar[ies]." *Matter of Heller*, 6 N.Y.3d at 655. Instead, Defendants touted their single-minded focus on their climate-change agenda by "literally putting money where our mouth is when it comes to climate change," as Mayor de Blasio announced after the meeting. ¶ 25. One of Defendants' trustees said the decision to divest reflected Defendants' "collective commitment to environmental responsibility." *Id*. Absent from these statements was any meaningful discussion of how the divestment decision was in Plan beneficiaries' financial interests, let alone that Defendants' divestment decision had those interests as its "exclusive purpose."

The NYCPPF and NYCFPF trustees—who had been in the same meeting, listened to the same presentations, and then voted down the divestment proposals for their respective Plans—confirmed Defendants' motives a few days later. Patrick Lynch, a trustee of the NYCPPF, explained in a press statement: "[T]he money in the pension fund does not belong to us, nor to the comptroller, nor to the mayor. It belongs to the active and retired police officers who have worked

and sacrificed to earn their pensions. Our views on any social or political issue cannot enter into the equation." *Id*. Andrew Ansbro, a trustee of the NYCFPF, was similarly blunt: "[W]e have not entertained the idea of divesting from fossil fuels . . . We do not see our pension fund as an object to be used to make political statements." ¶ 26. He added, "[o]ur job is to provide for our retirees." *Id*.

Since that January 2021 divestment vote, Defendants have continued to manage Plan assets with the goal—in their words—to make New York City a "global leader on climate change." ¶ 28. In April 2022, Comptroller Lander announced another round of investments in "climate solutions," fulfilling a campaign promise that he would "make the office a hub for focusing the attention & action of New Yorkers on the climate crisis." ¶ 32. And in a September 2022 letter to the asset manager BlackRock, Lander boasted of the Plans' steps to "confront the climate crisis head on" through divestment, and warned he would terminate Defendants' relationship with BlackRock if it did not more aggressively pursue a climate-driven strategy. *Id*.

Defendants show no signs of stopping. This spring, NYCERS and TRS adopted "Net-Zero Implementation Plans," with the goal of "decarboniz[ing] the market" and "keep[ing] fossil fuels in the ground." ¶¶ 33-34. Defendants again announced they were acting to "address the global climate crisis." ¶ 34.

A "liberal construction" of the Complaint—indeed any reading of it—shows Plaintiffs have adequately alleged Defendants' fiduciary breach. *Martinez*, 84 N.Y.2d at 87. Defendants have boasted repeatedly that the reason for the divestment actions was to address climate change. Under the law of trusts, this is a paradigmatic example of divided loyalties.

Defendants' counterarguments are meritless. Defendants do not address or even acknowledge the many public statements and actions alleged in the Complaint that demonstrate their divided loyalties. This is fatal to their position. *Birnbaum*, 73 N.Y.2d at 466; *Mitzner*, 44

N.Y.2d at 45 n.4. Instead, Defendants' motion rests on a canard—the repeated claim that the Complaint hinges 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." Mot. 16. But that is not the Complaint Plaintiffs filed, and Defendants cannot obtain dismissal of this case by ignoring the Complaint at hand and tilting at one of their own imagination.

First, Plaintiffs nowhere alleged, much less made it a "key substantive contention," that the Plans "divested without financial analysis." Plaintiffs' well-pled allegations, in page after page of the Complaint, are that addressing climate change was the driving force of the divestment strategy. Thus, the Complaint alleges a failure to *adequately* assess the financial impact of divestment on the Plans, a lack of *transparency* regarding any analysis that was conducted, and—most importantly—that whatever analysis was done, it was subordinated to Defendants' policy agenda. ¶ 52 (lack of a "*prudent* assessment of which investments will produce lucrative returns"); ¶ 24 ("The . . . investment analyses, if any, on which the Trustees relied *were never made public*."). Financial analyses may well have been conducted (they often are, when imprudent fiduciaries paper their actions), but the absence of studies was not a "key" allegation of the Complaint, and Defendants' outside-the-pleadings evidence of *some* financial analysis does not (particularly at this stage) defeat the allegations Plaintiffs *did* make. *Infra* 17-19.

Second, Plaintiffs nowhere allege that "climate-related risks are 'unrelated' to 'relevant' risk-return considerations." Mot. 16. What is "unrelated" and not "relevant" to prudent plan management is using plan assets for a collateral social purpose—here, addressing climate change. When, as alleged, two successive comptrollers and multiple trustees declare that they would use plan assets to "attack . . . the fossil fuel industry," to pursue their "collective commitment to

environmental responsibility," and to be a "global leader on climate change," they espouse a plan to use Plan assets for a goal other than providing for participants' retirement.

Tellingly, Defendants suggest in their Motion (at 16) that "risk-return considerations" were the reason for their divestment program. *See also* Mot. 23. Under the law, "risk-return considerations" *should* have been Defendants' lodestar—it is helpful to have Defendants affirm that for the Court. But Plaintiffs' well-pled allegations illustrate at length, and in Defendants' own words, that Defendants were in fact driven by a different goal.[5]

Moreover, many things are "relevant" and "related" to "risk-return considerations," including potentially climate-change risks. But furthering those "related" things cannot become an investment objective in itself. That is what Plaintiffs allege happened here. And nowhere is it alleged that Defendants based their divestment decisions on "material financial risks" "such as a corporation's exposure to real and potential economic effects of climate change." Mot. 17-18 (quoting *Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights*, 87 Fed. Reg. 73,822, 73,832 (Dec. 1, 2022)).

Third, in arguing that fossil-fuel stocks have not performed well historically, Defendants "merely dispute" Plaintiffs' well-pleaded factual allegations, and by no means "conclusively establish that [Plaintiffs] ha[ve] no cause of action." *Premier Lincoln-Mercury*, 11 A.D.3d at 494.

[5] The U.S. Department of Labor rule on "ESG" investing, and the out-of-circuit court decision recently upholding it, *State of Utah v. Walsh*, 2023 WL 2663256 (N.D. Tex. Sept. 21, 2023), further illustrate Defendants' violation of fiduciary standards of conduct. The court there emphasized fiduciaries must act for the "'exclusive purpose' of 'providing benefits to participants,'" and those "'benefits' must be understood to refer to 'financial benefits.'" *Id*. at *5-6, 9. Further, the court emphasized that "'where a fiduciary reasonably determines that an investment strategy will maximize risk-adjusted returns, a fiduciary may pursue the strategy.'" *Id*. at *9. The Complaint does not allege—nor do Defendants even argue—that Defendants believed divestment would "maximize risk-adjusted returns," let alone that this was their "exclusive purpose" in divesting (the allegations are the opposite).

Further, it is beyond cavil that Defendants dumped their energy holdings even as they were surging in value. ¶¶ 43-44.

Defendants' reliance on CPLR 3016(b) is unavailing. That provision requires that, where a cause of action is based, *inter alia*, on "breach of trust," the "circumstances constituting the wrong shall be stated in detail." The purpose of the standard "is to inform a defendant with respect to the incidents complained of." *Pludeman v. N. Leasing Sys., Inc.*, 10 N.Y.3d 486, 491 (2008). Assuming the statute applies here, the Complaint's specific allegations about the meetings Defendants held, actions they took, and motivations on which they acted notify Defendants "of the incidents said to underlie the breach of fiduciary duty claims." *Miami Firefighters' Relief & Pension Fund v. Icahn*, 199 A.D.3d 524, 526 (1st Dep't 2021). And to the extent there are gaps in the allegations, that is only because much of Defendants' conduct occurred behind closed doors, so the "facts that would support the breach of fiduciary duty . . . claims are peculiarly within the . . . defendants' knowledge." *Id*. "Thus, the appropriate course of action is to order discovery." *Id.*

B. The Complaint Adequately Pleads That Defendants Breached Their Duty Of Care By Divesting Without A Prudent Process For Evaluating The Financial Consequences For Plan Participants

Defendants indisputably owed a duty of care under which they are to make investment decisions with "such diligence and such prudence . . . as in general, prudent men of discretion and intelligence in such matters, employ in their own like affairs." *Matter of Bank of N.Y.*, 35 N.Y.2d 512, 518-19 (1974). The "test is one of conduct rather than performance," meaning that whether Defendants acted prudently depends on the process they undertook when deciding to divest. *Matter of Bankers Tr. Co.*, 219 A.D.2d 266, 273 (1st Dep't 1995).[6] And like the duty of loyalty,

[6] Contrary to Defendants' assertion (Mot. 18) that Plaintiffs must allege that the Plans' current portfolio does not equally serve participants' interests, or their protestation (Mot. 20) that a prudent analyst "could conclude" divestment is a good idea, the duty of care is breached whenever a

"[g]enerally, whether a fiduciary has acted prudently is a factual determination to be made by the trial court" after discovery and a trial. *Matter of Janes*, 90 N.Y.2d 41, 50 (1997).

The Complaint alleges that Defendants' decision to divest was guided by improper considerations, and that the process Defendants undertook failed to adequately assess the financial impact of divestment on the Plans. Defendants' own statements show that non-financial factors, namely political and social goals, shaped the decision to divest. Further, Defendants' commitment to *indiscriminately* exclude "investments in the production, exploration, or extraction of fossil fuels" from their portfolios, ¶ 34, demonstrates that Defendants did not undertake a proper analysis "of each individual investment," *Matter of Donner*, 82 N.Y.2d 574, 585 (1993); *see also* ¶ 52. These allegations alone are enough to "manifest [a] cause of action cognizable at law" for fiduciary breach. *Jennifer Realty*, 98 N.Y.2d at 152. A failure to consider relevant factors, or a reliance on irrelevant ones, are sure marks of an imprudent decision-making process. *Matter of JP Morgan Chase Bank, N.A.*, 133 A.D.3d 1292, 1297 (4th Dep't 2015).

Fiduciaries of public pension systems across the country have similarly roundly rejected such wholesale divestment after engaging in a prudent assessment of the implications for retirees. For instance, the Colorado Public Employees' Retirement Association ("PERA") recognized that "divestment is costly and limits PERA's ability to effectively seek the best risk-adjusted returns to secure the retirement benefits of public servants," and that undertaking a divestment strategy would be "inconsistent with its fiduciary duty." ¶ 38; *see also* ¶¶ 36-37 (similar statements by the trustees of a California State Teachers' Retirement System and the Seattle City Employees' Retirement System Board of Administration). Plaintiffs have alleged that Defendants, by contrast, were single-

fiduciary employs an imprudent process, regardless of its outcome or whether a prudent process may have led to the same outcome, *Matter of Bankers*, 219 A.D.2d at 273.

mindedly focused on advancing a climate-change agenda without regard to the toll it would take on Plaintiffs' retirement security.

As further evidence of Defendants' failure to prudently evaluate their divestment decisions, Plaintiffs allege that Defendants divested from fossil-fuel companies at a time that their stocks were rising—and continued to rise. ¶¶ 43-44. This reflects a failure to consider "general economic conditions" when Defendants divested. *Matter of JP Morgan Chase Bank,* 133 A.D.3d at 1297. Contrary to Defendants' claims (at 16-17), this information about stock performance was available to them at the time they divested, ¶¶ 43-44.

In seeking dismissal, Defendants lapse again into misrepresenting Plaintiffs' allegations and raising improper factual disputes not appropriate at this stage. But it is a canard, as shown above, that the Complaint's "key" "contentions" are that "the Plans divested without financial analysis," and that "fossil-fuel stocks have performed well historically." Mot. 16-17. And Defendants' outside-the-pleadings assertion that they continue to retain minimal investments in fossil fuel securities, Mot. 18, does not change the fact that Defendants are publicly committed to divesting all fossil fuel holdings and are $4 billion down the path to doing so.

A time will come when Defendants may seek to persuade the Court that, despite their public boasts, they actually divested on the basis of "risk-return considerations" and judgments of "financial risk." Mot. 16, 23. That time is not now, because those are not the allegations of the Complaint.

C. The Draft Reports Submitted By Defendants Do Not Support Dismissing This Case Without Allowing Plaintiffs Discovery

Defendants have submitted with their motion 304 pages of materials from their files that they claim vindicate their actions. To secure dismissal of the Complaint, these draft reports would have to "utterly refute[] plaintiff's factual allegations and conclusively establish[] a defense to the

asserted claims as a matter of law." *Kolchins*, 128 A.D.3d at 58. Ordinarily, the materials that satisfy this standard are "documents reflecting out-of-court transactions such as mortgages, deeds, contracts, and any other papers, the contents of which are essentially undeniable." *Fontanetta v. Doe*, 73 A.D.3d 78, 84-85 (2d Dep't 2010). The draft reports, which Defendants claim were prepared by BlackRock and Meketa (the "Reports"), fall well short of that standard.

As a preliminary matter, the Reports fail to satisfy CPLR 3211(a)(1), which requires that documentary evidence "satisf[y] the following criteria: (1) it is 'unambiguous'; (2) it is of 'undisputed authenticity'; and (3) its contents are 'essentially undeniable.'" *VXI Lux Holdco S.A.R.L. v. SIC Hldgs., LLC*, 171 A.D.3d 189, 193 (1st Dep't 2019). The reports are marked as drafts, and Defendants have submitted nothing to establish the reports' authenticity, who commissioned them, how they were prepared, or who received them, let alone who reviewed them, and how, if at all, they were used in the process of evaluating and making the challenged divestment decisions. Even if the Reports could be appropriately considered at this juncture, they do not, as Defendants suggest, "disprove Plaintiffs' core allegation that the Plans divested without financial analysis." Mot. 20. As discussed above, Plaintiffs have made no such allegation; rather, Plaintiffs allege that Defendants' actions were driven by an improper motive that took precedence over Plaintiffs' financial interests, and employed a flawed process for evaluating the appropriateness of divesting. The Reports do not "disprove" these allegations. *Shanghai Yongrun Inv. Mgmt. Co., Ltd. v. Xu*, 203 A.D.3d 495, 495 (1st Dep't 2022).

Further, "[s]imply engaging an expert and following its advice" does not "'operate as a complete whitewash' and insulate the fiduciary from liability." *Perez v. First Bankers Tr. Servs., Inc.*, 210 F. Supp. 3d 518, 529 (S.D.N.Y. 2016) (quoting *Donovan*, 680 F.2d at 272). In fact, the Reports reflect that Defendants violated their fiduciary duties. The Phase 3 Meketa Report (NYSCEF 16) presented three different divestment options, with the more modest options 2 and 3

requiring divestment from 256 and 207 companies, respectively. NYSCEF 16 at 5. Defendants have announced that they have divested from *at least* 260 companies. ¶ 30. It is therefore fair to conclude that, to the extent Defendants relied on Meketa's reports at all, they adopted a strategy along the lines of option 1. That option, according to the draft report, failed to "account for material differences between securities"; options 2 or 3, not option 1, would "best serve[]" the interests of the Plans. *Id*. at 29, 35. Even if the Plans had followed the Reports, moreover, that by itself would not have discharged Defendants' fiduciary obligations. A few cherry-picked documents cannot be used to dismiss this case and bar Plaintiffs from discovery of the full contents of Defendants' files and decision-making process.

III. Fiduciary Breach Claims Such As These Are Plainly Justiciable; In Arguing Otherwise, Defendants Depart From The Facts Alleged And The Relief Sought

In their effort to immunize their actions from judicial review, Defendants contend not only that Plan participants have no standing to sue, but also that courts have no authority to adjudicate claims like theirs or provide a remedy. The Courts, they say, may not judge plan fiduciaries' "discretionary investment decisions," nor "substitute their investment judgment for that of the trustees" or "assess the market worthiness of securities." Mot. 20-21.

This is all nonsense. New York courts regularly adjudicate claims for fiduciary breach, and have a duty to do so. *E.g.*, *Withers*, 447 F. Supp. at 1248. When a fiduciary breach involves politically-driven government mismanagement of pension funds holding retirement savings for 639,000 current and future City pensioners, that is more reason for court oversight, not less.

Defendants' claim of non-justiciability flounders, also, on their mistaken characterizations of the relief Plaintiffs seek, and of the conduct they allege.

On the first, Plaintiffs do not ask the Court to second-guess Defendants' "investment judgment[s]," Mot. 21, but instead to adjudicate whether such judgments were made—or whether,

as Plaintiffs claim, Defendants carelessly cast aside such judgments and their duties to Plan participants in order to pursue their own policy goals. Courts routinely assess such deviations from the duties of loyalty and care, assisted as needed by experts on the standards for fiduciary conduct and the performance of different investments. *E.g.*, *Shatz v. Chertok*, 180 A.D.3d 609, 610 (1st Dep't 2020). And Plaintiffs also do not seek a court order requiring Defendants to "buy back" certain "stocks" (Mot. 22), but an order—as stated in the Prayer for Relief—that the Plans "mak[e] decisions going forward regarding fossil-fuel-related and all other potential investments based exclusively on relevant risk-return factors . . ." ¶ 24.[7]

Second, the final pages of Defendants' brief are striking—and damning—for how sharply the fiduciary standards they describe depart from the allegations in the Complaint and Defendants' own public statements. There, Defendants articulately describe the serious "responsibility" with which they are charged and the delicate "art" of prudent investment, requiring as it does "countless judgments and predictions about . . . diversification across various risk profiles," and "hedging" "across a wide range of industries." Mot. 20-23. This, they say, calls for the "judgment" of "experts," specifically, "financial experts," that include "internal investment staff" and "multiple third-party consultants." *Id.* Much of this is true—and the Complaint is brimming with allegations that this expert-driven, risk-return-driven assessment was displaced by politicians' pursuit of a climate-change agenda.

[7] For these reasons, the *Sgaglione* case cited by Defendants is inapposite. Mot. 20-21. There, in a suit by plan participants, the court invalidated a state statute that required plans to invest in certain asset classes; investment decisions, the court explained, lay within the trustees' "sound discretion." *Sgaglione v. Levitt*, 37 N.Y.2d 507, 512 (1975). Here, Plaintiffs seek only to have Defendants prudently exercise that "sound discretion," rather than adopting a per se rule *against* certain asset classes for policy-motivated reasons.

Plaintiffs are entitled to obtain discovery that will show that the process Defendants followed is *not* the one described at the close of their brief, but instead is described in the well-pled facts of the Complaint.

CONCLUSION

For the foregoing reasons, the Court should deny Defendants' motion.

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Respectfully submitted,

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ATTORNEY CERTIFICATION

I, Akiva Shapiro, an attorney duly admitted to practice law before the courts of the State of New York, hereby certify that this memorandum complies with the word count limit set forth in Rule 17 of the Rules of the Commercial Division of the Supreme Court (202.70(g)) because it contains 6,348 words, excluding the parts of the memorandum exempted by Rule 202.8-b. In preparing this certification, I have relied on the word count of the word-processing system used to prepare this memorandum.

New York, NY
Dated: September 27, 2023

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