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

---x

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

Plaintiffs,

Index No. 652297/2023

Motion Seq. No. 4

-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.

---x

REPLY MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

Dated: New York, New York
October 23, 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 (admitted *pro hac vice*)
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

ARGUMENT 2

A. Plaintiffs lack standing because they face no injury in fact. 2

1. Plaintiffs offer no persuasive justification for this Court to decline to follow *Thole*. 3

2. Plaintiffs have not alleged any injury in fact. 5

3. Plaintiffs' assertion that "no one" else might be able to sue does not give them a free pass on standing. 6

B. In the alternative, Plaintiffs fail to state a cause of action. 8

1. Plaintiffs have not pled a breach of fiduciary duty claim. 8

2. Plaintiffs cannot plead a taxpayer action under Section 51. 10

C. Plaintiffs fail to address any of the serious justiciability and policy concerns detailed in the Plans' opening brief. 11

CONCLUSION 14

TABLE OF AUTHORITIES

Page(s)

Cases

Birnbaum v. Birnbaum,
73 N.Y.2d 461 (1989) 10

Brunkhorst v. Iowa Pub. Emps.' Ret. Sys.,
852 N.W.2d 21, 2014 WL 1714457 (Iowa Ct. App. 2014) 3, 4

Clissuras v. City of N.Y.,
131 A.D.2d 717 (2d Dep't 1987) 12

David v. Alphin,
704 F.3d 327 (4th Cir. 2013) 3

Duncan v. Muzyn,
885 F.3d 422 (6th Cir. 2018) 3

Fletcher v. Convergex Grp., L.L.C.,
679 F. App'x 19 (2d Cir. 2017) 3

Frankel v. J.P. Morgan Chase & Co.,
193 A.D.3d 689 (2d Dep't 2021) 5

Glanton v. AdvancePCS Inc.,
465 F.3d 1123 (9th Cir. 2006) 3

Herzog v. Town of Thompson,
216 A.D.2d 801 (3d Dep't 1995) 7, 11

Lee v. Verizon Commc'ns, Inc.,
837 F.3d 523 (5th Cir. 2016) 3

Leon v. N.Y.C. Emps.' Ret. Sys.,
240 A.D.2d 186 (1st Dep't 1997) 12

Mental Hygiene Legal Serv. v. Daniels,
33 N.Y.3d 44 (2019) 2, 3

Mesivta of Forest Hills Inst., Inc. v. City of N.Y.,
58 N.Y.2d 1014 (1983) 11

Piagentini v. N.Y. State Bd. of Parole,
176 A.D.3d 138 (3d Dep't 2019) 7

Ramon v. Teacher Ret. Sys. of Tex.,
No. 01-09-00684-cv, 2010 WL 1241293 (Tex. Ct. App. Apr. 1, 2010) 3, 4

Rees v. Teachers' Ret. Bd. of N.Y.,
247 N.Y. 372 (1928) 11

Roberts v. Health & Hosps. Corp.,
87 A.D.3d 311 (1st Dep't 2011) 13

Roulan v. Cnty. of Onondaga,
21 N.Y.3d 902 (2013) 5

Schlesinger v. Reservists to Stop the War,
418 U.S. 208 (1974) 3

Schnepel v. Bd. of Educ. of Rochester,
302 N.Y. 94 (1951) 11

Sgaglione v. Levitt,
37 N.Y.2d 507 (1975) 11

Soc'y of Plastics Indus. v. Cnty. of Suffolk,
77 N.Y.2d 761 (1991) 3, 13

Spokeo, Inc. v. Robins,
578 U.S. 330 (2016) 3

Matter of Stevens v. N.Y. State Division of Criminal Justice Services,
206 A.D.3d 88 (1st Dep't 2022) 7

Thole v. U.S. Bank N.A.,
140 S. Ct. 1615 (2020) .... *passim*

Transactive Corp. v. N.Y. State Dep't of Soc. Servs.,
92 N.Y.2d 579 (1998) 7

Utah v. Walsh,
No. 2:23-cv-16, 2023 WL 6205926 (N.D. Tex. Sept. 21, 2023) 9

Matter of Wallens,
9 N.Y.3d 117 (2007) 10

Washburn v. Goldin,
59 A.D.2d 682 (1st Dep't 1977) 10, 11

Weimer v. Bd. of Educ. of Smithtown Cent. Sch. Dist. No. 1,
52 N.Y.2d 148 (1981) 11

Wein v. City of N.Y.,
47 A.D.2d 367 (1st Dep't 1975), *mod'd*, 36 N.Y.2d 610 (1975)........11

Statutes and Regulations

11 NYCRR § 136-1.9 8

General Municipal Law § 51 ....*passim*

Retirement and Social Security Law §§ 150–59, 176–79-a, 210–17 4

Retirement and Social Security Law § 177(9)........9

Other Authorities

Department of Labor, *Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights*, 87 Fed. Reg. 73,822 (Dec. 1, 2022)........9

PRELIMINARY STATEMENT

Plaintiffs offer no good reason for this Court to depart from overwhelming authority—including the U.S. Supreme Court's decision in *Thole*—holding that members of a defined-benefit pension plan lack standing to sue for investment losses, absent some real threat that their pensions are in jeopardy. Because Plaintiffs' arguments for why the Court should hear this case rest on clear misunderstandings of New York law, it's no surprise that Plaintiffs cite exactly *zero* cases holding—contrary to *Thole* and many other decisions—that members of defined-benefit plans have standing to bring lawsuits like this one.

Plaintiffs' jurisdictional argument hinges on three fundamental legal errors. First, Plaintiffs wrongly argue that the U.S. Supreme Court's decision in *Thole* is unpersuasive due to differences between New York and federal standing law. But when it comes to the only element at issue here—injury in fact—New York courts apply the very same test as federal courts. Plaintiffs cite no decisions holding otherwise.

Second, Plaintiffs wrongly assert—without citation—that the "common law of trusts" somehow governs the defendant public pension funds (the "Plans"). Not only do none of Plaintiffs' common-law citations support their theory, but, as the Plans explained in their opening brief, the Retirement and Social Security Law ("RSSL") and Insurance Law provide the governing legal framework for New York's public pension funds. Statutes, not the common law, govern the investment choices the Plans may permissibly make, what checks exist for contesting those choices, and courts' role in reviewing public officials' financial decisions.

Third, Plaintiffs baselessly ask for a free pass on standing because, they claim, dismissal here would foreclose "any judicial review" of the Plans' investment decisions. But, as Plaintiffs concede, this lawsuit is a challenge to alleged "waste of municipal funds." The legislatively-

defined avenue for such a challenge, if any, is a taxpayer action under General Municipal Law ("GML") § 51. The fact that Plaintiffs fail to state a claim under that statute does not permit them to sidestep clear jurisdictional requirements like standing. Moreover, as Plaintiffs concede, the New York Attorney General could take legal action.

Uninjured but unhappy plan members—like Plaintiffs here—have multiple avenues to air their grievances, including by appealing to trustees, legislators, or the State's Department of Financial Services ("DFS"). That lawmakers did not create a private right of action for uninjured Plan members does not mean it is the Court's job to create one.

Lastly, regardless of Plaintiffs' lack of standing, the Complaint fails to allege any cause of action. Plaintiffs' breach of fiduciary duty claim fails because Plaintiffs have now conceded that they have no basis to challenge the merits of the Plans' divestment, but rather only the Plans' purported motivations. This challenge necessarily fails as a matter of law because, as Plaintiffs' own authority confirms, fiduciaries may take into account considerations like climate change if the resulting investments are prudent.

The Court should dismiss the Complaint, with prejudice.

ARGUMENT

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

Plaintiffs have plainly not alleged a "concrete" and "particularized" injury as required to satisfy the injury-in-fact requirement. *Mental Hygiene Legal Serv. v. Daniels*, 33 N.Y.3d 44, 50 (2019). Rather, as participants in defined-benefit plans, Plaintiffs will receive the same benefits payments "regardless of the plan's value at any one moment and regardless of the investment decisions of the plan's fiduciaries." *Thole v. U.S. Bank N.A.*, 140 S. Ct. 1615, 1618 (2020). On virtually identical facts, the Court in *Thole* held that there was no injury in fact, and, therefore, no standing. The same result applies here.

1. Plaintiffs offer no persuasive justification for this Court to decline to follow *Thole*.

Plaintiffs devote much of their argument to asking this Court to decline to follow *Thole*, which they disparage as "a single U.S. Supreme Court decision" decided "by a 5-4 vote." (NYSCEF Doc. No. 32 ("Opp.") at 11). But Plaintiffs fail to cite a single case reaching the opposite result, and they offer no sound basis for rejecting *Thole*.

First, *Thole* is no aberration. Before *Thole* was decided, at least four other federal circuit courts reached the same conclusion as the Court in *Thole*; only one circuit court concluded otherwise.[1] And though the issue rarely arises in state court—after all, uninjured plan members have no real incentive to sue[2]—state courts have consistently reached the same conclusion, too. *E.g.*, *Brunkhorst v. Iowa Pub. Emps.' Ret. Sys.*, 852 N.W.2d 21, 2014 WL 1714457, *7 (Iowa Ct. App. 2014); *Ramon v. Teacher Ret. Sys. of Tex.*, No. 01-09-00684-cv, 2010 WL 1241293, *3-5 (Tex. Ct. App. Apr. 1, 2010).

Second, Plaintiffs observe that New York standing law differs from federal law in some respects. That observation, while true, misses the point: New York and federal law are indistinguishable when it comes to the *injury-in-fact* requirement, which is the only standing element relevant here. When articulating the injury-in-fact requirement, the Court of Appeals routinely invokes, and uses exactly the same language as, federal caselaw. *E.g.*, *Mental Hygiene Legal Serv.*, 33 N.Y.3d at 50 (citing *Spokeo, Inc. v. Robins*, 578 U.S. 330 (2016)); *Soc'y of Plastics Indus. v. Cnty. of Suffolk*, 77 N.Y.2d 761, 772-73 (1991) (citing *Schlesinger v. Reservists*

[1] *David v. Alphin*, 704 F.3d 327, 334-35 (4th Cir. 2013); *Lee v. Verizon Commc'ns, Inc.*, 837 F.3d 523, 547-48 (5th Cir. 2016); *Duncan v. Muzyn*, 885 F.3d 422, 428-29 (6th Cir. 2018); *Glanton v. AdvancePCS Inc.*, 465 F.3d 1123, 1125 (9th Cir. 2006); *but see Fletcher v. Convergex Grp., L.L.C.*, 679 F. App'x 19, 20 (2d Cir. 2017).

[2] ERISA's fee-shifting provision provides such an incentive under federal law, which is why this question has been more thoroughly litigated under federal law than under state law.

to Stop the War, 418 U.S. 208 (1974)). Multiple courts have found no "significant difference" between New York's and federal law's injury-in-fact requirements (NYSCEF Doc. No. 20 ("MTD") at 12-13 (citing cases)). Plaintiffs cite no authority reaching the opposite conclusion.

Third, Plaintiffs argue that the "common law of trusts" obviates the need for them to establish injury in fact at all. Under this "common law," they argue, the mere allegation of a breach of fiduciary duty is injury enough to avail oneself of the court's jurisdiction, such that no injury in fact need be pled (Opp. 10). But Plaintiffs' case citations do not remotely support that proposition: the cases they cite all involve actual injury, and none suggest that an unharmed plaintiff—such as a beneficiary in a defined-benefit plan with a guaranteed stake that is not dependent on the fund's total value—can sue (*id.*). Courts applying common law have declined to permit such suits because the beneficiaries face no injury. *See Brunkhorst*, 2014 WL 1714457, *7; *Ramon*, 2010 WL 1241293, *3-5.

Leaving aside Plaintiffs' misrepresentation of old trust-law cases, Plaintiffs are simply wrong that the "common law of trusts" governs New York's public pension funds (Opp. 10). Comprehensive statutory law, including the RSSL and Insurance Law, governs the Plans. *See, e.g.*, RSSL §§ 150–59, 176–79-a, 210–17. Plaintiffs cite no cases to the contrary. And none of the "common law" cases Plaintiffs cite involve *public* pension funds, or governmental defendants, at all. Whatever the substantive legal standards in actions between private parties might have been at common law, that common law provides no basis to find standing to sue the government here.

Finally, even were this Court to split from the U.S. Supreme Court, Plaintiffs are wrong to insinuate that the dissenting Justices in *Thole* would find standing here. The dissent in *Thole* rested heavily on ERISA's explicit private right of action enabling plan members to sue

trustees—a statutory right "designed" to address lawmakers' acute concerns about trustees abusing private pension funds. *Thole*, 140 S. Ct. at 1635 (Sotomayor, J., dissenting). By contrast, New York's lawmakers opted for a different statutory framework under which the government fully guarantees Plan members' benefits, and numerous avenues—but not fiduciary duty suits by uninjured Plan members—exist for Plan members to contest investment decisions they dislike (Section C, *infra*; MTD 3-6, 21-22). *Cf. Thole*, 140 S. Ct. at 1627 (ERISA benefits are partially, not fully, guaranteed by the government if a plan fails).

2. Plaintiffs have not alleged any injury in fact.

Although the Complaint does not allege that they will suffer any loss of benefits, Plaintiffs now suggest that: (i) the impact of divestment on the Plans is "so severe as to threaten [their] very existence"; (ii) the Plans' funding levels threaten "imminent harm" to Plaintiffs; and (iii) if the City's finances "deteriorate further" (which is not alleged) then it is *possible* that the City *might* declare bankruptcy at some *unknown point* in the future—even though, as Plaintiffs admit, that did not happen even during the fiscal crisis in the 1970s (Opp. 12). As detailed below, these assertions are divorced from any plausible factual allegations and, together, provide a textbook example of a "speculative financial loss" that is insufficient to confer standing. *Roulan v. Cnty. of Onondaga*, 21 N.Y.3d 902, 905 (2013); *see Frankel v. J.P. Morgan Chase & Co.*, 193 A.D.3d 689, 690 (2d Dep't 2021) (injury in fact cannot hinge on "speculation" about future events).

First, it is inconceivable that the Plans' divestment decisions—which involve, by Plaintiffs' own tally, just 2.7% of the Plans' total assets (MTD 14)—could "threaten" the Plans' existence. Plaintiffs cannot dispute that the divested assets involve "far too little" of the Plans' overall portfolios to have a meaningful impact on the Plans' viability (*id.*). Moreover, it is entirely speculative whether the Plans will ultimately be any worse off due to the divestment.

Plaintiffs do not allege otherwise; instead, they concede that "a prudent analyst 'could conclude' divestment is a good idea" and that the Plans' current portfolios could "equally serve [the] participants' interests" over time (*see* Opp. 20 n.6).

Second, the Plans are dramatically better funded than the average public pension plan (*see* MTD 4 & n.4). Plaintiffs simply ignore that fact. And even if, contrary to fact, the Plans were substantially underfunded, such an allegation would not support standing because, without more, an "allegation of plan underfunding does not itself demonstrate a substantially increased risk that the plan and the employer would both fail." *Thole*, 140 S. Ct. at 1622.

Third, Plaintiffs do not and cannot allege that the City will declare bankruptcy—something not even mentioned as a possibility in the City financial report cited in the Complaint. Ironically, Plaintiffs' purported concern seems premised on the fact that, during the City's fiscal crisis in the 1970s, the City *avoided* bankruptcy (Opp. 12). If anything, the fact that the Plans remained able to pay pension benefits throughout that crisis—and are now among the best funded plans in the nation—proves that Plaintiffs face no real risk of loss, much less an imminent one.

3. Plaintiffs' assertion that "no one" else might be able to sue does not give them a free pass on standing.

Plaintiffs maintain that they should be permitted to sue based on a wholly speculative risk of harm because, they contend, "no one" can sue if they cannot (Opp. 14). That argument has no place in a case like this, which asserts no individual constitutional rights but instead is—by Plaintiffs' admission—a generalized challenge to the alleged "waste of municipal funds" (Opp. 13 (internal quotation marks omitted)).

In cases involving legislation that violates constitutional rights, courts may find common-law taxpayer standing in order to avoid an "impenetrable barrier to any judicial scrutiny."

Transactive Corp. v. N.Y. State Dep't of Soc. Servs., 92 N.Y.2d 579, 589 (1998). But that rule is "not implicated" where lawsuits "do not seek review of any legislative action." *Id.*

And taxpayers have "no common-law right of action" against government officials to prevent financial decisions they believe are wasteful. *Herzog v. Town of Thompson*, 216 A.D.2d 801, 804 (3d Dep't 1995). Rather, in cases like this—where the challenged decisions "ultimately put[] New York City taxpayers on the hook" (Compl. ¶ 46)—the Legislature, not the courts, have defined the only available right of action. *See Herzog*, 216 A.D.2d at 804. Such action, if any, is a general taxpayer action under GML § 51. *See id.* Indeed, Plaintiffs affirmatively contend that Section 51 provides an appropriate avenue for judicial relief here (Opp. 13).

But as detailed below, Plaintiffs fail to plead a Section 51 claim on the merits because the challenged Plan conduct is neither fraudulent nor for "entirely illegal purposes" (Section B.2, *infra*). Furthermore, Plaintiffs do not even purport to pay the kind of taxes (property taxes) that Section 51 requires; Plaintiffs' argument that *they* should be able to sue without injury makes no sense in light of the existence of other, better-situated potential plaintiffs, such as those who meet Section 51's taxpaying requirement.[3]

And Plaintiffs' failure to state a cause of action under Section 51 provides no basis to let this lawsuit proceed. Rather, it supports dismissal: the Legislature can, and does, create causes of action for litigants who would otherwise lack standing, and has opted not to create one that could succeed here. *See also Piagentini v. N.Y. State Bd. of Parole*, 176 A.D.3d 138, 144-45 (3d Dep't

[3] Plaintiffs' argument also relies on *Matter of Stevens v. N.Y. State Division of Criminal Justice Services*, 206 A.D.3d 88 (1st Dep't 2022), a decision now pending before the Court of Appeals involving a constitutional challenge to DNA databank regulations. There, the First Department held that the palpable fear and anxiety caused by an increased risk of criminal investigation constituted an injury in fact. *Id.* at 99. *Stevens* is inapposite because there is no analogous injury here, and because *Stevens* did not implicate Section 51 or any other statutory right of action for litigants to sue without injury in fact.

2019) (dismissing for lack of standing where "no one would have the ability to raise such a challenge, even if the Board blatantly disregarded the law" because there existed other, nonjudicial avenues for accountability).

Finally, as Plaintiffs concede, DFS has "oversight authority over Defendants" (Opp. 14 n.3), which includes holding hearings to determine if "any public pension fund has been depleted by reason of any [fiduciary's] wrongful or negligent act" and transmitting DFS's findings to the Attorney General, who "may proceed according to statute." 11 NYCRR § 136-1.9. Plaintiffs' argument that the Attorney General is *unlikely* to challenge the Plans' decisions in court because she has already concluded that "comparable" "divestment actions" are lawful (Opp. 14. n.3) simply highlights the baselessness of Plaintiffs' claims.

B. In the alternative, Plaintiffs fail to state a cause of action.

Separate from their lack of standing, Plaintiffs also have not stated a cause of action. The causes of action actually asserted in the Complaint—for breach of fiduciary duty—fail as a matter of law because Plaintiffs have not pled, with particularity, any breach of the duties of loyalty or care.[4] And Plaintiffs' new attempt to invoke an unpled Section 51 taxpayer action is plainly insufficient, too.

1. Plaintiffs have not pled a breach of fiduciary duty claim.

Plaintiffs' concessions require dismissal of their Complaint, with prejudice. Critically, they do not dispute "that a prudent analyst 'could conclude' divestment is a good idea" (Opp. 20

[4] Plaintiffs also assert a duplicative "declaratory relief" cause of action that merely incorporates their breach-of-fiduciary-duty allegations and requests a declaration of breach (Compl. ¶¶ 59-61). This declaratory relief cause of action is subject to dismissal for all the same reasons as the fiduciary duty claims, including lack of standing. And contrary to Plaintiffs' suggestion (Opp. 15 n.4), the Plans moved to dismiss this cause of action when they moved to dismiss the entire Complaint.

n.6). They do not dispute that many other institutional investors, including public pension funds, have chosen to divest from fossil fuels. And they assert that the Attorney General has concluded that "comparable" "divestment actions" by the state employees' retirement system are consistent with New York law (Opp. 14 n.3).

These concessions confirm, on their face, that the Plans' ultimate investment choices were prudent—or, at the very least, that a prudent investor could have reached the same result. The supposed misconduct alleged by Plaintiffs did not yield an imprudent investment mix, by their own admission. This is fatal to their lawsuit.

Plaintiffs' only response is to argue that the Plans' or trustees' subjective "motives" regarding climate change are alone sufficient to constitute a breach of fiduciary duty—even if the resulting investment choices are not imprudent (Opp. 16-17, 20 n.6). But that legal theory is fundamentally inconsistent, as a matter of law, with the very authorities on which Plaintiffs rely (*see* Compl. ¶¶ 20, 41 and Opp. 19 & n.5 (collectively citing RSSL § 177(9); Dep't of Labor, *Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights*, 87 Fed. Reg. 73,822, 73,786 (Dec. 1, 2022) ("DOL Regulation"); and *Utah v. Walsh*, No. 2:23-cv-16, 2023 WL 6205926 (N.D. Tex. Sept. 21, 2023))). These authorities properly authorize consideration of "collateral" impacts, including climate change, so long as it yields investments that "equally serve the financial interests of the plan." DOL Regulation, 87 Fed. Reg. at 73,836; *see also Walsh*, 2023 WL 6205926, at *4, *6; RSSL § 177(9) (Plans may consider the broader impact of investments while still acting for the "exclusive benefit of the participants and beneficiaries").

Thus, to state a cause of action, Plaintiffs must plausibly allege that the Plans' challenged decisions did not "equally serve the financial interests of the plan." DOL Regulation, 87 Fed.

Reg. at 73,836. Not only have they failed to make such an allegation; they have conceded the opposite by admitting that a prudent investor could reach the same decision as the Plans here.

None of Plaintiffs' arguments or allegations are sufficient to overcome this failing. They offer no authority which holds that the "exclusive benefit" rule precludes any policy considerations. Instead, they cite inapposite cases in which trustees used trust assets to pay themselves or hire family members (*see* Opp. 15 (citing *Matter of Wallens*, 9 N.Y.3d 117 (2007); *Birnbaum v. Birnbaum*, 73 N.Y.2d 461 (1989))).

Similarly unavailing is Plaintiffs' reliance on the fact that, years ago, certain other pension funds opted not to cease their fossil fuel investments and declined to even study the issue (Opp. 21). Plaintiffs' observation that some other funds have decided not to divest (*id.*) clearly cannot support an inference of imprudence now that Plaintiffs have conceded that many pension plans funds have divested from fossil fuels, "a prudent analyst 'could conclude' divestment is a good idea," and "comparable" divestment actions have the Attorney General's approval (*see* Opp. 14 n.3, 20 n.6; MTD 11).

Finally, as an independent basis to dismiss for failure to state a cause of action, Plaintiffs do not dispute that they must allege damages which are "directly caused" by the alleged fiduciary breach, not "speculative damages" they might suffer in the future (MTD 19 (citing cases)). Plaintiffs offer no response to this argument. Instead, their opposition confirms that any damages hinge on unpled, baseless speculation about the City possibly filing for bankruptcy someday (Opp. 12).

2. Plaintiffs cannot plead a taxpayer action under Section 51.

In their opposition papers, Plaintiffs assert a taxpayer cause of action under GML § 51. That unpled claim fails at the threshold because Plaintiffs do not allege that they "own real property assessed at $1,000 or more," as the statute requires. *Washburn v. Goldin*, 59 A.D.2d 682

(1st Dep't 1977); *Wein v. City of N.Y.*, 47 A.D.2d 367, 370 (1st Dep't 1975), *modified on other grounds*, 36 N.Y.2d 610 (1975). Plaintiffs' unpled assertion that they "are taxpayers" (Opp. 13) is plainly insufficient. *Washburn*, 59 A.D.2d at 682; *Weimer v. Bd. of Educ. of Smithtown Cent. Sch. Dist. No. 1*, 52 N.Y.2d 148, 153 n.3 (1981). This alone requires dismissal of the unpled Section 51 claim.[5]

In any event, Plaintiffs cannot allege any statutory or constitutional violation sufficient to support a Section 51 action. Section 51 authorizes taxpayer actions only where the challenged acts are "fraudulent" or "represent a use of public property or funds for entirely illegal purposes." *Mesivta of Forest Hills Inst., Inc. v. City of N.Y.*, 58 N.Y.2d 1014, 1016 (1983). There is no legal ground for applying Section 51 to common-law torts or discretionary government decisions, such as the Plans' decisions about which investments to select. *See Herzog*, 216 A.D.2d at 804. Because Plaintiffs cannot come close to meeting Section 51's high bar, there is no basis to allow them to amend their Complaint to add their unpled Section 51 claim.[6]

C. Plaintiffs fail to address any of the serious justiciability and policy concerns detailed in the Plans' opening brief.

In their opening brief, the Plans explained that under the governing legislative framework and Court of Appeals precedent, it is not the judiciary's role to second-guess public pension funds' investment decisions (MTD 20-21 (citing *Sgaglione v. Levitt*, 37 N.Y.2d 507, 513 (1975))). In lieu of close judicial review, the Legislature provided various avenues for dissatisfied Plan members to air their grievances about the Plans' investment choices—including by appealing to lawmakers, the Plans' publicly accountable trustees, or financial regulators

[5] Plaintiffs also have not furnished the requisite bond. GML § 51.

[6] Some precedent indicates the Plans fall under the ambit of Section 51. *E.g.*, *Rees v. Teachers' Ret. Bd. of N.Y.*, 247 N.Y. 372 (1928). But more recent decisions suggest it is an open question. *See Schnepel v. Bd. of Educ. of Rochester*, 302 N.Y. 94 (1951).

(MTD 21-22). Respecting this structural framework is necessary to ensure that courts are not flooded with fiduciary duty suits and their onerous discovery, brought by any of the Plans' 639,000 members who dislike particular Plan decisions (MTD 20).

Plaintiffs' opposition offers no meaningful response to any of this. Their primary retort is to accuse the Plans of invoking justiciability concerns and well-settled standing principles to evade judicial review of the Plans' actions (Opp. 14). But they do not dispute that lawmakers, or the trustees, could address all of their grievances.

Rather than confront the controlling legislative framework that leaves the Plans' investment decisions in the hands of the Plans' trustees and financial advisers (MTD 20-21), Plaintiffs complain that the nonjudicial branches might not provide them the relief they desire. For example, they contend that the current Attorney General would not intervene here because she believes it is appropriate for public pension funds to stop investing in fossil fuel companies (Opp. 14 n.3). But if the Attorney General believes that the Plans' discretionary investment decisions are appropriate, that should weigh against further judicial review, not in favor of more.

And Plaintiffs do not seriously grapple with the Legislature's decision to provide for highly deferential judicial review of official government action. Section 51 provides relief only where government action is fraudulent or performed for entirely illegal purposes. And the other accepted avenue for challenging official action, Article 78, provides a judicial check only on actions that are irrational, arbitrary, or contrary to law. *See Clissuras v. City of N.Y.*, 131 A.D.2d 717, 718 (2d Dep't 1987) (fiduciary duty challenge to public pension fund action must be analyzed under deferential Article 78 standard); *Leon v. N.Y.C. Emps.' Ret. Sys.*, 240 A.D.2d 186, 186 (1st Dep't 1997) (same). These limited avenues for judicial review reflect the Legislature's sound judgment about the "proper role" of the judiciary when reviewing the actions

of coordinate branches. *Roberts v. Health & Hosps. Corp.*, 87 A.D.3d 311, 313-14 (1st Dep't 2011).

Under this settled law, there is no room for courts to second-guess public pension funds' investment decisions under the guise of common-law "fiduciary duty" claims. The fact that the Plans' alleged "misconduct" would plainly satisfy Section 51's or Article 78's deferential standard does not mean the Plans are "evading" review; it simply confirms that Plaintiffs' grievances are for the coordinate branches, not the courts.

And Plaintiffs do not dispute that their fiduciary duty claims, if allowed to proceed, would open the door to countless lawsuits by any of the Plans' 639,000 members, without any discernible limit (MTD 22). Far from identifying any administrable limit, Plaintiffs instead urge an unworkable legal theory that hinges on whether the Plans, and the dozens of elected and appointed public officials who serve as Plan trustees, divested for impermissible reasons (Section B.1, *supra*; Opp. 23).

At the end of the day, no law or sound policy supports Plaintiffs' brute insistence that they can bring an unprecedented "fiduciary duty" claim to challenge Plan decisions that do not impact them one bit. They cite no case in which a court has overruled a public pension fund's discretionary investment decisions. They ignore controlling statutes and instead appeal to a "common law of trusts" that they pretend, without citation, governs the Plans.

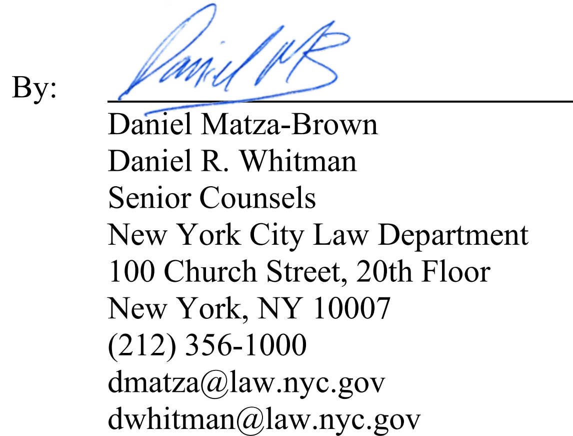
But laws govern here. If the Legislature wanted to authorize fiduciary duty suits by any of the Plans' 639,000 members, to challenge any investment decisions they disagreed with, the Legislature "could easily" do so. *Soc'y of Plastics Indus.*, 77 N.Y.2d at 770. It has not; and the Court should respect that legislative judgment.

CONCLUSION

The Court should dismiss the Complaint with prejudice.

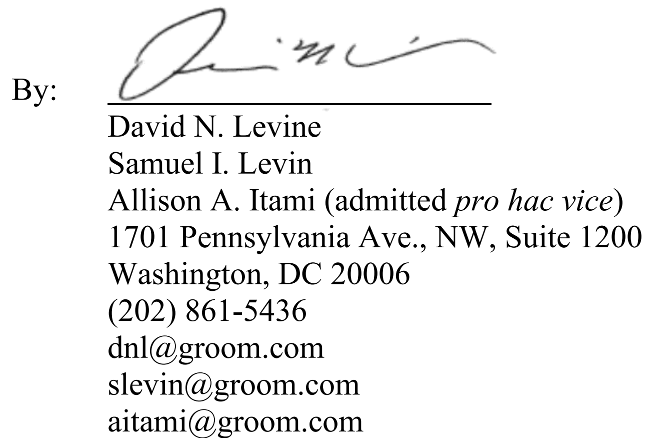
Dated: New York, New York
October 23, 2023

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 (admitted *pro hac vice*)
1701 Pennsylvania Ave., NW, Suite 1200
Washington, DC 20006
(202) 861-5436
dnl@groom.com
slevin@groom.com
aitami@groom.com

Attorneys for Defendants

CERTIFICATION OF COMPLIANCE
WITH UNIFORM CIVIL RULE 202.8-b

I certify that this document, excluding any caption, table of contents, table of authorities, and signature block, contains 4,195 words, according to the word count feature of the word-processing system used to prepare the document.

/s/ Daniel Matza-Brown
Daniel Matza-Brown