No. 23-1082-cv

In the U.S. Court of Appeals
For the Second Circuit

JOSEPH VELLALI, Individually and as representative of a class of participants and beneficiaries on behalf of the Yale University Retirement Account Plan, NANCY S. LOWERS, Individually and as representative of a class of participants and beneficiaries on behalf of the Yale University Retirement Account Plan, JAN M. TASCHNER, Individually and as representative of a class of participants and beneficiaries on behalf of the Yale University Retirement Account Plan, JAMES MANCINI, Individually and as representative of a class of participants and beneficiaries on behalf of the Yale University Retirement Account Plan,
Plaintiffs-Appellants-Cross-Appellees,

RANAY P. CIRILLO, Individually and as representative of a class of participants and beneficiaries on behalf of the Yale University Retirement Account Plan, TARA HEARD, Individually and as representative of a class of participants and beneficiaries on behalf of the Yale University Retirement Account Plan,
Plaintiffs,

v.

YALE UNIVERSITY, MICHAEL A. PEEL, THE RETIREMENT PLAN FIDUCIARY COMMITTEE
Defendants-Appellees-Cross-Appellants.

On Appeal from the United States District Court for the District of Connecticut
The Honorable Judge Alvin W. Thompson, Case No. 3:16-cv-001345-AWT

Brief for the Acting U.S. Secretary of Labor as Amicus Curiae Supporting Plaintiffs-Appellants

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QUESTION PRESENTED

Whether a fiduciary under the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1001, *et seq.*, can escape liability under ERISA Section 409(a) after a plaintiff establishes a fiduciary breach and a related plan loss, by showing that it "could have" made the same decision had it followed a prudent process, or instead whether it must show that it "would have" done so.

STATEMENT OF IDENTITY, INTEREST, AND AUTHORITY TO FILE

The Acting Secretary of Labor ("Secretary") has the primary authority to interpret and enforce Title I of ERISA and is responsible for "assur[ing] the . . . uniformity of enforcement of the law under the ERISA statutes." *See Sec'y of Labor v. Fitzsimmons*, 805 F.2d 682, 691–93 (7th Cir. 1986) (en banc). To that end, the Secretary has an interest in effectuating ERISA's express purpose of "establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans." 29 U.S.C. § 1001(b). The Secretary has a substantial interest in ensuring that courts correctly interpret ERISA in light of its trust-law background so that breaching fiduciaries are not improperly absolved from liability for their fiduciary breaches.

This case involves allegations that the fiduciaries of an ERISA-covered employee benefit plan breached their duty of prudence by failing to adequately monitor and control the amount of recordkeeping fees paid to plan service providers. After the jury found that Defendants breached ERISA's duty of prudence and that Plaintiffs' ERISA plan incurred a loss, the district court correctly required Defendants to prove that their breach did not cause losses to the plan. However, the court erroneously instructed the jury as to how Defendants could meet that burden. Specifically, the jury instruction allowed Defendants to escape liability if they proved that a fiduciary following a prudent process *could have* made the same decisions as to recordkeeping and administrative fees that Defendants made, rather than require (as Plaintiffs had urged) that the jury determine whether a prudent fiduciary *would*, more likely than not, have done so. The Secretary has a strong interest in ensuring that this Court articulates the correct standard of proof.

The Secretary files this brief as amicus curiae pursuant to Federal Rule of Appellate Procedure 29(a)(2).

STATEMENT OF THE CASE

A. Factual Background

Yale University ("Yale") sponsors a 403(b) defined-contribution retirement plan ("Plan") in which participants invest a portion of their earnings into investment options offered by the Plan. SA43.[1] Yale is the Plan's administrator and named fiduciary. *Id.*

In 2010, Yale contracted with the Teachers Insurance and Annuity Association of America ("TIAA") and Vanguard to provide investment management and recordkeeping services for the Plan. SA 43–44. In late 2014 and early 2015, Yale terminated its services with Vanguard and exclusively contracted with TIAA to serve as the Plan's sole recordkeeper. SA46. Recordkeeping fees "can materially affect an employee's retirement income because every dollar spent on either recordkeeping or investment management is a dollar that is not contributing to increasing the amount of the employee's retirement savings." SA43–44. Initially, both Vanguard and TIAA charged

[1] Consistent with Plaintiffs-Appellants' Principal Brief, citations in the form "SA__" and "A__" refer respectively to Plaintiffs-Appellants' Special Appendix, ECF No. 65-2, and Plaintiffs-Appellants' Appendix, ECF Nos. 66–68.

recordkeeping fees that were tied to the amount of assets in the Plan. SA47–48. In 2015, TIAA transitioned away from an asset-based recordkeeping fee model to a per-participant model that charged recordkeeping fees based on the number of Plan participants. SA48.

B. Procedural History

Plaintiffs, who are participants and beneficiaries in the Plan, filed a putative class action against Yale, one of its executives, and the Plan's fiduciary committee in the United States District Court for the District of Connecticut, asserting several claims under ERISA. SA1–2. Among other claims, Plaintiffs alleged that the Defendants breached their fiduciary duty of prudence under ERISA section 404(a), 29 U.S.C. § 1104(a), by failing to adequately monitor and control the amount of the Plan's recordkeeping fees. SA1; SA19. Specifically, Plaintiffs alleged that the Defendants breached their duty of prudence by (1) failing to employ strategies that would lower recordkeeping fees, such as installing a system to monitor and control fees; (2) failing to periodically solicit bids to compare cost and quality of recordkeeping services; (3) failing to leverage the Plan's size to negotiate for cheaper recordkeeping fees; (4) failing to consolidate from two recordkeepers to one; and (5)

failing to move to a per-participant fee model instead of an asset-based fee model. SA19.

The district court granted Defendants' motion to dismiss in part but permitted the duty of prudence claim as to recordkeeping fees (among others) to proceed. SA37; SA40. The court subsequently granted in part and denied in part Defendants' motion for summary judgment, allowing four claims relating to the Defendants' duty of prudence to proceed to trial, including the claim as to recordkeeping fees. SA42; SA60.

After a four-week trial, the jury entered a verdict for Defendants on all four remaining claims. A42; SA137. With respect to Plaintiffs' recordkeeping fees claim, the jury found that the Plaintiffs had proven by a preponderance of the evidence that Defendants breached their duty of prudence by allowing unreasonable recordkeeping and administrative fees to be charged to Plan participants. SA121. Additionally, the jury found that the Plaintiffs had proven by a preponderance of the evidence that the Defendants' fiduciary breach resulted in a loss to the Plan. SA122.

Finally, the verdict form contained two special interrogatories. The first interrogatory asked:

> "Have the defendants proven by a preponderance of the evidence that a fiduciary following a prudent process could have made the same decisions as to recordkeeping and administrative fees as the defendants?"

Id. Plaintiffs had previously objected to this instruction on the ground that "the could language should be would," A195–96, but the court ultimately retained the instruction. The jury found in the affirmative as to this interrogatory. SA122.[2] Among other issues, Plaintiffs now seek this Court's review of whether they are "entitled to a new trial on damages from Defendants' breach of fiduciary duty regarding recordkeeping and administrative fees, where the district court instructed the jury that Defendants could avoid financial liability merely by showing that a prudent fiduciary *could* have made the same

[2] Somewhat paradoxically, and despite expressly finding that Plaintiffs had proven by "a preponderance of the evidence that the defendants' breach of fiduciary duty resulted in a loss to the plan," the jury also found that the loss proved by the Plaintiffs was $0. SA122. In its Jury Charge, however, the district court suggested to the jury that if it found that a prudent fiduciary could have made the same decisions, "no loss to the Plan" would have resulted. SA196–97 (3677:01–3678:6). Thus, the jury's no-loss finding appears to have been a function of the jury's conclusion, pursuant to the instruction at issue in this appeal, that a prudent fiduciary "could have" reached the same decision.

decisions, rather than requiring Defendants to prove that a prudent fiduciary *would* have made the same decisions." Appellants' Principal Br. 2, ECF No. 61-1.

SUMMARY OF THE ARGUMENT

The district court erred in instructing the jury that Defendants could escape liability for their fiduciary breach associated with the Plan's recordkeeping expenses if they proved that a fiduciary following a prudent process "could have" made the same decisions, rather than requiring Defendants to establish that a prudent fiduciary "would have" done so.

ERISA section 409(a) subjects fiduciaries to personal liability for "any losses to the plan resulting from" a fiduciary breach. 29 U.S.C. § 1109(a). This Court has previously held that once a plaintiff has established a fiduciary breach and related loss to an ERISA plan, the burden shifts to the fiduciary defendant to prove that their breach did not cause the loss. *Sacerdote v. New York Univ.*, 9 F.4th 95, 113 (2d Cir. 2021), *cert. denied*, 142 S. Ct. 1112 (2022). In this case, the district court allowed Defendants to satisfy their burden by showing that a fiduciary following a prudent process "could have" made the same decisions

Defendants made as to recordkeeping and administrative fees. On this basis, the jury—despite finding that Defendants breached their fiduciary duties in locking the Plan into an unreasonable recordkeeping arrangement that resulted in a loss to the Plan—absolved Defendants of all liability for their misconduct.

The district court's "could have" standard, which allows fiduciaries to escape liability for their breaches based on mere (even remote) possibilities, is inconsistent with ERISA's trust-law backdrop, the statute's protective purposes, and authority from this this Court and its sister circuits. The law of trusts—to which this Court looks for guidance in ERISA cases—is clear that breaching fiduciaries are liable for losses associated with their breaches unless they demonstrate that a prudent process "would have" yielded the same decision. And every circuit to consider the question has held exactly that. Although this Court, like many of its sister circuits, also arguably articulated a "would have" standard in *Sacerdote*, this Court should now make that explicitly clear and vacate the judgment on the recordkeeping claim.

ARGUMENT

I. The District Court Erroneously Required Defendants to Disprove Loss Causation by Demonstrating That a Prudent Fiduciary "Could Have" Made the Same Decisions

This Court has previously held that, once a plaintiff proves (1) a fiduciary breach and (2) a causal link between the breach and a loss to their ERISA plan, "the burden under ERISA shifts to the defendants to disprove any portion of potential damages by showing that the loss was not caused by the breach of fiduciary duty." *Sacerdote*, 9 F.4th at 113; *see Silverman v. Mut. Benefit Life Ins. Co.*, 138 F.3d 98, 104 (2d Cir. 1998) (explaining that a plaintiff's initial burden entails showing a "causal link" between the breach and a plan loss)). For breaching fiduciaries to meet that burden, every circuit court to consider the question—arguably including this Court in *Sacerdote*—requires proof that a fiduciary "would have" made the challenged decisions even had it followed a prudent process.[3] But the district court here imposed a substantively different and far more lenient standard by allowing the

[3] *See Tatum v. RJR Pension Inv. Comm.*, 761 F.3d 346, 363 (4th Cir. 2014); *Roth v. Sawyer-Cleator Lumber Co.*, 16 F.3d 915, 919 (8th Cir. 1994); *In re Unisys Savings Plan Litigation*, 173 F.3d 145, 154 (3d Cir. 1999); *Bussian v. RJR Nabisco Inc.*, 223 F.3d 286, 300 (5th Cir. 2000); *Brotherston v. Putnam Invs., LLC*, 907 F.3d 17, 39 (1st Cir. 2018).

jury to absolve Defendants for their misconduct merely by finding that a fiduciary following a prudent process, by some distinct possibility, "could have" agreed to the same recordkeeping fees that Defendants did. The district court's "could have" standard not only is contrary to caselaw, it also is antithetical to ERISA's trust law roots and protective purposes.

A. A "Could Have" Standard is Contrary to this Court's Precedent and the Law of Trusts

ERISA "abounds with the language and terminology of trust law and must be construed against the background of the common law of trusts." *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 264 (1993) (citation and internal quotation marks omitted). For example, ERISA's fiduciary duties, including those of prudence and loyalty, "are those of trustees of an express trust—the highest known to the law." *Donovan v. Bierwirth,* 680 F.2d 263, 272 n.8 (2d Cir. 1982); *see Varity Corp. v. Howe*, 516 U.S. 489, 496 (1996) (ERISA's fiduciary duties "draw much of their content from the common law of trusts."). For these reasons, in developing a federal common law under ERISA, courts "are to be guided by the principles of traditional trust law." *Chemung Canal Trust Co. v. Sovran Bank/Md.*, 939 F.2d 12, 16 (2d Cir. 1991).

This Court has thus looked to trust law to fill in the contours of ERISA's fiduciary liability provisions. One of those provisions is ERISA section 409(a), which provides that fiduciaries who breach their duties are personally liable for "any losses to the plan resulting from each such breach." 29 U.S.C. § 1109(a). Because section 409(a) does not otherwise describe how to allocate the burden to prove plan losses, this Court has turned to trust law to do so. As this Court explained, "[t]rust law acknowledges the need in certain instances to shift the burden to the trustee, who commonly possesses superior access to information." *Sacerdote*, 9 F.4th at 113 (citing Restatement (Third) of Trusts § 100 cmt. f (Am. L. Inst. 2012)). Accordingly, this Court justified its requirement that breaching fiduciaries disprove loss causation as "aligned with the Supreme Court's instruction to 'look to the law of trusts' for guidance in ERISA cases." *Id.* (quoting *Tibble v. Edison Int'l.*, 575 U.S. 523, 529 (2015)).

The law of trusts likewise offers guidance on how breaching fiduciaries can meet their burden to disprove loss causation. "[I]n matters of causation, when a beneficiary has succeeded in proving that the trustee has committed a breach of trust and that a related loss has

occurred, the burden shifts to the trustee to prove that the loss *would have* occurred in the absence of the breach." Restatement (Third) of Trusts § 100 cmt. f (Am. L. Inst. 2012) (emphasis added); *see* Bogert, The Law of Trusts and Trustees § 701 ("Once the beneficiary has proven that a breach of trust occurred and loss resulted, then the burden shifts to the trustee to prove that the loss *would have* occurred, regardless of the breach.") (emphasis added); *In re Est. of Lychos*, 470 A.2d 136, 142 (Pa. Super. Ct. 1983) (same); *In re Est. of Stetson*, 345 A.2d 679, 690 (Pa. 1975) (same).[4] Requiring breaching fiduciaries to prove what "would have" resulted from a prudent process also accords with the trust law principle that, "as between innocent beneficiaries and a defaulting fiduciary, the latter should bear the risk of uncertainty as to

[4] *See also LaRue v. DeWolff, Boberg & Assocs., Inc.*, 552 U.S. 248, 253 n.4 (2008) ("Under the common law of trusts, which informs our interpretation of ERISA's fiduciary duties, trustees are 'chargeable with . . . any profit which *would have* accrued to the trust estate if there had been no breach of trust.'") (internal citation omitted) (emphasis added) (quoting 1 Restatement (Second) of Trusts § 205, and cmt. i (Am. L. Inst. 1957)); *Ambromovage v. Thomas*, No. 8796, 1982 WL 2114, at *7 (M.D. Pa. July 9, 1982) (union that permitted fund contributors to incur delinquencies must provide "proof that delinquencies would have accrued even if the trustees had exercised" reasonable prudence), *aff'd sub nom. Ambromovage v. United Mine Workers of Am.*, 726 F.2d 972 (3d Cir. 1984).

the consequences of its breach of duty." *In re Est. of Stetson*, 345 A.2d at 690; *cf. Donovan v. Bierwirth*, 754 F.2d 1049, 1056 (2d Cir. 1985) (noting "the principle that, once a breach of trust is established, uncertainties in fixing damages will be resolved against the wrongdoer").

This Court's decision in *Sacerdote* supports—if not explicitly adopts—trust law's "would have" standard. In justifying its application of trust law's burden-shifting framework, this Court explained that "'it makes little sense to have the plaintiff hazard a guess as to what the fiduciary would have done had it not breached its duty in selecting investment vehicles, only to be told [to] guess again.'" *Sacerdote*, 9 F.4th at 113 (alteration in original) (quoting *Brotherston v. Putnam Invs., LLC*, 907 F.3d 17, 38 (1st Cir. 2018)). Rather, the Court reasoned that "'[i]t makes much more sense for the *fiduciary* to say what it claims it *would have* done and for the plaintiff to then respond to that.'" *Id.* (quoting *Brothertson*, 907 F.3d at 38) (emphasis added). In short, this Court envisioned a breaching fiduciary's burden as requiring proof of what the fiduciary "would have" done had it acted prudently.

But the district court here applied a different standard entirely. Over Plaintiffs' objections, the court instructed the jury to assess whether the Defendants had "proven by a preponderance of the evidence that a fiduciary following a prudent process *could have* made the same decision as to recordkeeping and administrative fees as the defendants." SA122 (emphasis added). Not only does that standard have no support in the law of trusts or this Court's precedent, but as explained further below, it sets a dangerously low bar for breaching fiduciaries to clear that undermines ERISA's protective purposes.

B. A "Could Have" Standard Undermines ERISA's Purposes

In addition to being informed by trust law, "Congress expect[ed] that the courts will interpret [ERISA's] prudent man rule (and the other fiduciary standards) bearing in mind the special nature and purpose of employee benefit plans." *Varity Corp.*, 516 U.S. at 497 (quoting H.R. Rep. No. 93-1280, pt. 21, at 27,926 (1974)). Here too, and as the Fourth Circuit found in adopting a "would have" standard, a "could have" standard undermines one of ERISA's central purposes: to safeguard employee benefits from fiduciary misconduct. *See Tatum v. RJR Pension Inv. Comm.*, 761 F.3d 346, 365 (4th Cir. 2014) ("ERISA's

statutory scheme is premised on the recognition that imprudent conduct will usually result in a loss to the fund, a loss for which [the fiduciary] will be monetarily penalized.") (citation and internal quotation marks omitted).

The distinction between "could" and "would" is "both real and legally significant"—it is the difference between what is "merely possible" and what is probable. *Id.* (citing *Knight v. Comm'r*, 552 U.S. 181, 192 (2008)); *see Usery v. Hermitage Concrete Pipe Co.*, 584 F.2d 127, 131 (6th Cir. 1978) (the distinction between the words "would" and "could" "is not merely one of semantics"). As the Supreme Court has explained, "the word 'would' is best read as 'express[ing] concepts such as custom, habit, natural disposition, or probability.'" *Knight*, 552 U.S. at 192 (citation omitted); *see Hermitage Concrete Pipe Co.*, 584 F.2d at 131 (the term "would" connotes "a greater degree of certainty" than the term "could"); *McFarlane v. Life Ins. Co. of N. Am.*, 999 F.2d 266, 269 (7th Cir. 1993) ("Whereas 'could' refers to some probability of an indeterminate size, 'would' conveys something closely akin to more likely than not"). Determining "what would happen if a fact were changed . . . . necessarily entails a prediction; and predictions are based

on what would customarily or commonly occur." *Knight*, 552 U.S. at 192.

The "could have" standard applied by the district court, on the other hand, encompasses a much broader range of possibilities from the most probable consequence of a prudent investigation to the "most remote of possibilities." *See Tatum*, 761 F.3d at 365; *Kentucky Res. Council, Inc. v. EPA*, 467 F.3d 986, 994 (6th Cir. 2006) (the term "could," unlike the term "would," encompasses "some remote possibility" of a given condition). Courts have thus rejected attempts to conflate the terms "would" and "could" in a variety of contexts. *See Knight*, 552 U.S. at 187–88 (a court's inquiry into "whether the cost at issue *could* have been incurred" with respect to trust taxation "flies in the face of the statutory language" that "asks whether the costs would not have been incurred" (citation and internal quotation marks omitted)); *Hermitage Concrete Pipe Co.*, 584 F.2d at 131–32, 134 ("consistent employment of the term 'would' in place of 'could'. . . . imposed too stringent a degree of probability" where statutory language only required a "substantial probability that death or serious physical harm 'could' result"); *Kentucky Res. Council, Inc.*, 467 F.3d at 994 (rejecting petitioner's

attempt to "substitute 'could' for 'would'" in statute prohibiting state environmental plan revisions that "would interfere" with requirement of the EPA).[5]

Because of these material definitional differences, replacing trust law's "would have" standard with a "could have" standard would directly weaken ERISA's protections for employee benefit plans. Under a "would have" standard, determining if a fiduciary must make good to the plan for their breach entails an inquiry into the likely, probable, or customary consequence of a prudent investigation. *See Tatum*, 761 F.3d at 364 (stating that, under the "would have," standard, courts "determin[e] whether the evidence established that a prudent fiduciary, more likely than not, would have" made the same decisions). A "could have" standard, as the Fourth Circuit put it, would "create[] too low a bar, allowing breaching fiduciaries to avoid financial liability based

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[5] Indeed, the "could have" standard's focus on possibilities rather than probabilities is arguably inconsistent with the very concept of proof by preponderance of the evidence. *See Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Tr. for S. Cal.*, 508 U.S. 602, 622 (1993) ("The burden of showing something by a 'preponderance of the evidence,' the most common standard in the civil law, simply requires the trier of fact to believe that the existence of a fact is more *probable* than its nonexistence . . . .") (emphasis added) (citation and internal quotation marks omitted).

even on remote possibilities." *Id.* at 365 (citation and internal quotation marks omitted). Indeed, it would "diminish ERISA's enforcement provision to an empty shell if [courts] permitted a breaching fiduciary to escape liability by showing nothing more than the mere possibility that a prudent fiduciary 'could have' made the same decision." *Id.*

Requiring fiduciaries seeking to shirk responsibility for their misconduct to satisfy a high standard is nothing new. As this Court long ago explained, courts "do not take kindly to arguments by fiduciaries who have breached their obligations that if they had not done this, everything would have been the same." *Beck Industries, Inc. v. Kirschenbaum*, 605 F.2d 624, 636 (2d Cir. 1979). The district court's erroneous jury instruction turns that principle on its head.

C. Circuit Authority Uniformly Supports a "Would-Have" Standard

As noted, in addition to being inconsistent with ERISA's trust law principles and protective purposes, the "could have" standard reflected in the district court's verdict form is contrary to the standard applied by every circuit court to consider the question.

The Fourth Circuit explicitly rejected a "could have" standard in *Tatum*, 761 F.3d at 363–65. The district court there had found that the

defendant breached its duty of prudence by removing certain investments from the plan without investigating the prudence of doing so. *Id.* at 355. However, the district court absolved the defendant of liability "because its decision to eliminate the [investments] was one which a reasonable and prudent fiduciary *could* have made after performing such an investigation." *Id.* at 355, 364 (citation and internal quotation marks omitted). The Fourth Circuit vacated the district court's decision, holding that "a plaintiff who has proved the defendant-fiduciary's procedural imprudence and a prima facie loss prevails *unless* the defendant-fiduciary can show, by a preponderance of the evidence, that a prudent fiduciary *would have* made the same decision." *Id.* at 364, 372. The Fourth Circuit reasoned that the "would have" standard better comported with ERISA's structure and purpose. *Id.* at 364–66; *see* sec. I(B), *supra* (discussing *Tatum*).[6]

[6] The dissent in *Tatum* criticized the majority's adoption of a "would have" standard as inconsistent with the notion that a prudent process can conceivably yield a range of investment options. *Tatum*, 761 F.3d at 372–74 (Wilkinson, J., dissenting). But that concept simply recognizes that ERISA's duty of prudence "focus[es] on a fiduciary's conduct in arriving at an investment decision, not on its results," and that a fiduciary does not necessarily act imprudently merely because it chose an investment that turned out to be sub-optimal. *Pension Ben. Guar. Corp. ex rel. St. Vincent Cath. Med. Ctrs. Ret. Plan v. Morgan Stanley*

As the Fourth Circuit pointed out in *Tatum*, other circuits have uniformly applied the same "would have" standard even if they have not expressly considered and rejected a "could have" standard. *See Tatum*, 761 F.3d at 363–64; *Roth v. Sawyer-Cleator Lumber Co.*, 16 F.3d 915, 919 (8th Cir. 1994) ("Even if a trustee failed to conduct an investigation before making a decision, he is insulated from liability [under § 1109(a)] if a hypothetical prudent fiduciary *would have* made the same decision anyway.") (emphasis added); *In re Unisys Sav. Plan Litig.*, 173 F.3d at 154 ("[W]e are satisfied that the district court's holdings that [the fiduciary] was prudent, and in the alternative, that a hypothetical prudent fiduciary *would have* made the same investments, are supported by the evidence.") (emphasis added); *Bussian*, 223 F.3d at 300 ("ERISA's obligations are nonetheless satisfied if the [investment] selected *would have* been chosen had the fiduciary conducted a proper

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Inv. Mgmt. Inc., 712 F.3d 705, 716 (2d Cir. 2013) (citation and internal quotation marks omitted). Here, though, because the jury already found that Defendants employed an imprudent process and that the Plan incurred a related loss, the question is simply whether Defendants' imprudence caused that loss. And that entails a *prediction* of what, more likely than not, would have happened had Defendants acted prudently, not a compilation of possible outcomes of a prudent process, no matter how improbable.

investigation.") (emphasis added); *Brotherston*, 907 F.3d at 39 ("We remand for the district court to . . . decide whether [the defendant] can meet its burden of showing that the loss most likely *would have* occurred even if [it] had been prudent in its selection and monitoring procedures.") (emphasis added). And the same is arguably true of this Court. *See* sec. I(A), *supra* (discussing *Sacerdote*, 9 F.4th at 112).[7]

District courts following *Tatum* likewise have applied or cited the "would have" standard. *Lauderdale v. NFP Ret., Inc.*, No. 8:21-CV-301-JVS-KES, 2022 WL 17260510, at *11 (C.D. Cal. Nov. 17, 2022) (under the burden-shifting approach, defendants are required to "show that a prudent fiduciary 'would have' made the same decision"); *Walsh v.*

[7] As the parenthetical quotations indicate, some courts have framed the inquiry in terms of what a "hypothetical prudent fiduciary" would have done, while others ask what the fiduciary in that case would have done. There is force to the proposition that on the question of causation, as distinguished from the substantive standard of prudence (which by statute turns on what a reasonable person in like circumstances would do, *see* 29 U.S.C. 1104(a)), the inquiry should focus on what the actual fiduciary would have done if it had not committed the breach. *See, e.g.*, Restatement (Third) of Trusts § 100 cmt. e (Am. L. Inst. 2012). The decisions cited in the text did not address whether there is any difference between the two inquiries. However, as the parties in this case did not raise any issue as to whether there is a difference between those two inquiries and if so, what the appropriate inquiry would be, the Court need not decide this question.

Preston, No. 1:14-CV-04122-ELR, 2022 WL 17959237, at *21 (N.D. Ga. Sept. 20, 2022) (finding that defendants did not meet their burden to disprove loss causation because a "prudent fiduciary would not have made the same decision in accepting the stock prices" without a minority discount); *Pledger v. Reliance Tr. Co.*, No. 1:15-CV-4444-MHC, 2019 WL 10886802, at *25–26 (N.D. Ga. Mar. 28, 2019); *Scalia v. Reliance Tr. Co.*, No. 17-CV-4540 (SRN/ECW), 2021 WL 795270, at *32 (D. Minn. Mar. 2, 2021); *Wildman v. Am. Century Servs., LLC*, No. 4:16-CV-00737-DGK, 2018 WL 2326627, at *5–6 (W.D. Mo. May 22, 2018) (defendants did not establish that a prudent fiduciary "would have chosen the same lineup" of funds sufficient to warrant summary judgment in favor of the defendants on causation).

Finally, a "would have" standard also is consistent with non-ERISA burden-shifting regimes. For example, in the Title VII context, the Supreme Court has endorsed a similar burden shifting framework using a "would have" standard: "Where a disparate treatment plaintiff has made such a showing [of an illicit motivation], the burden then rests with the employer to convince the trier of fact that it is more likely than not that the decision *would have* been the same absent

consideration of the illegitimate factor." *Price Waterhouse v. Hopkins*, 490 U.S. 228, 276 (1989) (O'Connor, J., concurring) (emphasis added); *see also id.* at 250 (plurality opinion) ("[T]he plaintiff who shows that an impermissible motive played a motivating part in an adverse employment decision has thereby placed upon the defendant the burden to show that it would have made the same decision in the absence of the unlawful motive."); *Stratton v. Dep't for the Aging for City of New York*, 132 F.3d 869, 878 n.4 (2d Cir. 1997) (same). There is no reason to apply a different rule to ERISA's burden-shifting framework. *See ILGWU Nat'l Ret. Fund v. Levy Bros. Frocks, Inc.*, 846 F.2d 879, 885 (2d Cir. 1988) (explaining that ERISA is a remedial statute and "should be liberally construed in favor of protecting the participants in employee benefits plans") (citation and internal quotation marks omitted).

* * *

The district court's jury instruction is inconsistent with ERISA's trust-law principles, its protective purposes, and the uniform circuit authority. Allowing a breaching fiduciary to escape liability based on the remote possibility that a prudent fiduciary "could have" made the same decisions risks hollowing out ERISA's enforcement scheme. This

Court should hold that, once the burden has shifted to a breaching fiduciary to prove that their breach did not cause losses to an ERISA plan, the fiduciary can meet that burden only by showing that, had it followed a prudent process, it "would have" made the same decision.

CONCLUSION

The Secretary respectfully requests that this Court vacate the district court's judgment and remand for a new trial on Plaintiffs' duty of prudence claim regarding recordkeeping and administrative fees, with revised jury instructions on the issue of loss causation consistent with a "would have" standard.

Respectfully submitted,

Date: December 14, 2023

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CERTIFICATE OF COMPLIANCE

This document complies with the type-volume limit of Fed. R. App. P. 29(a)(5) and 32(a)(7)(B) and Local Rules 29.1(c) and 32.1(a)(4) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), this document contains 4932 words. This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Microsoft Word in Century Schoolbook 14-point font.

/s/ Elizabeth Feldstein
Elizabeth Feldstein
Trial Attorney

Date: December 14, 2023

CERTIFICATE OF SERVICE

I hereby certify that on this day, December 19, 2023, I electronically filed the foregoing amicus brief with the Clerk of the Court for the U.S. Court of Appeals for the Second Circuit by using the CM/ECF system. I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/ Elizabeth Feldstein
Elizabeth Feldstein
Trial Attorney

Date: December 19, 2023