IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

JOSEPH VELLALI *et al*.,

Plaintiffs,

v.

YALE UNIVERSITY *et al*.,

Defendants.

Civil Action No. 3:16-cv-01345-AWT

Hon. Alvin W. Thompson

DEFENDANTS' MEMORANDUM IN SUPPORT OF THEIR EMERGENCY MOTION TO CERTIFY INTERLOCUTORY APPEAL UNDER 28 U.S.C. § 1292(b)

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INTRODUCTION

On March 17, 2023, this Court denied Defendants Yale University *et al.*'s ("Yale") motion to strike the jury demand, concluding that some of the relief Plaintiffs seek—in particular, an order adjudging Defendants "personally liable to make good to the Plan all losses to the Plan resulting from each breach of fiduciary duty"—must be tried to a jury. Ruling on Motion to Strike Jury Demand 7, Mar. 17, 2023, ECF No. 439, reported at 2023 WL 2552719. The Court's Ruling deepens an extensive intra- and inter-circuit split over the availability of a jury trial in ERISA cases. In addition, it has fundamental implications for the upcoming trial and creates a significant risk of reversible error on appeal. Given the legal uncertainty about the availability of a jury trial, and the material implications for the remainder of the litigation, Yale respectfully requests that the Court certify its Ruling for interlocutory appeal and stay proceedings while the Second Circuit resolves this crucial question.

ARGUMENT

A district court may certify a non-final order for appeal if the court is of the opinion that the order "[1] involves a controlling question of law [2] as to which there is a substantial ground for difference of opinion" and [3] "an immediate appeal from the order may materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b). As shown below, all three Section 1292(b) factors are satisfied here.

I. The Court's Ruling Involves a Controlling Question of Law

In its March 17, 2023 Ruling, this Court held that Plaintiffs are entitled to a jury trial on their claims for breach of fiduciary duty under ERISA Section 502(a)(2) and (3). This presents a "controlling" question of law within the meaning of Section 1292(b).

A legal question may be "controlling" even if the question does not dispose of the entire matter. *See Klinghoffer v. S.N.C. Achille Lauro*, 921 F.2d 21, 24 (2d Cir. 1990) ("resolution of an

issue need not necessarily terminate an action in order to be 'controlling'"). In particular, the phrase "'a controlling question of law' in § 1292(b) … include[s] a procedural determination that may *importantly affect* the conduct of an action." *In re Duplan Corp.*, 591 F.2d 139, 148 n.11 (2d Cir. 1978) (emphasis added). Whether a case should be tried to the bench or the jury under ERISA is such a question because it is (1) purely legal in nature, and (2) of immense procedural importance. The Seventh Amendment analysis turns on the relief pled in the complaint and not on any factual determinations or case-specific factors. Further, the analysis "reflect[s] a fundamental decision about the exercise of official power." *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968). This is true not only of claims that must be tried to a jury, but also of claims that must be tried to the bench. *See Brown v. Kalamazoo Cir. Judge*, 42 N.W. 827, 830 (Mich. 1889) ("The right to have equity controversies dealt with by equitable methods is as sacred as the right of trial by jury."); *In re Simons*, 247 U.S. 231, 240 (1918) (citing *Brown* for the proposition that courts may use "extraordinary remed[ies]," such as mandamus, to ensure a correct mode of trial).

In fact, there is a long history of courts certifying questions regarding the availability of a jury trial for interlocutory appeal, in the Second Circuit and otherwise. In one case, for example, the district court certified a question regarding the availability of a jury trial, but the Second Circuit concluded that Section 1292(b) did not apply to appeals under the Bankruptcy Code. *See Germain v. Conn. Nat'l Bank*, 926 F.2d 191, 193 (2d Cir. 1991) ("*Germain I*"). Subsequently, the Supreme Court held that Section 1292(b) *did* apply, and the Second Circuit proceeded to decide the appeal. *See Germain v. Conn. Nat'l Bank*, 988 F.2d 1323, 1326 n.3 (2d Cir. 1993) ("*Germain II*"). In another case, the Second Circuit similarly observed that, when the district court struck the jury demand, it "wisely included the certificate for interlocutory appeals specified by 28 U.S.C. § 1292(b)." *Ruggiero v. Compania Peruana de Vapores Inca Capac Yupanqui*, 639 F.2d 872, 873

(2d Cir. 1981). The Second Circuit took the appeal, observing that the decision "runs counter to those of some district courts in other circuits." *Id*.

Two other ERISA cases are also especially on point. In the first, the court denied the defendant's motion to strike the jury in an ERISA Section 502(a)(1)(B) case, holding, similar to this Court, that the request for "money damages" rendered the Plaintiffs' action "one in law, rather than equity, notwithstanding its statutory context." *Adams v. Cyprus Amax Min. Co.*, 954 F. Supp. 1470, 1477 (D. Colo. 1997). However, the court certified its order for interlocutory appeal, *id*., and the Tenth Circuit accepted jurisdiction. *Adams v. Cyprus Amax Minerals Co.*, 149 F.3d 1156, 1157-58 (10th Cir. 1998). As the Tenth Circuit later held, "no jury right attaches to Plaintiffs' § 1132(a)(1)(B) claims." *Id*. at 1158.

In the second case, the district court likewise denied the motion to strike, holding that "the remedies Plaintiff seeks pursuant to Section 502(a)(2) of ERISA arise at least partly under law and thus the right to jury trial is preserved as to those claims." *Chao v. Meixner*, 2008 WL 2691019, at *5 (N.D. Ga. July 3, 2008). Notably, Plaintiffs themselves relied on *Meixner* in opposing Yale's motion to strike the jury demand here. *See* Plaintiffs' Memorandum in Opposition to Defendants' Motion to Strike Jury Demand 6-7, Nov. 21, 2022, ECF No. 423. Again, however, the district court certified its determination for appeal. *Meixner,* 2008 WL 2691019, at *6. The Eleventh Circuit then granted permission to appeal. *See Chao v. Meixner*, No. 07-cv-595 (N.D. Ga.Aug. 8, 2008), ECF No. 100..

Outside of these cases, there are a host of other decisions about jury trial rights that reached the appellate courts on interlocutory appeal from decisions on a motion to strike the jury demand. *See, e.g., Rosen v. Dick*, 639 F.2d 82, 83-84 (2d Cir. 1980) (bankruptcy action; interlocutory appeal from denial of motion to strike); *Ross v. Bernhard*, 403 F.2d 909, 910 (2d Cir. 1968) (Investment

Company Act; same) (Judgment Reversed by 396 U.S. 531 (1970); *Stewart v. KHD Deutz of Am. Corp.*, 75 F.3d 1522, 1524 (11th Cir. 1996) (ERISA); *Brownlee v. Yellow Freight Sys., Inc.*, 921 F.2d 745, 746 (8th Cir. 1990) (Labor Management Relations Act); *Terry v. Chauffeurs, Teamsters & Helpers, Loc. 391*, 863 F.2d 334, 335 (4th Cir. 1988) (same); *Washington Int'l Ins. v. United States*, 863 F.2d 877, 878 (Fed. Cir. 1988) (Court of International Trade dispute); *EEOC v. Chrysler Corp.*, 759 F.2d 1523, 1524 (11th Cir. 1985) (age discrimination); *Standard Oil Co. of Cal. v. Arizona*, 738 F.2d 1021, 1022 (9th Cir. 1984) (antitrust actions by state governments); *Johnson v. Ga. Highway Exp., Inc.*, 417 F.2d 1122, 1125 (5th Cir. 1969) (racial discrimination case); *Swofford v. B & W, Inc.*, 336 F.2d 406, 407–08 (5th Cir. 1964) (patent infringement). As these and other decisions show, interlocutory appeal is an important mechanism for providing clarity on this critical question, and the Court's Ruling is plainly "controlling" within the meaning of Section 1292(b).

II. There Is Substantial Ground for Difference of Opinion.

The Court's Ruling deepens an already-entrenched divide within the Second Circuit over the availability of jury trials in ERISA breach-of-fiduciary-duty cases. By Yale's count, since *CIGNA Corp. v. Amara*, 563 U.S. 421 (2011), two judges in this District (including your Honor) have decided that jury trials are available in actions like this one, while a third (adopting the conclusion urged by the Department of Labor) has ruled to the contrary.[1] In other Districts within the Second Circuit, courts are also intensely divided on the availability of a jury trial in ERISA

[1] *Compare* ECF No. 439 (denying motion to strike); *Garthwait v. Eversource Energy Co.*, 2022 WL 17484817 (D. Conn. Dec. 7, 2022) (Hall, J.) (same); *Healthcare Strategies, Inc. v. ING Life Ins. & Annuity Co.*, 2012 WL 162361 (D. Conn. Jan. 19, 2012) (Hall, J.) (same); *with Acosta v. Bridgeport Health Care Ctr., Inc.*, 2018 WL 11446779 (D. Conn. Sept. 5, 2018) (Covello, J.) (granting motion to strike).

cases. Indeed, if anything, the balance within the Second Circuit has tilted in favor of striking the jury demand.[2]

Meanwhile, outside of the Second Circuit, courts overwhelmingly hold that ERISA breach-of-fiduciary-duty cases are *not* triable to a jury. For example, at least five courts have struck identical jury demands in breach-of-fiduciary-duty cases filed by Plaintiffs' counsel against other universities.[3] Likewise, in the last six months, additional courts have struck identical jury demands in non-university cases by Plaintiffs' counsel, including one issued just four days before this Court's March 17, 2023 Ruling. *See, e.g.*, *Harmon v. Shell Oil Co.*, 2023 WL 2474503, at *4 (S.D. Tex. Mar. 13, 2023) ("Given the equitable nature of the claims and relief that Plaintiffs seek and the weight of authority consistently striking jury demands in cases like the one before me, I grant Shell's Motion to Strike."); *Lauderdale v. NFP Ret., Inc.*, 2022 WL 17259050, at *5 (C.D. Cal. Nov. 17, 2022) ("*Amara* controls the characterization of the remedies at issue as opposed to *Great-West*, *Montanile*, and *Mertens*.").[4]

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[2] *Compare*, *e.g.*, *Cunningham v. Cornell Univ.*, 2018 WL 4279466, at *4 (S.D.N.Y. Sept. 6, 2018) (denying motion to strike); with Reply in Support of Defendants' Motion to Strike Plaintiffs' Jury Demand, *Cates v. Columbia Univ.*, No. 16-cv-06524, (S.D.N.Y. Jan. 25, 2018), ECF No. 140 (finding it "quite clear" that the case was triable to the court); *Carver* v. *Bank of N.Y. Mellon*, 2017 WL 1208598, at *11-12 (S.D.N.Y. Mar. 31, 2017) (granting motion to strike); *Acument Glob. Techs., Inc. v. Towers Watson & Co.*, 998 F. Supp. 2d 111, 114 (S.D.N.Y. 2014) (same); *Bauer-Ramazani v. Teachers Ins. & Annuity Ass'n of Am.-Coll. Ret. & Equities Fund*, 2013 WL 6189802, at *11 (D. Vt. Nov. 27, 2013) (same).

[3] *See Divane v. Nw. Univ.*, 953 F.3d 980, 993 (7th Cir. 2020), *vacated on other grounds sub nom. Hughes v. Nw. Univ.*, 142 S. Ct. 737 (2022); *Henderson v. Emory Univ.*, 2018 WL 11350441, at *6 (N.D. Ga. Feb. 28, 2018); *Tracey v. Mass. Inst. of Tech.*, 395 F. Supp. 3d 150, 154 (D. Mass. 2019); *Munro v. Univ. of S. Cal.*, 2019 WL 4543115, at *5 (C.D. Cal. Aug. 27, 2019); Order, *Clark v. Duke Univ.*, No. 16-cv-1044, (M.D.N.C. June 11, 2018), ECF No. 107.

[4] In addition to *Harmon*, courts struck the jury demand in *Mills v. Molina Healthcare, Inc.*, 2022 WL 17825534, at *17 (C.D. Cal. Dec. 8, 2022), and in *In re Sutter Health ERISA Litig.*, 2023 WL 1868865, at *1 (E.D. Cal. Feb. 9, 2023), which was filed by a different plaintiffs' firm.

These courts join a host of other courts that have held, following *Amara*, that there is no right to a jury trial in this context.[5] To be sure, Plaintiffs have cited a small minority of courts outside the Second Circuit that have held to the contrary and sustained jury demands.[6] But that merely makes the existence of substantial grounds for difference of opinion even more clear.

Yale respectfully disagrees with this Court's conclusion, based on its reading of *Amara*, *Pereira v. Farace*, 413 F.3d 330 (2d Cir. 2005), and other Supreme Court authority, that *Amara* is not controlling and that a jury trial right applies under cases like *Great-West*. But for purposes of this motion, Yale mentions the contrary cases only to show that, at a minimum, there are substantial grounds for dispute over this question. Indeed, Judge Castel, in denying a motion to strike the jury demand in the *Cunningham* case, candidly admitted that "the *Pereira* court may have over-read *Great–West*" and that "there is a split among district courts within this Circuit on whether a claim for compensatory damages for breach of fiduciary duty requires the empanelment of a jury." *Cunningham*, 2018 WL 4279466, at *4. And recently, Judge Hall similarly stated that "both parties acknowledge the split within this Circuit as to whether 'make good' claims arising from a breach of fiduciary duty demand a jury trial." *Garthwait*, 2022 WL 17484817, at *3.[7]

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[5] *See, e.g.*, *Williams v. Centerra Grp., LLC*, 579 F. Supp. 3d 778, 785-86 (D.S.C. 2022); *Ramos v. Banner Health*, 2019 WL 1558069, at *4 (D. Colo. Apr. 10, 2019); *Moitoso v. FMR LLC*, 410 F. Supp. 3d 320, 324 (D. Mass. 2019); *Daugherty v. Univ. of Chicago*, 2017 WL 4227942, at *9 (N.D. Ill. Sept. 22, 2017); *Pledger v. Reliance Tr. Co.,* 2017 WL 11568409, at *5 (N.D. Ga. Nov. 7, 2017); *Gernandt v. SandRidge Energy Inc.*, 2017 WL 3219490, at *12 (W.D. Okla. July 28, 2017); *Bell v. Pension Comm. of Ath Holding Co., LLC*, 2016 WL 4088737, at *2 (S.D. Ind. Aug. 1, 2016); *Perez v. Silva*, 185 F. Supp. 3d 698, 703-05 (D. Md. 2016). Many of these cases were also brought by Plaintiffs' counsel.

[6] *See, e.g.*, *Romano v. John Hancock Life Ins. (USA),* 2021 WL 949939 (S.D. Fla Mar. 12, 2021); *Hellman v. Catalado*, 2013 WL 4482889 (E.D. Mo. Aug. 20, 2013).

[7] In an earlier 2012 opinion denying certification on an ERISA jury trial issue, Judge Hall found no substantial grounds for difference of opinion because, at that time, there were few conflicting decisions within the Second Circuit. *See Healthcare Strategies, Inc. v. ING Life Ins. & Annuity Co.*, 2012 WL 13027294, at *4 (D. Conn. Dec. 27, 2012). As discussed in the text, however, courts within the Second Circuit have become hopelessly divided on this question since 2012. Moreover, the defendant in *Healthcare Strategies* waited "three months from th[e] court's denial of its Motion for Reconsideration to seek

In sum, given the conflicting authority within the Second Circuit and the great weight of authority outside it, there can be no serious dispute that the Court's decision presents a substantial ground for difference of opinion. *See Kinkead v. Humana, Inc.*, 2016 WL 9453808, at *2 (D. Conn. Oct. 13, 2016) (finding substantial grounds for difference of opinion where "district courts elsewhere across the country have reached conflicting conclusions"); *In re Hawker Beechcraft, Inc.*, 2013 WL 6673607, at *5 (S.D.N.Y. Dec. 18, 2013) ("There may be 'substantial ground for difference of opinion' with respect to the legal issue presented for interlocutory appeal when . . . there is conflicting authority on the issue."); *Glatt v. Fox Searchlight Pictures Inc.*, 2013 WL 5405696, at *2 (S.D.N.Y. Sept. 17, 2013) ("The intra-district split and decisions from other circuits clearly show a substantial basis exists for difference of opinion."). Therefore, the second element for certification under Section 1292(b) is also satisfied.

III. Interlocutory Appeal Would Materially Advance the Litigation.

As a final matter, an interlocutory appeal would materially advance the litigation.

A. Conclusive Resolution of Whether This Case Should Be Tried to the Bench or a Jury Will Materially Advance Trial and Appellate Proceedings.

Whether this case is tried to the bench or jury will have significant ramifications for the remainder of the litigation. Most significantly, it is well settled that "inappropriately denying a motion to strike a jury demand constitutes reversible error." *Speedfit LLC v. Woodway USA, Inc.*, 2020 WL 3051511, at *2 (E.D.N.Y. June 8, 2020). The Second Circuit has been clear that if an appellate court agrees on appeal that a plaintiff "has no right to a jury trial," it "will remand for a nonjury trial, thus vindicating the [defendant's] right." *Germain v. Conn. Nat'l Bank*, 930 F.2d 1038, 1040 (2d Cir. 1991) ("*Germain III*"). Similarly, in another case in which the plaintiff was

certification—a time period deemed unreasonable by courts within the circuit—[and] approximately nine months from the court's original ruling." 2012 WL 13027294, at *2. By contrast, Yale requests certification immediately after the Court's Ruling.

seeking benefits under ERISA Section 502(a)(1)(B), the Second Circuit reversed a trial verdict and remanded for a new trial after concluding that the district court had erroneously denied the motion to strike the jury demand. *See Sullivan v. LTV Aerospace & Def. Co.*, 82 F.3d 1251, 1257-59 (2d Cir. 1996) (Abrogation recognized by 551 F.3d 126). A reversal on these grounds would not only result in a substantial waste of resources for the parties and the Court, but also the jurors, who would be greatly inconvenienced by a lengthy and complex trial that might later be set aside as a nullity. This weighs heavily in favor of an immediate appeal. *See Meixner*, 2008 WL 2691019, at *4 ("if the case proceeds to a jury trial without appeal, and then it is later determined that the defendants' jury trial demand should have been stricken, then the Court would be required to try the action again without a jury"); *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 1979 WL 1689, at *3 (E.D. Pa. Aug. 21, 1979) ("we construe 'ultimate termination' as referring to final determination of the litigation, not just conclusion of the trial").

Even setting aside the prospect of reversal and a second trial, the initial trial in this action will look dramatically different if this case must be tried to a jury. "Jury and bench trials necessitate different litigation strategies, allocations of court time, and expense to the parties." *Matsushita*, 1979 WL 1689, at *2 (granting interlocutory appeal). Therefore, "[p]reparing for and conducting a jury trial will cause the parties to spend extra time and expense beyond those that would be expended in a bench trial." *Meixner*, 2008 WL 2691019, at *4 (granting certification).

Beyond the added expense and complexity for the parties, the presentation of evidence and the nature of the proof will look different as well. As one federal judge has observed, "[b]ecause the jury is an ad hoc tribunal, a significant amount of time is consumed at the outset of trial in the selection of the members of the tribunal. And because it is inexperienced, a professional judge is needed to guide it, and the pace of the trial is slowed down by the need to educate the jurors in the

rudiments of their job." Richard A. Posner, *An Economic Approach to the Law of Evidence*, 51 Stan. L. Rev. 1477, 1491 (1999). "In the federal courts, civil jury trials are on average more than twice as long as civil bench (that is, judge) trials." *Id.*; *see also O'Donnell v. Watson Bros. Transp. Co.*, 183 F. Supp. 577, 583 (N.D. Ill. 1960) ("Jury trials are prolonged by voir dire, instructions to juries, frequent recesses to discuss problems of law and procedure in their absence, opening statements, closing arguments, charges by the court, jury deliberations and mistrials. Statistics show that 23 per cent less time is consumed in examining witnesses in a bench trial than in a jury trial . . . and that approximately 40 per cent less time is consumed in the trial of nonjury cases . . . The element of appeal is by far a more frequent and costly factor in jury trials.").

This Court's Trial Preferences recognize that the mode of trial may have a material impact on proceedings. "During bench trials," these guidelines state, "Judge Thompson routinely asks questions after counsel have finished their questioning if there is additional information he feels he needs. In a jury case, he rarely asks questions and then only to clarify the testimony of a witness." Trial Preferences, https://www.ctd.uscourts.gov/content/alvin-w-thompson. *See also Olympia Express, Inc. v. Linee Aeree Italiane, S.P.A.*, 509 F.3d 347, 353 (7th Cir. 2007) (noting that "judges are reluctant to question witnesses in jury trials for fear of confusing jurors about who is the trier of fact, but there is no similar inhibition in a bench trial"). Such questioning is likely to prove useful due to the complex financial and other issues posed by this case. The *Sacerdote v. New York University* case, in which Plaintiffs' counsel tried materially similar claims to the bench, is instructive. There, Judge Forrest was a highly active participant, directly questioning witnesses and cutting off lines of testimony that she deemed duplicative or irrelevant. *See, e.g., Sacerdote v.*

N. Y. Univ., 328 F. Supp. 3d 273, 304 n.69 (S.D.N.Y. 2018) (discussing the court's questioning of an expert witness on a particular issue).[8]

Certification is especially appropriate here because, as the cases discussed at p. 6 *supra* reflect, the jury trial question recurs frequently and has divided district courts in this Circuit and elsewhere. *See In re Auction Houses Antitrust Litig.*, 164 F. Supp. 2d 345, 348 (S.D.N.Y. 2001) (considering whether an issue "extend[s] beyond [the parties'] immediate interests" or is a problem "of broad practical significance" in determining whether to grant certification); *Johnson v. Benton Cnty. Sch. Dist.*, 926 F. Supp. 2d 899, 900 (N.D. Miss. 2013) (providing the opportunity for interlocutory appeal because it "will give the Fifth Circuit an opportunity to clarify the law for the purposes of not only this case, but for all ADA and FMLA cases which are filed in this circuit"). The Second Circuit has said that "district court[s] should not hesitate to certify an interlocutory appeal" that meets the statutory criteria and, as here, involves a question of "special consequence." *Balintulo v. Daimler AG*, 727 F.3d 174, 186 (2d Cir. 2013).

At the same time, appellate review of this question has proved inordinately difficult. In *Sacerdote v. New York University*, for example, the parties briefed the jury trial question before the Second Circuit, but the court found that Plaintiffs' counsel had waived the issue in the district court and did not reach the merits. 9 F.4th 95, 117-18 (2d Cir. 2021). The fact that ERISA breach-of-fiduciary-duty cases often settle without the opportunity for appeal has also hampered review. Indeed, the Second Circuit has recognized the risk of "settlement extortion" in ERISA cases. *See Pension Benefit Guaranty Corp. ex rel. St. Vincent Catholic Med. Ctrs. Ret. Plan v. Morgan Stanley Inv. Mgmt.*, 712 F.3d 705, 719 (2d Cir. 2013).

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[8] A bench trial may also streamline proceedings, if, for example, the court takes direct testimony by declaration. *See Sacerdote*, 328 F. Supp. 3d at 281 & n.3 (noting that over an eight-day bench trial, the court heard testimony from 20 witnesses, seventeen by trial declaration and three by deposition designation).

B. The Pendency of Trial Is Not a Barrier to Certification.

Yale acknowledges that sometimes, it may be more efficient to postpone interlocutory appeal when a case is close to trial, because the dissatisfied party can raise their arguments on appeal once the trial is over. That rationale, however, has no force here, because the question at issue is how *the trial itself* should be conducted. The "clear intention" of Section 1292(b) was "to avoid a wasted trial." *Katz v. Carte Blanche Corp.*, 496 F.2d 747, 755 (3d Cir. 1974). Thus, in *Rosen*, the Second Circuit accepted an interlocutory appeal to decide whether a jury was required "as the case heads for trial." 639 F.2d at 84.

Even outside the mode-of-trial context, courts may certify questions for appeal close to trial. In one case, for instance, the district court certified a question for appeal even though the parties were "set to go to trial in less than a week." *Johnson*, 926 F. Supp. 2d at 900; *see also Gier ex rel. Gier v. Educ. Serv. Unit No. 16*, 845 F. Supp. 1342, 1353 (D. Neb. 1994) (certifying question despite "the short amount of time until the trial date" and staying action in the event of an appeal); *Isaacs v. Caterpillar, Inc.*, 765 F. Supp. 1359, 1376 (C.D. Ill. 1991) (certifying question arising from a summary judgment motion filed 13 days before the originally scheduled trial date, and noted that "speculation about possible trial delay" would not overcome "the potential harm to this Court and the judicial system should resources be expended in a 50-day trial that could be obviated by an appellate court ruling").

Yale is also cognizant of the approaching trial date, currently contemplated for late May.[9] It has therefore brought this motion as promptly as possible following the Court's resolution of the motion to strike. Additionally, Yale is willing to forgo a reply brief to expedite consideration of

[9] Based on a communication to the parties from the Court's law clerk, however, Yale understands that the Court may decide to push back the trial date because of the new due date for the joint trial memorandum.

its request. *See* L.R. 7(d) ("Reply memoranda are not required and the absence of a reply memorandum will not prejudice the moving party.").

C. Judge Castel's and Judge Hall's Reasons for Declining to Certify Similar Orders Are Unpersuasive.

In the interests of completeness, Yale acknowledges that Judge Hall in this District and Judge Castel in the Southern District of New York have declined to certify similar issues. *See Garthwait v. Eversource Energy Co.*, 2023 WL 371036 (D. Conn. Jan. 24, 2023); *Cunningham v. Cornell Univ.*, 2018 WL 10323056 (S.D.N.Y. Oct. 11, 2018). Frankly, these decisions indicate why certification would be useful. The *Garthwait* case settled before trial, underscoring why appellate review of this question is often difficult to obtain. The defendants in the pending *Cunningham* case raised the denial of the motion to strike in a conditional cross-appeal after the plaintiffs appealed the entry of summary judgment in defendant's favor. *Cunningham v. Cornell Univ.*, No. 21-96 (2d Cir. Oct. 19, 2022). But because the Second Circuit may well affirm the summary judgment order in the main *Cunningham* appeal, the Second Circuit may not reach the jury trial question there either.[10]

In any event, neither Judge Hall's nor Judge Castel's reasons for declining certification are persuasive. First, both Judge Hall and Judge Castel appeared to doubt that the jury trial question could be "controlling" for purposes of Section 1292(b). Ample authority in the Second Circuit and elsewhere shows otherwise. *See* p. 2-4 *supra*; *see also In re Baker & Getty Fin. Servs., Inc.*, 954 F.2d 1169, 1172 n.8 (6th Cir. 1992) (agreeing that the district court correctly concluded that "whether bankruptcy courts may conduct jury trials" was a "controlling" question that would "materially affect the outcome" the litigation).

[10] Of course, if the Second Circuit does decide the jury trial issue in *Cunningham*, any interlocutory appeal in this case would become moot, and proceedings could promptly resume in this Court.

Second, Judge Hall stated that "requiring an extra half day to select a jury and composing a jury charge minimally impacts" the trial. *Garthwait*, 2023 WL 371036, at *2. As discussed above, that dramatically understates the consequences of a jury trial for this matter. The jury trial issue does not just impact *voir dire*, but also evidentiary objections, judicial involvement, the presentation of evidence, and the parties' trial strategies, not to mention the substantial imposition on the jurors' time.

Third, Judge Hall adopted Judge Castel's reasoning that "[i]f the case is tried to verdict before a jury and a jury were deemed on appeal to have been an improper fact finder, then, on remand, no new or additional testimony would be required for this Court to enter findings of fact and conclusions of law." *Garthwait*, 2023 WL 371036, at *2 (quoting *Cunningham*, 2018 WL 10323056, at *1). That is incorrect. The parties will tailor the testimony to the respective factfinder and may well need to modify complicated financial principles if the case is tried to a jury rather than the bench. *Cf. S.E.C. v. Antar*, 44 F. App'x 548, 552 (3d Cir. 2002) (holding that the district court's "active role" in a case "involv[ing] complicated financial transactions" "facilitated its management of the bench trial and resolution of the issues"). Precisely for this reason, it makes sense to settle the question of the factfinder matter beforehand so the parties know what to expect. It is far better that, if the Court serves as the trier of fact, it make findings of fact and conclusions of law after trial rather than after appeal. *See Olympia Express*, 509 F.3d at 353 (noting on remand that a judge may have "forgotten some of the evidence" or realize that "in a bench trial he would have elicited additional evidence").

Finally, Judge Hall stated that "any time and expense that might be saved by the parties if the Second Circuit reversed this court's Ruling on the jury trial right pales in comparison to the time and expense associated with an appeal." *Garthwait*, 2023 WL 371036, at *2. Yet the question

posed by this appeal is straightforward and does not require extensive briefing or study of the factual record. And appeal would bring important benefits not only for this individual case, but the many other ERISA breach-of-fiduciary-duty cases filed against plan sponsors around the country each year. As *Meixner*, *Adams*, and many other cases demonstrate, questions regarding the availability of a jury trial are well suited for interlocutory certification. Indeed, a resolution of this recurring question in this Circuit is long overdue.

IV. If the Second Circuit Accepts Review, the Court Should Stay the Case While an Appeal Is Pending.

If the Court certifies its Order for appeal and the Second Circuit grants Yale's application to appeal, the Court should stay the case while the appeal is pending. Section 1292(b) provides that "application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order." 28 U.S.C. § 1292(b). Courts apply the traditional four-factor test to decide whether a stay is appropriate. *See Kinkead*, 2016 WL 9453808, at *3; *Hymes v. Bank of Am., N.A.*, 2020 WL 9174972, at *7 (E.D.N.Y. Sept. 29, 2020). Under this test, a court should ask (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies. *SEC v. Citigroup Glob. Mkts. Inc.*, 673 F.3d 158, 162 (2d Cir. 2012). Not all factors must be satisfied if others point strongly in one direction. *Id*. Courts routinely stay cases when certifying interlocutory appeals near the trial date. *E.g.*, *Gier*, 845 F. Supp. at 1353.

Here, all factors would weigh in favor of a stay. First, considering the substantial arguments and authorities favoring Yale's position here and in other circuits, Yale has a more-than-reasonable prospect of success. *See Kinkead*, 2016 WL 9453808, at *3 ("Although it remains my view that

the D.C. Circuit's decision applies retroactively, I find that defendants have demonstrated 'more than a mere possibility that relief will be granted'"). Second, declining to stay the action would effectively obviate the interlocutory appeal, since the point is to decide *whether* a jury trial should occur. Third, Plaintiffs will not face substantial injury. They can pursue their claims for monetary and forward-looking injunctive relief after the Second Circuit decides the appeal. Finally, the public interest weighs very heavily in favor of a stay. *See Ferring B.V. v. Allergan, Inc.*, 343 F. Supp. 3d 284, 292 (S.D.N.Y. 2018) (finding that public interest weighs in favor of a stay because it "would be a waste of resources—the parties', the Court's, and the public's—to proceed to a trial that turns out to be a nullity").

Yale recognizes that the pretrial memorandum is currently due in late April. *See* Order, Mar. 17, 2023, ECF No. 440. For the avoidance of doubt, Yale states that it will continue to work towards that deadline while this motion is pending and, if the motion is granted, while the Second Circuit is considering whether to allow an interlocutory appeal. Accordingly, even though it would clearly be preferable to settle the jury trial issue before conducting a trial, there will be no delay if the Second Circuit decides not to hear an appeal in an interlocutory posture.

CONCLUSION

The Court should certify its March 17, 2023 Ruling for interlocutory appeal. Thereafter, if the Second Circuit grants Yale's application to appeal, the Court should stay proceedings while the appeal is pending.

Dated: March 20, 2023

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 20, 2023, a copy of the foregoing document was filed electronically using the Court's CM/ECF system, which will provide notice of the filing to all counsel of record.

/s/ *Nancy G. Ross*
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