UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

DR. ALAN SACERDOTE, et al.,	:	Case No.: 1:17-cv-08834
Plaintiffs,	:	ECF Case (Judge Katherine B. Forrest)
v.	:	
NEW YORK UNIVERSITY SCHOOL OF MEDICINE, et al.,	:	
Defendants.	:	

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT'S MOTION FOR SANCTIONS AGAINST PLAINTIFFS AND THEIR COUNSEL, OR IN THE ALTERNATIVE, FOR ATTORNEY'S FEES PURSUANT TO ERISA § 502(g)(1)

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Defendant, New York University School of Medicine, an administrative unit of New York University ("NYU"), by and through its undersigned counsel, filed a Motion for Sanctions against Plaintiffs and their counsel that this Court administratively terminated pending the completion of Plaintiffs' appeal. Plaintiffs have voluntary stipulated to the dismissal of all claims against the NYU Defendants. In accordance with this Court's May 21, 2018 Order, NYU respectfully renews its Motion for Sanctions and respectfully requests that the Court (i) enter judgment for sanctions against Plaintiffs and their counsel pursuant to Federal Rule of Civil Procedure 11 and 28 U.S.C. § 1927 for filing a duplicative—and now a dismissed—lawsuit which Plaintiffs and their counsel filed in a blatant attempt to avoid the Court's prior rulings, or (ii) in the alternative, award Defendant its attorneys' fees and costs pursuant to ERISA § 502(g)(1).

INTRODUCTION

NYU seeks sanctions in response to Plaintiffs and Plaintiffs' counsel egregious attempts to avoid this Court's prior rulings in *Sacerdote, et al. v. New York University* (Case No. 16-cv-6284) ("Sacerdote I"). Prior to the initiation of this case, this Court dismissed the vast majority of Plaintiffs' claims in Sacerdote I pursuant to its ruling on Defendant's Motion to Dismiss. (Sacerdote I ECF No. 79.) This Court then denied Plaintiffs' motion for reconsideration of the dismissal of those claims and denied Plaintiffs' request to amend their complaint a second time and join as defendants several current and former NYU employees who served *ex officio* on the NYU Retirement Plan Committee. (Sacerdote I ECF Nos. 100, 101.)

Rather than accept this Court's orders and decisions in Sacerdote I, Plaintiffs admittedly initiated this action ("Sacerdote II") to circumvent this Court's orders in Sacerdote I. Plaintiffs' Complaint and subsequent Amended Complaint in Sacerdote II was based on the very same facts as Sacerdote I, asserted each and every claim alleged in Sacerdote I, including all of the claims

that were dismissed by this Court in Sacerdote I, sought the same relief sought in Sacerdote I, and named as defendants the very individuals that this Court refused to allow Plaintiffs to join in Sacerdote I.

In its Opinion and Order, dated February 23, 2018, this Court dismissed Plaintiffs' lawsuit in its entirety, holding *inter alia* that:

(i) "[i]t is clear that Sacerdote II is duplicative of Sacerdote I [16-cv-6284],";

(ii) Plaintiffs' "Amended Complaint in Sacerdote II is a blatant attempt to replead an existing action;" and

(iii) "that plaintiffs cannot file the same case twice in an attempt to avoid the Court's previous rulings." (ECF No. 137, at pp. 2, 4).[1]

Moreover, the Court found that Plaintiffs (in their deposition testimony) and Plaintiffs' counsel (in their brief opposing the motion to dismiss the Amended Complaint) admitted that they filed "'duplicative litigation'" in an effort to circumvent this Court's previous Orders in Sacerdote I. (*Id.* at 8) (citing Brown Dep. Tr., at 28:2-4 and Mem. Opp. at 7).

Plaintiffs and their counsel chose to proceed with their frivolous Sacerdote II lawsuit notwithstanding being put on notice by Defense counsel at the outset that (i) the action was "an outrageous attempt at avoiding Judge Forrest's October 17, 2017 Order denying your motion to file a second amended complaint" in Sacerdote I; and that (ii) Defendant would make a "motion for sanctions" if Plaintiffs did not "immediately withdraw the complaint."

There are four separate bases upon which this Court should sanction Plaintiffs and their counsel for their frivolous and vexatious conduct, including but not limited to awarding Defendant its attorneys' fees and expenses in connection with responding to the Sacerdote II

[1] All ECF citations in this memorandum are to docket number 17-cv-8834 unless otherwise noted.

lawsuit and in bringing this motion. *First*, Federal Rule of Civil Procedure 11 provides for sanctions against both a party and its counsel who, as here, engage in litigation tactics for an "improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation." *Second*, Plaintiffs' counsel should be sanctioned pursuant to 28 U.S.C. § 1927, which provides that "[a]ny attorney . . . who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct." *Third*, the Court may use its inherent authority to sanction Plaintiffs and their counsel given the Court's Opinion and Order holding that Sacerdote II lacks any colorable basis and was brought for the purpose of avoiding the Court's orders in Sacerdote I. *Fourth*, as the prevailing party, this Court should award Defendant its "reasonable attorney's fee and costs" pursuant to the fee-shifting provision in ERISA § 502(g)(1), codified at 29 U.S.C. § 1132(g)(1).

Accordingly, and for the reasons expressed herein, Defendant requests that the Court enter appropriate monetary and non-monetary sanctions against Plaintiffs and their counsel, including:

(1) an award for the costs and attorneys' fees associated with bringing the motion to dismiss the Complaint filed in Sacerdote II;

(2) an award for the costs and attorneys' fees associated with bringing the successful motion to dismiss the Amended Complaint in Sacerdote II;

(3) an award for the costs and attorneys' fees associated with bringing this motion;

(4) an award for the costs and attorneys' fees associated with responding to Plaintiffs' appeal of the Court's order dismissing the Amended Complaint in Sacerdote II; and

(5) any other appropriate sanctions this Court deems appropriate.

FACTS

A. This Court in Sacerdote I Issued Several Orders Unfavorable to Plaintiffs.

On November 9, 2016, Plaintiffs filed a seven-count Amended Complaint in Sacerdote I, which NYU moved to dismiss on December 12, 2016. (Sacerdote I ECF Nos. 39, 44.) The claims in Sacerdote I related to NYU's management of the NYU School of Medicine Retirement Plan for Members of the Faculty, Professional Research Staff and Administration (the "Medical Plan") and the New York University Retirement Plan for Members of the Faculty, Professional Research Staff and Administration (the "Faculty Plan"). Specifically, in Sacerdote I, Plaintiffs alleged that NYU breached certain fiduciary duties under the Employee Retirement Income Security Act of 1974, as amended ("ERISA") and engaged in transactions prohibited by ERISA.

On August 25, 2017, the Court granted, in significant part, NYU's motion to dismiss the Amended Complaint in Sacerdote I. (Sacerdote I ECF No. 79.) In its order, this Court dismissed more than half of the Amended Complaint, including dismissing Counts I, II, IV, VI and VII of the Sacerdote I complaint in their entirety. (*Id.* at p. 37.) The Court dismissed all of Plaintiffs' prohibited transaction claims, and dismissed all of Plaintiffs' duty of loyalty claims contained in Counts I, III, and V. (*Id.* at p. 14.)

At the same time that they asked this Court to reconsider its decision on the motion to dismiss in Sacerdote I, Plaintiffs also sought leave to file a second amended Complaint in that case. (Sacerdote I ECF No. 83.) In their motion, Plaintiffs sought, *inter alia*, leave to add "as parties (1) the New York University Retirement Plan Committee (the "Retirement Committee"), and (2) the individuals who served on the Committee during the proposed class period (since

August 9, 2010)."[2] (Sacerdote I ECF No. 84 at p. 1.) On October 17, 2017, this Court denied Plaintiffs' motion for leave, holding that Plaintiffs did not "demonstrate[] good cause for their failure to include the defendants whom they now propose to add." (Sacerdote I ECF No. 100, at p. 1.)

B. Plaintiffs filed Sacerdote II in an Attempt to Avoid this Court's Orders in Sacerdote I; Defense Counsel Put Plaintiffs On Notice That Sacerdote II was Frivolous.

On November 13, 2017, Plaintiffs filed their Complaint in Sacerdote II. (ECF No. 1.) The Sacerdote II Complaint was virtually identical to the Amended Complaint in Sacerdote I, with over 225 of the 276 paragraphs contained in the Sacerdote II Complaint being verbatim recitations of paragraphs contained in the Sacerdote I Amended Complaint save for minor text changes. (*See* ECF No. 75, at 4-6; ECF No. 76-2.)

By letter dated November 14, 2017, Defense counsel put Plaintiffs' counsel on notice that the new action was frivolous and should be immediately withdrawn:

> This morning I obtained a copy of that 'related complaint' and was very surprised to find that it **alleged facts and claims that were largely identical to those set out in the First Amended Complaint in the current case (including all of the claims that Judge Forrest previously dismissed)** as well as one additional prohibited transaction claim and a monitoring claim.
>
> **We think that your 'related complaint' is an outrageous attempt at avoiding Judge Forrest's October 17, 2017 Order denying your motion to file a second amended complaint in the case**. That Order specifically denied your request to add additional defendants (specifically the Retirement Plan Committee and its members who are named as defendants in this 'related complaint') and reinstate the dismissed monitoring claim (also included in this 'related complaint') as being untimely and without good cause.

[2] The individual members of the Retirement Committee that Plaintiffs sought to join to the Sacerdote I Complaint are Richard Bing, Michael Burke, Catherine Casey, Martin Dorph, Sabrina Ellis, Thomas Feuerstein, Andrew Gordon, Patricia Halley, Tim Hesler, Kathleen Jacobs, Marina Kartanos, Ann Kraus, Margaret Meagher, Cynthia Nascimento, Nancy Sanchez, Tina Surh, and Linda Woodruff.

> **We ask that you immediately withdraw the complaint you filed last night. If you do not, please be advised that we will advise Judge Forrest of your actions and ask for permission to file a motion to strike that complaint as well as a motion for sanctions in this case.**

(Declaration of Mark Muedeking ("Muedeking Decl."), at Ex. 1) (emphasis added). Plaintiffs refused to withdraw the Sacerdote II complaint.

Plaintiffs admitted at deposition that the purpose of filing Sacerdote II was to circumvent this Court's Orders in Sacerdote I (*see* ECF No. 137, at p. 8):

- Plaintiff Brown acknowledged that Sacerdote II "is a chance to get the question of the fees charged for investing back on the table and, therefore, I'm for it." (Muedeking Decl., Ex. 2, Brown Dep. Tr., at 28:2–4, quoted in Opinion and Order, ECF No. 137, at p. 8).

- Plaintiff Monaco admitted that Sacerdote II was filed as an alternative to Sacerdote I "being amended" and that she was relying upon her counsel as choosing the "way to go" in naming as defendants the individuals on the Retirement Committee whom the Court held could not be added to Sacerdote I. (Muedeking Decl., Ex. 3, Monaco Dep. Tr., at 10:9-15:6).

- Plaintiff Crispin Miller admitted that he was aware that Sacerdote II states claims previously dismissed in Sacerdote I and names as defendants individuals Plaintiffs previously sought to add to Sacerdote I, and that he said he "expected" that the allegations in the Sacerdote II complaint were merely "rephrased." (Muedeking Decl., Ex. 4, Crispin Miller Dep. Tr., at 20:18-26:2).

Plaintiffs also filed Sacerdote II in an effort to harass individuals on the Retirement Committee – the very same individuals whom this Court previously held Plaintiffs could not add to Sacerdote I. Plaintiffs chose to name the Retirement Committee members as individual defendants, notwithstanding the fact that plaintiffs knew such individuals were merely "**serving *ex officio* . . . and not in his or her individual capacity**."[3] (Muedeking Decl., Ex. 5, Retirement Committee Charter) (emphasis added). Plaintiffs further sought to harass and intimidate the individual defendants by serving the Sacerdote II Complaint at their private residences, without

[3] Plaintiffs incorporated by reference into their Sacerdote II Complaint the Retirement Committee Charter.

first inquiring whether Defense counsel would accept service. Worse, because of Plaintiffs' vexatious and harassive actions, the individual defendants will now be required to disclose on every loan and financial application, job filing, and other legal disclosure forms that they were individually named as defendants in a multi-million dollar lawsuit alleging, among other things, breach of fiduciary duty.[4]

C. When Defendants Filed a Motion to Dismiss the Original Sacerdote II Complaint; Plaintiffs Attempted to Disguise their Duplicative Lawsuits with an Amended Complaint.

On December 20, 2017, the then-named Defendants moved to dismiss the Sacerdote II Complaint as an impermissible duplicative complaint. (ECF No. 75 at 7.) Thereafter, in further disregard for the Court's orders in Sacerdote I, Plaintiffs filed an Amended Complaint in Sacerdote II on January 10, 2018. (ECF No. 105.) Despite attempting to disguise the pleading as a new case, the Sacerdote II Amended Complaint sought to assert claims dismissed from Sacerdote I and against parties the Court ruled could not be added to Sacerdote I. Moreover, all of the claims in the Sacerdote II Amended Complaint arose out of the same facts at issue in Sacerdote I.

Defendants then moved to dismiss the Amended Complaint in Sacerdote II as a thinly-veiled attempt to circumvent the Court's orders in Sacerdote I. As this Court recognized in its February 23, 2018 Opinion and Order dismissing the Amended Complaint, "plaintiffs' brief in opposition to the motion to dismiss acknowledges the 'duplicative litigation' and notes that Sacerdote II was filed '[g]iven the Court's denial of the motion for leave to amend, dismissal of

[4] In *Cunningham v. Cornell University*, No. 16-cv-6525, ECF No. 122 (S.D.N.Y. Jan. 19, 2018), a copycat lawsuit that the same Plaintiffs' counsel filed against Cornell University, Judge Castel chastised Plaintiffs' counsel for seeking to add individual defendants, noting that they "will be required to list the lawsuit on every auto, mortgage or student financial aid application they file." Plaintiffs' counsel later withdrew their motion for leave to amend and agreed that Plaintiffs' counsel "shall not thereafter seek to join any of the 29 Individuals as a party to this action." (*Cunningham v. Cornell University*, No. 16-cv-6525, ECF No. 192 (S.D.N.Y. Jul. 23, 2018).

the failure-to-monitor claim, and the prospect that NYU could disclaim liability based on having delegated its duties to the committee.'" (ECF No. 137, at p. 8 (quoting Mem. Opp. at 7.).)[5]

D. This Court Dismissed the Sacerdote II Amended Complaint in its Entirety as Duplicative of Sacerdote I, Thereby Prompting NYU's Motion for Sanctions.

On February 23, 2018, this Court dismissed the Sacerdote II Amended Complaint in its entirety, admonishing the Plaintiffs that they "cannot file the same case twice in an attempt to avoid the Court's previous rulings" and that Plaintiffs' "Amended Complaint in Sacerdote II is a blatant attempt to replead an existing action." (ECF No. 137 at 2.) The Court further held that:

> Sacerdote II is more properly characterized as a type of Rule 15 motion . . . , a motion for reconsideration, and/or a motion for joinder . . . [b]ut . . . plaintiffs have already tried several of those avenues and such attempts have been denied by the Court. ***Plaintiffs are not entitled to another bite at the apple simply because they have repackaged various claims*** . . . .

(*Id*. at 8 (emphasis added) (internal citation omitted).)

On March 21, 2018, in response to this Court's February 23, 2018 Order, NYU filed a Motion for Sanctions against Plaintiffs and Plaintiffs' counsel pursuant to Federal Rule of Civil Procedure 11 and 28 U.S.C. § 1927. (*See* ECF No. 144-146.) Plaintiffs filed their Opposition to NYU's Motion for Sanctions on April 11, 2018. (ECF No. 150.) NYU filed its Reply in Support of NYU's Motion for Sanctions on May 18, 2018. (ECF No. 156-157.) On the same day, Plaintiff's filed their Notice of Appeal. (ECF No. 158.)

On May 21, 2018, this Court directed the Clerk of Court to administratively terminate NYU's Motion for Sanctions stating that "[t]he Court will not rule on that motion until the appeal before the Second Circuit has been decided." (ECF No. 159, at 1-2.) The order further

[5] Ignoring yet another prior order in Sacerdote I based on precisely the same facts and circumstances, Plaintiffs amended their complaint in Sacerdote II to include a demand for a jury trial. The demand for a jury trial was struck in *Sacerdote I* on December 19, 2017. (Sacerdote I, ECF No. 122 ("ERISA does not grant a right to a jury trial.").).

directed NYU to "refile their motion within twenty-one days of the resolution of the appeal." (*Id.* at 2.)

E. This Court Found in Favor of NYU on All Claims in Sacerdote I.

This Court's Opinion and Order in Sacerdote I further proved that the duplicative complaint in Sacerdote II was meritless. On July 31, 2018, this Court issued an Opinion and Order dismissing all claims against New York University in Sacerdote I. (Sacerdote I ECF No. 348, at 3, 78.) In dismissing all of the claims against New York University, this Court specifically found that Plaintiffs "have not proven that the Committee acted imprudently or that the Plans suffered losses as a result." (*Id.* at 3.)

This Court made specific findings concerning the actions of the Retirement Committee and its members in Sacerdote I, all of whom were named as Defendants in Sacerdote II. Specifically, this Court held that the Committee "prudently managed its recordkeepers" and that it "closely monitored the performance of the investment alternatives offered in the Plans." (*Id.* at 30, 57.) The Court found that the Committee, in exercising its fiduciary duties on behalf of NYU, "made decisions based on adequate investigation and independent decisionmaking." (*Id.* at 22.) The Court concluded that "the evidence does not support a failure or loss with regard to recordkeeping fees, or with regard to the two Plans investment options at issue here." (*Id.* at 29.) As the "resolution of the claims in Sacerdote II relies on the same set of facts as resolution of Sacerdote I," the evidence in Sacerdote I is proof that the Sacerdote II claims were meritless. (*See* ECF No. 137, at 7.)

F. The Sacerdote II Judgment in Favor of the NYU Defendants is Final.

Having failed to prove a single fiduciary breach in Sacerdote I, Plaintiffs now realize that their claims against the NYU Defendants in Sacerdote II are meritless and have abandoned them. On August 27, 2018 Plaintiffs voluntarily dismissed their appeal with respect to the "NYU

Defendants."[6] (*Sacerdote v. Retirement Plan Committee*, Case No. 18-1558 (2d Cir.), ECF No. 49, at 2.) And, accordingly, on August 28, 2018, the United States Court of Appeals for the Second Circuit dismissed the "appeal with prejudice as to the NYU Defendants-Appellees." (*Sacerdote v. Retirement Plan Committee*, Case No. 18-1558 (2d Cir.), ECF No. 52, at 2.)

Upon the termination of Plaintiffs' appeal of this Court's order dismissing all claims against the NYU Defendants, pursuant to this Court's May 21, 2018 Order (ECF No. 159), NYU refiles its Motion for Sanctions against Plaintiffs and Plaintiff's Counsel.

ARGUMENT

Courts routinely sanction litigants and their counsel who file duplicative litigation in an effort to circumvent a court's prior orders and/or to harass an opposing party. Pursuant to Federal Rule of Civil Procedure 11 and 28 U.S.C. § 1927, this Court should sanction Plaintiffs and their counsel and should award Defendant, among other things, its attorneys' fees and costs in connection with successfully dismissing Sacerdote II and for this sanctions motion. Alternatively, this Court should award Defendant its attorneys' fees and costs pursuant to ERISA § 502(g)(1), which provides for fee-shifting to a prevailing party in an ERISA action.

I. The Court Retains Jurisdiction Over This Motion.

As a threshold matter, this Court, following the dismissal of Sacerdote II, retains jurisdiction over this motion. In *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 395-96 (1990), the U.S. Supreme Court held that:

> [i]t is well established that *a federal court may consider collateral issues after an action is no longer pending*. . . . Like the imposition

[6] The NYU Defendants included: the NYU Retirement Plan Committee, Richard Bing, Michael Burke, Catherine Casey, Martin Dorph, Sabrina Ellis, Thomas Feuerstein, Andrew Gordon, Patricia Halley, Tim Hesler, Kathleen Jacobs, Marina Kartanos, Ann Kraus, Margaret Meagher, Cynthia Nascimento, Nancy Sanchez, Tina Surh, Linda Woodruff, Maurice Maertens, Joseph Monteleone, Ray Oquendo, Chris Tang, New York University School Of Medicine, NYU Langone Hospitals, and NYU Langone Health System. (*Sacerdote v. Retirement Plan Committee*, Case No. 18-1558 (2d Cir.), ECF No. 51, at 2.)

> of costs, attorney's fees, and contempt sanctions, the imposition of a Rule 11 sanction is not a judgment on the merits of an action. Rather, it requires the determination of a collateral issue: whether the attorney has abused the judicial process, and, if so, what sanction would be appropriate. *Such a determination may be made after the principal suit has been terminated.*

(emphasis added). *See also Schlaifer Nance & Co. v. Estate of Warhol*, 194 F.3d 323, 336 (2d Cir. 1999); *Valley Disposal, Inc. v. Cent. Vermont Solid Waste Mgmt. Dist.*, 71 F.3d 1053, 1056 (2d Cir. 1995); *Heinrichs v. Marshall & Stevens Inc.*, 921 F.2d 418, 421 (2d Cir. 1990); *Phoenix Four, Inc. v. Strategic Res. Corp.*, No. 05 Civ. 4837 (HB), 2006 WL 2135798, at *1 (S.D.N.Y. Aug. 1, 2006) (awarding sanctions after granting defendant's motion to dismiss complaint).[7]

II. The Court Should Sanction Plaintiffs and Their Counsel.

A. This Court Should Sanction Plaintiffs and Their Counsel Pursuant to Federal Rule of Civil Procedure 11.

Fed. R. Civ. P. 11(c) provides that, upon a finding that "Rule 11(b) has been violated, the court may impose an appropriate sanction on any attorney, law firm, or party that violated the rule or is responsible for the violation." A pleading violates Rule 11(b) when it is "being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation." Fed. R. Civ. P. 11(b)(1).

"[T]he central purpose of Rule 11 is to deter baseless filings in district court and . . . streamline the administration and procedure of the federal courts." *Cooter & Gell*, 496 U.S. at 393. "Baseless filing puts the machinery of justice in motion, burdening courts and individuals

[7] Plaintiffs argued in response to Defendant's original Motion for Sanctions that the motion was untimely under Fed. R. Civ. P. 54(d)(2). (ECF No. 150, 24-25.) As stated in Defendant's Reply Memorandum in Support of Defendant's Motion for Sanctions (*see* ECF No. 156, 7-8), Fed. R. Civ. P. 54(d)(2) – and its concomitant 14-day deadline – applies to "a claim for attorney's fees and related nontaxable expenses." Fed. R. Civ. P. 54(d)(2)(A)-(B). In fact, Fed. R. Civ. P. 54(d)(2)(E) explicitly states that it **does not** apply to "claims for fees and expenses for sanctions for violating these rules. . ." *See also* Baker v. Urban Outfitters, Inc., 249 F. App'x 845, 846 n. 3 (2d Cir. 2007) ("[t]o the extent fees were ordered against counsel pursuant to 28 U.S.C. § 1927 or Fed. R. Civ. P. 11, no timeliness concerns arise.") (citing Fed. R. Civ. P. 54(d)(2)(E)); Balcar v. Bell & Assocs., LLC, 295 F. Supp. 2d 635, 638 (N.D.W. Va.), *aff'd*, 83 F. App'x 519 (4th Cir. 2003) (holding that time limitation for filing a motion for attorney's fees does not apply to sanctions, and granting sanctions under the court's inherent powers).

alike with needless expense and delay." *Id.* at 398. To act as a proper deterrent, the "typical sanction imposed is the payment of the other party's reasonable attorneys' fees which were incurred as a result of the violation," *Howard v. Klynveld Peat Marwick Goerdeler*, 977 F. Supp. 654, 667 (S.D.N.Y. 1997), including an "award to the prevailing party the reasonable expenses, including attorney's fees, incurred for the [Rule 11] motion." Fed. R. Civ. P. 11(c)(2).

Filing a duplicative lawsuit is grounds for Rule 11 monetary sanctions, and courts in the Second Circuit routinely sanction parties and attorneys who file multiple lawsuits arising from the same set of facts. *See, e.g.*, *Ginther v. Provident Life and Cas. Ins. Co.*, 350 F. App'x 494 (2d Cir. 2009); *Wynn v. AC Rochester Gen. Motors Corp.*, 96 F. App'x 768 (2d Cir. 2004); *Hawkins-El v. AIG Fed. Sav. Bank*, No. 05-CV-3222 (DLI) (LB), 2010 WL 1292295 (E.D.N.Y. Feb. 22, 2010); *Mantis Transp. v. Kenner*, 45 F. Supp. 3d 229 (E.D.N.Y. 2014). Moreover, "[i]mproper purposes such as bad faith and an intent to delay and harass can be inferred 'when applicable preclusion doctrines clearly foreclose further litigation.'" *Lipin v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*, 202 F. Supp. 2d 126, 140 (S.D.N.Y. 2002).

As this Court held in its February 23, 2018 Opinion and Order, Plaintiffs improperly filed Sacerdote II, a "duplicative" lawsuit that "is a blatant attempt to replead an existing action" and "to avoid the Court's previous rulings." (ECF No. 137, at p. 2, 4.) Indeed, this Court found that Plaintiffs (in their depositions) and their counsel (in "plaintiffs' brief in opposition to the motion to dismiss") "acknowledges the 'duplicative litigation'" in an effort to sidestep this Court's decisions in Sacerdote I. (*Id.* at p. 8.)

The propriety of sanctions is further reinforced by actions taken by Plaintiffs' counsel in at least one other lawsuit, wherein Plaintiffs' counsel proposed a nearly identical amendment to add individual defendants. Specifically, Judge Castel, overseeing a nearly identical lawsuit

against Cornell University, issued an order to plaintiffs' counsel Jerome Schlichter and Stephen Hoeplinger to meet with their clients and discuss "the wisdom and propriety" of adding 29 individual defendants, and noting "the tremendous power to harass these individuals." *Cunningham v. Cornell University*, No. 16-cv-6525, ECF No. 122 (S.D.N.Y. Jan. 19, 2018). The order specifically notes the negative effects on the individual defendants, who "will be required to list the lawsuit on every auto, mortgage or student financial aid application they file." *Id.* The improper purpose of adding individual defendants in this action was further confirmed by Plaintiff Sacerdote, who during his deposition, answered "no" when asked "Do you think any of those individuals should be personally liable to you?" (Muedeking Decl., Ex. 6, Sacerdote Dep. 113:19-22.)

Plaintiffs' decision to abandon their appeal of this Court's February 23, 2018 Opinion and Order further proves that Plaintiffs were fully aware that the Sacerdote II complaints were duplicative. On May 18, 2018, Plaintiffs filed their Notice of Appeal of this Court's February 23, 2018 Opinion and Order. (ECF No. 158.) On July 31, 2018, this Court issued an Opinion and Order dismissing all claims against New York University in Sacerdote I and holding that that "the evidence does not support a failure or loss with regard to recordkeeping fees, or with regard to the two Plans investment options at issue here." (Sacerdote I ECF No. 348, at 29.) As this Court correctly observed, the "resolution of the claims in Sacerdote II relies on the same set of facts as resolution of Sacerdote I." (*See* ECF No. 137, at 7.) Despite claiming that the allegations in Sacerdote II were not duplicative of Sacerdote I, Plaintiffs filed a joint stipulation dismissing with prejudice all claims against the NYU Defendants on August 27, 2018, less than a month after NYU prevailed on all counts in Sacerdote I. (*Sacerdote v. Retirement Plan Committee*, Case No. 18-1558 (2d Cir.), ECF No. 49, at 2.) Plaintiffs' decision to drop their

appeal concerning the dismissal of their claims against the NYU Defendants in Sacerdote II shortly after this Court found against all of their claims in Sacerdote I reveals Plaintiffs knew all along that the complaints were duplicative and meritless.

Accordingly, this Court should grant monetary sanctions against the individual Plaintiffs and their counsel for violating Fed. R. Civ. P. 11(b)(1). *See, e.g.*, *Lipin*, 202 F. Supp. 2d at 140 ("The Court, however, may sanction a represented party under subdivision (b)(1), if the party had actual knowledge that filing the paper constituted wrongful conduct, e.g., the paper made false statements or was filed for an improper purpose." (internal quotations omitted)).

B. The Court Should Sanction Plaintiffs' Counsel Pursuant to 28 U.S.C. § 1927.

This Court should sanction Plaintiffs' counsel pursuant to 28 U.S.C. § 1927, which provides, in pertinent part, "[a]ny attorney . . . who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct."

As discussed *supra*, by filing the original and amended complaints in Sacerdote II, Plaintiffs' counsel attempted to circumvent this Court's orders in Sacerdote I. Furthermore, in the face of Defendants' Motion to Dismiss the original Sacerdote II complaint which cited precedent forbidding such duplicative lawsuits, Plaintiffs' counsel willfully disregarded such precedent and filed an Amended Complaint, instead of voluntarily dismissing their lawsuit (as requested by Defense counsel prior to any motion practice). (*See* Sacerdote II Motion to Dismiss, ECF No. 75; Amended Complaint, ECF No. 105; Order Granting Motion to Dismiss ECF No. 137.) That this Court dismissed Sacerdote II further underscores the need to impose sanctions on Plaintiffs' counsel for initiating and persisting with a duplicative lawsuit for which they had been put on notice was frivolous. *Cf. Enmon v. Prospect Capital Corp.*, 675 F.3d 138 (2d Cir. 2012) (affirming imposition of sanctions pursuant to 28 U.S.C. § 1927).

Accordingly, this Court should also sanction Plaintiffs' counsel pursuant to 28 U.S.C. § 1927.

C. The Court Should Use its Inherent Authority to Sanction Plaintiffs and Their Counsel.

While sanctions are warranted here pursuant to Federal Rule of Civil Procedure 11 and 28 U.S.C. § 1927, this Court independent may sanction Plaintiffs and their counsel pursuant to the court's inherent authority. "A court's inherent authority permits it to impose costs and fees against an attorney who has 'acted in bad faith, vexatiously, wantonly, or for oppressive reasons.'" *Neroni v. Becker*, 609 F. App'x 690, 693 (2d Cir. 2015) (quoting *United States v. Int'l Bhd. of Teamsters*, 948 F.2d 1338, 1345 (2d Cir. 1991)). To impose sanctions through its inherent power, "a district court must find that: (1) the challenged claim was without a colorable basis and (2) the claim was brought in bad faith, *i.e.*, motivated by improper purposes such as harassment or delay." *Enmon*, 675 F.3d at 143 (quoting *Schlaifer Nance & Co.*, 194 F.3d at 336). "[B]ad faith may be inferred only if actions are so completely without merit as to require the conclusion that they must have been undertaken for some improper purpose such as delay." *Enmon*, 675 F.3d at 143 (internal quotations omitted).

Sanctions are appropriate in this situation, especially since this Court has already found that Sacerdote II lacks any colorable basis and was brought for the bad faith purpose of avoiding the Court's orders in Sacerdote I. (ECF No. 137 at 2-4, 7-8.) Plaintiffs and their counsel have deliberately sought to avoid previous court orders in Sacerdote I regarding scheduling (ECF No. 43), jury trial (ECF No. 122), dismissed claims (ECF No. 84), and additional parties (*id.*). Accordingly, this Court can, and should, sanction Plaintiffs' counsel.

III. Alternatively, Defendant Should Be Awarded Its Attorneys' Fees Pursuant to ERISA § 502(g)(1).

ERISA § 502(g)(1), codified at 29 U.S.C. § 1132(g)(1), provides that "the court in its

discretion may allow a reasonable attorney's fee and costs of action to either party." Defendants in ERISA lawsuits may be awarded attorney's fees, where, as here, plaintiffs engage in frivolous litigation tactics or file lawsuits in bad faith. *See, e.g.*, *Operating Eng'rs Pension Tr. v. Gilliam*, 737 F.2d 1501, 1506 (9th Cir. 1984); *Little v. Cox's Supermarkets*, 71 F.3d 637, 644-45 (7th Cir. 1995).

In determining whether to award attorney's fees in an ERISA action, courts in the Second Circuit apply a five-factor test:

> (1) the degree of the offending party's culpability or bad faith, (2) the ability of the offending party to satisfy an award of attorney's fees, (3) whether an award of fees would deter other persons from acting similarly under like circumstances, (4) the relative merits of the parties' positions, and (5) whether the action conferred a common benefit on a group of pension plan participants.

Chambless v. Masters, Mates & Pilots Pension Plan, 815 F.2d 869, 871 (2d Cir. 1987).

Here, the factors militate in favor of an award of attorney's fees and costs to Defendant.

- *First*, the improper conduct was willful and in bad faith, as evidenced by the failure to voluntarily dismiss Sacerdote II when requested by Defense counsel (along with a warning that NYU would seek sanctions if Plaintiffs did not withdraw Sacerdote II), testimony of numerous Plaintiffs, and the addition of a jury demand in the Amended Complaint.
- *Second*, Plaintiffs and their counsel have the ability to satisfy an award of attorney's fees, and Plaintiffs' law firm boasts of multi-million dollar judgments. (ECF No. 105 at pp. 104-06.)
- *Third*, Plaintiffs' counsel is currently counsel for plaintiffs in no fewer than 10 copycat complaints against universities across the county. Indeed, the addition of individual defendants is currently being questioned in ERISA-based litigation against Cornell University, in which the plaintiffs are represented by the same counsel as Plaintiffs in this action. An award of fees in this action would hopefully act as a deterrent to other improper, bad faith duplicative litigation.

- *Fourth*, this Court, in dismissing Sacerdote II, held that Plaintiffs and their counsel improperly filed duplicative litigation "in an attempt to avoid the Court's previous rulings." (ECF No. 137 at 2-4, 7-8.)

Applying a similar five-factor test, defendants in ERISA lawsuits have been awarded attorney's fees. For example, in *Operating Eng'rs Pension Tr. v. Gilliam*, the Ninth Circuit upheld the award of attorney's fees to an ERISA defendant where the trial court "concluded that the prosecution of this suit was grossly unfair, that the [plaintiff] had substantial ability to satisfy the fee award, that the assessment of fees would deter unfair acts, and that the position taken by the [plaintiff] was without merit." 737 F.2d at 1506; *see also Little*, 71 F.3d at 644-45.

Accordingly, pursuant to the fee-shifting provision of ERISA § 502(g)(1), the Court should award Defendant its reasonable attorneys' fees and costs incurred in successfully dismissing Sacerdote II.

CONCLUSION

For the foregoing reasons, Defendant respectfully requests that the Court enter appropriate monetary and non-monetary sanctions, including attorneys' fees, in connection with the (i) motions to dismiss the original complaint and amended complaint in this action, (ii) this motion for sanctions, and (iii) Plaintiffs' appeal of the Court's order dismissing the Amended Complaint in this action, as well as any other relief that the Court deems reasonable and appropriate.

Respectfully submitted,

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