UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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ANDREW SNITZER, ET AL.,

Plaintiffs,

v. 17 CV 5361 (VEC)

THE BOARD OF TRUSTEES OF THE AMERICAN FEDERATION OF MUSICIANS AND EMPLOYERS' PENSION FUND, ET AL.,

Defendants.

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New York, N.Y.
July 12, 2019
10:26 a.m.

Before:

HON. VALERIE E. CAPRONI,

District Judge

APPEARANCES

CHIMICLES & TIKELLIS, LLP
Attorneys for Plaintiffs
BY: ROBERT J. KRINER, JR.
STEVEN A. SCHWARTZ
VERA BELGER

PROSKAUER ROSE LLP
Attorneys for Defendants
BY: MYRON D. RUMELD
DEIDRE ANN GROSSMAN
AND
COHEN, WEISS AND SIMON, LLP
BY: JANI KAREN RACHELSON
ZACHARY NATHAN LEEDS

(In open court)

(Case called)

THE COURT: I held you guys until last because I thought we were going to take some time.

Starting here, you are?

MR. SCHWARTZ: Steve Schwartz.

THE COURT: You are?

MR. KRINER: Robert Kriner.

THE COURT: Robert Kriner.

MR. RUMELD: Myron Rumeld.

THE COURT: Mr. Rumeld.

MS. GROSSMAN: Deidre Grossman.

THE COURT: Ms. Grossman.

MS. RACHELSON: Jani Rachelson.

THE COURT: Ms. Rachelson.

MS. BELGER: Vera Belger.

THE COURT: You're for the plaintiffs, right?

MS. BELGER: Yes.

MR. LEEDS: Zachary Leeds for the defendant.

THE COURT: Okay. Other than the two depositions, is all the discovery complete?

MR. SCHWARTZ: Yes.

THE COURT: Mr. Rumeld?

MR. RUMELD: I think we have some cleanup document production with you, but I don't think it will interfere with

anything.

THE COURT: Okay. And the two depositions are going to be complete by July 31st?

MR. RUMELD: That's correct.

MR. SCHWARTZ: Yes.

THE COURT: Okay. You mention in your letter something called an opt-out -- a non-opt-out class, what is that? I confess I've never heard of it. Oh, that sounds like you haven't either.

MR. KRINER: No, it's common. It's a (b)(1) class, and we've had discussions with defendants regarding whether to assert a class or not. It seems, under Second Circuit, there's an issue about a representative plaintiff in an ERISA claim, and although class certification is not required, it is sufficient to do that. And I think we've come to an agreement to ask your Honor if we can certify a class under (b)(1), 23(b)(1), and leave it to your Honor how your Honor wishes us to present that, by motion or by stipulation.

THE COURT: You're in agreement?

MR. KRINER: We are.

THE COURT: What does this accomplish, to have a class?

MR. RUMELD: Maybe I should take the lead on this.

THE COURT: Okay. So this sounds like this is the defendant wanting it.

MR. RUMELD: I know it's not every day of the week when your Honor hears the defendant asking for a class, instead of the plaintiffs. So in, you know, most ERISA cases that come into the court these days tend to be 401(k) plans, where there are separate accounts --

THE COURT: Right.

MR. RUMELD: -- so each participant has a stake in the outcome. In defined benefit plan cases, there's just one pot of money, and any participant can bring, under ERISA, a representative claim seeking relief that really is for the benefit of everybody else.

And the case law is a little bit unclear as to whether, in a circumstance like that, it's appropriate or inappropriate or necessary to have a class. There is a Second Circuit opinion that I alerted plaintiff's lawyers to called *Coan v. Kaufman* that actually dismisses an ERISA breach of fiduciary duty claim for failure to take measures to act in a representative capacity on behalf of the class.

So if two individuals bring a claim and purport to bring it for everybody else, there is a certain issue that's been left open by the Second Circuit as to whether you have to do something to make it clear that you're acting in a representative capacity.

THE COURT: Got it.

MR. RUMELD: And the Second Circuit indicated the

safest way to do that is for there to be a class.

Now, on the defendant's side, to be perfectly upfront as we've been with plaintiffs' lawyers, there was a period of time in this case where we weren't necessarily interested in having a class because, you know, there is a lot of public attention amongst the musicians to this case and, frankly, we didn't want to do anything that would kind of fuel the idea that this case had more merit than we felt it did, and sometimes when you tell everybody there's a class, it has that outcome.

THE COURT: Yes.

MR. RUMELD: But we are looking at a trial now, and the one things that's clear is that if your Honor's going to render a ruling, it ought to be a ruling that decides this for everybody.

THE COURT: That makes sense.

MR. RUMELD: And the case law is a little bit ambiguous as to whether when somebody brings a representative case, whether that's going to have a res adjudicata effect on everybody.

So when we balanced all these interests, we felt that there ought to be a class, as Mr. Kriner indicated, under 23(b)(1). In a case like this, you can certify a class without giving notice and without giving opt-out rights. There's discretion that can be exercised as to whether it's in

everybody's interest just to notify everybody involved in the class.

And we told the plaintiffs' lawyers that we don't mind taking the lead and the laboring ore on this, since they are our participants, and we would try and come to agreement on whatever notice was needed. And we, obviously, want to give your Honor whatever paperwork she feels she needs to feel comfortable about whether that class should be certified.

THE COURT: Okay. So that sounds reasonable. Why don't you do this. If you're all in agreement, what I'd like is a memorandum of law explaining why this is appropriate and kind of what goes with it all.

MR. KRINER: Certainly, your Honor. The Second Circuit Kaufman opinion says that class certification is not necessarily required, but it is sufficient if you jump through that hoop.

THE COURT: Okay. I mean, I get it. It kind of makes sense, and I certainly agree, I think everything agrees, that this case should resolve this issue, and the defendants should not be subject to yet another lawsuit.

MR. KRINER: We are all in agreement on that.

THE COURT: Everybody agrees to that.

Okay. So I know that there is some desire for me to reconsider my norm that a in bench trial, I'm going to let you move for summary judgement. Having just read your letter, I

did not think that makes sense. I think it's going to benefit -- it's going to be a lot easier to decide this case hearing from the people and the experts, than just reading their reports. And I think it will be cheaper, actually.

MR. RUMELD: So if I could be heard, your Honor.

THE COURT: Sure.

MR. RUMELD: It was my intention in the letter to indicate that, in light of your Honor's remarks the last time, that we would back away from summary judgment in favor of what we've referred to as this staged approach because we do think it -- we think there are holes in plaintiff's case independent of what the trustees will say they did and why they did it.

And if there really is a desire to try and save some time and control the length of this case, I think if we proceed in this sequential process, where we take care of some of the issues that the experts can cover, if we're right, your Honor is going to find certain aspects of the claim that will disappear. In which case, your Honor won't have to hear testimony with respect to those claims.

THE COURT: Give me a for instance with that, where I don't really need to know the facts.

MR. RUMELD: So if your Honor will permit me, I actually prepared a little --

THE COURT: A little powerpoint?

MR. RUMELD: Right, very little, and in my past

experience, it never works out when I do this, but I can sort of talk you through this.

So if you turn to the first page, this is just a basic summary of the two claims we have in this case. Right? We have the first claim that has to do with two asset allocation decisions, one that took place in 2011 and one that took place in 2015.

Each of those decisions involved an increase in the aggregate targeted returns, a somewhat riskier allocation policy, and each had with it increases in investments of certain securities that the plaintiffs have focused on, specifically the emerging market equities and the private equity.

THE COURT: Correct.

MR. RUMELD: The second claim has to do with the use of actively managed funds or actively managed investments, and there are two aspects of that claim, one is: Is it prudent to retain active managers to begin with if the index funds outperform them; and the second is: If you have retained active managers, did we fail to remove underperforming managers here?

THE COURT: We're all in agreement up to now, right? That seems like a correct statement of what's at issue?

MR. SCHWARTZ: Well, I think --

THE COURT: There may be some nuances, but in broad

strokes.

MR. SCHWARTZ: I think there is a big nuance, which is that they took domestic equities in order to fund these risky --

THE COURT: No, I understand --

MR. SCHWARTZ: Right.

THE COURT: -- that in order to increase anything, you've got to decrease something else because it's all got to add to a hundred.

MR. SCHWARTZ: And they decreased domestic equities, which is the gold standard.

MR. RUMELD: And it is true, I think there's some -- I have some rebuttals to some of those nuances about what the domestic equity was used for, but there's no question that there is less domestic equity in this plan than there might have been under other models, and domestic equities performed very, very well during this period of time, which is, in our view, this is somewhat an exercise of hindsight rather than foresight, but those are issues we can cover later.

THE COURT: We've agreed to disagree at the motions to dismiss level on that.

MR. RUMELD: Right. So I thought I would lay out for you some for instances of what your Honor would learn if she heard from the experts first. And just to be clear, to lay the groundwork, the plaintiffs have one expert in their case in

chief and two rebuttal experts, and we have three experts; an expert actuary, an expert on fiduciary process, and an expert on causation and damages.

THE COURT: Okay. And what's plaintiff's expert?

MR. RUMELD: Plaintiff has -- maybe I should let you describe the plaintiff's expert in the case in chief, but it's important to us that he's not an actuary. And one of the points we would like to get across when you hear the expert testimony, is he's really not competent to testify to the issues of risk as they relate to this type of plan, the funding risks, the risks associated with the Pension Protection Act, of which he has no experience.

And I think even if you read plaintiff's letter, the focus of his attention is on his belief that there's something inherently wrong with having too much money in emerging market equities and in private equities. And he says that based on a comparison to what other funds typically do.

THE COURT: That's the description in your letter of he's comparing the asset allocation in this pension fund to other, I presume, similar-sized, similar --

MR. SCHWARTZ: Yes.

THE COURT: -- defined benefit plans?

MR. SCHWARTZ: The averages for large pension plans, for Taft-Hartley plans are, as we set forth in our letter, way different from what the trustees here did. No one's been able

to identify a single pension plan or Taft-Hartley plan that did anything like what the AFM trustees did, and --

THE COURT: Hang on. Let me interrupt you just for a second. So what is he? Is he an economist? Is he an investment advisor?

MR. SCHWARTZ: He's an investment professional. He also is an expert in portfolio management and monitoring and monitoring software. He actually sells software programs to investment professionals so they can monitor their portfolios. So he has expertise both from the investment end, from the, what I'll call, the monitoring of investments end. He's got decades of experience in the field. He was the winning expert in the Tibble case.

THE COURT: Okay.

MR. RUMELD: So and it's interesting, your Honor, because the last couple of times we were here, if I could paraphrase a little, I understood your Honor to be similarly saying, I get it, Mr. Rumeld, that the trustees engaged in a lot of process and that they were facing a difficult situation, but isn't it just too much if you have emerging marketing equities in these numbers?

So what I would like the opportunity to do is to let you hear from the experts on both sides so that we can take our chance at persuading your Honor that that's not a proper measure of risk. That risk is measured in the portfolio in the

aggregate.

And we have an expert actuary, okay, who has looked at -- whose career is in multi-employer fund business, who has looked objectively at the circumstances facing this fund in 2011 and 2015 and has demonstrated, doing the math, looking at forward risk, looking at short-term risk, looking at long-term gain, basically balancing the rewards and the risk, which both sides' experts agree is what the exercise should be, and basically is prepared to testify why this was exactly the right thing to do as of that time.

And the reason that's very important, your Honor, is because while we can spend a whole lot of time going over the procedural prudence aspects of this case -- what the trustees asked? What information they got from their consultants? Are they telling the truth? -- the plaintiff's burden in this case as indicated in some of the cases we cited in that long footnote, your Honor -- and I apologize for long footnotes -- is not to just show that we were procedurally prudent but that a prudent fiduciary would have done something else.

And, in fact, if they cannot show that a prudent fiduciary would have done something else under these circumstances, they lose. They have not presented -- while they have presented a witness who can talk about what other plans typically do, they have not presented a witness who has identified an alternative asset allocation that was better that

a prudent fiduciary should have taken.

And this is all information that can be evaluated just based on the expert testimony, that doesn't involve looking into what each trustee's motivations were, what advice they got, et cetera, et cetera, which is much more extensive.

THE COURT: So essentially your argument is even if they weren't sufficiently curious, even if they weren't asking the hard questions, even if they were, at some level, being led around by their paid advisors, as a matter of fact, they ended up at kind of the only asset allocation that a rational actuary would say, this is the right, like, this is what you got to do?

MR. RUMELD: Right. And, you know, with ERISA cases, prudence is sometimes a range of prudent conduct.

THE COURT: Right.

MR. RUMELD: But certainly if what we did was in the range of what a prudent fiduciary would have concluded to do, then that's correct. Even if your Honor would find that some of the trustees were not asking the right questions -- and please don't misunderstand me; we're perfectly prepared to --

THE COURT: I understand.

MR. RUMELD: -- defend the prudence of what we did here, but it's just a question of what's the most efficient way to get from here to there.

THE COURT: Okay. So I kind of get -- let's assume my hypothetical, right? Assume that we go through all the facts.

I listen to everybody who served on the board of this plan for lo these many years, and my conclusion is that some of them were asleep at the switch, some of them weren't asking the hard questions, et cetera. That is they weren't really jumping through the right procedural hoops, but that, as a matter of fact, even though I think my gut reaction, I've been very clear that this seems like an extremely risky asset allocation for a Taft-Hartley plan, but if their expert persuades me and -- do you have a rebuttal expert to their actuary?

MR. SCHWARTZ: Yes.

THE COURT: Okay. And your rebuttal expert does not persuade me, why isn't that the most efficient way? Because then you lose, right? You lose if, in fact, this was a prudent fiduciary decision.

MR. SCHWARTZ: Well, if there's an ultimate factual finding that this -- and the only way to describe it is this crazy asset allocation is prudent, then, of course, we would lose. We expect to win this case because there will be a finding that this allocation was not just way out of the norm and different from any other investor that we know of, but just crazy.

But I guess what I should respond to is an actual expert, Mr. Franklin, the defendants' expert.

THE COURT: Is he the actuary?

MR. SCHWARTZ: Yes. He can't do this. First of all,

actuaries don't make opinions about asset allocations. They're not recommenders of asset allocations. That's what investment consultants are. And there's a nuance in trial, which we'll get to, where it wasn't Meketa, the investment consultant, leading the trustees by a leash; it was the trustees leading Meketa by a leash, or, in the trustees' own words, Meketa followed the trustees' marching orders.

Second. What Mr. Franklin is going to do is talk about a stochastic analysis he did. Well, there's already been a stochastic analysis for the 2015 allocation. That's when the trustees ordered the EMEs to 15 percent and the private equity to 18 percent. The plan actuary, Milliman, did a stochastic analysis. We discussed that at the motion to dismiss. It's going to an issue at trial because it's a centerpiece for the defense.

All their actuarial expert is going to do is say, I agree with what Milliman did in 2015, and by the way, even though the trustees did not do a stochastic analysis in 2011, when they doubled EMEs from 6 to 11 percent and brought private equity from 3 to 15 percent, even though the trustees didn't do one, I did one for 2011, and it kind of shows the same thing that Milliman shows in 2015.

So we're going to have an actual -- we have actual, real facts as to whether the stochastic analysis is relevant at all, and it does not prove their defense at all. In fact, the

stochastic analysis, what Milliman said, was a caution that no allocation -- that a riskier asset allocation produces increased potential for insolvency and greater return volatility and that no allocation policy gets the funded status above 80 percent at the 50th percentile at any point in time.

Meaning, you know, don't look at outlier results from the stochastic analysis because you've got to look at what I'll call the normal, you know, within the sweet-spot range. And so we already have fact testimony that the trustees were warned about the limits of the stochastic analysis.

Second. Both Milliman and Mr. Franklin did what's called a simple or static stochastic analysis. They didn't do the state of the art stochastic analysis, and the big difference is the static analysis they did is, it assumes that if -- that you're going to have a long-term, disciplined investor that will set an investment policy and stick with it for 20 years.

So depending on all the various paths that could happen, all the various, you know, permutations, combinations as to how the returns will go, the trustees or the investment decider will stick with the plan because all the stochastic analysis says is if you assume -- and this is only an assumption. If you assume that high-risk asset classes, like EMEs or private equity or real estate or infrastructure have a higher rate of return with higher volatility, maybe at the very

tail end, maybe after you go through a lot of losses and gains and losses and gains, maybe you'll end up better.

It doesn't really say that much, but the key thing here is there's no fit to the actual facts in this case because these trustees were the least disciplined, unlong-term investors that we've ever seen. They started with an asset allocation in 2009 at 40 percent domestic equities, right in the sweet spot. They made a radical change in 2010, radical change in 2011 when it didn't work out, radical change in 2015, and it turns out they made another radical change in 2017, 2018 when they switched to the OCIO model.

So the stochastic analysis, which assumes you have to stick with the plan, instead of panicking as you go through volatility, has nothing to do with the actual facts in this case for these trustees, who are the most reactive investors and basically act like what we call the drunken gambler, who, well, you lose? Well, you double down because eventually you'll, theoretically, make it up.

So there's no kill shot here for this, and it's going to have to be evaluated within the context of the actual facts in this case.

And, by the way, Mr. Franklin does not offer any prudence opinion at all. It's just not -- and he couldn't. It's not within his expertise.

MR. KRINER: He disclaims it. Expressly he said I'm

giving no prudence opinion whether it was prudent.

MR. RUMELD: Well, that's correct because that's your Honor's job to decide prudence. The role of the experts is to give you the information from which to make that evaluation, and Mr. Franklin definably is not commenting on procedural prudence at all. That wasn't his role.

For procedural prudence, we have a different expert, Phyllis Borzi, who is the former head of the Employee Benefits Security Administration, whose job was to evaluate claims of breach of fiduciary duty. And I'm happy to have her come in and express her views as to whether these trustees were more or less competent relative to what she views to be standards of the industry.

So, look, I think what Mr. Schwartz's comments reveal is that there's a disagreement between the parties as to what inferences and conclusions you're going to draw when you listen to the expert opinions, but none of that changes the fact that, if we're right, one, that Mr. Franklin has demonstrated that what we did was objectively prudent; and two, and arguably more importantly, that the plaintiffs have not demonstrated objective imprudence.

They have not identified any alternative course of action that would have been better for this fund. Their expert actuary, who's just a rebuttal witness, who has tried to poke various holes at mine, admitted at his deposition that he has

not done any analysis of some alternative policy that we could have, should have adopted, and he hasn't ruled out the possibility that this plan was sunk from the beginning and that anything we did would not have helped.

So in my view, this is an element of the case that the plaintiffs have to prove, that they cannot prove, and they cannot prove it just by saying that certain sectors are high relative to other plans. It's not only an issue of what our professional, the actuary, will say as to the proper way to measure the risk, but it also has to do with the legal standard because there's case law in this circuit, and there's DOL regulations that specifically say that the risk of a portfolio is evaluated as the whole. There's two aspects of this --

THE COURT: Right.

MR. RUMELD: -- decision, one is to target 8 percent returns instead of 7-and-a-half, and then 9 percent; and the second aspect of the decision is what portfolio mix will get you there.

So one of the things that both our actuary and our damages expert will show is that there were various ways to target 8 percent. Some of them involved more emerging market equities, some of them could have involved having more domestic equity and less emerging market equities. But they all had the same risk profile in the aggregate. With the benefit of hindsight, it turned out that emerging market equities didn't

do as well as domestic equity, and that's why we're here.

THE COURT: What will the experts say in terms of, not with -- look, you can have a plan that's in the hole, which your plan was. I think one of the questions is whether it was reasonable to think that they could, consistent with their obligation not to make things worse, target an 8 percent return, let alone a 9 percent return.

MR. RUMELD: I agree. That's the issue, and what the expert says is he evaluates the rewards in the long term, the increased probability of getting this 8 percent return.

THE COURT: The actuary does?

MR. RUMELD: Yes. Versus what is the risk of something really bad happening in the meantime by taking on that greater amount of risk. That's the analysis that's done. That's what he's prepared to explain to the Court, why, when you put all of this together, this was the optimal thing to do.

You have to keep in mind that the backdrop of this decision was the plan's actuary telling the trustees that if they continue to target 7-and-a-half percent, the plan will surely decline, a path towards eventual insolvency. So the status quo was not looking like a very good option here, which is what led to this whole discussion in the first place.

But, again, I get it. There's going to be a lot of back and forth. Their actuary is going to come in and he's going to say that Mr. Franklin's analysis is not good enough,

and your Honor is going to have to evaluate that. But I am telling you, at the end of the day, there was no offer of proof on the other side about another model that was better than this one that's been tested out by their experts. They haven't done that, and I think it's an essential flaw.

Let me just say two other things, and then I'd like to talk a little bit about the second claim. First of all, even if Mr. Schwartz is right, that there are some facts under there that are going to become relevant. So one of the things he's talked about is that he thinks the trustees influenced the consultants in terms of the asset allocation model. Okay? We think even the written record, we think, is demonstratively against that, and I've cross-examined their expert about that, and I think that we've already shown that.

But if your Honor hears from the experts, and it becomes apparent that there are certain factual assumptions that the experts are making that contribute to their opinions, I think your Honor is going to be way ahead of the game by fleshing out those issues in advance. Because if it becomes clear, as I think it will be, that their prudent process expert is basing a lot of her findings on the belief that Meketa, the investment consultant, was not on board with this 11 percent emerging market equity allocation, then you should focus your attention on hearing what the evidence is about that. Because I think you're going to find pretty quickly that that's just

wrong, that the expert is basing her opinion on a wrong fact.

So even if we have to proceed to the procedural prudence issues, why not proceed to them with a better understanding about what's really relevant, what's really important here and what's not.

Now, let me just make one other point, which goes to both claims. Which is, you're also going to hear a lot of expert testimony on damages and causation. The plaintiffs right now have damages claims in the hundreds of millions of dollars. Okay? We believe --

THE COURT: How big is this fund?

MR. RUMELD: Well, it started at about $2 billion --

THE COURT: Okay.

MR. RUMELD: -- and it's somewhere around 1.6, 1.7. I will say, the direction it's moving that's the problem.

THE COURT: Has it turned around?

MR. RUMELD: No. The fund is now in what we call critical and declining status --

THE COURT: Okay.

MR. RUMELD: -- which means that it's projected by its actuary to become insolvent within 20 years, which is a legislative trigger that allows it to make an application to the Department of Treasury for some form of relief that could include cutting benefits so that the fund can right itself. This is a new legislative thing that came into being in 2015.

THE COURT: Why is this happening? Are there just fewer musicians now?

MR. RUMELD: So this is another reason why I think your Honor would benefit from the actuary's testimony because he will explain, big picture, that the role that investment returns have in this and what other contributing factors there are.

We have older participants who are guaranteed fairly rich benefits. This plan once had what was called a $4 multiplier in terms of getting, for every dollar of benefit put in or contribution put in, a $4 return. It's now down to $1, okay, as a result of all the changes that have been made.

But basically, this is what we refer to as mature plans; that as participants age, you sometimes get into situations not much different than Social Security. When the Baby Boomers all become of retirement age, the money coming in may not be enough to take care of the people going out.

So this fund is looking at a situation where its deficit every year between the contributions and the benefit obligations is getting bigger and bigger, and you can see this looking into the future.

THE COURT: But is that because the number of musicians are going down?

MR. RUMELD: It's a combination of the number of musicians going down and an increasing number of retirees.

It's not necessarily musicians. It's those musicians who are contributing to this plan, who are unionized musicians and aren't just -- you know, you have to keep in mind that while we think in terms of like the orchestras, there are also many, many musicians who are like individual band leaders who have discretion whether they're going to participate in this plan. And as the benefit structure becomes poorer, the incentive to participate in this plan disappears. That was a big concern.

THE COURT: Sorry. We digressed.

MR. RUMELD: The last point I want to make as to why I think the expert testimony will be relevant is because I think it's going to show that there are some fundamental disconnects between the theory of the case on the merits and the damages theory.

So, for example, if, in fact, the plaintiffs want to prevail by saying we have too many emerging market equities or we had too many private equities, then there should be damages that are calibrated towards that. But what's happening in their damages models is they're capturing in all kinds of "but for" scenarios that capture the performance of other investments that aren't alleged to be imprudent at the time. Some investments did better, some did worse.

So it's another thing that we would try and evaluate with you upfront. It's even more so important with respect to the second claim. If you remember, there's two aspects of the

claim. The first aspect of the claim -- their expert presented a damages report that basically looks at how we would have performed if we didn't have any managed investments, if we used index funds --

THE COURT: Pure index, okay.

MR. RUMELD: -- in the sectors. But he has admitted, at his testimony in his deposition, that he doesn't have a problem with having managed investments in certain inefficient sectors of the economy. Where his problem is is that we had underperforming managers, and we didn't get rid of them. And that's, by the way, probably the most fact-intensive area of the case because you could go manager by manager, why did we keep him, why did we keep him so long, what did Meketa say about them, what about all of these e-mails where you're expressing misgivings about them?

But there is no damages model in this case that measures how much money we would have saved if we got rid of this, this and this manager sooner. The only damages model that's presented is a damages model that's based on a claim that their expert has walked away from, which is that we shouldn't have had any managed funds at all.

So we think that these issues should be fleshed out at the beginning because, frankly, your Honor, if it turns out that this case is worth only 10 or $20 million, rather than $250 million, maybe something will shake out here along the

way.

THE COURT: All right. I got you.

MR. SCHWARTZ: Okay. There's a lot to unpack, but I'll try to do this in a logical fashion. I think Mr. Rumeld made an insightful point.

THE COURT: Woo.

MR. RUMELD: Okay, that's new.

MR. SCHWARTZ: Now, I know I have everyone's attention, that if an expert is making opinions based on wrong facts, not really worth that much. And I think this shows why his proposal has everything backwards because what experts do is they take the facts as they are, and they have to have expert opinions that have fit to the facts.

And what this proposal to do to stage it the opposite way is, you're going to have experts talking in a vacuum about what they think. We disagree on the facts. I think he's all wrong on the facts; so I won't debate that too hard here, but you're going to get a lot of theoretical stuff from the experts, and at the end of the day, you won't be able to make a decision because you're going to have to know the underlying facts.

THE COURT: Let me interrupt you for a second. One of my questions on this is, I'm sure that there are facts as to which there is a disagreement. But am I wrong that are a lot of facts in this case as to which there is no disagreement?

That is, you know, when the board met, what decision they made coming out of that meeting, what the investment was, what the return on the investment was? I mean, kind of those core facts can't possibly be disputed.

MR. SCHWARTZ: Right, and that's why I think we both propose that we give your Honor a robust, a robust proposed findings of facts with underlying documentations and proof, but we have very different views and spins on those facts. Their experts, and I'll just give an example for their actuarial expert, since that seems to be the focus of Mr. Rumeld's pitch here.

First of all, we agree you have to evaluate the portfolio as a whole. We're not saying that you can never have EMEs at 6 percent or 11 percent or 15 percent. What we're saying is if you're taking domestic equities down from 40 to below 20, and then putting everything in these high-risk, volatile asset classes and illiquid asset classes, like EMEs and real estate and infrastructure and private equity at percentages that are unknown in the Taft-Hartley world or in the pension plan world, that's, as a whole, that's why the portfolio is out of whack and it's imprudent.

Now, Mr. Franklin has a theory, and you'll love his theory. His theory is --

THE COURT: Franklin is your expert or their expert?

MR. SCHWARTZ: That's the defense actuarial expert.

His wonderful theory --

MR. RUMELD: I think he's being sarcastic.

MR. SCHWARTZ: Yes. It's Mr. Rumeld's defense expert. Mr. Franklin's theory is -- and I'm sure if your Honor is a hockey fan. His theory is that at the end of the game, if you're behind by a goal or two, pull your goalie because it's better to lose by five or six or seven goals than it is to lose by just one goal.

And his theory for this pension plan and for a stochastic analysis is not a problem if these trustees take some Hail Mary shots in the end zone, take a lot of crazy risks because if the plan is going to go insolvent anyway, who cares if it goes insolvent with a hundred or $300 million more or a hundred or $300 million less because you're still insolvent. But all insolvent means is instead of getting a hundred percent of your vested benefits, you get maybe 90 or 80 or 70 or 60.

THE COURT: Yes, I get it.

MR. SCHWARTZ: So Franklin's opinion literally is it doesn't matter if they lost a hundred or three hundred million. By the way, this 300-and-plus million figure, if they would have just put their money in a Vanguard balanced index fund, that's where you get that number. We're not necessarily saying that's the right comp for this, but it just shows how far out of whack these trustees were with normal investing.

And so the whole issue about the stochastic analysis,

it doesn't say this is what you should do. It doesn't say this is prudent. All they claim it says is that not in five years or ten years or maybe even 15 years, but maybe between 15 years and 20, maybe you might have a slightly, slightly, on the very outer edges, less chance of going insolvent.

But again, Milliman, which was the actuary on the ground, said it's going to be more volatile; it's going to increase your risk of insolvency. Milliman never gave the kind of advice that -- they gave no opinions as to whether the trustees should adopt any of these allocations even after they did the stochastic analysis.

And even Meketa's Mr. Spatrick testified accurately that the stochastic analysis always understate the risks. Because it's just a mathematical fact that if you assume an EME or a private equity will have a higher rate of return, which is an assumption that we disagree with, but if you assume that, which these stochastic analyses do, then, of course, they're going to come out with, at the end of the day, maybe higher returns, but these analyses didn't even do that because there's virtually no reflection that there's any extra reward available for the materially increased risk.

So we don't think that there's any kill shot or even any good defense for Mr. Franklin and his actuarial opinions. And, in fact, Mercer, which is a monster actuary, at the very beginning, told the trustees, when it was analyzing all the

actuarial issues and analyzing the underfunded status of the plan and reached a conclusion that the plan was probably not going to make it, Mercer told the trustees, to go with a more aggressive investment approach was a highly risky roll of the dice.

So you're not going to make a decision based on expert testimony when we have a fact witness, Mercer, who has put in a report that it's a highly risky roll of the dice to do exactly what the trustees did, particularly when the trustees asked their own actuary Milliman, what do you think of Mercer's report? Milliman said: We have no objections to it from an actuarial perspective.

The interesting thing is, given that very specific piece of advice, highly risky roll of the dice, the trustees never -- either never bothered to tell Meketa and ask Meketa, what do you think of this, give us your opinion, we can't find any evidence as to Meketa giving any opinion on it. The trustees, according to the board minutes, were supposed to -- the union trustees were supposed to have gone back to Meketa to get some input from Meketa, but it either never happened or dropped down the memory hole or just disappeared from the face of the earth.

So how are we going to make a decision from hearing from experts, when you already have fact witnesses, Milliman and Mercer, which is going to be contradictory to what

Mr. Franklin is saying, and it's not going to get them anywhere. And at the end of the day, you're going to need to know what the facts are and make those fact determinations before any of this actuarial stuff comes into play.

MR. RUMELD: So --

MR. SCHWARTZ: Let me finish.

MR. RUMELD: Sorry.

MR. SCHWARTZ: With respect to the damages, our expert, Mr. Witz, has compared the actual results to a long laundry list of menus of what I'll call, you know, control allocations. The most -- and I don't want to use the word extreme, but the one that I mentioned before, just comparing to the Vanguard balance fund, that was one metric they can see what the difference is.

But he compared it to suppose -- suppose your Honor holds that the 2010 allocation was okay, and from 2011 forward, the allocations were wrong? We have that number, 2010 compared to the actual. He also compared suppose the 2011 allocation was at the outer edge of being okay, barely making it, and so it compares that as a control to the rest of them. And he compares --

THE COURT: That is, if they had just stayed steady?

MR. SCHWARTZ: Right, just stayed steady. So he's basically giving your Honor a menu of actual allocations that the trustees had at points in time, and so your Honor can

pretty much mix and match a liability determination with numbers. And he's also testified, and so has their damages expert because this is all in an Excel spreadsheet. If your Honor wants to change a number or change a date, that's literally a flip of a couple of buttons. We can get you those numbers, and there's no disagreement on the numbers.

So even on the active managers, suppose your Honor says, okay, maybe it was okay at the beginning, but they should have ditched them in a year or two. We just change the dates on the spreadsheet, the number crunches out. There's no real dispute on the methodology.

So if we go and have experts testify first, which very much like the asset allocation trustees did, I've never been in a trial, other than something like maybe if it's like a, is this product defective, maybe you want to have the expert talk about that because that's a threshold issue. In a case like this, where there's no threshold issue, having the experts first is going to be backwards, and at the end of the day, we're going to have to bring the experts back because after we have the factual portion of the case, the experts are going to have to come back and conform their opinions to what the facts were.

THE COURT: Well, I guess my question is, why isn't it a threshold issue whether what the plan adopted was prudent?

MR. SCHWARTZ: It is, but Mr. Franklin can't opine

about prudence. He's not opining about that. In order to determine whether the allocation on, I guess, an objective -- because this is not a process question, from an objective perspective is prudent, that's where you need the fact experts of Mercer, Milliman and the trustees because what you'll hear from the trustees is their thought process was if we need to get 8 percent long term to stave off insolvency, well, then let's construct a portfolio, any portfolio, to get that.

THE COURT: Hang on. So let me ask you something. I hear what he's saying. I hear what you're saying. Why isn't, as opposed to saying we're going to do experts and then fact, why isn't it that we're going to start with whether it was a prudent investment? And you want to call your actuary. He wants to call fact witnesses from Milliman and whoever --

MR. RUMELD: Because the objective prudence of the investment, not the procedural prudence -- my insightful comment about the relevant facts concern the procedural prudence, and I made that point because I think, as some of Mr. Schwartz's comments indicate, the facts can really go all over the place when we're evaluating procedural prudence.

THE COURT: But what --

MR. RUMELD: On objective prudence, your Honor, the facts about what the trustees were doing and thinking is not relevant. I would encourage your Honor to read the NYU decision, even though it's a very different kind of case

because Judge Forrest excoriated the defendants during the closing arguments because she found a lot of things wanting in the process. Okay? And nevertheless, she entered a decision dismissing all the claims, some of them based on an evaluation of the process, but some of them because, regardless of the process, there was nothing wrong with the decision that was made.

THE COURT: Okay. But then what is your response to Mr. Schwartz's argument that Mr. Franklin -- the actuary can tell me that if -- correct me if I'm wrong. The actuary can tell me that, based on all of his work on this plan, if the plan maintained a 7 percent return rate, it was going to go --

MR. RUMELD: Down.

THE COURT: -- insolvent.

MR. RUMELD: Yes.

THE COURT: I think they'll stipulate to that.

MR. RUMELD: He can also tell you --

THE COURT: I don't need expert --

MR. SCHWARTZ: We have that now.

THE COURT: I think everybody agrees to that.

MR. RUMELD: I'm happy.

THE COURT: I mean, I think the question is whether setting a benchmark at 7-and-a-half or 8, and then accomplishing it via the mix of investments that they adopted, whether that was prudent.

MR. RUMELD: Right, and in order to --

THE COURT: And how does the actuary help? I mean, correct me if I'm wrong, the actuary can say, I've crunched, who's in this plan, who's going to come in the plan, what the claims on the plan are going to be. In order to satisfy the claims, you need a return of X so that you can pay a hundred percent of benefits for the next 20 years. What the actuary can't tell me is how you achieve that. What is the prudent way to achieve that?

MR. RUMELD: Well, first of all, he can evaluate the -- he evaluates the risk, and in doing so, he can explain what the difference is between the risk of one investment and the risk of investments in the aggregate, and that's all part of the actual --

THE COURT: Say that again.

MR. RUMELD: The actuary will take a portfolio and evaluate the risks versus the rewards, which both sides agree is what should be done.

THE COURT: That is the --

MR. RUMELD: And compare it to alternative portfolios, and what the risks and rewards would be of those alternative portfolios.

THE COURT: So has he compared the mix of investments that this plan adopted to the risk and reward likely of plans that had a more moderate --

MR. RUMELD: Yes, and --

THE COURT: Okay.

MR. RUMELD: And again, baked in there, and, you know, it's hard to do this without them testifying, okay, but baked in there is the explanation that when you do this analysis properly, you don't say, oh, 11 percent emerging market equities, they have such and such standard deviation.

You say, how does that fit in the overall package, and what's the standard deviation of the overall package, and what's the risk that we are going insolvent next year if we have a really bad day, or the risk that we are going to go down in some irretrievable way, and what's the potential benefit that this mix will have in the longer run.

What the actuary basically does is he looks at the direction of the funded status of the plan under one portfolio package versus others, and this is why I'm trying to say that I think when you finish listening to the experts, you'll realize that it's not proper to demonize a particular percentage investment in a particular sector because it's the package as a whole that's relevant for purposes of doing this analysis.

And, again, I want to emphasize that while we will respond to the criticisms of what Mr. Franklin does, the other side has not demonstrated that there's an alternative portfolio that would have been better for this fund. So on their burden to demonstrate causation that our allegedly imprudent process

led to a decision that was made that a prudent fiduciary would not have made or could not have made, I don't think they can sustain that burden of proof.

MR. SCHWARTZ: Can I respond to that?

THE COURT: How would you prove that? Yes.

MR. SCHWARTZ: That's just not true. That is simply not true. We have the actual numbers, and their economic expert has basically agreed with the numbers, that if they had an asset allocation that had domestic equities even lower than what the average ranges but still within a reasonable range, and with various actual asset allocations the trustees did, that there's been between a hundred and three hundred million of damages. We have absolutely --

THE COURT: I'm sorry. So if I said, all right, tell me what your evidence is, who are your witnesses --

MR. SCHWARTZ: Okay.

THE COURT: -- that are going to prove what the prudent -- you have to prove that their allocation was not prudent.

MR. SCHWARTZ: Yes.

THE COURT: So what's your evidence that it was not prudent? It's not simply that it lost money.

MR. SCHWARTZ: Right. The evidence is that the -- and, obviously, we have to do both process and objective prudence at the same time.

THE COURT: Let's just start with objective.

MR. SCHWARTZ: Okay. The evidence is that the trustees went on a risk rampage, and what they did was they took increasing risks, doubling and tripling down.

THE COURT: I know that. I remember -- I vaguely -- I don't remember the facts as well as you do, but I got the basic premise. But you've got to show that the result -- like you're not happy with how they got there, but that the result, that is the actual asset allocation on whatever years you're complaining about, was imprudent.

MR. SCHWARTZ: Right.

THE COURT: So what's the evidence that the actual allocation was imprudent? Is it just your expert that says no other Taft-Hartley plan had an allocation that was even close to this, ergo, it's imprudent?

MR. SCHWARTZ: Well, it is that our experts and their experts and their fact witnesses and their advisors all say no one else has this allocation. The fact that Meketa says they have the most aggressive asset allocation of any of our clients, and Meketa panicked in 2006 and said, do you risk your entire portfolio? The fact that advisors all were getting out of EMEs. It's the fact that the trustees' own words and documents and e-mails show that they picked the allocation in reverse engineered process by setting a target return simply to match what they thought they needed to avoid insolvency, and in

just getting an allocation, any allocation, that would try to meet that return, and --

THE COURT: Well, you're saying that was imprudent? That it was imprudent to set a target investment rate that would avoid insolvency?

MR. SCHWARTZ: It was imprudent to make that the -- such an overriding factor that the trustees went and deviated from, oh, let's try to get a little more money and be a little more aggressive -- that could be a very prudent decision that individual investors or pension plan trustees can make, let's try to be a little more aggressive.

But when you start saying I want to be a little more aggressive, if you start going way out into the stratosphere, then you've got to come back and say, okay, the decision, the driving decision can't simply be, oh, I want to take a shot, no matter what the shot is, to stave off insolvency. This is the Franklin fallacy where, well, we don't care if we loose a hundred or $300 million because the insolvency, the yes/no insolvency, meaning a hundred percent payment of benefits versus some smaller percentages, is the be all, end all.

And the problem that these trustees had, which is the fundamental imprudence that they did, was they got blinded by not wanting to face the fact that absent either increased employer contributions or decreased benefits, the plan, at the end of the day, probably was going to have insolvency problems.

They got blinded by the fact that, since they weren't going to tackle those issues, which were the, what I'll call, the structural issues, they did exactly what Mercer told them not to do, which is they took more increasing and increasing risks, the kinds of risks that no one else would have done.

And so we're going to prove it out of the trustees' own mouths, their on-the-ground advisors' mouths, and through our experts' mouths that the asset allocations were crazy and --

THE COURT: But I hear you saying that your case is not entirely that the asset allocations were imprudent. It is that it was imprudent to aim for a return that would avoid insolvency, that that was imprudent.

MR. SCHWARTZ: Let me give you some nuance on that. The asset allocations themselves are crazy under any set of circumstances.

THE COURT: I got that.

MR. SCHWARTZ: The reason why the target return drove the asset allocations is this --

THE COURT: But I'll -- let you finish, but is it your position that the target return was itself imprudent?

MR. SCHWARTZ: It is.

THE COURT: Okay.

MR. SCHWARTZ: And the reason it is is in the actuarial world, with 7-and-a-half percent going down, and

Mr. Brockmeyer, the lead co-chair of the trustees, he said that in an article before this case ever started. Their actuary said that. Everyone says that the target returns were going down.

THE COURT: What do you mean, the target returns were do going down?

MR. SCHWARTZ: I mean, the actuarial assumption target returns. You know, the norm in the old days, I'll call them, was 7-and-a-half percent, when the fixed income because you can't get money from interest rates for fixed income, when that went down, the actuarial assumptions and the target investment returns were trending downward from 7-and-a-half percent down lower, the trustees went in the opposite direction. And here's how that has an impact --

THE COURT: So, again, so your position really is that even if I accept the actuary's testimony that in order to keep this fund solvent you needed a 7-and-a-half percent, 7-and-three-quarters, whatever, return, your view is that was imprudent because in order to get there, the amount of risk that you have to build into the plan is too high for a Taft-Hartley plan?

MR. SCHWARTZ: Right. It was 8 percent, and then 9 percent, and those numbers aren't prudent, and they're imprudent -- and this is the real reason why they're imprudent because, again, it's not imprudent in a vacuum. But what do

you need to do to get those numbers? Meketa told the trustees, there's no way to do it. We can't do it. We tried the math. We can't do it unless we ramp up EMEs, we ramp up private equity.

They have an economist expert, a Mr. Carron, and Mr. Carron actually tries to blame Meketa for the EME fiasco because he says they could have -- Meketa could have constructed an 8 percent portfolio. He can't touch the 9 percent portfolio because he can't make the math work, but he said Meketa could have constructed an 8 percent portfolio without increasing the EMEs above 6 percent.

And since he has no investment expertise, but he's good at math. He's a smart mathematician. His theoretical math showed that the other way that Meketa could have done it is is if they would have ramped up real estate and private equity, so about 36 percent of the plan would be in real estate and private equity, two illiquid categories, and another six percent of EMEs on top of that, to which our expert, and anyone else who looks at it says, it's crazy for an underfunded plan to have 36 percent in illiquid assets.

He proves by his exercise it was impossible, just like Meketa said, it was impossible at that target return, given the capital assumptions that they were working with, to construct a portfolio that doesn't create this bizarre portfolio that no one in the world would ever do, and it's imprudent on its face.

So I'm not saying that the trustees were wrong to have said, oh, god, if we need 8 percent, can't we try to get 8 percent? But then when they go and see what those portfolios look like, they had to step back and say, we can't go into crazy land, and that's where they went into. And so that is what I called the very beginning of this.

And Mr. Franklin's opinion, all his opinion is and all this stochastic analysis, it doesn't show you're going to do better or make more money with this crazy asset allocation. All it says is on the margins you might have a few more paths where you might be less insolvent or might barely avoid insolvency. But there's no risk/reward -- when you look at the evidence on that, you're not going to find any risk/reward tradeoff where the upside reward is big enough where anyone would say, oh, that makes sense to do it.

THE COURT: But --

MR. RUMELD: May I?

THE COURT: Let me just ask you a question, and then I'll let you respond.

Does the actuary measure that, that is, the likelihood of hitting on the upside is worth the risk on the downside?

MR. RUMELD: Yeah, the whole point of the stochastic modeling is to run 10,000 scenarios of interest rates moving this way, that way, markets moving up, markets moving down, and in each scenario to look at what the outcome is.

THE COURT: To look at the percentage, right.

MR. RUMELD: What happens to the funded status of the plan? Will the fund get in some irretrievably bad position or, conversely, will the fund be better off at the end of the day? So it's an exercise in trying to evaluate risk and rewards in as competent a way that it can be done.

Now, Mr. Schwartz's rebuttal expert, he's got some problems with how Mr. Franklin did this, and that's okay. We can go back and forth that, but at the end of the day, your Honor's job is to decide whether the plaintiffs have demonstrated that what we did was objectively imprudent, meaning somebody should have done something else. Okay?

And that question, you know, I make my statement and then you ask Mr. Schwartz what about it, and then he responds by talking about what the trustees were told and what they were thinking or what they were doing. And, your Honor, all of that is relevant to the procedural issue, but it's not relevant to the substantive issue.

And frankly, you know, a few minutes ago, just by way of illustration, he talked about this Mercer advice. Okay? It's the fact that the plaintiffs have been clinging to throughout this case. Mercer was not an advisor to this plan. Mercer was retained by one of the employer organizations to see whether it would be worthwhile to withdraw from this plan, and they basically got told, no can do because you're going to have

so much withdrawal liability because of the funded status of the plan.

And in the course of doing that, there's a slide presentation where they talk about what some other options can be, and they point out that if you increase your investment returns, it could be very risky. Okay? It wasn't advice to the trustees. We have no idea of what context in which they made this statement, but because of this one line on page 14 of a slide slow, they want to say that our trustees were procedurally imprudent.

And, you know, if your Honor let's them, they're entitled to do that if we try the procedural prudence part of the case, but it is an illustration about why the factual assertions in the responses are going to be incredibly robust and time consuming if we get to the procedural prudence part of this case.

So what I'm urging your Honor to consider is, one, we don't have to consider procedural prudence at all, if I'm right on objective prudence, and also if I'm right about the lack of the connection with the damages, which I'm happy to talk about some more; and, two, even if we go to the procedural prudence part of this case, your Honor is going to have such a clearer sense of what the facts are that are really driving the bus here and what aren't.

Because Mr. Schwartz is right, each of the experts are

making opinions based on certain assertions, certain citations to the factual record and overlooking other citations to the factual record. And once it becomes a little clearer what we're disagreeing on that's contributing to the procedural prudence findings, I think your Honor is going to be able to control this case much better than if everybody just comes in with everything they think is relevant in this case.

THE COURT: Okay. Y'all have given me a lot to think about. Let me also, on Daubert, who wants to make a Daubert motion? You do?

MR. RUMELD: So that would be me. I don't want to make a Daubert motion. I'm well aware that in a nonjury trial --

THE COURT: It doesn't make a lot of sense.

MR. RUMELD: Right. And the only reason I would think it makes sense is because for all the reasons I've said today, I think there are aspects of this case that cannot succeed without competent expert testimony. So if your Honor will hear the experts first and make her decisions on objective prudence and on some of the damages issues, then I don't have to make any Daubert motion. You'll hear them and you'll decide whether they're persuasive or not.

But if I'm not left with that alternative, I would rather make the Daubert motion because if I'm right, that Mr. Witz, their only expert, is not competent to testify to

objective prudence, then I think your Honor is going to conclude there's a lot of testimony we won't need on the factual side here.

But my strong preference would be to let your Honor have as much information as she needs about the experts. I just don't want to go through days and days of fact testimony that may turn out to be unneeded here.

THE COURT: Okay. I hear you.

MR. SCHWARTZ: And I agree that, in our experiences in bench trials, that Daubert motions tend to be a total waste of time, other than for perhaps the purpose of trying to help educate a Court if the Court hasn't been exposed to more of the case before, but that's not this case. You're very knee deep in the facts.

I don't think we should be doing Daubert motions, but if we are and he is filing one, I'm filing between two and three. We haven't deposed the last expert, but we have grounds to knock their experts out both -- one, on qualifications, both of them on the fit of their opinions, but I don't think that makes sense because it's going to be work that you will do, and I suspect at the end of the day you're going to say, that's all interesting but I probably, as a fact finder, can handle it a lot better with a lot less appellate risk for everybody.

Just listening to the conversation, from day one, this is a real substantial case. It's a big case. I get Mr. Rumeld

that he has his viewpoints on his defense. We're confident in our opinions. The bottom line is, I think we just need to try this case, and I think that having a convoluted, backwards trial, to me, just doesn't make sense.

We're the plaintiffs. We should be allowed to just present our case. Mr. Rumeld can present the defense. The order will be as the order is in most trials, and I guess I'm concerned that the more we overthink this, the more we're going to get into what we're trying to avoid, which is a lot more work, which ends up being a lot of wasted work instead of if we just try the case, maybe it will at least just pull off the Band-Aid, one and done.

THE COURT: Okay. I'm not sure what the right answer is today, but I don't have to decide it right now. So what I would like is -- I'm going to tell you what I'm thinking. I'm happy to hear you why this doesn't make sense, but I want from the parties by the end of the year, so by December 31st, a statement of stipulated facts and conclusions of law; so the things y'all agree on.

And then plaintiff's findings of facts and conclusions of law, and defendants findings of facts and conclusions of law. So I don't want you to duplicate the things that you agree on. So that's by December 31st.

MR. KRINER: Excuse me, your Honor, three separate?

THE COURT: Three separate documents, stipulated

findings of fact and conclusions of law, plaintiffs findings of facts and conclusions of law, and defendants findings of facts and conclusions of law, proposed. And a pretrial memo, how many pages do you think you need for your pretrial memo?

MR. RUMELD: I know I'll make it fit the requirements, but I'm thinking 20 or 25 pages, but I'm not locked into it.

MR. SCHWARTZ: I know shorter is always better. I can see more being useful in this case.

MR. KRINER: Does your Honor have a preference?

THE COURT: I was thinking 25 pages. That strikes me as a nice amount.

MR. KRINER: The point is to educate your Honor.

THE COURT: Correct.

MR. RUMELD: And also, if we're all submitting proposed conclusions of law, in my experience, a lot of the legal arguments are already expressed there; so I find that the brief is really just to get a little deeper on some of the issues that may be dealt with in a more cursory way than in the proposed conclusions of law.

THE COURT: Okay. So a 25 page limit.

So one question I have for this trial, is one way -- and I have never done this in a bench trial, but I know that some of my colleagues do -- is have the direct testimony be prepared via sort of a written document. The question is whether that can be done here, given the fact that you're

calling the defense witnesses.

MR. SCHWARTZ: Right. I don't think it will work. We would also object to that, and --

THE COURT: I'm not usually in favor of it, and so do you have a different --

MR. RUMELD: No, I --

THE COURT: I mean, I don't know how you would do it when the defense --

MR. KRINER: That's the problem, your Honor.

MR. RUMELD: I've done it, but it was -- in my view, it was a bad experience, and I don't know that it saved a lot of time at the end. I mean, the difficulty here is the plaintiffs have deposed all the trustees, or many of the trustees, and I understand the plaintiffs may want to submit, you know, a lot of deposition testimony because they've already testified.

I haven't deposed my people. We're going to want them to tell the story their way, particularly if we are doing procedural prudence and there's hundreds of millions of dollars hanging over their heads.

THE COURT: Right.

MR. RUMELD: It's going to be very important for us to present as robust a picture as possible about what that process was, and I don't think affidavits are going to do the trick.

MR. KRINER: Your Honor, I've done a lot of bench

trials with most of the witnesses I'm calling in my case are directors on the other side of the case from me, and it's always we're calling them in their case as if on cross. I don't think with that other procedure --

THE COURT: I am persuaded. Okay.

MR. RUMELD: I will say that one of the concerns I have is because I certainly don't want to be the one who says our witnesses have to be called multiple times, but for various reasons that I have said, I think when the plaintiffs have rested their case, we may want to make a motion that they haven't sustained their burden on some or all of the issues, and it gets a little more convoluted if I'm already putting on my case because he's called my witnesses.

THE COURT: That is entirely up to you. There is utility, particularly if you have witnesses who are not particularly available, to getting all their testimony in when they're on the stand the first time, but I'm agnostic. I can also understand, from a strategic perspective, why you might not want to do that. For some trial reasons, there's utility to not doing it that way. Specifically, you shouldn't be leading your own witnesses, but you're entitled to if you're crossing on what he's brought out.

So I'm agnostic. That, to me, the lawyers who are trying the case get to decide that.

MR. SCHWARTZ: And we --

THE COURT: You've indicated -- hold on.

MR. SCHWARTZ: Yes.

THE COURT: You indicated that some of your witnesses may have difficulty being available. I am fine with them testifying via video link. I'm not crazy about them testifying via prior videotaped deposition. The advantage of a bench trial is that I get to ask questions, and I can't do that if they're in a canned videotape.

MR. SCHWARTZ: Okay. And --

THE COURT: But we can set up --

MR. RUMELD: I'm not sure we're anticipating any issues right now. I think he was just reserving the point.

MR. SCHWARTZ: Right. We don't know of any testify who can't testify live. We just anticipate if that happens, that we do whatever gymnastics we need to to make it work. And I agree, having a video -- and we've done this before in other trials. That's best for the judge. I think it's best for everybody to get better testimony that way.

THE COURT: I agree. All right. So you had proposed to do the trial the first quarter of 2020. I don't think I can do that. I've got a busy winter, but what I would like to do is shoot for the spring of 2020. So my plan -- this could change but assume that it will not; it could change after I get your findings of fact and conclusions of law and pretrial memoranda -- is we'll have a final pretrial conference on March

the 12th at 10:00, and trial will begin April 20th, which I think is after Passover. I think I counted it right, but you double-check.

MR. SCHWARTZ: I only brought my calendar through the end of the year, but that should work for us.

MR. RUMELD: At the risk of being difficult, Passover for some is an eight-day holiday; so if you're measuring from the first day of Passover --

THE COURT: Passover is the 8th.

MR. RUMELD: And you wanted it the 20th?

THE COURT: The 20th.

MR. RUMELD: Thank you. That would be great.

THE COURT: Okay. March 12th is during purim. I have not checked purim.

MR. RUMELD: It is not a --

THE COURT: It's not a stay-at-home?

MR. RUMELD: No, it's not a stay-at-home holiday. Please don't quote me on that.

MR. SCHWARTZ: We'll have a party.

THE COURT: You have the special rabbinical exemption.

Okay. So trial on the 20th, and we'll talk at the final pretrial conference on how we're actually going to stage the trial, whether we're going to do something different or whether we're going to do as you propose, just a standard trial, call your witnesses.

I will let you know, I probably will let you know before then which way I'm going. My view is that because, on these sorts of Daubert issues, it's almost always necessary to have a hearing on the expert, it's very difficult to decide these things just on paper. And so since it's a bench trial, you can say this expert should be excluded because he doesn't know what he's talking about, but as a practical matter, we're going to have a hearing during the course of the trial anyway.

So I'm not sure that we're really gaining much, other than perhaps briefing on why I should disregard them, but we can talk about that as we get closer. Okay?

Anything from the plaintiffs?

MR. SCHWARTZ: No.

MR. KRINER: Your Honor, I have one question. Does your Honor have a date by which we should submit the class memorandum of law?

THE COURT: Yes. How long do you want to do on that? Because the defendant is taking the laboring oar on that.

MR. KRINER: We'll do that, your Honor. It's going to be our memorandum and motion.

THE COURT: It doesn't need to be a motion. It sounds to me like it is stipulated.

MR. KRINER: Okay. Very good.

MR. RUMELD: I tend to think, whether it's you or us, there should be some brief that lays out what the grounds are.

THE COURT: Yes, I'd like a memo that kind of lays out what, if any, notice requirements there are, why we're doing this, essentially what you started the presentation you made at the very beginning.

MR. RUMELD: Right. It does seem that since we have a few months to play with, I don't see why we shouldn't make an end-of-summer deadline for this.

MR. KRINER: Is that sufficient for your Honor?

THE COURT: Yes, that's fine.

MR. SCHWARTZ: Okay. We have some depositions coming up in the next couple of weeks.

THE COURT: So why don't we say September the 6th?

MR. KRINER: Very good.

MR. RUMELD: There was one other issue --

THE COURT: Okay.

MR. RUMELD: -- that was mentioned in our letter, which has to do with this Article III issue and just -- and really go over --

THE COURT: This is the case the Supreme Court took?

MR. RUMELD: Correct. All we wanted to do was alert your Honor to the issue.

THE COURT: I appreciate that. It may be decided before -- I mean given the fact that this is --

MR. RUMELD: It's possible.

THE COURT: -- kicked off into the spring, and

depending on how that argument goes, we may say this should be kicked off a little further and let's see what the Supreme Court has to say, but we don't need to do that right now.

MR. RUMELD: We agree.

THE COURT: Something had flitted into my head and then it flitted back out.

Anything further from the plaintiffs?

MR. SCHWARTZ: No.

THE COURT: Oh, I know what it was, and I think the answer is no, because you've done some of -- each time you thought you could have a settlement conference, you've decided against it. Right now, y'all are just too far apart, right? You're in the hundreds of millions of dollars, and they're in the "that's not going to happen."

MR. SCHWARTZ: We're too far apart. I don't want to put any numbers on that because there are practical realities, but right now, it appears that nothing is happening on settlement. But we've had multiple sessions with our mediator, and it just didn't work.

THE COURT: Okay. Is there any insurance here, or are we talking about people's individual --

MR. RUMELD: Well, there is insurance.

THE COURT: Okay.

MR. RUMELD: It's not a secret, but it is also true that, depending on the outcome of the claims, we may be well

above the remaining insurance limits and that is one of the complicating factors.

THE COURT: Indeed.

MR. RUMELD: You know, and it's, in fact, one of the issues that I didn't go back on here, was the comments I made in the letter about the individual liability because that's one of the reasons why that becomes a very important issue.

Each of these people is potentially personally out-of-pocket, and that's why we do believe there's going to need to be, whether it's in separate proceedings or the same proceeding, some additional time and evidence devoted to who amongst the trustees is responsible for what, because I think that's a little more complicated as well.

So I would just ask that you take a look at what we wrote on that, but we have time to discuss the issue.

THE COURT: I did, but I thought there's some bigger issues that have to be decided before we get to who's writing what checks, like whether they can prove that anybody is writing a check.

MR. RUMELD: I would say in response to the question about settlement prospects is, one, we are keeping the mediator apprised but, two, regardless of how one evaluates the size of the delta, I was left with the impression that there has to be some rulings in this case before somebody's position moves, which is one of the reasons why I was making the suggestion I

was making.

THE COURT: Got it. I understand. Okay. All right. Anything further from the defense?

MR. RUMELD: No. Just our thanks for taking all this time.

THE COURT: Thank you all. Thank you both. Thanks so much.

MR. SCHWARTZ: Thank you, your Honor.

(Adjourned)