THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 1:16-cv-00175-REB-CBS

DEBORAH TROUDT, *et al.*,

Plaintiffs,

v.

ORACLE CORPORATION, *et al.*,

Defendants.

DEFENDANTS' MOTION TO STRIKE PLAINTIFFS' JURY DEMAND

Defendants (collectively, "Oracle"),[1] pursuant to Federal Rule of Civil Procedure 39(a)(2), respectfully submit this motion to strike Plaintiffs' jury demand.[2]

INTRODUCTION

Plaintiffs allege that Oracle breached its fiduciary duties under ERISA in administering the 401(k) plan Oracle offers to its employees (the "Plan"). Now that the Court has ruled on Oracle's Motion for Summary Judgment [#179], only a portion of Plaintiffs' claims remains for determination at trial. For these surviving claims—like all claims in the Amended Complaint [#84]—Plaintiffs seek equitable remedies under ERISA Sections 502(a)(2) and (a)(3), 29 U.S.C. §§ 1132(a)(2)-(3), and demand a jury trial. But these claims should be tried to the Court, not a jury.

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[1] Defendants include Oracle Corporation, the Oracle 401(k) Committee, Gayle Fitzpatrick, John Gawkowski, Dan Sharpley, Peter Shott, Mark Sunday, and Amit Zavery.

[2] Pursuant to D.C.COLO.LCivR 7.1, counsel for Oracle conferred with counsel for Plaintiffs on March 6, 2019. Counsel for Plaintiffs indicated that they intend to oppose this Motion.

Plaintiffs' jury demand contradicts well-settled authority, including Tenth Circuit precedent, holding that jury trials are unavailable under ERISA. *See, e.g.*, *Adams v. Cyprus Amax Minerals Co.*, 149 F.3d 1156 (10th Cir. 1998). Indeed, "[t]he Tenth Circuit has repeatedly noted there is no right to a jury trial in ERISA cases because the statute's benefits are inherently equitable, not legal in nature." *Gernandt v. SandRidge Energy Inc.*, 2017 WL 3219490, at *11 (W.D. Okla. July 28, 2017) (granting motion to strike jury demand) (citing *Graham v. Hartford Life & Acc. Ins. Co.*, 589 F.3d 1345, 1355 (10th Cir. 2009)). The Tenth Circuit is not alone: every U.S. Court of Appeals that has considered the question has held that no such right exists.[3] Based on this same authority, over the past two years, no less than seven district courts have rejected jury demands in similar ERISA breach-of-fiduciary duty cases brought by Plaintiffs' same counsel. The same result is appropriate here.

BACKGROUND

As set forth in the Amended Complaint [#84], Plaintiffs have claimed that Oracle breached its fiduciary duties of prudence and loyalty under ERISA Section 404, 29 U.S.C. § 1104, by: (1) allowing the Plan to incur "excessive" recordkeeping costs; and (2) including "underperforming" investment options on the Plan's investment menu. *See* [#84], Am. Compl. ¶¶ 81-98. Plaintiffs also claimed that the same fiduciary conduct

[3] *See, e.g.*, *Hampers v. W. R. Grace & Co.*, 202 F.3d 44, 54 (1st Cir. 2000); *DeFelice v. Am. Int'l Life Assurance Co. of N.Y.*, 112 F.3d 61, 64 (2d Cir. 1997); *Nat'l Sec. Sys., Inc. v. Iola*, 700 F.3d 65, 79 n.10 (3rd Cir. 2012); *Biggers v. Wittek Indus., Inc.*, 4 F.3d 291, 298 (4th Cir. 1993); *Borst v. Chevron Corp.*, 36 F.3d 1308, 1324 (5th Cir. 1994); *Reese v. CNH Am. LLC*, 574 F.3d 315, 327 (6th Cir. 2009); *Mathews v. Sears Pension Plan*, 144 F.3d 461, 468 (7th Cir. 1998); *Ibson v. United Healthcare Servs., Inc.*, 776 F.3d 941, 947 (8th Cir. 2014); *Thomas v. Or. Fruit Prods. Co.*, 228 F.3d 991, 996–97 (9th Cir. 2000); *Broaddus v. Fla. Power Corp.*, 145 F.3d 1283, 1287 n.** (11th Cir. 1998).

constituted certain "prohibited transactions" under ERISA Section 406, 29 U.S.C. § 1106. *Id.* ¶¶ 99-103.

On March 1, 2019, the Court entered an Order [#179] granting Oracle's motion for summary judgment, in part. The Court dismissed Plaintiffs' recordkeeping costs and prohibited transactions claims in their entirety. *See* [#179], Order re: Defendants' Motion for Summary Judgment. The Court also dismissed Plaintiffs' investment performance claims to the extent they are based on Oracle's investment in the PIMCO Fund and decision to include the TCM Fund in the Plan. *Id.* Plaintiffs' only remaining claims are those based on Oracle's (1) allegedly imprudent retention of the Artisan Fund between January 22, 2010 and June 22, 2015; (2) allegedly imprudent retention of the TCM Fund between January 22, 2010 and April 8, 2013; and (3) alleged failure to monitor the Plan fiduciaries responsible for the foregoing alleged breaches. *Id.* at 29.

Plaintiffs bring these surviving claims under ERISA Section 502(a)(2) and (a)(3), 29 U.S.C. § 1132(a)(2)-(3). *See* [#84], Am. Compl. ¶¶ 3-4, 42-43, 76-77. Section 502(a)(2) authorizes plan participants to sue for the relief provided under ERISA Section 409, 29 U.S.C. § 1109. Section 409(a), in turn, provides that a plan fiduciary who breaches his or her duties "shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of any such fiduciary which have been made through use of assets of the plan by the fiduciary." *Id.* § 1109(a). A fiduciary also "shall be subject to such other equitable and remedial relief as the court may deem appropriate[.]" *Id.* Section 502(a)(3) permits a participant to seek an injunction or "other appropriate equitable relief." *Id.* § 1102(a)(3).

Plaintiffs' Amended Complaint seeks a litany of equitable remedies: a declaration that Oracle breached its fiduciary duties; the removal of Plan fiduciaries who breached any duty under ERISA; an injunction against future breaches of duty; any accounting necessary to remedy the Plan's losses; a "surcharge" of "all amounts involved in any transactions" that violated ERISA; "equitable restitution" of Plan losses; and "any other and further equitable or remedial relief, as the Court deems appropriate." *See* [#84], Am. Compl. at 39-41 (Prayer for Relief).[4]

ARGUMENT

I. The Seventh Amendment Ensures a Jury Trial for Legal, Not Equitable, Relief

Rule 39(a)(2) directs a court, "on motion or on its own," to strike a jury demand where "there is no federal right to a jury trial." Fed. R. Civ. P. 39(a)(2). ERISA itself does not grant a right to a jury trial, nor does it contain evidence of any Congressional intent to do so. *See Adams*, 149 F.3d at 1158.

Plaintiffs' demand therefore hinges on the Seventh Amendment's guarantee of a jury trial for "suits at common law." *See* U.S. CONST. Amend. VII. The Supreme Court is clear, however, that the Seventh Amendment applies only where ***legal*** rights are adjudicated, not where equitable rights are at issue and equitable remedies will be administered. *See, e.g.*, *Chauffeurs, Teamsters & Helpers, Local No. 391 v. Terry*, 494 U.S. 558, 564-65 (1990); *Granfinanciera v. Nordberg*, 492 U.S. 33, 41 (1989).

To determine whether a claim is legal or equitable, courts evaluate "whether a

[4] Plaintiffs' Amended Complaint also seeks the equitable remedies of disgorgement and imposition of a constructive trust. *See* [#84] Am. Comp. at 40 (Prayer for Relief). However, we understand these forms of relief to be irrelevant given the recent dismissal of Plaintiffs' recordkeeping costs and prohibited transactions claims. *See* [#179] Order re: Defendants' Motion for Summary Judgment at 29-31.

particular statutory action more closely resembles an 18th century case tried in a court of law or one tried in a court of equity." *Adams*, 149 F.3d at 1159 (quotations omitted); *see also Granfinanciera*, 492 U.S. at 42. This analysis has two steps. First, courts examine the nature of the statutory cause of action, comparing it to its antecedents before the merger of law and equity. *Adams*, 149 F.3d at 1159; *see also Tull v. United States*, 481 U.S. 412, 417-18 (1987). Second, courts examine whether the remedy sought is legal or equitable in nature. *Id.* The nature of the relief sought is the "more important factor." *Adams*, 149 F.3d at 1159. Here, both Plaintiffs' surviving ERISA claims and the relief they seek are equitable, so they are not entitled to a jury trial.

II. Plaintiffs' Claims Are Equitable in Nature

Claims under ERISA are equitable, not legal, in nature. *See Adams*, 149 F.3d at 1160-61 (rejecting jury trial for ERISA claims, as an "ERISA action is analogous to a trust action and therefore equitable in nature"). This case, brought "by a beneficiary against a plan fiduciary (whom ERISA typically treats as a trustee) about the terms of a plan (which ERISA typically treats as a trust), is the kind of lawsuit that, before the merger of law and equity, [plaintiffs] could have brought only in a court of equity, not a court of law." *Cigna Corp. v. Amara*, 563 U.S. 421, 439 (2011) (citations omitted).

Indeed, ERISA derives primarily from the law of trusts. *See, e.g.*, *Varity Corp. v. Howe*, 516 U.S. 489, 496 (1996) (ERISA's "fiduciary duties draw much of their content from the common law of trusts."); *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 110 (1989) (recognizing "ERISA abounds with the language and terminology of trust law," and codified "certain principles developed in the evolution of the law of trusts"); *Graham*,

589 F.3d at 1356 ("Because Congress borrowed from the common law of trusts in enacting ERISA, trust law often provides a useful starting point [for] interpreting" its provisions.) (quotations omitted).

Accordingly, an ERISA breach of fiduciary duty claim is most analogous to a claim for breach of fiduciary duty by a trustee. *See, e.g., In re YRC Worldwide, Inc. ERISA Litig.*, 2010 WL 4920919, at *2 (D. Kan. Nov. 29, 2010) ("Plaintiffs in this case do not dispute that under the first step in the Seventh Amendment analysis [plaintiffs'] claims for breach of fiduciary duty are analogous to claims under trust law that have traditionally been decided by courts of equity."). And "at common law, the courts of equity had exclusive jurisdiction over virtually all actions by beneficiaries for breach of trust." *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 256 (1993); *see also Terry*, 494 U.S. at 567 (explaining that "an action by a trust beneficiary against a trustee for breach of fiduciary duty" was historically "within the exclusive jurisdiction of courts of equity"); *Perez v. Silva*, 185 F. Supp. 3d 698, 701-02 (D. Md. 2016) ("As to the first step, there is little doubt that actions brought under section 502(a)(2) are more akin to those actions traditionally adjudicated by Chancellors at equity than to those adjudged in courts of law.").

Given ERISA's trust-law and equitable antecedents, the Tenth Circuit is clear that this prong of the analysis weighs decidedly in favor of striking Plaintiffs' jury demand. *See Graham*, 589 F.3d at 1355-56; *Adams*, 149 F.3d at 1160-61; *see also In re YRC Worldwide*, 2010 WL 4920919, at *2; *Adair v. El Pueblo Boys' & Girls' Ranch, Inc. Long Term Disability Plan*, 2007 WL 2788614 (D. Colo. Sept. 21, 2007).

III. Plaintiffs Seek Equitable Relief Under ERISA Sections 502(a)(2) and (a)(3)

Plaintiffs fare no better under the second prong of the analysis, as the relief they seek under ERISA Sections 502(a)(2) and (a)(3) is plainly equitable in nature. As noted, Plaintiffs seek various forms of relief, including a declaration of a fiduciary breach, an injunction, removal of fiduciaries, an accounting, "surcharge," "equitable restitution," and "other and further equitable or remedial relief, as the Court deems appropriate." *Supra* at 3-4. Under Supreme Court and Tenth Circuit precedent, this is equitable (not legal) relief.

To start, the types of relief Plaintiffs seek historically were available only in a court of equity. *See Adams*, 149 F.3d at 1162 (observing that, historically, "a beneficiary's remedy against a trustee *is exclusively equitable* unless the trustee has an immediate and unconditional duty to pay the beneficiaries," which does not apply here) (emphasis added). As the Supreme Court put it, a lawsuit "by a beneficiary against a plan fiduciary (whom ERISA typically treats as a trustee) about the terms of a plan (which ERISA typically treats as a trust) is 'the kind of lawsuit that, before the merger of law and equity, [a participant] could have brought only in a court of equity, not a court of law.'" *Amara*, 563 U.S. at 439 (citation omitted).[5]

Unsurprisingly, then, the various remedies Plaintiffs seek sound in equity. For example, Plaintiffs demand a "surcharge" to recover amounts involved in actions that were allegedly "improper" or "in violation of ERISA." [#84] Am. Comp. at 40 (Prayer for

[5] *See also, e.g.*, *Divane v. Northwestern Univ.*, 2018 WL 1942649, at *2 (N.D. Ill. Apr. 25, 2018) ("The relief plaintiffs seek is equitable, because the remedy they seek was available in equity prior to the merger of equity and law."); *In re YRC Worldwide*, 2010 WL 4920919, at *4 (denying jury trial for fiduciary breach claims under Section 502(a)(2), agreeing that "no common-law court in the colonial Anglo-American legal system would ever have entertained such a suit or granted such relief").

Relief). Historically, however, this "kind of monetary remedy against a trustee . . . was 'exclusively equitable.'" *Amara*, 563 U.S. at 441-42 (citations omitted); *see also In re YRC Worldwide*, 2010 WL 4920919, at *4 (order compelling fiduciaries to pay for losses resulting from alleged fiduciary breach was a form of surcharge, a traditionally equitable remedy). Plaintiffs seek declaratory and injunctive relief, fundamentally equitable remedies. *See, e.g.*, *Amara*, 563 U.S. at 440 (identifying injunctions as equitable relief); *In re YRC Worldwide*, 2010 WL 4920919, at *1-2, 5 (rejecting jury demand where participants sought "a declaration of breach" and injunctive relief); *Spano v. Boeing Co.*, 2007 WL 1149192, at *8 (S.D. Ill. Apr. 18, 2007) (same and collecting cases). Plaintiffs also seek "equitable restitution," which the Tenth Circuit has held is equitable. *See Adams*, 149 F.3d at 1162.

Plaintiffs may contend in response that they are entitled to a jury trial because they are seeking to recover a monetary award.[6] But that does not change the analysis: "the

[6] We expect Plaintiffs will rely on three Supreme Court cases—*Mertens*, *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204 (2002), and *Montanile v. Board of Trustees of the National Elevator Industry Health Benefit Plan*, 136 S. Ct. 651 (2016)—to make this argument. For one thing, "none of the three [above] cited cases addressed whether there is a right to a jury trial under ERISA." *Bell v. Pension Comm. of ATH Holding Co., LLC*, 2016 WL 4088737, at *2 (holding *Mertens*, *Knudson*, and *Montanile* did not support plaintiffs' claim to a jury in their ERISA Section 502(a)(2) suit). For another thing, while Plaintiffs may rely upon the Court's statement in *Montanile* that equitable remedies are "directed against some specific thing . . . rather than a right to recover a sum of money generally out of the defendants' assets" to argue that Plaintiffs are pursuing legal relief because they are seeking recovery from Oracle's general assets, *id.* at 658-59 (citations omitted), courts have repeatedly rejected this same argument. *See, e.g.*, *Gerandt*, 2017 WL 3219490, at *11 (rejecting plaintiffs' argument that "their remedy is legal in light of" *Montanile*, because "it is not clear that the Court's holding was meant to overturn the well-established precedent regarding the right to a jury trial under the claims asserted here"); *In re YRC*, 2010 WL 4920919, at *3 (in *Great-West*, the Court did not "overturn[ ] the traditional view that plaintiffs' claims are equitable claims arising under trust law for purposes of the Seventh Amendment"); *Will v. Gen'l Dynamics Corp.*, No. 3:06-cv-00698 [#90] (S.D. Ill. Aug. 29, 2007), at 7 ("Properly understood, neither *Mertens* nor [*Great-West*] requires a conclusion that the Seventh Amendment gives the right to a trial by jury in an action to recover money against a trustee for breach of duty for the benefit of an ERISA plan.").

fact that . . . relief takes the form of a monetary payment does not remove it from the category of traditionally equitable relief." *Amara*, 563 U.S. at 441-42. Indeed, the Tenth Circuit is clear that most monetary awards ***do not*** constitute a "legal" remedy for purposes of the Seventh Amendment analysis with respect to claims under ERISA, given that ERISA plaintiffs "have no entitlement to the benefits unless and until a court exercises its ***equitable powers***." *Adams*, 149 F.3d at 1161-62 (emphasis added); *see also Amara*, 563 U.S. at 441-42 ("Equity courts possessed the power to provide relief in the form of monetary 'compensation' for a loss resulting from a trustee's breach of duty," and these remedies are within the "equitable relief" available under ERISA); *LaRue v. DeWolff, Boberg & Assocs.*, 552 U.S. 248, 253 n.4 (2008) (ERISA Section 502(a)(2) may encompass claims for monetary loss to a plan, such as "lost profits," which is analogous to "the common law of trusts," under which "trustees are chargeable with . . . any profit which would have accrued to the trust estate if there had been no breach of trust") (citation omitted); *Millsap v. McDonnell Douglas Corp.*, 368 F.3d 1246, 1251 (10th Cir. 2004) ("In *Mertens* and *Great-West*, the Supreme Court made clear only equitable relief is available under [29 U.S.C.] § 502(a)(3). The Court laid to rest any suggestion that other relief may also be available under § 502(a)(3).").

In fact, both of the most common exceptions to the general rule that monetary relief constitutes a legal remedy apply here: (1) any monetary award would be "incidental to or intertwined with injunctive relief," and (2) any such damages would be "restitutionary." *Adams*, 149 F.3d at 1161. In *Adams*, the Tenth Circuit explained that the plaintiffs "ha[d] no entitlement" to the relief they sought "unless and until a court exercises its equitable

powers to declare [p]laintiffs eligible beneficiaries of the plan and thus order [d]efendants, as fiduciaries, to pay benefits." *Id.* at 1161-62. That is, "[a]bsent a favorable ruling (*i.e.*, equitable relief) on that issue, [p]laintiffs have no claim for money damages," meaning any claim for "monetary relief is inextricably intertwined with equitable relief." *Id.* So too here. Absent a favorable ruling sounding in equity—namely, that Oracle breached its fiduciary duties—"Plaintiffs have no claim for money damages." *Adams*, 149 F.3d at 1162; *see also In re YRC Worldwide*, 2010 WL 4920919, at *5 (a monetary award for fiduciary breach is inextricably intertwined with equitable relief because, as in *Adams*, "plaintiffs would not be entitled to money damages on behalf of the plan until they obtained a ruling that defendants breached their fiduciary duties—an issue traditionally within the Court's equitable domain.").[7]

For these reasons, courts across the country have rejected the right to a jury trial in cases brought under ERISA Section 502(a)(2) and (a)(3), because "a claim against a trustee for breach of trust to recover the resulting loss in value of the trust estate is an equitable remedy, not a legal one." *In re YRC Worldwide*, 2010 WL 4920919, at *5 (citing Restatement (Second) of Trusts §§ 197, 198, 205); *see also Spano*, 2007 WL 1149192, at *8 ("[T]he overwhelming weight of authority in the federal courts holds that actions under ERISA § 502(a)(2) . . . are equitable in nature for purposes of the Seventh Amendment jury trial right") (collecting cases).

[7] *See also, e.g.*, *Broadnax Mills, Inc. v. Blue Cross & Blue Shield of Va.*, 876 F. Supp. 809, 816 (E.D. Va. 1995) (for Section 502(a)(2), "any entitlement to monetary relief necessarily turns upon whether or not the fiduciary has breached its ERISA duties; thus, any relief sought is necessarily intertwined with the equitable process of resolving the ultimate issue—whether or not there has been a breach of fiduciary duty.").

Indeed, courts have rejected the right to a jury trial in at least 18 ERISA cases challenging 401(k) plan investments based on allegedly excessive fees or alleged underperformance, including at least seven in the past two years alone. *See, e.g.*, *Tracey v. Mass. Inst. of Tech.*, 2019 WL 1005488 (D. Mass. Feb. 28, 2019); *Clark v. Duke Univ.*, No. 1:16-cv-01044 [#107] (M.D.N.C. June 11, 2018); *Divane*, 2018 WL 1942649; *Henderson v. Emory Univ.*, No. 1:16-cv-02920 [#127] (N.D. Ga. Feb. 28, 2018); *Cates v. Columbia Univ.*, No. 1:16-cv-06524 [#140] (S.D.N.Y. Jan. 25, 2018); *Sacerdote v. New York Univ.*, No. 1:16-cv-06284 [#122] (S.D.N.Y. Dec. 19, 2017); *Pledger v. Reliance Trust Co.*, No. 1:15-cv-04444 [#100] (N.D. Ga. Nov. 7, 2017); *Daugherty v. Univ. of Chicago*, 2017 WL 4227942 (N.D. Ill. Sept. 22, 2017); *Bell v. Pension Comm. of ATH Holding Co. LLC*, 2016 WL 4088737 (S.D. Ind. Aug. 1, 2016); *Sims v. BB&T Corp.*, No. 1:15-cv-00732 [#72] (M.D.N.C. July 6, 2016).[8]

Likewise, numerous courts have rejected jury demands in similar fiduciary breach cases under ERISA involving only slightly different claims. *See, e.g.*, *Perez v. Silva*, 185 F. Supp. 3d 698, 704 (D. Md. 2016); *Bauer-Ramazani v. Teachers Ins. & Annuity Ass'n of Am.-Coll. Ret. & Equities Fund*, 2013 WL 6189802, at *11 (D. Vt. Nov. 27, 2013); *Ehlen Floor Covering, Inc. v. Lamb*, 2012 WL 1698351, at *2 (M.D. Fla. May 14, 2012); *Canestri v. NYSA–ILA Pension Trust Fund & Plan*, 2009 WL 3698111, at *1–2 (D.N.J. Nov. 5,

[8] *See also, e.g.*, *Beesley v. Int'l Paper Co.*, 2009 WL 260782 (S.D. Ill. Feb. 4, 2009); *Martin v. Caterpillar, Inc.*, No. 1:07-cv-01009, [#106] (C.D. Ill. Jan. 22, 2009); *Kanawi v. Bechtel Corp.*, No. 3:06-cv-5566 [## 578, 579] (N.D. Cal. Oct. 10, 2008); *George v. Kraft Foods Global Inc.*, 2008 WL 780629 (N.D. Ill. March 20, 2008); *Will v. Gen'l Dynamics Corp.*, No. 3:06-cv-00698 [#90] (S.D. Ill. Aug. 29, 2007); *Abbott v. Lockheed Martin Corp.*, 2007 WL 2316481 (S.D. Ill. Aug. 13, 2007); *Tussey v. ABB, Inc.*, No. 2:06-cv-4305 [#105] (W.D. Mo. Aug. 13, 2007); *Spano v. Boeing Co.*, 2007 WL 1149192, at *8 (S.D. Ill. Apr. 18, 2007); *Loomis v. Exelon Corp.*, No. 1:06-cv-04900 [#57] (N.D. Ill. Feb. 21, 2007).

2009); *Termini v. Life Ins. Co. of N. Am.*, 474 F. Supp. 2d 775, 779 (E.D. Va. 2007); *Ellis v. Rycenga Homes, Inc.*, 2007 WL 1032367, at *3-4 (W.D. Mich. Apr. 2, 2007); *White v. Martin*, 2002 WL 598432, at *3-4 (D. Minn. Apr. 12, 2002); *Morgan v. Ameritech*, 26 F. Supp. 2d 1087, 1091 (C.D. Ill. 1998); *Raff v. Travelers Ins. Co.*, 1996 WL 154171, at *1 (S.D.N.Y. 1996); *Broadnax Mills*, 876 F. Supp. at 816. *Cf. Brotherson v. Putman Invs., LLC*, 2017 WL 2634361, at *2 n.3 (D. Mass. June 19, 2017) (observing that plaintiffs *did not* seek a jury trial, noting that an "action to charge the trustees historically sounds in equity," and the "most thorough scholarship confirms that no constitutional right to a jury trial attached under the Seventh Amendment").

As Plaintiffs will undoubtedly emphasize in response, one recent decision is adrift of the overwhelming weight of authority cited above. *See Cunningham v. Cornell Univ.*, 2018 WL 4279466 (S.D.N.Y. Sept. 6, 2018) *writ denied* No. 18-3203, [#31] (2d. Cir. Feb. 20, 2019). *Cunningham* went against the grain because the court believed it was "constrained" by the Second Circuit's ruling in a non-ERISA case, *Pereira v. Farace*, 413 F.3d 330 (2d Cir. 2005). 2018 WL 4279466 at *3-4. This Court is not so constrained. It should recognize, as other courts have, that *Pereira*—and by extension, *Cunningham*—is both wrongly decided and effectively abrogated in light of the Supreme Court's subsequent decision in *Amara*. *See id.* (acknowledging *Pereira* "may have over-read" *Great-West*, decided nine years before *Amara*); *Tracey*, 2019 WL 1005488, at *4 (rejecting *Cunningham* in light of *Amara* and "in accord with the great weight of authority"); *see also supra* n. 6 (collecting authority rejecting the argument that a request to recover from general assets transforms equitable remedies into legal ones). In any event,

Cunningham provides no basis under the Tenth Circuit's precedents for Plaintiffs' claimed entitlement to a jury trial in this case. *See Adams*, 149 F.3d at 1160-61; *see also Gernandt*, 2017 WL 3219490, at *11; *In re YRC Worldwide*, 2010 WL 4920919, at *4.

In short, given the equitable nature of the relief Plaintiffs seek, and the overwhelming weight of authority consistently striking jury demands in cases like this one, the second prong of the Seventh Amendment analysis weighs strongly against Plaintiffs' demand for a jury trial.

CONCLUSION

For the above reasons, the Court should strike Plaintiffs' jury demand.

Dated: March 12, 2019

Respectfully submitted,

by: *s/ Christopher J. Boran*

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CERTIFICATION OF SERVICE

I hereby certify that on the 12th day of March, 2019, I electronically filed the foregoing document with the Clerk of Court using the CM/ECF system, which will send notification of such filing to all parties and counsel of record.

/s/ *Christopher J. Boran*