

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32
33
34

In the
United States Court of Appeals
For the Second Circuit

AUGUST TERM, 2018

ARGUED: APRIL 8, 2019

DECIDED: OCTOBER 1, 2019

No. 18-1558

DR. ALAN SACERDOTE, DR. HERBERT SAMUELS, MARIE E. MONACO,
MARK CRISPIN MILLER, DR. SHULAMITH LALA STRAUSSNER, DR. JAMES
B. BROWN, INDIVIDUALLY AND AS REPRESENTATIVES OF A CLASS OF
PARTICIPANTS AND BENEFICIARIES ON BEHALF OF THE NYU SCHOOL OF
MEDICINE RETIREMENT PLAN FOR MEMBERS OF THE FACULTY,
PROFESSIONAL RESEARCH STAFF AND ADMINISTRATION AND THE NEW
YORK UNIVERSITY RETIREMENT PLAN FOR MEMBERS OF THE FACULTY,
PROFESSIONAL RESEARCH STAFF AND ADMINISTRATION,
Plaintiffs-Appellants,

v.

CAMMACK LARHETTE ADVISORS, LLC,
Defendant-Appellee,

RETIREMENT PLAN COMMITTEE, RICHARD BING, MICHAEL BURKE,
CATHERINE CASEY, MARTIN DORPH, SABRINA ELLIS, THOMAS
FEUERSTEIN, ANDREW GORDON, PATRICIA HALLEY, TIM HESLER,
KATHLEEN JACOBS, MARINA KARTANOS, ANN KRAUS, MARGARET
MEAGHER, CYNTHIA NASCIMENTO, NANCY SANCHEZ, TINA SURH,
LINDA WOODRUFF, MAURICE MAERTENS, JOSEPH MONTELEONE, RAY

1 OQUENDO, CHRIS TANG, NEW YORK UNIVERSITY SCHOOL OF
2 MEDICINE, NYU LANGONE HOSPITALS, NYU LANGONE HEALTH
3 SYSTEM,
4 *Defendants.**
5 _____
6

7 Appeal from the United States District Court
8 for the Southern District of New York.
9 No. 17 Civ. 8834 – Katherine B. Forrest, *Judge*.
10 _____
11

12 Before: WALKER, CALABRESI, AND LIVINGSTON, *Circuit Judges*.
13 _____
14

15 Plaintiffs filed an action, which we refer to as *Sacerdote I*, against
16 New York University (“NYU”) alleging violations of ERISA in
17 connection with two retirement plans sponsored by NYU. The
18 district court dismissed most, but not all, of the causes of action
19 against NYU. Plaintiffs then filed this action, which we refer to as
20 *Sacerdote II*, against a variety of affiliates of NYU and Cammack
21 Larhette Advisors, LLC, alleging substantially the same claims as
22 those in *Sacerdote I*, including the dismissed claims. Cammack is an
23 independent investment management company that was hired by
24 NYU to provide investment advice on the retirement plans. The
25 district court dismissed all of the claims against all of the NYU-
26 affiliated defendants, as well as Cammack, on the grounds that a
27 plaintiff has no right to maintain two actions on the same subject,
28 against the same parties, at the same time. The district court
29 concluded that even though Cammack and the other defendants in
30 *Sacerdote II* were not defendants in *Sacerdote I*, all of them were in
privity with defendant NYU in *Sacerdote I* because they had a

* The Clerk of Court is respectfully directed to amend the official caption as listed above.

1 sufficiently close relationship with NYU and their interests were
2 aligned with those of NYU. Plaintiffs appealed only the dismissal as
3 to Cammack. We conclude that Cammack and NYU are not in
4 privity, and we now VACATE and REMAND the district court's
5 order as to Cammack.

6
7 SEAN E. SOYARS (Jerome J. Schlinchter, *on the brief*),
8 Schlichter Bogard & Denton LLP, St. Louis, MO, *for*
9 *Plaintiffs-Appellants*.

10 CHARLES M. DYKE, Nixon Peabody LLP, San
11 Francisco, CA (Kristin Marie Jamberdino, Nixon
12 Peabody LLP, New York, NY, *on the brief*), *for*
13 *Defendant-Appellee*.

14
15 JOHN M. WALKER, JR., *Circuit Judge*:

16 Plaintiffs filed an action, which we refer to as *Sacerdote I*, against
17 New York University ("NYU") alleging violations of ERISA in
18 connection with two retirement plans sponsored by NYU. The
19 district court dismissed most, but not all, of the causes of action
20 against NYU. Plaintiffs then filed this action, which we refer to as
21 *Sacerdote II*, against a variety of affiliates of NYU and Cammack
22 Larhette Advisors, LLC, alleging substantially the same claims as
23 those in *Sacerdote I*, including the dismissed claims. Cammack is an
24 independent investment management company that was hired by
25 NYU to provide investment advice on the retirement plans. The
26 district court dismissed all of the claims against all of the NYU-
27 affiliated defendants, as well as Cammack, on the grounds that a
28 plaintiff has no right to maintain two actions on the same subject,
29 against the same parties, at the same time. The district court

1 concluded that even though Cammack and the other defendants in
2 *Sacerdote II* were not defendants in *Sacerdote I*, all of them were in
3 privity with defendant NYU in *Sacerdote I* because they had a
4 sufficiently close relationship with NYU and their interests were
5 aligned with those of NYU. Plaintiffs appealed only the dismissal as
6 to Cammack. We conclude that Cammack and NYU are not in
7 privity, and we now VACATE and REMAND the district court's
8 order as to Cammack.

9 BACKGROUND

10 This appeal concerns two actions that were filed in the
11 Southern District of New York and assigned to Judge Katherine
12 Forrest.¹ We refer to the two actions as *Sacerdote I* (No. 16-cv-06284)
13 and *Sacerdote II* (No. 17-cv-8834). Plaintiffs in both actions are six
14 professors at New York University ("NYU") or the New York
15 University School of Medicine who participated in two ERISA-
16 governed retirement plans sponsored by NYU ("the plans").

17 I. *Sacerdote I*

18 Plaintiffs commenced the first action on August 9, 2016, against
19 NYU only, and alleged breaches of the duties of loyalty and prudence
20 under ERISA based on unreasonable administrative fees,
21 unreasonable investment management fees and performance losses,
22 and failure to monitor unnamed co-fiduciaries.²

23 On November 9, 2016, plaintiffs amended their complaint to
24 allege breaches of ERISA's duties of loyalty and prudence, as well as
25 its prohibited transaction rules, by: locking the plans into an
26 imprudent investment and recordkeeping arrangement with TIAA-

¹ Judge Forrest resigned from the bench in September 2018. The case has been reassigned to Judge Analisa Torres.

² See Complaint, *Sacerdote I*, 16-cv-06284 (S.D.N.Y. Aug. 9, 2016), ECF No. 1.

1 CREF (Counts I and II); causing the plans' participants to pay
2 unreasonable administrative fees to TIAA-CREF and Vanguard
3 (Counts III and IV); and causing the plans' participants to pay
4 unreasonable investment management, marketing, distribution,
5 mortality, and expense risk fees, and incur unreasonable performance
6 losses (Counts V and VI).³ Plaintiffs also alleged that NYU failed to
7 properly monitor unnamed co-fiduciaries to the plans (Count VII).⁴
8 The amended complaint, like its predecessor, named NYU as the only
9 defendant.

10 On August 25, 2017, the district court granted in part and
11 denied in part NYU's motion to dismiss the amended complaint. The
12 district court dismissed all claims except those alleging certain
13 breaches of ERISA's duties of loyalty and prudence in Counts III and
14 V.⁵ With respect to Count VII, alleging NYU's failure to properly
15 monitor unnamed co-fiduciaries, the district court found that
16 plaintiffs' failure to name any co-fiduciary rendered the claim
17 materially deficient.⁶ However, the district court invited plaintiffs to
18 file for reconsideration if they possessed additional facts to support
19 their co-fiduciary claim.⁷

20 While NYU's motion to dismiss was pending, plaintiffs learned
21 that NYU had delegated responsibility for administering the plans to
22 a Retirement Plan Committee (the "Committee"), which consisted of
23 nine officers of NYU and NYU Langone Medical Center. Armed with
24 this new information, and in response to the district court's invitation,
25 plaintiffs moved on September 8, 2017, for reconsideration of the
26 district court's dismissal. The same day, plaintiffs moved for leave to

³ See Amended Complaint, *Sacerdote I*, ECF No. 39.

⁴ See *id.*

⁵ See Opinion & Order, *Sacerdote I*, ECF No. 79.

⁶ *Id.* at 34–35.

⁷ *Id.* at 35.

1 file a second amended complaint, in which they sought to add the
2 Committee and its nine individual members, as defendants, and to
3 add additional facts to bolster the co-fiduciary claim.

4 On October 17, 2017, the district court denied plaintiffs' motion
5 for leave to amend.⁸ It concluded that plaintiffs failed to demonstrate
6 good cause for why they failed to amend earlier, given that the
7 defendant had disclosed the existence of the Committee and its
8 members in November 2016. Two days later, the district court denied
9 plaintiffs' motion for reconsideration for substantially the same
10 reason.⁹

11 II. *Sacerdote II*

12 On November 13, 2017, the same plaintiffs filed a new action—
13 *Sacerdote II*—alleging substantially the same seven claims alleged in
14 *Sacerdote I*, including those claims the district court dismissed in its
15 August 25, 2017 decision.¹⁰ The *Sacerdote II* complaint named as
16 defendants: NYU Langone Hospitals, NYU Langone Health System,
17 the Retirement Plan Committee, and twenty-one past or present
18 members of the Committee. It did not name NYU. The *Sacerdote II*
19 complaint also added a new claim and specifically identified the
20 Committee and its members as the co-fiduciaries that NYU Langone
21 Hospitals and NYU Langone Health System allegedly failed to
22 monitor.

23 On December 20, 2017, the *Sacerdote II* defendants moved to
24 dismiss the action as duplicative of *Sacerdote I*. Instead of responding
25 to the motion to dismiss, plaintiffs amended the *Sacerdote II* complaint
26 on January 10, 2018. The amended complaint removed NYU Langone

⁸ See Order, *Sacerdote I*, ECF No. 100.

⁹ See Order, *Sacerdote I*, ECF No. 101.

¹⁰ See Complaint, *Sacerdote II*, No. 17-cv-08834 (S.D.N.Y. Nov. 13, 2017), ECF No. 1.

1 Hospitals and NYU Langone Health System as defendants and added
2 the New York University School of Medicine (“NYU School of
3 Medicine”) as a defendant.¹¹ The amended complaint, for the first
4 time, also named Cammack Larhette Advisors, LLC (“Cammack”), as
5 a defendant, and alleged that Cammack was a co-fiduciary; that
6 Cammack breached its fiduciary duties under ERISA; and that both
7 Cammack and the NYU School of Medicine, as co-fiduciaries, were
8 liable for the other’s breaches. The amended complaint also added
9 new claims.

10 On January 24, 2018, all defendants—except for Cammack—
11 (the “NYU defendants”) responded to the *Sacerdote II* amended
12 complaint with a new motion to dismiss. The NYU defendants
13 argued that the *Sacerdote II* action was duplicative of the *Sacerdote I*
14 action and was an impermissible attempt to circumvent the district
15 court’s rulings in *Sacerdote I*, which prohibited plaintiffs from
16 amending the complaint to replead the dismissed claims and add the
17 new defendants. Before Cammack responded to the amended
18 complaint, the district court entered an opinion and order dismissing
19 the entire action against the NYU defendants and Cammack as
20 duplicative of *Sacerdote I*.¹² The district court held that the NYU
21 defendants in *Sacerdote II* were in privity with NYU in *Sacerdote I*, and
22 that *Sacerdote II*, which alleged substantially the same claims and facts
23 as the prior action, was duplicative of *Sacerdote I*. With respect to
24 Cammack, the district court held that the claims against Cammack
25 “should have been brought by joining Cammack earlier in the
26 *Sacerdote I* litigation.”¹³

¹¹ See Amended Complaint, *Sacerdote II*, ECF No. 105.

¹² See Opinion & Order, *Sacerdote II*, ECF No. 137; see also No. 17-cv-8834 (KBF), 2018 WL 1054573 (S.D.N.Y. Feb. 23, 2018).

¹³ *Sacerdote II*, ECF No. 137 at 7.

1 On March 7, 2018, plaintiffs moved for reconsideration of the
2 district court's *sua sponte* dismissal as to Cammack before Cammack
3 had responded to the amended complaint. Plaintiffs argued they
4 were entitled to assert the same claims against a separate,
5 independent defendant, and that the factors the district court cited to
6 support a finding of privity between the NYU defendants in *Sacerdote*
7 *I* and *II* did not apply to Cammack, an independent entity not related
8 to NYU. In response, the district court ordered Cammack to file a
9 letter motion for dismissal and granted plaintiffs an opportunity to
10 respond, which they did. Cammack argued that like the NYU
11 defendants in *Sacerdote II*, it was in privity with NYU, the defendant
12 in *Sacerdote I*, because Cammack and NYU were in contractual
13 privity, the parties' interests were fully aligned, and the defenses of
14 NYU would be fully dispositive of any claims against Cammack, if
15 successful.

16 On March 22, 2018, the district court adhered to its judgment
17 dismissing Cammack from *Sacerdote II*.¹⁴ The district court concluded
18 that Cammack was in privity with NYU because Cammack and
19 NYU's interests were aligned and they had a "sufficiently close
20 relationship . . . to justify preclusion."¹⁵ The district court rejected
21 plaintiffs' argument that "Cammack need not have been added [as a
22 defendant in *Sacerdote I*] and that they can maintain a separate suit"
23 against Cammack.¹⁶

¹⁴ See Mem. Decision & Order, *Sacerdote II*, ECF No. 147; see also No. 17-cv-8834 (KBF), 2018 WL 6253366 (S.D.N.Y. Mar. 22, 2018).

¹⁵ 2018 WL 6253366, at *2 (internal quotation marks omitted).

¹⁶ *Id.*

1 Plaintiffs now appeal the district court’s dismissal of Cammack
2 from *Sacerdote II*.¹⁷

3 DISCUSSION

4 We must determine in this case whether the district court
5 correctly applied the privity rule in the context of the rule against
6 duplicative litigation. More precisely, the question is whether the
7 claims against Cammack in *Sacerdote II*—which are substantially
8 similar to the claims against NYU in *Sacerdote I*—should have been
9 barred by the rule against duplicative litigation on the basis of
10 Cammack’s alleged privity with NYU. We begin with a discussion of
11 the rule against duplicative litigation and the privity rule, and then
12 assess whether the district court properly applied the two rules to
13 conclude that Cammack was in privity with NYU and that *Sacerdote*
14 *II* was therefore barred by the rule against duplicative litigation.

15 I. The Rule Against Duplicative Litigation

16 “As part of its general power to administer its docket, a district
17 court may stay or dismiss a suit that is duplicative of another federal
18 court suit.”¹⁸ This is because a plaintiff has “no right to maintain two
19 actions on the same subject in the same court, against the same
20 defendant at the same time.”¹⁹ In order for the rule to be properly
21 invoked, however, “the case must be the same.”²⁰ As the Supreme
22 Court recognized over a century ago, “[t]here must be the same

¹⁷ Plaintiffs initially also appealed the dismissal of the NYU defendants from *Sacerdote II*, but have since dropped that argument following a bench trial on the surviving claims in *Sacerdote I*, in which the district court ruled in favor of NYU on all claims. That decision in *Sacerdote I* is also up on appeal, but has not yet been argued.

¹⁸ *Curtis v. Citibank, N.A.*, 226 F.3d 133, 138 (2d Cir. 2000).

¹⁹ *Id.* at 139.

²⁰ *The Haytian Republic*, 154 U.S. 118, 124 (1894).

1 parties, or, at least, such as represent the same interests; there must be
2 the same rights asserted and the same relief prayed for; the relief must
3 be founded upon the same facts, and the title, or essential basis, of the
4 relief sought must be the same.”²¹

5 This rule, known as the rule against duplicative litigation,
6 sometimes termed the rule against claim-splitting, is “distinct from
7 but related to the doctrine of claim preclusion or *res judicata*.”²² The
8 rule and the doctrine serve similar goals of “foster[ing] judicial
9 economy,” “protect[ing] the parties from vexatious and expensive
10 litigation,” and ensuring the “comprehensive disposition of
11 litigation.”²³ As the Seventh Circuit put it, “[c]laim splitting is an
12 aspect of the law of preclusion. Lawyers often use the words ‘res
13 judicata’ to summon up all aspects of preclusion.”²⁴ Because they are
14 animated by similar policy goals and concerns, we frequently apply
15 principles governing the doctrine of claim preclusion to the rule
16 against duplicative litigation.²⁵

17 The vital difference between the rule against duplicative
18 litigation and the doctrine of claim preclusion, however, is that the
19 former can only be raised to bar one of two suits that are both still

²¹ *Id.* (internal quotation marks omitted).

²² *Curtis*, 226 F.3d at 138.

²³ *Id.* (internal quotation marks omitted).

²⁴ *Horwitz v. Alloy Auto. Co.*, 992 F.2d 100, 103 (7th Cir. 1993).

²⁵ See *Davis v. Norwalk Econ. Opportunity Now, Inc.*, 534 F. App’x 47, 48 (2d Cir. 2013) (summary order) (“While the rule against duplicative litigation is distinct from claim preclusion, the former analysis borrows from the latter to ‘assess whether the second suit raises issues that should have been brought in the first.’” (quoting *Curtis*, 226 F.3d at 138–40) (internal citations omitted)); see also 18 Charles A. Wright, Arthur R. Miller, et al., *Fed. Prac. & Proc.* § 4404 (3d ed.), Westlaw (“One growing trend is to import the tests of claim preclusion into a ‘claim-splitting’ doctrine that enables a court, as a matter of discretion, to dismiss an action that presents the same claim, as measured by claim-preclusion tests, as another pending action.”).

1 pending; the latter is generally²⁶ raised, after a prior suit is resolved
2 on the merits, to preclude a party (or its privy) from relitigating claims
3 in a subsequent suit that were or could have been raised in the prior
4 action.²⁷

5 II. Privy Rule

6 Just as we typically do not allow the doctrine of claim
7 preclusion to bind nonparties to a judgment because they have “not
8 had a full and fair opportunity to litigate the claims and issues settled
9 in that suit,”²⁸ we generally do not apply the rule against duplicative
10 litigation when the defendants in two similar actions are different.²⁹
11 Indeed, a plaintiff has “as many causes of action as there are
12 defendants to pursue.”³⁰ As the Restatement (Second) of Judgments
13 states:

14 When a person suffers injury as the result of the
15 concurrent or consecutive acts of two or more persons,
16 he has a claim against each of them. If he brings an action
17 against one of them, he is required [by the doctrine of
18 claim preclusion] to present all the evidence and theories

²⁶ We say that claim preclusion “generally” is only raised after one suit has been resolved on the merits because the doctrine can apply while two similar suits are pending when the district court denies on the merits a motion to amend the complaint to add new claims while permitting the existing claims to proceed. In such a case, the denial of leave to amend on the merits, as opposed to a denial on procedural grounds such as timeliness, operates as a bar. The plaintiff cannot file a new, second action raising those denied claims. See *Curtis*, 226 F.3d at 139. That precise scenario does not apply to this case, however, because plaintiffs never sought, and were never denied, leave to amend their complaint in *Sacerdote I* to add Cammack as a defendant.

²⁷ *Curtis*, 226 F.3d at 138.

²⁸ *Taylor v. Sturgell*, 553 U.S. 880, 892 (2008) (internal quotation marks omitted).

²⁹ See *The Haytian Republic*, 154 U.S. at 124 (the rule against duplicative litigation may only be invoked when the cases are the same and involve “the same parties, or, at least, such as represent the same interests”).

³⁰ *N. Assur. Co. of Am. v. Square D Co.*, 201 F.3d 84, 88–89 (2d Cir. 2000).

1 of recovery that might be advanced in support of the
2 claim against the obligor But the claim against others
3 who are liable for the same harm is regarded as
4 separate.³¹

5 In other words, if a plaintiff suffers the same harm at the hands of two
6 defendants, the plaintiff may institute one suit against one defendant
7 and a separate suit against another defendant alleging that each
8 caused his injury.³² This is known as the rule against nonparty
9 preclusion.³³

10 There are specific exceptions to this rule, however, that
11 recognize narrow circumstances in which applying a preclusion
12 doctrine to a nonparty is appropriate, fair, and does not violate the
13 nonparty's due process rights. When any of these circumstances is
14 present, the parties are said to be in privity.³⁴ In the context of claim
15 preclusion, if a party to an action is found to be in privity with a party
16 to a previous action, then the "privity is bound with respect to all the
17 issues that were raised or could have been raised in the previous
18 lawsuit."³⁵

19 The circumstances sufficient to invoke the privity rule have
20 evolved over time. In 2008, the Supreme Court distilled the current

³¹ Restatement (Second) of Judgments § 49 (1982).

³² See *N. Assurance*, 201 F.3d at 88–89. We do not consider here how other doctrines and rules of civil procedure, such as joinder of parties, might impact a plaintiff's ability to bring separate claims against different defendants regarding the same harm caused by both.

³³ See *Taylor*, 553 U.S. at 892.

³⁴ See *id.* at 898 n.8 ("The substantive legal relationships justifying preclusion are sometimes collectively referred to as 'privity.' The term 'privity,' however, has also come to be used more broadly, as a way to express the conclusion that nonparty preclusion is appropriate on any ground." (internal citations omitted)); see also Wright & Miller § 4449 ("[T]he privity label simply expresses a conclusion that preclusion is proper.").

³⁵ *Chase Manhattan Bank, N.A. v. Celotex Corp.*, 56 F.3d 343, 346 (2d Cir. 1995).

1 “recognized exceptions” to the rule against nonparty preclusion into
2 six categories: (1) agreements by a nonparty to be bound by the
3 determination of issues in an action between others; (2) certain pre-
4 existing substantive legal relationships based in property law
5 between the nonparty and the party, such as preceding and
6 succeeding owners of property, bailee and bailor, and assignee and
7 assignor; (3) representative suits where the nonparty’s interest was
8 adequately represented³⁶ by a party with the same interests, such as
9 class actions and suits brought by trustees, guardians, and other
10 fiduciaries; (4) when a nonparty has assumed control over the
11 litigation in which the judgment was rendered; (5) when a nonparty
12 is acting as a proxy, agent, or designated representative of a party
13 bound by a judgment; and (6) when a statutory scheme expressly
14 forecloses successive litigation by nonlitigants, so long as the scheme
15 comports with due process.³⁷

16 Although most of the treatises and cases—including *Taylor*—
17 that discuss the privity rule do so in the context of claim preclusion,
18 the same principles apply in the context of the rule against duplicative
19 litigation. In *The Haytian Republic*, the Supreme Court implicitly
20 recognized that the privity rule applies to the rule against duplicative
21 litigation when it stated that the rule may only be invoked when the
22 two pending suits have “the same parties, or, at least, *such as represents*
23 *the same interests*.”³⁸ Since then, courts, including ours, have

³⁶ The term “adequate representation” was further defined by the Court as requiring certain procedural protections. These requirements are discussed in greater detail below. See *infra*, notes 64–66 and accompanying text.

³⁷ *Taylor*, 553 U.S. at 893–95.

³⁸ 154 U.S. at 124 (emphasis added). As illustrated by *Taylor*, the privity rule has evolved over time such that a party merely representing the same interest as a nonparty, without more, is no longer sufficient to justify a finding of privity and to apply a preclusion doctrine to a nonparty. See *infra*, notes 64–66 and accompanying text. At the time of *The Haytian Republic*, however, this was a

frequently applied principles originating in the doctrine of claim preclusion to the similar context of the rule against duplicative litigation.³⁹ We can think of no reason—and the parties have presented none—why the principles underlying the privity rule in the context of other preclusion doctrines should not apply equally in the context of the rule against duplicative litigation.

III. Standard of Review

We review *de novo* both a district court's dismissal of a complaint⁴⁰ and its ruling on preclusion.⁴¹ At the dismissal stage, we must accept as true all factual claims in the complaint and draw all reasonable inferences in the plaintiff's favor.⁴² We review for abuse of discretion a district court's decision to stay or dismiss a suit as duplicative of another federal court suit.⁴³ However, when a district court's determination that parties are in privity rests on a "purely legal proposition," we review that decision, like all questions of law, *de novo*.⁴⁴ Moreover, a district court necessarily abuses its discretion when it makes an error of law.⁴⁵

sufficient condition to invoke the privity rule and bar a nonparty from instituting a similar suit, and demonstrates that the concepts of privity and nonparty preclusion apply to the rule against duplicative litigation.

³⁹ See *N. Assur.*, 201 F.3d at 88–89 (declining to apply the rule against duplicative litigation to bar a suit by a plaintiff against one defendant that was identical to, and arose out of the same events as, another suit by the same plaintiff against a different defendant and alleged joint tortfeasor because the parties were not in privity); see also *Davis*, 534 F. App'x at 48; *Vancouver v. NCO Fin. Svcs., Inc.*, 857 F.3d 833, 841–42 (11th Cir. 2017) (asking whether the case "involves the same parties and their privies" in applying the rule against duplicative litigation); Wright & Miller § 4404.

⁴⁰ See *Singh v. Cigna Corp.*, 918 F.3d 57, 62 (2d Cir. 2019).

⁴¹ See *Hoblock v. Albany Cty Bd. of Elections*, 422 F.3d 77, 93 (2d Cir. 2005).

⁴² See *Singh*, 918 F.3d at 62.

⁴³ See *Curtis*, 226 F.3d at 138.

⁴⁴ See *Hoblock*, 422 F.3d at 93–94.

⁴⁵ See *United States v. Hasan*, 586 F.3d 161, 167–68 (2d Cir. 2009).

1 **IV. The District Court’s Finding of Privity Between NYU**
2 **and Cammack**

3 There is no dispute that the facts and legal claims asserted in
4 *Sacerdote II* are substantially similar to those asserted in *Sacerdote I*.
5 Nor is there a dispute that NYU and Cammack are different parties.
6 The question, therefore, is whether the district court erred in
7 concluding that NYU and Cammack are in privity, such that the rule
8 against duplicative litigation should apply to bar recovery against
9 Cammack in *Sacerdote II*. We conclude that the district court did so
10 err.

11 The district court concluded that NYU and Cammack were in
12 privity based on the following facts taken from the amended
13 complaint:

14 Cammack has provided advisory services to NYU since
15 2009. The Amended Complaint alleges that Cammack is
16 a co-fiduciary to the Plans, and is a party to a contract
17 that requires it to advise NYU on investment options. It
18 also claims that Cammack participated in and enabled
19 the NYU defendants to commit a number of the alleged
20 breaches of fiduciary duty by providing imprudent
21 investment advice, and by failing to make any reasonable
22 effort under the circumstances to remedy the breaches
23 [However,] NYU and Cammack have different
24 states of incorporation and different principal places of
25 business, and [plaintiffs allege that] they took
26 independent actions with regard to the Plans’ losses.⁴⁶

27 The district court found that these facts supported the conclusion that
28 “Cammack has a ‘sufficiently close relationship’ to NYU to justify

⁴⁶ *Sacerdote II*, 2018 WL 6253366, at *1–2 (internal citations and quotation marks omitted).

1 preclusion.”⁴⁷ It also rejected plaintiffs’ argument that Cammack and
2 NYU’s interests will “sharply diverge” to the extent that Cammack’s
3 advice was imprudent.⁴⁸

4 We disagree that Cammack and NYU’s interests are sufficiently
5 identical to support a finding of privity. Under ERISA’s co-fiduciary
6 provision, a co-fiduciary is only liable for another fiduciary’s
7 independent breach if the co-fiduciary (1) knowingly participates in
8 or conceals the breaching act or omission of another fiduciary; (2)
9 enables another fiduciary to breach by failing to comply with ERISA’s
10 “prudent man” standard of care; or (3) knows of another fiduciary’s
11 breach and fails to make reasonable efforts to remedy the breach.⁴⁹
12 Unless this is so, the co-fiduciaries’ interests are not aligned. Here,
13 the bases for liability as to NYU and Cammack are not necessarily the
14 same; it is possible that one party could be found liable and the other
15 not.

16 Indeed, as plaintiffs plausibly pleaded, Cammack and NYU
17 had separate and distinct responsibilities as co-fiduciaries to the
18 plans, and could be found liable for plaintiffs’ injuries for separate
19 reasons. “Cammack’s potential liability arises from providing flawed
20 advice to the Committee”⁵⁰ On the other hand, “NYU’s
21 [potential] liability would arise from failing to independently
22 investigate the merits of the Plans’ investments, or failing to
23 determine whether it was reasonable to rely on Cammack.”⁵¹

⁴⁷ *Id.* at *2 (quoting *Cent. Hudson Gas & Elec. Corp. v. Empresa Naviera Santa S.A.*, 56 F.3d 359, 368 (2d Cir. 1995)).

⁴⁸ *Id.*

⁴⁹ 29 U.S.C. § 1105(a); *see also* 29 U.S.C. § 1104(a)(1) (defining the “prudent man” standard of care).

⁵⁰ Appellant’s Br. at 18.

⁵¹ *Id.* at 18–19.

1 A reasonable trier of fact could find that Cammack provided
2 flawed advice to NYU and was liable for plaintiffs' losses, while also
3 finding that NYU reasonably relied on Cammack's advice,
4 notwithstanding its flawed nature. Conversely, a reasonable trier of
5 fact could find that Cammack provided reasonably prudent advice to
6 NYU, but that NYU imprudently rejected Cammack's advice or failed
7 to properly implement Cammack's investment recommendations. In
8 these plausible scenarios, NYU and Cammack's interests would
9 surely diverge, to the point where it would be in each of their interests
10 to place the blame on the other. Especially at the pleading stage, it
11 was error for the district court to accept Cammack's argument that its
12 interests were identical to those of NYU over plaintiffs' plausible
13 assertions to the contrary.⁵²

14 Even assuming that Cammack and NYU have a sufficiently
15 close relationship and identical interests, the district court further
16 erred because the presence of these two conditions alone is
17 insufficient as a matter of law to support a finding of privity. The
18 district court relied primarily on *Central Hudson* for the proposition
19 that identical interests and a sufficiently close relationship are *all* that
20 is required to find parties in privity. That case, however, does not
21 support that proposition. *Central Hudson* held that to determine
22 whether nonparty preclusion is warranted, a court must also "inquire

⁵² In its brief, Cammack argues that the district court's determination that NYU and Cammack had identical interests was proper because plaintiffs "never made any showing" "that NYU's interests will sharply diverge from Cammack's." See Appellee's Br. at 29. But the burden of proving privity and preclusion is on the party asserting that affirmative defense. See *Taylor*, 553 U.S. at 907. It was therefore Cammack's burden to prove that its interests were aligned with NYU's. We conclude it has failed to do so because plaintiffs have plausibly alleged realistic scenarios in which Cammack and NYU's interests are not identical, but, in fact, materially conflict.

1 whether a [non]party controlled or substantially participated in the
2 control of the presentation on behalf of a party to the prior action.”⁵³

3 The Supreme Court’s decision in *Taylor* is instructive. In
4 recognizing the six circumstances sufficient to establish privity, the
5 Court rejected a proposed seventh category called virtual
6 representation.⁵⁴ The contours of a proposed virtual representation
7 category have differed from circuit to circuit.⁵⁵ The formulation
8 rejected by the Court in *Taylor* would have found a nonparty to be in
9 privity with a party if the nonparty (1) had the same interests as the
10 party; (2) was adequately represented by the party; and (3) at least
11 one of the following conditions was present: (a) a close relationship
12 between the nonparty and party; (b) substantial participation by the
13 nonparty in the other action; or (c) tactical maneuvering by the
14 nonparty to avoid preclusion.⁵⁶ The Court refused to adopt this
15 virtual representation exception to the rule against nonparty
16 preclusion, stating that it would be “at odds with the constrained
17 approach to nonparty preclusion” adopted by the Court’s prior
18 decisions, and would circumvent the protections guaranteed by the
19 Due Process Clause.⁵⁷ In holding that that NYU and Cammack were
20 in privity based solely on their sufficiently close relationship and
21 identical interests, the district court essentially adopted an even
22 broader formulation of virtual representation than that rejected by the
23 Court in *Taylor*. This was in error.

⁵³ *Cent. Hudson*, 56 F.3d at 368 (modifications incorporated) (internal quotation marks omitted).

⁵⁴ *Taylor*, 553 U.S. at 895–96.

⁵⁵ *See id.* at 889.

⁵⁶ *Id.* 889–90.

⁵⁷ *Id.* at 898; *see also id.* at 901.

1 Moreover, none of the six circumstances that *Taylor* recognized
2 as permitting a finding of privity are present here. There is no
3 allegation or evidence that Cammack agreed to be bound by the
4 disposition of *Sacerdote I*,⁵⁸ nor that Cammack assumed control over
5 NYU's defense in *Sacerdote I*,⁵⁹ nor that Cammack is a designated
6 representative or proxy of NYU.⁶⁰ And no applicable statutory
7 scheme expressly forecloses successive litigation by or against
8 nonlitigants.⁶¹

9 We also conclude that NYU and Cammack do not have the type
10 of property rights-based "pre-existing substantive legal relationship"
11 that could justify a finding of privity in this case.⁶² The contract
12 between NYU and Cammack obliges Cammack only to provide
13 investment advisory services to NYU with respect to the plans. It
14 does not create a property rights-based relationship akin to those
15 recognized in *Taylor* that could render a nonparty subject to the
16 judgment of a party with which it is in privity.⁶³ No property rights
17 were transferred, assigned, or delegated to or from NYU or
18 Cammack, and the claims in *Sacerdote I* and *II* did not concern NYU
19 and Cammack's mutual or successive rights in the same property.
20 Thus, the contractual and co-fiduciary relationships between NYU
21 and Cammack are insufficient to find the parties in privity.

22 Finally, we conclude that the representative suit exception to a
23 plaintiff's right to sue each defendant separately does not apply here.
24 The Supreme Court has described this exception as applying only in

⁵⁸ See *id.* at 893–94.

⁵⁹ See *id.* at 895.

⁶⁰ See *id.*

⁶¹ See *id.*

⁶² See *id.* at 894 (internal quotation marks omitted).

⁶³ See *id.*

1 “certain limited circumstances” when the nonparty is “adequately
2 represented by someone with the same interests who was a party to
3 the suit,” such as class actions and suits brought by trustees,
4 guardians, and other fiduciaries.⁶⁴ A party’s representation of a
5 nonparty is considered “adequate” for preclusion purposes “only if,
6 at a minimum: (1) [t]he interests of the nonparty and her
7 representative are aligned; and (2) either the party [in the first suit]
8 understood herself to be acting in a representative capacity [of the
9 nonparty] or the original court took care to protect the interests of the
10 nonparty.”⁶⁵ Adequate representation often also requires “(3) notice
11 of the original suit to the persons alleged to have been represented.”⁶⁶

12 Cammack has made no argument that NYU understood itself
13 to be acting in a representative capacity for Cammack in litigating
14 *Sacerdote I*, or that the district court took care to protect the interests
15 of Cammack in *Sacerdote I*.⁶⁷ Without these procedural protections,
16 privity cannot be said to exist on the basis that NYU adequately
17 represented Cammack’s interests in *Sacerdote I*, such that plaintiffs are
18 now precluded by the rule against duplicative litigation from
19 asserting claims against Cammack arising out of the same nucleus of
20 acts at issue in *Sacerdote I*.

21 In summary, because the relationship between NYU and
22 Cammack does not fit into any of the privity categories recognized by
23 the Supreme Court in *Taylor* as sufficient to justify an exception to the
24 rule against nonparty preclusion, the district court erred in
25 concluding that NYU and Cammack were in privity. It is insufficient

⁶⁴ *Id.* at 894–95 (modifications incorporated) (internal quotation marks omitted).

⁶⁵ *Id.* at 900 (internal quotation marks and citations omitted).

⁶⁶ *Id.*

⁶⁷ Because preclusion is an affirmative defense, it was Cammack’s burden to plead and prove that these procedural protections were in place to justify nonparty preclusion under the representative suit exception. *See id.* at 907.

1 as a matter of law to find two parties in privity based solely on the
2 fact that they share a sufficiently close relationship and have aligned
3 interests. This is precisely the type of virtual representation theory of
4 privity that the Supreme Court rejected in *Taylor*. Because NYU and
5 Cammack are not in privity, the district court's dismissal of Cammack
6 from *Sacerdote II* pursuant to the rule against duplicative litigation
7 was legal error, and thus an abuse of discretion, and a violation of the
8 fundamental principle that a plaintiff has "as many causes of action
9 as there are defendants to pursue."⁶⁸

10 CONCLUSION

11 We have considered the parties' other arguments and find them
12 to be without merit. We therefore VACATE the district court's order
13 dismissing Cammack from *Sacerdote II* and REMAND the matter back
14 to the district court.

⁶⁸ *N. Assur.*, 201 F.3d at 88–89.