UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

JULIETTE MOTZ, individually and as a representative of a class of similarly situated persons, on behalf of the CITI RETIREMENT SAVINGS PLAN, Plaintiff, v. CITIGROUP INC., Defendant.	No. 3:22-cv-00965-RNC March 8, 2024

MOTION FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA FOR LEAVE TO PARTICIPATE AS AMICUS CURIAE

OF COUNSEL:

Tara S. Morrissey
Jordan L. Von Bokern
U.S. CHAMBER LITIGATION CENTER
1615 H Street, NW
Washington, DC 20062

Jaime A. Santos (ct31237)
Rohiniyurie Tashima
GOODWIN PROCTER LLP
1900 N Street, NW
Washington, DC 20036
Telephone: (202) 346-4000
Facsimile: (202) 346-4444
jsantos@goodwinlaw.com

Counsel for Amicus Curiae the Chamber of Commerce of the United States of America

The Chamber of Commerce of the United States of America (Chamber) respectfully moves for leave to file a brief as amicus curiae in the above-captioned case in support of Defendant's motion to dismiss the amended complaint. This Court previously granted the Chamber's motion for leave to file an amicus brief in support of Defendant's motion to dismiss the initial complaint. *See* ECF No. 74. The proposed amicus brief is attached as Exhibit A. Defendant has consented to the filing of this brief. Counsel for Plaintiff informed counsel for the Chamber that Plaintiff does not oppose the Chamber's motion.

Amicus participation is appropriate where, as here, the "amicus has unique information or perspective that can help the Court beyond the help that the lawyers for the parties are able to provide." *Schaghticoke Tribal Nation v. Norton*, 2007 WL 9719292, at *3 (D. Conn. July 29, 2007) (internal quotation marks omitted). "[T]here is no governing standard" dictating "the procedure for obtaining leave to file an amicus brief in the district court," and district courts thus "have broad discretion" to assess whether amicus participation will be "of aid to the court and offer insights not available from the parties." *Auto. Club of N.Y., Inc. v. Port Authority of N.Y. and N.J.*, 2011 WL 5865296, at *1 (S.D.N.Y. Nov. 22, 2011).

The Chamber's amicus brief provides a unique perspective informed by its position as the world's largest business federation. The Chamber represents approximately 300,000 direct members and indirectly represents the interests of more than three million businesses and professional organizations of every size, in every industry sector, and from every region of the country. Many of the Chamber's members maintain, administer, or provide services to employee-benefit plans governed by ERISA. In fact, the Chamber's membership is unique because it includes representatives from all aspects of the private-sector retirement system, such as plan sponsors, asset managers, recordkeepers, consultants, and other service providers.

Since ERISA was enacted, the Chamber has played an active role in the law's development and administration. The Chamber regularly submits comment letters when the Department of Labor (DOL) engages in notice-and-comment rulemaking,[1] provides information to the Pension Benefit Guaranty Corporation (PBGC) to support PBGC in its efforts to protect retirement incomes,[2] submits comments to the Department of the Treasury on plan administration and qualification,[3] and provides testimony to DOL's standing ERISA Advisory Council.[4] The Chamber has also published literature proposing initiatives to encourage and bolster the employment-based retirement benefits system in the United States,[5] and is frequently quoted as a resource on retirement policy.[6]

Given its perspective and deep understanding of the issues involved in these cases, the

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[1] *See, e.g.*, Electronic Disclosure by Employee Benefit Plans (Nov. 22, 2019), https://www.uschamber.com/sites/default/files/final_electronic_delivery_proposed_regulation_comments_11.22.19.pdf.

[2] *See, e.g.*, Comments on the Interim Final Regulation for the Special Financial Assistance Program for Financially Troubled Multiemployer Plans (Aug. 10, 2021), https://www.pbgc.gov/sites/default/files/sfa-ifr-comment-us-chamber-and-others.pdf; Letter from U.S. Chamber of Commerce Regarding Partitions of Eligible Multiemployer Plans (Aug. 18, 2015), https://www.pbgc.gov/documents/Multiemployer%20-Comments-to-PBGC-on-Partitions-RIN-1212-AB29-Partitions-of-Eligible-Multiemployer-Plans.pdf.

[3] *See, e.g.*, Permanent Relief for Remote Witnessing Procedures (Sept. 29, 2021), https://www.uschamber.com/sites/default/files/final_september_remote_notarization_letter.pdf.

[4] *See, e.g.*, Statement of the U.S. Chamber of Commerce Regarding Gaps in Retirement Savings Based on Race, Ethnicity, and Gender (Aug. 27, 2021), https://www.uschamber.com/sites/default/files/final_august_2020_gaps_in_retirement_savings_dol_testimony.pdf.

[5] *See* U.S. Chamber of Commerce, *Private Retirement Benefits in the 21st Century: A Path Forward* (2016), https://www.uschamber.com/sites/default/files/legacy/reports/1204Private_Retirement_Paper.pdf.

[6] *See, e.g.*, Austin R. Ramsey, *Who Wins, Who Loses With Auto Retirement Savings Plan Proposal*, Bloomberg Law (Sept. 23, 2021), https://news.bloomberglaw.com/daily-labor-report/who-wins-who-loses-with-auto-retirement-savings-plan-proposal; Jaclyn Diaz, *Retirement Industry Hustles to Keep Up With DOL's Rules Tsunami*, Bloomberg Law (Sept. 1, 2020), https://news.bloomberglaw.com/daily-labor-report/retirement-industry-hustles-to-keep-up-with-dols-rules-tsunami.

Chamber regularly participates as amicus curiae in cases involving employee-benefit design or administration. *See, e.g.*, *Hughes v. Northwestern Univ.*, 142 S. Ct. 737 (2022) (standard for pleading fiduciary-breach claim involving challenges to defined-contribution plan line-ups and service-provider arrangements); *Fifth Third Bancorp v. Dudenhoeffer*, 573 U.S. 409 (2014) (standard for pleading fiduciary-breach claim involving employer stock); *Smith v. CommonSpirit Health*, 37 F.4th 1160 (6th Cir. 2022) (standard for pleading fiduciary-breach claim involving 401(k) plan fees and investment line-up); *Sweda v. Univ. of Pa.*, 923 F.3d 320 (3d Cir. 2019) (same);[7] *Meiners v. Wells Fargo Co.*, 898 F.3d 820 (8th Cir. 2018) (same). District courts in a string of recent cases have granted the Chamber leave to participate as an amicus at the motion-to-dismiss stage. As one court explained, "given the Chamber's experience with both retirement plan management and ERISA litigation, the Chamber can offer a valuable perspective on the issues presented in this matter." *Sigetich v. The Kroger Co.*, No. 21-697 (S.D. Ohio July 22, 2022), ECF No. 47 (granting the Chamber's motion for leave to file over plaintiffs' opposition); *see also Baumeister v. Exelon Corp.*, No. 21-6505 (N.D. Ill. Mar. 11, 2022), ECF No. 44 (explaining that the Chamber's "proposed amicus brief could provide the Court wi[th] a broader view of the impact of the issues raised in the case"—"an appropriate basis to allow amicus participation"); *Locascio v. Fluor Corp.*, No. 22-154 (N.D. Tex. Oct. 20, 2022), ECF No. 63 (granting the Chamber's motion for leave to file over the plaintiffs' opposition); *Singh v. Deloitte LLP*, No. 21-8458 (S.D.N.Y. Apr. 14, 2022), ECF No. 41 (same); *Barcenas v. Rush Univ. Med. Ctr.*, No. 22-366 (N.D. Ill. Apr. 4, 2022), ECF No. 38 (same).[8]

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[7] In *Sweda*, the Chamber's motion for leave to file an amicus brief was granted over the plaintiffs' opposition.

[8] As these decisions reflect, amicus briefs are routinely accepted at the motion-to-dismiss stage, including from the Chamber itself. *See, e.g.*, *New York v. U.S. Dep't of Labor*, No. 18-1747

Because of the Chamber's unique membership, which represents nearly all of those in the private-sector retirement community, the Chamber's collective knowledge about the management of retirement plans, the legal issues surrounding ERISA, and the types of allegations commonly included in these types of complaints extends beyond any single defendant or group of defendants named in a particular case. The Chamber seeks to provide a broader perspective on the key threshold issue of when circumstantial allegations of a violation of ERISA are plausible in the context of plan-management decisionmaking and the overall context of ERISA class-action litigation. And as the Supreme Court has instructed, that context is key—courts are supposed to undertake a "careful, context-sensitive scrutiny of [the] complaint's allegations," *Fifth Third*, 573 U.S. at 425, just as they are supposed to consider "context" in evaluating plausibility in all civil cases, *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 554 (2007); *see also Hughes*, 142 S. Ct. at 742 (explaining that the pleading standard articulated in *Twombly* and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), applies to ERISA cases).

The Chamber's brief will therefore "contribute in clear and distinct ways" to the Court's analysis. *Prairie Rivers Network v. Dynegy Midwest Generation, LLC*, 976 F.3d 761, 764 (7th Cir. 2020) (granting the Chamber's motion for leave to file); *see also Neonatology Assocs., P.A. v. Comm'r of Internal Revenue*, 293 F.3d 128, 132 (3d Cir. 2002) (Alito, J.) (an amicus brief may assist the court "by explain[ing] the impact a potential holding might have on an industry or other group") (quotation marks omitted). "Even when a party is very well represented, an amicus may provide important assistance to the court." *Neonatology Assocs.*, 293 F.3d at 132. And here, the Chamber's perspective and expertise will serve several functions courts have identified as useful:

(D.D.C. Nov. 9, 2018) (minute order); *United States v. DaVita Inc.*, No. 21-229 (D. Colo. Oct. 20, 2021), ECF No. 65; *United States v. Walgreen Co.*, No. 21-32 (W.D. Va. Sept. 9, 2021), ECF No. 22.

It "explain[s] the broader regulatory or commercial context" in which this case arises; "suppl[ies] empirical data" informing the issues at hand; and "provid[es] practical perspectives on the consequences of particular outcomes." *Prairie Rivers Network*, 976 F.3d at 763.

Specifically, the proposed amicus brief provides context regarding the recent surge in ERISA litigation, describes similarities among these cases that help to shed light on Plaintiff's allegations here, and provides context for how to evaluate these types of allegations in light of the pleading standard set forth by the Supreme Court in *Twombly* and *Iqbal*. In particular, the brief marshals examples from many of the dozens of recently filed cases to contextualize the issues presented in this litigation. These cases largely touch on issues that are relevant but adjacent to the issues presented here, and therefore in many instances may not have been cited or discussed by the parties. Given the extensive collective experience of the Chamber's members in both retirement-plan management and ERISA litigation, the Chamber offers a distinct vantage point that it believes will be of value to the Court as it considers Plaintiff's complaint and whether it surpasses the plausibility threshold.

Notably, "the mere fact that a non-party seeks to put forth an opinion in the case does not disqualify it as an amicus." *Tafas v. Dudas*, 511 F. Supp. 2d 652, 661 (E.D. Va. 2007). "Although an amicus is not a party to the litigation and participates only to assist the court, nevertheless, by the nature of things an amicus is not normally impartial and there is no rule that amici be totally disinterested." *Id.* (internal alterations and quotations omitted). A strong advocate is still the "court's friend." *Neonatology Assocs.*, 293 F.3d at 131. Indeed, it is a "fundamental assumption of our adversary system that strong (but fair) advocacy on behalf of opposing views promotes sound decision making." *Id.* As one court recently recognized in granting the Chamber's motion for leave: "Speech is a beautiful thing. So beautiful that James Madison, who wrote that a bill of

rights was unnecessary, later drafted a bill of rights and urged Congress to pass it." *Locascio*, ECF No. 63.

The proposed amicus brief is also being filed well before Plaintiff's opposition is due and therefore will not delay resolution of this motion. *See Andersen v. Leavitt*, 2007 WL 2343672, at *2 (E.D.N.Y. Aug. 13, 2007) (considering timeliness as one factor relevant to amicus participation). And this Court and others have frequently permitted amici to participate in its proceedings. *See, e.g.*, *Dist. Lodge 26 of the Int'l Ass'n of Machinists & Aerospace Workers v. United Techs. Corp.*, 2009 WL 3571624, at *1 (D. Conn. Oct. 23, 2009); *Schaghticoke Tribal Nation*, 2007 WL 9719292, at *3. Indeed, this Court granted the Chamber's motion for leave to file an amicus brief in this very same case in December 2023. *See* ECF No. 74.

For these reasons, the Chamber respectfully requests that the Court grant it leave to participate as amicus curiae and accept the proposed amicus brief, which accompanies this motion.

Dated: March 8, 2024

Respectfully submitted,

/s/ *Jaime A. Santos*
Jaime A. Santos (ct31237)
Rohiniyurie Tashima
GOODWIN PROCTER LLP
1900 N Street, NW
Washington, DC 20036
Telephone: (202) 346-4000
Facsimile: (202) 346-4444
jsantos@goodwinlaw.com

Counsel for Amicus Curiae the Chamber of Commerce of the United States of America

OF COUNSEL:

Tara S. Morrissey
Jordan L. Von Bokern
U.S. CHAMBER LITIGATION CENTER
1615 H Street, NW
Washington, DC 20062

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States District Court for the District of Connecticut by using the court's CM/ECF system on March 8, 2024.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the court's CM/ECF system.

Dated: March 8, 2024

*_/s/ Jaime A. Santos_*

Jaime A. Santos (ct31237)
GOODWIN PROCTER LLP
1900 N Street, N.W.
Washington, D.C. 20036
Telephone: (202) 346-4000
Facsimile: (202) 346-4444
jsantos@goodwinlaw.com

Counsel for Amicus Curiae the Chamber of Commerce of the United States of America

EXHIBIT A

UNITED STATES DISTRICT COURT
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JULIETTE MOTZ, individually and as a representative of a class of similarly situated persons, on behalf of the CITI RETIREMENT SAVINGS PLAN, Plaintiff, v. CITIGROUP INC., Defendant.	No. 3:22-cv-00965-RNC March 8, 2024

BRIEF OF AMICUS CURIAE THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA

OF COUNSEL:

Tara S. Morrissey
Jordan L. Von Bokern
U.S. CHAMBER LITIGATION CENTER
1615 H Street, NW
Washington, DC 20062

Jaime A. Santos (ct31237)
Rohiniyurie Tashima
GOODWIN PROCTER LLP
1900 N Street, NW
Washington, DC 20036
Telephone: (202) 346-4000
Facsimile: (202) 346-4444
jsantos@goodwinlaw.com

Counsel for Amicus Curiae the Chamber of Commerce of the United States of America

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INTEREST OF THE AMICUS CURIAE

The Chamber of Commerce of the United States of America (Chamber) is the world's largest business federation, representing approximately 300,000 direct members and indirectly representing the interests of more than three million businesses and professional organizations of every size, in every industry sector, and from every region of the country.[1] Given the importance of the laws governing fiduciary conduct to its members, many of which maintain or provide services to retirement plans, the Chamber regularly participates as amicus curiae in ERISA cases at all levels of the federal-court system, including those addressing the pleading standard for fiduciary-breach claims. The Chamber submits this brief to provide context on retirement-plan management and how this case is situated in the broader litigation landscape challenging ERISA fiduciaries' investment decisions.

INTRODUCTION

This case is one of many in a recent surge of putative class actions challenging the management of employer-sponsored retirement plans. This explosion in litigation "is not a warning that retirees' savings are in jeopardy." Daniel Aronowitz, *Exposing Excessive Fee Litigation Against America's Defined Contribution Plans* 3, Euclid Specialty (Dec. 2020), https://bit.ly/3hNXJaW ("*Excessive Fee Litigation*"). To the contrary, in nearly every case, the asset size of the targeted plan has increased, often by billions of dollars, thus generating substantial positive returns for participants. *See id.* Nevertheless, many of these suits cherry-pick particular data points, disregard bedrock principles of plan management and investment strategies, and ignore judicially noticeable information demonstrating the flawed nature of many plaintiffs'

[1] No counsel for a party authored this brief in whole or in part. No party, no counsel for a party, and no person other than Amicus, its members, or its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

allegations in an effort to create an illusion of mismanagement and imprudence.

The complaints typically follow a familiar playbook, often loaded with inferences unsupported by nonconclusory factual allegations. Using the benefit of hindsight, these lawsuits challenge plan fiduciaries' decisions about the investment options made available to retirement plan participants based on a few cherry-picked comparators and a cherry-picked window of time—even where, as here, that decision resulted in the selection of one of the highest-performing target-date funds on the market. The complaints typically point to a few alternative investment options (among tens of thousands of investment options offered in the investment marketplace, and dozens within the same category of fund), and allege that plan fiduciaries *must have* had a flawed decisionmaking process because they did not choose one of those alternatives. They then lean heavily on ERISA's perceived complexity to open the door to discovery, even where their allegations are belied by publicly available information. No plan, regardless of size or type, is immune from these challenges. It is *always* possible for plaintiffs to use the benefit of hindsight to identify, among the almost innumerable options available in the marketplace, a better-performing investment option than the ones plan fiduciaries chose. That is not sufficient under the pleading standard established in *Hughes v. Northwestern University*, 595 U.S. 170 (2022), *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), and *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007).

This lawsuit provides the perfect example: The BlackRock LifePath Index Funds that Plaintiff challenges here are among the most highly ranked and high-performing target-date fund (TDF) suites on the market, attracting billions of dollars in investments.[2] Nevertheless, Plaintiff attempts to make out a claim of imprudence by limiting the universe of performance data included

[2] *See* Morningstar, Target-Date Strategy Landscape: 2023 (2023) ("Morningstar") at 7, 16, 18, https://www.morningstar.com/lp/tdf-landscape.

in the complaint to a short window of time and the universe of comparator funds to a narrow set of the *other* most highly ranked and high-performing TDFs on the market—TDFs that are, in any event, plainly inapt comparators based on any fair reading of the caselaw, not to mention common-sense investment principles. Defendant (and nearly a dozen other plan sponsors sued by the same plaintiffs' counsel) thus *still* found itself the target of a lawsuit based solely on its decision to select a fund with a "Gold" rating and nearly 9% of the market share. *See* Morningstar, *supra* n.2, at 7, 9, 16, 18; Amended Complaint ("Am. Compl.") ¶ 49. Plaintiff similarly objects to Defendant's decision to make the BlackRock TDFs the Plan's qualified default investment alternative ("QDIA"), alleging that this decision "[e]xacerbat[ed]" Defendant's "imprudent" decision to include the BlackRock TDFs in the Plan. Am. Compl. ¶ 34. But, notably, the Department of Labor ("DOL") has explained approvingly that "many plan sponsors decide to use TDFs as their plan's" QDIA.[3] Indeed, TDFs are one of only three types of investment options that DOL permits to serve as a plan's default option. 29 C.F.R. § 2550.404c-5(e). Thus, if these cases teach us anything, it is that it is nearly impossible for plan fiduciaries to prevent themselves from becoming the subject of a lawsuit no matter how rigorous their process, no matter the high quality of the funds they choose, and no matter how carefully they monitor the market. Plan sponsors and fiduciaries today truly are, as the Supreme Court has observed, "between a rock and a hard place." *Fifth Third Bancorp v. Dudenhoeffer*, 573 U.S. 409, 424 (2014).

Against this backdrop, it is critical that courts do not shy away from the "context-specific inquiry" ERISA requires. *Hughes*, 595 U.S. at 173; *see also Fifth Third*, 573 U.S. at 425. As the

[3] DOL, *Target Date Retirement Funds – Tips for ERISA Plan Fiduciaries* (Feb. 2013) ("DOL TDF Tips"), at 1, *available at* https://www.dol.gov/sites/dolgov/files/EBSA/about-ebsa/our-activities/resource-center/fact-sheets/target-date-retirement-funds.pdf. A QDIA "is a default investment option chosen by a plan fiduciary for participants who fail to make an election regarding investment of their account balances." *Id.*

Supreme Court recently made explicit, and as circuit courts have repeatedly emphasized since, ERISA cases are subject to the pleading standard articulated in *Twombly* and *Iqbal*. *See Hughes*, 595 U.S. at 177; *see also Matney v. Barrick Gold of N. Am.*, 80 F.4th 1136, 1144 (10th Cir. 2023); *Matousek v. MidAmerican Energy Co.*, 51 F.4th 274, 278 (8th Cir. 2022); *Albert v. Oshkosh Corp.*, 47 F.4th 570, 577 (7th Cir. 2022); *Smith v. CommonSpirit Health*, 37 F.4th 1160, 1165 (6th Cir. 2022). When a plaintiff does not present direct allegations of wrongdoing[4] and relies on circumstantial allegations that are "just as much in line with" plan fiduciaries' having acted through a prudent fiduciary process, dismissal is required. *See Twombly*, 550 U.S. at 554. And if these types of conclusory and speculative complaints are sustained, plan participants will be the ones who suffer. Fiduciaries will be pressured to limit investments to a narrow range of options at the expense of providing a diversity of choices with a range of fees, risk levels, and potential

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[4] Plaintiff attempted to avoid dismissal of her purely performance-based claims by adding purported allegations of process deficiencies premised on the Plan's investment policy statement (IPS). As Defendant explains in its motion to dismiss, Plaintiff's allegations are based on a demonstrable mischaracterization of the IPS, which is enough to resolve the matter. Mot. to Dismiss 32-35. But it is worth mentioning that Plaintiff's counsel has relied on this same misleading tactic—purporting to offer process deficiencies by blatant mischaracterizations of plan documents expressly cited in the complaint—in other BlackRock cases. Indeed, in *Anderson v. Advance Publications, Inc.*, No. 22-6826 (S.D.N.Y.), the plaintiff's amended complaint alleged that plan fiduciaries did not compare the BlackRock TDFs' returns "to any peer funds until mid-2018," despite the fact that the very written fiduciary materials incorporated by reference into the complaint showed precisely those types of peer comparisons. *See* Mot. to Dismiss 17-18, *Anderson v. Advance Publications, Inc.*, No. 22-6826 (S.D.N.Y. Sept. 13, 2023), ECF No. 112; *see also* Reply Br. 8-9, *Anderson*, *supra* (S.D.N.Y. Oct. 18, 2023), ECF No. 116 (noting the plaintiff's mischaracterizations of the IPS, along with the plaintiff's response, which was to ask the district court to ignore the plan documents incorporated by reference into the complaint). In these cases, "the Court is not obliged to reconcile and accept as true pleadings that are contradicted by other matters asserted or relied upon or incorporated by reference." *In re Express Scripts/Anthem ERISA Litig.*, 285 F. Supp. 3d 655, 671 (S.D.N.Y. 2018) (quotation marks omitted), *aff'd*, 837 F. App'x 44 (2d Cir. 2020); *accord B.B. v. The New Sch.*, 2018 WL 2316342, at *6 (S.D.N.Y. Apr. 30, 2018). This Court accordingly should not hesitate to examine the documents incorporated by reference into Plaintiff's complaint here to ensure "a proper consideration of the true merits of the pleadings." *Lasker v. N.Y. State Elec. & Gas Corp.*, 1995 WL 867881, at *4 (E.D.N.Y. Aug. 22, 1995), *aff'd,* 85 F.3d 55 (2d Cir. 1996).

performance upsides, as ERISA expressly encourages and most participants want.

ARGUMENT

I. There is no ERISA exception to Rule 8(a)'s pleading standard.

The past decade has seen a surge of ERISA litigation challenging 401(k) plan fees and performance.[5] What began as a trickle has become a flood, with hundreds of lawsuits filed since 2020.[6] Four dozen new lawsuits were filed in 2023, which, although lower than the near-record number of complaints filed in 2022, "still reflects the higher filing frequency of the last eight years in which 463 excess fee cases have been filed."[7] These lawsuits have been filed against employers in every industry, and these cases generally do not develop organically based on plan-specific details, but rather are advanced as prepackaged, one-size-fits-all challenges, as this case and the ten other nearly identical challenges show. As a result, they typically rely on generalized allegations that do not reflect the context of the actual plan whose fiduciaries are being sued.

The Supreme Court has taken several recent opportunities to address the standard for pleading a fiduciary-breach claim under ERISA. Each time, it has stressed that ERISA suits are no different from any others: To survive a motion to dismiss, plaintiffs must satisfy the Rule 8 pleading standard articulated in *Twombly* and *Iqbal*. *Hughes*, 595 U.S. at 177. Given the variety among ERISA plans, the wide discretion fiduciaries have when making decisions on behalf of tens of thousands of employees with different investment needs and risk tolerances, and the risk that

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[5] *See, e.g.*, Daniel Aronowitz, *Summary of 2023 Excess Fee and Performance Litigation*, Encore Fiduciary (Jan. 8, 2024), https://bit.ly/42IIrcW ("*Summary of 2023 Litigation*"); George S. Mellman and Geoffrey T. Sanzenbacher, *401(k) Lawsuits: What are the Causes and Consequences?*, Center for Retirement Research at Boston College (May 2018), https://bit.ly/3fUxDR1 (documenting the rise in 401(k) complaints from 2010 to 2017).

[6] *See Summary of 2023 Litigation* (graphing number of cases filed by year).

[7] *Id.*

any ERISA suit can be made to appear superficially complicated, applying Rule 8(a) to ERISA claims requires a close evaluation of "the circumstances … prevailing at the time the fiduciary acts" and a "careful, context-sensitive scrutiny of a complaint's allegations." *Fifth Third*, 573 U.S. at 425. In most cases, the "circumstances facing an ERISA fiduciary will implicate difficult tradeoffs, and courts must give due regard to the range of reasonable judgments a fiduciary may make based on her experience and expertise." *Hughes*, 595 U.S. at 177. If anything, the discretion and flexibility ERISA affords should make pleading through hindsight-based circumstantial allegations *more* difficult, not less.

As with many complaints alleging breaches of fiduciary duty based on excessive fees or underperformance, the allegations in this case fail this standard twice over. First, the complaints' circumstantial allegations are often equally (if not far more) consistent with lawful behavior, and therefore cannot "nudge[] the[] claims across the line from conceivable to plausible." *Twombly*, 550 U.S. at 570. Second, the allegations frequently ignore the discretion fiduciaries have in making decisions based on their experience and expertise, and in light of the context of their particular plan.

A. These lawsuits often manufacture factual disputes that do not survive plausibility scrutiny.

The shared problem with many of these lawsuits is exemplified by a feature that appears in most of the complaints. Plaintiffs typically create a chart (or many charts) purporting to compare some of the investment options in the plan under attack to a handful of other options available on the market that allegedly out-performed the plan's options during a cherry-picked time period. *See, e.g.*, Am. Compl. pp. 29-41. They then use the charts to try and barrel past dismissal, asking the Court to infer that plan fiduciaries must have been asleep at the wheel and requesting discovery to prove it. Inferring imprudence from this tactic ignores the realities of plan management, basic

investment principles, and ERISA's statutory structure—important context the Supreme Court has instructed lower courts to consider. *See Hughes*, 595 U.S. 173; *Fifth Third*, 573 U.S. at 425.

To start, plaintiffs' attorneys can easily cherry-pick historical data to make a fiduciary's choices look suboptimal given the near-infinite combination of comparator options and time periods. When plaintiffs' attorneys zero in on a single time period and a single metric for comparison—in these cases, performance—they will *always* be able to find a supposedly "better" fund among the options on the market.[8] With the benefit of hindsight, one can always identify a better-performing fund during a cherry-picked time period, just as one could always identify a worse-performing fund. But with dozens of TDF suites on the market, it cannot be that a court can infer that fiduciaries were acting imprudently simply because—as Plaintiff alleges here—a few other suites occasionally had slightly higher returns. *See, e.g.*, *Meiners v. Wells Fargo & Co.*, 898 F.3d 820, 823 (8th Cir. 2018) ("The fact that one fund with a different investment strategy ultimately performed better does not establish anything about whether the [challenged funds] were an imprudent choice at the outset."). Indeed, chasing performance—*i.e.*, switching investment strategies to pursue the fund performing well at the time—is a misguided investment approach

[8] Despite Plaintiff's tortured analysis, the BlackRock TDFs she challenges are still not properly characterized as underperforming. Even putting aside that Plaintiff identifies only three- and five-year returns, the difference between the performance of the BlackRock TDFs and Plaintiff's chosen comparators would be inconsequential to fiduciaries monitoring the fund's investment options, and should be seen as inconsequential in class-action litigation attempting to Monday-morning-quarterback plan fiduciaries' decisions. *See, e.g.*, *Patterson v. Morgan Stanley*, 2019 WL 4934834, at *10 (S.D.N.Y. Oct. 7, 2019) ("allegations of consistent, ten-year underperformance may support a duty of prudence claim," but "the underperformance must be substantial"). For instance, with respect to three-year returns, Plaintiff alleges that the BlackRock TDF underperformed the S&P TDF Index by, depending on the vintage, 1.21%-1.38%, and with respect to five-year returns, 0.62%-0.81%. Am. Compl. ¶ 59. Such low differences would not have been material to plan fiduciaries.

"generally doomed to some kind of failure."[9]

Moreover, plaintiffs frequently compare apples and oranges: comparing the performance of Fund A with one investment style and performance benchmark to that of Fund B, with a different investment style and performance benchmark. *See, e.g.*, *Matousek*, 51 F.4th at 281 (rejecting comparators where plaintiffs failed to allege they held "similar securities," had "similar investment strategies," or "reflect[ed] a similar risk profile"). That is precisely what happened here: Plaintiff's chosen comparators performed differently because they had different features, including different glidepaths, different investment styles, and different asset allocations. Am. Compl. ¶¶ 51-53; *see also Parmer v. Land O'Lakes, Inc.*, 518 F. Supp. 3d 1293, 1306 (D. Minn. 2021) (explaining that comparators with different "glide path strategies" "do not provide meaningful benchmarks"). Plaintiff conspicuously does not allege that the BlackRock TDFs underperformed their own benchmarks, and she thus cannot assert that the BlackRock TDFs underperformed in light of the suite's particular investment strategy. While ERISA plaintiffs often ask courts to ignore these features on a motion to dismiss, the Supreme Court has said the opposite—that "context" *must* be considered at the 12(b)(6) stage. *Fifth Third*, 573 U.S. at 425.

Plaintiff notably fails to use the most apt available comparator: the BlackRock TDFs' custom benchmark, which is "a weighted mix of the benchmarks of the underlying portfolio funds." Am. Compl. ¶ 39. Plaintiff objects that the benchmark is a flawed tool because "[u]sing this custom benchmark is akin to looking in a mirror." Am. Compl. ¶ 39. But the custom benchmark reflects a comparator that employs the same goals and investment strategies—precisely what fiduciaries and courts are supposed to consider when evaluating performance—not some

[9] Kate Stalter, *Chasing Performance Is a Quick Way to Disaster*, U.S. News (Feb. 8, 2017), https://bit.ly/3IhKn0R.

strategy superimposed by Plaintiff. That is why courts reject "apples-to-oranges" comparisons as an inference of breach. *See Luckett v. Wintrust Fin. Corp.*, 2023 WL 4549620, at *3 (N.D. Ill. July 14, 2023) (citation omitted). And Plaintiff's underlying assumption that peer-relative performance reviews are necessary every quarter, *see, e.g.*, Am. Compl. ¶¶ 39-41, finds no support in ERISA, especially given Plaintiff's concession that the plan fiduciaries periodically *did* review information concerning TDF suites from multiple providers. Indeed, DOL has never suggested that fiduciaries should remove TDFs based on comparisons to peer funds' performance. In its guidance, DOL advises fiduciaries *selecting* a TDF to consider myriad factors, including investment returns, fees, glide path, and investment strategy, along with plan-specific information, such as "how well the TDF's characteristics align with eligible employees' ages and likely retirement dates." DOL, *TDF Tips* 2. Once a TDF is selected, DOL instructs fiduciaries to monitor the TDF by "examining whether there have been any significant changes in the information fiduciaries considered when the option was selected or last reviewed," and they may need to consider replacing a TDF "if a TDF's investment strategy or management team changes significantly, … the fund's manager is not effectively carrying out the fund's stated investment strategy," or "your plan's objectives in offering a TDF change." *Id.* Nothing in this guidance suggests abandoning a TDF based on short-term underperformance when compared to a peer with a different investment strategy. Indeed, "[p]recipitously selling a well-constructed portfolio in response to disappointing short-term losses … is one of the surest ways to frustrate the long-term growth of a retirement plan." *CommonSpirit Health*, 37 F.4th at 1166.

B. Fiduciaries have discretion to make a range of reasonable choices.

The allegations in these types of ERISA complaints also often fail to grasp a fundamental tenet of ERISA—namely, the "range of reasonable judgments a fiduciary may make" and the

"difficult tradeoffs" inherent in fiduciary decisionmaking. *Hughes*, 595 U.S. at 177. That fiduciaries did not select what turned out to be the absolute best-performing option does not suggest that their process was imprudent. There is no one prudent fund, service provider, or fee level that renders everything else imprudent. Instead, there is a wide range of reasonable options, and Congress vested fiduciaries with flexibility and discretion to choose from among those options based on their informed assessment of the needs of their plan and its unique participant base.

The complaints themselves reflect a range of assessments, as one complaint's supposedly imprudent choice is often another complaint's prudent exemplar. Plaintiffs in many cases allege imprudence based on defendants' decision to offer actively managed funds. *See, e.g.*, Compl. ¶¶ 79-82, 93, 100, 109-116, *Baumeister v. Exelon Corp.*, No. 21-6505 (N.D. Ill.), ECF No. 1. But plaintiffs have also alleged the exact opposite—a breach of fiduciary duty based on a plan's decision to include passively managed funds rather than actively managed ones. *See Ravarino v. Voya Financial, Inc.*, No. 21-1658 (D. Conn.), ECF No. 1 ¶¶ 79-83. This same phenomenon plays out with respect to plan performance. General Electric was sued in 2017 for including the GE RSP U.S. Equity Fund, among others, in its 401(k) plan. *See* Compl. ¶ 1, *Haskins v. Gen. Elec. Co.*, No. 17-01960 (S.D. Cal.), ECF No. 1. But in a different case, plaintiffs held up *that exact fund* as a "superior performing alternative[]." *See* Compl. ¶ 122, *Harding v. Southcoast Hosps. Grp.*, No. 20-12216 (D. Mass.), ECF No. 1.

As these complaints demonstrate, ERISA fiduciaries making discretionary decisions are at risk of being sued seemingly no matter what decisions they make. Plaintiffs sue fiduciaries for failing to divest from risky or dropping stock,[10] or for failing to *hold onto* such stock because high

[10] *See, e.g.*, *In re RadioShack Corp. ERISA Litig.*, 547 F. Supp. 2d 606, 611 (N.D. Tex. 2008).

risk can produce high reward.[11] Some plaintiffs allege that it is imprudent for a plan to offer more than one investment option in the same style,[12] while others complain that including *only one option* in each investment style is imprudent.[13] In many cases, plaintiffs allege that fiduciaries were imprudent because they should have offered Vanguard mutual funds,[14] but others complain that defendants were imprudent *because they offered* Vanguard mutual funds.[15] Some plaintiffs allege that plans offered imprudently risky investments,[16] while others allege that fiduciaries were *imprudently cautious* in their investment approach.[17] In some instances, fiduciaries have simultaneously defended against "diametrically opposed" liability theories, giving new meaning to the phrase "cursed-if-you-do, cursed-if-you-don't."[18] Indeed, while most plaintiffs sue plans for charging allegedly excessive fees in the hopes of outperformance, this suit (and ten materially identical complaints) charge defendants with following the purportedly "in vogue" trend of

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[11] *E.g.*, *Thompson v. Avondale Indus., Inc.*, 2000 WL 310382, at *1 (E.D. La. Mar. 24, 2000) (plaintiff alleged that fiduciaries "prematurely" divested ESOP stock).

[12] *See, e.g.*, *Sweda v. Univ. of Penn.*, 2017 WL 4179752, at *10 (E.D. Pa. Sept. 21, 2017), *rev'd in part*, 923 F.3d 320 (3d Cir. 2019).

[13] *See, e.g.*, Am. Compl. ¶ 52, *In re GE ERISA Litig.*, No. 17-cv-12123-IT (D. Mass.), ECF No. 35.

[14] *See, e.g.*, *Moreno v. Deutsche Bank Ams. Holding Corp.*, 2016 WL 5957307, at *6 (S.D.N.Y. Oct. 13, 2016).

[15] *See, e.g.*, Am. Compl. ¶ 108, *White v. Chevron Corp.*, No. 16-cv-0793-PJH (N.D. Cal.), ECF No. 41.

[16] *E.g.*, *In re Citigroup ERISA Litig.*, 104 F. Supp. 3d 599, 608 (S.D.N.Y. 2015), *aff'd sub nom.*, *Muehlgay v. Citigroup Inc.*, 649 F. App'x 110 (2d Cir. 2016); *St. Vincent v. Morgan Stanley Inv. Mgmt. Inc.*, 712 F.3d 705, 711 (2d Cir. 2013).

[17] *See Brown v. Am. Life Holdings, Inc.*, 190 F.3d 856, 859-860 (8th Cir. 1999) (addressing claim that fiduciaries maintained an overly safe portfolio); Compl. ¶ 2, *Barchock v. CVS Health Corp.*, No. 16-cv-61-ML-PAS, (D.R.I.), ECF No. 1 (alleging plan fiduciaries imprudently invested portions of the plan's stable value fund in conservative money market funds and cash management accounts).

[18] *E.g.*, *Evans v. Akers*, 534 F.3d 65, 68 (1st Cir. 2008).

"chas[ing]" low fees rather than focusing on "the value provided in exchange for such fees." Am. Compl. ¶ 32. In other words, Plaintiff alleges that Defendant violated the duty of prudence by doing precisely what plaintiffs in dozens of other suits have said defendants *should* be doing. This dynamic has made it incredibly difficult for fiduciaries to do their jobs—and, as this case reveals, it has made it virtually impossible for fiduciaries to avoid being sued, no matter how careful their process and how reasonable their decisions.

Accordingly, it is critical for courts to consider context—things like the DOL instruction that fees are only one of *several factors* that should be considered and the absence of any DOL guidance or other general investment principles to abandon a TDF based on short-term peer performance differences;[19] publicly available information demonstrating that a complaint's supposed comparators are inapposite; industry data showing that services (and their pricing) vary widely; the performance ebbs and flows that are common characteristics of investment management; and the wide discretion granted to fiduciaries by Congress all bear on whether fiduciary-breach claims are plausible. Indeed, the Supreme Court has directed that courts should "give due regard to the range of reasonable judgments a fiduciary may make," recognizing that a bare allegation that one fiduciary made a decision different from another fiduciary is insufficient to survive a motion to dismiss. *Hughes*, 595 U.S. at 177.

II. These lawsuits will harm participants and beneficiaries.

This surge of litigation has significant negative consequences for plan participants and beneficiaries. These lawsuits impose pressure on plan fiduciaries to make decisions based on how to avoid litigation, rather than on their considered discretion as to what is best for their population of employees. In order to minimize risk, employers may be hesitant to make decisions that would

[19] DOL, *A Look at 401(k) Plan Fees* 1 (Sept. 2019), https://bit.ly/3fP8vuH.

otherwise benefit their employees—such as instituting auto-enrollment and designating a permissible investment option to serve as the default fund for employees who do not affirmatively select any particular investment options. The changing litigation landscape also increases the cost of fiduciary liability insurance, leaving employers with less money to provide benefits for employees—such as matching contributions or paying for administrative expenses. And for smaller employers, retirement plans might become cost-prohibitive or simply not worth the risk of litigation. The result will be fewer employers sponsoring plans, less generous benefits, and reduced choice for participants. This outcome is wholly at odds with a primary purpose of ERISA—to *encourage* employers to voluntarily offer retirement plans and a diverse set of options within those plans. *See Conkright v. Frommert*, 559 U.S. 506, 517 (2010).

A. These lawsuits pressure plan sponsors away from exercising their discretion.

These suits threaten to undermine one of the most important aspects of ERISA: the value of innovation, diversification, and employee choice. An investment committee may, for example, feel pressured by the threat of litigation to chase investment performance, even though doing so is not in participants' best interests. *See supra*, pp. 7-9. Likewise, an investment committee may feel it needs to offer only "a diversified suite of passive investments," despite "actually think[ing] that a mix of active and passive investments is best." *See* David McCann, *Passive Aggression*, CFO (June 22, 2016), https://bit.ly/2Sl55Yq. In a purported effort to safeguard retirement funds, plaintiffs actually pressure fiduciaries *away from* exercising their "responsibility to weigh … competing interests and to decide on a (prudent) financial strategy." *Brown v. Daikin Am., Inc.*, 2021 WL 1758898, at *7 (S.D.N.Y. May 4, 2021).

B. Changes in the liability-insurance market will harm participants.

The litigation surge has upended the insurance industry for retirement plans. Judy

Greenwald, *Litigation Leads to Hardening Fiduciary Liability Market*, Business Insurance (Apr. 30, 2021), https://bit.ly/3ytoRBX. The risks of litigation have pushed fiduciary insurers "to raise insurance premiums, increase policyholder deductibles, and restrict exposure with reduced insurance limits." *Excessive Fee Litigation* 4; *see also* Jacklyn Wille, *Spike in 401(k) Lawsuits Scrambles Fiduciary Insurance Market*, Bloomberg Law (Oct. 18, 2021), https://bit.ly/307mOHg (discussing the "sea change" in the market for fiduciary insurance); Robert Steyer, *Sponsors Rocked by Fiduciary Insurance Hikes*, Pensions & Investments (Sept. 20, 2021), https://bit.ly/39W996Y. Plans are now at risk of not being able to "find[] adequate and affordable fiduciary coverage because of the excessive fee litigation." *Excessive Fee Litigation* 4; *see also* Jon Chambers, *ERISA Litigation in Defined Contribution Plans* 1, Sageview Advisory Grp. (Mar. 2021), https://bit.ly/2SHZuME (fiduciary insurers may "increasingly move to reduce coverage limits, materially increase retention, or perhaps even cancel coverage"); Charles Filips et al., *Options When Fiduciary Insurance Is Too Expensive* 1, PlanSponsor (Mar. 8, 2022), https://bit.ly/3q1vgRU (responding to an inquiry from a plan sponsor that was no longer able to afford fiduciary insurance).

If employers need to absorb the cost of higher insurance premiums and higher deductibles, many employers will inevitably have to offer less generous plans—reducing their employer contributions, declining to cover administrative fees and costs when they otherwise would elect to do so, and reducing the services available to employees. And while large employers may have some capacity to absorb some of these costs, many smaller employers do not. If smaller plan sponsors "cannot purchase adequate fiduciary liability insurance to protect their plan fiduciaries,

the next step is to stop offering retirement plans to their employees." *Excessive Fee Litigation* 4.[20] This problem will only grow as plaintiffs target funds like the BlackRock TDFs—"Gold"-rated investment choices that comprise nearly 9% of the market—making it near impossible for fiduciaries to avoid being sued. Am. Compl. ¶ 49; *see also Morningstar*, supra n.2, at 7, 9, 16, 18. In short, these suits impose significant costs on plan sponsors—and, by extension, plan participants and beneficiaries—often without producing any concomitant benefit.

CONCLUSION

For the foregoing reasons, adopting anything less than the "context-specific inquiry" of ERISA complaints prescribed by the Supreme Court in *Hughes* and *Fifth Third* would create precisely the types of negative consequences that Congress intended to avoid in crafting ERISA. *Amicus* urges the Court to adopt and apply that level of scrutiny to this case.

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Respectfully submitted,

OF COUNSEL:

Tara S. Morrissey
Jordan L. Von Bokern
U.S. CHAMBER LITIGATION CENTER
1615 H Street, NW
Washington, DC 20062

/s/ *Jaime A. Santos*
Jaime A. Santos (ct31237)
Rohiniyurie Tashima
GOODWIN PROCTER LLP
1900 N Street, NW
Washington, DC 20036
Telephone: (202) 346-4000
Facsimile: (202) 346-4444
jsantos@goodwinlaw.com

Counsel for Amicus Curiae the Chamber of Commerce of the United States of America

[20] Congress is in fact trying to do the opposite. The Setting Every Community Up for Retirement Enhancement Act of 2019 increases the tax incentives available for small employers that sponsor eligible employer plans and creates a structure for pooled employer plans, allowing unrelated employees to join together to participate in a single defined contribution plan. *See* Public L. 116-94, 133 Stat. 2534 (2019), §§ 101, 104-105. These lawsuits run counter to Congress's goal to expand—rather than shrink—the number of employees who are able to participate in retirement plans.

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States District Court for the District of Connecticut by using the court's CM/ECF system on March 8, 2024.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the court's CM/ECF system.

Dated: March 8, 2024

/s/ Jaime A. Santos

Jaime A. Santos (ct31237)
GOODWIN PROCTER LLP
1900 N Street, N.W.
Washington, D.C. 20036
Telephone: (202) 346-4000
Facsimile: (202) 346-4444
jsantos@goodwinlaw.com

Counsel for Amicus Curiae the Chamber of Commerce of the United States of America