No. 17-3244

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

JENNIFER SWEDA, BENJAMIN A. WIGGINS, ROBERT L. YOUNG, FAITH PICKERING, PUSHKAR SOHONI, AND REBECCA N. TONER, individually and as representatives of a class of similarly situated persons of the University of Pennsylvania Matching Plan,

Plaintiffs-Appellants,

v.

THE UNIVERSITY OF PENNSYLVANIA, INVESTMENT COMMITTEE, AND JACK HEUER,

Defendants-Appellees.

Appeal from the United States District Court for the
Eastern District of Pennsylvania
The Honorable Gene E.K. Pratter
No. 2:16-cv-04329-GEKP

OPPOSITION TO PETITION FOR PANEL REHEARING OR REHEARING EN BANC

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CONTENTS

AUTHORITIES

Cases

Statutes

Rules

Other Authorities

ARGUMENT

There is no reason for the Court to rehear this appeal because the Court's decision does not conflict with *Renfro v. Unisys Corp.*, 671 F.3d 314 (3d Cir. 2011), does not conflict with Supreme Court precedent, and does not threaten the existence of university retirement plans.

I. The Court's decision does not conflict with *Renfro.*

Penn tries to create a conflict with *Renfro* by asserting that Plaintiffs' complaint is no different from the *Renfro* complaint. That is not true. As Penn's own attorney pointed out when he represented the fiduciaries in *Renfro*, the *Renfro* complaint "failed entirely to allege with any specificity that institutional classes of the same funds offered as retail funds were available to the Plan and not selected." Br. for Appellees Unisys Corp. *et al*., at 55, *Renfro v. Unisys Corp.*, No. 10-2447 (filed Nov. 8, 2010). Here, Plaintiffs point to 58 mutual funds in the plan that were available in share classes that were much less expensive that what Penn provided, for the exact same mutual fund investment. A88–96 ¶¶128–29 (Appendix); Appellants' Br. 13.

Providing the more expensive class of shares of plan mutual funds is a recognized fiduciary breach. *Tibble v. Edison Int'l*, 729 F.3d 1110, 1137–39 (9th Cir. 2013), *vacated on other grounds*, 135 S.Ct. 1823 (2015). Penn's attorney distinguished the *Renfro* complaint from the *Tibble* complaint on the basis that the

Tibble complaint "addressed specific allegations ... that defendants failed to consider available institutional share classes of six specific mutual funds." Br. for Appellees Unisys Corp. *et al*., at 55 n.45. That is what Plaintiffs' complaint does here, and it is equally as distinct, if not more distinct, from the *Renfro* complaint. The Ninth Circuit found such facts to be a breach despite agreeing with *Renfro* that a "broadside" against mutual funds *per se* is insufficient to state a claim. *Tibble*, 729 F.3d at 1135.

Plaintiffs allege many more facts that plausibly show a deficient fiduciary process. *See* Appellants' Br. 9–11. Plaintiffs allege that Penn allowed 118 investment options into the plan, when 15 is the average. A66 ¶77; A97 ¶133; A354–A356.[1] That lack of scrutiny over what funds were included in the plan led to unnecessary and detrimental overlap and duplication among investment categories. A100 ¶140; A104 ¶147. Penn retained funds in the plan at the beginning of the statutory period even though they had underperformed their benchmarks and comparable alternatives that were available to the plan. A105 ¶151; A108–A124. That included the CREF Stock Account, which so consistently underperformed its stated benchmark (A112–A114 ¶¶163–64)[2] as well as

[1] Penn reduced that to 78 options only in October 2012, during the proposed class period, by removing 40 Vanguard funds. A249.

[2] Penn argues for the first time that Plaintiffs failed to allege "a meaningful benchmark" to demonstrate underperformance. Pet. 11 n.3. Penn forfeited that argument by failing to raise it in its brief on appeal. *E.g.*, *Peter v. Hess Oil Virgin*

comparable alternatives (A114–A117) that an established investment consultant advised its retirement plan clients to remove it from their plans (A118 ¶169). Penn, however, agreed, at TIAA's insistence, to keep the CREF Stock Account in the plan no matter how bad its performance. A69–A71 ¶¶84–87. The complaint in *Renfro* did not "challenge the prudence of the inclusion of any particular investment option." 671 F.3d at 326. The complaint here does so.

Plaintiffs also allege that Penn failed to put plan recordkeeping services out for bid, maintained duplicative recordkeeping systems, and failed to monitor and regulate the asset-based compensation that the plan's recordkeepers received from plan investments, even as plan assets increased while participants decreased, resulting in compensation equivalent to the rate of over $200 per participant per year, over five times a reasonable rate of $35. A34 ¶4; A78 ¶103; A80–A84 ¶¶108–118. Failing to put plan services out for bid and allowing excessive compensation of recordkeepers from unmonitored revenue sharing out of plan investments is a recognized fiduciary breach. *Tussey v. ABB, Inc.*, 746 F.3d 327, 336 (8th Cir. 2014); *George v. Kraft Foods Global, Inc.*, 641 F.3d 786, 798–800 (7th Cir. 2011). In contrast, the plaintiffs in *Renfro* did not even challenge the fee-

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Islands Corp., 910 F.2d 1179, 1181 (3d Cir. 1990)(citations omitted). It did not even cite *Meiners v. Wells Fargo & Co.*, 898 F.3d 820, 822 (8th Cir. 2018), in its brief on appeal. Furthermore, as noted above, Penn is wrong.

sharing arrangement for compensating recordkeepers. 671 F.3d at 326 n.7.[3] Plaintiffs here do.

These allegations are far more than claiming "some options could have been obtained more cheaply, through more effective use of 'bargaining power' or the like." Pet. 8. They do not depict a "carefully curated retirement plan[.]" Pet. 12. They are specific allegations about the plan that plausibly suggest a fiduciary process tainted by failure of effort, competence, or loyalty. *Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 596 (8th Cir. 2009). Those allegations plausibly show "fiduciary misconduct[.]" Roth, Sr. Judge, concurring in part and dissenting in part at 14. These allegations are far more detailed and plan-specific than the allegations in *Renfro*, which were "directed exclusively to the fee structure and [were] limited to contentions that Unisys should have paid per-participant fees," 671 F.3d at 327. Because the complaint here is so distinct from the complaint in *Renfro*, the Court's reasoning and reversal in this case does not conflict with its reasoning and decision in *Renfro.*

Petitioners and their amici (as well as the dissent) want *Renfro* to have established a judicially created safe harbor for fiduciaries in which there can be no

[3] This, of course, is not an attack on revenue sharing as a means of compensating recordkeepers *per se*. If the revenue sharing is monitored and compensation in excess of a reasonable amount is returned to the plan, then there is no problem. But that is not what Penn did. Failure to do so is a breach. *Tussey*, 746 F.3d at 336; Appellants' Br. 48–49.

fiduciary breach so long as a plan has at least 73 investment options and at least one fund with a 0.10% total expense ratio. There is no basis in the statute or precedent for such an interpretation of ERISA or *Renfro*. As the Court recognized, that interpretation "would insulate from liability every fiduciary who, although imprudent, initially selected a 'mix and range' of investment options." Op. 25. Even the Seventh Circuit in *Hecker*, on which *Renfro* relied, rejected that interpretation. *Hecker v. Deere & Co*., 569 F.3d 708, 711 (7th Cir. 2009)("The panel's opinion, however, was not intended to give a green light to such 'obvious, even reckless, imprudence in the selection of investments.'"); *Renfro*, 671 F.3d at 326–27 (relying on *Hecker*). There is no support in the statute or precedent for rendering impotent statutory duties that are the "highest known to the law." Op. 23 (quoting *Tatum v. RJR Pension Inv. Comm.*, 761 F.3d 346, 355–56 (4th Cir. 2014)). Interpreting *Renfro* as establishing such a fiduciary safe harbor would create a circuit split and undermine ERISA's protective purpose. *Cf. Boggs v. Boggs*, 520 U.S. 833, 845 (1997)("The principal object of the statute is to protect plan participants and beneficiaries."); *In re Unisys Sav. Plan Litig*., 74 F.3d 420, 434 (3d Cir. 1996)(ERISA's underlying purposes include "to protect and strengthen the rights of employees" and "to enforce strict fiduciary standards").

The Court's decision in this case does not conflict with *Renfro* because the complaint here contains detailed allegations of imprudent funds and administrative

expenses, which were missing from *Renfro.* Petitioner's first argument provides no basis for rehearing this appeal.

II. The Court's decision does not conflict with Supreme Court precedent.

In dismissing the complaint, the district court held that Plaintiffs' allegations of fiduciary breach were implausible because "[a]s in *Twombly*, the actions are at least 'just as much in line with a wide swath of rational and competitive business strategy' in the market as they are with a fiduciary breach." *Sweda v. Univ. of Pennsylvania*, No. CV 16-4329, 2017 WL 4179752, at *7 (E.D.Pa. Sept. 21, 2017) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 554 (2007)); *see also id.* at *8 ("Just as the actions in *Twombly* were 'consistent with conspiracy, but just as much in line with a wide swath of rational' actions, so too are the actions here—perhaps consistent with fiduciary breach, but also well in line with a wide swath of other rational actions."); Op. 8. As the Court noted, that "just as much in line" rule in *Twombly* is specific to antitrust cases, and it not a general rule of pleading. Op. 8.

That is not a "misapplication of Supreme Court precedent." Pet. 12. It is what the Court concluded nine years ago in *In re Insurance Brokerage Antitrust Litigation*, 618 F.3d 300, 321, 341 n.42 (3d Cir. 2010). In that case the Court held that "*Twombly* makes clear that in the *specific context* of a claim under § 1 of the Sherman Act, it is unreasonable to infer an agreement from allegations of parallel conduct that are equally consistent with independently motivated behavior." *Id.* at

341 n.42 (emphasis added); *see also id.* at 321 (explaining the parallel conduct issue in antitrust law). Outside of that specific context, however, "the *Twombly* standard does not impose a 'probability requirement'" and "does not require as a general matter that the plaintiff plead facts supporting an inference of defendant's liability *more compelling than the opposing inference*." *Id.* at 341 n.42 (emphasis added, quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)).

That is precisely the precedent applied by the Court here. The Court has applied the "just as much in line" rule in *Twombly* only in antitrust cases: *Insurance Brokerage*, 618 F.3d at 321, and *Burtch v. Milberg Factors, Inc.*, 662 F.3d 212, 227 (3d Cir. 2011)(a decision in which Senior Judge Roth joined).[4] The Court did not apply the "just as much in line" rule to ERISA in *Renfro*. Penn cites no decision in any court that has applied the "just as much in line" rule outside of antitrust.[5] Penn does not even mention *Insurance Brokerage* in its petition (nor do the *amici* in support of rehearing). If the Court was not wrong in *Insurance Brokerage*, as Penn appears to concede by failing to argue otherwise, it cannot have been wrong here. In fact, the Court's decision is in line with the context-

[4] Even Senior Judge Roth, concurring in part and dissenting in part, does not dispute the Court's application of Supreme Court precedent in this case.

[5] None of the cases cited by the Chamber of Commerce *et al*. relied on *Twombly*'s "just as much in line" rule. *Cf.* Br. for the Chamber of Commerce of the U.S. of A. *etc*. at 5 n.2 (filed June 6, 2019). The Supreme Court in *Fifth Third Bancorp v. Dudenhoeffer*, 573 U.S. 409 (2014), also did not apply *Twombly*'s "just as much in line" rule to that ERISA case. 573 U.S. at 425–30.

specific application of Supreme Court precedent to claims of fiduciary breach under ERISA in *Braden*, 588 F.3d at 597. As the Seventh Circuit notes, applying the same pleading standards, the time for the fiduciary to argue that its process was adequate is on summary judgment after discovery. *Allen v. GreatBanc Trust Co.*, 835 F.3d 670, 679 (7th Cir. 2016).

Iqbal did not even address the "just as much in line" rule, much less apply it in that or any other context outside of antitrust law. Nor could it, since the plaintiff there did not allege facts that were just as much in line with lawful conduct. Instead, the plaintiff alleged that the Director of the FBI and the Attorney General of the United States conspired to subject Muslim aliens to harsh conditions of confinement out of racial, religious, or xenophobic animus. 565 U.S. at 668–69. *Iqbal's* inference was implausible on its face because the obvious explanation for the defendants' conduct was "that the Nation's top law enforcement officers, in the aftermath of a devastating terrorist attack, sought to keep suspected terrorists in the most secure conditions available until the suspects could be cleared of terrorist activity." *Id.* at 683. *Iqbal's* inference was no more than the assertion of "a sheer possibility" that those defendants acted unlawfully. *Id.* at 678.

Plaintiffs' allegations show far more than a sheer possibility of misconduct by their fiduciaries. Prudent fiduciaries do not provide the more expensive shares of the same mutual funds, retain investment options that consistently underperform

their benchmarks and available alternatives, lock an investment option into a plan regardless of its performance, fail to put administrative services out for bid, and fail to monitor growing asset-based compensation or even negotiate a reasonable rate of compensation. Those are not the marks of a "carefully curated retirement plan[.]" Pet. 12.

The Court did not misapply Supreme Court precedent. Penn's second argument provides no basis for rehearing this appeal.

III. The Court's decision does not threaten the future of defined contribution plans. It protects them.

Penn and its *amici* contend that allowing this lawsuit to proceed somehow will spell the end of defined contribution retirement plans. That is not a basis for rehearing an appeal. Fed.R.App.P. 35(b)(1) (requiring conflict with Supreme Court or Circuit Court decisions for *en banc* rehearing); Fed.R.App.P. 40(a)(2) (requiring points of law or fact overlooked or misapprehended for panel rehearing). The Court properly dismissed this as a policy argument to be directed to Congress. Op. 24 n.9.

These apocalyptic warnings also are entirely baseless. Penn and its *amici* do not point to any corporation or university that has terminated its retirement plan in the face of ERISA fiduciary breach litigation such as this. Instead of harming retirement plans, participant-led ERISA fiduciary breach litigation has reduced by nearly 50% the expenses of retirement plan investments. George S. Mellman and

Geoffrey T. Sanzenbacher, *401(K) Lawsuits: What Are The Causes And Consequences?*, Center For Retirement Research (May 2018) at 2 (fig. 1), 5 (fig. 5).[6] It has resulted in enhanced fiduciary awareness, reduction of investment and administrative fees, and enhanced employee retirement accounts. Anne Tergeson, *401(k) Fees, Already Low, Are Heading Lower*, WALL ST. J. (May 15, 2016).[7]

Many courts have recognized how this litigation has benefited retirement plans across the country. *Kruger v. Novant Health, Inc.*, No. 14-208, 2016 WL 6769066, at *5 (M.D.N.C. Sept. 29, 2016)(noting "dramatic reductions in fees paid by 401(k) plan participants throughout the United States, through heightened awareness and scrutiny of fees, selfdealing, and imprudent investment options"); *Spano v. Boeing Co.*, No. 06-743, 2016 WL 3791123, at *3 (S.D.Ill. Mar. 31, 2016)("has significantly improved 401(k) plans across the country"); *Beesley v. Int'l Paper Co.*, No. 06-703, 2014 WL 375432, at *2 (S.D.Ill. Jan. 31, 2014) (litigation has "benefited employees and retirees throughout the country by bringing sweeping changes to fiduciary practices"); *Nolte v. Cigna Corp.*, No. 07-2046, 2013 WL 12242015, at *2 (C.D.Ill. Oct. 15, 2013)("$2.8 billion in annual savings for American workers and retirees"); *Will v. Gen. Dynamics Corp.*, No. 06-

[6] https://crr.bc.edu/wpcontent/uploads/2018/04/IB_18-8.pdf; https://crr.bc.edu/briefs/401k-lawsuits-what-are-the-causes-and-consequences/.

[7] https://www.wsj.com/articles/401-k-fees-already-low-are-heading-lower-1463304601

698, 2010 WL 4818174, at *2 (S.D.Ill. Nov. 22, 2010)("these cases, collectively, have brought sweeping changes to fiduciary practices within 401(k) plans and have changed the 401(k) industry for the benefit of employees and retirees throughout the country").

Penn points to Duke University and Vanderbilt University as examples of settlements "extracted" by plaintiffs. Pet. 15. The Duke settlement was scrutinized by the district court and an independent fiduciary and approved after providing every participant the opportunity to object—and no participant objected. *Clark v. Duke Univ.*, No. 16-1044, Doc. 164 (M.D.N.C. June 24, 2019)(order of final approval); *Clark v. Duke Univ.*, No. 16-1044, Doc. 163-1 (M.D.N.C. June 4, 2019) (report of independent fiduciary).[8] If this settlement was an "extortion" unfairly "extracted" from cowed defendants, or if it were in any way detrimental to participants, neither the court nor an independent fiduciary would have allowed it. The Vanderbilt settlement has been preliminarily approved by the district court and is now undergoing similar scrutiny. *Cassell v. Vanderbilt Univ.*, No. 16-2086, Doc. 153 (May 30, 2019).

The participants' action against Duke University itself sparked reform of that

[8] The Secretary of Labor requires independent fiduciaries to approve settlements of fiduciary breach claims on behalf of ERISA plans. Adoption of Amendment to Class Exemption for the Release of Claims and Extensions of Credit in Connection With Litigation (PTE 2003-39), 75 Fed.Reg. 33830 (June 15, 2010).

plan. After the participants filed their lawsuit in 2016, Duke University in 2019 reduced its plan to one primary recordkeeper under a fixed-fee contract with a streamlined range of investment options. *Clark v. Duke Univ*., No. 16-1044, Doc. 160-5 at 2–3 (M.D.N.C. Apr.19, 2019).[9] The additional non-monetary benefits to the participants from that settlement were worth over $25 million. *Id.* at 4–6. In addition to restoring millions of dollars to its retirement plan, Duke University will engage an independent consultant to advise on putting plan administrative services out for competitive bidding, improve the process for negotiating recordkeeping compensation and selecting plan investment options, allow for external monitoring of plan investments, and provide participants information for transferring legacy investments into new plan investments. *Clark*, Doc. 164 at 6. In addition to restoring millions of dollars to its retirement plan, Vanderbilt has agreed, *inter alia*, to put plan recordkeeping services out for competitive bidding, improve the process for selecting plan investments, prohibit plan recordkeepers from soliciting non-plan business from participants, and provide an easy process for participants to transfer legacy investments into the plan's new and monitored investment options. *Cassell v. Vanderbilt Univ.*, No. 16-2086, Doc. 146 at 5–6 (April 22, 2019). Like the other settlements and judgments that preceded them, these settlements have resulted in vastly improved retirement plans and enhanced employee retirement

[9] https://hr.duke.edu/benefits/retirement/retirement-plan-redesign

savings, and have not led to termination or diminution of any plan.

Although ERISA authorizes the Secretary of Labor to enforce its terms, the statute also authorizes participants to enforce ERISA's fiduciary duties through litigation in Federal court. It is the stated policy of ERISA to provide "ready access to the Federal courts" to enforce the statute's "standards of conduct, responsibility, and obligations for fiduciaries[.]" 29 U.S.C. §1001(b). The Secretary of Labor relies on participant-led litigation to enforce ERISA's stringent fiduciary duties and objects to erection of unnecessarily high pleading standards that thwart that litigation. *Braden*, 588 F.3d at 597 n.8. All of the fiduciary breach litigation that Penn and its *amici* bemoan has resulted in significant and valuable changes in the administration of defined contribution retirement plans to the benefit of employee-participants. That would not have happened with the safe-harbor interpretation of *Renfro* that Penn and its *amici* argue for in this petition. Granting fiduciaries that safe harbor will harm participants by allowing fiduciaries charged with the highest duty known to the law to escape liability through the simple expedient of including a very large number of investment alternatives in a plan and then shifting to the participants the responsibility for choosing among them. *Hecker*, 569 F.3d at 711. That is not a proper interpretation of *Renfro* or ERISA, and it is not a reason for the Court to rehear this appeal.

CONCLUSION

Penn and its *amici* provide no reason for rehearing this appeal. The Court should deny the petition.

July 5, 2019

Respectfully submitted,

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CERTIFICATE OF ADMISSION

I certify that Jerome J. Schlichter and Michael A. Wolff are members of the bar of this Court.

s/ Jerome J. Schlichter
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July 5, 2019

CERTIFICATE OF COMPLIANCE

1. I certify that this brief complies with the type-volume limitation set forth in Fed.R.App.P. 40(b)(1) because this brief contains 3,226 words, excluding the parts of the brief exempted by Fed.R.App.P. 32(f).

2. I certify that this brief complies with the typeface requirements of Fed.R.App.P. 32(a)(5) and the type style requirements of Fed.R.App.P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2010 Times New Roman 14 point font.

3. **L.A.R. 31.1(c) Certification**: The text of the electronic version of this brief is identical to the text in the paper copies of this brief. A virus detection program (Trend Micro Antivirus version 9.0 Service Pack 1 Build 3147) has been run on the file of this brief and no virus was detected.

s/ Jerome J. Schlichter
Jerome J. Schlichter
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July 5, 2019

CERTIFICATE OF SERVICE

On July 5, 2019, I electronically filed this Opposition to Petition for Panel Rehearing or Rehearing En Banc with the Clerk of the Court for the United States Court of Appeals for the Third Circuit by using the appellate CM/ECF system. I further certify that counsel of record for Defendants is a Filing User and is served electronically by the Notice of Docket Activity.

s/ Jerome J. Schlichter
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July 5, 2019