No. 17-3244

In the United States Court of Appeals for the Third Circuit

JENNIFER SWEDA; BENJAMIN A. WIGGINS; ROBERT L. YOUNG; FAITH PICKERING; PUSHKAR SOHONI; REBECCA N. TONER, individually and as representatives of a class of participants and beneficiaries on behalf of the University of Pennsylvania Matching Plan,

Appellants,

v.

UNIVERSITY OF PENNSYLVANIA; INVESTMENT COMMITTEE; JACK HEUER,

Appellees.

On Appeal from the U.S. District Court for the Eastern District of Pennsylvania
No. 2:16-cv-04329-GEKP

MOTION FOR LEAVE TO FILE REPLY IN SUPPORT OF REHEARING

Christopher J. Boran
Matthew A. Russell
MORGAN, LEWIS & BOCKIUS LLP
77 West Wacker Drive
Chicago, Illinois 60601
T. 312.324.1000
F. 312.324.1001

Brian T. Ortelere
MORGAN, LEWIS & BOCKIUS LLP
1701 Market Street
Philadelphia, Pennsylvania 19103
T. 215.963.5000
F. 215.963.5001

Michael E. Kenneally
MORGAN, LEWIS & BOCKIUS LLP
1111 Pennsylvania Avenue, NW
Washington, D.C. 20004
T. 202.739.3000
F. 202.739.3001

Counsel for the University of Pennsylvania, Investment Committee, and Jack Heuer

MOTION FOR LEAVE TO FILE REPLY IN SUPPORT OF REHEARING

Defendants-Appellees the University of Pennsylvania, Investment Committee, and Jack Heuer respectfully move for leave to file the attached reply in support of their Petition For Panel Rehearing Or Rehearing En Banc.

On July 5, 2019, Plaintiffs filed their Opposition To Petition For Panel Rehearing Or Rehearing En Banc. Plaintiffs' Opposition mischaracterizes: Defendants' arguments; this Court's decision in *Renfro v. Unisys Corp.*, 671 F.3d 314 (3d Cir. 2011); this Court's decisions in *In re Insurance Brokerage Antitrust Litigation*, 618 F.3d 300, 341 n.42 (3d Cir. 2011), and *Burtch v. Milberg Factors, Inc.*, 662 F.3d 212, 227 (3d Cir. 2011); and the criteria for rehearing. By responding to these mischaracterizations and Plaintiffs' other arguments against rehearing, Defendants respectfully submit that the proposed reply will assist the Court's evaluation of Defendants' Petition.

For these reasons, the Court should grant Defendants leave to file the attached reply.

Dated: July 11, 2019

Respectfully submitted,

s/ Brian T. Ortelere

Brian T. Ortelere
MORGAN, LEWIS & BOCKIUS LLP
1701 Market Street
Philadelphia, Pennsylvania 19103
T. 215.963.5000
F. 215.963.5001

Christopher J. Boran
Matthew A. Russell
MORGAN, LEWIS & BOCKIUS LLP
77 West Wacker Drive
Chicago, Illinois 60601
T. 312.324.1000
F. 312.324.1001

Michael E. Kenneally
MORGAN, LEWIS & BOCKIUS LLP
1111 Pennsylvania Avenue, NW
Washington, D.C. 20004
T. 202.739.3000
F. 202.739.3001

Counsel for the University of Pennsylvania, Investment Committee, and Jack Heuer

CERTIFICATE OF BAR MEMBERSHIP, COMPLIANCE WITH TYPE-VOLUME LIMITATION, AND VIRUS CHECK

In accordance with Local Appellate Rule 28.3(d), I certify that all counsel whose names appear on this motion are members in good standing of the bar of this Court.

In accordance with Federal Rule of Appellate Procedure 32(g)(1), I certify that the foregoing Motion For Leave To File Reply In Support Of Rehearing complies with the type-volume limitation of Rule 27(d)(2)(A) because it contains 153 words.

In accordance with Local Appellate Rule 31.1(c), I certify that McAfee Endpoint Security 10.6 was run on the file and did not detect a virus.

Dated: July 11, 2019

s/ Brian T. Ortelere
Brian T. Ortelere

Counsel for the University of Pennsylvania, Investment Committee, and Jack Heuer

CERTIFICATE OF SERVICE

I certify that, on this July 11, 2019, I electronically filed the foregoing Motion For Leave To File Reply In Support Of Rehearing with the Clerk for the United States Court of Appeals for the Third Circuit through the appellate CM/ECF system. All counsel of record in this case are registered CM/ECF users.

s/ Brian T. Ortelere
Brian T. Ortelere

Counsel for the University of Pennsylvania, Investment Committee, and Jack Heuer

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MORGAN, LEWIS & BOCKIUS LLP
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T. 215.963.5000
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MORGAN, LEWIS & BOCKIUS LLP
1111 Pennsylvania Avenue, NW
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T. 202.739.3000
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INTRODUCTION

Plaintiffs fail to refute—and largely seek to distract from—the three compelling reasons to grant rehearing in this case. First, the panel majority's decision conflicts with this Court's decision in *Renfro v. Unisys Corp.*, 671 F.3d 314 (3d Cir. 2011), by viewing a certain set of allegations as suggestive of fiduciary breach—even though *Renfro* found the same allegations *not* suggestive of fiduciary breach, and even though the University's Plan is objectively better than the *Renfro* plan. Second, the panel majority held that part of the pleading standard articulated in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), is inapplicable outside the antitrust context—even though the Supreme Court has unequivocally instructed that *Twombly* applies with full force in all federal civil litigation, including ERISA disputes. And third, the panel majority's ruling will have far-reaching negative implications because many plan fiduciaries face identical theories of liability and overwhelming pressure to settle—even though the only such case to reach trial rejected every one of these theories of liability in full.

Plaintiffs' arguments to the contrary rest on a mischaracterization of Defendants' arguments, this Court's decisions, and the rehearing criteria. Rehearing is needed to restore uniformity in this Court's precedents, conform to Supreme Court precedent, and dispel the notion that procuring multimillion-dollar settlements through boilerplate allegations furthers ERISA's aims.

ARGUMENT

I. Plaintiffs Cannot Reconcile The Panel's Decision With *Renfro*.

In their effort to reconcile the panel's ruling with *Renfro*, Plaintiffs' first line of defense rests not on the content of the two decisions, but on the purported content of litigants' filings in those cases and an entirely unrelated case. Opp'n 1-2. This effort is misguided because parties and courts who look to this Court's precedent to determine legal rights and responsibilities necessarily rely on the Court's opinions, not parties' briefs and pleadings.[1]

This Court's opinion in *Renfro* rested not on the lack of specificity in the plaintiffs' pleading, but on the Court's conclusion that the plaintiffs' various objections to the defendants' plan did not warrant an inference of fiduciary breach given "the reasonableness of the mix and range of investment options" in that case. 671 F.3d at 326. As Defendants demonstrated, the challenged features of the *Renfro* plan are fundamentally the same as the features challenged here, Pet. 9-10, and by any objective measure the mix and range of options in this case is superior to the mix and range in *Renfro*, Pet. 3-4.

[1] Besides, as Defendants observed before the panel, the *Renfro* plaintiffs' appellate briefing only confirms the overlap between these two cases: just as here, the *Renfro* plaintiffs insisted that the defendants had chosen "the more expensive version of the exact same investment," identifying specific examples, and had permitted "uncapped and unmonitored" asset-based fees. Br. of Appellees 24-25 (quoting *Renfro* plaintiffs' opening brief).

Plaintiffs cannot deny these points and offer no real response to them. At most, they claim this case differs from *Renfro* because (1) it includes allegations that certain funds—like the CREF Stock Account—underperformed their purported benchmarks, and (2) the *Renfro* plaintiffs supposedly did not challenge "the fee-sharing arrangement for compensating recordkeepers." Opp'n 3-4.

On the first point, however, the panel majority entirely disregarded Defendants' arguments that Plaintiffs' underperformance allegations rest on inapposite benchmarks, belying Plaintiffs' suggestion that this is somehow a critical distinction from *Renfro*. Pet. 11 n.3. Plaintiffs baselessly claim that Defendants forfeited this argument, Opp'n 2 n.2, when Defendants devoted pages of their appellate brief to explaining exactly why Plaintiffs' cited benchmarks were inapt "apples-to-oranges" comparisons and failed to suggest fiduciary breach in all events, Br. of Appellees 41-44. Plaintiffs then fault Defendants for not citing *Meiners v. Wells Fargo & Co.*, 898 F.3d 820 (8th Cir. 2018), in their appellate brief, Opp'n 3 n.2, but neglect to mention that (1) *Meiners* was decided months *after* Defendants filed their brief, and (2) Defendants did cite the Second Circuit case on which *Meiners* later relied. *Compare* Br. of Appellees 41 (citing *Pension Benefit Guar. Corp. ex rel. St. Vincent Catholic Med. Ctrs. Ret. Plan v. Morgan Stanley Inv. Mgmt. Inc.*, 712 F.3d 705, 719 (2d Cir. 2013)), *with Meiners*, 898 F.3d at 822 (deriving "meaningful benchmark" requirement from *St. Vincent*, 712 F.3d at 718-20).

Plaintiffs' second purported distinction rests on a brazen mischaracterization of *Renfro*. While Plaintiffs (represented by the same counsel as the *Renfro* plaintiffs) pretend that the *Renfro* plaintiffs did not raise any challenge to the fee-sharing arrangement, the Court explained that the *Renfro* "plaintiffs *did* challenge the mutual fund fee structure." 671 F.3d at 326 n.7 (emphasis added). In fact, the *Renfro* plaintiffs raised exactly the same challenge to asset-based fees that is now re-raised in this case—*i.e.*, that the fees were imprudently "calculated as a percentage of the total assets in the funds" even though "the services required to administer mutual funds do not vary based on the aggregate amount of assets in the funds." *Id.* at 326. Their challenge to the recordkeeper Fidelity's own "internal distribution of fees" "among its corporate affiliates" was a separate legal theory not asserted here. *Id.* at 326 n.7.

Instead of grappling with the overlap between the two cases, Plaintiffs return to their straw-man argument that Defendants seek a "judicially created safe harbor for fiduciaries" that leaves ERISA's statutory duties "impotent," Opp'n 4-5, ignoring Defendants' explanation of why that is not so, Pet. 8. Plaintiffs' efforts to confuse the issues and ignore Defendants' arguments confirm that they cannot reconcile the panel decision with *Renfro*.

II. Plaintiffs Cannot Escape The Conflict With *Twombly*, *Iqbal*, And *Dudenhoeffer*.

Plaintiffs do not deny that "*Twombly* expounded the pleading standard for 'all civil actions,'" including ERISA disputes. *Ashcroft v. Iqbal*, 556 U.S. 662, 684

(2009); *see Fifth Third Bancorp v. Dudenhoeffer*, 573 U.S. 409, 425 (2014). Yet they purport to find an unstated exception for the part of *Twombly* that refuses to place weight on allegations that are "consistent with" unlawful behavior but "just as much in line with" lawful behavior. Opp'n 6 (quoting *Twombly*, 550 U.S. at 554). But there is no basis for this exception, which conflicts with *Iqbal* and *Dudenhoeffer*'s unqualified endorsement of *Twombly*.

Indeed, *Iqbal* squarely rejected any such exception. It reaffirmed, and applied to the facts at hand, *Twombly*'s principle that "[w]here a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of 'entitlement to relief.'" *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 557); *see also id.* at 681 ("Taken as true, these allegations are *consistent with* petitioners' purposefully designating detainees 'of high interest' because of their race, religion, or national origin. But given more likely explanations, they do not *plausibly* establish this purpose." (emphases added)). Defendants' Petition also explains (and Plaintiffs ignore) that the Eighth Circuit decision invoked by the panel majority applies the same principle: "a plaintiff cannot proceed if his allegations are '"merely consistent with" a defendant's liability.'" *Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 597 (8th Cir. 2009) (quoting *Iqbal*, 556 U.S. at 678, and *Twombly*, 550 U.S. at 557).

Plaintiffs' main response to this problem is to focus on the words "just as much in line," suggesting this specific formulation is confined to antitrust claims. Not so. Courts often invoke *Twombly*'s "just as much in line" language outside the antitrust setting. *E.g.*, *Warnick v. Cooley*, 895 F.3d 746, 754 n.8 (10th Cir. 2018) (malicious prosecution); *Almanza v. United Airlines, Inc.*, 851 F.3d 1060, 1074 (11th Cir. 2017) (RICO); *N.J. Carpenters Health Fund v. Royal Bank of Scotland Grp., PLC*, 709 F.3d 109, 121 (2d Cir. 2013) (securities law); *Brooks v. Ross*, 578 F.3d 574, 581 (7th Cir. 2009) (due process).

Plaintiffs also err in claiming that this Court charted a different course in two antitrust cases. Opp'n 6-7 (citing *In re Ins. Brokerage Antitrust Litig.*, 618 F.3d 300, 341 n.42 (3d Cir. 2011); *Burtch v. Milberg Factors, Inc.*, 662 F.3d 212, 227 (3d Cir. 2011)). Unsurprisingly, neither case concluded (contrary to *Iqbal*) that *Twombly* is limited to antitrust cases. Nor could this Court have drawn any such conclusion in a pair of *antitrust cases* without the conclusion being dictum. On the contrary, as *amici* detail, this Court (like others) has long applied *Twombly* outside of antitrust law, as the Supreme Court says it must. *See* Br. for Chamber of Commerce *et al.* as *Amici Curiae* in Support of Rehearing ("Chamber Br.") 5 & n.2.

The district court rightly concluded that Plaintiffs at most allege conduct that is consistent with a violation of ERISA's duty of prudence, but equally consistent with prudent fiduciary decision-making. A17-18. Critically, the panel majority did

not disagree. So under the pleading standard required by Supreme Court precedent, Plaintiffs' claims should be dismissed.

III. The Exceptional Importance Of These Issues Provides Further Reason For Rehearing.

Contrary to Plaintiffs' assertion, Opp'n 9, it is entirely appropriate for this Court to consider that this case presents questions "of exceptional importance." Fed. R. App. P. 35(b)(1)(B); 3d Cir. L.A.R. 35.1. As Defendants, *amici*, and various courts have explained, the costs of defending ERISA class actions can easily outweigh the costs of settling meritless claims, even at a multimillion-dollar price tag. *See* Pet. 15-16; Chamber Br. 6-11.[2]

Plaintiffs attempt to redirect the discussion by insisting that private ERISA litigation sometimes yields positive results in the industry or beyond. Even so, the question is not whether private ERISA lawsuits are a good thing some of the time—or even overall—but whether *this* lawsuit is targeting a real problem rather than conduct falling within the bounds of reasonable discretionary judgment. That Plaintiffs' same legal theories resoundingly failed at the end of a bench trial in *Sacerdote v. New York University*, 328 F. Supp. 3d 273 (S.D.N.Y. 2018), coupled with plaintiffs'

[2] Defendants do not understand Plaintiffs' suggestion that settlement approval procedures guarantee that ERISA settlements are fair to *defendants*. Opp'n 11. Settlement approval does not determine the merits of a plaintiff's claims, in the ERISA context or elsewhere—least of all from the perspective of the settling defendants, who are expected to make their own cost-benefit assessments given their interests.

counsel's ability to levy the same claims against so many different defendants, *see* Pet. 2 n.2, 15, suggests the latter. Plaintiffs' own defense of their broadside litigation strategy shows they want to replace common fiduciary decisions with a one-size-fits-all retirement plan design: a diminished or "streamlined" range of investment options that supposedly promises lower total recordkeeping expenses, regardless of whether participants already have ample opportunity to prioritize low-fee options. Opp'n 12.

Nothing in ERISA prohibits fiduciaries from giving a large amount of "choice to the people who have the most interest in the outcome." *Loomis v. Exelon Corp.*, 658 F.3d 667, 673-74 (7th Cir. 2011). On the contrary, ERISA encourages participant choice, as *Renfro* recognized. 671 F.3d at 327. That is especially true where, as here, plan fiduciaries (1) conscientiously present participants with a reasonable mix and range of options carefully organized among differing tiers of investments based on plan participants' desired level of involvement in the investment process and (2) steadily work to reduce the fees associated with those options. *See* Dissent 4. If an ERISA claim can be stated against such fiduciaries—despite active plan oversight and improvement, without *any* allegations of improper motives or divided loyalty—then no fiduciary wishing to offer a plan like the University of Pennsylvania's will ever be safe from the costs and burdens of ERISA class-action litigation. That is not the system Congress designed.

CONCLUSION

For these reasons and those in Defendants' Petition, the Court should grant panel or en banc rehearing.

Dated: July 11, 2019

Respectfully submitted,

s/ Brian T. Ortelere
Brian T. Ortelere
MORGAN, LEWIS & BOCKIUS LLP
1701 Market Street
Philadelphia, Pennsylvania 19103
T. 215.963.5000
F. 215.963.5001

Christopher J. Boran
Matthew A. Russell
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Dated: July 11, 2019

s/ Brian T. Ortelere
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s/ Brian T. Ortelere
Brian T. Ortelere

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