No. 23-1108

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

RUPINDER SINGH, JEFFREY S. POPKIN, JONI WALKER, and JENNY MARK, individually and on behalf of all others similarly situated,

*Plaintiffs-Appellants*,

v.

DELOITTE LLP, THE BOARD OF DIRECTORS OF DELOITTE LLP, THE RETIREMENT PLAN COMMITTEE OF DELOITTE LLP, and JOHN DOES 1-30,

*Defendants-Appellees.*

On Appeal from the United States District Court
for the Southern District of New York
1:21-cv-8458 (Hon. John G. Koeltl)

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

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February 9, 2024

Pursuant to Federal Rules of Appellate Procedure 27 and 29, 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 Defendants-Appellees and affirmance. Defendants-Appellees have consented to the filing of this brief. Counsel for Plaintiffs-Appellants informed counsel for amicus curiae that they take no position on this motion. As a result, amicus moves this Court for leave to file.

The Chamber has an interest in the outcome of this litigation, and believes the proposed amicus brief will help the Court in considering the issues presented by this case. *See* Fed. R. App. 29(a)(3); *see New York v. U.S. Dep't of Homeland Security*, 969 F.3d 42, 55 n.11 (2d Cir. 2020) (noting that amicus briefs "provided helpful nuance on many aspects of the complex questions before [this Court]"); *N. States Power Co. v. Minnesota*, 447 F.2d 1143, 1145 (8th Cir. 1971) (noting that "[t]he many amici briefs filed in this appeal have not only been helpful in our consideration of this case, but have served as an indicator of the widespread interest generated by this litigation"). In support of its motion, the Chamber states as follows:

1. The Chamber is 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.

2. An important function of the Chamber is to represent its members' interests in matters before the courts, Congress, and the Executive Branch. To that end, the Chamber regularly participates in cases before this Court, other courts of appeals, and the U.S. Supreme Court on issues that affect their members. *See, e.g.*, *Hughes v. Northwestern Univ.*, 142 S. Ct. 737 (2022); *Cunningham v. Cornell Univ.*, 86 F.4th 961 (2d Cir. 2023).

3. As in the above cases, a decision in this appeal has the potential to significantly affect the Chamber's members, which include plan sponsors and fiduciaries that benefit from Congress's decision to create, through ERISA, an employee-benefits system that is not "so complex that administrative costs, or litigation expenses" discourage employers from sponsoring benefit plans or individuals from serving as fiduciaries. *Conkright v. Frommert*, 559 U.S. 506, 517 (2010) (citation omitted). This case presents questions of enormous practical importance to the Chamber's members, because it concerns the key threshold issue of what ERISA plaintiffs who do not make any direct allegations concerning a fiduciary's decision-making process must plead to open the door to protracted and expensive discovery.

4. As the Chamber's proposed brief explains, the Supreme Court has recognized that undertaking a "careful, context-sensitive scrutiny of a complaint's allegations" to "weed[] out meritless claims" is an important mechanism for advancing Congress's goal. *Fifth Third Bancorp v. Dudenhoeffer*, 573 U.S. 409, 425 (2014). Plaintiffs here seek a diluted pleading standard that would authorize discovery based on conclusory assertions about a fiduciary's decision-making process and suggestions of alternative decisions that, after ignoring the varying levels of quality and scope of available services and investment options, would have entailed lower costs or prices. Plan sponsors and plan fiduciaries alike, including the Chamber's members that maintain, administer, insure, and provide services to ERISA plans, have a strong interest in preventing such an empty standard, which would defeat dismissal in virtually every case, undermine ERISA's objectives, and harm plan sponsors and participants.

5. The Chamber's substantial interest and thorough knowledge of the questions addressed by this appeal are likely to be of assistance to this Court. The proposed amicus brief provides context on how the Court's decisions will likely affect all plan sponsors, fiduciaries, and participants—not just those currently before the Court.

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.

February 9, 2024

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I, Jaime A. Santos, hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the appellate CM/ECF system on February 9, 2024.

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

Dated: February 9, 2024

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**BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS AMICUS CURIAE IN SUPPORT OF DEFENDANTS-APPELLEES AND AFFIRMANCE**

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February 9, 2024

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## CORPORATE DISCLOSURE STATEMENT

The Chamber of Commerce of the United States of America certifies that it is a non-profit corporation, that it does not have a parent corporation, and that no publicly held corporation owns ten percent or more of its stock.

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## INTEREST OF THE AMICUS CURIAE[1]

The Chamber of Commerce of the United States of America (Chamber) is 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 its members maintain, administer, or provide services to employee-benefit plans governed by the Employee Retirement Income Security Act of 1974 (ERISA).

An important function of the Chamber is to represent its members' interests in matters before the courts, Congress, and the Executive Branch. To that end, the Chamber regularly files amicus curiae briefs in cases, like this one, that raise issues of concern to the nation's business community. *See, e.g.*, *Hughes v. Northwestern Univ.*, 595 U.S. 170 (2022); *Cunningham v. Cornell Univ.*, 86 F.4th 961 (2d Cir. 2023).

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[1] Counsel for Defendants consents to the filing of this brief. Counsel for Plaintiffs informed counsel for amicus curiae that Plaintiffs take no position with respect to the filing of this brief, and the Chamber has accordingly filed a motion for leave to file. No party or party's counsel authored this brief in whole or in part. No party, party's counsel, or person other than amicus curiae, its members, and its counsel made a monetary contribution to fund the preparation or submission of this brief.

## SUMMARY OF THE ARGUMENT

This case is just one of many in a wave of ERISA class-action complaints designed to extract costly settlements by challenging the management of employer-sponsored retirement plans—specifically, the payment of allegedly excessive recordkeeping fees. This "surge" in ERISA litigation[2] is not "a warning that retirees' savings are in jeopardy."[3] To the contrary, "in nearly every case, the asset size of many of these plans being sued has increased—often by billions of dollars"—over the last decade.[4] Nevertheless, many of these suits cherry-pick particular data points, disregard bedrock principles of plan management, and myopically focus on a plan's costs and fees while ignoring the varying levels of quality and scope of plan services available in the retirement-plan marketplace.

Not surprisingly, while plans vary widely based on the particular employer and its employees' needs, many complaints are highly similar, if not materially identical. *See Excessive Fee Litigation* 10 (noting "copy-cat complaints" being filed using the same "template"). In many cases, including this one, the complaint contains no allegations about the fiduciaries' decision-making process—the key

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[2] *See* Inside Compensation, *ERISA Litigation Surging – Focus on Fees* (July 16, 2018), https://bit.ly/49txkGC.

[3] Daniel Aronowitz, *Exposing Excessive Fee Litigation Against America's Defined Contribution Plans* 3, Euclid Specialty (Dec. 2020), https://bit.ly/3hNXJaW ("*Excessive Fee Litigation*").

[4] *Id.*

element in an ERISA fiduciary-breach claim. *Pfeil v. State St. Bank & Tr.*, 806 F.3d 377, 384-385 (6th Cir. 2015); *see also* Opening Br. 8 ("Plaintiffs did not have and do not have actual knowledge of the specifics of Defendants' decision-making process with respect to the Plan …."). Instead, the complaint offers allegations, made with the benefit of 20/20 hindsight, that plan fiduciaries failed to select the cheapest recordkeeping option, often using inapt comparators to advance the point. *See, e.g.*, Proposed First Am. Compl., App115-116 ¶ 104, App118 ¶¶ 110-111. Then, the plaintiffs ask the court to *infer* from these circumstantial allegations that the plan's fiduciaries must have failed to prudently manage and monitor the plan's recordkeeping. *See, e.g.*, App118-119 ¶¶ 112-113; Opening Br. 8-9 ("For purposes of the FAC, Plaintiffs have drawn reasonable inferences regarding these fiduciary processes based upon information available to Plaintiffs ….").

Pleading a plausible ERISA claim requires more. When a complaint lacks direct allegations of key elements of a civil claim, courts must rigorously analyze the circumstantial allegations to determine whether they plausibly suggest wrongdoing or are "just as much in line with" lawful behavior. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 554 (2007). When the alleged facts are of the latter variety—when, as *Twombly* put it, there is an "obvious alternative explanation" to the inference of wrongdoing the plaintiffs ask the court to draw—the complaint fails Rule 8(a)'s plausibility requirement. *Id.* at 567.

This rigorous analysis—which this Court has applied in numerous other contexts where plaintiffs attempt to plead wrongdoing from circumstantial facts—is particularly important in ERISA cases, where the Supreme Court has specifically instructed courts to apply a "careful, context-sensitive scrutiny" to "divide the plausible sheep from the meritless goats." *Fifth Third Bancorp v. Dudenhoeffer*, 573 U.S. 409, 424-425 (2014); *accord Hughes*, 595 U.S. at 177 (evaluating ERISA claims for plausibility "will necessarily be context specific"). The Supreme Court has recognized that "the circumstances facing an ERISA fiduciary will implicate difficult tradeoffs," and therefore has advised lower courts to "give due regard to the range of reasonable judgments a fiduciary may make based on her experience and expertise" in evaluating whether a claim is plausible. *Hughes*, 595 U.S. at 177.

The district court here did exactly that, applying a context-specific scrutiny to Plaintiffs' allegations before concluding that they did not state a plausible fiduciary-breach claim. *See* App21-24. Plaintiffs here effectively seek a diluted pleading standard that would authorize discovery with no factual allegations about a fiduciary's decision-making process, simply by making conclusory assertions about imprudence and pointing to alternative decisions that, with the benefit of hindsight, might have entailed lower fees—regardless of the level, quality, and types of plan services involved.

Plaintiffs' proposed standard could be met in virtually every case, because plaintiffs' counsel could always use the benefit of hindsight to cherry-pick other investments or service providers at specific points in time to use as comparators. And while these suits purport to protect employees' retirement savings, they in fact risk having the opposite effect. Rather than allowing fiduciaries to draw on their expertise to make decisions using the wide discretion and flexibility Congress provided them, these suits push plan sponsors and fiduciaries into a corner, pressuring them to narrow the range of options available to participants—an outcome at odds with ERISA's purpose and participants' best interests.

## ARGUMENT

### I. ERISA encourages the creation of benefit plans by affording flexibility and discretion to plan sponsors and fiduciaries.

When Congress enacted ERISA, it "did not *require* employers to establish benefit plans." *Conkright v. Frommert*, 559 U.S. 506, 516 (2010) (emphasis added). Rather, it crafted a statute intended to encourage employers to offer benefit plans while also protecting the benefits promised to employees. *Id.* at 516-517. Congress knew that if it adopted a system that was too "complex," then "administrative costs, or litigation expenses, [would] unduly discourage employers from offering … benefit plans in the first place." *Varity Corp. v. Howe*, 516 U.S. 489, 497 (1996).

Congress also knew that plan sponsors and fiduciaries must make a range of decisions and accommodate "competing considerations." H.R. Rep. No. 96-869, at 67 (1980), *reprinted in* 1980 U.S.C.C.A.N. 2918, 2935. Sponsors and fiduciaries must account for present and future participants' varying objectives, administrative efficiency, and the need to "protect[] the financial soundness" of plan assets. *Id.* Accordingly, Congress designed a statutory scheme that affords plan sponsors and fiduciaries "greater flexibility, in the making of investment decisions…, than might have been provided under pre-ERISA common and statutory law in many jurisdictions." U.S. Dep't of Labor, Op. No. 81-12A, 1981 WL 17733, at *1 (Jan. 15, 1981). This flexibility extends to a variety of areas, including with respect to negotiating arrangements with service providers. Fiduciaries must decide what services to offer (simple recordkeeping, individualized financial advice, participant loans, a brokerage window, etc.); who should provide those services; and how to compensate service providers (flat fees, percentage-of-asset fees, per-service fees, etc.). When negotiating these arrangements, fiduciaries must also select the duration of service-provider agreements. Fiduciaries also must keep in mind how often they want to consider potential new service providers and whether to switch providers based on the results of those evaluations. These decisions implicate numerous competing considerations, including cost, quality of services, and the need to facilitate a constructive working relationship between the plan and its providers.

Most plans work with the same service provider for many years because they value continuity, given the disruption and participant confusion that switching providers can cause. As of 2019, 50% of plans had been with their current recordkeeper for more than ten years.[5] That a fiduciary decides to continue using a service provider does not mean the fiduciary has not done its due diligence, evaluated other potential providers or benchmarks, and considered whether the plan is receiving the appropriate value for the compensation it pays to the provider.

Given the breadth of decisions fiduciaries make in the face of market uncertainty and the need for flexibility, Congress chose the "prudent man" standard to define the scope of the duties that fiduciaries owe to plans and their participants. 29 U.S.C. § 1104(a); *Fine v. Semet*, 699 F.2d 1091, 1094 (11th Cir. 1983). Neither Congress nor the Department of Labor ("DOL") provides a list of required or forbidden investment options, investment strategies, service providers, or compensation structures. For example, ERISA plaintiffs frequently fault plan fiduciaries for choosing actively managed funds over passively managed index funds (citing the higher cost that active management typically entails),[6] but when Congress considered requiring plans to offer at least one index fund, the proposal failed. *See*

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[5] Deloitte Development LLC, *2019 Defined Contribution Benchmarking Survey Report* 25 (2019), https://bit.ly/3wLmhp1 ("Deloitte Benchmarking Survey").
[6] *See, e.g.*, *Smith v. CommonSpirit Health*, 37 F.4th 1160, 1164 (6th Cir. 2022).

H.R. 3185, 110th Cong. (2007). DOL expressed "concern[]" that "[r]equiring specific investment options would limit the ability of employers and workers together to design plans that best serve their mutual needs in a changing marketplace." *Helping Workers Save For Retirement: Hearing Before the S. Comm. on Health, Education, Labor, and Pensions*, 110th Cong. 15 (2008) (statement of Bradford P. Campbell, Assistant Sec'y of Labor).

The flexibility Congress provided means that fiduciaries have a wide range of reasonable options for almost any decision they make. There are thousands of reasonable investment options with different investment styles and risk levels—nearly 9,000 mutual funds alone,[7] several thousand of which are offered in retirement plans—and nearly innumerable ways to put together a plan that enables employees to save for retirement.

Thus, while ERISA plaintiffs often try to challenge fiduciaries by pointing to less-expensive alternatives and then suggesting that the fiduciaries *must have* had an inadequate decision-making process—just as Plaintiffs here assert, App118-119 ¶¶ 112-113—that is not how the prudence standard works. There is no one prudent fund, service provider, or fee structure that renders everything else imprudent.

[7] Investment Company Institute, Investment Company Fact Book 17 (63rd ed. 2023), https://www.ici.org/system/files/2023-05/2023-factbook.pdf ("Investment Company Fact Book").

Instead, there is a "range of reasonable judgments a fiduciary may make," which courts must account for when evaluating the plausibility of ERISA claims. *Hughes*, 595 U.S. at 177.

## II. An ERISA complaint that lacks direct allegations of wrongdoing cannot rely solely on inferences from circumstantial facts that merely suggest a possibility of misconduct.

ERISA "requires prudence, not prescience." *PBGC ex rel. St. Vincent Cath. Med. Ctrs. Ret. Plan v. Morgan Stanley Inv. Mgmt. Inc.*, 712 F.3d 705, 716 (2d Cir. 2013) (quoting *DeBruyne v. Equitable Life Assurance Soc'y of U.S.*, 920 F.2d 457, 465 (7th Cir. 1990) (quotation marks omitted)). The standard of prudence "focus[es] on a fiduciary's conduct in arriving at an investment decision, not on its results." *Id.* (alteration in original) (citation omitted). Thus, the proper question in evaluating an ERISA claim, is not, for example, whether "post facto" it is apparent that a different decision might have proven to be more financially beneficial to the plan, but rather whether the fiduciary's "conduct [was prudent] as of 'the time it occurred,'" including whether the fiduciary used appropriate methods to investigate the merits of the transactions. *Pfeil*, 806 F.3d at 387-388 (citation omitted).

Here, Plaintiffs concededly do not allege any facts regarding the defendants' decision-making process. *E.g.*, App110 ¶ 85 ("Plaintiffs did not have and do not have actual knowledge of the specifics of Defendants' decision-making process with respect to the Plan …."); App112 ¶ 92 ("[T]here is *little to suggest* that Defendants

conducted a RFP at reasonable intervals …." (emphasis added)); Opening Br. 8. They suggest instead that the district court should have *inferred* an imprudent process based on hindsight allegations about the plan's fees—even if there are obvious explanations for the options chosen that are entirely consistent with prudent fiduciary decision-making. *See* Opening Br. 30-31. This proposed approach is not the law. For complaints that lack direct allegations of wrongdoing, courts have consistently probed the circumstantial factual allegations to determine if they plausibly suggest wrongdoing, or are simply a pretext for a fishing expedition. ERISA claims should be treated no differently.

### A. Claims that seek inferences of wrongdoing from circumstantial facts must allege something more than outcomes that are equally consistent with lawful behavior.

This Court's decisions recognize, as did *Twombly*, the practical significance of complaints that do not present any direct allegations of wrongdoing but instead rely on circumstantial allegations that, even if true, do not necessarily establish unlawful conduct. Those allegations are "much like a naked assertion" of wrongdoing that, "without some further factual enhancement," fall "short of the line between possibility and plausibility of entitle[ment] to relief." *Twombly*, 550 U.S. at 557 (quotations omitted).

Discerning between plausible and implausible circumstantial allegations entails traveling down "a well-worn trail" used in numerous areas of law. *Smith v.*

*CommonSpirit Health*, 37 F.4th 1160, 1165 (6th Cir. 2022). Take fraud, for instance. This Court has recognized that allegations of knowledge to support a fraud claim must satisfy the *Twombly*/*Iqbal* pleading standard (rather than the higher Rule 9(b) particularity pleading requirement). *See Meyer v. Seidel*, 89 F.4th 117, 139 (2d Cir. 2023). In *Meyer*, this Court applied that standard in a case involving the purchase of a forged painting from the defendant art dealers, and the relevant question was whether the plaintiff had plausibly alleged that the defendants knew that the painting they sold was a forgery. *Id.* at 123. The district court dismissed the complaint in part because the complaint failed "to allege more than conclusorily that defendants had knowledge that, *inter alia*, the Painting was a forgery." *Id.* at 138. Although the plaintiff alleged generally that the defendants "'knew' the falsity of [certain] misstatements," this Court noted that "[t]hreadbare recitals of the elements of a cause of action may not suffice, especially when there may be an obvious alternative explanation." *Id.* at 139 (citations and quotation marks omitted). Indeed, this Court explained that "an obvious possible alternative was that [the defendants] had been duped by the Painting's seller." *Id.* Accordingly, this Court concluded that "the complaint, in alleging knowledge only conclusorily, without any allegation of facts that would permit an inference of defendants' knowledge, fell short of stating plausible claims of fraud." *Id.*

Conspiracy claims are another example of claims presenting inference-based allegations that courts carefully probe to determine whether the plausibility standard is satisfied. In *City of Pontiac Police & Fire Retirement System v. BNP Paribas Securities Corp.*, --- F.4th ---, 2024 WL 368105 (2d Cir. 2024), a group of pension and retirement funds and other investors alleged that various banks "engaged in a conspiracy to rig Treasury auctions" and "conspired to boycott the emergence of direct trading." *Id.* at *1. In affirming the district court's dismissal of the plaintiffs' antitrust claims, this Court explained that the "defect that is fatal to both alleged conspiracies is failure to demonstrate the existence of an agreement, whether through direct or indirect evidence." *Id.* Indeed, "Plaintiffs' allegations of collusive information-sharing in online chatrooms largely amount to inconsequential market chatter," and "Plaintiffs fail in their attempt to weave scattered, unrelated episodes involving different dealers [banks] over the course of roughly two decades into an actionable conspiratorial narrative." *Id.*; *see also id.* at *9 ("Insofar as Plaintiffs rely on the chat transcripts as indirect evidence of a conspiracy, they are insufficient …."). Accordingly, this Court concluded that these "allegations do not plausibly rebut the inference that the dealers' conduct served their respective, individual, legitimate business interests to maintain a profitable and reliable market structure." *Id.* at *1. In short, "Plaintiffs discount 'obvious alternative explanations' for the [defendants'] alleged conduct." *See id.* at *22 (quoting *Twombly*, 550 U.S. at 567).

These precedents apply with full force in ERISA cases. Prior to *Hughes*, many ERISA plaintiffs had taken the position that ERISA claims are somehow exempt from Rule 8(a)'s plausibility pleading requirement. The Third Circuit seemed to embrace that position in *Sweda v. University of Pennsylvania*, 923 F.3d 320, 326 (3d Cir. 2019) ("declin[ing] to extend" *Twombly* to ERISA claims"); *see also Sacerdote v. N.Y. Univ.*, 9 F.4th 95, 108 & n.47 (2d Cir. 2021) (citing *Sweda*'s rejection of *Twombly*'s "heightened antitrust pleading standard" in the context of "ERISA Complaints"). *Hughes* squarely rejected this position, holding that courts must "apply[] the pleading standard discussed in" *Iqbal* and *Twombly*. 595 U.S. at 177. It also cautioned that evaluating ERISA claims "will necessarily be context specific." *Id.* It emphasized the wide "range of reasonable judgments a fiduciary may make" in a given situation, noting that "the circumstances facing an ERISA fiduciary will implicate difficult tradeoffs." *Id.* In other words, there may be perfectly justifiable reasons for a fiduciary's decision to offer one investment option over another, even if the unchosen option ultimately performs better or has a lower fee. And when that is the case—*i.e.*, when an ERISA plaintiff's circumstantial allegations of fiduciary malfeasance are consistent with entirely lawful fiduciary behavior—the claim is properly dismissed.

Following *Hughes*, circuit courts have reinforced this pleading standard in ERISA cases. As the Eighth Circuit explained in one post-*Hughes* decision, the

"process is what ultimately matters, not the results," and a "plaintiff typically clears the pleading bar by alleging enough facts to '*infer* … that the process was flawed.'" *Matousek v. MidAmerican Energy Co.*, 51 F.4th 274, 278 (8th Cir. 2022) (emphasis in original) (citation omitted). Under that standard, the Sixth Circuit observed, the "plausibility of an inference depends on a host of considerations, including common sense and the strength of competing explanations for the defendant's conduct." *Smith*, 37 F.4th at 1165. The Seventh Circuit likewise followed this approach in *Albert v. Oshkosh Corp.*, 47 F.4th 570, 579-582 (7th Cir. 2022), rejecting the plaintiffs' effort to distort *Hughes* in advocating for a laxer pleading standard. Rather, the court affirmed dismissal of the complaint because it failed to "provide 'the kind of context that could move this claim from possibility to plausibility' under *Twombly* and *Iqbal*." *Id.* at 580 (quoting *Smith*, 37 F.4th at 1169).

### B. The complaint in this case is filled with allegations that closely resemble the types of allegations rejected as implausible in *Twombly* and *Iqbal*.

Here, Plaintiffs argue that the Court can infer imprudence based solely on the Plan's administrative recordkeeping fees (App115-116 ¶¶ 102, 104), but these allegations provide a perfect example of the removed-from-context, ex-post-facto speculation that is insufficient to survive a motion to dismiss.

The first problem with Plaintiffs' approach is that fees are only "one of several factors" fiduciaries "need to consider in deciding on service providers."[8] Recordkeeping services are highly customizable depending on, *e.g.*, the needs of each plan, the size and features of its participant population, and the capabilities and resources of the plan's administrator and the sponsor's HR department. Moreover, myriad services are available at different fee levels, among them core operational services, participant communication, participant education, brokerage windows, loan processing, and compliance services.[9] DOL itself recognizes this, listing a variety of considerations that impact the cost of administrative expenses,[10] and noting in particular "that plan fiduciaries are not always required to pick the least costly provider. Cost is only one factor to be considered in selecting a service provider." DOL, *Tips for Selecting and Monitoring Service Providers for Your Employee Benefit Plan* 1, https://bit.ly/498ziMZ (last accessed Feb. 8, 2024) ("DOL, *Tips for Selecting and Monitoring Service Provider*"). That is why cost in isolation does not suggest that the "fees were high in relation to the services that the plan

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[8] DOL, *Meeting Your Fiduciary Responsibilities* 5 (2020), https://bit.ly/3rjBA83 ("*Fiduciary Responsibilities*"). And in the investment context, as elsewhere, "cheaper is not necessarily better." DOL, *A Look at 401(k) Plan Fees* 1, 9 (2019), https://bit.ly/3NwDLiN ("DOL, *A Look at Fees*").

[9] *See, e.g.*, Sarah Holden et al., *The Economics of Providing 401(k) Plans: Services, Fees, and Expenses, 2020*, at 4, ICI Research Perspective (June 2021), https://bit.ly/3vnbCU3.

[10] *See generally* DOL, *A Look at Fees*.

provided," or otherwise "could not be justified by the plan's strategic goals relative to their selected comparators." *Forman v. TriHealth, Inc.*, 40 F.4th 443, 449 (6th Cir. 2022).

For these reasons, when plaintiffs attempt to plead a fiduciary breach by comparing the fees or performance of plan funds or services against the fees or performance of alternatives in the market, at the very least courts require the plaintiffs to "provid[e] 'a sound basis for comparison—a meaningful benchmark'—not just alleg[e] that 'costs are too high, or returns are too low.'" *Matousek*, 51 F.4th at 278 (citation omitted). As the Tenth Circuit has explained, a "court cannot reasonably draw an inference of imprudence simply from the allegation that a cost disparity exists." *Matney v. Barrick Gold of N. Am.*, 80 F.4th 1136, 1148-1149 (10th Cir. 2023). "[R]ather, the complaint must state facts to show the funds or services being compared are, indeed, comparable." *Id.* at 1149. In other words, the "allegations must permit an apples-to-apples comparison" of the services the Plan and comparator plans received in comparison to the price paid, not simply isolated comparisons of each plan's price. *See id.* at 1149-1151; *Lard v. Marmon Holdings, Inc.*, 2023 WL 6198805, at *3-4 (N.D. Ill. Sept. 22, 2023); *England v. DENSO Int'l Am., Inc.*, 2023 WL 4851878, at *3-5 (E.D. Mich. July 28, 2023). Courts thus routinely dismiss claims that allege that cheaper pricing was available, but fail to account for the service level. *See Albert*, 47 F.4th at 579; *Matousek*, 51 F.4th at 280;

*Gonzalez v. Northwell Health, Inc.*, 632 F. Supp. 3d 148, 165-168 (E.D.N.Y. 2022); *Perkins v. United Surgical Partners Int'l, Inc.*, 2022 WL 824839, at *6 (N.D. Tex. Mar. 18, 2022).

Here, Plaintiffs ignore whether the Plan's services are equivalent in value to those of comparator plans, instead opting for a chart containing six other plans with little to no factual allegations as to those plans' available tools and funds or even the scope and quality of recordkeeping services provided. *See* App115-116 ¶ 104; Response Br. 30-32. Instead, Plaintiffs merely list the number of participants, assets under management, costs, and recordkeepers before summarily claiming that "[t]hus, the Plan … should have been able to negotiate a recordkeeping cost in the low $20 range." App116 ¶ 104. This lack of detail is fatal to Plaintiffs' claims, which are based on the "conclusory" notion that all large plans "receive nearly identical recordkeeping services and that any difference in services is immaterial to the price of those services"—an assertion that is not only conclusory but also entirely inconsistent with DOL guidance and the reality of the marketplace. *See England*, 2023 WL 4851878, at *3 & n.5 (collecting cases).[11] And even where services are

[11] The Seventh Circuit's decision on remand in *Hughes v. Northwestern University*, 63 F.4th 615 (7th Cir. 2023) (*Hughes II*), is of no help to Plaintiffs. *See* Response Br. 38-41. As the district court recognized, "the facts of *Hughes II* are not comparable to the facts in this case." App25. More specifically, *Hughes II* involved more specific allegations about changes similarly situated plans made to lower costs, and the plaintiffs in *Hughes* alleged that other recordkeepers were equally capable of providing comparable services. *See* App25-27. And to the extent *Hughes II* could

similar, the quality and level of these services can differ significantly, just like the quality and level of services in other contexts, such as cable and cellular services, vary widely. *See Miller v. Packaging Corp. of Am., Inc.*, 2023 WL 2705818, at *5-6 (W.D. Mich. Mar. 30, 2023). Because of these variations, courts have repeatedly rejected the conclusory assertion that recordkeeping services, and their prices, are fungible. *See, e.g.*, *England*, 2023 WL 4851878, at *3-5; *Miller*, 2023 WL 2705818, at *5.

The second problem with Plaintiffs' approach is that ERISA plaintiffs can easily cherry-pick historical data to make a fiduciary's choices look suboptimal given the wide range of recordkeeping services available, at a wide variety of price points, that hundreds of thousands of ERISA-governed retirement plans have negotiated. When plaintiffs' attorneys zero in on a single metric—here, recordkeeping fees—they will *always* be able to find a supposedly "better" option in their preferred time period. And "nothing in ERISA requires every fiduciary to scour the market to find and offer the cheapest possible [option] (which might, of course, be plagued by other problems)." *Hecker v. Deere & Co.*, 556 F.3d 575, 586

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be read as accepting as true conclusory assertions that all recordkeeping services are the same, cost the same, and are essentially free to provide, this Court should not take the same approach. Courts must take a plaintiff's own allegations of historical fact as true, but just as a court would not accept as true a conclusory assertion that principles of gravity do not apply in a particular location, they also need not accept as true conclusory and fantastical assertions about marketplace economic realities that defy logic and common sense.

(7th Cir. 2009); *accord PBGC*, 712 F.3d at 718; *Meiners v. Wells Fargo & Co.*, 898 F.3d 820, 823-824 (8th Cir. 2018).

Equally specious is the notion that if a fiduciary does not require a competitive request for proposal (RFP) process for recordkeeping services every few years—a contention Plaintiffs vaguely speculate about, without actually alleging it[12]—then that plausibly suggests the fiduciaries are running on auto-pilot. *See* Opening Br. 9-10 (claiming "there is little to suggest that Defendants conducted a RFP at reasonable intervals"); App112 ¶ 92 (same). As courts have noted, "nothing in ERISA compels periodic competitive bidding." *E.g.*, *White v. Chevron Corp.*, 2016 WL 4502808, at *14 (N.D. Cal. Aug. 29, 2016); *Matney*, 80 F.4th at 1156 ("Simply alleging the Committee needed to conduct regular RFPs does not raise a plausible inference of imprudence in this case."). There are many ways fiduciaries can prudently monitor service providers short of an expensive and time-consuming bidding process. They can, for example, obtain market data from consultants, obtain benchmarking studies, or periodically renegotiate their service and compensation arrangements as the plan's needs evolve. *See Matney*, 80 F.4th at 1156. Indeed, despite promulgating myriad regulations and guidance about monitoring service-provider compensation, DOL has never—not even through informal guidance, much less rulemaking—

[12] *See* Appx109 ¶ 81 ("Generally, any RFPs, if conducted, would not be made available to plan participants. The same is true for Plaintiffs here who do not have direct access to such information.").

suggested that periodic competitive bidding is necessary (or even that a lack of competitive bidding is presumptively imprudent). Instead, DOL has consistently embraced a flexible approach. DOL requires existing providers to disclose information about their fees and services to plans to ensure fiduciaries can evaluate the reasonableness of the service-provider arrangement. *See, e.g.*, 29 C.F.R. § 2550.408b-2. It has advised fiduciaries that obtaining formal bids is *one option* that they "may want to" use *when initially retaining service providers*, and stated that fiduciaries should "[p]eriodically review the performance of your service providers." DOL, *Tips for Selecting and Monitoring Service Providers* 2. But DOL has never dictated (or even recommended) any particular mechanism or timeframe for doing so.

Taken together, these considerations demonstrate that Plaintiffs' price-tag-centric approach is particularly unhelpful.

### C. Allowing hindsight-based disagreement with discretionary fiduciary decisions would encourage meritless lawsuits designed to extract costly settlements.

If conclusory and speculative complaints like this one are sustained, plan participants will be the ones to suffer. Without the plausibility pleading rule guarding against speculative suits, "cost-conscious defendants" will be "push[ed] … to settle even anemic cases." *Twombly*, 550 U.S. at 558-559. In ERISA cases, discovery is entirely asymmetrical and comes at an "ominous" price, given the

central role that experts play in the litigation—costs in even the simplest of ERISA class actions easily run into the millions of dollars for a defendant. *PBGC*, 712 F.3d at 719; *see also* Lockton Financial Services Claims Practice, *Fiduciary Liability Claim Trends* 1 (Feb. 2017), https://bit.ly/3h5mssJ. While discovery is sometimes appropriate, the price of discovery (financial and otherwise) "elevates the possibility that 'a plaintiff with a largely groundless claim [will] simply take up the time of a number of other people, with the right to do so representing an *in terrorem* increment of the settlement value, rather than a reasonably founded hope that the discovery process will reveal relevant evidence.'" *PBGC*, 712 F.3d at 719 (quoting *Dura Pharms., Inc. v. Broudo*, 544 U.S. 336, 347 (2005)).

Equally problematic, 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 performance upsides, as ERISA expressly encourages and most participants want. ERISA fiduciaries making discretionary decisions are at risk of being sued seemingly no matter what they do. Fiduciaries are sued for offering numerous investments in the same style, and for offering only one investment in a given investment style;[13] for failing to divest from stocks with

[13] *Compare* First Am. Compl. ¶¶ 68-71, in *Davis v. Salesforce.com, Inc.*, No. 3:20-cv-01753-MMC (N.D. Cal. Oct. 23, 2020), ECF No. 38, *with* Am. Compl., *In re GE ERISA Litig.*, No. 1:17-cv-12123-IT (D. Mass. Jan. 12, 2018), ECF No. 35.

declining share prices or high risk profiles,[14] and for failing to *hold onto* such stock because high risk can produce high reward;[15] for making available investment options that plaintiffs' lawyers deem too risky,[16] and conversely for taking what other plaintiffs' lawyers deem an overly cautious approach.[17] Indeed, while most plaintiffs sue plans for charging allegedly excessive fees in the hopes of outperformance, a new set of cases charge defendants with following the purportedly "in vogue" trend of "chas[ing]" low fees rather than focusing on funds' "ability to generate return."[18]

This same phenomenon plays out with respect to recordkeeping fees: in the past few years, Henry Ford Health System was hit with an ERISA class action

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[14] *In re RadioShack Corp. ERISA Litig.*, 547 F. Supp. 2d 606, 611 (N.D. Tex. 2008) (plaintiffs alleged that defendants failed "to divest the plans of all RadioShack stock … despite the fact that they knew the stock price was inflated").

[15] *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).

[16] *See, 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); *PBGC*, 712 F.3d at 711.

[17] *See Brown v. Am. Life Holdings, Inc.*, 190 F.3d 856, 859-60 (8th Cir. 1999) (assuming without deciding that "the fiduciary duty of prudent diversification can be breached by maintaining an investment portfolio that is *too safe and conservative*"); Compl., *Barchock v. CVS Health Corp.*, No. 1:16-cv-00061 (D.R.I. Feb. 11, 2016), ECF No. 1 (alleging plan fiduciaries breached duty of prudence by investing portions of plan's stable value fund in conservative money market funds and cash management accounts).

[18] *See, e.g.*, Compl. ¶ 31, *Hall v. Capital One*, No. 1:22-cv-857-PTG-JFA (E.D. Va.) (filed Aug. 1, 2022), ECF No. 1.

alleging that plan fiduciaries breached their duty of prudence by negotiating "excessive" recordkeeping fees. *See* Compl. ¶¶ 157-167, *Hundley v. Henry Ford Health System*, No. 2:21-cv-11023 (E.D. Mich.) (filed May 5, 2021), ECF No. 1. But another complaint holds up *that same plan* as an example of "prudent and loyal" fiduciary decision-making with respect to recordkeeping fees. *See* Compl. ¶ 45, *Carrigan v. Xerox Corp.*, No. 21-1085 (D. Conn.) (filed Aug. 11, 2021), ECF No. 1.

This dynamic has created an untenable situation for fiduciaries. And the pressure created by these suits undermines one of the most important aspects of ERISA—the value of innovation, diversification, and employee choice. Plaintiffs' attorneys have often taken a cost- or price-above-all approach, filing strike suits against any sponsors that consider factors other than cost or price—notwithstanding ERISA's direction to do just that. *White*, 2016 WL 4502808, at *10 (collecting cases); *cf.* DOL, *A Look at Fees* 1, 9. If accepted, this theory would only encourage plan fiduciaries to limit the service offerings to the absolute barebones services required to run a plan at the lowest cost possible to minimize the litigation risk. That would discourage plans from contracting with service providers for the types of tools that employees increasingly ask for, such as financial-wellness education, brokerage windows, financial-advice tools and services, and managed-account services. *See* Ted Godbout, *Demand for Employer Financial Wellness Benefits Remains Strong, NAPA* (Dec. 15, 2022), https://bit.ly/493JGpS; Noah Zuss, *Employees' Improved*

*Finances Mean More Demand for Financial Wellness Tools*, PlanSponsor (Jan. 11, 2022), https://bit.ly/495eJlc. Indeed, that is already happening. "Before the increases in 401(k) plan litigation, some fiduciaries offered more asset class choice by including specialty assets, … options [that] could potentially enhance expected returns in well-managed and monitored portfolios." George S. Mellman and Geoffrey T. Sanzenbacher, *401(k) Lawsuits: What are the Causes and Consequences?*, Ctr. for Retirement Research at Boston College (May 2018), https://bit.ly/3fUxDR1. Now, however, fiduciaries overwhelming choose purportedly "'safe' funds over those that could add greater value." *Id.* And they're getting sued for choosing those "safe" options anyway. *See supra* pp. 21-22.

Moreover, many plaintiffs' practice of suing not just companies that sponsor retirement plans but also individual fiduciaries under new and often contradictory circumstantial theories of imprudence has made fiduciaries' jobs virtually impossible. It creates huge barriers for plan sponsors attempting to recruit individuals (like human-resources professionals) to serve as plan fiduciaries, knowing that at any time they could be sued in an ERISA class action—an event that has very real consequences when a fiduciary tries to refinance her home mortgage, start a business, or apply for a loan for her children's college expenses. *Cunningham v. Cornell Univ.*, 2018 WL 1088019, at *1 (S.D.N.Y. Jan. 19, 2018) (noting "tremendous power to harass" individual fiduciaries in this way).

This dynamic has upended the fiduciary-insurance industry.[19] The risks of litigation have pushed insurers "to raise insurance premiums, increase policyholder deductibles, and restrict exposure with reduced insurance limits." *Excessive Fee Litigation* 4. These consequences harm participants. If employers need to absorb the litigation risks and costs of higher insurance premiums, then many employers will inevitably offer less generous benefits. And for smaller employers, the ramifications are even starker: if they "cannot purchase adequate fiduciary liability insurance to protect their plan fiduciaries, the next step is to stop offering retirement plans to their employees." *Id.* That result would undermine a primary purpose of ERISA–to *encourage* employers to voluntarily offer retirement plans to their employees.

Neither ERISA nor the pleading standards articulated by the Supreme Court support such a result, and this Court's approach to Rule 12(b)(6) motions in ERISA cases must be careful to guard against it.

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[19] Judy Greenwald, Business Insurance, *Litigation Leads to Hardening Fiduciary Liability Market* (Apr. 30, 2021), https://bit.ly/3ytoRBX; *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).

## CONCLUSION

This Court should affirm the judgment below.

February 9, 2024

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Federal Rules of Appellate Procedure 29(a)(5) and 32(a)(7)(B) because it contains 5,925 words, excluding the parts exempted by Rule 32(f).

This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Rule 32(a)(6) because it appears in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font.

Dated: February 9, 2024

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## CERTIFICATE OF SERVICE

I, Jaime A. Santos, hereby certify that I electronically filed the foregoing with the United States Court of Appeals for the Second Circuit by using the appellate CM/ECF system on February 9, 2024.

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

Dated: February 9, 2024

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