EXHIBIT A

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

VICTORIA CLARK, individually, and as representative of a class of participants and beneficiaries and on behalf of the Centene Management Corporation Retirement Plan,

Plaintiff,

v.

CENTENE CORPORATION,

Defendant.

Case No. 3:25-cv-09743-RFL

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

Date: October 13, 2026
Time: 10:00 AM
Place: Courtroom 4
Judge: Hon. Rita F. Lin

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases:

Statutes and Legislative and Regulatory Materials:

Other Authorities:

INTEREST OF THE AMICUS CURIAE

The Chamber of Commerce of the United States of America (Chamber) is the world's largest business organization. As the nation's leading advocate for business, the Chamber represents companies 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. 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), bit.ly/4hZ3LEC. 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. *Id.* Nevertheless, many of these suits cherry-pick particular data points, disregard bedrock principles of plan management and investment strategies, and ignore critical context demonstrating the flawed nature of many plaintiffs' allegations to create an illusion of mismanagement and imprudence.

This case is no different. ERISA plaintiffs have spent more than a decade challenging fiduciaries for offering mutual funds instead of collective investment trusts (CITs) that employ the same investment approach, claiming that the inclusion of mutual funds in a 401(k) plan lineup was a clear sign that fiduciaries were asleep at the wheel and failing in their obligation to ensure cost-conscious plan management. Plaintiff here takes the exact opposite approach, claiming that the decision to offer CITs rather than mutual funds that employ the same investment approach is

[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.

categorically indicative of imprudence. If nothing else, this case demonstrates definitively what plan sponsors have observed from 401(k) litigation for decades: they will be a target for strike suits no matter what decisions they make.

These per se theories of fiduciary breach find no basis in ERISA's text or structure. The Supreme Court and Ninth Circuit have been clear that allegations of a breach of a fiduciary duty require a context-specific inquiry, which does not lend itself to per se rules. Plaintiff, in contrast, completely ignores the relevant context—the relative pros and cons of the two types of investment styles (which may "implicate difficult tradeoffs"), the relative regulatory oversight mechanisms for the different investment options, and the overall context of fiduciary management, which vests fiduciaries with enormous discretion and flexibility to exercise "reasonable judgment[]" based on the facts and circumstances of the plan and its participants, not to mention the fiduciary's own "experience and expertise." *Hughes v. Nw. Univ.*, 595 U.S. 170, 177 (2022).

Worse yet, this lawsuit is the poster child for precisely the situation plan sponsors (with 20+ years of experience with 401(k) litigation) warned of: efforts to "recast breach-of-fiduciary-duty claims as prohibited-transaction claims" to force meritless cases into discovery and impose enormous settlement pressure on plan sponsors and fiduciaries. Chamber Amicus Br. 22, *Cunningham v. Cornell Univ.*, No. 23-1007 (U.S.), https://tinyurl.com/cffe9tw7; *see also id.* at 19-23, 23-26. That is precisely what Plaintiff does here, asserting a prohibited-transaction claim in name only to take advantage of the Supreme Court's recent decision in *Cunningham v. Cornell University*, 604 U.S. 693 (2025). But asserting a facially deficient claim and bestowing it with the name "prohibited-transaction claim" does not give Plaintiff a one-way express ticket past a motion to dismiss to discovery and trial. To be sure, *Cunningham* held that a plaintiff does not need to plead that a prohibited-transaction exemption (an affirmative defense) is inapplicable, but *Cunningham* was nevertheless clear that courts must "use existing tools at their disposal" to prevent plaintiffs from triggering an "avalanche of meritless litigation." *See id.* at 707-08. 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 Bancorp v. Dudenhoeffer*, 573 U.S. 409, 425 (2014). 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 performance upsides, as ERISA requires in the case of a self-directed plan,[2] such as the one Plaintiff currently challenges, and most participants want. Yet as this case shows, even that will not protect them from lawsuits, and the litigation costs will have to come from *somewhere*, likely by diluting the generosity of benefits employers are able to offer. That outcome helps no one—aside from the lawyers litigating these cases.[3]

ARGUMENT

I. Hindsight-based attacks on fiduciary decision-making are at odds with ERISA's text and structure.

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 protecting the benefits promised to employees. *Id.* at 516-17. Congress recognized plan sponsors and fiduciaries must make a range of decisions and accommodate "competing considerations." H.R. Rep. No. 96-869(I), at 67 (1980), *reprinted in* 1980 U.S.C.C.A.N. 2918, 2935. Accordingly, Congress chose the flexible "prudent man" standard to define the scope of the duties 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

[2] *See* 29 C.F.R. § 2550.404c-1(a)(3) (providing that to meet Section 404(c)'s safe harbor provision, ERISA plan must offer "at least three investment alternatives: (1) Each of which is diversified; (2) Each of which has materially different risk and return characteristics; (3) Which in the aggregate enable the participant or beneficiary … to achieve a portfolio with aggregate risk and return characteristics at any point within the range normally appropriate for the participant or beneficiary; and (4) Each of which when combined with investments in the other alternatives tends to minimize through diversification the overall risk of a participant's or beneficiary's portfolio").

[3] The Chamber focuses primarily on Plaintiff's novel CIT challenge, but agrees with Defendant that all of Plaintiff's claims should be dismissed. For example, the Chamber has written extensively about Plaintiff's forfeiture challenge, which has recently been in vogue among the ERISA plaintiffs' bar, and refers the Court to the Chamber's prior amicus briefs on that issue. *See, e.g.*, Chamber Amicus Br., *Hutchins v. HP Inc.*, No. 25-826 (9th Cir.) (appeal pending), https://tinyurl.com/pz6cz4nu; *Wright v. JPMorgan Chase & Co.*, No. 25-4235 (9th Cir.) (appeal pending), https://tinyurl.com/mw672paw.

strategies, service providers, or compensation structures. And when Congress considered requiring plans to offer at least one index fund, the proposal failed. *See* H.R. 3185, 110th Cong. (2007). Indeed, DOL has declined to provide even *examples* of appropriate investment options, because doing so would "limit … flexibility in plan design." 57 Fed. Reg. 46,906, 46,919 (Oct. 13, 1992).

As courts have recognized, the broad discretion conferred by Congress is the "sine qua non of fiduciary duty." *Pohl v. Nat'l Benefits Consultants, Inc.*, 956 F.2d 126, 129 (7th Cir. 1992). Discretion is critical to the entire ERISA framework, because there virtually never is a single "right" answer to the questions fiduciaries must answer. There are thousands of reasonable investment options with different investment styles and risk levels. Given the vast array of options and the need to tailor solutions to participants and their diverse interests, plan fiduciaries are best positioned to weigh the pros and cons of various choices. If a fiduciary is subjected to constant litigation and Monday-morning quarterbacking over decisions—with the benefit of hindsight and not "based upon information available to the fiduciary at the time of each investment decision," *Anderson v. Intel Corp. Inv. Policy Comm.*, 137 F.4th 1015, 1021 (9th Cir. 2025) (*Intel*) (citation omitted), *certiorari granted*, No. 25-498 (U.S.) —that would eviscerate the discretion at ERISA's core.

Put simply, "ERISA 'requires prudence, not prescience.'" *Intel*, 137 F.4th at 1021 (citation omitted). Accordingly, courts "evaluate prudence prospectively, based on the methods the fiduciaries employed, rather than retrospectively, based on the results they achieved." *Id.* at 1021. This "context-sensitive" analysis therefore focuses on "the circumstances … prevailing *at the time the fiduciary acts*." *Dudenhoeffer*, 573 U.S. at 425 (emphasis added) (quotation marks omitted).

Given this focus on process, the most natural way to "plead a breach of the duty of prudence" is to "allege[] facts that would directly show that the fiduciaries employed unsound methods in making their investment decisions." *Intel*, 137 F.4th at 1021-22 (collecting examples). To be sure, it is not automatically "fatal" when a complaint "contains no factual allegations referring *directly* to [the fiduciary's] knowledge, methods, or investigations at the relevant times." *Pension Ben. Guar. Corp. ex rel. St. Vincent Catholic Med. Ctrs. Ret. Plan v. Morgan Stanley Inv. Mgmt. Inc.*, 712 F.3d 705, 718 (2d Cir. 2013) (*PBGC*). Sometimes, "a plaintiff can make circumstantial factual allegations from which the court may reasonably infer from what is alleged that the process was flawed." *Intel*, 137 F.4th at 1022 (quotation marks omitted). But "[w]hen an ERISA plaintiff attempts to do so by relying on a theory that a prudent fiduciary in like circumstances would have selected a different fund based on the cost or performance of the selected fund," then at a bare minimum "that plaintiff must provide a sound basis for comparison." *Id.* (quotation marks omitted). In other words, because courts "evaluate prudence prospectively," "it is not enough for a plaintiff simply to allege that the fiduciaries could have obtained better results—whether higher returns, lower risks, or reduced costs—by choosing different investments." *Id.* at 1021. Instead, if "a plaintiff asks a court to infer that a fiduciary used improper methods based on the performance of the investments, … he must compare that performance to funds or investments that are meaningfully similar." *Id.* at 1023. The "same reasoning holds for … allegations that investors in the [defendant's] plans incurred higher fees. As with [] performance allegations, the fact that different kinds of funds with distinct objectives and approaches carried different fees does not by itself demonstrate imprudence." *Id.*; *see also Albert v. Oshkosh Corp.*, 47 F.4th 570, 581 (7th Cir. 2022) ("A complaint cannot simply make a bare allegation that costs are too high, or returns are too low. … Rather, it must provide a sound basis for comparison—a meaningful benchmark." (brackets and quotation marks omitted; ellipses in original)).

The upshot of these cases is clear. To state a plausible imprudent-fiduciary claim, ERISA plaintiffs must either plead direct factual allegations of an imprudent process, or else must have strong circumstantial pleadings that the fiduciary's investment choices were poor when measured against an array of meaningfully similar comparators. Hindsight-based allegations that ignore the circumstances and considerations around a particular fiduciary choice are insufficient.

II. There is no per se rule rendering CITs imprudent, and Plaintiff's attempt to cast doubt on CITs' regulatory framework holds no water.

A. Plaintiff's attempt to create a per se rule and shift the goalposts puts fiduciaries in a Catch-22.

Plaintiff's Second Amended Complaint puts fiduciaries in an impossible position twice over: Plaintiff first seeks to create a bright-line rule automatically rendering CITs imprudent and mutual funds prudent when plaintiffs have spent the past decade challenging fiduciaries for doing precisely that—offering mutual funds over CITs. On top of that, Plaintiff joins years of ERISA plaintiffs in drastically decreasing the level of fees Plaintiff deems acceptable, trapping fiduciaries in a never-ending game of limbo that is divorced from the reality of managing a plan and the providers who offer necessary (and wanted) services to participants.

1. Plaintiff's request for a *per se* rule rendering CITs automatically imprudent flies in the face of ERISA's contextual-based analysis and ignores the safeguards in place to protect CIT investors. CITs, also known as "common trusts," are "institutional investment vehicles" that are "only accessible to certain types of investors, including participants in employer-sponsored retirement plans." T. Rowe Price Participant Insights, Collective Investment Trusts (2021), bit.ly/3SKA1B9. These trusts "are managed by banks or trust companies that 'pool' retirement plan assets into a single portfolio that is invested with a specified investment philosophy and strategy" and "may invest in a wide range of active or passive investment vehicles." *Id.* The "primary objective of a collective fund is, through economies of scale, to lower costs with a combination of profit-sharing funds and pensions." *Terraza v. Safeway Inc.*, 241 F. Supp. 3d 1057, 1064 (N.D. Cal. 2017) (citation omitted). CITs do share similarities with mutual funds "in that they are composed of pooled assets invested with a specified philosophy and strategy." *See* T. Rowe Price Participant Insights, *supra*. But CITs, unlike mutual funds, "are not available to individual investors and are not advertised to the public." *Id.* Indeed, the "essential features" of CITs and mutual funds "differ so significantly" that courts have deemed comparisons of mutual funds to collective trusts as "an 'apples-to-oranges' comparison." *See White v. Chevron Corp.*, 2017 WL 2352137, at *11 (N.D. Cal. May 31, 2017).

In contending that the mere decision to offer CITs instead of mutual funds should be deemed automatically imprudent (or even permit an inference of imprudence), *e.g.*, Second Am. Compl. ¶¶ 4, 32-35, Plaintiff fails to grapple with how per se theories "run[] contrary to the Supreme Court's instruction that the plausibility of allegations of breach of fiduciary duty is a 'context specific' inquiry dependent on the particular circumstances at issue." *Wright v. JPMorgan Chase*

& Co., 2025 WL 1683642, at *5 (C.D. Cal. June 13, 2025) (quoting *Dudenhoeffer*, 573 U.S. at 421). The Ninth Circuit itself has highlighted that context-specific inquiry when previously rejecting as untenable attempts to create bright-line rules in the ERISA context, because "[t]here are simply too many relevant considerations for a fiduciary." *See Tibble v. Edison Int'l*, 729 F.3d 1110, 1135 (9th Cir. 2013) (rejecting "bright-line approach to prudence" where plaintiff launched "a broadside against retail-class mutual funds" and recognizing Seventh Circuit agreement), *vacated on other grounds*, 135 S. Ct. 1823 (2015).

This *particular* per se theory is especially chafing given the history of ERISA plaintiffs' 401(k) line-up challenges over the past decade. Courts have recognized that "collective trusts … are … common investment instruments with the potential to outperform mutual funds" given their lower investment-management fees due to the economies of scale for these investment vehicles. *See Moitoso v. FMR LLC*, 451 F. Supp. 3d 189, 212 (D. Mass. 2020) (collecting cases). And for more than a decade, plaintiffs have been targeting fiduciaries for deigning to offer mutual funds within their 401(k) plan line-up rather than offering CIT versions of the same investment. *See, e.g.*, *Davis v. Salesforce.com, Inc.*, 2020 WL 5893405, at *6 (N.D. Cal. Oct. 5, 2020) (addressing "an imprudence claim predicated on a comparison of mutual funds with collective trusts"); *Tobias v. NVIDIA Corp.*, 2021 WL 4148706, at *9 (N.D. Cal. Sept. 13, 2021) ("Plaintiffs allege that Committee Defendants failed to utilize collective trusts when such options were available."); *White*, 2017 WL 2352137, at *12 (plaintiffs arguing "the fiduciaries imprudently offered mutual funds when the Plan could have used less expensive institutional products, such as collective trusts or separate accounts"); *Miguel v. Salesforce.com, Inc.*, 2024 WL 1222092, at *1 (N.D. Cal. Mar. 20, 2024) (plaintiff challenging defendants for "failing to substitute the Fidelity mutual funds with Fidelity collective investment trusts"); *Kendall v. Pharm. Prod. Dev., LLC*, 2021 WL 1231415, at *8 (E.D.N.C. Mar. 31, 2021); *Moitoso*, 451 F. Supp. 3d at 210; *Ferguson v. Ruane Cunniff & Goldfarb Inc.*, 2019 WL 4466714, at *10 (S.D.N.Y. Sept. 18, 2019); *Larson v. Allina Health Sys.*, 350 F. Supp. 3d 780, 795 (D. Minn. 2018); *Main v. Am. Airlines Inc.*, 248 F. Supp. 3d 786, 794 (N.D. Tex. 2017); *Moreno v. Deutsche Bank Ams. Holding Corp.*, 2016 WL 5957307 (S.D.N.Y.

Oct. 13, 2016).

Plaintiff here is claiming *exactly the opposite*—that the mere fact that fiduciaries have chosen to include CITs instead of mutual funds (as ERISA plaintiffs have for a decade claimed is the only prudent option) is a clear sign that fiduciaries must have been asleep at the wheel. Second Am. Compl. ¶ 32. It is no wonder Centene is exasperated. Importantly, the point is not that *this plaintiff* is wrong and plaintiffs for the last decade have been right—that CITs are categorically prudent and mutual funds are a clear sign of fiduciary misfeasance. Nor is the point that *this plaintiff* is right and ERISA plaintiffs for the last decade have been wrong. Instead, the point is precisely what the Supreme Court has acknowledged: "At times, 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. CITs and mutual funds are *both* reasonable options for plan fiduciaries to select, but they do offer different costs and benefits. Given ERISA's process-based inquiry, the mere fact that a fiduciary chose one investment vehicle over the other says nothing about whether the fiduciary had a sound process in place to make that choice.

2. Moreover, this is not the only goalpost Plaintiff has moved. For years, plaintiffs have alleged that plan fiduciaries paid excessive recordkeeping fees, but the per participant cost that plaintiffs have arbitrarily deemed acceptable has shifted over time—sometimes even within the same case. For many years, the number ERISA Plaintiffs seemed to pick out of a hat was $35 or $40 per participant per year, completely irrespective of the level or quality of services that their fiduciaries decided to make available. *See, e.g.*, *Hughes v. Nw. Univ.*, 63 F.4th 615, 625 (7th Cir. 2023) (recognizing "Northwestern was not required to search for a recordkeeper willing to take $35 per year per participant as plaintiffs would have liked" (citation omitted)); *Wehner v. Genentech, Inc.*, 2021 WL 507599, at *4 & n.2 (N.D. Cal. Feb. 9, 2021) (plaintiff arguing recordkeeping costs should be $40 per participant or $35 per participant). But when plaintiffs' challenged plans were actually paying fees *below* that range, instead of abandoning their claims or refraining from bringing them in the first place, ERISA plaintiffs changed tack, dropping the recordkeeping cost

they deemed acceptable even lower. *Moore v. Humana Inc.* is a perfect example. There, the plaintiffs initially contended that "slightly over $40 per participant in recordkeeping, trust and custody fees" would have been acceptable. Class Action Compl. ¶ 83, *Moore v. Humana Inc.*, No. 3:21-cv-232 (W.D. Ky. Apr. 13, 2021), ECF No. 1. But after learning that the plans they challenged actually paid *less* than that, the plaintiffs amended their complaint to newly contend that the defendants "should have been able to negotiate a recordkeeping cost in the low $20 range." First Am. Compl. ¶ 72, *id.* (Aug. 26, 2021), ECF No. 17.

Since then, plaintiffs have continued to lower that bar. Indeed, Plaintiff here preposterously claims that comparator plans paid as little as $3 per participant per year. Second Am. Compl. ¶¶ 40, 45. Setting aside the flaws in Plaintiff's purported comparators and their alleged fees, Mot. to Dismiss 11-13 (ECF No. 60), the contention that a plan would pay a mere $3 per participant per year in fees defies logic. Retirement plans are required to send notices to plan participants, but $3 would not even cover the cost of distributing disclosures. *See* Default Electronic Disclosure by Employee Pension Benefit Plans Under ERISA, 85 Fed. Reg. 31,884, 31,915 (May 27, 2020). As the Department of Labor has explained, the "estimated average per-participant cost of distributing disclosures on paper" includes $4.48 to send a summary plan description alone—a figure already over Plaintiff's desired $3 per participant fee—and an additional $1.72 and $1.79 to send the summary annual report and annual funding notice, respectively, among other disclosures. *See id.* (capitalization altered). And sending out notices is only a *tiny piece* of what plan recordkeepers do.

As this case demonstrates perhaps better than any other, ERISA fiduciaries making discretionary decisions are at risk of being sued seemingly no matter what decisions they make. The plaintiffs in the myriad cases *supra* would have had no objection to the fiduciaries' decision to offer CITs in this case or to the recordkeeping fees applicable to them, yet Plaintiff has targeted Centene's fiduciaries for offering exactly what others have lauded, giving new meaning to the phrase "cursed-if-you-do, cursed-if-you-don't." 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.

B. Fearmongering as to the regulation of CITs does not plausibly suggest a fiduciary violated ERISA.

Even setting aside the Catch-22 Plaintiff seeks to place all fiduciaries in, Plaintiff's grounds for creating a new bright-line rule—that CITs are "structurally opaque" and subject to a "regulatory gap" compared to mutual funds—ignores the rigorous scrutiny state governments give to CITs and the reasons underlying the different regulatory regimes.

This Court has already explained that Plaintiffs failed to "plausibly allege[] Centene's selection of CITs instead of mutual funds injured her in a way that gives rise to Article III standing," including because "it is not reasonable to infer that [Plaintiff] paid higher fees just because the CITs are 'structurally opaque.'" ECF No. 55 at 1-2. Nevertheless, Plaintiff still faults purportedly "structurally opaque" CITs for not being regulated by the SEC like mutual funds, Second Am. Compl. ¶¶ 32-35, but the fact that CITs do not fall within the SEC's purview does not mean CITs are not regulated. "CITs are primarily regulated by the Office of the Comptroller of the Currency or state banking regulators." Investor.gov, *Collective Investment Trust (CIT)*, U.S. SEC, https://www.investor.gov/introduction-investing/investing-basics/glossary/collective-investment-trust-cit (last visited Sep. 1, 2026). Indeed, Plaintiff herself recognizes the role state regulators play, acknowledging that the Fidelity Freedom Blend CITs are regulated by New Hampshire. Second Am. Compl. ¶ 32. More specifically, a "CIT is subject to regulation and oversight under the banking law governing its trustee, such as the National Bank Act and the rules and regulations of the Office of the Comptroller of the Currency (the 'OCC') for national banks and federal savings associations, a state's banking law for banks and trust companies established under state law, and general common law principles of fiduciary duties." Great Gray Trust Co., *Governance of Collective Investment Trusts: Benefits To Plan Investors* 2 (2024), bit.ly/4wWaO4z (*Governance of CITs*). And even though CITs sponsored by state-chartered institutions are not directly subject to OCC regulation, many "non-OCC regulated banks and trust companies generally use [the OCC's Handbook] as a guide to best practices in managing a CIT." *Id.* at 6. And adding to this web of regulations is ERISA itself: "because CITs by definition serve as investment vehicles exclusively for retirement assets …, they are subject to the fiduciary responsibility and prohibited transaction rules" under ERISA. *Id.* at 2.

The extensive regulatory regime governing CITs ensures that there is no "regulatory gap" as Plaintiff tries to suggest (Second Am. Compl. ¶ 33). For instance, Plaintiff complains that "SEC mutual funds are capped at holding no more than 15% in illiquid assets" while "state-regulated CITs have no statutory limit on illiquid assets." *Id.* But Plaintiff overlooks how mutual funds are generally "prohibited, with very limited exceptions, from suspending the right of redemption or postponing payment of proceeds beyond seven days," causing the SEC to "continue[] to impose more requirements on mutual funds to have sufficient liquidity to meet investor redemptions." *Governance of CITs*, *supra*, at 4-5. In contrast, CITs "have greater flexibility and more tools in their toolbox to achieve the goal of ensuring that all participating accounts are treated fairly." *Id.* at 5. These tools include, for instance, "us[ing] its authority, if needed, to suspend or delay withdrawals if, in its capacity as a fiduciary to the CIT, it views such steps as necessary to protect the non-withdrawing investors from adverse impacts of large withdrawals on the fund." *Id.*

The driving force between the different regulatory systems governing CITs and mutual funds is the difference in eligible investors. Unlike CITs, "[m]utual fund shares are permitted to be publicly offered to both institutional and retail investors, including possibly unsophisticated individuals." *Governance of CITs*, *supra*, at 3. Because of that difference in sophistication, the SEC imposes certain requirements to provide greater protection. *Id.* (discussing SEC requirement that mutual funds "sell shares only pursuant to an effective, up-to-date … prospectus"). In contrast, "CITs cannot be sold directly to the general public or any institution. They can only be sold to qualified retirement plans managed by persons who are subject to various fiduciary duties." *Id.* at 3-4. Precisely because CITs are "available exclusively to qualified retirement plans that are institutional investors (or represented by sophisticated persons), there are no specific disclosure, distribution or registration requirements," but "general fiduciary considerations that require accurate disclosures to investors and no misleading statements" and "streamlined disclosure requirements under ERISA" remain. *Id.* at 4.

To nevertheless claim that Centene's fiduciaries "abdicated [their] duty to monitor," Plaintiff characterizes CITs as a "black box." Second Am. Compl. ¶ 34. To the extent Plaintiff claims fiduciaries cannot "monitor the underlying risks, liquidity, or valuation of these assets" because "state-regulated CITs are exempt from the Investment Company Act of 1940, do not file Form N-PORT, and do not provide a public prospectus," Second Am. Compl. ¶ 91, these are not the sole ways for fiduciaries to monitor potential investments. Indeed, "[s]ince 2011, the Department of Labor has mandated that certain plan administrators provide uniform performance, fee and other disclosures to plan participants regarding all investment options offered in 401(k) retirement plans," which would include CITs. *Governance of CITs*, *supra*, at 4. And "many CITs issue quarterly fact sheets and fund data is readily available." *Id.*

Put simply, CITs are not the Wild West—they are subject to overlapping layers of protection that exist specifically to protect plan participants, all of which Plaintiff glosses over. But this Court should not gloss over it because the regulatory landscape is precisely the type of "context" that the Supreme Court has repeatedly reminded courts that they should consider when evaluating the plausibility of fiduciary-breach claims. *Hughes*, 595 U.S. at 172, 173; *Dudenhoeffer*, 573 U.S. at 425. Completely ignoring the complex and interlocking protections that exist through heavy state regulation does not plausibly suggest plan fiduciaries were asleep at the wheel simply because they chose an investment that Plaintiff does not prefer. If Plaintiff's theory were the rule, then every fiduciary of a plan investing in CITs could be expected to be haled into court—and in the United States, that amounts to trillions of dollars of 401(k) plan assets invested in CITs alone, Mot. to Dismiss 8—simply for making the extraordinarily popular decision to offer this low-cost method of investing to plan participants that ERISA plaintiffs' lawyers have for years posited is the *only* prudent option. That is not how the statute works.

III. This case is the quintessential example of what the Supreme Court feared its decision in *Cunningham* would unleash (and took pains to address).

ERISA's prohibited-transaction provisions forbid fiduciaries from causing their plan to engage in specified transactions, including the "lending of money … between the plan and a party in interest," 29 U.S.C. § 1106(a)(1)(B), and the "furnishing of goods, services, or facilities between the plan and a party in interest," *id.* § 1106(a)(1)(C). At the same time, ERISA also "exempts" from § 1106's enumerated prohibitions certain transactions including "loans made by the plan to parties in interest who are participants or beneficiaries of the plan" under certain circumstances and "[c]ontracting or making reasonable arrangements with a party in interest for office space, or legal, accounting, or other services necessary for the establishment or operation of the plan." 29 U.S.C. § 1108(b). The "transactions" Congress enumerated as prohibited "generally involve uses of plan assets that are potentially harmful to the plan." *Lockheed Corp. v. Spink*, 517 U.S. 882, 893 (1996). Plaintiff's prohibited-transaction claim, however, does not allege plan assets are being used in this manner and fails entirely to allege that Centene acted in its own interest in contracting with Fidelity or Strategic Advisors or that they were parties in interest. Mot. to Dismiss 10-11, 14-15. Instead, Plaintiff's assertions simply represent efforts to recast fiduciary-breach claims as prohibited-transaction claims to avoid any need to assert *plausible* and non-conclusory claims for relief. In short, Plaintiff's prohibited-transaction claim is nothing more than a naked attempt to sneak "meritless litigation" "past the motion-to-dismiss stage." *See Cunningham*, 604 U.S. at 708.

This case accordingly exemplifies precisely why courts must rigorously police prohibited-transaction claims to prevent an "avalanche of meritless litigation." *See Cunningham*, 604 U.S. at 707. Otherwise, plaintiffs may attempt to disguise all ERISA claims as prohibited-transaction claims purely to take advantage of the Court's conclusion in *Cunningham* that plaintiffs need not plead that an exemption does not apply to the challenged transaction. *See id.* at 695-96. As the Supreme Court indicated, to prevent plaintiffs from end-running ERISA's pleading requirements through these claims, courts must "use existing tools at their disposal to screen out meritless claims before discovery." *Id.* at 708. These tools include carefully analyzing whether plaintiffs have standing, requiring plaintiffs to "file a reply putting forward specific, nonconclusory factual allegations showing the exemption does not apply" under Rule 7, and imposing sanctions "where an exemption obviously applies, and a plaintiff and his counsel lack a good-faith basis to believe otherwise." *Id.* at 708-09 (alteration, citation, and quotation marks omitted); *see also id.* at 711 (Alito, J., concurring) ("District courts should strongly consider utilizing this option [requiring a reply to an answer]—and employing the other safeguards that the Court describes—to achieve 'the prompt disposition of insubstantial claims.'" (citation omitted)). The Court's admonitions (and the concerns underlying them) are consistent with the concerns raised by ERISA's drafters—as Professor James Wooten has explained, the "legislative drafters appear to have been quite concerned about the possibility that participants or beneficiaries would bring unworthy or vexatious claims." James Wooten, *Enforcement of ERISA Rights and Responsibilities: An ERISA@40 Event* 8 (2014), https://tinyurl.com/mtkb9b9c. In the face of those concerns, Plaintiff raises a prohibited-transaction claim in name only. That name cannot transform her deficient claims into plausible ones.

CONCLUSION

For the foregoing reasons, this Court should dismiss the Second Amended Complaint.

Respectfully submitted,

Dated: September 3, 2026

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