No. 22-16268

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WINSTON ANDERSON, et al.,

Plaintiffs-Appellants,

v.

INTEL CORPORATION INVESTMENT POLICY COMMITTEE, et al.,

Defendants-Appellees.

On Appeal from the United States District Court
for the Northern District of California
No. 3:19-cv-04618 (Hon. Lucy Koh / Hon. Vince Chhabria)

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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CORPORATE DISCLOSURE STATEMENT

The Chamber of Commerce of the United States of America is a non-profit corporation organized under the laws of the District of Columbia. It has no parent corporation. No publicly held corporation owns ten percent or more of its stock.

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INTEREST OF THE *AMICUS CURIAE*

The Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation.[1] 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 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 participates as *amicus curiae* in this Court and in others on issues that affect benefit-plan design or administration. *See, e.g.*, *Hughes v. Nw. Univ.*, 142 S. Ct. 737 (2022); *Davis v. Salesforce.com, Inc.*, 2022 WL 1055557 (9th Cir. Apr. 8, 2022); *Santomenno v. Transamerica Life Ins. Co.*, 883 F.3d 833 (9th Cir. 2018); *White v. Chevron Corp.*, 752 F. App'x 453 (9th Cir. 2018). The Chamber files this brief to provide the Court with greater context regarding the discretion and flexibility that ERISA affords fiduciaries. This discretion and flexibility allows fiduciaries to adopt customized strategies tailored to the needs of participants, like the investment

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[1] All parties have consented to the filing of this brief. *See* Fed. R. App. P. 29(a)(2). 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, and its counsel made a monetary contribution to fund the preparation or submission of this brief.

strategy employed by Intel's plan fiduciaries. Contrary to plaintiffs' view, such strategies are *encouraged* by ERISA—not plausibly suggestive of a fiduciary breach.

INTRODUCTION

Under ERISA, courts are not investment analysts tasked with choosing their own preferred funds for 401(k) plans. Yet that is precisely what Plaintiffs have proposed. According to their theory of the case, this Court should declare broad categories of investments as effectively off-limits based on Plaintiffs' disagreement with particular investment strategies and their (incorrect) view that those investments were particularly novel. Plaintiffs asked the district court to infer that Intel's fiduciaries lacked a prudent fiduciary process by alleging that the Intel funds performed poorly relative to Plaintiffs' cherry-picked funds. Now, they complain that the district court erred by evaluating those same allegations and the plausibility of Plaintiffs' comparators in determining whether Plaintiffs' claims are adequately pled. According to Plaintiffs, it is improper at the pleading stage for the district court to evaluate whether Plaintiffs' conclusory assertions of high cost or underperformance are in any way plausible. This approach, too, would remove any objective guardrails on a plausibility analysis the Supreme Court has repeatedly cautioned is critical to "divide the plausible sheep from the meritless goats." *Fifth Third Bancorp v. Dudenhoeffer*, 573 U.S. 409, 425 (2014).

Plaintiffs' approach is not how the law operates. In enacting ERISA, Congress recognized that there are any number of reasonable options for selecting investment options for a retirement plan line-up, and that those decisions will themselves turn on a variety of plan-specific features. It is wholly consistent with ERISA (indeed, encouraged) for fiduciaries to exercise their discretion to carefully account for the needs and characteristics of their participant base—and not, as Plaintiffs suggest, a breach of fiduciary duty. Except as specifically articulated in ERISA's prohibited-transaction provisions (29 U.S.C. §§ 1106-1107), which are not at issue here, there are no categorically "off limit" investment decisions, whether based on the type of investment or their purported novelty. And when plaintiffs attempt to make out a claim by pointing to the performance or costs of the challenged funds *in comparison to* other funds, that analysis is meaningful only when those funds are apt comparators in terms of their respective investment strategies.

At every step, Plaintiffs' approach is at odds with both ERISA's embrace of flexibility and discretion, and with the Supreme Court's repeated recognition that ERISA claims, just like any others, must pass the *Twombly* and *Iqbal* pleading standard to survive a motion to dismiss. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007); *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). The district court correctly applied that analysis here, and this Court should affirm.

ARGUMENT

I. ERISA prioritizes flexibility and discretion for 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). Rather, it crafted a statute intended to encourage employers to offer benefit plans while also protecting the benefits promised to employees. *Id.* at 516-17; *see also* H.R. Rep. No. 93-533, at 9 (1973), *reprinted in* 1974 U.S.C.C.A.N. 4639, 4647 (noting that ERISA "represents an effort to strike an appropriate balance between the interests of employers and labor organizations in maintaining flexibility in the design and operation of their pension programs, and the need of the workers for a level of protection which will adequately protect their rights and just expectations"). 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," often during periods of considerable market uncertainty. 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.* As a result, Congress designed a statutory scheme that affords plan sponsors and fiduciaries considerable flexibility—"greater flexibility, in the making of investment decisions…, than might have been provided under pre-ERISA common and statutory law in many jurisdictions." DOL, Op. No. 81-12A, 1981 WL 17733, at *1 (Jan. 15, 1981).

This flexibility extends to a variety of areas. For example, plan fiduciaries must make decisions concerning, among other things:

- the general investment policies and purposes of the plan;
- the appropriate number of investment options to make available to plan participants (some plans offer a dozen, others offer more);
- the risk levels of investment options to offer (ranging from very conservative capital-preservation options intended to avoid loss, to aggressive growth strategies);
- the investment styles to include (potentially including domestic equity funds, international funds, asset allocation funds, bond funds, and target-date funds, among others);
- the structure of the investment options (such as mutual funds, separate accounts, or collective trusts);
- the share class of investment funds to offer; and
- the default investment option, if any, for plan participants who have not made a decision about how to allocate their individual investment accounts.

All of these decisions involve "difficult tradeoffs," *Hughes*, 142 S. Ct. at 742, especially in the face of market turmoil. Recognizing as much, Congress chose the "prudent man" standard to define the scope of the duties fiduciaries owe to plans and their participants. 29 U.S.C. § 1104(a). This standard is designed to provide

fiduciaries with the "flexibility" necessary to determine how best to manage their plans. *Fine v. Semet*, 699 F.2d 1091, 1094 (11th Cir. 1983).

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). This discretion is critical to the entire framework, particularly because there virtually never is a single "right" answer to the questions fiduciaries must answer given the almost innumerable options available to them. In light of the vast array of options that exist for investment products and services, the need for fiduciaries to tailor solutions to their participants, and the widely diverse nature of those participants, fiduciaries are best positioned to weigh the pros and cons of various choices—often with assistance from consultants and other investment professionals. Subjecting a fiduciary to constant Monday morning quarterbacking over his decisions, with the benefit of 20/20 hindsight, would eviscerate the discretion that is at the core of the statutory framework. A fiduciary's decisions must be evaluated based on "the circumstances as they reasonably appear[ed] to him at the time when he does the act and not at some subsequent time when his conduct is called in question." *Smith v. CommonSpirit Health*, 37 F.4th 1160, 1164 (6th Cir. 2022) (quoting Restatement (Second) of Trusts § 174 cmt. b (1959)).

II. Hindsight-based attacks like Plaintiffs' are not cognizable under ERISA.

A. ERISA does not police investment outcomes but rather focuses on a sound fiduciary process.

ERISA "requires prudence, not prescience." *DeBruyne v. Equitable Life Assurance Soc'y of U.S.*, 920 F.2d 457, 465 (7th Cir. 1990) (citation omitted). And so, claims for breach of fiduciary duty "focus[] on a fiduciary's conduct in arriving at an investment decision, not on its results." *PBGC ex rel. Saint Vincent Cath. Med. Ctrs. Ret. Plan v. Morgan Stanley Inv. Mgmt. Inc.*, 712 F.3d 705, 716 (2d Cir. 2013) (alteration in original) (citation omitted). Under this framework, "the proper question" in evaluating an ERISA claim "is not whether the investment results were unfavorable, but whether the fiduciary used appropriate methods to investigate the merits of the transaction." *Harris v. Amgen, Inc.*, 788 F.3d 916, 936 (9th Cir. 2015) (citation and quotation marks omitted), *rev'd and remanded on other grounds by* 577 U.S. 308 (2016). In other words, fiduciaries are judged not for the outcome of their decisions but for the *process* by which those decisions were made.

This focus on process is evident from the consistent guidance of the Department of Labor ("DOL"). For example, when asked to weigh in on whether plans may offer funds with a private-equity component, DOL emphasized that the question was not whether a particular type of fund was prudent in the abstract but rather whether fiduciaries made the decision to offer such a fund through "an objective, thorough, and analytical process that considers all relevant facts and

circumstances." DOL, *Information Letter 06-03-2020*, 2020 WL 8366126, at *2 (June 3, 2020) ("DOL, *2020 Information Letter*"). As is true of a wide variety of investment plan line-up decisions, those facts and circumstances include, for example, consideration of "the risks and benefits associated with the investment alternative," diversification goals, the expertise and experience of the fund manager, the characteristics and needs of the plan and its participants, etc. *Id.* at *3-4.

DOL reiterated this same point in its 2021 Supplement Statement, explaining that when fiduciaries "consider *any* investment for an individual account plan menu, they must engage in an objective, thorough, and analytical process that evaluates anticipated opportunities for investment diversification and enhanced investment returns." DOL, *Supplement Statement on Private Equity in Defined Contribution Plan Designated Investment Alternatives*, 2021 WL 6750836, at *1 (Dec. 21, 2021) ("*2021 Supplement Statement*"). While these considerations include "the complexities associated with the [private equity] component," that means only that plan fiduciaries must "secur[e] sufficient information to understand the investment and its attendant risks." *Id.*

So long as a fiduciary engages in this reasoned decisionmaking process, DOL has noted, "[t]here may be many reasons why a fiduciary may properly select an asset allocation fund with a private equity component as a designated investment alternative for a participant directed individual account plan." DOL, *2020*

Information Letter, 2020 WL 8366126, at *4. Thus, the mere fact that a plan fiduciary elects to invest in funds with a private equity component—something that DOL has repeatedly stated ERISA permits—could not reasonably suggest fiduciary wrongdoing any more than the mere fact that a plan fiduciary elects to make available a stable-value fund, a passively managed target date fund ("TDF"), an equity fund, or any number of other funds that are permitted under ERISA. A contrary rule would turn ERISA's process-based focus on its head, allowing entirely permissible choices to serve as a proxy for a deficient process.

And therein lies the deficiency of many ERISA complaints, including this one. While ERISA's fiduciary standards focus entirely on process, ERISA complaints asserting claims for fiduciary breach rarely include any allegations about process. Instead, they sometimes assert per se attacks against particular fiduciary decisions—with no allegations that fiduciaries failed to consider the relevant factors or weigh relevant considerations—or, more often, they ask the Court to *infer* an imprudent process based on circumstantial, outcome-focused allegations comparing the fees or performance outcome of the plan fiduciaries' decision against the fees or performance of a different option available on the market. The per-se-attack approach has no basis in ERISA, and the pleading-by-inference approach has appropriately been subjected to the type of careful, context-sensitive scrutiny that the district court employed. This careful scrutiny allows district courts to determine

whether circumstantial allegations plausibly suggest that fiduciaries were acting improperly, or whether they merely reflect a non-actionable disagreement with fiduciaries' discretionary decisions.

B. Plaintiffs' per se attacks on particular investment strategies are anathema to the flexibility and discretion ERISA provides.

Plaintiffs effectively concede that their Consolidated Amended Complaint, like many ERISA class-action complaints, contains no allegations about the Intel fiduciaries' decisionmaking process. Pls.' Br. 32-33. Instead, their primary argument is essentially a categorical challenge to the *types* of investments the fiduciaries selected starting in 2009. According to Plaintiffs, "Intel fiduciaries imprudently adopted an asset-allocation model that disproportionately favored hedge funds, private equity, and other non-traditional investments." Pls.' Br. 33. Notably, these objections do not target any particular funds selected by Intel fiduciaries, but rather the purportedly "well-recognized risks of hedge funds and private equity" writ large. *Id.*; *see also id.* at 1 (claiming that "[h]edge funds and private equity are less regulated and riskier than traditional investments like stocks and bonds").

This approach cannot be squared with a fundamental premise of ERISA—namely, the "range of reasonable judgements a fiduciary may make." *Hughes*, 142 S. Ct. at 742. Neither Congress nor DOL provides a list of required or forbidden investment options or investment strategies. In fact, when Congress considered

requiring plans to offer at least one index fund, the proposal failed. *See* 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." *401(K) Fee Disclosure: 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). Rather, "[w]ithin the framework of ERISA's prudence, exclusive purpose and diversification requirements, . . . plan fiduciaries have broad discretion in defining investment strategies appropriate to their plans." DOL, Advisory Op. No. 2006-08A, at 3 (Oct. 3, 2006), https://bit.ly/3pnva5z. 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).

Likewise, DOL has expressly declined to weigh in on whether "a particular fund or investment alternative" is permitted or forbidden for a plan, because the appropriateness of any given investment option for a particular plan "is an inherently factual question" that depends on numerous "relevant facts and circumstances" that must be considered by a fiduciary through "an objective, thorough, and analytical process." DOL, *2020 Information Letter*, 2020 WL 8366126, at *2. At bottom, as DOL noted repeatedly in its 2020 Information Letter and 2021 Supplement

Statement, the key question for "any plan investment," including private equity, is whether the investment is "prudent and made solely in the interest of the plan's participants and beneficiaries." *2021 Supplement Statement*, 2021 WL 6750836, at *1; *see also id.* (outlining considerations for "any investment for an individual account plan menu").

As this framework makes clear, "categorical rules" have no place in ERISA fiduciary-breach challenges. There are thousands of reasonable investment options with different investment styles and risk levels—nearly 9,000 mutual funds alone,[2] several thousand of which are offered in retirement plans, not to mention the countless customizable options that plan fiduciaries could design—and nearly innumerable ways to put together a plan that enables employees to save for retirement. Different plans will take different approaches; each plan is unique, and each plan's participants have a different range of financial sophistication, risk sensitivities, retirement needs, and investment preferences. Thus, the Supreme Court has directed courts to "give due regard to the range of reasonable judgments a fiduciary may make based on her experience and expertise." *Hughes*, 142 S. Ct. at 742.

[2] Investment Company Institute, *2023 Investment Company Fact Book* 17 (63d ed. 2023), https://bit.ly/3PuoJgv.

Simply declaring in a class-action complaint that an entire universe of investment products is inherently imprudent or improper or off-limits is completely inconsistent with this directive. It is almost unheard of for DOL—the regulator with authority to promulgate regulations and guidance informing fiduciaries' decisionmaking—to even *suggest* that certain investments *might* give rise to concerns that make them systemically unsuitable for retirement-plan investment.[3] Regardless, mounting such an attack nearly a decade *after* the relevant decision was made, based on market conditions and outcomes known only with the benefit of hindsight, is directly contrary to the "[b]edrock trust principles" upon which ERISA's fiduciary-breach provisions were based—the notion that "[w]hether the trustee is prudent in the doing of an act depends upon the circumstances as they reasonably appear to him at the time when he does the act and not at some subsequent time when his conduct is called in question." *CommonSpirit*, 37 F.4th at 1164 (citation omitted).

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[3] The closest DOL has come was to informally suggest that there are "significant risks" to *direct* investments in cryptocurrencies, in large part due to unique concerns surrounding "fraud, theft, and loss." DOL, *Compliance Assistance Release No. 2022-01, 401(k) Plan Investments in "Cryptocurrencies"* (Mar. 10, 2022), https://bit.ly/3IY1ZRM. Even then, this suggestion was limited to direct investments in cryptocurrencies, rather than including those investments as a component of a diversified fund. *See id.*

C. Innovative and customized strategies by fiduciaries are a virtue under ERISA, not a vice indicative of fiduciary breach.

In a closely related attack, Plaintiffs repeatedly ask the Court to infer imprudence based on their assertion that Intel plan sponsors employed "novel or unusual investment strategies." Pls.' Br. 43; *see also id.* at 2 (referring to the plan's "novel asset-allocation approach"); *id.* at 42 (same). In other words, regardless of the nature of the underlying funds, Plaintiffs contend that their novelty alone renders them unacceptable. This theory is likewise a perversion of ERISA. Plaintiffs would penalize Defendants for doing precisely what ERISA encourages of fiduciaries: innovating and creating customized solutions using their expertise and knowledge about the participants in their particular plan. It is for precisely this reason that Congress prioritized flexibility, recognizing it as "essential to achieve the basic objectives of private pension plans because of the variety of factors which structure and mold the plans to individual and collective needs of different workers, industries, and locations." S. Rep. No. 92-634, at 21 (1972).

Given that ERISA and DOL expressly encourage flexibility, it is no surprise that neither ERISA nor DOL forbids or discourages custom solutions created by fiduciaries for their plans. Quite the contrary: in the context of target-date funds, for example, DOL has expressly noted that while off-the-shelf, or "pre-packaged," TDFs are available—often at a very low fee—"custom" TDFs crafted specifically for a particular plan, based on the specific needs of the plan, and often composed of

investment options already in the plan line-up "may offer advantages" that fiduciaries may wish to consider despite the additional "costs and administrative tasks involved" in these types of investments. *See* DOL, *Target Date Retirement Funds – Tips for ERISA Plan Fiduciaries* 3 (Feb. 2013) ("DOL, *TDF Tips*"), https://bit.ly/43YdMYu.

Plaintiffs' characterization of the novelty of the fiduciaries' approach is also wrong. As Plaintiffs themselves recognize, Intel's plan sponsors employed an asset-allocation approach that is common in defined-benefit plans. 3-ER-414-17. Plaintiffs do not explain why an approach that is commonly used in defined-benefit plans should be understood as "novel" and "untested" in the context of defined-contribution plans. Indeed, ERISA plaintiffs frequently fault fiduciaries for *not* employing the strategies that are commonly used in defined-benefit plans. *See, e.g.*, First Am. Compl. ¶ 189(H), *Beesley v. Int'l Paper Co.*, No. 3:06-cv-00703-DRH-SCW (S.D. Ill. May 1, 2008), ECF No. 169; Pls' Mem. in Opp. to Defs' Mot. for Summ. J. at 5, *Moreno v. Deutsche Bank Ams. Holding Corp.*, No. 1:15-cv-09936-LGS (S.D.N.Y. Mar. 5, 2018), ECF No. 192. Here, they do the opposite—attempting to squeeze an inference of imprudence from the fact that the Intel plan fiduciaries incorporated into their defined-contribution plan an investment strategy that is common (and successful) in defined-benefit plans.

In short, the Court should reject Plaintiffs' attempts to short-circuit the pleading standard through non-cognizable categorical attacks.

D. Using inapt comparators in an attempt to plead by inference is inconsistent with ERISA and the heavy weight of authority.

In addition to offering per se attacks on hedge-fund and private-equity investments in defined-contribution plans, Plaintiffs criticize the district court for employing what Plaintiffs characterize as an "atextual" apt-comparator or meaningful-benchmark requirement. Pls.' Br. 4, 49. But the district court did not independently impose an apt-comparator requirement; it simply responded to the way *Plaintiffs attempted to plead their case*—by seeking inferences of an imprudent fiduciary *process* from allegations that the challenged funds had worse investment performance from alternatives available on the market.

That pleading-by-inference-from-outcomes-identified-in-hindsight approach is itself misguided—although quite common in ERISA class-action complaints. It uses outcomes as a proxy for imprudence when the whole point of ERISA's fiduciary standards is that they do not compel any particular outcome and that decisions are not judged in hindsight. Moreover, this approach to pleading typically considers only one or two factors—*e.g.*, investment performance or fees—as dispositive, whereas DOL instructs fiduciaries to consider those factors *alongside many others* when making investment decisions. At the very least, though, courts that accept this type of circumstantial approach to pleading fiduciary-breach claims

commit no error by refusing to infer that fiduciaries are asleep at the wheel without *at least* requiring the alternatives cited by ERISA plaintiffs to be *apt* comparators. Without a baseline of *like* alternative investments, ERISA plaintiffs cannot even plead underperformance or excessive fees, much less plausibly allege that plan fiduciaries failed to adequately monitor the plan line-up based solely on the outcome of their investment decisions.

1. Plaintiffs' pleading-by-performance-comparisons approach is misguided given ERISA's statutory framework.

Despite ERISA's focus on process, complaints alleging fiduciary breach—like the Consolidated Amended Complaint here—are typically silent on the process employed by defendant fiduciaries. Rather, plaintiffs construct an after-the-fact comparison of the fees or performance of the challenged funds to alternatives in the market, and then ask courts to infer that fiduciaries *must* have been asleep at the wheel based on their decision to retain the funds in question. This approach is on shaky footing from the get-go. By using outcomes as a proxy for process, plaintiffs attempt to peg their claim to a metric—results—that courts have been clear has no place in the analysis. If, as the Eighth Circuit has explained, it is "the process" that "ultimately matters, not the results," *Matousek v. MidAmerican Energy Co.*, 51 F.4th 274, 278 (8th Cir. 2022), plaintiffs should not be able to survive a motion to dismiss by then using results as a stand-in for process.

Even assuming results might play some role in the analysis, plaintiffs often use purely results-based metrics (performance and fees, for example) as their proxies—despite fiduciaries' obligation to account for a full range of factors when selecting funds. To take one example, Plaintiffs maintain that they can state a claim simply because certain Vanguard funds ultimately performed better and had lower fees than the Intel Funds. Pls. Br. 18-19. But unlike Plaintiffs, fiduciaries consider performance and fees alongside many other metrics. DOL made this point directly in its Supreme Court brief in *Hughes*, explaining that "prudent fiduciaries must consider all relevant factors," including fees, "potential for higher return, lower financial risk, more services offered, or greater management flexibility." U.S. Br. at 20, *Hughes v. Nw. Univ.*, No. 19-1401, https://bit.ly/3Zf8C7I (citation omitted). DOL's regulatory guidance likewise directs fiduciaries to account for a variety of factors when choosing and monitoring investments, including plan-specific factors "such as participation in a traditional defined benefit pension plan offered by the employer, salary levels, turnover rates, contribution rates and withdrawal patterns." DOL, *TDF Tips* 2.

Because fiduciaries must consider fees and performance alongside many historical and prospective quantitative and qualitative factors in a holistic analysis, inferring imprudence based on only one or two outcome-based criteria, examined in

the abstract, should not be sufficient to nudge a claim over the line from possible to plausible.

2. Claims that attempt to plead imprudence from circumstantial, outcome-based facts must allege something more than allegations that are equally consistent with lawful behavior.

When courts do consider whether outcome-based allegations permit a plausible inference of breach, it is critical that they employ a "careful, context-sensitive scrutiny of a complaint's allegations" in order to "divide the plausible sheep from the meritless goats." *Fifth Third Bancorp v. Dudenhoeffer*, 573 U.S. 409, 425 (2014).[4] Indeed, the Supreme Court could not have made this clearer in its recent *Hughes* decision. Prior to *Hughes*, some courts appeared to adopt the position

[4] Thus, for example, courts have recognized that even if underperformance might "offer a building block for a claim of imprudence," it is "quite another [thing] to say that it suffices alone." *CommonSpirit*, 37 F.4th at 1167; *see also, e.g.*, *PBGC*, 712 F.3d at 721-22 (identifying "[t]he most glaring problem" with a complaint as plaintiffs' failure to "allege *any* such surrounding circumstances" beyond underperformance); *Forman v. TriHealth, Inc.*, 40 F.4th 443, 448-449 (6th Cir. 2022) ("[A] showing of imprudence cannot come down to simply pointing to a fund with better performance.") (citation and quotation marks omitted); *Matousek*, 51 F.4th at 280-282 ("bare allegations" of underperformance are insufficient to satisfy plausibility). By contrast, courts have allowed allegations of underperformance to proceed only when coupled with other indicia of fiduciary misfeasance. *See, e.g.*, *Moler v. Univ. of Md. Med. Sys.*, 2022 WL 2756290, at *1, *4 (D. Md. July 13, 2022) (plaintiffs alleged underperformance, "grossly excessive" investment-management fees, selection of high-cost shares of funds when identical low-cost shares were available, and a failure "to monitor or control" recordkeeping expenses or solicit competitive bids for providers); *Falberg v. Goldman Sachs Grp., Inc.*, 2020 WL 3893285, at *9-10 (S.D.N.Y. July 9, 2020) (plaintiffs alleged ten years of underperformance, excessive fees, and "several other indicia of imprudence").

that ERISA claims were exempt from the plausibility pleading requirement established by Rule 8(a), *Twombly*, and *Iqbal*. *See Sweda v. Univ. of Pa.*, 923 F.3d 320, 326 (3d Cir. 2019) ("declin[ing] to extend" *Twombly* to ERISA claims); *Sacerdote v. N.Y. Univ.*, 9 F.4th 95, 108 n.47 (2d Cir. 2021) (citing *Sweda* as "rejecting" the application of *Twombly* "to ERISA complaints"). *Hughes* squarely rejected this position, holding that courts must "apply[] the pleading standard discussed in" *Iqbal* and *Twombly*. 142 S. Ct. at 742. It also cautioned, citing its prior decision in *Fifth Third*, that evaluating ERISA claims "will necessarily be context specific." *Id.* at 742. 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 another 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.

This standard is not new. Indeed, there are numerous areas of the law in which this Court has already applied this method to assess whether circumstantial factual allegations are sufficient to allege wrongdoing, and thereby satisfy the pleading standards set forth in *Twombly* and *Iqbal*. Take antitrust, for example. In *In re*

Musical Instruments & Equipment Antitrust Litigation, 798 F.3d 1186 (9th Cir. 2015), the plaintiff lacked direct allegations of illegal agreements among guitar manufacturers to fix prices. This Court had to determine whether it could plausibly "infer a price-fixing conspiracy" based on allegations of "circumstantial evidence of anticompetitive behavior." *Id.* at 1189, 1193. It carefully scrutinized each of the plaintiffs' circumstantial allegations to determine whether they plausibly suggested "something more" than lawful parallel conduct, or whether the circumstantial allegations "could just as easily suggest rational, legal business behavior." *Id.* at 1193-98 (citations omitted) (affirming dismissal because the allegations did not support a plausible inference of an anticompetitive agreement).

This Court has taken the same approach in other types of cases, including viewpoint-discrimination cases, *Moss v. U.S. Secret Serv.*, 572 F.3d 962 (9th Cir. 2009), RICO cases, *Eclectic Props. E., LLC v. Marcus & Millichap Co.*, 751 F.3d 990 (9th Cir. 2014), and securities cases (even outside the context of heightened pleading), *In re Century Aluminum Co. Sec. Litig.*, 729 F.3d 1104 (9th Cir. 2013). In each of these contexts, when the plaintiffs failed to provide any direct allegations about a foundational element of the claim, this Court carefully scrutinized the circumstantial factual allegations and did not hesitate to order dismissal when those allegations did not support a plausible inference of wrongdoing because they were

equally consistent with lawful behavior.[5] As the Court summarized in *Century Aluminum*, "[w]hen faced with two possible explanations, only one of which can be true and only one of which results in liability, plaintiffs cannot offer allegations that are 'merely consistent with' their favored explanation but are also consistent with the alternative explanation." 729 F.3d at 1108 (citation omitted). Instead, "[s]omething more is needed, such as facts tending to exclude the possibility that the alternative explanation is true." *Id*.[6]

Post-*Hughes*, it is clear that *Twombly* and this Court's post-*Twombly* precedents should apply with full force in ERISA cases—as this Court already concluded in *White v. Chevron*, a recent unpublished opinion in another fiduciary

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[5] *See, e.g.*, *Moss*, 572 F.3d at 970-972 (claim was inadequately pled because the factual allegations were merely "consistent with a viable First Amendment claim," and the "mere possibility" of misconduct is insufficient to reasonably infer a discriminatory intent); *Eclectic Props.*, 751 F.3d at 998-999 (significant increase in real estate prices was "consistent with Defendants' alleged fraudulent intent" but "d[id] not tend to exclude a plausible and innocuous alternative explanation," such as the variability of real estate values and fluctuations in prices over time).

[6] Plaintiffs cite *Starr v. Baca*, 652 F.3d 1202 (9th Cir. 2011), in arguing that they need not rule out rational alternative explanations for the circumstantial facts from which they ask this Court to infer an imprudent process. Pls.' Br. 49. But as this Court noted in *Eclectic Properties* when it rejected this same argument, in *Starr* the plaintiff's claims "survived a motion to dismiss by offering facts that tended to exclude the defendant's innocuous alternative explanation." 751 F.3d at 997; *accord Century Aluminum*, 729 F.3d at 1108 (similarly distinguishing *Starr* and stating that "[t]o render their explanation plausible, plaintiffs must do more than allege facts that are merely consistent with both their explanation and defendants' competing explanation").

breach case. 752 F. App'x 453. There, this Court—citing *Twombly* and *Century Aluminum*—affirmed the district court's dismissal of an ERISA complaint similar to Plaintiffs'. *See id.* at 454-55. In so doing, this Court explained that circumstantial allegations that a plan sponsor "could have chosen different vehicles for investment that performed better during the relevant period, or sought lower fees for administration of the fund," cannot survive dismissal. *Id.* at 455. Because allegations of this type do not make "it more plausible than not that any breach of fiduciary duty ha[s] occurred," they are insufficient to make out a claim under ERISA. *Id.*[7] As the Supreme Court stated expressly in *Hughes*, these same rules must apply to ERISA claims.

Where, as here, the plaintiffs' circumstantial allegations take the form of a comparison to other funds, the "meaningful benchmark" requirement serves a critical gatekeeping role in the pleading analysis. Plaintiffs contend that the district court erred by imposing a categorical "apt comparator" requirement for all breach of fiduciary duty cases. Pls.' Br. 37 (claiming that the district court "required the plaintiffs to plead 'meaningful benchmarks'—without any consideration of the

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[7] *Tibble v. Edison International*, 843 F.3d 1187 (9th Cir. 2016) (*en banc*), which Plaintiffs heavily lean on, was not about whether the plaintiffs had satisfied the *Twombly* pleading standard, and this Court did not opine on what would be required to do so in context of an ERISA challenge to a plan line-up. Furthermore, this Court merely noted in *Tibble* that fiduciaries must consider investments that "are substantially identical—other than their lower cost." *Id.* at 1198. Plaintiffs here have not raised a claim based on substantially identical investments.

plaintiffs' theory of breach or the particular circumstances here"). But the district court was merely responding to *Plaintiffs*' theory in their complaint—namely, that the Intel plan underperformed when compared to similar alternative funds, and that the underperformance permitted a plausible inference of imprudence. As just one example, the complaint presented charts purporting to compare some of the investment options in Intel's plan to a set of other options available on the market that allegedly out-performed and/or had lower fees than the plan's options during a cherry-picked time period. *See, e.g.*, 3-ER-590-595, 601-605. Once Plaintiffs put this approach in play, the district court properly considered whether these funds were in fact appropriate comparators.

This step was critical to evaluating the plausibility of Plaintiffs' allegations. As discussed above, fiduciaries have broad discretion to choose among thousands of options in a thriving investment-management marketplace. With the benefit of hindsight, it is *always* possible for plaintiffs to identify a cheaper or better-performing alternative, allowing plaintiffs to paint *any* decision as an imprudent one. Thus, when Plaintiffs proceed on a fiduciary-breach claim by identifying purported comparators, the "meaningful benchmark" standard is critical to whether plaintiffs may have provided "something more" to push their allegations over the plausibility line. *In re Musical Instruments*, 798 F.3d at 1193-94. Otherwise, a fiduciary's decision "could just as easily" (if not more easily) "suggest rational, legal business

behavior"—namely, that a fiduciary committee made a different choice because its weighing of all the factors led it to a different fund. *Id.* at 1194 (citation omitted). For that reason, when the plausibility of a complaint proceeding via comparators is at issue, the "meaningful benchmark" analysis *must* be conducted at the pleading stage, rather than, as Plaintiffs suggest (at 48-50), later in the case. It is not a fact-intensive inquiry; rather, courts ask only whether the plaintiffs have themselves plausibly alleged that their comparators are in fact comparable.

This case provides an apt example. There is "no one-size-fits-all approach," but a meaningful benchmark must "hold similar securities, have similar investment strategies, and reflect a similar risk profile." *Matousek*, 51 F.4th at 281. Comparing funds with "different aims, different risks, and different potential rewards that cater to different investors," as Plaintiffs did here, says nothing about whether "one is better or worse than the other," much less whether a fiduciary's process for maintaining the fund was infirm. *Davis v. Wash. Univ. in St. Louis*, 960 F.3d 478, 485 (8th Cir. 2020); *CommonSpirit*, 37 F.4th at 1166. In particular, Plaintiffs conspicuously do not allege that the Intel fund underperformed its own custom benchmark, and they thus cannot assert that the Plan underperformed in light of its particular investment strategy. While ERISA plaintiffs often ask courts to ignore these features on a motion to dismiss, the Supreme Court has said the opposite—that "context" *must* be considered at the 12(b)(6) stage. *Fifth Third*, 573 U.S. at 425.

III. Allowing hindsight-based disagreement with discretionary fiduciary decisions would undermine ERISA's focus on flexibility and discretion.

The plausibility pleading rule is necessary to ensure that ERISA fiduciaries are not targeted for class-action litigation whenever they fail to follow a particular plaintiff's preferred investment approach. As this case demonstrates, employers can—and will—be sued, essentially no matter how they exercise their discretionary responsibilities. Fiduciaries are sued for offering numerous investments in the same style, and for offering only one investment in a given investment style;[8] for failing to divest from stocks with declining share prices or high risk profiles,[9] and for failing to *hold onto* such stock because high risk can produce high reward;[10] for making available investment options that plaintiffs' lawyers deem too risky,[11] and conversely for taking what other plaintiffs' lawyers deem an overly cautious approach.[12]

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[8] *Compare* First Am. Compl. ¶¶ 68-71, *Miguel 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.

[9] *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").

[10] *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).

[11] *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.

[12] *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

This dynamic—with new and often contradictory circumstantial theories of imprudence popping up every year—has created an untenable situation for fiduciaries, whose jobs have become 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 the "tremendous power to harass" individual fiduciaries in this way).[13] Courts have recognized this dilemma, noting that ERISA fiduciaries often find themselves "between a rock and a hard place," *Fifth Third*, 573 U.S. at 424, or on a "razor's edge," *Armstrong v. LaSalle Bank Nat'l Ass'n*, 446 F.3d 728, 733 (7th Cir. 2006).

The pressure created by these suits also undermines ERISA's central focus on innovation, diversification, and employee choice. *See supra*, pp. 4-6, 14-15. The more that specious complaints survive dismissal, the more a fiduciary might feel that

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be breached by maintaining an investment portfolio that is *too safe and conservative*"); Compl., *Barchock v. CVS Health Corp.*, No. 1:16-cv-00061-ML-PAS (D.R.I. Feb. 11, 2016), ECF No. 1 (alleging plan fiduciaries breached the duty of prudence by investing portions of the plan's stable value fund in conservative money market funds and cash management accounts).

[13] In this case, for example, Plaintiffs sued twenty-one individual fiduciaries.

she has no choice but to offer, for example, only "a diversified suite of passive investments"—despite "actually think[ing] that a mix of active and passive investments is best." *See* David McCann, *Passive Aggression*, CFO (June 22, 2016), https://bit.ly/2Sl55Yq. Indeed, that is already happening. "Before the increases in 401(k) plan litigation, some fiduciaries offered more asset class choice by including specialty assets, such as industry-specific equity funds, commodities-based funds, and narrow-niche fixed income funds[,] options [that] could potentially enhance expected returns in well-managed and monitored portfolios."[14] Now fiduciaries overwhelming choose purportedly "'safe' funds over those that could add greater value." *Id.* The Intel fiduciaries should not be penalized for being willing to think strategically about the particular funds that work best for their participants.

Finally, the pressure created by lawsuits that simply second guess discretionary fiduciary decisions impose enormous costs on plan sponsors. As the Supreme Court recognized in *Twombly*, enforcing the plausibility pleading rule is necessary to guard against speculative suits that "push cost-conscious defendants to settle even anemic cases." 550 U.S. at 558-59. In ERISA cases, discovery is entirely asymmetrical and comes at an "ominous" price, easily running into the millions of dollars for a defendant. *PBGC*, 712 F.3d at 719; *see also* Chubb, *Excessive*

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[14] George S. Mellman & Geoffrey T. Sanzenbacher, *401(k) Lawsuits: What are the Causes and Consequences?*, Center for Retirement Research at Boston College 5 (May 2018), https://bit.ly/3fUxDR1.

Litigation Over Excessive Plan Fees In 2023 3, https://bit.ly/3qN4rnL. While discovery is sometimes appropriate—in cases that are plausibly pled without hindsight bias or mere speculation—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)). And with those increases in costs come a decreased likelihood that large employers will continue offering generous voluntary retirement benefits (such as generous employer contributions or funding retirement-plan services that employees prefer), and that small employers will feel comfortable taking the risk of exposure to litigation created by the simple act of voluntarily sponsoring a retirement plan for employees.

Neither ERISA nor the pleading standards articulated by the Supreme Court supports such a result, and this Court's approach to Rule 12(b)(6) motions in ERISA cases must be careful to guard against it. *Hughes* requires that courts apply *Twombly*'s "plausibility" standard to ERISA cases—precisely what the district court did here. 142 S. Ct. at 742.

CONCLUSION

This Court should affirm the judgment below.

Respectfully submitted,

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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 6,988 words, excluding the parts exempted by Rule 32(f).

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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 Ninth Circuit by using the appellate CM/ECF system on June 14, 2023.

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.

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