

# 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

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

Date: May 19, 2026  
Time: 10:00 AM  
Place: Courtroom 15  
Judge: Hon. Rita F. Lin

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4 **Other Authorities:**

5 Daniel Aronowitz, *Exposing Excessive Fee Litigation Against America’s*

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8 Coalition of Collective Investment Trusts, *Collective Investment Trusts* (2015),

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12 Investor.gov, *Collective Investment Trust (CIT)*, U.S. SEC,

13 <https://tinyurl.com/3mx4auay> (last visited Mar. 23, 2026)..... 10

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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, representing approximately 300,000 direct members and indirectly representing 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.<sup>1</sup> 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), <https://tinyurl.com/469xhac8>. 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

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<sup>1</sup> 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.

1 decision to offer CITs rather than mutual funds that employ the same investment approach is  
2 categorically indicative of imprudence. If nothing else, this case demonstrates definitively what  
3 plan sponsors have observed from 401(k) litigation for decades: they will be a target for strike suits  
4 no matter what decisions they make.

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

14 Worse yet, this lawsuit is the poster child for precisely the situation plan sponsors (with 20+  
15 years of experience with 401(k) litigation) warned of: efforts to “recast breach-of-fiduciary-duty  
16 claims as prohibited-transaction claims” to force meritless cases into discovery and impose  
17 enormous settlement pressure on plan sponsors and fiduciaries. Chamber Amicus Br. 22,  
18 *Cunningham v. Cornell Univ.*, No. 23-1007 (U.S.), <https://tinyurl.com/cffe9tw7>; *see also id.* at 19-  
19 23, 23-26. That is precisely what Plaintiff does here, asserting a prohibited-transaction claim in  
20 name only to take advantage of the Supreme Court’s recent decision in *Cunningham v. Cornell*  
21 *University*, 604 U.S. 693 (2025). But asserting a facially deficient claim and bestowing it with the  
22 name “prohibited-transaction claim” does not give Plaintiff a one-way express ticket past a motion  
23 to dismiss to discovery and trial. To be sure, *Cunningham* held that a plaintiff does not need to  
24 plead that a prohibited-transaction exemption (an affirmative defense) is inapplicable, but  
25 *Cunningham* was nevertheless clear that courts must “use existing tools at their disposal” to prevent  
26 plaintiffs from triggering an “avalanche of meritless litigation.” *See id.* at 707-08. Against this  
27 backdrop, it is critical that courts do not shy away from the “context-specific inquiry” ERISA  
28

1 requires. *Hughes*, 595 U.S. at 173; *see also Fifth Third Bancorp v. Dudenhoeffer*, 573 U.S. 409,  
 2 425 (2014). If these types of conclusory and speculative complaints are sustained, plan participants  
 3 will be the ones who suffer. Fiduciaries will be pressured to limit investments to a narrow range  
 4 of options at the expense of providing a diversity of choices with a range of fees, risk levels, and  
 5 potential performance upsides, as ERISA requires in the case of a self-directed plan,<sup>2</sup> such as the  
 6 one Plaintiff currently challenges, and most participants want. Yet as this case shows, even that  
 7 will not protect them from lawsuits, and the litigation costs will have to come from *somewhere*,  
 8 likely by diluting the generosity of benefits employers are able to offer. That outcome helps no  
 9 one—aside from the lawyers litigating these cases.<sup>3</sup>

## 10 ARGUMENT

### 11 I. Hindsight-based attacks on fiduciary decision-making are at odds with ERISA’s text 12 and structure.

13 When Congress enacted ERISA, it “did not *require* employers to establish benefit plans.”  
 14 *Conkright v. Frommert*, 559 U.S. 506, 516 (2010) (emphasis added). Rather, it crafted a statute  
 15 intended to encourage employers to offer benefit plans while protecting the benefits promised to  
 16 employees. *Id.* at 516-17. Congress recognized plan sponsors and fiduciaries must make a range  
 17 of decisions and accommodate “competing considerations.” H.R. Rep. No. 96-869(I), at 67 (1980),  
 18 *reprinted in* 1980 U.S.C.C.A.N. 2918, 2935. Accordingly, Congress chose the flexible “prudent  
 19 man” standard to define the scope of the duties fiduciaries owe to plans and their participants. 29  
 20 U.S.C. § 1104(a); *Fine v. Semet*, 699 F.2d 1091, 1094 (11th Cir. 1983). Neither Congress nor the

21 \_\_\_\_\_  
 22 <sup>2</sup> See 29 C.F.R. § 2550.404c-1(a)(3) (providing that to meet Section 404(c)’s safe harbor provision,  
 23 ERISA plan must offer “at least three investment alternatives: (1) Each of which is diversified;  
 24 (2) Each of which has materially different risk and return characteristics; (3) Which in the aggregate  
 25 enable the participant or beneficiary ... to achieve a portfolio with aggregate risk and return  
 26 characteristics at any point within the range normally appropriate for the participant or beneficiary;  
 27 and (4) Each of which when combined with investments in the other alternatives tends to minimize  
 28 through diversification the overall risk of a participant’s or beneficiary’s portfolio”).

<sup>3</sup> 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>.

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

6 As courts have recognized, the broad discretion conferred by Congress is the “sine qua non  
7 of fiduciary duty.” *Pohl v. Nat’l Benefits Consultants, Inc.*, 956 F.2d 126, 129 (7th Cir. 1992).  
8 Discretion is critical to the entire ERISA framework, because there virtually never is a single “right”  
9 answer to the questions fiduciaries must answer. There are thousands of reasonable investment  
10 options with different investment styles and risk levels. Given the vast array of options and the  
11 need to tailor solutions to participants and their diverse interests, plan fiduciaries are best positioned  
12 to weigh the pros and cons of various choices. If a fiduciary is subjected to constant litigation and  
13 Monday-morning quarterbacking over decisions—with the benefit of hindsight and not “based  
14 upon information available to the fiduciary at the time of each investment decision,” *Anderson v.*  
15 *Intel Corp. Inv. Policy Comm.*, 137 F.4th 1015, 1021 (9th Cir. 2025) (*Intel*) (citation omitted)—  
16 that would eviscerate the discretion at ERISA’s core.

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

22 Given this focus on process, the most natural way to “plead a breach of the duty of  
23 prudence” is to “allege[] facts that would directly show that the fiduciaries employed unsound  
24 methods in making their investment decisions.” *Intel*, 137 F.4th at 1021-22 (collecting examples).  
25 To be sure, it is not automatically “fatal” when a complaint “contains no factual allegations  
26 referring *directly* to [the fiduciary’s] knowledge, methods, or investigations at the relevant times.”  
27 *Pension Ben. Guar. Corp. ex rel. St. Vincent Catholic Med. Ctrs. Ret. Plan v. Morgan Stanley Inv.*

1 *Mgmt. Inc.*, 712 F.3d 705, 718 (2d Cir. 2013) (*PBGC*). Sometimes, “a plaintiff can make  
 2 circumstantial factual allegations from which the court may reasonably infer from what is alleged  
 3 that the process was flawed.” *Intel*, 137 F.4th at 1022 (quotation marks omitted). But “[w]hen an  
 4 ERISA plaintiff attempts to do so by relying on a theory that a prudent fiduciary in like  
 5 circumstances would have selected a different fund based on the cost or performance of the selected  
 6 fund,” then at a bare minimum “that plaintiff must provide a sound basis for comparison.” *Id.*  
 7 (quotation marks omitted). In other words, because courts “evaluate prudence prospectively,” “it is  
 8 not enough for a plaintiff simply to allege that the fiduciaries could have obtained better results—  
 9 whether higher returns, lower risks, or reduced costs—by choosing different investments.” *Id.* at  
 10 1021. Instead, if “a plaintiff asks a court to infer that a fiduciary used improper methods based on  
 11 the performance of the investments, ... he must compare that performance to funds or investments  
 12 that are meaningfully similar.” *Id.* at 1023. The “same reasoning holds for ... allegations that  
 13 investors in the [defendant’s] plans incurred higher fees. As with [] performance allegations, the  
 14 fact that different kinds of funds with distinct objectives and approaches carried different fees does  
 15 not by itself demonstrate imprudence.” *Id.*; see also *Albert v. Oshkosh Corp.*, 47 F.4th 570, 581  
 16 (7th Cir. 2022) (“A complaint cannot simply make a bare allegation that costs are too high, or  
 17 returns are too low. ... Rather, it must provide a sound basis for comparison—a meaningful  
 18 benchmark.” (brackets and quotation marks omitted; ellipses in original)).

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

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

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

28 Plaintiff’s Amended Complaint puts fiduciaries in an impossible position twice over:

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

7 1. Plaintiff’s request for a *per se* rule rendering CITs automatically imprudent flies in  
8 the face of ERISA’s contextual-based analysis and ignores the safeguards in place to protect CIT  
9 investors. CITs, also known as “common trusts,” are “institutional investment vehicles” that are  
10 “only accessible to certain types of investors, including participants in employer-sponsored  
11 retirement plans.” T. Rowe Price Participant Insights, Collective Investment Trusts (2021), [https://](https://tinyurl.com/prbnfp24)  
12 [tinyurl.com/prbnfp24](https://tinyurl.com/prbnfp24). These trusts “are managed by banks or trust companies that ‘pool’  
13 retirement plan assets into a single portfolio that is invested with a specified investment philosophy  
14 and strategy” and “may invest in a wide range of active or passive investment vehicles.” *Id.* The  
15 “primary objective of a collective fund is, through economies of scale, to lower costs with a  
16 combination of profit-sharing funds and pensions.” *Terraza v. Safeway Inc.*, 241 F. Supp. 3d 1057,  
17 1064 (N.D. Cal. 2017) (citation omitted). CITs do share similarities with mutual funds “in that  
18 they are composed of pooled assets invested with a specified philosophy and strategy.” *See* T.  
19 Rowe Price Participant Insights, *supra*. But CITs, unlike mutual funds, “are not available to  
20 individual investors and are not advertised to the public.” *Id.* Indeed, the “essential features” of  
21 CITs and mutual funds “differ so significantly” that courts have deemed comparisons of mutual  
22 funds to collective trusts as “an ‘apples-to-oranges’ comparison.” *See White v. Chevron Corp.*,  
23 2017 WL 2352137, at \*11 (N.D. Cal. May 31, 2017).

24 In contending that the mere decision to offer CITs instead of mutual funds should be deemed  
25 automatically imprudent (or even permit an inference of imprudence), *e.g.*, Am. Compl. ¶¶ 4, 24-  
26 25, Plaintiff fails to grapple with how *per se* theories “run[] contrary to the Supreme Court’s  
27 instruction that the plausibility of allegations of breach of fiduciary duty is a ‘context specific’  
28

1 inquiry dependent on the particular circumstances at issue.” *Wright v. JPMorgan Chase & Co.*,  
2 2025 WL 1683642, at \*5 (C.D. Cal. June 13, 2025) (quoting *Dudenhoeffer*, 573 U.S. at 421). The  
3 Ninth Circuit itself has highlighted that context-specific inquiry when previously rejecting as  
4 untenable attempts to create bright-line rules in the ERISA context, because “[t]here are simply too  
5 many relevant considerations for a fiduciary.” *See Tibble v. Edison Int’l*, 729 F.3d 1110, 1135 (9th  
6 Cir. 2013) (rejecting “bright-line approach to prudence” where plaintiff launched “a broadside  
7 against retail-class mutual funds” and recognizing Seventh Circuit agreement), *vacated on other*  
8 *grounds*, 135 S. Ct. 1823 (2015).

9 This *particular* per se theory is especially chafing given the history of ERISA plaintiffs’  
10 401(k) line-up challenges over the past decade. Courts have recognized that “collective trusts ...  
11 are ... common investment instruments with the potential to outperform mutual funds” given their  
12 lower investment-management fees due to the economies of scale for these investment vehicles.  
13 *See Moitoso v. FMR LLC*, 451 F. Supp. 3d 189, 212 (D. Mass. 2020) (collecting cases). And for  
14 more than a decade, plaintiffs have been targeting fiduciaries for deigning to offer mutual funds  
15 within their 401(k) plan line-up rather than offering CIT versions of the same investment. *See, e.g.*,  
16 *Davis v. Salesforce.com, Inc.*, 2020 WL 5893405, at \*6 (N.D. Cal. Oct. 5, 2020) (addressing “an  
17 imprudence claim predicated on a comparison of mutual funds with collective trusts”); *Tobias v.*  
18 *NVIDIA Corp.*, 2021 WL 4148706, at \*9 (N.D. Cal. Sept. 13, 2021) (“Plaintiffs allege that  
19 Committee Defendants failed to utilize collective trusts when such options were available.”); *White*,  
20 2017 WL 2352137, at \*12 (plaintiffs arguing “the fiduciaries imprudently offered mutual funds  
21 when the Plan could have used less expensive institutional products, such as collective trusts or  
22 separate accounts”); *Miguel v. Salesforce.com, Inc.*, 2024 WL 1222092, at \*1 (N.D. Cal. Mar. 20,  
23 2024) (plaintiff challenging defendants for “failing to substitute the Fidelity mutual funds with  
24 Fidelity collective investment trusts”); *Kendall v. Pharm. Prod. Dev., LLC*, 2021 WL 1231415, at  
25 \*8 (E.D.N.C. Mar. 31, 2021); *Moitoso*, 451 F. Supp. 3d at 210; *Ferguson v. Ruane Cunniff &*  
26 *Goldfarb Inc.*, 2019 WL 4466714, at \*10 (S.D.N.Y. Sept. 18, 2019); *Larson v. Allina Health Sys.*,  
27 350 F. Supp. 3d 780, 795 (D. Minn. 2018); *Main v. Am. Airlines Inc.*, 248 F. Supp. 3d 786, 794

1 (N.D. Tex. 2017); *Moreno v. Deutsche Bank Ams. Holding Corp.*, 2016 WL 5957307 (S.D.N.Y.  
2 Oct. 13, 2016).

3 Plaintiff here is claiming *exactly the opposite*—that the mere fact that fiduciaries have  
4 chosen to include CITs instead of mutual funds (as ERISA plaintiffs have for a decade claimed is  
5 the only prudent option) is a clear sign that fiduciaries must have been asleep at the wheel. Am.  
6 Compl. ¶ 24. It is no wonder Centene is exasperated. Importantly, the point is not that *this plaintiff*  
7 is wrong and plaintiffs for the last decade have been right—that CITs are categorically prudent and  
8 mutual funds are a clear sign of fiduciary misfeasance. Nor is the point that *this plaintiff* is right  
9 and ERISA plaintiffs for the last decade have been wrong. Instead, the point is precisely what the  
10 Supreme Court has acknowledged: “At times, the circumstances facing an ERISA fiduciary will  
11 implicate difficult tradeoffs, and courts must give due regard to the range of reasonable judgments  
12 a fiduciary may make based on her experience and expertise.” *Hughes*, 595 U.S. at 177. CITs and  
13 mutual funds are *both* reasonable options for plan fiduciaries to select, but they do offer different  
14 costs and benefits. Given ERISA’s process-based inquiry, the mere fact that a fiduciary chose one  
15 investment vehicle over the other says nothing about whether the fiduciary had a sound process in  
16 place to make that choice.

17 2. Moreover, this is not the only goalpost Plaintiff has moved. For years, plaintiffs  
18 have alleged that plan fiduciaries paid excessive recordkeeping fees, but the per participant cost  
19 that plaintiffs have arbitrarily deemed acceptable has shifted over time—sometimes even within  
20 the same case. For many years, the number ERISA Plaintiffs seemed to pick out of a hat was \$35  
21 or \$40 per participant per year, completely irrespective of the level or quality of services that their  
22 fiduciaries decided to make available. *See, e.g., Hughes v. Nw. Univ.*, 63 F.4th 615, 625 (7th Cir.  
23 2023) (recognizing “Northwestern was not required to search for a recordkeeper willing to take \$35  
24 per year per participant as plaintiffs would have liked” (citation omitted)); *Wehner v. Genentech,*  
25 *Inc.*, 2021 WL 507599, at \*4 & n.2 (N.D. Cal. Feb. 9, 2021) (plaintiff arguing recordkeeping costs  
26 should be \$40 per participant or \$35 per participant). But when plaintiffs’ challenged plans were  
27 actually paying fees *below* that range, instead of abandoning their claims or refraining from  
28

1 bringing them in the first place, ERISA plaintiffs changed tack, dropping the recordkeeping cost  
2 they deemed acceptable even lower. *Moore v. Humana Inc.* is a perfect example. There, the  
3 plaintiffs initially contended that “slightly over \$40 per participant in recordkeeping, trust and  
4 custody fees” would have been acceptable. Class Action Compl. ¶ 83, *Moore v. Humana Inc.*, No.  
5 3:21-cv-232 (W.D. Ky. Apr. 13, 2021), ECF No. 1. But after learning that the plans they challenged  
6 actually paid *less* than that, the plaintiffs amended their complaint to newly contend that the  
7 defendants “should have been able to negotiate a recordkeeping cost in the low \$20 range.” First  
8 Am. Compl. ¶ 72, *id.* (Aug. 26, 2021), ECF No. 17.

9 Since then, plaintiffs have continued to lower that bar. Indeed, Plaintiff here preposterously  
10 claims that comparator plans paid as little as \$3 per participant per year. Am. Compl. ¶ 32. Setting  
11 aside the flaws in Plaintiff’s purported comparators and their alleged fees, Mot. to Dismiss 14-17  
12 (ECF No. 38), the contention that a plan would pay a mere \$3 per participant per year in fees defies  
13 logic. Retirement plans are required to send notices to plan participants, but \$3 would not even  
14 cover the cost of distributing disclosures. *See* Default Electronic Disclosure by Employee Pension  
15 Benefit Plans Under ERISA, 85 Fed. Reg. 31,884, 31,915 (May 27, 2020). As the Department of  
16 Labor has explained, the “estimated average per-participant cost of distributing disclosures on  
17 paper” includes \$4.48 to send a summary plan description alone—a figure already over Plaintiff’s  
18 desired \$3 per participant fee—and an additional \$1.72 and \$1.79 to send the summary annual  
19 report and annual funding notice, respectively, among other disclosures. *See id.* (capitalization  
20 altered). And sending out notices is only a *tiny piece* of what plan recordkeepers do.

21 As this case demonstrates perhaps better than any other, ERISA fiduciaries making  
22 discretionary decisions are at risk of being sued seemingly no matter what decisions they make.  
23 The plaintiffs in the myriad cases *supra* would have had no objection to the fiduciaries’ decision to  
24 offer CITs in this case or to the recordkeeping fees applicable to them, yet Plaintiff has targeted  
25 Centene’s fiduciaries for offering exactly what others have lauded, giving new meaning to the  
26 phrase “cursed-if-you-do, cursed-if-you-don’t.” This dynamic has made it incredibly difficult for  
27 fiduciaries to do their jobs—and, as this case reveals, it has made it virtually impossible for  
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1 fiduciaries to avoid being sued, no matter how careful their process and how reasonable their  
2 decisions.

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

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

9 Plaintiff faults CITs for not being regulated by the SEC like mutual funds, Am. Compl.  
10 ¶¶ 24-25, but the fact that CITs do not fall within the SEC's purview does not mean CITs are not  
11 regulated. “CITs are primarily regulated by the Office of the Comptroller of the Currency or state  
12 banking regulators.” Investor.gov, *Collective Investment Trust (CIT)*, U.S. SEC, <https://tinyurl.com/3mx4auay> (last visited Mar. 23, 2026). Indeed, Plaintiff herself recognizes the role state  
13 regulators play, acknowledging that the Fidelity Freedom Blend CITs are regulated by New  
14 Hampshire. Am. Compl. ¶¶ 24-25. More specifically, a “CIT is subject to regulation and oversight  
15 under the banking law governing its trustee, such as the National Bank Act and the rules and  
16 regulations of the Office of the Comptroller of the Currency (the ‘OCC’) for national banks and  
17 federal savings associations, a state's banking law for banks and trust companies established under  
18 state law, and general common law principles of fiduciary duties.” Great Gray Trust Co.,  
19 *Governance of Collective Investment Trusts: Benefits To Plan Investors 2* (2024), <https://tinyurl.com/bd9fs9wj> (*Governance of CITs*). And even though “CITs sponsored by state-chartered  
20 institutions are not directly subject to OCC regulation, many states apply the OCC's rules either by  
21 statute, rule, other guidance or as best practices in examining state bank collective trust activities.”  
22 Coalition of Collective Investment Trusts, *Collective Investment Trusts 10* (2015), <https://tinyurl.com/yds256b5>; *Governance of CITS, supra*, at 6 (noting that “non-OCC regulated banks and trust  
23 companies generally use [the OCC's Handbook] as a guide to best practices in managing a CIT”).  
24 And adding to this web of regulations is ERISA itself: “because CITs by definition serve as  
25 investment vehicles exclusively for retirement assets ..., they are subject to the fiduciary  
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27  
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1 responsibility and prohibited transaction rules” under ERISA. *Governance of CITs, supra*, at 2.

2 The extensive regulatory regime governing CITs ensures that there is no “regulatory gap”  
3 as Plaintiff tries to suggest (Am. Compl. ¶ 25). For instance, Plaintiff complains that “SEC mutual  
4 funds are capped at holding no more than 15% in illiquid assets” while “state-regulated CITs have  
5 no statutory limit on illiquid assets.” *Id.* But Plaintiff overlooks how mutual funds are generally  
6 “prohibited, with very limited exceptions, from suspending the right of redemption or postponing  
7 payment of proceeds beyond seven days,” causing the SEC to “continue[] to impose more  
8 requirements on mutual funds to have sufficient liquidity to meet investor redemptions.”  
9 *Governance of CITs, supra*, at 4-5. In contrast, CITs “have greater flexibility and more tools in  
10 their toolbox to achieve the goal of ensuring that all participating accounts are treated fairly.” *Id.*  
11 at 5. These tools include, for instance, “us[ing] its authority, if needed, to suspend or delay  
12 withdrawals if, in its capacity as a fiduciary to the CIT, it views such steps as necessary to protect  
13 the non-withdrawing investors from adverse impacts of large withdrawals on the fund.” *Id.*

14 The driving force between the different regulatory systems governing CITs and mutual  
15 funds is the difference in eligible investors. Unlike CITs, “[m]utual fund shares are permitted to  
16 be publicly offered to both institutional and retail investors, including possibly unsophisticated  
17 individuals.” *Governance of CITs, supra*, at 3. Because of that difference in sophistication, the  
18 SEC imposes certain requirements to provide greater protection. *Id.* (discussing SEC requirement  
19 that mutual funds “sell shares only pursuant to an effective, up-to-date ... prospectus”). In contrast,  
20 “CITs cannot be sold directly to the general public or any institution. They can only be sold to  
21 qualified retirement plans managed by persons who are subject to various fiduciary duties.” *Id.* at  
22 3-4. Precisely because CITs are “available exclusively to qualified retirement plans that are  
23 institutional investors (or represented by sophisticated persons), there are no specific disclosure,  
24 distribution or registration requirements,” but “general fiduciary considerations that require  
25 accurate disclosures to investors and no misleading statements” and “streamlined disclosure  
26 requirements under ERISA” remain. *Id.* at 4.

27 To nevertheless claim that Centene’s fiduciaries “abdicated [their] duty to monitor,”  
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1 Plaintiff characterizes CITs as a “black box.” Am. Compl. ¶ 26. To the extent Plaintiff claims  
2 fiduciaries cannot “monitor the underlying risks, liquidity, or valuation of these assets” because  
3 “state-regulated CITs are exempt from the Investment Company Act of 1940, do not file Form N-  
4 PORT, and do not provide a public prospectus,” Am. Compl. ¶ 77, these are not the sole ways for  
5 fiduciaries to monitor potential investments. Indeed, “[s]ince 2011, the Department of Labor has  
6 mandated that certain plan administrators provide uniform performance, fee and other disclosures  
7 to plan participants regarding all investment options offered in 401(k) retirement plans,” which  
8 would include CITs. *Governance of CITs, supra*, at 4. And “many CITs issue quarterly fact sheets  
9 and fund data is readily available.” *Id.*

10 Put simply, CITs are not the Wild West—they are subject to overlapping layers of  
11 protection that exist specifically to protect plan participants, all of which Plaintiff glosses over. But  
12 this Court should not gloss over it because the regulatory landscape is precisely the type of  
13 “context” that the Supreme Court has repeatedly reminded courts that they should consider when  
14 evaluating the plausibility of fiduciary-breach claims. *Hughes*, 595 U.S. at 172, 173; *Dudenhoeffer*,  
15 573 U.S. at 425. Completely ignoring the complex and interlocking protections that exist through  
16 heavy state regulation does not plausibly suggest plan fiduciaries were asleep at the wheel simply  
17 because they chose an investment that Plaintiff does not prefer. If Plaintiff’s theory were the rule,  
18 then every fiduciary of a plan investing in CITs could be expected to be haled into court—and in  
19 the United States, that amounts to more than \$2.5 trillion in assets under management in target-date  
20 CITs alone, Mot. to Dismiss 10—simply for making the extraordinarily popular decision to offer  
21 this low-cost method of investing to plan participants that ERISA plaintiffs’ lawyers have for years  
22 posited is the *only* prudent option. That is not how the statute works.

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

25 ERISA’s prohibited-transaction provisions forbid fiduciaries from causing their plan to  
26 engage in specified transactions, including the “lending of money ... between the plan and a party  
27 in interest,” 29 U.S.C. § 1106(a)(1)(B), and the “furnishing of goods, services, or facilities between  
28 the plan and a party in interest,” *id.* § 1106(a)(1)(C). At the same time, ERISA also “exempts”

1 from § 1106’s enumerated prohibitions certain transactions including “loans made by the plan to  
2 parties in interest who are participants or beneficiaries of the plan” under certain circumstances and  
3 “[c]ontracting or making reasonable arrangements with a party in interest for office space, or legal,  
4 accounting, or other services necessary for the establishment or operation of the plan.” 29 U.S.C.  
5 § 1108(b). The “transactions” Congress enumerated as prohibited “generally involve uses of plan  
6 assets that are potentially harmful to the plan.” *Lockheed Corp. v. Spink*, 517 U.S. 882, 893 (1996).  
7 Plaintiff’s prohibited-transaction claim, however, does not allege plan assets are being used in this  
8 manner and fails entirely to allege that Centene acted in its own interest in contracting with Fidelity  
9 or Strategic Advisors or that they were parties in interest. Mot. to Dismiss 19-20. Instead,  
10 Plaintiff’s assertions simply represent efforts to recast fiduciary-breach claims as prohibited-  
11 transaction claims to avoid any need to assert *plausible* and non-conclusory claims for relief. In  
12 short, Plaintiff’s prohibited-transaction claim is nothing more than a naked attempt to sneak  
13 “meritless litigation” “past the motion-to-dismiss stage.” *See Cunningham*, 604 U.S. at 708; Mot.  
14 to Dismiss 18-20.

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

10 **CONCLUSION**

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

12 Respectfully submitted,

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