IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

JAIME H. PIZARRO, CRAIG SMITH, JERRY MURPHY, RANDALL IDEISHI, GLENDA STONE, RACHELLE NORTH, MARIE SILVER, and GARTH TAYLOR on behalf of themselves and all others similarly situated,

***Plaintiffs*,**

v.

THE HOME DEPOT, INC.; THE ADMINISTRATIVE COMMITTEE OF THE HOME DEPOT FUTUREBUILDER 401(K) PLAN; THE INVESTMENT COMMITTEE OF THE HOME DEPOT FUTUREBUILDER 401(K) PLAN; AND DOES 1-30,

***Defendants*.**

Civil Action No.
1:18-cv-01566-WMR

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

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INTEREST OF *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 companies and professional organizations of every size, in every industry sector, and from every region of the country.[1] Many of the Chamber's members sponsor or provide services to ERISA-governed retirement plans. The standards governing those plans are of crucial importance to the Chamber and its members, and the Chamber regularly participates as *amicus curiae* in ERISA cases implicating those standards.

Every day, defined contribution plan fiduciaries across the country must make the types of administrative and management decisions that are at issue in this case. The Chamber submits this brief to provide context about how its plan sponsor members and other fiduciaries approach those decisions under ERISA's substantive standards and to aid the Court's consideration of how summary judgment principles should apply in a case challenging them.

[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, and its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

Fiduciaries consider a wide range of factors in making plan choices, and reasonable fiduciaries may reach different conclusions when considering the same question. ERISA's flexible, process-driven prudence standard accommodates the complex realities of fiduciary decision-making, and that standard informs which factual disputes are (or are not) material at the summary judgment stage. The issues before the Court have practical importance to *amicus* and its members: permitting inadequately supported fiduciary breach claims to continue to trial portends consequences beyond this case for all plan sponsors who make context-specific decisions for their plans, as ERISA permits, and then face claims that a different decision would have been better. Simply identifying a different reasonable fiduciary action is not enough to support liability under ERISA, and it cannot be enough to survive summary judgment.

INTRODUCTION

Defendants' motion for summary judgment calls on the Court to consider how the Rule 56 standard—and its focus on *material* factual disputes—maps onto ERISA's duty of prudence. That issue is of great importance not only to the parties in this case, but also to the many thousands of employers across the country that sponsor ERISA governed retirement plans. The volume of class action litigation challenging the

management of 401(k) plans has grown exponentially in recent years, and virtually every plan now faces a significant risk of litigation, regardless of the decisions made or the decision-making process. Summary judgment is a crucial device for identifying and disposing of those claims that have no hope of succeeding at trial.

ERISA neither requires nor forbids the use of any specific plan investment option or service arrangement. Rather, ERISA requires fiduciaries to act loyally, and to use a prudent process when making decisions. In this way, ERISA affords fiduciaries significant discretion to make decisions based on the unique circumstances of their individual plans and the unique characteristics of their participants. A plaintiff accordingly cannot prevail on a claim for fiduciary breach simply by critiquing the choices that plan fiduciaries made and pointing to cheaper or better-performing alternatives that plaintiffs prefer in hindsight. Without a defect in the fiduciary process, ERISA does not subject fiduciaries to liability for selecting the alternatives they judged suitable for their individual plans at the time the decision was made, or for arriving at a conclusion different from what another fiduciary could have prudently made—not least when a fiduciary has elected objectively reasonable investments and services that are widely embraced by the fiduciaries of other similar plans.

For this reason, courts have recognized that mere second-guessing of discretionary fiduciary judgments is not sufficient at the summary judgment stage. However fervently plaintiffs may dispute whether a plan fiduciary's choices were the "right" ones, such disputes are not material to the ultimate question of prudence. The Court should enter judgment for the fiduciaries if they conducted a prudent investigation, or if they arrived at decisions a hypothetical prudent fiduciary could have made. If plaintiffs cannot raise a genuine factual dispute on both issues, there is no basis for subjecting the defendants—and the court—to the burdens of a pointless trial.

ARGUMENT

I. ERISA's prudence standard does not dictate any particular choice among the many reasonable options available to plan fiduciaries.

A. Fiduciary decision-making requires plan-specific discretionary judgments that produce varied results.

Oversight of plan investment options and service arrangements are core responsibilities for fiduciaries of defined contribution plans. The market offers a wide range of administrative services and investment products for fiduciaries to consider, and fiduciaries face complex, multi-faceted choices in evaluating those offerings. Reasonable fiduciaries may easily arrive at different conclusions when doing so. Plan participants differ in their

financial needs, interests, sophistication, and technological proficiency. As a result, a service arrangement or investment option that is right for one plan may be a bad fit for another. Even among similarly situated plans, there are often many reasonable ways to run an effective plan that will help participants build retirement savings.

There is no standard package of administrative services common to every plan. While all plans need certain basic recordkeeping services (such as maintaining plan records, processing participant investment elections and contributions, and issuing account statements), demand for other available services may vary considerably from plan to plan. Plan fiduciaries may be called upon to make decisions about the scope and method of conveying participant communications (including employee meetings, call centers, voice-response systems, or web access), participant education and advice (including online calculators or face-to-face investment advice), brokerage windows, loan processing, or insurance and annuity services (if applicable). *See* Sarah Holden, et al., *The Economics of Providing 401(k) Plans: Services, Fees, and Expenses, 2020*, 27 ICI Research Perspective at 4 (June 2021), https://bit.ly/3IwR5Av.

How fiduciaries evaluate each of these service features will depend in significant part on the particular needs and characteristics of their plan and

its participants. For example, some fiduciaries considering whether to offer participant education services may determine that such services are unnecessary, particularly if their plan's participants tend to be sophisticated investors. Other fiduciaries may view the same services as vital, if their plan's participants generally have limited experience with investing. Some plans may have a diverse participant population with varied investment knowledge and expertise, further complicating the determination of whether the potential benefits of educational services justify the associated fees. The choices do not stop there. Plan fiduciaries who determine that participant educational services *would* be useful then face a series of decisions about what form those services should take: Online tools? In-person resources? Both? These decisions also are informed by the fiduciaries' understandings of their individual plan's participant bases and the options that will best serve their needs.

Numerous factors similarly bear on decisions about which plan service providers to retain. Of course, some providers may not offer all the features that particular fiduciaries deem desirable and thus may not be a viable option for a given plan (even if they are an ideal choice for a different plan with different needs). And while cost is an important factor when choosing among providers, it is not the *only* factor. *See* U.S. Dep't of Labor, *A Look at*

401(k) Plan Fees at 1 (Sept. 2019), https://bit.ly/3fP8vuH. Fiduciaries may also reasonably account for considerations such as a service provider's experience with similar plans, record of customer service, or professional reputation. High marks in these categories may lead fiduciaries to conclude that a provider's services are reasonably priced, even if their fees are not the absolute lowest available. These considerations along with the desire to avoid disruption for participants may influence fiduciaries' decisions about whether to retain an incumbent provider after its initial engagement.

Plan fiduciaries likewise face a long list of choices concerning plan investments. Fiduciaries must decide how many investments to offer, and how to structure the plan menu (for example, whether to organize the plan's investment options into "tiers" to help guide participants towards the options best aligned with their individual investment approach). They must decide what strategies to offer, including whether to offer funds with innovative styles and objectives. They must consider whether to offer only passive investments or to make actively-managed options available as well. They must pick specific managers for each of the strategies in the lineup based on complex appraisals of the managers' prospects for delivering strong performance going forward. They must weigh the potential benefits and drawbacks of supplementing the core plan investment menu with a

brokerage window offering. And they must evaluate whether participants would benefit from additional investment-related services, such as access to professional, individualized asset-allocation advice (and, if so, which provider offers the best balance of service breadth, quality, and cost).

In making these decisions, plan- and participant-specific considerations are once again paramount. Some fiduciaries might conclude that an investment menu with a large number of funds in specialized strategies is likely to confuse participants and contribute to poor asset-allocation decisions. A fiduciary of another plan might decide that the plan's participants would value the opportunity to select from a wider range of choices, and they feel confident participants have the resources and know-how to make appropriate use of a more expansive menu. *See* BrightScope, *The BrightScope/ICI Defined Contribution Plan Profile: A Close Look at 401(k) Plans, 2018* at 29 (July 2021), https://bit.ly/31EXaKc (noting "considerable variation between plans" with respect to the number of investment options offered). Fiduciaries likewise may reasonably conclude (as Home Depot did) that participants would benefit from access to managed account services to assist them in allocating their investment portfolios—for instance, because the plan's participants generally are not experienced investors, or because the plan includes a large number of older participants

whose financial circumstances may become more complex as they approach retirement. Other fiduciaries may determine that participants in *their* plans are generally making sound asset-allocation decisions without professional assistance and are unlikely to gain sufficient benefit from the added service to justify the cost.

Rarely is there a single "right" decision for any of these choices, and there is no one-size-fits-all approach that works for every plan.

B. ERISA's context-specific prudence standard accommodates the complex realities of fiduciary decision-making.

Congress recognized the inherent complexity of fiduciary decision-making when it enacted ERISA. Rather than attempt to dictate any particular outcome, Congress required only that fiduciaries act prudently and loyally when making plan decisions. "Because the content of the duty of prudence turns on 'the circumstances ... prevailing' at the time the fiduciary acts, the appropriate inquiry will necessarily be context specific"—tailored to the specific circumstances of an individual plan, and to the particular decision confronting the plan's fiduciaries. *Fifth Third Bancorp v. Dudenhoeffer*, 573 U.S. 409, 425 (2014) (quoting 29 U.S.C. § 1104(a)(1)(B)); *see DiFelice v. U.S. Airways, Inc.*, 497 F.3d 410, 420 (4th Cir. 2007) (prudence will "depend[] on the character and aim of the particular plan and decision at

issue and the circumstances prevailing at the time" (quoting *Bussian v. RJR Nabisco, Inc.*, 223 F.3d 286, 299 (5th Cir. 2000)).

Under the prudence standard, fiduciaries are judged not by the "results" of their decisions, but by the process or "methods" employed in making them. *PBGC ex rel. St. Vincent Catholic Med. Ctrs. Ret. Plan v. Morgan Stanley Inv. Mgmt. Inc.*, 712 F.3d 705, 716 (2d Cir. 2013); *see also, e.g.*, *Roth v. Sawyer-Cleator Lumber Co.*, 16 F.3d 915, 918 (8th Cir. 1994). There is no single, uniform "prudent" process: "Courts have found that a variety of actions can support a finding that a fiduciary acted with procedural prudence, including, for example, … holding meetings to ensure fiduciary oversight of the investment decision, and continuing to monitor and receive regular updates on the investment's performance." *Tatum v. RJR Pension Inv. Comm.*, 761 F.3d 346, 358 (4th Cir. 2014). The fundamental question is whether a fiduciary has "act[ed] reasonably"—i.e., has "appropriately investigate[d] the merits of an investment decision prior to acting." *Id.*; *see* 29 C.F.R. § 2550.404a–1(b)(1) (duty of prudence is satisfied where a plan fiduciary "[h]as given appropriate consideration" to the relevant "facts and circumstances" and "acted accordingly").

By focusing on process rather than results, ERISA's prudence standard recognizes that similarly situated fiduciaries may reach different decisions

when faced with the same questions, and that the decisions of one fiduciary cannot be condemned solely because another fiduciary in a different plan took a different tack. So long as a fiduciary conducts a prudent investigation, there is no "duty to take any particular course of action if another approach seems preferable." *Chao v. Merino*, 452 F.3d 174, 182 (2d Cir. 2006). And because ERISA does not seat fiduciaries "on a razor's edge" when "balancing … competing interests under conditions of uncertainty," courts review fiduciary decisions under a "deferential" standard. *Armstrong v. LaSalle Bank Nat'l Ass'n*, 446 F.3d 728, 732-33 (7th Cir. 2006).

Outcomes can matter in one important respect: Whatever the fiduciary's process, he is not liable for breach if his decisions were objectively prudent. The objective prudence standard derives from the statutory requirement that a plaintiff demonstrate that the fiduciary's decision caused a loss to the plan: a plaintiff "must show that 'no reasonable fiduciary would have maintained the investment' and thus [the defendants] would have acted differently" absent a procedural lapse. *Ramos v. Banner Health*, 461 F. Supp. 3d 1067, 1127 (D. Colo. 2020), *aff'd*, 1 F.4th 769 (10th Cir. 2021).[2] Putting

[2] *See also, e.g.*, *Roth*, 16 F.3d at 919 (explaining that objectively prudent decisions cause no loss (citing *Fink v. Nat'l Sav. & Tr. Co.*, 772 F.2d 951, 962 (D.C. Cir. 1985) (Scalia, J., concurring in part and dissenting in part))); *Friend v. Sanwa Bank Cal.*, 35 F.3d 466, 469 (9th Cir. 1994) (awarding

the procedural and objective prudence standards together, demonstrating that the fiduciary made an objectively prudent choice supports judgment in the fiduciary's favor, but a fiduciary is not required to make any particular choice, if he followed a prudent process to reach it. A plaintiff must prove both an imprudent process and an objectively imprudent result to establish liability under ERISA.

II. Summary judgment is a crucial stage for weeding out claims that lack factual support after discovery.

A. The summary judgment standard does not permit plaintiffs to go to trial solely on evidence of reasonable alternative actions plan fiduciaries could have taken.

The flexibility inherent in the prudence standard necessarily informs a court's evaluation of the evidence at the summary judgment stage. Under the Rule 56 standard, "the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion

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summary judgment to defendant notwithstanding dispute over existence of a breach, on the ground that "ERISA holds a trustee liable for a breach of fiduciary duty only to the extent that losses to the plan result from the breach"); *In re Unisys Sav. Plan Litig.*, 173 F.3d 145, 154 (3d Cir. 1999) (holding that purchase of investment contracts was not imprudent where "other well-known pension plans" did so too); *Plasterers' Local Union No. 96 Pension Plan v. Pepper*, 663 F.3d 210, 219 (4th Cir. 2011) (vacating trial judgment for lack of loss causation showing where district court "never found that the failure to investigate investment options led to imprudent investments or otherwise found that the investments were objectively imprudent").

for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). Materiality is measured by reference to the relevant "substantive law" (here, the prudence standard), and "[o]nly disputes over facts that might affect the outcome of the suit … will properly preclude the entry of summary judgment." *Id.* at 248. "When it is plain that a trial could have but one outcome, summary judgment is properly granted to spare the parties and the court the time, the bother, the expense, the tedium, the pain, and the uncertainties of trial." *Spellman v. Comm'r*, 845 F.2d 148, 152 (7th Cir. 1988) (Posner, J.).

Because ERISA does not hinge fiduciary liability on the outcomes of the decision-making process, courts have recognized that plaintiffs cannot survive summary judgment merely by identifying some other decision that they contend would have been "better" in the circumstances. For instance, in *Ellis v. Fidelity Management Trust Company*, 883 F.3d 1 (1st Cir. 2018), the court granted the fiduciary defendant's motion for summary judgment, declining to permit plaintiffs to prove at trial that their preferred course of action was superior to the reasonable actions taken by the fiduciary, "particularly given that [the fiduciary] had introduced a wealth of undisputed evidence supporting the conclusion that it engaged in an evaluative process

prior to making the [contested] decisions." *Id.* at 11. Similarly, the court in *Taylor v. United Technologies Corp.*, 2009 WL 535779 (D. Conn. Mar. 3, 2009), entered summary judgment for the defendant based on evidence that it properly evaluated the merits of the challenged decision—"retaining cash to provide transactional liquidity" in a unitized stock fund. *Id.* at *9, *aff'd*, 354 F. App'x 525 (2d Cir. 2009). Although the plaintiffs argued that the fund would have performed better without the cash retention, that disagreement with the fiduciaries' chosen approach did not create a genuine issue of material fact about whether the fiduciaries acted prudently. *See id.*; *see also, e.g.*, *Birse v. CenturyLink, Inc.*, 2020 WL 1062902, at *4 (D. Colo. Mar. 5, 2020) (granting summary judgment for defendant on claim challenging plan investment option where the record showed that a "highly qualified team of professionals rigorously analyzed the purpose the Fund would serve, how it would accomplish that purpose, and the Fund's strategic place within the overall portfolio of the Plan"), *appeal dismissed*, 2020 WL 5900551 (10th Cir. June 4, 2020).

Courts rendering judgment on ERISA fiduciary breach claims following trial likewise have consistently rejected liability based on purportedly "superior" choices fiduciary defendants might have made, so long as the fiduciaries appropriately investigated their decisions and reached conclusions

within the broad range of reasonableness. For example, in *Wildman v. American Century Services, LLC*, 362 F. Supp. 3d 685 (W.D. Mo. 2019), the court rejected claims that the fiduciary defendants acted imprudently by failing to offer index and stable value funds, emphasizing that "the issue is whether the Defendants considered these options and came to a reasoned decision for omitting them." *Id.* at 704. Having determined that the fiduciaries gave "appropriate consideration" to whether to include index and stable value funds in the plan before deciding against it, there was no basis for a finding of imprudence even though "one could argue the benefits" of including the omitted options. *Id.* at 705.

Similarly, in *Reetz v. Lowe's Companies, Inc.,* 2021 WL 4771535 (W.D.N.C. Oct. 12, 2021), the court held that the plaintiff's "disagreement" about whether the particular investment structure implemented in the plan "was the best approach to plan menu design" did not establish that the plan's fiduciary investment consultant was imprudent in presenting that structure for consideration, as the consultant "provided … reasoned advice based on substantial research into investor behavior and decades of experience" and "followed a reasonable process in conveying that advice." *Id.* at *50-51, *appeal filed*, No. 21-2267 (4th Cir. Nov. 10, 2021).

As these decisions make plain, plaintiffs advancing claims of imprudence cannot establish liability—or a genuine dispute of material fact—simply by pointing to alternative investment options, plan structures, or service arrangements that they find preferable. It could hardly be otherwise: plaintiffs can *always* identify some alternate path a plan's fiduciaries reasonably might have taken. There are thousands of investment options available on the market, and hundreds of 401(k) plans with varied investment structures and service arrangements that can be cited as examples of what a plan's fiduciaries "should" have done. *See A Close Look at 401(k) Plans* at 7 (reporting more than 650 plans with over $1 billion in assets, and another 603 with assets between $500 million and $1 billion). The existence of reasonable alternatives does not mean the fiduciary used an imprudent process to reach the decision it made.[3]

[3] For the same basic reason, plaintiffs cannot shore up outcome-based critiques by raising marginal complaints about the fiduciary process. It is virtually always possible to identify some additional step a plan's fiduciaries might have taken when investigating investment options or service arrangements. But prudent fiduciaries "need not follow a uniform checklist," nor must they adopt exhaustive, unduly burdensome procedures with diminishing marginal returns to avoid charges of insufficient diligence. *Tatum*, 761 F.3d at 358. Courts have accordingly recognized that where the evidence demonstrates that plan fiduciaries employed reasonable measures to examine their options, plaintiffs cannot raise a *material* dispute about the prudence of that process simply by identifying something more the fiduciaries

Indeed, one plaintiff's supposedly imprudent investment option is often another's example of a "superior" alternative that fiduciaries imprudently passed up. For instance, well over a dozen plans have been sued on the theory that their inclusion of Fidelity's Freedom Funds demonstrates imprudence, while other suits have invoked the Freedom Funds as options plan fiduciaries *should* have selected.[4] Other funds, including Wells Fargo's Stable Value Fund, have likewise been both challenged and praised by plaintiffs in different ERISA class actions.[5] Fiduciaries have been sued for not offering Vanguard mutual funds,[6] but also because they offered Vanguard mutual funds.[7] They have been sued for offering more than one investment

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might have done. *See, e.g.*, *Birse*, 2020 WL 1062902, at *7; *Taylor*, 2009 WL 535779, at *10.

[4] *Compare, e.g.*, 2d Am. Compl. ¶¶ 33-50, *In re Omnicom Grp., Inc. ERISA Litig.*, No. 1:20-cv-4141-CM (S.D.N.Y. Aug. 27, 2021), ECF No. 54, *with* Am. Compl. ¶¶ 152, 160, 228, *Anderson v. Intel Corp. Inv. Pol'y Comm.*, No. 5:19-cv-04618-LHT (N.D. Cal. Mar. 22, 2021), ECF No. 113.

[5] *Compare, e.g.*, *Becker v. Wells Fargo & Co.*, 2021 WL 1909632, at *1 n.1 (D. Minn. May 12, 2021), *with McGinnes v. FirstGroup Am., Inc.*, 2021 WL 1056789, at *2 (S.D. Ohio Mar. 18, 2021).

[6] *See, e.g.*, *Moreno v. Deutsche Bank Ams. Holding Corp.*, 2016 WL 5957307, at *6 (S.D.N.Y. Oct. 13, 2016).

[7] *See, e.g.*, Am. Compl. ¶ 108, *White v. Chevron Corp.*, No. 4:16-cv-00793-PJH (N.D. Cal. Sept. 30, 2016), ECF No. 41.

option in the same style,[8] but also for including only one option in each investment style.[9] Some plaintiffs allege that plans offered investments that were too risky,[10] while others allege that a plan's investments were too conservative.[11] If simply presenting evidence of a reasonable alternative path were enough to create a material factual dispute with respect to prudence, essentially every defined contribution plan could be required to go to trial to defend its fiduciary processes.

Plaintiffs' theories of imprudence in this case vividly illustrate the problem. Plaintiffs effectively contend that *no* plan fiduciary could have reasonably determined that the investment advice offered by Financial Engines was worth the cost, or that the Blackrock LifePath Funds or JP

[8] *See, e.g.*, *Sweda v. Univ. of Pa.*, 2017 WL 4179752, at *10 (E.D. Pa. Sept. 21, 2017), *rev'd in part*, 923 F.3d 320 (3d Cir. 2019); *see also Wildman*, 362 F. Supp. 3d at 706 (addressing claim that plan offered "too many funds," "resulting in duplication").

[9] *See, e.g.*, Am. Compl. ¶ 52, *In re GE ERISA Litig.*, No. 1:17-cv-12123-DJL (D. Mass. Jan. 12, 2018), ECF No. 35.

[10] *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.

[11] *See Brown v. Am. Life Holdings, Inc.*, 190 F.3d 856, 859-60 (8th Cir. 1999) (addressing claim that fiduciaries maintained an overly safe portfolio); Compl. ¶ 2, *Barchock v. CVS Health Corp.*, No. 1:16-cv-00061-ML-PAS (D.R.I. Feb. 11, 2016), ECF No. 1.

Morgan Stable Value Fund remained reasonable investment options in the relevant period. Yet these are market-tested options that have been a favored choice of sophisticated institutional actors: Financial Engines is the leading provider of managed account services, and the challenged funds are and have been broadly adopted among defined contribution plans. *See, e.g.*, ECF No. 227-1 at 13, 24. By plaintiffs' logic, fiduciaries across huge swaths of the market violated their duties because they retained leading investment options and service providers. ERISA's flexible, process-based standard does not support that absurd result.

Summary judgment is an indispensable procedural tool that allows courts "to isolate and dispose of factually unsupported claims" before trial and thereby avoid the "unwarranted consumption of public and private resources." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24, 327 (1986). As the Supreme Court has instructed, to meaningfully serve this screening function, "Rule 56 must be construed with due regard not only for the rights of persons asserting claims and defenses that are adequately based in fact to have those claims and defenses tried … , but also for the rights of persons opposing such claims and defenses to demonstrate in the manner provided by the Rule, prior to trial, that the claims and defenses have no factual basis." *Id.* at 327.

This understanding of the Rule calls for courts confronted with a properly supported summary judgment motion to undertake a probing review of the evidence to evaluate whether it could support a judgment in the plaintiff's favor after trial. A claim of imprudence that rests on nothing more than criticism of the *outcome* of the fiduciary process does not clear that bar.

B. Permitting claims to proceed to trial based on mere second-guessing of reasonable fiduciary judgments disserves the interests of plan participants.

The importance of rigorously evaluating claims of imprudence at the summary judgment stage is underscored by the growing volume of ERISA class action litigation, and the potential negative effects of outcome-focused suits on the administration of ERISA plans.

Although class actions involving defined contribution retirement plans were once relatively "rare," they are now "a seemingly everyday occurrence," with more than 90 cases filed in 2020 alone. Jon Chambers, *ERISA Litigation in Defined Contribution Plans: Background, History, Current Status and Risk Management Techniques* 1, Sageview Advisory Grp. (Mar. 2021), https://bit.ly/3lIsyPp. And while earlier waves of litigation focused primarily on "jumbo" plans—the biggest of the big, with well over $1 billion in assets—plaintiffs have increasingly begun to target significantly smaller plans as well. *See* Allison Barrett & Joel Townsend, AIG, *Fiduciary Liability*

Insurance: Understanding the rapid rise in excessive fee claims at 4, 7, https://bit.ly/3GmxFwl. Today, virtually every medium-to-large plan sponsor can expect to be sued about the management of its 401(k) plan, if they have not been already.

As pleaded, these lawsuits overwhelmingly focus on the outcomes of the fiduciary process, rather than advancing any direct attack on the process through which the fiduciaries arrived at those decisions. When these claims do not pan out in discovery (as is often the case), it is imperative that courts promptly dispose of them at the summary judgment stage, for several reasons.

First, even plan sponsors that have spent millions of dollars to defend claims through discovery face enormous pressure to settle before a trial judgment. Regardless of the merits of the underlying claims, proceeding to trial is a high-risk endeavor, particularly because defendants routinely face damages theories running into the tens and hundreds of millions of dollars. *See, e.g.*, *Ramos*, 461 F. Supp. 3d at 1079 (plaintiffs sought approximately $85 million in "losses" to the plan); *Wildman*, 362 F. Supp. 3d at 710-11 (plaintiffs claimed as much as $31.7 million in damages); *see also* Daniel Aronowitz, *Exposing Excessive Fee Litigation Against America's Defined Contribution Plans* at 18, Euclid Specialty (Dec. 2020), https://bit.ly/3hNXJaW (noting that

plaintiffs claim damages "of $25 million to $200 million in most lawsuits"). These damages calculations are often inflated, as courts have recognized in multiple cases that have gone to trial. *See, e.g.*, *Ramos*, 461 F. Supp. 3d at 1108-09 (rejecting plaintiffs' damages model as "unreliable" and calculating damages of approximately $1.66 million on claim for which plaintiffs sought $19 million); *Wildman*, 362 F. Supp. 3d at 710-11 (identifying numerous flaws in plaintiffs' damages models and concluding that plaintiffs had not established *any* loss). Even so, few defendants can stomach even a relatively remote possibility of a massive damages award.

Permitting fiduciary-breach claims to proceed based on mere second-guessing of discretionary decisions also creates counterproductive incentives for fiduciaries when making judgments about plan services and investment options. For instance, a plan investment committee may feel compelled to minimize investment costs (a common focus of ERISA class actions) by offering only a "suite of passive investments," even if the fiduciaries "actually think that a mix of active and passive investments is best." David McCann, *Passive Aggression*, CFO (June 22, 2016), https://bit.ly/3EDsJCT. The same litigation-fueled, cost-minimizing impulse may pressure plan fiduciaries to eschew innovative services that would benefit participants, or to compromise on quality, just to keep fees below an arbitrary number. Any litigation

standard that compels fiduciaries to compromise their conscientious judgments about what best serves the interests of their plans will ultimately come at the expense of plan participants.

To counter these harmful dynamics, it is essential that courts evaluate motions for summary judgment with appropriate respect for the substantial discretion that ERISA affords fiduciaries who engage in a prudent process and arrive at reasonable decisions. *See Metro. Life Ins. Co. v. Glenn*, 554 U.S. 105, 120 (2008) (Roberts, C.J., concurring in part and concurring in the judgment) (noting importance of "[e]nsuring that reviewing courts respect the discretionary authority conferred on ERISA fiduciaries"). Trials should be reserved for plaintiffs who have proffered evidence that could support a judgment in their favor.

CONCLUSION

For the foregoing reasons, *amicus* urges the Court to rigorously examine the evidence put forward by the parties to evaluate whether plaintiffs have raised a genuine, material dispute regarding the prudence of defendants' processes for overseeing the Plan—or have offered only immaterial, hindsight-infected criticisms of the fiduciaries' reasonable decisions.

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Respectfully submitted,

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Local Rule 7.1(D) Certification of Compliance

I hereby certify that the foregoing brief has been prepared with Century Schoolbook font, 13 point, one of the font and point selections approved by the Court in N.D. Ga. Local Rule 5.d1B.

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