Jaime A. Santos (SBN 284198)
JSantos@goodwinlaw.com
GOODWIN PROCTER LLP
1900 N Street, NW
Washington, DC 20036
(202) 346-4000

Jordan Bock (SBN 321477)
JBock@goodwinlaw.com
GOODWIN PROCTER LLP
100 Northern Avenue
Boston, MA 02215
(617) 570-1000

Counsel for Amicus Curiae the Chamber of Commerce of the United States of America

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

ROBERT BRACALENTE and BORIS GDALEVICH, individually and as representatives of a class of similarly situated persons, on behalf of the CISCO SYSTEMS, INC. 401(K) PLAN,

Plaintiffs,

v.

CISCO SYSTEMS, INC.; THE BOARD OF TRUSTEES OF CISCO SYSTEMS, INC.; THE ADMINISTRATIVE COMMITTEE OF THE CISCO SYSTEMS, INC. 401(K) PLAN; and DOES No. 1-20, Whose Names Are Currently Unknown,

Defendants.

Case No. 5:22-cv-04417-EJD

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

Date: March 23, 2023
Time: 9:00 a.m.
Crtm: Room 4, 5th Floor
Judge: Hon. Edward J. Davila

NOTICE OF MOTION AND MOTION

PLEASE TAKE NOTICE that on March 23, 2023 at 9:00 a.m., or as soon thereafter as this matter may be heard, in Courtroom 4, San Jose Courthouse, 5th Floor, 280 South 1st Street, San Jose, CA 95113, before the Honorable Edward J. Davila, proposed amicus the Chamber of Commerce of the United States (Chamber) will and hereby does move the Court for entry of an order permitting the Chamber to participate as amicus curiae, and to file a brief in support of Defendant Cisco System, Inc.'s motion to dismiss the complaint under Federal Rule of Civil Procedure 12(b)(6). The proposed amicus brief is attached as Exhibit A. Defendants have consented to the filing of this brief. Counsel for Plaintiffs informed counsel for the Chamber that Plaintiffs do not consent to the Chamber's Motion.

This Motion is based upon this Notice of Motion, Motion, and Memorandum of Points and Authorities; the concurrently filed proposed amicus brief; the other pleadings and papers on file in this matter; and any additional information and argument that may be presented to the Court before or during the hearing.

STATEMENT OF ISSUES TO BE DECIDED

Whether the Court should exercise its discretion to permit the Chamber to participate in this matter as amicus curiae, and to file a brief in support of Cisco System, Inc.'s motion to dismiss the complaint.

MEMORANDUM OF POINTS AND AUTHORITIES

"District courts frequently welcome amicus briefs from non-parties … if the amicus has 'unique information or perspective that can help the court beyond the help that the lawyers for the parties are able to provide.'" *Ctr. for Biological Diversity v. Jewell*, 2013 WL 4127790, at *4 (N.D. Cal. Aug. 9, 2013) (quoting *NGV Gaming, Ltd. v. Upstream Point Molate, LLC*, 355 F. Supp. 2d 1061, 1067 (N.D. Cal. 2005)). "There are no strict prerequisites that must be established prior to qualifying for amicus status; an individual seeking to appear as amicus must merely make a showing that his participation is useful to or otherwise desirable to the court." *WildEarth Guardians v. Haaland*, 561 F. Supp. 3d 890, 905 (C.D. Cal. 2021). District courts thus have "'broad

discretion" to permit amicus participation. *Oakley v. Devos*, 2020 WL 3268661, at *13 n.23 (N.D. Cal. June 17, 2020) (quoting *Hoptowit v. Ray*, 682 F.2d 1237, 1260 (9th Cir. 1982), *abrogated on other grounds by Sandin v. Conner*, 512 U.S. 472 (1995)); *see also Auto. Club of N.Y., Inc. v. Port Authority of N.Y. and N.J.*, 2011 WL 5865296, at *1 (S.D.N.Y. Nov. 22, 2011) (recognizing that "[t]here is no governing standard" dictating "the procedure for obtaining leave to file an amicus brief in the district court").

The Chamber's amicus brief provides a unique perspective informed by its position as the world's largest business federation. The Chamber represents approximately 300,000 direct members and indirectly represents the interests of more than three million businesses and professional organizations of every size, in every industry sector, and from every region of the country. Many of the Chamber's members maintain, administer, or provide services to employee-benefit plans governed by ERISA. In fact, the Chamber's membership is unique because it includes representatives from all aspects of the private-sector retirement system, such as plan sponsors, asset managers, recordkeepers, consultants, and other service providers.

Since ERISA was enacted, the Chamber has played an active role in the law's development and administration. The Chamber regularly submits comment letters when the Department of Labor (DOL) engages in notice-and-comment rulemaking,[1] provides information to the Pension Benefit Guaranty Corporation (PBGC) to support PBGC in its efforts to protect retirement incomes,[2] submits comments to the Department of the Treasury on plan administration and

[1] *See, e.g.*, Electronic Disclosure by Employee Benefit Plans (Nov. 22, 2019), https://www.uschamber.com/sites/default/files/final_electronic_delivery_proposed_regulation_comments_11.22.19.pdf.

[2] *See, e.g.*, Comments on the Interim Final Regulation for the Special Financial Assistance Program for Financially Troubled Multiemployer Plans (Aug. 10, 2021), https://www.pbgc.gov/sites/default/files/sfa-ifr-comment-us-chamber-and-others.pdf; Letter from U.S. Chamber of Commerce Regarding Partitions of Eligible Multiemployer Plans (Aug. 18, 2015),

qualification,[3] and provides testimony to DOL's standing ERISA Advisory Council.[4] The Chamber has also published literature proposing initiatives to encourage and bolster the employment-based retirement benefits system in the United States,[5] and is frequently quoted as a resource on retirement policy.[6]

Given its perspective and deep understanding of the issues involved in these cases, the Chamber regularly participates as amicus curiae in cases involving employee-benefit design or administration. *See, e.g.*, *Hughes v. Northwestern Univ.*, 142 S. Ct. 737 (2022) (standard for pleading fiduciary-breach claim involving challenges to defined-contribution plan line-ups and

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https://www.pbgc.gov/documents/Multiemployer%20-Comments-to-PBGC-on-Partitions-RIN-1212-AB29-Partitions-of-Eligible-Multiemployer-Plans.pdf.

[3] *See, e.g.*, Permanent Relief for Remote Witnessing Procedures (Sept. 29, 2021), https://www.uschamber.com/sites/default/files/final_september_remote_notarization_letter.pdf.

[4] *See, e.g.*, Statement of the U.S. Chamber of Commerce Regarding Gaps in Retirement Savings Based on Race, Ethnicity, and Gender (Aug. 27, 2021), https://www.uschamber.com/sites/default/files/final_august_2020_gaps_in_retirement_savings_dol_testimony.pdf.

[5] *See* U.S. Chamber of Commerce, *Private Retirement Benefits in the 21st Century: A Path Forward* (2016), https://www.uschamber.com/sites/default/files/legacy/reports/1204Private_Retirement_Paper.pdf.

[6] *See, e.g.*, Austin R. Ramsey, *Who Wins, Who Loses With Auto Retirement Savings Plan Proposal*, Bloomberg Law (Sept. 23, 2021), https://news.bloomberglaw.com/daily-labor-report/who-wins-who-loses-with-auto-retirement-savings-plan-proposal; Jaclyn Diaz, *Retirement Industry Hustles to Keep Up With DOL's Rules Tsunami*, Bloomberg Law (Sept. 1, 2020), https://news.bloomberglaw.com/daily-labor-report/retirement-industry-hustles-to-keep-up-with-dols-rules-tsunami.

service-provider arrangements); *Fifth Third Bancorp v. Dudenhoeffer*, 573 U.S. 409 (2014) (standard for pleading fiduciary-breach claim involving employer stock); *Smith v. CommonSpirit Health*, 37 F.4th 1160 (6th Cir. 2022) (standard for pleading fiduciary-breach claim involving 401(k) plan fees and investment line-up); *Sweda v. Univ. of Pa.*, 923 F.3d 320 (3d Cir. 2019) (same);[7] *Meiners v. Wells Fargo Co.*, 898 F.3d 820 (8th Cir. 2018) (same). District courts in a string of recent cases have granted the Chamber leave to participate as an amicus at the motion-to-dismiss stage. As one court explained, "given the Chamber's experience with both retirement plan management and ERISA litigation, the Chamber can offer a valuable perspective on the issues presented in this matter." *Sigetich v. The Kroger Co.*, No. 21-697 (S.D. Ohio July 22, 2022), ECF No. 47 (granting the Chamber's motion for leave to file over plaintiffs' opposition); *see also Baumeister v. Exelon Corp.*, No. 21-6505 (N.D. Ill. Mar. 11, 2022), ECF No. 44 (explaining that the Chamber's "proposed amicus brief could provide the Court wi[th] a broader view of the impact of the issues raised in the case"—"an appropriate basis to allow amicus participation"); *Locascio v. Fluor Corp.*, No. 22-154 (N.D. Tex. Oct. 20, 2022), ECF No. 63 (granting the Chamber's motion for leave to file over the plaintiffs' opposition); *Singh v. Deloitte LLP*, No. 21-8458 (S.D.N.Y. Apr. 14, 2022), ECF No. 41 (same); *Barcenas v. Rush Univ. Med. Ctr.*, No. 22-366 (N.D. Ill. Apr. 4, 2022), ECF No. 38 (same).[8]

Because of the Chamber's unique membership, which represents nearly all of those in the private-sector retirement community, the Chamber's collective knowledge about the management of retirement plans, the legal issues surrounding ERISA, and the types of allegations commonly

[7] In *Sweda*, the Chamber's motion for leave to file an amicus brief was granted over the plaintiffs' opposition.

[8] As these decisions reflect, amicus briefs are routinely accepted at the motion-to-dismiss stage, including from the Chamber itself. *See, e.g.*, *New York v. U.S. Dep't of Labor*, No. 18-1747 (D.D.C. Nov. 9, 2018) (minute order); *United States v. DaVita Inc.*, No. 21-229 (D. Colo. Oct. 20, 2021), ECF No. 65; *United States v. Walgreen Co.*, No. 21-32 (W.D. Va. Sept. 9, 2021), ECF No. 22.

included in these types of complaints extends beyond any single defendant or group of defendants named in a particular case. The Chamber seeks to provide a broader perspective on the key threshold issue of when circumstantial allegations of a violation of ERISA are plausible in the context of plan-management decisionmaking and the overall context of ERISA class-action litigation. And as the Supreme Court has instructed, that context is key—courts are supposed to undertake a "careful, context-sensitive scrutiny of [the] complaint's allegations," *Fifth Third*, 573 U.S. at 425, just as they are supposed to consider "context" in evaluating plausibility in all civil cases, *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 554 (2007); *see also Hughes*, 142 S. Ct. at 742 (explaining that the pleading standard articulated in *Twombly* and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), applies to ERISA cases).

The Chamber's brief will therefore "contribute in clear and distinct ways" to the Court's analysis. *Prairie Rivers Network v. Dynegy Midwest Generation, LLC*, 976 F.3d 761, 764 (7th Cir. 2020) (granting the Chamber's motion for leave to file); *see also Neonatology Assocs., P.A. v. Comm'r of Internal Revenue*, 293 F.3d 128, 132 (3d Cir. 2002) (Alito, J.) (an *amicus* brief may assist the court "by explain[ing] the impact a potential holding might have on an industry or other group") (quotation marks omitted). "Even when a party is very well represented, an amicus may provide important assistance to the court." *Neonatology Assocs.*, 293 F.3d at 132. And here, the Chamber's perspective and expertise will serve several functions courts have identified as useful: The Chamber "explain[s] the broader regulatory or commercial context" in which this case arises; "suppl[ies] empirical data" informing the issue on appeal; and "provid[es] practical perspectives on the consequences of particular outcomes." *Prairie Rivers Network*, 976 F.3d at 763.

Specifically, the proposed amicus brief provides context regarding the recent surge in ERISA litigation, describes similarities among these cases that help to shed light on Plaintiffs' allegations here, and provides context for how to evaluate these types of allegations in light of the pleading standard set forth by the Supreme Court in *Twombly* and *Iqbal*. In particular, the brief marshals examples from many of the dozens of recently filed cases to contextualize the issues presented in this litigation. These cases largely touch on issues that are relevant but adjacent to the

issues presented here, and therefore in many instances may not have been cited or discussed by the parties. Given the extensive collective experience of the Chamber's members in both retirement-plan management and ERISA litigation, the Chamber offers a distinct vantage point that it believes will be of value to the Court as it considers Plaintiffs' complaint and whether it surpasses the plausibility threshold.

Notably, "there is no rule that amici must be totally disinterested," *Funbus Sys., Inc. v. State of Cal. Public Utilities Comm'n*, 801 F.2d 1120, 1125 (9th Cir. 1986), and a strong advocate is still the "court's friend," *Neonatology Assocs.*, 293 F.3d at 131. Indeed, it is a "fundamental assumption of our adversary system that strong (but fair) advocacy on behalf of opposing views promotes sound decision making." *Id.* As one court recently recognized in granting the Chamber's motion for leave over an opposition from plaintiffs' counsel: "Speech is a beautiful thing. So beautiful that James Madison, who wrote that a bill of rights was unnecessary, later drafted a bill of rights and urged Congress to pass it." *Locascio*, ECF No. 63.

Finally, the proposed amicus brief is being filed well before Plaintiffs' opposition is due and therefore will not delay resolution of this motion. And although Plaintiffs in this case have decided to oppose the Chamber's motion for leave to file, this Court has frequently permitted amici to participate in its proceedings, including over an opposition. *See, e.g.*, *Jimenez v. Tsai*, 2017 WL 4877442, at *6 (N.D. Cal. Oct. 30, 2017) (granting leave to file and rejecting the opposing party's "baseless … assertion that they [were] prejudiced by the Court's order"); *Doe I v. Cisco Sys., Inc.*, No. 5:11-cv-02449-EJD, Dkt. 124 (N.D. Cal. Dec. 23, 2013) (granting leave to file over an opposition).

For these reasons, the Chamber respectfully requests that the Court grant it leave to participate as amicus curiae and accept the proposed amicus brief, which accompanies this motion.

Respectfully submitted,

Dated: November 7, 2022

/s/ *Jaime A. Santos*
Jaime A. Santos (SBN 284198)
JSantos@goodwinlaw.com
GOODWIN PROCTER LLP
1900 N Street, NW
Washington, DC 20036
(202) 346-4000

Jordan Bock (SBN 321477)
JBock@goodwinlaw.com
GOODWIN PROCTER LLP
100 Northern Avenue
Boston, MA 02215
(617) 570-1000

Counsel for Amicus Curiae the Chamber of Commerce of the United States of America

EXHIBIT A

Jaime A. Santos (SBN 284198)
JSantos@goodwinlaw.com
GOODWIN PROCTER LLP
1900 N Street, NW
Washington, DC 20036
(202) 346-4000

Jordan Bock (SBN 321477)
JBock@goodwinlaw.com
GOODWIN PROCTER LLP
100 Northern Avenue
Boston, MA 02215
(617) 570-1000

Counsel for Amicus Curiae the Chamber of Commerce of the United States of America

UNITED STATES DISTRICT COURT
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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.[1] Given the importance of the laws governing fiduciary conduct to its members, many of which maintain or provide services to retirement plans, the Chamber regularly participates as amicus curiae in ERISA cases at all levels of the federal-court system, including those addressing the pleading standard for fiduciary-breach claims. 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://bit.ly/3hNXJaW ("*Excessive Fee Litigation*"). 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 judicially noticeable information demonstrating the flawed nature of many plaintiffs' allegations in an effort to create an illusion of mismanagement and imprudence.

The complaints typically follow a familiar playbook, often loaded with inferences

[1] No counsel for a party authored this brief in whole or in part. No party, no counsel for a party, and no person other than Amicus, its members, or its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

unsupported by the plaintiffs' conclusory factual allegations. Using the benefit of hindsight, these lawsuits challenge plan fiduciaries' decisions about the investment options made available to retirement plan participants based on a few cherry-picked comparators and a cherry-picked window of time—even where, as here, that decision resulted in selection of one of the highest-performing funds on the market. The complaints typically point to alternative investment options (among tens of thousands of investment options offered in the investment marketplace, and dozens within the same category of fund), and allege that plan fiduciaries *must have* had a flawed decisionmaking process because they did not choose one of those alternatives. They then lean heavily on ERISA's perceived complexity to open the door to discovery, even where their allegations are belied by publicly available data. No plan, regardless of size or type, is immune from these challenges. It is *always* possible for plaintiffs to use the benefit of hindsight to identify, among the almost innumerable options available in the marketplace, a better-performing investment option than the ones plan fiduciaries chose. That is not sufficient under the pleading standard established in *Hughes v. Northwestern University*, 142 S. Ct. 737, 740 (2022), *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), and *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007).

This lawsuit—and the ten other nearly identical cases pending in districts around the country—provide the perfect example: The BlackRock LifePath Index Funds that Plaintiffs challenge here are among the most highly ranked and high-performing target date fund (TDF) suites on the market, attracting billions of dollars in investments.[2] Nevertheless, Plaintiffs attempt to make out a claim of imprudence by limiting the universe to a short window of time and a narrow set of comparator funds—funds that are, in any event, plainly inapt comparators based on any fair reading of the caselaw, not to mention common-sense investment principles. Defendants thus *still* found themselves the targets of a lawsuit based solely on their decision to select a fund with a "Gold" rating and nearly 9% of the market share. *See* Morningstar, *supra* n.2, at 19; Compl. ¶ 36.

[2] *See* Morningstar, 2022 Target-Date Strategy Landscape (2022) ("Morningstar") at 19, https://bit.ly/3TTVVNl.

If these cases teach us anything, it is that it is nearly impossible for plan fiduciaries to prevent themselves from becoming the subject of a lawsuit no matter how rigorous their process, no matter the high quality of the funds they choose, and no matter how carefully they monitor the market. Plan sponsors and fiduciaries today truly are, as the Supreme Court has observed, "between a rock and a hard place." *Fifth Third Bancorp v. Dudenhoeffer*, 573 U.S. 409, 424 (2014).

Against this backdrop, it is critical that courts do not shy away from the "context-specific inquiry" ERISA requires. *Hughes*, 142 S. Ct. at 740; *see also Fifth Third*, 573 U.S. at 425. As the Supreme Court recently made explicit, and as circuit courts have repeatedly emphasized since, ERISA cases are subject to the pleading standard articulated in *Twombly* and *Iqbal*. *See Hughes*, 142 S. Ct. at 742; *see also Matousek v. MidAmerican Energy Co.*, 51 F.4th 274, 278 (8th Cir. 2022); *Albert v. Oshkosh Corp.*, 47 F.4th 570, 577 (7th Cir. 2022); *Smith v. CommonSpirit Health*, 37 F.4th 1160, 1165 (6th Cir. 2022). When a plaintiff does not present direct allegations of wrongdoing and relies on circumstantial allegations that are "just as much in line with" plan fiduciaries' having acted through a prudent fiduciary process, dismissal is required. *See Twombly*, 550 U.S. at 554. And if these types of conclusory and speculative complaints are sustained, plan participants will be the ones who suffer. Fiduciaries will be pressured to limit investments to a narrow range of options at the expense of providing a diversity of choices with a range of fees, risk levels, and potential performance upsides, as ERISA expressly encourages and most participants want.

ARGUMENT

I. There is no ERISA exception to Rule 8(a)'s pleading standard.

The last 15 years have seen a surge of ERISA litigation challenging 401(k) plan fees and performance.[3] What began as a trickle has become a flood, with at least 190 lawsuits filed since

[3] *See, e.g.*, George S. Mellman and Geoffrey T. Sanzenbacher, *401(k) Lawsuits: What are the Causes and Consequences?*, Center for Retirement Research at Boston College (May 2018), https://bit.ly/3fUxDR1 (documenting the rise in 401(k) complaints from 2010 to 2017).

2020.[4] This year alone, there were 42 excessive-fee cases filed in the first half of 2022—and the total is predicted to reach 75 to 100 by the end of the year.[5] These lawsuits have been filed against employers in every industry, including those that have been hit the hardest by the pandemic. These cases generally do not develop organically based on plan-specific details, but rather are advanced as prepackaged, one-size-fits-all challenges, as this case and the ten other nearly identical challenges show. As a result, they typically rely on generalized allegations that do not reflect the context of the actual plan whose fiduciaries are being sued.

The Supreme Court has taken several recent opportunities to address the standard for pleading a fiduciary-breach claim under ERISA. Each time, it has stressed that ERISA suits are no different from any others: To survive a motion to dismiss, plaintiffs must satisfy the Rule 8 pleading standard articulated in *Twombly* and *Iqbal*. *Hughes*, 142 S. Ct. at 742.[6] Given the variety among ERISA plans, the wide discretion fiduciaries have when making decisions on behalf of tens of thousands of employees with different investment needs and risk tolerances, and the risk that any ERISA suit can be made to appear superficially complicated, applying Rule 8(a) to ERISA claims requires a close evaluation of "the circumstances … prevailing at the time the fiduciary acts" and a "careful, context-sensitive scrutiny of a complaint's allegations." *Fifth Third*, 573 U.S. at 425. "[C]ategorical rules" have no place in this analysis—particularly because "the circumstances facing an ERISA fiduciary will implicate difficult tradeoffs, and courts must give due regard to the range of reasonable judgments a fiduciary may make based on her experience and expertise."

[4] *See West Corp. Inks, $875,000 Deal in Class Challenge to 401(k) Fees*, Bloomberg Law (June 29, 2022), https://bit.ly/3VsmOcy.

[5] *See* Daniel Aronowitz, *The State of the Fiduciary Liability Insurance Market and Excessive Fee Cases at the Half-Way Point of 2022* (July 13, 2022), available at https://bit.ly/3sgvaqq.

[6] The Court thus rejected some circuits' suggestion that a lower pleading standard applies in ERISA cases. *See Sacerdote v. N.Y. Univ.*, 9 F.4th 95, 108 & n.47 (2d Cir. 2021); *Sweda v. Univ. of Pa.*, 923 F.3d 320, 326 (3d Cir. 2019).

Hughes, 142 S. Ct. at 742. If anything, the discretion and flexibility ERISA affords should make pleading through hindsight-based circumstantial allegations *more* difficult, not less.

The allegations in many of the cases in this wave of litigation, including this one, fail this standard twice over. First, the complaints' circumstantial allegations are often equally (if not far more) consistent with lawful behavior, and therefore cannot "nudge[] the[] claims across the line from conceivable to plausible." *Twombly*, 550 U.S. at 570. Second, the allegations frequently ignore the discretion fiduciaries have in making decisions based on their experience and expertise, and in light of the context of their particular plan.

A. These lawsuits often manufacture factual disputes that do not survive plausibility scrutiny.

The shared problem with many of these lawsuits is exemplified by a feature that appears in most of the complaints. Plaintiffs typically create a chart (or many charts) purporting to compare some of the investment options in the plan under attack to a handful of other options available on the market that allegedly out-performed the plan's options during a cherry-picked time period. *See, e.g.*, Compl. pp. 17-26. They then use the charts to try and barrel past dismissal, asking the Court to infer that plan fiduciaries must have been asleep at the wheel and requesting discovery to prove it. Inferring imprudence from this tactic ignores the realities of plan management, basic investment principles, and ERISA's statutory structure—important context the Supreme Court has instructed lower courts to consider. *See Hughes*, 142 S. Ct. at 740; *Fifth Third*, 573 U.S. at 425.

To start, plaintiffs' attorneys can easily cherry-pick historical data to make a fiduciary's choices look suboptimal given the near-infinite combination of comparator options and time periods. When plaintiffs' attorneys zero in on a single time period and a single metric for comparison—in these cases, performance—they will *always* be able to find a supposedly "better" fund among the options on the market.[7] With the benefit of hindsight, one can always identify a

[7] Despite Plaintiffs' tortured analysis, the BlackRock TDFs they challenge are still not properly characterized as underperforming. Even putting aside that Plaintiffs identify only three- and five-

better-performing fund during a cherry-picked time period, just as one could always identify a worse-performing fund. But with dozens of TDF suites on the market, it cannot be that a court can infer that fiduciaries were acting imprudently simply because—as Plaintiffs allege here—a particular suite was not *the absolute top performer* at all times. *See, e.g.*, *Meiners v. Wells Fargo & Co.*, 898 F.3d 820, 823 (8th Cir. 2018) ("The fact that one fund with a different investment strategy ultimately performed better does not establish anything about whether the [challenged funds] were an imprudent choice at the outset."). Indeed, chasing performance—*i.e.*, switching investment strategies to pursue the fund performing well at the time—is a misguided investment approach "generally doomed to some kind of failure."[8]

Moreover, plaintiffs frequently compare apples and oranges: comparing the performance of Fund A with one investment style and performance benchmark to that of Fund B, with a different investment style and performance benchmark. *See, e.g.*, *Matousek*, 51 F.4th at 281 (rejecting comparators where plaintiffs failed to allege that they held "similar securities," had "similar investment strategies," or "reflect[ed] a similar risk profile"). That is precisely what happened here: Plaintiffs' chosen comparators performed differently precisely because they had different features, including different glidepaths, different investment styles, and different asset allocations. Compl. ¶¶ 38-40; *see also Parmer v. Land O'Lakes, Inc.*, 518 F. Supp. 3d 1293, 1306 (D. Minn. 2021) (explaining that comparators with different "glide path strategies" "do not provide meaningful benchmarks"). Plaintiffs conspicuously do not allege that the BlackRock TDFs underperformed their own peer group or benchmarks, and they thus cannot assert that the

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year returns, the difference between the performance of the BlackRock TDFs and Plaintiffs' chosen comparators is inconsequential. *See, e.g.*, *Patterson v. Morgan Stanley*, 2019 WL 4934834, at *10 (S.D.N.Y. Oct. 7, 2019) ("allegations of consistent, ten-year underperformance may support a duty of prudence claim," but "the underperformance must be substantial").

[8] Kate Stalter, *Chasing Performance Is a Quick Way to Disaster*, U.S. News (Feb. 8, 2017), https://bit.ly/3IhKn0R.

BlackRock TDFs underperformed in light of the suite's 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.

B. Fiduciaries have discretion to make a range of reasonable choices.

The allegations in these complaints also often fail to grasp a fundamental tenet of ERISA—namely, the "range of reasonable judgements a fiduciary may make" and the "difficult tradeoffs" inherent in fiduciary decisionmaking. *Hughes*, 142 S. Ct. at 742. That fiduciaries did not select what turned out to be absolute best-performing option does not suggest that their process was imprudent. There is no one prudent fund, service provider, or fee level that renders everything else imprudent. Instead, there is a wide range of reasonable options, and Congress vested fiduciaries with flexibility and discretion to choose from among those options based on their informed assessment of the needs of their plan and its unique participant base.

The complaints themselves reflect a range of assessments, as one complaint's supposedly imprudent choice is often another complaint's prudent exemplar. Plaintiffs in many cases allege imprudence based on defendants' decision to offer actively managed funds. *See, e.g.*, Compl. ¶¶ 79-82, 93, 100, 109-116, *Baumeister v. Exelon Corp.*, No. 21-6505 (N.D. Ill.), ECF No. 1. But plaintiffs have also alleged the exact opposite—a breach of fiduciary duty based on a plan's decision to include passively managed funds rather than actively managed ones. *See Ravarino v. Voya Financial, Inc.*, No. 21-1658 (D. Conn.), ECF No. 1 ¶¶ 79-83. This same phenomenon plays out with respect to plan performance. General Electric was sued in 2017 for including the GE RSP U.S. Equity Fund, among others, in its 401(k) plan. *See* Compl. ¶ 1, *Haskins v. Gen. Elec. Co.*, No. 17-01960 (S.D. Cal.), ECF No. 1. But in a different case, plaintiffs held up *that exact fund* as a "superior performing alternative[]." *See* Compl. ¶ 122, *Harding v. Southcoast Hosps. Grp.*, No. 20-12216 (D. Mass.), ECF No. 1.

As these complaints demonstrate, ERISA fiduciaries making discretionary decisions are at risk of being sued seemingly no matter what decisions they make. Plaintiffs sue fiduciaries for failing to divest from risky or dropping stock,[9] or for failing to *hold onto* such stock because high risk can produce high reward.[10] Some plaintiffs allege that it is imprudent for a plan to offer more than one investment option in the same style,[11] while others complain that including *only one option* in each investment style is imprudent.[12] In many cases, plaintiffs allege that fiduciaries were imprudent because they should have offered Vanguard mutual funds,[13] but others complain that defendants were imprudent *because they offered* Vanguard mutual funds.[14] Some plaintiffs allege that plans offered imprudently risky investments,[15] while others allege that fiduciaries were *imprudently cautious* in their investment approach.[16] In some instances, fiduciaries have simultaneously defended against "diametrically opposed" liability theories, giving new meaning to the phrase "cursed-if-you-do, cursed-if-you-don't."[17] Indeed, while most plaintiffs sue plans for charging allegedly excessive fees in the hopes of outperformance, this suit (and ten other materially identical complaints) charge defendants with following the purportedly "in vogue" trend of "chas[ing]" low fees rather than focusing on funds' "ability to generate return." Compl. ¶ 30. This dynamic has made it incredibly difficult for fiduciaries to do their jobs—and, as this case reveals, it has made it virtually impossible for fiduciaries to avoid being sued, no matter how careful their process and how reasonable their decisions.

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[9] *See, e.g.*, *In re RadioShack Corp. ERISA Litig.*, 547 F. Supp. 2d 606, 611 (N.D. Tex. 2008).

[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.*, *Sweda v. Univ. of Penn.*, 2017 WL 4179752, at *10 (E.D. Pa. Sept. 21, 2017), *rev'd in part*, 923 F.3d 320 (3d Cir. 2019).

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

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

Accordingly, it is critical for courts to consider context—things like the Department of Labor's ("DOL") instruction that fees are only one of *several factors* that should be considered;[18] publicly available information demonstrating that a complaint's supposed comparators are inapposite; industry data showing that services (and their pricing) vary widely; the performance ebbs and flows that are common characteristics of investment management; and the wide discretion granted to fiduciaries by Congress all bear on whether fiduciary-breach claims are plausible. Nevertheless, some courts have declined to consider context when evaluating plausibility, suggesting that doing so would require the court to resolve a purported dispute of fact. That approach cannot be squared with the Supreme Court's direction to "give due regard to the range of reasonable judgments a fiduciary may make," recognizing that a bare allegation that one fiduciary made a decision different from another fiduciary is insufficient to survive a motion to dismiss. *Hughes*, 142 S. Ct. at 742.

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[14] *See, e.g.*, Am. Compl. ¶ 108, *White v. Chevron Corp.*, No. 16-cv-0793-PJH (N.D. Cal.), ECF No. 41.

[15] *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); *St. Vincent v. Morgan Stanley Inv. Mgmt. Inc.*, 712 F.3d 705, 711 (2d Cir. 2013).

[16] *See Brown v. Am. Life Holdings, Inc.*, 190 F.3d 856, 859-860 (8th Cir. 1999) (addressing claim that fiduciaries maintained an overly safe portfolio); Compl. ¶2, *Barchock v. CVS Health Corp.*, No. 16-cv-61-ML-PAS, (D.R.I.), ECF No. 1 (alleging plan fiduciaries imprudently invested portions of the plan's stable value fund in conservative money market funds and cash management accounts).

[17] *E.g.*, *Evans v. Akers*, 534 F.3d 65, 68 (1st Cir. 2008).

[18] DOL, *A Look at 401(k) Plan Fees* 1 (Sept. 2019), https://bit.ly/3fP8vuH.

II. These lawsuits will harm participants and beneficiaries.

This surge of litigation has significant negative consequences for plan participants and beneficiaries. These lawsuits impose pressure on plan fiduciaries to make decisions based on how to avoid litigation, rather than on their considered discretion as to what is best for their population of employees. The changing litigation landscape also increases the cost of fiduciary liability insurance, leaving employers with less money to provide benefits for employees—such as matching contributions or paying for administrative expenses. And for smaller employers, retirement plans might become cost-prohibitive or simply not worth the risk of litigation. The result will be fewer employers sponsoring plans, less generous benefits, and reduced choice for participants. This outcome is wholly at odds with a primary purpose of ERISA—to *encourage* employers to voluntarily offer retirement plans and a diverse set of options within those plans. *See Conkright v. Frommert*, 559 U.S. 506, 517 (2010).

A. These lawsuits pressure plan sponsors away from exercising their discretion.

These suits threaten to undermine one of the most important aspects of ERISA: the value of innovation, diversification, and employee choice. An investment committee may, for example, feel pressured by the threat of litigation to chase investment performance, even though doing so is not in participants' best interests. *See supra*, pp. 5-6. Likewise, an investment committee may feel it needs to offer 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. In a purported effort to safeguard retirement funds, plaintiffs actually pressure fiduciaries *away from* exercising their "responsibility to weigh … competing interests and to decide on a (prudent) financial strategy." *Brown v. Daikin Am., Inc.*, 2021 WL 1758898, at *7 (S.D.N.Y. May 4, 2021).

B. Changes in the liability-insurance market will harm participants.

The litigation surge has upended the insurance industry for retirement plans. Judy Greenwald, *Litigation Leads to Hardening Fiduciary Liability Market*, Business Insurance (Apr. 30, 2021), https://bit.ly/3ytoRBX. The risks of litigation have pushed fiduciary insurers "to raise

insurance premiums, increase policyholder deductibles, and restrict exposure with reduced insurance limits." *Excessive Fee Litigation* 4; *see also* Jacklyn Wille, *Spike in 401(k) Lawsuits Scrambles Fiduciary Insurance Market*, Bloomberg Law (Oct. 18, 2021), https://bit.ly/307mOHg (discussing the "sea change" in the market for fiduciary insurance); Robert Steyer, *Sponsors Rocked by Fiduciary Insurance Hikes*, Pensions & Investments (Sept. 20, 2021), https://bit.ly/39W996Y. Plans are now at risk of not being able to "find[] adequate and affordable fiduciary coverage because of the excessive fee litigation." *Excessive Fee Litigation* 4; *see also* Jon Chambers, *ERISA Litigation in Defined Contribution Plans* 1, Sageview Advisory Grp. (Mar. 2021), https://bit.ly/2SHZuME (fiduciary insurers may "increasingly move to reduce coverage limits, materially increase retention, or perhaps even cancel coverage"); Charles Filips et al., *Options When Fiduciary Insurance Is Too Expensive* 1, PlanSponsor (Mar. 8, 2022), https://bit.ly/3q1vgRU (responding to an inquiry from a plan sponsor that was no longer able to afford fiduciary insurance).

If employers need to absorb the cost of higher insurance premiums and higher deductibles, many employers will inevitably have to offer less generous plans—reducing their employer contributions, declining to cover administrative fees and costs when they otherwise would elect to do so, and reducing the services available to employees. And while large employers may have some capacity to absorb some of these costs, many smaller employers do not. If smaller plan sponsors "cannot purchase adequate fiduciary liability insurance to protect their plan fiduciaries, the next step is to stop offering retirement plans to their employees." *Excessive Fee Litigation* 4.[19]

[19] Congress is in fact trying to do the opposite. The Setting Every Community Up for Retirement Enhancement Act of 2019 increases the tax incentives available for small employers that sponsor eligible employer plans and creates a structure for pooled employer plans, allowing unrelated employees to join together to participate in a single defined contribution plan. *See* Public L. 116-94, 133 Stat. 2534 (2019), §§ 101, 104-105. These lawsuits run counter to Congress's goal to expand—rather than shrink—the number of employees who are able to participate in retirement plans.

This problem will only grow as plaintiffs target funds like the BlackRock TDFs—"Gold"-rated investment choices that comprise nearly 9% of the market—making it near impossible for fiduciaries to avoid being sued. Compl. ¶ 36; *see also Morningstar*, supra n.2, at 19. In short, these suits impose significant costs on plan sponsors—and, by extension, plan participants and beneficiaries—often without producing any concomitant benefit.

CONCLUSION

For the foregoing reasons, adopting anything less than the "context-specific inquiry" of ERISA complaints prescribed by the Supreme Court in *Hughes* and *Fifth Third* would create precisely the types of negative consequences that Congress intended to avoid in crafting ERISA. *Amicus* urges the Court to adopt and apply that level of scrutiny to this case.

Respectfully submitted,

Dated: November 7, 2022

/s/ *Jaime A. Santos*
Jaime A. Santos (SBN 284198)
JSantos@goodwinlaw.com
GOODWIN PROCTER LLP
1900 N Street, NW
Washington, DC 20036
(202) 346-4000

Jordan Bock (SBN 321477)
JBock@goodwinlaw.com
GOODWIN PROCTER LLP
100 Northern Avenue
Boston, MA 02215
(617) 570-1000

Counsel for Amicus Curiae the Chamber of Commerce of the United States of America

Jaime A. Santos (SBN 284198)
JSantos@goodwinlaw.com
GOODWIN PROCTER LLP
1900 N Street, NW
Washington, DC 20036
(202) 346-4000

Jordan Bock (SBN 321477)
JBock@goodwinlaw.com
GOODWIN PROCTER LLP
100 Northern Avenue
Boston, MA 02215
(617) 570-1000

Counsel for Amicus Curiae the Chamber of Commerce of the United States of America

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

ROBERT BRACALENTE and BORIS GDALEVICH, individually and as representatives of a class of similarly situated persons, on behalf of the CISCO SYSTEMS, INC. 401(K) PLAN,

Plaintiffs,

v.

CISCO SYSTEMS, INC.; THE BOARD OF TRUSTEES OF CISCO SYSTEMS, INC.; THE ADMINISTRATIVE COMMITTEE OF THE CISCO SYSTEMS, INC. 401(K) PLAN; and DOES No. 1-20, Whose Names Are Currently Unknown,

Defendants.

Case No. 5:22-cv-04417-EJD

[PROPOSED] ORDER GRANTING THE MOTION OF THE CHAMBER OF COMMERCE OF THE UNITED STATES FOR LEAVE TO PARTICIPATE AS AMICUS CURIAE

Ctrm: Room 4, 5th Floor
Judge: The Hon. Edward J. Davila

The Court, having considered the Motion of the Chamber of Commerce of the United States of America (Chamber) for Leave to Participate as Amicus Curiae and related documents, hereby orders that the Chamber's Motion is hereby GRANTED and the amicus brief and supporting documents submitted therewith are deemed filed.

Dated: _____

_____
The Honorable Edward J. Davila