No. 21-15867

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

TIM DAVIS, GREGOR MIGUEL, and AMANDA BREDLOW, individually and on behalf of all others similarly situated,

Plaintiffs-Appellants,

and

SALESFORCE.COM, INC., BOARD OF DIRECTORS OF SALESFORCE.COM, INC., MARC BENIOFF, THE INVESTMENT ADVISORY COMMITTEE, JOSEPH ALLANSON, STAN DUNLAP, and, JOACHIM WETTERMAR,

Defendants-Appellees.

On Appeal from the United States District Court
for the Northern District of California
No. 3:20-cv-01753-MMC (Hon. Maxine M. Chesney)

BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANTS-APPELLEES AND AFFIRMANCE

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INTEREST OF THE *AMICUS CURIAE*

The **Chamber of Commerce of the United States of America** ("Chamber") is the world's largest business federation.[1] The Chamber represents approximately 300,000 direct members and indirectly represents the interests of more than three million businesses and professional organizations of every size, in every industry sector, and from every region of the country. Many of the Chamber's members maintain, administer, or provide services to employee-benefit plans governed by ERISA.

An important function of the Chamber is to represent the interests of its members in matters before the courts, Congress, and the Executive Branch. To that end, the Chamber regularly participates as *amicus curiae* in this Court and in other courts on issues that affect benefit-plan design or administration. *See, e.g.*, *Hughes v. Northwestern Univ.*, No. 19-1401 (U.S.); *Fifth Third Bancorp v. Dudenhoeffer*, 573 U.S. 409 (2014); *Santomenno v. Transamerica Life Ins. Co.*, 883 F.3d 833 (9th Cir. 2018); *White v. Chevron Corp.*, 752 F. App'x 453 (9th Cir. 2018).

The Chamber's members include plan sponsors and fiduciaries that benefit from Congress's decision to create, through ERISA, an employee-benefits system that is not "so complex that administrative costs, or litigation expenses" discourage

[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.

employers from sponsoring benefit plans or individuals from serving as fiduciaries. *Conkright v. Frommert*, 559 U.S. 506, 517 (2010) (citation omitted). The Supreme Court has recognized that undertaking a "careful, context-sensitive scrutiny of a complaint's allegations" to "weed[] out meritless claims" is an important mechanism for advancing Congress's goal. *Fifth Third*, 573 U.S. at 425. Plaintiffs here seek a diluted pleading standard that would authorize discovery based on conclusory assertions about a fiduciary's decisionmaking process and suggestions of alternative decisions that, with the benefit of 20/20 hindsight, allegedly could have been more profitable for plan participants. Plan sponsors and plan fiduciaries alike, including the Chamber's members that administer, insure, and provide services to ERISA plans, have a strong interest in preventing such an empty standard, which would defeat dismissal in virtually every case, undermine ERISA's objectives, and harm plan sponsors and participants.

SUMMARY OF THE ARGUMENT

This case is just one of many in a wave of ERISA class-action complaints designed to extract costly settlements. In 2020 alone, plaintiffs filed over 200 ERISA class actions, "an all-time record that represents an 80% increase over the number of ERISA class actions filed in 2019 and more than double the number filed in 2018."[2] In many of these cases, including this one, the complaint contains no allegations about the fiduciaries' decisionmaking process—the key element in an ERISA claim for breach of fiduciary duty. *See Harris v. Amgen, Inc.*, 788 F.3d 916, 936 (9th Cir. 2014), *rev'd on other grounds*, 577 U.S. 308 (2016). Instead, the complaint asks courts *to infer* an inadequate process from hindsight-driven, circumstantial allegations about the *outcome* of fiduciaries' decisions. While these suits purport to protect employees' retirement savings, they in fact risk having the opposite effect. Rather than allowing fiduciaries to draw on their expertise to make a range of discretionary decisions, these suits push plan sponsors into a corner, pressuring them to narrow the range of options available to participants—an outcome that is thoroughly at odds with ERISA's diversification and participant-choice values.

This tactic is being carried out by a handful of firms. Just five firms were responsible for the vast majority of 401(k) litigation filed in 2020, and almost half

[2] *See* Lars Golumbic et al., *2020 ERISA Litigation Trends Hint At What's Ahead This Year*, Law360 (Jan. 3, 2021), https://bit.ly/2TeiodS (identifying over 200 ERISA class actions filed in 2020—"an all-time record that represents an 80% increase over the number of ERISA class actions filed in 2019 and more than double the number filed in 2018"); Jacklyn Wille, *401(k) Fee Suits Flood Courts, Set for Fivefold Jump in 2020*, Bloomberg Law (Aug. 31, 2020), https://bit.ly/3fDgjQ5 (ERISA suits alleging excessive fees were on track for a fivefold increase from 2019 to 2020); 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 surge in 401(k) complaints from 2010 to 2017).

of recent lawsuits were filed by a single firm, Capozzi Adler—the firm that filed the current suit against Salesforce. *See* Ilana Polyak, *401(k) Lawsuits on the Rise as Participants Target Fees, Conflicts of Interest and Data Privacy*, Benefits Pro (Jan. 21, 2021), https://bit.ly/3oPGIP2; *see also* Wille, *401(k) Fee Suits Flood Courts*, *supra*. Not surprisingly, while plans vary widely based on the particular employer and the needs of its employees, the complaints are highly similar—if not materially identical. *See* Euclid Specialty, *Exposing Excessive Fee Litigation Against America's Defined Contribution Plans* 10 (Dec. 2020), https://bit.ly/3hNXJaW ("*Excessive Fee Litigation*") (noting "copy-cat complaints" being filed using the same "template"). A challenge to the University of Miami's retirement savings plan, for example, was "a *literal* copy-and paste," with its "allegations, right down to the typos … lifted directly from complaints in other cases about other plans offered by other universities, without regard for how (or even if) they relate[d]" to the University of Miami's plan. *See* Mot. to Dismiss 1, *Santiago v. Univ. of Miami*, No. 1:20-cv-21784 (S.D. Fla. July 8, 2020), ECF No. 16.

These complaints, like the one against Salesforce, typically contain no allegations about the fiduciaries' decisionmaking process. Instead they offer allegations, made with the benefit of 20/20 hindsight, that plan fiduciaries failed to select the cheapest or best-performing funds (often using inapt comparators to advance the point). Then, the plaintiffs ask the court to *infer* from these circumstantial facts that the plan's fiduciaries must have been "asleep at the wheel," 2-ER-132 (First Am. Compl. ¶ 89)—or, worse yet, not acting in the sole interest of participants and beneficiaries.

Pleading a plausible ERISA claim requires more. When a complaint lacks direct factual allegations of key elements of a civil claim, the Supreme Court and this Court have instructed lower courts to rigorously analyze the circumstantial allegations to determine whether they plausibly suggest wrongdoing or are instead "just as much in line with" lawful behavior. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 554 (2007). When the alleged facts are of the latter variety—when, as *Twombly* put it, there is an "obvious alternative explanation" to the inference of wrongdoing that the plaintiffs ask the court to draw—the complaint fails Rule 8(a)'s plausibility requirement and must be dismissed. *Id.* at 567. That rigorous analysis is particularly important in ERISA cases, where the Supreme Court has specifically instructed courts to apply "careful, context-sensitive scrutiny" in order to "divide the plausible sheep from the meritless goats." *Fifth Third*, 573 U.S. at 424-425. And this Court has likewise held that an ERISA complaint relying entirely on circumstantial facts cannot survive a motion to dismiss by offering allegations that are wholly consistent with a lawful, alternative explanation to the inference of wrongdoing the plaintiffs seek. *White*, 752 F. App'x 453.

The district court faithfully applied that pleading standard here. The court examined each of the factual allegations that Plaintiffs contend suggest an imprudent fiduciary process, and it concluded that Plaintiffs' hindsight-based allegations did not plausibly suggest imprudence by the plan's fiduciaries. The court's methodical analysis was consistent both with this Court's recent ERISA decisions, and with this Court's post-*Twombly* decisions in other contexts that also involve inference-based claims, *see infra* pp. 15-18 (discussing antitrust, viewpoint-discrimination, RICO, and securities cases).

Rather than adhere to this Court's caselaw, Plaintiffs lean heavily on out-of-circuit decisions that are either inapposite or have expressly "decline[d] to extend" *Twombly* to ERISA claims, *Sweda v. Univ. of Penn.*, 923 F.3d 320, 326 (3d Cir. 2019)—an outlier position irreconcilable with post-*Twombly* decisions from the Supreme Court and this Court. At bottom, Plaintiffs suggest that they should be able to unlock the doors to discovery simply by proffering, with the benefit of 20/20 hindsight, an alternative investment option that could have earned higher returns. Plaintiffs' standard could be met in virtually every case, as a plan fiduciary *always* could have made *some* decision that might have proved more profitable in hindsight—it is not possible to beat the market every time, nor are fiduciaries required or expected to. Given the "ominous" prospect of discovery in ERISA actions and the "probing and costly inquiries" that discovery entails (including the need to retain expensive fiduciary and financial experts), *PBGC ex rel. St. Vincent Catholic Med. Ctrs. Ret. Plan v. Morgan Stanley Inv. Mgmt. Inc.*, 712 F.3d 705, 719 (2d Cir. 2013) ("*PBGC*"), the superficial approach Plaintiffs seek would "push cost-conscious defendants to settle even anemic cases," *Twombly*, 550 U.S. at 559, if not lead to outright "settlement extortion," *PBGC*, 712 F.3d at 719 (citation omitted). And ERISA plaintiffs and plaintiffs' lawyers could exploit that standard to target the largest and most generous plan sponsors, like Salesforce, in the hopes of pressuring the company into settling. These tactics, if successful, will simply inflate the costs of establishing and administering a plan—something that is entirely voluntary—which is precisely what Congress sought to avoid in crafting ERISA.

This Court should reject Plaintiffs' invitation to dilute the pleading standard in ERISA cases and thus should affirm the judgment below.

ARGUMENT

I. ERISA encourages the creation of benefit plans by affording flexibility and discretion to plan sponsors and fiduciaries.

A. ERISA requires 401(k) plan fiduciaries to use their experience and expertise to make numerous discretionary decisions while accommodating a participant base with diverse interests.

When Congress enacted ERISA, it "did not *require* employers to establish benefit plans." *Conkright*, 559 U.S. at 516 (emphasis added). Rather, it crafted a statute intended to encourage employers to offer benefit plans while also protecting the benefits promised to employees. *Id.* at 516-517; *see also* H.R. Rep. No. 93-533, at 218 (1973), *reprinted in* 1974 U.S.C.C.A.N. 4639, 4647 (noting that ERISA "represents an effort to strike an appropriate balance between the interests of employers and labor organizations in maintaining flexibility in the design and operation of their pension programs, and the need of the workers for a level of protection which will adequately protect their rights and just expectations"). Congress knew that if it adopted a system that was too "complex," then "administrative costs, or litigation expenses, [would] unduly discourage employers from offering … benefit plans in the first place." *Varity Corp. v. Howe*, 516 U.S. 489, 497 (1996).

Congress also knew that plan sponsors and fiduciaries must make a variety of decisions, often during periods of considerable market uncertainty, and accommodate "competing considerations." H.R. Rep. No. 96-869, at 67 (1980), *reprinted in* 1980 U.S.C.C.A.N. 2918, 2935. Sponsors and fiduciaries must take into account present and future participants' varying objectives, administrative efficiency, and the need to "protect[] the financial soundness" of plan assets. *Id.* As a result, Congress designed a statutory scheme that affords plan sponsors and fiduciaries considerable flexibility—"greater flexibility, in the making of investment decisions . . . , than might have been provided under pre-ERISA common and statutory law in many jurisdictions." U.S. Dep't of Labor, Op. No. 81-12A, 1981 WL 17733, at *1 (Jan. 15, 1981). As courts have recognized, the broad discretion conferred by Congress is the "sine qua non of fiduciary duty." *Pohl v. Nat'l Benefits Consultants, Inc.*, 956 F.2d 126, 129 (7th Cir. 1992).

This discretion extends to a variety of different areas. For example, plan fiduciaries must make decisions concerning:

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

Plan fiduciaries must also decide whether to outsource plan services (such as recordkeeping) and whether to offer additional elective services (such as investment-advice services). If fiduciaries elect to hire service providers, they must decide which service provider(s) to retain, negotiate the compensation for providers, and determine how that compensation should be structured.

Here, too, the decisions must take account of several competing considerations. For example, DOL recognizes that, depending on a fiduciary's evaluation of the needs of the plan and its participants, it may choose either a fixed-fee structure, which generally requires the deduction of a fixed amount from each participant's account, or a bundled-pricing arrangement through which fees are covered by revenue-sharing—where an investment manager shares a percentage of the fees it receives from plan investments with the plan's recordkeeper.[3] This fee-sharing reflects the reality that, for plan investments, the plan's recordkeeper performs many of the administrative services that otherwise would have to be performed by the mutual fund's service provider.

Under a bundled-pricing model, higher-balance participants with larger investments in funds that provide revenue-sharing are responsible for a higher proportion of fees.[4] Under a fixed-pricing structure, lower-balance, lower-income employees—who already face greater barriers to building retirement savings—may shoulder a significantly larger percentage of the plan's fees.[5] Thus, fiduciaries may

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[3] DOL, Advisory Op. No. 1997-15A, at 1-2 (May 22, 1997), https://bit.ly/3oKClVF; DOL, *Advisory Council Report of the Working Group on Fiduciary Responsibilities and Revenue Sharing Practices*, https://bit.ly/30LPeGU; Deloitte Development LLC, *2019 Defined Contribution Benchmarking Survey Report* 20 (2019), https://bit.ly/3wLmhp1 ("*Deloitte Benchmarking Survey*").

[4] DOL, Field Assistance Bulletin No. 2003-03 (May 19, 2003), https://bit.ly/3nhg1Uf.

[5] *See* Bureau of Labor Statistics, News Release, *Employee Benefits in the United States – March 2020*, at 7 (Sept. 2020), https://bit.ly/3oHWPhL (reporting that only

reasonably elect to structure service-provider compensation as a percentage of assets under management through revenue-sharing practices, which may result in participants paying a more proportionate share of the costs to manage the plan. As courts have recognized, there is nothing inherently improper about the decision to structure a plan in this manner. *See, e.g.*, *Hecker v. Deere & Co.*, 556 F.3d 575, 585-87 (7th Cir. 2009); *White v. Chevron Corp.*, 2017 WL 2352137, at *14 (N.D. Cal. May 31, 2017), *aff'd*, 752 F. App'x 453 (9th Cir. 2018). Fiduciaries may also elect to use a combination of compensation structures. *See* Deloitte Development LLC, *Inside the Structure of Defined Contribution / 401(k) Plan Fees, 2013* 16 (Aug. 2014), https://bit.ly/3Dmawcg.

B. ERISA's "prudent man" standard affords broad discretion to 401(k) plan fiduciaries.

Given the breadth of fiduciary decisions made in the face of market uncertainty, Congress chose the "prudent man" standard to define the scope of the duties that these fiduciaries owe to plans and their participants. *See* 29 U.S.C. § 1104(a). Congress chose this standard with a goal of providing fiduciaries with the "flexibility" necessary to determine how best to manage their plans. *See Fine v. Semet*, 699 F.2d 1091, 1094 (11th Cir. 1983). Neither Congress nor the Department of Labor provides a list of required or forbidden investment options, investment

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26% of workers in the bottom quartile wage group participate in retirement benefits, whereas 81% of wage earners in the top quartile do so).

strategies, service providers, or compensation structures. And when Congress considered requiring plans to offer at least one index fund, the proposal failed. *See* H.R. 3185, 110th Cong. (2007). DOL expressed "concern[]" that "[r]equiring specific investment options would limit the ability of employers and workers together to design plans that best serve their mutual needs in a changing marketplace." *Helping Workers Save For Retirement: Hearing Before the S. Comm. on Health, Education, Labor, and Pensions*, 110th Cong. 15 (2008) (statement of Bradford P. Campbell, Assistant Sec'y of Labor).

DOL has declined to provide even *examples* of appropriate investment options, because doing so would "limit … flexibility in plan design." 57 Fed. Reg. 46,906, 46,919 (Oct. 13, 1992). Instead, it has focused on diversification and participant choice. For example, in promulgating regulations under 29 U.S.C. § 1104(c), which provides fiduciaries with a safe harbor from liability where participants exercise control over the assets in their individual accounts, DOL required plans to offer "a broad range of investment alternatives," including "at least three" with "materially different risk and return characteristics," and provide participants with "sufficient information to make informed investment decisions." 29 C.F.R. § 2550.404c-1(b)(2)-(3). This flexible approach, it said, would "better serve the needs of both plan[] sponsors and participants and beneficiaries than would an approach which attempts to specify particular investment alternatives." 57 Fed.

Reg. at 46,919. Salesforce structured its plan to comply with the safe-harbor provision, and therefore offered participants a broad range of investment options from which to choose. *See* 2 SER-063; 3 SER-413, 424.

The flexibility that Congress provided means that fiduciaries have a wide range of reasonable options for almost any decision they make. There are thousands of reasonable investment options with different investment styles and risk levels—nearly 10,000 mutual funds alone,[6] several thousand of which are offered in retirement plans—and nearly innumerable ways to put together a plan that enables employees to save for retirement.

Thus, while ERISA plaintiffs often try to challenge fiduciaries' decisions to offer specific investment options by pointing to less expensive or ultimately better-performing alternatives and then suggesting that the fiduciaries *must have* had an inadequate decisionmaking process, that is not how the prudence standard operates. There will always be a plan that performs better and a plan—typically many plans—that performs worse. There is no one prudent fund, service provider, or fee structure that renders everything else imprudent. Instead, there is a wide range of reasonable options, and Congress vested fiduciaries with the flexibility and discretion to choose from among those options based on their informed assessment of the needs of their

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[6] Investment Company Institute, *2017 Investment Company Fact Book* 19 (57th ed. 2017), https://bit.ly/3HFULjd.

particular plan. As the Department of Labor has put it, "[w]ithin the framework of ERISA's prudence, exclusive purpose and diversification requirements, . . . plan fiduciaries have broad discretion in defining investment strategies appropriate to their plans." U.S. Dep't of Labor, Advisory Op. No. 2006-08A, at 3 (Oct. 3, 2006), https://bit.ly/3pnva5z.

II. An ERISA complaint that lacks direct allegations of wrongdoing cannot rely solely on inferences from circumstantial facts that have an "innocuous alternative explanation" or suggest "the mere possibility of misconduct."

ERISA "requires prudence, not prescience." *DeBruyne v. Equitable Life Assurance Soc'y of U.S.*, 920 F.2d 457, 465 (7th Cir. 1990) (citation omitted). The standard of prudence "focus[es] on a fiduciary's conduct in arriving at an investment decision, not on its results." *PBGC*, 712 F.3d at 716 (alteration in original) (citation omitted). Thus, "the proper question" in evaluating an ERISA claim "is not whether the investment results were unfavorable, but whether the fiduciary used appropriate methods to investigate the merits of the transactions." *Harris*, 788 F.3d at 936 (quotation marks omitted). In other words, fiduciaries are judged not for the outcome of their decisions but for the *process* by which those decisions were made.

Here, Plaintiffs admit that they do not allege any facts regarding Defendants' decisionmaking process. Pls.' Br. 11. They suggest instead that the district court should have *inferred* that Defendants had an imprudent process based on hindsight allegations about the plan and its performance—even if there are obvious alternative explanations for the plans' line-up that are entirely consistent with prudent fiduciary decisionmaking. Their proposed approach is not the law in this Circuit. For complaints that lack direct allegations of wrongdoing, this Court has consistently probed the circumstantial factual allegations to determine if they plausibly suggest wrongdoing, or are simply a pretext for a fishing expedition. ERISA claims should be treated no differently.

A. Claims that rely on inferences of wrongdoing from circumstantial facts must allege "something more" than allegations that are equally consistent with lawful behavior.

This Court's decisions recognize, as the Supreme Court did in *Twombly,* the "practical significance" of the Rule 8(a) pleading requirement in cases in which the plaintiff does not present any direct allegations of wrongdoing but instead relies entirely on circumstantial allegations that, even if true, do not necessarily establish unlawful conduct. Such allegations are "much like a naked assertion" of wrongdoing that, "without some further factual enhancement," fall "short of the line between possibility and plausibility of 'entitle[ment] to relief.'" *Twombly*, 550 U.S. at 557 (citation omitted).

There are numerous areas of the law in which courts must consider whether wrongdoing can be inferred from circumstantial factual allegations to satisfy the pleading standards set forth in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). Take antitrust, for example. In *In re*

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

This Court has taken the same approach in viewpoint-discrimination cases, *Moss v. U.S. Secret Serv.*, 572 F.3d 962 (9th Cir. 2009), RICO cases, *Eclectic Props. E., LLC v. Marcus & Millichap Co.*, 751 F.3d 990 (9th Cir. 2014), and securities cases (even outside the context of heightened pleading), *In re Century Aluminum Co. Sec. Litig.*, 729 F.3d 1104 (9th Cir. 2013). In each of these contexts, when the plaintiffs failed to provide any direct allegations about a foundational element of the claim, this Court carefully scrutinized the circumstantial factual allegations and did not hesitate to order dismissal when those allegations did not support a plausible inference of wrongdoing because they were equally consistent with lawful behavior.[7] As the Court summarized in *Century Aluminum*, "[w]hen faced with two possible explanations, only one of which can be true and only one of which results in liability, plaintiffs cannot offer allegations that are 'merely consistent with' their favored explanation but are also consistent with the alternative explanation." 729 F.3d at 1108. Instead, "[s]omething more is needed, such as facts tending to exclude the possibility that the alternative explanation is true." *Id*.[8]

Twombly and this Court's post-*Twombly* precedents should apply with full force in ERISA cases—as this Court already concluded in *White v. Chevron*, a recent unpublished opinion in a case similar to this one. 752 F. App'x 453. There, this Court—citing *Twombly* and *Century Aluminum*—affirmed the district court's

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

[8] Plaintiffs cite *Starr v. Baca*, 652 F.3d 1202 (9th Cir. 2011), in arguing that they need not rule out rational alternative explanations for the circumstantial facts from which they ask this Court to infer an imprudent process. Pls.' Br. 21. But as this Court noted in *Eclectic Properties* when it rejected this same argument, in *Starr* the plaintiff's claims "survived a motion to dismiss by offering facts that tended to exclude the defendant's innocuous alternative explanation." 751 F.3d at 997; *accord Century Aluminum*, 729 F.3d at 1108 (similarly distinguishing *Starr* and stating that "[t]o render their explanation plausible, plaintiffs must do more than allege facts that are merely consistent with both their explanation and defendants' competing explanation").

dismissal of an ERISA complaint similar to Plaintiffs'. *See id.* at 454-55. In so doing, this Court explained that circumstantial allegations that a plan sponsor "could have chosen different vehicles for investment that performed better during the relevant period, or sought lower fees for administration of the fund" cannot survive dismissal. *Id.* at 455. Because allegations of this type do not make "it more plausible than not that any breach of fiduciary duty ha[s] occurred," they are insufficient to make out a claim under ERISA. *Id.*[9]

That conclusion is not only entirely consistent with this Court's post-*Twombly* precedents, but it is also eminently sound. As in the antitrust, RICO, securities, and discrimination cases discussed above, ERISA plaintiffs (including Plaintiffs here) often fail to present any direct allegations of the foundational element of a fiduciary breach claim—an imprudent decisionmaking process. *See* Pls.' Br. 11. Instead, they ask courts to infer wrongdoing from circumstantial allegations, such as the performance of funds included in a plan lineup compared to other available funds that could have been selected, or the fees of investment options or service providers

[9] *Tibble v. Edison International*, 843 F.3d 1187 (9th Cir. 2016) (*en banc*), which Plaintiffs heavily lean on, was not about whether the plaintiffs had satisfied the *Twombly* pleading standard, and this Court did not opine on what would be required to do so in context of an ERISA challenge to a plan line-up. Furthermore, this Court merely noted in *Tibble* that fiduciaries must consider investments that "are substantially identical—other than their lower cost." *Id.* at 1198. Here, however, Plaintiffs have not sufficiently alleged that the investments were in fact identical. *See* pp. 19-20, *infra*.

compared to alternatives in the market. But those circumstantial allegations are often consistent with entirely lawful conduct, particularly given the range of reasonable options available to fiduciaries for any decision they must make. And when that is true, as it is here, the claim is properly dismissed.

Plaintiffs' allegation that Defendants were imprudent in failing to replace funds with cheaper alternatives provides a perfect example of this sort of speculation. 2-ER-125-132 (First Am. Compl. ¶¶ 72-89). Plaintiffs ask this Court to infer that plan fiduciaries were not acting in participants' sole interests because they chose to maintain certain investment options when they could have selected allegedly identical lower-cost funds. *Id.* But as the district court explained, there was "an obvious alternative explanation" for Defendants' decision—namely, that the Plan used a revenue-sharing arrangement through which the additional fees covered recordkeeping and other administrative services. *See* 1-ER-7; *see also* p. 5, *supra*. Indeed, judicially noticeable forms before the district court showed that this was precisely the case. 1-ER-7. As noted above, this fee-sharing reflects the reality that, for plan investments, the plan's recordkeeper performs many of the administrative services that otherwise would have to be performed by the mutual fund's service provider. For institutional share classes, that reality is already reflected in the lower expense ratio, which is why institutional share classes provide far less, if any, revenue-sharing.

The decision to pay recordkeeping expenses using an asset-based, revenue-sharing model—rather than to offer alternative investment structures or share classes that would require separate, hard-dollar recordkeeping fees to be deducted from participants' accounts—involves a discretionary judgment about who should shoulder the greater burden of plan recordkeeping expenses. If an asset-based, revenue-sharing model is chosen, the burden often falls more heavily on participants with higher account balances. If a plan offers investment structures that do not pay revenue sharing (*e.g.*, certain institutional share classes of mutual funds, certain unit classes of collective trusts, or separate accounts), then all participants must pay the same hard-dollar fee, which disproportionately affects participants with smaller account balances. Neither choice is necessarily right or wrong, and neither choice provides any basis to infer that plan fiduciaries lacked a sound decisionmaking process.[10]

In their opening brief, Plaintiffs' response is to offer yet more guesswork. Plaintiffs muse: "What if the revenue sharing was used to pay kick-backs to the Plan's recordkeeper Fidelity? Or Fidelity intentionally overcharged for recordkeeping in order to justify the amount of revenue sharing it received?" Pls.' Br. 30. This is rank speculation, not factual allegation. Plaintiffs' conclusory

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[10] *Deloitte Benchmarking Survey* 20 (describing and providing data regarding the variety of approaches taken by plans with respect to recordkeeping fees).

assertion that the plan fiduciaries' chosen share classes provided "no benefit" to the plan were thus insufficient to survive a motion to dismiss. 2-ER-129 (First Am. Compl. ¶ 81).

Indeed, had Defendants chosen *not* to utilize revenue sharing, they might have been sued on that basis instead, on the theory that failing to do so increased the "Net Investment Expense" of the funds. *See* Salesforce Br. 34 (discussing the value of revenue sharing from the Institutional/R5 share class)*; see, e.g.*, Am. Compl. ¶¶ 128-168, *Albert v. Oshkosh Corp.*, No. 1:20-cv-00901 (E.D. Wis. Aug. 31, 2020), ECF No. 20; Am. Compl. ¶¶ 127-166, *Cotter v. Matthews Int'l Corp.*, No. 1:20-cv-01054 (E.D. Wis. Sept. 25, 2020), ECF No. 17 (same).

As these dueling theories demonstrate, ERISA fiduciaries making discretionary decisions are at risk of being sued for breach of the duty of prudence seemingly no matter what decision they make. Fiduciaries are sued for offering numerous investments in the same style (as in this case), and for offering only one investment in a given investment style;[11] for failing to divest from stocks with declining share prices or high risk profiles,[12] and for failing to *hold onto* such stock

[11] *Compare* 2-ER-123-125 (First Am. Compl. ¶¶ 68-71) *with* Am. Compl., *In re GE ERISA Litig.*, No. 1:17-cv-12123 (D. Mass. Jan. 12, 2018), ECF No. 35

[12] *In re RadioShack Corp. ERISA Litig.*, 547 F. Supp. 2d 606, 611 (N.D. Tex. 2008) (plaintiffs alleged that defendants failed "to divest the plans of all RadioShack stock . . . despite the fact that they knew the stock price was inflated").

because high risk can produce high reward;[13] for making available investment options that plaintiffs' lawyers deem too risky,[14] and conversely for taking what other plaintiffs' lawyers deem an overly cautious approach.[15] Indeed, plaintiffs have advanced "diametrically opposed" theories of liability *against the same defendant*, giving new meaning to the phrase "cursed-if-you-do, cursed-if-you-don't."[16]

This dynamic—with new and often contradictory circumstantial theories of imprudence popping up every year—has created an untenable situation for fiduciaries, whose jobs have become virtually impossible. It creates huge barriers for plan sponsors attempting to recruit individuals (like human-resources

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[13] *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).

[14] *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.

[15] *See Brown v. Am. Life Holdings, Inc.*, 190 F.3d 856, 859-60 (8th Cir. 1999) (assuming without deciding that "the fiduciary duty of prudent diversification can be breached by maintaining an investment portfolio that is *too safe and conservative*"); Compl., *Barchock v. CVS Health Corp.*, No. 1:16-cv-00061 (D.R.I. Feb. 11, 2016), ECF No. 1 (alleging plan fiduciaries breached the duty of prudence by investing portions of the plan's stable value fund in conservative money market funds and cash management accounts).

[16] *E.g.*, *Evans v. Akers*, 534 F.3d 65, 68 (1st Cir. 2008) (involving claims that fiduciaries breached ERISA duties by maintaining a "heavy investment in Grace securities when the stock was no longer a prudent investment" and noting "[a]nother suit challenging the actions of Plan fiduciaries" that "asserted a diametrically opposed theory of liability"—"that the Plan fiduciaries had imprudently *divested* the Plan of its holdings in Grace common stock despite the company's solid potential to emerge from bankruptcy" (citation omitted)).

professionals) to serve as plan fiduciaries, knowing that at any time they could be sued in an ERISA class action—an event that has very real consequences when a fiduciary tries to refinance her home mortgage, start a business, or apply for a loan for her children's college expenses. *Cunningham v. Cornell Univ.*, 2018 WL 1088019, at *1 (S.D.N.Y. Jan. 19, 2018) (noting the "tremendous power to harass" individual fiduciaries in this way).

The recent surge of litigation has also sent a clear signal to employers: You can—and will—be sued, essentially no matter what you do. Courts have recognized this dilemma, noting that ERISA fiduciaries often find themselves "between a rock and a hard place," *Fifth Third*, 533 U.S. at 424, or on a "razor's edge," *Armstrong v. LaSalle Bank Nat'l Ass'n*, 446 F.3d 728, 733 (7th Cir. 2006). Consequently, the Supreme Court has instructed lower courts that "careful, context-sensitive scrutiny of a complaint's allegations," through a motion to dismiss, is the appropriate way to accomplish the "important task" of "divid[ing] the plausible sheep from the meritless goats." *Fifth Third*, 573 U.S. at 425.

While *White* already recognizes that this Court's non-ERISA caselaw establishes the proper standard to apply to a motion to dismiss under ERISA, it would be beneficial for this Court to issue a published opinion adopting the approach from *Musical Instruments*, *Eclectic Properties*, *Moss*, and *Century Aluminum* in ERISA cases. *See White*, 752 F. App'x at 454-55. Given the increasing number of

ERISA lawsuits—and Plaintiffs' continued reliance on an outlier out-of-circuit opinion *rejecting* the application of *Twombly*'s pleading standard to ERISA cases,[17] it would be particularly helpful for district courts to have published guidance on the proper standard to apply in ERISA suits.

B. Allowing hindsight-based disagreement with discretionary fiduciary decisions would encourage meritless lawsuits designed to extract costly settlements.

As the Supreme Court recognized in *Twombly*, enforcing the pleading rules is necessary to guard against speculative suits that "push cost-conscious defendants to settle even anemic cases." 550 U.S. at 558-59. In ERISA cases, discovery is entirely asymmetrical and can easily run in the millions of dollars for a defendant. *See* Lockton Financial Services Claims Practice, *Fiduciary Liability Claim Trends* 1 (Feb. 2017), https://bit.ly/3viCsd2. Indeed, "the prospect of discovery in a suit claiming breach of fiduciary duty is ominous, potentially exposing the ERISA fiduciary to probing and costly inquiries and document requests about its methods and knowledge at the relevant times." *PBGC*, 712 F.3d at 719. While discovery is, of course, sometimes appropriate, the price of discovery (financial and otherwise) "elevates the possibility that 'a plaintiff with a largely groundless claim [will] simply take up the time of a number of other people, with the right to do so representing an

[17] Plaintiffs rely heavily upon the Third Circuit's decision in *Sweda*. There, the court "decline[d] to extend" the *Twombly* pleading standard beyond the antitrust context. 923 F.3d at 326. That approach is irreconcilable with this Court's precedents, as explained above, and should be squarely rejected.

in terrorem increment of the settlement value, rather than a reasonably founded hope that the discovery process will reveal relevant evidence." *Id.* (quoting *Dura Pharm., Inc. v. Broudo*, 544 U.S. 336, 347 (2005)).

Regardless of the merits of the underlying claims, proceeding to trial can be risky as defendants are often staring down astronomical damages figures that outstrip their annual contributions. *See, e.g.*, Findings of Fact and Conclusions of Law ¶ 4, *Ramos v. Banner Health*, No. 1:15-cv-02556 (D. Colo. May 20, 2020), ECF No. 470 (defendant that contributed $71 million in matching employer contributions faced $85 million in potential damages). These damages calculations can be highly suspect—as courts have recognized in the few cases that have proceeded to trial. *See, e.g.*, *id.* ¶ 187 (throwing out plaintiffs' damages model as "unreliable" where plaintiffs' expert "relied almost exclusively on his unquantifiable and non-replicable experience"); *Wildman v. Am. Century Servs., LLC*, 362 F. Supp. 3d 685, 710-11 (W.D. Mo. 2019) (concluding that plaintiffs had failed to prove a prima facie case of loss after cataloguing the extensive flaws in plaintiffs' damages model). But the risk that a district court might nevertheless accept these calculations is often too great for defendants to bear.

C. Strike suits like this one ultimately harm plan participants.

If ERISA suits are allowed to proceed past dismissal without the proper scrutiny of circumstantial allegations, they will have significant negative consequences for plan sponsors and plan participants alike. These complaints put enormous pressure on plan sponsors to settle even meritless suits, and they push plan fiduciaries to prioritize low fees at all costs, rather than to make decisions based on well-established principles of plan management. The upshot will be fewer employers sponsoring plans, less-generous benefits, and less choice for plan participants—an outcome wholly at odds with the purpose of ERISA.

To start, the pressure created by these suits undermines one of the most important aspects of ERISA—the value of innovation, diversification, and employee choice. Plaintiffs' attorneys have often taken a cost-above-all approach, filing strike suits against any sponsors that take into account considerations other than cost—notwithstanding ERISA's direction to do precisely that. *White v. Chevron Corp.*, 2016 WL 4502808, at *10 (N.D. Cal. Aug. 29, 2016); *cf.* U.S. Dep't of Labor, *A Look at 401(k) Plan Fees* 1 (Sept. 2019), https://bit.ly/2RZ2YtF (urging plan participants to "[c]onsider fees as one of several factors in your decision making" and noting that "cheaper is not necessarily better"). In other words, while "nothing in ERISA requires every fiduciary to scour the market to find and offer the cheapest possible fund," these lawsuits impose precisely that type of pressure—even though these low-cost funds "might, of course, be plagued by other problems." *Hecker*, 556 F.3d at 586; *see also* David McCann, *Passive Aggression*, CFO (June 22, 2016), https://bit.ly/2Sl55Yq (noting that these lawsuits push plan fiduciaries toward the "lowest-cost fund," which is not always "the most prudent" option). Thus, the more these suits survive dismissal, the more a fiduciary might feel that she has no choice but to offer only "a diversified suite of passive investments"—despite "actually think[ing] that a mix of active and passive investments is best." *Id.* Indeed, that is already happening. "Before the increases in 401(k) plan litigation, some fiduciaries offered more asset class choice by including specialty assets, such as industry-specific equity funds, commodities-based funds, and narrow-niche fixed income funds[,] options [that] could potentially enhance expected returns in well-managed and monitored portfolios." Mellman & Sanzenbacher, *supra*, at 5. Now fiduciaries overwhelming choose purportedly "'safe' funds over those that could add greater value." *Id.*

The choice among funds and services offered within a diversified plan line-up like this one should rest with plan fiduciaries and participants—who, after all, are "the people [with] the most interest in the outcome," *Loomis v. Exelon Corp.*, 658 F.3d 667, 673-74 (7th Cir. 2011). Indeed, the statute encourages "sponsors to allow more choice to participants." *Id.* That is precisely what Salesforce has done here.

Moreover, given the constantly evolving (and contradictory) theories asserted in these types of cases, even plan fiduciaries that do their best to avoid litigation may find themselves sued regardless. *See* pp. 20-22, *supra*. This dynamic not only imposes significant litigation costs and settlement pressure on plan fiduciaries, it also has upended the fiduciary-insurance industry.[18] 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. These consequences harm plan participants. If employers need to absorb the litigation risks and costs of higher insurance premiums, then many employers will inevitably offer less generous benefits. And for smaller employers, the ramifications are even starker: if they "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. That result would undermine a primary purpose of ERISA, which was to *encourage* employers to voluntarily offer retirement plans to their employees.

* * *

Adopting anything less than the "careful . . . scrutiny" of ERISA complaints prescribed by the Supreme Court in *Twombly* and *Fifth Third* would create precisely the types of "undu[e]" administrative costs and litigation expenses that Congress intended to avoid in crafting ERISA. *Conkright*, 559 U.S. at 516-17. For the 34%

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[18] Judy Greenwald, Business Insurance, *Litigation Leads to Hardening Fiduciary Liability Market* (Apr. 30, 2021), https://bit.ly/3ytoRBX; *see also* Jacklyn Wille, *Spike in 401(k) Lawsuits Scrambles Fiduciary Insurance Market*, Bloomberg Law (Oct. 18, 221), https://bit.ly/307mOHg (discussing the "sea change" in the market for fiduciary insurance).

of plan sponsors that are small or mid-sized businesses,[19] there is a real risk that costs inflated through the need to defend meritless lawsuits may discourage them from offering, or continuing to offer, retirement benefits—just as Congress feared.[20] *See Conkright*, 559 U.S. at 517. And for those that continue to sponsor plans, Plaintiffs' diluted pleading standard and the strike suits it would encourage would crimp the flexibility that Congress provided to fiduciaries; raise the costs of services, indemnification, and insurance; and ultimately divert resources from other key aspects of employee-benefit programs, such as 401(k) matching contributions or employer contributions toward healthcare coverage.

Neither ERISA nor the pleading standards articulated by the Supreme Court support such a result. This Court's approach to Rule 12(b)(6) motions in ERISA cases must be careful to guard against it.

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[19] *See Deloitte Benchmarking Survey* 7.

[20] Exacerbating this concern, plaintiffs' attorneys have recently targeted smaller 401(k) plans, including those with under $100 million in assets and fewer than 1,000 participants. *See* Golumbic, Delaney, and Levin, *supra*; *see also* Wille, *Spike in 401(k) Lawsuits Scrambles Fiduciary Insurance Market*, *supra* (quoting an industry analyst's assessment that "[e]xposure is metastasizing" and plaintiffs are moving "more down market … to smaller plans").

CONCLUSION

This Court should affirm the judgment below.

Respectfully submitted,

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This brief complies with the type volume limitations of Federal Rules of Appellate Procedure 32(a)(7)(B) because it contains 6,992 words, excluding the parts exempted by Rule 32(a)(7)(B)(iii).

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I, Jaime A. Santos, hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on November 19, 2021.

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