IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

DARYA DEARING, JANICE GULLICK, RICHARD A. HAYNES, NELSON SIEVERS, and LAUREN BROWN, individually and as a representatives of a class of similarly situated persons, on behalf of IQVIA 401(K) Plan, Plaintiffs, vs. IQVIA INC., THE BOARD OF DIRECTORS OF IQVIA HOLDINGS, INC., THE BENEFITS INVESTMENT COMMITTEE, and JOHN DOES No. 1-20, Whose Names Are Currently Unknown, Defendants.	Case No. 1:20-cv-574-WO-JEP

BRIEF OF AMICUS CURIAE THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA

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INTEREST OF AMICUS CURIAE

The Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation, representing approximately 300,000 direct members and indirectly representing the interests of more than three million 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. The Chamber submits this brief to provide additional context regarding the standards governing fiduciary liability under ERISA and the practical consequences that may follow if ERISA's loss requirement is not properly enforced.

INTRODUCTION

When Congress passed the Employee Retirement Income Security Act of 1974 ("ERISA"), it understood that the statutory framework needed to strike a balance between protecting benefits to which participants were entitled and encouraging employers to offer employee benefit plans in the first place. *See Conkright v. Frommert*, 559 U.S. 506, 516-17 (2010). One of the ways in which ERISA achieves this balance is by imposing fiduciary duties on those who manage ERISA plans while limiting liability for any breach of fiduciary duty to losses "resulting from [the] breach." 29 U.S.C. § 1109(a). The

[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.

careful balance Congress sought can only be maintained if courts rigorously enforce *both* ERISA's fiduciary standards and the statutory loss requirement.

This case illustrates the critical importance of the loss requirement and the risks of allowing it to be diluted. Plaintiffs challenge three investment options offered in the IQVIA 401(k) Plan: the Fidelity Freedom Funds (a suite of target date funds), the Columbia Acorn USA fund (a small cap equity fund), and the Prudential Jennison Mid Cap Growth fund. In their complaint, plaintiffs alleged that fiduciaries employing a prudent process would have removed the challenged funds based on their performance, and that prudent fiduciaries would have replaced the actively managed Fidelity Freedom Funds with the lower-cost, lower-risk passively managed Fidelity Freedom Index Funds in particular. Amended Complaint ("Am. Compl.") (ECF No. 17) ¶¶ 31, 45-46, 48-53. But plaintiffs cannot show that the Plan suffered a loss from its investment in the Freedom Funds rather than the Freedom Index Funds because the actively managed Freedom Funds *outperformed* the passively managed Freedom Index Funds over the relevant period. *See* Memorandum of Law in Support of Defendants' Motion for Summary Judgment ("Defs.' Mem. ISO MSJ") (ECF No. 70) at 21-22, 26. Nor can plaintiffs demonstrate that any of the three challenged funds performed poorly compared to their peer group or appropriate index benchmarks. Rather, plaintiffs purport to show loss by comparing each challenged fund's returns to those of a *single* peer alternative. *See id.* at 28-30.

Plaintiffs' measure of loss is misaligned with the standards governing fiduciary conduct under ERISA. Nothing in ERISA requires prudent fiduciaries to choose plaintiffs' proposed alternatives over any number of other reasonable options. Permitting plaintiffs to manufacture losses by ignoring the broad range of choices available to prudent fiduciaries would produce windfall recoveries inconsistent with the statutory text and Congress's intent in enacting ERISA. It would also harm plan participants by creating incentives for investment fiduciaries to engage in counterproductive returns chasing or limit plan options to minimize potential performance differentials at any point in time. And it would further distort litigation dynamics at significant cost to plans. Such an approach has no basis in the law, and the Court should not endorse it.

ARGUMENT

I. ERISA Plaintiffs Are Required To Demonstrate That An Asserted Breach Resulted In A Loss To The Plan

To carry her burden on a claim for breach of ERISA's duty of prudence, a plaintiff must not only demonstrate that the defendant committed a breach, but also make a showing of a resulting loss to the plan. *See* 29 U.S.C. § 1109(a); *Tatum v. RJR Pension Inv. Comm.*, 761 F.3d 346, 356-57 (4th Cir. 2014); *Plasterers' Loc. Union No. 96 Pension Plan v. Pepper*, 663 F.3d 210, 217-18 (4th Cir. 2011); *Meyer v. Berkshire Life Ins. Co.*, 250 F. Supp. 2d 544, 565 (D. Md. 2003), *aff'd*, 372 F.3d 261 (4th Cir. 2004). Limiting liability for breaches of fiduciary duty to losses resulting from the breach ensures that participants are adequately compensated when a breach of fiduciary duty harms a plan, while avoiding windfall recoveries that might discourage employers from

offering employee benefit plans. *See Walsh v. Vinoskey*, 19 F.4th 672, 676 (4th Cir. 2021) ("The aim of ERISA is to make the plaintiffs whole, but not to give them a windfall." (quotations omitted)); *Donovan v. Bierwirth*, 754 F.2d 1049, 1056 (2d Cir. 1985) ("Section 409, by providing for the recovery of losses, primarily seeks to undo harm that may have been caused a pension plan by virtue of the fiduciaries' acts," rather than penalizing fiduciaries for a breach.).

"Determining whether a loss occurred as a result of the fiduciaries' breach of duty requires a comparison between the challenged plan's actual performance and performance that would have otherwise occurred—*e.g.*, performance according to models the Court accepts as reasonable." *Pizarro v. Home Depot, Inc.*, 2022 WL 4687096, at *15 (N.D. Ga. Sept. 30, 2022), *appeal filed*, No. 22-13643-BB (11th Cir. Oct. 26, 2022); *see Peters v. Aetna*, 2 F.4th 199, 222 (4th Cir. 2021), *cert. denied sub nom. OptumHealth Care Sols. v. Peters*, 142 S. Ct. 1227 (2022); *Donovan*, 754 F.2d at 1057. Importantly, any reasonable measure of loss must have a clear "nexus to the ERISA breaches alleged." *Peters*, 2 F.4th at 223. That is, the comparison must "isolate the effect of the alleged breach" so that fiduciaries are not charged with "losses" that merely reflect strategic choices fully consistent with prudent plan management. *Wildman v. Am. Century Servs., LLC*, 362 F. Supp. 3d 685, 711 (W.D. Mo. 2019). The appropriate comparator in an individual case depends on "the nature of the breach involved" and "other facts and circumstances of the case." Restatement (Third) of Trusts § 100 (2012).

II. ERISA Plaintiffs Cannot Establish A Plan Loss Merely By Showing That One Alternative Outperformed The Challenged Fund

The loss model proffered by plaintiffs in this case is inconsistent with established principles regarding proof of loss under ERISA. Plaintiffs purport to demonstrate that the Plan suffered a loss by comparing each challenged investment's returns to the returns of a single alternative peer fund. *See* Defs.' Mem. ISO MSJ at 28-30. Those alternative funds have no particular significance in the context of the Plan—they are not, for example, options that were ever used in the Plan menu, or alternatives that the Plan's fiduciaries specifically considered. *See id.* Rather, the comparator funds were identified by plaintiffs in hindsight, based on criteria developed after the relative returns of the challenged funds and alternative options were known. *See id.*

Absent a factual basis for concluding that fiduciaries likely would have chosen a specific alternative investment or set of investments for a plan if not for a procedural lapse, a plaintiff cannot establish loss simply by identifying *some* alternative fund fiduciaries could have chosen that ultimately performed better than the challenged option. Fiduciaries have a wide range of reasonable investments available to them, and Congress afforded fiduciaries the flexibility and discretion to choose among those options based on multifaceted judgments about how best to meet the needs of their particular plan and its participants. *See Hughes v. Nw. Univ.*, 142 S. Ct. 737, 742 (2022) ("At times, 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."); *Chao v. Merino*, 452 F.3d 174, 182 (2d Cir. 2006)

("[S]o long as the 'prudent person' standard is met, ERISA does not impose a 'duty to take any particular course of action if another approach seems preferable.'"). There is no one "best" fund for every plan in every circumstance, nor is there any fixed formula for selecting plan investments. Because ERISA's prudence standard focuses on process rather than dictating that fiduciaries select any particular investment option, there is no single performance profile for a prudently managed plan, but a range of results a plan might have experienced with a prudent fiduciary process in place.

For this reason, courts have rejected loss models based on "a one-to-one, rather than a range, comparison of funds," which wrongly imply that a plan suffered cognizable harm if there is *any* alternative option that had higher returns in retrospect—even if many or most reasonable alternatives did not. *Wildman*, 362 F. Supp. 3d at 698-99, 710-11; *see Leister v. Dovetail, Inc.*, 546 F.3d 875, 881 (7th Cir. 2008) (noting error in calculation of the value a plan account would have yielded absent a breach because it "was based not on the average performance of the investment vehicles in which the contributions might have been placed but on the performance of the best of those vehicles, as improperly determined *ex post*"). Instead, where there is a range of reasonable choices available to prudent fiduciaries (as is typically the case), the loss inquiry logically looks at the range of returns generated by those options to determine whether it is likely the plan would have experienced better performance absent the asserted breach.

That plaintiffs have generated a formula based on past performance through which they assert a prudent fiduciary conceivably could have identified their specific alternative

funds *ex ante* does not eliminate the problem. ERISA does not require fiduciaries to make decisions about plan investments based on performance alone, let alone based on a specific weighting of the particular performance measures used in plaintiffs' model. *See, e.g.*, *Meiners v. Wells Fargo & Co.*, 898 F.3d 820, 823 (8th Cir. 2018) ("No authority requires a fiduciary to pick the best performing fund."). To the contrary, ERISA's flexible, context-specific prudence standard recognizes that no fund can reasonably be expected to outperform over every period, and that "past performance is no guarantee of future success." *Patterson v. Morgan Stanley*, 2019 WL 4934834, at *11 (S.D.N.Y. Oct. 7, 2019); *see Cunningham v. Cornell Univ.*, 2019 WL 4735876, at *11 (S.D.N.Y. Sept. 27, 2019) ("Long-term investment options, like those offered in a retirement plan, may have varying levels of performance over the course of time.").

Further, particularly when it comes to multi-asset strategies like target date funds, the top performer over any given period may be a fund that assumed higher risk than the peer group average to achieve that result. *See* Morningstar Manager Research, *2022 Target-Date Strategy Landscape*, at 22 (Mar. 23, 2022), https://bit.ly/3HhLXzW (noting "above-average equity weighting" and "aggressive equity tilt" of American Funds and T. Rowe Price target date suites that delivered top-decile returns over the past decade). Failing to account for variations in risk when measuring loss ignores the well-recognized principle that fiduciaries need not "prioritize raw returns over other considerations, including the higher risk associated with higher expected returns." *Reetz v. Lowe's Cos.*, 2021 WL 4771535, at *56 (W.D.N.C. Oct. 12, 2021), *appeal filed*, No. 21-2267 (4th Cir.

Nov. 10, 2021); *see, e.g.*, *Jenkins v. Yager*, 444 F.3d 916, 925 (7th Cir. 2006) (ERISA does not preclude fiduciary from adopting a strategy focused on "long-term, conservative, reliable investments that would do well during market fluctuations"). Consistent with that principle, retirement plan assets are not concentrated exclusively in the target date fund strategies that have delivered the highest trailing returns over any given period, but are spread across a range of options with different asset allocations and risk profiles. *See 2022 Target-Date Strategy Landscape* at 12 (listing assets under management and market share for ten largest target date providers). Variations in risk are particularly salient here, where plaintiffs' complaint alleged that the Plan's fiduciaries should have selected a passively managed target date option with *less* risk than the Fidelity Freedom Funds. *See* Am. Compl. ¶ 31.

III. Permitting ERISA Plaintiffs To Show Loss Based On Arbitrary One-to-One Comparisons Would Harm Participants By Pressuring Fiduciaries To Overemphasize Short-Term Performance Considerations When Evaluating Funds And Fueling Opportunistic Litigation

A standard under which plaintiffs can establish a loss from allegedly imprudent plan investments merely by identifying *any* higher-performing alternative not only would be contrary to law, but also would ultimately harm—rather than help—plan participants and beneficiaries.

A. Plaintiffs' Loss Standard Would Create Incentives For Fiduciaries To Engage In Detrimental Returns-Chasing And Restrict Investment Choice

Embracing a loss standard under which fiduciaries may face massive liability simply because there was a single high-performing alternative over a discrete, cherry-

picked period of time would encourage fiduciaries to focus on short-term performance when evaluating plan investments, contrary to participants' long-term interests. Numerous studies have demonstrated that short-term performance does not necessarily correlate with long-term investment success, and even the investment options with the strongest long-term performance commonly experience significant periods of underperformance. For example, a 2018 Morningstar study showed that over a 15-year period, active managers that ultimately outperformed their benchmark indexes often had extended periods of underperformance, and one year's top-performing fund frequently "underperformed" the year before or after as market conditions evolved. *See* Maciej Kowara & Paul Kaplan, *How Long Can a Good Fund Underperform?*, Morningstar (Aug. 17, 2018), bit.ly/3NXD8xV. Studies also have demonstrated that jumping from investment to investment based on ever-evolving trailing performance measures is detrimental over the long-run. For example, a Vanguard study found that investors who chased performance by buying assets after short periods of outperformance and selling after short periods of underperformance fared significantly worse over a ten-year period compared to investors who used a buy-and-hold strategy. *See* Brian R. Wimmer et al., *Quantifying the Impact of Chasing Fund Performance*, Vanguard Research Note (July 2014), bit.ly/3GZnSzp. As the Sixth Circuit has put it, "[p]recipitously selling a well-constructed portfolio in response to disappointing short-term losses … is one of the surest ways to frustrate the long-term growth of a retirement plan." *Smith v. CommonSpirit Health*, 37 F.4th 1160, 1166 (6th Cir. 2022).

A loss standard under which liability may turn on the returns of a single alternative option—no matter how much of an outlier it is—may also discourage fiduciaries from offering participants the opportunity to invest in any actively managed funds. The range of performance across actively managed funds can be substantial, with some funds outperforming benchmarks by significant margins in periods where other funds experience below-benchmark returns. As a result, plaintiffs relying on single-fund comparisons will often be able to generate a "loss" even for challenged funds with returns in the middle of the pack compared to the peer group as a whole. The risk of large claimed "losses" may discourage fiduciaries from offering actively managed funds, which could reduce participant choice by limiting plan menus to index funds that generate performance within a much narrower range. *See CommonSpirit*, 37 F.4th at 1165 (explaining that participants may have different preferences with respect to active and passive investment strategies); *Loomis v. Exelon Corp.*, 658 F.3d 667, 673-74 (7th Cir. 2011) (noting that ERISA encourages fiduciaries to offer a range of choices in defined contribution plans).

B. Accepting Plaintiffs' Loss Methodology Would Encourage Meritless Lawsuits That Harm Plan Participants And Beneficiaries

The last several years have seen a flood of ERISA fiduciary breach litigation, with 88 new cases filed in 2022 alone. *See* Daniel Aronowitz, *The Key Fiduciary Liability Storylines of 2022*, Euclid Specialty (Jan. 10, 2023), bit.ly/3GZkDbk. The pace will not slow down any time soon if ERISA cases are allowed to proceed to trial based on manufactured theories of loss that do not reflect genuine harm to a plan. Many

fiduciaries will choose to settle when confronted with even a modest risk of incurring outsized liability, which will only further encourage the plaintiffs' bar to pursue weak claims in the hope of extracting a substantial settlement.

Even where fiduciaries resist the pressure to settle, attorney-driven fiduciary breach litigation comes with substantial defense costs. *See Pension Benefit Guar. Corp. ex rel. St. Vincent Catholic Med. Ctrs. Ret. Plan v. Morgan Stanley Inv. Mgmt. Inc.*, 712 F.3d 705, 719 (2d Cir. 2013); *see also* Jacklyn Wille, *Spike in 401(k) Lawsuits Scrambles Fiduciary Insurance Market*, Bloomberg Law (Oct. 18, 2021), https://bit.ly/307mOHg ("These cases are very expensive to defend."). Rising litigation expenses and frequent settlements have already impacted the fiduciary insurance market, pushing insurers "to raise insurance premiums, increase policyholder deductibles, and restrict exposure with reduced insurance limits." Daniel Aronowitz, *Exposing Excessive Fee Litigation Against America's Defined Contribution Plans*, Euclid Specialty, at 4 (Dec. 2020), https://bit.ly/3hNXJaW. If employers are regularly saddled with millions of dollars in litigation expenses, many employers will inevitably need 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. While large employers may have capacity to absorb some of these costs, many smaller employers do not. This is not what Congress intended in seeking "to create a system that is not so complex that administrative costs, or litigation expenses, unduly

discourage employers from offering ERISA plans in the first place." *Conkright*, 559 U.S. at 517 (quotation omitted).

CONCLUSION

For the foregoing reasons, amicus urges the Court to rigorously enforce ERISA's loss requirement and ensure that any purported measure of loss aligns with the specific theory of breach alleged and fairly reflects the position a plan likely would have been in absent the asserted breach.

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Respectfully submitted,

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CERTIFICATE OF WORD COUNT

I hereby certify that the foregoing brief complies with Local Rule 7.3(d) and 7.5(d) because the brief contains no more than 6,250 words.

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CERTIFICATE OF SERVICE

I hereby certify that on January 17, 2023, I caused the foregoing to be filed with the Clerk of the Court for the United States District Court for the Middle District of North Carolina using the CM/ECF system. All participants in the case are registered CM/ECF users, and service will be accomplished by the CM/ECF system.

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