No. 21-3977

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DANIELLE FORMAN, NICHOLE GEORG, and CINDY HANEY, individually and as representatives of a class of participants and beneficiaries on behalf of TriHealth Inc. Retirement Plan,

Plaintiffs-Appellants,

and

TRIHEALTH, INC. and TRIHEALTH 401(K) RETIREMENT SAVINGS PLAN RETIREMENT COMMITTEE,

Defendants-Appellees.

On Appeal from the United States District Court
for the Southern District of Ohio
No. 1:19-cv-00613 (Hon. Matthew W. McFarland)

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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April 14, 2022

CORPORATE DISCLOSURE STATEMENT

The Chamber of Commerce of the United States of America is a non-profit corporation organized under the laws of the District of Columbia. It has no parent corporation. No publicly held corporation owns ten percent or more of its stock.

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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 its members maintain, administer, or provide services to employee-benefit plans governed by ERISA.

An important function of the Chamber is to represent its members' interests 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 others on issues that affect benefit-plan design or administration. *See, e.g.*, *Hughes v. Nw. Univ.*, 142 S. Ct. 737 (2022); *Smith v. Commonspirit Health*, No. 21-5964 (6th Cir.).

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

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[1] All parties have consented to the filing of this brief. *See* Fed. R. App. P. 29(a)(2). 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 to fund the preparation or submission of this brief.

in 2018."[2] The healthcare industry (which has seen its resources taxed during the pandemic) has been hit particularly hard with these lawsuits, including the defendant here, TriHealth, Inc.; Louisville-based Humana; Michigan-based Henry Ford Health System; Rush University Medical Center; Wake Forest University Baptist Medical Center; Yale-New Haven Hospital; and the University of Maryland Medical System, just to name a few. This year is poised to be more of the same, with three Boston-area hospitals sued during a single week in January by a plaintiffs' firm responsible for filing a torrent of similar suits.

Not surprisingly, while plans vary widely based on the particular employer and the needs of its employees, many of these 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" filed using the same "template"). In many of these cases, including this one, the complaint contains no allegations about the fiduciaries' decisionmaking process—

[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; 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).

the key element in an ERISA fiduciary-breach claim. *Pfeil v. State St. Bank & Tr. Co.*, 806 F.3d 377, 384-85 (6th Cir. 2015). Instead, the complaint offers 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. *See, e.g.*, Complaint, R. 15, PageID#1102-1103. Then, the plaintiffs ask the court to *infer* from these circumstantial allegations that the plan's fiduciaries must have "failed to employ a prudent and loyal process" for managing and monitoring the plan's investment line-up. *Id.*, PageID#1111.

Pleading a plausible ERISA claim requires more. When a complaint lacks direct allegations of key elements of a civil claim, lower courts must rigorously analyze the circumstantial allegations to determine whether they plausibly suggest wrongdoing or are "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 the plaintiffs ask the court to draw—the complaint fails Rule 8(a)'s plausibility requirement. *Id.* at 567.

This rigorous analysis—which this Court has applied in numerous other contexts where plaintiffs attempt to plead wrongdoing based on circumstantial facts—is particularly important in ERISA cases, where the Supreme Court has specifically instructed courts to apply "careful, context-sensitive scrutiny" to "divide the plausible sheep from the meritless goats." *Fifth Third Bancorp v. Dudenhoeffer*, 573 U.S. 409, 424-25 (2014); *accord Hughes*, 142 S. Ct. at 742 (evaluating ERISA claims for plausibility "will necessarily be context specific"). The Supreme Court has recognized that "the circumstances facing an ERISA fiduciary will implicate difficult tradeoffs," and therefore has advised lower courts to "give due regard to the range of reasonable judgments a fiduciary may make based on her experience and expertise" in evaluating whether a claim is plausible. *Hughes*, 142 S. Ct. at 742.

The district court here did exactly that, carefully applying a context-specific scrutiny to plaintiffs' allegations before concluding that they do not state a plausible claim for fiduciary breach. The plaintiffs in this case effectively seek a diluted pleading standard that would authorize discovery based on conclusory assertions (with no factual allegations) about a fiduciary's decisionmaking process and suggestions of alternative decisions that, with the benefit of hindsight, allegedly could have been more profitable for plan participants.

The plaintiffs' standard could be met in virtually every case, because a plan fiduciary *always* could have made *some* decision that might turn out to be more profitable in hindsight: it is not possible to beat the market every time, nor are fiduciaries required or expected to. And 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 decisions using the wide discretion and flexibility that Congress provided them, these suits push plan sponsors and fiduciaries into a corner, pressuring them to narrow the range of options available to participants—an outcome at odds with ERISA's purpose.

ARGUMENT

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

When Congress enacted ERISA, it "did not *require* employers to establish benefit plans." *Conkright v. Frommert*, 559 U.S. 506, 516 (2010) (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 516-17. 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 range 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). Congress viewed this flexibility as "essential to achieve the basic objectives of private pension plans because of the variety of factors which structure and mold the plans to individual and collective needs of different workers, industries, and locations." S. Rep. No. 92-634, at 16 (1972). Each plan is unique, and each plan's participants have a different range of financial sophistication, risk sensitivities, retirement needs, and investment preferences.

This flexibility extends to a variety of areas. Plan fiduciaries must make decisions concerning what investment options to offer from among the thousands available in the market (how many, which types, at what risk/reward levels, and at what fee levels); what services to offer; who should provide those services; and how to compensate service providers. All of these decisions involve "difficult tradeoffs." *Hughes*, 142 S. Ct. at 742. For example, some employees may prefer passively managed index funds that typically have lower fees and more predictably track market indices like the S&P 500, while others might prefer the potential to beat the market through active management, and still others might prefer the even more tailored investment management offered by managed-account products. In selecting a plan line-up, fiduciaries take into account these varying preferences and competing considerations.

The same is true with respect to negotiating arrangements with service providers. For example, the Department of Labor (DOL) recognizes that, depending on a fiduciary's evaluation of the needs of the plan and its participants, it may choose 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—a common practice whereby an investment manager shares a percentage of the fees it receives from plan investments with the plan's recordkeeper.[3]

Under a revenue-sharing 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-fee structure, lower-balance employees (often with lower incomes), who already face greater barriers to building retirement

[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.

savings, may shoulder a significantly larger percentage of the plan's fees.[5] Thus, fiduciaries may 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 this way. *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).

Given the need for flexibility regarding the breadth of fiduciary decisions that need to be made, especially 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. 29 U.S.C. § 1104(a); *Fine v. Semet*, 699 F.2d 1091, 1094 (11th Cir. 1983). Neither Congress nor DOL provides a list of required or forbidden investment options, investment 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

[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 26% of workers in the bottom quartile wage group participate in retirement benefits, compared to 81% of wage earners in the top quartile).

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).

Indeed, 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 to provide participants with "sufficient information to make informed investment decisions." 29 C.F.R. § 2550.404c-1(b)(2)-(3). This flexible approach, DOL 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.

The flexibility 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 better-performing alternatives and then suggesting that the fiduciaries *must have* had an inadequate decisionmaking process—just as the plaintiffs here assert, Complaint, R. 15, PageID#1111—that is not how the prudence standard operates. There will always be a plan whose line-up performs better and a plan whose line-up performs worse. There is no one prudent fund, service provider, or fee structure that renders everything else imprudent. Instead, there is a "range of reasonable judgments a fiduciary may make," which courts must account for when evaluating the plausibility of excessive-fee allegations. *Hughes*, 142 S. Ct. at 742.

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

[6] Investment Company Institute, Investment Company Fact Book 40 (61st ed. 2021), https://bit.ly/3KIvvd9.

decision, not on its results." *PBGC ex rel. St. Vincent Catholic Med. Ctrs. Ret. Plan v. Morgan Stanley Inv. Mgmt. Inc.*, 712 F.3d 705, 716 (2d Cir. 2013) ("*PBGC*") (alteration in original) (citation omitted). Thus, the proper question in evaluating an ERISA claim, is not, for example, whether "post facto" it is apparent that the value of investments "decreased after certain dates," but rather whether the fiduciary's "conduct [was prudent] as of the 'time it occurred,'" including whether the fiduciary used appropriate methods to investigate the merits of the transactions. *Pfeil*, 806 F.3d at 386, 387 (citation omitted).

Here, the plaintiffs concededly do not allege any facts regarding the defendants' decisionmaking process. Complaint, R. 15, PageID#1103. They suggest instead that the district court should have *inferred* an imprudent process based on hindsight allegations about the plan and its performance—even if there are obvious alternative explanations for the plan's line-up that are entirely consistent with prudent fiduciary decisionmaking. This proposed approach is not the law. 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 did *Twombly*, the practical significance of Rule 8(a)'s plausibility requirement in cases in which the plaintiff does not present any direct allegations of wrongdoing but instead relies on circumstantial allegations that, even if true, do not necessarily establish unlawful conduct. Those 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 (quotations 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 *Twombly* and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). Take antitrust, for example. In *In re Travel Agent Commission Antitrust Litigation*, 583 F.3d 896 (6th Cir. 2009), the plaintiff travel agencies lacked direct allegations of illegal agreements among the defendant airlines to eliminate the practice of paying sales commissions for the travel agencies. This Court therefore had to determine whether it could plausibly "infer agreement" among the defendant airlines based on allegations of the airlines' "parallel business behavior." *Id.* at 903 (quotation marks omitted). It carefully scrutinized each of the plaintiffs' circumstantial allegations—rejecting the allegations it deemed conclusory or factually unsupported, *id.* at 904-

05—to determine whether they plausibly suggested something more than lawful "parallel behavior," or were instead "just as much in line with a wide swath of rational and competitive business strategy," *id.* at 903-911 (citation omitted) (affirming dismissal).

This Court has taken the same approach in discrimination cases, *see Rondigo, L.L.C. v. Twp. of Richmond*, 641 F.3d 673 (6th Cir. 2011), civil conspiracy cases, *see Hensley v. Gassman*, 693 F.3d 681 (6th Cir. 2012), and even run-of-the-mill breach-of-contract cases, *see Dakota Girls, LLC v. Phila. Indem. Ins. Co.*, 17 F.4th 645 (6th Cir. 2021). In each of these contexts, when the plaintiffs failed to provide any direct allegations for a foundational element of the claim, this Court carefully scrutinized the circumstantial factual allegations and did not hesitate to order or affirm dismissal when the allegations did not support a plausible inference of wrongdoing.[7] As the Court summarized in *Hensley*, where a defendant's conduct is "just as consistent with" plaintiffs' favored explanation as with an alternative explanation, the allegations must be dismissed for failure to state a claim. 693 F.3d at 695; *see also In re Century Aluminum Co. Sec. Litig.*, 729 F.3d 1104, 1107 (9th

[7] *See, e.g.*, *Dakota Girls*, 17 F.4th at 651-52 (claim was inadequately pled because the factual allegations were "merely consistent with [the] defendant's liability" under the insurance contract (citation omitted)); *Rondigo*, 641 F.3d at 684 (where "there is nothing to suggest that these Defendants' actions were not taken in good faith and pursuant to applicable statutes" rather than with "unlawful discriminatory animus," the court cannot "infer more than the mere possibility of misconduct" (citations omitted)).

Cir. 2013) ("When 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. Something more is needed … to render plaintiffs' allegations plausible ….").

These precedents apply fully in ERISA cases. The Supreme Court could not have been clearer that this is the law in its recent decision in *Hughes*. Prior to *Hughes*, many ERISA plaintiffs had taken the position that ERISA claims are somehow exempt from the plausibility pleading requirement established by Rule 8(a), *Twombly*, and *Iqbal*. That position had been embraced by the Third Circuit in a case plaintiffs rely on (at 18, 22), *Sweda v. Univ. of Pa.*, 923 F.3d 320, 326 (3d Cir. 2019) ("declin[ing] to extend" *Twombly* to ERISA claims), and the Second Circuit in *Sacerdote v. N.Y. Univ.*, 9 F.4th 95, 108 & n.47 (2d Cir. 2021). *Hughes* squarely rejected this position, holding that courts must "apply[] the pleading standard discussed in" *Iqbal* and *Twombly*. 142 S. Ct. at 742. It also cautioned, citing its prior decision in *Dudenhoeffer*, that evaluating ERISA claims "will necessarily be context specific." *Id.* at 742. It emphasized the wide "range of reasonable judgments a fiduciary may make" in a given situation, noting that "the circumstances facing an ERISA fiduciary will implicate difficult tradeoffs." *Id.* In other words, there may be perfectly justifiable reasons for a fiduciary's decision to offer one investment option over another, even if the unchosen option ultimately performs more impressively or has a lower fee. And when that is the case—*i.e.*, when an ERISA plaintiff's circumstantial allegations of fiduciary malfeasance are consistent with entirely lawful fiduciary behavior—the claim is properly dismissed.

B. The complaint in this case is filled with allegations that closely resemble the types of allegations rejected as implausible in *Twombly* and *Iqbal*.

The plaintiffs' allegations in this case provide a perfect example of the removed-from-context, ex-post-facto speculation on which ERISA plaintiffs regularly rely.

1. Investment Fees—Like many ERISA complaints, plaintiffs' complaint seeks an inference of a deficient process based on allegations that funds in the plan's line-up had higher expense ratios than alternatives in the market.[8] *See, e.g.*, Complaint, R. 15, PageID#1102-1103, 1111. But inferring imprudence from fees in this context is implausible.

First, "nothing in ERISA requires every fiduciary to scour the market to find and offer the cheapest possible fund (which might, of course, be plagued by other problems)." *Hecker*, 556 F.3d at 586; *accord PBGC*, 712 F.3d at 718; *Meiners v.*

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[8] A fund's "expense ratio" is the sum of an investment's fees expressed as a percentage of assets under management. *See, e.g.*, *Obeslo v. Great-W. Life & Annuity Ins. Co*, 6 F.4th 1135, 1155 n.15 (10th Cir. 2021); DOL, *A Look at 401(k) Plan Fees* 6 (Sept. 2019), https://bit.ly/2RZ2YtF ("*A Look at Fees*").

Wells Fargo & Co., 898 F.3d 820, 823-824 (8th Cir. 2018). There are many sound reasons why a prudent fiduciary, crafting and monitoring a plan line-up as a whole, would include some options that do not have rock-bottom fees, particularly when those options appear alongside lower-cost options—fiduciaries must "consider each plan investment as part of the plan's entire portfolio."[9]

Fiduciaries may wish to offer actively managed options, which make up 60% of the $24.9 trillion invested in mutual funds and exchange-traded funds each year.[10] Active management is more expensive, but it offers the opportunity for higher upsides or less-severe downsides than funds that merely duplicate a market index, like the S&P 500. *See A Look at Fees* 7. Or they may wish to offer mutual funds, which come with greater transparency and regulatory safeguards than other types of institutional products with generally lower expense ratios. *See Loomis v. Exelon Corp.*, 658 F.3d 667, 671-672 (7th Cir. 2011). Or, having received information about the various options, they may simply believe that the chosen funds fall within the wide range of reasonableness. There are many prudent reasons for retaining funds besides the cheapest options in a diversified plan line-up, and doing so does not plausibly suggest an imprudent process.

Second, it is all too easy to make a fiduciary's choices look suboptimal in

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[9] DOL, *Meeting Your Fiduciary Responsibilities* 3 (2020), https://bit.ly/3rjBA83.

[10] *Investment Company Fact Book* 49.

hindsight, because plaintiffs' counsel can cherry-pick alternative investments as comparators. Take the federal Thrift Savings Plan (TSP), which plaintiffs often tout as the "gold standard" and use as a comparator in challenging a plan's performance or fees.[11] Even the TSP could be made to look mismanaged by cherry-picking comparators with *even lower* fees at a given point in time[12]:

Fund	Expense Ratio
TSP Fixed Income Index Investment Fund (F Fund) https://www.tsp.gov/funds-individual/f-fund/?tab=fees	0.058%
iShares Core US Aggregate Bond ETF https://www.morningstar.com/etfs/arcx/agg/price	0.040%
Vanguard Total Bond Market Index Fund (Institutional Plus Shares) https://www.morningstar.com/funds/xnas/vbmpx/price	0.030%
TSP Common Stock Index Investment Fund (C Fund) https://www.tsp.gov/funds-individual/c-fund/?tab=fees	0.043%
Fidelity 500 Index Fund https://www.morningstar.com/funds/xnas/fxaix/price	0.015%
iShares S&P 500 Index Fund (Class K) https://www.morningstar.com/funds/xnas/wfspx/price	0.030%
TSP Small Cap Stock Index Investment Fund (S Fund) https://www.tsp.gov/funds-individual/s-fund/?tab=fees	0.059%
Fidelity Extended Market Index Fund https://www.morningstar.com/funds/xnas/fsmax/price	0.040%

[11] *See, e.g.*, Appellants' Br., *Brotherston v. Putnam Invs., LLC,* 2017 WL 5127942, at *23 (1st Cir. Nov. 1, 2017) (describing TSP as "a quintessential example of a prudently-designed plan"). The TSP is a particularly inapt exemplar given that the U.S. government subsidizes administrative and investment-management expenses for TSP-offered funds.

[12] *See* Individual Funds, Thrift Savings Plan, https://www.tsp.gov/funds-individual/.

When plaintiffs' attorneys zero in on a single metric at a single point in time for comparison—in the above example, fees—they will *always* be able to find a supposedly "better" fund among the thousands on the market. And that is particularly true given that plaintiffs frequently compare the performance of funds with different investment styles and performance benchmarks. *See, e.g.*, *Ramos v. Banner Health*, 461 F. Supp. 3d 1067, 1108 (D. Colo. 2020) (rejecting plaintiffs' reliance on "inapt comparators"). Just as a Joe Burrow's average passing yards cannot be meaningfully measured against a relief pitcher's ERA or Simone Biles' average all-around score, comparing the fees or investment performance of funds that have completely different investment styles and goals indicates nothing about which fund is "better," much less whether a fiduciary's "decision-making process was flawed." *Meiners v. Wells Fargo & Co.*, 2017 WL 2303968, at *3 (D. Minn. May 25, 2017), *aff'd*, 898 F.3d 820 (8th Cir. 2018). Thus, the district court correctly followed other courts' lead in requiring plaintiffs to demonstrate, at the very least, that they have pled "a sound basis for comparison—a meaningful benchmark," *Davis v. Washington Univ. in St. Louis*, 960 F.3d 478, 484 (8th Cir. 2020); *see* Order, R. 42, PageID#2931.

2. Share-class selections—As in this case, many plaintiffs seek an inference of imprudence from allegations that fiduciaries offered retail share classes of mutual funds that have higher expense ratios than institutional share classes of the same fund. But this theory ignores an obvious explanation: the decision to pay plan service providers through revenue-sharing, rather than through a flat fee imposed against participants' individual accounts.

Expense ratios *are* typically higher for retail share classes than for institutional share classes. This price difference reflects the fact that expense ratios are composed of both investment management fees and administrative fees. The investment-management fee must be the same for all fund investors, irrespective of share class. *See* 17 C.F.R. § 270.18f-3(a)(1). But the portion assessed for administrative expenses can vary by share class. *See id.* Retail share classes frequently provide revenue-sharing, which, as discussed above, may be credited to the plan to cover recordkeeping fees that participants would otherwise have to bear, and may even result in revenue-sharing rebates to participant accounts. *See supra* pp. 7-8; *Deloitte Benchmarking Survey*, Exs. 7.6, 7.7 (35% of plans in 2019 received a revenue-sharing rebate and allocated credits to participants 42% of the time). 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.

Sometimes, revenue-sharing credits to a plan on retail shares can exceed the expense-ratio difference between institutional and retail share classes. Indeed, some plaintiffs have complained about plans' failure to offer *higher-expense-ratio retail share classes*, on the theory that doing so would have resulted in a lower "Net Investment Expense" for the funds. *E.g.*, Compl. ¶¶ 154, 170-85, *Reichert v. Juniper Networks, Inc.*, No 3:21-cv-06213-JD (N.D. Cal. Aug. 11, 2021), ECF No. 1; Am. Compl. ¶¶ 128-168, *Albert v. Oshkosh Corp.*, No. 1:20-cv-00901-WCG (E.D. Wis. Aug. 31, 2020), ECF No. 20.

Some plans may prefer to offer only the lowest-cost share class with *no* revenue-sharing benefits and then pay for administrative fees through deductions from participant accounts. Others may wish to offer higher-cost share classes that use revenue-sharing benefits to pay for recordkeeping fees. And some might select a combination of the two payments structures. That does not make any one of these fee structures or share-class selections per se or even presumptively unreasonable; it simply reflects the range of reasonable judgments available to plan fiduciaries over these important decisions.

That is not to say a plaintiff could *never* plausibly allege an imprudent process based on share-class allegations. If, for example, a complaint alleged that a plan sponsor had voluntarily elected to pay all plan recordkeeping expenses (as a minority of sponsors do[13]) and yet the plan fiduciaries chose to offer *only* retail share classes and rebated no revenue-sharing credits back to participants, then the complaint might state a plausible fiduciary-breach claim. Indeed, that was precisely the nature of the arrangement in *Tibble v. Edison Int'l*, on which plaintiffs lean so heavily. *Tibble v. Edison Int'l*, 729 F.3d 1110, 1131 (9th Cir. 2013) (citing Summary Plan Description), *vacated*, 575 U.S. 523 (2015). But given the discretion fiduciaries have in deciding how to structure service-provider compensation and the complicated economic realities of revenue-sharing arrangements tied to different share classes, "[s]omething more" than simply the choice of retail share classes is necessary to nudge an imprudence claim over the line from conceivable to plausible. *Century Aluminum*, 729 F.3d at 1108.

3. Total Plan Fees—Plaintiffs also asked the district court to infer an imprudent fiduciary process based on what they call "total plan fees," expressed as a percentage of total plan assets, that they allege are "excessive" when compared to the "total" fees of comparator plan. Complaint, R.15, PageID#1098-1099, 1105. Plaintiffs' brief refers to this figure as fees that the "plan" was "charging participants" that were allegedly greater than the fees "charged by comparator plans." Opening Br. 27.

[13] *See Deloitte Benchmarking Survey* 20.

But retirement plans do not charge fees to participants as a country club might charge fees to members. Rather, retirement plans pay fees to various third parties that provide all kinds of services used by plans and their participants—things like investment-management fees, or recordkeeping fees, or individual service fees for, *e.g.*, taking out a participant loan or using a managed-account product—and then some or all of those fees may be allocated among participants' individual accounts or deducted from investment returns. *See generally A Look at Fees* 3-8. The "total" fees ultimately borne by the plan and its participants will vary widely depending on which investments a plan decides to offer; whether the plan sponsor voluntarily decides to pay for those services itself; whether plan fiduciaries choose to make available optional features paid for by individual participants who choose to take advantage of those services; the extent to which those optional features are used; the quality of those services; and so on.

Simply asserting that the aggregate of fees paid by any participant to any fund or service provider is "excessive" compared to some unspecified plan(s) is meaningless. It is akin to saying that one household's "total" household expenses are excessive because they are greater than the monthly expenditures of another household—completely disregarding factors such as whether the first household has numerous school-aged children, whether the second household benefits from solar panels that effectively subsidize electricity costs, and whether the first household has chosen to retain a housekeeper or accountant to provide needed services to the family, among other things. The Chamber is unaware of any case that has endorsed the unprecedented "total plan fees" theory advanced by plaintiffs—which seeks to entirely divorce the fees from the quality and nature of services offered—and this Court should not do so here.

C. 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 plausibility pleading rule 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 comes at an "ominous" price, easily running into the millions of dollars for a defendant. *PBGC*, 712 F.3d at 719; *see also* Lockton Financial Services Claims Practice, *Fiduciary Liability Claim Trends* 1 (Feb. 2017), https://bit.ly/3viCsd2. While discovery is 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 *in terrorem* increment of the settlement value, rather than a reasonably founded hope that the discovery process will reveal relevant evidence.'" *PBGC*, 712 F.3d at 719 (quoting *Dura Pharms., Inc. v. Broudo*, 544 U.S. 336, 347 (2005)).

Equally problematic, ERISA fiduciaries making discretionary decisions are at risk of being sued seemingly no matter what they do. Fiduciaries are sued for offering numerous investments in the same style, and for offering only one investment in a given investment style;[14] for failing to divest from stocks with declining share prices or high risk profiles,[15] and for failing to *hold onto* such stock because high risk can produce high reward;[16] for making available investment options that plaintiffs' lawyers deem too risky (as in this case),[17] and conversely for taking what other plaintiffs' lawyers deem an overly cautious approach.[18]

This same phenomenon plays out with respect to fund performance. General Electric was sued in 2017 for including the GE RSP U.S. Equity Fund, among others,

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[14] *Compare* First Am. Compl. ¶¶ 68-71, in *Davis v. Salesforce.com, Inc.*, No. 3:20-cv-01753-MMC (N.D. Cal. Oct. 23, 2020), ECF No. 38, *with* Am. Compl., *In re GE ERISA Litig.*, No. 1:17-cv-12123-IT (D. Mass. Jan. 12, 2018), ECF No. 35.

[15] *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").

[16] *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).

[17] *See, 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.

[18] *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).

in its 401(k) plan. *See* Compl. ¶ 1, *Haskins v. Gen. Elec. Co.*, No. 3:17-cv-1960-CAB-BLM (S.D. Cal.) (filed Sept. 26, 2017), ECF No. 1. But a different case held up *that exact fund* as a "superior performing alternative[]." Compl. ¶ 122, *Harding v. Southcoast Hosps. Grp.*, No. 1:20-cv-12216-LTS (D. Mass.) (filed Dec. 14, 2020), ECF No. 1. Likewise with recordkeeping fees: last year Henry Ford Health System was hit with an ERISA class action alleging that plan fiduciaries breached their duty of prudence by negotiating "excessive" recordkeeping fees. *See* Compl. ¶¶ 157-167, *Hundley v. Henry Ford Health System*, No. 2:21-cv-11023 (E.D. Mich.) (filed May 5, 2021), ECF No. 1. But another complaint holds up *that same plan* as an example of "prudent and loyal" fiduciary decisionmaking with respect to recordkeeping fees. *See* Compl. ¶ 45, *Carrigan v. Xerox Corp.*, No. 21-1085 (D. Conn.) (filed Aug. 11, 2021), ECF No. 1.

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 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 pressure created by these suits also 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 just that. *White v. Chevron Corp.*, 2016 WL 4502808, at *10 (N.D. Cal. Aug. 29, 2016) (collecting cases); *cf. A Look at Fees* 1 (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). The more that specious complaints 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.*

This dynamic also has upended the fiduciary-insurance industry.[19] The risks of litigation have pushed insurers "to raise insurance premiums, increase policyholder deductibles, and restrict exposure with reduced insurance limits." *Excessive Fee Litigation* 4. These consequences harm 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." *Id.* That result would undermine a primary purpose of ERISA, which was to *encourage* employers to voluntarily offer retirement plans to their employees.

[19] 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 fiduciary-insurance market).

Neither ERISA nor the pleading standards articulated by the Supreme Court support such a result, and this Court's approach to Rule 12(b)(6) motions in ERISA cases must be careful to guard against it. *Hughes* requires that courts apply *Twombly*'s "plausibility" standard to ERISA cases. 142 S. Ct. at 742. While *Hughes* was clear on this point, it would also be beneficial for this Court to issue a published opinion saying as much, and adopting the approach used in *Travel Agent, Rondigo*, *Hensley*, and *Dakota Girls* in ERISA cases as well, particularly in light of the increasing number of ERISA lawsuits throughout the country and in this circuit especially.

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 29(a)(5) and 32(a)(7)(B) because it contains 6,499 words, excluding the parts exempted by Rule 32(f) and Sixth Circuit Rule 32(b)(1).

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Dated: April 14, 2022

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CERTIFICATE OF SERVICE

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 Sixth Circuit by using the appellate CM/ECF system on April 14, 2022.

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