No. 20-56415

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RICHARD A. KONG, et al.,
Plaintiffs-Appellants,

and

TRADER JOE'S COMPANY, et al.,
Defendants-Appellees.

On Appeal from the United States District Court
for the Central District of California
No. 2:20-cv-05790 PA-JEM
Hon. Percy Anderson

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 employee-benefit design or administration. *See, e.g.*, *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.

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

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[2] *See* Lars Golumbic, William Delany & Samuel Levin, *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

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 or disloyal 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, such that they have no choice but to adhere to whatever serves plaintiffs' attorneys—and their pocketbooks.

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 of recent lawsuits were filed by a single firm, Capozzi Adler—the firm that filed the current suit against Trader Joe's. *See* Ilana Polyak, *401(k) Lawsuits on the Rise as Participants Target Fees, Conflicts of Interest and Data Privacy*, Benefits Pro (Jan.

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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).

21, 2021), https://bit.ly/3oPGIP2; *see also* Wille, *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 that the "approximately 200 excessive [fee] lawsuits follow a similar template, and new law firms are copying the leading law firms by filing copy-cat complaints"). 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" 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 Trader Joe's, 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), or failed to retain a service provider at the fee level negotiated by a different plan (ignoring, of course, that plans do not all contract for the same services). Then, the plaintiffs ask the court to *infer* from these circumstantial facts that the plan's fiduciaries must have been asleep at the wheel—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 or disloyal fiduciary process, and concluded that Plaintiffs' hindsight-based allegations did not plausibly suggest imprudence or disloyalty 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* precedent 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, alternative fiduciary decisions 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 could have proved more profitable in hindsight. 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 Trader Joe's, 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, Opinion 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).

Retirement plan fiduciaries must make numerous decisions about the investment options to offer to plan participants. For example, unless the plan document limits fiduciary discretion, plan fiduciaries must make decisions concerning:

- the general investment decisions for the plan (*i.e.*, whether certain types of investments, such as funds that invest in mortgage-backed securities, will be prohibited);
- 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 simply intended 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, with certain share classes offering more "revenue sharing"—a common practice in which service providers of mutual funds share a percentage of the fees they receive with the administrative-service provider of a particular 401(k) plan[3]—which can help defray participants' recordkeeping and other administrative costs.

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[3] Deloitte Development LLC, *Defined Contribution Benchmarking Survey Report* 20 (2019) ("Deloitte Benchmarking Survey"), *available at* https://bit.ly/3wLmhp1.

Plan fiduciaries must also decide whether to outsource plan services (such as recordkeeping) and whether to offer additional elective services (such as participant-loan or investment-advice services). If fiduciaries elect to hire service providers, they must decide which service provider(s) to retain, negotiate the compensation for such providers, and determine whether that compensation should be paid on a hard-dollar per-participant fee, an asset basis, or via specialized fees for particular services. Fiduciaries must also determine whether plan services and funds should be coordinated through one vendor—a common practice known as "bundling"[4]—or whether services and funds should be provided by unrelated entities.

Here, too, the decisions must take account of several competing considerations. For example, structuring service-provider compensation on a hard-dollar basis could mean that lower-balance, lower-income employees may shoulder a significantly larger share of the plan's fees, placing disproportionate burdens on a group that already faces barriers to building retirement savings.[5] Thus, fiduciaries may reasonably elect to structure service-provider compensation as a percentage of assets under management through revenue-sharing practices, which results in those

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[4] *See* Deloitte Benchmarking Survey 25.

[5] *See* Bureau of Labor Statistics, News Release, *Employee Benefits in the United States – March 2020* 7 (September 2020), http://www.bls.gov/news.release/pdf/ebs2.pdf (reporting that only 26% of workers in the bottom quartile wage group participate in retirement benefits, whereas 81% of wage earners in the top quartile do so).

participants who obtain the greatest rewards from the plan paying a 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, *Defined Contribution / 401(k) Fee Study* 15 (2009), *available at* https://bit.ly/3yVbTgy.

Fiduciaries must likewise select the duration of service-provider agreements and determine how often to switch providers. These decisions implicate numerous competing considerations, including cost, quality of services, and the need to facilitate a constructive working relationship between the plan and its providers. Most plans work with the same service provider for many years because they value continuity given the disruption and participant confusion that can be caused by switching providers. As of 2019, 50% of plans had been with their current recordkeeper for more than 10 years.[6]

[6] Deloitte Benchmarking Survey 25.

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 strategies, service providers, or compensation structures. Nor does the "prudent man" standard require fiduciaries to "scour the market to find and offer" the most profitable or cheapest investments and service providers, "which might, of course, be plagued by other problems." *Hecker*, 556 F.3d at 586. Instead, fiduciaries must make reasonable, *prudent* decisions based on the information available at the time according to their own experience and expertise.

The flexibility that Congress provided means that fiduciaries have a wide range of reasonable options for almost any decision they make. There are many administrative service providers (including Trader Joe's recordkeeper, Capital Research), all of which compete with each other on a range of levels, with different fee structures, service offerings, quality, and reputation.[7] There are also thousands of reasonable investment options with different investment styles and risk levels—nearly 10,000 mutual funds alone,[8] 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 perform 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 particular plan. As the Department of Labor has put it, "[w]ithin the framework of ERISA's prudence, exclusive purpose and diversification requirements, . . . plan

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[7] *See, e.g.*, Andrew Wang, *401K Providers: 2016 Top 20 Lists* (July 26, 2016), http://bit.ly/2suEbjC; Healy Jones, *Who are the Top 10 Small Business 401k Providers?*, ForUsAll 401(k) Blog (Jan. 30, 2017), http://bit.ly/2HeKL19.

[8] Investment Company Institute, *2017 Investment Company Fact Book* 19 (57th ed. 2017), *available at* https://www.ici.org/pdf/2017_factbook.pdf.

fiduciaries have broad discretion in defining investment strategies appropriate to their plans." U.S. Dep't of Labor, Advisory Opinion No. 2006-08A, at 3 (Oct. 3, 2006), *available at* 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). This 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 and service-provider arrangement that are entirely consistent with loyal and 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 thus 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.[9] As the Court summarized in *Century Aluminum*, "[w]hen faced with two

[9] *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

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*.[10]

Twombly and this Court's post-*Twombly* precedents should apply with full force in ERISA cases—as this Court in fact 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 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

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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).

[10] 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. 24. 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").

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.*

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 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, the claim should be dismissed.

Plaintiffs' loyalty and prudence allegations regarding the Capital Research-affiliated funds provide a perfect example of this sort of speculation. Plaintiffs ask this Court to infer that plan fiduciaries were not acting in participants' best interests because they included numerous investment options managed by an affiliate of the plan's recordkeeper. But this arrangement, known as "bundled services" (not unlike bundling your home television and internet services with one provider) is entirely common and regularly mentioned in DOL guidance. *See, e.g.*, 85 Fed. Reg. 39,113, 39,127 (June 30, 2020) (describing application of regulatory amendments to "investment platforms for defined contribution individual account plans, including platforms with bundled administrative and investment services"); U.S. Dep't of Labor, *Tips for Selecting and Monitoring Service Providers for Your Employee Benefit Plan*, https://www.dol.gov/sites/dolgov/files/EBSA/about-ebsa/our-activities/resource-center/fact-sheets/tips-for-selecting-and-monitoring-service-providers.pdf (advising plan fiduciaries to consider bundled-services arrangements). Indeed, more than 70% of plan sponsors report using bundled services.[11] Consequently, courts have held that even limiting *the entire plan line-up* to funds managed by an affiliate of the plan's recordkeeper does not plausibly suggest imprudence. *See Hecker*, 556 F.3d at 586-587.

Plaintiffs' allegations regarding Trader Joe's decision to use a revenue-sharing arrangement provide another example of improper pleading-by-speculation. Plaintiffs argue that this Court can infer an imprudent decisionmaking process from Trader Joe's selection of retail-class shares. Pls.' Br. 30-36. But the decision to offer retail share classes of mutual funds and pay recordkeeping expenses using an

[11] Deloitte Benchmarking Survey 26.

asset-based, revenue-sharing model—rather than to offer alternative investment structures or share classes that would require participants to pay separate hard-dollar recordkeeping fees—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 falls more heavily on participants with higher account balances. If a plan offers investment structures that do not pay revenue sharing (*e.g.*, institutional share classes of mutual funds 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.[12]

Indeed, had Defendants chosen *not* to utilize revenue sharing, they might have been sued on that basis instead. Like Plaintiffs' complaint, many suits include copy-and-paste allegations that offering more expensive share classes can be circumstantial proof of imprudence. *Compare* ER-130 (Am. Compl. ¶¶ 121-122) (alleging that "revenue sharing … unchecked … is devastating for Plan participants" because it "saddled [them] with … above-market recordkeeping fees"); *with* Compl. ¶¶ 85-86, *Loomis v. Nextep, Inc.*, No. 5:21-cv-00199 (W.D. Okla. Mar.

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

10, 2021), ECF No. 1 (alleging that "revenue sharing … unchecked … is devastating for Plan participants" because it "saddled [them] with above-market recordkeeping fees"). But other suits allege that plan sponsors acted imprudently precisely because they did *not* offer options providing revenue sharing, on the theory that doing so would have lowered the "Net Investment Expense" of the funds. *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;[13] for failing to divest from stocks with declining share prices or high risk profiles,[14] and for failing to *hold onto* such stock because high risk can produce high reward;[15] for making available investment

[13] *Compare* ER-046 *with* Am. Compl., *In re GE ERISA Litig.*, No. 1:17-cv-12123 (D. Mass. Jan. 12, 2018), ECF No. 35

[14] *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").

[15] *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).

options that plaintiffs' lawyers deem too risky,[16] and conversely for taking what other plaintiffs' lawyers deem an overly cautious approach.[17] 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."[18]

And as this case makes clear, defendants are often sued based on cookie-cutter complaints that simply do not reflect the judicially noticeable reality. Plaintiffs alleged here that Trader Joe's acted imprudently by making "very little change in the Plan's core investment lineup" over a period of years. ER-045. Even putting aside that there is nothing improper about choosing not to react to every change in the market, judicially noticed documents show that the Investment Committee *did*

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[16] *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.

[17] *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).

[18] *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)).

make several significant changes to the plan lineup—including seven fund changes in 2017 alone. *See* SER-210. The district court recognized as much, explaining that "the judicially noticeable facts demonstrate that several changes to the Plan lineup were made during the Class Period." ER-013.

The recent surge of litigation has 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. Following this instruction, this Court should carefully scrutinize circumstantial allegations in ERISA complaints to determine whether they are plausibly suggestive of wrongdoing, or whether they are equally consistent with rational, lawful behavior and therefore do not satisfy the *Twombly* pleading standard.

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' reliance on an outlier out-of-circuit opinion *rejecting* the application of *Twombly*'s pleading standard to ERISA cases,[19] 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. Even putting cost aside, "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

[19] 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.

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." *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 sponsors 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.*

Similarly, if simply alleging that a plan has higher recordkeeping fees than some arbitrarily chosen moving target[20] is sufficient to state a fiduciary-breach claim, then every plan's fiduciaries will be encouraged to prioritize cost above all else—even if that means abstaining from innovative services (like financial wellness and enhanced customer-service options) from which their participants would benefit.

While plaintiffs' attorneys file these suits under the mantle of safeguarding plaintiffs' retirement funds, the outcome of their campaign would instead be to tie the hands of plan sponsors, preventing them from exercising their "responsibility

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[20] Plaintiffs' Complaint asserts that $35 per participant would have been reasonable, ER-135 (¶ 141); their opening brief asserts (at 17) that reasonable rates "range between $18 to $27," and then later suggests (at 51) that "$14-21" might be the appropriate number.

to weigh … competing interests and to decide on a [prudential] financial strategy." *Brown v. Daikin Am., Inc.*, 2021 WL 1758898, at *7 (S.D.N.Y. May 4, 2021). The choice among funds and services offered within a diversified plan line-up 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*.

Moreover, given the constantly evolving (and contradictory) theories asserted in these types of cases, even plan fiduciaries that do their best to avoid litigation will likely 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.[21] 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

[21] Judy Greenwald, Business Insurance, *Litigation Leads to Hardening Fiduciary Liability Market* (Apr. 30, 2021), https://bit.ly/3ytoRBX.

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% of plan sponsors that are small or mid-sized businesses,[22] 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.[23] *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

[22] *See* Deloitte Benchmarking Survey 7.

[23] 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*.

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.

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 6,968 words, excluding the parts exempted by Rule 32(a)(7)(B)(iii).

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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 Ninth Circuit by using the appellate CM/ECF system on June 4, 2021.

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