IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Judy Lalonde, individually and as a representative of a class of similarly situated persons, and on behalf of the MassMutual Thrift Plan,

Plaintiff,

vs.

Massachusetts Mutual Life Insurance Co., Roger Crandall, Investment Fiduciary Committee, Plan Administrative Committee, and John and Jane Does 1-20,

Defendants.

Case No. 3:22-cv-30147

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

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Callan Institute, *The Cobbler's Shoes: How Asset Managers Run Their Own 401(k) Plans* (May 2019), bit.ly/3kUFUui 6

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Jacklyn Wille, *Employee Benefit Class Settlements Gleaned Over $500M in 2017*, Bloomberg Law (Jan. 23, 2018), bit.ly/3XSr1qU 2

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INTEREST OF AMICUS CURIAE

The Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation, representing approximately 300,000 direct members and indirectly representing the interests of more than three million businesses and professional organizations of every size, in every industry sector, and from every region of the country.[1] Given the importance of the laws governing fiduciary conduct to its members, many of which maintain or provide services to retirement plans, the Chamber regularly participates as amicus curiae in ERISA cases at all levels of the federal court system. The Chamber submits this brief to provide additional context regarding the use of proprietary investment products in retirement plans sponsored by financial services companies and how this case is situated in the broader litigation landscape.

INTRODUCTION

This case involves allegations that the fiduciaries of the MassMutual Thrift Plan (the "Plan")—a 401(k) plan sponsored by MassMutual to help its employees save for retirement—violated ERISA by including in the Plan menu certain mutual funds managed by affiliates of MassMutual. As the number of retirement plan lawsuits has skyrocketed over the last decade, similar allegations attacking the use of "proprietary" funds—funds offered by the plan's sponsor or an affiliate—in financial services companies' plans have become commonplace. *See, e.g.*, Jana Steele, *What DC Plan Sponsors Should Know About Recent Litigation Trends: Part 1*, Callan Blog (Oct. 19, 2022), bit.ly/3WQ7dD5 (reporting on review of 165 ERISA suits filed between January 2019 and August 2022 which found "[p]lan sponsors in the financial services

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

industry were most likely to be subject to these complaints"); Jacklyn Wille, *Employee Benefit Class Settlements Gleaned Over $500M in 2017*, Bloomberg Law (Jan. 23, 2018), bit.ly/3XSr1qU (discussing "flurry of litigation against financial companies that put affiliated investment products in their 401(k) plans"). Virtually every large asset manager has faced litigation challenging the inclusion of proprietary funds in its employee retirement plan.[2] Several companies—MassMutual now among them—have faced multiple suits related to use of proprietary investment products.[3]

Proprietary fund suits often rest on the implicit premise that there is something inherently suspect about fiduciaries choosing to offer proprietary funds, with plaintiffs asking courts to infer an imprudent and disloyal decisionmaking process based on the resulting fund line-up. But as

[2] *See, e.g.*, *Schissler v. Janus Henderson US (Holdings) Inc.*, No. 1:22-cv-02326-RM-MEH, ECF No. 1 (D. Colo. Sept. 9, 2022); *Gomes v. State St. Corp.*, No. 1:21-cv-10863-MLW, ECF No. 1 (D. Mass. May 25, 2021); *Kohari v. MetLife Grp., Inc.*, No. 1:21-cv-06146-JHR, ECF No. 1 (S.D.N.Y. July 19, 2021); *Cryer v. Franklin Res., Inc.*, No. 4:16-cv-4265-CW, ECF No. 1 (N.D. Cal. July 28, 2016); *Falberg v. Goldman Sachs Grp., Inc*, No. 1:19-cv-09910-ER, ECF No. 1 (S.D.N.Y. Oct. 25, 2019); *Cervantes v. Invesco Holding Co. (US), Inc.*, No. 1:18-cv-02551-AT, ECF No. 1 (N.D. Ga. May 24, 2018); *Karg v. Transamerica Corp.*, No. 1:18-cv-00134-CJW-KEM, ECF No. 1 (N.D. Iowa Dec. 28, 2018); *Baird v. BlackRock Institutional Tr. Co., N.A.*, No. 4:17-cv-01892-HSG, ECF No. 1 (N.D. Cal. Apr. 5, 2017); *Beach v. JPMorgan Chase Bank, N.A.*, No. 1:17-cv-00563-JMF, ECF No. 1 (S.D.N.Y. Jan. 25, 2017); *Dorman v. Charles Schwab & Co. Inc.*, No. 4:17-cv-00285-CW, ECF No. 1 (N.D. Cal. Jan. 19, 2017); *Feinberg v. T. Rowe Price Grp., Inc.*, No. 1:17-cv-0427-JKB, ECF No. 1 (D. Md. Feb. 14, 2017); *Bekker v. Neuberger Berman Grp. LLC*, No. 1:16-cv-06123-LTS-BCM, ECF No. 1 (S.D.N.Y. Aug. 2, 2016); *Brotherston v. Putnam Invs., LLC*, No. 1:15-cv-13825-WGY, ECF No. 1 (D. Mass. Nov. 13, 2015); *Dennard v. Aegon USA LLC*, No. 1:15-cv-00030-EJM-JSS, ECF No. 1 (N.D. Iowa Feb. 6, 2015); *Patterson v. Morgan Stanley*, No. 1:16-cv-06568-RJS, ECF No. 1 (S.D.N.Y. Aug. 19, 2016); *Moreno v. Deutsche Bank Americas Holding Corp.*, No. 1:15-cv-09936-LGS, ECF No. 1 (S.D.N.Y. Dec. 21, 2015); *Urakhchin v. Allianz Asset Mgmt. of Am., L.P.*, No. 8:15-cv-01614-JLS, ECF No. 1 (C.D. Cal. Oct. 7, 2015); *Leber v. Citigroup 401(k) Plan Inv. Comm.*, No. 1:07-cv-09329-SHS, ECF No. 1 (S.D.N.Y. Oct. 18, 2007).

[3] *See infra* at 10-11; *see also, e.g.*, *Moitoso v. FMR LLC*, No. 1:18-cv-12122-WGY, ECF No. 1 (D. Mass. Oct. 10, 2018); *Bilewicz v. FMR LLC*, No. 1:13-cv-10636-DJC, ECF No. 1 (D. Mass. Mar. 19, 2013); *Becker v. Wells Fargo & Co.*, No. 4:20-cv-01803, ECF No. 1 (N.D. Cal. Mar. 13, 2020); *Meiners v. Wells Fargo & Co.*, No. 0:16-cv-03981-DSD-FLN, ECF No. 1 (D. Minn. Nov. 22, 2016).

courts have recognized, "offering proprietary options is not a breach of the duty of prudence and loyalty in and of itself." *Evans v. Associated Banc-Corp*, 2022 WL 4638092, at *7 (E.D. Wis. Sept. 30, 2022). To the contrary, reliance on proprietary funds is a common, accepted practice in the financial industry, and there are sound, loyal reasons for fiduciaries to choose to offer proprietary funds. As a result, simply alleging that a plan menu includes proprietary funds does not raise a plausible inference of imprudence or disloyalty. *See Patterson v. Cap. Grp. Cos., Inc.*, 2018 WL 748104, at *5 (C.D. Cal. Jan. 23, 2018) ("[T]hat all or most of the challenged funds were Defendants' own financial products [is] insufficient, when viewed in context, to create a plausible inference of wrongdoing."). Nor does a proprietary fund claim become plausible whenever a plaintiff alleges, as plaintiff does here, that some non-proprietary options had lower fees or higher returns than the challenged funds over an arbitrary period of time—something that could be alleged about nearly *any* fund in *any* plan. Any other rule would be contrary to established law calling for careful, context-specific evaluation of the plausibility of ERISA fiduciary breach claims. It would also harm plan participants by inviting an endless cycle of repeat litigation and by pressuring fiduciaries to abandon use of proprietary funds that many participants want to invest in—funds that the Department of Labor ("DOL") has directly recognized fiduciaries should be able to consider for in-house plans.

ARGUMENT

I. Merely Identifying Alternative Investment Options With Lower Fees Or Higher Returns Over Discrete Periods Does Not Plausibly Suggest An Imprudent Fiduciary Process

Whether brought against financial institutions or other plan sponsors, many recent ERISA suits follow a familiar pattern in challenging investment options offered to participants. Plaintiffs, with the benefit of hindsight, identify a handful of alternatives that outperformed the challenged fund and ask courts to infer that plan fiduciaries must have had a flawed

decisionmaking process because they did not choose one of plaintiffs' retrospectively preferred alternatives. Or plaintiffs identify windows in which actively managed funds' returns trailed their benchmarks or index funds (often by relatively modest margins) and on that basis ask courts to infer that plan fiduciaries could not have been prudently monitoring the active options. The complaint here does both. *See* Complaint, ECF No. 1 ("Compl.") ¶¶ 79-83. And, as in many other ERISA cases, the complaint pairs its performance allegations with assertions that the Plan's investment options were too expensive when compared to broad category averages or fees charged by individual, cherry-picked alternatives. *See id.* ¶¶ 74-78.

This common approach leaves virtually no plan safe from suit. With countless investment options available in the marketplace, it is nearly certain that plaintiffs will be able to identify better-performing funds in hindsight. It is likewise all but inevitable—and unexceptionable—that an actively managed fund will experience periods of underperformance relative to its benchmark, even if it outperforms over the long-run. *See* Maciej Kowara & Paul Kaplan, *How Long Can a Good Fund Underperform?*, Morningstar (Aug. 17, 2018), bit.ly/3NXD8xV (finding that over a 15-year period, active managers that ultimately outperformed their benchmark indexes often had extended periods of underperformance, and one year's top-performing fund frequently "underperformed" the year before or after as market conditions evolved). Yet these performance patterns are not knowable before-the-fact, and hindsight performance critiques say nothing about whether the challenged investments were reasonable options to offer. *See, e.g.*, *Smith v. CommonSpirit Health*, 37 F.4th 1160, 1166 (6th Cir. 2022); *see also Meiners v. Wells Fargo & Co.*, 898 F.3d 820, 823 (8th Cir. 2018) ("No authority requires a fiduciary to pick the best performing fund."). Claims rooted in post hoc performance comparisons ignore that ERISA's standard of prudence is "not a test of the result

of performance of the investment," but focuses on the process through which fiduciaries arrived at their decisions. *Bunch v. W.R. Grace & Co.*, 555 F.3d 1, 7 (1st Cir. 2009) (quotation omitted).

Similarly, claims based on bare fee comparisons ignore that ERISA affords fiduciaries discretion to consider a range of factors beyond fees when making decisions about plan investment options and does not require plans to "offer the cheapest possible fund (which might, of course, be plagued by other problems)." *Hecker v. Deere & Co.*, 556 F.3d 575, 586 (7th Cir. 2009); *see also, e.g.*, *Patterson v. Morgan Stanley*, 2019 WL 4934834, at *12 (S.D.N.Y. Oct. 7, 2019) ("The existence of a cheaper fund does not mean that a particular fund is too expensive in the market generally or that it is otherwise an imprudent choice." (quotation omitted)); *White v. Chevron Corp.*, 2016 WL 4502808, at *10 (N.D. Cal. Aug. 29, 2016) ("Fiduciaries have latitude to value investment features other than price (and indeed, are required to do so) … ."). Thus, as courts have recognized, "the mere fact that a fund charges an expense ratio higher than the mean or median, in and of itself, does not imply that the cost was excessive." *Singh v. Deloitte LLP*, 2023 WL 186679, at *6 (S.D.N.Y. Jan. 13, 2023). Were it otherwise, "by definition, half of all funds would charge excessive fees." *Id.*

II. Use Of Proprietary Funds In Asset Managers' In-House Retirement Plans Is A Common Practice That ERISA Explicitly Permits

The types of allegations about investment performance and fees just discussed do not become plausible simply because the funds involved are managed by the plan's sponsor or an affiliate. Fiduciaries of asset managers' 401(k) plans commonly look to the funds they know best when building their investment line-ups. *See, e.g.*, *Brotherston v. Putnam Invs., LLC*, 2017 WL 2634361, at *8 (D. Mass. June 19, 2017), *vacated in part on other grounds*, 907 F.3d 17 (1st Cir. 2018). A review conducted by the Callan Institute found that of 157 plans sponsored by

asset managers included in the study, 92 included proprietary products in the investment menu. *See* Callan Institute, *The Cobbler's Shoes: How Asset Managers Run Their Own 401(k) Plans* at 17 (May 2019), bit.ly/3kUFUui; *see also* Pendency of Proposed Class Exemption Involving Mutual Fund In-House Plans Requested by the Investment Company Institute, 41 Fed. Reg. 54,080, 54,081 (Dec. 10, 1976) (observing that "[i]n most instances" "in-house employee benefit plans" sponsored by companies that offer mutual funds "invest … in whole or in part in shares of one or more of the mutual funds in the fund organization").

Like nearly any other fiduciary investment decision, a variety of factors can influence the extent to which the fiduciaries of a particular plan choose to rely on proprietary funds. Companies that offer the full range of strategies typically demanded by retirement plans often rely more heavily, or even entirely, on their own products, which leave no gaps to be filled by other options. *See The Cobbler's Shoes*, *supra*, at 17 (observing that the in-house plans with the largest percentage of assets in proprietary products were those sponsored by companies that have "the full spectrum of investment products wrapped in competitively priced vehicles aimed squarely at the large-plan DC market"); *see also Wildman v. Am. Century Servs., LLC*, 362 F. Supp. 3d 685, 693, 703-04 (W.D. Mo. 2019). Other asset managers' plans may offer fewer—or no—proprietary options, whether because the plan sponsor and its affiliates do not offer investments in styles, strategies, or vehicles that would be suitable for 401(k) plans or because the plan's fiduciaries have otherwise concluded that non-proprietary options are a better fit for their particular plan's needs. *See The Cobbler's Shoes*, *supra*, at 17; *see also Hughes v. Northwestern Univ.*, 142 S. Ct. 737, 742 (2022) (noting the "range of reasonable judgments a fiduciary may make based on her experience and expertise").

There are sound reasons for fiduciaries of asset managers' in-house retirement plans to

choose to offer proprietary funds where those options align with a plan's objectives. In-house plan fiduciaries are likely to be most familiar with the offerings on their own platforms from a qualitative perspective (including insights on such factors as investment process, resources, and personnel), and so have a better basis on which to assess the merits of the funds. *See Wildman*, 362 F. Supp. 3d at 693, 702; *Dupree v. Prudential Ins. Co. of Am.*, 2007 WL 2263892, at *10-11 (S.D. Fla. Aug. 7, 2007), *as amended* (Aug. 10, 2007). If potential concerns arise, plan fiduciaries generally have much better access to their own company's investment team than they would have with competitors. *See Wildman*, 362 F. Supp. 3d at 693, 702. In addition, employees of financial services companies often have a strong interest in investing in the strategies they are involved in managing or distributing. *See id.* at 702. The proprietary funds offered in the MassMutual Plan, for example, have remained very popular with participants even as the Plan's fiduciaries have introduced more unaffiliated options to the menu over time. *See* Mem. of Law in Supp. of Defs.' Mot. to Dismiss Pl.'s Class Action Compl., ECF No. 22 ("Mot. to Dismiss Mem.") at 5.

Understanding that plan participants can benefit from having the opportunity to invest in funds offered by their employer, the DOL long ago adopted a class exemption to ERISA's prohibited transaction rules that explicitly allows in-house plans to invest in proprietary mutual funds so long as certain conditions ensuring the plan is treated fairly are met. *See* Class Exemption Involving Mutual Fund In-House Plans Requested by the Investment Company Institute, 42 Fed. Reg. 18,734, 18,734-35 (Apr. 8, 1977) ("PTE 77-3"). The DOL has explained that the exemption in PTE 77-3 recognizes that it would be "contrary to normal business practice for a company whose business is financial management to seek financial management services from a competitor." Notice of Proposed Rulemaking, Participant Directed Individual Account

Plans, 56 Fed. Reg. 10,724, 10,730 (Mar. 13, 1991). When it granted the class exemption, the DOL specifically found that permitting in-house plans to offer proprietary funds was "in the interests of plans and of their participants and beneficiaries." 42 Fed. Reg. at 18,734. Congress itself crafted a similar exemption for plan investments in proprietary group annuity contracts. *See* 29 U.S.C. § 1108(b)(5).

Courts have also acknowledged that plan fiduciaries reasonably may decide through a prudent and loyal process to rely on proprietary investment options and, consistent with that view, have ruled for defendants in a number of proprietary fund cases at various stages of the litigation. *See, e.g.*, *Evans*, 2022 WL 4638092, at *8 (dismissing proprietary fund claims); *Patterson*, 2019 WL 4934834, at *13 (same); *Patterson*, 2018 WL 748104, at *1 (same); *Meiners v. Wells Fargo & Co.*, 2017 WL 2303968, at *3 (D. Minn. May 25, 2017) (same), *aff'd*, 898 F.3d 820 (8th Cir. 2018); *Dorman v. Charles Schwab Corp.*, 2019 WL 580785, at *5-7 (N.D. Cal. Feb. 8, 2019) (dismissing in part proprietary fund claims); *Falberg v. Goldman Sachs Grp., Inc.*, 2022 WL 4280634, at *18 (S.D.N.Y. Sept. 14, 2022) (granting summary judgment for defendants on proprietary fund claims), *appeal docketed*, No. 22-2689 (2d Cir. Oct. 18, 2022); *Fuller v. SunTrust Banks, Inc.*, 2019 WL 5448206, at *29 (N.D. Ga. Oct. 3, 2019) (granting partial summary judgment for defendants); *Sims v. BB&T Corp.*, 2018 WL 3128996, at *13 (M.D.N.C. June 26, 2018) (same); *Wildman*, 362 F. Supp. 3d 685, 706 (entering judgment for defendants in proprietary fund suit following bench trial); *Dupree*, 2007 WL 2263892, at *10-11 (same in case concerning use of proprietary investment vehicles in defined benefit plan).

In this context, it is not plausible to infer that a plan's fiduciaries lacked a prudent process for evaluating funds or made investment decisions for disloyal reasons simply because they decided to include proprietary funds in the plan menu—even if some other investment options

had lower fees or higher returns in a given period, as would be true for virtually any fund a plan's fiduciaries could have selected. *See, e.g.*, *Evans*, 2022 WL 4638092, at *7; *Dorman*, 2019 WL 580785, at *5-7; *see also Fifth Third Bancorp v. Dudenhoeffer*, 573 U.S. 409, 425 (2014) (instructing that courts should apply "careful, context-sensitive scrutiny of a complaint's allegations" when considering motions to dismiss in ERISA fiduciary breach suits). A plaintiff must plead something more to "nudge[]" a proprietary fund claim "across the line from conceivable to plausible." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007).

III. Permitting ERISA Claims To Proceed To Discovery Based On Little More Than The Fact That The Plan Includes Proprietary Funds Would Encourage Costly Repeat Litigation And Pressure Fiduciaries To Avoid Investment Options The DOL Has Recognized Benefit Participants

If unremarkable allegations about the fees and performance of proprietary funds are enough to survive a motion to dismiss, financial services companies will remain targets for ERISA litigation as long as they continue to offer proprietary funds in their retirement plans—a dynamic that will harm plan participants.

Over the last decade, dozens of major financial companies have entered settlements to resolve proprietary fund suits, at a collective cost of hundreds of millions of dollars.[4] The pressure to settle is strong, particularly if claims are permitted to proceed to discovery. "[T]he

[4] *See, e.g.*, *Fuller v. SunTrust Banks, Inc*, No. 1:11-cv-00784-ODE, ECF No. 288-1 (N.D. Ga. Mar. 11, 2020) ($29 million); *Sims v. BB&T Corp*., No. 1:15-cv-00732-CCE-JEP, ECF No. 436-2 (M.D.N.C. Nov. 30, 2018) ($24 million); *Moreno v. Deutsche Bank Americas Holding Corp*, No. 1:15-cv-09936-LGS, ECF No. 322-1 (S.D.N.Y. Aug. 14, 2018) ($21.9 million); *In re M&T Bank Corp. ERISA Litig.*, No. 1:16-cv-00375-FPG-JJM, ECF No. 159-1 (W.D.N.Y. Dec. 26, 2019) ($20.85 million); *Bekker v. Neuberger Berman Grp. LLC*, No. 1:16-cv-06123-LTS-BCM, ECF No. 132-1 (S.D.N.Y. June 10, 2020) ($17 million); *Baker v. John Hancock Life Ins. Co. (U.S.A.)*, No. 1:20-cv-10397-RGS, ECF No. 64-1 (D. Mass June 1, 2021) ($14 million); *Brotherston v. Putnam Invs., LLC*, No. 1:15-cv-13825-WGY, ECF No. 215-1 (D. Mass Apr. 17, 2020) ($12.5 million); *Urakhchin v. Allianz Asset Mgmt. of Am., L.P.*, No. 8:15-cv-1614-JLS-JCG, ECF No. 174-3 (C.D. Cal. Dec. 26, 2017) ($12 million); *Karpik v. Huntington Bancshares, Inc*, No. 2:17-cv-01153-MHW-KAJ, ECF No. 67-3 (S.D. Ohio Aug. 7, 2020) ($10.5 million).

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[.]" *PBGC ex rel. St. Vincent Catholic Med. Ctrs. Ret. Plan v. Morgan Stanley Inv. Mgmt. Inc.*, 712 F.3d 705, 719 (2d Cir. 2013); *see* Jacklyn Wille, *Spike in 401(k) Lawsuits Scrambles Fiduciary Insurance Market*, Bloomberg Law (Oct. 18, 2021), https://bit.ly/3mTtP65 ("[T]his litigation is very, very expensive." (quotation omitted)). Even if defendants are otherwise willing to shoulder the costs of litigation, the plaintiffs' bar often claims astronomical damages based on hindsight performance comparisons, and many defendants (and their insurers) are ultimately unwilling to risk even a small chance of incurring massive liability if they litigate the claims through trial.

The stakes are especially high for financial institutions confronted with claims challenging the inclusion of proprietary funds in their plans. Proprietary fund litigation presents a unique reputational risk given that it implicates the defendants' core business functions by calling into question the quality of a company's investment products and the suitability of those vehicles for retirement investing. That dynamic drives settlement figures up beyond what is typical for other ERISA fiduciary breach suits, and substantial settlement figures only further incentivize the plaintiffs' bar to keep bringing proprietary fund claims, no matter how weak those claims may be on the merits. *See What DC Plan Sponsors Should Know About Recent Litigation Trends: Part 1, supra* (reporting on analysis that found the average settlement for ERISA lawsuits involving proprietary funds was 2.5x that for suits involving large plans without proprietary funds).

As this case illustrates, even a multi-million dollar settlement payment may not be enough to secure peace for very long. In 2016, MassMutual paid $30.9 million to settle the *Gordan* litigation which, like this case, alleged ERISA violations based in part on the inclusion

of MassMutual funds in the Plan. *See* Compl. ¶¶ 32, 34; Mot. to Dismiss Mem. at 4-5; Class Action Settlement Agreement, *Gordan v. Mass. Mut. Life Ins. Co.*, No. 13-cv-30184-MAP, ECF No. 107-2 (D. Mass. June 15, 2016). Several other asset managers have also faced subsequent lawsuits after settling proprietary fund litigation. Just last month, plaintiffs filed a second proprietary fund suit against Allianz, which settled a previous case brought by the same plaintiffs' firm for $12 million in 2017. *See* Compl., *Rocke v. Allianz Asset Mgmt. of Am., L.P.*, No. 8:23-cv-00098-CJC-KES, ECF No. 1 (C.D. Cal. Jan. 17, 2023); Class Action Settlement Agreement, *Urakhchin v. Allianz Asset Mgmt. of Am., L.P.*, No. 8:15-cv-01614-JLS-JCG, ECF No. 174-3 (C.D. Cal. Dec. 26, 2017). In 2021, New York Life Insurance Company was sued over use of proprietary funds in its 401(k) plan, just four years after paying $3 million to settle claims regarding the inclusion of a proprietary S&P 500 index fund in the plan menu. *See* Compl., *Krohnengold v. N.Y. Life Ins. Co.*, No. 1:21-cv-01778-JMF, ECF No. 4 (S.D.N.Y. Mar. 3, 2021); Class Action Settlement Agreement, *Andrus v. N.Y. Life Ins. Co.*, No. 1:16-cv-05698-KPF, ECF No. 66-1 (S.D.N.Y. Feb. 14, 2017). Fidelity settled proprietary fund litigation in 2014 only to be hit with another lawsuit pressing similar claims in 2018. *See Moitoso v. FMR LLC*, 451 F. Supp. 3d 189, 198-99 (D. Mass. 2020).

Asset managers that have defeated fiduciary breach allegations in court have not been spared from subsequent suits: less than two years after the Eighth Circuit affirmed the dismissal of proprietary fund claims against Wells Fargo, *see Meiners*, 898 F.3d 820, Wells Fargo once again found itself the target of ERISA litigation based on the inclusion of Wells Fargo-managed funds in its 401(k) plan, *see* Compl., *Becker v. Wells Fargo & Co.*, No. 4:20-cv-01803-JST, ECF No. 1 (N.D. Cal. Mar. 13, 2020). The funds challenged in *Becker* included the same Wells Fargo target date strategies at issue in *Meiners*.

The threat of repeat litigation is widespread. Although defendants sometimes agree as part of a settlement to maintain a brokerage window or add unaffiliated options to a plan's core menu[5], settlements of proprietary fund claims typically do not bar future reliance on proprietary funds. *See, e.g.*, Mot. to Dismiss Mem. at 15 (discussing MassMutual settlement in *Gordan*). Indeed, some proprietary fund settlements explicitly contemplate the possibility that plan fiduciaries will continue to include at least some proprietary funds in the plan line-up.[6] A review of annual Form 5500 filings publicly available from the DOL's online database confirms that many financial services companies that have settled proprietary fund suits do in fact continue to offer proprietary funds in their in-house plan menus. While the fact that settlement agreements

[5] *See, e.g.*, *Anderson v. Principal Life Ins. Co.*, No. 15-cv-0119-JAJ-HCA, ECF No. 27 (S.D. Iowa June 30, 2015); *Brotherston v. Putnam Invs., LLC*, No. 1:15-cv-13825-WGY, ECF No. 215-1 (D. Mass Apr. 17, 2020); *Cervantes v. Invesco Holding Co. (US), Inc.*, No. 1:18-cv-02551-AT, ECF No. 83-3 (N.D. Ga. Mar. 9, 2020); *Cryer v. Franklin Res., Inc.*, No. 4:16-cv-04265-CW, ECF No. 156-1 (N.D. Cal. Feb. 15, 2019); *Dennard v. Aegon USA LLC*, No. 1:15-cv-00030-EJM-JSS, ECF No. 86 (N.D. Iowa May 20, 2016); *Feinberg v. T. Rowe Price Grp., Inc.*, No. 1:17-cv-00427-JKB, ECF No. 240-1 (D. Md. Feb. 22, 2022); *Richards-Donald v. Teachers Ins. & Annuity Ins. Assoc. of Am.*, No. 1:15-cv-08040, ECF No. 41-1 (S.D.N.Y. May 10, 2017); *Velazquez v. Mass. Fin. Servs. Co.*, No. 1:17-cv-11249-RWZ, ECF No. 91-1 (D. Mass. June 14, 2019).

[6] *See, e.g.*, *Cervantes v. Invesco Holding Co. (US), Inc.*, No. 1:18-cv-02551-AT, ECF No. 83-3 at 33 (N.D. Ga. Mar. 9, 2020) ("Defendants agree to modify the investment options offered through the Plan's self-directed investment account so that participants will be permitted to invest in non-proprietary Exchange Traded Funds ("ETFs"), in addition to the proprietary ETFs offered to Participants during the Class Period."); *Brotherston v. Putnam Invs., LLC*, No. 1:15-cv-13825-WGY, ECF No. 215-1 (D. Mass Apr. 17, 2020) (plan investment committee to meet regularly to review proprietary options in plan menu); *Krueger v. Ameriprise Fin., Inc.*, No. 11-02781-SRN-JSM, ECF No. 597-1 at 22 (D. Minn. Mar. 26, 2015) ("If affiliated collective trusts are used, Defendants shall continue to secure the lowest cost of participation offered to any other investor with the same or less assets to invest."); *In re M&T Bank Corp. ERISA Litig.*, No. 1:16-cv-00375-FPG-JJM, ECF No. 159-1 at 36-37 (W.D.N.Y. Dec. 26, 2019) (imposing various procedural requirements relating to proprietary funds); *Moreno v. Deutsche Bank Americas Holding Corp.*, No. 1:15-cv-09936-LGS, ECF No. 322-1 at 37-38 (S.D.N.Y. Aug. 14, 2018) (decisions relating to proprietary funds in the plan delegated to independent fiduciary); *Richards-Donald v. Teachers Ins. & Annuity Ins. Assoc. of Am.*, No. 1:15-cv-08040-PKC, ECF No. 41-1 at 43 (S.D.N.Y. May 10, 2017) (defendants agree to continue practice of not providing committee members with any compensation as a result of plan investment in proprietary options).

allowed for this result logically suggests a recognition that plans can offer proprietary funds consistent with ERISA's requirements, the plaintiffs' bar often points to little more than the presence of proprietary funds in a plan menu to allege ERISA violations. And lest there be any doubt about the plaintiffs' bar's intentions when it comes to repeat litigation, the complaint in this case asserts that the fact that there was prior litigation regarding the Plan's use of proprietary funds—litigation resolved through a settlement with no finding or admission of liability—lends support to "an inference of a broken and conflicted fiduciary process." Compl. ¶ 131.

Contrary to the complaint's self-serving view, it is if anything *less* plausible to infer an imprudent process where plan fiduciaries have weathered prior litigation, especially where, as here, the plan's fiduciaries agreed in a settlement to follow a particular process going forward. When MassMutual resolved the *Gordan* litigation, the defendants committed to measures such as performing a full review of all Plan investments with the assistance of an independent consultant; ensuring that all Plan investment options complied with the investment policy statement and documenting their process with respect to any investment options that triggered further review; and providing the Plan's fiduciaries with annual training on their fiduciary obligations. *See* Mot. to Dismiss Mem. at 5, 8-9; Class Action Settlement Agreement, *Gordan v. Mass. Mutual Life Ins. Co.*, No. 13-cv-30184-MAP, ECF No. 107-2 at 22-23 (D. Mass. June 15, 2016). Several other financial services companies have agreed to similar settlement terms.[7]

[7] *See, e.g.*, *Baker v. John Hancock Life Ins. Co. (U.S.A.)*, No. 1:20-cv-10397-RGS, ECF No. 64-1 (D. Mass June 1, 2021) (defendants to retain third-party investment consultant and develop IPS); *Brotherston v. Putnam Invs., LLC,* No. 1:15-cv-13825-WGY, ECF No. 215-1 (D. Mass Apr. 17, 2020) (defendants to maintain IPS and charter of duties and responsibilities of investment committee; meet regularly to review plan offerings; and arrange annual training on fiduciary duties); *Velazquez v. Mass. Fin. Servs. Co.*, No. 1:17-cv-11249-RWZ, ECF No. 91-1 (D. Mass. June 14, 2019) (defendants to retain third-party investment consultant); *Urakhchin v. Allianz Asset Mgmt. of Am., L.P.*, No. 8:15-cv-01614-JLS-JCG, ECF No. 174-3 (C.D. Cal. Dec. 26, 2017) (plan to retain unaffiliated investment consultant).

If the plaintiffs' bar is permitted to unlock the doors to discovery based on allegations about unexceptionable performance and fees of proprietary investment options, financial services companies will face a difficult choice: accept a never-ending threat of litigation as a cost of offering a retirement plan to their employees, or eliminate proprietary funds from their plan menus in the hope that doing so will make them a less attractive target for future litigation. Neither option serves participants' interests. If employers are regularly saddled with millions of dollars in litigation expenses (not to mention settlement payments), some may compensate by offering less generous plans—reducing their employer contributions, declining to cover administrative fees and costs when they otherwise would elect to do so, and reducing the services available to employees. And pressuring fiduciaries to abandon proprietary funds regardless of the funds' merits deprives participants of the potential benefits those funds have to offer—benefits the DOL specifically recognized when it created a prohibited transaction exemption permitting financial institutions to offer their employees the opportunity to invest in the same funds they help make available to other investors.

CONCLUSION

For the foregoing reasons, amicus urges the Court to apply the "careful, context-sensitive scrutiny" prescribed by the Supreme Court when evaluating whether plaintiff's allegations of imprudence and disloyalty based on the inclusion of proprietary funds in the Plan's investment menu state a plausible claim under ERISA. *Dudenhoeffer*, 573 U.S. at 425.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on February 7, 2023, I caused the foregoing to be filed with the Clerk of the Court for the United States District Court for the District of Massachusetts by using the court's CM/ECF system. All participants in the case are registered CM/ECF users, and service will be accomplished by the CM/ECF system.

/s/ Gregory J. Comeau