No. 22-2552

IN THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

ROBERT MATOR; NANCY MATOR, individually and as representatives of a class of participants and beneficiaries in and on behalf of WESCO Distribution, Inc. Retirement Savings Plan,

Plaintiffs-Appellants,

v.

WESCO DISTRIBUTION, INC.; THE ADMINISTRATIVE AND INVESTMENT COMMITTEE FOR WESCO DISTRIBUTION, INC. RETIREMENT SAVINGS PLAN; JOHN AND JANE DOES 1-30,

Defendants-Appellees.

On Appeal from the United States District Court
for the Western District of Pennsylvania
No. 2:21-cv-00403 (Hon. Marilyn J. Horan)

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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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); *Sweda v. Univ. of Pa.*, 923 F.3d 320 (3d Cir. 2019).

SUMMARY OF THE ARGUMENT

This case is just one in a series of ERISA class-action complaints designed to extract costly settlements. The list continues to grow, with over 200 lawsuits filed since 2019 against employers in every industry—including 88 cases filed in 2022

[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.

alone.[2] And numerous employers have succumbed to the enormous settlement pressure, making costly, and often unnecessary, agreed-upon structural changes to their plan—only to be sued again by plaintiffs claiming that the changes were not enough.[3]

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.[4] In many of these cases, including this one, the complaint contains no allegations about the fiduciaries' decisionmaking process—the key element in an ERISA fiduciary-breach claim. *See Renfro v. Unisys Corp.*, 671 F.3d 314, 322, 324-25 (3d Cir. 2011). Instead, the complaint offers allegations, made with the benefit of 20/20 hindsight, that plan fiduciaries failed to select the cheapest funds or cheapest recordkeeping option, often using inapt comparators to try to advance the point. *See,*

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[2] *See* Jacklyn Willie, *Suits Over 401(k) Fees Nab $150 Million in Accords Big and Small*, Bloomberg Law (Aug. 23, 2022), https://bit.ly/3Uel7y5; Daniel Aronowitz, *The Key Fiduciary Liability Storylines of 2022* (January 10, 2023), http://bit.ly/3Hn8FbH.

[3] *See, e.g.*, Greg Iacurci, *MassMutual Settles 401(k) Suit with Its Employees for $31 million*, InvestmentNews (June 13, 2016), https://bit.ly/3kFDIqq; Robert Steyer, *MassMutual Sued for Alleged ERISA Violations in Its 401(k) Plan*, Pensions&Investments (Nov. 11, 2022), https://bit.ly/3HukqgI; Robert Steyer, *Allianz 401(k) Plan Sued for ERISA Violations over Proprietary Investments*, Pensions&Investments (Jan. 19, 2023), https://bit.ly/3Dfglui.

[4] *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").

e.g., Appx2141-2145 (¶¶ 102-109). Then, the plaintiffs ask the court to "infer that the Plan fiduciaries failed to follow a prudent process" for selecting and monitoring the plan's investment line-up. Appx2150 (¶ 127).

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—meaning, under *Twombly*, that 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. The Supreme Court has specifically instructed courts to apply "careful, context-sensitive scrutiny" in ERISA cases 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. Plaintiffs in this case effectively seek a diluted pleading standard that would authorize discovery based on conclusory assertions that a fiduciary's decisionmaking process is deficient coupled with suggestions of alternative decisions that, with the benefit of hindsight, allegedly could have turned out more profitably for plan participants.

This standard could be met in virtually every case because it is *always* possible to identify a purportedly "better" fund or recordkeeping option when plaintiffs consider only a single metric (here, cost). But it is universally understood (and the Department of Labor has instructed fiduciaries[5]) that fiduciaries must consider a constellation of factors in making investment decisions—not just cost. 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

[5] U.S. Dep't of Labor, *A Look at 401(k) Plan Fees* 1 (Sept. 2019) (*A Look at Fees*), https://bit.ly/3ZYYlhp.

them, these suits push plan sponsors and fiduciaries into a corner, pressuring them to make decisions based solely on cost, rather than taking into account which options make the most sense for the plan as a whole.

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. And some may prefer a combination of all to diversify their investments. 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.[6]

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.[7] Under a fixed-fee structure, lower-balance employees (often with lower incomes), who already face greater barriers to building retirement

[6] 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*").

[7] 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.[8] 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 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

[8] *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 requires 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 9,000 mutual funds alone,[9] 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. There are likewise hundreds of different options for arrangements with service providers, varying based on the needs of the plan, the services offered, and the fee structure.

Thus, while ERISA plaintiffs often try to challenge fiduciaries' decisions to offer specific investment options by pointing to less expensive alternatives and then suggesting that the fiduciaries *must have* had an inadequate decisionmaking process—just as Plaintiffs here assert, *e.g.*, Appx2150 (¶ 127)—that is not how the prudence standard operates. There will always be an option with lower fees, just as there will always be an option with higher fees. 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.

[9] Investment Company Institute, Investment Company Fact Book 40 (62nd ed. 2022), https://bit.ly/3KIvvd9.

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). Thus, applying Rule 8(a) to ERISA claims requires a close evaluation of "the circumstances … prevailing at the time the fiduciary acts" and a "careful, context-sensitive scrutiny of a complaint's allegations." *Fifth Third*, 573 U.S. at 425. "[C]ategorical rules" have no place in this analysis—particularly because, as the Supreme Court has recognized, "the circumstances facing an ERISA fiduciary will implicate difficult tradeoffs, and courts must give due regard to the range of reasonable judgments a fiduciary may make based on her experience and expertise." *Hughes*, 142 S. Ct. at 742. If anything, the discretion and flexibility ERISA affords should make pleading through hindsight-based circumstantial allegations *more* difficult, not less.

Here, Plaintiffs concededly do not allege any facts regarding the defendants' decisionmaking process. Appx2150 (¶ 127). They suggest instead that the district court should have *inferred* an imprudent process based on a single metric—cost—even if there are obvious alternative explanations for the plan's line-up and recordkeeping arrangement that are entirely consistent with a prudent fiduciary decisionmaking process. This proposed approach is not the law. For complaints

that lack direct allegations of wrongdoing, courts must probe the circumstantial factual allegations to determine if they plausibly suggest wrongdoing, or are simply a pretext for a fishing expedition. As the Supreme Court recently confirmed, ERISA claims are treated no differently.

A. Under *Hughes*, claims that rely on inferences of wrongdoing from circumstantial facts must allege something more than allegations that are equally consistent with lawful behavior.

The Supreme Court could not have made clearer in its recent *Hughes* decision that *Twombly* and *Iqbal* apply with full force in ERISA cases. Prior to *Hughes*, this Court appeared to adopt the position that ERISA claims were exempt from the plausibility pleading requirement established by Rule 8(a), *Twombly*, and *Iqbal*. *See Sweda*, 923 F.3d at 326 ("declin[ing] to extend" *Twombly* to ERISA claims); *see also Sacerdote v. New York Univ.*, 9 F.4th 95, 108 n.47 (2d Cir. 2021) (citing *Sweda* as "rejecting" the application of *Twombly* "to ERISA complaints"). *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 another option ultimately performs better 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.

This standard is not new. Indeed, there are numerous areas of the law in which this Court has already applied this method to assess whether circumstantial factual allegations are sufficient to allege wrongdoing, and thereby satisfy the pleading standards set forth in *Twombly* and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). Take antitrust, for example. In *Burtch v. Milberg Factors, Inc.*, 662 F.3d 212 (2011), this Court considered whether the plaintiffs' "circumstantial" allegations "plausibly show[ed] the existence of" a conspiratorial agreement among companies that financed purchase and sale transactions between garment retailers. *Id.* at 226. The Court scrutinized each allegation, evaluating whether it was "just as much in line with a wide swath of rational and competitive business" decisions. *Id.* at 227 (quotation marks omitted). And the Court ultimately affirmed the district court's dismissal of the complaint, noting that the "defendants' parallel conduct 'was not only compatible with, but indeed was more likely explained by, lawful, unchoreographed free-market behavior.'" *Id.* at 228 (quoting *Iqbal*, 556 U.S. at 680 (explaining *Twombly*)).

In *Sweda*, this Court rejected this standard as "specific to antitrust cases." 923 F.3d at 326. But this Court—and a series of circuits—have already extended this standard far beyond antitrust: in First Amendment retaliation cases, *e.g.*, *George v. Rehiel*, 738 F.3d 562 (3d Cir. 2013); civil-rights cases, *e.g.*, *Santiago v. Warminster Township*, 629 F.3d 121 (3d Cir. 2010); and RICO cases, *e.g.*, *Eclectic Props. E., LLC v. Marcus & Millichap Co.*, 751 F.3d 990 (9th Cir. 2014), to name just a few. In each of these contexts, when the plaintiffs failed to provide any direct allegations for a foundational element of the claim, this Court carefully reviewed the circumstantial factual allegations and did not hesitate to order or affirm dismissal when the allegations did not support a plausible inference of wrongdoing. *See, e.g.*, *George*, 738 F.3d at 583 (allegations are insufficient where it "seems just as likely" that the challenged action arose from lawful behavior); *see also In re Century Aluminum Co. Sec. Litig.*, 729 F.3d 1104, 1108 (9th 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 …."). As the Supreme Court stated expressly in *Hughes*, these same rules must apply to ERISA claims.

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

Plaintiffs' allegations in this case provide a perfect example of the removed-from-context speculation on which ERISA plaintiffs regularly rely.

1. Recordkeeping Fees—Like many ERISA complaints, Plaintiffs' complaint seeks an inference of a deficient process based on allegations that the Plan's recordkeeping fees were "excessive." *See, e.g.*, Appx2138 (¶ 96); Appx2149 (¶ 120); Appx2150 (¶ 27). Plaintiffs' allegations do not push their claim over the line from possibility to plausibility.

First, fees are only "one of several factors" fiduciaries "need to consider in deciding on service providers."[10] And "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 v. Deere & Co.*, 556 F.3d 575, 586 (7th Cir. 2009). The fee arrangement of any plan or even a subset of plans indicates little about whether an arrangement is reasonable for the plan whose fiduciaries are being sued, much less plausibly suggests that the fiduciaries' decision-making *process* is imprudent. *See PBGC ex rel. St. Vincent Catholic Med. Ctrs. Ret. Plan v. Morgan Stanley Inv. Mgmt. Inc.*, 712 F.3d 705, 716 (2d Cir. 2013) (standard of

[10] *DOL, Meeting Your Fiduciary Responsibilities* 5 (2020), https://bit.ly/3JNWgMp. And in the investment context, as elsewhere, "cheaper is not necessarily better."

prudence "focus[es] on a fiduciary's conduct in arriving at an investment decision, not on its results"). Cost in isolation does not suggest that the "fees were high in relation to the services that the plan provided," or otherwise "could not be justified by the plan's strategic goals relative to their selected comparators." *Forman v. TriHealth, Inc.*, 40 F.4th 443, 449 (6th Cir. 2022). Courts thus routinely dismiss claims that allege that cheaper pricing was available, but fail to account for the service level. *See Singh v. Deloitte LLP*, 2023 WL 186679, at *2 (S.D.N.Y. Jan. 13, 2023); *see also Albert v. Oshkosh Corp.*, 47 F.4th 570, 579 (7th Cir. 2022); *Matousek v. MidAmerican Energy Co.*, 51 F.4th 274, 280 (8th Cir. 2022); *Gonzalez v. Northwell Health, Inc.*, 2022 WL 4639673, at *1 (E.D.N.Y. Sept. 30, 2022); *Perkins v. United Surgical Partners Int'l, Inc.*, 2022 WL 824839, at *6 (N.D. Tex. Mar. 18, 0222).

Moreover, plaintiffs can easily cherry-pick historical data to make a fiduciary's choices look suboptimal given the wide range of recordkeeping services available, at a wide variety of price points, that hundreds of thousands of ERISA-governed retirement plans have negotiated. When plaintiffs' attorneys zero in on a single metric for comparison—here, recordkeeping fees—they will *always* be able to find a supposedly "better" option in their preferred time period. This case is a perfect example: Plaintiffs focus on *one year* of fees, out of almost eight total, with no discussion of how these fees changed over time, or how the Plan's fees compared

to the selected comparators during a different year altogether. Appx2141-2142 (¶ 102).

These allegations do not support a plausible inference of imprudence, particularly where, as here, the plaintiffs' comparator plans are entirely inapt. *See, e.g.*, *Smith v. CommonSpirit Health*, 37 F.4th 1160, 1169 (6th Cir. 2022) (plaintiff failed "to give the kind of context that could move [her recordkeeping] claim from possibility to plausibility"). Because neither recordkeepers nor recordkeeping services are interchangeable widgets, "the key to stating a plausible excessive-fees claim is to make a like-for-like comparison." *Matousek*, 51 F.4th at 279. Recordkeeping services are highly customizable depending on, for example, the needs of each plan, the size and features of its participant population, the capabilities and resources of the plan's administrator, and the sponsor's human-resources department. Here, Plaintiffs acknowledge that recordkeeping fees can vary based on plan size, *see* Appx2111 (¶ 10), but still selected comparators that vary widely across both the number of participants and the assets under management. *See* Appx2140-2144 (¶¶ 98, 102, 106). Moreover, myriad services are available at different fee levels, among them core operational services, participant communication, participant education, brokerage windows, loan processing, and

compliance services.[11] And fee arrangements between plans and recordkeepers are often extraordinarily complicated, with many ways compensation can be structured. Taken together, these factors demonstrate that Plaintiffs' "price tag to price tag" approach is particularly unhelpful. Appx20.[12]

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-

[11] *See, e.g.*, Sarah Holden et al., *The Economics of Providing 401(k) Plans: Services, Fees, and Expenses, 2020*, at 4, ICI Research Perspective (June 2021), https://bit.ly/3vnbCU3.

[12] Plaintiffs' allegations fail of their own accord, but Plaintiffs are in fact inflating the recordkeeping fee by focusing solely on the Form 5500, and, as Defendants explain in their brief (at 42 n.6), double-counting the compensation the Plan's recordkeeper received. Other courts have rejected plaintiffs' efforts to avoid looking at the actual recordkeeping fees listed in their own participant-fee disclosures and instead to rely misleadingly on DOL filings that typically aggregate numerous different types of fees together. *See Matousek*, 51 F.4th at 279. This Court should do so as well.

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 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 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

[13] *See Deloitte Benchmarking Survey* 20.

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.

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]

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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).

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, 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.* DOL, *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."[19] Now fiduciaries overwhelming choose purportedly "'safe' funds over those that could add greater value."[20]

This dynamic also has upended the fiduciary-insurance industry.[21] 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,

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[19] 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) at 5, https://bit.ly/3fUxDR1.

[20] *Id.*

[21] 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).

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.[22]

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 clarify that *Hughes* abrogated *Sweda* to the extent *Sweda* holds that ERISA allegations are subject to a lower pleading standard.

[22] Recent legislation reflects Congress's ongoing efforts to facilitate employer-sponsored retirement plans. The Setting Every Community Up for Retirement Enhancement Act of 2019 ("SECURE") increases the tax incentives available for small employers that sponsor eligible employer plans and creates a structure for pooled employer plans, allowing unrelated employees to join together to participate in a single defined contribution plan. *See* Public L. 116-94, 133 Stat. 2534 (2019), §§ 101, 104-105. Likewise, SECURE 2.0, enacted as part of the 2023 Consolidated Appropriations Act, increases the credits available to small employers and implements measures to ease administrative burdens. *See, e.g.*, Public L. 117-328, H.R. 2617 (2022), § 102 ("Modification of credit for small employer pension plan start-up costs"), § 320 ("Eliminating unnecessary plan requirements related to unenrolled participants"), § 341 ("Consolidation of defined contribution plan notices"). These lawsuits undermine Congress's goal of expanding the number of employees who are able to participate in retirement plans.

CONCLUSION

This Court should affirm the judgment below.

Respectfully submitted,

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This brief complies with the type volume limitations of Federal Rules of Appellate Procedure 29(a)(5) and 32(a)(7)(B) because it contains 6,127 words, excluding the parts exempted by Rule 32(f).

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I, Jaime A. Santos, hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Third Circuit by using the appellate CM/ECF system on January 30, 2023. The text of the electronic brief is identical to the text of the paper copies delivered to the Court.

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CERTIFICATE OF ADMISSION TO BAR

Pursuant to L.A.R. 46.1(e), the undersigned certifies that she is a member of the bar of the United States Court of Appeals for the Third Circuit.

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