EXHIBIT A

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION

ELECTRONICALLY FILED

KENA MOORE, TIMOTHY K. SWEENEY, RUSSEL A. HOHMAN, SUSAN M. SMITH and VERONICA CARGILL, individually and on behalf of all others similarly situated,

Plaintiffs,

v.

HUMANA INC., THE BOARD OF DIRECTORS OF HUMANA INC., THE HUMANA RETIREMENT PLANS COMMITTEE and JOHN DOES 1-30,

Defendants.

Civil Action No. 3:21-cv-00232-RGJ

BRIEF OF AMICUS CURIAE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS PLAINTIFFS' FIRST AMENDED COMPLAINT

Cory J. Skolnick
FROST BROWN TODD LLC
400 West Market Street, 32nd Floor
Louisville, KY 40202
(502) 568-0254
cskolnick@fbtlaw.com

William M. Jay (*pro hac vice pending*)
Jaime A. Santos (*pro hac vice pending*)
GOODWIN PROCTER LLP
1900 N Street, NW
Washington, DC 20036
(202) 346-4000
wjay@goodwinlaw.com
jsantos@goodwinlaw.com

Counsel for Amicus Curiae

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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, representing approximately 300,000 direct members and indirectly representing the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. Many of the Chamber's members maintain or provide services to ERISA-governed retirement plans. The Chamber regularly participates as amicus curiae in ERISA cases, including those addressing the standard for pleading fiduciary-breach claims based on circumstantial allegations. The Chamber submits this brief to aid the Court's consideration of Defendants' motion to dismiss by providing context on recent trends in ERISA litigation and how this case is situated in the broader litigation landscape.

INTRODUCTION

This case is one of many in a recent surge of class actions challenging the management of employer-sponsored retirement plans. This explosion in litigation is not "a warning that retirees' savings are in jeopardy." Daniel Aronowitz, *Exposing Excessive Fee Litigation Against America's Defined Contribution Plans* 3, Euclid Specialty (Dec. 2020), https://bit.ly/3hNXJaW ("*Excessive Fee Litigation*"). To the contrary, "in nearly every case, the asset size of many of these plans being sued has increased—often by billions of dollars"—over the course of the last decade. *Id.* Nevertheless, converting subpar allegations into settlements has proven a lucrative endeavor—mostly for the lawyers bringing these lawsuits, though, rather than the plan participants they purport to represent.

The lawsuits typically follow a familiar playbook, often with copycat complaints that cut and paste pages and pages of identical assertions about the nature of fiduciary obligations, recycling them verbatim from prior pleadings. Using the benefit of hindsight, these lawsuits second-guess the decisions of plan fiduciaries across the country. The complaints point to occasional periods of underperformance of certain funds or note that other alternative, lower-fee options were available (among tens of thousands of options offered in the investment marketplace). They typically do not allege that the plan fiduciaries used a flawed process in making their decisions, but instead ask courts to infer that plan sponsors must have breached their fiduciary duties because they did not choose these alternative investments for their plan line-up. Plaintiffs' attorneys then exploit the perceived complexity of ERISA's statutory scheme to barrel past the motion-to-dismiss stage, resisting dismissal by claiming a dispute of fact even where their conclusory allegations are belied by publicly available data regarding performance and fees, or even by their own allegations in other lawsuits. At that point, plan sponsors too often face the no-win scenario of dealing with expensive and intrusive discovery or settling a case with large damage requests but minimal merit.

No plan, regardless of size or type, is immune from this type of challenge. It is *always* possible for plaintiffs' attorneys to use the benefit of hindsight to identify, among the almost innumerable options available in the marketplace, a better-performing or less-expensive investment option or service provider than the ones chosen by plan fiduciaries—which, plaintiffs in these lawsuits generally allege, is all they need to open the doors to discovery.

This surge of litigation has significant negative consequences for plan participants. The suits pressure fiduciaries to limit investments to a narrow range of options at the expense of providing a diversity of choices with a range of fees, fee structures, risk levels, and potential performance upsides, as ERISA expressly encourages. And given the plaintiffs' often single-minded emphasis on cost, fiduciaries may forgo recordkeeping packages that include popular and much-needed financial education, and instead elect only barebones recordkeeping services. These suits thus elevate the cost-above-all mantra of plaintiffs' lawyers—despite the Department of Labor's (DOL) admonition that fees should be only "one of several factors" in fiduciary decisionmaking. DOL, *A Look at 401(k) Plan Fees* 1 (Sept. 2019), https://bit.ly/3fP8vuH (*401(k) Plan Fees*). Moreover, the increase in litigation has led to a cascade of changes in the insurance marketplace, requiring plan sponsors to, at a minimum, shell out much more for liability insurance, which has also become more difficult to procure. This increased cost—compounded by a significantly increased litigation risk—works to the detriment of employees seeking to save for retirement. For larger employers, those additional funds must come from somewhere, often in place of more generous employer contributions; for smaller employees, the increased cost and risk could make sponsoring a retirement plan cost prohibitive. In short, many of these suits will, if successful, simply inflate the costs of establishing and administering a plan—something that is entirely voluntary. That is precisely what Congress sought to avoid in crafting ERISA. *See Conkright v. Frommert*, 559 U.S. 506, 517 (2010).

Given this context, and the relative ease of cherry-picking data in an attempt to manufacture a factual dispute involving literally any plan, it is critical that courts do not shy away from the "careful, context-sensitive scrutiny of [the] complaint's allegations" the Supreme Court has instructed courts to undertake in ERISA cases. *Fifth Third Bancorp v. Dudenhoeffer*, 573 U.S. 409, 425 (2014). When a plaintiff does not present any direct allegations of wrongdoing but instead relies entirely on circumstantial allegations that are "just as much in line with" plan fiduciaries' having acted through a prudent fiduciary process, dismissal is appropriate. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 554 (2007).

ARGUMENT

I. This case is one of hundreds of recent copycat ERISA class actions filed by just a handful of law firms.

The last 15 years have seen a surge of ERISA litigation. *See*, *e.g.*, 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 rise in 401(k) complaints from 2010 to 2017). What began as a steady increase has exploded in the past 18 months, culminating in over 100 excessive-fee suits in 2020—a five-fold increase over the prior year—and many additional lawsuits filed this year. *See Understanding the Rapid Rise in Excessive Fee Claims* 2, AIG, https://bit.ly/3k43kt8 ("*Rapid Rise in Excessive Fee Claims*"). Many of these challenges allege that plan fiduciaries breached their fiduciary duties under ERISA through some combination of failing to select lower-cost or higher-performing investment options and (like this case) failing to control recordkeeping costs. *See* First Am. Compl. ¶¶ 54-57. Other common allegations include providing plan members with too few investment options, or with too many investment options; using a revenue-sharing approach[1] to pay for recordkeeping services, or not doing so; failing to remove investments when they begin underperforming; and using "bundled" arrangements that offer both recordkeeping services and investment options from an affiliate of the recordkeeper. *See infra*, p. 11 nn.5-12. These claims do not reflect a change in plan management in these areas; to the contrary, they "attack … commonplace and longstanding"

[1] Revenue-sharing arrangements typically require mutual fund service providers to share some portion of the investment-management fees they collect with the plan's administrative service provider. *See* DOL, Advisory Op. 1997-15A, at 1-2 (May 22, 1997), https://bit.ly/3sAjhLo; DOL, *Report of the Working Group on Fiduciary Responsibilities and Revenue Sharing Practices* (June 18, 2009), https://bit.ly/3AVlcgr (describing a revenue-sharing arrangement between a mutual fund and a 401(k) service provider). This sharing of fees reflects the reality that, for plan investments, the plan's service provider performs many of the administrative services that otherwise would have to be performed by the mutual fund's service provider.

retirement-plan practices. *Excessive Fee Litigation* 3.

Likewise, these claims generally do not develop organically based on the details of a particular plan, but rather are often advanced as prepackaged, one-size-fits-all challenges. Lawyers frequently find a plan sponsor to sue, advertise for current or former employees willing to serve as plaintiffs, and pursue the litigation, often with minimal communication with their clients during the process. A suit challenging Anthem's 401(k) plan is typical: The named plaintiffs had no preexisting concerns about their plan and sued their employer solely in response to advertisements from class counsel. *See* Depo. Tr. 50:8-23, *Bell v. ATH Holding Co. LLC*, No. 1:15-cv-02062-TWP-MPB (S.D. Ind.), ECF No. 123-1; *id.*, ECF No. 123-4, at 16:25-17:22 (employee became a plaintiff after "read[ing] an advertisement … on Facebook" and had not previously "been dissatisfied with the Anthem 401(k) plan").

This tactic is being carried out by a handful of firms, and just five firms were responsible for the vast majority of 401(k) litigation in 2020. *See* Ilana Polyak, *401(k) Lawsuits on the Rise as Participants Target Fees, Conflicts of Interest and Data Privacy*, Benefits Pro (Jan. 21, 2021), https://bit.ly/3oPGIP2. Not surprisingly, then, while plans vary widely based on the particular employer and the needs of its employees, the complaints are highly similar. *Excessive Fee Litigation* 10. A challenge to the University of Miami's retirement 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-DPG (S.D. Fla.), ECF No. 16.

Given the number of employer-sponsored retirement plans, there is an almost endless supply of possible defendants.[2] While plaintiffs' attorneys initially focused on large 401(k) plans sponsored by Fortune 500 companies, they have recently expanded to new territory. Judy Greenwald, *Litigation Leads to Hardening Fiduciary Liability Market*, Business Insurance (Apr. 30, 2021), https://bit.ly/3ytoRBX ("*Hardening Fiduciary Liability Market*"). Universities became (and remain) a popular target, with a single law firm in St. Louis filing a "wave" of suits targeting university 403(b) plans. Heather Salko, *ERISA Litigation Targets Higher Education Retirement Plans*, United Educators, https://bit.ly/3yWhjYm. In 2021, lawsuits began to target hospitals and health systems—whose resources are particularly stressed in the pandemic environment. *See, e.g.*, *Holmes v. Baptist Health S. Fla., Inc.*, No. 1:21-cv-22986 (S.D. Fla.), ECF No. 1 (filed Aug. 17, 2021); *Garnick v. Wake Forest Univ. Baptist Med. Center*, No. 1:21-cv-00454-WO-JLW (M.D.N.C.), ECF No. 1 (filed June 4, 2021).

Most recently, plaintiffs' attorneys have moved on to smaller 401(k) plans, including those with under $100 million in assets or fewer than 1,000 participants. *See Rapid Rise in Excessive Fee Claims* 2; *see also* Robert Steyer, *Sponsors Rocked by Fiduciary Insurance Hikes*, Pensions & Investments (Sept. 20, 2021), https://bit.ly/39W996Y ("*Fiduciary Insurance Hikes*") (noting that 20% of the excessive-fee suits filed from January 2020 to August 2021 were filed against plans with under $500 million in assets). In 2020, for example, CDI Corporation—an engineering firm with fewer than 1,000 employees—was hit with an ERISA class action challenging the management of its $263 million 401(k) plan. *See* Compl. ¶ 6, *Crawford v. CDI Corp.*, No. 2:20-cv-3317-CFK (E.D. Pa.), ECF No. 16. The plaintiffs sued in an outlier circuit that has expressly "decline[d] to extend" the *Twombly* pleading standard to ERISA cases. *Sweda v. Univ. of Penn.*,

[2] There are 588,499 401(k) plans in the United States. DOL, *Private Pension Plan Bulletin Historical Tables and Graphs 1975-2018* 25 (Jan. 2021), https://bit.ly/36C3pOi.

923 F.3d 320, 326 (3d Cir. 2019). Shortly after the suit was filed, the case settled for $1.8 million. *See Crawford*, ECF No. 37-1, at 1.

II. This wave of litigation was precipitated by attorneys' success in surviving dismissal and extracting large settlements regardless of the merits of the underlying claims.

Plaintiffs' attorneys' incentives to file these lawsuits can be attributed in large part to two related factors. First, they have become adept at using ERISA's perceived complexity to evade dismissal, regardless of the quality of the allegations. Second, given the cost of discovery and the inflated damages figures advanced by plaintiffs' experts, there is often substantial pressure to settle if a case survives dismissal—again, regardless of the merits. As a result, plaintiffs' attorneys have been able to turn copycat allegations into lucrative paydays with plans of all shapes and sizes.

A. Plaintiffs' attorneys often manufacture factual disputes to avoid dismissal.

The shared problem with these lawsuits is exemplified by a feature that appears in the vast majority of the complaints. Plaintiffs' attorneys typically create a chart purporting to compare some of the investment options in the plan under attack to various other investment options available on the market that allegedly out-performed or had lower fees than the plan's options during a cherry-picked time period. *See, e.g.*, First Am. Compl. ¶ 72. They then use the chart to barrel past dismissal, asking the Court to infer that plan fiduciaries must have been asleep at the wheel and requesting discovery to prove it. This approach is both legally and factually flawed: legally flawed because it employs the wrong standard for evaluating prudence, and factually flawed because it is all too easy to manipulate data to make any investment option appear to be under-performing or overly expensive.

Courts have long recognized that ERISA "requires prudence, not prescience." *DeBruyne v. Equitable Life Assurance Soc'y*, 920 F.2d 457, 465 (7th Cir. 1990). As a result, the "central aim of ERISA's investment prudence standard is to police the *means* by which fiduciaries carry out their duties, and not to scrutinize the *substantive outcomes* of their decisions." *Brown v. Daikin Am., Inc.*, No. 18-cv-11091 (PAC), 2021 WL 1758898, at *6 (S.D.N.Y. May 4, 2021). These lawsuits, in contrast, typically rest on allegations that focus entirely on *substantive outcomes*, such as investment performance judged in hindsight. Rather than asking the court to evaluate fiduciaries' actions "based upon information available to the fiduciary at the time of each investment decision," they instead often improperly operate "from the vantage point of hindsight," selectively using data to craft an argument based on a snapshot of the investment option's historical performance. *PBGC ex rel. St. Vincent Catholic Med. Ctrs. Ret. Plan v. Morgan Stanley Inv. Mgmt. Inc.*, 712 F.3d 705, 716 (2d Cir. 2013).

This oversimplified approach is particularly problematic because plaintiffs' attorneys can easily cherry-pick historical data to make a fiduciary's choices look suboptimal given the effectively infinite combination of comparator investment options and time periods. Take the federal Thrift Savings Plan ("TSP"), typically held out as the "gold standard" for retirement plans, and regularly used by plaintiffs as a comparator to argue that an investment underperformed or had excessive fees. *See, e.g., Brotherston v. Putnam Invs., LLC,* Appellants' Br., No. 17-1711, 2017 WL 5127942, at *23 (1st Cir. Nov. 1, 2017) (describing TSP as "a quintessential example of a prudently-designed plan"); *see also* Thrift Savings Plan, Tex. State Sec. Bd., https://bit.ly/3wE4MXA ("The TSP is considered the gold standard of 401(k)s because it charges extremely low fees and offers mutual funds that invest in a cross-section of the stock and bond markets.").[3] But even the TSP could be made to look like a mismanaged plan by cherry-picking

[3] The TSP is a particularly inapt exemplar given that the U.S. government subsidizes administrative and investment-management expenses, thereby inflating the net-of-fees performance of the plan's investment options.

comparators with fees that are significantly lower than the TSP's[4]:

Fund	Total Expense Ratio
TSP Fixed Income Index Investment Fund (F Fund)	0.06%
iShares Core US Aggregate Bond ETF	0.04%
Vanguard Total Bond Market Index Fund (Institutional Plus Shares)	0.03%
TSP Common Stock Index Investment Fund (C Fund)	0.051%
Fidelity 500 Index Fund	0.015%
iShares S&P 500 Index Fund (Class K)	0.030%
TSP Small Cap Stock Index Investment Fund (S Fund)	0.068%
Fidelity Extended Market Index Fund	0.036%

As this example shows, when plaintiffs' attorneys zero in on a single metric for comparison—in the above example, fees—they will *always* be able to find a supposedly "better" fund among the thousands on the market. But this is not a plausible sign of imprudence—fees are only "one of several factors" fiduciaries consider. *401(k) Plan Fees* 1. In the investment context, as elsewhere, "cheaper is not necessarily better." *Id.* Thus, "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 same is true of charts purporting to identify a "superior" alternative measured by recent investment returns. With the benefit of hindsight, one can always identify a better-performing fund during a cherry-picked time period, but chasing performance—*i.e.*, switching investment strategies to pursue the fund performing well at the time—is just as problematic as a single-minded focus on costs. Kate Stalter, *Chasing Performance Is a Quick Way to Disaster*, U.S. News & World Report (Feb. 8, 2017), https://bit.ly/3hEs1Lk; Vanguard, *Quantifying the Impact of Chasing*

[4] The data for this table was drawn from the TSP website. *See* Individual Funds, Thrift Savings Plan, https://bit.ly/3ybcxEK (results last updated Dec. 31, 2020).

Fund Performance (2014), https://bit.ly/3mjGZu5. Moreover, plaintiffs' lawyers frequently compare apples and oranges: comparing the performance of Fund A with one investment style and performance benchmark with that of Fund B, which has a demonstrably different investment style and performance benchmark. *See, e.g.*, *Ramos v. Banner Health*, 461 F. Supp. 3d 1067, 1108 (D. Colo. 2020) (rejecting plaintiffs' reliance on "inapt comparators"); *Parmer v. Land O'Lakes, Inc.*, 518 F. Supp. 3d 1293, 1306 (D. Minn. 2021) (rejecting "apples to oranges" comparisons offered by plaintiff's complaint, which compared "blended strategy funds" with varying "strategies, aims, risks, and potential rewards" to "wholly passive" alternatives).

When confronted with publicly available sources making clear the comparison is inapt, plaintiffs often claim a factual dispute that must be resolved through discovery, despite the fact that nothing in a defendant's files will shed light on a fund's investment style or benchmarks. That information is all available through judicially noticeable documents, a point plaintiffs ignore at the pleading stage so they can engage in a fishing expedition through discovery. *Compare* Mot. to Dismiss 19, *Evans v. Associated Banc-Corp*, No. 1:21-cv-00060 (E.D. Wis.), ECF No. 14 (citing public sources to debunk inapt comparators), *with* Opp. to Mot. to Dismiss 17, *id.*, ECF No. 30 (maintaining that the aptness of comparators is a matter for discovery).

Further underscoring the flaws in this approach, one complaint's supposedly underperforming investment option is often another complaint's better-performing exemplar. For example, 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-01960-CAB-BLM (S.D. Cal.), ECF No. 1. But a different case subsequently held up *this exact fund* as a "superior performing alternative[]" to the funds in another plan. Compl. ¶ 122, *Harding v. Southcoast Hosps. Grp.*, No. 1:20-cv-12216-LTS (D. Mass.), ECF No. 1. Likewise, while some lawsuits suggest that investment in Fidelity Freedom Funds is suggestive of imprudence (*e.g.*, Compl. ¶¶ 22-26, *Maisonette v. Omnicom Grp., Inc.*, No. 1:20-cv-06007-CM (S.D.N.Y.), ECF No. 1), others hold out those same funds as a model of prudent plan management (*e.g.*, Am. Compl. ¶ 160, *Anderson v. Intel Corp.*, No. 5:19-cv-04618-LHK (N.D. Cal.), ECF No. 113).

As these complaints 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. Plaintiffs sue fiduciaries for failing to divest from risky or dropping stock,[5] or for failing to *hold onto* such stock because high risk can produce high reward.[6] Some plaintiffs allege that it is imprudent for a plan to offer more than one investment option in the same style,[7] while others complain that including *only one option* in each investment style is imprudent.[8] In many cases, plaintiffs allege that fiduciaries were imprudent because they should have offered Vanguard mutual funds,[9] but others complain that Defendants were imprudent *because they offered* Vanguard mutual funds.[10] Some plaintiffs allege that plans offered imprudently risky investments,[11] while others allege that fiduciaries were *imprudently cautious* in their investment approach.[12] And in some instances, fiduciaries have simultaneously defended against

[5] *See, e.g.*, *In re RadioShack Corp. ERISA Litig.*, 547 F. Supp. 2d 606, 611 (N.D. Tex. 2008).
[6] *E.g.*, *Thompson v. Avondale Indus., Inc.*, No. Civ.A.99-3439, 2000 WL 310382, at *1 (E.D. La. Mar. 24, 2000) (plaintiff alleged that fiduciaries "prematurely" divested ESOP stock).
[7] *See, e.g.*, *Sweda v. Univ. of Penn.*, No. 16-4329, 2017 WL 4179752, at *10 (E.D. Pa. Sept. 21, 2017), *rev'd in part*, 923 F.3d 320 (3d Cir. 2019).
[8] *See, e.g.*, Am. Compl. ¶ 52, *In re GE ERISA Litig.*, No. 17-cv-12123 (D. Mass.), ECF No. 35.
[9] *See, e.g.*, *Moreno v. Deutsche Bank Ams. Holding Corp.*, No. 15 Civ. 9936 (LGS), 2016 WL 5957307, at *6 (S.D.N.Y. Oct. 13, 2016).
[10] *See, e.g.*, Am. Compl. ¶ 108, *White v. Chevron Corp.*, No. 16-cv-0793-PJH (N.D. Cal.), ECF No. 41.
[11] *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); *St. Vincent*, 712 F.3d at 711.
[12] *See Brown v. Am. Life Holdings, Inc.*, 190 F.3d 856, 859-860 (8th Cir. 1999) (addressing claim that fiduciaries maintained an overly safe portfolio); Compl. ¶2, *Barchock v. CVS Health Corp.*,

"diametrically opposed" theories of liability, giving new meaning to the phrase "cursed-if-you-do, cursed-if-you-don't."[13]

Given the malleability in the data, this inference-through-cherrypicked-comparisons approach hardly provides a basis for stating a claim for breach of fiduciary duties. When a complaint lacks direct factual allegations of key elements of a civil claim, the Supreme Court has 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. *Twombly*, 550 U.S. at 554. Complaints in the latter category fail 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 425; *see also White*, 752 F. App'x 453, 454-455 (9th Cir. 2018) (applying *Twombly* and affirming dismissal of ERISA complaint alleging excessive fees).

Moreover, that fiduciaries did not select what turned out to be the lowest-cost or highest-performing investment options does not suggest that the cherry-picked comparators in a complaint were in fact "better" overall (even in hindsight). Indeed, there will always be a fund that performs better and a fund—typically many funds—that perform worse, just as there will always be a plan with lower administrative expenses and a plan—typically many plans—with higher expenses. There is no one prudent fund, service provider, fee level, or fee structure that renders everything else imprudent. Instead, there is a wide range of reasonable options, and Congress vested

No. 16-cv-61-ML-PAS, (D.R.I.), ECF No. 1 (alleging plan fiduciaries imprudently invested portions of the plan's stable value fund in conservative money market funds and cash management accounts).

[13] *E.g.*, *Evans v. Akers*, 534 F.3d 65, 68 (1st Cir. 2008).

fiduciaries with flexibility and discretion to choose from among those options based on their informed assessment of the needs of their plan. Despite that, courts often do not have the broader context at the motion-to-dismiss stage to recognize that plaintiffs' data is frequently nothing more than a smokescreen, and are therefore inclined to allow plaintiffs to proceed with discovery.

B. Plan sponsors face substantial pressure to settle if a case survives dismissal.

Once a court denies a motion to dismiss, the defendant must face discovery—which, for these types of suits, is entirely asymmetrical and can easily run in the millions of dollars for an ERISA defendant. *See* Lockton Financial Services Claims Practice, *Fiduciary Liability Claim Trends* 1 (Feb. 2017), https://bit.ly/3viCsd2. "[T]he 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." *St. Vincent*, 712 F.3d at 719. While discovery is, of course, sometimes "appropriate," the cost 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 real evidence.'" *Id.* (quoting *Dura Pharm., Inc. v. Broudo*, 544 U.S. 336, 347 (2005)). And once one plan sponsor decides to settle, it makes it more difficult for other sponsors with similar plans to resist. *See* Jon Chambers, *ERISA Litigation in Defined Contribution Plans* 9-10, Sageview Advisory Grp. (Mar. 2021), https://bit.ly/2SHZuME.

Moreover, ERISA lawsuits are generally not filed simply against the employer, as plan sponsor, but also against the individual fiduciaries who served on particular committees during the relevant time period. Increasingly, just as in this case, plaintiffs' lawyers have chosen to sue dozens of individual defendants (from every member of a defendant's board of directors to lower-level human-resources personnel)—even if they have a demonstrably tangential relationship to the plan. *See, e.g.*, Am. Compl. ¶ 32, 36, 40, 45, *In re GE ERISA Litig.*, No. 17-cv-12123 (D. Mass.), ECF No. 54 (naming over 60 individual defendants occupying various roles with the company). As courts have noted, this tactic has "the tremendous power to harass" individual defendants and is likely to increase the pressure on employers to settle—particularly because these defendants are forced to disclose "the lawsuit on every auto, mortgage or student financial aid application they file." *Cunningham v. Cornell Univ.*, No. 16-cv-6525 (PKC), 2018 WL 1088019, at *1 (S.D.N.Y. Jan. 19, 2018).

Defendants continue to face significant settlement pressure even after discovery. Regardless of the merits of the underlying claims, proceeding to trial is often risky as defendants are frequently staring down astronomical damages figures that outstrip their annual plan contributions. *See, e.g.*, *Ramos*, 461 F. Supp. 3d at 1079, 1081 (plaintiffs sought $85 million in damages from employer that made $71 million in annual contributions). These damages calculations can be highly suspect—as courts have recognized in the few cases that went to trial. *See, e.g.*, *id.* at 1108-1109 (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, 710-711 (W.D. Mo. 2019) (cataloguing 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.

In light of these dynamics, plaintiffs' attorneys have often been successful in extracting settlements once a case survives a motion to dismiss. Of the hundreds of cases filed over the last several years, only 10-15% made it to summary judgment, and only a handful made it to trial. *See Excessive Fee Litigation* 11; *see also Rapid Rise in Excessive Fee Claims* 6. And despite the "poor showing" plaintiffs have had in the few cases that have gone to trial, *Excessive Fee Litigation* 11, plaintiffs' attorneys have still been successful in pushing through enormous settlements. *See* Good Jobs First, *Retirement-Plan Class Action Payouts by Large Corporations Top $6 Billion*, https://bit.ly/3c8IuW6. These substantial settlements lead to correspondingly substantial attorneys' fees. *Excessive Fee Litigation* 11. In 2019, for example, plaintiffs' attorneys received one-third of the $231 million in fee-litigation settlements—fees sometimes amounting to staggering hourly rates. *See, e.g.*, Opp. re Mot. for Attorney Fees 2, *Cruz v. Raytheon Co.*, No. 1:19-cv-11425-PBS (D. Mass.), ECF No. 96 (requested fees amounted to $3,800 hourly rate), *approved*, *id.*, ECF No. 113.

These settlements do not establish that the plaintiffs' allegations have merit. In other words, the data do not show that defendants take weak challenges to trial (resulting in a plaintiff loss) while choosing to settle cases where they have in fact breached their fiduciary duties. To the contrary, these settlements—while large—are often nowhere near as large as the plaintiffs' requested relief. *See, e.g.*, *Johnson v. Fujitsu Tech. & Bus. of Am., Inc.*, No. 16-cv-03698-NC, 2018 WL 2183253, at *5 (N.D. Cal. May 11, 2018) (approving an ERISA settlement for $14 million, or about 10% of plaintiffs' total requested damages of $147.8 million). Thus, if these settlements say anything, it is that the underlying allegations do not have much merit at all. In short, these suits provide plaintiffs' attorneys an avenue to convert an endless supply of lackluster allegations into substantial paydays—hence the explosion in litigation in this area.

III. These lawsuits have negative consequences for participants and beneficiaries.

This surge of litigation has significant negative consequences for plan participants and beneficiaries. These lawsuits impose pressure on plan sponsors to make decisions based on how to avoid litigation by prioritizing cost, such as the cost of recordkeeping fees, above all else. The changing litigation landscape also increases the cost of fiduciary liability insurance, leaving employers with less money to provide benefits for employees—such as matching contributions or paying for administrative expenses. And for smaller employers, retirement plans might become cost-prohibitive or simply not worth the risk of litigation. The result will be fewer employers sponsoring plans, less generous benefits, and reduced choice for participants. This outcome is wholly at odds with a primary purpose of ERISA—to *encourage* employers to voluntarily offer retirement plans and a diverse set of options within those plans. *See Conkright*, 559 U.S. at 517.

A. These lawsuits are often engineered to benefit attorneys, not plan participants.

While class actions "are intended to serve as a vehicle for capable, committed advocates to pursue the goals of the class members through counsel," all too often counsel pursue their goals (and financial interests) "through those class members." *Berger v. Compaq Comput. Corp.*, 257 F.3d 475, 484 (5th Cir. 2001). Employees frequently have little understanding of the underlying litigation or the nature of the claims. And once in the case, plaintiffs often have little agency over the direction of the case, instead (in their words) relying "entirely" on the attorneys "in terms of how th[e] case should be handled." Opp. to Mot. to Certify Class, Ex. 20, at 62:15-63:11 (deposition testimony), *Moreno v. Deutsche Bank Ams. Holding Corp.*, No. 1:15-CV-09936 (LGS) (S.D.N.Y.), ECF No. 149-20. Plaintiffs sometimes are not even aware that their attorneys stand to receive a percentage of any settlement fund. *See id.*, Ex. 22, at 59:19-25, ECF No. 149-22 (plaintiff "did not think [it] was possible" for his attorneys to receive a portion of any settlement).

This lack of communication by many plaintiffs' lawyers regarding the nature and economics of litigation is particularly concerning given that ERISA plaintiffs who lose their challenges can personally be on the hook for attorneys' fees. ERISA's fee-shifting statute grants a court discretion to "allow a reasonable attorney's fee and costs of action to either party." 29 U.S.C. § 1132(g)(1). Several courts have held that this provision "allows a fee award against parties, not their counsel." *See Peer v. Liberty Life Assurance Co. of Boston*, 992 F.3d 1258, 1265 (11th Cir. 2021). Thus, while attorneys stand to reap much of the benefit of any award in plaintiffs' favor, they do not face the risk of being saddled with attorneys' fees in the event they lose.

ERISA's fee-shifting provision is meant to operate as a moderator; like all fee-shifting statutes, it "exist[s] to deter frivolous litigation." *Citizens for Free Speech, LLC v. Cty. of Alameda*, 953 F.3d 655, 658 (9th Cir. 2020). In the abstract, it makes sense to deter the *plaintiff* from filing frivolous litigation, as the plaintiff should be primarily responsible for deciding to pursue a lawsuit. *See Peer*, 992 F.3d at 1264 ("clients are responsible for the actions of their lawyers"). But where it is in fact "the other way around," *id.*—*i.e.*, the attorney conceives of a suit and then finds an appropriate plaintiff—the fee-shifting statute no longer serves a tempering function. Given the mismatch between who often designs and brings the suit (the attorney) and who would have to pay fees (the plaintiff), plaintiffs' attorneys do not face a financial penalty from bringing questionable litigation. The only effective deterrent is the "careful, context-sensitive scrutiny" of circumstantial allegations the Supreme Court has instructed courts to apply. *Fifth Third*, 573 U.S. at 424-425.

B. These lawsuits pressure plan sponsors to manage plans based solely on cost.

The pressure created by these suits undermines one of the most important aspects of ERISA—the value of innovation, diversification, and employee choice. ERISA *requires* diversification. *See* 29 U.S.C. § 1104(a)(1)(C). And DOL regulations require plans to offer at least three options with *different* risk and return characteristics to qualify as participant-directed plans under 29 U.S.C. § 1104(c), which shields fiduciaries from liability for losses that result from participants' control over their investment allocations. *See* 29 C.F.R. § 2550.404c-1(b)(3).

But Plaintiffs' attorneys often take a cost-above-all approach, filing strike suits against any fiduciaries that take into account considerations other than cost—notwithstanding ERISA's direction to do precisely that. *See White v. Chevron Corp.*, No. 16-cv-0793-PJH, 2016 WL 4502808, at *10 (N.D. Cal. Aug. 29, 2016). These suits affect the recordkeeping services fiduciaries select, pushing plan sponsors toward the lowest-cost option, which DOL has acknowledged may not be the best one. *See 401(k) Plan Fees* 1. Plaintiffs' cost argument rests on a misconception "that all recordkeepers provide exactly the same service for all plans." *Excessive Fee Litigation* 6. To the contrary, "[e]ven plans that have an identical number of participants and the same total plan assets may have very different service models." *Id.* When a recordkeeper is, for example, "not only an administrative services provider, but also an investment manager for several of [a plan's] investment funds," it "only make[s] sense that the fees it charge[s] … exceed those charged by a simple administrative services provider." *Brown*, 2021 WL 1758898, at *8. In other words, while plaintiffs' attorneys often suggest that any variation in fees is essentially *per se* evidence of a fiduciary breach, fees *should* vary among plans because services vary among plans. *Id.* If, however, simply alleging that a plan has higher recordkeeping fees than some arbitrarily chosen median, or some other plan, 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 education and web-based financial tools, and even enhanced customer-service options) from which their participants would benefit.

The collective impact of these lawsuits is to pressure plan fiduciaries to chase investment performance or the lowest-cost fees or services, whether or not doing so is actually in the interests of participants. An investment committee may, for example, feel pressured by the threat of litigation to offer only "a diversified suite of passive investments," despite "actually think[ing] that a mix of active and passive investments is best." *See* David McCann, *Passive Aggression*, CFO (June 22, 2016), https://bit.ly/2Sl55Yq (lawsuits push fiduciaries toward the "lowest-cost fund," which is not always "the most prudent" option). In a purported effort to safeguard plaintiffs' retirement funds, plaintiffs' attorneys pressure fiduciaries *away from* exercising their "responsibility to weigh … competing interests and to decide on a (prudent) financial strategy." *Brown*, 2021 WL 1758898, at *7. In so doing, plaintiffs' attorneys risk paring down the choices available to plan participants—in contravention of the statute's encouragement to "sponsors to allow more choice to participants." *Loomis v. Exelon Corp.*, 658 F.3d 667, 673 (7th Cir. 2011). At the end of the day, the choice among investment options in a diversified plan line-up should rest not with plaintiffs' attorneys, but with plan fiduciaries and plan participants—who, after all, are "the people [with] the most interest in the outcome," *id.* at 673-674.

C. These lawsuits lead to increases in liability insurance that adversely impact participants.

The litigation surge has also upended the insurance industry for retirement plans. *See Hardening Fiduciary Liability Market*. 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; *see also Fiduciary Insurance Hikes* (describing forecasts that insurance premiums will rise 20% to 30% this year). Plans are now at risk of not being able to "find[] adequate and affordable fiduciary coverage because of the excessive fee litigation." *Id.*; *see also ERISA Litigation in Defined Contribution Plans* 1 (fiduciary insurers may "increasingly move to reduce coverage limits, materially increase retention, or perhaps even cancel coverage"). Indeed, some insurers now require plans to disclose "any inquiries from" specific law firms—including Capozzi Adler PC—"regarding any topic whatsoever," and whether they know of "any 'online/social media solicitation of [their] employees to contact a law firm about their defined contribution plan fees or investments.'" Nevin E. Adams, *Insurance Renewal Contains Excessive Fee Questionnaire*, National Association of Plan Advisors (Mar. 9, 2020), https://bit.ly/347vZFY; *see also Fiduciary Insurance Hikes* (noting the trend of insurers asking "potential and existing clients about any contact with law firms active in ERISA litigation"). These questionnaires also probe whether plans have specific features that have been the subject of recent litigation, compounding the pressure on sponsors to narrow the choices available to plan participants. *See Fiduciary Insurance Hikes*.

These changes harm plan participants. If employers need to absorb the cost of higher insurance premiums and higher deductibles, then many employers will inevitably have to offer less generous plans—reducing their employer contributions, declining to cover administrative fees and costs when they otherwise would voluntarily elect to do so, and reducing the services available to employees. *See id.* (documenting costs to plan participants from increased insurance costs). And while large employers may have some capacity to absorb some of these costs, many smaller employers in particular do not. If smaller plan sponsors "cannot purchase 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. Moreover, these costs do not even account for the risk of uninsured attorneys' fees and settlements. While some portion of the settlement proceeds is returned to plan beneficiaries (after deducting hefty administrative fees), the portion of the settlement that goes to attorneys' fees is not, nor are the funds that the plan sponsor must itself spend on attorneys' fees. Thus, these suits impose significant costs on plan sponsors—and, by extension, plan participants and beneficiaries—without producing concomitant benefit.

CONCLUSION

For the foregoing reasons, adopting anything less than the "careful . . . scrutiny" of ERISA complaints prescribed by the Supreme Court in *Fifth Third* would create precisely the types of negative consequences that Congress intended to avoid in crafting ERISA. Amicus urges the Court to adopt and apply that level of scrutiny in this case.

Dated: October 4, 2021

/s/ Cory J. Skolnick
Cory J. Skolnick
FROST BROWN TODD LLC
400 West Market Street, 32nd Floor
Louisville, KY 40202
(502) 568-0254
cskolnick@fbtlaw.com

William M. Jay (*pro hac vice pending*)
Jaime A. Santos (*pro hac vice pending*)
GOODWIN PROCTER LLP
1900 N Street, NW
Washington, DC 20036
(202) 346-4000
wjay@goodwinlaw.com
jsantos@goodwinlaw.com

Counsel for Amicus Curiae