

# **EXHIBIT A**

**UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF MICHIGAN**

JEFFREY PARKER, DONALD B. LOSEY, )  
and SHELLEY WEATHERFORD, )  
individually and on behalf of themselves, the )  
GKN Group Retirement Savings Plan, and all )  
others similarly situated, )

Plaintiffs, )

vs. )

GKN NORTH AMERICA SERVICES, INC., )  
BOARD OF DIRECTORS OF GKN NORTH )  
AMERICA SERVICES, INC., and the )  
BENEFIT COMMITTEE, )

Defendants. )

Case No. 2:21-cv-12468-SFC-JJCG

Hon. Sean F. Cox

Mag. Jonathan J.C. Grey

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

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## ISSUE PRESENTED

1. Whether Plaintiffs plausibly pled a claim for breach of the duty of prudence under the standards set forth in *Fifth Third Bancorp v. Dudenhoeffer*, 573 U.S. 409 (2014), and *Hughes v. Northwestern University*, 142 S. Ct. 737 (2022).

**CONTROLLING AND/OR MOST APPROPRIATE AUTHORITY**

*Ashcroft v. Iqbal*, 556 U.S. 662 (2009)

*Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007)

*Fifth Third Bancorp v. Dudenhoeffer*, 573 U.S. 409 (2014)

*Hughes v. Northwestern Univ.*, 142 S. Ct. 737 (2022)



## **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 businesses and professional organizations of every size, in every industry sector, and from every region of the country.<sup>1</sup> 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, including those addressing the pleading standard for fiduciary-breach claims. The Chamber submits this amicus brief in support of Defendants’ motion to dismiss to provide context on retirement-plan management and how this case is situated in the broader litigation landscape.

## **INTRODUCTION**

This case is one of many in a recent surge of putative 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*

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<sup>1</sup> 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.

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 last decade. *Id.* Nevertheless, many of these suits cherry-pick particular data points, disregard bedrock principles of plan management, and ignore judicially noticeable information demonstrating the flawed nature of many plaintiffs’ allegations in an effort to create an illusion of mismanagement and imprudence.

The complaints typically follow a familiar playbook, often loaded with legal conclusions but few factual allegations specific to the plan at issue. Using the benefit of hindsight, these lawsuits challenge the decisions plan fiduciaries made about what investment options to make available to retirement plan participants or the arrangements fiduciaries negotiated with the plan’s service provider. The complaints typically point to alternative investment or service options (among tens of thousands of investment options offered in the investment marketplace and the dozens of service providers with a wide variety of service offerings and price points), and allege that plan fiduciaries *must have* had a flawed decisionmaking process because they did not choose one of those alternatives. They then lean heavily on ERISA’s perceived complexity to open the door to discovery, even where their conclusory allegations are belied by publicly available data and data plan fiduciaries must provide quarterly to each plan participant.

No plan, regardless of size or type, is immune from this type of challenge. It is *always* possible for plaintiffs 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 plan fiduciaries chose. That is not sufficient under the pleading standard established in *Hughes v. Northwestern University*, 142 S. Ct. 737, 740 (2022), *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), and *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007).

If conclusory and speculative complaints like the ones here are sustained, plan participants will be the ones who suffer. 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 most participants want. These lawsuits also operate on a cost-above-all mantra—despite the admonition by the Department of Labor (“DOL”) that fees should be only “one of several factors” in fiduciary decisionmaking.<sup>2</sup> “[N]othing 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). But given the plaintiffs’ often single-minded emphasis on cost, these lawsuits pressure

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<sup>2</sup> DOL, *A Look at 401(k) Plan Fees* 1 (Sept. 2019), <https://bit.ly/3fP8vuH> (*401(k) Plan Fees*).

fiduciaries to forgo packages that include popular and much-needed services, including financial-wellness education and enhanced customer-service options.

If the recent flood of litigation has taught us anything, it is that it is nearly impossible for plan fiduciaries to prevent themselves from becoming the subject of a lawsuit—no matter how rigorous their process, no matter the high quality of the funds that they choose, and no matter how low the fees they negotiate. This lawsuit is a perfect example: Plaintiffs allege that the Plan’s “GoalMaker funds should have been removed from the Plan prior to 2020.” First Am. Compl., ECF No. 28, PageID.463 ¶ 102. Defendants did precisely that, as Plaintiffs themselves acknowledge in their allegation that Defendants removed GoalMaker from the Plan in 2019 and added Fidelity index funds (*id.*, ECF No. 28, PageID.455 ¶ 84), and yet Defendants still found themselves the subject of a lawsuit. Plan sponsors and fiduciaries today truly are, as the Supreme Court has observed, “between a rock and a hard place.” *Fifth Third Bancorp v. Dudenhoeffer*, 573 U.S. 409, 424 (2014).

Against this backdrop, it is critical that this Court apply the “context-specific inquiry” required at the motion-to-dismiss stage. *Hughes*, 142 S. Ct. at 740; *see also Fifth Third*, 573 U.S. at 425. As the Supreme Court recently made explicit, ERISA cases are subject to the pleading standard articulated in *Twombly* and *Iqbal*. *See Hughes*, 142 S. Ct. at 742. When a plaintiff does not present direct allegations of wrongdoing and relies on circumstantial allegations that are “just as much in line

with” plan fiduciaries’ having acted through a prudent fiduciary process, dismissal is required. *See Twombly*, 550 U.S. at 554.

## ARGUMENT

### I. There is no ERISA exception to Rule 8(a)’s pleading standard.

The last 15 years have seen a surge of ERISA litigation.<sup>3</sup> What began as a steady increase has exploded in the past two years, culminating in over 100 excessive-fee suits in 2020—a five-fold increase over the prior year.<sup>4</sup> The last 16 months have seen more of the same, including a barrage of lawsuits filed against universities, nonprofits, and healthcare systems that have seen their resources particularly taxed during the pandemic—including Rush University Medical Center and Henry Ford Health System. These cases generally do not develop organically based on plan-specific details, but rather are advanced as prepackaged, one-size-fits-all challenges. As a result, they typically rely on generalized allegations that do not reflect the context of the actual plan they are suing.

The Supreme Court has taken several recent opportunities to address the standard for pleading a fiduciary-breach claim under ERISA. Each time, it has

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<sup>3</sup> *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).

<sup>4</sup> *See Understanding the Rapid Rise in Excessive Fee Claims 2*, AIG, <https://bit.ly/3k43kt8>; *see also* Jacklyn Wille, *401(k) Fee Suits Flood Courts, Set for Fivefold Jump in 2020*, Bloomberg Law (Aug. 31, 2020), <https://bit.ly/3fDgjQ5>.

stressed that ERISA suits are no different from any others: To survive a motion to dismiss, plaintiffs must satisfy the Rule 8 pleading standard articulated in *Twombly* and *Iqbal*. *Hughes*, 142 S. Ct. at 742.<sup>5</sup> Given the variety among ERISA plans and the risk that any ERISA suit can be made to appear superficially complicated, applying Rule 8(a) to ERISA claims requires a close evaluation of “the circumstances ... prevailing at the time the fiduciary acts.” *Fifth Third*, 573 U.S. at 425. The “careful, context-sensitive scrutiny” this analysis demands must account for the wide discretion fiduciaries have when making decisions on behalf of tens of thousands of employees with different investment styles and risk tolerances. *Id.* “[C]ategorical rules” have no place in this analysis—particularly because “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.

The allegations in many of the cases in this wave of litigation fail this standard twice over. First, the complaints’ circumstantial allegations are often equally (if not far more) consistent with lawful behavior, and therefore cannot “nudge[] the[] claims

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<sup>5</sup> The Court thus rejected some circuits’ suggestion that a lower pleading standard applies in ERISA cases. *See Sacerdote v. N.Y. Univ.*, 9 F.4th 95, 108 & n.47 (2d Cir. 2021); *Sweda v. Univ. of Pa.*, 923 F.3d 320, 326 (3d Cir. 2019).

across the line from conceivable to plausible.” *Twombly*, 550 U.S. at 570. Second, the allegations frequently ignore the discretion fiduciaries have in making decisions based on their experience and expertise, and in light of the context of their plan.

**A. These lawsuits often manufacture factual disputes that do not survive minimal scrutiny.**

The shared problem with many of these lawsuits is exemplified by a feature that appears in most complaints. Plaintiffs typically create a chart (or many charts) purporting to compare some of the investment options in the plan under attack to other options available on the market that allegedly out-performed or had lower fees than the plan’s options. Many also contain a chart purporting to compare the plan’s administrative fees to the administrative fees of other plans, during a cherry-picked time period. *See, e.g.*, First Am. Compl., ECF No. 28, PageID.456–74 ¶¶ 87, 99, 140, 142. They then use the charts 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. Inferring imprudence from this tactic ignores the realities of plan management, the plaintiffs’ reliance on demonstrably inaccurate data, and ERISA’s statutory structure—important context the Supreme Court has instructed lower courts to consider. *See Hughes*, 142 S. Ct. at 740; *Fifth Third*, 573 U.S. at 425.

To start, plaintiffs’ attorneys can easily cherry-pick historical data to make a fiduciary’s choices look suboptimal given the near-infinite combination of comparator options and time periods. Take the federal Thrift Savings Plan (“TSP”),

often 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.<sup>6</sup> Even the TSP could be made to look like a mismanaged plan by cherry-picking comparators with fees that are significantly lower than the TSP’s<sup>7</sup>:

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

<sup>6</sup> See, e.g., *Brotherston v. Putnam Invs., LLC*, Appellants’ Br., 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.”). The TSP is a particularly inapt exemplar given that the U.S. government subsidizes administrative and investment-management expenses, thereby inflating the plan’s net-of-fees investment performance.

<sup>7</sup> The data for this table is based on the most recently available figures as of March 1, 2022.



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. 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, just as one could always identify a worse-performing fund. But chasing performance—*i.e.*, switching investment strategies to pursue the fund performing well at the time—is a misguided investment approach “generally doomed to some kind of failure.”<sup>8</sup>

Moreover, plaintiffs 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 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 1239, 1306 (D. Minn. 2021) (similar). These barebones comparisons are particularly unhelpful with respect to recordkeeping fees. As DOL has explained, services “may be provided through a variety of arrangements,”<sup>9</sup> and neither recordkeepers nor recordkeeping services are interchangeable widgets. To

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<sup>8</sup> Kate Stalter, *Chasing Performance Is a Quick Way to Disaster*, U.S. News (Feb. 8, 2017), <https://bit.ly/3IhKn0R>.

<sup>9</sup> *401(k) Plan Fees* 3.

the contrary, recordkeeping services are highly customizable depending on, for example, the needs of each plan, its participant population, the capabilities and resources of the plan's administrator, and the sponsor's human-resources department. *See Excessive Fee Litigation 3* (recognizing that “[e]ven plans that have an identical number of participants and the same total plan assets may have very different service models”). 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.<sup>10</sup> Plaintiffs’ attempt to identify services offered by the comparator plans proves the point—they allege that certain comparator plans offered general consulting while others performed services related to sub-transfer agency fees and yet others offered direct trustee services, but they do not allege that any offered the *same services* as the Plan. First Am. Compl., ECF No. 28, PageID.476 ¶ 145. Despite these differences, Plaintiffs nonsensically assert the costs for all plans should have been the same. *Id.*, ECF No. 28, PageID.474 ¶ 142.

Further underscoring the unreliability of these comparisons, in many cases the plaintiffs’ allegations of excessive fees are directly contradicted by publicly available documents or fee disclosures that DOL *requires* plan fiduciaries to provide

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<sup>10</sup> *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>.

to participants on a regular basis.<sup>11</sup> Nevertheless, when confronted with publicly available sources or documents incorporated by reference into the complaint that make clear their allegations are deficient (or demonstrably wrong), plaintiffs often ask the court to close its eyes to that contextual information and claim a factual dispute that must be resolved through discovery. The Supreme Court has said the opposite—that “context” *must* be considered at the 12(b)(6) stage in order to “divide the plausible sheep from the meritless goats.” *Fifth Third*, 573 U.S. at 425. And as other courts have recognized, it would be strange indeed to allow plaintiffs “to freely utilize” these types of documents in drafting their complaints, “only to turn around and disavow those very same documents when cited to Plaintiffs’ disadvantage.” *Cohen v. Cap. One Funding, LLC*, 489 F. Supp. 3d 33, 46 (E.D.N.Y. 2020). “[J]udicial resources would be wasted, and cases needlessly prolonged in discovery,

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<sup>11</sup> DOL requires plan fiduciaries to provide to participants on a quarterly basis disclosures describing the administrative fees that participants pay. 29 C.F.R. § 2550.404(a)-5(c)(2)(ii). Those disclosures will reflect, for example, when a plan sponsor has decided to *voluntarily* pay administrative fees in whole or in part, and when certain fees are charged for specific, individualized services (like participant loan processing fees or managed-account fees) rather than being borne by all participants alike. But rather than basing their allegations on those numbers, plaintiffs manufacture inflated fee figures by dividing the total fees paid to *all* plan providers by the number of participants in the plan and reporting the latter number as the “per participant recordkeeping and other administrative fees” for the plan. *See, e.g.*, Am. Compl. ¶ 140 & n.10. That figure is misleading, though, because it includes many fees that are not borne equally by all participants and thus does not in fact represent the “per participant” recordkeeping fees, as many plaintiffs try to suggest.

were courts to blind themselves to integral documents that plainly undermine, or even flatly contradict, the allegations based on those very documents.” *Id.*

**B. Fiduciaries have discretion to make a range of reasonable choices.**

The allegations in these complaints also often fail to grasp a fundamental tenet of ERISA—namely, the “range of reasonable judgements a fiduciary may make” and the “difficult tradeoffs” inherent in fiduciary decisionmaking. *Hughes*, 142 S. Ct. at 742. That fiduciaries did not select what turned out to be the lowest-cost or best-performing option does not suggest that cherry-picked comparators were in fact “better” overall. There will always be a plan with lower expenses and a plan—typically many plans—with higher ones, just as there will always be a fund that performs better and many funds that perform worse. There is no one prudent fund, service provider, or fee level that renders everything else imprudent. Instead, there is a wide range of reasonable options, and Congress vested fiduciaries with flexibility and discretion to choose from among those options based on their informed assessment of the needs of their plan and its unique participant base.

The complaints themselves reflect a range of assessments, as one complaint’s supposedly imprudent choice is often another complaint’s prudent exemplar. Plaintiffs here allege imprudence based on Defendants’ decision to offer actively managed funds. *See* First Am. Compl., ECF No. 28, PageID.458–59 ¶¶ 89, 92–93. But plaintiffs in other cases have alleged a breach of fiduciary duty based on a plan’s

decision to include passively managed funds rather than actively managed ones—the exact opposite of the allegations here. *See* Compl. ¶¶ 79–83, *Ravarino v. Voya Financial, Inc.*, No. 21-1658 (D. Conn.), ECF No. 1. This same phenomenon plays out with respect to recordkeeping fees. Last year Henry Ford 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 exact 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.

As these complaints demonstrate, ERISA fiduciaries making discretionary decisions are at risk of being sued seemingly no matter what decisions they make. Plaintiffs sue fiduciaries for failing to divest from risky or dropping stock,<sup>12</sup> or for failing to *hold onto* such stock because high risk can produce high reward.<sup>13</sup> Some plaintiffs allege that it is imprudent for a plan to offer more than one investment

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<sup>12</sup> *See, e.g., In re RadioShack Corp. ERISA Litig.*, 547 F. Supp. 2d 606, 611 (N.D. Tex. 2008).

<sup>13</sup> *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).

option in the same style,<sup>14</sup> while others complain that including *only one option* in each investment style is imprudent.<sup>15</sup> In many cases, plaintiffs allege that fiduciaries were imprudent because they should have offered Vanguard mutual funds,<sup>16</sup> but others complain that defendants were imprudent *because they offered* Vanguard mutual funds.<sup>17</sup> Some plaintiffs allege that plans offered imprudently risky investments,<sup>18</sup> while others allege that fiduciaries were *imprudently cautious* in their investment approach.<sup>19</sup> And in some instances, fiduciaries have simultaneously defended against “diametrically opposed” theories of liability, giving new meaning to the phrase “cursed-if-you-do, cursed-if-you-don’t.”<sup>20</sup> This dynamic has made it incredibly difficult for fiduciaries to do their job—and it has made it virtually *impossible* for fiduciaries to avoid being sued, no matter how careful their process and no matter how reasonable their decisions.

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<sup>14</sup> See, e.g., *Sweda v. Univ. of Pa.*, 2017 WL 4179752, at \*10 (E.D. Pa. Sept. 21, 2017), *rev’d in part*, 923 F.3d 320 (3d Cir. 2019).

<sup>15</sup> See, e.g., Am. Compl. ¶ 52, *In re GE ERISA Litig.*, No. 17-cv-12123-IT (D. Mass.), ECF No. 35.

<sup>16</sup> See, e.g., *Moreno v. Deutsche Bank Ams. Holding Corp.*, 2016 WL 5957307, at \*6 (S.D.N.Y. Oct. 13, 2016).

<sup>17</sup> See, e.g., Am. Compl. ¶ 108, *White v. Chevron Corp.*, No. 16-cv-0793-PJH (N.D. Cal.), ECF No. 41.

<sup>18</sup> 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 ex rel. St. Vincent Cath. Med. Ctrs. Ret. Plan v. Morgan Stanley Inv. Mgmt. Inc.*, 712 F.3d 705, 711 (2d Cir. 2013).

<sup>19</sup> E.g., 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).

<sup>20</sup> E.g., *Evans v. Akers*, 534 F.3d 65, 68 (1st Cir. 2008).

Accordingly, it is critical for courts to consider context—things like DOL’s instruction that fees are only one of *several factors* that should be considered,<sup>21</sup> publicly available information demonstrating that a complaint’s supposed comparators are inapposite, industry data showing that services (and their pricing) vary widely, the performance ebbs and flows that are common characteristics of investment management, and the wide discretion granted to fiduciaries by Congress all bear on whether fiduciary-breach claims are plausible, among other contextual information. Nevertheless, some courts have declined to consider context when evaluating plausibility, suggesting that doing so would require the court to resolve a purported dispute of fact. That approach cannot be squared with the Supreme Court’s direction to “give due regard to the range of reasonable judgments a fiduciary may make,” recognizing that a bare allegation that one fiduciary made a decision different from another fiduciary is insufficient to survive a motion to dismiss. *Hughes*, 142 S. Ct. at 742.

## **II. These lawsuits will harm participants and beneficiaries.**

This surge of litigation has significant negative consequences for plan participants and beneficiaries. These lawsuits impose pressure on plan fiduciaries 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

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<sup>21</sup> *401(k) Plan Fees* 1.

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 v. Frommert*, 559 U.S. 506, 517 (2010).

**A. 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. Plaintiffs often take a cost-above-all approach, filing strike suits against any fiduciaries that consider factors other than cost—notwithstanding ERISA’s direction to do precisely that. *See White v. Chevron Corp.*, 2016 WL 4502808, at \*10 (N.D. Cal. Aug. 29, 2016). 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>. Likewise, these suits affect the recordkeeping services fiduciaries select, pushing plan sponsors toward the lowest-cost option, even though



DOL has acknowledged “that cheaper is not necessarily better.” *See 401(k) Plan Fees* 1. The collective impact of these lawsuits is to pressure fiduciaries to chase investment performance or the lowest-cost fees or services, whether or not doing so is in participants’ interest. In a purported effort to safeguard retirement funds, plaintiffs actually pressure fiduciaries *away from* exercising their “responsibility to weigh ... competing interests and to decide on a (prudent) financial strategy.” *Brown v. Daikin Am., Inc.*, 2021 WL 1758898, at \*7 (S.D.N.Y. May 4, 2021).

**B. Changes in the liability-insurance market will harm participants.**

The litigation surge has upended the insurance industry for retirement plans. Judy Greenwald, *Litigation Leads to Hardening Fiduciary Liability Market*, Business Insurance (Apr. 30, 2021), <https://bit.ly/3ytoRBX>. 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* Jacklyn Wille, *Spike in 401(k) Lawsuits Scrambles Fiduciary Insurance Market*, Bloomberg Law (Oct. 18, 2021), <https://bit.ly/307mOHg> (discussing the “sea change” in the market for fiduciary insurance); Robert Steyer, *Sponsors Rocked by Fiduciary Insurance Hikes*, Pensions & Investments (Sept. 20, 2021), <https://bit.ly/39W996Y>. Plans are now at risk of not being able to “find[] adequate and affordable fiduciary coverage because of the excessive fee litigation.” *Excessive Fee Litigation* 4; *see also* Jon Chambers, *ERISA Litigation in Defined*

*Contribution Plans* 1, Sageview Advisory Grp. (Mar. 2021), <https://bit.ly/2SHZuME> (fiduciary insurers may “increasingly move to reduce coverage limits, materially increase retention, or perhaps even cancel coverage”); Charles Filips et al., *Options When Fiduciary Insurance Is Too Expensive* 1, PlanSponsor (Mar. 8, 2022), <https://bit.ly/3q1vgRU> (responding to an inquiry from a plan sponsor that was no longer able to afford fiduciary insurance).

As with any business decision, an employer may need to cut costs based on particular cost drivers. This means that if employers need to absorb the cost of higher insurance premiums and higher deductibles, 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 elect to do so, and reducing the services available to employees. And while large employers may have some capacity to absorb some of these costs, many smaller employers 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.<sup>22</sup> In short, these suits impose significant

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<sup>22</sup> Congress is in fact trying to do the opposite. The recently enacted Setting Every Community Up for Retirement Enhancement Act of 2019 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* Pub. L. 116-94, 133 Stat. 2534 (2019), §§ 101, 104-105. These lawsuits run counter to Congress’s goal

costs on plan sponsors—and, by extension, plan participants—often without producing concomitant benefit.

### CONCLUSION

For the foregoing reasons, adopting anything less than the “context-specific inquiry” of ERISA complaints prescribed by the Supreme Court in *Hughes* and *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 to this case.

Dated: May 12, 2022

Respectfully submitted,

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of expanding—rather than shrinking—the number of employees who are able to participate in retirement plans.

### CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States District Court for the Eastern District of Michigan by using the court's CM/ECF system on May 12, 2022.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the court's CM/ECF system.

Dated: May 12, 2022

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