No. 21-5964

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

YOSAUN SMITH, individually and as a representative of a class of similarly situated persons and on behalf of the CATHOLIC HEALTH INITIATIVES 401(K) PLAN,

Plaintiff-Appellant,

and

COMMONSPIRIT HEALTH a/k/a CATHOLIC HEALTH INITIATIVES; CATHOLIC HEALTH INITIATIVES RETIREMENT PLANS SUBCOMMITTEE; DOES 1-10,

Defendants-Appellees.

On Appeal from the United States District Court
for the Eastern District of Kentucky
No. 2:20-cv-00095-DLB-EBA (Hon. David L. Bunning)

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*[1]

The **Chamber of Commerce of the United States of America** ("Chamber") is the world's largest business federation.[2] The Chamber represents approximately 300,000 direct members and indirectly represents the interests of more than three million businesses and professional organizations of every size, in every industry sector, and from every region of the country. Many of the Chamber's members maintain, administer, or provide services to employee-benefit plans governed by ERISA.

An important function of the Chamber is to represent the interests of its members in matters before the courts, Congress, and the Executive Branch. To that end, the Chamber regularly participates as *amicus curiae* in this Court and in other courts on issues that affect benefit-plan design or administration. *See, e.g.*, *Hughes v. Nw. Univ.*, 142 S. Ct. 737 (2022); *Jammal v. Am. Fam. Ins. Co.*, 914 F.3d 449 (6th Cir. 2019).

SUMMARY OF THE ARGUMENT

This case is just one of many in a wave of ERISA class-action complaints designed to extract costly settlements. In 2020 alone, plaintiffs filed over 200

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[1] All parties have consented to the filing of this brief. *See* Fed. R. App. P. 29(a)(2).
[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.

ERISA class actions, "an all-time record that represents an 80% increase over the number of ERISA class actions filed in 2019 and more than double the number filed in 2018."[3] The healthcare industry (which has seen its resources taxed during the pandemic) has been hit particularly hard with these lawsuits, including the defendant here, CommonSpirit Health; Louisville-based Humana; Michigan-based Henry Ford Health System; Chicago's Rush University Medical Center; Wake Forest University Baptist Medical Center; Yale-New Haven Hospital; and the University of Maryland Medical System, just to name a few. This year is poised to be more of the same, with three Boston-area hospitals, including Boston Children's Hospital, sued during a single week in January by two of the same firms representing the plaintiff here.

Not surprisingly, 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. *See* Euclid Specialty, *Exposing Excessive Fee Litigation Against America's Defined Contribution Plans* 10 (Dec. 2020),

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[3] *See* Lars Golumbic et al., *2020 ERISA Litigation Trends Hint At What's Ahead This Year*, Law360 (Jan. 3, 2021), https://bit.ly/2TeiodS; Jacklyn Wille, *401(k) Fee Suits Flood Courts, Set for Fivefold Jump in 2020*, Bloomberg Law (Aug. 31, 2020), https://bit.ly/3fDgjQ5 (ERISA suits alleging excessive fees were on track for a fivefold increase from 2019 to 2020); George S. Mellman and Geoffrey T. Sanzenbacher, *401(k) Lawsuits: What are the Causes and Consequences?*, Center for Retirement Research at Boston College (May 2018), https://bit.ly/3fUxDR1 (documenting the surge in 401(k) complaints from 2010 to 2017).

https://bit.ly/3hNXJaW ("*Excessive Fee Litigation*") (noting "copy-cat complaints" being filed using the same "template").

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. *Pfeil v. State St. Bank & Tr. Co.*, 806 F.3d 377, 384-85 (6th Cir. 2015). Instead, the complaint offers allegations, made with the benefit of 20/20 hindsight, that plan fiduciaries failed to select the cheapest or best-performing funds, often using inapt comparators to advance the point, as the plaintiffs do here. Then, the plaintiffs ask the court to *infer* from these circumstantial allegations that the plan's fiduciaries must have been "standing idly by." Compl., RE 1, ¶ 80(a).

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—when, as *Twombly* put it, 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, where the Supreme Court specifically instructed courts to apply "careful, context-sensitive scrutiny" 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 admonished 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 plaintiff has stated a plausible claim. *Hughes*, 142 S. Ct. at 742.

The district court in this case did exactly what the Supreme Court requires, applying a careful context-specific scrutiny to the allegations in the plaintiff's complaint to conclude that they do not state a plausible claim for fiduciary breach. The plaintiff in this case now seeks a diluted pleading standard that would authorize discovery based on conclusory assertions (with no factual allegations) about a fiduciary's decisionmaking process and suggestions of alternative decisions that, with the benefit of hindsight, allegedly could have been more profitable for plan participants. The plaintiff suggests that ERISA class actions are uniquely unsuitable for resolution on a motion to dismiss, leaning heavily on out-of-circuit decisions that are either inapposite or have expressly "decline[d] to extend" *Twombly* to ERISA claims, *Sweda v. Univ. of Pa.*, 923 F.3d 320, 326 (3d Cir. 2019)—an outlier position that was rejected in *Hughes*.[4]

The plaintiff's standard could be met in virtually every case, as a plan fiduciary *always* could have made *some* decision that might have proved more profitable in hindsight: it is not possible to beat the market every time, nor are fiduciaries required or expected to. 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 them, these suits push plan sponsors and fiduciaries into a corner, pressuring them to narrow the range of options available to participants—an outcome at odds with ERISA's purpose.

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

[4] Plaintiffs' brief on appeal was filed before *Hughes* was decided.

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 goals and preferences.

This flexibility extends to a variety of areas. For example, 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 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. In selecting a plan line-up, fiduciaries take into account all of 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.[5] 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.

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.[6] Under a fixed-fee structure, lower-balance employees (often with lower incomes), who already face greater barriers to building retirement savings, may shoulder a significantly larger percentage of the plan's fees.[7] 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

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[5] 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.

[6] DOL, Field Assistance Bulletin No. 2003-03 (May 19, 2003), https://bit.ly/3nhg1Uf.

[7] *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, whereas 81% of wage earners in the top quartile do so).

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 breadth of fiduciary decisions made in the face of market uncertainty and the need for flexibility, Congress chose the "prudent man" standard to define the scope of the duties that 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—plaintiffs' preferred investment style—the proposal failed. *See* H.R. 3185, 110th Cong. (2007). DOL expressed "concern[]" that "[r]equiring specific investment options would limit the 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 *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 required plans to offer "a broad range of investment alternatives," including "at least three" with "materially different risk and return characteristics," and 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 10,000 mutual funds alone,[8] several thousand of which are offered in retirement plans—and nearly innumerable ways to put together a plan that enables employees to save for retirement.

Thus, while ERISA plaintiffs often try to challenge fiduciaries' decisions to offer specific investment options by pointing to less expensive or better-performing alternatives and then suggesting that the fiduciaries *must have* had an inadequate

[8] Investment Company Institute, Investment Company Fact Book 40 (61st ed. 2021), https://www.ici.org/system/files/2021-05/2021_factbook.pdf.

decisionmaking process—just as the plaintiff in this case asserts—that is not how the prudence standard operates. There will always be a plan that performs better and a plan that performs worse. 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.

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). The standard of prudence "focus[es] on a fiduciary's conduct in arriving at an investment decision, not on its results." *PBGC ex rel. St. Vincent Catholic Med. Ctrs. Ret. Plan v. Morgan Stanley Inv. Mgmt. Inc.*, 712 F.3d 705, 716 (2d Cir. 2013) ("*PBGC*") (alteration in original) (citation omitted). Thus, the proper question in evaluating an ERISA claim, is not, for example, whether "post facto" it is apparent that the value of investments "decreased after certain dates," but rather whether the fiduciary's "conduct [was prudent] as of the 'time it occurred,'" including whether the fiduciary used appropriate methods to investigate the merits of the transactions. *Pfeil*, 806 F.3d at 386, 387 (citation omitted). In other words, fiduciaries are judged not by the *outcome* of their decisions but by the *process* by which those decisions were made.

Here, the plaintiff does not allege any facts regarding the defendants' decisionmaking process. The plaintiff suggests instead that the district court should have *inferred* that the defendants had an imprudent process based on hindsight allegations about the plan and its performance—even if there are obvious alternative explanations for the plan's line-up that are entirely consistent with prudent fiduciary decisionmaking. This proposed approach is not the law. For complaints that lack direct allegations of wrongdoing, this Court has consistently probed the circumstantial factual allegations to determine if they plausibly suggest wrongdoing, or are simply a pretext for a fishing expedition. ERISA claims should be treated no differently.

A. Claims that rely on inferences of wrongdoing from circumstantial facts must allege "something more" than allegations that are equally consistent with lawful behavior.

This Court's decisions recognize, as the Supreme Court did in *Twombly*, the "practical significance" of the Rule 8(a) pleading requirement in cases in which the plaintiff does not present any direct allegations of wrongdoing but instead relies entirely on circumstantial allegations that, even if true, do not necessarily establish unlawful conduct. Such allegations are "much like a naked assertion" of wrongdoing that, "without some further factual enhancement," fall "short of the line between possibility and plausibility of entitle[ment] to relief." *Twombly*, 550 U.S. at 557 (quotations omitted).

There are numerous areas of the law in which courts must consider whether wrongdoing can be inferred from circumstantial factual allegations to satisfy the pleading standards set forth in *Twombly* and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). Take antitrust, for example. In *In re Travel Agent Commission Antitrust Litigation*, 583 F.3d 896 (6th Cir. 2009), the plaintiff travel agencies lacked direct allegations of illegal agreements among the defendant airlines to eliminate the practice of paying sales commissions for the travel agencies. This Court therefore had to determine whether it could plausibly "infer agreement" among the defendant airlines based on allegations of the airlines' "parallel business behavior." *Id.* at 903 (citation and quotations omitted). It carefully scrutinized each of the plaintiffs' circumstantial allegations—rejecting the allegations it deemed conclusory, *id.* at 904-05—to determine whether they plausibly suggested something more than lawful "parallel behavior," or whether the circumstantial allegations were "just as much in line with a wide swath of rational and competitive business strategy," *id.* at 903-911 (citation omitted) (affirming dismissal).

This Court has taken the same approach in discrimination cases, *see Rondigo, L.L.C. v. Twp. of Richmond*, 641 F.3d 673 (6th Cir. 2011), civil conspiracy cases, *see Hensley v. Gassman*, 693 F.3d 681 (6th Cir. 2012), and even run-of-the-mill breach-of-contract cases, *see Dakota Girls, LLC v. Phila. Indem. Ins. Co.*, 17 F.4th 645 (6th Cir. 2021). In each of these contexts, when the plaintiffs failed to provide any direct allegations for a foundational element of the claim, this Court carefully scrutinized the circumstantial factual allegations and did not hesitate to order or affirm dismissal when the allegations did not support a plausible inference of wrongdoing.[9] As the Court summarized in *Hensley*, where a defendant's conduct is "just as consistent with" plaintiffs' favored explanation as with an alternative explanation, the allegations must be dismissed for failure to state a claim. 693 F.3d at 695.

These precedents apply with full force in ERISA cases. The Supreme Court could not have been clearer that this is the law in its recent decision in *Hughes*. Prior to *Hughes*, many ERISA plaintiffs had taken the position that ERISA claims are somehow exempt from the plausibility pleading requirement established by Rule 8(a), *Twombly*, and *Iqbal*. That position had been embraced by the Third Circuit in *Sweda*, 923 F.3d at 326—on which the plaintiff leans heavily throughout his opening brief—and the Second Circuit in *Sacerdote v. N.Y. Univ.*, 9 F.4th 95, 108 & n.47 (2d Cir. 2021). *Hughes* rejected this position, holding that courts must "apply[] the pleading standard discussed in" *Iqbal* and *Twombly*. 142 S. Ct. at 742. It also

[9] *See, e.g.*, *Dakota Girls*, 17 F.4th at 651-52 (claim was inadequately pled because the factual allegations were "merely consistent with [the] defendant's liability" under the insurance contract) (citation omitted); *Rondigo*, 641 F.3d at 684 (where "there is nothing to suggest that these Defendants' actions were not taken in good faith and pursuant to applicable statutes" rather than with "unlawful discriminatory animus," the court cannot "infer more than the mere possibility of misconduct," and the claim was inadequately alleged) (citations omitted).

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 fiduciary judgments that can be made in any given situation, noting that "the circumstances facing an ERISA fiduciary will implicate difficult tradeoffs" and instructing courts to "give due regard to the range of reasonable judgments a fiduciary may make based on her experience and expertise." *Id.* In other words, there may be obvious and completely justifiable reasons for a fiduciary's decision to invest in one investment option over another, even if the unchosen option preferred by a particular participant ultimately performs less impressively or has a higher 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.

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

The plaintiff's allegations in this case provide a perfect example of the removed-from-context, ex-post-facto speculation on which ERISA plaintiffs regularly rely.

1. Investment performance.—As noted above, the Supreme Court has repeatedly instructed lower courts to undertake a "context-sensitive scrutiny" of ERISA class-action allegations. *Dudenhoeffer*, 573 U.S. at 425; *accord Hughes*, 142

S. Ct. at 742. But when ERISA defendants offer publicly available and judicially noticeable sources providing context that demonstrates that conclusory allegations of imprudence are implausible—*e.g.*, that a complaint's comparator is inapt, that alleged performance figures are wrong, or that a fiduciary decision is wholly consistent with common and accepted fiduciary practice—ERISA plaintiffs often cry foul, claiming a factual dispute that must be resolved through discovery. *Compare* Mot. to Dismiss at 19, *Evans v. Associated Banc-Corp*, No. 1:21-cv-00060 (E.D. Wis. Mar. 18, 2021), ECF No. 14 (citing public sources to debunk inapt comparators), *with* Opp. to Mot. to Dismiss at 17, *id.*, (E.D. Wis. May 27, 2021), ECF No. 30 (maintaining that the aptness of comparators is a matter for discovery).

That is exactly what the plaintiff does here. The district court concluded that it is implausible to infer imprudence merely because fiduciaries did not remove a fund that allegedly underperformed during a cherry-picked time period when judicially noticeable performance data shows that *the same fund actually outperformed* during an adjacent time period. RE 77, Page ID# 1531-1532. That conclusion is entirely sensible given the context and realities of investing. The notion that fiduciaries should chase performance is a misguided investment approach "generally doomed to some kind of failure."[10] It hinges on the idea that future

[10] Kate Stalter, *Chasing Performance Is a Quick Way to Disaster*, U.S. News (Feb. 8, 2017), https://money.usnews.com/money/blogs/the-smarter-mutual-fund-investor/articles/2017-02-08/chasing-performance-is-a-quick-way-to-disaster.

performance can be predicted from past performance—something that only clairvoyant fiduciaries could accomplish with accuracy. *See* Vanguard, *Quantifying the Impact of Chasing Fund Performance* (Apr. 2014), https://www.vanguard.com.hk/documents/quantifying-the-impact-en.pdf. Investing for retirement is a *long-term* endeavor; selling low and buying high is a recipe for locking in losses. That is why prudent fiduciaries consider past performance as only one of many factors when evaluating an investment line-up. Rather than confront that context, the plaintiff argues that the district court should have ignored it, Opening Br. 29-32—a proposition that is wholly at odds with the Supreme Court's admonitions.

Furthermore, it will *always* be possible for a plaintiff, with the benefit of hindsight, to find *some* option among the thousands on the market that outperformed investments in a plan. Indeed, one complaint's supposedly underperforming option is often another complaint's better-performing exemplar. For example, while some lawsuits allege that offering Fidelity Freedom Funds suggests imprudence,[11] others hold out those same funds as models of prudent plan management.[12]

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[11] *E.g.*, Compl. ¶¶ 22-26, *Maisonette v. Omnicom Grp. Inc.*, No. 1:20-cv-06007-CM (S.D.N.Y. July 31, 2020), ECF No. 1.

[12] *E.g.*, Am. Compl. ¶ 160, *Anderson v. Intel Corp. Inv. Pol'y Comm.*, No. 3:19-cv-04618-VC (N.D. Cal. Mar. 22, 2021), ECF No. 113; *compare also Becker v. Wells Fargo & Co.*, 2021 WL 1909632, at *1 n.1 (D. Minn. May 12, 2021) (alleging imprudence from offering Wells Fargo Stable Value Fund), *with McGinnes v. FirstGroup Am., Inc.*, 2021 WL 1056789, at *2 (S.D. Ohio Mar. 18, 2021) (Wells Fargo Stable Value Fund is part of a "diverse portfolio of well-established funds").

Fiduciaries are not guarantors of optimal plan performance; every plan line-up will include funds with periods of suboptimal performance. Under *Twombly*, hinging a prudence claim on these types of allegations of underperformance—allegations that are "just as much in line with" a prudently run plan as with an inference of misconduct—is insufficient to state a claim. 550 U.S. at 554.

2. Service-provider arrangements.—The plaintiff also challenges the plan's recordkeeping fees as "excessive." Opening Br. 9-10. This is a common allegation in ERISA complaints. Most plaintiffs complain about fiduciaries' failure to obtain services at the same fee level as one of the other 700,000+ retirement plans in the country,[13] or according to some seemingly arbitrarily chosen level that plaintiffs often nakedly contend is "reasonable." Here, the plaintiff seeks an inference of imprudence because the plan's "excessive" recordkeeping fees were $30-$34 per year—notably *lower* than the *Hughes* plaintiffs argued would have been "reasonable" for a "jumbo defined contribution plan" during the same time period. Br. for Petitioners at 9, *Hughes*, No. 19-1401 (U.S. Sept. 3, 2021), https://bit.ly/3HSTq85. Inferring imprudence from this type of allegation requires one to ignore obvious realities of plan management and ERISA's statutory structure.

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[13] DOL, *EBSA Fact Sheet* (2020), https://www.dol.gov/sites/dolgov/files/ebsa/about-ebsa/our-activities/resource-center/fact-sheets/ebsa-monetary-results.pdf.

First, neither recordkeepers nor recordkeeping services are interchangeable widgets—recordkeeping services are highly customizable depending on the needs of each plan, its participant population, the capabilities and resources of the plan's administrator or the sponsor's human-resources department, and other factors. Myriad services are available at different fee levels, including core operational services (*e.g.*, maintaining plan records, processing enrollment, processing investment elections and contributions, issuing account statements, processing transactions); a variety of options for participant communication; participant education, including access to online financial tools; brokerage windows; loan processing; and compliance services, including preparation and distribution of legally required notices.[14]

Second, fee arrangements between plans and recordkeepers are often extraordinarily complicated, with myriad ways compensation can be structured, which makes comparisons impossible without more facts than plan size. For example, fiduciaries may negotiate for "all-in" recordkeeping fees to cover all of the services described above, or they may negotiate a fee that covers a subset of services and agree to separate, fee-for-service charges on the remaining services.

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[14] *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://www.ici.org/system/files/2021-06/per27-06.pdf.

Third, "cheaper is not necessarily better," because service offerings and service levels differ between service providers. U.S. Dep't of Labor, *A Look at 401(k) Plan Fees* 1 (Sept. 2019) ("*A Look at Fees*"), https://bit.ly/2RZ2YtF. That is why fees are "just one of several factors fiduciaries need to consider in deciding on service providers." DOL*, Meeting Your Fiduciary Responsibilities* 5 (2020), https://www.dol.gov/sites/dolgov/files/ebsa/about-ebsa/our-activities/resource-center/publications/meeting-your-fiduciary-responsibilities.pdf. 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.

Fourth, the conclusory and speculative nature of these types of allegations is underscored by a dynamic that has played out in numerous ERISA cases. In several cases filed by the plaintiff's counsel, the plaintiffs' "reasonableness" bar has moved steadily lower as counsel learned that the original recordkeeping-fee allegations were wrong. In *Moore v. Humana*, for example, the original complaint alleged that reasonable recordkeeping fees were about "$40 per participant," but after learning that the plan's fees were less than that, the plaintiffs filed an amended complaint alleging that prudently managed plans paid between $25 and $28 per participant for recordkeeping fees. *See* Mot. to Dismiss at 2, *Moore v. Humana*, No. 3:21-cv-00232-RGJ (W.D. Ky. Sept. 27, 2021), ECF No. 23. The same thing occurred in a case filed against the Red Cross. *Compare* Consolidated Compl. ¶ 88, *In re Am. Nat'l. Red Cross ERISA Litig.*, No. 1:21-cv-00541-EGJ (D.D.C. June 15, 2021), ECF No. 20 (alleging that plaintiffs paid $71 per year in recordkeeping fees and that "reasonable" fees would have been $34 per year based on cherry-picked "comparator" plans), *with* First Am. Consolidated Compl. ¶ 94, *id.*, (D.D.C. Sept. 30, 2021), ECF No. 26 (alleging that plaintiffs paid between $31.50 and $45 per year in recordkeeping fees and revising the "reasonableness" level down to $30 based on new "comparator" plans).

And as occurs in the context of challenges to plan line-ups, one complaint's "excessive" fees are another complaint's prudent exemplar. For example, 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-110233-SFC-EAS (E.D. Mich. May 5, 2021), ECF No. 1. But a complaint filed against Xerox holds up *that exact plan* as an example of "prudent and loyal" decisionmaking with respect to recordkeeping fees. Compl. ¶ 45, *Carrigan v. Xerox Corp.*, No. 3:21-cv-01085-SVN (D. Conn. Aug. 11, 2021), ECF No. 1.

The district court correctly scrutinized these allegations under *Iqbal*'s standard, requiring the claim to be "plausible," and not just "possib[le]." RE 77, Page ID# 1526. The district court also correctly considered the allegations *in context* and considered obvious explanations for the defendants' choices, as *Hughes* and *Twombly* require. For example, with respect to the plaintiff's allegations that the defendants breached their fiduciary duty by including allegedly more expensive, less lucrative actively managed funds instead of allegedly cheaper, better performing index funds, the district court noted that price and performance comparisons are not determinative of fiduciary breach with respect to investments that have different characteristics. A fiduciary that includes actively managed funds "alongside other types of investments in a plan menu" is not plausibly imprudent, because "[a]ctively managed funds … provide plan participants with the opportunity to take on more risk and pay higher fees in the hope of beating the market." RE 77, Page ID #1530. In other words, the allegations that the active funds in the plan were high cost and low performing—even if true—are not sufficient to state a claim, because there is an obvious alternative explanation for plan fiduciaries' decision to include those options that does not involve a fiduciary breach: plan fiduciaries were providing plan participants the opportunity to take on more risk, in the hopes of beating the market. It is precisely this kind of decision—whether to offer active or passive investments—that "implicate[s] difficult tradeoffs" and for which "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.

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 pleading rules is necessary to guard against speculative suits that "push cost-conscious defendants to settle even anemic cases." 550 U.S. at 558-59. In ERISA cases, discovery is entirely asymmetrical and 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 for breach of the duty of prudence 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;[15] for failing to divest from stocks with declining share prices or high risk profiles,[16] and for failing to *hold onto* such stock because high risk can produce high reward;[17] for making available investment options that plaintiffs' lawyers deem too risky (as in this case),[18] and conversely for taking what other plaintiffs' lawyers deem an overly cautious approach.[19] Indeed, plaintiffs have advanced "diametrically opposed" theories of liability *against the same defendant*, giving new meaning to the phrase "cursed-if-you-do, cursed-if-you-don't."[20]

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[15] *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.

[16] *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").

[17] *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).

[18] Compl., RE 1, ¶ 22; *see also, 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.

[19] *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).

[20] *E.g.*, *Evans v. Akers*, 534 F.3d 65, 68 (1st Cir. 2008) (involving claims that fiduciaries breached ERISA duties by maintaining a "heavy investment in Grace securities when the stock was no longer a prudent investment" and noting "[a]nother

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. A Look at Fees*

suit challenging the actions of Plan fiduciaries" that "asserted a diametrically opposed theory of liability"—"that the Plan fiduciaries had imprudently *divested* the Plan of its holdings in Grace common stock despite the company's solid potential to emerge from bankruptcy" (citation omitted)).

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." Mellman & Sanzenbacher, *supra*, at 5. Now fiduciaries overwhelming choose purportedly "'safe' funds over those that could add greater value." *Id.*

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, 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.

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 all courts apply *Twombly*'s searching "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 issue a published opinion saying as much, and adopting the approach used in *Travel*

[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 market for fiduciary insurance).

Agent, Rondigo, *Hensley*, and *Dakota Girls* in ERISA cases as well, particularly in light of the increasing number of ERISA lawsuits throughout the country and in this circuit especially.

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 6,392 words, excluding the parts exempted by Rule 32(a)(7)(B)(iii).

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CERTIFICATE OF SERVICE

I, Jaime A. Santos, hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit by using the appellate CM/ECF system on February 18, 2022.

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