EXHIBIT A

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

JERMAINE ANDERSON, individually and as a representative of a class of similarly situated persons, on behalf of the ADVANCE 401(K) PLAN, Plaintiff, v. ADVANCE PUBLICATIONS, INC., Defendant.	Case No. 1:22-CV-06826-AT

BRIEF OF *AMICUS CURIAE* CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS THE AMENDED COMPLAINT UNDER RULE 12(B)(6)

Stuart Sarnoff (N.Y. Bar No. 1976034)
O'Melveny & Myers LLP
Times Square Tower
7 Times Square
New York, NY 10036
Tel: (212) 326-2000
ssarnoff@omm.com

Shannon Barrett (*pro hac vice*)
Alexander Reed (*pro hac vice*)
O'Melveny & Myers LLP
1625 Eye St., N.W.
Washington, D.C. 20006
Tel: (202) 383-5300
sbarrett@omm.com
areed@omm.com

Counsel for Amicus Curiae Chamber of Commerce of the United States of America

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INTEREST OF AMICUS CURIAE

The Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation, representing approximately 300,000 direct members and indirectly representing the interests of more than three million businesses and professional organizations of every size, in every industry sector, and from every region of the country.[1] Many of the Chamber's members sponsor or provide services to retirement plans governed by the Employee Retirement Income Security Act of 1974 ("ERISA"). The Chamber regularly participates as *amicus curiae* in ERISA cases at all levels of the federal court system, including cases addressing the standard for pleading fiduciary breach claims based on circumstantial allegations of imprudence. The Chamber submits this brief to aid the Court's consideration of defendant's motion to dismiss plaintiff's Amended Class Action Complaint ("Amended Complaint" or "Am. Compl.") (ECF No. 54) by providing additional context regarding the factors bearing on a fiduciary choice of plan investment options (including target date funds), the circumstances in which such decisions are made, and the broader litigation landscape.

INTRODUCTION

ERISA does not dictate that plan fiduciaries achieve particular results. Nor does it require or forbid the use of any specific investment option. Rather, ERISA requires fiduciaries act "with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims." 29 U.S.C. § 1104(a)(1)(B). Inherent in this standard is a recognition that fiduciary decision-making entails discretion and there often is not

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

one objectively "right" choice. The Supreme Court has recognized the same. Noting the "context specific" nature of the statutory standard, it has cautioned that, "[a]t times, 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 v. Nw. Univ.*, 142 S. Ct. 737, 742 (2022).

Yet, despite the flexibility of the statutory prudence standard, the last several years have brought an explosion of ERISA litigation seeking to second-guess plan fiduciaries' decisions based on the hindsight observation that alternatives would have generated better results, at least over the timeframe specified by plaintiffs.[2] The current case epitomizes this approach: Plaintiff, a current or former participant in the Advance 401(k) Plan ("Plan"), alleges that defendant breached its fiduciary duties by retaining the BlackRock LifePath Index Funds (the "BlackRock TDFs") as the Plan's target date investment option and qualified default investment alternative. Plaintiff, however, does not meaningfully allege any way in which the fiduciaries' "care, skill, prudence, [or] diligence" fell short. 29 U.S.C. § 1104(a)(1)(B). Plaintiff instead asks the Court to infer that the fiduciaries' process must have been insufficient because the BlackRock TDFs underperformed certain alternative target date fund ("TDF") suites over some time periods (while outperforming some or all of those alternative fund suites over others).

Just as it is easy to pick the winner of a race after it has been run, it is easy enough to generate such hindsight-based attacks on investment decisions. Where any set of funds exists, some will invariably underperform others over any given time period. Thus, the plaintiffs' bar

[2] *See, e.g.*, Jon Chambers, *ERISA Litigation in Defined Contribution Plans: Background, History, Current Status and Risk Management Techniques,* SageView Advisory Group (Mar. 2021), https://tinyurl.com/ejcuzaau; Jacklyn Wille, *401(k) Fee Suits Flood Courts, Set for Fivefold Jump in 2020 (1)*, Bloomberg Law (Aug. 31, 2020), https://bit.ly/3fDgjQ5.

need only wait to see which funds underperform over a discrete period of time to formulate a theory of imprudence against any fiduciaries who chose to offer those funds. And potential litigation targets expand even further when one considers that funds which prosper relative to their peers over some periods commonly trail the performance of those peers over others. This is particularly so in the case of TDFs, which have investment strategies and features that vary greatly from suite to suite, causing different TDF suites to thrive in different market environments. As a result, plan fiduciaries who offered the very funds that plaintiff casts as prudent alternatives here have themselves been sued by other plaintiffs focused on other cherrypicked timeframes and comparators.

Unlike potential plaintiffs, however, plan fiduciaries do not have the benefit of hindsight when evaluating funds for retention or selection. They instead must make decisions for their plans in real time based on the information available when those decisions are made. Nor does it suffice to say that the fiduciaries here should have removed the BlackRock TDFs in the face of the performance figures cited in the Amended Complaint. Indeed, as plaintiff acknowledged in his initial Class Action Complaint, as of the last quarter-end before plaintiff filed his suit, half of the vintages of the BlackRock TDFs had outperformed all but one of plaintiff's allegedly prudent alternatives on a trailing three-year basis, and all of the vintages had outperformed at least one allegedly prudent alternative over that same time period. ECF No. 1, ¶ 39. Removing the BlackRock TDFs based on earlier relative underperformance thus could have subjected plan participants to worse rather than better performance.

Plaintiffs asserting a fiduciary breach based on the choice to offer a particular investment option must plausibly show that no prudent fiduciary could have made the same investment decision when the decision was made. *See, e.g., Pension Ben. Guar. Corp. ex rel. St. Vincent*

Cath. Med. Ctrs. Ret. Plan v. Morgan Stanley Inv. Mgmt. Inc. ("*St. Vincent*"), 712 F.3d 705, 720 (2d Cir. 2013). Merely pointing out in hindsight that other alternatives performed better on either an absolute or risk-adjusted basis over a given time period does not meet that standard. Allowing claims such as these to proceed past the pleadings stage penalizes fiduciaries, not for flaws in their deliberative processes, but for failing to predict the future. Worse still, it encourages near-sighted returns-chasing (with the likely effect of causing participants to "buy high" and "sell low") at the expense of the long-term, multi-factored considerations that are characteristic of prudent decision-making.

DISCUSSION

I. TDFs Vary Significantly in Terms of Investment Strategy, Risk, and Cost, and Different Fiduciaries May Reasonably Determine That Different TDF Suites Are Appropriate for Their Plans.

TDFs are intended to provide a long-term, all-in-one solution through which a participant's investment assets are allocated among a mix of stocks, bonds, and other investments that change as the participant ages, such that the participant does not need to allocate his or her account among different funds to achieve a diversified portfolio. *See* DOL EBSA, *Target Date Retirement Funds – Tips for ERISA Plan Fiduciaries* at 1 (Feb. 2013), https://bit.ly/3mPRxjC ("*Tips for ERISA Plan Fiduciaries*"). A TDF's initial asset allocation usually consists mostly of equity investments, which typically have greater returns potential but also carry greater investment risk. *Id.* As the target retirement date approaches (and, for some TDFs, even beyond that retirement date), the fund's asset allocation shifts to include a higher proportion of more conservative investments. *Id.* TDFs "can be attractive investment options for employees who do not want to actively manage their retirement savings," and many plan sponsors select TDFs as the default investment option for those plan participants who fail to make an election regarding investment of their accounts. *Id.* Largely for these reasons, TDFs have come to dominate the retirement investment landscape, with a total of $3.27 trillion invested in TDFs in 2021. Morningstar, *2022 Target-Date Strategy Landscape* at 1 (Mar. 23, 2022), https://bit.ly/3HhLXzW ("*Morningstar Target-Date Landscape*").

Given the complexities inherent in multi-asset investment vehicles intended to provide an age-appropriate, diversified portfolio that continuously adjusts over a period of decades, it is unsurprising that TDFs vary materially in multiple respects. TDFs, for example, vary significantly in their "glidepaths"—the schedules by which their asset allocations are adjusted over time—such that even funds with the same target retirement date may have materially different asset allocations. *See* SEC and DOL, Notice of Hearing, Hearing on Target Date Funds and Similar Investment Options at 1–2 (May 19, 2009), https://bit.ly/3ubDWHR ("SEC/DOL Notice of Hearing").

One key difference among TDF glidepaths is whether the suite uses a "to" approach, in which the funds reach their most conservative asset allocation at the target retirement date (like the BlackRock TDFs), or a "through" approach, in which the funds continually wind down their equity exposure after retirement (like the comparator funds offered by plaintiff). *Tips for ERISA Plan Fiduciaries* at 1; *Morningstar Target-Date Landscape* at 36. The chosen approach directly impacts how a TDF's assets are allocated over time and thus how the funds will perform in different market environments. *Morningstar Target-Date Landscape* at 37–38. This difference in performance is reflected in the fact that the S&P Target Date Indices, which the Amended Complaint touts as the "most common benchmark used to approximate the overall performance of the TDF industry" (Am. Compl. ¶ 35), include separate sets of indices for "to" and "through" TDFs. S&P Dow Jones Indices, *S&P Target Date Index Series Methodology* at 2 (June 2022), https://tinyurl.com/3zcmves2. Nevertheless, as the existence of separate market indices for "to" and "through" TDFs also underscores, both approaches are accepted, and either approach may be reasonable for a retirement plan.[3] By shifting to a more conservative asset allocation at an earlier point, the "to" approach affords participants greater protection against investment risk and volatility as they enter their intended retirement years. *See Tips for ERISA Plan Fiduciaries* at 1. That approach thus may be more appropriate where participants are less likely to keep working after their target retirement date, whereas the "through" approach may be more appropriate where participants are likely to continue to supplement their income by working well past that date. *See* Julianna Paterra, *To or Through? Evaluating TDF Glide Paths,* Benefits Magazine at 48–49 (Dec. 2019), https://tinyurl.com/3cyecerk. The choice between the two approaches depends on fiduciary assessments about a particular plan's participant population, including that population's investment behavior, and may be influenced by considerations such as participants' average savings rates, salaries, overall risk tolerance, and access to other retirement resources like a defined benefit pension plan. *See* Amanda Umpierrez, *Evaluating 'To' vs. 'Through' Glide Paths*, Plan Sponsor (Feb. 17, 2021), https://bit.ly/3N8CQmK; *Choosing Target Date Funds*.

Even within the broad "to" and "through" categories, there are significant differences across TDFs in terms of asset allocation and risk profile.[4] As the U.S. Government Accountability Office has explained: "Differences in the size of the equity component throughout the TDF's glide path may be rooted in different goals and in the treatment of various

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[3] The Department of Labor has emphasized the importance of such participant-specific factors in its guidance to fiduciaries of the selection of TDF suites, encouraging fiduciaries to discuss the "possible significance of other characteristics of the participant population, such as participation in a traditional defined benefit pension plan offered by the employer, salary levels, turnover rates contribution rates and withdrawal patterns." *Tips for ERISA Plan Fiduciaries* at 2.

[4] *See* SEC/DOL Notice of Hearing at 1–2.

considerations such as the risk of losing money because of financial market fluctuations—investment risk—and the risk that a participant could outlive his or her assets—longevity risk." U.S. Gov't Accountability Off., GAO-11-118, *DEFINED CONTRIBUTION PLANS - Key Information on Target Date Funds as Default Investments Should Be Provided to Plan Sponsors and Participants* at 11 (Jan. 2011), https://bit.ly/3b7HjbP. In addition to the extent of a fund's concentration in equities, TDFs can also differ along such parameters as their relative exposure of domestic versus international equity, their tilt toward growth versus value equity, and their exposure to alternative asset classes. Just as with the broad "to" versus "through" distinction, these differences in asset allocation strategy "can significantly affect the way a TDF performs." *Tips for ERISA Plan Fiduciaries* at 1.

TDFs may also invest in actively or passively managed underlying funds—or a mix of both. *See, e.g.*, *Parmer v. Land O'Lakes, Inc.*, 518 F. Supp. 3d 1293, 1306 (D. Minn. 2021). As courts have recognized, active and passive management are different approaches to investing, with "different aims, different risks, and different potential rewards." *Davis v. Wash. Univ. in St. Louis*, 960 F.3d 478, 485 (8th Cir. 2020). Notably, although asset allocation tends to be the primary driver of performance for any TDF—passive, active, or blend—it is essentially the *only* driver of performance for index-based funds like the BlackRock TDFs, because index funds are designed to closely track (rather than beat) the returns of a relevant market index. *See id.*

Different plan fiduciaries can reasonably weigh these various TDF features differently, as reflected in the array of choices that plan fiduciaries have made in selecting TDF suites. As the Complaint acknowledges, retirement plan assets are spread across more than two dozen TDF suites. Am. Compl. ¶ 24. And, while plaintiff emphasizes that a substantial percentage of those assets are concentrated in a half dozen TDF suites (including the BlackRock TDFs), no single suite has managed to capture a majority of the market. Am. Compl. ¶ 39. There is no one universally accepted "best" TDF strategy for every retirement plan; there is instead a "range of reasonable judgments a fiduciary may make" in choosing a TDF suite in the face of "difficult tradeoffs"—the type of range the Supreme Court has instructed courts to consider in evaluating motions to dismiss. *Hughes*, 142 S. Ct. at 742.

II. Plaintiff's Comparison of the Historical Returns of the BlackRock TDFs to Those of a Handful of Other TDF Suites Does Not Support a Claim of Imprudence.

Plaintiff's allegations do not meet the established standards for pleading an imprudent fiduciary investment process. Plaintiff does not allege any genuine shortcomings in defendant's process; nor does plaintiff allege facts that, in combination, plausibly establish that a fiduciary following a prudent process would not have reached the same investment decision. Plaintiff instead rests his claim of fiduciary breach on the backward-looking observation that a handful of other funds generated greater returns over a given period of time.

Allowing ERISA claims to proceed on such a thin basis would prevent motions to dismiss from serving as an "important mechanism for weeding out meritless claims," *Fifth Third Bancorp. v. Dudenhoeffer*, 573 U.S. 409, 425 (2014), whether in the context of challenges to the retention of TDFs or ERISA plan investments generally. In a world where no single TDF suite has attracted the majority of 401(k) plan assets (*see* Am. Compl. ¶ 39), a large cross-section of plan fiduciaries, if not a majority of them, will inevitably be susceptible to a criticism that some other set of funds did better over a given time period regardless of the skill, care, prudence, and diligence those fiduciaries apply in making their investment decisions. Plaintiff's approach thus diverts the prudence inquiry away from the fiduciary process and places it exclusively where courts, including the Second Circuit, have held it does not belong—a hindsight view of investment results. Plaintiff's outcome-focused attack would be a legally and logically flawed basis for challenging any investment decision. It is particularly misplaced, however, when applied to the retention of a suite of TDFs given the variation among those investment vehicles and the number of factors that can go into choosing between them.

A. To Plead a Breach of ERISA's Prudence Standard, Plaintiff Must Allege Facts Sufficient to Plausibly Establish an Inadequate or Improper Fiduciary Process.

ERISA plan fiduciaries face a host of decisions when it comes to plan investments. In the context of 401(k) plans, they must decide, among other choices, how many investment options to offer; what asset classes and investment strategies to include; whether to offer both passively and actively managed options and, if so, in what blend; what types of investment vehicles (mutual funds, collective trusts, or separate accounts) to utilize; what fund to designate as the qualified default investment alternative for participants who decline to make an affirmative investment allocation; and which particular managers to use. These decisions do not submit to obvious choices, but can instead "implicate difficult tradeoffs[.]" *Hughes,* 142 S. Ct. at 742. As a result, fiduciaries facing the same or similar decision commonly reach varying conclusions. The Amended Complaint, for example, acknowledges that with respect to the decision at issue here—the choice of a TDF suite—at least six different suites have attracted more than $100 billion in retirement plan assets. Am. Compl. ¶ 39. And the fiduciaries of many plans have selected TDF suites available on the market beyond these six or constructed their own custom TDFs. *See Morningstar Target-Date Landscape* at 20 (identifying forty-five TDF mutual fund suites as of year-end 2021); *DC Trends Survey Highlights Plans' Focus for 2020*, Callan, https://tinyurl.com/4u33f6uj (noting roughly 20% of plans used a custom TDF solution). No suite has cornered a majority of the market. Am. Compl. ¶ 39.

ERISA's prudence standard accommodates both the complexities of the decisions fiduciaries must make and the uncertainty in which they must make them. Rather than attempt to dictate precise investment choices, Congress required only that fiduciaries act with "care, skill, prudence, and diligence" in light of the character of their particular plan and the circumstances that exist at the time of their decision. 29 U.S.C. § 1104(a)(1)(B). The prudence inquiry thus "focuses on a fiduciary's conduct in arriving at an investment decision, not on its results, and asks whether [the] fiduciary employed the appropriate methods to investigate and determine the merits of a particular investment." *St. Vincent*, 712 F.3d at 716 (quoting *In re Unisys Sav. Plan Litig.*, 74 F.3d 420, 434 (3d Cir. 1996) (alterations omitted)). While a plaintiff may rely on indirect indications of an imprudent process, the prudence standard still "generally requires the plaintiff to allege facts, accepted as true, showing that a prudent fiduciary in like circumstances would have acted differently." *St. Vincent*, 712 F.3d at 720.

Given this requirement, the Second Circuit has recognized that it is not "necessarily sufficient to show that better investment opportunities were available at the time of the relevant decisions." *Id.* at 718; *see Laboy v. Bd. of Trs. of Bldg. Serv. 32 BJ SRSP*, 513 F. App'x 78, 80 (2d Cir. 2013) ("It is well-established that allegations of poor results alone do not constitute allegations sufficient to state a claim for such a breach."); *see also, e.g.*, *Smith v. CommonSpirit Health*, 37 F.4th 1160, 1166 (6th Cir. 2022) ("Nor does a showing of imprudence come down to simply pointing to a fund with better performance."); *Tussey v. ABB, Inc.*, 746 F.3d 327, 338 (8th Cir. 2014) (hindsight-oriented allegations based on "subsequent performance" do not state a claim of imprudence); *Wilcox v. Georgetown Univ.*, 2019 WL 132281, at *11 (D.D.C. Jan. 8, 2019) ("ERISA does not provide a cause of action for 'underperforming funds.'"). This is because there is often no one "right" answer when it comes to investment decisions, let alone one that can be identified without the benefit of hindsight. Fiduciary decision-making typically involves the "balancing of competing interests under conditions of uncertainty." *Armstrong v.*

LaSalle Bank Nat'l Ass'n, 446 F.3d 728, 733 (7th Cir. 2006). Accordingly, "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; *see Chao v. Merino*, 452 F.3d 174, 182 (2d Cir. 2006) ("ERISA does not impose a duty [on fiduciaries] to take any particular course of action if another approach seems preferable." (quotation omitted)). In addition, courts must avoid assessing a fiduciary's conduct through the lens of hindsight, explicitly or implicitly assuming that because something happened after a fiduciary's decision, the fiduciary should have known it would occur. *See St. Vincent*, 712 F.3d at 716 ("Under that common-law standard, and consistent with ERISA's instruction that fiduciaries act in a prudent manner under the circumstances then prevailing . . . , we judge a fiduciary's actions based upon information available to the fiduciary at the time of each investment decision and not from the vantage point of hindsight[.]" (quotation and citation omitted)); s*ee also id.* (ERISA "requires prudence, not prescience" (quotation omitted)).

B. Plaintiff's Hindsight Observations of Fund Performance Do Not Plausibly Establish an Improper or Inadequate Fiduciary Process.

Plaintiff's comparison of the returns of a challenged TDF suite to those of a small subset of the TDF market for ERISA plans fails to meet these established pleading standards. The wide variation in the strategies and structures of different TDFs renders plaintiff's comparison of the returns of the BlackRock TDFs to those of other suites virtually meaningless, and certainly inadequate, in evaluating whether defendant followed a prudent process. It is predictable that funds with different investment strategies and asset allocations will perform differently. Thus, with the benefit of hindsight, one can readily identify within a set of diverse funds some funds which underperformed others over a given timeframe. That is particularly so if, as here, underperformance is not defined by comparison to all funds in the same category, or even those funds with the most similar investment mandates, but instead by comparison to a small set of those funds that are the most popular in the market and thus likely to have been among the top performers. What is more, because funds with distinct strategies flourish under different market conditions, it is possible to make almost any fund look superior or inferior to others by manipulating the timeframe considered. Thus, TDFs that are held up as prudent alternatives in some complaints are cast as imprudent choices in others—including some of the very TDF suites that plaintiff identifies as prudent alternatives here.[5] Indeed, plaintiff's own counsel have cited the BlackRock TDFs they attack here as a superior "off-the-shelf" comparator in another complaint, touting them as among the "most popular off-the-shelf target date funds." *See* Am. Compl. ¶¶ 146–50, *Wehner v. Genentech, Inc.*, No. 20-cv-06894-RS (N.D. Cal. Mar. 1, 2021), ECF No. 46.

As reflected in the ability of plaintiffs to frame the same TDFs as imprudent in one case and prudent in another, a hindsight assessment of a TDF suite's raw performance to a handful of other funds says little about the skill and care applied in selecting or retaining that suite as a plan investment option. As easy as it is to note which funds outperformed others in the past, it is difficult if not impossible to predict which funds will perform better going forward. *See Seawell*

[5] *Compare, e.g.*, Am. Compl. ¶ 46 (identifying American Funds Target Date Retirement funds as prudent alternative), *with* Compl. ¶¶ 360–460, *Patterson v. The Capital Group Companies, Inc.*, No. 2:17-cv-04399 (C.D. Cal. June 13, 2017), ECF No. 1 (challenging American Funds Target Date Retirement funds as imprudent); Compl. ¶ 93, *Russell v. Ill. Tool Works, Inc.*, No. 1:22-cv-02492 (N.D. Ill. May 11, 2022), ECF No. 1 (identifying Fidelity Freedom Fund TDFs as a prudent investment alternative), *with* Compl. ¶¶ 55, 77–82, *Salvador Aquino v. 99 Cents Only Stores LLC*, No. 2:22-cv-01966-SPG-AFM (C.D. Cal. Mar. 25, 2022), ECF No. 1 (challenging Fidelity Freedom Fund TDFs as imprudent); Second Am. Compl. ¶¶ 54, 56 72, 94, *McGinnes v. FirstGroup Am.*, *Inc.*, No. 1:18-cv-0326-TSB (S.D. Ohio Sept. 30, 2021), ECF No. 71 (identifying T. Rowe Price TDFs as a prudent investment alternative), *with* Am. Compl. ¶¶ 105–10, *Tobias v. NVIDIA Corp.*, No. 4:20-cv-6081-LHK (N.D. Cal. Nov. 12, 2021), ECF No. 51 (challenging T. Rowe Price TDFs as imprudent).

v. Brown, 2010 WL 11561287, at *8 (S.D. Ohio Sept. 9, 2010) ("[I]t is easy to say in retrospect what asset classes were producing the highest rates of return and what those rates of return were. What is not so simple is to predict where the highest rates of return will lie in the future."). Accordingly, courts have dismissed as insufficient challenges to the selection or retention of TDFs based on the fact that other TDFs with different investment strategies generated higher returns. *See., e.g., Meiners v. Wells Fargo & Co.*, 898 F.3d 820, 823 (8th Cir. 2018) ("The fact that one fund with a different investment strategy ultimately performed better does not establish anything about whether the Wells Fargo TDFs were an imprudent choice at the outset."); *Wehner v. Genentech, Inc.*, 2021 WL 507599, at *8 (N.D. Cal. Feb. 9, 2021).

Although plaintiff may argue that he is not relying on hindsight because he alleges that defendant should have removed the BlackRock TDFs from the Plan's lineup based on the ongoing performance reported in the Complaint, this too ignores the uncertainties inherent in real-time fiduciary decision-making. As the Department of Labor and Securities and Exchange Commission have both recognized, an investment's past performance is not a reliable indicator of how the investment will perform prospectively. *See* 29 C.F.R. § 2550.404a-5(d)(1)(ii)(A) (DOL regulation requiring plan fiduciaries to caution participants that "an investment's past performance is not necessarily an indication of how the investment will perform in the future."); 17 C.F.R. § 230.482(b)(3)(i) (SEC regulation requiring disclaimer that "past performance does not guarantee future results."). Funds that generate lower returns than a set of alternative funds during one period can generate greater returns than those same funds over others. This is particularly true in the case of investment vehicles, such as TDFs, that pursue very different investment strategies.

Indeed, the relative performance of the BlackRock TDFs and plaintiff's comparator suites in one year has in no way been a dependable indicator of their relative performance in others. The following chart ranks the annual returns[6] of the 2045 vintage of the BlackRock TDFs and each of plaintiff's alleged prudent alternatives over the last seven years:

Fund	2016 Rank	2017 Rank	2018 Rank	2019 Rank	2020 Rank	2021 Rank	2022 Rank
Fidelity Freedom Index 2045 Premier (FQIPX)	1	5	2	2	3	5	3
Vanguard Target Retirement 2045 Fund (VTIVX)	2	3	5	4	4	4	1
T. Rowe Price Retirement I 2045 I (TRPKX)	5	1	T-3	3	2	2	5
BlackRock LifePath Index 2045 K (LIHKX)	3	4	T-3	1	5	1	2
American Funds 2045 Trgt Date Retire R6 (RFHTX)	4	2	1	5	1	3	4

As the chart shows, none of the funds consistently generated the highest or lowest annual returns (or even among the highest or lowest annual returns) during that period. Rather, every fund, including the 2045 BlackRock TDF, produced the highest annual return of the group in at least one year and the lowest annual return of the group in at least another. Moreover, on several occasions, a fund's annual return went from the relative "worst" in one year to the relative "best" in the next, or vice versa.

[6] Annual returns data was obtained by entering the five-letter mutual fund ticker into the publicly available Morningstar database (www.morningstar.com). Specifically, returns data can be found at https://www.morningstar.com/funds/xnas/fqipx/performance for the Fidelity Freedom Index 2045 Premier (FQIPX); https://www.morningstar.com/funds/xnas/vtivx/performance for the Vanguard Target Retirement 2045 Fund (VTIVX); https://www.morningstar.com/funds/xnas/trpkx/performance for the T. Rowe Price Retirement I 2045 fund, Class I (TRPKX); https://www.morningstar.com/funds/xnas/lihkx/performance for the BlackRock LifePath Index 2045 fund, Class K (LIHKX); and https://www.morningstar.com/funds/xnas/rfhtx/performance for the American Funds 2045 Target Date Retirement fund, Class R6 (RFHTX).

Plaintiff's allegations in this case have borne out the same point. As alleged in plaintiff's initial complaint, over the three-year period trailing "2Q22"—the last quarter before plaintiff filed suit—two vintages of the BlackRock TDFs outperformed all of plaintiff's comparators, two other vintages outperformed all but one of plaintiff's comparators, and every single vintage outperformed at least one of plaintiff's comparators. ECF No. 1, ¶ 39. Plaintiff has similarly acknowledged that half the vintages of the BlackRock TDFs outperformed all but one of plaintiff's comparators over the trailing five-year period. *Id.*

The point is not that plaintiff's claims are invalid because of the BlackRock TDFs' recent outperformance. The point is that past performance is not a reliable indicator of future results, as both DOL and the SEC emphasize. Accordingly, rather than chase returns, fiduciaries can reasonably choose to weather discrete periods of relative underperformance and consider factors beyond a fund's historical returns in evaluating whether the fund is an appropriate long-term investment option. *See, e.g.*, *Jenkins v. Yager*, 444 F.3d 916, 926 (7th Cir. 2006) ("Nothing in the record suggests that it was not reasonable and prudent to select conservative funds with long-term growth potential and to stay with those mutual funds even during years of lower performance."); *Patterson v. Morgan Stanley*, 2019 WL 4934834, at *11 (S.D.N.Y. Oct. 7, 2019) ("[T]he duty of prudence does not compel ERISA fiduciaries to reflexively jettison investment options in favor of the prior year's top performers."); *White v. Chevron Corp.*, 2016 WL 4502808, at *17 (N.D. Cal. Aug. 29, 2016) ("[A] fiduciary may – and often does – retain investments through a period of underperformance as part of a long-range investment strategy."). Indeed, the willingness of fiduciaries to stick with investment options through periods of relative underperformance can be critical in protecting participant interests. *CommonSpirit Health*, 37 F.4th at 1166 ("Precipitously selling a well-constructed portfolio in response to disappointing short-term losses, as it happens, is one of the surest ways to frustrate the long-term growth of a retirement plan."); *Wildman v. Am. Century Servs., LLC*, 362 F. Supp. 3d 685, 707 (W.D. Mo. 2019) ("Were the Committee to adopt a strategy of removing funds based on short-term underperformance, [p]lan participants would be forced to sell their shares at a lower price and miss out on any subsequent improved performance.").

Thus, as the Second Circuit has held, the mere recitation of underperformance relative to a few alternative funds over a given period is not a sufficient basis to plausibly conclude that a fiduciary following a prudent process would not have retained the challenged fund. *Cf. St. Vincent*, 712 F.3d at 721–22 (recognizing that, "in some cases," decline in value of security, "*combined with other alleged facts*," could support inference that security was no longer a sound plan investment but affirming dismissal where complaint failed to allege "such surrounding circumstances"); *see also CommonSpirit Health,* 37 F.4th at 1166 ("Nor does a showing of imprudence come down to simply pointing to a fund with better performance. We accept that pointing to an alternative course of action, say another fund the plan might have invested in, will often be necessary to show a fund acted imprudently (and to prove damages). But that factual allegation is not by itself sufficient."); *Chevron Corp.,* 2016 WL 4502808, at *17 ("Poor performance, standing alone, is not sufficient to create a reasonable inference that plan administrators failed to conduct an adequate investigation – either when the investment was selected or as its underperformance emerged – as ERISA requires a plaintiff to plead some other objective indicia of imprudence.").

Plaintiff's references to the TDFs' risk-adjusted returns, or "Sharpe ratios," in addition to their raw returns does not overcome this insufficiency. Sharpe ratios are merely another measure of an investment's past performance over a given period that can and do fluctuate over time, as reflected by the different rankings that the Amended Complaint assigns to individual vintages of the BlackRock TDFs in different quarters. Am. Compl. ¶ 46. Sharpe ratios thus have the same shortcoming as any hindsight performance metric—they do not, in and of themselves, reliably tell a fiduciary how a fund is likely to perform in the future as market conditions change.[7] As a result, they do not plausibly indicate whether a fiduciary failed to follow a prudent monitoring process.

CONCLUSION

For the foregoing reasons, *amicus* urges the Court to grant defendant's motion to dismiss.

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O'MELVENY & MYERS LLP

By: /s/ *Stuart Sarnoff*

Stuart Sarnoff (N.Y. Bar No. 1976034)
O'Melveny & Myers LLP
Times Square Tower
7 Times Square
New York, NY 10036
Tel: (212) 326-2000
ssarnoff@omm.com

Shannon Barrett (*pro hac vice*)
Alexander Reed (*pro hac vice*)
O'Melveny & Myers LLP
1625 Eye St., N.W.
Washington, D.C. 20006
Tel: (202) 383-5300
sbarrett@omm.com
areed@omm.com

[7] Plaintiff's reliance on a comparison of the BlackRock TDFs' returns to the historic performance of S&P Target Indices suffers this same shortcoming. In addition, although index benchmarks can be a useful tool in monitoring funds, they are not funds themselves and are not investible. Am. Compl. ¶ 35. The Amended Complaint does not point to any actual fund that has consistently, much less predictably, outperformed the S&P Target Indices. Failing that, plaintiff has not plausibly alleged that a fiduciary following a prudent process would have jettisoned the BlackRock TDFs in favor of another TDF suite based on their performance relative to the S&P Target Indices.

Attorneys for Amicus Curiae Chamber of Commerce of the United States of America