UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION AT CINCINNATI

LISA A. SIGETICH, Plaintiff, v. THE KROGER CO., THE BOARD OF DIRECTORS OF THE KROGER CO., and JOHN DOES 1-30, Defendants.	Case No. 1:21-cv-00697-SJD (SKB) Judge Timothy S. Black Magistrate Judge Stephanie K. Bowman

MOTION FOR THE CHAMBER OF COMMERCE
OF THE UNITED STATES OF AMERICA FOR LEAVE
TO PARTICIPATE AS *AMICUS CURIAE*

The Chamber of Commerce of the United States of America ("Chamber") respectfully moves for leave to file a brief as *amicus curiae* in the above-captioned case in support of Defendants' motion to dismiss. The proposed *amicus* brief is attached as Exhibit A. Defendants have consented to the filing of this brief. Counsel for Plaintiff informed counsel for the Chamber that Plaintiff does not consent to the Chamber's motion.[1]

Amicus participation is appropriate where, as here, the *amicus* has "an important interest and a valuable perspective on the issues presented." *United States v. Columbus*, 99-1097, 2000 WL 1745293, at *1 (S.D. Ohio Nov. 20, 2000) (quoting *United States v. Michigan*, 940 F.2d 143, 165 (6th Cir. 1991)). "[T]here is no governing standard" dictating "the procedure for obtaining leave to file an amicus brief in the district court," and district courts thus "have broad discretion" to assess whether *amicus* participation will be "of aid to the court and offer insights not available from the parties." *Auto. Club of N.Y., Inc. v. Port Authority of N.Y. and N.J.*, No. 11 Civ. 6746(RJH), 2011 WL 5865296, at *1 (S.D.N.Y. Nov. 22, 2011). The Chamber aims to provide those insights here by virtue of its unique membership, which represents nearly all of those in the private-sector retirement community—plan sponsors, asset managers, recordkeepers, consultants, and other service providers. As a result, the Chamber's collective knowledge about the management of retirement plans, the legal issues surrounding ERISA, and the types of allegations commonly included in these types of complaints extends beyond any single defendant or group of defendants named in a particular case. The Chamber seeks to provide this Court with a broader

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[1] The Chamber previously sought leave to file an amicus brief in support of Defendants' motion to dismiss Plaintiff's original complaint. ECF No. 27. Thereafter, Plaintiff amended her complaint rather than filing an opposition to Defendants' motion, ECF No. 35, and Defendants then moved to dismiss the amended complaint, ECF No. 40. Because Plaintiff's amended complaint may have mooted the Chamber's earlier motion, the Chamber files this motion for leave to participate as an *amicus* in support of Defendants' operative motion to dismiss Plaintiff's amended complaint.

perspective on the key threshold issue of when circumstantial allegations of a violation of ERISA are plausible in the context of plan-management decisionmaking and the overall context of ERISA class-action litigation. And as the Supreme Court has instructed, that context is key—courts are supposed to undertake a "careful, context-sensitive scrutiny of [the] complaint's allegations," *Fifth Third Bancorp v. Dudenhoeffer*, 573 U.S. 409, 425 (2014), just as they are supposed to consider "context" in evaluating plausibility in all civil cases, *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 554 (2007); *see also Hughes v. Northwestern Univ.*, 142 S. Ct. 737, 742 (2022) (explaining that the pleading standard articulated in *Twombly* and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), applies to ERISA cases).

Specifically, the proposed *amicus* brief provides context regarding the recent surge in ERISA litigation, describes similarities among these cases that help to shed light on Plaintiff's allegations here, and provides context for how to evaluate these types of allegations in light of the pleading standard set forth by the Supreme Court in *Twombly* and *Iqbal*. In particular, the brief marshals examples from many of the dozens of recently filed cases to contextualize the issues presented in this litigation. These cases largely touch on issues that are relevant but adjacent to the issues presented here, and therefore in many instances have not have been cited or discussed by the parties.

The Chamber is well positioned to provide the Court with this context given the extensive experience of the Chamber's members in both retirement-plan management and ERISA litigation. Furthermore, since ERISA was enacted, the Chamber has played an active role in the law's development and administration. The Chamber regularly submits comment letters when the

Department of Labor (DOL) engages in notice-and-comment rulemaking,[2] provides information to the Pension Benefit Guaranty Corporation (PBGC) to support PBGC in its efforts to protect retirement incomes,[3] submits comments to the Department of the Treasury on plan administration and qualification,[4] and provides testimony to DOL's standing ERISA Advisory Council.[5] The Chamber has also published literature proposing initiatives to encourage and bolster the employment-based retirement benefits system in the United States,[6] and is frequently quoted as a resource on retirement policy.[7]

Given this knowledge and experience, the Chamber offers a distinct vantage point that it believes will be of value to the Court as it considers Plaintiff's complaint and whether it surpasses the plausibility threshold. For that reason, it regularly participates as *amicus curiae* in cases

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[2] *See, e.g.*, Electronic Disclosure by Employee Benefit Plans (Nov. 22, 2019), https://www.uschamber.com/sites/default/files/final_electronic_delivery_proposed_regulation_comments_11.22.19.pdf.

[3] *See, e.g.*, Comments on the Interim Final Regulation for the Special Financial Assistance Program for Financially Troubled Multiemployer Plans (Aug. 10, 2021), https://www.pbgc.gov/sites/default/files/sfa-ifr-comment-us-chamber-and-others.pdf; Letter from U.S. Chamber of Commerce Regarding Partitions of Eligible Multiemployer Plans (Aug. 18, 2015), https://www.pbgc.gov/documents/Multiemployer%20-Comments-to-PBGC-on-Partitions-RIN-1212-AB29-Partitions-of-Eligible-Multiemployer-Plans.pdf.

[4] *See, e.g.*, Permanent Relief for Remote Witnessing Procedures (Sept. 29, 2021), https://www.uschamber.com/sites/default/files/final_september_remote_notarization_letter.pdf.

[5] *See, e.g.*, Statement of the U.S. Chamber of Commerce Regarding Gaps in Retirement Savings Based on Race, Ethnicity, and Gender (Aug. 27, 2021), https://www.uschamber.com/sites/default/files/final_august_2020_gaps_in_retirement_savings_dol_testimony.pdf.

[6] *See* U.S. Chamber of Commerce, *Private Retirement Benefits in the 21st Century: A Path Forward* (2016), https://www.uschamber.com/sites/default/files/legacy/reports/1204Private_Retirement_Paper.pdf.

[7] *See, e.g.*, Austin R. Ramsey, *Who Wins, Who Loses With Auto Retirement Savings Plan Proposal*, Bloomberg Law (Sept. 23, 2021), https://news.bloomberglaw.com/daily-labor-report/who-wins-who-loses-with-auto-retirement-savings-plan-proposal; Jaclyn Diaz, *Retirement Industry Hustles to Keep Up With DOL's Rules Tsunami*, Bloomberg Law (Sept. 1, 2020), https://news.bloomberglaw.com/daily-labor-report/retirement-industry-hustles-to-keep-up-with-dols-rules-tsunami.

involving employee-benefit design or administration, including briefs—like this one—addressing the standing for pleading fiduciary-breach claims in the context of defined-contribution plans. *See, e.g.*, *Hughes v. Northwestern Univ.*, 142 S. Ct. 737 (2022); *Fifth Third Bancorp v. Dudenhoeffer*, 573 U.S. 409 (2014); *Sweda v. Univ. of Pa.*, 923 F.3d 320 (3d Cir. 2019);[8] *Meiners v. Wells Fargo Co.*, 898 F.3d 820 (8th Cir. 2018). Courts have found the Chamber's amicus participation helpful given its role and institutional knowledge about plan management and fiduciary practice—in a recent case, the district court not only granted the Chamber leave to participate as an amicus at the motion-to-dismiss stage,[9] but even expressly raised the Chamber's arguments at the motion hearing. *See Carrigan v. Xerox Corp.*, No. 21-1085-SVN (D. Conn. Nov. 10, 2021), ECF No. 54 (Chamber brief).[10] As a court in the Northern District of Illinois recently explained in granting the Chamber's motion for leave to file and denying the plaintiffs' motion for reconsideration of that decision, "the proposed amicus brief could provide the Court [with] a broader view of the impact of the issues raised in the case"—"an appropriate basis to allow amicus participation." *Baumeister v. Exelon Corp.*, No. 21-6505 (N.D. Ill. Mar. 11, 2022), ECF No. 44.

The Chamber's brief will therefore "contribute in clear and distinct ways" to the Court's analysis. *Prairie Rivers Network v. Dynegy Midwest Generation, LLC*, 976 F.3d 761, 764 (7th Cir. 2020) (granting the Chamber's motion for leave to file); *see also Neonatology Assocs., P.A. v. Comm'r of Internal Revenue*, 293 F.3d 128, 132 (3d Cir. 2002) (Alito, J.) (an *amicus* brief may assist the court "by explain[ing] the impact a potential holding might have on an industry or other

[8] In *Sweda*, the Chamber's motion for leave to file an *amicus* brief was granted over the plaintiffs' opposition.

[9] *Amicus* briefs are routinely accepted at the motion-to-dismiss stage, including from the Chamber itself. *See, e.g.*, *New York v. U.S. Dep't of Labor*, No. 18-1747-JDB (D.D.C. Nov. 9, 2018) (minute order); *United States v. DaVita Inc.*, No. 21-229-RBJ (D. Colo. Oct. 20, 2021), ECF No. 65; *United States v. Walgreen Co.*, No. 21-32-JPJ (W.D. Va. Sept. 9, 2021), ECF No. 22.

[10] The transcript from the court's February 15, 2022 motion hearing has not been released.

group") (quotation marks omitted). "Even when a party is very well represented, an amicus may provide important assistance to the court." *Neonatology Assocs.*, 293 F.3d at 132. And here, the Chamber's perspective and expertise will serve several functions courts have identified as useful: It "explain[s] the broader regulatory or commercial context" in which this case arises; "suppl[ies] empirical data" informing the issue on appeal; and "provid[es] practical perspectives on the consequences of particular outcomes." *Prairie Rivers Network*, 976 F.3d at 763.

The proposed *amicus* brief is also being filed well before Plaintiff's opposition is due and therefore will not delay resolution of this motion. *See Dakota Girls, LLC v. Phila. Indemnity Ins. Co.*, 524 F. Supp. 3d 762, 768 (S.D. Ohio 2021) ("[O]ne of the factors relevant to the determination of *amicus* status is whether the proffered information is timely."). And although Plaintiff in this case has decided to oppose the Chamber's motion for leave to file, this Court frequently permits *amici* to participate in its proceedings over an opposition from one of the parties. *See, e.g.*, *United States ex rel. Fry v. Health Alliance of Greater Cincinnati*, No. 3-00167, 2009 WL 485501, at *6 (S. D. Ohio Feb. 26, 2009); *Columbus*, 2000 WL 1745293, at *1; *United States ex rel. Roby v. Boeing Co.*, 73 F. Supp. 2d 897, 901 (S. D. Ohio 1999). And this Court's Local Rules expressly contemplate amicus participation in pending cases. *See* L.R. 7.1.1(a) (extending corporate-disclosure requirements "to entities appearing *amici curiae*").

For these reasons, the Chamber respectfully requests that the Court grant it leave to participate as *amicus curiae* and accept the proposed *amicus* brief, which accompanies this motion.

Dated: April 1, 2022

Respectfully submitted,

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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 Southern District of Ohio by using the court's CM/ECF system on April 1, 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.

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EXHIBIT A

UNITED STATES DISTRICT COURT
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LISA A. SIGETICH,
Plaintiff,

v.

THE KROGER CO., THE BOARD OF DIRECTORS OF THE KROGER CO., and JOHN DOES 1-30,
Defendants.

Case No. 1:21-cv-00697-SJD (SKB)

Judge Timothy S. Black

Magistrate Judge Stephanie K. Bowman

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

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INTEREST OF THE *AMICUS CURIAE*

The Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation, representing approximately 300,000 direct members and indirectly representing the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country.[1] Many of the Chamber's members maintain or provide services to ERISA-governed retirement plans. Given the importance of the laws governing fiduciary conduct to its members, the Chamber regularly participates as *amicus curiae* in ERISA cases pending at all levels of the federal-court system, including those addressing the pleading standard for fiduciary-breach claims. The Chamber submits this brief to aid the Court's consideration of Defendants' motion to dismiss by providing context on recent trends in ERISA litigation and how this case is situated in the broader litigation landscape.

INTRODUCTION

This case is one of many in a recent surge of 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* 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 universally understood principles of plan management, and ignore judicially noticeable information demonstrating the flawed nature of many plaintiffs' allegations in an effort to create

[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, or its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

an illusion of mismanagement and imprudence.

The complaints typically follow a familiar playbook, often loaded with legal conclusions but few factual allegations that are specific to the particular plan at issue in the case. Using the benefit of hindsight, these lawsuits challenge the decisions plan fiduciaries made about the investment options 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 who offer their services to plans 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 discovery even where their conclusory allegations are belied by publicly available data—or, here, Plaintiff's own account statements.

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 chosen by plan fiduciaries. That is not sufficient under the pleading standards 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 these types of conclusory and speculative complaints are sustained, plan participants will be the ones who will suffer. These lawsuits operate on a cost-above-all mantra—despite the Department of Labor's (DOL) admonition that fees should be only "one of several factors" in fiduciary decisionmaking.[2] The suits pressure fiduciaries to limit investments to a narrow range

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

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 as most participants want. And given the plaintiffs' often single-minded emphasis on cost, fiduciaries may forgo recordkeeping packages that include popular and much-needed financial education, and instead elect only barebones recordkeeping services.

Moreover, if the recent flood of litigation has taught us anything, it is that it is virtually impossible for plan fiduciaries to prevent themselves from becoming the subject of a lawsuit—no matter how bulletproof 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: for years, plans have been sued for failing to negotiate "reasonable" annual recordkeeping fees of $35 per participant. *See, e.g.*, Br. for Petitioners at 9, *Hughes*, No. 19-1401 (U.S. Sept. 3, 2021), https://bit.ly/3HSTq85. Kroger's fiduciaries not only negotiated a *much lower* fee, the plan sponsor went one better—it *subsidized* that fee so that participants paid only $5-$6. But Kroger still found itself hit with a multi-million dollar, nationwide putative class action, with Plaintiff incredibly claiming that the duty of prudence is still "not satisfied" because at some undetermined point in the future, "participants may be asked to pay" an unsubsidized recordkeeping fee. Am. Compl. ¶ 8. 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 courts do not shy away from the "context-specific inquiry" ERISA requires. *Hughes*, 142 S. Ct. at 740; *see also Fifth Third Bancorp v. Dudenhoeffer*, 573 U.S. 409, 425 (2014). As the Supreme Court recently made explicit, ERISA cases are not exempt from 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 appropriate. *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.[3] 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.[4] And the year-and-a-half since then have only seen more of the same. These cases generally do not develop organically based on the details of a particular plan, but rather are advanced as prepackaged, one-size-fits-all challenges. As a result, the complaints typically rely on generalized allegations that, at a minimum, do not reflect the context of a particular plan—and, here, are directly contradicted by publicly available materials and information in the Plaintiff's own plan records.

Against the backdrop of this surge, the Supreme Court has taken several recent opportunities to address the standard for sufficiently alleging a claim under ERISA. Each time, it has 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.[5] Given the variety among ERISA plans, the wide discretion plan fiduciaries have when making decisions on behalf of tens of thousands of employees with different investment

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[3] *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).

[4] *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.

[5] The Court thus rejected some Circuits' conclusion 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).

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

The allegations in many of the cases in this wave of litigation fail this standard twice over. First, the circumstantial allegations in these complaints are often equally (if not far more) consistent with lawful behavior, and therefore cannot "nudge[] the[] claims across the line from conceivable to plausible." *Twombly*, 550 U.S. at 570. Second, the allegations frequently ignore the discretion fiduciaries have to make decisions based on their experience and expertise, and in light of the context of a particular plan.

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

Plaintiff here challenges the plan's recordkeeping fees as "excessive." Am. Compl. ¶¶ 56-57; *see also id.* ¶¶ 93-100. 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,[6] or according to some arbitrarily chosen level that plaintiffs often nakedly contend is "reasonable"—typically $35 per participant per year. They then use this comparison to ask the Court to infer that plan fiduciaries must have been asleep at the

[6] DOL, *EBSA Fact Sheet* (2020), https://bit.ly/3hyVAyx.

wheel and request discovery to prove it. Inferring imprudence from this type of allegation requires one to ignore obvious realities of plan management and ERISA's statutory structure.

To start, plaintiffs can easily cherry-pick historical data to make a fiduciary's choices look suboptimal given the wide range of recordkeeping services available, at a wide variety of price points, that hundreds of thousands of ERISA-governed retirement plans have negotiated. When plaintiffs' attorneys zero in on a single metric for comparison—here, recordkeeping fees—they will *always* be able to find a supposedly "better" option among the alternatives available. This is not a plausible sign of imprudence—particularly because plaintiffs' comparator plans are often entirely inapt. *See, e.g.*, *Ramos v. Banner Health*, 461 F. Supp. 3d 1067, 1108 (D. Colo. 2020) (rejecting plaintiffs' reliance on "inapt comparators"); *Parmer v. Land O'Lakes, Inc.*, 518 F. Supp. 3d 1293, 1306 (D. Minn. 2021) (similar). Neither recordkeepers nor recordkeeping services are interchangeable widgets. To 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. 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.[7] And fee arrangements between plans and recordkeepers are often extraordinarily complicated, with many ways compensation can be structured—making these barebones comparisons particularly unhelpful.

Further underscoring the arbitrary nature of these allegations, in many cases—including this one—the participants pay less in fees than the level ERISA plaintiffs identify as "reasonable."

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[7] *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.

Here, Plaintiff alleges that $17 (or perhaps even $14) is a reasonable fee, Am. Compl. ¶¶ 83-86, but she acknowledges that she in fact paid only $5-$6 annually, *id.* ¶¶ 7-8, 94. Moreover, Plaintiff previously alleged that $20 per participant would have been reasonable (a number already almost 50% lower than the level alleged to be reasonable in *Hughes*), ECF No. 1 (Compl.) ¶ 98, before conspicuously lowering the bar in her amended complaint, Am. Compl. ¶¶ 83-86. The same has been true in other cases, where the plaintiffs' "reasonableness" bar has dropped after counsel learned that the original recordkeeping-fee allegations were demonstrably wrong. In *In re American National Red Cross ERISA Litigation*, No. 21-541 (D.D.C.), for example, the plaintiffs originally alleged that they paid $71 per year in recordkeeping fees, and that "reasonable" fees would have been $34 per year based on cherry-picked comparator plans. *See* Consolidated Compl. ¶¶ 88, ECF No. 20. After discovering that they paid as little as $31.50 per year in recordkeeping fees, the plaintiffs lowered the "reasonableness" level to $30 based on new "comparator" plans. *See* First Am. Consolidated Compl. ¶ 94, ECF No. 26. Given the malleability in the data, plaintiffs' "inference through cherry-picked comparisons" approach hardly provides a basis for stating a claim for breach of fiduciary duties.

Nevertheless, when confronted with publicly available sources making clear their allegations are deficient (or clearly 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.

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-fee option does not suggest that a complaint's 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 a fund—typically 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 particular plan.

Notably, fees are only "one of several factors" fiduciaries "need to consider in deciding on service providers."[8] And "nothing in ERISA requires every fiduciary to scour the market to find and offer the cheapest possible fund (which might, of course, be plagued by other problems)." *Hecker v. Deere & Co.*, 556 F.3d 575, 586 (7th Cir. 2009). The fee arrangement of any plan or even a subset of plans indicates little about whether an arrangement is reasonable for the plan whose fiduciaries are being sued, much less plausibly suggests that the fiduciaries' decision-making *process* is imprudent. *See PBGC ex rel. St. Vincent Catholic Med. Ctrs. Ret. Plan v. Morgan Stanley Inv. Mgmt. Inc.*, 712 F.3d 705, 716 (2d Cir. 2013) (standard of prudence "focus[es] on a fiduciary's conduct in arriving at an investment decision, not on its results").

The complaints themselves reflect a range of assessments, as one complaint's supposedly imprudent choice is often another complaint's prudent exemplar. Here, Plaintiff seeks an inference of imprudence because the plan's "excessive" recordkeeping fees were alleged to be $30 per year, *id.* ¶¶ 97-98—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*,

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

No. 19-1401 (U.S. Sept. 3, 2021), https://bit.ly/3HSTq85. Likewise, Plaintiff here identifies the Sutter Health 403(b) Savings Plan as an exemplar for reasonable recordkeeping fees, Am. Compl. ¶ 75, but Sutter Health was itself sued for supposedly excessive recordkeeping fees. *See* Compl. ¶ 122, *Sargony v. Sutter Health*, No. 20-1007 (E.D. Cal.), ECF No. 1. The same has been true in other cases as well. 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.), 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.), 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,[9] or for failing to *hold onto* such stock because high risk can produce high reward.[10] Some plaintiffs allege that it is imprudent for a plan to offer more than one investment option in the same style,[11] while others complain that including *only one option* in each investment style is imprudent.[12] In many cases, plaintiffs allege that fiduciaries were imprudent because they should have offered Vanguard mutual funds,[13] but others complain

[9] *E.g.*, *In re RadioShack Corp. ERISA Litig.*, 547 F. Supp. 2d 606, 611 (N.D. Tex. 2008).
[10] *E.g.*, *Thompson v. Avondale Indus., Inc.*, No. Civ.A.99-3439-AJM, 2000 WL 310382, at *1 (E.D. La. Mar. 24, 2000) (plaintiff alleged that fiduciaries "prematurely" divested ESOP stock).
[11] *E.g.*, *Sweda v. Univ. of Penn.*, No. 16-4329-GEKP, 2017 WL 4179752, at *10 (E.D. Pa. Sept. 21, 2017), *rev'd in part*, 923 F.3d 320 (3d Cir. 2019).
[12] *E.g.*, Am. Compl. ¶ 52, *In re GE ERISA Litig.*, No. 17-cv-12123-IT (D. Mass.), ECF No. 35.
[13] *E.g.*, *Moreno v. Deutsche Bank Ams. Holding Corp.*, No. 15 Civ. 9936 (LGS), 2016 WL 5957307, at *6 (S.D.N.Y. Oct. 13, 2016).

that defendants were imprudent *because they offered* Vanguard mutual funds.[14] Some plaintiffs allege that plans offered imprudently risky investments,[15] while others allege that fiduciaries were *imprudently cautious* in their investment approach.[16] 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."[17] Because courts often do not have the broader context at the motion-to-dismiss stage to recognize that plaintiffs' allegations are frequently nothing more than a smokescreen, courts are often inclined to allow plaintiffs to proceed with discovery. 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 employer made a decision different from another employer is insufficient to survive a motion to dismiss. *Hughes*, 142 S. Ct. at 742.

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

This surge of litigation has significant negative consequences for plan participants and beneficiaries. These lawsuits impose pressure on plan sponsors to make decisions based on how to avoid litigation by prioritizing cost, such as the cost of recordkeeping fees, above all else. The changing litigation landscape also increases the cost of fiduciary liability insurance, leaving employers with less money to provide benefits for employees—such as matching contributions or paying for administrative expenses. And for smaller employers, retirement plans might become

[14] *E.g.*, Am. Compl. ¶ 108, *White v. Chevron Corp.*, No. 16-cv-0793-PJH (N.D. Cal.), ECF No. 41.
[15] *E.g.*, *In re Citigroup ERISA Litig.*, 104 F. Supp. 3d 599, 608 (S.D.N.Y. 2015), *aff'd sub nom.*, *Muehlgay v. Citigroup Inc.*, 649 F. App'x 110 (2d Cir. 2016); *St. Vincent*, 712 F.3d at 711.
[16] *See Brown v. Am. Life Holdings, Inc.*, 190 F.3d 856, 859-860 (8th Cir. 1999) (addressing claim that fiduciaries maintained an overly safe portfolio); Compl. ¶2, *Barchock v. CVS Health Corp.*, No. 16-cv-61-ML-PAS, (D.R.I.), ECF No. 1 (alleging plan fiduciaries imprudently invested portions of the plan's stable value fund in conservative money market funds and cash management accounts).
[17] *E.g.*, *Evans v. Akers*, 534 F.3d 65, 68 (1st Cir. 2008).

cost-prohibitive or simply not worth the risk of litigation. The result will be fewer employers sponsoring plans, less generous benefits, and reduced choice for participants. This outcome is wholly at odds with a primary purpose of ERISA—to *encourage* employers to voluntarily offer retirement plans and a diverse set of options within those plans. *See Conkright*, 559 U.S. at 517.

A. These lawsuits 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 suits against any fiduciaries that take into account considerations other than cost—notwithstanding ERISA's direction to do precisely that. *See White v. Chevron Corp.*, No. 16-cv-0793-PJH, 2016 WL 4502808, at *10 (N.D. Cal. Aug. 29, 2016); *see also supra*, p. 8. These suits affect the recordkeeping services fiduciaries select, pushing plan sponsors toward the lowest-cost option, which DOL has acknowledged may not be the best one. *See 401(k) Plan Fees* 1; *cf. Hecker v. Deer & Co.*, 556 F.3d 575, 586 (7th Cir. 2009) ("[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)."). Plaintiff's cost argument rests on a misconception that all recordkeepers provide essentially the same standard services and can do so equally well at the same cost. *See* Am. Compl. ¶¶ 37-43. There is simply no support for that conclusory assertion. To the contrary, "[e]ven plans that have an identical number of participants and the same total plan assets may have very different service models." *Excessive Fee Litigation* 6. Nor is it even logical—in virtually every industry, service offerings, quality, and pricing vary from provider to provider. In other words, while plaintiffs' attorneys often suggest that any variation in fees is suggestive of a fiduciary breach, fees *should* vary among plans because services vary among plans. *See id.*; *see also supra*, p. 6.

If simply alleging that a plan has higher recordkeeping fees than some arbitrarily chosen

moving target, or some other plan, is sufficient to state a fiduciary-breach claim, then every plan's fiduciaries will be encouraged to prioritize cost above all else. And that dynamic could push fiduciaries to abstain from innovative services like financial-wellness education, web-based financial tools, and enhanced customer-service options—services from which plan participants benefit, and which fiduciaries have discretion to tailor to their particular plan members. Thus, the collective impact of these lawsuits is to pressure plan fiduciaries to chase investment performance or the lowest-cost fees or services, whether or not doing so is actually in the interests of participants. 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.*, No. 18-cv-11091 (PAC), 2021 WL 1758898, at *7 (S.D.N.Y. May 4, 2021).

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

The litigation surge has also 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").

If employers need to absorb the cost of higher insurance premiums and higher deductibles, then many employers will inevitably have to offer less generous plans—reducing their employer contributions, declining to cover administrative fees and costs when they otherwise would voluntarily elect to do so, and reducing the services available to employees. 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. In short, these suits impose significant costs on plan sponsors—and, by extension, plan participants and beneficiaries—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: April 1, 2022

Respectfully submitted,

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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 Southern District of Ohio by using the court's CM/ECF system on April 1, 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: April 1, 2022

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