No. 17-3244

IN THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

JENNIFER SWEDA, BENJAMIN A. WIGGINS, ROBERT L. YOUNG, FAITH PICKERING, PUSHKAR SOHONI, and REBECCA N. TONER, individually and as representatives of a class of similarly situated persons of the University of Pennsylvania Matching Plan,

Plaintiffs-Appellants,

v.

THE UNIVERSITY OF PENNSYLVANIA, INVESTMENT COMMITTEE, and JACK HEUER,

Defendants-Appellees.

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
No. 2:16-cv-04329-GEKP (Hon. Gene E.K. Pratter)

BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND THE AMERICAN BENEFITS COUNCIL AS *AMICI CURIAE* IN SUPPORT OF APPELLEES' PETITION FOR PANEL REHEARING OR REHEARING *EN BANC*

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INTEREST OF THE *AMICI CURIAE*

The **Chamber of Commerce of the United States of America** and the **American Benefits Council** represent hundreds of thousands of businesses and professional organizations across the country, including many employers that offer ERISA-governed benefit plans to their employees, as well as companies who fund or administer those plans.[1] Collectively, *Amici*'s members either directly sponsor or provide services to retirement and health plans covering virtually every American who participates in employer-sponsored benefit programs.

Both organizations have a strong interest in ERISA litigation and filed an amicus brief at the merits stage in this litigation. In *Amici*'s view, the panel decision adopted a diluted pleading standard for ERISA actions that is inconsistent with controlling precedent and would improperly open the door to burdensome discovery based on allegations that rely on hindsight bias and do not plausibly suggest wrongdoing.

SUMMARY OF THE ARGUMENT

In *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), the Supreme Court held that district courts must scrutinize circumstantial factual allegations in a complaint to determine whether they plausibly suggest wrongdoing or are instead

[1] All parties have consented to the filing of this brief. 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 *Amici*, their members, and their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

"just as much in line with" lawful conduct. *Id.* at 554. In the latter circumstance, the complaint must be dismissed. The 2-1 panel majority in this case, however, held that *Twombly*'s rule is "specific to antitrust cases" and thus "declined to extend *Twombly*'s antitrust pleading rule to breach of fiduciary claims under ERISA." Majority 8. The panel's decision to effectively confine *Twombly*'s reasoning to its facts warrants rehearing.

First, the panel's narrowing of *Twombly* is contrary to *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), which held that the pleading standards established in *Twombly* apply to all cases. The panel's holding also conflicts with prior decisions of this Court and of other courts of appeals, which have applied the *Twombly* standard in full to ERISA cases, along with other non-antitrust cases.

Second, there are compelling practical reasons for applying the careful scrutiny of circumstantial allegations compelled by *Twombly* to ERISA cases: ERISA fiduciaries often find themselves "between a rock a hard place," as they may face suit for alleged fiduciary breach regardless of the decisions they make. *Fifth Third Bancorp v. Dudenhoeffer*, 573 U.S. 409, 424 (2014). For this reason, the Supreme Court has instructed that "the motion to dismiss for failure to state a claim" is an "important mechanism for weeding out meritless [ERISA] claims." *Id.* at 425. The panel's decision undermines this "important mechanism," and, if allowed to stand, would allow ERISA plaintiffs to impose serious discovery

burdens on defendants, pressuring ERISA fiduciaries into settling meritless cases. The costs imposed by such a rule would create a serious disincentive for employers to maintain ERISA plans in the first place and would, at a minimum, divert resources away from funding retirement plans to finance litigation instead.

ARGUMENT

I. By Limiting *Twombly* To Antitrust Claims, The Panel's Decision Conflicts With *Iqbal* And Numerous Federal Appellate Decisions.

Under *Twombly*, district courts must scrutinize allegations to determine whether they plausibly suggest wrongdoing, or whether they are equally consistent with lawful behavior. 550 U.S. at 557. As further explained by *Iqbal*, courts must consider whether there is an "obvious alternative explanation" to the inference of wrongdoing that the plaintiffs ask the court to draw. *Iqbal*, 556 U.S. at 682. Under these precedents, if the complaint's allegations are equally consistent with lawful behavior because, for example, there is an obvious alternative explanation to the plaintiff's assertions of wrongdoing, then the claim must be dismissed.

The district court applied those precedents faithfully, correctly holding that Sweda's complaint did not state a plausible claim because, "[a]s in *Twombly*, the actions [alleged in the complaint] are at least 'just as much in line with a wide swath of rational and competitive business strategy' in the market as they are with a fiduciary breach." A17 (quoting *Twombly*, 550 U.S. at 554). The panel majority,

however, held that this key rule from *Twombly* is "specific to antitrust cases." Majority 8. That is wrong for at least two reasons.

First, the Supreme Court in *Iqbal* expressly rejected the notion that the pleading standard described in *Twombly* is limited to antitrust cases. The Court held that cabining *Twombly* in this way is

> not supported by *Twombly* and is incompatible with the Federal Rules of Civil Procedure. Though *Twombly* determined the sufficiency of a complaint sounding in antitrust, the decision was based on our interpretation and application of Rule 8. That Rule in turn governs the pleading standard in "in all civil actions and proceedings in the United States district courts."

556 U.S. at 684 (citations omitted). Moreover, the *Iqbal* Court applied the precise rule that the majority here tried to restrict to antitrust actions, holding that the circumstantial allegations could not support a plausible inference of wrongdoing because they were equally consistent with lawful conduct. *See id.* at 681-82.

Second, *Twombly*'s instruction for courts to dismiss claims that seek to impute wrongdoing based on factual allegations that are consistent with lawful behavior does not, as the panel majority suggested, require an ERISA plaintiff to "rule out every possible lawful explanation for the conduct he challenges," Majority 8-9 (quotation marks omitted). Rather, the governing standard "simply calls for enough facts to raise a reasonable expectation" of unlawful conduct, meaning "allegations plausibly suggesting (not merely consistent with)" wrongdoing. *Twombly*, 550 U.S. at 556-57. Circumstantial allegations that have a

"natural" or "obvious" alternative lawful explanation will not suffice. *Id* at 566-67.

Although the panel majority appeared to treat *Twombly*'s scope as an open question, this Court and others have heeded *Iqbal*'s instruction and applied *Twombly*'s pleading standard to numerous cases outside of the antitrust context.[2] In each substantive area, if the plaintiff does not provide any direct allegations about a foundational element of the claim, courts have scrutinized the circumstantial factual allegations and ordered dismissal when those allegations did not support a plausible inference of wrongdoing because they were equally consistent with lawful behavior. As this Court summarized in *Santiago*, after *Twombly* and *Iqbal*, "[a]llegations that are 'merely consistent with a defendant's liability' or show the 'mere possibility of misconduct' are not enough." 629 F.3d at 133 (citation omitted); *accord Century Aluminum*, 729 F.3d at 1108 ("When faced with two possible explanations, only one of which can be true and only one of which results in liability, plaintiffs cannot offer allegations that are 'merely

[2] *See George v. Rehiel*, 738 F.3d 562 (3d Cir. 2013) (First Amendment retaliation); *Santiago v. Warminster Twp.*, 629 F.3d 121 (3d Cir. 2010) (supervisory liability); *Eclectic Props. E., LLC v. Marcus & Millichap Co.*, 751 F.3d 990 (9th Cir. 2014) (RICO); *In re Century Aluminum Co. Sec. Litig.*, 729 F.3d 1104 (9th Cir. 2013) (securities, even without heightened pleading requirement for scienter); *McReynolds v. Merrill Lynch & Co.*, 694 F.3d 873 (7th Cir. 2012) (discrimination); *McCauley v. City of Chi.*, 671 F.3d 611 (7th Cir. 2011) (equal protection).

consistent with' their favored explanation but are also consistent with the alternative explanation.").

Courts have applied *Twombly*'s pleading rule in ERISA cases specifically, making the panel decision a true outlier. *See Hecker v. Deere & Co.*, 556 F.3d 575 (7th Cir. 2009) (declining to infer a breach from circumstantial allegations that were just as consistent with lawful fiduciary behavior); *Meiners v. Wells Fargo & Co.*, 898 F.3d 820 (8th Cir. 2018) (same); *White v. Chevron Corp.*, 752 F. App'x 453 (9th Cir. 2018) (same), *cert. denied*, No. 18-1271 (May 28, 2019). Faithful application of *Twombly*'s pleading standards is important and often outcome-determinative, because ERISA plaintiffs often fail to present any direct allegations of the foundational element of their claims—here, an imprudent decision-making process. Plaintiffs instead ask courts to infer wrongdoing from circumstantial allegations, such as the ultimate performance of funds in a plan lineup. When those circumstantial allegations are consistent with entirely lawful conduct, *Twombly* requires that the claims be dismissed. The panel majority's failure to do so here calls for rehearing.

II. The Panel's Decision Creates A Toothless Pleading Standard For ERISA Cases That Will Lead To Settlement Extortion.

The panel majority's adoption of a diluted pleading standard for ERISA cases is not only inconsistent with *Iqbal* and *Twombly*, but it subverts Congress's objective underlying ERISA itself. Congress enacted ERISA in significant part to

encourage employers to offer ERISA plans, *Fifth Third*, 573 U.S. at 425, and thus intended to ensure that "administrative costs" and "litigation expenses" are not so great that they discourage employers from sponsoring benefit plans or individuals from serving as fiduciaries, *Conkright v. Frommert*, 559 U.S. 506, 517 (2010).

Because the sheer dollar value of ERISA claims directed at plans with hundreds of millions or billions of dollars in assets makes ERISA fiduciaries such attractive litigation targets, they may face suits for breach of the duty of prudence seemingly regardless of what they do. Plaintiffs sue fiduciaries for failing to divest from stocks with declining share prices or high risk profiles.[3] And they sue fiduciaries for failing to hold on to such stock because high risk can produce high reward.[4] Plaintiffs here allege that it is imprudent for a plan to offer numerous investment options in the same style (A97-98), while other plaintiffs complain that including only one option in each investment style is imprudent.[5] Many plaintiffs allege that fiduciaries were imprudent because they should have offered mutual

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[3] *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").

[4] *E.g.*, *Thompson v. Avondale Indus., Inc.*, No. Civ.A.99-3439, 2000 WL 310382, at *1 (E.D. La. Mar. 24, 2000) (plaintiff alleged that fiduciaries "prematurely" divested ESOP stock).

[5] *E.g.*, *In re GE ERISA Litig.*, No. 17-cv-12123 (D. Mass. Jan. 12, 2018), ECF No. 35.

funds from one particular investment manager (Vanguard),[6] while others complain that defendants were imprudent because they offered mutual funds from that manager.[7] Some plaintiffs allege that plans offered imprudently risky investments,[8] while others allege that fiduciaries were imprudently cautious in their investment approach.[9] 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."[10]

Courts have recognized this dilemma, observing that ERISA fiduciaries often find themselves "between a rock and a hard place," *Fifth Third*, 573 U.S. at 424, or on a "razor's edge," *Armstrong v. LaSalle Bank Nat'l Ass'n*, 446 F.3d 728, 733 (7th Cir. 2006). The Supreme Court has instructed lower courts reviewing

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[6] *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); *George v. Kraft Foods Global, Inc.*, No. 08 C 3799, 2011 WL 5118815, at *8 (N.D. Ill. Oct. 25, 2011).

[7] *White v. Chevron Corp.*, No. 16-cv-0793-PJH, 2016 WL 4502808, at *9 (N.D. Cal. Aug. 29, 2016), *aff'd*, 52 F. App'x 453 (9th Cir. 2018).

[8] *E.g.*, *In re Citigroup ERISA Litig.*, 104 F. Supp. 3d 599, 608 (S.D.N.Y. 2015), *aff'd sub nom. Muehlgay v. Citigroup Inc.*, 649 F. App'x 110 (2d Cir. 2016); *PBGC ex rel. St. Vincent Catholic Med. Ctrs. Ret. Plan v. Morgan Stanley Inv. Mgmt. Inc.*, 712 F.3d 705, 711 (2d Cir. 2013).

[9] *See, e.g.*, *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*").

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

motions to dismiss in ERISA cases that "careful, context-sensitive scrutiny of a complaint's allegations" is the appropriate way to accomplish the "important task" of "divid[ing] the plausible sheep from the meritless goats." *Fifth Third*, 573 U.S. at 425.

Without the careful scrutiny that *Twombly* requires, ERISA plaintiffs will impose serious discovery burdens on plan fiduciaries based entirely on improper second-guessing of discretionary decisions. The panel's decision permits ERISA plaintiffs to survive dismissal merely by pointing to alternative decisions that, with the benefit of hindsight, could have produced more favorable outcomes—even where the fiduciary's choice has an equally likely, lawful explanation. *See, e.g.*, Majority 20-21 (citing difference between the Plan's returns and fees and returns and fees for other investment options as supporting plausibility of fiduciary breach claim). As a result, the panel's decision makes the "important mechanism" of the motion to dismiss "for weeding out meritless claims" effectively toothless. *Fifth Third*, 573 U.S. at 425. Plaintiffs' attorneys will always be able to identify *some* investment option that performed better or had lower fees during some arbitrarily selected time period, because there are thousands of investment options and numerous service providers that compete in the marketplace.

Given the "ominous" prospect of discovery in ERISA actions and the "probing and costly inquiries" that discovery entails, *PBGC ex rel. St. Vincent*

Catholic Med. Ctrs. Ret. Plan v. Morgan Stanley Inv. Mgmt. Inc., 712 F.3d 705, 719 (2d Cir. 2013), the superficial approach to analyzing ERISA complaints that the panel adopted in this case will "push cost-conscious defendants to settle even anemic cases," *Twombly*, 550 U.S. at 559, if not lead to outright "settlement extortion," *PBGC*, 712 F.3d at 719 (citation omitted). ERISA plaintiffs will exploit the relaxed pleading standard to target large and generous plan sponsors, like the University of Pennsylvania, in the hopes of pressuring the defendant into settling.

Even before the panel's decision, there was immense pressure on plan fiduciaries to settle meritless lawsuits, creating perverse incentives for plaintiffs' attorneys. Since the early 2000s, plan participants have brought hundreds of lawsuits against sponsors of large plans. David McCann, *Passive Aggression*, CFO.com (June 22, 2016), https://bit.ly/2UXSCGs. The numbers are only increasing: over 100 new 401(k) complaints were filed in 2016-2017, the highest two-year total since 2008-2009. George S. Mellman & Geoffrey T. Sanzenbacher, *401(k) Lawsuits: What are the Causes and Consequence?*, Center for Retirement Research at Boston College, No. 18-8, at 1-2 (May 2018). A large proportion of these cases never make it to trial because the defendants, faced with likely class certification, huge discovery costs, and the prospect of enormous damages, even in

meritless cases, choose to settle instead. *See* Dissent 6-7. The panel's decision will make this bad situation worse.

Furthermore, for the twenty percent of plan sponsors that are small or mid-sized entities, there is a real risk that costs inflated through the need to defend meritless lawsuits may discourage them from offering, or continuing to offer, benefits under ERISA—just as Congress feared. *See Conkright*, 559 U.S. at 517; Dissent at 7-8. And for those that continue to sponsor plans, the panel's pleading standard and the strike suits it will encourage will raise the costs of services, indemnification, and insurance—ultimately diverting resources from other key aspects of employee-benefit programs, such as retirement matching contributions or subsidization of healthcare premiums. This will severely undermine the "careful balancing" Congress struck in ERISA following "a decade of congressional study," *Renfro v. Unisys Corp.*, 671 F.3d 314, 321 (3d Cir. 2011), and crimp the considerable flexibility Congress provided to fiduciaries in an effort to encourage them to implement employee-benefit plans. Neither ERISA nor the pleading standards articulated by the Supreme Court supports such a result.

CONCLUSION

The Court should grant rehearing.

Dated: June 6, 2019

Respectfully submitted,

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CERTIFICATE OF BAR MEMBERSHIP

Pursuant to Local Rule of Appellate Procedure 46.1(e), the undersigned hereby certifies that he is a member of the bar of the United States Court of Appeals for the Third Circuit.

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