No. 23-2501

IN THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

ERICA BARRETT, KATHLEEN VINCENT, CONNIE ENDERLE, EDWARD Q. INGERSON, II, PENNY KENOYER, AND GILBERT ONTIVEROS, individually and on behalf of all others similarly situated,

Plaintiffs-Appellants,

v.

O'REILLY AUTOMOTIVE, INC., THE BOARD OF DIRECTORS OF O'REILLY AUTOMOTIVE, INC., O'REILLY AUTOMOTIVE 401(K) PLAN INVESTMENT COMMITTEE, AND JOHN DOES 1-30,

Defendants-Appellees.

On Appeal from the United States District Court
for the Western District of Missouri
6:22-cv-03111 (Hon. Brian C. Wimes)

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

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October 25, 2023

Pursuant to Federal Rules of Appellate Procedure 27 and 29, 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-Appellees and affirmance. Defendants-Appellees have consented to the filing of this brief. Counsel for Plaintiffs-Appellants informed counsel for amicus that they take no position on this motion. As a result, amicus moves this Court for leave to file.

The Chamber has an interest in the outcome of this litigation, and believes the proposed amicus brief will help the Court in considering the issues presented by this case. *See* Fed. R. App. 29(a)(3); *see New Mexico Oncology and Hematology Consultants, Ltd. v. Presbyterian Healthcare Servs.*, 994 F.3d 1166, 1175-76 (10th Cir. 2021) (amicus participation appropriate where "*amici* have an interest in th[e] proceeding and brief matters relevant to the disposition of th[e] case"); *N. States Power Co. v. Minnesota*, 447 F.2d 1143, 1145 (8th Cir. 1971) (noting that "[t]he many amici briefs filed in this appeal have not only been helpful in our consideration of this case, but have served as an indicator of the widespread interest generated by this litigation"). In support of its motion, the Chamber states as follows:

1. The Chamber is the world's largest business federation. The Chamber represents approximately 300,000 direct members and indirectly represents the interests of more than three million businesses and professional organizations of every size, in every industry sector, and from every region of the country. Many of

the Chamber's members maintain, administer, or provide services to employee-benefit plans governed by ERISA.

2. An important function of the Chamber is to represent its members' interests in matters before the courts, Congress, and the Executive Branch. To that end, the Chamber regularly participates in cases before this Court, other courts of appeals, and the U.S. Supreme Court on issues that affect their members. *See, e.g.*, *Hughes v. Northwestern Univ.*, 142 S. Ct. 737 (2022); *Rozo v. Principal Life Ins. Co.*, 949 F.3d 1071 (8th Cir. 2020).

3. As in the above cases, a decision in this appeal has the potential to significantly affect the Chamber's members, which include plan sponsors and fiduciaries that benefit from Congress's decision to create, through ERISA, an employee-benefits system that is not "so complex that administrative costs, or litigation expenses" discourage employers from sponsoring benefit plans or individuals from serving as fiduciaries. *Conkright v. Frommert*, 559 U.S. 506, 517 (2010) (citation omitted). This case presents questions of enormous practical importance to the Chamber's members, because it concerns the key threshold issue of what ERISA plaintiffs who do not make any direct allegations concerning a fiduciary's decision-making process must plead to open the door to protracted and expensive discovery.

4. As the Chamber's proposed brief explains, the Supreme Court has recognized that undertaking a "careful, context-sensitive scrutiny of a complaint's allegations" to "weed[] out meritless claims" is an important mechanism for advancing Congress's goal. *Fifth Third Bancorp v. Dudenhoeffer*, 573 U.S. 409, 425 (2014). Plaintiffs here seek a diluted pleading standard that would authorize discovery based on conclusory assertions about a fiduciary's decision-making process and suggestions of alternative decisions that, after ignoring the varying levels of quality and scope of available services and investment options, would have entailed lower costs or prices. Plan sponsors and plan fiduciaries alike, including the Chamber's members that maintain, administer, insure, and provide services to ERISA plans, have a strong interest in preventing such an empty standard, which would defeat dismissal in virtually every case, undermine ERISA's objectives, and harm plan sponsors and participants.

5. The Chamber's substantial interest and thorough knowledge of the questions addressed by this appeal are likely to be of assistance to this Court. The proposed amicus brief provides context on how the Court's decisions will likely affect all plan sponsors, fiduciaries, and participants—not just those currently before the Court.

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.

October 25, 2023

Respectfully submitted,

/s/ Jaime A. Santos

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CERTIFICATE OF COMPLIANCE

This motion complies with the type-volume limitations of Federal Rule of Appellate Procedure 27(d)(2)(A) because it contains 678 words, excluding the parts exempted by Rule 32(f).

This motion complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Rule 32(a)(6) because it appears in a proportionally spaced typeface using Microsoft Word in a 14-point Times New Roman font.

Dated: October 25, 2023

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CERTIFICATE OF SERVICE

I, Jaime A. Santos, hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the appellate CM/ECF system on October 25, 2023.

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

Dated: October 25, 2023

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BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS AMICUS CURIAE IN SUPPORT OF DEFENDANTS-APPELLEES AND AFFIRMANCE

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CORPORATE DISCLOSURE STATEMENT

The Chamber of Commerce of the United States of America certifies that it is a non-profit corporation, that it does not have a parent corporation, and that no publicly held corporation owns ten percent or more of its stock.

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INTEREST OF THE AMICUS CURIAE[1]

The Chamber of Commerce of the United States of America (Chamber) is the world's largest business federation. The Chamber represents approximately 300,000 direct members and indirectly represents the interests of more than three million businesses and professional organizations of every size, in every industry sector, and from every region of the country. Many of its members maintain, administer, or provide services to employee-benefit plans governed by the Employee Retirement Income Security Act of 1974 (ERISA).

An important function of the Chamber is to represent its members' interests in matters before the courts, Congress, and the Executive Branch. To that end, the Chamber regularly files amicus curiae briefs in cases, like this one, that raise issues of concern to the nation's business community. *See, e.g.*, *Hughes v. Northwestern Univ.*, 142 S. Ct. 737 (2022).

SUMMARY OF THE ARGUMENT

This case is just one of many in a wave of ERISA class-action complaints designed to extract costly settlements by challenging the management of employer-

[1] Counsel for Defendants consents to the filing of this brief. Counsel for Plaintiffs informed counsel for amicus curiae that Plaintiffs take no position on the filing of this brief. No party or party's counsel authored this brief in whole or in part. No party, party's counsel, or person other than amicus curiae, its members, and its counsel made a monetary contribution to fund the preparation or submission of this brief.

sponsored retirement plans—specifically, the payment of allegedly excessive recordkeeping and investment-management fees. This "surge" in ERISA litigation[2] is not "a warning that retirees' savings are in jeopardy."[3] 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.[4] Nevertheless, many of these suits cherry-pick particular data points, disregard bedrock principles of plan management, and myopically focus on a plan's costs and fees while ignoring the varying levels of quality and scope of plan services and investment options available in the retirement-plan marketplace.

Not surprisingly, while plans vary widely based on the particular employer and its employees' needs, many complaints are highly similar, if not materially identical. *See Excessive Fee Litigation* 10 (noting "copy-cat complaints" being filed using the same "template"). In many cases, including this one, the complaint contains no allegations about the fiduciaries' decision-making process—the key element in an ERISA fiduciary-breach claim. *Pfeil v. State St. Bank & Tr.*, 806 F.3d

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[2] *See* Inside Compensation, ERISA Litigation Surging – Focus on Fees (July 16, 2018), https://www.insidecompensation.com/2018/07/16/erisa-litigation-surging-focus-on-fees/.

[3] Daniel Aronowitz, *Exposing Excessive Fee Litigation Against America's Defined Contribution Plans* 3, Euclid Specialty (Dec. 2020), https://bit.ly/3hNXJaW ("*Excessive Fee Litigation*").

[4] *Id.*

377, 384-385 (6th Cir. 2015). Instead, the complaint offers allegations, made with the benefit of 20/20 hindsight, that plan fiduciaries failed to select the cheapest funds, or the cheapest recordkeeping option, often using inapt comparators to advance the point. *See, e.g.*, R. Doc. 24 at 20-22, 29-31 (¶¶ 66-70, 96-97). Then, the plaintiffs ask the court to *infer* from these circumstantial allegations that the plan's fiduciaries must have failed to prudently manage and monitor the plan's investment line-up. *See, e.g.*, *id.* at 19, 21-23, 27 (¶¶ 62, 69-70, 75-77, 89).

Pleading a plausible ERISA claim requires more. When a complaint lacks direct allegations of key elements of a civil claim, courts must rigorously analyze the circumstantial allegations to determine whether they plausibly suggest wrongdoing or are "just as much in line with" lawful behavior. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 554 (2007). When the alleged facts are of the latter variety—when, as *Twombly* put it, there is an "obvious alternative explanation" to the inference of wrongdoing the plaintiffs ask the court to draw—the complaint fails Rule 8(a)'s plausibility requirement. *Id.* at 567.

This rigorous analysis—which this Court has applied in numerous other contexts where plaintiffs attempt to plead wrongdoing from circumstantial facts—is particularly important in ERISA cases, where the Supreme Court has specifically instructed courts to apply a "careful, context-sensitive scrutiny" to "divide the plausible sheep from the meritless goats." *Fifth Third Bancorp v. Dudenhoeffer*, 573

U.S. 409, 424-425 (2014); *accord Hughes*, 142 S. Ct. at 742 (evaluating ERISA claims for plausibility "will necessarily be context specific"). The Supreme Court has recognized that "the circumstances facing an ERISA fiduciary will implicate difficult tradeoffs," and therefore has advised lower courts to "give due regard to the range of reasonable judgments a fiduciary may make based on her experience and expertise" in evaluating whether a claim is plausible. *Hughes*, 142 S. Ct. at 742.

The district court here did exactly that, applying a context-specific scrutiny to Plaintiffs' allegations before concluding that they did not state a plausible fiduciary-breach claim. *See* R. Doc. 71 at 34:24-35:14. Plaintiffs here effectively seek a diluted pleading standard that would authorize discovery with no factual allegations about a fiduciary's decision-making process, simply by making conclusory assertions about imprudence and pointing to alternative decisions that, with the benefit of hindsight, might have entailed lower fees—regardless of the level, quality, and types of plan services and investment options involved.

Plaintiffs' proposed standard could be met in virtually every case, because plaintiffs' counsel could always use the benefit of hindsight to cherry-pick other investments or service providers at specific points in time to use as comparators. And while these suits purport to protect employees' retirement savings, they in fact risk having the opposite effect. Rather than allowing fiduciaries to draw on their expertise to make decisions using the wide discretion and flexibility Congress provided them, these suits push plan sponsors and fiduciaries into a corner, pressuring them to narrow the range of options available to participants—an outcome at odds with ERISA's purpose.

ARGUMENT

I. ERISA encourages the creation of benefit plans by affording flexibility and discretion to plan sponsors and fiduciaries.

When Congress enacted ERISA, it "did not *require* employers to establish benefit plans." *Conkright v. Frommert*, 559 U.S. 506, 516 (2010) (emphasis added). Rather, it crafted a statute intended to encourage employers to offer benefit plans while also protecting the benefits promised to employees. *Id.* at 516-517. Congress knew that if it adopted a system that was too "complex," then "administrative costs, or litigation expenses, [would] unduly discourage employers from offering … benefit plans in the first place." *Varity Corp. v. Howe*, 516 U.S. 489, 497 (1996).

Congress also knew that plan sponsors and fiduciaries must make a range of decisions and accommodate "competing considerations." H.R. Rep. No. 96-869, at 67 (1980), *reprinted in* 1980 U.S.C.C.A.N. 2918, 2935. Sponsors and fiduciaries must account for present and future participants' varying objectives, administrative efficiency, and the need to "protect[] the financial soundness" of plan assets. *Id.* Accordingly, Congress designed a statutory scheme that affords plan sponsors and fiduciaries "greater flexibility, in the making of investment decisions…, than might have been provided under pre-ERISA common and statutory law in many jurisdictions." U.S. Dep't of Labor, Op. No. 81-12A, 1981 WL 17733, at *1 (Jan. 15, 1981). This flexibility extends to a variety of areas, including with respect to negotiating arrangements with service providers. Fiduciaries must decide what services to offer (simple recordkeeping, individualized financial advice, participant loans, a brokerage window, etc.); who should provide those services; and how to compensate service providers (flat fees, percentage-of-asset fees, per-service fees, etc.). When negotiating these arrangements, fiduciaries must also select the duration of service-provider agreements. Fiduciaries also must keep in mind how often they want to consider potential new service providers and whether to switch providers based on the results of those evaluations. These decisions implicate numerous competing considerations, including cost, quality of services, and the need to facilitate a constructive working relationship between the plan and its providers. Most plans work with the same service provider for many years because they value continuity, given the disruption and participant confusion that switching providers can cause. As of 2019, 50% of plans had been with their current recordkeeper for more than ten years.[5] That a fiduciary decides to continue using a service provider

[5] Deloitte Development LLC, *2019 Defined Contribution Benchmarking Survey Report* 25 (2019), https://bit.ly/3wLmhp1 ("Deloitte Benchmarking Survey").

does not mean the fiduciary has not done its due diligence and considered other providers or benchmarks.

Fiduciaries also must consider many factors in deciding what investment options to offer under a plan. For example, plan fiduciaries must make decisions concerning what investment options to offer from among the thousands available in the market, including how many options to offer; which investment styles and at what risk/reward and fee levels to include; the structure of the investment options (mutual funds, separate accounts, collective trusts, etc.); the share class (taking into account that certain share classes may offer revenue sharing that offsets fees that would otherwise be paid by participants); and what the default investment option, if any, should be for participants who do not specifically allocate their account to particular investments.

All of these decisions involve "difficult tradeoffs." *Hughes*, 142 S. Ct. at 742. Some employees may prefer passively managed index funds that typically have lower fees and more predictably track market indices like the S&P 500, while others might prefer the potential to beat the market through active management, and still others might prefer the even more tailored investment management offered by managed-account products. In selecting an investment line-up, fiduciaries take into account these varying preferences and competing considerations.

Given the breadth of decisions fiduciaries make in the face of market uncertainty and the need for flexibility, Congress chose the "prudent man" standard to define the scope of the duties that fiduciaries owe to plans and their participants. 29 U.S.C. § 1104(a); *Fine v. Semet*, 699 F.2d 1091, 1094 (11th Cir. 1983). Neither Congress nor DOL provides a list of required or forbidden investment options, investment strategies, service providers, or compensation structures. And when Congress considered requiring plans to offer at least one index fund, the proposal failed. *See* H.R. 3185, 110th Cong. (2007). DOL expressed "concern[]" that "[r]equiring specific investment options would limit the ability of employers and workers together to design plans that best serve their mutual needs in a changing marketplace." *Helping Workers Save For Retirement: Hearing Before the S. Comm. on Health, Education, Labor, and Pensions*, 110th Cong. 15 (2008) (statement of Bradford P. Campbell, Assistant Sec'y of Labor).

The flexibility Congress provided means that fiduciaries have a wide range of reasonable options for almost any decision they make. There are thousands of reasonable investment options with different investment styles and risk levels—nearly 9,000 mutual funds alone,[6] several thousand of which are offered in retirement plans—and nearly innumerable ways to put together a plan that enables

[6] Investment Company Institute, Investment Company Fact Book 17 (63rd ed. 2023), https://www.ici.org/system/files/2023-05/2023-factbook.pdf ("Investment Company Fact Book").

employees to save for retirement.

Thus, while ERISA plaintiffs often try to challenge fiduciaries by pointing to less-expensive alternatives and then suggesting that the fiduciaries *must have* had an inadequate decision-making process—just as Plaintiffs here assert, R. Doc. 24 at 19, 21-23, 27 (¶¶ 62, 69-70, 75-77, 89)—that is not how the prudence standard works. There is no one prudent fund, service provider, or fee structure that renders everything else imprudent. Instead, there is a "range of reasonable judgments a fiduciary may make," which courts must account for when evaluating the plausibility of ERISA claims. *Hughes*, 142 S. Ct. at 742.

II. An ERISA complaint that lacks direct allegations of wrongdoing cannot rely solely on inferences from circumstantial facts that merely suggest a possibility of misconduct.

ERISA "requires prudence, not prescience." *DeBruyne v. Equitable Life Assurance Soc'y of U.S.*, 920 F.2d 457, 465 (7th Cir. 1990) (citation omitted). The standard of prudence "focus[es] on a fiduciary's conduct in arriving at an investment decision, not on its results." *PBGC ex rel. St. Vincent Catholic Med. Ctrs. Ret. Plan v. Morgan Stanley Inv. Mgmt. Inc.*, 712 F.3d 705, 716 (2d Cir. 2013) ("*PBGC*") (alteration in original) (citation omitted). Thus, the proper question in evaluating an ERISA claim, is not, for example, whether "post facto" it is apparent that the value of investments "decreased after certain dates," but rather whether the fiduciary's "conduct [was prudent] as of the 'time it occurred,'" including whether the fiduciary used appropriate methods to investigate the merits of the transactions. *Pfeil*, 806 F.3d at 387-388 (citation omitted).

Here, Plaintiffs concededly do not allege any facts regarding the defendants' decision-making process. R. Doc. 24 at 18 (¶ 58) ("Plaintiffs … do not have actual knowledge of the specifics of Defendants' decision-making process with respect to the Plan …."). They suggest instead that the district court should have *inferred* an imprudent process based on hindsight allegations about the plan's fees—even if there are obvious explanations for the options chosen that are entirely consistent with prudent fiduciary decision-making. *See* Opening Br. 23-24. This proposed approach is not the law. For complaints that lack direct allegations of wrongdoing, courts have consistently probed the circumstantial factual allegations to determine if they plausibly suggest wrongdoing, or are simply a pretext for a fishing expedition. ERISA claims should be treated no differently.

A. Claims that seek inferences of wrongdoing from circumstantial facts must allege something more than outcomes that are equally consistent with lawful behavior.

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

Discerning between plausible and implausible circumstantial allegations entails traveling down "a well-worn trail" used in numerous areas of law. *Smith v. CommonSpirit Health*, 37 F.4th 1160, 1165 (6th Cir. 2022). Take antitrust, for example. In *Insulate SB, Inc. v. Advanced Finishing Systems, Inc.*, 797 F.3d 538 (8th Cir. 2015), the plaintiff lacked direct allegations of an illegal agreement among equipment distributors and a manufacturer to keep potential entrants out of the market. So instead, it relied on circumstantial allegations—the manufacturer's policy of not selling products to distributors who sold competitors' products, and some distributors' "compliance" with that policy. *Id.* at 541, 544-545. This Court had to determine whether the plaintiff "provide[d] any … specific factual allegation that would create an inference that an agreement was made." *Id.* at 546. It carefully scrutinized each of the circumstantial allegations—rejecting the ones it deemed conclusory or factually unsupported, *id.* at 545-546—to determine whether they plausibly suggested something more than lawful "refus[al] to deal." *Id.* at 545-547 (citation omitted) (affirming dismissal of antitrust claim). And it concluded the plaintiff failed to provide the necessary "factual enhancement" required to nudge the assertions of conspiracy over the plausibility line. *Id.* at 546-547.

Discrimination cases present another example. In *Ellis v. City of Minneapolis*, 860 F.3d 1106 (8th Cir. 2017), for example, this Court examined whether the plaintiffs plausibly alleged disparate impact under the Fair Housing Act. The plaintiffs asserted that Minneapolis had "adopted a policy to discourage rental housing and effected such a policy through deliberate or negligent misapplication of the housing code." *Id.* at 1112. But because the plaintiffs offered no direct factual allegations to support that conclusory assertion, this Court carefully scrutinized the circumstantial allegations as a whole to determine whether there was sufficient factual heft to plausibly support it. The court concluded that there were "more 'obvious alternative explanation[s]' for the City's misapplication of the housing code—*e.g.*, good-faith errors or disagreements between the City and the Ellises with respect to violations." *Id.* "[G]iven the varying and evolving contexts in which such codes must be applied, it is to be expected that the application of housing codes be less than perfect." *Id.* at 1113. And, the Court noted, "[g]overnmental entities … must have the leeway to apply reasonable housing-code provisions without fear of inviting a costly lawsuit." *Id.* at 1114. While the court acknowledged that it was "arguably conceivable that the City would have adopted a policy of discouraging rental housing," the plaintiffs had failed to allege sufficient facts plausibly demonstrating that the City was disregarding the code as a matter of policy. *Id.* at 1112-1113; *see also Warmington v. Bd. of Regents*, 998 F.3d 789, 798 (8th Cir. 2021) (similar careful scrutiny of circumstantial allegations in employment

discrimination case).

These precedents apply with full force in ERISA cases. Prior to *Hughes*, many ERISA plaintiffs had taken the position that ERISA claims are somehow exempt from Rule 8(a)'s plausibility pleading requirement. The Second and Third Circuits had embraced that position in *Sweda v. University of Pennsylvania*, 923 F.3d 320, 326 (3d Cir. 2019) ("declin[ing] to extend" *Twombly* to ERISA claims"), and *Sacerdote v. New York University*, 9 F.4th 95, 108 & n.47 (2d Cir. 2021) (citing *Sweda*'s rejection of *Twombly*'s "heightened antitrust pleading standard" in the context of "ERISA Complaints"). *Hughes* squarely rejected this position, holding that courts must "apply[] the pleading standard discussed in" *Iqbal* and *Twombly*. 142 S. Ct. at 742.[7] It also cautioned that evaluating ERISA claims "will necessarily be context specific." *Id.* at 742. It emphasized the wide "range of reasonable judgments a fiduciary may make" in a given situation, noting that "the circumstances facing an ERISA fiduciary will implicate difficult tradeoffs." *Id.* In other words, there may be perfectly justifiable reasons for a fiduciary's decision to offer one investment option over another, even if the unchosen option ultimately performs better or has a lower fee. And when that is the case—*i.e.*, when an ERISA plaintiff's circumstantial allegations of fiduciary malfeasance are consistent with entirely

[7] Despite *Hughes*' clear rejection of this principle, Plaintiffs continue to rely on *Sweda* in articulating the relevant pleading standard. *See* Opening Br. 13, 17.

lawful fiduciary behavior—the claim is properly dismissed.

Following *Hughes*, circuit courts have reinforced this pleading standard in ERISA cases. As this Court explained in one post-*Hughes* decision, the "process is what ultimately matters, not the results," and a "plaintiff typically clears the pleading bar by alleging enough facts to '*infer* … that the process was flawed.'" *Matousek v. MidAmerican Energy Co.*, 51 F.4th 274, 278 (8th Cir. 2022) (emphasis in original) (citation omitted). Under that standard, the Sixth Circuit observed, the "plausibility of an inference depends on a host of considerations, including common sense and the strength of competing explanations for the defendant's conduct." *Smith*, 37 F.4th at 1165. The Seventh Circuit likewise followed this approach in *Albert v. Oshkosh Corp.*, 47 F.4th 570, 579-582 (7th Cir. 2022), rejecting the plaintiffs' effort to distort *Hughes* in advocating for a laxer pleading standard. Rather, the court affirmed dismissal of the complaint because it failed to "provide 'the kind of context that could move this claim from possibility to plausibility' under *Twombly* and *Iqbal*." *Id.* at 580 (quoting *Smith*, 37 F.4th at 1169).

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

Here, Plaintiffs argue that the Court can infer imprudence based solely on the Plan's administrative recordkeeping fees and the costs of its investment options, but these allegations provide a perfect example of the removed-from-context, ex-post-facto speculation that is insufficient to survive a motion to dismiss.

1. Recordkeeping fees—Like many ERISA complaints, Plaintiffs' complaint seeks an inference of a deficient process based on allegations that the Plan's recordkeeping fees were "excessive." *See, e.g.*, R. Doc. 24 at 23, 26-31 (¶¶ 77, 87-90, 96-99). Plaintiffs' allegations do not push their claim over the plausibility line.

The first problem with Plaintiffs' approach is that fees are only "one of several factors" fiduciaries "need to consider in deciding on service providers."[8] Recordkeeping services are highly customizable depending on, *e.g.*, the needs of each plan, the size and features of its participant population, and the capabilities and resources of the plan's administrator and the sponsor's HR 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.[9] Cost in isolation does not suggest that the "fees were high in relation to the services that the plan provided," or otherwise "could not be justified by the plan's strategic goals relative to their selected

[8] DOL, *Meeting Your Fiduciary Responsibilities* 5 (2020), https://bit.ly/3rjBA83 ("*Fiduciary Responsibilities*"). And in the investment context, as elsewhere, "cheaper is not necessarily better." DOL, *A Look at 401(k) Plan Fees* 1, 9 (2019), https://bit.ly/3NwDLiN ("*A Look at Fees*").

[9] *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.

comparators." *Forman v. TriHealth, Inc.*, 40 F.4th 443, 449 (6th Cir. 2022).

For these reasons, when plaintiffs attempt to plead a fiduciary breach by comparing the fees or performance of plan funds or services against the fees or performance of alternatives in the market, at the very least courts (including this one) require the plaintiffs to "provid[e] 'a sound basis for comparison—a meaningful benchmark'—not just alleg[e] that 'costs are too high, or returns are too low.'" *Matousek*, 51 F.4th at 278 (citation omitted). As the Tenth Circuit has explained, a "court cannot reasonably draw an inference of imprudence simply from the allegation that a cost disparity exists." *Matney v. Barrick Gold of N. Am.*, 80 F.4th 1136, 1148-1149 (10th Cir. 2023). "[R]ather, the complaint must state facts to show the funds or services being compared are, indeed, comparable." *Id.* at 1149. In other words, the "allegations must permit an apples-to-apples comparison" of the services the Plan and comparator plans received in comparison to the price paid, not simply isolated comparisons of each plan's price. *See id.* at 1149-1151; *Lard v. Marmon Holdings, Inc.*, 2023 WL 6198805, at *3-4 (N.D. Ill. Sept. 22, 2023); *England v. DENSO Int'l Am., Inc.*, 2023 WL 4851878, at *3-5 (E.D. Mich. July 28, 2023). Courts thus routinely dismiss claims that allege that cheaper pricing was available, but fail to account for the service level. *See Singh v. Deloitte LLP*, 2023 WL 186679, at *2 (S.D.N.Y. Jan. 13, 2023); *Albert*, 47 F.4th at 579; *Matousek*, 51 F.4th at 280; *Gonzalez v. Northwell Health, Inc.*, 632 F. Supp. 3d 148, 165-168 (E.D.N.Y. 2022);

Perkins v. United Surgical Partners Int'l, Inc., 2022 WL 824839, at *6 (N.D. Tex. Mar. 18, 2022).

Here, Plaintiffs ignore whether the Plan's services are equivalent in value to those of the comparator plans, instead opting for the conclusory assertion that "[t]he services chosen by a large plan do not affect the amount charged by recordkeepers." R. Doc. 24 at 25, 29-31 (¶¶ 80, 96-97). But the notion that all large plans "receive nearly identical recordkeeping services and that any difference in services is immaterial to the price of those services" is "conclusory" and entirely inconsistent with the reality of the marketplace. *See England*, 2023 WL 4851878, at *3 & n.5 (collecting cases); Response Br. 27-28.[10] And even where services are similar, the quality and level of these services can differ significantly, just like the quality and level of services in other contexts, such as cable and cellular services, vary widely. *See Miller v. Packaging Corp. of Am., Inc.*, 2023 WL 2705818, at *5-6 (W.D. Mich. Mar. 30, 2023). Because of these variations, courts have repeatedly rejected the conclusory assertion that recordkeeping services, and their prices, are fungible. *See, e.g.*, *England*, 2023 WL 4851878, at *3-5; *Miller*, 2023 WL 2705818, at *5.

[10] The Seventh Circuit's decision on remand in *Hughes v. Northwestern University*, 63 F.4th 615 (7th Cir. 2023), is of no help to Plaintiffs. As other courts have since recognized, *Hughes* involved multiple recordkeepers, more specific allegations about changes similarly situated plans made to lower costs, and the fees alleged in *Hughes* were scores higher than in this case. *See Singh v. Deloitte LLP*, 2023 WL 4350650, at *5 (S.D.N.Y. July 5, 2023) (distinguishing *Hughes*, 63 F.4th 615); Response Br. 29-30.

The second problem with Plaintiffs' approach is that ERISA 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—here, recordkeeping fees—they will *always* be able to find a supposedly "better" option in their preferred time period. And "nothing in ERISA requires every fiduciary to scour the market to find and offer the cheapest possible [option] (which might, of course, be plagued by other problems)." *Hecker v. Deere & Co.*, 556 F.3d 575, 586 (7th Cir. 2009); *accord PBGC*, 712 F.3d at 718; *Meiners*, 898 F.3d at 823-824.

Equally specious is the notion that if a fiduciary does not require a competitive request for proposal (RFP) process for recordkeeping services every few years—a contention Plaintiffs vaguely speculate about, without actually alleging it[11]—then that plausibly suggests the fiduciaries are running on auto-pilot. *See* Response Br. 33. As courts have noted, "nothing in ERISA compels periodic competitive bidding." *E.g.*, *White v. Chevron Corp.*, 2016 WL 4502808, at *14 (N.D. Cal. Aug. 29, 2016); *Matney*, 80 F.4th at 1156 ("Simply alleging the Committee needed to conduct regular RFPs does not raise a plausible inference of imprudence in this

[11] *See* R. Doc. 24 at 27 (¶ 89) ("[T]here is little to suggest that Defendants conducted an appropriate RFP ….").

case.”). There are many ways fiduciaries can prudently monitor service providers short of an expensive and time-consuming bidding process. They can, for example, obtain market data from consultants, obtain benchmarking studies, or periodically renegotiate their service and compensation arrangements as the plan’s needs evolve. *See Matney*, 80 F.4th at 1156. Indeed, despite promulgating myriad regulations and guidance about monitoring service-provider compensation, DOL has never—not even through informal guidance, much less rulemaking—suggested that periodic competitive bidding is necessary (or even that a lack of competitive bidding is presumptively imprudent). Instead, DOL has consistently embraced a flexible approach. DOL requires existing providers to disclose information about their fees and services to plans to ensure fiduciaries can evaluate the reasonableness of the service-provider arrangement. *See, e.g.*, 29 C.F.R. § 2550.408b-2. It has advised fiduciaries that obtaining formal bids is *one option* that they “may want to” use *when initially retaining service providers*, and stated that fiduciaries should “[p]eriodically review the performance of your service providers.” DOL, *Tips for Selecting and Monitoring Service Providers for Your Employee Benefit Plan*, https://bit.ly/46s7xxr. But DOL has never dictated (or even recommended) any particular mechanism for doing so.

Allegations concerning “total plan costs” are even more misguided because these costs include everything from basic recordkeeping services all participants use, to investment-management fees that vary widely by investment, to individual fee-for-service options that participants may or may not use depending on their financial acumen and circumstances. Many of these fees are for enhanced *options* that participants can but are not required to use, meaning that not all participants will incur all of these costs. The proposition that fiduciaries are presumptively imprudent because they provide participants with more enhanced options defies logic. If accepted, it will only encourage fiduciaries to reduce the number of choices and tools available to participants. Accordingly, courts have squarely rejected the "total plan fees" comparisons to industry averages Plaintiffs offer here, R. Doc. 24 at 22-23 (¶¶ 72-76). *See, e.g.*, *McCaffree Fin. Corp. v. ADP, Inc.*, 2023 WL 2728787, at *15 (D.N.J. Mar. 31, 2023); *Rodriguez v. Hy-Vee, Inc.*, 2022 WL 16648825, at *8 (S.D. Iowa Oct. 21, 2022); *Smith v. CommonSpirit Health*, 2021 WL 4097052, at *11-12 (E.D. Ky. Sept. 8, 2021), *aff'd*, 37 F.4th 1160 (6th Cir. 2022).

Taken together, these considerations demonstrate that Plaintiffs' price-tag-centric approach is particularly unhelpful.

2. Investment Fees—Plaintiffs' complaint here likewise seeks an inference of a deficient process from allegations that funds in the plan's line-up had higher fees than alternatives in the market. *See, e.g.*, R. Doc. 24 at 19-22 (¶¶ 61-62, 66-70). But inferring imprudence from fees in this context is implausible.

There are many sound reasons why a prudent fiduciary, crafting and monitoring a plan line-up, would include options that do not have rock-bottom fees, particularly when those options appear alongside lower-cost options—fiduciaries must "consider each plan investment as part of the plan's entire portfolio."[12] For investment options, as with recordkeeping services, "cheaper is not necessarily better"—fees "are only one part of the bigger picture," and thus must be considered as just "one of several factors" in fiduciary decision-making. *A Look at Fees* 9.

For example, fiduciaries may wish to offer actively managed options, which make up more than 50% of the $23.7 trillion invested in mutual funds and exchange-traded funds each year.[13] Active management is more expensive, but it offers the opportunity for higher upsides or less-severe downsides than funds that merely duplicate a market index, like the S&P 500. *See A Look at Fees* 7. Or they may wish to offer mutual funds, which come with greater transparency and regulatory safeguards than other types of institutional products with generally lower expense ratios. *See Loomis v. Exelon Corp.*, 658 F.3d 667, 671-672 (7th Cir. 2011). Or, having reviewed information about the various options, they may simply believe that the chosen funds fall within the wide range of reasonableness. There are many prudent reasons for retaining funds besides the cheapest options in a diversified plan line-up, and doing so does not plausibly suggest an imprudent process.

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[12] *Fiduciary Responsibilities* 3.

[13] *Investment Company Fact Book* 22.

Moreover, it is all too easy to make a fiduciary's choices look suboptimal in hindsight, because plaintiffs' counsel often cherry-pick alternative investments as comparators. Take the federal Thrift Savings Plan (TSP), which plaintiffs often tout as the "gold standard" and use as a comparator in challenging a plan's performance or fees.[14] Even the TSP could be made to look mismanaged by cherry-picking comparators with *even lower* fees at a given point in time[15]:

Fund	**Expense Ratio**
TSP Fixed Income Index Investment Fund (F Fund) https://www.tsp.gov/funds-individual/f-fund/?tab=fees	0.078%
iShares Core US Aggregate Bond ETF https://www.morningstar.com/etfs/arcx/agg/price	0.030%
Vanguard Total Bond Market Index Fund (Institutional Plus Shares) https://www.morningstar.com/funds/xnas/vbmpx/price	0.030%
TSP Common Stock Index Investment Fund (C Fund) https://www.tsp.gov/funds-individual/c-fund/?tab=fees	0.059%
Fidelity 500 Index Fund https://www.morningstar.com/funds/xnas/fxaix/price	0.015%
iShares S&P 500 Index Fund (Class K) https://www.morningstar.com/funds/xnas/wfspx/price	0.030%
TSP Small Cap Stock Index Investment Fund (S Fund) https://www.tsp.gov/funds-individual/s-fund/?tab=fees	0.090%
Fidelity Extended Market Index Fund https://www.morningstar.com/funds/xnas/fsmax/price	0.035%

[14] *See, e.g.*, Appellants' Br., *Brotherston v. Putnam Invs., LLC,* 2017 WL 5127942, at *23 (1st Cir. Nov. 1, 2017) (describing TSP as "a quintessential example of a prudently-designed plan"). The TSP is a particularly inapt exemplar given that the U.S. government subsidizes administrative and investment-management expenses for TSP-offered funds.

[15] *See* Individual Funds, Thrift Savings Plan, https://www.tsp.gov/funds-individual/.

Again, when plaintiffs' attorneys zero in on a single metric at a single point in time, they will *always* be able to find a supposedly "better" fund among the thousands on the market. And that is particularly true given that plaintiffs frequently compare the performance of funds with different investment styles and performance benchmarks. Just as a quarterback's average passing yards cannot be meaningfully measured against a relief pitcher's ERA or Simone Biles' average all-around score, comparing the fees or investment performance of funds that have completely different investment styles and goals indicates nothing about which fund is "better," much less whether a fiduciary's "decision-making process was flawed." *Meiners v. Wells Fargo & Co.*, 2017 WL 2303968, at *3 (D. Minn. May 25, 2017), *aff'd*, 898 F.3d 820 (8th Cir. 2018). Thus, the district court correctly followed other courts' lead in requiring ERISA plaintiffs to demonstrate, at the very least, that they have pled "a sound basis for comparison." *Davis v. Washington Univ. in St. Louis*, 960 F.3d 478, 484 (8th Cir. 2020); *Matousek*, 51 F.4th at 278; *see* R. Doc. 71 at 34:22-35:14.

C. Allowing hindsight-based disagreement with discretionary fiduciary decisions would encourage meritless lawsuits designed to extract costly settlements.

If conclusory and speculative complaints like this one are sustained, plan participants will be the ones to suffer. Without the plausibility pleading rule guarding against speculative suits, "cost-conscious defendants" will be "push[ed] …

to settle even anemic cases." *Twombly*, 550 U.S. at 558-559. In ERISA cases, discovery is entirely asymmetrical and comes at an "ominous" price, easily running into the millions of dollars for a defendant. *PBGC*, 712 F.3d at 719; *see also* Lockton Financial Services Claims Practice, *Fiduciary Liability Claim Trends* 1 (Feb. 2017), https://bit.ly/3h5mssJ. While discovery is sometimes appropriate, the price of discovery (financial and otherwise) "elevates the possibility that 'a plaintiff with a largely groundless claim [will] simply take up the time of a number of other people, with the right to do so representing an *in terrorem* increment of the settlement value, rather than a reasonably founded hope that the discovery process will reveal relevant evidence.'" *PBGC*, 712 F.3d at 719 (quoting *Dura Pharms., Inc. v. Broudo*, 544 U.S. 336, 347 (2005)).

Equally problematic, fiduciaries will be pressured to limit investments to a narrow range of options at the expense of providing a diversity of choices with a range of fees, risk levels, and potential performance upsides, as ERISA expressly encourages and most participants want. ERISA fiduciaries making discretionary decisions are at risk of being sued seemingly no matter what they do. Fiduciaries are sued for offering numerous investments in the same style, and for offering only one investment in a given investment style;[16] for failing to divest from stocks with declining share prices or high risk profiles,[17] and for failing to *hold onto* such stock because high risk can produce high reward;[18] for making available investment options that plaintiffs' lawyers deem too risky,[19] and conversely for taking what other plaintiffs' lawyers deem an overly cautious approach.[20] Indeed, while most plaintiffs sue plans for charging allegedly excessive fees in the hopes of outperformance, a new set of cases charge defendants with following the purportedly

[16] *Compare* First Am. Compl. ¶¶ 68-71, in *Davis v. Salesforce.com, Inc.*, No. 3:20-cv-01753-MMC (N.D. Cal. Oct. 23, 2020), ECF No. 38, *with* Am. Compl., *In re GE ERISA Litig.*, No. 1:17-cv-12123-IT (D. Mass. Jan. 12, 2018), ECF No. 35.

[17] *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").

[18] *E.g.*, *Thompson v. Avondale Indus., Inc.*, 2000 WL 310382, at *1 (E.D. La. Mar. 24, 2000) (plaintiff alleged that fiduciaries "prematurely" divested ESOP stock).

[19] *See, e.g.*, *In re Citigroup ERISA Litig.*, 104 F. Supp. 3d 599, 608 (S.D.N.Y. 2015), *aff'd sub nom.*, *Muehlgay v. Citigroup Inc.*, 649 F. App'x 110 (2d Cir. 2016); *PBGC*, 712 F.3d at 711.

[20] *See Brown v. Am. Life Holdings, Inc.*, 190 F.3d 856, 859-60 (8th Cir. 1999) (assuming without deciding that "the fiduciary duty of prudent diversification can be breached by maintaining an investment portfolio that is *too safe and conservative*"); Compl., *Barchock v. CVS Health Corp.*, No. 1:16-cv-00061 (D.R.I. Feb. 11, 2016), ECF No. 1 (alleging plan fiduciaries breached duty of prudence by investing portions of plan's stable value fund in conservative money market funds and cash management accounts).

"in vogue" trend of "chas[ing]" low fees rather than focusing on funds' "ability to generate return."[21]

This same phenomenon plays out with respect to recordkeeping fees: in the past few years, Henry Ford was hit with an ERISA class action alleging that plan fiduciaries breached their duty of prudence by negotiating "excessive" recordkeeping fees. *See* Compl. ¶¶ 157-167, *Hundley v. Henry Ford Health System*, No. 2:21-cv-11023 (E.D. Mich.) (filed May 5, 2021), ECF No. 1. But another complaint holds up *that same plan* as an example of "prudent and loyal" fiduciary decision-making with respect to recordkeeping fees. *See* Compl. ¶ 45, *Carrigan v. Xerox Corp.*, No. 21-1085 (D. Conn.) (filed Aug. 11, 2021), ECF No. 1.

This dynamic has created an untenable situation for fiduciaries. And the pressure created by these suits undermines one of the most important aspects of ERISA—the value of innovation, diversification, and employee choice. Plaintiffs' attorneys have often taken a cost- or price-above-all approach, filing strike suits against any sponsors that consider factors other than cost or price—notwithstanding ERISA's direction to do just that. *White*, 2016 WL 4502808, at *10 (collecting cases); *cf. A Look at Fees* 1, 9. If accepted, this theory would only encourage plan fiduciaries to limit the service offerings to the absolute barebones services required

[21] *See, e.g.*, Compl. ¶ 31, *Hall v. Capital One*, No. 1:22-cv-857-PTG-JFA (E.D. Va.) (filed Aug. 1, 2022), ECF No. 1.

to run a plan at the lowest cost possible to minimize the litigation risk. That would discourage plans from contracting with service providers for the types of tools that employees increasingly ask for, such as financial-wellness education, brokerage windows, financial-advice tools and services, and managed-account services. *See* Ted Godbout, *Demand for Employer Financial Wellness Benefits Remains Strong, NAPA* (Dec. 15, 2022), https://bit.ly/493JGpS; Noah Zuss, *Employees' Improved Finances Mean More Demand for Financial Wellness Tools*, PlanSponsor (Jan. 11, 2022), https://bit.ly/495eJlc. Indeed, that is already happening. "Before the increases in 401(k) plan litigation, some fiduciaries offered more asset class choice by including specialty assets … options [that] could potentially enhance expected returns in well-managed and monitored portfolios." George S. Mellman and Geoffrey T. Sanzenbacher, *401(k) Lawsuits: What are the Causes and Consequences?*, Ctr. for Retirement Research at Boston College (May 2018), https://bit.ly/3fUxDR1. Now, however, fiduciaries overwhelming choose purportedly "'safe' funds over those that could add greater value." *Id.* And they're getting sued for choosing those "safe" options anyway. *See supra* pp. 24-26.

This dynamic has upended the fiduciary-insurance industry.[22] The risks of litigation have pushed insurers "to raise insurance premiums, increase policyholder

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[22] Judy Greenwald, Business Insurance, *Litigation Leads to Hardening Fiduciary Liability Market* (Apr. 30, 2021), https://bit.ly/3ytoRBX; *see also* Jacklyn Wille, *Spike in 401(k) Lawsuits Scrambles Fiduciary Insurance Market*, Bloomberg Law

deductibles, and restrict exposure with reduced insurance limits." *Excessive Fee Litigation* 4. These consequences harm participants. If employers need to absorb the litigation risks and costs of higher insurance premiums, then many employers will inevitably offer less generous benefits. And for smaller employers, the ramifications are even starker: if they "cannot purchase adequate fiduciary liability insurance to protect their plan fiduciaries, the next step is to stop offering retirement plans to their employees." *Id.* That result would undermine a primary purpose of ERISA–to *encourage* employers to voluntarily offer retirement plans to their employees.

Neither ERISA nor the pleading standards articulated by the Supreme Court support such a result, and this Court's approach to Rule 12(b)(6) motions in ERISA cases must be careful to guard against it.

(Oct. 18, 2021), https://bit.ly/307mOHg (discussing the "sea change" in the market for fiduciary insurance).

CONCLUSION

This Court should affirm the judgment below.

October 25, 2023

Respectfully submitted,

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This brief complies with the type-volume limitations of Federal Rules of Appellate Procedure 29(a)(5) and 32(a)(7)(B) because it contains 6,481 words, excluding the parts exempted by Rule 32(f).

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I, Jaime A. Santos, hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the appellate CM/ECF system on October 25, 2023.

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