UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT

TYLER BAKER, individually and on behalf of The University of Vermont Medical Center 403(b) Plan, Plaintiff, v. THE UNIVERSITY OF VERMONT MEDICAL CENTER, INC., the BOARD OF TRUSTEES OF THE UNIVERSITY OF VERMONT MEDICAL CENTER, the D.C. FIDUCIARY INVESTMENT COMMITTEE, and JOHN DOES 1-45, Defendants.	Case No. 2:23-CV-00087 (GWC)

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

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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.

Amicus participation is appropriate where, as here, the "amicus has unique information or perspective that can help the Court beyond the help that the lawyers for the parties are able to provide." *Schaghticoke Tribal Nation v. Norton*, 2007 WL 9719292, at *3 (D. Conn. July 29, 2007) (internal quotation marks omitted). "[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. & N.J.*, 2011 WL 5865296, at *1 (S.D.N.Y. Nov. 22, 2011); *see also Given v. Rosette*, 2015 WL 5177820, at *2 (D. Vt. Sept. 4, 2015) (noting the district court's "inherent authority" to allow amicus participation).

The Chamber's amicus brief provides a unique perspective informed by its position as 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. In fact, the Chamber's membership is unique because it includes representatives from all aspects of the private-sector retirement system, such as plan sponsors, asset managers, recordkeepers, consultants, and other service providers.

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, provides information to the Pension Benefit Guaranty Corporation (PBGC) to support PBGC in its efforts to protect retirement incomes, submits comments to the Department of the Treasury on plan administration and qualification, and provides testimony to DOL's standing ERISA Advisory Council.[1] The Chamber has also published literature proposing initiatives to encourage and bolster the employment-based retirement benefits system in the United States, and is frequently quoted as a resource on retirement policy.[2]

Given its perspective and deep understanding of the issues involved in these cases, the Chamber regularly participates as amicus curiae in cases involving employee-benefit design or administration. *See, e.g.*, *Hughes v. Northwestern Univ.*, 142 S. Ct. 737 (2022) (standard for pleading fiduciary-breach claim involving challenges to defined-contribution plan line-ups and service-provider arrangements); *Fifth Third Bancorp v. Dudenhoeffer*, 573 U.S. 409 (2014) (standard for pleading fiduciary-breach claim involving employer stock); *Smith v. CommonSpirit Health*, 37 F.4th 1160 (6th Cir. 2022) (standard for pleading fiduciary-breach claim involving 401(k) plan fees and investment line-up); *Sweda v. Univ. of Pa.*, 923 F.3d 320 (3d Cir. 2019)

[1] *See, e.g.*, Electronic Disclosure by Employee Benefit Plans (Nov. 22, 2019), https://bit.ly/3CWJ8UE; Comments on the Interim Final Regulation for the Special Financial Assistance Program for Financially Troubled Multiemployer Plans (Aug. 10, 2021), https://bit.ly/3pvgpPJ; Permanent Relief for Remote Witnessing Procedures (Sept. 29, 2021), https://bit.ly/3yE5g3u; Statement of the U.S. Chamber of Commerce Regarding Gaps in Retirement Savings Based on Race, Ethnicity, and Gender (Aug. 27, 2021), https://bit.ly/3TmzbVL.

[2] *See, e.g.*, Austin R. Ramsey, *Who Wins, Who Loses With Auto Retirement Savings Plan Proposal*, Bloomberg Law (Sept. 23, 2021), https://bit.ly/3Tg6g69; Jaclyn Diaz, *Retirement Industry Hustles to Keep Up With DOL's Rules Tsunami*, Bloomberg Law (Sept. 1, 2020), https://bit.ly/3MecArL.

(same); *Meiners v. Wells Fargo Co.*, 898 F.3d 820 (8th Cir. 2018) (same). District courts in a string of recent cases have granted the Chamber leave to participate as an amicus at the motion-to-dismiss stage. As one court recently explained, the Chamber is able to provide "unique information or perspective that can help the court beyond the help that the lawyers for the parties are able to provide." *Williams v. Centene Corp.*, 2023 WL 2755544, at *3 (E.D. Mo. Mar. 31, 2023) (quoting *Ryan v. Commodity Futures Trading Comm'n*, 125 F.3d 1062, 1063 (7th Cir. 1997)); *see also Sigetich v. The Kroger Co.*, No. 21-697 (S.D. Ohio July 22, 2022), ECF No. 47 ("[G]iven the Chamber's experience with both retirement plan management and ERISA litigation, the Chamber can offer a valuable perspective on the issues presented in this matter."); *Baumeister v. Exelon Corp.*, No. 21-6505 (N.D. Ill. Mar. 11, 2022), ECF No. 44 (explaining that the Chamber's "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"); *Locascio v. Fluor Corp.*, No. 22-154 (N.D. Tex. Oct. 20, 2022), ECF No. 63 (granting the Chamber's motion for leave to file over the plaintiffs' opposition); *Singh v. Deloitte LLP*, No. 21-8458 (S.D.N.Y. Apr. 14, 2022), ECF No. 41 (same); *Barcenas v. Rush Univ. Med. Ctr.*, No. 22-366 (N.D. Ill. Apr. 4, 2022), ECF No. 38 (same). As these decisions reflect, 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 (D.D.C. Nov. 9, 2018) (minute order); *United States v. DaVita Inc.*, No. 21-229 (D. Colo. Oct. 20, 2021), ECF No. 65; *United States v. Walgreen Co.*, No. 21-32 (W.D. Va. Sept. 9, 2021), ECF No. 22.

Because of the Chamber's unique membership, which represents nearly all of those in the private-sector retirement community, 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 a broader 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*, 573 U.S. at 425, 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*, 142 S. Ct. at 742 (explaining that the pleading standard articulated in *Twombly* and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), applies to ERISA cases).

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 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 issues at hand; and "provid[es] practical perspectives on the consequences of particular outcomes." *Prairie Rivers Network*, 976 F.3d at 763.

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 may not have been cited or discussed by the parties. Given the extensive collective experience of the Chamber's members in both retirement-plan management and ERISA litigation, 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.

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 Andersen v. Leavitt*, 2007 WL 2343672, at *2 (E.D.N.Y. Aug. 13, 2007) (considering timeliness as one factor relevant to amicus participation). And although Plaintiff in this case has decided to oppose the motion for leave to file, this Court and others have frequently permitted amici to participate in its proceedings, including over an opposition from one of the parties. *See, e.g.*, ECF No. 105, *Friends of Pine St. v. Sosa*, No. 5:19-cv-00095-gwc (D. Vt. Feb. 24, 2023) (granting leave to file over an opposition and noting that the Court "welcome[d] the inclusion of as many viewpoints as possible on [an] important community issue").

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: August 30, 2023

Respectfully submitted,

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LOCAL RULE 7(a)(7) CERTIFICATION

The undersigned certifies that counsel for the parties have conferred in good faith regarding the relief requested in this motion. Defendants have consented to the requested relief. Counsel for Plaintiff informed Counsel for the Chamber that he does not consent to the requested relief.

Dated: August 30, 2023

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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 District of Vermont by using the court's CM/ECF system on August 30, 2023.

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: August 30, 2023

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EXHIBIT A

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT

TYLER BAKER, individually and on behalf of The University of Vermont Medical Center 403(b) Plan, Plaintiff, v. THE UNIVERSITY OF VERMONT MEDICAL CENTER, INC., the BOARD OF TRUSTEES OF THE UNIVERSITY OF VERMONT MEDICAL CENTER, the D.C. FIDUCIARY INVESTMENT COMMITTEE, and JOHN DOES 1-45, Defendants.	Case No. 2:23-CV-00087 (GWC)

BRIEF OF AMICUS CURIAE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS THE 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 businesses and professional organizations of every size, in every industry sector, and from every region of the country.[1] Given the importance of the laws governing fiduciary conduct to its members, many of which maintain or provide services to retirement plans, the Chamber regularly participates as amicus curiae in ERISA cases at all levels of the federal-court system, including those addressing the pleading standard for fiduciary-breach claims. The Chamber submits this brief to provide context on retirement-plan management and how this case is situated in the broader litigation landscape challenging ERISA fiduciaries' plan-management decisions.

INTRODUCTION

This case is one of many in a recent surge of putative class actions challenging the management of employer-sponsored retirement plans—specifically, the payment of allegedly excessive recordkeeping fees. This explosion in litigation is not "a warning that retirees' savings are in jeopardy."[2] 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.[3] Nevertheless, many of these suits cherry-pick particular data points, disregard bedrock principles of plan management, and ignore judicially noticeable information in an effort to create an illusion of

[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.

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

[3] *Excessive Fee Litigation* 3.

mismanagement and imprudence.

The complaints typically follow a familiar playbook, often loaded with legal conclusions but few factual allegations specific to the plan at issue. Using the benefit of hindsight, these lawsuits challenge plan fiduciaries' decisions about the arrangements fiduciaries negotiated with a service provider, selecting an arbitrary figure as a purportedly "reasonable" fee that plan fiduciaries failed to achieve. Or they object to the investment options included in the plan line-up, similarly asserting—with the benefit of hindsight—that plan fiduciaries should have made a different decision. The complaints typically point to alternative service arrangements among dozens of service providers with a wide variety of service offerings and price points, or alternative investment options among tens of thousands offered in the marketplace, 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 the door to discovery, even where their conclusory allegations are belied by publicly available data and inconsistent with plan documents.

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 less-expensive service provider than the ones plan fiduciaries chose. That is not sufficient under the pleading standard 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, hospital employees will be the ones who suffer. Medical systems have seen their resources taxed during the COVID-19 pandemic, and many—especially smaller, rural hospitals—operate on razor-thin margins with

little capacity to absorb increased litigation costs or withstand the daunting prospect of the expensive, asymmetrical, class-action discovery that is commonly sought by plaintiffs in these types of cases. As a result, these suits pressure fiduciaries of hospital-sponsored plans to operate on a cost-above-all mantra, encouraging them to forgo packages that include popular and much-needed services like financial-wellness education and enhanced customer-service options. But "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). To the contrary, the Department of Labor ("DOL") has admonished that fees should be only "one of several factors" in fiduciary decisionmaking.[4]

Against this backdrop, it is critical that courts do not shy away from the "context-specific inquiry" that 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 subject to 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 required. *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 challenging 401(k) and 403(b) plan

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

fees and performance.[5] In particular, there has been a flood of suits in the last three years, with over 200 lawsuits filed since 2020.[6] In 2022 alone, there were 88 excessive-fee cases filed—the second highest number ever (after only 2020).[7] These lawsuits have been filed against employers in every industry, including those that have been hit the hardest by the pandemic. In particular, hospitals and medical centers have been a popular target. In just the past two years, complaints have been filed against Boston Children's Hospital, Dartmouth-Hitchcock Medical Center, Mass General Brigham, Munson Healthcare, NorthShore University Health System, Rush University Medical Center, Yale New Haven Hospital, and, of course, Defendants here. These cases generally do not develop organically based on plan-specific details, but rather are advanced as prepackaged, one-size-fits-all challenges. As a result, they typically rely on generalized allegations that do not reflect the context of the actual plan whose fiduciaries are being sued.

The Supreme Court has taken several recent opportunities to address the standard for pleading a fiduciary-breach claim under ERISA. Each time, it has stressed that ERISA suits are not subject to a lower pleading standard: 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; *see also Smith v. CommonSpirit Health*, 37 F.4th 1160, 1165 (6th Cir. 2022) (directing courts to apply the

[5] *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); *Excessive Litigation Over Excessive Plan Fees in 2023*, Chubb, https://bit.ly/3qN4rnL (documenting the rise in both 401(k) and 403(b) litigation).

[6] *Excessive Litigation Over Excessive Plan Fees in 2023*, Chubb, https://bit.ly/3qN4rnL (noting that "the filing activity over the last three years has significantly increased").

[7] Daniel Aronowitz, *The Key Fiduciary Liability Storylines of 2022*, Euclid Specialty (Jan. 10, 2023), https://bit.ly/3mXDTit.

"well-worn trail" from *Twombly* and *Iqbal* when evaluating analogous ERISA class actions).[8] Given the variety among ERISA plans, the wide discretion fiduciaries have when making decisions on behalf of tens of thousands of employees with different investment needs 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 "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 complaints' circumstantial allegations 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 in making decisions based on their experience and expertise, and in light of the context of their particular plan.

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

Plaintiff's claims turn in large part on his allegation that plan fiduciaries should have

[8] *Hughes* thus rejected any suggestion by the Second Circuit (or others) 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).

negotiated a lower recordkeeping fee. In an attempt to make out a claim solely on this basis, plaintiffs often follow an improper apples-to-oranges approach: evaluating Plan A's recordkeeping fees against those of Plan B—with no meaningful allegations regarding the services offered by those recordkeepers. This approach cannot nudge Plaintiff's claims over the line from possible to plausible, as shown by the string of courts that have dismissed a series of highly similar recordkeeping challenges in just the past year. *See Singh v. Deloitte LLP*, 2023 WL 4350650, at *3 (S.D.N.Y. July 5, 2023) (explaining that there is no basis to infer imprudence "without information as to the type and quality of the services provided"); *Kruchten v. Ricoh USA, Inc.*, 2023 WL 3026705, at *2 (E.D. Pa. Apr. 20, 2023) (recognizing that fiduciaries may "reasonably choos[e] to pay more for higher quality services"); *Perkins v. United Surgical Partners Int'l, Inc.*, 2023 WL 2899539, at *6 (N.D. Tex. Mar. 10, 2023) (dismissing excessive-fee claim where plaintiffs failed to "plead that the administrative fees [were] excessive in relation to the *specific services* the recordkeeper provided to the *specific plan* at issue"), *appeal docketed*, No. 23-10375 (5th Cir. Apr. 11, 2023); *Gonzalez v. Northwell Health*, 2022 WL 4639673, at *10 (E.D.N.Y. Sept. 30, 2022) ("A plaintiff 'must plead administrative fees that are excessive in relation to the *specific* services the recordkeeper provided to the *specific* plan at issue'").

The reason is simple: it is always possible to cherry-pick historical data to make a fiduciary's choices look suboptimal given the near-infinite combination of comparator options and time periods. Take the federal Thrift Savings Plan ("TSP"), often held out as the "gold standard" for retirement plans and regularly used by plaintiffs as a comparator to argue that an investment

underperformed or had excessive fees.[9] Even the TSP could be made to look like a mismanaged plan by cherry-picking comparators with fees that are significantly lower than the TSP's[10]:

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%

As this example shows, when plaintiffs' attorneys zero in on a single metric for comparison—in the above example, fees—they will *always* be able to find a supposedly "better" fund among the thousands on the market. With the benefit of hindsight, one can always identify a better-performing fund during a cherry-picked time period, just as one could always identify a worse-performing fund. Thus, "allegations 'that costs are too high, or returns are too low' fail to support an inference of misconduct." *Riley v. Olin Corp.*, 2022 WL 2208953, at *7 (E.D. Mo.

[9] *See, e.g.*, *Brotherston v. Putnam Invs., LLC*, Appellants' Br., 2017 WL 5127942, at *23 (1st Cir. Nov. 1, 2017) (describing the TSP as "a quintessential example of a prudently-designed plan"); *see also* Thrift Savings Plan, Tex. State Sec. Bd., https://bit.ly/3wE4MXA ("The TSP is considered the gold standard of 401(k)s because it charges extremely low fees and offers mutual funds that invest in a cross-section of the stock and bond markets."). The TSP is a particularly inapt exemplar given that the U.S. government subsidizes administrative and investment-management expenses, thereby inflating the plan's net-of-fees investment performance.

[10] The data for this table is based on the most recently available figures as of August 24, 2023.

June 21, 2022) (citation omitted).

Here, Plaintiff's allegations are even weaker than the typical complaint. Plaintiff does not identify *any* comparators, relying instead on a set of citations to other cases in which courts purportedly allowed complaints to survive the pleading stage based on allegations that the plan at issue charged more than $35 per participant in recordkeeping fees. Compl. ¶ 95. The Complaint includes no discussion of the services offered by these plans. *See id.* Not only that, the Complaint says nothing about the allegations in these other cases, and whether the plaintiffs there included the requisite support for their claims that the plans' recordkeeping fees were excessive. *See, e.g.*, *Cassell v. Vanderbilt Univ.*, 285 F. Supp. 3d 1056, 1064 (M.D. Tenn. 2018) (noting that plaintiffs "alleged specific facts" regarding "the Plan's features, the nature of the administrative services provided by the Plan's record-keepers, the Plan's participant level, and the record-keeping market" to support their record-keeping claim). And while Plaintiff uses $35 per participant as the relevant benchmark, he fails to consider whether his cited cases involved only direct compensation, rather than Plaintiff's vague (and unsupported) estimate of total compensation. *See Matousek v. MidAm. Energy Co.*, 51 F.4th 274, 279-280 (8th Cir. 2022) (comparing fees for "standard recordkeeping services" to the "'*total* compensation' for 'services rendered to the plan'" captured by the Form 5500).[11] In short, there is zero basis for drawing any conclusions about the recordkeeping fees in

[11] What is even more perplexing is that although plaintiffs in these suits receive disclosures specifying the amount of their plan's recordkeeping fees, their complaints often instead proffer a misleading, inflated purported fee that does not reflect the actual standard recordkeeping fees paid by the plan. This case is a perfect example: Plaintiff alleges that Plan participants paid $54 in direct fees (based on the Plan's required disclosures under 29 C.F.R. § 2550.404a-5), Compl. ¶ 97, but still alleges that Plan participants paid much more in indirect compensation based on expenses disclosed in the Form 5500 and an unsupported estimate of "float income" and BrokerageLink fees. Compl. ¶¶ 97-101. This approach inflates the recordkeeping fee—the amounts listed on the Form 5500 typically include numerous different types of fees paid to a particular vendor, including costs that are charged only to certain individuals because of their unique experiences, such as loan

this case.

In an attempt to paper over this deficiency, Plaintiff baldly asserts that the "services chosen by a large plan do not affect the amount charged by recordkeepers." Compl. ¶ 81. Plaintiff offers no basis for this conclusory allegation, which defies economic reality and common sense. Unsurprisingly, then, it has been rejected by other courts. *Singh*, 2023 WL 4350650, at *4 ("plaintiffs do not consider that different plans may offer different services, or that different plans may provide a higher level of service than competing plans"); *Kruchten*, 2023 WL 3026705 at *2 ("vaguely alleging recordkeeping services are fungible does not plausibly allege a breach"); *Probst v. Eli Lilly & Co.*, 2023 WL 1782611, at *11 (S.D. Ind. Feb. 3, 2023) (rejecting as "not plausible" the plaintiff's "allegations that any difference in services provided does not affect the price of the services"). 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. And myriad services are available at different fee levels, among them core operational services, participant communication, participant education, brokerage windows, loan processing, and compliance services.[12] According to DOL, services "may be provided through a variety of arrangements"; neither recordkeepers nor recordkeeping services are interchangeable widgets, and "generally the more services provided, the higher the fees."[13] As a result, "[w]ithin the 'careful, context-sensitive scrutiny' the Supreme Court mandates

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processing or qualifying domestic relations orders. Moreover, even assuming that Plaintiff is properly including "float income" and BrokerageLink fees in the amount of indirect compensation, Plaintiff entirely ignores whether the allegations in his comparator cases accounted for these same purported sources of indirect compensation. *See* Compl. ¶ 96.

[12] *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.

[13] *401(k) Plan Fees* 3.

in evaluating ERISA claims, vaguely alleging recordkeeping services are fungible does not plausibly allege a breach." *Kruchten*, 2023 WL 3026705, at *2 ("If 'bare allegations' about differences in fees and corresponding services were sufficient, any plaintiff could access discovery by so pleading."); *see also Probst*, 2023 WL 1782611, at *10 (rejecting allegations that "all mega plans receive nearly identical recordkeeping services and that any difference in services was immaterial to the price of those services"). In short, given the wide range of services, providers, and fee arrangements, it is implausible to suggest that everything in excess of a single fee level (without any basis) is imprudent. Doing so would simply ignore the realities of plan management and ERISA's statutory structure—important context the Supreme Court has instructed lower courts to consider. *See Hughes*, 142 S. Ct. at 740; *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-cost or best-performing investment option or service provider does not suggest that their process was imprudent. 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 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 plan and its unique

participant base at the time.[14] Indeed, this discretion is critical for medical systems, which have especially broad employee populations that encompass varying income levels and degrees of financial literacy. As a result, it is particularly important for hospitals to offer a broad array of investment options, and to provide employees with the necessary services and educational resources to best utilize a diversity of options.

The complaints themselves reflect a range of assessments, as one complaint's supposedly imprudent choice is often another complaint's prudent exemplar. For example, Henry Ford was hit with an ERISA class action alleging that plan fiduciaries breached their duty of prudence by negotiating "excessive" recordkeeping fees. *See* Compl. ¶¶ 157-167, *Hundley v. Henry Ford Health System*, No. 2:21-cv-11023 (E.D. Mich.) (filed May 5, 2021), 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.) (filed Aug. 11, 2021), ECF No. 1. This same phenomenon plays out with respect to investment selection. Plaintiffs in many cases allege imprudence based on defendants' decision to offer actively managed funds. *See, e.g.*, Compl. ¶¶ 79-82, 93, 100, 109-116, *Baumeister v. Exelon Corp.*, No. 21-6505 (N.D. Ill.), ECF No. 1. But other cases have alleged the exact opposite—a fiduciary breach based on a plan's decision to include passive index funds rather than actively managed ones. *See Ravarino v. Voya Financial, Inc.*, No. 21-1658 (D. Conn.), ECF No. 1 ¶¶ 79-83.

[14] Indeed, 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).

As these complaints demonstrate, ERISA fiduciaries making discretionary decisions are at risk of being sued seemingly no matter what decisions they make. Some plaintiffs allege that it is imprudent for a plan to offer more than one investment option in the same style,[15] while others complain that including *only one option* in each investment style is imprudent.[16] In many cases, plaintiffs allege that fiduciaries were imprudent because they should have offered Vanguard mutual funds,[17] but others complain that defendants were imprudent *because they offered* Vanguard mutual funds.[18] Some plaintiffs allege that plans offered imprudently risky investments,[19] while others allege that fiduciaries were *imprudently cautious* in their investment approach.[20] In some instances, fiduciaries have simultaneously defended against "diametrically opposed" liability theories, giving new meaning to the phrase "cursed-if-you-do, cursed-if-you-don't."[21] This dynamic has made it incredibly difficult for fiduciaries to do their jobs—and it has made it virtually impossible for fiduciaries to avoid being sued, no matter how careful their process

[15] *See, e.g.*, *Sweda v. Univ. of Pa.*, 2017 WL 4179752, at *10 (E.D. Pa. Sept. 21, 2017), *rev'd in part*, 923 F.3d 320 (3d Cir. 2019).

[16] *See, e.g.*, Am. Compl. ¶ 52, *In re GE ERISA Litig.*, No. 17-cv-12123-IT (D. Mass.), ECF No. 35.

[17] *See, e.g.*, *Moreno v. Deutsche Bank Ams. Holding Corp.*, 2016 WL 5957307, at *6 (S.D.N.Y. Oct. 13, 2016).

[18] *See, e.g.*, Am. Compl. ¶ 108, *White v. Chevron Corp.*, No. 16-cv-0793-PJH (N.D. Cal.), ECF No. 41.

[19] *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 Cath. Med. Ctrs. Ret. Plan v.Morgan Stanley Inv. Mgmt. Inc.*, 712 F.3d 705, 711 (2d Cir. 2013).

[20] *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).

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

and how reasonable their decisions. Plan sponsors and fiduciaries today truly are, as the Supreme Court has observed, "between a rock and a hard place." *Fifth Third*, 573 U.S. at 424.

Accordingly, it is critical for courts to consider context—including DOL's instruction that fees are only one of *several factors* that should be considered,[22] publicly available information demonstrating that a complaint's supposed comparators are inapposite, industry data showing that services (and their pricing) vary widely, the performance ebbs and flows that are common characteristics of investment management, and the wide discretion granted to fiduciaries by Congress. These considerations all bear on whether fiduciary-breach claims are plausible. Nevertheless, some courts have declined to consider context when evaluating plausibility, suggesting that doing so would require the court to resolve a purported dispute of fact. 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 fiduciary made a decision different from another fiduciary is insufficient to survive a motion to dismiss. *Hughes*, 142 S. Ct. at 742.

II. These lawsuits will harm participants and beneficiaries.

This surge of litigation has significant negative consequences for plan participants and beneficiaries. First, these lawsuits impose pressure on plan fiduciaries to manage plans based solely on cost, undermining 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 strike suits against any fiduciaries that consider factors other than cost—notwithstanding ERISA's directive that fiduciaries do precisely that. *See White v. Chevron Corp.*, 2016 WL 4502808, at *10 (N.D. Cal. Aug. 29, 2016). A plan sponsor may, for example, feel pushed toward the lowest-cost

[22] *401(k) Plan Fees* 1.

option, even though DOL has acknowledged "that cheaper is not necessarily better." *See 401(k) Plan Fees* 1. Likewise, an investment committee may feel pressured by the threat of litigation to offer only "a diversified suite of passive investments," despite "actually think[ing] that a mix of active and passive investments is best." *See* David McCann, *Passive Aggression*, CFO (June 22, 2016), https://bit.ly/2Sl55Yq. 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.*, 2021 WL 1758898, at *7 (S.D.N.Y. May 4, 2021).

Second, the litigation surge has upended the insurance industry for retirement plans, pushing 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). 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, 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 elect to do so, and reducing the services available to employees. And for small plans, if the sponsor "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. 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 v. Frommert*, 559 U.S. 506, 517 (2010).

CONCLUSION

For the foregoing reasons, adopting anything less than the "context-specific inquiry" for 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: August 30, 2023

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 District of Vermont by using the court's CM/ECF system on August 30, 2023.

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: August 30, 2023

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