No. 24-2630

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MATTHEW WEHNER,

Plaintiff-Appellant,

v.

GENENTECH, INC. and U.S. ROCHE DC FIDUCIARY COMMITTEE,

Defendants-Appellees.

On Appeal from the United States District Court
for the Northern District of California
Case No. 3:20-cv-6894

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 is a non-profit corporation organized under the laws of the District of Columbia. It has no parent corporation. No publicly held corporation owns ten percent or more of its stock.

Dated: October 23, 2024

s/ Jaime A. Santos
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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.[1] 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 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 participates as *amicus curiae* in this Court and in others on issues that affect benefit-plan design or administration. *See, e.g.*, *Hughes v. Nw. Univ.*, 595 U.S. 170 (2022); *White v. Chevron Corp.*, 752 F. App'x 453 (9th Cir. 2018).

The Chamber files this brief to provide the Court with greater context regarding the operation of ERISA's process-based directive, and to explain why a discrete period of supposed comparative underperformance by certain funds in no way plausibly suggests a fiduciary breach—particularly in the case of custom target date funds ("TDFs") like those employed by Genentech's plan fiduciaries here.

[1] All parties have consented to the filing of this brief. *See* Fed. R. App. P. 29(a)(2). No counsel for a party authored this brief in whole or in part. No party, no counsel for a party, and no person other than *Amicus*, its members, and its counsel made a monetary contribution to fund the preparation or submission of this brief.

INTRODUCTION

The process surrounding the Genentech 401(k) plan (the "Plan") is an example of precisely how ERISA should operate. The U.S. Roche DC Fiduciary Committee ("Committee")—the Plan administrator—redesigned the Plan's investment options to better serve participant needs and investment behavior. In particular, it designed and implemented a custom target date suite ("the custom Roche TDFs") that was calibrated to meet the retirement needs of U.S. Genentech and Roche employees, with a particular focus on weathering volatility in the financial markets.[2]

Against this backdrop, Plaintiff alleged that the Committee breached its fiduciary duties—not because Plaintiff identified any deficiencies in this process, but rather because the custom Roche TDFs purportedly underperformed a set of "off-the-shelf" TDFs for a short, discrete period of time. But after asking the district court to infer imprudence based on a comparative examination of the performance of the custom Roche TDFs and his cherry-picked funds, Plaintiff now suggests that the district court erred by engaging in that comparative exercise and, in particular, in evaluating whether the funds were—as Plaintiff had conclusorily asserted—actually comparable. The Court should reject this bait-and-switch:

[2] Genentech, Inc. is a member of the Roche Group. *See* Answering Br. 1.

Having himself chosen to proceed via comparators, Plaintiff cannot now turn around and disclaim the district court's analysis of his own pleaded comparators.

On appeal, Plaintiff asks the Court to apply a "holistic plausibility standard" to assess whether the amended complaint adequately states a claim. But what Plaintiff *really* asks is for this Court to infer imprudence based on a handful of irrelevant tidbits about the manager of the custom TDFs and a general nod to short-term underperformance, shorn of any context or comparison. This approach would remove any objective guardrails on a plausibility analysis the Supreme Court has repeatedly cautioned is critical to "divide the plausible sheep from the meritless goats." *Fifth Third Bancorp v. Dudenhoeffer*, 573 U.S. 409, 425 (2014). It would also allow virtually any complaint to survive a motion to dismiss merely by identifying even unpled alternative investment options that the plaintiff would have preferred.

That is not how ERISA operates. In enacting ERISA, Congress recognized that there are any number of reasonable investment decisions, and that those decisions will themselves turn on a variety of plan-specific features and the exercise of reasonable judgment by fiduciaries. It is wholly consistent with ERISA (indeed, encouraged) for fiduciaries to exercise their discretion to carefully account for the needs and characteristics of their participant base. That is the precise path the fiduciaries took here by thoughtfully developing and implementing the custom

Roche TDFs. Plaintiff would penalize Defendants for doing precisely what ERISA encourages of fiduciaries: innovating and creating customized solutions using their expertise and knowledge about the participants in their particular plan. It is for exactly this reason that Congress prioritized flexibility, recognizing it as "essential to achieve the basic objectives of private pension plans because of the variety of factors which structure and mold the plans to individual and collective needs of different workers, industries, and locations." S. Rep. No. 92-634, at 16 (1972).

Plaintiffs' approach is at odds both with ERISA's embrace of flexibility and discretion, and with the Supreme Court's repeated recognition that ERISA claims, just like any others, must satisfy the *Twombly*/*Iqbal* pleading standard to survive a motion to dismiss. The district court correctly applied that analysis here, and this Court should affirm.

ARGUMENT

I. Genentech's decision to offer the custom Roche TDFs is an example of exactly how ERISA should operate.

A. ERISA prioritizes flexibility and discretion for 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). Rather, it crafted a statute intended to encourage employers to offer benefit plans while also protecting the benefits promised to employees. *Id.* at 516-17; *see also* H.R. Rep.

No. 93-533, at 218 (1973), *reprinted in* 1974 U.S.C.C.A.N. 4639, 4647. Congress knew that if it adopted a system that was too inflexible or "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," often during periods of considerable market uncertainty. 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.* As a result, Congress designed a statutory scheme that affords plan sponsors and fiduciaries considerable flexibility—"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).

Neither Congress nor DOL provides a list of required or forbidden investment options or investment strategies. Rather, "[w]ithin the framework of ERISA's prudence, exclusive purpose and diversification requirements, . . . plan fiduciaries have broad discretion in defining investment strategies appropriate to

their plans." U.S. Dep't of Labor, Advisory Op. No. 2006-08A, at 3 (Oct. 3, 2006), https://bit.ly/3pnva5z. Indeed, DOL has declined to provide even *examples* of appropriate investment options, because doing so would "limit … flexibility in plan design." 57 Fed. Reg. 46,906, 46,919 (Oct. 13, 1992).

This flexibility extends to a variety of areas. For example, plan fiduciaries must make decisions concerning, among other things:

- the general investment policies and purposes of the plan;
- the appropriate number of investment options to make available to plan participants (some plans offer a dozen, others offer more);
- the risk levels of investment options to offer (ranging from very conservative capital-preservation options intended to avoid loss, to aggressive growth strategies);
- the investment styles to include (potentially including domestic equity funds, international funds, asset allocation funds, bond funds, and target-date funds, among others);
- the structure of the investment options (such as mutual funds, separate accounts, target-date funds, or collective trusts);
- the share class of investment funds to offer; and
- the default investment option, if any, for plan participants who have not made a decision about how to allocate their individual investment accounts.

All of these decisions involve "difficult tradeoffs," *Hughes*, 595 U.S. at 177, especially in the face of market turmoil. Recognizing as much, Congress chose the "prudent man" standard to define the scope of the duties fiduciaries owe to plans and their participants. 29 U.S.C. § 1104(a). This standard is designed to provide

fiduciaries with the "flexibility" necessary to determine how best to manage their plans. *Fine v. Semet*, 699 F.2d 1091, 1094 (11th Cir. 1983).

As courts have recognized, the broad discretion conferred by Congress is the "sine qua non of fiduciary duty." *Pohl v. Nat'l Benefits Consultants, Inc.*, 956 F.2d 126, 129 (7th Cir. 1992). This discretion is critical to the entire framework, particularly because there virtually never is a single "right" answer to the questions fiduciaries must answer given the almost innumerable options available to them. In light of the vast array of options that exist for investment products and services, the need for fiduciaries to tailor solutions to their participants, and the widely diverse nature of those participants, fiduciaries are best positioned to weigh the pros and cons of various choices—often with assistance from consultants and other investment professionals. If a fiduciary is subjected in litigation to constant Monday morning quarterbacking over his decisions—with the benefit of 20/20 hindsight rather than based on "the circumstances as they reasonably appear[ed] to him at the time when he does the act," *Smith v. CommonSpirit Health*, 37 F.4th 1160, 1164 (6th Cir. 2022) (quoting Restatement (Second) of Trusts § 174 cmt. b (1959))—that would eviscerate the discretion that is at the core of the statutory framework.

At bottom, fiduciaries have a wide range of reasonable options for almost any decision they make. Different plans will take different approaches; each plan

is unique, and each plan's participants have a different range of financial sophistication, risk sensitivities, retirement needs, and investment preferences. Thus, the Supreme Court has directed courts to "give due regard to the range of reasonable judgments a fiduciary may make based on her experience and expertise." *Hughes*, 595 U.S. at 177.

B. The Roche TDFs show the Plan's thoughtful exercise of discretion in crafting an option that makes sense for the Plan's participants.

Plaintiff's challenge turns on his criticism of the Plan's decision to retain the custom Roche TDFs. Far from permitting an inference of imprudence, the Plan's use of a custom TDF—tailored to the particular needs of U.S. Genentech and Roche employees—suggests that the Plan employed a thorough, careful process.

1. TDFs are a general class of investments that vary along several axes.

The term TDF describes a broad category of investments that employ a variety of approaches, including different investment styles and diversified investment types, to both optimize growth and manage risk in relation to an investor's "target" retirement date. With TDFs, fund managers use different approaches to change a fund's asset allocation as a participant nears retirement—referred to as the fund's "glide path." *See* U.S. Dep't of Labor, *Target Date Retirement Funds – Tips for ERISA Plan Fiduciaries* 1 (Feb. 2013), https://bit.ly/3imKQqY ("DOL, *TDF Tips*"). Early in the glide path, when an investor is farther from retirement, TDFs generally take on higher risk—by, for

example, concentrating more heavily in equity investments, "which often have greater potential for higher returns but also can be more volatile and carry greater investment risk." *Id.* Closer to retirement, "the fund's asset allocation shifts to include a higher proportion of more conservative investments, like bonds and cash instruments, which generally are less volatile and carry less investment risk." *Id.* Given these features, TDFs "can be attractive investment options for employees who do not want to actively manage their retirement savings." *Id.*[3]

While TDFs all fall within the same "general framework," there are "considerable differences among TDFs offered by different providers, even among TDFs with the same target date." *Id.* Given these differences, fiduciaries selecting a TDF have to consider myriad factors, including investment returns, fees, glide path, and investment strategy. *Id.* at 2. They must also account for plan-specific information, such as "how well the TDF's characteristics align with eligible employees' ages and likely retirement dates." *Id.*

In particular, TDFs typically follow one of two distinct investment strategies—"to" retirement and "through" retirement. A TDF that is managed "to"

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[3] TDFs are one of only three types of investments that DOL permits to be a "default" for participants who do not affirmatively designate investments for their retirement contributions. 29 C.F.R. § 2550.404c-5(e)(4). Of those three options, TDFs "have become the most popular choice," with upwards of 70% of plan sponsors indicating that they selected TDFs as the default. Noah Zuss, *QDIA Basics*, PlanSponsor (Feb. 23, 2022), https://bit.ly/44PdiUq. The custom Roche TDFs are the Plan's default fund. SER-162, SER-203.

retirement "reduces the TDF's equity exposure over time to its most conservative point at the target date." *Id.* By contrast, a "through" TDF "reduces equity exposure through the target date so it does not reach its most conservative point until years later." *Id.* These strategies reflect different approaches to balancing risks: "A 'to' objective is focused on limiting the volatility or the variability of outcomes for the investor up to retirement, while a 'through' objective drives growth for participant balances for several years and then allows them to be converted into income through retirement." Amanda Umpierrez, *Evaluating 'To' vs. 'Through' Glide Paths*, PlanSponsor (Feb. 17, 2021), https://bit.ly/44FnrTw ("Umpierrez, *Evaluating Glide Paths*").

Beyond the design of the glide path, the underlying asset classes can involve either passive or active management. When the underlying funds are actively managed, a "manager actively makes investment decisions" for those funds "in an effort to maximize return." *Smith*, 37 F.4th at 1163. Actively managed funds have the potential to outperform the market, but they come with the concomitant risk of underperformance and typically a higher price point. *See id.* By contrast, passively managed funds consist of underlying funds with "a fixed portfolio structured to match the overall market or a preselected part of it." *Id.* Because passively managed funds are designed to track markets rather than outperform

them, investment-management fees are lower, as is the risk of underperformance. *See id.*

2. Custom TDFs provide extensive personalization benefits.

Fiduciaries need not limit themselves to "off-the-shelf" TDFs—*i.e.*, "a pre-packaged product which uses only the vendor's proprietary funds as the TDF component investments." DOL, *TDF Tips* 3. Rather, fiduciaries can consider "custom" TDFs, which are crafted specifically for a particular participant population, based on the specific needs of that population, and are often composed of investment options already in the plan line-up. *Id.* As described in a recent GAO report examining TDFs, custom TDFs thus provide plan sponsors the opportunity "to design investment strategies that are specifically aligned with their participant demographics and provide the flexibility to customize the asset allocation, underlying investments, and glide path that are unique to their participants' needs." U.S. Government Accountability Office, *401(k) Retirement Plans: Department of Labor Should Update Guidance on Target Date Funds* 38 (Mar. 2024), https://bit.ly/3YaH1G5.

While "[o]ff-the-shelf target date funds have a single retirement glide path for the entire fund family," custom TDFs allow plans to tailor glide paths "to the plan's employee population," including using "multiple glide path options" if a plan decides that makes the most sense based on their participants. Calamos

Investments, *Target Date Funds – Off-the-Shelf or Custom?* 1 (Aug. 2022), https://bit.ly/3NAAEXz. A custom TDF also "allows for the use of multiple managers and investment approaches," including, for example, combining index portfolios and actively managed portfolios. *Id.* Perhaps most significantly, custom TDFs allow plans to be uniquely responsive to their surrounding context, including changing particular investments while keeping the remainder of the TDF suite intact. "This type of granular fine tuning is just not possible with an off-the-shelf target date fund." *Id.* Rather, with an off-the-shelf TDF, "[a]ny change made to the target-date fund by the provider impacts participants, regardless of whether the sponsor believes the change is in the best interests of participants." AllianceBernstein, *Are Single-Manager Target-Date Funds Risky for Large Plan Fiduciaries?* 1 (2009), https://bit.ly/4f5Hq3x. It is not surprising that DOL has itself recognized that these custom TDFs "may offer advantages" that fiduciaries should consider. DOL, *TDF Tips* 3.

II. Hindsight-based attacks like Plaintiff's are not cognizable under ERISA.

Despite the significant benefits afforded by custom TDFs, Plaintiff points to the purported underperformance of the custom Roche TDFs to argue that the Plan should have jettisoned this option after just a few years. Plaintiff's single-minded second guessing comes nowhere near plausibly alleging a breach of fiduciary duty. While Plaintiff now balks at the district court's decision to apply the meaningful-

benchmark standard, that is how *Plaintiff* attempted to plead his case. Having done so, Plaintiff cannot now turn around and fault the district court for following his lead. And applying the meaningful-benchmark standard, Plaintiff's purported comparators fail to plausibly establish that the custom Roche TDFs were an imprudent choice, particularly given the unique features of custom TDFs.

A. ERISA does not police investment outcomes but rather focuses on a sound fiduciary process.

In light of the discretion afforded to fiduciaries, claims for breach of fiduciary duty "focus on a fiduciary's conduct in arriving at an investment decision, not on its results." *Pension Ben. Guar. Corp. ex rel. St. Vincent Cath. Med. Centers Ret. Plan v. Morgan Stanley Inv. Mgmt. Inc.*, 712 F.3d 705, 716 (2d Cir. 2013) ("*PBGC*") (alteration in original) (citation omitted). 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). As a result, "the proper question" in evaluating an ERISA claim "is not whether the investment results were unfavorable, but whether the fiduciary used appropriate methods to investigate the merits of the transactions." *Harris v. Amgen, Inc.*, 788 F.3d 916, 936 (9th Cir. 2015) (citation and quotation marks omitted), *rev'd and remanded on other grounds by* 577 U.S. 308 (2016). In other words, fiduciaries are judged not for the outcome of their decisions but for the *process* by which those decisions were made.

Although ERISA's fiduciary standards focus entirely on process, ERISA complaints asserting claims for fiduciary breach rarely include any allegations about process. Instead, just as in this case, ERISA complaints often ask the Court to *infer* an imprudent process based on circumstantial, outcome-focused allegations comparing the fees or performance outcome of the plan fiduciaries' decision against the fees or performance of a different option available on the market. This approach must be subject to the careful, context-sensitive scrutiny that the district court employed here to ensure that the circumstantial allegations offered plausibly suggest that fiduciaries were acting unlawfully rather than reflect a non-actionable disagreement with fiduciaries' discretionary decisions.

B. Using inapt comparators in an attempt to plead by inference is inconsistent with ERISA and the heavy weight of authority.

Plaintiff criticizes the district court for employing the meaningful-benchmark requirement, rather than what Plaintiff describes as "a holistic plausibility analysis." Opening Br. 33. But the district court did not independently impose a meaningful-benchmark requirement; it instead simply responded to the way *Plaintiff attempted to plead his case*—by seeking inferences of an imprudent fiduciary *process* from allegations that the custom Roche TDFs had worse *performance* than certain off-the-shelf TDFs. If anything, it is Plaintiff that eschewed a holistic approach by alleging nothing about the fiduciaries' actual processes and instead zeroing in on after-the-fact performance.

Relying on a hindsight-based analysis to infer imprudence is also misguided—although common in ERISA class-action complaints. This approach uses outcomes as a proxy for an imprudent process when the whole point of ERISA's fiduciary standards is that they do not compel any particular outcome and that decisions are not judged in hindsight. Moreover, this approach to pleading typically considers only one or two factors—*e.g.*, investment performance or fees—as dispositive, whereas DOL instructs fiduciaries to consider those factors *alongside many others* when making investment decisions. At the very least, though, courts that accept this type of circumstantial approach to pleading fiduciary-breach claims commit no error by requiring the alternatives cited by ERISA plaintiffs to be *apt* comparators. Without a baseline of *like* alternative investments, ERISA plaintiffs cannot even plead comparative underperformance or excessive fees, much less plausibly allege an inference that plan fiduciaries were asleep at the wheel based solely on the outcome of their investment decisions.

1. Plaintiff's pleading-by-performance-comparisons approach is misguided given ERISA's statutory framework.

Despite ERISA's focus on process, complaints alleging fiduciary breach are typically silent on the process employed by defendant fiduciaries, as is the case here. Rather, plaintiffs construct an after-the-fact comparison of the fees or performance of the challenged funds to alternatives in the market, and then ask courts to infer that fiduciaries *must* have been asleep at the wheel based on their

decision to retain the funds in question. This approach is on shaky footing from the get-go. By using outcomes as a proxy for process, plaintiffs attempt to peg their claims to a metric—results—that courts have been clear has no place in the analysis. Because, as the Eighth Circuit has explained, it is "the process" that "ultimately matters, not the results," *Matousek v. MidAmerican Energy Co.*, 51 F.4th 274, 278 (8th Cir. 2022), plaintiffs should not be able to survive a motion to dismiss by then using results as a stand-in for process.

Even assuming results might play some role in the analysis, plaintiffs often use only performance and fees as their proxies—despite fiduciaries' obligation to account for a full range of factors when selecting funds. Here, Plaintiff argues that it was imprudent to retain the custom Roche TDFs because they underperformed a handful of off-the-shelf TDFs. Opening Br. 45-46. But unlike Plaintiff, fiduciaries consider performance alongside many other metrics. DOL made this point directly in its brief in *Hughes*, explaining that "prudent fiduciaries must consider all relevant factors," including fees, "potential for higher return, lower financial risk, more services offered, or greater management flexibility." U.S. Br. 20, *Hughes v. Nw. Univ.*, No. 19-1401 (May 25, 2021), https://bit.ly/3Zf8C7I (citation omitted). DOL's regulatory guidance likewise directs fiduciaries to account for a variety of factors when choosing and monitoring investments, including plan-specific factors "such as participation in a traditional defined benefit pension plan offered by the

employer, salary levels, turnover rates, contribution rates and withdrawal patterns." DOL, *TDF Tips* 2.

This approach is particularly problematic in the context of performance-based analyses, as Plaintiff relies on here. It is easy to cherry-pick historical data to make a fiduciary's choices look suboptimal given the near-infinite combination of comparator options and time periods. 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. But with dozens of TDFs on the market, it cannot be that a court can infer that fiduciaries were acting imprudently simply because a particular suite was purportedly outperformed by a handful of other suites during a discrete time period. *See, e.g.*, *Forman v. TriHealth, Inc.*, 40 F.4th 443, 448-449 (6th Cir. 2022) ("[A] showing of imprudence cannot come down to simply pointing to a fund with better performance." (quotation marks omitted)). As Genentech explains (at 15), the custom Roche TDFs were specifically designed to prioritize stability and to protect against volatility—a decision made after analyzing participants' needs. As designed, the Roche custom TDFs were therefore nearly the top performer among Plaintiff's comparators during the market volatility of 2018. The corollary—namely, that the Roche TDFs did not grow as quickly in bull markets—is not a bug, but a feature.

Moreover, it is well-established that chasing performance (*i.e.*, switching investment strategies to pursue the fund performing well at the time) is a misguided investment approach "generally doomed to some kind of failure." Kate Stalter, *Chasing Performance Is a Quick Way to Disaster*, U.S. News (Feb. 8, 2017), https://bit.ly/3IhKn0R. Indeed, Morningstar reports that the 3,790 mutual funds that outperformed their benchmarks over a 15-year period starting in 2003 experienced, on average, between 9 and 11 years of underperformance in that 15-year span. Paul D. Kaplan and Maciej Kowara, *How Long Can a Good Fund Underperform?*, Morningstar, Aug. 17, 2018, *available at* https://bit.ly/4hixFRc. As the report concludes, performance valuation periods of three, five, or even ten years "are far too short to make well-informed judgments about a manager's skill or lack thereof." *Id.* Here, Genentech's selection of a custom TDF provided an even stronger rationale for maintaining the Roche TDFs, as Genentech had the ability to make tailored adjustments to the underlying investments in response to changing market conditions. *See supra*, pp. 11-12. At bottom, "[m]erely pointing to another investment that has performed better in a five-year snapshot of the lifespan of a fund that is supposed to grow for fifty years does not suffice to plausibly plead an imprudent decision—largely a process-based inquiry—that breaches a fiduciary duty." *Smith*, 37 F.4th at 1166.

2. Claims that attempt to plead imprudence from circumstantial, outcome-based facts must allege something more than allegations that are equally consistent with lawful behavior.

When courts do consider whether outcome-based allegations permit a plausible inference of breach, it is critical that they employ a "careful, context-sensitive scrutiny of a complaint's allegations" in order to "divide the plausible sheep from the meritless goats." *Fifth Third Bancorp v. Dudenhoeffer*, 573 U.S. 409, 425 (2014). Indeed, the Supreme Court could not have made this clearer in its recent *Hughes* decision, holding that courts must "apply[] the pleading standard discussed in" *Iqbal* and *Twombly*. 595 U.S. at 177. It also cautioned, citing its prior decision in *Dudenhoeffer*, 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 another option ultimately ended up performing better. And when that is the case—*i.e.*, when an ERISA plaintiff's circumstantial allegations of fiduciary malfeasance are consistent with entirely lawful fiduciary behavior—the claim is properly dismissed.

This standard is not new. Indeed, there are numerous areas of the law in which this Court has already applied this method to assess whether circumstantial

factual allegations are sufficient to allege wrongdoing, and thereby satisfy the pleading standards set forth in *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). Take antitrust, for example. In *In re Musical Instruments & Equipment Antitrust Litigation*, 798 F.3d 1186 (9th Cir. 2015), the plaintiff lacked direct allegations of illegal agreements among guitar manufacturers to fix prices. This Court had to determine whether it could plausibly "infer a price-fixing conspiracy" based on allegations of "circumstantial evidence of anticompetitive behavior." *Id.* at 1189, 1193. It carefully scrutinized each of the plaintiffs' circumstantial allegations to determine whether they plausibly suggested "something more" than lawful parallel conduct, or whether the circumstantial allegations "could just as easily suggest rational, legal business behavior." *Id.* at 1193-98 (citations omitted) (affirming dismissal because the allegations did not support a plausible inference of an anticompetitive agreement).

This Court has taken the same approach in viewpoint-discrimination cases, *Moss v. U.S. Secret Serv.*, 572 F.3d 962 (9th Cir. 2009); RICO cases, *Eclectic Props. E., LLC v. Marcus & Millichap Co.*, 751 F.3d 990 (9th Cir. 2014); and securities cases (even outside the context of heightened pleading), *In re Century Aluminum Co. Sec. Litig.*, 729 F.3d 1104 (9th Cir. 2013). In each of these contexts, when the plaintiffs failed to provide any direct allegations about a foundational element of the claim, this Court carefully scrutinized the

circumstantial factual allegations and did not hesitate to order dismissal when those allegations did not support a plausible inference of wrongdoing because they were equally consistent with lawful behavior.[4] As *Century Aluminum* summarized, "[w]hen faced with two possible explanations, only one of which can be true and only one of which results in liability, plaintiffs cannot offer allegations that are 'merely consistent with' their favored explanation but are also consistent with the alternative explanation." 729 F.3d at 1108. Instead, "[s]omething more is needed, such as facts tending to exclude the possibility that the alternative explanation is true." *Id.*[5]

Post-*Hughes*, it is clear that *Twombly* and this Court's post-*Twombly* precedents should apply with full force in ERISA cases—as this Court already concluded in *White v. Chevron*, an unpublished opinion in another fiduciary-breach

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[4] *See, e.g.*, *Moss*, 572 F.3d at 970-972 (claim inadequately pled where factual allegations were merely "consistent with a viable First Amendment claim," and the "mere possibility" of misconduct is insufficient to reasonably infer discriminatory intent); *Eclectic Props.*, 751 F.3d at 998-999 (significant increase in real estate prices was "consistent with Defendants' alleged fraudulent intent" but "d[id] not tend to exclude a plausible and innocuous alternative explanation," such as the variability of real estate values and fluctuations in prices over time).

[5] Plaintiff cites *Starr v. Baca*, 652 F.3d 1202 (9th Cir. 2011), in arguing that they need not rule out rational alternative explanations for the circumstantial facts from which they ask this Court to infer an imprudent process. Opening Br. 37. But as this Court noted in *Eclectic Properties* when it rejected this same argument, in *Starr* the plaintiff's claims "survived a motion to dismiss by offering facts that tended to exclude the defendant's innocuous alternative explanation." 751 F.3d at 997; *accord Century Aluminum*, 729 F.3d at 1108 (similar).

case. 752 F. App'x 453. There, this Court—citing *Twombly* and *Century Aluminum*—affirmed the district court's dismissal of an ERISA complaint similar to the amended complaint here. *See id.* at 454-55. In so doing, this Court explained that circumstantial allegations that plan fiduciaries "could have chosen different vehicles for investment that performed better during the relevant period, or sought lower fees for administration of the fund" cannot survive dismissal. *Id.* at 455. Because allegations of this type do not make "it more plausible than not that any breach of fiduciary duty ha[s] occurred," they are insufficient to make out a claim under ERISA. *Id.* As the Supreme Court stated expressly in *Hughes*, these same rules must apply to ERISA claims.

Where, as here, the plaintiffs' circumstantial allegations take the form of a comparison to other funds, the "meaningful benchmark" requirement serves a critical gatekeeping role in the pleading analysis. Plaintiff contends that this requirement "runs afoul of ERISA and the 'context-specific inquiry that [it] requires.'" Opening Br. 33-34 (criticizing the district court for, in Plaintiff's view, "failing to apply a holistic plausibility standard"). But the district court was merely responding to *Plaintiff's* theory—namely, that the custom Roche TDF underperformed when compared to other TDFs, and that the underperformance permitted a plausible inference of imprudence. The amended complaint presents pages of charts purporting to compare the custom Roche TDFs to S&P Target Date

Indices and a set of off-the-shelf TDFs available on the market that allegedly out-performed the Roche TDFs in a particular time period. *See* ER-98 – ER-104. Once Plaintiff put this approach in play, the district court properly considered whether these funds were in fact appropriate comparators.[6]

3. Plaintiff's comparators do not provide a basis for inferring imprudence.

Applying the meaningful-benchmark analysis, the district court properly concluded that Plaintiff's allegations could not survive the pleading stage. As discussed above, fiduciaries have broad discretion to choose among thousands of options in a thriving investment-management marketplace. With the benefit of hindsight, it is *always* possible for plaintiffs to identify a cheaper or better-

[6] While Plaintiff purports to offer other scattered indicia of imprudence (Opening Br. 46-47), these allegations in no way plausibly suggest imprudence. To the contrary, they represent yet more Monday morning quarterbacking based on information that was irrelevant and, in many cases, that Plan fiduciaries had absolutely no reason to know. As the district court properly recognized, the performance of the entirely separate, off-the-shelf TDFs offered by the manager of the custom Roche TDFs (Russell Investment Management Company) has no bearing on the proprietary of the Roche TDFs. Nor does the size of Russell's customer base (which, notably, Plaintiff alleges Plan fiduciaries should have been aware of based on a "response to a RFP" for the San Francisco Deferred Compensation Plan in 2015, ER-94). These conclusory allegations are a far cry from actual indicia of fiduciary misfeasance that courts have found bolster allegations of underperformance. *See, e.g.*, *Moler v. Univ. of Md. Med. Sys.*, 2022 WL 2756290, at *1, *4 (D. Md. July 13, 2022) (plaintiffs alleged underperformance, "grossly excessive" investment-management fees, selection of high-cost shares of funds when identical low-cost shares were available, and a failure "to monitor or control" recordkeeping expenses or solicit competitive bids for providers).

performing alternative, allowing plaintiffs to paint *any* decision as an imprudent one. *See supra*, pp. 16-17. That is particularly true in the context of performance claims, given the variation in investment performance over time. *See supra*, p. 17. The "meaningful benchmark" analysis thus is critical to whether plaintiffs may have provided "something more" to push their allegations over the plausibility line. *In re Musical Instruments*, 798 F.3d at 1193. Otherwise, fiduciaries' decision "could just as easily" (if not more easily) "suggest rational, legal business behavior"—namely, that fiduciaries made a different decision because weighing all the relevant factors led them to a different fund. *Id.* at 1194. For that reason, the "meaningful benchmark" analysis *must* occur at the pleading stage, rather than, as Plaintiff suggests (at 49-51), later in the case. It is not a fact-intensive inquiry; rather, courts ask only whether the plaintiffs have themselves plausibly alleged that their comparators are in fact comparable.

This case provides an apt example. There is "no one-size-fits-all approach," but a meaningful benchmark must "hold similar securities, have similar investment strategies, and reflect a similar risk profile." *Matousek*, 51 F.4th at 281. Comparing funds with "different aims, different risks, and different potential rewards that cater to different investors," as Plaintiff did here, says nothing about whether "one is better or worse than the other," much less whether fiduciaries' process for maintaining the fund was infirm. *Davis v. Wash. Univ. in St. Louis*,

960 F.3d 478, 485 (8th Cir. 2020); *Smith*, 37 F.4th at 1166. And the mere fact that the comparator funds are TDFs cannot satisfy the meaningful-benchmark requirement. TDFs are a diverse category of funds, with different goals, investment approaches, and underlying funds. *See supra*, pp. 8-10. Recognizing as much, this Court and others have rejected comparators between TDF suits with different investment strategies—even when offered by the same provider. *See Davis v. Salesforce.com, Inc.*, 2022 WL 1055557, at *1 n.1 (9th Cir. Apr. 8, 2022) (affirming the district court's rejection of plaintiff's comparison between passively and actively managed JPMorgan TDFs); *see also Smith*, 37 F.4th at 1167 (performance differences between active and passive Fidelity TDFs were insufficient to support a claim of imprudence given their "distinct goals" and "distinct strategies"); *Meiners v. Wells Fargo & Co.*, 898 F.3d 820, 823 (8th Cir. 2018) (plaintiff improperly compared Wells Fargo TDFs to Vanguard TDFs "with a different investment strategy").

That is all the more true with a custom TDF. Genentech decided that the best option for its particular employee population—informed by its experience during the 2008 financial crisis—was to weight the TDF investments toward inflation-sensitive assets (including commodities, infrastructure, and real estate), with less significant investment in equities. Answering Br. 15-16. Comparing the performance of the Roche TDFs to the performance of an off-the-shelf TDF says

nothing about the particular success of that strategy. Notably, Plaintiff does not allege that the Roche TDFs underperformed their own custom benchmark, and he thus cannot assert that the Plan underperformed in light of its particular investment strategy.[7] Plaintiff asked the district court to effectively ignore all of this context on a motion to dismiss, but the Supreme Court has said the opposite—that "context" *must* be considered at the 12(b)(6) stage. *Fifth Third*, 573 U.S. at 425.

III. Allowing hindsight-based disagreement with discretionary fiduciary decisions would undermine ERISA's focus on flexibility and discretion.

The plausibility pleading rule is necessary to ensure that ERISA fiduciaries are not targeted for class-action litigation whenever they fail to follow a particular plaintiff's preferred investment approach. As this case demonstrates, employers can—and will—be sued, essentially no matter how they exercise their discretionary responsibilities. Fiduciaries are sued for offering numerous investments in the same style, and for offering only one investment in a given

[7] Plaintiff likewise does not suggest there was anything imprudent about this particular strategy. Nor could he: any attempt to dictate which approach is appropriate for a plan would run smack into the flexibility and discretion afforded to fiduciaries under ERISA. It was well within the Plan fiduciaries' discretion to determine that prioritizing stability was the proper choice for Plan participants, even if it might result in comparative underperformance against TDFs that took a different approach. If Plaintiff disagreed with that choice, he was free to choose a different investment option. Answering Br. 17-18.

investment style;[8] for failing to divest from stocks with declining share prices or high risk profiles,[9] and for failing to *hold onto* such stock because high risk can produce high reward;[10] for making available investment options that plaintiffs' lawyers deem too risky,[11] and conversely for taking what other plaintiffs' lawyers deem an overly cautious approach.[12]

This same phenomenon plays out with respect to fund performance, as this case reveals. To take just one example, Plaintiff here selected the BlackRock LifePath TDF suite as one of the "peer TDFs" that Plaintiff suggests would have been a more appropriate plan option. Opening Br. 13-15. But Plaintiff's counsel

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[8] *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.

[9] *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").

[10] *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).

[11] *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.

[12] *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 the duty of prudence by investing portions of the plan's stable value fund in conservative money market funds and cash management accounts).

in fact filed eleven separate suits in 2022 and 2023 challenging the retention of this precise fund. *E.g.*, *Bracalente v. Cisco Sys., Inc.*, No. 5:22-cv-04417-EJD (N.D. Cal. July 29, 2022).

This dynamic—with new and often contradictory circumstantial theories of imprudence popping up every year—has placed fiduciaries "between a rock and a hard place," *Fifth Third*, 573 U.S. at 424, or on a "razor's edge," *Armstrong v. LaSalle Bank Nat'l Ass'n*, 446 F.3d 728, 733 (7th Cir. 2006). The pressure created by these suits also undermines ERISA's central focus on innovation, diversification, and employee choice. *See supra*, pp. 4-8. The more that specious complaints survive dismissal, the more a fiduciary might feel that she has no choice but to shy away from any form of creative thinking about what option makes the most sense for the participants in a particular plan—here, offering a custom TDF that prioritizes stability.[13] The Genentech fiduciaries should not be penalized for being willing to think strategically about the options that work best for their participants.

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[13] The result will be a loss of new, highly beneficial options for plan participants. Indeed, TDFs themselves were once an innovative approach to retirement investing, and now they dominate the market. *See* Jonathan A. Parker, Antoinette Schoar, and Yang Sun, *National Bureau of Economic Research Working Paper Series*, Retail Financial Innovation and Stock Market Dynamics: The Case of Target Date Funds 1 (Oct. 2020), https://bit.ly/3AlW47T ("Over the past two decades, one of the most important financial innovations for the typical American retail investor has been the development and spread of Target Date Funds.").

Finally, these second-guessing lawsuits impose enormous costs on plan sponsors. As the Supreme Court recognized in *Twombly*, enforcing the plausibility pleading rule is necessary to guard against speculative suits that "push cost-conscious defendants to settle even anemic cases." 550 U.S. at 558-59. 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. While discovery is sometimes appropriate—in cases that are plausibly pled without hindsight bias or mere speculation—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)).

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. *Hughes* requires that courts apply *Twombly*'s "plausibility" standard to ERISA cases—precisely what the district court did here. 595 U.S. at 170.

CONCLUSION

This Court should affirm the judgment below.

Respectfully submitted,

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