NOT YET SCHEDULED FOR ORAL ARGUMENT
No. 23-7059

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

DARRELL WILCOX and MATTHEW MCGUIRE, individually and on behalf of the Georgetown University Defined Contribution Retirement Plan and the Georgetown University Voluntary Contribution Retirement Plan,

Plaintiffs-Appellants,

v.

GEORGETOWN UNIVERSITY, CHRISTOPHER AUGOSTINI, and GEOFF CHATAS,

Defendants-Appellees.

On Appeal from the United States District Court
for the District of Columbia
1:18-cv-422 (Hon. Amy B. Jackson)

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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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28, amicus curiae the Chamber of Commerce of the United States of America, through its undersigned counsel, certifies as follows:

(A) Parties and amici. Except for amicus curiae the Chamber of Commerce of the United States of America, all parties, intervenors, and amici appearing before the district court and in this Court are listed in the Plaintiffs-Appellants' Certificate as to Parties, Rulings, and Related Cases filed June 7, 2023 (hereinafter, "Appellants' Certificate").

(B) Rulings under review. References to the rulings at issue appear in the Appellants' Certificate.

(C) Related cases. Related cases appear in the Appellants' Certificate.

Dated: November 3, 2023

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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.*, 595 U.S. 170 (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-

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[1] Counsel for Defendants consents to the filing of this brief. Counsel for Plaintiffs informed counsel for amicus curiae that Plaintiffs do not consent to the filing of this brief, and the Chamber has accordingly filed a motion for leave to file. 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 fees and the availability of investment options. 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 provided "too many" investment choices and failed to select the cheapest recordkeeping option, often using inapt comparators to advance the point. *See, e.g.*, Proposed First Am. Compl., Dkt. No. 58-2 ¶¶ 67-71, 73-78. 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 and recordkeeping. *See, e.g.*, *id.* ¶¶ 72, 77, 102.

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*, 595 U.S. at 177 (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*, 595 U.S. at 177.

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* Dkt. No. 76 at 26-30, 33-34. 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 (particularly here where Plaintiffs claim there were "too many" options) 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 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*, 595 U.S. at 177. 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

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

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 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, Dkt. No. 58-2 ¶¶ 67-68, 72, 138-140—that is not how the prudence standard works. There is no one prudent fund, service provider, or fee structure that renders everything else imprudent. Nor is there one prudent number of investment options to provide that renders any other number 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*, 595 U.S. at 177.

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*

[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").

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. Dkt. No. 58-2 ¶ 74 ("The sheer volume of … total investment choices … *indicates* that Defendants failed properly to monitor …." (emphasis added)), ¶ 77 (alleging "it is highly doubtful" that fiduciaries "read the prospectuses"), ¶ 102 ("Defendants *apparently* have failed to evaluate the differences in compensation paid to each of the three recordkeepers…." (emphasis added)). They suggest instead that the district court should have *inferred* an imprudent process based on hindsight allegations about the plan's fees and number of investment options—even if there are obvious explanations for the options chosen that are entirely consistent with prudent fiduciary decision-making. *See* Opening Br. 29-33, 39-40. 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 *Air Excursions LLC v. Yellen*, 66 F.4th 272 (D.C. Cir. 2023), the plaintiff lacked direct allegations of a causal connection between the Treasury's disbursement of pandemic relief funds to a competitor and that competitor's decision to charge below-market rates for its services and to approach sublease negotiations with the plaintiff "in bad faith." *Id.* at 275-278. Instead, the plaintiff relied on "conclusory allegations connecting [its competitor's] receipt of [pandemic-relief]

funds with the outcome of the sublease negotiations." *Id.* at 278. This Court had to consider whether the complaint contained well-pleaded allegations to support "the inference that [the competitor] used the disbursements to further its alleged anticompetitive behavior." *Id.* at 278-279 (evaluating whether complaint's allegations of constitutional standing satisfied *Twombly* and *Iqbal* standards). It carefully scrutinized each of the circumstantial allegations—rejecting the ones it deemed conclusory or factually unsupported, *id.*—to determine whether the plaintiff plausibly suggested something more than lawful business practices. *Id.* And it concluded that the competitor's subleasing decision "is not only compatible with, but indeed is more likely explained by [the competitor's] obvious incentive not to sublease to a competitor, independent of its receipt of [pandemic-relief] disbursements." *Id.* at 278 (citation, alteration, and quotation marks omitted).

Civil conspiracy cases present another example. In *RSM Production Corp. v. Freshfields Bruckhaus Deringer U.S. LLP*, 682 F.3d 1043 (D.C. Cir. 2012), for example, this Court examined whether the plaintiff plausibly alleged that Freshfields conspired to violate the Racketeer Influenced and Corrupt Organizations Act (RICO) by representing the country Grenada in international arbitration. *Id.* at 1045. The plaintiff asserted that Freshfields "was part of a conspiracy to bribe Grenadian officials and deny [the plaintiff] its offshore licensing rights." *Id.* at 1047. But because the plaintiff offered no direct factual allegations to support that conclusory

assertion, this Court carefully scrutinized the circumstantial allegations "regarding Freshfields' knowledge" to determine whether there was sufficient factual heft to plausibly support it. *Id.* at 1048-1051. This Court concluded that "the allegations of the complaint target Freshfields' services as attorneys, nothing more." *Id.* at 1051. More specifically, "the complaint alleges no conduct by Freshfields beyond the provision of normal legal services in arbitration and so fails to support a reasonable inference that Freshfields agreed to assist others in the commission of unlawful acts." *Id.* (citation, alteration, and quotation marks omitted). And this Court emphasized that "dismissal is proper when a conspiracy allegation does not plausibly suggest an illicit accord because it is not only compatible with, but indeed is more likely explained by, lawful, unchoreographed free-market behavior." *Id.* at 1052 (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 680 (2009)) (alterations and quotation marks omitted).

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*. 595 U.S. at 177.[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 lawful fiduciary behavior—the claim is properly dismissed.

Following *Hughes*, circuit courts have reinforced this pleading standard in ERISA cases. As the Eighth Circuit 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.'"

[7] Plaintiffs fault the district court here for relying on the district court's decision in *Sweda*; they claim that "the district court never acknowledged or dealt with" the Third Circuit's reversal of the district court's dismissal order in *Sweda*. Opening Br. 26-27. But Plaintiffs fail to acknowledge that the Third Circuit's decision in *Sweda* rested on its view that *Twombly*'s pleading standard did not apply to ERISA cases, *Sweda*, 923 F.3d at 326—a view the Supreme Court in *Hughes* emphatically rejected, 595 U.S. at 177.

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 number of investment options available, 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.*, Dkt. No. 58-2 ¶¶ 67-72, 138-142. 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 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

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[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.

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 comparator plans, instead opting for a list of six other university plans with little to no factual allegations as to those plans' size, number of participants, total

assets, available tools and funds, and even scope and quality of recordkeeping services provided. *See* Dkt. No. 58-2 ¶¶ 85-100; Response Br. 37-41. This lack of detail is fatal to Plaintiffs' claims, which are based on the "conclusory" notion that all large plans "receive nearly identical recordkeeping services and that any difference in services is immaterial to the price of those services"—a theory that is entirely inconsistent with the reality of the marketplace. *See England*, 2023 WL 4851878, at *3 & n.5 (collecting cases).[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.

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

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[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 more specific allegations about changes similarly situated plans made to lower costs, and the plaintiffs in *Hughes* alleged that other recordkeepers were equally capable of providing comparable services. *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. 43-45.

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 v. Wells Fargo & Co.*, 898 F.3d 820, 823-824 (8th Cir. 2018).

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. 47 (noting lack of allegation in this case). 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 case."). There are many ways fiduciaries can prudently monitor service providers short of an expensive and time-consuming

[11] *See* Dkt. No. 58-2 ¶ 63 (alleging that "prudent fiduciaries of large defined contribution retirement plans solicit competitive bids for recordkeeping and administrative services at regular intervals of approximately three to five years").

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 or timeframe for doing so.

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

2. Number of Investment Options—Plaintiffs' complaint here likewise seeks an inference of a deficient process from allegations that the plan included "too many"

investment choices. *See* Dkt. No. 58-2 ¶¶ 73-78. But inferring imprudence from the availability of options in this context is implausible.

ERISA's focus on flexibility and discretion is particularly important for university plan sponsors and fiduciaries, who serve a uniquely diverse set of employees. All plan sponsors and fiduciaries must consider employees across age ranges with divergent risk tolerances, but universities have a uniquely variable employee population. A single university employs economics professors, art history professors, nurses, lawyers, admissions officers, IT technicians, janitorial staff, and food service professionals, just to name a few. These employees have different backgrounds, incomes, financial sophistication levels, degrees of financial flexibility, and retirement needs. As discussed *supra* pp. 6-7, plan fiduciaries must make a variety of decisions as to what investment options to offer; which services to offer; who should provide those services; and how to compensate service providers. And universities are no exception. Across these areas, it is critical that universities and fiduciaries have the flexibility Congress envisioned to craft a plan that will serve *all* of their employees. *Hughes*, 595 U.S. at 177. The proposition that fiduciaries can be deemed presumptively imprudent simply because they choose to select a diverse array of offerings that employees can select from is completely inconsistent with the Supreme Court's admonition that fiduciaries must make "difficult tradeoffs,

and courts must give due regard to the range of reasonable judgments a fiduciary may make based on her experience and expertise." *Id.*

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;[12] for failing to divest from stocks with declining share prices or high risk profiles,[13] and for failing to *hold onto* such stock because high risk can produce high reward;[14] for making available investment options that plaintiffs' lawyers deem too risky,[15] and conversely for taking what other plaintiffs' lawyers deem an overly cautious approach.[16] Indeed, while most

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[12] *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.

[13] *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").

[14] *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).

[15] *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.

[16] *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).

plaintiffs sue plans for charging allegedly excessive fees in the hopes of outperformance, a new set of cases charge defendants with following the purportedly "in vogue" trend of "chas[ing]" low fees rather than focusing on funds' "ability to generate return."[17]

This same phenomenon plays out with respect to recordkeeping fees: in the past few years, Henry Ford Health System 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

[17] *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.

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 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. 22-24.

Moreover, many plaintiffs' practice of suing not just companies and the plan's governing body but also individual fiduciaries under new and often contradictory

circumstantial theories of imprudence has made individual fiduciaries' jobs virtually impossible. It creates huge barriers for plan sponsors attempting to recruit individuals (like human-resources professionals) to serve as plan fiduciaries, knowing that at any time they could be sued in an ERISA class action—an event that has very real consequences when a fiduciary tries to refinance her home mortgage, start a business, or apply for a loan for her children's college expenses. *Cunningham v. Cornell Univ.*, 2018 WL 1088019, at *1 (S.D.N.Y. Jan. 19, 2018) (noting "tremendous power to harass" individual fiduciaries in this way). And these barriers are only greater in the university context where "fiduciaries … are often staff members who volunteer to serve in these roles." *Sweda*, 923 F.3d at 341 (Roth, J., concurring and dissenting in part).

This dynamic has upended the fiduciary-insurance industry.[18] The risks of litigation have pushed insurers "to raise insurance premiums, increase policyholder 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

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

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.

CONCLUSION

This Court should affirm the judgment below.

November 3, 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 6,233 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 District of Columbia Circuit by using the appellate CM/ECF system on November 3, 2023.

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