UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

DAVID RAVARINO, *et al.*, Plaintiffs,	)	No. 3:21-cv-01658-OAW
v.	)	March 7, 2022
VOYA FINANCIAL, INC., *et al.*, Defendants.	)	

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

The Chamber of Commerce of the United States of America ("Chamber") respectfully moves for leave to file a brief as *amicus curiae* in the above-captioned case in support of Defendants' motion to dismiss. The proposed *amicus* brief is attached as Exhibit A. Defendants have consented to the filing of this brief. Counsel for Plaintiffs informed counsel for the Chamber that Plaintiffs do not object to the Chamber's motion.

Amicus participation is appropriate where, as here, "the amicus has unique information or perspective that can help the Court beyond the help that the lawyers for the parties are able to provide." *Schaghticoke Tribal Nation v. Norton*, 2007 WL 9719292, at *3 (D. Conn. July 29, 2007) (internal quotation marks omitted). "[T]here is no governing standard" dictating "the procedure for obtaining leave to file an amicus brief in the district court," and district courts thus "have broad discretion" to assess whether *amicus* participation will be "of aid to the court and offer insights not available from the parties." *Auto. Club of N.Y., Inc. v. Port Authority of N.Y. and N.J.*, 2011 WL 5865296, at *1 (S.D.N.Y. Nov. 22, 2011). Applying these principles, this Court has frequently permitted *amici* to participate in its proceedings. *See, e.g.*, *Dist. Lodge 26 of the Int'l Ass'n of Machinists & Aerospace Workers v. United Techs. Corp.*, 2009 WL 3571624, at *1 (D. Conn. Oct. 23, 2009); *Schaghticoke Tribal Nation*, 2007 WL 971929, at *3.

The Chamber's *amicus* brief provides a unique perspective informed by its position as the world's largest business federation. The Chamber represents approximately 300,000 direct members and indirectly represents the interests of more than three million businesses and professional organizations of every size, in every industry sector, and from every region of the country. Many of the Chamber's members maintain, administer, or provide services to employee-benefit plans governed by ERISA. In fact, the Chamber's membership is unique because it includes representatives from all aspects of the private-sector retirement system, such as plan

sponsors, asset managers, recordkeepers, consultants, and other service providers.

Since ERISA was enacted, the Chamber has played an active role in the law's development and administration. The Chamber regularly submits comment letters when the Department of Labor (DOL) engages in notice-and-comment rulemaking,[1] provides information to the Pension Benefit Guaranty Corporation (PBGC) to support PBGC in its efforts to protect retirement incomes,[2] submits comments to the Department of the Treasury on plan administration and qualification,[3] and provides testimony to DOL's standing ERISA Advisory Council.[4] The Chamber has also published literature proposing initiatives to encourage and bolster the employment-based retirement benefits system in the United States,[5] and is frequently quoted as a resource on retirement policy.[6]

Given its perspective and deep understanding of the issues involved in these cases, the Chamber regularly participates as *amicus curiae* in cases involving employee-benefit design or administration. *See, e.g.*, *Hughes v. Northwestern Univ.*, 142 S. Ct. 737 (2022) (standard for pleading fiduciary-breach claim involving challenges to defined-contribution plan line-ups and

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[1] *See, e.g.*, Electronic Disclosure by Employee Benefit Plans (Nov. 22, 2019), https://bit.ly/3C8QKBp.

[2] *See, e.g.*, Comments on the Interim Final Regulation for the Special Financial Assistance Program for Financially Troubled Multiemployer Plans (Aug. 10, 2021), https://bit.ly/3pvgpPJ; Letter from U.S. Chamber of Commerce Regarding Partitions of Eligible Multiemployer Plans (Aug. 18, 2015), https://bit.ly/3IEuvpd.

[3] *See, e.g.*, Permanent Relief for Remote Witnessing Procedures (Sept. 29, 2021), https://bit.ly/3Mkrqgj.

[4] *See, e.g.*, Statement of the U.S. Chamber of Commerce Regarding Gaps in Retirement Savings Based on Race, Ethnicity and Gender (Aug. 27, 2021), https://bit.ly/3sJWPkR.

[5] *See* U.S. Chamber of Commerce, *Private Retirement Benefits in the 21st Century: A Path Forward* (2016), https://bit.ly/3hOPBWt.

[6] *See, e.g.*, Austin R. Ramsey, *Who Wins, Who Loses With Auto Retirement Savings Plan Proposal*, Bloomberg Law (Sept. 23, 2021), https://bit.ly/3vxZ8JA; Jaclyn Diaz, *Retirement Industry Hustles to Keep Up With DOL's Rules Tsunami*, Bloomberg Law (Sept. 1, 2020), https://bit.ly/3MecArL.

service-provider arrangements); *Fifth Third Bancorp v. Dudenhoeffer*, 573 U.S. 409 (2014) (standard for pleading fiduciary-breach claim involving employer stock); *Sweda v. Univ. of Pa.*, 923 F.3d 320 (3d Cir. 2019) (standard for pleading fiduciary-breach claim involving 401(k) plan fees and investment line-up);[7] *Meiners v. Wells Fargo Co.*, 898 F.3d 820 (8th Cir. 2018) (same). Courts have found the Chamber's amicus participation helpful given its role and institutional knowledge about plan management and fiduciary practice—in a recent case pending in this district, the court not only granted the Chamber leave to participate as an amicus at the motion-to-dismiss stage,[8] but even expressly raised the Chamber's arguments at the motion hearing. *See Carrigan v. Xerox Corp.*, No. 21-1085-SVN (D. Conn. Nov. 10, 2021), ECF No. 54 (Chamber brief).[9]

Because the Chamber's membership includes countless sponsors and service providers in the private-sector retirement community, the Chamber's collective knowledge about the issues presented here—including the management of retirement plans, the legal issues surrounding ERISA, and the types of allegations commonly included in these types of complaints—extends beyond any single defendant or group of defendants named in a particular case. The Chamber seeks to provide a broader perspective on the key threshold issue of when circumstantial allegations of a violation of ERISA are plausible in the context of plan-management decisionmaking and the overall context of ERISA class-action litigation. And as the Supreme Court has instructed, that context is key—courts are supposed to undertake a "careful, context-

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[7] In *Sweda*, the Chamber's motion for leave to file an *amicus* brief was granted over the plaintiffs' opposition.

[8] *Amicus* briefs are routinely accepted at the motion-to-dismiss stage, including from the Chamber itself. *See, e.g.*, *New York v. U.S. Dep't of Labor*, No. 18-1747-JDB (D.D.C. Nov. 9, 2018) (minute order); *United States v. DaVita Inc.*, No. 21-229-RBJ (D. Colo. Oct. 20, 2021), ECF No. 65; *United States v. Walgreen Co.*, No. 21-32-JPJ (W.D. Va. Sept. 9, 2021), ECF No. 22.

[9] The transcript from the court's February 15, 2022 motion hearing has not been released.

sensitive scrutiny of [the] complaint's allegations," *Fifth Third Bancorp*, 573 U.S. at 425, just as they are supposed to consider "context" in evaluating plausibility in all civil cases, *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 554 (2007); *see also Hughes*, 142 S. Ct. at 742 (explaining that the pleading standard articulated in *Twombly* and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), applies to ERISA cases).

The Chamber's brief will therefore "contribute in clear and distinct ways" to the Court's analysis. *Prairie Rivers Network v. Dynegy Midwest Generation, LLC*, 976 F.3d 761, 764 (7th Cir. 2020) (granting the Chamber's motion for leave to file); *see also Neonatology Assocs., P.A. v. Comm'r of Internal Revenue*, 293 F.3d 128, 132 (3d Cir. 2002) (Alito, J.) (an *amicus* brief may assist the court "by explain[ing] the impact a potential holding might have on an industry or other group") (quotation marks omitted). "Even when a party is very well represented, an amicus may provide important assistance to the court." *Neonatology Assocs.*, 293 F.3d at 132. And here, the Chamber's perspective and expertise will serve several functions courts have identified as useful: It "explain[s] the broader regulatory or commercial context" in which this case arises; "suppl[ies] empirical data" informing the issue on appeal; and "provid[es] practical perspectives on the consequences of particular outcomes." *Prairie Rivers Network*, 976 F.3d at 763.

Specifically, the proposed *amicus* brief provides context regarding the recent surge in ERISA litigation, describes similarities among these cases that help to shed light on Plaintiffs' allegations here, and provides context for how to evaluate these types of allegations in light of the pleading standard set forth by the Supreme Court in *Twombly* and *Iqbal*. In particular, the brief marshals examples from many of the dozens of recently filed cases to contextualize the issues presented in this litigation. These cases largely touch on issues that are relevant but adjacent to the issues presented here, and therefore in many instances have not been cited or discussed by the

parties. Given the extensive collective experience of the Chamber's members in both retirement-plan management and ERISA litigation, the Chamber offers a distinct vantage point that it believes will be of value to the Court as it considers Plaintiffs' complaint and whether it surpasses the plausibility threshold.

For these reasons, the Chamber respectfully requests that the Court grant it leave to participate as *amicus curiae* and accept the proposed *amicus* brief, which accompanies this motion.

Dated: March 7, 2022

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States District Court for the District of Connecticut by using the court's CM/ECF system on March 7, 2022.

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

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EXHIBIT A

UNITED STATES DISTRICT COURT
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BRIEF OF *AMICUS CURIAE* CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS THE COMPLAINT

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INTEREST OF THE *AMICUS CURIAE*

The Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation, representing approximately 300,000 direct members and indirectly representing the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country.[1] Given the importance of the laws governing fiduciary conduct to its members, many of which maintain or provide services to retirement plans, the Chamber regularly participates as *amicus curiae* in ERISA cases at all levels of the federal-court system, including those addressing the pleading standard for fiduciary-breach claims. The Chamber submits this brief to provide context on retirement-plan management and how this case is situated in the broader litigation landscape.

INTRODUCTION

For nearly 50 years, ERISA has governed the conduct of fiduciaries of employee-benefit plans that employers voluntarily establish. For decades after ERISA's enactment, fiduciaries—often company employees, such as HR professionals or executives with financial and investment expertise—went about their work, exercising their wide discretion to make a range of decisions that meet the specific needs and preferences of their unique participant base. In many (if not most) plans, those fiduciaries are themselves plan participants, with a keen understanding of the practical impact of their decisions. And fiduciaries' decisions evolved over time as the healthcare industry and retirement industry evolved—with increasingly more options, service offerings, and service providers competing against each other in the marketplace.

ERISA litigation has existed nearly as long as ERISA, which is no surprise given its private

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[1] No counsel for a party authored this brief in whole or in part. No party, no counsel for a party, and no person other than *Amicus*, its members, or its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

rights of action. *See, e.g.*, 29 U.S.C. § 1132(a)(2). But the nature of that litigation has shifted over time, particularly in the retirement-plan context. Today, much of the most high-profile and prolific ERISA litigation does not challenge a fiduciary's specific decision that negatively impacted a particular participant—*e.g.*, a denial of a claim for benefits the participant thought he was owed, or a failure to pay pension benefits based on a dispute about vesting rules. Instead, starting about 15 years ago, a new universe of ERISA litigation began to surface—wholesale challenges to plan management. Plan sponsors and fiduciaries found themselves faced with class-action lawsuits challenging everything from their choice of investment options, to their choices of service providers, to the size of the plan's investment line-up, to whether the service fee they negotiated for $34 per participant was reasonable when another plan negotiated an agreement with a different service provider for $31 per participant, and so on. And although under ERISA, fiduciaries are judged not for the "results" of their decisions, but rather by the "process" used in making those decisions, *PBGC ex rel. St. Vincent Cath. Med. Ctrs. Ret. Plan v. Morgan Stanley Inv. Mgmt. Inc.*, 712 F.3d 705, 719 (2d Cir. 2013), the lawsuits focused *entirely* on outcomes—arguing that particular performance or fee outcomes were per se indicators of an imprudent process.

These lawsuits became increasingly simple to bring—filing this type of complaint does not require an extensive investigation of any individual participant's experience; instead, complaints are typically based on a review of disclosures publicly filed with regulators, investment performance data publicly available on Morningstar, and sometimes fee and investment disclosures sent to participants by the plan. Discovery is almost completely one-sided—requiring thousands upon thousands of pages of documents and numerous witnesses to be produced by the plan sponsor and the plan's fiduciaries, but very little production (or even involvement) from participants. And class certification has long been readily granted, under the reasoning that the

plan fiduciaries' decisionmaking process applies to all participants alike. As the Second Circuit has recognized, that dynamic has made it relatively easy to force plan sponsors—fearful of a large class-wide judgment and expending millions of dollars in defense costs, no matter the merits of the plaintiffs' claims—to agree to a settlement. *See PBGC*, 712 F.3d at 719.

The lawsuits that began to pop up 15 years ago quickly grew into a cottage industry. Plan sponsors and fiduciaries are now sued no matter what decision they make. If fiduciaries hire a service provider for a fee of $50 per participant, they are sued for negotiating fees that are "excessive" because the fees exceed $35 per participant. If they hire a service provider for $30 per participant, they are sued for not negotiating a $20-per-participant fee (or here, for not negotiating a $5 fee!). If they offer actively managed funds that seek to beat the market, they are sued for not offering a less risky index fund that simply seeks to track a market index. And if (like Voya here) they offer an index fund, they are sued for not offering an actively managed fund with greater reward potential. This creates enormous frustration and litigation costs for plan sponsors, who provide employee-benefit plans *voluntarily* and often contribute tens of millions of dollars in voluntary contributions to employees' plan accounts, and it is equally frustrating for fiduciaries, who are often employees doing their best to make difficult decisions during times of market uncertainty for a diverse participant base. Plan sponsors and fiduciaries today truly are, as the Supreme Court has observed, "between a rock and a hard place." *Fifth Third Bancorp v. Dudenhoeffer*, 573 U.S. 409, 424 (2014).

Even worse, many of these lawsuits are cookie-cutter versions of each other that are frequently riddled with obvious errors, including foundational premises that even a modicum of pre-suit review—*i.e.*, the most basic examination of a plan participant's own account records or the plan's governing document, both readily available to plan participants—would have revealed

to be demonstrably inaccurate. And when defense counsel brings these undisputable inaccuracies to the attention of the lawyers who file the lawsuits, they rarely abandon their ill-founded claims. Instead, they simply move the supposedly "reasonable" level of investment performance higher or service provider fees lower so that the complaint can continue to assert that the plan fiduciaries acted imprudently. For plan fiduciaries, litigating these cases—and managing a plan—has become a game of whack-a-mole.

Moreover, ERISA complaints can easily be made to appear complicated, and retirement-plan management is not always intuitive, which makes it more difficult for courts to evaluate whether claims of imprudence are plausible or spurious. And ERISA plaintiffs frequently claim a factual dispute and seek discovery no matter how weak, demonstrably mistaken, or conclusory the allegations. At the same time, against this backdrop of exploding ERISA litigation, the Supreme Court has repeatedly implored lower courts to carefully scrutinize a complaint's allegations to "weed out meritless lawsuits" that are "economically burdensome" and thus undermine Congress's "desire not to create a system that is so complex that administrative costs, or litigation expenses, unduly discourage employers from offering … benefit plans in the first place." *Dudenhoeffer*, 573 U.S. at 424-425 (citation omitted). It has also emphasized the importance of undertaking a "context specific" scrutiny of a complaint's allegations by applying the principles set forth in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), and *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and of "giv[ing] due regard to the range of reasonable judgments a fiduciary may make" in light of the "difficult tradeoffs" fiduciaries must weigh. *Hughes v. Northwestern Univ.*, 142 S. Ct. 737, 742 (2022). Given all of this, how is a court supposed to evaluate whether a complaint has some there there or is simply a smokescreen? And what kind of "context" should it consider?

Two principles are relevant to answering these questions. First, ERISA's statutory

structure—including the wide discretion and flexibility it affords to fiduciaries—and general principles of plan management offer important context that courts should consider. If a complaint asks a court to infer an imprudent process from a fiduciary's decision to offer mutual funds rather than collective investment trusts, but the Department of Labor (DOL) has advised that both investments are "common" in plans and offer different benefits,[2] then that contextual information will demonstrate that an inference of imprudence from offering one type of investment vehicle rather than another is implausible under *Twombly* and *Iqbal*.

Second, the incorporation-by-reference and judicial-notice doctrines are vital for courts to apply in these cases. Counsel for ERISA plaintiffs craft their complaints not from plaintiffs' own personal experiences with plan fiduciaries' decisionmaking processes, but from publicly available fee and performance data showing what funds and service arrangements resulted from those processes. As courts within the Second Circuit have acknowledged in the related securities context, it would be perverse to allow plaintiffs "to freely utilize" these types of integral documents in drafting their complaints, "only to turn around and disavow those very same documents when cited to Plaintiffs' disadvantage." *Cohen v. Cap. One Funding, LLC*, 489 F. Supp. 3d 33, 46 (E.D.N.Y. 2020). "[J]udicial resources would be wasted, and cases needlessly prolonged in discovery, were courts to blind themselves to integral documents that plainly undermine, or even flatly contradict, the allegations based on those very documents." *Id.*

This Court should apply these principles here and dismiss Plaintiffs' complaint.

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

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 516-17. 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, often during periods of considerable market uncertainty, and accommodate "competing considerations." H.R. Rep. No. 96-869(I), at 67 (1980). They must take into account 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 "greater flexibility, in the making of investment decisions…, than might have been provided under pre-ERISA common and statutory law in many jurisdictions." DOL, Op. No. 81-12A, 1981 WL 17733, at *1 (Jan. 15, 1981). Congress viewed this flexibility 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).

This flexibility extends to a variety of areas, including the decision of which investment options to offer from among the thousands available in the market (how many, which types, at what risk/reward levels, and at what fee levels). These decisions all involve "difficult tradeoffs." *Hughes*, 142 S. Ct. at 742. For example, 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 tailored investment management offered by managed-account products. In selecting a plan line-up, fiduciaries take into account all of these competing considerations.

Fiduciaries enjoy this same flexibility with respect to what services to offer, who should provide those services, and how to compensate service providers. In making these decisions, plan fiduciaries must heed DOL's common-sense observation "that cheaper is not necessarily better," and fees should be considered as only "one of several factors" when one makes a decision. *401(k) Plan Fees* 1. Nor is there just one way that fees for administrative services like recordkeeping—the kind of services most frequently challenged in ERISA class actions—should be negotiated and allocated. About one-quarter of plan sponsors pay recordkeeping fees themselves—an entirely voluntary act, much like employer contributions. Deloitte Development LLC, *2019 Defined Contribution Benchmarking Survey Report* 20 (2019), https://bit.ly/3KcNlUW ("*Benchmarking Survey*"). For the rest, plan participants pay (in whole or in part) for these fees. Even then, there are a wide variety of allocation mechanisms—some plans pay through "a direct fee" that is charged to participant accounts; for others, recordkeeping fees are a part of the "expense ratios" participants pay for investing in specific funds through a mechanism known as "revenue sharing." *Id.* In short, for fiduciary decisions, there is virtually never just one way to skin a cat.

Given the breadth of fiduciary decisions made 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 these fiduciaries owe to plans and their participants. 29 U.S.C. § 1104(a). 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." *401(k) Fee Disclosure: Helping Workers Save For Ret.: Hearing Before the S. Comm. on Health, Educ., Lab., and Pensions*, 110th Cong. 15 (2008) (statement of Assistant Secretary 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 10,000 mutual funds alone,[3] several thousand of which are offered in 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' decisions to offer specific investment options by pointing to less expensive or better-performing alternatives and then suggesting that the fiduciaries *must have* had an inadequate decisionmaking process—just as Plaintiffs in this case assert—that is not how the prudence standard operates. Rather, courts must account for the "range of reasonable judgments a fiduciary may make" when evaluating the plausibility of ERISA claims. *Hughes*, 142 S. Ct. at 742.

II. There is no ERISA exception to Rule 8(a)'s pleading standard.

The last 15 years have seen a surge of ERISA litigation.[4] What began as a steady increase has exploded in the past two years, culminating in over 100 excessive-fee suits in 2020—a five-fold increase over the prior year.[5] The last 14 months have only seen more of the same. These

[3] Investment Company Institute, Investment Company Fact Book 40 (61st ed. 2021), https://www.ici.org/system/files/2021-05/2021_factbook.pdf.

[4] *See, e.g.*, George S. Mellman and Geoffrey T. Sanzenbacher, *401(k) Lawsuits: What are the Causes and Consequences?*, Center for Retirement Research at Boston College (May 2018), https://bit.ly/3fUxDR1 (documenting the rise in 401(k) complaints from 2010 to 2017).

[5] *See Understanding the Rapid Rise in Excessive Fee Claims* 2, AIG, https://bit.ly/3k43kt8; *see also* Jacklyn Wille,

cases generally do not develop organically based on plan-specific details, but rather rely heavily on generalized allegations that do not reflect the context of a particular plan.

Against this backdrop, the Supreme Court has taken several recent opportunities to address the standard for sufficiently alleging a claim under ERISA. Each time, it has emphasized that ERISA suits are no different from any others: to survive a motion to dismiss, plaintiffs must satisfy Rule 8(a)'s pleading standard as articulated in *Twombly* and *Iqbal*. *Hughes*, 142 S. Ct. at 742.[6] Given the variety among ERISA plans, the wide discretion fiduciaries have when making decisions on behalf of thousands of employees with different investment styles and risk tolerances, and the risk that any ERISA suit can be made to appear superficially complicated, applying Rule 8(a) to ERISA claims requires a close evaluation of "'the circumstances … prevailing' at the time the fiduciary acts" and a "careful, context-sensitive scrutiny of a complaint's allegations." *Dudenhoeffer*, 573 U.S. at 425. "[C]ategorical rules" have no place in this analysis—as the Court has recognized, "the circumstances facing an ERISA fiduciary will implicate difficult tradeoffs, and courts must give due regard to the range of reasonable judgments a fiduciary may make based on her experience and expertise." *Hughes*, 142 S. Ct. at 742.

The allegations in many of the cases in this wave of litigation fail this standard twice over, particularly when informed by documents that are subject to judicial notice or incorporated by reference in the complaints. First, the circumstantial allegations in these complaints are often equally (if not far more) consistent with lawful behavior, and therefore cannot "nudge[] the[] claims across the line from conceivable to plausible." *Twombly*, 550 U.S. at 570. Second, the

401(k) Fee Suits Flood Courts, Set for Fivefold Jump in 2020, Bloomberg Law (Aug. 31, 2020), https://bit.ly/3fDgjQ5.

[6] The Court thus rejected some circuits' suggestion that a lower pleading standard applies in ERISA cases. *See Sacerdote v. N.Y. Univ.*, 9 F.4th 95, 108 & n.47 (2d Cir. 2021); *Sweda v. Univ. of Pa.*, 923 F.3d 320, 326 (3d Cir. 2019).

allegations frequently ignore the discretion fiduciaries have to make decisions based on their experience and expertise, and in light of the context of a particular plan.

A. The incorporation-by-reference and judicial-notice doctrines allow courts to consider critical context for evaluating these allegations.

When ruling on a motion to dismiss, "a court is not limited to the factual allegations of the complaint," but may evaluate both (1) documents attached to the complaint or incorporated by reference; and (2) information properly subject to judicial notice, like regulatory filings and statutorily required disclosures. *Patrowicz v. Transamerica HomeFirst, Inc.*, 359 F. Supp. 2d 140, 144 (D. Conn. 2005) (quoting *Brass v. Am. Film Techs., Inc.*, 987 F.2d 142, 150 (2d Cir. 1993)). With respect to the first category, the Second Circuit has explained that, "generally, the harm to the plaintiff when a court considers material extraneous to a complaint is the lack of notice that the material may be considered." *Chambers v. Time Warner, Inc.*, 282 F.3d 147, 153 (2d Cir. 2002) (same). That concern does not apply, however, where the "plaintiff has actual notice of all the information in the movant's papers and has relied upon these documents in framing the complaint." *Id.* Given this justification, courts routinely extend the incorporation-by-reference doctrine to documents that are "integral" to the complaint—meaning the complaint "relies heavily upon its terms and effect"—even if the document is not itself expressly cited. *Id.*

Allowing courts to give "such documents their due consideration[] 'prevents plaintiffs from generating complaints invulnerable to Rule 12(b)(6) simply by clever drafting.'" *Cohen*, 489 F. Supp. 3d at 46 (quoting *Glob. Network Commc'ns, Inc. v. City of N.Y.*, 458 F.3d 150, 157 (2d Cir. 2006)). It would be strange indeed to allow plaintiffs "to freely utilize" these types of documents in drafting their complaints, "while omitting critical facts" from those documents, "only to turn around and disavow those very same documents when cited to Plaintiffs' disadvantage. More generally, judicial resources would be wasted, and cases needlessly prolonged in discovery, were

courts to blind themselves to integral documents that plainly undermine, or even flatly contradict, the allegations based on those very documents." *Id.*

Those principles apply with particular force to ERISA class actions. As many of these complaints (including this one) expressly note, they are often filed without any personal knowledge regarding the relevant merits question, namely the fiduciaries' "decision-making processes with respect to the Plan (including Defendants' processes for selecting, monitoring, evaluating and removing Plan investments)." Compl. ¶ 106. Instead, they are crafted from judicially noticeable information (*e.g.*, fee and performance information), regulatory filings and disclosures, and plan documents available to participants. Based on those documents alone, the plaintiffs infer (and ask courts to infer) an imprudent fiduciary process. *See* Compl. ¶ 106; *id.* ¶ 71 n.11; *e.g.*, *id.* ¶¶ 18 & n.2, 29, 41, 46 & nn.8-9, 63 & n.10, 71 & n.11.

Given that Plaintiffs themselves concede they have no information about the plan's fiduciary process and are instead inferring wrongdoing entirely from these types of materials, it would be highly impractical to disallow Defendants from using *those same types of documents* to demonstrate why Plaintiffs' reading of them is clearly inaccurate or cherry-picks favorable information while omitting unfavorable information that renders their inferences of wrongdoing implausible under *Twombly* and *Iqbal*. Imagine, for example, a plaintiff who brings a breach-of-contract claim, alleging that her contractor promised to have renovations completed in one week at a price of $8,000. If the plain language of the contract refutes that allegation, forcing the defendant into discovery would not only impose unfair financial burdens on defendants, it would also be an extraordinary waste of judicial resources and encourage plaintiffs (and their lawyers) to misuse the legal process to try to extract costly settlements. Now imagine that instead of a small contract dispute, the case were a class action asserting claims for hundreds of millions of dollars

on behalf of thousands of plan participants in a context where discovery will cost the defendant millions and where being named as an individual fiduciary defendant has very real consequences when the fiduciary tries to refinance her home mortgage, start a business, or apply for a loan for her children's college expenses. *See Cunningham v. Cornell Univ.*, 2018 WL 1088019, at *1 (S.D.N.Y. Jan. 19, 2018) (noting the "tremendous power to harass" individual fiduciaries in this way); *see also Kramer v. Time Warner Inc.*, 937 F.2d 767, 774 (2d Cir. 1991) (noting the risk that forbidding examination of documents that are incorporated by reference "might lead to complaints filed solely to extract nuisance settlements").

This concern is not merely hypothetical—the Second Circuit has noted that the risk of "settlement extortion" is a very real concern in ERISA cases given the "ominous" and "asymmetric" discovery costs involved in these lawsuits, which "elevate[] 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 (quotation marks omitted). And that is exactly the dynamic the Chamber's members are seeing—dozens of cookie-cutter lawsuits, many of which are filed with almost identical claims and allegations, and many of which are founded on demonstrably inaccurate premises, conclusory allegations, or theories that completely ignore how ERISA operates. Given this backdrop, it is all the more critical that courts account for judicially noticeable information to abide by the Supreme Court's direction to apply "careful, context-sensitive scrutiny" in order to "divide the plausible sheep from the meritless goats." *Dudenhoeffer*, 573 U.S. at 425. And the incorporation-by-reference and judicial-notice doctrines provide courts with the necessary "context" in these lawsuits, providing them with information that will allow them to understand the difference

between conclusory or implausible allegations and well-pleaded factual ones.

B. Plaintiffs' complaint is a prime example of the importance of context.

This case and others like it exemplify the importance of considering context, including documents that can be examined under the judicial-notice and incorporation-by-reference doctrines, when evaluating plausibility under *Twombly* and *Iqbal*.

1. Challenges to recordkeeping fees provide an excellent example. For years, the Chamber's members have seen a race to the bottom with respect to plan services and fee arrangements. Hundreds of plan sponsors have been sued for not negotiating the lowest fees on the market even though service providers vary widely in their scope, quality, and cost, and DOL has cautioned that "cheaper is not necessarily better." *401(k) Plan Fees* 1.

ERISA complaints have, for years, alleged that plan fiduciaries must have been asleep at the wheel because they failed to negotiate a "reasonable" fee pegged to an arbitrary figure (often $35 per participant). *See, e.g.*, Br. for Petitioners 9, *Hughes v. Northwestern Univ.*, No. 19-1401 (U.S. Sept. 3, 2021), https://bit.ly/3HSTq85; Compl. ¶ 54, *Sweda v. Univ. of Pa.*, No. 16-4329, 2016 WL 11723831 (E.D. Pa.) (filed Aug. 10, 2016); Compl. ¶ 76, *Fritton v. Taylor Corp.*, No. 22-415 (D. Minn.) (filed Feb. 14, 2022), ECF No. 1; Compl. ¶ 69, *Singh v. Deloitte, LLP*, No. 21-8458 (S.D.N.Y.) (filed Oct. 13, 2021), ECF No. 1. This type of allegation is, itself, entirely conclusory, as an appropriate consideration of contextual information makes clear. As DOL has explained, services "may be provided through a variety of arrangements,"[7] and neither recordkeepers nor recordkeeping services are interchangeable widgets. To the contrary, recordkeeping services are highly customizable depending on, for example, the needs of each plan, its participant population, the capabilities and resources of the plan's administrator, and the

[7] *401(k) Plan Fees* 3.

sponsor's human-resources department. *See* Daniel Aronowitz, *Exposing Excessive Fee Litigation Against America's Defined Contribution Plans* 6, Euclid Specialty (Dec. 2020), https://bit.ly/3hNXJaW ("*Excessive Fee Litigation*") (recognizing that "[e]ven plans that have an identical number of participants and the same total plan assets may have very different service models"). 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.[8] Given the wide range of services, providers, and fee arrangements, it is implausible to suggest everything in excess of a single fee level is imprudent.

But recently, challenges to recordkeeping fees have become almost outlandish. Plans that *did* negotiate recordkeeping fees for less than the arbitrarily chosen $35 level that many recent complaints deem "reasonable" have also been sued—for not having negotiated *an even lower* recordkeeping fee. Kroger's plan fiduciaries, for example, allegedly negotiated a recordkeeping fee of just $30 per participant between 2015 and 2019. Compl. ¶ 93, *Sigetich v. Kroger Co.*, No. 21-697 (S.D. Ohio) (filed Nov. 5, 2021), ECF No. 1. But even that could not keep a lawsuit at bay—plan fiduciaries were sued for not having negotiated *a $20-per-participant* fee. *Id.* ¶ 98. Worse yet, the participants *actually* paid almost nothing, because much like Voya, Kroger voluntarily subsidized almost all recordkeeping fees—something even a cursory pre-suit examination of the named plaintiff's account statements would have shown. *See* Mot. to Dismiss 5, *Sigetich*, ECF No. 22-1.

In other cases, the plaintiffs' "reasonableness" bar has been a moving target—changing once plaintiffs' counsel learns that the fees paid by participants were within the range alleged to

[8] *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.

be reasonable. In *Moore v. Humana*, for example, the original complaint alleged that reasonable recordkeeping fees were about "$40 per participant," but after being informed that the plan's fees were lower than that, the plaintiffs filed an amended complaint alleging that prudently managed plans paid between $25 and $28 per participant for recordkeeping fees. *See* Mot. to Dismiss 2, *Moore v. Humana*, No. 21-232 (W. D. Ky.), ECF No. 23. Likewise, in *In re American National Red Cross ERISA Litigation*, No. 21-541 (D.D.C.), the plaintiffs originally alleged that they paid $71 per year in recordkeeping fees, and that "reasonable" fees would have been $34 per year based on cherry-picked comparator plans. *See* Consolidated Compl. ¶¶ 88 (filed June 15, 2021), ECF No. 20. After discovering that participants paid as little as $31.50 per year, the plaintiffs lowered the "reasonableness" level to $30 based on new "comparator" plans. *See* First Am. Consolidated Compl. ¶ 94 (filed Sept. 30, 2021), ECF No. 26.

This case is perhaps the weakest one yet. Plaintiffs *do not even allege what the fees were*—but nevertheless, they allege "[o]n information and belief," that whatever those fees were, they *must have been* unreasonable, and participants "would have paid much less" but for plan fiduciaries' imprudent process (about which they offer no allegations). Compl. ¶¶ 107-109.[9] And, just as in the *Kroger* case, here Plaintiffs *actually pay nothing* because the plan sponsor voluntarily subsidizes all administrative expenses for the entire plan—once again, something that even a modicum of pre-suit investigation would have shown. Dkt. No. 20-1, at 11-12. Indeed, Plaintiffs could have discovered this fact from looking at the exhibits attached to their *own complaint*.

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[9] The only number Plaintiffs even reference in the complaint is a "$5 average" that they suggest was reasonable. Compl. ¶¶ 106, 108. That number is meaningless—not only because Plaintiffs compare it to nothing (they do not allege what the plan's fees were), but also because it captures only "direct compensation," which is just one of many ways that plans allocate recordkeeping expenses. One-third of plans allocate fees entirely through *indirect* compensation, as part of investment expense ratios shared with recordkeepers. *Benchmarking Survey* 20. Many others use a combination of direct and indirect compensation. Thus, comparing two plans' fees paid only through *direct* compensation has no bearing on whether *total recordkeeping fees* are reasonable, much less on whether fiduciaries' decisionmaking process is prudent.

Exhibit D to Plaintiffs' complaint discloses all fees incurred by Plan participants (a requirement under ERISA section 404a-5), and notably does not list any recordkeeping fees. *See* 29 C.F.R. § 2550.404a-5(b)(2).

2. Challenges to investment fees or performance provide another useful example of the importance of context. In many complaints, including this one, plaintiffs typically create a chart (or many charts) purporting to compare some of the investment options in the plan under attack to other options available on the market that allegedly out-performed or had lower fees than the plan's options during a particular time period, and ask the court to infer an imprudent process from these outcomes. *See, e.g.*, Compl. ¶¶ 57, 63-65, 80, 83, 87, 92-93. This approach is itself problematic once one considers the investment context and general principles of retirement-plan management: one can always cherry-pick historical data to make a fiduciary's choices look suboptimal given the near-infinite combination of comparator options and time periods. Take the federal Thrift Savings Plan ("TSP"), often held out as the "gold standard" for retirement plans, and regularly used by plaintiffs as a comparator to argue that an investment underperformed or had excessive fees.[10] Even the TSP could be made to look like a mismanaged plan by cherry-picking comparators with fees that are significantly lower than the TSP's[11]:

Fund	Expense Ratio
TSP Fixed Income Index Investment Fund (F Fund) https://www.tsp.gov/funds-individual/f-fund/?tab=fees	0.058%
iShares Core US Aggregate Bond ETF	0.040%

[10] *See, e.g.*, *Brotherston v. Putnam Invs., LLC*, Appellants' Br., No. 17-1711, 2017 WL 5127942, at *23 (1st Cir. Nov. 1, 2017) (describing TSP as "a quintessential example of a prudently-designed plan"); *see also* Thrift Savings Plan, Tex. State Sec. Bd., https://bit.ly/3wE4MXA ("The TSP is considered the gold standard of 401(k)s because it charges extremely low fees and offers mutual funds that invest in a cross-section of the stock and bond markets."). The TSP is a particularly inapt exemplar given that the U.S. government subsidizes administrative and investment-management expenses, thereby inflating the plan's net-of-fees investment performance.

[11] The data for this table is based on the most recently available figures as of March 1, 2022. *See* Individual Funds, Thrift Savings Plan, https://bit.ly/3ybcxEK.

https://www.morningstar.com/etfs/arcx/agg/price	
Vanguard Total Bond Market Index Fund (Institutional Plus Shares) https://www.morningstar.com/funds/xnas/vbmpx/price	0.030%
TSP Common Stock Index Investment Fund (C Fund) https://www.tsp.gov/funds-individual/c-fund/?tab=fees	0.043%
Fidelity 500 Index Fund https://www.morningstar.com/funds/xnas/fxaix/price	0.015%
iShares S&P 500 Index Fund (Class K) https://www.morningstar.com/funds/xnas/wfspx/price	0.030%
TSP Small Cap Stock Index Investment Fund (S Fund) https://www.tsp.gov/funds-individual/s-fund/?tab=fees	0.059%
Fidelity Extended Market Index Fund https://www.morningstar.com/funds/xnas/fsmax/price	0.035%

Thus, when plaintiffs and their attorneys zero in on a single metric for comparison—*e.g.*, fees—they will *always* be able to find a supposedly "better" fund among the thousands on the market. But fees are only "one of several factors fiduciaries need to consider in deciding on service providers and plan investments." DOL, *Meeting Your Fiduciary Responsibilities* 3 (2021), https://bit.ly/3sFMs1f. And "nothing in ERISA requires every fiduciary to scour the market to find and offer the cheapest possible fund (which might, of course, be plagued by other problems)." *Hecker v. Deere & Co.*, 556 F.3d 575, 586 (7th Cir. 2009).

The same is true of charts purporting to identify a "superior" alternative measured by recent investment returns. As an initial matter, ERISA plaintiffs frequently compare apples and oranges: comparing the performance of Fund A with one investment style and performance benchmark with that of Fund B, which has a demonstrably different investment style and performance benchmark. *See, e.g.*, *Ramos v. Banner Health*, 461 F. Supp. 3d 1067, 1108 (D. Colo. 2020) (rejecting reliance on "inapt comparators"); *Parmer v. Land O'Lakes, Inc.*, 518 F. Supp. 3d 1239, 1306 (D. Minn. 2021) (similar). But even if the comparisons are apt, simply identifying a better-performing fund among the myriad options on the market does not plausibly indicate an imprudent process—

otherwise, every plan that offers any fund other than the highest performer during one particular time period would be deemed imprudent (or at least presumptively imprudent). With the benefit of hindsight, one can always identify a better-performing fund during a cherry-picked time period, but chasing performance—*i.e.*, switching investment strategies to pursue the fund performing best at the time—is a misguided investment approach "generally doomed to some kind of failure."[12]

Plaintiffs' underperformance allegations here are just as flawed as their recordkeeping allegations. To begin with, the four corners of the complaint and the documents attached to it themselves belie the inference of imprudence and underperformance that Plaintiffs ask the Court to infer with respect to the plan's target-date funds. Plaintiffs complain that these funds "have performed worse than [25%] to [45%] of peer funds." Compl. ¶ 79. In other words, these funds *outperformed* 55%-75% of peer funds. A suite of funds that outperforms the majority of the market cannot plausibly be labeled "underperforming" under any definition of that term, much less give rise to a plausible inference of a deficient fiduciary process. Furthermore, the participant disclosure that Plaintiffs attach to the complaint itself rebuts the "underperforming" label they affix to the target-date fund, because it shows the plan's target-date fund consistently *outperforms* its benchmark. Exhibit D, Dkt. No. 1-4. The complaint simply ignores that track record, instead comparing these funds' performance to *other* investments that Plaintiffs do not even try to allege are similar in their investment strategy and risk profile. Compl. ¶¶ 80, 83. Just as a quarterback's average passing yards cannot be meaningfully measured against a relief pitcher's ERA or Simone Biles' average all-around score, comparing the investment performance of funds that have completely different investment styles and goals indicates nothing about which fund is "better," much less whether a fiduciary's choice of one over another was the result of a prudent process.

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[12] Kate Stalter, *Chasing Performance Is a Quick Way to Disaster*, U.S. News (Feb. 8, 2017), https://bit.ly/3IhKn0R.

As this discussion demonstrates, the structure of common allegations in these types of cases makes particularly clear why it is necessary for courts to consider the broader context. In many of these cases, plaintiffs' theory hinges largely (if not entirely) on plaintiffs' conclusory assertions that a plan's investment options or service-provider arrangements were "excessive" or "underperforming" when compared to a handful of the thousands of alternatives available on the market. Without illuminating the bigger picture—as provided by judicially noticeable information and publicly available documents—courts will be left with an entirely inaccurate understanding of the complaint. That is precisely what the Supreme Court was trying to avoid when it directed courts to consider the broader context. *See Dudenhoeffer*, 573 U.S. at 425. Absent this step, it would be impossible for a defendant to ever defeat a motion to dismiss, in direct contravention of the plausibility requirement articulated in *Hughes*, *Dudenhoeffer*, *Twombly*, and *Iqbal*.

C. Fiduciaries have discretion to make a range of reasonable choices.

The allegations in these complaints also often fail to grasp a fundamental tenet of ERISA—the "range of reasonable judgements a fiduciary may make" and the "difficult tradeoffs" inherent in fiduciary decisionmaking. *Hughes*, 142 S. Ct. at 742. Again, evaluating the plausibility of plaintiffs' allegations requires considering their assertions in light of the broader structure of ERISA and the realities of plan management. That fiduciaries did not select what turned out to be the lowest-cost or best-performing option does not plausibly suggest that cherry-picked comparators were in fact "better" overall, much less that fiduciaries' decision-making *process* was imprudent. There will always be a plan with lower expenses and a plan—typically many plans—with higher ones, just as there will always be a fund that performs better and many funds that perform worse. There is no one prudent fund, service provider, or fee level that renders everything else imprudent. Instead, there is a wide range of reasonable options, and Congress vested

fiduciaries with flexibility and discretion to choose from among those options based on their informed assessment of the needs of their plan and its unique participant base. *See* pp. 6-8, *supra*.

The complaints themselves reflect a range of assessments, as one complaint's supposedly imprudent choice is often another complaint's prudent exemplar. Plaintiffs here allege imprudence based on Voya's decision to make available the passively managed Voya Target Trusts given the allegedly "superior" performing actively managed Voya Target Retirement Funds. *See* Compl. ¶¶ 78-83. But plaintiffs frequently allege a breach of fiduciary duty based on a plan's decision to include actively managed funds rather than passively managed ones—the exact opposite of the allegations here. *See, e.g.*, Compl. ¶¶ 79-82, 93, 100, 109-116; *Baumeister v. Exelon Corp.*, No. 21-6505 (N.D. Ill.) (filed Dec. 6, 2021), ECF No. 1. This same phenomenon plays out with respect to fund performance. General Electric was sued in 2017 for including the GE RSP U.S. Equity Fund, among others, in its 401(k) plan. *See* Compl. ¶ 1, *Haskins v. Gen. Elec. Co.*, No. 3:17-cv-1960-CAB-BLM (S.D. Cal.) (filed Sept. 26, 2017), ECF No. 1. But a different case held up *that exact fund* as a "superior performing alternative[]." Compl. ¶ 122, *Harding v. Southcoast Hosps. Grp.*, No. 1:20-cv-12216-LTS (D. Mass.) (filed Dec. 14, 2020), ECF No. 1. And it plays out again with respect to recordkeeping fees. Last year Henry Ford was hit with an ERISA class action alleging that plan fiduciaries breached their duty of prudence by negotiating "excessive" recordkeeping fees. *See* Compl. ¶¶ 157-167, *Hundley v. Henry Ford Health System*, No. 2:21-cv-11023 (E.D. Mich.) (filed May 5, 2021), ECF No. 1. But another complaint holds up *that exact plan* as an example of "prudent and loyal" fiduciary decisionmaking with respect to recordkeeping fees. *See* Compl. ¶ 45, *Carrigan v. Xerox Corp.*, No. 21-1085 (D. Conn.) (filed Aug. 11, 2021), ECF No. 1.

As these complaints demonstrate, ERISA fiduciaries making discretionary decisions are at

risk of being sued seemingly no matter what decisions they make. Plaintiffs sue fiduciaries for failing to divest from risky or dropping stock,[13] or for failing to *hold onto* such stock because high risk can produce high reward.[14] Some plaintiffs allege that it is imprudent for a plan to offer more than one investment option in the same style,[15] while others complain that including *only one option* in each investment style is imprudent.[16] In many cases, plaintiffs allege that fiduciaries were imprudent because they should have offered Vanguard mutual funds,[17] but others complain that defendants were imprudent *because they offered* Vanguard mutual funds.[18] Some plaintiffs allege that plans offered imprudently risky investments,[19] while others allege that fiduciaries were *imprudently cautious* in their investment approach.[20] And in some instances, fiduciaries have simultaneously defended against "diametrically opposed" theories of liability, giving new meaning to the phrase "cursed-if-you-do, cursed-if-you-don't."[21] This dynamic has made it incredibly difficult for fiduciaries to do their job—and it has made it *impossible* for fiduciaries to avoid being sued, no matter how careful their process and no matter how reasonable their decisions.

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[13] *See, e.g.*, *In re RadioShack Corp. ERISA Litig.*, 547 F. Supp. 2d 606, 611 (N.D. Tex. 2008).

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

[16] *See, e.g.*, Am. Compl. ¶ 52, *In re GE ERISA Litig.*, No. 17-cv-12123-IT (D. Mass.) (filed Jan. 12, 2018), ECF No. 35.

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

[18] *See, e.g.*, Am. Compl. ¶ 108, *White v. Chevron Corp.*, No. 16-cv-0793-PJH (N.D. Cal.) (filed Sept. 30, 2016), ECF No. 41.

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

[20] *See Brown v. Am. Life Holdings, Inc.*, 190 F.3d 856, 859-860 (8th Cir. 1999) (addressing claim that fiduciaries maintained an overly safe portfolio); Compl. ¶2, *Barchock v. CVS Health Corp.*, No. 16-cv-61-ML-PAS, (D.R.I.) (filed Feb. 11, 2016), ECF No. 1 (alleging plan fiduciaries imprudently invested portions of the plan's stable value fund in conservative money market funds and cash management accounts).

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

Accordingly, it is critical for courts to consider context—things like DOL's instruction that fees are only one of *several factors* that should be considered,[22] publicly available information demonstrating that a complaint's supposed comparators are inapposite, industry data showing that services (and their pricing) vary widely, the performance ebbs and flows that are common characteristics of investment management, and the wide discretion granted to fiduciaries by Congress all bear on whether fiduciary-breach claims are plausible.

III. The surge of litigation has interfered with fiduciaries' ability to prudently manage plans.

The Chamber has seen first-hand the negative impact the recent flood of speculative lawsuits has had on ERISA plan sponsors and fiduciaries. Fiduciaries are often themselves plan participants and have every incentive to maintain a well-monitored and high-performing plan. But these lawsuits have made their jobs nearly impossible. While purporting to police fiduciary practices, these suits have actually made following standard fiduciary practices a risky endeavor.

The pressure created by these suits undermines one of the most important aspects of ERISA: the values of innovation, diversification, and employee choice. Plaintiffs often take a cost-above-all approach, filing lawsuits against any fiduciaries that take into account considerations other than cost—notwithstanding ERISA's direction to do precisely that. *See White v. Chevron Corp.*, 2016 WL 4502808, at *10 (N.D. Cal. Aug. 29, 2016). An investment committee may, for example, feel pressured by the threat of litigation to offer only the "lowest-cost fund," which is not always "the most prudent" option. *See* David McCann, *Passive Aggression*, CFO (June 22, 2016), https://bit.ly/2Sl55Yq. Likewise, these suits affect the recordkeeping services fiduciaries select, pushing plan fiduciaries toward lower-cost options, which DOL has

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

acknowledged may not actually be better. *See 401(k) Plan Fees* 1.

Fiduciaries *should* make careful decisions based on a constellation of factors, but these lawsuits push them to reflexively select the lowest-cost option in every scenario. In a purported effort to safeguard retirement funds, plaintiffs actually pressure fiduciaries *away from* exercising their "responsibility to weigh … competing interests and to decide on a (prudent) financial strategy." *Brown v. Daikin Am., Inc.*, 2021 WL 1758898, at *7 (S.D.N.Y. May 4, 2021).

The litigation surge has also upended the insurance industry for retirement plans. Judy Greenwald, *Litigation Leads to Hardening Fiduciary Liability Market*, Business Insurance (Apr. 30, 2021), https://bit.ly/3ytoRBX. The risks of litigation have pushed fiduciary insurers "to raise insurance premiums, increase policyholder deductibles, and restrict exposure with reduced insurance limits." *Excessive Fee Litigation* 4; *see also* Jacklyn Wille, *Spike in 401(k) Lawsuits Scrambles Fiduciary Insurance Market*, Bloomberg Law (Oct. 18, 2021), https://bit.ly/307mOHg (discussing the "sea change" in the market for fiduciary insurance); Robert Steyer, *Sponsors Rocked by Fiduciary Insurance Hikes*, Pensions & Investments (Sept. 20, 2021), https://bit.ly/39W996Y. Plans are now at risk of not being able to "find[] adequate and affordable fiduciary coverage because of the excessive fee litigation." *Excessive Fee Litigation* 4; *see also* Jon Chambers, *ERISA Litigation in Defined Contribution Plans* 1, Sageview Advisory Grp. (Mar. 2021), https://bit.ly/2SHZuME (fiduciary insurers may "increasingly move to reduce coverage limits, materially increase retention, or perhaps even cancel coverage").

If employers need to absorb the cost of higher insurance premiums and higher deductibles, many employers will inevitably have to offer less generous plans—reducing their employer contributions, declining to cover administrative fees and costs when they otherwise would voluntarily elect to do so, and reducing the services available to employees. And while large

employers may have some capacity to absorb some of these costs, many smaller employers do not. If smaller plan sponsors "cannot purchase adequate fiduciary liability insurance to protect their plan fiduciaries, the next step is to stop offering retirement plans to their employees." *Excessive Fee Litigation* 4. In short, these suits impose significant costs on plan sponsors—and, by extension, plan participants and beneficiaries—often without producing concomitant benefit.

CONCLUSION

For the foregoing reasons, adopting anything less than the "context-specific inquiry" of ERISA complaints prescribed by the Supreme Court in *Hughes* and *Dudenhoeffer* would create precisely the types of negative consequences that Congress intended to avoid in crafting ERISA. *Amicus* urges the Court to adopt and apply that level of scrutiny to this case.

Dated: March 7, 2022

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States District Court for the District of Connecticut by using the court's CM/ECF system on March 7, 2022.

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

Dated: March 7, 2022

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