No. 22-4045

IN THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

COLE MATNEY and PAUL WATTS, individually and on behalf of all others similarly situated,

Plaintiffs-Appellants,

v.

BARRICK GOLD OF NORTH AMERICA, BOARD OF DIRECTORS OF BARRICK GOLD OF NORTH AMERICA, and BARRICK U.S. SUBSIDIARIES BENEFITS COMMITTEE,

Defendants-Appellees.

On Appeal from the United States District Court
for the District of Utah
2:20-cv-275-TC-CMR (Hon. Tena Campbell)

BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, THE AMERICAN BENEFITS COUNCIL, THE ERISA INDUSTRY COMMITTEE, AND THE NATIONAL MINING ASSOCIATION AS AMICI CURIAE IN SUPPORT OF DEFENDANTS-APPELLEES AND AFFIRMANCE

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CORPORATE DISCLOSURE STATEMENT

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

The ERISA Industry Committee 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.

The American Benefits Council 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.

The National Mining Association 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 AMICI 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).

The **American Benefits Council** (Council) is a national non-profit organization dedicated to protecting and fostering employer-sponsored benefit plans. The Council's members are primarily large, multistate U.S. employers that sponsor benefit plans for active and retired workers and their families. The Council's membership also includes organizations that offer services to benefit plans of all sizes. Collectively, the Council's approximately 430 members directly sponsor or provide services to plans covering virtually every American who participates in an employer-sponsored benefit program.

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[1] Counsel for Defendants consents to the filing of this brief. Counsel for Plaintiffs informed counsel for amici that Plaintiffs take no position on the filing of this brief. *See* Fed. R. App. P. 29(a)(2). No counsel for a party authored this brief in whole or in part. No party, no counsel for a party, and no person other than amici, their members, or their counsel made a monetary contribution to fund the preparation or submission of this brief.

The **ERISA Industry Committee** (ERIC) is a national nonprofit organization exclusively representing large employers in the United States in their capacity as sponsors of employee benefit plans for their nationwide workforces. ERIC's member companies voluntarily provide benefits, through plans governed by ERISA, that cover millions of active and retired workers and their families across the country. With member companies that are leaders in every sector of the economy, ERIC is the voice of large employer plan sponsors on issues affecting their ability to sponsor benefit plans and to lawfully operate under ERISA's protection.

The **National Mining Association** (NMA) is the national trade association of the mining industry. NMA's members include the producers of most of the Nation's coal, metals, and industrial and agricultural minerals; manufacturers of mining and mineral processing machinery, equipment, and supplies; and engineering and consulting firms that serve the mining industry.

An important function of amici is to represent their members' interests in matters before the courts, Congress, and the Executive Branch. To that end, amici regularly participate in cases before this Court, other courts of appeals, and the U.S. Supreme Court on issues that affect their members. *See, e.g.*, *Hughes v. Northwestern Univ.*, 142 S. Ct. 737 (2022).

SUMMARY OF THE ARGUMENT

This case is just one of many in a wave of ERISA class-action complaints designed to extract costly settlements. What began as a trickle has become a flood, with over 200 lawsuits filed since 2019 against employers in every industry.[2] This year alone, there were 42 excessive-fee cases filed in the first half of 2022—and the total is predicted to reach 75 to 100 by the end of the year.[3]

Not surprisingly, while plans vary widely based on the particular employer and its employees' needs, many of these complaints are highly similar, if not materially identical. *See* Euclid Specialty, *Exposing Excessive Fee Litigation Against America's Defined Contribution Plans* 10 (Dec. 2020), https://bit.ly/3hNXJaW ("*Excessive Fee Litigation*") (noting "copy-cat complaints" being filed using the same "template"). In many of these 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. Co.*, 806 F.3d 377, 384-85 (6th Cir. 2015). Instead, the complaint offers allegations, made with the benefit of 20/20 hindsight, that plan fiduciaries failed to

[2] *See* Jacklyn Willie, *Suits Over 401(k) Fees Nab $150 Million in Accords Big and Small*, Bloomberg Law (Aug. 23, 2022), https://bit.ly/3Uel7y5.

[3] *See* Daniel Aronowitz, *The State of the Fiduciary Liability Insurance Market and Excessive Fee Cases at the Half-Way Point of 2022* (July 13, 2022), https://bit.ly/3sgvaqq.

select the cheapest or best-performing funds, or the cheapest recordkeeping option, often using inapt comparators to advance the point. *See, e.g.*, App. Vol. I at 114-115, 126-129 (¶¶ 75-76, 104-106). Then, the plaintiffs ask the court to *infer* from these circumstantial allegations that the plan's fiduciaries must have failed to prudently manage and monitor the plan's investment line-up. *See, e.g.*, *id.* at 103 (¶¶ 24-25).

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 based on circumstantial facts—is particularly important in ERISA cases, where the Supreme Court has specifically instructed courts to apply "careful, context-sensitive scrutiny" to "divide the plausible sheep from the meritless goats." *Fifth Third Bancorp v. Dudenhoeffer*, 573 U.S. 409, 424-25 (2014); *accord Hughes*, 142 S. Ct. at 742 (evaluating ERISA

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

The district court here did exactly that, carefully applying a context-specific scrutiny to plaintiffs' allegations before concluding that they do not state a plausible claim for fiduciary breach. The plaintiffs in this case effectively seek a diluted pleading standard that would authorize discovery based on conclusory assertions with no factual allegations about a fiduciary's decision-making process and suggestions of alternative decisions that, with the benefit of hindsight, allegedly could have been more profitable for plan participants.

The plaintiffs' proposed standard could be met in virtually every case, because a plan fiduciary *always* could have made *some* decision that might turn out to be more profitable in hindsight: it is not possible to beat the market every time, nor are fiduciaries required or expected to. 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 that Congress provided them, these suits push plan sponsors

and fiduciaries into a corner, pressuring them to narrow the range of options available to participants—an outcome at odds with ERISA's purpose.

ARGUMENT

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

When Congress enacted ERISA, it "did not *require* employers to establish benefit plans." *Conkright v. Frommert*, 559 U.S. 506, 516 (2010) (emphasis added). Rather, it crafted a statute intended to encourage employers to offer benefit plans while also protecting the benefits promised to employees. *Id.* at 516-17. 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, at 67 (1980), *reprinted in* 1980 U.S.C.C.A.N. 2918, 2935. Sponsors and fiduciaries 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." U.S. Dep't of Labor, 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, 92nd Cong., at 16 (1972).

This flexibility extends to a variety of areas. For example, plan fiduciaries must make decisions concerning what 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); what services to offer; who should provide those services; and how to compensate service providers. All of these decisions involve "difficult tradeoffs." *Hughes*, 142 S. Ct. at 742. Some employees may prefer passively managed index funds that typically have lower fees and more predictably track market indices like the S&P 500, while others might prefer the potential to beat the market through active management, and still others might prefer the even more tailored investment management offered by managed-account products. In selecting a plan line-up, fiduciaries take into account these varying preferences and competing considerations.

The same is true with respect to negotiating arrangements with service providers. For example, the Department of Labor (DOL) recognizes that, depending

on a fiduciary's evaluation of the needs of the plan and its participants, it may choose a fixed-fee structure, which generally requires the deduction of a fixed amount from each participant's account, or a bundled-pricing arrangement through which fees are covered by revenue-sharing—a common practice whereby an investment manager shares a percentage of the fees it receives from plan investments with the plan's recordkeeper.[4]

Under a revenue-sharing model, higher-balance participants with larger investments in funds that provide revenue-sharing are responsible for a higher proportion of fees.[5] Under a fixed-fee structure, lower-balance employees (often with lower incomes), who already face greater barriers to building retirement savings, may shoulder a significantly larger percentage of the plan's fees.[6] Thus, fiduciaries may reasonably elect to structure service-provider compensation as a percentage of assets under management through revenue-sharing practices, which

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[4] DOL, Advisory Op. No. 1997-15A, at 1-2 (May 22, 1997), https://bit.ly/3oKClVF; DOL, *Advisory Council Report of the Working Group on Fiduciary Responsibilities and Revenue Sharing Practices*, https://bit.ly/30LPeGU; Deloitte Development LLC, *2019 Defined Contribution Benchmarking Survey Report* 20 (2019), https://bit.ly/3wLmhp1 ("*Deloitte Benchmarking Survey*").

[5] DOL, Field Assistance Bulletin No. 2003-03 (May 19, 2003), https://bit.ly/3nhg1Uf.

[6] *See* Bureau of Labor Statistics, News Release, *Employee Benefits in the United States – March 2020*, at 7 (Sept. 2020), https://bit.ly/3oHWPhL (reporting that only 26% of workers in the bottom quartile wage group participate in retirement benefits, whereas 81% of wage earners in the top quartile do so).

may result in participants paying a more proportionate share of the costs to manage the plan. As courts have recognized, there is nothing inherently improper about the decision to structure a plan this way. *See, e.g.*, *Hecker v. Deere & Co.*, 556 F.3d 575, 585-87 (7th Cir. 2009). To the contrary, revenue sharing is a "common and acceptable investment industry practice[] that frequently inure[s] to the benefit of ERISA plans." *Tussey v. ABB, Inc.*, 746 F.3d 327, 336 (8th Cir. 2014).

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 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).

Indeed, DOL has declined to provide even *examples* of appropriate investment options, because doing so would "limit … flexibility in plan design." 57 Fed. Reg. 46,906, 46,919 (Oct. 13, 1992). Instead, it has focused on diversification and participant choice. For example, in promulgating regulations under 29 U.S.C. § 1104(c), which provides fiduciaries with a safe harbor from liability where participants exercise control over the assets in their individual accounts, DOL required plans to offer "a broad range of investment alternatives," including "at least three" with "materially different risk and return characteristics," and to provide participants with "sufficient information to make informed investment decisions." 29 C.F.R. § 2550.404c-1(b)(2)-(3). This flexible approach, DOL said, would "better serve the needs of both plan[] sponsors and participants and beneficiaries than would an approach which attempts to specify particular investment alternatives." 57 Fed. Reg. at 46,919.

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,[7] several thousand of which are offered in retirement plans—and nearly innumerable ways to put together a plan that enables

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

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 decision-making process—just as the plaintiffs here assert, App. Vol. I at 103 (¶¶ 24-25)—that is not how the prudence standard operates. There will always be a plan whose line-up performs better and a plan whose line-up performs worse. There is no one prudent fund, service provider, or fee structure that renders everything else imprudent. Instead, there is a "range of reasonable judgments a fiduciary may make," which courts must account for when evaluating the plausibility of excessive-fee allegations. *Hughes*, 142 S. Ct. at 742.

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

ERISA "requires prudence, not prescience." *DeBruyne v. Equitable Life Assurance Soc'y of U.S.*, 920 F.2d 457, 465 (7th Cir. 1990) (citation omitted). The standard of prudence "focus[es] on a fiduciary's conduct in arriving at an investment decision, not on its results." *PBGC ex rel. St. Vincent Catholic Med. Ctrs. Ret. Plan v. Morgan Stanley Inv. Mgmt. Inc.*, 712 F.3d 705, 716 (2d Cir. 2013) ("*PBGC*") (alteration in original) (citation omitted). Thus, the proper question in evaluating an ERISA claim, is not, for example, whether "post facto" it is apparent that the value

of investments "decreased after certain dates," but rather whether the fiduciary's "conduct [was prudent] as of the 'time it occurred,'" including whether the fiduciary used appropriate methods to investigate the merits of the transactions. *Pfeil*, 806 F.3d at 387-88 (citation omitted).

Here, the plaintiffs concededly do not allege any facts regarding the defendants' decision-making process. App. Vol. I at 103 (¶¶ 24-25). They suggest instead that the district court should have *inferred* an imprudent process based on hindsight allegations about the plan and its performance—even if there are obvious alternative explanations for the plan's line-up that are entirely consistent with prudent fiduciary decision-making. *See* Opening Br. 34-35. 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 rely on inferences of wrongdoing from circumstantial facts must allege something more than allegations that are equally consistent with lawful behavior.

This Court's decisions recognize, as did *Twombly*, the practical significance of Rule 8(a)'s plausibility requirement in cases in which the plaintiff does not present any direct allegations of wrongdoing but instead relies 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).

There are numerous areas of the law in which courts must consider whether wrongdoing can be inferred from circumstantial factual allegations to satisfy the pleading standards set forth in *Twombly* and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). Take antitrust, for example. In *Llacua v. Western Range Association*, 930 F.3d 1161 (10th Cir. 2019), the plaintiff employees lacked direct allegations of an illegal agreement among the defendant employers to fix employee wages, focusing instead on alleged "tacit collusion" by the defendants. *Id.* at 1174; *see also id.* at 1179. This Court had to determine whether it could nevertheless plausibly "infer an agreement" among the defendants based on allegations of "parallel conduct." *Id.* at 1180. It carefully scrutinized each of the plaintiffs' circumstantial allegations—rejecting the allegations it deemed conclusory or factually unsupported, *id.* at 1179-1180—to determine whether they plausibly suggested something more than lawful "parallel conduct," or were instead "just as much in line with a wide swath of rational and competitive business strategy," *id.* at 1180 (citation omitted) (affirming dismissal of antitrust claim).

This Court has taken the same approach in discrimination cases, *see Bekkem v. Wilkie*, 915 F.3d 1258, 1275, 1279 (10th Cir. 2019), civil rights cases, *see Warnick*

v. Cooley, 895 F.3d 746, 754 n.6 (10th Cir. 2018), civil conspiracy cases, *see Gowadia v. Stearns*, 596 Fed. Appx. 667, 671 (10th Cir. 2014), and even run-of-the-mill tort cases, *see Brooks v. Mentor Worldwide LLC*, 985 F.3d 1272, 1281-82 (10th Cir. 2021). In each of these contexts, when the plaintiffs failed to provide any direct allegations for a foundational element of the claim, this Court carefully scrutinized the circumstantial factual allegations and did not hesitate to order or affirm dismissal when the allegations did not support a plausible inference of wrongdoing. As the Court summarized in *VDARE Foundation v. City of Colorado Springs*, 11 F.4th 1151, 1174 (10th Cir. 2021), allegations showing that a defendant "*possibly*" acted unlawfully are insufficient to "*plausibly*" plead a violation. And "[w]here a complaint pleads facts that are merely consistent with a defendant's liability, it stops short of the line between possibility and plausibility of entitlement to relief." *Id.* (quoting *Twombly*, 550 U.S. at 557).

These precedents apply with full force in ERISA cases. The Supreme Court could not have been clearer about this point in its recent decision in *Hughes*. Prior to *Hughes*, many ERISA plaintiffs had taken the position that ERISA claims are somehow exempt from the plausibility pleading requirement established by Rule 8(a), *Twombly*, and *Iqbal*. The Second and Third Circuits had embraced that position in *Sweda v. University of Pennsylvania*, 923 F.3d 320, 326 (3d Cir. 2019) ("declin[ing] to extend" *Twombly* to ERISA claims"), and *Sacerdote v. New York*

University, 9 F.4th 95, 108 & n.47 (2d Cir. 2021) (citing *Sweda*'s rejection of *Twombly*'s "heightened antitrust pleading standard" in the context of "ERISA Complaints"). *Hughes* squarely rejected this position, holding that courts must "apply[] the pleading standard discussed in" *Iqbal* and *Twombly*. 142 S. Ct. at 742.[8] 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. Indeed, every published appellate decision interpreting *Hughes* has required a careful, context-specific scrutiny of a complaint's allegations. As the Sixth Circuit explained, "[i]n gauging the sufficiency" of allegations of an ERISA

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[8] Despite *Hughes*' clear rejection of this principle, Plaintiffs continue to rely on both *Sweda* and *Sacerdote* in articulating the relevant pleading standard. *See* Opening Br. at 2, 24, & 25 n.6.

violation, courts "take a well-worn trail"—namely, the well-established plausibility requirement. *Smith v. CommonSpirit Health*, 37 F.4th 1160, 1165 (6th Cir. 2022). Under that standard, 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." *Id.* The Seventh Circuit followed this approach in *Albert v. Oshkosh Corp.*, 47 F.4th 570, 579-82 (7th Cir. 2022), rejecting the plaintiffs' effort to distort *Hughes* in advocating for a laxer pleading standard—the same gambit Plaintiffs attempt here. *See* Opening Br. 24-25. 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). The Eighth Circuit has held the same. *Matousek v. MidAmerican Energy Co.*, 51 F.4th 274, 278-82 (8th Cir. 2022).

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 costs of the Plan's investment options and its administrative recordkeeping fees, 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. Investment Fees—Like many ERISA complaints, plaintiffs' complaint here seeks an inference of a deficient process from allegations that funds in the plan's

line-up had higher expense ratios than alternatives in the market.[9] *See, e.g.*, App. Vol. I at 126-128 (¶ 104). But inferring imprudence from fees in this context is implausible.

First, "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*, 556 F.3d at 586; *accord PBGC*, 712 F.3d at 718; *Meiners*, 898 F.3d at 823-824. There are many sound reasons why a prudent fiduciary, crafting and monitoring a plan line-up as a whole, would include some options that do not have rock-bottom fees, particularly when those options appear alongside lower-cost options—fiduciaries must "consider each plan investment as part of the plan's entire portfolio."[10] As DOL has explained, "cheaper is not necessarily better"—"[t]hey are only one part of the bigger picture," and thus fees must be considered as just "one of several factors" in decision-making. DOL, *A Look at 401(k) Plan Fees* 1, 9 (2019), https://bit.ly/3NwDLiN (*A Look at Fees*).

For example, fiduciaries may wish to offer actively managed options, which make up 60% of the $24.9 trillion invested in mutual funds and exchange-traded

[9] A fund's "expense ratio" is the sum of an investment's fees expressed as a percentage of assets under management. *See, e.g.*, *Obeslo v. Great-W. Life & Annuity Ins. Co*, 6 F.4th 1135, 1155 n.15 (10th Cir. 2021); *A Look at Fees* 6.

[10] DOL, *Meeting Your Fiduciary Responsibilities* 3 (2020), https://bit.ly/3rjBA83.

funds each year.[11] Active management is more expensive, but it offers the opportunity for higher upsides or less-severe downsides than funds that merely duplicate a market index, like the S&P 500. *See A Look at Fees* 7. Or they may wish to offer mutual funds, which come with greater transparency and regulatory safeguards than other types of institutional products with generally lower expense ratios. *See Loomis v. Exelon Corp.*, 658 F.3d 667, 671-672 (7th Cir. 2011). Or, having received information about the various options, they may simply believe that the chosen funds fall within the wide range of reasonableness. There are many prudent reasons for retaining funds besides the cheapest options in a diversified plan line-up, and doing so does not plausibly suggest an imprudent process.

Second, it is all too easy to make a fiduciary's choices look suboptimal in hindsight, because plaintiffs' counsel often cherry-pick alternative investments as comparators. Take the federal Thrift Savings Plan (TSP), which plaintiffs often tout as the "gold standard" and use as a comparator in challenging a plan's performance or fees.[12] Even the TSP could be made to look mismanaged by cherry-picking

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[11] *Investment Company Fact Book* 49.

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

comparators with *even lower* fees at a given point in time[13]:

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 https://www.morningstar.com/etfs/arcx/agg/price	0.040%
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	0.040%

As this example shows, when plaintiffs' attorneys zero in on a single metric at a single point in time—in the above example, fees—they will *always* be able to find a supposedly "better" fund among the thousands on the market. And that is particularly true given that plaintiffs frequently compare the performance of funds with different investment styles and performance benchmarks. Just as a quarterback's average passing yards cannot be meaningfully measured against a relief pitcher's ERA or Simone Biles' average all-around score, comparing the fees

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

or investment performance of funds that have completely different investment styles and goals indicates nothing about which fund is "better," much less whether a fiduciary's "decision-making process was flawed." *Meiners v. Wells Fargo & Co.*, 2017 WL 2303968, at *3 (D. Minn. May 25, 2017), *aff'd*, 898 F.3d 820 (8th Cir. 2018). Thus, the district court correctly followed other courts' lead in requiring ERISA plaintiffs to demonstrate, at the very least, that they have pled "a sound basis for comparison." *Davis v. Washington Univ. in St. Louis*, 960 F.3d 478, 484 (8th Cir. 2020); *Matousek*, 2022 WL 6880771, at *2; *see* App. Vol. II at 553.

2. Share-class selections—As in this case, many plaintiffs seek an inference of imprudence from allegations that fiduciaries offered retail share classes of mutual funds that have higher expense ratios than institutional share classes of the same fund. But this theory ignores obvious explanations such as the decision to pay plan service providers through revenue-sharing, rather than through a flat fee imposed against participants' individual accounts, or, as in this case, the availability of a revenue credit that lowers the effective retail class expense ratio—arrangements that are exceedingly common in the retirement-plan context.

Expense ratios *are* typically higher for retail share classes than for institutional share classes. This price difference reflects the fact that expense ratios are composed of both investment management fees and administrative fees. The investment-management fee must be the same for all fund investors, irrespective of share class.

See 17 C.F.R. § 270.18f-3(a)(1). But the portion assessed for administrative expenses can vary by share class. *See id.* Retail share classes frequently provide revenue-sharing, which, as discussed above, may be credited to the plan to cover recordkeeping fees that participants would otherwise have to bear, and may even result in revenue-sharing rebates to participant accounts. *See supra* pp. 7-9; *Deloitte Benchmarking Survey*, Exs. 7.6, 7.7 (35% of plans in 2019 received a revenue-sharing rebate and allocated credits to participants 42% of the time). This fee-sharing reflects the reality that, for plan investments, the plan's recordkeeper performs many of the administrative services that otherwise would have to be performed by the mutual fund's service provider. For institutional share classes, that reality is already reflected in the lower expense ratio, which is why institutional share classes provide far less, if any, revenue-sharing.

Sometimes, revenue-sharing credits to a plan on retail shares can exceed the expense-ratio difference between institutional and retail share classes. Indeed, some plaintiffs have complained about plans' failure to offer *higher-expense-ratio retail share classes*, on the theory that doing so would have resulted in a lower "Net Investment Expense" for the funds. *See, e.g.*, Compl. ¶¶ 154, 170-85, *Reichert v. Juniper Networks, Inc.*, No 3:21-cv-06213-JD (N.D. Cal. Aug. 11, 2021), ECF No. 1; Am. Compl. ¶¶ 128-168, *Albert v. Oshkosh Corp.*, No. 1:20-cv-00901-WCG (E.D. Wis. Aug. 31, 2020), ECF No. 20.

Some plans may prefer to offer only the lowest-cost share class with *no* revenue-sharing benefits and then pay for administrative fees through deductions from participant accounts. Others may wish to offer higher-cost share classes that use revenue-sharing benefits to pay for recordkeeping fees. And some might select a combination of the two payment structures. That does not make any one of these fee structures or share-class selections per se or even presumptively unreasonable; it simply reflects the range of reasonable judgments available to plan fiduciaries. *See* App. Vol. I at 558 ("While compelling in the abstract, Plaintiffs' characterization of the reasonableness of the Plan's handling of its arrangement with Fidelity and payment of administrative costs through revenue sharing is based on generalizations, assumptions, and unsuitable comparisons.").

This case provides an apt example. Plaintiffs allege that Defendants *must* have had an imprudent process because they failed to select "lower fee" share classes. App. Vol. I at 116 (¶¶ 79-80). But Plaintiffs' allegations fail to account for the entirely sensible justification for Plaintiffs' selection of the R5 share class—namely, the 15-basis-point credit that the plan received. Precisely because Defendants' decision was "just as much in line with" reasonable fiduciary judgment, Plaintiffs' bare allegation that Defendants selected more expensive share classes is insufficient to plead imprudence. *See Llacua*, 930 F.3d at 1179-1180. Rather, as the district court recognized, "careful, context-sensitive scrutiny" is critical to

evaluating the plausibility of Plaintiffs' allegations—and here that context includes the fact that credits and rebates are incredibly common for plans to receive. *Fifth Third Bancorp*, 573 U.S. at 424.

That is not to say a plaintiff could *never* plausibly allege an imprudent process based on share-class allegations. If, for example, a complaint alleged that a plan sponsor had voluntarily elected to pay all plan recordkeeping expenses (as a minority of sponsors do[14]) and yet the plan fiduciaries chose to offer *only* retail share classes that provided *no* credits or rebates for participants, then the complaint might state a plausible fiduciary-breach claim. Indeed, that was precisely the nature of the arrangement in *Tibble v. Edison Int'l*, on which plaintiffs lean so heavily. *Tibble v. Edison Int'l*, 729 F.3d 1110, 1131 (9th Cir. 2013) (citing Summary Plan Description), *vacated*, 575 U.S. 523 (2015); *see* Opening Br. 26-28. But given the discretion fiduciaries have in deciding how to structure service-provider compensation and the complicated economic realities of revenue-sharing arrangements tied to different share classes, "something more than merely" the choice of retail share classes is necessary to nudge an imprudence claim over the line from conceivable to plausible. *Twombly*, 550 U.S. at 560.

[14] *See Deloitte Benchmarking Survey* 20.

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

As the Supreme Court recognized in *Twombly*, enforcing the plausibility pleading rule is necessary to guard against speculative suits that "push cost-conscious defendants to settle even anemic cases." 550 U.S. at 558-59. In ERISA cases, discovery is entirely asymmetrical and comes at an "ominous" price, easily running into the millions of dollars for a defendant. *PBGC*, 712 F.3d at 719; *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, 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;[15] for failing to divest from stocks with declining share prices or high risk profiles,[16] and for failing to *hold onto* such stock because high risk can produce high reward;[17] for making available investment options that plaintiffs' lawyers deem too risky (as in this case),[18] and conversely for taking what other plaintiffs' lawyers deem an overly cautious approach.[19] Indeed, while most plaintiffs sue plans for charging allegedly excessive fees in the hopes of outperformance, a new set of cases charge defendants with following the purportedly

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[15] *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.

[16] *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").

[17] *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).

[18] Compl., RE 1, ¶ 22; *see also, 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.

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

"in vogue" trend of "chas[ing]" low fees rather than focusing on funds' "ability to generate return."[20]

This same phenomenon plays out 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 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. It also imposes 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 mortgageor 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 the "tremendous power to harass" individual fiduciaries in this way).

[20] *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.

The pressure created by these suits also undermines one of the most important aspects of ERISA—the value of innovation, diversification, and employee choice. Plaintiffs' attorneys have often taken a cost-above-all approach, filing strike suits against any sponsors that consider factors other than cost—notwithstanding ERISA's direction to do just that. *White v. Chevron Corp.*, 2016 WL 4502808, at *10 (N.D. Cal. Aug. 29, 2016) (collecting cases); *cf. A Look at Fees* 1, 9. The more that specious complaints survive dismissal, the more a fiduciary might feel that she has no choice but to offer only "a diversified suite of passive investments"—despite "actually think[ing] that a mix of active and passive investments is best." *Id.* 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?*, Center 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. 25-26.

This dynamic has upended the fiduciary-insurance industry.[21] 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 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. *Hughes* requires that courts apply *Twombly*'s "plausibility" standard to ERISA cases. 142 S. Ct. at 742. While *Hughes* was clear on this point, it would also be beneficial for this Court to issue a published

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

opinion saying as much, and adopting the approach used in *Bekkem*, *Warnick*, and *Brooks* in ERISA cases as well, particularly in light of the increasing number of ERISA lawsuits throughout the country and in this circuit especially.

CONCLUSION

This Court should affirm the judgment below.

November 4, 2022

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 6,494 words, excluding the parts exempted by Rule 32(a)(7)(B)(iii).

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CERTIFICATE OF SERVICE

I, Jaime A. Santos, hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit by using the appellate CM/ECF system on November 4, 2022.

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