NO. 19-1401

IN THE

Supreme Court of the United States

APRIL HUGHES, ET AL., *Petitioners*,

v.

NORTHWESTERN UNIVERSITY, ET AL., *Respondents*.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF THE AMERICAN ASSOCIATION FOR JUSTICE AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS CURIAE[1]

The American Association for Justice (AAJ) is a national, voluntary bar association founded in 1946 to strengthen the civil justice system, preserve the right to trial by jury, and protect access to the courts for those who have been wrongfully injured. With members in the United States, Canada, and abroad, AAJ is the world's largest plaintiff trial bar. AAJ's members primarily represent plaintiffs in personal injury actions, employment rights cases, and other civil actions. Throughout its 75-year history, AAJ has served as a leading advocate for all Americans seeking legal recourse for wrongful conduct.

Notice pleading under the Federal Rules of Civil Procedure, requiring only "a short and plain statement of the claim," has served the interests of justice. AAJ is concerned that anticipated proposed new pleading requirements will demand that plaintiffs essentially put on their case prior to any discovery. The result will be to close the doors of federal courthouses to many with potentially meritorious claims.

SUMMARY OF ARGUMENT

1. AAJ addresses this Court regarding the anticipated argument that district courts should dismiss actions where complaints have not demonstrated to the court that the inference from the facts that the defendant is liable is more likely than

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[1] No counsel for any party authored this brief in whole or in part and no person or entity, other than amicus, its members, or its counsel has made a monetary contribution to its preparation or submission. Petitioners and Respondents have consented to the filing of this brief.

the inference that the defendant is not. The U.S. Chamber advanced that proposal as amicus in the Seventh Circuit below and in other cases.

Such a "more likely" standard is not consistent with this Court's "plausibility" threshold for factual sufficiency of pleadings. This Court has demanded no more of plaintiffs than factual allegations that, if true, would plausibly suggest liability and place the defendant on notice of the nature of the claim. The inferences plaintiff draws from the facts alleged must, of course, constitute a wrong or breach of duty under substantive law. But this Court has not required anything more to survive a motion to dismiss, even if the district court would view the allegations as improbable or the chances of recovery remote and unlikely. The plausibility standard is not a probability requirement.

The assessment of the plausibility of a plaintiff's complaint is also necessarily context specific. Here, Congress imposed a high fiduciary duty of care on plan administrators and authorized private actions to enforce those obligations. ERISA's purpose is to protect workers whose retirement savings had been vulnerable to loss due to misconduct and mismanagement by those entrusted with such funds. Congress therefore provided remedies and sanctions for violations of plan fiduciaries' duties of care and ready access to federal courts to enforce those obligations. Indeed, the Department of Labor depends upon private litigants to assist in enforcing ERISA's protections. Placing greater obstacles in the path of plan participants and beneficiaries at the dismissal stage is not consistent with the statute's protective purpose.

2. Plaintiffs met this Court's fact-pleading requirements by setting forth in their Amended Complaint specific factual allegations that plausibly suggest that Defendants breached their fiduciary duties. Three sets of factual allegations, taken as true, showed that plan sponsors and administrators paid out excessive administrative fees to two recordkeeping providers; caused participants to pay excessive management fees, including offering retail-class shares of funds rather than cheaper, otherwise identical, institutional shares; and offering an over-large menu of investment options that resulted in higher costs and other obstacles for participants. These facts give rise to the plausible inference that Defendants failed to actively monitor the performance of the Northwestern plans, actively investigate available more advantageous investment products and services, and wield the purchasing power of the Northwestern plans to negotiate with providers for the most advantageous options for participants and beneficiaries.

The lower court erroneously dismissed Plaintiffs' complaint. The court did not find the complaint *factually* insufficient under this Court's plausibility standard. It found the complaint *legally* insufficient: The court held that ERISA fiduciaries owed no affirmative duty to monitor, investigate, and/or negotiate in this case. This view of the duties imposed by ERISA was erroneously limited and passive. The judgment below should be reversed on that basis. The case provides no appropriate vehicle for this Court to undertake alter its established standards of fact pleading.

3. If this Court addresses the pleading standards in this case, there are compelling reasons to reject the proposed "more likely" pleading standard. Such a requirement is in conflict with the central, universally accepted principle that on motion to dismiss the court accepts the alleged facts in the complaint as true and construes them in the light most favorable to the plaintiff.

The "more likely" requirement is also inconsistent with Fed. R. Civ. P. ("Rule") 9, which permits heightened pleading requirements to a few enumerated types of cases. It is inconsistent with Rule 11, which allows attorneys to certify pleadings that are based on evidence reasonably anticipated to be uncovered by further discovery. It is also inconsistent with Rule 12(e), which makes repleading with a more definite statement the appropriate remedy for a complaint that lacks sufficient detail, rather than dismissal. Any alteration of the pleading standards is best obtained by the formal rulemaking process, rather than by judicial interpretation.

Nor is a requirement that plaintiffs refute or disprove a defendant's alternate innocent explanations of factual allegations prior to the opportunity for plaintiffs to discover relevant evidence in possession of the defendant.

If the proponents of more stringent pleading requirements truly believe such restrictions are warranted by litigations costs and settlement pressures, such concerns are most appropriately directed to Congress.

ARGUMENT

I. IMPOSING A "MORE LIKELY" PLEADING STANDARD IS INCONSISTENT WITH THIS COURT'S "PLAUSIBILITY" STANDARD AND WITH THE PROTECTIVE PURPOSE OF ERISA.

AAJ addresses this Court regarding the proposal pressed by the U.S. Chamber of Commerce that a heightened standard of pleading be imposed under Rule 8. In its amicus brief to the Seventh Circuit in this case, the U.S. Chamber argued: "Claims That Rely On Inferences Of Wrongdoing From Circumstantial Facts Must Allege 'Something More' Than Allegations That Are Equally Consistent With Lawful Behavior." Brief for the Chamber of Commerce of the United States of America and the American Benefits Council as Amici Curiae in Support of Appellees, *Divane v. Northwestern Univ.*, No. 18-2569 (7th Cir., Mar. 21, 2019) ["U.S. Chamber Br."] at 14**.** That is, plaintiffs must not only plead facts supporting an inference that the defendant is liable, but also show that this inference is *more likely* than alternative explanations of innocent behavior. In cases such as this, the Chamber proposes that courts "carefully scrutinize[] the circumstantial allegations and order[] dismissal when those allegations were equally consistent with lawful behavior." *Id.* at 16. *See also id.* at 15 (Courts should "decline[] to infer a breach from circumstantial allegations that were just as consistent with lawful fiduciary behavior.").

The U.S. Chamber advanced the same argument to the Third Circuit. *See* Brief for the Chamber of Commerce of the United States of America and the American Benefits Council as Amici

Curiae in Support of Appellees, *Sweda v. Univ. of Pennsylvania*, No. 17-3244 (3d Cir., Apr. 12, 2018) at 15-18; And to the Ninth. *See* Brief for the Chamber of Commerce of the United States of America and the American Benefits Council, *White v. Chevron Corp.*, No. 17-16208 (9th Cir., Feb. 15, 2018) at 15-18.

This "more likely" standard is inconsistent with this Court's generally applicable "plausibility" standard and inconsistent with Congress's purpose in authorizing private actions to enforce ERISA fiduciary obligations.

A. The Proposed "More Likely" Standard Is Not Consistent With This Court's Plausibility Standard.

Plaintiffs in this case met their burden of plausibly alleging that the administrators of their ERISA savings and retirement plans breached their fiduciary duties. They were required to do no more. To demand "something more" to survive a motion to dismiss is not consistent with this Court's established pleading requirements.

Federal Rule of Civil Procedure 8 requires that a complaint present "a short and plain statement of the claim showing that the pleader is entitled to relief." To meet this standard, and survive a motion to dismiss under Rule 12(b)(6), "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

This Court crafted the plausibility requirement as an "important mechanism" for district courts to use on motion to dismiss "for weeding out meritless claims." *Fifth Third Bancorp v. Dudenhoeffer*, 573 U.S. 409, 425 (2014). Requiring facial plausibility also serves to "give the defendant fair notice of what . . . the claim is and the grounds upon which it rests." *Twombly*, 550 U.S. at 555. Thus, mere "labels and conclusions" or "formulaic recitation of the elements of a cause of action" will not do. *Id.*

This Court did not ask for "something more" of a complaint beyond plausible inferences supporting the claim. Indeed, the Court pointed out that it had reversed the dismissal of an employment discrimination claim in *Swierkiewicz v. Sorema N. A.*, 534 U.S. 506 (2002), on the ground that the court of appeals had "impermissibly applied what amounted to a heightened pleading requirement by insisting that Swierkiewicz allege 'specific facts' beyond those necessary to state his claim." *Twombly*, 550 U.S. at 570. A plaintiff need not, and often cannot, set forth a prima facie case in a complaint, *Swierkiewicz*, 534 U.S. at 511-12, but "only enough facts to state a claim to relief that is plausible on its face." *Twombly*, 550 U.S. at 570. This plausibility standard asks only that the plaintiff specify "enough factual matter (taken as true) to *suggest*" the alleged breach. *Id.* at 556 (emphasis added). It "does not impose a probability requirement at the pleading stage; it simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of" misconduct. *Id.*

Plainly, this Court's plausibility standard cannot be squared with the U.S. Chamber's insistence that plaintiffs convince the district court that the

inferences from the facts not only support liability, but are also more likely than inferences that the defendant would draw. This Court has emphasized that a cause of action may not be dismissed "even if it strikes a savvy judge [as] improbable," or "doubtful" or that "a recovery is very remote and unlikely." *Id.* at 556-57 (internal quotation marks omitted).

It is true that the Court determined that *Twombly*'s Sherman Act complaint required "further factual enhancement" to negate innocent explanations of the alleged parallel conduct of the telephone business competitors. *Id.* at 557. Context, however, matters. As the Third Circuit persuasively noted, *Twombly*'s discussion of this point "is specific to antitrust cases." *Sweda v. Univ. of Pennsylvania*, 923 F.3d 320, 326 (3d Cir. 2019). Competitors are under no Sherman Act duty to compete; Section 1 prohibits anticompetitive *conspiracy*. Evidence of parallel conduct may give rise to a plausible inference of conscious parallel conduct, but that is not illegal conduct under substantive antitrust law. Without more facts to "rule out the possibility that the defendants were acting independently" there was no plausible inference of preceding agreement and thus no inference of violation of the Sherman Act. *Twombly*, 550 U.S. at 554 (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986)).

In this case, by contrast, Plaintiffs asserted that Defendants, under the substantive law of ERISA, owed an affirmative duty to continuously monitor plans for excessive costs, investigate options that would provide beneficiaries with the same products and services at lower costs, and wield the plan's substantial purchasing power to bargain on behalf of

participants. As set out in more detail in Part II, the facts alleged by Plaintiffs here support the plausible inference that Defendants breached that duty.

This Court's fairly strict assessment of the pleadings in *Ashcroft v. Iqbal*, 556 U.S. at 685, is also best understood through the Court's context-specific sensitivity to the fact that the "Government-official defendants are entitled to assert the defense of qualified immunity," the purpose of which "is to free officials from the concerns of litigation." By contrast, ERISA authorizes participants and beneficiaries to bring cases against fiduciaries who have breached their duties. *See* Employee Retirement Income Security Act of 1974 (ERISA) § 502(a); 29 U.S.C. § 1132(a). Indeed, the Department of Labor "depends in part on private litigation to ensure compliance with [ERISA] the statute." *Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 597 n.8 (8th Cir. 2009); *see also Jander v. Ret. Plans Comm. of IBM*, 910 F.3d 620, 624 (2d Cir. 2018) (private actions by beneficiaries are "important mechanisms for furthering ERISA's remedial purpose").

That remedial purpose does not support further pleading requirements that will limit plan participants and beneficiaries from the "ready access to the Federal courts" that Congress intended. *See* 29 U.S.C. § 1001(b).

B. Congress Enacted ERISA To Require Plan Administrators To Meet High Standards of Skill, Prudence, and

Diligence in the Sole Interest of Participants and Beneficiaries.

The "appropriate inquiry" to determine the plausibility of plaintiffs' complaint "will necessarily be context specific." *Dudenhoeffer*, 573 U.S. at 425. Consequently, ERISA's protective focus and congressional purpose to provide ready access to remedies in federal courts inform the courts' assessment of plaintiffs' complaint stating a cause of action under 29 U.S.C. § 1109. *Sweda*, 923 F.3d at 326-27 ("ERISA's purpose informs our assessment of Sweda's pleadings."). *See also Braden*, 588 F.3d at 597 ("[W]e must be attendant to ERISA's remedial purpose and evident intent to prevent [misuse and mismanagement] through private civil litigation.").

Congress enacted ERISA, 29 U.S.C.A. § 1001 *et seq*. to protect workers from the risks of loss of their retirement savings at the hands of those entrusted with administering their benefit plans. The saga of this landmark statute began in 1963, when financially troubled automaker Studebaker defaulted on its pension obligations, robbing thousands of workers and retirees of the assets they had worked for. *See* James A. Wooten, *"The Most Glorious Story of Failure in the Business": The Studebaker-Packard Corporation and the Origins of ERISA*, 49 Buff. L. Rev. 683 (2001). Other scandals followed in which workers found that their accumulated benefits had been lost through incompetence, mismanagement, or wrongdoing. *See generally* Michael S. Gordon, Overview: Why Was ERISA Enacted?, in U.S. Senate Special Comm. on Aging, 98th Cong., The Employee Retirement Income Security Act of 1974: The First Decade 6-24 (Comm. Print 1984).

Following "a decade of congressional study of the Nation's private employee benefit system," *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 251 (1993), Congress enacted ERISA to address "the absolute need that safeguards for plan participants be sufficiently adequate and effective to prevent the numerous inequities to workers under plans which have resulted in tragic hardship to so many." H.R. Rep. No. 93-533, at 9 (1974), *reprinted in* 1974 U.S.C.C.A.N. 4639, 4647.

To protect American workers, ERISA requires plan administrators to be fiduciaries who "shall discharge [their] duties with respect to a plan solely in the interest of the participants and beneficiaries . . . with the care, skill, prudence, and diligence . . . that a prudent [person] acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of like character and with like aims." 29 U.S.C. § 1104(a). In addition, Congress made fiduciaries personally liable for losses to ERISA plans resulting from their breach of this duty, 29 U.S.C. § 1109, and authorized plan participants to bring an action on behalf of the plan to enforce those statutory duties. 29 U.S.C. § 1132(a)(2). Congress further intended that there be "ready access to the Federal courts" for that purpose. 29 U.S.C. § 1001(b).

Congress established these "standards of conduct, responsibility, and obligation for fiduciaries" to protect "the interests of participants in employee benefit plans and their beneficiaries." 29 U.S.C. § 1001(b). It is a duty that is the "highest known to the law." *Donovan v. Bierwirth*, 680 F.2d 263, 272 n.8 (2d Cir. 1982) (Friendly, J.). *See Varity Corp. v. Howe*, 516 U.S. 489, 497 (1996) (ERISA fiduciary duty may even

exceed fiduciary duty as derived from the common law of trusts). And, as this Court has observed, Congress "expect[ed] that the courts will interpret this prudent man rule (and the other fiduciary standards) bearing in mind the special nature and purpose of employee benefit plans." *Varity Corp.*, 516 U.S. at 497 (quoting H.R. Conf. Rep. No. 93-1280 at 302).

This Court in *Dudenhoeffer* rejected arguments that without increasing the threshold for plaintiffs to survive a motion to dismiss under Rule 12(b)(6), businesses fearing administrative and litigations costs may be discouraged from offering benefit plans at all. 573 U.S. at 425. Such arguments did not warrant adoption of a "defense-friendly presumption" that would as a practical matter make it "impossible for a plaintiff to state a duty-of-prudence claim, no matter how meritorious." *Id.*

Viewing the allegations in this case in the context of ERISA's protective purpose, the dismissal of Plaintiffs' § 1132(a)(2) cause of action ought to be reversed; nor does it provide occasion for this Court to entertain proposals to restrict access to the federal courts through more restrictive pleading requirements.

II. PLAINTIFFS PLAUSIBLY ALLEGED THAT THE NORTHWESTERN PLAN ADMINISTRATORS BREACHED THEIR FIDUCIARY DUTIES TO PARTICIPANTS AND BENEFICIARIES.

The Amended Complaint in this case clearly met this Court's fact-pleading standard. Plaintiffs set forth three sets of facts regarding the administration of the Northwestern plans that allegedly resulted in

losses for which Defendants may be liable. Those factual allegations were not "conclusory" or "formulaic" and were sufficient to put the Defendants on notice of the basis of Plaintiffs' claim. Most importantly for this Court's review, Plaintiffs' factual allegations provide "plausible grounds to infer" that defendants breached their duties under ERISA. *Twombly*, 550 U.S. at 556.

A. Plaintiffs Alleged Specific Facts Giving Rise To Plausible Inferences of Breach of Fiduciary Duty.

1. Excessive administrative fees for recordkeeping services

In Count III of their amended complaint, Plaintiffs alleged that the plan paid out excessive administrative fees by employing two recordkeeping providers on a revenue-sharing basis, compared with similar plans that obtained economies of scale and lower costs using a single provider on a flat-rate basis. Am. Compl. ¶¶ 246-254; *id.* at ¶¶ 101-105 (reviewing the practice of similar plans).

Plaintiffs properly "focus on the process by which [a plan] makes its decisions rather than the results of those decisions." *Braden*, 588 F.3d at 595. Thus, the complaint does not allege that the fees the Northwestern plans paid for recordkeeping services were a violation of ERISA *per se*. Rather the alleged facts give rise to the inference that Defendants' decision-making process fell short of that required of a reasonably prudent fiduciary. It did so by failing to "monitor the Plans' recordkeeping fees" to determine whether they were reasonable and competitive, "solicit bids from competing providers," and/or

"negotiate lower recordkeeping fees" using the substantial purchasing power of the Northwestern plans. Am. Compl. ¶¶ 249, 251.

Failure to fulfill these affirmative fiduciary duties—to actively monitor, investigate, and negotiate—are inferences that recur in all three sets of factual allegations.

2. Excessive management fees for individual investment offerings

Secondly, in Count V, Plaintiffs claimed losses caused by unreasonably high management fees. Am. Compl. ¶¶ 260-273. Plaintiffs alleged that Defendants selected and retained "mutual funds and insurance company variable annuities with high expenses and poor performance relative to other investment options that were readily available to the Plans." *Id.* at ¶ 264. Most notably, Plaintiffs alleged that Defendants offered some 129 retail-class mutual fund shares, even though institutional-class shares of the same mutual funds, with identical risk-return profiles but lower management fees, were available to the Northwestern plans. Am. Compl. ¶ 266. *See also id.* at ¶161 (naming the specific higher-cost "retail" shares and the lower-cost institutional versions that defendants could have made available).

Again, the facts alleged raise the inference of a breach of Defendants' obligation to actively work exclusively for the benefit of plan participants and beneficiaries. It is open to Defendants to bring out evidence in discovery that they met their fiduciary duties by engaging in the appropriate monitoring, investigating, and negotiating that a reasonably prudent fiduciary would undertake. But the clear

inference from the factual allegations at the pleading stage is that they did not.

3. Plan structure with costly and confusing number of investment options

Third, in Count V Plaintiffs contended that plan participants suffered losses resulting from the high number of individual fund options offered to plan participants. Am. Compl. ¶¶ 264-266. During the relevant time, the Retirement Plan offered 242 investment options, and the Voluntary Savings Plan offered 187 options. *Id.* at ¶¶ 113 & 115. Plaintiffs alleged that this overcrowding of options resulted in losses due to unnecessary layers of fees attached to some funds, *id.* at ¶ 265, "depriving the Plans of their ability to qualify for lower cost share classes of certain investments," and causing "participant confusion and inaction." *Id.* at ¶ 265.

Defendants' awareness of the imprudence of this menu structure became starkly evident in October 2016, when Northwestern streamlined its investment offerings to about 40 options to enable "simpler decision-making by participants, reduce administrative expenses, increase participant returns, and provide access to lower cost shares when available." *Id.* at ¶ 221. Defendants announced that the streamlined structure would "[r]educe[] administration fees," "increase[] participant returns" and provide "[a]ccess to lower cost share classes when available." *Id.* at ¶ 222.

Again, this set of factual allegations supports the plausible inference that defendants breached their fiduciary duties by failing to actively monitor plan

performance and weed out unduly expensive options, engage in "a rigorous process to control administrative and management costs," *id.* at ¶ 45, and "actively negotiate with service providers for the best price or investigate whether participants would be better served by alternative investment products or services." *Id.* at ¶ 47.

B. The Lower Court Did Not Find the Complaint Deficient in Factual Pleading but Legally Deficient Based on the Court's Lenient View of the Duties Under ERISA.

The Seventh Circuit erred in upholding the dismissal of Plaintiffs' action, but it did not do so for reasons of *factual* deficiency the Amended Complaint. Rather, the court of appeals determined that Plaintiffs' complaint was *legally* insufficient because Defendants owed no duty under ERISA to affirmatively monitor, investigate, and negotiate. AAJ suggests that the lower court applied an erroneously passive and lenient view of ERISA plan administrators' fiduciary duties. This case is therefore not an appropriate vehicle for adoption of the proposed heightened standard of fact pleading.

1. Breach of duty regarding administrative fees

With regard to Plaintiffs' allegations that the Northwestern plans paid out unreasonable and excessive administrative fees for recordkeeping services, the lower court did not find it implausible to infer that Defendants failed to monitor costs, investigate alternatives, or negotiate better terms from providers. The court instead held that

Defendants had no affirmative duty to undertake such efforts. In the court's view, ERISA did not require plan fiduciaries "to search for a recordkeeper willing to take $35 per year per participant," *Divane v. Northwestern Univ.*, 953 F.3d 980, 991 (7th Cir. 2021), to solicit competitive bids, *id.* at 990, or to negotiate with TIAA for better terms for this service. *Id.*

AAJ suggests that this view of the duty of a trust fiduciary is far too passive and lenient. It is widely accepted that "cost-conscious management is fundamental to prudence" in trusteeship. Restatement (Third) of Trusts § 90, cmt. b. Fiduciaries "ordinarily have a duty to seek [] the lowest level of risk and cost for a particular level of expected return," *id.* at cmt. f, should pay careful attention to "sales charges, compensation, and other costs," *id.* at cmt. m, and "make careful overall cost comparisons." *Id.* Other courts have concluded that a breach of the fiduciary duty of prudence can be inferred from such decision-making deficiencies as alleged in the Amended Complaint in this case. *See Sweda*, 923 F.3d at 330; *Tussey v. ABB, Inc.*, 746 F.3d 327, 336 (8th Cir. 2014).

2. Breach of duty regarding management fees of certain investment options

With respect to the inclusion of investment options with excessive management fees, including retail shares of funds instead of identical but cheaper institutional-class shares of the same funds, the court below again found no breach of duty. In the court's view, defendants owed no affirmative duty to remove those offerings because "[a]ny participant could avoid what plaintiffs consider to be the problems with those

products . . . simply by choosing from hundreds of other options." *Divane*, 953 F.3d at 988. ERISA's fiduciary duty, in the court's view, was limited to providing "a meaningful mix and range of investment options." *Id.* at 992 (quoting *Sweda*, 923 F.3d at 330).

Other appellate courts, however, have found that similar factual allegations—that plan sponsors offered higher-cost retail-class mutual funds instead of otherwise identical lower-cost institution-class mutual funds—gives rise to a plausible inference of breach of fiduciary duty. *See, e.g.*, *Sacerdote v. New York Univ.*, No. 18-2707-cv, 2021 WL 3610355, at *5-8 (2d Cir., Aug. 16, 2021); *Davis v. Washington Univ. in St. Louis*, 960 F.3d 478, 483 (8th Cir. 2020); *Tibble v. Edison Int'l*, 843 F.3d 1187, 1197-98 (9th Cir. 2016) (en banc).

3. Breach of duty regarding the number of options

Similarly, the court of appeals found no duty on the part of the Northwestern plan sponsors to monitor the plans to determine if the large menu of options resulted in losses to participants or weed out those that proved to be poor investments. The court stated that plans "may generally offer a wide range of investment options and fees without breaching any fiduciary duty no breach of any fiduciary duty." *Divane*, 953 F.3d at 992. Defendants "left choice to the people who have the most interest in the outcome, and [] cannot be faulted for doing this." *Id.* at 989.

This lenient and passive view of the duty owed under ERISA appears dubious. "Under trust law, a trustee has a continuing duty to monitor trust investments and remove imprudent ones." *Tibble v.*

Edison Int'l, 575 U.S. 523, 529 (2015). It was, after all, an objective of Congress in imposing fiduciary duties on plan administrators to assure participants and beneficiaries that their savings are being looked after by trustees who will actively protect their interests. Allowing administrators to shift the burden back onto plan participants undermines that goal. Other courts of appeals agree. *See, e.g.*, *Sweda*, 923 F.3d at 330 (A "meaningful mix and range of investment options [does not] insulate[] plan fiduciaries from liability for breach of fiduciary duty. Such a standard would allow a fiduciary to avoid liability by stocking a plan with hundreds of options, even if the majority were overpriced or underperforming."); *Davis*, 960 F.3d at 484 ("It is no defense to simply offer a 'reasonable array' of options that includes some good ones, and then 'shift' the responsibility to plan participants to find them.") (brackets and citations omitted); *Pfeil v. State St. Bank & Trust Co.*, 671 F.3d 585, 597 (6th Cir. 2012) ("A fiduciary cannot avoid liability for offering imprudent investments merely by including them alongside a larger menu of prudent investment options.")

Because the lower court's dismissal of Plaintiffs' action was based on an erroneously inadequate view of ERISA's fiduciary duties, it does not present an appropriate vehicle for revisiting and altering the fact-pleading standard under Fed. R. Civ. P. 8.

III. THIS COURT SHOULD NOT ADOPT THE HEIGHTENED PLEADING STANDARD ADVOCATED BY THE U.S. CHAMBER.

If this Court takes up the question of altering the pleading standard to require a plaintiff to show the inferences supporting liability are "more likely"

than alternative explanations consistent with non-liability, there are powerful reasons for the Court to reject that proposal.

A. The "More Likely" Standard Is Inconsistent with the Principle that Courts Must Assume the Truth of Pleaded Facts and Construe them Most Favorably To the Nonmoving Party.

As AAJ explained in the opening of this brief, the U.S. Chamber has proposed that complaints be dismissed under Rule 12(b)(6) when plaintiffs fail to show that the inferences from alleged facts supporting liability are more likely than alternative, innocent explanations of those facts. Part I, *supra*.

This proposed pleading standard is in direct conflict with,

> A proposition that is at the heart of the application of the Rule 12(b)(6) motion, and one that is of universal acceptance . . . that for purposes of the motion to dismiss, (1) the complaint is construed in the light most favorable to the plaintiff, (2) its allegations are taken as true, and (3) all reasonable inferences that can be drawn from the pleading are drawn in favor of the pleader.

5B Wright And Miller, "Motions to Dismiss—Practice Under Rule 12(b)(6)," Federal Practice and Procedure Civil § 1357 (3d ed.).

Plainly, if the district court construes the pleaded facts in the light most favorable to the plaintiff, the inferences of liability will necessarily be more likely than alternative innocent explanations. To find inferences that the defendant's conduct was innocent would require the court to assume that at least some pleaded facts are not true or to interpret the facts in the light more favorable to the defendant.

For that reason, courts have concluded that dismissal of a complaint "for failing to plead facts tending to contradict" inferences favoring defendant "violates the familiar axiom that on a motion to dismiss, inferences are to be drawn in favor of the non-moving party." *Braden*, 588 F.3d at 595. *See also Sweda*, 923 F.3d at 326 ("Requiring a plaintiff to rule out every possible lawful explanation for the conduct he challenges would invert the principle that the complaint is construed most favorably to the nonmoving party.").

The "accepted pleading standard," the Court has declared, is that "once a claim has been stated adequately, it may be supported by showing *any set of facts consistent with the allegations* in the complaint. *Twombly*, 550 U.S. at 563 (emphasis added). This Court should not replace it with a "more likely" standard.

B. The "More Likely" Standard Is Inconsistent with Other Civil Rules.

The proposed "more likely" pleading requirement amounts to a "heightened pleading standard" that is "contrary to the Federal Rules' structure of liberal pleading requirements." *Twombly*, 550 U.S. at 570.

The Federal Rules address "the need for greater particularity in pleading certain actions," enumerated in Rule 9(b). *Leatherman v. Tarrant Cnty. Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168 (1993). Other causes of action, this Court stated, are necessarily excluded from the particularity requirement, by the rule of construction, "*Expressio unius est exclusio alterius*." *Id.* Additionally, the second sentence of Rule 9(b) indicates that those non-enumerated types of cases may be pled "generally," that is, by including in the complaint "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). Rule 8 may not be interpreted to impose a heightened pleading requirement, apart from fraud or mistake cases, because other cases are not mentioned in Rule 9(b) and may be averred "generally."

For example, in *Swierkiewicz v. Sorema N. A.*, 534 U.S. 506 (2002), this Court held that the Second Circuit erred in requiring a plaintiff filing a Title VII employment discrimination action to allege specific factual allegations sufficient to support a prima facie case of discrimination. To the extent that the appeals court demanded more of plaintiff than the "short and plain statement of the claim" under Rule 8(a)(2), it amounted to a "heightened pleading standard," permissible only in those cases enumerated in Rule 9(b). *Id.* at 512-13. The U.S. Chamber's proposal invites this Court to run afoul of those rules in exactly that manner.

The proposed higher pleading standard is also inconsistent with Rule 11, which requires attorneys to certify that claims set forth in a complaint are

warranted by the law and that the allegations "have evidentiary support or . . . *are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery*." Fed. R. Civ. P. 11(b)(3) (emphasis added). *See Rotella v. Wood*, 528 U.S. 549, 560 (2000) (noting "the flexibility provided by Rule 11(b)(3), allowing pleadings based on evidence reasonably anticipated after further investigation or discovery"). As the Seventh Circuit observed, Rule 11 does not "require[] counsel to prove the case in advance of discovery." *Frantz v. U.S. Powerlifting Fed'n*, 836 F.2d 1063, 1068 (7th Cir. 1987). The U.S. Chamber's proposed standard would do so.

Rule 12 also reflects the Rules' common-sense approach to pleading requirements by making repleading, not dismissal, the appropriate remedy for a complaint that lacks sufficient detail. Thus if a defendant finds that a pleading is so vague or ambiguous that the defendant cannot make a responsive pleading, the party may move the court to order a more definite statement prior to any response. Fed. R. Civ. P. 12(e).

If more stringent pleading requirements are truly necessary, this Court has repeatedly observed, they "must be obtained by the process of amending the Federal Rules, and not by judicial interpretation." *Swierkiewicz*, 534 U.S. at 515; *Leatherman*, 507 U.S. at 168. *See also Crawford-El v. Britton,* 523 U.S. 574, 595 (1998) ("[O]ur cases demonstrate that questions regarding pleading, discovery, and summary judgment are most frequently and most effectively resolved either by the rulemaking process or the legislative process.").

The procedure by which the Judicial Conference prescribes the rules of procedure, set out in the Rules Enabling Act, 8 U.S.C. §§ 2072-2073, is a transparent and accountable process, one that exposes proposed changes to the crucible of scrutiny by "members of the bench and the professional bar, and trial and appellate judges." *Id.* at § 2073(a)(2); *see also* Robert G. Bone, *The Process of Making Process: Court Rulemaking, Democratic Legitimacy, and Procedural Efficacy*, 87 Geo. L. J. 887, 920-26 (1999). The Advisory Committee on Civil Rules would be in a position to undertake studies to determine whether discovery abuse or settlement pressures exist to a significant degree, whether such problems would be alleviated by revision to pleading requirements, and whether those changes would impact other rules.

C. The "More Likely" Standard Is Not Appropriate for Assessing the Sufficiency of Pleadings Prior to Discovery.

Requiring a complaint to demonstrate that the inferences consistent with liability are more likely than inferences consistent with defendant's innocence is particularly inapt when passing on motions to dismiss, which most often occur prior to discovery.

In the ERISA context, as the Eighth Circuit recognized, "plan participants and beneficiaries typically have little access to the inner workings of their Plan's decision-making process." *Braden*, 588 F.3d at 594. Consequently, plaintiffs alleging that the decision-making process fell short of reasonable prudence must rely on plausible inferences from the facts. *Id. See, e.g.*, *Pension Ben. Guar. Corp. ex rel. St. Vincent Cath. Med. Centers Ret. Plan v. Morgan*

Stanley Inv. Mgmt. Inc., 712 F.3d 705, 718 (2d Cir. 2013) (Without "factual allegations referring directly to Morgan Stanley's knowledge, methods, or investigations" a complaint may survive if the court could plausibly infer from circumstantial facts that "an adequate investigation would have revealed" imprudence.).

To require plaintiffs to rebut alternative explanations for defendant's conduct prior to discovery is to prematurely deprive plaintiffs of a realistic opportunity to obtain the internal evidence that would show the merits of their claims. *Braden,* 588 F.3d at 597-98. Although "there may well be lawful reasons" for the fiduciary's decisions, it "is not [plaintiff's] responsibility to rebut these possibilities in his complaint." *Id.* at 596. "It would be perverse to require plaintiffs bringing [such claims] to plead facts that remain in the sole control of the parties who stand accused of wrongdoing." *Id.* at 602.

The Seventh Circuit agrees that "an ERISA plaintiff alleging breach of fiduciary duty does not need to plead details to which she has no access." *Allen v. GreatBanc Trust Co.*, 835 F.3d 670, 678 (7th Cir. 2016). Following discovery, "plaintiffs will be free to compare whatever steps [the fiduciary] actually took with the procedures that a prudent fiduciary would use." *Id.* at 680.

D. Arguments for Adoption of a More Stringent Pleading Standard Are More Appropriately Addressed to Congress.

The U.S. Chamber's proposed standard closely resembles the heighted pleading requirement

Congress established for certain securities cases. Responding to concerns regarding meritless litigation and discovery costs, very similar to those raised by the U.S. Chamber, Congress enacted the Private Securities Litigation Reform Act of 1995, 109 Stat. 737 (PSLRA). The statute includes "heightened pleading requirements in actions brought pursuant to § 10(b)" of the Securities Exchange Act of 1934. *Tellabs, Inc. v. Makor Issues & Rts., Ltd.*, 551 U.S. 308 (2007). That provision requires that the complaint in a private cause of action alleging securities fraud show that "the inference of scienter [is] at least as compelling as any opposing inference one could draw from the facts alleged." *Tellabs, Inc.*, 551 U.S. at 324. *See also Matrixx Initiatives, Inc. v. Siracusano*, 563 U.S. 27, 48 (2011).

Private enforcement of ERISA obligations, perhaps even more than private securities fraud enforcement, "represents a careful balancing between ensuring fair and prompt enforcement of rights under a plan and the encouragement of the creation of such plans." *Dudenhoeffer*, 573 U.S. at 424 (internal quotes omitted). As Justice Frankfurter memorably cautioned, "How best to reconcile competing interests is the business of legislatures, and the balance they strike is a judgment not to be displaced by ours, but to be respected unless outside the pale of fair judgment." *Dennis v. United States*, 341 U.S. 494, 539-40 (1951). One scholar has ventured that this Court is simply "not in a good position to gather and process" the empirical information regarding the frequency of meritless litigation, the difficulty of access by plaintiffs to information, and other factors relevant to striking the "cost-benefit balance" necessary for setting the proper pleading standard. Robert G. Bone,

Plausibility Pleading Revisited and Revised: A Comment on Ashcroft v. Iqbal, 85 Notre Dame L. Rev. 849, 883-84 (2010).

If the U.S. Chamber and others are convinced that discovery and litigation costs warrant adoption of a similar heightened pleading requirement in ERISA cases, this Court has instructed: "These concerns are more appropriately addressed to Congress." *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 277 (2014).

CONCLUSION

For the foregoing reasons, AAJ urges this Court to reverse the judgment of the lower court and reject any proposal to adopt a more stringent pleading requirement.

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Respectfully submitted,

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