No. 19A331

IN THE
SUPREME COURT OF THE UNITED STATES

UNIVERSITY OF PENNSYLVANIA;
INVESTMENT COMMITTEE; JACK HEUER,

Applicants,

v.

JENNIFER SWEDA; BENJAMIN A. WIGGINS;
ROBERT L. YOUNG; FAITH PICKERING;
PUSHKAR SOHONI; REBECCA N. TONER,

Respondents.

Application For A Second Extension Of Time To File A Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

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**APPLICATION TO THE HONORABLE
JUSTICE SAMUEL A. ALITO, JR. AS CIRCUIT JUSTICE**

BRIAN T. ORTELERE
MORGAN, LEWIS & BOCKIUS LLP
1701 Market Street
Philadelphia, PA 19103

CHRISTOPHER J. BORAN
MATTHEW A. RUSSELL
MORGAN, LEWIS & BOCKIUS LLP
77 West Wacker Drive
Chicago, IL 60601

DAVID B. SALMONS
Counsel of Record
MICHAEL E. KENNEALLY
MORGAN, LEWIS & BOCKIUS LLP
1111 Pennsylvania Avenue, N.W.
Washington, DC 20004
(202) 739-3000
david.salmons@morganlewis.com

Counsel for Applicants

CORPORATE DISCLOSURE STATEMENT

The University of Pennsylvania is a private entity and not publicly traded. There is no parent or publicly held company owning 10% or more of its stock.

APPLICATION FOR EXTENSION OF TIME

In accordance with Rules 13.5, 22, and 30.3 of the Rules of this Court, applicants the University of Pennsylvania, its Investment Committee, and Jack Heuer respectfully request a second 30-day extension of time, to and including December 16, 2019, within which to file a petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case. The court of appeals entered its judgment on May 2, 2019, and denied rehearing en banc on July 19, 2019. Because applicants' previous application (No. 19A331) was granted on September 25, 2019, the time within which to file a petition for a writ of certiorari will expire on November 16, 2019, unless extended. The jurisdiction of this Court would be invoked under 28 U.S.C. 1254(1). The opinion of the court of appeals (attached as Exhibit A to application No. 19A331) is reported at 923 F.3d 320. The court's order denying rehearing (attached as Exhibit B to application No. 19A331) is unreported.

1. In the decision below, a divided Third Circuit panel reversed the dismissal of certain claims asserted by respondents under the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1001 *et seq*. The case turns on the appropriate standard for pleading breach-of-fiduciary-duty claims under ERISA.

2. Over the past few years, plaintiffs have brought around twenty remarkably similar ERISA actions against prominent universities around the country. The defendants in these cases sponsor or maintain retirement plans that allow plan participants to save for retirement through individual, self-directed accounts. In this type of individual-account, "defined-contribution" plan, each participant's retirement benefits are ultimately based on the amounts contributed by the participant and his

or her employer to that participant's individual account, plus or minus any income, expenses, gains, or losses that result from the participant's investment decisions and performance. The university plan cases allege, in relevant part, that the university defendants breached ERISA's fiduciary duties of prudence and loyalty by allowing their retirement plans' participants to invest in allegedly imprudent investment options. In particular, the cases allege that defendants unlawfully permitted investment in mutual funds and annuities that purportedly charge excessive administrative fees for recordkeeping or other services or that purportedly underperform given the investment fees charged by those investment options. Because each university plan case is brought as a putative class action, each threatens to impose tens of millions of dollars in liability—or more—on the university defendants. See, *e.g.*, *Sacerdote* v. *N.Y. Univ.*, 328 F. Supp. 3d 273, 279 (S.D.N.Y. 2018) ("According to plaintiffs, NYU's imprudence resulted in losses totaling more than $358 million.").

3. In this case, the district court granted applicants' motion to dismiss respondents' amended complaint in full. *Sweda* v. *Univ. of Pa.*, No. 16-4329, 2017 WL 4179752, at *1 (E.D. Pa. Sept. 21, 2017). The court carefully examined respondents' allegations in light of the pleading standard articulated in *Bell Atlantic Corp.* v. *Twombly*, 550 U.S. 544 (2007), and reinforced in *Ashcroft* v. *Iqbal*, 556 U.S. 662 (2009), as well as circuit court precedent on pleading ERISA breach-of-fiduciary-duty claims. 2017 WL 4179752, at *7-10. Under these standards, the amended complaint failed to state a plausible claim for relief. *Ibid.*

4. A divided Third Circuit panel reversed the dismissal of two counts in the complaint. 923 F.3d 320. In doing so, the majority *faulted* the district court for its reliance on *Twombly*. See *id.* at 326. While the district court, guided by *Twombly*, had observed that applicants' alleged actions are "'just as much in line with a wide swath of rational and competitive business strategy' in the market as they are with a fiduciary breach," the Third Circuit majority believed that *Twombly*'s discussion on this point "is specific to antitrust cases." *Ibid.* (quoting *Twombly*, 550 U.S. at 554). The majority "declined to extend *Twombly*'s antitrust pleading rule to breach of fiduciary duty claims under ERISA." *Ibid.* Having done so, the majority disagreed with applicants' argument that the complaints' allegations fail because they are equally consistent with the prudent and loyal exercise of an ERISA fiduciary's lawful discretion. *Id.* at 332-334. According to the majority, "this argument goes to the merits and is misplaced at this early stage." *Id.* at 333.

5. Judge Roth dissented in relevant part. She stressed that "in enforcing the pleading standards under *Twombly* and *Iqbal*, courts must take great care to allow only plausible, rather than possible, claims to withstand a motion to dismiss." *Id.* at 343 (Roth, J., concurring in part and dissenting in part). Respondents' allegations failed to cross that line between possible and plausible for several reasons. For one, many of the challenged investment options were principally offered to "investors who have a more sophisticated understanding of investment options." *Id.* at 347. For another, applicants worked throughout the proposed class period to reduce the fees

charged by the plan's investment options, showing that applicants were not simply "ignoring" the importance of fee reduction. *Ibid.*

6. The petition for certiorari will demonstrate that the majority's characterization and application of the pleading standard for fiduciary breach claims conflicts with this Court's decisions and those of other federal courts of appeals. This Court has resoundingly rejected any notion that "*Twombly* should be limited to pleadings made in the context of an antitrust dispute." *Iqbal*, 556 U.S. at 684. And it has directed lower courts to "apply the pleading standard as discussed in *Twombly* and *Iqbal*" to ERISA fiduciary-breach claims specifically, emphasizing that "careful, context-sensitive scrutiny of a complaint's allegations" is an "important mechanism for weeding out meritless claims." *Fifth Third Bancorp* v. *Dudenhoeffer*, 573 U.S. 409, 425-426 (2014). The Third Circuit majority did not heed these instructions. But other circuit courts of appeals—much like the district court and Judge Roth here—have faithfully embraced the Court's pleading standards and rejected similarly deficient ERISA claims. See, *e.g.*, *Pension Benefit Guar. Corp. ex rel. St. Vincent Catholic Med. Ctrs. Ret. Plan* v. *Morgan Stanley Inv. Mgmt. Inc.*, 712 F.3d 705 (2d Cir. 2013); *Loomis* v. *Exelon Corp.*, 658 F.3d 667 (7th Cir. 2011); *Meiners* v. *Wells Fargo & Co.*, 898 F.3d 820 (8th Cir. 2018).

7. Applicants respectfully request a second 30-day of extension of time to prepare and print the petition in this case. Between the Court's order granting applicants' first application on September 25, 2019, and the current deadline of Novem-

ber 16, 2019, applicants' counsel have had numerous other pressing professional obligations making it difficult to complete a petition for certiorari by the current deadline. These include: appellate briefs in *Waithaka* v. *Amazon.com, Inc.*, No. 19-1848 (1st Cir.), *Cunningham* v. *Wawa, Inc.*, No. 19-2930 (3d Cir.), *U.S. Futures Exchange, L.L.C.* v. *Board of Trade of the City of Chicago, Inc.*, No. 18-3558 (7th Cir.), and *Rittmann* v. *Amazon.com, Inc.*, No. 19-35381 (9th Cir.); a petition for rehearing in *Children's Hospital Ass'n of Texas* v. *Azar*, No. 18-5135 (D.C. Cir.); a response in opposition to a motion to dismiss in *International Longshore & Warehouse Union* v. *NLRB*, No. 19-70297 (9th Cir.); an answer in opposition to a petition for permission to appeal in *Champion* v. *Amazon.com, Inc.*, No. 19-80128 (9th Cir.); oral argument in *Jogani* v. *Jogani*, No. B288037 (Cal. Ct. App.); and preparation for oral argument in *Heimbach* v. *Amazon.com, Inc.*, No. 18-5942 (6th Cir.), which was cancelled approximately one week before the scheduled date. In addition, applicants' counsel are currently preparing for an upcoming trial in *Troudt* v. *Oracle Corp.*, No. 1:16-cv-00175-REB-SKC (D. Colo.), which requires, among other things, significant pretrial filings and motions practice.

8. For all these reasons, applicants respectfully request that the due date for their petition for writ of certiorari be extended by 30 days, to and including December 16, 2019.

Respectfully submitted,

/s/ David B. Salmons

DAVID B. SALMONS
Counsel of Record
MICHAEL E. KENNEALLY
MORGAN, LEWIS & BOCKIUS LLP
1111 Pennsylvania Avenue, N.W.
Washington, DC 20004
(202) 739-3000
david.salmons@morganlewis.com

BRIAN T. ORTELERE
MORGAN, LEWIS & BOCKIUS LLP
1701 Market Street
Philadelphia, PA 19103

CHRISTOPHER J. BORAN
MATTHEW A. RUSSELL
MORGAN, LEWIS & BOCKIUS LLP
77 West Wacker Drive
Chicago, IL 60601

November 1, 2019

Counsel for Applicants