No. 23-1007

In the Supreme Court of the United States

CASEY CUNNINGHAM, ET AL.,

Petitioners,

v.

CORNELL UNIVERSITY, ET AL.,

Respondents.

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

BRIEF OF ENCORE FIDUCIARY AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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Ed Antonucci, CRC GROUP, *Surge in Excessive Fee Litigation is Impacting Fiduciary Liability Insurance* (Mar. 2021), https://tinyurl.com/bdme8359 30

TABLE OF AUTHORITIES
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ENCORE FIDUCIARY, 2020–2022 *Recordkeeping & Benchmarking Database*, https://encorefiduciary.com/wp-content/uploads/2024/01/Encore-Benchmark-Database-1.30v1.pdf 21

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U.S. Department of Labor, *Tips for Selecting and Monitoring Service Providers for Your Employee Benefit Plan* (2005) 24

INTEREST OF AMICUS CURIAE[1]

Encore Fiduciary (f/k/a Euclid Fiduciary) is a fiduciary insurance underwriting company, serving many of the nation's largest single employer, multiemployer, and government employee benefit plans. Fiduciary insurance policies provide defense and indemnity rights for plan-related legal claims. Because Encore reviews thousands of plan filings and plan materials each year for underwriting purposes, it has developed a deep understanding of industry trends and fiduciary best practices.

In addition to underwriting, Encore provides thought leadership through a variety of channels, including whitepapers, a benchmarking study for recordkeeping fees, and the Fid Guru Blog (https:/encorefiduciary.com/blog). Encore has chronicled dozens of examples in which plaintiffs' firms have manufactured excessive fee and imprudent investment lawsuits against plan sponsors that followed best fiduciary practices. Its commentary on these trends is cited frequently in the press and in court submissions.

Encore underwriters are skilled at vetting plans with prudent fiduciary practices—separating the sheep from the goats, as federal courts are supposed to do at the motion to dismiss stage. *See Fifth Third Bancorp* v. *Dudenhoeffer*, 573 U.S. 409, 425 (2014). As an underwriter for many of the nation's largest plans and close observer of the hundreds of excessive fee lawsuits filed in recent years, Encore has a strong interest in ensuring that courts have the tools to screen

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[1] No counsel for any party authored this brief in whole or in part. No person or entity other than Encore or its counsel made a monetary contribution to fund the brief's preparation or submission.

out abusive lawsuits early in the litigation process. It submits this brief to assist the Court in construing the prohibited transaction provisions in Section 1106 consistent with this objective.

SUMMARY OF ARGUMENT

A significant benefit that many employees receive from their employers is the opportunity to participate in tax-advantaged defined contribution plans like a 401(k) or 403(b) plan. Employers create, administer, and often contribute directly to these voluntary plans to help employees save for retirement. Participants can invest the funds in their individual plan accounts in a wide range of investment vehicles for capital preservation, growth, or other objectives.

Defined contribution plans have been a boon for workers, helping tens of millions of employees accumulate a nest egg for retirement. In recent years, however, uncontrolled litigation has turned defined contribution plans into a liability trap. An astonishing number of the nation's largest defined contribution plans have been targeted by lawsuits alleging that plan fiduciaries caused participants to overpay for third-party services or offered investments that underperformed alternative options. These "excessive fee" or "imprudent investment" lawsuits, brought on a class-wide basis, are extremely time-consuming and expensive for defendants to litigate. As a result, they generate tremendous settlement pressure.

Excessive fee lawsuits have become a lucrative way for a small group of plaintiffs' firms to monetize ERISA's fiduciary provisions. The key problem is that many fiduciary breach cases are allowed to proceed into expensive discovery even when the plans follow fiduciary best practices. Plaintiffs' lawyers design

complaints to withstand a motion to dismiss—and thus leverage settlement pressure—by alleging fees that are false or misleading or performance that is taken out of context, and then comparing those figures to misleading and false fee or investment benchmarks. As the few cases that have reached summary judgment or trial reflect, plaintiffs often never have plausible proof of fiduciary imprudence when they bring a case. Plan sponsors deserve a pleading standard to consistently weed out such meritless lawsuits.

To date, the surge in abusive litigation has focused on ERISA's fiduciary duty provisions, found in Section 1104. But Petitioners in this case—who have already lost on their Section 1104 claim—ask the Court to construe a neighboring provision to create a form of duplicative liability that would be even *more* susceptible to misuse. That provision, Section 1106(a), targets potential conflicts of interest between a plan and so-called "parties in interest." On Petitioners' reading, the *mere fact* that a plan uses a third-party recordkeeper (or any service provider) is a facial violation of Section 1106 and opens the doors to discovery.

Petitioners' construction of Section 1106 would turn ERISA's prohibited transaction provision on its head and open the door to widespread abuse. To begin, the prohibitions on causing transactions between a plan and a "party in interest" do not apply circularly to prohibit arrangements that make the service provider a "party in interest" in the first place. Section 1106 targets potentially suspect transactions with plan insiders. It does not turn arm's-length contracts with third parties into radioactive sources of liability.

Even if Section 1106(a) did facially prohibit all contracts with service providers, the text of that section

requires allegations that the fees paid to the service provider are unreasonable to state a claim. Experience with years of abusive litigation under Section 1104 shows that the plaintiffs' bar has promoted a false narrative of excessive fees that courts often accept without a critical eye. Without rigorous scrutiny to determine whether such excessive fee allegations are plausible, Section 1106 will become an end-run around meaningful limits on Section 1104 claims.

The ensuing flood of meritless fiduciary-breach lawsuits would have grave consequences. Already, litigation has upended ERISA's intended balance between protecting plan participants and encouraging sponsors to offer these voluntary benefits. If plaintiffs can sue under Section 1106 without alleging any meaningful benchmark for fees or investments, then sponsors and fiduciaries can be sued at any time—essentially forced into a litigation audit by private lawyers. Underwriting defined contribution plans would become a nightmare. Ultimately, participants and beneficiaries would suffer.

In sum, whether brought as an imprudence claim, a prohibited transaction claim, or both, courts evaluating excessive fee claims must rigorously assess whether it is plausible that a plan's fees *are* excessive. Otherwise, Section 1106 will join Section 1104 as a lever for litigation abuse.

ARGUMENT

I. ERISA Has Been Abused To Extract Unjustified Excessive Fee Settlements.

Something is rotten in ERISA litigation. Enacted in 1974, the Employee Retirement Income Security Act seeks to establish "standards of conduct, responsibility, and obligation for fiduciaries of employee

benefit plans." 29 U.S.C. § 1001(b). At the same time, Congress wanted to make sure that ERISA did not become so onerous that "administrative costs" or "litigation expenses" would discourage employers from offering benefit plans. *Conkright* v. *Frommert*, 559 U.S. 506, 517 (2010). To meet these goals, ERISA imposes process-oriented standards for fiduciaries, and gives fiduciaries substantial discretion in making investment and service provider decisions for their plans. *Hughes* v. *Nw. Univ.*, 595 U.S. 170, 177 (2022).

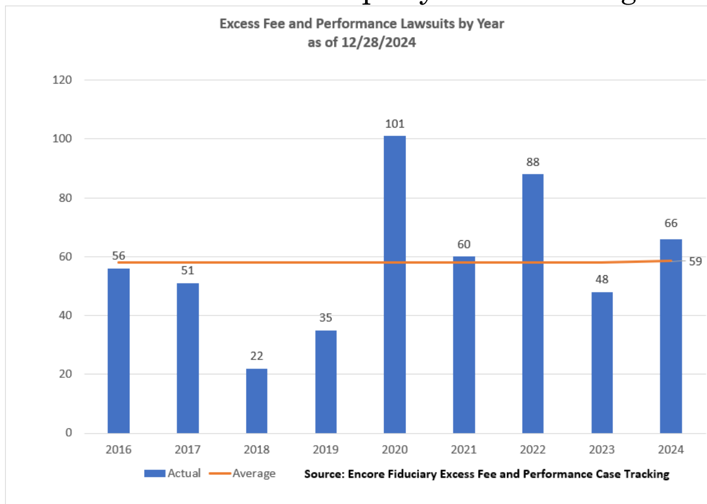
In the past decade, the plaintiffs' bar has turned this statutory framework on its head with a flood of lawyer-driven class actions targeting plan sponsors and fiduciaries. Ostensibly, these lawsuits challenge the process plan fiduciaries follow to oversee fees, investment options, and other plan functions. In practice, the lawsuits have created a *de facto* performance standard, under which fiduciaries that do not obtain the very lowest rates a plaintiff can allege in the market, or offer the very best performing investments, are presumed guilty and forced to exonerate themselves following intrusive and expensive discovery.

1. The most common abusive ERISA lawsuits are "excessive fee" cases alleging that plan fiduciaries allowed plans to overpay for recordkeeping services. Every defined contribution plan has a recordkeeper to provide the plan and participants with a variety of administrative services. Complaints ask courts to infer that the fiduciaries wasted participants' money on recordkeeping by alleging (often misleadingly) that a plan paid high recordkeeping fees, and comparing those inflated fees to a handful of self-selected plans that purportedly paid less at some point in time.

In addition to recordkeeping fees, ERISA plaintiffs often allege that fiduciaries selected or failed to remove investment options imprudently. Typically, plaintiffs allege short-term performance data for the plan's options and compare that data to a few of the best performing investments in broadly similar categories. Again, the goal is to convince courts that fiduciaries failed to consider or monitor supposed warning signs regarding the plan's investments.

Each year, plaintiffs' firms file scores of cases against sponsors and fiduciaries of large plans based on these theories. Plaintiffs have sued plans using low-cost, blue-chip recordkeepers; plans that have conducted recent competitive RFPs; and plans that negotiated for "most favored customer" treatment. Plaintiffs have sued plans offering ultra low-cost, top-rated investment options like the BlackRock target date funds, the Fidelity Freedom funds, or the TIAA Traditional annuity. Few large plans, service providers, or investment options are immune.

The following chart illustrates the 500+ such cases filed since 2016 – 59 cases per year on average:



Although the data reflects a natural ebb and flow as firms process a backlog of suits and look for new targets, new lawsuits hit dockets every month. Mallika Mitra, PLANADVISER, *Major 401(k) Litigators are "Back in Action," With More Entering the Fray* (Apr. 1, 2024); Daniel Aronowitz, PLANADVISER, *401(k) Litigation Continues at "Fever Pitch"* (Jan. 9, 2024).[2]

2. Excessive-fee lawsuits target the largest plans in the country by total assets—which explains why these plans are such attractive targets. Since 2016, over half of plans with $1+ billion in assets have been targeted by at least one excessive fee lawsuit. Some have been sued multiple times. Although there are different ways to parse the data, plans with $500 million or more in assets have close to a 10% chance of being sued in a given year. That is higher than the probability that a publicly traded company will draw a securities lawsuit, which typically requires a decline in stock price.

Compared to the thousands of retirement plans in the country, the plans targeted in excessive fee lawsuits have very low fees, solid investment options, high participation rates, and healthy employer matches. They employ independent consultants

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[2] The plaintiffs' bar has begun expanding outside the traditional excessive-fee model as well, with cases targeting plan forfeiture practices blessed by the IRS (30+ lawsuits in the last twelve months) and cases targeting pension risk transfers (11 lawsuits). An emerging type of claim is based on allegations that group health plan sponsors failed to control prescription drug fees negotiated by pharmacy benefit managers, in effect treating sponsors as the guarantors of the lowest possible fees for every drug or medical service offered under a health plan. Both plaintiff and defense lawyers have predicted an avalanche of similar litigation if courts allow the first PBM test cases to proceed.

versed in investing trends and offerings. Virtually every plan that has been sued has experienced significant asset appreciation over the last ten years.

Like an upside-down Lake Wobegon—where all the children are above average—it does not make sense that fiduciaries at hundreds of the most sophisticated and well-run plans in the country would have simultaneously committed fiduciary malpractice. But the onslaught of excessive-fee lawsuits is not about genuinely excessive fees or sub-par investments. Rather, it reflects a business model that exploits ERISA's fiduciary provisions for financial gain.

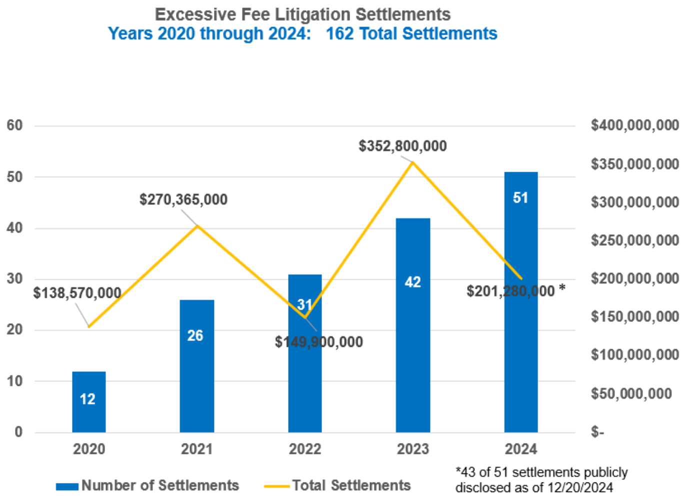
3. There are two fundamental drivers of this model: an inconsistent pleading standard and high and asymmetric discovery costs. Just prevailing on a motion to dismiss can cost upwards of $2 million. In one recent case, for example, the plaintiffs filed an original and three amended complaints, the last of which was finally denied on futility grounds. *Boyette* v. *Montefiore Med. Ctr.*, 2024 WL 1484115 (S.D.N.Y. Apr. 5, 2024). The allegedly excessive fee in the *Boyette* case started out at $230 per participant before falling to just $41 per participant in the fourth complaint. *Id.* at *6; *Boyette* v. *Montefiore Med. Ctr.*, 2023 WL 7612391, at *2 (S.D.N.Y. Nov. 13, 2023).

Although prevailing on the pleadings can be expensive, it is when a plaintiff beats a motion to dismiss—as over 70% do—that defense costs truly skyrocket. The "prospect of discovery in a suit claiming breach of fiduciary duty is ominous," exposing the ERISA fiduciary to "probing and costly inquiries and document requests about its methods and knowledge." *PBGC ex rel. St. Vincent Cath. Med. Ctrs. Ret. Plan* v. *Morgan Stanley*, 712 F.3d 705, 719 (2d Cir. 2013). Defendants

must also hire experts, who cost several millions of dollars. In Encore's experience, defense costs for excessive fee claims can run $5 million to $8 million through summary judgment. Taking a case all the way to trial can cost $10 million to $15 million.

Excessive fee cases are also risky in terms of exposure. Because the cases proceed as class actions, claimed liability can easily reach hundreds of millions of dollars. And it can take many years to reach final judgment. As of 2023, for instance, most cases filed since 2016 remained in litigation. This included 20% of cases filed in 2017 and 40% filed in 2019. CHUBB LTD., *Excessive Litigation Over Excessive Plan Fees in 2023*, at 3, https://tinyurl.com/5n7njmdv.

Faced with skyrocketing defense costs, years of litigation, and unpredictable liability, it is no surprise that most excessive fee cases result in settlements even when the plan fiduciaries followed a prudent process. As Encore's tracking shows, there have been over $1 billion in settlements since 2020:



Most are for little more than the cost of defense.

Although nearly all excessive fee cases that survive the pleading stage settle, the plaintiffs have lost resoundingly at the last six fiduciary breach cases that reached trial.[3] But the simple fact is that the industry cannot afford to try every excessive fee case that makes it past a motion to dismiss. Despite flimsy allegations and a few high-profile losses, filing cases en masse remains a very profitable endeavor. That is why a rigorous pleading standard is crucial to weed out meritless claims.

II. Section 1106 Is Not A Shortcut Around Section 1104 In Excessive Fee Cases.

Until now, most excessive fee litigation has arisen under ERISA Section 1104, which establishes a fiduciary duty of prudence. A fiduciary acts prudently by making reasonable decisions using the care and diligence expected under the circumstances. 29 U.S.C. § 1104(a)(1)(B). Recently, this Court called for rigorous scrutiny of claims that a fiduciary violated Section 1104 while selecting service providers or plan investments. The Court emphasized the need for a "context specific" inquiry and instructed courts to "give due regard to the range of reasonable judgments a fiduciary may make." *Hughes*, 595 U.S. at 177.

Before this Court, Petitioners do not discuss Section 1104. Instead, having lost on their Section 1104 claim at summary judgment, Petitioners argue that a

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[3] *See In re Prime Healthcare ERISA Litig.*, No. 8:20-cv-1529 (C.D. Cal.) (judgment entered Aug. 24, 2024); *Mattson* v. *Milliman Inc.*, No. 2:22-cv-0037 (W.D. Wash.) (July 30, 2024); *Lauderdale* v. *NFP Retirement, Inc.*, No. 8:21-cv-0301 (C.D. Cal.) (Mar. 12, 2024); *Mills* v. *Molina Healthcare, Inc.*, No. 2:22-cv-1813 (C.D. Cal.) (Mar. 27, 2024); *Nunez* v. *B. Braun Medical Co.*, No. 5:20-cv-4195 (E.D. Pa.) (Dec. 22, 2023); *Vellali* v. *Yale Univ.*, No. 3:16-cv-1345 (D. Conn.) (July 13, 2023).

neighboring section of ERISA effectively nullifies the discretion recognized in *Hughes*. Petitioners argue that they can bring a duplicative excessive fee claim under Section 1106(a)(1)(C), which provides that—

> Except as provided in section 1108 of this title: A fiduciary with respect to a plan shall not cause the plan to engage in a transaction, if he knows or should know that such transaction constitutes a direct or indirect furnishing of goods, services, or facilities between the plan and a party in interest.

29 U.S.C § 1106(a)(1)(C) (cleaned up). That reading is absurd and unsupported, and would greatly exacerbate litigation abuse.

According to Petitioners, Section 1106(a)(1)(C) is satisfied by alleging that (1) defendants are fiduciaries; (2) a recordkeeper provides services to the plan, and (3) defendants caused the recordkeeper to "furnish" those services. Pet Br. 2, 20. But every defined contribution plan has fiduciaries, uses service providers, and enters a contract with the service provider to "furnish" the requested services. Thus, this amounts to giving the plaintiffs' bar an automatic right to sue.

Section 1106(a)(1)(C) does not give plaintiffs the right to sue any time a fiduciary causes a plan to contract with a service provider for services. To the contrary, it is by virtue of the contractual relationship to provide services that *other* transactions with the service provider are subject to Section 1106 in the first place. Nor are participants out of luck under this reading. If a participant wishes to challenge the fees paid to a service provider, that claim simply must be pled, and proved, under the fiduciary duty of prudence. There is no automatic shortcut under Section 1106.

1. This Court's most detailed examination of Section 1106 is *Lockheed Corp.* v. *Spink*, 517 U.S. 882 (1996). There, the Court considered whether an employer's decision to cause retirement benefits to be paid in exchange for a waiver of employment claims was prohibited by Section 1106(a)(1)(D). The Court held that the payment of benefits was not a "transaction" in "the sense that Congress used that term." *Id.* at 892–93. What the "transactions" prohibited in Section 1106(a) "have in common," the Court explained, is that each "generally involve[s] uses of plan assets that are potentially harmful to the plan." *Id.*

As in *Spink*, merely using a recordkeeper or other service provider poses no "special risk" to plan assets and "cannot reasonably be said" to be presumptively harmful to the plan. *Id.* ERISA expressly contemplates the use of service providers. *E.g.*, 29 U.S.C. §§ 1023(a)(4), 1102(c), 1111(a)(2). And as noted above, every defined contribution plan uses recordkeepers to provide basic administrative services. Given their ubiquity, it makes no sense to say that routine transactions with plan recordkeepers are so dangerous that they warrant categorical prohibition.

Perversely, it would be far more challenging for sponsors to administer defined contribution plans themselves versus using a professional third-party recordkeeper. Merely hiring the personnel and establishing the infrastructure necessary to administer a plan with thousands of participants would be a massive undertaking—directly contrary to excessive fee litigation's supposed goal of lowering costs for participants.

2. The structure of ERISA's "party in interest" definition confirms that a fiduciary that merely causes

the plan to contract with a service provider for services does not violate Section 1106(a). As discussed above, Section 1106(a) applies to transactions between the plan and a "party in interest." The term "party in interest" includes the following categories:

> (A) fiduciaries, counsel, or employees of a plan;
>
> (B) a person providing services to a plan;
>
> (C) an employer whose employees are covered by a plan;
>
> (D) an employee organization whose members are covered by a plan; or
>
> (E) the majority owner of the entities described in subparagraphs (C) or (D).

29 U.S.C § 1002(14). It would be bizarre if one group covered by this definition—*i.e.*, service-provider entities that qualify under subparagraph (B)—were presumptively unlawful because Section 1106 prohibited the transactions that made the entities "parties in interest" in the first place. And it would be especially bizarre to single out service providers for this disfavored treatment, since the risks to the plan from transacting with a service provider for services are generally far lower than the risks of transacting with a plan insider covered by subparagraphs (A), (C), (D) or (E) of Section 1002(14). *Cf. Spink*, 517 U.S. at 893.

By contrast, there is nothing bizarre in interpreting Section 1106(a)(1)(C) to apply only where the party-in-interest entity still would qualify as a party in interest absent the challenged transaction. Service-provider parties in interest would remain subject to Section 1106(a)'s other prohibitions. *See Sellers* v. *Anthem Life Ins. Co.*, 316 F. Supp. 3d 25, 36–37 (D.D.C. 2018). A servicer-provider party in interest, for

instance, might implicate Section 1106(a)(1)(B) by obtaining a loan from a plan. *E.g.*, *Nieto* v. *Ecker*, 845 F.2d 868, 873 (9th Cir. 1988). But that is a very different claim than the services-based claim Petitioners bring here.

Notably, some plaintiffs, including plaintiffs represented by Petitioners' counsel, have tried to bring excessive fee claims against recordkeepers under parts of the statute other than Section 1106(a)(1)(C). *E.g.*, *Sweda* v. *Univ. of Pa.*, 923 F.3d 320, 339 (3d Cir. 2019) (rejecting prohibited transaction claims pled under subparagraphs (A) and (D) of Section 1106(a)(1)). Petitioners, however, do not pursue claims outside of Section 1106(a)(1)(C)—and correctly so, because none of the other provisions in Section 1106(a) apply to a recordkeeping contract.

3. This construction of Section 1106(a)(1)(C) as applied to service-provider parties in interest is consistent with the way courts have interpreted ERISA in other contexts. Many decisions recognize the need to avoid circularity and absurd results, and look to text, purpose, and structure rather than reading fragments of the statute in isolation.

In addition to the common-sense reading this Court gave Section 1106 in *Spink*, for instance, the Court has declined to apply the statutory definition of the term "employee" in Section 1002(6) to decide whether a plaintiff was entitled to bring a claim under Section 1132(a). In context, the Court recognized, the statutory definition of the term was "completely circular and explains nothing." *Nationwide Mut. Ins. Co.* v. *Darden*, 503 U.S. 318, 323 (1992). Instead of woodenly applying the statutory definition, therefore, the Court adopted a common-sense reading that would neither

"thwart the congressional design" nor "lead to absurd results." *Id.*

The same is true of the reading urged here. It does not thwart the congressional design or create absurdity to hold that the transactions that make a service provider a "party in interest" under Section 1002(14) cannot be bootstrapped into a prohibited transaction claim under Section 1106(a)(1)(C). To the contrary, it would be "nonsensical" to read Section 1106(a)(1) "to prohibit transactions for services that are essential for defined contribution plans, such as recordkeeping and administrative services." *Albert* v. *Oshkosh Corp.*, 47 F.4th 570, 584–85 (7th Cir. 2022) (citing *Spink*).

Likewise, this Court has held that the term "reasonable" functions differently in Section 1401(a)(3)(A) of ERISA than in Section 1401(a)(3)(B). *Concrete Pipe & Prods. of Cal., Inc.* v. *Constr. Laborers Pension Tr. for S. Cal.*, 508 U.S. 602, 634–35 (1993). It would be inappropriate, given how Section 1002(14) and Section 1106 interact, to use the selection or retention of a service provider as both the predicate for "party in interest" status and the basis for claimed liability under Section 1106(a)(1)(C). Simply put, Section 1106(a) "cannot be used to put an end to run-of-the-mill service agreements, opening plan fiduciaries up to litigation merely because they engaged in an arm's length deal with a service provider." *Ramos* v. *Banner Health*, 1 F.4th 769, 787–88 (10th Cir. 2021).

Finally, the construction Encore urges is consistent with the way courts analyze related questions under ERISA. It is widely recognized, for example, that service providers—even those that are functional fiduciaries—do not owe fiduciary duties when negotiating compensation at arm's length. *E.g.*, *Teets* v.

Great-West Life & Annuity Ins. Co., 921 F.3d 1200, 1213 (10th Cir. 2019); *Danza* v. *Fid. Mgmt. Tr. Co.*, 533 F. App'x 120, 124 (3d Cir. 2013). Petitioners' reading of Section 1106, however, threatens to "effectively unravel[]" this rule by making those same service providers liable for engaging in prohibited transactions. *Sellers*, 316 F. Supp. 3d at 36–37.

III. Even If Section 1106 Applied In Excessive Fee Cases, Claims Require Plausible Allegations That The Fees Are Excessive.

Even if the Court finds that Section 1106(a)(1)(C) applies merely because a plan contracts with a service provider for services, a plaintiff bringing such a claim still must plausibly allege that the fee was unreasonable to state a claim. This pleading requirement flows from Section 1106's text. It also maintains the "important role" for motions to dismiss in weeding out meritless claims. *Fifth Third Bancorp* v. *Dudenhoeffer*, 573 U.S. 409, 425 (2014). Although *Dudenhoeffer* involved a claim under Section 1104, not Section 1106, plaintiffs bringing excessive fee claims can simply "repackage their imprudent fiduciary claims" as "prohibited transaction claims." *Divane* v. *Nw. Univ.*, 953 F.3d 980, 992 (7th Cir. 2020), *vacated on other grounds by Hughes*, 595 U.S. at 177. Accordingly, unless courts apply rigorous scrutiny to both claims, Section 1106 will simply become an end-run around Section 1104, opening new avenues for abuse.

A. Courts should apply the same standard for excessive fee claims under Section 1106 as under Section 1104.

The text of Section 1106(a) confirms that, as with a Section 1104 claim, a prohibited transaction claim cannot proceed to discovery without plausible

allegations of excessive fees. ERISA expressly states that the transactions listed in Section 1106(a) are prohibited "[e]xcept as provided" in Section 1108. 29 U.S.C. § 1106(a). Section 1108, in turn, states that contracts for plan-related services are *not* prohibited transactions if the fees paid are reasonable. *Id.* § 1108(b)(2). As Respondents' brief comprehensively demonstrates, this means that a plaintiff must allege facts showing that compensation was unreasonable to state a claim under Section 1106(a)(1)(C).

At the pleading stage, ERISA plaintiffs are quick to point out that participants lack direct evidence of the processes that sponsors and fiduciaries use to negotiate fees or select investments. *See, e.g.*, Pet. Br. 41 (arguing that plaintiffs cannot "plead facts they do not know and which they do not, absent discovery, have access to"). But that is a non sequitur. ERISA has robust disclosure requirements to facilitate provision of relevant fee information to participants. By law, for example, plans must provide plan documents, account statements, and other materials showing the fees participants pay and the investment options available. 29 C.F.R. § 2550.404a-5. Participants have 24/7 access to additional relevant information through plan websites. They can also request additional information, like an annual report. 29 U.S.C. § 1024(b).

Encore and other underwriters routinely rely on this type of evidence to evaluate plans during the underwriting process. And in Section 1104 cases plaintiffs' firms have been pleading facts based on this evidence for years—albeit often in a highly misleading manner. *See infra* Part III.B.

Even Petitioners' amici admit that Section 1106 claims should include plausible allegations of

excessive fees. The United States, for example, notes that under Section 1106(a)(1)(C), the plausibility standard may require a plaintiff to plead factual content to overcome the "obvious alternative explanation" that the fees paid to the recordkeeper are reasonable. U.S. Br. 29–30. Another amicus supporting Petitioners argues that a Section 1106(a) claim generally requires allegations that "if proved, would show that an adequate investigation would have revealed to a reasonable fiduciary that the investment at issue was improvident [*i.e.*, imprudent]." AARP Br. 6 (quoting *St. Vincent*, 712 F.3d at 718, a Section 1104 case). Yet another states that "if the facts alleged are sufficient to sustain claims for a breach of the fiduciary's duty of prudence" under Section 1104, then "that set of factual allegations should be sufficient to sustain a prohibited transaction claim." Pension Rights Ctr. Br. 8. As these formulations reflect, the pleading analysis under Section 1104 and Section 1106 focuses on the same underlying question:

Do the facts alleged in the complaint make it plausible that a plan paid excessive fees for services?

B. Courts should not credit false or misleading allegations.

Although it is important to hold that excessive fee claims under Section 1104 and Section 1106 must meet the same pleading standard, that in itself will not stop litigation abuse. In hundreds of cases filed under Section 1104, the plaintiffs' bar has misrepresented circumstantial evidence to feed a misleading narrative that plans are paying outrageous amounts for recordkeeping. Given this history, excessive fee allegations require "careful, context-sensitive scrutiny"

(*Dudenhoeffer*, 573 U.S. at 425), no matter how the plaintiff labels the claim.

Misleading fees allegations. Excessive fee complaints routinely misrepresent basic facts about the amounts participants pay for plan recordkeeping. Two common problems are (1) including transaction fees (*i.e.*, individual fees for buying or selling investments or using optional services), and (2) including revenue sharing payments (*i.e.*, investment fees shared with the recordkeeper), even when the plaintiff knows from readily available information that the plan rebates some or all of these payments to participants.

In one case against MidAmerican Energy Company, for example, the complaint alleged that plan participants paid a shockingly high fee ranging "between $326 and $526 per plan participant." *Matousek* v. *MidAmerican Energy Co.*, 51 F.4th 274, 278–79 (8th Cir. 2022). Yet those numbers did not include substantial revenue-sharing credits rebated to participants or other non-recordkeeping services. Based on participant disclosures, the actual recordkeeping fee was only $32 to $48. *Id.*

Trader Joe's has been sued twice for excessive fees. The first complaint alleged a fee of "roughly $140 per participant." *Marks* v. *Trader Joe's Co.*, 2020 WL 2504333, at *5 (C.D. Cal. Apr. 24, 2020). The plan's recordkeeping contract—made available to the plaintiff's lawyers—limited the fee to $11,650 plus $48 per participant. *Id.* After that case was dismissed, a second firm filed suit alleging that the $48 fee was unreasonable because it boxed in the plan to pay the same amount per participant and because the plan was collecting tens of millions of dollars more than that amount. Again, this was misleading. The plan

collected revenue through investment fees and rebated the excess to participants. *Kong* v. *Trader Joe's Co.*, 2020 WL 5814102, at *5 (C.D. Cal. Sept. 24, 2020).

Davita, Inc. was sued for allegedly excessive recordkeeping fees ranging from $50 to $96 per participant. The recordkeeping contract and fee disclosures showed that the actual recordkeeping fees were $37. *Teodosio* v. *DaVita, Inc.*, No. 1:22-cv-0712 (D. Colo.), Dkt. 35 at 12–13. Plaintiffs arrived at the $50–$96 number by aggregating transaction fees and recordkeeping fees. Further, although the plan used a combination of direct charges and investment fees to pay for recordkeeping, excess fees were rebated to participants. Because the plaintiffs had small amounts invested in the plan, they never paid more than $10.50. *Id.* at 7. The strategy nevertheless paid off and the plaintiff law firm extracted a $2 million settlement after the plan sponsor lost the motion to dismiss.

Likewise, in a case against Humana, the plaintiffs alleged that the plan paid between $59 and $67 per participant instead of an allegedly reasonable rate of $40. *Moore* v. *Humana Ins. Co.*, 3:21-cv-0232 (W.D. Ky.), Dkt. 1 ¶ 79. In response to the lawsuit, defense lawyers disclosed the service agreements to plaintiffs. These contracts revealed a $37 recordkeeping fee in 2014; a $23 fee in 2019; and a $28 fee in 2021—well below the allegedly reasonable rate. *Id.*, Dkt. 23-1. In response to this information, the plaintiffs moved the goalposts, now asserting that a reasonable fee was $20 per participant. *Id.*, Dkt. 17 ¶ 72.

Finally, in a case against the Kroger Company, the plaintiffs alleged that plan participants paid an excessive $32 per participant for recordkeeping. As discussed below, such a fee is lower than most plans

in America today. But Kroger also subsidized $27 of the amount of the recordkeeping fee for each participant. As reflected on their account statements, Kroger plan participants paid only $5 per year for recordkeeping services. *Sigetich* v. *Kroger Co.*, No. 1:21-cv-0697 (S.D. Ohio), Dkt. 40-13 ¶¶ 3-5 & Dkt. 40-14.

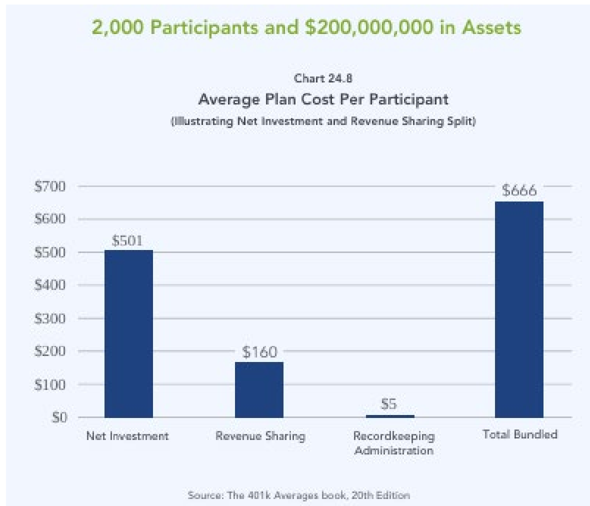
Misleading fee comparisons. A second fundamental problem with excessive fee cases is that they compare plan fees to a handful of cherry-picked alternatives. But to assess whether fees are too high, it is critical to have a valid and reliable benchmark for comparison.

Encore recently conducted a study of the average recordkeeping fees paid by large defined contribution plans around the country. Based on 2022 data for over 2,500 plans, Encore determined that the average large plan with $500 million to $1 billion in assets pays from $35 to $66 per participant for recordkeeping; with $1 billion to $5 billion, $26 to $53; and with more than $5 billion, between $20 and $40. ENCORE FIDUCIARY, 2020–2022 *Recordkeeping & Benchmarking Database*, https://encorefiduciary.com/wp-content/uploads/2024/01/Encore-Benchmark-Database-1.30v1.pdf. As these statistics show, in most cases the amounts allegedly paid by plan participants for recordkeeping—even if treated as true for purposes of a motion to dismiss—do not plausibly support a breach of fiduciary duty.

Instead of citing broad national surveys, which would give an accurate and statistically reliable picture of the fee landscape for retirement plans, plaintiffs' firms cherry-pick or mischaracterize evidence, hoping that courts will see these issues as fact questions.

Historically, for example, many complaints cited an industry resource, the *401k Averages Book*, to allege that plans with just $5 million in assets paid $35 or less per participant. That was the case in a 2020 lawsuit against PNC Bank, which was sued for a supposedly "shocking" breach of fiduciary duty based on alleged per-participant recordkeeping fees of $55 to $85. The complaint alleged that a proper recordkeeping rate was $14 to $21 per participant. The source for this assertion was a citation to the *401k Averages Book* (20th Ed.) for the proposition that "the average cost for recordkeeping and administration in 2017 for plans much smaller than the Plan . . . was $35 per participant." *Johnson* v. *PNC Financial Servs. Grp., Inc.*, No. 2:20-cv-1493 (W.D. Pa.), Dkt. 1 ¶ 25.

As Encore and others have pointed out for years, however, the low numbers in the past editions of the 401k Averages Book do not include hundreds of dollars of unrebated revenue sharing, which participants pay in addition to direct recordkeeping costs.



Including these unrebated revenue sharing costs, the true totals paid for recordkeeping in small plans are

many times higher than the fees paid by participants at PNC Bank.

Complaints in dozens of cases made similarly misleading allegations based on the 401k Averages Book. Finally, in its 2024 edition, the book's publisher changed its methodology to report both direct and asset-based fees in a single number rather than reporting direct recordkeeping fees separately. Hopefully, this will prevent distortion of these figures, even though the plaintiffs' bar continued to cite prior editions after defense counsel identified the error.

Another common tactic is to cite a discovery stipulation by Fidelity in litigation involving Fidelity's own sponsored plan to assert that all large plans should pay no more than $14-21 per participant. Fidelity has made clear that the stipulation was "for the limited purpose of resolving a discovery dispute." *Harmon* v. *Shell Oil Co.*, No. 3:20-cv-0021 (S.D. Tex.), Dkt. 134 at 3. Regardless, the value of the undefined services Fidelity provided to *its* plan does not inform how much a different plan would pay for different services. *See id.* (stating that the stipulation "certainly does not reflect the value of the recordkeeping services that Fidelity provides to *different plans* pursuant to *different recordkeeping contracts* for *different sets of services*"). Plaintiffs continue to mislead by citing the stipulation anyway.

The most deceptive method of purporting to establish that a plan has excessive recordkeeping fees is with a chart of random plans—something that shows up repeatedly in excessive fee litigation. *Cf.* J.A. 42-46 (¶¶ 83-87). The plans listed in these charts are always changing, and they frequently reflect a wide range of

reasonable fees. Moreover, the fees listed for these plans are often wrong.

For example, in a suit against Southeastern Grocers, the plaintiffs offered a chart alleging that the $1.48 billion Netflix 401(k) plan pays only $4.17 per participant. *Ulch* v. *Se. Grocers LLC*, No. 3:23-cv-1135 (M.D. Fla.), Dkt. 15 ¶ 92. That is hard to believe. But even if that number were correct—say, if Netflix chose to subsidize recordkeeping costs for its participants—a comparison to a few random plans does not give context and perspective as to whether the challenged plan has excessive fees. An underwriter would never consider unverified evidence from five random plans ranging from $4 to $22 per participant as a valid benchmark. Courts should not accept such evidence as plausible proof either.

Finally, many plaintiffs make rote allegations that recordkeeping for large plans has become a "commodity," implying that it is unnecessary to consider the scope or quality of the services provided. Some appellate courts have even accepted the truth of these assertions. *E.g.*, *Mator* v. *Wesco Distribution, Inc.*, 102 F.4th 172, 186 (3d Cir. 2024). But recordkeeping services can vary based on a variety of factors, and the Department of Labor has long advised fiduciaries to consider factors like the quality and scope of services when selecting service providers. *See* U.S. Department of Labor, *Tips for Selecting and Monitoring Service Providers for Your Employee Benefit Plan* (2005) ("Cost is only one factor to be considered in selecting a service provider."). Regardless, ERISA does not guarantee that a plan participant will pay the lowest rate available to any plan anywhere in the country.

Misleading investment comparisons. Plaintiffs challenging the prudence of plan investment options use similarly misleading comparisons to target low-cost, widely used investments. In 2022, for example, there was a wave of lawsuits against large plans that offered BlackRock LifePath target date funds. Robert Steyer, PENSIONS & INVESTMENTS, *401(k) Participants Sue 6 Companies Over Use of BlackRock Target-Date Funds* (Aug. 3, 2022). These cases alleged that the top-rated BlackRock TDFs underperformed compared to certain other target date funds over three- and five-year periods. But fiduciaries can choose from dozens of off-the-shelf target date funds, in addition to custom offerings. By definition, most target date funds will not be among the top performers among all such funds in any given period.

Here too, context was key. The BlackRock funds took a more conservative approach than some target date funds, but trailed by modest amounts compared to those funds in three and five-year lookbacks. To be sure, most if not all investments with more aggressive equity allocations have performed well during the last ten years, but that is because equities have been in a historic bull market, not because it is imprudent to take a more conservative approach. *See* Fid Guru Blog, *Debunking ERISA's Big Lie That BlackRock LifePath Investment Performance Is "Deplorable"* (Sept. 13, 2022). Despite no plausible allegations that large numbers of plans were leaving the BlackRock funds because of concerns about underperformance, and no meaningful basis to compare the BlackRock funds to the supposedly better-performing alternatives, one court allowed the claims to proceed. *See Trauernicht* v. *Genworth Fin. Inc.*, 2023 WL 5961651 (E.D. Va. Sept. 13, 2023).

As this example reflects, cases against ERISA sponsors and fiduciaries are particularly susceptible to hindsight abuse. In a rising market, conservative investment options may seem less attractive compared to the best performers. On the other hand, if there is a sustained downturn in the equity markets, the aggressive investments will perform less well compared to the same conservative alternatives. The inevitable tradeoffs between risk and reward and the risk of hindsight bias is why a five-year snapshot "does not suffice to plausibly plead an imprudent decision—largely a process-based inquiry—that breaches a fiduciary duty." *Smith* v. *CommonSpirit Health*, 37 F.4th 1160, 1166 (6th Cir. 2022).

Similarly, in a market where the cost of recordkeeping has been trending downward, merely pleading that a plan had higher fees than a handful of other plans does not plausibly show that the fees were unreasonable. Paying high fees or offering underperforming investments *can* be a sign of imprudence, but only if it is plausible that fees are actually and persistently high, or performance actually and persistently low, measured against a robust and meaningful benchmark. Further, there must not be obvious reasons why a reasonable fiduciary could have chosen to stick with the challenged options.

Misleading junk science. When cases reach discovery without plausible allegations of excessive fees, "careful case management" is insufficient to weed out those groundless cases early in the discovery process. *Bell Atl. Corp.* v. *Twombly*, 550 U.S. 544, 559 (2007). To the contrary, the same pathologies present at the pleading stage continue at summary judgment—at which point sponsors and fiduciaries have been subjected to years of needless and wasteful discovery.

In the PNC case discussed above, for instance, the plaintiffs filed an expert report from a former recordkeeper employee, who alleged an arbitrary low recordkeeping amount of $19 to $22 based his own personal benchmark. The expert invented the "reasonable" amount based on his gut feel from his fifteen years of "experience," and then found plans to support his fee target. He had no evidence that any plan in the plan universe actually paid the contrived benchmark upon which he based his opinions. *McCauley* v. *PNC Fin. Servs. Grp., Inc.*, 2024 WL 3091754, at *2-4 (W.D. Pa. June 21, 2024).

As another example, the court in the Humana litigation excluded the plaintiffs' expert for applying "no reliable methodology" to calculate recordkeeping fees. *Moore* v. *Humana Inc.*, 2024 WL 2402118, at *5–8 (W.D. Ky. May 23, 2024), *appeal dismissed*, 2024 WL 4370732 (6th Cir. July 11, 2024). The expert essentially reasoned by speculative inference "that, because the six smaller plans were able to achieve a fee in the $12–$20 range, it follows that Humana should have also been able to negotiate for fees in that range." *Id.*

As a final example, in this case, the district court determined at summary judgment that Petitioners failed to provide any admissible evidence that the plan could have obtained lower recordkeeping fees. As in the PNC and Humana cases, the court excluded Petitioners' experts for basing their assessment of a purportedly reasonable fee on their gut "experience" and a random sampling of other universities. *Cunningham* v. *Cornell Univ.*, 2019 WL 4735876, at *8–10 (S.D.N.Y. Sept. 27, 2019), *aff'd*, 86 F.4th 961, 982 (2d Cir. 2023). Indeed, one of the experts excluded was the same expert excluded in the PNC case.

IV. Failing To Weed Out Abusive Excessive Fee Cases Harms Plans and Participants.

As this brief has demonstrated, there are serious problems with many recent excessive fee complaints. If courts do not demand correct and plausible allegations of excessive fees or imprudent investments—based on a broad, representative snapshot of the market, not a few cherry-picked, unrelated, and dubious comparators selected by plaintiffs' lawyers—then firms will continue to file meritless cases, and plans and participants will suffer.

1. Motions to dismiss in ERISA cases are supposed to serve the "important function" of separating the "plausible sheep" from the "meritless goats." *Dudenhoeffer*, 573 U.S. at 425. After *Hughes*, some courts have heeded this Court's guidance and applied closer scrutiny to excessive fee claims. *E.g.*, *Smith*, 37 F.4th at 1164; *Albert*, 47 F.4th at 579–82.

Other courts, however, still refuse to apply the rigorous scrutiny called for by *Hughes*. Too many, for example, conclude that the "appropriateness" of benchmarks cannot be assessed at the pleading stage. *E.g.*, *Somers* v. *Cape Cod Healthcare, Inc.*, 2024 WL 4008527, at *5 (D. Mass. Aug. 30, 2024) ("the Court will not delve into disputes regarding the appropriateness of benchmarks at this stage"). Courts that do not demand meaningful comparators at the pleading stage are inviting litigation abuse. The rule that a complaint's factual allegations are presumed to be true does not mean that a court must close its eyes to judicial experience and common sense. *Ashcroft* v. *Iqbal*, 556 U.S. 662, 679 (2009).

Courts also continue to accept fake fee allegations contradicted by plan documents or disclosures. In one

recent case, for instance, the court observed that the fees in the plan disclosures ($22 to $40) appeared to contradict the fees alleged in the complaint ($46 to $65), but credited the numbers in the complaint despite this "unremarked" discrepancy. *Singh* v. *Deloitte LLP*, 123 F.4th 88, 96 n.11 (2d Cir. 2024). Even though the court dismissed the claims on other grounds, it is wrong to allege false fees. Courts should demand correct fees from participant account statements and disclosures as part of the plausibility standard.

Further, courts continue to issue inconsistent rulings when presented with allegations that fail to show a valid benchmark for comparison. In *Johnson* v. *Parker-Hannifin Corp.*, 122 F.4th 205 (6th Cir. 2024), for example, the panel held that an investments claim could proceed even though the claim rested on a misleading comparison of the performance of the intentionally conservative Northern Trust Focus funds to three intentionally more aggressive funds and the S&P 500 index. As noted above, funds that have more aggressive equity allocations will have higher returns in a bull market. *See id.* at 222–23 (Murphy, J., dissenting). Fiduciaries do not breach the duty of prudence just because, in retrospect, they did not pick the "best performing fund." *Meiners* v. *Wells Fargo & Co.*, 898 F.3d 820, 823 (8th Cir. 2018).

2. If this Court accepts Petitioners' interpretation of Section 1106, debates over pleading standards and valid benchmarks will largely go by the wayside. As discussed, plaintiffs will bring Section 1106 claims based on the mere fact that the plan uses a service provider, then leverage discovery on those claims to find new theories or strike a quick settlement. Plaintiffs' firms will be free to initiate the equivalent of a litigation audit of any plan. Years of litigation under

Section 1104 leaves no doubt that many more good plans with prudent fiduciary processes will be sued.

Without a way to separate sheep from goats at the pleading stage, fiduciary underwriters' underwriting models do not work. Indeed, insurers have already raised premiums because of the surge in cases under Section 1104. Ed Antonucci, CRC GROUP, *Surge in Excessive Fee Litigation is Impacting Fiduciary Liability Insurance (*Mar. 2021), https://tinyurl.com/bdme8359. In addition to raising premiums, insurers raised retentions from $1 million to as high as $15 million for many policies.

Encore (formerly Euclid) provided competition for large plans and moderated the effect of the premium and retention increases in the market that developed from skyrocketing lawsuits in 2019 to 2022. But the fever pitch of litigation against plans is unsustainable. If insurers cannot collect enough premium to match the cost of defending meritless cases, that will put quality employee benefit plans at risk.

Similar dynamics played out in the employee stock ownership plan (ESOP) market. Before excessive fee litigation, the plaintiffs' bar brought a wave of lawyer-driven cases targeting ESOPs and alleging improper valuations and breaches of fiduciary duty. *See, e.g.*, *Retirement Plans Comm. of IBM* v. *Jander*, 589 U.S. 49 (2020); *Dudenhoeffer*, 573 U.S. 409. The continued targeting of leveraged ESOPs by plaintiffs' law firms has caused the market for ESOP fiduciary coverage to evaporate. Many leading fiduciary carriers, including Encore, have stopped insuring these plans after realizing that leveraged ESOPs have a high probability of litigation and cannot be insured profitably at normal fiduciary premiums.

3. Difficulty procuring adequate insurance coverage is not just a problem for sponsors. It also makes it harder to convince qualified individuals to serve as plan fiduciaries because fiduciaries have personal liability. ERISA expressly prohibits plans from paying for or indemnifying fiduciaries for any responsibility, duty, or obligation imposed by the statute, 29 U.S.C. § 1110, so insurance is a necessity for ERISA plans.

Increased premiums and retentions also make it more difficult for sponsors to offer generous benefits. This means less choice and fewer benefits for those who value the option to participate in defined contribution plans. Participants who prefer conservative investment options, actively managed investments, or stable relationships with plan vendors would likely be very surprised at the waves of litigation seeking to treat these features of a plan as *per se* indicators of imprudence. But that is the message courts send plan sponsors when they allow thinly pled claims of circumstantial imprudence to proceed. *See* Fid Guru Blog, *Has ERISA Class Action Litigation Made a Positive Difference for Plan Participants?* (Oct. 31, 2023).

In sum—whether brought under Section 1104 or Section 1106—claims for excessive fees must include allegations that genuinely suggest that fees *are* excessive. If this Court lets plaintiffs' firms recast fiduciary prudence claims as prohibited transactions to avoid alleging any proof at all, then the result will be more lawsuits manufactured to extract settlements rather than brought to address legitimate allegations of fiduciary imprudence.

CONCLUSION

The Court should affirm the judgment below.

Respectfully submitted,

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January 3, 2025