Nos. 07-3605, 08-1224

In the United States Court of Appeals
for the Seventh Circuit

DENNIS HECKER, *et al.*,

Plaintiffs-Appellants,

vs.

DEERE & CO., *et al.*,

Defendants-Appellees.

On Appeal from the United States District Court
for the Western District of Wisconsin (Shabaz, J.)

Dist. Ct. Civil Action No. 06-C-719-S

Brief of The ERISA Industry Committee, The National Association of Manufacturers, and the American Benefits Council as *Amici Curiae* in Support of Appellees

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Fed. R. App. P. and Circuit Rule 26.1 Disclosure Statement

The undersigned, counsel of record for *Amici* The ERISA Industry Committee, The National Association of Manufacturers, and the American Benefits Council hereby furnish the following information in accordance with Rule 26.1 of the Federal Rules of Appellate Procedure and Rule 26.1 of the Circuit Rules of the United States Court of Appeals for the Seventh Circuit:

(1) The full name of every party or *amicus* the attorney represents:

The ERISA Industry Committee, The National Association of Manufacturers, and the American Benefits Council.

(2) If such party or *amicus* is a corporation:

(i) Its parent corporation, if any:

None. The ERISA Industry Committee, The National Association of Manufacturers, and the American Benefits Council have no parent corporations.

(ii) A list of stockholders that are publicly held companies owning 10% or more of stock in the party:

None. No publicly held company has any ownership interest in The ERISA Industry Committee, The National Association of Manufacturers, and the American Benefits Council.

(3) The names of all law firms whose partners or associates have appeared for the party or *amicus* in the case or are expected to appear for the party in this Court:

Covington & Burling LLP

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The ERISA Industry Committee, The National Association of Manufacturers, and the American Benefits Council

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STATEMENT OF INTEREST OF THE *AMICI CURIAE*

The ERISA Industry Committee ("ERIC"), The National Association of Manufacturers (the "NAM"), and the American Benefits Council (the "Council") (collectively, the "Associations") are associations whose members maintain, administer, and provide services to pension and other employee benefit plans governed by the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), 29 U.S.C. § 1001 *et seq.* Pursuant to their motion for leave under Federal Rule of Appellate Procedure 29, the Associations respectfully submit this brief as *amici curiae* in support of Appellees.

ERIC is a non-profit corporation representing America's largest private employers. The NAM is the nation's largest industrial trade association, representing small and large manufacturers in every industrial sector and in all 50 states. The Council is a broad-based non-profit organization with approximately 250 members, primarily large U.S. employers. The Associations' respective members provide benefits to millions of active and retired workers and their families through employee benefit plans governed by ERISA, including defined contribution plans.

Members of the Associations are currently litigants in pending lawsuits presenting the same issues as this appeal—*i.e.*, allegations that fiduciaries caused or allowed defined contribution plans to incur excessive costs. Indeed, each of the Associations' memberships include litigants in pending cases initiated by complaints that are largely identical to the complaint under review here.

The Associations participate as *amici curiae* in cases with the potential for far-reaching effects on employee benefit plan design or administration.[1] The decision for ERIC to file an *amicus* brief is made by its Legal Committee based on established criteria for review that limit such participation to significant cases in which ERIC will present views that will not be presented by the parties or other potential *amici*. The NAM and the Council follow similar criteria to decide whether to participate as *amici*. The Associations believe that this case meets those criteria.

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[1] See, e.g., *LaRue v. DeWolff, Boberg & Assocs., Inc.*, 128 S. Ct. 1020, 1026 (2008) (Roberts, C.J., concurring in part and in judgment) (citing ERIC's *amicus* brief); *Aetna Health, Inc. v. Davila*, 542 U.S. 200 (2004); *Cooper v. IBM Personal Pension Plan*, 457 F.3d 636 (7th Cir. 2006).

DISCUSSION

I. Participant-Directed Defined Contribution Plans Require Administrative and Investment Management Services

ERISA distinguishes between two types of retirement plans: defined contribution plans (also known as individual account plans) and defined benefit plans. A defined contribution plan is a pension plan that provides benefits to a participant based solely on the balance in the bookkeeping account that the plan maintains for the participant. The participant's account reflects his or her interest in the contributions made to the plan and the participant's share of the plan's investment experience and expenses. Other pension plans are defined benefit plans; typically, the benefit under such a plan is determined by a formula set forth in the plan. As a result, the plan's investment experience and the administrative expenses borne by the plan directly affect a participant's benefit under a defined contribution plan, but not under a defined benefit plan. *See* 29 U.S.C. §§ 1002(34), (35).

The fastest growing retirement plans are defined contribution plans with cash or deferred arrangements, commonly referred to as 401(k) plans after the relevant Internal Revenue Code provision, 26 U.S.C. § 401(k). *See* Gov't Accountability Office, Testimony of Barbara

Bovbjerg before House Committee on Education and Labor, at 2 (Mar. 6, 2007).[2] A 401(k) plan is a defined contribution plan that contains a qualified cash or deferred arrangement that allows participants to elect to contribute part of their compensation to the plan on a pre-tax basis; employer contributions are often made to the plan as well. Joint Committee on Taxation, *Present Law and Background Relating to Employer-Sponsored Defined Contribution Plans and Other Retirement Arrangements*, at 7 (Feb. 26, 2002).[3] The tax-advantages of pre-tax contributions make 401(k) plans a very efficient and attractive means of saving for retirement. In recent years, defined contribution plans have displaced defined benefit plans as the dominant form of pension plan in the private sector. *See* Bovbjerg Testimony at 2. Nearly $2 trillion are invested in 401(k) plans. Employee Benefits Research Inst., *History of 401(k) Plans: An Update*, at 3 (Feb. 2005).[4]

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[2] This testimony is available at http://edlabor.house.gov/testimony/030607BarbaraBovbjergtestimony.pdf.

[3] This report is available at http://www.house.gov/jct/x-9-02.pdf.

[4] This report is available at http://www.ebri.org/pdf/publications/facts/0205fact.a.pdf.

Today, most 401(k) plans allow each participant to allocate all or part of the participant's account balance among several designated investment options. *See* Joint Comm. Report at 11; Bovbjerg Testimony at 2. As a result, the plan's investment experience does not affect all participants uniformly; the effect of investment experience on each participant's benefit depends on the participant's investment allocation decisions.

The day-to-day operation of a 401(k) plan requires administrative services such as recordkeeping, accounting, legal, and trustee services. *See* U.S. Department of Labor ("DOL"), Employee Benefits Security Admin., *A Look at 401(k) Plan Fees*, at 4.[5] Recordkeeping consists of enrolling employees in the plan, processing participants' investment allocation decisions, preparing and mailing participants' periodic account statements, and other related administrative activities. Bovbjerg Testimony at 12. For large 401(k) plans, this requires the maintenance of individual accounts for tens of thousands of participants, as well as liaison with the employer, trustee, and multiple investment managers. In addition, 401(k) plans may offer other

[5] This report is available at http://www.dol.gov/ebsa/pdf/401kFeesEmployee.pdf.

services, "such as telephone voice-response systems, access to a customer service representative, educational seminars, retirement planning software, investment advice, electronic access to plan information, daily valuation and online transactions." *Look at 401(k) Plan Fees* at 4.

Administrative services for 401(k) plans frequently are provided by third-party vendors, including firms that specialize in providing trustee services, recordkeeping, or both. In recent years, the increasing trend has been for the plan, rather than the employer, to bear the costs of such services. *See* Bovbjerg Testimony at 13; Sarah Holden & Michael Hadley, *The Economics of Providing 401(k) Plans: Services, Fees, and Expenses*, at 5 (Inv. Co. Inst. Nov. 2006).[6]

The investment options offered by the plans that allow participants to give investment directions vary from plan to plan, but frequently include a mix of stable value products (such as guaranteed investment contracts), money market funds, employer stock funds, bond funds, and equity funds, and funds that include a mixture of investments. Investment funds may be offered through structures such as separate

[6] This report is available at http://www.ici.org/401k/fm-v15n7.pdf.

accounts (holding just one plan's assets) and collective trusts (holding assets of multiple plans). Because mutual funds offer diversified investment portfolios and publicly-available information that can help participants to make informed investment decisions, mutual funds are especially common investment options. Investment advisory fees and other expenses associated with investment management typically are borne by the plan as charges against the invested assets. *See* Bovbjerg Testimony at 13.

When administrative and investment management fees are borne by a 401(k) plan itself (rather than by the employer), they diminish the plan's assets and the value of participants' accounts. As a result, the impact of such expenses on the long-term values of 401(k) plans and their accounts has been on the radar screen of the Executive and Legislative Branches for more than a decade. *See*, *e.g.*, David Cay Johnston, "Earning It; 401(k) Fees Nibble Now, With the Bite Felt Later," *N.Y. Times* (Nov. 16, 1997) (discussing then-recent DOL hearings on 401(k) plan fees)[7]; DOL, Pension and Welfare Benefits

[7] This article is available at http://query.nytimes.com/gst/fullpage.html?res=9505E3D91538F935A25752C1A961958260.

Admin., *Study of 401(k) Plan Fees and Expenses* (Apr. 13, 1998)[8]; Bovbjerg Testimony (providing testimony to congressional hearing on 401(k) plan fees).

II. The *Twombly* Pleading Standard Should Be Applied to ERISA Fiduciary Breach Claims, Especially to Boilerplate Lawsuits

Lawsuits alleging widespread fiduciary breaches in the administration of defined contribution plans are potentially complex and costly cases that justify careful scrutiny under the standards recently established by the Supreme Court in *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955 (2007), which requires a pleading to allege facts giving rise to a plausible entitlement to relief. This lawsuit is just one of a recent torrent of ERISA cases that demonstrates the need for such careful scrutiny. The Court should so hold in resolving this appeal.

A. This Case Is One of Fifteen Lawsuits Making Virtually Identical Allegations

Between September 2006 and August 2007, a single law firm filed this action and fourteen other putative class actions alleging fiduciary breaches concerning the administration and investment options of defined contribution plans sponsored by major employers:

[8] This report is available at http://www.dol.gov/ebsa/pdf/401krept.pdf.

1. *Will v. General Dynamics Corp.*, No. 06-698-WDS (S.D. Ill.), filed Sept. 11, 2006 (complaint available at http://www.spencerfane.com/_FileLibrary/FileImage/Willv.GeneralDynamics.pdf)

2. *Abbott v. Lockheed Martin Corp.*, No. 06-701-MJR (S.D. Ill.), Sept. 11, 2006 (http://www.spencerfane.com/_FileLibrary/FileImage/Abbottv.LockheedMartin.pdf)

3. *Beesley v. International Paper Co.*, No. 06-703-DRH (S.D. Ill.), Sept. 11, 2006 (http://www.spencerfane.com/_FileLibrary/FileImage/Beasleyv.International Paper.pdf)

4. *Kanawi v. Bechtel Corp.*, No. 06-5566 (N.D. Cal.), Sept. 11, 2006 (http://www.spencerfane.com/_FileLibrary/FileImage/Kanawietalv.Bechtel CorporationetalComplaint.pdf)

5. *Loomis v. Exelon Corp.*, No. 06CV4900 (N.D. Ill.), Sept. 11, 2006 (http://www.spencerfane.com/_FileLibrary/FileImage/LoomisvExelon.pdf)

6. *Martin v. Caterpillar Inc.*, No. 1:07cv1009 (C.D. Ill.), formerly No. 2:06-cv-04208-SOW (W.D. Mo.), Sept. 11, 2006 (http://www.spencerfane.com/_FileLibrary/FileImage/Martinv.Caterpillar.pdf)

7. *Taylor v. United Technologies Corp.*, No. 3:06-cv-01494 (D. Conn.), Sept. 22, 2006 (http://www.spencerfane.com/_FileLibrary/FileImage/Taylorv.UnitedTechnologies.pdf)

8. *Waldbuesser v. Northrop Grumman Corp.*, No. 06-cv-06213 (C.D. Cal.), Sept. 28, 2006

9. *Spano v. Boeing Co.*, No. 06-743-JLF (S.D. Ill.), Sept. 28, 2006 (http://www.spencerfane.com/_FileLibrary/FileImage/ Spanov.Boeing.pdf)

10. *George v. Kraft Foods Global, Inc.*, No. 1:07cv1713 (N.D. Ill.), formerly No. 06-798-DRH (S.D. Ill.), Oct. 16, 2006 (http://www.spencerfane.com/_FileLibrary/FileImage/Georgev.KraftComplaint.pdf)

11. *Hecker v. Deere & Co.*, No. 06-C-0719-S (W.D. Wis.), Dec. 8, 2006

12. *Renfro v. Unisys Corp.*, No. 2:07-cv-02098-BWK (E.D. Pa.), formerly No. 2:06-cv-08268-FMC-FFM (C.D. Cal.), Dec. 28, 2006 (http://www.spencerfane.com/_FileLibrary/FileImage/Renfrovs.UnisysCorp.pdf)

13. *Kennedy v. ABB, Inc.*, No. 2:06-cv-04305-NKL (W.D. Mo.), Dec. 29, 2006 (http://www.spencerfane.com/_FileLibrary/FileImage/Kennedyv.ABBInc.pdf)

14. *Nolte v. CIGNA Corp.*, No. 2:07-cv-02046-HAB-DGB (C.D. Ill.), Feb. 27, 2007 (http://www.spencerfane.com/_FileLibrary/FileImage/NoltevCIGNAComplaint.pdf)

15. *Tibble v. Edison Int'l*, No. CV07-05359-SVW-AGR (C.D. Cal.), Aug. 27, 2007[9]

The 401(k) plans at issue in these fifteen lawsuits differ in the number and types of investments offered to participants, in the degree to which the employer bears plan expenses, and in the third-party

[9] Since 2006, other law firms have jumped on the bandwagon with additional class action lawsuits alleging that fiduciaries of defined contribution plans allowed excessive expenses to be paid. *See*, *e.g.*, *Young v. General Motors Investment Mgmt. Corp.*, No. 07 Civ. 1994 (BSJ) (S.D.N.Y.), filed Mar. 8, 2007; *Cormier v. RadioShack Corp.*, No. 4:07-cv-00285-Y (N.D. Tex.), May 14, 2007; *Gipson v. Wells Fargo & Co.*, No. 07-cv-1970 (D.D.C.), Nov. 1, 2007; *Braden v. Wal-Mart Stores, Inc.*, No. 08-cv-3109 (W.D. Mo.), Mar. 27, 2008.

vendors that provide services to the plan. What these plans have in common, however, is that each of them holds more than $1 billion in assets. *See* Second Amended Complaint ("SAC") ¶¶ 39, 46 (Deere plans hold $2.5 billion in assets).[10]

Despite differences among these defined contribution plans, the complaints initiating all fifteen lawsuits are substantially alike. Indeed, the fifteen original complaints share extensive passages *in haec verba.* At the heart of each complaint is a series of paragraphs (virtually identical from one complaint to the next) making allegations about "Revenue Sharing"—*i.e.*, "the transfer of asset-based compensation from brokers or investment management providers … to administrative service providers … in connection with 401(k) and other types of defined contribution plans." SAC ¶¶ 68-87; *compare*, *e.g.*, *Loomis* compl. ¶¶ 60-77.[11] All of these complaints allege, in more or less the same terms, that "participants and beneficiaries of the Plans have been charged fees and

[10] *See*, *e.g.*, *Abbott* compl. ¶ 45 (Lockheed Martin plans: $14 billion); *Taylor* compl. ¶ 57 (United Technologies plans: $14 billion); *George* compl. ¶ 38 (Kraft plan: $5 billion); *Beesley* compl. ¶ 150 (International Paper plans: $4 billion); *Loomis* compl. ¶ 36 (Exelon plan: $3 billion); *Renfro* compl. ¶ 43 (Unisys plan: $2.3 billion).

[11] *See also*, *e.g.*, *Abbott* compl. ¶¶ 69-87; *Spano* compl. ¶¶ 73-93; *Beesley* compl. ¶¶ 102-19; *Taylor* compl. ¶¶ 86-104.

expenses that include monies with which to make Revenue Sharing payments." SAC ¶ 84; *compare*, *e.g.*, *Renfro* compl. ¶ 80 (same).[12] These passages are followed by essentially identical paragraphs alleging that "Revenue Sharing is not disclosed to Plan participants." SAC ¶¶ 88-90(d); *compare*, *e.g.*, *Kennedy* compl. ¶¶ 83-85(d).[13]

All the complaints seek monetary damages under ERISA Section 502(a)(2), 29 U.S.C. § 1132(a)(2), and equitable relief under Section 502(a)(3), *id.* § 1132(a)(3). *Compare* SAC ¶¶ 103-130 *with Kennedy* compl. ¶¶ 97-124.[14] Count I, seeking monetary relief under Section 502(a)(2), consists of paragraphs alleging conclusions rather than facts. The SAC alleges that "Defendants owe the Plans, the participants and beneficiaries, and the Classes extensive fiduciary duties," SAC ¶ 104, which are described in 15 subparagraphs, *id.* ¶ 104(a)-(o).[15] For

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[12] *See also Kennedy* compl. ¶ 79; *Kanawi* compl. ¶ 79; *Loomis* compl. ¶ 76; *Taylor* compl. ¶ 103; *Abbott* compl. ¶ 86.

[13] *See also Abbott* compl. ¶¶ 88-90(d); *Spano* compl. ¶¶ 94-96(D); *Beesley* compl. ¶¶ 120-22(d).

[14] *See also Renfro* compl. ¶¶ 98-126; *Kanawi* compl. ¶¶ 117-35; *Abbott* compl. ¶¶ 131-49; *Taylor* compl. ¶¶ 150-68; *Will* compl. ¶¶ 126-44; *George* compl. ¶¶ 101-19.

[15] Identical passages in the other complaints demonstrate that these are boilerplate. *Compare*, *e.g.*, *Kennedy* compl. ¶¶ 98(a)-(o); *Kanawi* compl.

example, Defendants are alleged to owe a duty "[t]o ensure that the fees and expenses incurred by the Plans are reasonable and incurred for the sole and exclusive benefit of Plan participants and beneficiaries." *Id.* ¶ 104(f). In the following paragraph (with subparts), the SAC merely alleges that the defendants "breached their fiduciary obligations" by failing to discharge the enumerated duties, "among other conduct to be proven at trial." *Id.* ¶ 105. Even with the subparts, this paragraph amounts to nothing more than a barebones recitation of the elements of a cause of action—an approach repudiated by *Twombly*. *See* 127 S. Ct. at 1964-65 (Rule 8 requires "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do"). The subparts add no substance, but merely allege in conclusory fashion that the defendants agreed to, allowed, and/or failed to discover unreasonable plan fees. SAC ¶¶ 105(a)-(k).[16]

Although at first blush the complaints might seem likely to contain specific details—the SAC, after all, contains 130 paragraphs on 38

¶¶ 118(a)-(o); *Renfro* compl. ¶¶ 99(A)-(O); *Abbott* compl. ¶¶ 132(a)-(p); *Taylor* compl. ¶¶ 151(a)-(p).

[16] Defendants in the counterpart lawsuits are alleged to have committed the same breaches. *See*, *e.g.*, *Kennedy* compl. ¶¶ 99(a)-(k); *Kanawi* compl. ¶¶ 119(A)-(K); *Taylor* compl. ¶¶ 152(a)-(l).

pages—their rhetorical flourishes and boilerplate passages merely camouflage the complaints' utter lack of substance. One district court that was confronted with these allegations (including allegations that remain in the SAC) noted examples of "surplusage that renders the Complaint more like an opening statement at trial rather than a short and plain statement of Plaintiffs' claims." *Martin v. Caterpillar, Inc.*, No. 07-cv-1009, slip op. at 4 (C.D. Ill. May 15, 2007) (Appendix A hereto) (citing *Martin* compl. ¶¶ 1, 98).

Having opened the courthouse doors with the assertion that 401(k) plan fees are "unreasonable," Plaintiffs in this lawsuit and its counterparts have eagerly deployed discovery tools to obtain untold thousands of documents and hundreds of pages of transcribed deposition testimony in hopes of finding actionable wrongdoing. Notably, those efforts have not been confined to the topic of revenue sharing: plaintiffs have applied post-filing investigatory efforts toward top-to-bottom scrutiny of plans' administration and investments over lengthy periods of time. Thus, for example, Plaintiffs here argue against dismissal in part because they purport to have discovered that the Deere plans' vendor Fidelity "controlled the float and benefited from

float interest on Plan accounts," Pls. Br. at 50—an issue that appears nowhere in the SAC.[17]

Bald assertions that 401(k) plan fees are "too high" or "unreasonable" can be readily made about any plan, as present circumstances demonstrate. The plaintiffs' heavy reliance on boilerplate allegations and the absence of specific allegations strongly suggest that these cases were initiated as fishing expeditions. *See DM Research v. College of Am. Pathologists*, 170 F.3d 53, 55 (1st Cir. 1999) ("Conclusory allegations in a complaint, if they stand alone, are a danger sign that the plaintiff is engaged in a fishing expedition.").[18]

B. Scrutiny Under *Twombly* Is Warranted in ERISA Fiduciary Breach Lawsuits

"Few issues in civil procedure jurisprudence are more significant than pleading standards, which are the key that opens access to courts."

[17] "Float" refers to short-term interest earned by a plan's cash holdings, which typically occurs when cash is briefly held in clearing accounts while in the process of contribution into, or distribution out of, the plan's investment funds. The DOL has recognized that fiduciaries may properly agree to allow vendors to retain such short-term interest as additional compensation. *See* DOL, Employee Benefits Security Admin., *Field Assistance Bulletin 2002-3* (Nov. 5, 2002) (available at http://www.dol.gov/ebsa/regs/fab_2002-3.html).

[18] *See also EEOC v. Harvey L. Walner & Assocs.*, 91 F.3d 963, 971-72 (7th Cir. 1996) (noting that "discovery is not to be used as a fishing expedition").

Phillips v. County of Allegheny, 515 F.3d 224, 230 (3d Cir. 2008). In this appeal, Plaintiffs assert that this Court "has expressed doubt that the Supreme Court's recent decision in *Bell Atlantic* [*Corp.*] *v. Twombly*, 127 S. Ct. 1955 (2007), changed federal pleading requirements." Pls.' Br. at 14 n.4 (citing *EEOC v. Concentra Health Servs., Inc.*, 496 F.3d 773, 782 n.4 (7th Cir. 2007), and *Airborne Beepers & Video, Inc. v. AT&T Mobility LLC*, 499 F.3d 663, 667-68 (7th Cir. 2007)). Plaintiffs are wrong, both in their reading of this Court's precedents and in dismissing the significance of *Twombly*. Plaintiffs' arguments do, however, underscore the need for a clear statement by this Court about *Twombly*'s significance and application, especially in the ERISA context.

The prevalence of "strike suits" led Congress to enact the Private Securities Litigation Reform Act, Pub. L. No. 104-67, 109 Stat. 737 (1995), which included provisions intended to dispose of meritless claims at a threshold stage. Although the PSLRA does not apply to ERISA actions, *Pugh v. Tribune Co.*, 521 F.3d 686, 692 (7th Cir. 2008); *Rogers v. Baxter Int'l, Inc.*, No. 06-3241, 2008 WL 867741, at *2 (7th

Cir. Apr. 2, 2008), that does not mean that courts are powerless to protect defendants from "strike suits" under ERISA.

In *Twombly*, the Supreme Court ruled that when allegations in a complaint could not (even if true) give rise to a plausible claim of entitlement to relief, "this basic deficiency should … be exposed at the point of minimum expenditure of time and money by the parties and the court." *Twombly*, 127 S. Ct. at 1966 (citations omitted). Requiring plaintiffs to establish a plausible basis for their claim—*i.e.,* grounds for providing relief—at the pleading stage "serves the practical purpose of preventing a plaintiff with a largely groundless claim from tak[ing] up the time of a number of other people, with the right to do so representing an *in terrorem* increment of the settlement value." *Id.* at 1959. The Supreme Court explicitly acknowledged that "discovery can be expensive," and reminded courts of their obligation to take their gate-keeping function seriously. *Id.* Courts therefore should require "some specificity in pleading before allowing [this] potentially massive factual controversy to proceed." *Id.* at 1967.[19]

[19] Several citations in *Twombly* suggest that its analysis was influenced by writings of members of this Court. *See Twombly*, 127 S. Ct. at 1966-68 (citing, *inter alia*, *Car Carriers, Inc. v. Ford Motor Co.*, 745 F.2d 1101

More specifically, the Supreme Court recognized that the only factual averments in *Twombly* that could support the claimed anti-competitive agreement consisted of allegations that the defendants had engaged in similar parallel conduct. *See id.* at 1962. The Court held that such alleged conduct might be consistent with an illegal agreement among the defendants, but, standing alone, they did not plausibly suggest that the defendants had in fact conspired. *See id.* at 1964, 1966.

The Third Circuit recently observed that "the *Twombly* decision focuses our attention on the 'context' of the required short, plain statement." *Phillips*, 515 F.3d at 232. "Context matters in notice pleading. Fair notice under Rule 8(a)(2) depends on the type of case—some complaints will require at least some factual allegations to make out a 'showing that the pleader is entitled to relief, in order to give the defendant fair notice of what the … claim is and the grounds upon which it rests.'" *Id.* (quoting *Twombly*, 127 S. Ct. at 1964, ellipsis in original).

(7th Cir. 1984); *Asahi Glass Co. v. Pentech Pharms., Inc.*, 289 F. Supp. 2d 986 (N.D. Ill. 2003) (Posner, J., sitting by designation); and Frank H. Easterbrook, *Discovery as Abuse*, 69 B.U. L. REV. 635 (1989)).

The concerns expressed by the Supreme Court in *Twombly* led the Second Circuit to suggest that "whatever adjustment in pleading standards results from [*Twombly*] is limited to cases where massive discovery is likely to create unacceptable settlement pressures." *Iqbal v. Hasty*, 490 F.3d 143, 157 (2d Cir. 2007). While it does not appear that *Twombly* should be so limited, even if it is limited to such cases, this would be one of them. This lawsuit and its counterparts demonstrate that the concerns that prompted the Supreme Court to decide *Twombly* as it did also apply to fiduciary breach claims under ERISA.

Claims concerning the administration of 401(k) plans typically include decisions and events that occurred over long periods of time. *See*, *e.g.*, SAC ¶ 34 (alleging that the trust agreement at issue dates back to 1990); *Tussey v. ABB, Inc.*, No. 06-04305-CV-NKL, 2008 WL 379666, at *1, *9 (W.D. Mo. Feb. 11, 2008) (noting that the plan trustee had been selected in 1995, and denying a Rule 12 motion based on the statute of limitations that would have precluded damages based on events that occurred before December 2000). These 401(k) lawsuits also concern the conduct of multiple actors—the plans' fiduciaries, recordkeepers, trustees, and investment managers. Because of their

lengthy temporal scope and the multiplicity of actors, these lawsuits engender the kind of costly "massive discovery" described by the Second Circuit. *Iqbal*, 490 F.3d at 157.

The Bill of Costs in this case illustrates the point: between December 2006 and June 2007, Deere and Fidelity incurred more than $200,000 in *taxable costs alone*—excluding their attorneys' fees. *See* Pls.' Br., Tab D.

In addition, as putative class actions, these lawsuits entail the potential risk of heightened stakes and unwarranted settlement pressures inherent to such aggregate litigation. *See In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1298-99 (7th Cir. 1995).

In those respects, these ERISA lawsuits are much more like antitrust conspiracy cases than simple tort or civil rights actions. Thus, fiduciary breach allegations of the kind asserted in this case and its counterparts warrant searching analysis under *Twombly*, rather than the "liberal" standard that Plaintiffs request, Pls.' Br. at 14.[20]

Plaintiffs contend that *Twombly* did not change federal pleading requirements. According to Plaintiffs, they merely need to give "fair

[20] The Seventh Circuit decision on which Plaintiffs rely to request a "liberal" standard, *Baker v. Kingsley*, 387 F.3d 649 (7th Cir. 2004), applied the now-rejected "no set of facts" standard. *Id.* at 664 (citing *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)).

notice" of claims and "plausibly suggest" their entitlement to relief. Pls. Br. at 14. Yet both decisions Plaintiffs cited (*Concentra Health* and *Airborne Beepers*) affirmed Rule 12 dismissals; neither decision required the Court to determine the scope and meaning of *Twombly*.

In particular, because *Concentra Health* affirmed dismissal on the basis that the EEOC's allegations were insufficient even under pre-*Twombly* standards, its aside expressing doubt whether *Twombly* "changed the level of detail required by notice pleading," 496 F.3d at 782 n.4, was merely *dicta*. Moreover, the decision in *Concentra Health* recognized that *Twombly* requires plaintiffs to allege *more* than merely facts that would be *consistent with* actionable wrongdoing. *Id.* at 777. As for *Airborne Beepers*, its statement that *Twombly* means "that at some point the factual detail in a complaint may be so sketchy that the complaint does not provide the type of notice of the claim to which the defendant is entitled under Rule 8," 499 F.3d at 667, is far from a holding that boilerplate, conclusory allegations of fiduciary breaches will pass Rule 8 muster.

The more instructive Rule 8 precedent to be considered is the Court's recent decision in *Limestone Development Corp. v. Village of Lemont*,

520 F.3d 797 (7th Cir. 2008). That case involved civil allegations of racketeering in violation of RICO and constitutional claims. Construing *Twombly*, the Court recognized that "the complaint in a potentially complex litigation, or one that by reason of the potential cost of a judgment to the defendant creates the '*in terrorem*' effect against which *Blue Chip* [*Stamps v. Manor Drug Stores*, 421 U.S. 723 (1975),] warned, must have some degree of plausibility to survive dismissal." 520 F.3d at 803. Although *Twombly* was a Sherman Act case, the prudential concerns that the Supreme Court expressed in *Twombly* applied because "RICO cases, like antitrust cases, are 'big' cases and the defendant should not be put to the expense of big-case discovery on the basis of a threadbare claim." *Id.* The Associations submit that the same is true of fiduciary breach cases under ERISA. Thus, "a fuller set of factual allegations than found in the sample complaints in the civil rules' Appendix of Forms may be necessary to show that the plaintiff's claim is not 'large groundless.'" *Limestone Dev.*, 520 F.3d at 803 (quoting *Phillips*, 515 F.3d at 231-32).

This Court has heard appeals arising from putative ERISA class actions alleging fiduciary breaches related to falling employer stock

prices. *See*, *e.g.*, *Pugh*, 521 F.3d 686 (affirming dismissal); *Rogers*, 2008 WL 867741; *Harzewski v. Guidant Corp.*, 489 F.3d 799 (7th Cir. 2007). These fiduciary duty cases also involve complex facts and massive, expensive discovery efforts. The Court has noted that some of those lawsuits appear to depend on implausible theories and may fail on essential elements such as loss causation. *See*, *e.g.*, *Rogers*, 2008 WL 867741, at *2-*3 (noting apparent questions with plaintiffs' theories). Indeed, in *Harzewski*, a case improperly dismissed on standing grounds, the panel remanded to the district court with the admonition that, "as its first order of business, that court will have to take a very careful look at the plaintiffs' theory of how they were injured." 489 F.3d at 807. The Court's observations support the conclusion that complaints alleging fiduciary breaches under ERISA should be required to plead specific facts that plausibly suggest entitlement to relief.

In sum, ERISA fiduciary breach lawsuits—especially those filed as putative class actions—warrant application of the adjusted understanding of Rule 8 proffered by *Twombly*. In a 401(k) plan expense lawsuit like this case, or in a so-called "stock drop" case involving plan holdings of employer stock, the bench and bar will be

well served by a ruling in this case that plaintiffs must allege facts plausibly suggesting grounds and entitlement for relief.

C. The Fiduciary Breach Allegations of the SAC Fail to Satisfy *Twombly*'s Plausibility Standard

This Court may affirm the judgment below on any basis supported by the record. *Chicago Dist. Council of Carpenters Pension Fund v. Reinke Insulation Co.*, 464 F.3d 651, 657 n.3 (7th Cir. 2006). Thus, apart from the reasoning of the District Court, this Court should consider that "surviving a Rule 12(b)(6) motion 'requires more than labels and conclusions.'" *Pugh*, 521 F.3d at 699 (quoting *Twombly*, 127 S. Ct. at 1965). Despite its prolixity, the SAC—like its virtually identical counterpart pleadings in other pending cases—fails to satisfy *Twombly*'s plausibility standard. The SAC is long on labels and conclusions, but short on alleged facts. Insofar as the pleading alleges specific facts, those allegations (taken as true) might be consistent with inferences of fiduciary breaches, but do not suggest entitlement to relief above a speculative level. In addition, some of the alleged facts actually undermine any inference that defendants acted imprudently. *Pugh*, 521 F.3d at 699 ("[A] plaintiff can plead himself out of court by alleging facts that show there is no viable claim.").

Neither the subparagraphs in Count I of the SAC nor the boilerplate passages earlier in the pleading allege any facts to plausibly suggest that the fees at issue are unreasonable, as evaluated under ERISA. *See Brock v. Robbins*, 830 F.2d 640, 645, 648 (7th Cir. 1987) (assessing reasonableness of fees by comparing them to what other vendors would have charged); *Reich v. Lancaster*, 55 F.3d 1034, 1052 (5th Cir. 1995) (comparing service provider's compensation to that of a predecessor). The SAC is bereft of allegations regarding such comparisons. For example, there is no allegation that the expense ratios of the Fidelity mutual funds compare unfavorably to those of similar mutual funds, nor facts averred to show that similar 401(k) plans incur materially lesser expenses to obtain the same services.[21] Plaintiffs refer to the Fidelity funds as "retail mutual funds," SAC ¶ 44, but there is no allegation that the same Fidelity mutual funds offer cheaper share classes (*e.g.*, so-called institutional share classes). At most, the pleading implies that other mutual funds were available at lower costs; that implication alone does not plausibly suggest that the chosen funds were

[21] Nor does the SAC allege unfavorable comparisons to benchmark expense ratios such as those reported by Lipper or Morningstar.

unreasonably expensive.[22] After all, mutual funds and their managers are not fungible. *See*, *e.g.*, Robert Kosowski, *et al.*, *Can Mutual Fund "Stars" Really Pick Stocks? New Evidence from a Bootstrap Analysis*, 61 J. FIN. 2551, 2594 (2006) (finding that the investment performance of the best and worst mutual fund investment managers cannot be explained by sampling variability).

As Plaintiffs' appellate brief demonstrates, their claims depend entirely on the allegations concerning so-called "revenue sharing," and particularly the premise that a mutual fund's expense ratio is excessive whenever it "includes *both* the actual price for which the Fund will provide its service *and* additional amounts that the Fund does not need to cover the cost of its services and to make a profit." SAC ¶ 73 (emphases in original). Yet the SAC alleges—as do the counterpart complaints elsewhere—that payments between investment managers and 401(k) plans' administrative vendors are ubiquitous. *See id.* ¶¶ 68, 77. Moreover, the allegation that vendors earn more than enough to

[22] *See* Pamela D. Perdue, *Satisfying ERISA's Fiduciary Duty Requirements with Respect to Plan Costs*, 25 J. PENSION PLAN. & COMPLIANCE 1, 9 (1999) ("The requirement that fees be reasonable does not mean, of course, that the fiduciary must only or always select those products or vendors with the lowest cost.").

cover costs and "make a profit," *id.* ¶ 73, is irrelevant unless ERISA means that 401(k) plan vendors will become regulated public utilities, an outcome with no statutory basis.

The alleged ubiquity of revenue sharing demonstrates that any revenue sharing built into the plan's investment options is reasonable in relation to industry norms. *See Pugh*, 521 F.3d at 692 (noting that alleged facts may undermine a claim). If vendors to the 401(k) industry customarily engage in revenue sharing, that practice alone could not cause a vendor's fees to be unreasonable—especially where Plaintiffs have not alleged that the revenue sharing payments in this case differ from the payments in other cases.

D. The District Court Properly Considered Section 404(c) at the Rule 12 Stage

Although Plaintiffs contend that the district court erred in considering ERISA Section 404(c), 29 U.S.C. § 1104(c), at the pleadings stage, doing so is consistent with Rule 12, especially in light of *Twombly*.

First, Plaintiffs should not be heard to object to the consideration of Section 404(c) at the pleadings stage because the SAC expressly refers to that statute and the DOL's implementing regulations. *See* SAC

¶¶ 58-61, 94-95, 101. Yet even if the SAC had not mentioned Section 404(c), a plaintiff should not be permitted to avoid scrutiny of the viability of such ERISA claims through artful pleading that omits facts relevant to that issue.

Second, the blanket assertion that affirmative defenses may not be considered and applied in the Rule 12 context is erroneous. *See*, *e.g.*, *Limestone Dev.*, 520 F.3d at 802 ("[S]ince the statute of limitations is a defense, and a plaintiff is not required to anticipate and refute defenses in his complaint, the judge may seem to have jumped the gun. Not so." (citation omitted)).

Third, the reasoning of other courts that have considered defenses to ERISA fiduciary breach claims at the pleadings stage applies by analogy here. In ERISA "stock drop" cases, appellate courts have affirmed consideration at the Rule 12 stage of a presumption in favor of fiduciaries who allowed 401(k) plans to hold employer stock. *See Edgar v. Avaya, Inc.*, 503 F. 3d 340, 349 (3d Cir. 2007) (discussing *Moench v. Robertson*, 62 F.3d 553, 571 (3d Cir. 1995)); *Wright v. Oregon Metallurgical Corp.*, 360 F.3d 1090, 1094 (9th Cir. 2004). In doing so, the Third Circuit wrote that it saw "no reason to allow this case to

proceed to discovery when, even if the allegations are proven true, [plaintiff] cannot establish that defendants abused their discretion." *Avaya*, 503 F.3d at 349 (footnote omitted). Similarly, in light of the concerns articulated by *Twombly*, threshold dismissal on the basis of Section 404(c) is appropriate and will avoid the costs of pointless discovery.[23]

III. Failure-to-Disclose Claims Cannot Stem From Omissions of Immaterial Information Not Required by ERISA

The District Court properly dismissed the SAC's failure-to-disclose claim. Plaintiffs do not allege that the total fees for each investment option were not disclosed. Instead, Plaintiffs complain that the Defendants violated ERISA by failing to disclose revenue sharing. *See* SAC ¶¶ 88-90, 105(g)-(i). Yet neither ERISA's specific disclosure requirements, ERISA's general standards of fiduciary responsibility, nor the securities laws governing mutual funds require fiduciaries or

[23] The Associations take issue with the interpretation of Section 404(c) proffered in the DOL's *amicus* brief. The DOL would limit the section's application to situations in which a fiduciary had not been imprudent—and thus has no need for a defense to liability. *See Langbecker v. Elec. Data Sys. Corp.*, 476 F.3d 299, 311 (5th Cir. 2007). This would render Section 404(c) a nullity. *Id.*; *cf. also Jenkins v. Yager*, 444 F.3d 916, 924 (7th Cir. 2006) (holding that ERISA allows participant direction of individual accounts without regard to Section 404(c)).

fund managers to disclose to participants such revenue sharing payments. The DOL has proposed an amendment to its existing reporting regulation to require disclosure of revenue sharing payments received by the plan's service providers. *See* Annual Reporting and Disclosure, 71 Fed. Reg. 41,392, 41,394 (proposed July 21, 2006) (to be codified at 29 C.F.R. pt. 2520). Proposed legislation in Congress would mandate similar disclosures. *See* H.R. 3185, 110th Cong. (passed by committee Apr. 16, 2008).[24] These proposals confirm that current law does not require disclosure of the amounts paid to service providers pursuant to revenue sharing arrangements.

Nor should the "duty of loyalty" inherent in fiduciary responsibility under ERISA, *see Varity Corp. v. Howe*, 516 U.S. 489, 506 (1996), be interpreted to require the disclosure of amounts paid pursuant to revenue sharing arrangements. The circumstances here do not resemble those in *Varity*, where the defendants allegedly made affirmative misrepresentations to induce employees to accept jobs in a spin-off business of dubious viability (which failed), causing the employees' loss of future benefits. *Id.* at 492-94, 506.

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[24] This bill is available at http://www.americanbenefitscouncil.org/documents/hr_3185_110th_edlabor.pdf.

Given ERISA's detailed financial reporting and disclosure requirements, its fiduciary duty provisions should not be interpreted to create an affirmative obligation to disclose additional information. *See Nechis v. Oxford Health Plans, Inc.*, 421 F.3d 96, 102-03 (2d Cir. 2005) ("[Defendant] has no duty to disclose to plan participants information additional to that required by ERISA."); *Ehlmann v. Kaiser Found. Health Plan*, 198 F.3d 552, 555 (5th Cir. 2000); *Sprague v. Gen. Motors Corp.*, 133 F.3d 388, 405 (6th Cir. 1998); *Faircloth v. Lundy Packing Co.*, 91 F.3d 648, 657 (4th Cir. 1996). The Second Circuit has held that it is "inappropriate to infer an unlimited disclosure obligation on the basis of [ERISA's] general provisions that say nothing about disclosure." *Bd. of Trs. of the CWA/ITU Negotiated Pension Plan v. Weinstein*, 107 F.3d 139, 146-47 (2d Cir. 1997) (citation omitted).

Moreover, the failure-to-disclose claim should be dismissed because the information at issue is not material. To be actionable under ERISA, misrepresentations and omissions must concern material information. *See Ballone v. Eastman Kodak Co.*, 109 F.3d 117, 122 (2d Cir. 1997); *Anweiler v. American Elec. Power Corp.*, 3 F.3d 986, 991 (7th Cir. 1993). Participants in 401(k) plans have access to the total expense ratio of

any mutual fund they select for investment, because mutual fund prospectuses provide such information. For reasons cogently explained in a number of district court decisions, how an investment manager spends or distributes the income it collects from mutual fund shareholders is not material to investors. *See In re Smith Barney Fund Transfer Agent Litig.*, No. 05 Civ. 7583 (WHP), 2007 WL 2809600, at *3 (S.D.N.Y. Sept. 26, 2007) ("Where the total amount of fees paid by a mutual fund for various services is disclosed, other information about the fees, such as their allocation or the transfer agent's profit margin, is not material.") (collecting cases); *In re Merrill Lynch Inv. Mgmt. Funds Sec. Litig.*, 434 F. Supp. 2d 233, 238 (S.D.N.Y. 2006) ("Defendants disclosed the fees and commissions charged to shareholders. The precise allocation of those fees is not material information under the securities laws").[25]

Ultimately, Plaintiffs here contend that ERISA fiduciaries have an uncodified duty to disclose to participants anything that a participant

[25] In its *amicus* brief, the DOL states that it is "skeptical that, absent any misrepresentations, ERISA's duties of prudence and loyalty would have required disclosure to plan participants of revenue sharing among Fidelity affiliates." DOL Br. at 20.

might want to know. This Court already has recognized that the statute does not do so:

> Thus the case boils down to an argument that an ERISA fiduciary has a duty to disclose, directly to a pension plan's participants, even non-material information that may affect the participants for reasons unrelated to the value of the investment. … [T]he materiality requirements entitles fiduciaries to limit their disclosures and advice to those facts that concern real economic values.

Nelson v. Hodowal, 512 F.3d 347, 350-51 (7th Cir. 2008).

IV. Declaring Open Season for Baseless Claims Against 401(k) Plan Fiduciaries Would Harm the Interests of Plan Participants Seeking to Save for Retirement

Legislators and regulators are currently examining the marketplace for third-party services to 401(k) plans. Those governmental branches can appropriately take steps to alter current practices. The courts, however, are neither authorized nor equipped to change an industry through litigation that seeks to impose retroactive liability on fiduciaries who have procured services for 401(k) plans in that market.

Litigation outcomes that reduce the desirability of defined contribution plans also pose a more general threat to the employer-sponsored retirement plan system. "Nothing in ERISA requires employers to establish employee benefit plans." *Lockheed Corp. v.*

Spink, 517 U.S. 882, 887 (1996). As this Court noted, in a case where the employer had ceased to offer the disputed defined benefit program (even though the defendants won on appeal), "[i]t is possible … for litigation about pension plans to make everyone worse off." *Cooper v. IBM Personal Pension Plan*, 457 F.3d 636, 642 (7th Cir. 2006).

The risk (or perception of risk) that plan fiduciaries may be second-guessed and held liable for "losses" allegedly caused by allowing plan vendors to receive "unreasonable" compensation is likely to result in overdeterrence. Rather than mitigating risk by exercising even greater caution in selecting and negotiating with employee benefit plan vendors, employers may be motivated to avoid risk altogether by curtailing employee benefits. Even the most careful and prudent fiduciaries sometimes make decisions that fail to optimize, or even adversely affect, the value of plan assets. A fiduciary should not be liable for losses a plan incurs in those circumstances. *See DeBruyne v. Equitable Life Assurance Soc'y*, 920 F.2d 457, 465 (7th Cir. 1990) ("The fiduciary duty of care … requires prudence, not prescience."). If, nonetheless, courts entertain a barrage of armchair quarterbacks descending on the federal courts to second guess fiduciary decisions,

dockets will be clogged with vexatious litigation and capable persons will be discouraged from serving as ERISA fiduciaries. Congress clearly did not intend ERISA to have these consequences.

Furthermore, given the fact—which Plaintiffs emphasize—that defined contribution plans are becoming the predominant non-governmental source of retirement income for today's workers, a legal regime that allows groundless allegations of fiduciary misfeasance to trigger discovery and litigation costs hardly represents sound public policy. If full-blown litigation proceedings can be triggered merely by an allegation that fiduciaries have failed to engage vendors at the lowest possible prices, or have failed to make cost the primary criterion in selecting plan vendors, the resulting perverse incentives are obvious. At best, if vendors are required to be chosen solely on the basis of cost, plans will be exposed to the grave risk of receiving sub-standard services (whether for administration or investment management). At worst, more employers will conclude that the risks attendant to sponsoring defined contribution plans are unwarranted, and there will be a decline in employers' willingness to sponsor defined contribution plans—just as it has for defined benefit pension plans.

CONCLUSION

Fishing expeditions of the kind commenced in this lawsuit should not give rise to full-blown litigation proceedings. The Associations urge the Court to affirm the judgment of the District Court.

Respectfully submitted,

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Certificate of Compliance

I certify that the foregoing brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and the length limitation of Fed. R. App. P. 29(d). The brief is proportionally spaced, has typeface of 14 points or more, and excluding the portions exempted by Fed. R. App. P. 32(a)(7)(B), contains 6,975 words (including the signature block), as counted by Microsoft Word 97-2003, the word-processing software used to prepare this brief

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Certificate of Service

The undersigned attorney hereby certifies that on May 9, 2008, I caused two copies of the foregoing Brief of the ERISA Industry Committee, The National Association of Manufacturers, and the American Benefits Council As *Amici Curiae* in Support of Appellants to be served via FedEx overnight delivery service on each of the following:

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APPPENDIX A