

Nos. 09-4081, 10-1755

In the United States Court of Appeals  
for the Seventh Circuit

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BRIAN LOOMIS, *et al.*,  
Plaintiffs-Appellants,

vs.

EXELON CORP., *et al.*,  
Defendants-Appellees.

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On Appeal from the United States District Court  
for the Northern District of Illinois (Darrah, J.)

Dist. Ct. Civil Action No. 1:06-cv-04900

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Brief of The Investment Company Institute  
and The ERISA Industry Committee as  
*Amici Curiae* in Support of Appellees

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Appellate Court No: 09-4081, 10-1755

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**STATEMENT OF INTEREST OF THE  
*AMICI CURIAE***

The Investment Company Institute (“ICI” or the “Institute”) and The ERISA Industry Committee (collectively, with ICI, the “Associations”) respectfully submit this brief as *amici curiae*.

ICI is the national association of investment companies in the United States. Its members include over 8,000 mutual funds. Since ICI’s founding over 60 years ago, one of its main objectives has been to protect and advance the interests of all mutual fund shareholders (including 401(k) plan participants invested in mutual funds) through advocacy directed at ensuring a sound legal and regulatory framework for the mutual fund industry. ICI regularly engages in legislative, regulatory, and other initiatives aimed at increasing government and public awareness of issues affecting investment companies and their shareholders. ICI also conducts extensive research on the retirement market and the mutual fund industry, which is used and cited routinely by the Federal Reserve, the Department of Labor, and other regulators.

ERIC is a non-profit corporation representing America’s largest private employers. Its members provide benefits to millions of active and retired workers and their families through employee benefit plans

governed by the Employee Retirement Income Security Act of 1974, as amended (“ERISA”), including defined contributions plans such as 401(k) plans.

Mutual funds are a major investment vehicle of choice for fiduciaries and participants in 401(k) plans. Pursuant to their motion for leave, Fed. R. App. P. 29, the Associations respectfully submit this brief as *amici curiae* in support of Appellees.

## DISCUSSION

### **I. Introduction**

The Associations endorse the district court opinion in its entirety. Given limited space, however, this brief addresses only Plaintiffs' incorrect arguments that Count I of the Amended Complaint states a claim that fiduciaries "breached their duties of loyalty and prudence by selecting retail mutual funds as plan investment options" for the Exelon Savings Plan (App't Br. (No. 09-4081) at 1), as well as the Department of Labor's views supporting those arguments.

### **II. Defined Contribution Plans and Mutual Funds**

#### **A. Pertinent Aspects of Defined Contribution Plans**

A defined contribution plan provides benefits to a participant based on the balance in the account maintained for each participant. The participant's account reflects her interest in the contributions made to the plan and her share of the plan's investment experience and expenses. The most common defined contribution plans are those known as 401(k) plans. *See* 26 U.S.C. § 401(k).

Most 401(k) plans allow each participant to allocate all or part of the participant's account balance among several designated investment options. Many plans allow participants to elect to change investments

as often as daily. Because participants vary in age and other respects, they may prefer different investment styles to achieve varied goals according to their own objectives, risk tolerances, expected retirement dates, and other savings needs. In large plans, investment decisions are made individually by thousands of participants, any one of whom may elect to change an investment on any business day. The transactional patterns of participant-directed 401(k) plans therefore differ greatly from those of a typical defined benefit pension plan, which invests an aggregate trust fund from which formulaic benefits are paid to retirees.<sup>1</sup>

The investment options offered by 401(k) plans differ from plan to plan, but frequently include a mix of pooled equity or bond investment vehicles, capital preservation products (such as money market funds or guaranteed investment contracts), and employer stock. Because mutual funds offer diversified investment portfolios and provide publicly available information that can help participants make informed decisions, mutual funds are especially popular investment options. In

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<sup>1</sup> Sean Collins, *The Expenses of Defined Benefit Pension Plans and Mutual Funds*, at 17 (ICI Dec. 2003) ([www.ici.org/pdf/per09-06.pdf](http://www.ici.org/pdf/per09-06.pdf)) (“Although mutual funds and pension plans have some features in common—such as managing large pools of assets—they also have significant organizational and institutional differences.”). All websites cited in this brief were last viewed on June 14, 2010.

fact, numerous ERISA provisions and DOL regulations expressly contemplate that plan assets may be invested in mutual funds established pursuant to the Investment Company Act of 1940, 15 U.S.C. § 80a-1 *et seq.* (the “1940 Act”). *See* 29 U.S.C. § 1002(21)(B) (specifying that plan investment in a mutual fund does not make the fund’s adviser a plan fiduciary for ERISA purposes); *id.* § 1101(b)(1) (specifying that mutual fund shares owned by a plan are plan assets, but that such mutual fund’s underlying investments are not plan assets); 29 C.F.R. § 2509.75-3 (specifying that “a person who is connected with an investment company ... is not deemed to be a fiduciary of or party in interest with respect to a plan solely because the plan has invested in the investment company’s shares”); *id.* § 2550.404c-1(e)(1)(i) (defining mutual funds as “look-through investment vehicles” for purposes of regulations implementing ERISA Section 404(c)).

## B. Pertinent Aspects of Mutual Funds

### 1. *Mutual Funds Generally*

A mutual fund is a pool of assets, consisting primarily of a portfolio of securities purchased with capital obtained from the fund’s shareholders. *Jones v. Harris Assocs., L.P.*, 130 S. Ct. 1418, 1422 (2010).

The fund's *raison d'être* is to allow shareholders to collectively and efficiently purchase a diversified and professionally managed portfolio, even if they make relatively small individual investments. Under the management of its investment adviser, a mutual fund assembles its portfolio in accord with the fund's stated objectives. These investment objectives, as well as the styles and strategies to obtain them, can vary greatly—*e.g.*, different types of securities (equity, fixed income, or both), different sizes of targeted enterprises (“large cap,” “small cap,” etc.), different geographic locations (domestic U.S., emerging foreign markets, etc.), different management styles (index-based versus active management), and so on.

Like other professional services, the investment management services provided by mutual funds are not fungible. Even two mutual funds with the same basic objectives—*e.g.*, two small cap growth funds—can be expected to assemble different portfolios and often achieve materially different investment results. In this respect, investment management resembles other professional services, such as medical and legal services, whose providers (*i.e.*, doctors and lawyers) clearly are not interchangeable.

In addition to investment management services, mutual funds provide numerous other services to shareholders, including communications with shareholders, compliance with myriad regulations, and accounting services. Required by law to provide daily pricing (17 C.F.R. § 270.22c-1(b)(1)) and daily redemption (15 U.S.C. § 80a-22), mutual funds typically build or contract for the technological capacity to handle purchase, redemption, and exchange orders of thousands of shareholders daily and to provide ongoing recordkeeping and customer service to large numbers of investors. Mutual funds incur expenses for providing all of these services to shareholders.<sup>2</sup>

Mutual funds are governed by all of the major securities laws, including the 1940 Act, the Securities Act of 1933, and implementing regulations. These laws govern mutual fund capital structure, custody of fund assets, and how funds value their portfolios, among other things. This regulatory framework holds advisers and fund boards to fiduciary standards, strictly regulates conflicts of interest, and imposes disclosure rules with the needs of ordinary investors in mind. Those disclosure rules require that each mutual fund provide shareholders a

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<sup>2</sup> See SEC, *Mutual Fund Fees and Expenses* (Aug. 2007) ([www.sec.gov/answers/mffees.htm](http://www.sec.gov/answers/mffees.htm)).

prospectus containing extensive information about the fund's organization, its fees and expenses, its investment strategy, investment risks, and past performance, as well as a summary prospectus that discloses the key information in plain English and in a standardized format.<sup>3</sup> These valuable protections are among the reasons that mutual funds are highly favored by retail investors.

## 2. *“Retail” and “Institutional” Investment Vehicles*

In this action, Plaintiffs complain about “retail” mutual funds. Although Plaintiffs do not use the term consistently, the Amended Complaint appears to define “retail mutual funds” as those “in which any individual investor outside of a 401(k) plan could invest at the same cost with an initial \$500.00 investment.” App. 20 (¶30).<sup>4</sup> Elsewhere, Plaintiffs seem to intend “retail mutual fund” to denote any investment vehicle that incurs more expenses than the supposedly cheaper

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<sup>3</sup> See 15 U.S.C. §§ 77j(a), 80a-8(b); 17 C.F.R. § 274.11A; SEC, “Enhanced Disclosure and New Prospectus Delivery Option for Registered Open-End Management Investment Companies,” 74 Fed. Reg. 4546 (Jan. 26, 2009).

<sup>4</sup> This metric is arbitrary and odd. Most funds used by investors for personal investing outside the context of 401(k) plans impose minimum investments much higher than \$500. Two of the largest no-load equity funds impose much higher minimum investments: Fidelity Magellan Fund (\$2,500) and Vanguard 500 Index Fund (\$3,000).



“institutional” investment vehicles they favor. The Department of Labor (“DOL”) further confuses the matter by suggesting in its *amicus* brief that a “retail” investment vehicle is one with “[n]on-discounted fees.” DOL Br. at 4 n.2. The DOL contrasts such funds with institutional funds that “receive discounted rates on fees, often referred to as ‘wholesale’ fees.” *Id.* Plaintiffs and the DOL have mischaracterized how mutual fund fees work and have incorrectly suggested that “retail” mutual funds are essentially the “expensive” funds.

First, all mutual funds have features characteristic of “retail” products. They must be capable of interacting with and serving large numbers of shareholders. Moreover, *any* kind of investment vehicle that a 401(k) plan offers to thousands of individual, decision-making participants as an option—whether or not it is a mutual fund—takes on a “retail” character in that setting.

Second, contrary to the DOL’s suggestion, individual 401(k) plan fiduciaries cannot negotiate “wholesale” pricing with mutual funds. The securities laws require a mutual fund to charge the expense ratio,

which includes the advisory fee, to every investor in a particular share class—no more or less.<sup>5</sup>

Mutual funds may establish distinct share classes within the fund, where the components of the expense ratio other than the advisory fee (*e.g.*, administrative expenses, distribution fees, and loads, if any) may vary, but the SEC requires the fund to charge the same advisory fee to all shareholders in each share class. 17 C.F.R. § 270.18f-3. In cases where the fund decides to establish separate share classes—and many do not—one of those share classes may be labeled the “institutional” class because it is designed for a segment of the market requiring fewer services and distribution expenses. But no investor in any particular share class may “negotiate” with a fund or its adviser for a lower fee.

In addition, simply because a share class is called “institutional” does not guarantee that it has lower fees than funds with similar investment objectives. The expense ratios of “institutional” mutual fund share classes are sometimes well above the fees of a “retail” share class of

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<sup>5</sup> The effect of negotiating a discount for certain shareholders would be a senior security to those shareholders, which is prohibited by the 1940 Act. 15 U.S.C. § 80a-18(f). It also could violate an Internal Revenue Code provision prohibiting registered investment companies from distributing preferential dividends. 26 U.S.C. § 562(c).

another fund in the same asset category. Institute data show that 401(k) plan assets invested in mutual funds are concentrated in lower-cost funds<sup>6</sup> and when these data are segregated by retail versus institutional share class, the same pattern emerges. The average expense ratio of institutional share classes of equity mutual funds offered for sale in 2009 was 1.09 percent. But the asset-weighted average expense ratio incurred by 401(k) investors in “retail” share classes of equity mutual funds in 2009 was 0.76 percent—fully 30 percent less. In other words, these data indicate that 401(k) plan fiduciaries and participants tend to seek out lower-cost mutual funds, regardless of the label attached to those funds.

Although not entirely clear, DOL’s observation that institutional funds receive “discounted rates” may refer to employee benefit plans having alternatives to registered mutual funds as potential plan options, such as trust accounts. These trust accounts may take the form

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<sup>6</sup> Sarah Holden & Michael Hadley, *The Economics of Providing 401(k) Plans: Services, Fees, and Expenses*, 2008, at 10-14 (ICI Aug. 2009) ([www.ici.org/pdf/fm-v18n6.pdf](http://www.ici.org/pdf/fm-v18n6.pdf)).

of either a “separate account” (holding a single plan’s assets) or a “collective trust” or “commingled pool” (holding multiple plans’ assets).<sup>7</sup>

Such trust accounts, however, are not governed by securities laws such as the 1940 Act or the 1933 Act.<sup>8</sup> As the Supreme Court recently observed, the important protections that these laws provide for investors require mutual funds to incur the costs of satisfying “more burdensome regulatory and legal obligations” than other investment vehicles must satisfy. *Harris Assocs.*, 130 S. Ct. at 1428-29.

Moreover, the services that separate accounts and collective trusts provide may differ from those of mutual funds. While some providers of trust accounts can provide services such as daily individual account valuation, customer service or communications for individual plan participants, providing those services *in addition to* investment management will entail additional fees.<sup>9</sup> Consequently, comparisons

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<sup>7</sup> ICI, *Mutual Funds and Institutional Accounts: A Comparison*, at 1 n.2 (ICI 2006)([www.ici.org/pdf/ppr\\_06\\_mf\\_inst\\_comparison.pdf](http://www.ici.org/pdf/ppr_06_mf_inst_comparison.pdf)).

<sup>8</sup> See ICI, *Mutual Funds and Institutional Accounts*, at 5. In addition, unlike trust account managers, broker-dealers that sell mutual funds must comply with the Securities Exchange Act of 1934 and the advisers to mutual funds must comply with the Investment Advisers Act of 1940.

<sup>9</sup> ICI, *Mutual Funds and Institutional Accounts*, at 9 (observing that, generally, “if an institutional investor such as a defined benefit pension

that focus exclusively on the respective investment advisory fee component of different investment vehicles are misleading. *See Harris Assocs.*, 130 S. Ct. at 1429 (“If the services rendered are sufficiently different that a comparison is not probative, then courts must reject such a comparison.”).

C. Mutual Funds Are Very Common Investment Options in 401(k) Plans, Large and Small

A typical large 401(k) plan allows its thousands of participants to direct the investment of their individual account balances and to change investment choices daily. Because mutual funds are designed to provide information to a multitude of actual and potential investors and to process large numbers of investments and redemptions on a daily basis, they are well-suited to meet the needs of a 401(k) plan.

Not surprisingly, therefore, mutual funds are ubiquitous investment options among 401(k) plans—including very large ones. Deloitte

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plan offers beneficiaries an Internet website or a call center to handle inquiries, the costs of providing those services are not encompassed in the advisory fees that the institution pays for investment management”).

Consulting LLP conducts a periodic survey of 401(k) plans.<sup>10</sup> Its 2009 edition compiled data received from more than 600 employers that sponsor such plans, including many large employers with more than 10,000 employees.<sup>11</sup> Among 510 employers that provided data on their 401(k) plan investments, 91% reported offering mutual funds as investment options in 2009.<sup>12</sup> This level of mutual fund usage in 401(k) plans was not unusual; Deloitte found the same datum (91%) in its 2005-06 survey.<sup>13</sup>

The frequent inclusion of mutual funds as investment options remains true even if one focuses on the largest 401(k) plans. The Profit Sharing/401k Council's recent survey of 908 profit-sharing and 401(k) plans asked plans about the investment structure they used for various investment strategies (*e.g.*, bond-actively managed, equity-indexed

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<sup>10</sup> See [www.deloitte.com/assets/Dcom-UnitedStates/Local%20Assets/Documents/us\\_consulting\\_401\(k\)AnnualBenchmarkingSurvey2009\\_081409.pdf](http://www.deloitte.com/assets/Dcom-UnitedStates/Local%20Assets/Documents/us_consulting_401(k)AnnualBenchmarkingSurvey2009_081409.pdf).

<sup>11</sup> *Id.* at 6 (Ex. 4).

<sup>12</sup> *Id.* at 26 (Ex. 77).

<sup>13</sup> See [www.iscebs.org/PDF/srvy401kresults\\_06.pdf](http://www.iscebs.org/PDF/srvy401kresults_06.pdf) (p. 19 (Ex. 71)).

international, real estate fund, etc.).<sup>14</sup> While use of non-registered products like collective trusts and separately managed accounts is higher among the larger plans, among the largest plans in the survey (with 5,000 or more participants), mutual funds were used by a majority of these large plans in *every category of investment strategy* except stable value funds (which generally cannot operate as a mutual fund and must be created as a collective trust or separate account). For example, 81.8% of these large plans report using mutual funds for their plans' actively-managed domestic equity fund, compared with 13.1% for collective trusts and 20.2% for separately managed accounts.<sup>15</sup>

Further light on the frequent inclusion of mutual funds among the nation's largest 401(k) plans is shed by Forms 11-K filed by many (but not all) plans with the SEC.<sup>16</sup> For fiscal years ending in 2008, at least

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<sup>14</sup> Profit Sharing/401k Council of America, *52nd Annual Survey of Profit Sharing and 401(k) Plans (Reflecting 2008 Plan Experience)*, at 33 (2009) (Table 51).

<sup>15</sup> About 1% of the surveyed plans reported using insurance company pooled general accounts for such investments. *Id.*

<sup>16</sup> Courts may take judicial notice of data in forms filed with the SEC. *Lovelace v. Software Spectrum Inc.*, 78 F.3d 1015, 1017-18 (5th Cir. 1996); *see also* DOL Br. at 20 n.10 (urging the Court to take judicial notice of data from DOL filings; "it is proper for courts to take judicial notice of ... public disclosure documents filed with a federal agency").

fifty-eight defined contribution plans whose trust funds held more than \$1 billion in assets apiece (including the Exelon Plan) reported to the SEC that they owned shares of registered investment companies (*i.e.*, mutual funds). *See* Appendix A, *infra*. In addition, at least five other plans with assets in excess of \$1 billion (but whose 2008 filings are not available online) reported investments in mutual funds in fiscal year 2007. *Id.* Notably, to the extent that some SEC filings identify particular mutual funds, so-called “retail” mutual funds appear as well as “institutional” mutual funds.<sup>17</sup> These data contradict the DOL’s assertion that large employee benefit plans “typically” eschew “retail” mutual funds altogether. DOL Br. at 4 n.2.

### **III. The Plaintiffs Did Not Plead a Colorable Claim of Fiduciary Imprudence**

#### **A. Prudent Fiduciary Decision Making**

ERISA defines and mandates prudent investing, not prudent investments. That is because ERISA’s fiduciary duty provisions focus on

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<sup>17</sup>For example, the Dodge & Cox Stock Fund—a widely held “retail” mutual fund—was included among at least eleven of the aforementioned sixty-three large plans. *See* Appendix A. Shares of the Fidelity Low Price Stock Fund were reported to be owned by at least eight of those sixty-three plans, including the Exelon Plan. *Id.*; *see also* App. at 24.



the way investment decisions are made, rather than on the characteristics of the investments themselves.<sup>18</sup> The duty of prudence requires a plan fiduciary to “discharge his duties with respect to a plan ... with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims.” 29 U.S.C. § 1104(a)(1)(B).

ERISA’s fiduciary standards were intended to accommodate a variety of investments and investment strategies. Congress chose not to impose rigid requirements such as the “legal list” rules that limited permissible trust investments under English law and in some states.<sup>19</sup> Moreover, in accord with congressional intent, the prudence requirement is flexible, such that the fiduciary’s selection process and choices are evaluated in light of the character and aims of the particular plan. *In re Unisys Sav. Plan Litig.*, 74 F.3d 420, 434 (3d Cir. 1996); 29 U.S.C. § 1104(a)(1)(B).

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<sup>18</sup> See John M. Vine, *Prudent Investing*, TAX MGM’T COMPENSATION PLANNING J., Jan. 1, 2010, at 3 ([www.eric.org/forms/uploadFiles/1E77B0000009E.filename.10-\\_VineArt\\_Prud\\_Invstng.pdf](http://www.eric.org/forms/uploadFiles/1E77B0000009E.filename.10-_VineArt_Prud_Invstng.pdf)).

<sup>19</sup> See Howard R. Williams, *The Prudent Man Rule of the Pension Reform Act of 1974*, 31 BUS. LAWYER 99, 100 (1975) (discussing Congress’s rejection of the “legal list” rule in favor of the prudent fiduciary standard).

ERISA thus establishes “an objective standard” for evaluating prudence, *Unisys*, 74 F.3d at 434, which evaluates fiduciary conduct under circumstances and standards prevailing at the time it occurred. *Chao v. Merino*, 452 F.3d 174, 182 (2d Cir. 2006); cf. *DeBruyne v. Equitable Life Assur. Soc’y*, 920 F.2d 457, 465 (7th Cir. 1990).

Although ERISA establishes a standard of care for plan fiduciaries, review of their actions properly entails a degree of deference that avoids mere judicial second-guessing. *Armstrong v. LaSalle Bank N.A.*, 446 F.2d 728, 732-33 (7th Cir. 2006); *Rogers v. Baxter Int’l Inc.*, 521 F.3d 702, 706 (7th Cir. 2008) (doubting that courts have financial judgment superior to that of investment professionals).

B. Plaintiffs’ Misguided Focus on Outcome, Not Fiduciary Process

The Associations agree with the DOL that “[w]hether particular fiduciaries acted imprudently depends on the facts and circumstances of the particular case.” DOL Br. at 22. Yet the DOL and Plaintiffs alike err in asking the Court to focus on allegations about the Exelon Plan’s investments, rather than on any meaningful allegation about the *actions* of the Plan’s fiduciaries. Their contentions about the outcome of

the fiduciary process, rather than about the process itself, fail to support a colorable claim.

Consider Plaintiffs' contentions. Count I avers that a fiduciary breach occurred because defendants "included high priced retail mutual funds ... as Plan investment options." App. at 24 (§39(h)). Appellants' Brief attempts to establish that this averment states a claim because the chosen investments were imprudent. For example, that brief states that Plaintiffs "focus on the imprudence of specific funds included in the Plan," App't Br. at 22; asserts that fiduciaries had a "duty to select only prudent investment options," *id.* at 24; observes that "this case ... is about the imprudence of specific options," *id.* at 29 n.22; and otherwise refers repeatedly to investment options as being inherently "prudent" or "imprudent," *id.* at 31.

Count I alleges nothing about the actions of the Plan fiduciaries except conclusory assertions about failures to consider cheaper investment vehicles. *See* App. at 22-23 (§39). The Argument proffered to support Count I (App't Br. at 13-31) focuses exclusively on the character of the chosen investments, not on the process that led to their selection as options. Thus, Plaintiffs start from the premise "that retail mutual

funds, because of their higher fees alone, generally are not suitable for large retirement plans.” *Id.* at 14. Most tellingly, they contend that the Plan’s mutual funds were “unsound and reckless,” *id.* at 28 n.20, and that the case is “about the imprudence of specific options,” *id.* at 29 n.22.<sup>20</sup>

In effect, Plaintiffs advocate the broad proposition that retail mutual funds are inherently imprudent as investment options for a large 401(k) plan. They urge the Court to infer a plausible entitlement to relief simply because “large retirement plans can obtain cheaper investment options than retail mutual funds.” *Id.* at 15. Of course, cheaper is not necessarily better, because investment portfolios vary, advisers’ services are not fungible, and expenses constitute only one factor among many that determine the net investment performance of any investment vehicle. *Hecker v. Deere & Co.*, 556 F.3d 575, 586 (7th Cir.) (noting that the cheapest fund “might ... be plagued by other problems”), *reh’g denied*, 569 F.3d 708 (2009), *cert. denied*, 130 S. Ct. 1141 (2010). In any event, nothing in ERISA either empowers or requires a court to assess

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<sup>20</sup> Although Appellants’ Brief cryptically contends that Defendants chose retail mutual funds for unspecified but illegitimate reasons (App’t Br. at 22), there is no such allegation in the Amended Complaint.

investments themselves in the way that Plaintiffs advocate. Rather, the statutory standard of care focuses exclusively on the conduct of fiduciaries.

C. Selection of Retail Mutual Funds Does Not Imply Imprudent Fiduciary Conduct

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Because the Amended Complaint alleges only conclusory facts concerning the process by which the fiduciaries selected investment options for the Plan, the viability of Count I depends solely on the inference that selection of retail mutual funds must have resulted from a defective process. The pleading thus fails to state a claim, because selection of the mutual funds at issue here does not plausibly imply imprudent fiduciary conduct.

Whether Plaintiffs have stated a claim must be assessed in light of *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009). *Twombly* instructs that pleading entitlement to relief requires “more than labels and conclusions.” 550 U.S. at 555. “Factual allegations must be enough to raise a right to relief above the speculative level.” *Id.* In these and other statements, *Twombly* establishes two working principles that are critical here. First, a court applying Rule 12(b)(6) does not credit naked assertions and

other merely conclusory allegations in a pleading. Second, a plaintiff cannot rely on speculative inferences lacking foundation in well-pleaded fact to show plausible claims to relief. *See Iqbal*, 129 S. Ct. at 1949 (reiterating the “working principles” that “merely conclusory statements” do not suffice and well-pleaded facts must permit the court “to infer more than the mere possibility of misconduct”).

A comparison between the allegations in *Twombly* and this case is illuminating. In *Twombly*, the plaintiffs alleged that the defendants had secretly conspired and had overtly engaged in parallel conduct. The Supreme Court held that the merely conclusory allegations of conspiracy need not be credited; it also concluded that the alleged fact of parallel actions did not plausibly imply conspiracy because such conduct “could just as well be independent action” by the defendants. *Id.* at 556-57. Dismissal was appropriate because the plaintiffs failed to allege “enough factual matter (taken as true) to suggest that an agreement was made.” *Id.* at 556.

Similarly, Plaintiffs here allege (1) in conclusory fashion that fiduciaries who selected the Plan’s investment options failed to consider alternatives to retail mutual funds and (2) that retail mutual funds

were chosen. The first allegation is a naked assertion. No “factual matter,” *id.*, or “well-pleaded facts,” *Iqbal*, 129 S. Ct. at 1949, about the selection process have been alleged. The second allegation is concrete, but does not plausibly suggest entitlement to relief. Plaintiffs merely speculate about a flawed process, because the fact that retail mutual funds were chosen (among other options) does not support the inference that fiduciaries failed to act prudently in doing so.<sup>21</sup> As shown by the data on the ubiquity of mutual funds in 401(k) plans (including the largest ones), the selection of those funds “could just as well be” (*Twombly*, 550 U.S. at 557) the result of careful, skillful, prudent, and diligent decision making. When “placed in a context,” *id.*, the alleged choice of retail mutual funds as investment options does not imply any imprudence by those responsible for choosing.

Because Plaintiffs failed to discharge their burden of “showing that the pleader is entitled to relief,” Fed. R. Civ. P. 8(a)(2), they cannot

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<sup>21</sup> The fact—acknowledged by the Amended Complaint (App. at 20 (¶ 30)) and Appellants’ Brief (at 5)—that the Plan also offered investments that were not retail mutual funds is notable, because Plaintiffs contradict their own assertion that fiduciaries failed to consider any alternatives. *Pugh v. Tribune Co.*, 521 F.3d 686, 699 (7th Cir. 2008) (“[A] plaintiff can plead himself out of court by alleging facts that show there is no viable claim.”).

avoid dismissal by arguing that Defendants failed to proffer evidence about the process that selected the funds. App't Br. at 20 (contending that Defendants "offered no justification ... for including mutual funds"). Rule 12(b)(6) would not even allow a court to consider such evidence. In any event, Defendants were not obliged by conclusory allegations to open, in effect, pretrial discovery about the fiduciaries' conduct. If valid, Plaintiffs' argument would allow claimants to shoot in the dark and require defendants seeking the dismissal of groundless claims to *disprove* them at the pleading stage. Even the now-retired standard from *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957), did not impose such a burden on defendants seeking dismissal.

Count I also fails to state a plausible claim for an additional, independent reason. Plaintiffs' (speculative) inference about fiduciary imprudence depends on the premise that a prudent fiduciary must consider investment alternatives that would be cheaper than the selected mutual funds. That premise is fatally flawed. As this Court stated in *Hecker*, "nothing in ERISA requires every fiduciary to scour the market to find and offer the cheapest possible fund ...." 556 F.3d at 586. ERISA does not impose a fiduciary duty to search out still-cheaper



or optimal fees so long as the expenses that are incurred by a plan are reasonable. 29 U.S.C. § 1104(a)(1)(A)(ii).<sup>22</sup>

D. The DOL Advocates an Erroneous Pleading Standard

In urging reversal, the DOL as well argues in effect that a fiduciary breach claim may be stated by allegations solely about a 401(k) plan's investment options, rather than by allegations about the fiduciaries' conduct. Like Plaintiffs, the DOL contends that a plausible claim of imprudence can arise from "participants' assertion that the fiduciaries ... failed to consider lower-cost institutional funds or use their institutional leverage to secure lower fees or greater services ...." DOL Br. at 17. Because there are no well-pleaded, non-conclusory factual allegations about the fiduciaries' conduct in this case, the DOL necessarily endorses the position that such alleged failure can be inferred merely from the selection of retail mutual funds.

The DOL's observations about the importance of fees and the existence of alternative ("institutional") investment vehicles do not suffice to transform the Amended Complaint's conclusory and

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<sup>22</sup> Similarly, if a patient has chosen a particular surgeon or oncologist for treatment, one cannot infer that the patient was imprudent merely because a cheaper physician was available.

speculative assertions into plausible claims. Data about the general effect of costs on investment performance ignore other criteria relevant to the selection of investment options—including the regulatory protections of those options and the services available in the essentially retail context of 401(k) plans with thousands of individual decision makers choosing how and when to invest account balances.

The DOL also fails to appreciate the distinctions among components of different investment vehicles' expenses, as well as other expenses that must be incurred to offer an investment option to 401(k) plan participants.<sup>23</sup> For example, when contrasting the fees charged by "institutional" trust accounts with the expenses of mutual funds, the DOL appears to consider only the fee charged by the former for investment advisory services while including the entire expense ratio (including administrative services) of mutual funds. Yet a 401(k) plan cannot offer any institutional investment vehicle without somehow

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<sup>23</sup> "[C]are must be taken" when making price comparisons among investment vehicles to consider the distinction between a mutual fund's investment advisory fee and other components of its "total management costs." R. GLENN HUBBARD, ET AL., *THE MUTUAL FUND INDUSTRY: COMPETITION AND INVESTOR WELFARE* 106-107 (2010); *accord*, Collins, *Expenses of Defined Benefit ...*, at 17 (noting that "considerable care must be exercised when analyzing the expenses" of pension plan trust accounts in comparison to mutual funds).

incurring expenses for services such as daily valuation, recordkeeping, and participant communication.<sup>24</sup>

The empirical data that are useful for putting Plaintiffs' allegations in context are those that demonstrate the actual conduct of similarly situated fiduciaries who have chosen investment options for other 401(k) plans. Contrary to the DOL's assertion, such fiduciaries frequently select mutual funds as investment options. *See* pages 14-16, *supra*, and Appendix A. These data undermine the plausibility of Count I and its necessary premise that only a flawed process would allow the selection of retail mutual funds. They also demonstrate that, if the DOL were correct that the allegations in this case sufficed to state a claim,

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<sup>24</sup> The DOL misleadingly cites Institute research to support the notion that Plaintiffs plausibly state a claim simply because of the self-evident point that "large account balances lead to economies of scale with respect to recordkeeping" for a 401(k) plan. DOL Br. at 20-22 (citing Sarah Holden & Michael Hadley, *The Economics of Providing 401(k) Plans: Services, Fees, and Expenses*, 2006 (ICI Nov. 2006) ([www.ici.org/pdf/fm-v15n7.pdf](http://www.ici.org/pdf/fm-v15n7.pdf))). In context, however, that research shows that a "variety of factors affect the fees and expenses paid by plan participants," including the service features of the plans. The DOL fails to acknowledge that the same research shows that (a) about half of all 401(k) plan assets are held in mutual funds and (b) share classes designated as "retail" are the most common share class used in mutual funds held in 401(k) plans. Both of these points undermine the plausibility of Plaintiffs' allegation of imprudence.

then many of the largest 401(k) plans could be dragged into court and subjected to the burdens of pretrial discovery at any time.

By urging that conclusory allegations should be sufficient to entitle Plaintiffs to the benefit of the doubt, and to commence full-blown litigation, the DOL disregards the Supreme Court's admonition that "[i]t is no answer to say that a claim just shy of a plausible entitlement to relief can, if groundless, be weeded out early in the discovery process ...." *Twombly*, 550 U.S. at 559. Moreover, the pleading standard advocated by the DOL cannot be reconciled with the Supreme Court's rejection of the contention that "a wholly conclusory statement of claim" can avoid dismissal so long as the pleadings leave open the possibility that discovery "might later establish some set of undisclosed facts to support recovery." *Id.* at 561 (internal quotation marks and brackets omitted).<sup>25</sup>

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<sup>25</sup> The DOL's concern that participants lack access to "the determinative facts" (DOL Br. at 14) could be addressed by utilizing ERISA plans' claims procedures before filing lawsuits. *LaRue v. DeWolff, Boberg & Assocs, Inc.*, 128 S. Ct. 1020, 1024 (2008) ("[W]e do not decide whether petitioner ... was required to exhaust remedies set forth in the Plan before seeking relief in federal court pursuant to [ERISA] § 502(a)(2)"); *id.* at 1027 (Roberts, C.J., concurring in part and in the judgment) (noting potential value of requiring such exhaustion of remedies before lawsuits alleging fiduciary breaches).

As part of its argument, the DOL also attempts to limit this Court's reasoning in the *Hecker* opinions. According to the agency's brief here, the Court "considered the [*Hecker*] complaint deficient principally because the allegations ... did not expressly allege that the price they [*i.e.*, the fiduciaries] paid [*sic*] as a large institutional investor was excessive in relation to the services received." DOL Br. at 25. This description of the reasoning in *Hecker*—in effect, that the *Hecker* plaintiffs merely omitted a crucial allegation—renders much of the *Hecker* opinions irrelevant, and even nonsensical. This description also is contradicted by the DOL's prior reading of *Hecker* when appearing as an *amicus* before the Eighth Circuit:

[T]he dismissal in *Hecker* was not based on a perceived failure to plead sufficient facts to indicate an imprudent process, but was instead based on the court's conclusion that, given the specific range of fees in the 22 selected mutual funds and the open brokerage window, which made available an additional 2,500 [retail] funds, no rational trier of fact could find that Deere had not offered a prudent mix of investments with a wide range of expense ratios.

Brief of Secretary of Labor as *Amicus* in *Braden v. Wal-Mart Stores, Inc.*, at 19-20 (8th Cir. No. 08-3798) (filed March 13, 2009) ([www.dol.gov/sol/media/briefs/braden\(A\)-03-13-2009.pdf](http://www.dol.gov/sol/media/briefs/braden(A)-03-13-2009.pdf)) (emphasis added).

The DOL was closer to the mark in its *Braden* brief. *Hecker*, in fact, established principles that support dismissal of this action, despite an amended pleading that adds the asserted failure to consider alternatives.

In addition to the data showing the widespread selection of mutual funds by even the largest 401(k) plans' fiduciaries, the context that informs plausibility (*Twombly*, 550 U.S. at 557) includes the DOL's pre-litigation positions. In its regulations, the DOL has expressly contemplated and countenanced the selection of mutual funds as investment options for 401(k) plans. *See* page 5, *supra*. In addition, the DOL has said in its publications that fees are not the sole factor plan fiduciaries and participants should consider in selecting investments—in fact, the DOL website tells participants: “don’t consider fees in a vacuum[,]” because “cheaper [is not] necessarily better.”<sup>26</sup>

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<sup>26</sup> DOL, *A Look at 401(k) Plan Fees* ([www.dol.gov/ebsa/publications/401k\\_employee.html](http://www.dol.gov/ebsa/publications/401k_employee.html)); *see also* DOL, *Understanding Retirement Plan Fees and Expenses*, at 10 (May 2004) (<http://www.dol.gov/ebsa/pdf/undrstndgrtrmmt.pdf>) (“Fees and expenses are one of several factors to consider when you select and monitor plan service providers and investments. The level and quality of service and investment risk and return will also affect your decisions.”).

The pleading standard that the DOL (and Plaintiffs) advocate in this case—which suggests that ERISA allows participants to bring suits based on nothing more than a naked assertion that fiduciaries failed to consider cheaper investment options—could be as likely to deter the sponsorship of 401(k) plans as to deter the imprudent selection of investments. Moreover, the signal that litigation would best be avoided by making cost the primary criterion in selecting investment options would create undesirable incentives. *Hecker*, 556 F.3d at 586. For example, a decision that indicated that mutual funds are inappropriate plan investments could tend to motivate plan fiduciaries to forgo the important regulatory protections that registered mutual funds provide to investors. *See* pages 7-8, *supra*.

Ultimately, the result that the DOL advocates would undermine important congressional goals. Recognizing that “[n]othing in ERISA requires employers to establish employee benefit plans,” *Lockheed Corp. v. Spink*, 517 U.S. 882, 887 (1996), Congress sought to create a system that was not so complex that litigation expenses would discourage employers from sponsoring plans, *Conkright v. Frommert*, 130 S. Ct. 1640, 1649 (2010). As this Court noted in a case where the employer

ceased to offer the pension plan at issue—despite the fact that the defendants ultimately prevailed—“[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). Prosecution of speculative claims asserted without well-pleaded facts, as Plaintiffs propose here, threatens “to make everyone worse off.”

### CONCLUSION

The Associations urge the Court to affirm the judgment of the District Court.

Respectfully submitted,

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## Appendix A

Selected plans with reported assets >\$1 billion <sup>1</sup>	Reported plan investment in mutual funds?	Forms 11-K
Abbott Laboratories Stock Ret. Program	yes	<i>Plan Year 2007</i> <a href="http://www.sec.gov/Archives/edgar/vpr/08/99999999997-08-030716">www.sec.gov/Archives/edgar/vpr/08/99999999997-08-030716</a>
American Electric Power System Ret. Sav. Plan	yes *, **	<a href="http://www.sec.gov/Archives/edgar/data/4904/000000490409000098/form11k0609.htm">www.sec.gov/Archives/edgar/data/4904/000000490409000098/form11k0609.htm</a>
Amgen Ret. & Sav. Plan	yes	<a href="http://www.sec.gov/Archives/edgar/data/318154/000119312509135799/d11k.htm">www.sec.gov/Archives/edgar/data/318154/000119312509135799/d11k.htm</a>
Bank of America 401(k) Plan	yes *	<a href="http://www.sec.gov/Archives/edgar/data/70858/000119312509139256/d11k.htm">www.sec.gov/Archives/edgar/data/70858/000119312509139256/d11k.htm</a>
Employee Sav. & Inv. Plan of the Bank of N.Y. Co., Inc.	yes	<a href="http://www.sec.gov/Archives/edgar/data/1390777/000119312509135651/d11k.htm">www.sec.gov/Archives/edgar/data/1390777/000119312509135651/d11k.htm</a>

<sup>1</sup> Unless otherwise noted, data are from Forms 11-K for fiscal years ending in 2008. Not all defined contribution plans file a Form 11-K. This list does not encompass all plans with assets greater than \$1 billion that have filed a Form 11-K. Investments in “mutual funds” comprise reported plan investments in registered investment companies (whether in so-called “institutional” or “retail” share classes).

\* Plans whose mutual fund options (if identified by Form 11-K) include Dodge & Cox Stock Fund.

\*\* Plans whose mutual fund options (if identified by Form 11-K) include Fidelity Low Price Stock Fund.

### Appendix A

<b>Selected plans with reported assets &gt;\$1 billion<sup>1</sup></b>	<b>Reported plan investment in mutual funds?</b>	<b>Forms 11-K</b>
BP Master Trust for Employee Sav. Plans	yes	<a href="http://www.sec.gov/Archives/edgar/data/313807/000116923209003109/d77236_11-k.htm">www.sec.gov/Archives/edgar/data/313807/000116923209003109/d77236_11-k.htm</a>
Bristol-Myers Squibb Co. Sav. Plan Master Trust	yes	<a href="http://www.sec.gov/Archives/edgar/data/14272/000119312509138020/d11k.htm">www.sec.gov/Archives/edgar/data/14272/000119312509138020/d11k.htm</a>
Cardinal Health, Inc. U.S. Qualified Plans Master Trust and Cardinal Health Balanced Fund	yes	<a href="http://www.sec.gov/Archives/edgar/data/721371/000119312509140034/d11k.htm">www.sec.gov/Archives/edgar/data/721371/000119312509140034/d11k.htm</a>
Caterpillar Invt. Trust	yes	<a href="http://www.sec.gov/Archives/edgar/data/18230/000001823009000229/form11k_401k.htm">www.sec.gov/Archives/edgar/data/18230/000001823009000229/form11k_401k.htm</a>
Chevron Employee Sav. Invt. Plan	yes	<a href="http://www.sec.gov/Archives/edgar/data/93410/000095012309017778/f52855exv99w2.htm">www.sec.gov/Archives/edgar/data/93410/000095012309017778/f52855exv99w2.htm</a>
Citigroup 401(k) Plan	yes	<a href="http://www.sec.gov/Archives/edgar/data/831001/000095012309016892/y77914e11vk.htm">www.sec.gov/Archives/edgar/data/831001/000095012309016892/y77914e11vk.htm</a>
Coca-Cola Co. Thrift & Invt. Plan	yes	<a href="http://www.sec.gov/Archives/edgar/data/21344/000110465909040015/a09-16757_111k.htm">www.sec.gov/Archives/edgar/data/21344/000110465909040015/a09-16757_111k.htm</a>
ConocoPhillips Sav. Plan	yes *, **	<a href="http://www.sec.gov/Archives/edgar/data/1163165/000095012309016558/h67231e11vk.htm">www.sec.gov/Archives/edgar/data/1163165/000095012309016558/h67231e11vk.htm</a>
Dell Inc. 401(k) Plan	yes *	<a href="http://www.sec.gov/Archives/edgar/data/826083/000095012309017374/d68196e11vk.htm">www.sec.gov/Archives/edgar/data/826083/000095012309017374/d68196e11vk.htm</a>
Disney 401(k) Master Trust	yes	<a href="http://www.sec.gov/Archives/edgar/data/1001039/000119312509139461/dex991.htm">www.sec.gov/Archives/edgar/data/1001039/000119312509139461/dex991.htm</a>

### Appendix A

Selected plans with reported assets >\$1 billion <sup>1</sup>	Reported plan investment in mutual funds?	Forms 11-K
Dominion Salaried Sav. Plan	yes	<a href="http://www.sec.gov/Archives/edgar/data/715957/000119312509136422/d11k.htm">www.sec.gov/Archives/edgar/data/715957/000119312509136422/d11k.htm</a>
Duke Energy Ret. Sav. Plan	yes	<a href="http://www.sec.gov/Archives/edgar/data/1326160/0000119312509138831/d11k.htm">www.sec.gov/Archives/edgar/data/1326160/0000119312509138831/d11k.htm</a>
Edison 401(k) Sav. Plan	yes	<a href="http://www.sec.gov/Archives/edgar/data/827052/000082705209000014/eix11k609.htm">www.sec.gov/Archives/edgar/data/827052/000082705209000014/eix11k609.htm</a>
Emerson Electric Co. Master Trust	yes	<a href="http://www.sec.gov/Archives/edgar/vprrr/09/99999999997-09-016188">www.sec.gov/Archives/edgar/vprrr/09/99999999997-09-016188</a>
Sav. Plan of Entergy Corp. & Subs. VII	yes	<a href="http://www.sec.gov/Archives/edgar/data/65984/000006598409000137/a03909.htm">www.sec.gov/Archives/edgar/data/65984/000006598409000137/a03909.htm</a>
Exelon Corp. Employee Sav. Plan	yes **	<a href="http://www.sec.gov/Archives/edgar/data/1109357/0000119312509132506/d11k.htm">www.sec.gov/Archives/edgar/data/1109357/0000119312509132506/d11k.htm</a>
FirstEnergy Corp. Sav. Plan	yes	<a href="http://www.sec.gov/Archives/edgar/data/1031296/0000103129609000016/form11_k.htm">www.sec.gov/Archives/edgar/data/1031296/0000103129609000016/form11_k.htm</a>
Ford Defined Contribution Plans Master Trust	yes	<a href="http://www.sec.gov/Archives/edgar/data/37996/000095012309017886/c87153e11vk.htm">www.sec.gov/Archives/edgar/data/37996/000095012309017886/c87153e11vk.htm</a>
Master Trust for Ret. Sav. Plans of FPL Group, Inc. & Affiliates	yes **	<a href="http://www.sec.gov/Archives/edgar/data/753308/000075330809000065/form11knonbarg2008.htm">www.sec.gov/Archives/edgar/data/753308/000075330809000065/form11knonbarg2008.htm</a>
GE Sav. & Security Program	yes	<i>Plan Year 2007</i> <a href="http://www.sec.gov/Archives/edgar/data/40545/000004054508000025/frm11k.htm">www.sec.gov/Archives/edgar/data/40545/000004054508000025/frm11k.htm</a>

### Appendix A

Selected plans with reported assets >\$1 billion <sup>1</sup>	Reported plan investment in mutual funds?	Forms 11-K
General Dynamics Corp. Sav. & Stock Invt. Plan Master Trust	yes	www.sec.gov/Archives/edgar/data/40533/000119312509139287/d11k.htm www.sec.gov/Archives/edgar/data/40533/000119312509139262/d11k.htm
GM Master Trust [for Defined Contrib. Plans]	yes	<i>Plan Year 2007</i> www.sec.gov/Archives/edgar/data/40730/000004073008000014/psp07plan062608.txt
The Goldman Sachs 401(k) Plan	yes	www.sec.gov/Archives/edgar/data/886982/000095012309018767/y77991e11vk.htm
Halliburton Company Employee Benefit Master Trust	yes	www.sec.gov/Archives/edgar/data/45012/000004501209000229/ed11k_hrsp12312008.htm
The Hartford Invt. & Sav. Plan	yes	www.sec.gov/Archives/edgar/data/874766/000095012309018047/c87328e11vk.htm
Hewlett-Packard Company 401(k) Plan	yes *, **	www.sec.gov/Archives/edgar/data/47217/000004721709000027/form11-k_2008.htm
Home Depot FutureBuilder	yes *	www.sec.gov/Archives/edgar/data/354950/000095012309018535/g19538e11vk.htm
Honeywell Sav. & Ownership Plan	yes	www.sec.gov/Archives/edgar/data/773840/000093041309003372/c58044_11k.htm
IBM 401(k) Plus Plan	yes	www.sec.gov/Archives/edgar/data/51143/000110465909040756/a09-16924_211k.htm

### Appendix A

Selected plans with reported assets >\$1 billion <sup>1</sup>	Reported plan investment in mutual funds?	Forms 11-K
Intel Corp. 401(k) Sav. Plan	yes *, **	<a href="http://www.sec.gov/Archives/edgar/data/50863/000095012309016714/f52532e11vk.htm">www.sec.gov/Archives/edgar/data/50863/000095012309016714/f52532e11vk.htm</a>
ITT Salaried Invt. & Sav. Plan	yes	<a href="http://www.sec.gov/Archives/edgar/data/216228/000095012309022177/y78180e11vk.htm">www.sec.gov/Archives/edgar/data/216228/000095012309022177/y78180e11vk.htm</a>
John Deere Sav. & Invt. Plan	yes	<a href="http://www.sec.gov/Archives/edgar/vpr/09/9999999997-09-008218">www.sec.gov/Archives/edgar/vpr/09/9999999997-09-008218</a>
JPMorgan Chase 401(k) Sav. Plan	yes	<a href="http://www.sec.gov/Archives/edgar/data/19617/000095012309017477/y77840e11vk.htm">www.sec.gov/Archives/edgar/data/19617/000095012309017477/y77840e11vk.htm</a>
Kraft Foods Sav. Plan Master Trust	yes	<a href="http://www.sec.gov/Archives/edgar/data/1103982/000119312509130270/d11k.htm">www.sec.gov/Archives/edgar/data/1103982/000119312509130270/d11k.htm</a>
Lockheed Martin Corp. Defined Contrib. Plans Master Trust	yes	<i>Plan Year 2007</i> <a href="http://www.sec.gov/Archives/edgar/vpr/08/9999999997-08-029455">www.sec.gov/Archives/edgar/vpr/08/9999999997-08-029455</a>
Lucent Technologies Inc. Defined Contrib. Plan Master Trust	yes	<a href="http://www.sec.gov/Archives/edgar/data/886125/000093041309003397/c58041_11-k.htm">www.sec.gov/Archives/edgar/data/886125/000093041309003397/c58041_11-k.htm</a>
McKesson Corp. Profit-Sharing Invt. Plan	yes	<a href="http://www.sec.gov/Archives/edgar/data/927653/000095013408016941/f43820e11vk.htm">www.sec.gov/Archives/edgar/data/927653/000095013408016941/f43820e11vk.htm</a>
Medtronic, Inc. Sav. & Invt. Plan	yes	<a href="http://www.sec.gov/Archives/edgar/data/64670/000089710108002126/medtronic084306_11k.htm">www.sec.gov/Archives/edgar/data/64670/000089710108002126/medtronic084306_11k.htm</a>
Microsoft Corp. Sav. Plus 401(k) Plan	yes	<a href="http://www.sec.gov/Archives/edgar/data/789019/000119312509140716/d11k.htm">www.sec.gov/Archives/edgar/data/789019/000119312509140716/d11k.htm</a>

### Appendix A

<b>Selected plans with reported assets &gt;\$1 billion<sup>1</sup></b>	<b>Reported plan investment in mutual funds?</b>	<b>Forms 11-K</b>
Morgan Stanley 401(k) Plan	yes *	<a href="http://www.sec.gov/Archives/edgar/data/895421/000095010309001535/dp13952_11k.htm">www.sec.gov/Archives/edgar/data/895421/000095010309001535/dp13952_11k.htm</a>
National Grid USA Cos.' Incentive Thrift Plan I	yes **	<a href="http://www.sec.gov/Archives/edgar/data/1004315/000095012309018708/y77995exv99w1.htm">www.sec.gov/Archives/edgar/data/1004315/000095012309018708/y77995exv99w1.htm</a>
Occidental Petroleum Corp. Sav. Plan	yes	<a href="http://www.sec.gov/Archives/edgar/data/797468/000079746809000073/form11k-2008.htm">www.sec.gov/Archives/edgar/data/797468/000079746809000073/form11k-2008.htm</a>
PepsiCo Long Term Sav. Program Master Trust	yes	<a href="http://www.sec.gov/Archives/edgar/data/77476/000119312509134154/d11k.htm">www.sec.gov/Archives/edgar/data/77476/000119312509134154/d11k.htm</a>
Pfizer Sav. Plan	yes *, **	<a href="http://www.sec.gov/Archives/edgar/data/78003/000115752309004642/a5995429.htm">www.sec.gov/Archives/edgar/data/78003/000115752309004642/a5995429.htm</a>
PG&E Corp. Ret. Sav. Plan Master Trust	yes	<a href="http://www.sec.gov/Archives/edgar/data/1004980/000100498009000038/exhibit1.htm">www.sec.gov/Archives/edgar/data/1004980/000100498009000038/exhibit1.htm</a>
The Procter & Gamble Sav. Plan	yes	<a href="http://www.sec.gov/Archives/edgar/data/80424/00008042408000126/savingsplan.htm">www.sec.gov/Archives/edgar/data/80424/00008042408000126/savingsplan.htm</a>
The Prudential Employee Sav. Plan	yes	<a href="http://www.sec.gov/Archives/edgar/data/1137774/000119312509138605/d11k.htm">www.sec.gov/Archives/edgar/data/1137774/000119312509138605/d11k.htm</a>
Qwest DB/DC Master Trust	yes	<a href="http://www.sec.gov/Archives/edgar/data/1037949/000110465909040684/a09-16974_111k.htm">www.sec.gov/Archives/edgar/data/1037949/000110465909040684/a09-16974_111k.htm</a>
Raytheon Sav. & Invt. Plan	yes	<a href="http://www.sec.gov/Archives/edgar/data/1047122/000119312509137619/d11k.htm">www.sec.gov/Archives/edgar/data/1047122/000119312509137619/d11k.htm</a>
Schering-Plough Employees' Sav. Plan	yes	<a href="http://www.sec.gov/Archives/edgar/data/310158/000095012309017949/y77916e11vk.htm">www.sec.gov/Archives/edgar/data/310158/000095012309017949/y77916e11vk.htm</a>

### Appendix A

Selected plans with reported assets >\$1 billion <sup>1</sup>	Reported plan investment in mutual funds?	Forms 11-K
Shell Sav. Group Trust	yes	<i>Plan Year 2007</i> <a href="http://www.sec.gov/Archives/edgar/vpr/08/9999999997-08-030869">www.sec.gov/Archives/edgar/vpr/08/9999999997-08-030869</a>
Textron Sav. Plan	yes	<a href="http://www.sec.gov/Archives/edgar/data/217346/000021734609000094/elevnk.htm">www.sec.gov/Archives/edgar/data/217346/000021734609000094/elevnk.htm</a>
United Technologies Corporation Employee Sav. Plan	yes	<a href="http://www.sec.gov/Archives/edgar/data/101829/000119312509139452/d11k.htm">www.sec.gov/Archives/edgar/data/101829/000119312509139452/d11k.htm</a>
Verizon Master Sav. Trust	yes	<a href="http://www.sec.gov/Archives/edgar/data/732712/000119312509140689/d11k.htm">www.sec.gov/Archives/edgar/data/732712/000119312509140689/d11k.htm</a> <a href="http://www.sec.gov/Archives/edgar/data/732712/000119312509140662/d11k.htm">www.sec.gov/Archives/edgar/data/732712/000119312509140662/d11k.htm</a>
Wachovia Sav. Plan	yes *	<a href="http://www.sec.gov/Archives/edgar/data/72971/000119312509136751/d11k.htm">www.sec.gov/Archives/edgar/data/72971/000119312509136751/d11k.htm</a>
Wal-Mart Profit Sharing and 401(k) Plan	yes	<a href="http://www.sec.gov/Archives/edgar/data/104169/000010416909000013/wmtfy0911k.htm">www.sec.gov/Archives/edgar/data/104169/000010416909000013/wmtfy0911k.htm</a>
Wells Fargo & Co. 401(k) Plan	yes *	<a href="http://www.sec.gov/Archives/edgar/vpr/09/9999999997-09-021754">www.sec.gov/Archives/edgar/vpr/09/9999999997-09-021754</a>
Weyerhaeuser Co. 401(k) and Performance Share Plan Trust	yes	<a href="http://www.sec.gov/Archives/edgar/data/106535/000095012309017735/v52833be11vk.htm">www.sec.gov/Archives/edgar/data/106535/000095012309017735/v52833be11vk.htm</a>

### 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 6,829 words (including Appendix A, but excluding the signature block and certificates of counsel), as counted by Microsoft Word 97-2003, the word-processing software used to prepare this brief

/s/ Thomas L. Cabbage III  
Counsel for *Amici Curiae* The  
Investment Company Institute and  
The ERISA Industry Committee



### Certificate of Service

The undersigned attorney hereby certifies that on June 15, 2010, I caused two copies of the foregoing Brief of The Investment Company Institute and The ERISA Industry Committee as *Amici Curiae* in Support of Appellees to be served via FedEx overnight delivery service on each of the following:

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/s/ Thomas L. Cabbage III  
Counsel for *Amici Curiae* The  
Investment Company Institute and  
The ERISA Industry Committee

## Appendix A

Selected plans with reported assets >\$1 billion <sup>1</sup>	Reported plan investment in mutual funds?	Forms 11-K
Abbott Laboratories Stock Ret. Program	yes	<i>Plan Year 2007</i> www.sec.gov/Archives/edgar/vpr/08/99999999997-08-030716
American Electric Power System Ret. Sav. Plan	yes *, **	www.sec.gov/Archives/edgar/data/4904/000000490409000098/form11k0609.htm
Amgen Ret. & Sav. Plan	yes	www.sec.gov/Archives/edgar/data/318154/000119312509135799/d11k.htm
Bank of America 401(k) Plan	yes *	www.sec.gov/Archives/edgar/data/70858/000119312509139256/d11k.htm
Employee Sav. & Invt. Plan of the Bank of N.Y. Co., Inc.	yes	www.sec.gov/Archives/edgar/data/1390777/000119312509135651/d11k.htm

<sup>1</sup> Unless otherwise noted, data are from Forms 11-K for fiscal years ending in 2008. Not all defined contribution plans file a Form 11-K. This list does not encompass all plans with assets greater than \$1 billion that have filed a Form 11-K. Investments in "mutual funds" comprise reported plan investments in registered investment companies (whether in so-called "institutional" or "retail" share classes).

\* Plans whose mutual fund options (if identified by Form 11-K) include Dodge & Cox Stock Fund.

\*\* Plans whose mutual fund options (if identified by Form 11-K) include Fidelity Low Price Stock Fund.

## Appendix A

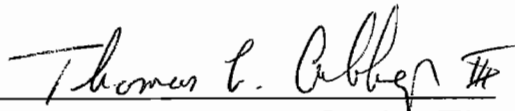
Selected plans with reported assets >\$1 billion <sup>1</sup>	Reported plan investment in mutual funds?	Forms 11-K
BP Master Trust for Employee Sav. Plans	yes	www.sec.gov/Archives/edgar/data/313807/000116923209003109/d77236_11-k.htm
Bristol-Myers Squibb Co. Sav. Plan Master Trust	yes	www.sec.gov/Archives/edgar/data/14272/000119312509138020/d11k.htm
Cardinal Health, Inc. U.S. Qualified Plans Master Trust and Cardinal Health Balanced Fund	yes	www.sec.gov/Archives/edgar/data/721371/000119312509140034/d11k.htm
Caterpillar Invt. Trust	yes	www.sec.gov/Archives/edgar/data/18230/00001823009000229/form11k_401k.htm
Chevron Employee Sav. Invt. Plan	yes	www.sec.gov/Archives/edgar/data/93410/000095012309017778/f52855exv99w2.htm
Citigroup 401(k) Plan	yes	www.sec.gov/Archives/edgar/data/831001/000095012309016892/y77914e11vk.htm
Coca-Cola Co. Thrift & Invt. Plan	yes	www.sec.gov/Archives/edgar/data/21344/000110465909040015/a09-16757_111k.htm
ConocoPhillips Sav. Plan	yes *, **	www.sec.gov/Archives/edgar/data/1163165/00095012309016558/h67231e11vk.htm
Dell Inc. 401(k) Plan	yes *	www.sec.gov/Archives/edgar/data/826083/000095012309017374/d68196e11vk.htm
Disney 401(k) Master Trust	yes	www.sec.gov/Archives/edgar/data/1001039/000119312509139461/dex991.htm

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National Grid USA Cos.' Incentive Thrift Plan I	yes **	www.sec.gov/Archives/edgar/data/1004315/000095012309018708/y77995exv99w1.htm
Occidental Petroleum Corp. Sav. Plan	yes	www.sec.gov/Archives/edgar/data/797468/000079746809000073/form11k-2008.htm
PepsiCo Long Term Sav. Program Master Trust	yes	www.sec.gov/Archives/edgar/data/77476/000019312509134154/d11k.htm
Pfizer Sav. Plan	yes *, **	www.sec.gov/Archives/edgar/data/78003/000015752309004642/a5995429.htm
PG&E Corp. Ret. Sav. Plan Master Trust	yes	www.sec.gov/Archives/edgar/data/1004980/000100498009000038/exhibit1.htm
The Procter & Gamble Sav. Plan	yes	www.sec.gov/Archives/edgar/data/80424/000008042408000126/savingsplan.htm
The Prudential Employee Sav. Plan	yes	www.sec.gov/Archives/edgar/data/1137774/000119312509138605/d11k.htm
Qwest DB/DC Master Trust	yes	www.sec.gov/Archives/edgar/data/1037949/000110465909040684/a09-16974_11k.htm
Raytheon Sav. & Invt. Plan	yes	www.sec.gov/Archives/edgar/data/1047122/000119312509137619/d11k.htm
Schering-Plough Employees' Sav. Plan	yes	www.sec.gov/Archives/edgar/data/310158/000095012309017949/y77916e11vk.htm

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