In the

United States Court of Appeals

For the Seventh Circuit

No. 18-2569

APRIL HUGHES, *et al.*,

Plaintiffs-Appellants,

v.

NORTHWESTERN UNIVERSITY, *et al.*,

Defendants-Appellees.

Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division.
No. 1:16-cv-08157 — **Jorge L. Alonso**, *Judge*.

ARGUED NOVEMBER 29, 2022 — DECIDED MARCH 23, 2023

Before SYKES, *Chief Judge*, and HAMILTON and BRENNAN, *Circuit Judges*.

BRENNAN, *Circuit Judge*. On remand from *Hughes v. Northwestern University*, 142 S. Ct. 737 (2022), we reexamine plaintiffs' allegations that plan fiduciary Northwestern breached its duty of prudence under the Employee Retirement Income Security Act, 29 U.S.C. § 1104(a). Following *Hughes*, we discern three claims of breach that require reconsideration: that Northwestern (1) failed to monitor and incurred excessive

recordkeeping fees, (2) failed to swap out retail shares for cheaper but otherwise identical institutional shares, and (3) retained duplicative funds. We conclude that the first two claims survive dismissal and remand them for further proceedings. For all other claims and issues, we reinstate this court's prior judgment in *Divane v. Northwestern University*, 953 F.3d 980 (7th Cir. 2020).

I. Background

A. Factual Background

Plaintiffs are individuals who participate in two defined-contribution plans subject to ERISA: the Northwestern University Retirement Plan and the Northwestern University Voluntary Savings Plan (the "Plans"). Subject to I.R.C. § 403(b), the Plans provide for tax-deferred contributions to retirement accounts by employees of I.R.C. § 501(c)(3) nonprofits like defendant Northwestern University. As defined-contribution plans, the Plans allow participants to direct the investment of their contributions. But the investment options included in the Plans are selected by the Plans' fiduciary. Northwestern University, as the employer, is the administrator and fiduciary of the Plans. The university assigned some of its fiduciary administrative duties to two Northwestern officers, the Northwestern University Retirement Investment Committee, and its members. We refer to these fiduciary defendants collectively as "Northwestern" or "the university."

Northwestern selected various investment options offered by the Teachers Insurance and Annuity Association of America and College Retirement Equities Fund ("TIAA") and the Fidelity Management Trust Company ("Fidelity") to be included in the Plans. Before October 2016, the Retirement Plan

and the Savings Plan offered over 240 and 180 investment options, respectively, from TIAA and Fidelity. For example, the TIAA Traditional Annuity, a fixed annuity contract that returns a contractually specified minimum interest, is a popular investment option in the Plans. This annuity has restrictions and penalties for withdrawal, including a 2.5% surrender charge if a participant withdraws the investment in a lump sum sooner than 120 days after the termination of her employment. TIAA's policy also requires any plan offering the Traditional Annuity to use TIAA as a recordkeeper for its products.

In October 2016, Northwestern streamlined its investment options by greatly reducing the Plans' offerings to 32 investment options spread across four tiers: target date mutual funds, index funds, actively managed funds, and a self-directed brokerage window. Leading up to this change, Northwestern informed its plan participants that this new tiered structure would "enable simpler decisionmaking," "[r]educe[] administration fees," "increase[] participant returns," and provide "[a]ccess to lower cost share classes when available." Northwestern acknowledged that this restructuring better aligned it with its peers who had reduced their investment line-ups.

B. Procedural Background

Plaintiffs filed suit alleging various ERISA violations. The First Amended Complaint—the operative pleading—asserts three violations of the duty of prudence under 29 U.S.C. § 1104(a)(1) (Counts I, III, & V), three counts of ERISA-prohibited transactions under 29 U.S.C. § 1106(a)(1) (Counts II, IV, & VI), and a claim against Northwestern University and two officers for failure to monitor fiduciaries (Count VII).

Count III alleges a breach of fiduciary duty by Northwestern for incurring unreasonable recordkeeping fees. Among other things, plaintiffs aver that Northwestern paid about four to five times a reasonable per-participant recordkeeping fee for the Plans in aggregate by paying for recordkeeping services through uncapped revenue-sharing arrangements. Revenue sharing allows fund providers to take a percentage of the revenue from plan participants' investments to defray the participants' recordkeeping and other administrative costs. Per plaintiffs, Northwestern should have lowered its expenses by consolidating from two recordkeepers to one, soliciting bids from competing providers, and using the massive size and correspondent bargaining power of the Plans to negotiate for fee rebates.

Count V alleges a breach of fiduciary duty by Northwestern's failure to monitor the Plans' investments and to remove imprudent ones. As part of this claim, plaintiffs maintain that the Plans contained too many funds and caused investor confusion, and that Northwestern should have removed duplicative funds that did nothing but add expenses to the Plans. According to plaintiffs, Northwestern should have used its size and bargaining power to replace retail-class shares of funds with cheaper but otherwise identical institutional-class shares of the same funds.

The district court granted Northwestern's motion to dismiss plaintiffs' First Amended Complaint. Relevant to this remand, the court dismissed Count III (excessive recordkeeping fees) finding that, under Seventh Circuit precedent, Northwestern did not violate ERISA by using revenue sharing for plan expenses. The court observed that it was not apparent that the Plans could have arranged for lower fees. In any case,

the court found that plan participants had options to keep their expenses low by investing in low-expense funds that were available in the Plans. The district court also dismissed Count V (imprudent funds retention) because the Plans offered the low-expense funds desired by plaintiffs and found irrelevant that the Plans offered additional funds plaintiffs did not want to choose. In the same order, the district court denied plaintiffs' April 2018 motion for leave to amend their complaint, concluding that the proposed amendments were untimely and futile.

Following this dismissal, the district court also denied plaintiffs' June 2018 motion to amend judgment and, in the alternative, for leave to file a proposed Second Amended Complaint. The proposed complaint largely mirrored the First Amended Complaint, but it added certain alleged admissions from Northwestern's executives and an outside consultant. These additions bolstered the plausibility of the existing Counts III and V. The new Count VII repackaged pleadings in Count V and claimed breach of fiduciary duty by Northwestern's failure to replace retail-class shares with institutional-class shares. Otherwise, Counts III and V remained identical in the operative and proposed complaints.

This court affirmed the district court's dismissal and denial of leave to amend in *Divane*, 953 F.3d 980, largely adopting its reasoning. The dismissal on Count III was affirmed because plaintiffs failed to support their claim that a flat-fee structure—as opposed to revenue-sharing—is required by ERISA or would benefit plan participants. *Id.* at 989. This court also held that ERISA does not require Northwestern to use a single recordkeeper and observed that plaintiffs had failed to allege that participants would have been better

off in such an arrangement. *Id.* at 990. Plaintiffs had also failed to identify an alternative low-cost recordkeeper who would supply comparable recordkeeping services. *Id.* at 991.

Similarly, this court affirmed the dismissal on Count V because the Plans offered some low-expense funds that "eliminat[ed] any claim that plan participants were forced to stomach an unappetizing menu." *Id.* Prior Seventh Circuit cases—*Loomis v. Exelon Corp.*, 658 F.3d 667, 673–74 (7th Cir. 2011), and *Hecker v. Deere & Co.*, 556 F.3d 575, 586 (7th Cir. 2009)—were relied upon for the proposition that "plans may generally offer a wide range of investment options and fees without breaching any fiduciary duty." *Divane*, 953 F.3d at 992. The district court's dismissal of other claims, denial of leave to amend, and rejection of Plaintiffs' jury demand were also affirmed. *Id.* at 993–94.

Plaintiffs petitioned for certiorari on only Counts III and V of the First Amended Complaint.[1] The certiorari petition did not include plaintiffs' other claims, the jury demand issue, or the denial of leave to amend. Petition for Writ of Certiorari, *Hughes v. Nw. Univ.*, No. 19-1401. The Supreme Court granted certiorari, vacated the judgment, and remanded the case for reconsideration. *Hughes*, 142 S. Ct. 737. The Court rejected this court's reliance on a "categorical rule" that providing some low-cost options eliminates concerns about other investment options being imprudent. *Id.* at 740. We were directed to reevaluate plaintiffs' allegations based on the duty of prudence articulated in *Tibble v. Edison International,* 575 U.S. 523

[1] Laura Divane did not participate in this petition and is no longer pursuing this appeal. So, April Hughes became the lead plaintiff and appellant, resulting in the changed caption.

(2015), applying the pleading standard discussed in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), and *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007). *Hughes*, 142 S. Ct at 742.

II. Impact of *Hughes*

A. Scope of Remand

The Supreme Court identified three ways in which plaintiffs pleaded that Northwestern violated the duty of prudence: (1) "respondents allegedly failed to monitor and control the fees they paid for recordkeeping"; (2) "respondents allegedly offered a number of mutual funds and annuities in the form of 'retail' share classes that carried higher fees than those charged by otherwise identical 'institutional' share classes of the same investments"; and (3) "respondents allegedly offered too many investment options … and thereby caused participant confusion and poor investment decisions." *Id.* at 741. The first allegation relates to Count III, and the second and third to Count V.

Plaintiffs acknowledge that they are not rearguing the jury demand issue. In their briefs on remand, they ask to relitigate only Counts III and V of the First Amended Complaint, stating: "Northwestern imprudently incurred excessive recordkeeping fees" (Count III); "Northwestern provided higher-cost retail-class shares when identical lower-cost institutional-class shares of the same funds were available" (Count V); and "Northwestern imprudently retained excessively duplicative funds" (Count V).

Grounds not argued on appeal are waived. *Bordelon v. Bd. of Educ. of the City of Chi.*, 811 F.3d 984, 991 (7th Cir. 2016) (citation omitted). And generally, issues that were not argued before the Supreme Court are not encompassed within a

remand from the Court. *See United States v. Husband*, 312 F.3d 247, 250 (7th Cir. 2002) (citations omitted) ("[A]ny issue that could have been but was not raised on appeal is waived and thus not remanded."); *Buckley v. Fitzsimmons*, 952 F.2d 965, 967 (7th Cir. 1992) ("But this topic was not raised in the Supreme Court … and so is not encompassed within the remand."), *rev'd on other grounds*, 509 U.S. 259 (1993); 18B CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 4478.3 (3d ed. 2022) (explaining the "Law of the Case—Mandate Rule"). But if the opinion on appeal identifies an error that implicates and requires redetermination of other issues not raised on appeal, we may consider them. *See Husband*, 312 F.3d at 251.

Because plaintiffs did not petition for certiorari on and have not reargued the following issues on remand, we do not reconsider them: the TIAA products claim (Count I), the prohibited transactions claims (Counts II, IV, and VI), and the jury demand issue. Nothing in *Hughes* undercuts the bases on which this court previously resolved these claims and issue, so we reinstate this court's prior decisions on them. *See generally United States v. Romero*, 528 F.3d 980, 981 (7th Cir. 2008) (reinstating holdings not implicated by the Supreme Court's remand).

Plaintiffs do ask us to remand for reconsideration their request for leave to file their Second Amended Complaint. While we agree that *Hughes* may strengthen the plausibility of the recordkeeping, share-class, and duplicative funds claims in the proposed Second Amended Complaint, ultimately, we need not grant this request because we rule that the analogous counts in the First Amended Complaint state plausible claims for relief. The other counts in the proposed Second Amended

Complaint[2] are not implicated by *Hughes*, so we do not reconsider granting leave to amend for those claims. For those counts, we reinstate this court's former decision affirming the district court's denial of leave to amend.

B. Impact on *Loomis* and *Hecker*

Hughes abrogated a line of reasoning derived from *Loomis*, 658 F.3d 667, and *Hecker*, 556 F.3d 575. The Supreme Court rejected this court's reliance on a categorical rule that Count V failed because plaintiffs' "preferred type of low-cost investments were available as plan options." *Hughes*, 142 S. Ct. at 740; *see Divane*, 953 F.3d at 991–92. Put another way, "ERISA does not allow the soundness of investments A, B, and C to excuse the unsoundness of investments D, E, and F." *Albert v. Oshkosh Corp.*, 47 F.4th 570, 575 (7th Cir. 2022). The duty of prudence requires a fiduciary to assess the prudence of each investment both individually and relative to the entire plan.

Hughes negates some of the reasoning developed in *Hecker* and *Loomis* and employed in *Divane*. *See Forman v. TriHealth, Inc.*, 40 F.4th 443, 452 (6th Cir. 2022) ("*Hecker* and *Loomis* dismissed imprudence claims in part because the retirement plan under review offered a range of options, including some that

[2] "Aside from … four new counts, the second amended complaint mirrored the causes of action and claims in the amended complaint. The four new counts alleged that Northwestern: (1) offered retail class funds as investment options instead of using their bargaining power to offer institutional class shares at lower prices; (2) violated Northwestern's Investment Policy Statement by failing to monitor investment performance and recordkeeping costs; and (3) allowed TIAA to access and use participant information to market its services to participants." *Divane*, 953 F.3d at 985. *Hughes* does not impact the district court's findings of futility and undue delay as to Counts VIII, IX, and X.

were less expensive than the challenged retail mutual fund shares. *Hughes* rejected that bright-line rule, precluding us from evaluating these employees' claims under it."). *Hecker* relied in part on the "wide range of expense ratios" in a plan to dismiss a claim that a plan fiduciary provided investment options with excessive fees. 556 F.3d at 586. *Loomis*, too, employed this reasoning to reject a share-class claim. 658 F.3d at 670. In *Divane*, this court also depended on the fact that Northwestern had provided a "wide range of investment options" in rejecting Count V. 953 F.3d at 992. As this court has recognized in recent decisions, *Hughes* says providing a diverse menu of investments alone is not dispositive that a plan fiduciary has fulfilled the duty of prudence. *Albert*, 47 F.4th at 579-80; *Dean v. Nat'l Prod. Workers Union Severance Tr. Plan*, 46 F.4th 535, 548–49 n.4 (7th Cir. 2022).

Still, *Hughes* left untouched three principles from *Loomis* and *Hecker*. The first is that the use of revenue sharing for plan expenses does not amount to a per se violation of fiduciary duty under ERISA. *Hecker*, 556 F.3d at 585. This goes to Count III (excessive recordkeeping fees). But this principle does not foreclose the possibility of violating a fiduciary duty by failing to monitor and incur only reasonable expenses. Plan fiduciaries have a continuing duty to monitor their expenses to make sure that they are not excessive with respect to the services received. *See Tibble v. Edison Int'l*, 843 F.3d 1187, 1197 (9th Cir. 2016) ("[A] trustee is to 'incur only costs that are reasonable in amount and appropriate to the investment responsibilities of the trusteeship.'"(quoting RESTATEMENT (THIRD) OF TRUSTS § 90(c)(3))); *Tibble v. Edison Int'l*, 575 U.S. 523, 525 (2015).[3]

[3] The *Tibble* litigation has a lengthy procedural history. For our purposes, its two most relevant opinions are the Supreme Court's decision

Switching from a revenue-sharing to a per capita expense model may in some cases be a proper means of reining in excessive expenses. But *Hughes* does not state that revenue sharing is an impermissible expense arrangement.

The second principle is that "nothing in ERISA requires every fiduciary to scour the market to find and offer the cheapest possible fund." *Hecker*, 556 F.3d at 586; *Loomis,* 658 F.3d at 670. This primarily goes to Count V (imprudent fund retention) but does not account for the share-class claim embedded within Count V. This principle does not address the duty of a fiduciary when it has access to a cheaper but otherwise identical fund from the same fund provider. ERISA requires a fiduciary to assess whether a given fund is prudent in light of other investment options in a plan, comparable funds, and the expenses charged, among other factors. *See Tibble*, 575 U.S. at 529–30.

Also, the second principle accords with this court's prior conclusion about Count III that "Northwestern was not required to search for a recordkeeper willing to take $35 per year per participant as plaintiffs would have liked." *Divane*, 953 F.3d at 990–91. In *Albert*, this court read this portion of *Divane* as "reject[ing] the notion that a failure to regularly solicit quotes or competitive bids from service providers breaches the duty of prudence." 47 F.4th at 579. *Albert*

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vacating the judgment of the Ninth Circuit in *Tibble v. Edison International*, 575 U.S. 523 (2015), and the Ninth Circuit's en banc decision following remand from the Court in *Tibble v. Edison International*, 843 F.3d 1187 (9th Cir. 2016). The former explained the continuing duty to monitor investments within the duty of prudence, and the latter expounded upon this duty with regards to plan expenses. We distinguish the cases by their reporter designations.

determined that *Hughes* left this portion of *Divane* untouched. *See id.* at 579–80. While true, *Hughes* directed us to reconsider plaintiffs' allegations concerning excessive recordkeeping fees in light of the continuing duty to monitor such fees stated in *Tibble*, 575 U.S. 523. *Hughes*, 142 S. Ct at 742. We reaffirm that a fiduciary need not constantly solicit quotes for record-keeping services to comply with its duty of prudence. But fi-duciaries who fail to monitor the reasonableness of plan fees and fail to take action to mitigate excessive fees—such as by adjusting fee arrangements, soliciting bids, consolidating recordkeepers, negotiating for rebates with existing record-keepers, or other means—may violate their duty of prudence.

The third principle is that plans may generally offer a wide range of investment options and fees without breaching any fiduciary duty. *Loomis*, 658 F.3d at 673–74; *Hecker*, 556 F.3d at 586. Nothing in *Hughes* undercuts this general proposition, but as mentioned earlier, the Supreme Court rejected this court's reliance on a categorical rule that a plan fiduciary may avoid liability by assembling a diverse menu of investment options that includes the types of investments a plaintiff de-sires. *Hughes*, 142 S. Ct. at 741–42.

III. Pleading Standard

Before evaluating whether plaintiffs have stated a claim in Counts III and V, we must specify the correct pleading stand-ard for a breach of the duty of prudence under ERISA. *Hughes* offers some guidance but stops short of pronouncing a con-crete standard. The Court directed us to "consider whether petitioners have plausibly alleged a violation of the duty of prudence as articulated in *Tibble*," 575 U.S. 523, applying the pleading standard from *Iqbal* and *Twombly*. *Hughes*, 142 S. Ct. at 742. The Court then quoted *Fifth Third Bancorp v.*

Dudenhoeffer, 573 U.S. 409, 425 (2014), stating that the inquiry into the duty of prudence is "context specific." *Id.* The Court concluded with a sentence, the meaning of which the parties debate. We first address the duty of prudence articulated in *Tibble*, 575 U.S. 523, and then determine the pleading standard.

A. Duty of Prudence

Under the duty of prudence mandated in ERISA, a plan fiduciary is required 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). "In determining the contours of an ERISA fiduciary's duty, courts often must look to the law of trusts." *Tibble*, 575 U.S. at 528–29. The Supreme Court has stated that "a trustee has a continuing duty to monitor trust investments and remove imprudent ones … separate and apart from the trustee's duty to exercise prudence in selecting investments at the outset." *Id.* at 529. "If the fiduciaries fail to remove an imprudent investment from the plan within a reasonable time, they breach their duty." *Hughes*, 142 S. Ct. at 742 (citing *Tibble*, 575 U.S. at 529–30). This continuing duty to monitor is a subset of the duty of prudence, *Tibble*, 575 U.S. at 529–30, and includes two related components.

First, the duty of prudence requires a plan fiduciary to systematically review its funds both at the initial inclusion of a particular fund in the plan and at regular intervals to determine whether each is a prudent investment. *Id.* at 529 ("[T]he trustee must 'systematic[ally] conside[r] all the investments of the trust at regular intervals' to ensure that they are

appropriate." (quoting AMY MORRIS HESS, GEORGE GLEASON BOGERT, & GEORGE TAYLOR BOGERT, BOGERT'S LAW OF TRUSTS AND TRUSTEES § 684, at 147–48 (3d ed. 2009) ("BOGERT'S LAW OF TRUSTS")); AUSTIN WAKEMAN SCOTT, MARK L. ASCHER, & WILLIAM FRANKLIN FRATCHER, SCOTT AND ASCHER ON TRUSTS §§ 19.3, 19.4 (6th ed. 2022) ("SCOTT ON TRUSTS"). "'Managing' embraces monitoring, that is, the trustee's continuing responsibility for oversight of the suitability of investments already made as well as the trustee's decisions respecting new investments." UNIF. PRUDENT INVESTOR ACT § 2, cmt. (UNIF. L. COMM'N 1995); *Tibble*, 575 U.S. at 529. "When the trust estate includes assets that are inappropriate as trust investments, the trustee ordinarily has a duty to dispose of them within a reasonable time." SCOTT ON TRUSTS § 19.3.1; *see also* BOGERT'S LAW OF TRUSTS § 685; *Tibble*, 575 U.S. at 529–30.

Second, the duty of prudence requires a plan fiduciary to "incur only costs that are reasonable in amount and appropriate to the investment responsibilities of the trusteeship." *Tibble*, 843 F.3d at 1197 (quoting RESTATEMENT (THIRD) OF TRUSTS § 90(c)(3)); *see also Sweda v. Univ. of Pa.*, 923 F.3d 320, 328 (3d Cir. 2019) ("Fiduciaries must also understand and monitor plan expenses."); *Davis v. Washington Univ. in St. Louis*, 960 F.3d 478, 483 (8th Cir. 2020) (discussing a fiduciary's duty to keep plan expenses under control). "Expenses, such as management or administrative fees, can sometimes significantly reduce the value of an account in a defined-contribution plan." *Tibble*, 575 U.S. at 525. So "cost-conscious management is fundamental to prudence in the investment function," and should be applied "not only in making investments but also in monitoring and reviewing investments." RESTATEMENT (THIRD) OF TRUSTS § 90, cmt. B; *see also id.* § 88, cmt. A ("Implicit in a trustee's fiduciary duties is a duty to be cost-

conscious."). "Wasting beneficiaries' money is imprudent." UNIF. PRUDENT INVESTOR ACT § 7, cmt. (UNIF. L. COMM'N 1995).

The duty to monitor stated in *Tibble*, 575 U.S. 523, will inform our analysis of Counts III and V. But *Tibble* "express[ed] no view on the scope of … fiduciary duty" and identified no pleading standard for a violation of that duty. *Id.* at 531. *Tibble* involved summary judgment and findings following a bench trial—not a motion to dismiss—so its relevance is limited in determining what allegations survive a motion to dismiss. *Id.* at 523.

B. *Dudenhoeffer*'s Reach

The parties dispute the meaning of the last sentence in *Hughes*: "At times, the circumstances facing an ERISA fiduciary will implicate difficult tradeoffs, and courts must give due regard to the range of reasonable judgments a fiduciary may make based on her experience and expertise." 142 S. Ct. at 742. This sentence is preceded by the citation to *Dudenhoeffer*, 573 U.S. at 425, quoting that the content of the duty of prudence is "context specific." *Hughes*, 142 S. Ct. at 742. Plaintiffs read *Hughes*'s last sentence as dicta and not as a part of the standard to plead a violation of the duty of prudence. In contrast, Northwestern reads the sentence as incorporating *Dudenhoeffer*'s heightened pleading standard, namely that "a plaintiff must plausibly allege an alternative action that the defendant could have taken … that a prudent fiduciary in the same circumstances would not have viewed as more likely to harm the fund than to help it." 573 U.S. at 428. For Northwestern, that means plaintiffs must plead that an alternative prudent action which the fiduciary should have taken was "actually

available" and that plaintiffs must "rule out reasonable explanations" for failure to take that action.

Dudenhoeffer involved an employee stock ownership plan (ESOP) in which fiduciaries allegedly had negative inside information about the stock the plan contained. *Id.* at 412–13. The duty of prudence there involved a conflict between the fiduciary's knowledge of negative inside information about the stock versus the fiduciary's adherence to insider trading laws and a reasonable belief that halting stock purchases "would do more harm than good to the fund by causing a drop in the stock price." *Id.* at 428–30. This unique tradeoff caused the Supreme Court to set a heightened pleading standard for that case. The Court also limited the higher standard to claims for breach of the duty of prudence based on inside information by fiduciaries of an ESOP. 573 U.S. at 428. Since *Dudenhoeffer*, the Court has reaffirmed that the case "set forth the standards for stating a claim for breach of the duty of prudence against fiduciaries who manage employee stock ownership plans (ESOPs)." *Amgen Inc. v. Harris*, 577 U.S. 308, 309 (2016).

Northwestern overreads the reference in *Hughes* to *Dudenhoeffer* as adopting that case's heightened pleading standard. Rather, the citation in *Hughes* to *Dudenhoeffer* signals that the duty of prudence inquiry is "context specific," but no more. Because this case does not involve an ESOP, *Dudenhoeffer*'s standard does not apply. But the context specific inquiry is key. It is in this light that we read the Supreme Court's directive to recognize the "difficult tradeoffs" that an ERISA fiduciary faces, and the "range of reasonable judgments" that may be made, and to consider alternative explanations for the fiduciary conduct complained of. But as we discuss next,

these alternative explanations need not be conclusively ruled out at the pleadings stage.

C. Contours of the Pleading Standard

Plausibility is the basic test for pleadings on a motion to dismiss. A plaintiff's "[f]actual allegations must be enough to raise a right to relief above the speculative level on the assumption that all allegations in the complaint are true." *Twombly*, 550 U.S. at 555 (citations and footnote omitted). Plaintiffs must provide "some further factual enhancement" to take a claim of fiduciary duty violation from the realm of "possibility" to "plausibility." *Id.* at 557. "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678. So for Counts III and V, plaintiffs must have alleged enough facts to show that a prudent fiduciary would have taken steps to reduce fees and remove some imprudent investments.

A fiduciary's actions may give rise to different inferences—some that suggest a breach of fiduciary duty and others that do not. While *Hughes* did not expressly address how we are to resolve such varying inferences on a motion to dismiss, the Court directed us to apply the pleading standard discussed in *Iqbal* and *Twombly*. *Hughes*, 142 S. Ct. at 742. The alternative inference that can arise from fiduciary conduct is analogous to the "obvious alternative explanation" that the Court in *Twombly* accounted for when assessing telephone carriers' parallel conduct in an antitrust action. 550 U.S. at 567–68. There, the Court highlighted "[t]he inadequacy of showing parallel conduct or interdependence," which "without more" would be equally "consistent with conspiracy" as

it is with a "rational and competitive business strategy unilaterally prompted by common perceptions of the market." *Id.* at 554. This suggests that something "more," *id.*, is necessary to survive dismissal when there is an obvious alternative explanation that suggests an ERISA fiduciary's conduct falls within the range of reasonable judgments a fiduciary may make based on her experience and expertise. *Hughes*, 142 S. Ct. at 742.

In *Iqbal*, the Supreme Court reaffirmed that obvious alternative explanations should be accounted for when considering constitutional claims alleging that federal officials unlawfully discriminated against the plaintiff by detaining him. 556 U.S. at 682. There, too, the Court ruled that the Pakistani Muslim plaintiff had not overcome the obvious alternative explanation that he had been arrested because of his suspected link to the 9/11 attacks rather than because of "purposeful, invidious discrimination." *Id. Twombly* and *Iqbal* establish that an obvious alternative explanation for a defendant's conduct that precludes liability can undermine the claim's plausibility. *Id.* at 682; *Twombly*, 550 U.S. at 567. But neither do these cases say a plaintiff must conclusively rule out every possible alternative explanation for a defendant's conduct, no matter how implausible. Only *obvious* alternative explanations must be overcome at the pleadings stage, and only by a plausible showing that such alternative explanations may not account for the defendant's conduct. Accordingly, whether a claim survives dismissal necessarily depends on the strength or obviousness of the alternative explanation that the defendant provides.

Other circuits are in accord that every possible alternative explanation for an ERISA fiduciary's conduct need not be

ruled out at the pleadings stage. *Forman*, 40 F.4th at 452–53 ("The theory merely provides a competing inference for why TriHealth offered retail-class funds," but "the facts of another complaint might suggest an alternative explanation that renders implausible an inference of imprudence."); *Sacerdote v. N.Y. Univ.*, 9 F.4th 95, 108 (2d Cir. 2021); *Davis*, 960 F.3d at 483 ("WashU has identified one plausible inference, but it is not the only one."); *Sweda*, 923 F.3d at 326; *Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 597 (8th Cir. 2009).

Northwestern contends that we should not rely on *Sacerdote* and *Sweda* because in those cases the courts failed to require the plaintiffs to rule out every possible alternative explanation for an ERISA fiduciary's conduct. *See Sacerdote*, 9 F.4th at 108; *Sweda*, 923 F.3d at 326 (citing *Braden*, 588 F.3d at 597). For this reason, Northwestern suggests those cases were not decided under the *Twombly* pleading standard. But *Twombly* and *Iqbal* provide that only obvious alternative explanations should be accounted for at the dismissal stage. *See Twombly*, 550 U.S. at 567; *Iqbal*, 556 U.S. at 682. These cases did not hold that *every possible* alternative explanation must be conclusively ruled out on the pleadings to state a claim. The Third Circuit in *Sweda* and the Second Circuit in *Sacerdote*—as well as the other circuits cited above—rejected the reading of *Twombly* and *Iqbal* that Northwestern advances here. *Sweda*, 923 F.3d at 326; *Sacerdote*, 9 F.4th at 108.

Where alternative inferences are in equipoise—that is, where they are all reasonable based on the facts—the plaintiff is to prevail on a motion to dismiss. *See Forman*, 40 F.4th at 450 ("Equally reasonable inferences … could exonerate TriHealth … [b]ut at the pleading stage, it is too early to make these judgment calls."). This is because, at the pleadings stage, we

must accept all well-pleaded facts as true and draw reasonable inferences in the plaintiff's favor. *Taha v. Int'l Bhd. of Teamsters, Loc. 781*, 947 F.3d 464, 469 (7th Cir. 2020) (citation omitted); *Davis*, 960 F.3d at 483. A court's role in evaluating pleadings is to decide whether the plaintiff's allegations are plausible—not which side's version is more probable. *See Twombly*, 550 U.S. at 556. Thus, on a motion to dismiss, courts must give due regard to alternative explanations for an ERISA fiduciary's conduct, *Hughes*, 142 S. Ct. at 742, but they need not be overcome conclusively by the plaintiff.

Sometimes an alternative explanation for an ERISA fiduciary's conduct may be patently more reasonable and better supported by the facts than any theory of fiduciary duty violation pleaded by a plaintiff. In such a scenario, courts should not hesitate to dismiss an ERISA claim for breach of the duty of prudence. This will often be the case where a plan fiduciary has actually performed the requisite diligence in monitoring plan expenses and fund prudence. If a plan fiduciary sufficiently monitors funds and expenses, its informed course of action is much more likely to be within "the range of reasonable judgments a fiduciary may make based on her experience and expertise." *Hughes*, 142 S. Ct. 737 at 742.

To plead a breach of the duty of prudence under ERISA, a plaintiff must plausibly allege fiduciary decisions outside a range of reasonableness. *See Hughes*, 142 S. Ct. at 742. How wide that range of reasonableness is will depend on "'the circumstances ... prevailing' at the time the fiduciary acts." *Dudenhoeffer*, 573 U.S. 409, 425 (citing 29 U.S.C. § 1104(a)(1)(B)). The discretion accorded to an ERISA fiduciary "will necessarily be context specific." *Id.*

Often, as here, the ERISA fiduciary will defend against allegations of breach of duty by arguing that the course of action the plaintiff says the fiduciary should have taken was not available. Under this reasoning, Northwestern argues plaintiffs must plead that a prudent alternative action was "actually available." This is a variant of the alternative explanation defense. That a prudent alternative action was unavailable, of course, can explain the fiduciary's failure to take that action.

We see no reason to treat this alternative explanation differently than any other. To the extent that the prudent course of action was unavailable, that will foreclose the claim. But if a course of action was only possibly unavailable, further factual development on the pleadings will be necessary to resolve the claim on that explanation. The actual availability that Northwestern asks us to incorporate into the pleading standard goes beyond the plausibility standard of *Iqbal* and *Twombly*. "[A] well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable … ." *Twombly*, 550 U.S. at 556. At the pleadings stage, a plaintiff must provide enough facts to show that a prudent alternative action was plausibly available, rather than actually available.

IV. Analysis

We now evaluate Counts III and V of the First Amended Complaint under the pleading standard for the duty of prudence.

A. Count III—Excessive Recordkeeping Fees

Plaintiffs pleaded that Northwestern incurred unreasonable recordkeeping fees by failing to monitor and control those expenses. Per plaintiffs, the university should have reduced

its fees by soliciting bids from competing providers, negotiating with existing recordkeepers for fee reductions, and consolidating to a single recordkeeper.

This court previously affirmed dismissal on Count III because: (1) ERISA does not require a flat-fee structure; (2) Northwestern explained that it retained TIAA as a separate recordkeeper so it could continue offering TIAA's popular Traditional Annuity; and (3) plan participants could keep recordkeeping expenses low by selecting low-cost funds, which were made available through the Plans. *Divane*, 953 F.3d at 989–90, 991 n.10. As discussed earlier, *Hughes* forecloses the third reason for the prior decision. 142 S. Ct. at 742 (rejecting this court's reliance on plan participant control over funds selection). As for the second, the desire to retain the Traditional Annuity among plan offerings is an alternative explanation that we assess under our newly formulated pleading standard. On the first, *Hughes* left untouched the holding in *Hecker* that the use of revenue sharing for plan expenses does not amount to a per se violation of fiduciary duty under ERISA. *Hecker*, 556 F.3d at 585. But just because a revenue-sharing fee arrangement does not amount to a per se ERISA violation does not also mean that using such an arrangement in every case fulfills the plan fiduciary's duty of prudence. Further analysis is warranted in light of the ERISA fiduciary's continuing duty to monitor plan expenses stated in *Tibble*, 575 U.S. 523.

Recall that the duty of prudence includes a continuing duty to monitor plan expenses and "incur only costs that are reasonable in amount and appropriate" with respect to the services received. *Tibble*, 843 F.3d at 1197. So, Count III's survival depends on whether plaintiffs have pleaded sufficient

facts to render it plausible that Northwestern incurred unreasonable recordkeeping fees and failed to take actions that would have reduced such fees.

To begin, plaintiffs alleged that the Plans together paid between four to five million dollars a year in recordkeeping fees when, based on a $35 flat fee per participant, a more reasonable amount would have been about one million dollars. Plaintiffs assert that $35 was a reasonable per participant fee "[b]ased on the Plans' features, the nature of the administrative services provided by the Plans' recordkeepers, the number of participants in the Plans (approximately 30,000), and the recordkeeping market." In *Albert*, this court affirmed dismissal of a similar claim in which the plaintiff pleaded that the relevant ERISA plan paid an average of $87 per participant in recordkeeping fees despite a reasonable fee being $40 per participant based on what comparator funds paid. 47 F.4th at 579. This court in *Albert* depended in large part on the previous holding in *Divane* that the defendant "was not required to search for a recordkeeper willing to take $35 per year per participant as plaintiffs would have liked." *Id.* (citing *Divane*, 953 F.3d at 990–91). This holding remains correct, but *Hughes* directs us to reconsider plaintiffs' allegations concerning excessive recordkeeping fees given the continuing duty to monitor such fees stated in *Tibble*, 575 U.S. 523. We reaffirm that a fiduciary need not constantly solicit quotes for recordkeeping to comply with his duty of prudence with respect to plan expenses. *See Hecker*, 556 F.3d at 586; *Loomis,* 658 F.3d at 670. But a fiduciary who fails to monitor the reasonableness of plan fees and fails to take action to mitigate excessive fees may violate the duty of prudence.

Further, *Albert* emphasized the lack of "allegations as to the quality or type of recordkeeping services the comparator plans provided." *Id.* at 579. This court cited two Sixth Circuit cases, *Smith v. CommonSpirit Health*, 37 F.4th 1160, 1169 (6th Cir. 2022), and *Forman*, 40 F.4th at 449, for the rule that claims alleging excessive recordkeeping fees fail when ERISA plaintiffs do not plead that the fees were excessive in relation to the services provided. *Albert*, 47 F.4th at 580. But in affirming dismissal, *Albert* left open the possibility "that recordkeeping claims in a future case could survive the 'context-sensitive scrutiny of a complaint's allegations' courts perform on a motion to dismiss." *Id.* (citing *Dudenhoeffer*, 573 U.S. at 425). The pleadings here lead us down that different path.

Unlike in *Albert*, plaintiffs here assert "[t]here are numerous recordkeepers in the marketplace who are *equally* capable of providing a high level of service to large defined contribution plans like the Plans." So, plaintiffs maintain that the quality or type of recordkeeping services provided by competitor providers are comparable to that provided by Fidelity and TIAA. Plaintiffs also plead that because recordkeeping services are "commoditized … recordkeepers primarily differentiate themselves based on price, and will aggressively bid to offer the best price in an effort to win the business, particularly for jumbo plans like the Plans." In short, plaintiffs allege that recordkeeping services are fungible and that the market for them is highly competitive. Plaintiffs also contend that $35 per participant was a reasonable recordkeeping fee based on the services provided by existing recordkeepers and the Plans' features. Unlike the plaintiffs in *CommonSpirit Health*, plaintiffs plead that the fees were excessive relative to the recordkeeping services rendered. *See* 37 F.4th at 1169.

Plaintiffs also provide examples of several other university I.R.C. § 403(b) plans that successfully reduced recordkeeping fees by soliciting competitive bids, consolidating to a single recordkeeper,[4] and negotiating rebates. Plans offered by Loyola Marymount University, Pepperdine University, Purdue University, and California Institute of Technology successfully lowered recordkeeping fees by consolidating recordkeepers, according to plaintiffs. Purdue and CalTech leveraged plan assets to lower fees by negotiating for a flat administrative fee structure and revenue-sharing rebates, respectively. Plaintiffs also cite industry experts who recommended soliciting bids for recordkeeping and consolidating to a single recordkeeper to reduce overall fees.

Per plaintiffs, despite these recognized benefits, Northwestern neglected to monitor its recordkeeping fees under its revenue-sharing fee arrangement. Instead, the university continued to contract with TIAA and Fidelity instead of consolidating, did not conduct competitive bidding for recordkeeping services, and failed to use the Plans' size to negotiate rebates from existing providers. Plaintiffs also pleaded that Northwestern successfully lowered the Plans' administrative fees (including recordkeeping fees) in the October 2016 restructuring, which suggests that Northwestern's recordkeeping fees were unreasonably high and that means to lower such fees were available. Under the context-specific pleading standard specified above, all these factual averments lead us to conclude that plaintiffs have plausibly alleged that

[4] Consolidation of recordkeepers was not at issue in *Albert*, 47 F.4th 570.

Northwestern violated its duty of prudence by incurring unreasonable recordkeeping fees.

Northwestern responds that these pleadings fail to state a claim because plaintiffs have not demonstrated that consolidating to a single recordkeeper was an available alternative or that an alternative recordkeeper would have accepted a lower fee than that paid to Fidelity or TIAA. But under the pleading standard, plaintiffs have sufficiently alleged that recordkeeper consolidation and soliciting an equally capable but lower-cost recordkeeper were available options. Plaintiffs point to other institutions that had successfully consolidated and reduced fees. And they maintain that the market is competitive with equally capable recordkeepers who can provide comparable services for less.

Requiring plaintiffs to prove that another recordkeeper would have offered a lower fee or that consolidation was actually available would apply *Dudenhoeffer*'s heightened pleading standard, rather than the lower *Twombly* and *Iqbal* plausibility requirement. The Supreme Court in *Hughes* directed us to examine the duty of prudence in light of context, *Hughes*, 142 S. Ct. at 742 (citing *Dudenhoeffer*, 573 U.S. at 425), but *Dudenhoeffer*'s pleading standard does not extend beyond ESOPs. At the pleadings stage, plaintiffs were required to plausibly allege that Northwestern's failure to obtain comparable recordkeeping services at a substantially lesser rate was outside the range of reasonable actions that the university could take as plan fiduciary. They have done so.

Northwestern offers alternative explanations for its failure to consolidate recordkeepers and to switch to a per capita fee arrangement. The university posits that dropping TIAA as a recordkeeper would remove the popular Traditional Annuity

from the Plans and that retaining TIAA as sole recordkeeper would have compromised the Plans' ability to offer Fidelity investments. Northwestern also highlights that TIAA imposes a penalty for withdrawing investments in the Traditional Annuity. Although these are reasonable alternative explanations, they do not explain why the university did not negotiate with TIAA and Fidelity to lower fees for plan participants, whether through rebates or a modified fee arrangement. Count III is not limited to a failure to consolidate recordkeepers. It includes a claim that Northwestern failed to mitigate excessive recordkeeping fees in several ways.

Northwestern also argues that plaintiffs failed to address the fact that a per capita fee would discourage small investor participation. But neither has the university shown why encouraging small participant investment is worth charging an alleged four to five times in recordkeeping fees to plan participants. An equally, if not more, plausible inference would be that the university neglected to keep its recordkeeping fees paid through revenue sharing at a reasonable level. Northwestern's alternative explanations are not strong enough to justify dismissal of the recordkeeping claim on the pleadings. *See Forman*, 40 F.4th at 450; *Davis*, 960 F.3d at 483. So, we hold that plaintiffs have pleaded a plausible claim in Count III.

* * *

We are not alone in our conclusion on this type of claim. Two circuits have ruled against dismissing similar claims that alleged a failure to lower recordkeeping expenses. *See Davis*, 960 F.3d at 482–83; *Sweda*, 923 F.3d at 330–31. The Second Circuit also recognized that consolidating recordkeepers may reduce fees, but that court affirmed dismissal of a similar claim

because the plan fiduciary consolidated recordkeepers within a reasonable time. *Sacerdote*, 9 F.4th at 119–20.

In reaching this conclusion, we reiterate that the inquiry into the duty of prudence is in all cases "context specific." *Hughes*, 142 S. Ct. at 742 (quoting *Dudenhoeffer*, 573 U.S. at 425). Claims for excessive recordkeeping fees in a future case may or may not survive dismissal based on different pleadings and the specific circumstances facing the ERISA fiduciary. But here, plaintiffs have pleaded enough to cross the line from possibility to plausibility.

B. Count V—Imprudent Fund: Share-Class Claim

Plaintiffs also contend Northwestern "selected and retained for years as the Plans' investment options mutual funds and insurance company variable annuities with high expenses and poor performance relative to other investment options that were readily available to the Plans at all relevant times." At bottom, Count V alleges imprudent fund retention. As part of this claim, plaintiffs said Northwestern retained multiple duplicative funds that caused plan participant confusion and inaction. We address that contention separately in Section IV.C. Plaintiffs also allege that the Plans included "mutual funds and variable annuities with retail expense ratios far in excess of other lower-cost options available to the Plans." To plaintiffs, this and other pleadings state a claim that Northwestern breached its duty of prudence by failing to replace retail-class shares of funds with cheaper but otherwise identical institutional-class shares.

Northwestern disputes that Count V includes such a share-class claim. But the university construes Count V too narrowly and skips over many allegations in plaintiffs' First

Amended Complaint that support a share-class claim. In addition to the pleadings already cited, plaintiffs maintain that institutional and retail shares differ only in that retail shares have higher expenses. They allege that although institutional shares have minimum investment thresholds, it is common for large plans to obtain waivers for such requirements. Plaintiffs claim that jumbo defined-contribution plans like Northwestern's had "massive bargaining power" that enabled them to obtain such a waiver from fund managers. In support, plaintiffs state that other fiduciaries had successfully negotiated for including institutional-class shares in their plans despite not meeting the minimum investment requirements.

Importantly, in *Hughes* the Supreme Court identified a share-class claim in Count V, namely that Northwestern had "offered a number of mutual funds and annuities in the form of 'retail' share classes that carried higher fees than those charged by otherwise identical 'institutional' share classes of the same investments." 142 S. Ct. at 741. That share-class claim is separate from the duplicative funds claim, also in Count V, that we discuss later in Section IV.C. This court previously affirmed dismissal of Count V because Northwestern provided some of the low-cost index funds that plaintiffs sought. *Divane*, 953 F.3d at 991. The Supreme Court rejected that reasoning, *Hughes*, 142 S. Ct. at 740, so we reexamine the pleadings in light of the continuing duty to monitor plan investments outlined in *Tibble*, 575 U.S. 523. Under that standard, we conclude that the share-class claim survives.

Plaintiffs' share-class pleadings are similar to those in *Tibble*. Plaintiffs alleged that Northwestern retained more expensive retail-class shares of 129 mutual funds when, by using Northwestern's size and correspondent bargaining

power, less expensive but otherwise identical institutional-class shares were available to the Plans. Similarly, in *Tibble* petitioners "argued that respondents acted imprudently by offering six higher priced retail-class mutual funds as Plan investments when materially identical lower priced institutional-class mutual funds were available." 575 U.S. at 525–26. "[E]xpress[ing] no view on the scope of respondents' fiduciary duty," the Court remanded the case. *Id.* at 531.

On remand, the Ninth Circuit restated much of the Supreme Court's clarification on the continuing duty to monitor and remanded for reconsideration of the district court's bench trial findings on the share-class claim. *Tibble*, 843 F.3d at 1199. In turn, the district court found, for all mutual funds at issue, that "no prudent fiduciary would purposefully invest in higher cost retail shares" and granted judgment for the plaintiffs. *Tibble v. Edison Int'l*, No. CV 07-5359 SVW (AGRx), 2017 WL 3523737, at *12 (C.D. Cal. Aug. 16, 2017). It follows from the similarity of the share-class claim in *Tibble* with the allegations here that this claim should survive dismissal.

Northwestern argues plaintiffs have not pleaded that institutional-class shares were *actually* available to the Plans. The university points out that access to institutional-class shares often requires significant minimum investment by investors. To Northwestern, plaintiffs provide merely naked assertions that the university could have obtained waivers of these investment minimums. But as described above, under *Twombly* and *Iqbal*, a plaintiff is required to show only that such cheaper institutional shares were plausibly available. Northwestern has contended that the institutional shares are only possibly unavailable. We cannot determine on the pleadings, for example, whether the university had tried to bargain

with existing fund providers for access to institutional-class shares but failed. Nor can we discern whether Northwestern ever considered the possibility of access to institutional shares for its plan participants.

To the contrary, plaintiffs plausibly allege that waivers of investment minimums were possible, and that Northwestern could have negotiated for institutional-class shares. These allegations are substantiated by statements from industry experts that jumbo retirement plans like Northwestern's have massive bargaining power. Plaintiffs noted the district court's finding in the proceedings prior to *Tibble*, 575 U.S. 523, that it is "common for investment advisors representing large 401(k) plans to call mutual funds and request waivers of the investment minimums so as to secure the institutional shares." *Tibble v. Edison Int'l*, No. CV 07-5359 SVW(AGRx), 2010 WL 2757153, at *9 (C.D. Cal. July 8, 2010). They also highlighted how other large I.R.C. § 403(b) plans had leveraged plan assets to bargain for access to institutional-class shares and cited one specific example of a plan doing so. These allegations render it plausible that institutional-class shares were available to Northwestern.

Northwestern also contends that retail-class shares are superior to institutional-class shares because their higher fees allow plans, through revenue sharing, to pay for recordkeeping and other administrative expenses—a feature, it argues, that encourages small plan participants to invest. In *Loomis*, this court considered a similar alternative explanation in favor of revenue sharing over per capita fee arrangements. *See* 658 F.3d at 672 ("[F]or … others with small investment balances, a capitation fee could work out to more, per dollar under management … ."). This is just one possible explanation

for why Northwestern chose to retain such a large number of retail-class shares. But this explanation is not so much more obvious than plaintiffs' account that this issue can be resolved on the pleadings. Plaintiffs allege that Northwestern failed to consider bargaining for cheaper institutional-class shares with existing fund providers to the detriment of plan participants. Plaintiffs' version is especially plausible in light of their allegation that the Plans collectively paid about four to five times as much in recordkeeping fees as they should have.

In *Loomis*, this court also noted other advantages that retail-class shares could offer in contrast to institutional-class shares: Pooled investment in institutional shares "lacks the mark-to-market benchmark provided by a retail mutual fund" and so imposes greater difficulties in valuing the investment relative to market. *Id.* Further, institutional shares are less liquid than retail shares, which allow daily transfers. *Id.* Even more, this court observed that the average expense ratio of institutional shares in equity funds was higher than any of the retail shares offered to the plaintiff plan participants. *Id.* This was to show that the relevant plan in *Loomis* had competitively priced retail shares compared to institutional shares on average.

These other claimed advantages of retail shares appear nowhere in the pleadings or the parties' briefs. Instead, plaintiffs maintain that the institutional shares in question are identical to corresponding retail shares in terms of investment and management. The only difference, plaintiffs allege, is that retail shares charge significantly higher fees.

In this respect, plaintiffs' share-class claim is special in that the comparator action that a prudent fiduciary should have taken—replacing retail shares with institutional shares—is

baked into the claim. *See Forman*, 40 F.4th at 451 ("Different ERISA claims have different requirements, to be sure. But this claim has a comparator embedded in it."); *Sacerdote*, 9 F.4th at 108 (observing that the plaintiffs alleged that a "superior alternative investment"—institutional shares—was apparent by simply reviewing the fund prospectus); *Davis*, 960 F.3d at 483–87 (analyzing comparator benchmark funds for an allegedly underperforming fund but not for a share-class claim on the same fund).

Northwestern's alternative explanations about the unavailability of institutional-class shares or the advantages of using higher revenue-sharing payments in retail shares to defray recordkeeping costs, could explain Northwestern's failure to swap out its retail for institutional shares. But based on the facts pleaded, these alternative inferences are not strong enough to overcome the equally, if not more, reasonable inference that Northwestern failed to use its size to bargain for cheaper institutional shares. Drawing these reasonable inferences in plaintiffs' favor, they have plausibly alleged that Northwestern's failure to swap out retail-class for institutional-class shares was outside the range of reasonable decisions a fiduciary could take. So, we hold that plaintiffs have stated a share-class claim in Count V.

* * *

Five other circuits—four since *Divane*—have joined in this conclusion to uphold similar share-class claims against dismissal. *See Forman*, 40 F.4th at 450 (recognizing "[e]qually reasonable inferences" from the facts on why a fiduciary would choose retail over institutional shares, but acknowledging that "at the pleading stage, it is too early to make these judgment calls"); *Kong v. Trader Joe's Co.*, No. 20-56415, 2022 WL

1125667, at *1 (9th Cir. Apr. 15, 2022); *Sacerdote*, 9 F.4th at 108; *Davis*, 960 F.3d at 483 (observing that a failure to negotiate aggressively enough or to negotiate at all for lower-cost alternatives is enough to state a claim for a breach of the duty of prudence); *Sweda*, 923 F.3d at 331–32.

C. Count V—Imprudent Fund: Duplicative Funds Claim

As stated earlier, we see a separate claim in Count V that Northwestern breached its duty of prudence by retaining multiple duplicative funds. Plaintiffs claim that the excessive options in the Plans caused "decision paralysis" and led to investor confusion.

To the extent investor confusion is the injury pleaded, the First Amended Complaint does not identify how plaintiffs were confused and personally injured by the multiplicity of funds. This court's prior opinion affirmed that plans may generally offer a wide range of investment options and fees without breaching any fiduciary duty. *Divane*, 953 F.3d at 992 (citing *Loomis*, 658 F.3d at 673–74; *Hecker*, 556 F.3d at 586). *Hughes* left this general principle untouched. Unspecific allegations that a fiduciary provided too many funds, without more, do not state a claim for breach of the duty of prudence. So, we affirm dismissal of the duplicative funds claim in Count V that is based on a theory of investor confusion.

Plaintiffs also maintained that consolidating duplicative investments of the same style into a single investment option would have allowed the Plans to obtain lower-cost investments—such as low-cost institutional shares of the fund. Indeed, the pleadings on the October 2016 restructuring suggest that Northwestern accomplished just that. To the extent the allegations for the duplicative funds claim support the share-

class claim, on remand the district court may consider them on the Count V share-class claim.

V. Conclusion

For the reasons stated, we REVERSE the district court's dismissal of the excessive recordkeeping fees claim in Count III and the share-class claim in Count V of the First Amended Complaint, and REMAND for further proceedings. For all other claims and issues, we reinstate this court's judgment in *Divane*, 953 F.3d 980, and we AFFIRM the district court's dismissal of Plaintiffs' First Amended Complaint on all other counts and AFFIRM the denial of Plaintiffs' requests for leave to further amend the complaint and for a jury trial.