No. 17-16208
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CHARLES E. WHITE, JR., JOHN P. JACOBS, VERLAN D. HOOPES, NORA L. PENNINGTON, JAMES A. RAY, and JEANNETTE A. FINLEY, individually and as representatives of a class of similarly situated persons of the Chevron Employee Savings Investment Plan,

Plaintiffs-Appellants,

v.

CHEVRON CORPORATION,
ESIP INVESTMENT COMMITTEE, and JOHN DOES 1–20,

Defendants-Appellees.

Appeal from the United States District Court for the
Northern District of California,
The Honorable Phyllis J. Hamilton, Presiding
No. 4:16-cv-00793-PJH

APPELLANTS' PETITION FOR REHEARING EN BANC

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CONTENTS

AUTHORITIES

Cases

Statutes

Rules

PETITION FOR REHEARING EN BANC

Appellants petition the Court en banc to rehear this appeal because the panel affirmed dismissal of their complaint by imposing strict pleading standards that conflict with the decisions of this Court and other Circuits. En banc consideration is necessary to secure and maintain the uniformity of this Court's decisions on the proper pleading standards in this Circuit and to avoid a conflict among the Circuits.

This appeal also presents a question of exceptional importance over a rule of national application for which there is an overriding need for national uniformity, namely, the proper pleading standards to apply to a fiduciary breach claim under the Employee Retirement Income Security Act (ERISA). Is it sufficient for an ERISA plaintiff to allege indirectly that a fiduciary process was tainted by lack of effort, competence, or loyalty? The Seventh and Eighth Circuits hold it is. The Fifth Circuit and this Circuit agree with the principles underlying those decisions. One of the purposes in enacting ERISA was to provide "uniformity of decisions[.]" *Evans v. Safeco Life Ins. Co.*, 916 F.2d 1437, 1440 (9th Cir. 1990)(quoting *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 56 (1987)). A uniform pleading standard for ERISA fiduciary breach actions serves that purpose.

The panel imposed a heightened pleading requirement for ERISA fiduciary breach actions. The Seventh and Eighth Circuits hold that heightened pleading standards in ERISA fiduciary breach actions are improper and undermine ERISA's

remedial purpose because plaintiffs in such actions do not have access to the detailed facts that demonstrate how their fiduciaries breached their duty. This Court and the Fifth Circuit agree with those principles. The panel's decision thus establishes a conflict among the Circuits (as well as with this Court's precedents) on the proper pleading standards.

The same pleading standard must apply to all complaints no matter the Circuit. The panel imposed the wrong standard, an impermissibly strict standard, which the Court en banc should correct.

PROCEDURAL BACKGROUND

This is an ERISA fiduciary breach action under 29 U.S.C. §1132(a)(2) that plaintiffs commenced in the Northern District of California on February 17, 2016. ER265. Plaintiffs, participants in a defined contribution 401(k) retirement plan administered by Chevron Corporation, allege that their fiduciaries breached their duties under ERISA by providing imprudent plan investment options and causing the plan to incur unreasonable administrative expenses. The district court dismissed the complaint under Federal Rule of Civil Procedure 12(b)(6), but allowed plaintiffs to file an amended complaint. ER42–76. The district court then dismissed the amended complaint under Rule 12(b)(6) with prejudice. ER2–41. Plaintiffs timely appealed. ER78.

On November 13, 2018, a panel of this Court affirmed the dismissal in an

unpublished, three-page Memorandum. DktEntry 46-1, *see* Addendum. This petition is timely under Federal Rule of Appellate Procedure 40(a)(1). The Court's review is de novo. *Int'l Longshore & Warehouse Union v. ICTSI Or., Inc.*, 863 F.3d 1178, 1187 n.5 (9th Cir. 2017).

PLAINTIFFS' CLAIMS

As this Court en banc recognized in *Tibble v. Edison Int'l*, 843 F.3d 1187 (9th Cir. 2016), in a defined contribution 401(k) plan such as this, "participants' retirement benefits are limited to the value of their own individual investment accounts, which is determined by the market performance of employee and employer contributions, less expenses." *Tibble*, 843 F.3d at 1191 (quoting *Tibble v. Edison Int'l*, 135 S.Ct. 1823, 1826 (2015)). ERISA imposes stringent standards on the fiduciaries of such plans, duties that are "the highest known to the law." *Id.* at 1197 (quoting *Howard v. Shay*, 100 F.3d 1484, 1488 (9th Cir. 1996)).

As the Court en banc made clear, "cost-conscious management is fundamental to prudence" and "[w]asting beneficiaries' money is imprudent." *Id.* at 1197, 1198 (quotation marks and citations omitted). "It is beyond dispute that the higher the fees charged to a beneficiary, the more the beneficiary's investment shrinks." *Id.* at 1198.

In *Tibble*, the Court en banc reversed the district court's summary judgment against the plaintiff-participants in a 401(k) retirement plan who contended their

fiduciaries breached their duty by providing mutual funds in share classes that were more expensive than what was available to the plan. *Id.* at 1198. After trial on remand, the district court found that the fiduciaries had breached their duties as plaintiffs alleged and caused that plan over $13 million in losses. *Tibble v. Edison Int'l*, No. 2:07-cv-05359-SVW, Doc. 602 (C.D.Cal. Oct. 25, 2018). The court ordered the fiduciaries to restore those losses to the plan. *Id.*[1]

The plaintiffs here allege the same breach: their fiduciaries also provided mutual funds in share classes that were far more expensive than what Chevron's multi-billion-dollar plan could have provided. ER217–22, ER276-80. They allege also that the plan was large enough to just hire the same managers of those mutual funds to manage the plan accounts at an even lower cost, ER223–27, ER281–84, or invest in institutional collective trust versions of the same investments at lower cost, ER227, ER284–85. As the Court en banc noted in *Tibble*, "a trustee cannot

[1] The procedural history of *Tibble* shows the importance of the Court en banc rehearing this appeal now. The Court en banc heard the *Tibble* appeal only after remand from the Supreme Court. The Court rejected the *Tibble* plaintiffs' initial petition for rehearing en banc. *Tibble v. Edison Int'l*, No. 10-56406, DktEntry 95 at 11 (9th Cir. Aug. 1, 2013). The Supreme Court, however, granted the plaintiffs' petition for writ of certiorari, vacated the panel's decision, and remanded for the Court to determine the scope of a fiduciary's continuing duty of prudence. *Tibble v. Edison Int'l*, 135 S.Ct. 1823 (2015). On remand, the same panel did not address the scope of that duty and instead affirmed its prior decision on the ground that plaintiffs had forfeited their argument. *Tibble v. Edison Int'l*, No. 10-56406, DktEntry 128-1 (9th Cir. Apr. 13, 2016). The Court subsequently ordered the parties to submit briefs on whether the case should be reheard en banc (*id.*, DktEntry 129 (9th Cir. May 17, 2016)), and then ordered rehearing en banc (831 F.3d 1262 (9th Cir. Aug. 5, 2016)).

ignore the power the trust wields to obtain favorable investment products, particularly when those products are substantially identical—other than their lower cost—to products the trustee has already selected." 843 F.3d at 1198.

In addition to the same claim that was at issue in *Tibble*, the plaintiffs here allege additional breaches. Plaintiffs allege their fiduciaries improperly provided an ultra-low-interest money market fund as their plan's capital preservation option when this multi-billion-dollar plan qualified for a stable value fund that was just as safe but provided far-higher returns. ER199–215, ER271–75. Stable value funds are capital preservation investments designed specifically for large retirement plans such as Chevron's and have been known since well before 2010 to consistently outperform money market funds, which are designed for small retail investors. ER202–07, ER213–14, ER271–74. The fiduciaries' obligation to provide the highest return for a given level of risk in an investment is not only recognized in the law (*Tatum v. RJR Pension Inv. Comm.*, 855 F.3d 553, 566 (4th Cir. 2017)), it was required by the plan's own investment policy statement (ER272–73, ER261).[2]

Plaintiffs also allege that their fiduciaries caused their plan to pay excessive recordkeeping fees by allowing the plan's recordkeeper to take uncapped, asset-based fees from 2010 through 2012 as plan assets grew without any change in

[2] Plaintiffs allege another high-cost fund (the Artisan Small Cap Value Fund) suffered severe, persistent underperformance beginning in 2010, but imprudently was not removed until 2014. ER 235–39, ER288–91.

recordkeeping services. ER227–35, ER285–88. Plaintiffs allege their fiduciaries never put the plan's recordkeeping services out for competitive bidding at least since 2002. ER233–34, ER287–88. Plaintiffs allege their plan consequently paid the equivalent of $167–$181 per participant in annual recordkeeping fees, when a properly administered plan would have paid only the equivalent of $25 per participant. ER228–29, ER232. Such facts, if proved, are not only enough to state a claim, they are enough to survive summary judgment. *George v. Kraft Foods Global Inc.*, 641 F.3d 786, 798–99 (7th Cir. 2011). That accords with the Court en banc's recognition that "[w]asting beneficiaries' money is imprudent." *Tibble*, 843 F.3d at 1198. Plaintiffs further allege that Chevron was motivated to benefit the recordkeeper with excessive compensation because of its close corporate relationship to the recordkeeper. ER194–99, ER234–35.

Plaintiffs allege that these facts show a breach of ERISA's fiduciary duties under 29 U.S.C. §1104(a)(1)(A), (B), and (D), among other provisions. ER246–ER251, ER297–ER301.

THE PANEL'S SUMMARY AFFIRMANCE

The panel affirmed dismissal of these claims, holding that plaintiffs' allegations "showed only that Chevron could have chosen different vehicles for investment that performed better during the relevant period, or sought lower fees for administration of the fund. None of the allegations made it more plausible than

not that any breach of a fiduciary duty had occurred." Mem. ¶2 (citing *In re Century Aluminum Co. Securities Litig.*, 729 F.3d 1104, 1108 (9th Cir. 2013)).

ARGUMENT

The panel imposed a heightened pleading standard that conflicts with the decisions of this Court and other Circuits.

I. This Court's pleading standards and the ERISA pleading standards of *Allen* and *Braden*.

Relying on Supreme Court precedent, this Court holds that Federal Rule of Civil Procedure 8(a)(2) "requires only 'a short and plain statement of the claim showing that the pleader is entitled to relief, in order to give the defendant fair notice of what the ... claim is and the grounds upon which it rests.'" *Allen v. Boeing Co.*, 821 F.3d 1111, 1119 n.8 (9th Cir. 2016)(quoting *Bell Atl. Corp v. Twombly*, 550 U.S. 544, 555 (2007)). A complaint need not contain "detailed factual allegations," but only "sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Sonoma Cty. Ass'n of Retired Employees v. Sonoma Cty.*, 708 F.3d 1109, 1115 (9th Cir. 2013)(quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). While plausibility requires something "more than a sheer possibility," it does not impose "a 'probability requirement[.]'" *Id.* (quoting *Iqbal*, 556 U.S. at 678). "[A] well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and that a recovery is very remote and unlikely." *Williams v. Yamaha Motor Co.*, 851 F.3d

1015, 1025 (9th Cir. 2017)(quoting *Twombly*, 550 U.S. at 556).

"[A]nalyzing the sufficiency of a complaint's allegations is a 'context-specific task[.]'" *Sheppard v. David Evans & Assoc.*, 694 F.3d 1045, 1051 (9th Cir. 2012) (quoting *Iqbal*, 556 U.S. at 679). To prove a breach of ERISA's duty of prudence, a plaintiff must address not only the merits of the transactions, but also the thoroughness of the investigation into the merits of the transactions. *Tibble*, 843 F.3d at 1197. Here, there is little dispute that Plaintiffs address the merits of the transactions in question, showing them to have been objectively imprudent and to have caused their plan millions of dollars in losses. Thus, the issue on appeal primarily concerns the sufficiency of plaintiffs' allegations as to defendants' investigation into the merits of those transactions.

At the pleading stage, the details of how a fiduciary made decisions "will frequently be in the exclusive possession of the breaching fiduciary." *Concha v. London*, 62 F.3d 1493, 1503 (9th Cir. 1995). A court must "relax pleading requirements where the relevant facts are known only to the defendant." *Park v. Thompson*, 851 F.3d 910, 928 (9th Cir. 2017)(quoting *Concha*, 62 F.3d at 1503).

Other Circuits recognize, as did this Court in *Concha*, that ERISA plaintiffs do not have access to the facts necessary to plead specifically how their fiduciaries' investigation into the merits of a transaction was defective, because those facts tend systemically to be in the exclusive possession of those fiduciaries. *Allen v.*

GreatBanc Trust Co., 835 F.3d 670, 678 (7th Cir. 2016)(quoting *Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 597–98 (8th Cir. 2009)); *Innova Hosp. San Antonio, L.P. v. Blue Cross & Blue Shield of Ga., Inc.*, 892 F.3d 719, 728–31 (5th Cir. 2018)(quoting *Braden* in the context of an action under 29 U.S.C. §1132(a)(1)(B)). Given the purpose of ERISA in protecting retirement plan participants by imposing stringent duties on plan fiduciaries and enabling participants to enforce those duties through private civil litigation, it is improper to impose heightened pleading requirements on ERISA plaintiffs. An ERISA plaintiff "does not need to plead details to which she has no access, as long as the facts alleged tell a plausible story." *Allen*, 835 F.3d at 678. An ERISA plaintiff need only "plead facts *indirectly* showing unlawful behavior." *Id.* (emphasis added, quoting *Braden*, 588 F.3d at 595). Those indirect allegations need only support an inference that the fiduciaries' decision-making process was flawed or inadequate. *Id.* at 678–79. A fiduciary breach claim is plausible if it is "reasonable … to infer from what is alleged that the process was flawed," and "tainted by failure of effort, competence, or loyalty." *Braden*, 588 F.3d at 596. To impose more stringent pleading standards on an ERISA plaintiff, as the panel did here, would mean "the remedial scheme of the statute will fail, and the crucial rights secured by ERISA will suffer." *Innova*, 892 F.3d at 731 (quoting *Braden*, 588 F.3d at 598).

II. The panel did not address this Court's pleading standards or *Allen* and *Braden*, and misapplied *Century Aluminum*.

The panel did not address the pleading standards of this Court as described above and did not address the ERISA-specific standards of *Allen* and *Braden*. The panel relied only on *Century Aluminum*.[3] The panel misapplied that decision and used it to impose a pleading standard that conflicts with this Court's decisions and *Allen* and *Braden*.

The panel cited *Century Aluminum* for the principle that "[w]here there are two *possible* explanations, only one of which can be true and only one of which results in liability, plaintiff cannot offer allegations that are merely consistent with its favored explanation but are also consistent with the alternative explanation." Mem. ¶1 (quoting *Century Aluminum*, 729 F.3d at 1108 (emphasis added)) (quotation and editing marks omitted). The Court in *Century Aluminum* made that statement only after first concluding there was an "obvious alternative explanation" that contradicted plaintiffs' inference from the facts. *Century Aluminum*, 729 F.3d at 1108. The panel here did not identify any obvious alternative explanation for the transactions at issue in this case. It is not obvious why fiduciaries would provide far more expensive shares of a mutual fund, provide poorer-returning investments with the same or lower level of risk, or fail to put plan recordkeeping services out for bid and fail to negotiate reasonable recordkeeping fees.

[3] Neither party cited *Century Aluminum* in their opening briefs.

The panel also applied *Century Aluminum* outside the context of that case. *Cf. Sheppard*, 694 F.3d at 1051 (applying the pleading standards is a "context specific task"). *Century Aluminum* addressed a claim under §11 of the Securities Act of 1933 (15 U.S.C. §77k). 729 F.3d at 1106. The Act requires that the plaintiff allege that her shares were issued in the offering for which the issuer made a misrepresentation. *Id.* at 1106–07.[4] Where the plaintiff did not purchase shares in the offering, but only in a subsequent transaction, the plaintiff must allege how she can trace her shares to the offering for which the alleged misrepresentation was made. *Id.* That task is particularly difficult when a corporation has issued shares in multiple offerings. *Id.* When a corporation has had only one offering, merely alleging that one's shares are directly traceable suffices because most shares necessarily came from that offering. *Id.* at 1107. In multiple offerings, more detailed allegations are required, because "aftermarket purchasers usually will *not* be able to trace their shares back to a particular offering." *Id.* at 1107–08. Thus, in such cases, "plaintiffs had to allege facts from which we can reasonably infer that their situation is different." *Id.* at 1108. The *Century Aluminum* plaintiffs sued over a misrepresentation made in a secondary offering of 24.5 million shares, after 49 million shares were already in the market, but did not allege how they could trace

[4] Actions under the Securities Exchange Act of 1934 also are subject to heightened pleadings standards under the Private Securities Litigation Reform Act (PSLRA), 15 U.S.C. §78u-4(b).

their shares to the secondary offering. *Id.* at 1106, 1109.

The Securities Act in this respect specifically imposes a heightened pleading requirement for §11 actions. In contrast, there is no heightened pleading requirement for ERISA fiduciary breach actions. *Allen*, 835 F.3d at 674; *Braden*, 588 F.3d at 595–97; *Innova*, 892 F.3d at 728–29. In fact, the Secretary of Labor, charged with enforcing ERISA, specifically cautions against unnecessarily high pleading standards for ERISA fiduciary breach actions, because that would defeat "ERISA's remedial purpose and evident intent to prevent through private civil litigation 'misuse and mismanagement of plan assets.'" *Braden*, 588 F.3d at 597 (quoting *Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 140 n.8 (1985)).

In *Century Aluminum* the "obvious alternative explanation" that the plaintiffs had to specifically address, in the context of that claim, was that they in fact *could* trace their after-market shares to the specific offering for which the alleged misrepresentation was made, a task that is "often impossible" except in unusual circumstances. *Century Aluminum*, 729 F.3d at 1107. There is no such obvious alternative explanation in this case. This Court en banc already concluded that providing participants the more expensive shares of a mutual fund is a breach of duty. *Tibble*, 843 F.3d at 1198. The panel's conclusion that such an allegation does not even state a claim thus contradicts the en banc decision in *Tibble*. In fact, under the panel's pleading standards, *Tibble* itself would have been dismissed, since the

complaint here is more detailed than the *Tibble* complaint. *Compare* ER187–253 (amended complaint) *with Tibble v. Edison Int'l*, No. 2:07-cv-05359-SVW, Doc. 116-2 (C.D.Cal. Apr. 15, 2009) (second amended complaint). Under the panel's overly strict pleading standards, the *Tibble* plaintiffs would not have been able to prove their fiduciaries beached their duties and would not have recovered over $13 million in plan losses. That is not a result that supports ERISA's remedial purpose or enforces duties that are "the highest known to the law." *Tibble*, 843 F.3d at 1197.

There also is no obvious reason why the fiduciaries of a multi-billion dollar plan would provide participants a money-market fund instead of a stable value fund, when the latter consistently provided much greater returns for the same amount of risk well before 2010 and money-market rates were nearly zero.[5] Given the well-known, demonstrated superiority of stable value funds over money market funds for large plans for decades before 2010, it is plausible that Chevron did not even consider providing a stable value fund or failed to balance the relevant factors and make a reasoned decision. *See George*, 641 F.3d at 796. Even if it is possible Chevron has a reason for using a money market fund instead of a stable value fund, it is improper at the pleading stage to require a participant to conceive of and rule

[5] Plaintiffs, in fact, alleged and cited authority showing that most large defined contribution plans provide stable value funds. ER211 (¶66), ER272 (¶30).

out every one of those possible reasons. *Braden*, 588 F.3d at 597.[6]

There is no obvious reason for a fiduciary to fail to put a plan's recordkeeping services out for competitive bidding for over fifteen years. Moreover, the fact that the plan's effective recordkeeping rates were *six times* higher than similar plans pay indicates the Chevron plan fiduciaries did not negotiate a reasonable recordkeeping arrangement. In fact, *George* holds such facts demonstrate a breach of duty. 641 F.3d at 798–99.

In sum, the facts plaintiffs allege do not show "precisely the result[s] one would expect" from a prudent process. *Braden*, 588 F.3d at 597. Even if it is *possible* that Chevron came to these decisions after a prudent process, it is not *obvious* that it did so, and it is improper to require a plaintiff "to rule out every possible lawful explanation" for these results. *Id.* at 597. That would be to impose "the sort of 'probability requirement' at the pleading stage which *Iqbal* and *Twombly* explicitly reject." *Id.* (quoting *Iqbal*, 556 U.S. at 678); *see also Sonoma County*, 708 F.3d at 1115 (rejecting "probability requirement").

The panel, in fact, if not in word, imposed such a probability standard by concluding, "None of the allegations made it *more* plausible than not that any breach of a fiduciary duty had occurred." Mem. ¶2 (emphasis added). It is not a

[6] Similarly, even if Chevron could show it was prudent to have waited four years to remove the consistently underperforming Artisan fund, it is not obviously proper to have done so.

matter at the pleading stage of what inference from the facts is *more* "plausible"—that is, more likely to be true. It is only a matter of determining whether it is *plausible at all* under the allegations that a fiduciary breach occurred. Even the *Century Aluminum* case on which the panel relied holds that "[i]f there are two alternative explanations, one advanced by defendant and the other advanced by plaintiff, *both of which are plausible*, plaintiff's complaint survives a motion to dismiss[.]" *Century Aluminum*, 729 F.3d at 1108 (quoting *Starr v. Baca*, 662 F.3d 1202, 1216 (9th Cir. 2011)). "The standard at this stage of the litigation is not that plaintiff's explanation must be true or even probable. The factual allegations of the complaint need only 'plausibly suggest an entitlement to relief.'" *Starr*, 662 F.3d at 1216–17 (quoting *Iqbal*, 556 U.S. at 681). The factual allegations in this case do. The panel's requirement that plaintiffs' explanation be *more* plausible directly contradicts *Starr*.

The panel apparently believed that plaintiffs' proof of a fiduciary breach was improbable and that plaintiffs' recovery was very remote and unlikely. The Court has rejected those beliefs as grounds on which a court can dismiss a complaint. *Williams*, 851 F.3d at 1025.

III. The panel erroneously interpreted the allegations to suggest a fiduciary breach only because investments underperformed after the fiduciary decision.

The panel misconstrued plaintiffs' allegations in suggesting they "showed only that Chevron could have chosen different vehicles for investment that performed better during the relevant period[.]". Mem. ¶2. Plaintiffs' share-class claim has nothing to do with performance, although the more expensive shares of the same mutual fund necessarily will perform worse than the cheaper shares. *Tibble*, 843 F.3d at 1198 ("beyond dispute"). Plaintiffs show that the far superior performance of stable value funds over money market funds with the same or less risk existed well before 2010, the start of the relevant period, so that a prudent fiduciary of a plan such as Chevron's as of 2010 would have known of the availability of that superior investment and determined whether there was any reason not to use it instead of a low-interest money market fund. *E.g.*, ER202–07, ER211, ER272. Further, Plaintiffs did not claim the Artisan fund should have been removed in anticipation of its underperformance starting in 2010; instead, they claim it should have been removed *after* it began consistently underperforming in 2010 and before 2014. ER235–39, ER288–91. These are not claims of breach merely because the investments the fiduciaries chose subsequently underperformed. They are not based on hindsight.

The panel's conclusion that alleging "Chevron could have ... sought lower fees

for administration of the fund" (Mem. ¶2) is insufficient to show a breach of duty conflicts with the Court en banc's conclusions in *Tibble* that "cost-conscious management is fundamental to prudence[,]" "[w]asting beneficiaries' money is imprudent[,]" and "trustees are obligated to minimize costs." *Tibble*, 843 F.3d at 1197–98. Plaintiffs do not just allege in conclusory terms that Chevron could have gotten lower recordkeeping fees. They allege how much Chevron caused the plan to pay and how much a plan of that enormous size should have paid, and show that their plan was paying *six times* more in recordkeeping fees than it should have. ER232. They allege how the plan's asset-based recordkeeping fees increased as assets increased even though recordkeeping services did not change. ER228–34, ER285–88. They allege how Chevron caused the plan to pay unreasonable recordkeeping fees because of the failure to put those services out for bid and because of Chevron's desire to benefit the recordkeeper at participants' expense. ER233–35, ER287–88; ER194–99.

CONCLUSION

The Court en banc should secure and maintain the uniformity of its decisions on pleading standards, especially in the context of ERISA fiduciary breach actions, by correcting the panel's disregard of those decisions and imposition of impermissibly strict pleading standards in this case. Doing so also will ensure national uniformity in the pleading standards for ERISA fiduciary breach actions

by ensuring this Circuit does not impose stricter standards that conflict with the standards of the Seventh and Eighth Circuits. The Court en banc should rehear this appeal and apply the proper pleading standards.

November 27, 2018

Respectfully submitted,

/s/ Jerome J. Schlichter

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CERTIFICATE OF COMPLIANCE

1. I certify that this brief complies with the type-volume limitation set forth in Circuit Rule 40-1(a) because this brief contains 4,191 words, excluding the parts of the brief exempted by Fed.R.App.P. 32(a)(7)(B)(iii).

2. I certify that this brief complies with the typeface requirements of Fed.R.App.P. 32(a)(5) and the type style requirements of Fed.R.App.P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2016 Times New Roman 14 point font.

s/ Jerome J. Schlichter
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Attorney for Plaintiffs-Appellants
November 27, 2018

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on November 27, 2018.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ Jerome J. Schlichter
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November 27, 2018

ADDENDUM

NOT FOR PUBLICATION

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U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CHARLES E. WHITE, Jr.; et al., Plaintiffs-Appellants, v. CHEVRON CORPORATION and ESIP INVESTMENT COMMITTEE, Defendants-Appellees.	No. 17-16208 D.C. No. 4:16-cv-00793-PJH MEMORANDUM*

Appeal from the United States District Court
for the Northern District of California
Phyllis J. Hamilton, Chief Judge, Presiding

Argued and Submitted October 19, 2018
San Francisco, California

Before: HAWKINS and HURWITZ, Circuit Judges, and EATON,** Judge.

Appellants (collectively, "White") appeal the district court's Rule 12(b)(6) dismissal of their amended complaint for failure to state a claim. White sought relief under the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C.

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** Richard K. Eaton, Judge of the United States Court of International Trade, sitting by designation.

§ 1001, *et seq*. White maintains that the amended complaint alleged sufficient facts to support a reasonable inference that appellees (collectively, "Chevron") breached their fiduciary duties of loyalty and prudence to the beneficiaries of Chevron's retirement plan, and engaged in a prohibited transaction. We have jurisdiction under 28 U.S.C. § 1291, and affirm.

1. Dismissal of a complaint is appropriate if it fails to "state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). That is, "the complaint must allege 'factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.'" *In re Century Aluminum Co. Securities Litig.*, 729 F.3d 1104, 1108 (9th Cir. 2013) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). Where there are "two *possible* explanations, only one of which can be true and only one of which results in liability, plaintiff[] cannot offer allegations that are 'merely consistent with' [its] favored explanation but are also consistent with the alternative explanation." *In re Century Aluminum Co. Securities Litig.*, 729 F.3d at 1108 (quoting *Iqbal*, 556 U.S. at 678) (emphasis added). "Something more is needed, such as facts tending to exclude the possibility that the alternative explanation is true, . . . in order to render plaintiffs' allegations plausible within the meaning of *Iqbal* and *Twombly*." *Id*. (citing *Twombly*, 550 U.S. at 554).

2. Applying the plausibility standard here, the facts alleged, viewed in the light most favorable to White, were insufficient to support a plausible inference of breach of the duty of loyalty, breach of the duty of prudence, or that a prohibited transaction took place. Rather, as to each count, the allegations showed only that Chevron could have chosen different vehicles for investment that performed better during the relevant period, or sought lower fees for administration of the fund. None of the allegations made it more plausible than not that any breach of a fiduciary duty had occurred. *See In re Century Aluminum Co. Securities Litig.*, 729 F.3d at 1108. Thus, we hold that White failed to state a claim for breach of fiduciary duty.

3. We also hold that the prohibited transaction claim was time-barred because the transaction alleged to have violated the statute—hiring Vanguard—is alleged to have occurred in 2002, and this action was not commenced until 2016. *See* 29 U.S.C. § 1113. In light of the foregoing, White's derivative cause of action alleging that Chevron failed to monitor third parties also fails.

AFFIRMED.

Form 11. Certificate of Compliance Pursuant to 9th Circuit Rules 35-4 and 40-1 for Case Number 17-16208

Note: This form must be signed by the attorney or unrepresented litigant *and attached to the back of each copy of the petition or answer.*

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☒ Contains 4,191 words (petitions and answers must not exceed 4,200 words), and is prepared in a format, type face, and type style that complies with Fed. R. App. P. 32(a)(4)-(6).

or

☐ Is in compliance with Fed. R. App. P. 32(a)(4)-(6) and does not exceed 15 pages.

Signature of Attorney or Unrepresented Litigant: s/ Jerome J. Schlichter

Date: Nov 27, 2018

("s/" plus typed name is acceptable for electronically-filed documents)