

No. 17-3244

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**UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT**

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JENNIFER SWEDA, BENJAMIN A. WIGGINS, ROBERT L. YOUNG, FAITH PICKERING,  
PUSHKAR SOHONI, AND REBECCA N. TONER, individually and as representatives of a  
class of participants and beneficiaries on behalf of the University of Pennsylvania  
Matching Plan,

*Plaintiffs-Appellants,*

v.

UNIVERSITY OF PENNSYLVANIA, INVESTMENT COMMITTEE, AND JACK HEUER,  
*Defendants-Appellees.*

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On Appeal from the United States District Court  
for the Eastern District of Pennsylvania, No. 2:16-cv-04329-GEKP  
Before the Honorable Gene E.K. Pratter

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**BRIEF FOR TIAA AS *AMICUS CURIAE* IN SUPPORT OF  
APPELLEES AND AFFIRMANCE**

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April 12, 2018

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## **CORPORATE DISCLOSURE STATEMENT**

Pursuant to Federal Rule of Appellate Procedure 26.1, the undersigned counsel for *amicus curiae* TIAA states that Teachers Insurance and Annuity Association of America (TIAA), a non-governmental corporate party, is a private stock life insurance company wholly owned by the Teachers Insurance and Annuity Association of America Board of Overseers, and no publicly held corporation owns 10% or more of the stock of TIAA.

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## STATEMENT OF INTEREST<sup>1</sup>

Teachers Insurance and Annuity Association of America (TIAA) was established in 1918 by the Carnegie Foundation for the Advancement of Teaching to provide guaranteed retirement income and life insurance to educators. Today, TIAA offers, among other things, annuities, mutual funds, and recordkeeping services to colleges, universities, and other government and research institutions, as well as their employees, for the purpose of securing lifetime income during the participant employees' retirement.

This case is one of sixteen lawsuits in which plaintiffs have alleged that universities violated their fiduciary duty under ERISA § 404(a) by including in their retirement plans certain TIAA investment options, which allegedly performed poorly and charged excessive fees, and using TIAA's recordkeeping services for TIAA investments. Although TIAA is not a party to this litigation, many of Plaintiffs' claims rest on a misguided depiction of TIAA's offerings and services. TIAA therefore submits this amicus brief to provide an accurate understanding about TIAA, its distinctive mission, and the nature of the products and services it offers. TIAA has a vital interest in ensuring that the Court evaluate those claims in

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<sup>1</sup> No counsel for a party authored this brief in whole or in part, and no one other than *amicus* or its counsel made any monetary contribution toward the brief's preparation or submission. *Amicus* has submitted a Motion for Leave to File this brief. Defendants-Appellees have consented to the filing of this brief; Plaintiffs-Appellants have indicated that they do not consent to the filing of the brief.

the proper context—one that, contrary to Plaintiffs’ assertions, does not reduce the prudence of an investment option to a single factor, such as cost.

### SUMMARY OF ARGUMENT

Plaintiffs claim that the University of Pennsylvania (Penn) violated its fiduciary duty under ERISA by selecting and maintaining certain TIAA offerings in the investment options available to plan participants and by selecting and maintaining TIAA as the recordkeeper for those options. Those claims reflect a misguided characterization of TIAA’s products and services, and are predicated on the flawed assumption that cost is the single determinant of an investment’s prudence. An accurate understanding of TIAA, its distinctive mission, and the nature of its products and services helps explain why, contrary to Plaintiffs’ allegations, Penn’s decision to include and maintain TIAA’s offerings was “objectively prudent.” *Renfro v. Unisys Corp.*, 671 F.3d 314, 322 (3d Cir. 2011); *see also Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2007) (plausibility is a “context-specific” standard).

Each count of the operative complaint invokes a variation of the claim that Penn breached its fiduciary duty in selecting and maintaining TIAA’s products because, according to Plaintiffs, those products have performed poorly and their fees were too high. Plaintiffs allege (Counts I, V), for example, that Penn’s decision to offer TIAA Traditional Annuity (TIAA Traditional), a fixed-income

annuity, and CREF Stock Account (CREF Stock), a variable annuity, together was unreasonable, because doing so restricted Penn's ability to remove CREF Stock—which, in Plaintiffs' view, has underperformed while charging excessive fees. In Counts I and III, Plaintiffs claim (A131) that Penn violated its fiduciary duty by “allowing TIAA ... to require that it provide recordkeeping for its proprietary options” and paying excessive recordkeeping fees. Plaintiffs also fault (Count V) Penn for maintaining the Real Estate Account (REA) and eight of TIAA's mutual funds based on their performance or fees.

All of those allegations proceed from fundamental misapprehensions about the products and services that TIAA provides.

*First*, Plaintiffs' “bundling” allegation overlooks that pairing of CREF Stock with TIAA Traditional is designed to provide participants with a *choice* to invest in those options and that no participant is required to invest in either or both. Indeed, the pairing arrangement is part of TIAA's integrated approach to secure lifetime income, which substantially reduces the likelihood that retirees will outlive their savings. The pairing enables that by providing participants with ready access to annuities with complementary characteristics. Moreover, CREF Stock has a record of strong performance, and its fees are reasonable. Plaintiffs' attack threatens the foundation of two of the most popular TIAA products that have provided retirees with lifetime income for decades.

*Second*, Plaintiffs' argument (Br. 14, 44, 48) that recordkeeping is a "commodity service" is incorrect, and reflects Plaintiffs' one-sided view that cost is the only proper metric in evaluating investment services. TIAA offers participants high-quality recordkeeping services, including individualized financial education and fund-level allocation advice at no additional cost. Those services help participants better understand TIAA's annuity offerings and investment strategy, and thus better plan for their retirement. TIAA's recordkeeping fees are reasonable, particularly in light of the value that participants derive from those services.

*Finally*, Plaintiffs' remaining allegations are also incorrect. Plaintiffs' claims regarding REA are misguided because they compare REA to an inappropriate benchmark. The expense ratios of the eight mutual funds of TIAA's are also well within the range that this Court and others have deemed reasonable, and in any event ERISA does not require fiduciaries to offer the lowest-cost options possible, irrespective of other considerations.

## **BACKGROUND**

TIAA was established in 1918 by the Carnegie Foundation for the Advancement of Teaching to provide retirement security to educators. TIAA's charter states that "[t]he purpose of the corporation is to aid and strengthen nonprofit colleges, universities, [and similar government and research institutions]

by providing annuities, life insurance, and accident and health insurance ... all without profit to the corporation or its stockholders.”<sup>2</sup> Consistent with that mission, TIAA has operated without profit over the past 100 years, even while adapting to market and regulatory changes to ensure that participants will enjoy a healthy retirement income.

Central to TIAA’s mission is its fixed-income annuity offering—TIAA Traditional. Launched the same year as the company’s founding, TIAA Traditional has been one of the safest investment options for a century, providing guaranteed principal with a contractually specified minimum interest rate, as well as guaranteed lifetime income if a participant chooses to annuitize upon retirement.

In 1952, TIAA created the College Retirement Equities Fund (CREF), the world’s first variable annuity, to respond to the persistent market inflation of the time. CREF was designed as a companion to TIAA Traditional, allowing participants to diversify their retirement savings through investments in equities, which could yield higher returns. CREF has grown to hold eight different accounts, one of which is CREF Stock. TIAA further diversified its investment asset classes in 1995 by creating REA, which invests in commercial and residential real estate for long-term returns. TIAA has offered CREF Accounts and REA at

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<sup>2</sup> Restated Charter of TIAA, art. 8, § 1 (amended Apr. 4, 2016), *available at* [https://www.tiaa.org/public/pdf/tiaa\\_charter.pdf](https://www.tiaa.org/public/pdf/tiaa_charter.pdf).

cost—*i.e.*, no profit or mark-up—including after Congress changed TIAA’s tax status in 1998.

TIAA’s growth reflects the popularity of its investment offerings. Today, TIAA Traditional has \$235 billion and CREF Stock has \$122 billion in assets under management. TIAA has more than 15,000 institutional clients, including Penn. Of TIAA’s 200 largest clients with at least one 403(b) plan, 198 held assets in CREF Stock as of 2016.<sup>3</sup> TIAA has received the highest credit rating from A.M. Best, Fitch, and Standard & Poor’s and the second highest rating from Moody’s.<sup>4</sup>

### ARGUMENT

Although Plaintiffs couch their allegations in different terms, they all boil down to the accusation that TIAA’s products have performed poorly and their fees were too high. All of those allegations reflect a fundamental misunderstanding of TIAA’s products and services, and ignore the distinctive value that TIAA offers participants in university retirement plans.<sup>5</sup>

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<sup>3</sup> TIAA’s 200 largest clients are based on the amount of those clients’ assets administered by TIAA in their respective plans as of December 31, 2010.

<sup>4</sup> *TIAA Traditional Annuity: Adding safety and stability to retirement portfolios* 1 n.2, TIAA (“*TIAA Traditional*”), available at <https://www.tiaa.org/public/pdf/compliance/tiaa-traditional-white-paper.pdf> (last visited Apr. 12, 2018); see also *TIAA Traditional Annuity* 1, TIAA (data as of Dec. 31, 2017), available at <https://www.tiaa.org/public/pdf/ffs/878094101-RA.pdf>.

<sup>5</sup> This Court may take judicial notice of facts outside the complaint that are “not subject to reasonable dispute in that [they are] ... capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be

**I. PLAINTIFFS' PAIRING ALLEGATION IS BASED ON A MISGUIDED UNDERSTANDING OF TIAA'S PRODUCTS AND VALUE**

Plaintiffs argue (Br. 3, 16, 49-52) that Penn breached its fiduciary duty in agreeing to offer CREF Stock as an investment option, which TIAA makes available together with TIAA Traditional. Specifically, they allege (A67-76, A130-132) that the pairing arrangement is unreasonable because it restricts Penn's ability to remove what is, in their view, an underperforming investment option—CREF Stock.<sup>6</sup>

Plaintiffs' allegations are premised on a myopic view of the applicable objective prudence standard under ERISA. The objective prudence standard inquires whether a “hypothetical prudent investor” would have made the same investment decision. *Renfro v. Unisys Corp.*, 671 F.3d 314, 322 (3d Cir. 2011) (quoting *In re Unisys Sav. Plan Litig.*, 173 F.3d 145, 153-154 (3d Cir. 1999)).

Penn's arrangement with TIAA satisfies that standard because TIAA Traditional

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questioned.” *In re NAHC, Inc. Sec. Litig.*, 306 F.3d 1314, 1331 (3d Cir. 2002) (quoting Fed. R. Evid. 201(b)); *see also Ieradi v. Mylan Labs., Inc.*, 230 F.3d 594, 600 n.3 (3d Cir. 2000) (taking judicial notice of stock prices reported by Quotron Chart Service). TIAA relies on such facts to explain that Plaintiffs' allegations rest on a misguided depiction of TIAA's products and services. *Cf. Loomis v. Exelon Corp.*, 658 F.3d 667, 672 (7th Cir. 2011) (citing an amicus brief in its reasoning to affirm dismissal of an ERISA action).

<sup>6</sup> Plaintiffs' “lock in” argument—that Penn locked in CREF Stock as part of the bundling—is substantively the same as their bundling or pairing allegation. Additionally, while Plaintiffs make a passing reference to CREF Money Market Account in their bundling allegation, they do not challenge it, and thus TIAA does not address it here.

and CREF Stock, as a pair, provide important value to investors by combining stability with complementary equity-based characteristics—all factors that a prudent investor would consider in choosing a retirement investment strategy. Moreover, CREF Stock has performed strongly, and its fees have been consistently competitive with its peers.

### **A. TIAA Traditional And CREF Stock Are Companion Products**

Evaluating the objective prudence of TIAA’s pairing arrangement requires understanding the features of the products paired and the basis for such an arrangement.

#### **1. TIAA Traditional**

TIAA Traditional is a core component of TIAA’s strategy for ensuring a lifetime income for its participants. A fixed annuity, TIAA Traditional is held in the General Account of TIAA and backed by TIAA’s claims-paying ability.<sup>7</sup> The General Account holds public and private fixed-income investments, commercial mortgage loans, real estate, natural resources, and other investments.<sup>8</sup>

TIAA Traditional guarantees the principal and a contractually specified minimum interest rate to participants, irrespective of broader economic situations.<sup>9</sup>

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<sup>7</sup> *TIAA Traditional* 1.

<sup>8</sup> *Financial Strength: The TIAA General Account* 1, TIAA (data as of Dec. 31, 2016), available at [https://www.tiaa.org/public/pdf/performance/retirement/profiles/TIAA\\_Gen\\_Act\\_Fin\\_Strength.pdf](https://www.tiaa.org/public/pdf/performance/retirement/profiles/TIAA_Gen_Act_Fin_Strength.pdf).

<sup>9</sup> *TIAA Traditional* 1-2.



On a yearly basis, TIAA may declare additional amounts (in effect, an interest rate higher than the minimum guarantee), depending on earnings in excess of the guaranteed rate.<sup>10</sup> TIAA has provided such additional amounts every year since 1948, and this has been true in times of war, financial disruption, recession, and political turmoil.<sup>11</sup> Unlike typical stock insurance companies, moreover, TIAA routinely pays out unneeded contingency reserves to plan participants, consistent with its mission to operate without profit.<sup>12</sup>

The guaranteed minimum and additional amounts make up the “crediting rate”—the rate at which TIAA Traditional credits interest to a participant’s account.<sup>13</sup> From 1987 to 2016, the total crediting rate for TIAA Traditional has ranged from a low of 3.94% in 2010 to a high of 10.18% in 1987.<sup>14</sup> It has never gone below 3%, the contractually specified minimum interest rate in many university contracts, including Penn’s.<sup>15</sup>

## **2. CREF Stock**

CREF Stock—the original CREF Account and the world’s first variable annuity product—is a companion to TIAA Traditional. CREF Stock is structured

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<sup>10</sup> *Id.* at 2.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* at 3.

<sup>13</sup> *Id.* at 2.

<sup>14</sup> *Id.* at 3.

<sup>15</sup> *Id.*

to provide participants the potential for higher returns than TIAA Traditional and an opportunity to diversify investments.<sup>16</sup> It invests primarily in a broadly diversified portfolio of common stocks, both domestic and foreign, for long-term favorable returns.<sup>17</sup>

Contributions made to CREF Stock are converted into accumulation units, the value of which is marked to market daily.<sup>18</sup> Participants have the option to transfer assets in CREF Stock to another CREF or TIAA annuity, such as TIAA Traditional.<sup>19</sup> In retirement, the accumulation units may be converted to annuity units or withdrawn.<sup>20</sup>

### **3. Basis for Pairing**

The pairing of TIAA Traditional and CREF Stock is designed to provide core annuity offerings with complementary features—centrally that TIAA Traditional offers guaranteed stability, while CREF Stock offers the potential for

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<sup>16</sup> *CREF Stock Account (Class R3) 1*, TIAA (data as of Dec. 31, 2017) (“*CREF Stock*”), available at <https://www.tiaa.org/public/pdf/ffs/194408126.pdf>.

<sup>17</sup> *Id.*

<sup>18</sup> *CREF Rules of the Fund A9*, TIAA (May 1, 2017) (“*CREF Rules of the Fund*”), available at [https://www.tiaa.org/public/pdf/cref\\_rules\\_of\\_the\\_fund.pdf](https://www.tiaa.org/public/pdf/cref_rules_of_the_fund.pdf); see also Goodman & Richardson, *TIAA and CREF: Program Features and Recent Evidence on Performance and Utilization* 11, TIAA-CREF Institute Research Dialogue, Issue No. 114 (Sept. 2014) (“Goodman & Richardson”), available at [https://www.tiaainstitute.org/sites/default/files/presentations/2017-02/rd114a\\_program\\_features\\_recent\\_evidence.pdf](https://www.tiaainstitute.org/sites/default/files/presentations/2017-02/rd114a_program_features_recent_evidence.pdf).

<sup>19</sup> Goodman & Richardson 11; *CREF Rules of the Fund* A18-19.

<sup>20</sup> *CREF Rules of the Fund* A2, A10.

higher returns. Those features advance TIAA's overall investment strategy to secure lifetime income for its participants, and they provide a portable pension that constitutes a comprehensive retirement package.<sup>21</sup> For academics who—more than other members of the universities' defined contribution plans—move frequently among different institutions, having a choice in the annuity products is critical.<sup>22</sup> The pairing arrangement ensures that choice. *See Renfro*, 671 F.3d at 327 (“An ERISA defined contribution plan is designed to offer participants meaningful choices about how to invest their retirement savings.”); *Loomis v. Exelon Corp.*, 658 F.3d 667, 673 (7th Cir. 2011) (ERISA “encourages sponsors to allow more choice to participants in defined-contribution plans”).

**B. CREF Stock Has Performed Strongly And Charged Competitive Fees**

Underlying Plaintiffs' challenge is their claim (Br. 49-52, A108-119, A130-132, A138-142) that CREF Stock has underperformed competitors while charging higher fees during the class period. In fact, CREF Stock has a record of strong performance, and its fees have been lower than its peers.

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<sup>21</sup> *See Saxon & Powell, Preparing Educational and Nonprofit Employees for Retirement: 403(b) Plans and ERISA Fiduciaries*, 127 J. Taxation 53, 55-56 (Aug. 2017).

<sup>22</sup> *Id.*

First, since its inception in 1952, CREF Stock has returned nearly 10% on contributions annually.<sup>23</sup> Indeed, Morningstar—an independent investment research firm that rates investment products on a scale of 1 to 5 stars—awarded 5 stars to CREF Stock as of December 31, 2017.<sup>24</sup> Currently, CREF Stock has 4 stars overall.<sup>25</sup> Only about 30% of funds receive 4 stars or higher.<sup>26</sup>

CREF Stock's expense ratios have also been competitive, contrary to Plaintiffs' allegation (Br. 13, A71-75, A118). The expense ratios cover the costs incurred to manage the account's unique, multi-portfolio approach. They are

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<sup>23</sup> *CREF Stock (Class R1)* 1, TIAA (data as of Dec. 31, 2017), available at <https://www.tiaa.org/public/pdf/ffs/194408803.pdf>. CREF Stock was originally structured as a single class. In 2015, TIAA expanded CREF Stock into three classes—R1, R2, and R3—to better reflect the administrative and distribution expenses across the range of TIAA's clients. All three classes, however, share the same origin, and have the same the investment objective, strategy, and risk profile. See *CREF Multi-Class Summary: A new class structure began April 24, 2015*, at 1, TIAA, available at [https://www.tiaa.org/public/pdf/cref\\_multi-class\\_summary.pdf](https://www.tiaa.org/public/pdf/cref_multi-class_summary.pdf) (last visited Apr. 12, 2018). Thus, although CREF Stock offered on Penn's plan is the R3 class, TIAA cites the R1 fact sheet, which contains data on the average annual return since CREF Stock's inception in 1952.

<sup>24</sup> *CREF Stock*, at 1.

<sup>25</sup> *CREF Stock R3*, Morningstar, available at <http://quote.morningstar.com/fund/chart.aspx?t=QCSTIX> (last visited Apr. 12, 2018).

<sup>26</sup> *The Morningstar Rating™ for Funds 2*, Morningstar, available at [https://corporate.morningstar.com/US/documents/MethodologyDocuments/FactSheets/MorningstarRatingForFunds\\_FactSheet.pdf](https://corporate.morningstar.com/US/documents/MethodologyDocuments/FactSheets/MorningstarRatingForFunds_FactSheet.pdf) (last visited Apr. 12, 2018).

reviewed and approved annually by the CREF Board of Trustees, which consists of experienced trustees independent of TIAA.<sup>27</sup>

CREF Stock's expense ratios have been lower than those of many of its peers:

### Exhibit 1. CREF Stock's Expense Ratios as Compared To Peers

	2010	2011	2012	2013	2014	2015	2016
<b>CREF Stock Expense Ratio</b>	0.47%	0.48%	0.49%	0.48%	0.46%	0.38%	0.38%
<b>Morningstar Categories</b>	US Insurance Fund Large Blend	US Insurance Fund Large Blend	US Insurance Fund Large Blend	US Insurance Fund Large Blend	US Insurance Fund Large Blend	US Insurance Fund Large Blend	US Insurance Fund Large Blend
<b>Number of Peers</b>	78	79	81	85	89	89	90
<b>Peers Mean</b>	0.84%	0.86%	0.86%	0.85%	0.86%	0.85%	0.90%
<b>Peers Median</b>	0.85%	0.84%	0.85%	0.84%	0.83%	0.82%	0.83%
<b>% of Peers with Expense Ratio Lower Than That of CREF Stock</b>	3.8%	2.5%	2.5%	2.4%	3.4%	1.1%	0.0%

The competitiveness is in large part due to TIAA's mission to operate without profit. Indeed, TIAA provides management, administrative, and distribution services to CREF at cost.<sup>28</sup> *Cf.* 29 U.S.C. § 1104(a)(1)(A)(ii) (a fiduciary must "discharge his duties with respect to a plan" for the purpose of, among other things, "defraying reasonable expenses of administering the plan").

<sup>27</sup> *CREF Rules of the Fund A6, A8; see also What is the CREF Board of Trustees?*, TIAA, available at <https://www.tiaa.org/public/about-tiaa/corporate-governance-leadership/cref-overseers-trustees> (last visited Apr. 12, 2018).

<sup>28</sup> *CREF Rules of the Fund A5-A6.*

Plaintiffs argue (Br. 13, A71-75) that CREF Stock's expense ratio unreasonably comprises several different components of fees, but that does not mean that the total ratio is unreasonable, or that the fees for each component are unreasonable. CREF Stock's expense ratios include administrative expenses, distribution expenses, mortality and expense risk (M&E) charge, and investment management expenses.<sup>29</sup> Administrative expenses cover the costs associated with recordkeeping, including participant education and consulting services TIAA provides.<sup>30</sup> Distribution expenses cover such costs as informing participants about the contract and helping employers implement and manage retirement plans, which go well beyond Plaintiffs' characterization (A72-73) as "marketing" cost.<sup>31</sup> The M&E charge is a fee paid to TIAA to guarantee that CREF Stock participants transferring funds to TIAA for the immediate purchase of lifetime annuities will not be charged more than the rate stipulated in the CREF contract.<sup>32</sup> Investment management expenses cover the costs associated with investment management, portfolio accounting, and custodial services.<sup>33</sup> All of those expenses are

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<sup>29</sup> CREF Prospectus 5, 6, TIAA (Dec. 15, 2017) ("CREF Prospectus"), available at <http://connect.rightprospectus.com/TIAA/TADF/194408803/P?site=VA#>.

<sup>30</sup> *Id.* at 5.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* at 6

<sup>33</sup> *Id.* at 5.

appropriate given the services that TIAA provides, and in any event, Plaintiffs have not alleged that the individual components led to an unreasonable total expense ratio. *See, e.g., Sacerdote v. New York Univ.*, No. 16-cv-6284, 2017 WL 3701482, at \*11 (S.D.N.Y. Aug. 25, 2017) (“plaintiffs’ allegations regarding unnecessary and excessive fee layers are insufficient ... to support a prudence claim” because it was not clear that the layers of fees led to “higher fees overall”); *Hecker v. Deere & Co.*, 556 F.3d 575, 586 (7th Cir. 2009) (“The total fee, not the internal, post-collection distribution of the fee, is the critical figure for someone interested in the cost of including a certain investment in her portfolio and the net value of that investment.”).

**C. Maintaining The Pairing Arrangement Was Objectively Prudent**

Plaintiffs further claim (Br. 3, 16, 20-21, 34, 39, 50) that the pairing arrangement was *per se* unreasonable because it prohibited Penn from removing CREF Stock. But that, too, misunderstands the pairing arrangement. Pairing of TIAA Traditional and CREF Stock is designed to provide participants with a *choice* to invest in either option. Participants are not required to invest in either of them.

A fiduciary’s decision to select and maintain a pairing arrangement is also not, by itself, imprudent. As the district court recognized (A17), bundling of products and services “is a common practice used across the business and personal world,” and can be “better for all sides because customers save money.” *See also*

*Tussey v. ABB, Inc.*, 746 F.3d 327, 336 (8th Cir. 2014) (“bundling of investment management and recordkeeping services” are “common and ‘acceptable’ investment industry practices”).

Plaintiffs invoke *Tibble v. Edison International*, 135 S. Ct. 1823, 1828-1829 (2015), which observed that “a fiduciary normally has a continuing duty of some kind to monitor investments and remove imprudent ones.” Maintaining CREF Stock as an option for participants does not breach such a duty. As explained above, CREF Stock has continued to show strong performance while charging competitive fees. Thus, in other litigation involving similar “bundling” claims, the district court ruled that the university’s “contractual agreement to include certain investment options does not, by itself, demonstrate imprudence” and that the plaintiffs had failed to plausibly allege that the arrangement “in fact (versus in theory) contractually precluded the Plans’ fiduciaries from” monitoring and reviewing “‘plainly risky’” options. *Sacerdote*, 2017 WL 3701482, at \*7 (emphasis omitted); *accord Cunningham v. Cornell*, No. 16-cv-6525, 2017 WL 4358769, at \*5 (S.D.N.Y. Sept. 29, 2017). The same is true here.

Indeed, Penn is not prohibited from removing CREF Stock. Since 2005, TIAA has offered contracts that allowed plan sponsors to remove any option,



including CREF Stock, from the plan.<sup>34</sup> Universities, like Penn, have the option to move their plans to those contracts, but many have not done so because the existing contracts have comparative advantages, such as the higher guaranteed interest rate of TIAA Traditional.<sup>35</sup> And as of 2016, more than 96 percent of TIAA's largest 200 clients with active contributions to a 403(b) plan received contributions to CREF Stock, either as part of the pair with TIAA Traditional or under a new contract.<sup>36</sup>

## **II. PLAINTIFFS' ALLEGATIONS ABOUT TIAA'S RECORDKEEPING SERVICES ARE BASED ON A FLAWED DESCRIPTION OF THOSE SERVICES**

In their second set of contentions, Plaintiffs argue (A131-132) that Penn violated its fiduciary duty by allowing TIAA to perform recordkeeping services for TIAA's proprietary products while also having Vanguard provide recordkeeping services for its own products. According to Plaintiffs (Br. 14, 44, 48), recordkeeping is a "commodity service," and it is categorically imprudent to have more than one firm provide recordkeeping for a retirement plan. Plaintiffs also argue (Br. 43-46, A81-83, A134-137) that TIAA's recordkeeping charges are excessive and unnecessary.

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<sup>34</sup> *TIAA and CREF contract comparison 1*, TIAA ("*Contract Comparison*"), available at [https://www.tiaa.org/public/pdf/RC\\_ComparisonGrid\\_8\\_fin.pdf](https://www.tiaa.org/public/pdf/RC_ComparisonGrid_8_fin.pdf) (last visited Apr. 12, 2018).

<sup>35</sup> Under the existing contracts requiring the pairing arrangement, Penn cannot remove CREF Stock because these contracts are individually owned by the participants. In other words, the restriction on removal exists to protect the rights of and benefits to the contract holders—*i.e.*, the participants.

<sup>36</sup> TIAA's largest 200 clients are based on the amount of those clients' assets administered by TIAA in their respective plans as of December 31, 2010.

All of those allegations rest on a misguided notion that the cheapest recordkeeper is always the prudent option. But as the Second Circuit has recognized, a fee charged under an ERISA plan must be evaluated based on whether it “bears [a] reasonable relationship to the services rendered.” *Young v. General Motors Inv. Mgmt. Corp.*, 325 F. App’x 31, 33 (2d Cir. 2009) (quoting *Gartenberg v. Merrill Lynch Asset Mgmt.*, 694 F.2d 923, 928 (2d Cir. 1982)); see also *Laboy v. Board of Trs. of Bldg. Serv. 32 BJ SRSP*, 513 F. App’x 78, 80 n.4 (2d Cir. 2013) (applying the *Gartenberg* standards in an ERISA case). A prudent investor would also consider the value of the services offered in choosing a recordkeeper. See *In re Unisys*, 173 F.3d at 153-154. Plaintiffs’ speculation (Br. 3, 5, 14, 15, 20, 45) about the “market rate” of TIAA’s recordkeeping services ignores the distinctive and high-quality services that TIAA provides to its participants, which TIAA is uniquely positioned to do.

**A. TIAA Provides Distinctive And High-Quality Recordkeeping Services**

TIAA’s recordkeeping encompasses a wide array of services that plan participants find valuable. For example, TIAA maintains records of each plan participant’s and beneficiary’s account balances. TIAA also sends recordkeeping reports and communications to the participants, which include information on returns and investment performance, personalized to each participant’s account.

TIAA also provides related fund-level allocation advice at no additional cost to help participants plan for retirement—a service of exceptional value to participants, who may have difficulty finding similar services elsewhere at a reasonable cost. TIAA employs trained consultants who use an independent third-party advice tool to offer retirement strategies that provide a lifetime income to participants. The consultants provide objective guidance, personalized to each participant’s career stage and retirement income goals. TIAA makes those services available and accessible in various of ways, including over the telephone, on the web, and through one-on-one, in-person meetings. TIAA also offers financial education seminars that help participants stay informed about their investment decisions.

All of these services advance TIAA’s overall strategy to ensure lifetime income. TIAA surveys indicate that respondents who received financial advice were significantly more confident in their retirement plan than those who did not (61% versus 37%), and thus more likely to develop a plan to generate steady retirement income.<sup>37</sup> Research also shows that well informed financial advice is critical to promoting much-needed retirement security; 58% of Americans report that they are confident about retirement security, but 65% do not know how much

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<sup>37</sup> *TIAA 2016 Advice Matters Survey Executive Summary 5*, TIAA (Sept. 29, 2016), available at <https://www.tiaa.org/public/pdf/advicemattersexecsummary2016.pdf>; see also *TIAA-CREF Advice Matters Survey Executive Summary 4*, TIAA (Oct. 20, 2015), available at [https://www.tiaa.org/public/pdf/2015\\_advice\\_matters\\_survey\\_executive\\_summary-1.pdf](https://www.tiaa.org/public/pdf/2015_advice_matters_survey_executive_summary-1.pdf).

income they will have each month in retirement, 41% are saving only 10% or less of their income for retirement, and 28% are not saving anything for retirement.<sup>38</sup> Additionally, 56% of Americans say the principal goal for their retirement plan should be to provide guaranteed monthly income in retirement, yet 51% report that they are unfamiliar with annuity products.<sup>39</sup>

TIAA's services help bridge those gaps for its participants. As explained above, TIAA's products have performed strongly, and participants contributing to annuities have the option of converting earnings into lifetime income. TIAA's counseling services ensure that participants are aware of these and other investment options that lead to retirement security. These personalized services in no way resemble a "commodity" service, as Plaintiffs would have it, and provide no support for their claim (A72) that TIAA's recordkeeping expense is "unreasonable for the actual services provided by [TIAA]."

**B. TIAA Is Uniquely Suited To Helping Participants Navigate TIAA's Distinctive Offerings**

TIAA is also uniquely suited to serving as the recordkeeper for its annuity products because TIAA can best guide its participants through the distinct features

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<sup>38</sup> *TIAA 2016 Lifetime Income Survey Executive Summary 2*, TIAA (Sept. 14, 2016), available at [https://www.tiaa.org/public/pdf/C33638\\_Lifetime\\_Income\\_ExecSummary.pdf](https://www.tiaa.org/public/pdf/C33638_Lifetime_Income_ExecSummary.pdf).

<sup>39</sup> *TIAA 2017 Lifetime Income Survey Executive Summary 1, 3*, TIAA, available at [https://www.tiaa.org/public/pdf/lifetime\\_income\\_survey\\_checklist.pdf](https://www.tiaa.org/public/pdf/lifetime_income_survey_checklist.pdf) (last visited Apr. 12, 2018).

of its offerings to help them better plan for retirement. *Cf.* Saxon & Powell, 127 J. Taxation at 59 (in part due to their unique benefits, “[l]ifetime income products are more complex and require more education for participants to make sure they fully understand how they work”).

TIAA’s products have several aspects that require training and expertise to help participants plan for their retirement. For example, Penn’s plan includes (A230) the Group Retirement Annuity (GRA) contract, which guarantees 3% minimum interest rate for TIAA Traditional. To sustain that minimum rate and the long-term performance of TIAA Traditional, GRA imposes certain conditions on lump-sum withdrawals, specifically that any lump-sum withdrawal be made within 120 days of the end of employment and accompanied by a 2.5% surrender charge.<sup>40</sup> These conditions allow TIAA to invest its General Account assets in a wide range of stable and long-term investments. TIAA is uniquely positioned to advise its participants about those and other features so that participants can make an informed decision about how to maximize their retirement security that suits their needs.

**C. TIAA’s Recordkeeping Expenses Are Objectively Reasonable**

TIAA’s recordkeeping fees reflect the unique, high-touch services that it offers to participants. Plaintiffs’ argument (Br. 5, 14-15, 20-21, 45) that “the market rate” of TIAA’s recordkeeping services was one-sixth of what Penn paid

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<sup>40</sup> *Contract Comparison 1.*

TIAA is thus misleading because it ignores the distinct value of TIAA's services—a factor that a prudent investor would consider.<sup>41</sup> See *In re Unisys*, 173 F.3d at 153-154; cf. *White v. Chevron Corp.*, No. 16-cv-0793, 2016 WL 4502808, at \*10 (N.D. Cal. Aug. 29, 2016) (rejecting a recordkeeping allegation because plaintiffs did “not allege that *the same services* were available for less on the market” (emphasis added)).

Plaintiffs' arguments (Br. 48-49) about revenue-sharing and per-participant fees add nothing. Plaintiffs allege that Penn acted imprudently in agreeing to pay asset-based fees (which include recordkeeping fees) as part of the revenue-sharing arrangement with TIAA, even though, as they concede (A77), “paying for recordkeeping with asset-based revenue sharing is not *per se* violation of ERISA.” Plaintiffs misunderstand those concepts. It is not the case that per-participant fees are categorically more prudent for larger plans with sizable assets. See, e.g., *Renfro*, 671 F.3d at 326, 327-328 (rejecting plaintiffs' challenge on asset-based fee, as opposed to per-participant fee). In fact, revenue-sharing arrangements are “common” among large institutional defined contribution plans. *Tussey*, 746 F.3d

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<sup>41</sup> Plaintiffs' emphasis (Br. 49) on the alleged failure to solicit competitive bids does not change the analysis. Plaintiffs do not allege that a bid would have led to recordkeeping services of comparable value with lower fees. Moreover, while Plaintiffs cite *George v. Kraft Foods Global, Inc.*, 641 F.3d 786 (7th Cir. 2011), the court in that case explained that if “the fiduciaries have good reasons for preferring a more expensive recordkeeper, then the court may consider whether those reasons make the fee reasonable.” *Id.* at 799 n.11. Those reasons exist here.

at 331; *accord Hecker*, 556 F.3d at 585; *cf. Understanding Retirement Plan Fees and Expenses* 3-4, U.S. Dep't of Labor (Dec. 2011), *available at* <https://www.dol.gov/sites/default/files/ebsa/about-ebsa/our-activities/resource-center/publications/understanding-retirement-plan-fees-and-expenses.pdf>.

Per-participant fees and asset-based fees are instead simply different ways of paying for the services that participants receive, and different arrangements may be suitable depending on the circumstances of the plan. A per-participant fee is an average per-participant revenue requirement, agreed upon by the plan sponsor and TIAA and applied to every participant in equal amount. Thus, as the district court noted (A19), a per-participant fee disproportionately disadvantages lower-income, lower-investment individuals: A \$50 fee represents 0.1% of an account with a \$50,000 balance, but only 0.01% for an account with \$500,000. An asset-based fee, by contrast, is an agreed-upon revenue requirement as percentage of plan assets under TIAA administration. The fee is thus closely associated with market conditions. If the asset-based fee target were 0.1%, and the plan assets were \$100 million, an increase in asset size to \$200 million due to favorable market conditions would mean \$200,000 for a fee, but a decrease in asset size to \$50 million in an unfavorable market would result in a \$50,000 fee.

Plaintiffs' assertion (Br. 49) that "an uncapped, unmonitored revenue sharing arrangement is imprudent" or that per-participant fees could have been

made more equitable for lower-income participants misses the point. Per-participant fees, by default, proportionately disadvantage lower-income participants, and asset-based fees, by nature, vary based on market fluctuations. ERISA does not require a fiduciary to come up with and implement every cost-saving measure possible, even at the expense of potentially forgoing or compromising investment options that offer better performance, more stability, or higher-quality services. As this Court has recognized, the “prudence requirement is flexible, such that the adequacy of a fiduciary’s independent investigation and ultimate investment selection is evaluated in light of the ‘character and aims’ of the particular type of plan he serves.” *In re Unisys Sav. Plan Litig.*, 74 F.3d 420, 434 (3d Cir. 1996); *see also Restatement (Third) of Trusts* § 90(a) (2007) (a fiduciary must apply “care, skill, and caution” to “investments not in isolation but in the context of the trust portfolio and as a part of an overall investment strategy”); 29 U.S.C. § 1104(a)(1)(B).

### **III. PLAINTIFFS’ REMAINING ALLEGATIONS ARE FLAWED**

Plaintiffs argue (Br. 51-52, A119-124, A142) that Penn breached its fiduciary duty in continuing to offer REA, claiming (Br. 15, 21) that REA has “severely underperformed” and charged higher fees. But Plaintiffs compare REA to an inapposite benchmark. REA is a variable annuity that invests in direct



ownership interests in commercial and multifamily residential real estate.<sup>42</sup> By contrast, Vanguard Real Estate Investment Trust (REIT) Index Fund, to which Plaintiffs compare REA (Br. 51-52, A120-123), is a mutual fund that purchases securities in publicly traded companies that own and manage real estate investments.<sup>43</sup> The two are different in numerous ways, including that REA provides participants with access to returns based on direct ownership of real estate, which is not typically available to mutual fund investors.

Plaintiffs' allegation (Br. 38-40, A95-96) that Penn improperly maintained eight of TIAA's mutual funds even though allegedly identical lower-cost options were available is similarly misguided. First, the fees in question are well within the range that this Court and others have deemed reasonable. The eight mutual funds' expense ratios range from 0.23% to 0.8% (A95-96), which is within the 0.1%-to-1.21% range that this Court has found reasonable, *Renfro*, 671 F.3d at 319, 327, and similar to the ranges that other circuits have deemed reasonable, including the 0.03%-to-0.96% range in *Loomis*, 658 F.3d at 669, the 0.07%-to-just-over-1% range in *Hecker*, 556 F.3d at 586, and the 0.03%-to-2% range in *Tibble v.*

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<sup>42</sup> *TIAA Real Estate Account 1*, TIAA (data as of Dec. 31, 2017), available at <https://www.tiaa.org/public/pdf/ffs/878094200.pdf>.

<sup>43</sup> *TIAA Real Estate Account Frequently Asked Questions 20*, TIAA, available at [https://www.tiaa.org/public/pdf/REA\\_FAQ\\_2Q15\\_Final.pdf](https://www.tiaa.org/public/pdf/REA_FAQ_2Q15_Final.pdf) (last visited Apr. 12, 2018).

*Edison International*, 729 F.3d 1110, 1135 (9th Cir. 2013), *vacated on other grounds*, 135 S. Ct. 1823 (2015).

Moreover, Plaintiffs’ argument rests on a flawed assumption that an ERISA fiduciary must always choose the investment options that have the lowest fees. But courts, including this Circuit, have held otherwise. *Renfro*, 671 F.3d at 327; *see Tibble*, 729 F.3d at 1135; *Hecker*, 556 F.3d at 586; *cf. White*, 2016 WL 4502808, at \*10 (“Fiduciaries have latitude to value investment features other than price (and indeed, are required to do so), as recognized by the courts.”). As the Seventh Circuit explained, “[t]he fact that ... some other funds might have had even lower ratios is beside the point; nothing in ERISA requires every fiduciary to scour the market to find and offer the cheapest possible fund (which might, of course, be plagued by other problems).” *Hecker*, 556 F.3d at 586. That is especially true where, as here, the retirement plan offers a broad variety of investment options with a wide range of fees. *See Renfro*, 671 F.3d at 327.

\* \* \* \* \*

In the end, all of Plaintiffs’ claims fail because Penn’s decision to select and maintain TIAA’s products and services was objectively prudent. The objective prudence of an investment option or service cannot be determined, as Plaintiffs would have it, solely in terms of cost. To the contrary, a prudent investor would consider a myriad of factors in making an investment decision, including the nature

and value of the products or services, rather than necessarily choose the cheapest option possible. Thus, the pairing of TIAA Traditional and CREF Stock must be evaluated in light of the nature of the two offerings and the reasons for the pairing arrangement, and TIAA's recordkeeping fee must be considered in light of the value of the services that TIAA provides to its participants. Because the "questioned decision[s] led to objectively prudent investments," *Renfro*, 671 F.3d at 322, and a "hypothetical prudent investor" would have made the same investment decisions, *In re Unisys*, 173 F.3d at 153-154, the district court correctly dismissed the Complaint.

### CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted.

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April 12, 2018

**CERTIFICATE OF BAR MEMBERSHIP**

Pursuant to Third Circuit Local Appellate Rule 46.1, I, Paul R.Q. Wolfson, hereby certify that I am a member in good standing of the bar of the United States Court of Appeals for the Third Circuit.

/s/ Paul R.Q. Wolfson

PAUL R.Q. WOLFSON

April 12, 2018

## CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g)(1), I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B)(i) and Fed. R. App. P. 29(a)(5).

1. In compliance with Fed. R. App. P. 32(a)(5) & (6) and Fed. R. App. P. 29(a)(5), the brief has been prepared in proportionally spaced typeface using Microsoft Word 2016 in 14-point Times New Roman font.

2. Exclusive of the exempted portions of the brief, as provided in Fed. R. App. P. 32(f), the brief contains 5,920 words. As permitted by Fed. R. App. P. 32(g)(1), I have relied upon the word count feature of Microsoft Word 2016 in preparing this certificate.

In addition, pursuant to Third Circuit Local Appellate Rule 31.1(c), I certify that the text of the brief filed with the Court via CM/ECF is identical to the text of the paper copies. I further certify that a virus detection program has been run on the electronic file and that no virus was detected. I rely on the virus detection program CylancePROTECT (version 2.0.1470.17) in making this representation.

/s/ Paul R.Q. Wolfson  
PAUL R.Q. WOLFSON

April 12, 2018

**CERTIFICATE OF SERVICE**

I hereby certify that on this 12th day of April, 2018, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Third Circuit using the appellate CM/ECF system. Counsel for all parties to the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

/s/ Paul R.Q. Wolfson

PAUL R.Q. WOLFSON

April 12, 2018