UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

CHARLES DOHERTY and MICHAEL J. NOEL, individually and as representatives on behalf of a class of similarly situated persons, Plaintiffs, v. BRISTOL-MYERS SQUIBB CO., BRISTOL-MYERS SQUIBB CO. PENSION COMMITTEE, BRISTOL-MYERS SQUIBB COMPENSATION AND MANAGEMENT DEVELOPMENT COMMITTEE, and STATE STREET GLOBAL ADVISORS TRUST CO., Defendants.	Case No. 1:24-cv-06628-MMG

BRIEF OF AMICI CURIAE THE ERISA INDUSTRY COMMITTEE, THE AMERICAN BENEFITS COUNCIL AND THE COMMITTEE ON INVESTMENT OF EMPLOYEE BENEFIT ASSETS INC. IN SUPPORT OF DEFENDANTS' MOTIONS TO DISMISS

TABLE OF CONTENTS

Page

I. INTRODUCTION 1

II. BACKGROUND 5

A. Employee Benefit Plans Are Voluntary And May Be Terminated. 5

B. Insurance-Based Annuities Are An Important, Well-Established Part Of The Voluntary Retirement Benefit System. 8

III. ARGUMENT 10

A. Plaintiffs Have Not Pleaded A Plausible Claim for Breach of Fiduciary Duty. 11

B. The Annuities Purchased From Athene Provide the Same Benefits As Promised Under The Plan, So Plaintiffs Have No Injury. 14

1. Plaintiffs' claimed risk to their pensions is too speculative to be considered "certainly impending." 17

2. Losing PBGC coverage is not an injury, and is not unique to selecting Athene as opposed to a different annuity provider. 19

IV. CONCLUSION 21

TABLE OF AUTHORITIES

Page(s)

Cases

Aetna Health Inc. v. Davila,
542 U.S. 200 (2004)....6

Allison v. Bank One—Denver,
289 F.3d 1223 (10th Cir. 2002)....14

Beck v. PACE Int'l Union,
551 U.S. 96 (2007)....4, 20

Blaw Knox Ret. Income Plan v. White Consol. Indus., Inc.,
998 F.2d 1185 (3d Cir. 1993)....7

Brandt v. Grounds,
687 F.2d 895 (7th Cir. 1982)....14

Bussian v. RJR Nabisco, Inc.,
223 F.3d 286 (5th Cir. 2000)....11, 12

Cason v. Nat'l Football League Players Ass'n,
538 F. Supp. 3d 100 (D.D.C. 2021)....18

Chait v. Bernstein,
645 F. Supp. 1092 (D.N.J. 1986), *aff'd*, 835 F.2d 1017 (3d Cir. 1987)....6

Clapper v. Amnesty Int'l USA,
568 U.S. 398 (2013)....18

Conkright v. Frommert,
559 U.S. 506 (2010)....6

Dempsey v. Verizon Communications, Inc. et al.,
No. 1:24-cv-10004-JGK (S.D.N.Y. Dec. 30, 2024)....13

Diduck v. Kaszycki & Sons Contractors, Inc.,
974 F.2d 270 (2d Cir. 1992)....14

Fifth Third Bancorp v. Dudenhoeffer,
573 U.S. 409 (2014)....5

Friend v. Sanwa Bank Cal.,
35 F.3d 466 (9th Cir. 1994)....14

Hughes Aircraft Co. v. Jacobson,
525 U.S. 432 (1999)....................3, 12, 21

Hughes v. Nw. Univ.,
595 U.S. 170 (2022)....................12

Knudsen v. MetLife Grp., Inc.,
117 F.4th 570 (3d Cir. 2024)....................16

Kuper v. Iovenko,
66 F.3d 1447 (6th Cir. 1995)....................14

Lee v. Verizon Commc'ns, Inc.,
837 F.3d 523 (5th Cir. 2016)....................4, 19

Lockheed Corp. v. Spink,
517 U.S. 882 (1996)....................6

Lujan v. Defenders of Wildlife,
504 U.S. 555 (1992)....................18

Mack Boring and Parts v. Meeker, Sharkey Moffitt,
930 F.2d 267 (3d Cir. 1991)....................8

Monsanto Co. v. Geertson Seed Farms,
561 U.S. 139 (2010)....................17

Pfeil v. State St. Bank & Trust Co.,
806 F.3d 377 (6th Cir. 2015), *cert. denied*, 136 S. Ct. 2511 (2016)....................12

Riley v. Murdock,
No. 95-cv-2414, 1996 WL 209613 (4th Cir. Apr. 30, 1996) (unpublished)....................11

Rivera v. Wyeth-Ayerst Lab'ys,
283 F.3d 315 (5th Cir. 2002)....................20

Rush Prudential HMO, Inc. v. Moran,
536 U.S. 355 (2002)....................6

Spokeo, Inc. v. Robins,
136 S. Ct. 1540 (2016)....................14

Pension Benefit Guar. Corp. ex rel. St. Vincent Catholic Med. Ctrs. Ret. Plan v. Morgan Stanley Inv. Mgmt. Inc.,
712 F.3d 705 (2d Cir. 2013)....................5

Thole v. U. S. Bank N.A,
590 U.S. 538 (2020)....................17

United Transp. Union v. ICC,
891 F.2d 908 (D.C. Cir. 1989) 19

Statutes and Regulations

29 C.F.R. § 2509.95-1(d) 11

29 C.F.R. § 2510.3-3(d)(2)(ii) 19

46 Fed. Reg. 9532 (1981) 6

29 U.S.C. § 1103(b)(1) 9

29 U.S.C. § 1056(d)(1) 15

29 U.S.C. § 1322 4

29 U.S.C. § 1341(b)(3) 6

29 U.S.C. § 4006 4

29 U.S.C. § 4007 4

Other Authorities

Allison Barrett and Joel Townsend, Understanding the rapid rise in excessive fee claims, AIG Whitepaper, at 2, https://www.aig.com/content/dam/aig/america-canada/us/documents/business/management-liability/pension-trustee-excess-fees-fiduciary-whitepaper.pdf 2

Aronowitz, 401(k) Litigation Continues At 'Fever Pitch,' https://www.planadviser.com/401k-litigation-continues-fever-pitch/ 2

Consumer Protection Comparison: The Federal Pension System and the State Insurance System, Nat'l Org. of Life and Health Ins. Guaranty Ass'n 10 (May 22, 2016), https://www.nolhga.com/resource/code/file.cfm?ID=2559; 8

Daniel Aronowitz and Karolina Jozwiak, 401(k) Excessive Fee Litigation Spiked to 'Near Record Pace' in '24, https://www.planadviser.com/401k-excessive-fee-litigation-spiked-near-record-pace-24/ 2

De-risking Strategies of Defined Benefit Plans: Empirical Evidence from the United States, Soc'y of Actuaries 11 (Nov. 2020), https://www.soa.org/globalassets/assets/files/resources/research-report/2020/de-risking-strategies.pdf 7

Dep't of Labor, https://www.dol.gov/general/topic/retirement/erisa 4

Employee Benefits Security Administration's Interpretive Bulletin 95-1 (June 2024), https://www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/laws/secure-2.0/report-to-congress-on-interpretive-bulletin-95-1.pdf 1

Employee Benefits Security Administration's Interpretive Bulletin 95-1 (June 2024), https://www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/laws/secure-2.0/report-to-congress-on-interpretive-bulletin-95-1.pdf 12

Hallez, Companies transferred billions in pension assets to annuities. Here come the lawsuits, Investment News, March 14, 2024, *available at* https://www.investmentnews.com/life-insurance-and-annuities/news/companies-transferred-billions-in-pension-assets-to-annuities-here-come-the-lawsuits-250826....................5

Issue Brief: Buy-Out Group Annuity Purchase Primer, Am. Acad. of Actuaries 11–12 (July 2023), https://www.actuary.org/sites/default/files/2023-07/Buy-Out_Group_Annuity_Purchase_Primer.pdf....................9

Issue Brief: Pension Risk Transfer, Am. Acad. of Actuaries 2–3 (Oct. 2016), https://www.actuary.org/sites/default/files/files/publications/PensionRiskTransfer10.16.pdf 2

James M. Poterba, Nat'l Bureau of Econ. Res., The History of Annuities in the United States (1997), https://www.nber.org/system/files/working_papers/w6001/w6001.pdf 8

Melone, Nature and Development of Private Pensions, in Life and Health Insurance Handbook 521 (D.W. Gregg and V.B. Lucas, 1973 ed.) 8

PBGC's Single-Employer Guarantee Outcomes (May 2019), https://www.pbgc.gov/sites/default/files/2016-single-employer-guaranty-study.pdf....................9, 20

IDENTITY AND INTEREST OF *AMICI CURIAE*[1]

The ERISA Industry Committee ("ERIC") is a national non-profit business trade association representing approximately 100 of the nation's largest employers in their capacity as sponsors of employee benefit plans for their workers, retirees, and families.

The American Benefits Council (the "Council") is a national non-profit organization dedicated to protecting and fostering privately sponsored employee benefit plans. Collectively, the Council's more than 430 members either directly sponsor or provide services to retirement plans and health and welfare plans, covering virtually all Americans who participate in employer-sponsored programs.

The Committee on Investment of Employee Benefit Assets Inc. ("CIEBA") is a group of 120 of the country's leading Chief Investment Officer Fiduciaries who collectively oversee over $2.6 trillion in retirement plan assets, in plans encompassing approximately 18 million participants. CIEBA members are responsible for overseeing a substantial portion of the assets held in the private-sector retirement system and have a direct interest in its effective regulation.

ERIC, the Council, and CIEBA frequently participate as *amicus curiae* in cases like this one that have the potential for far-reaching effects on employee benefit plan design or administration. Amici submit this brief in support of granting Defendants' motions to dismiss.

---

[1]This brief was principally authored by Amici along with Seyfarth Shaw LLP, counsel for Amici. No party's counsel authored this brief in whole or in part. Neither any party nor any party's counsel contributed money related to the preparation or submission of this brief. No person other than Amici, their members, and their counsel contributed money related to the preparation or submission of this brief.

I. INTRODUCTION

This case is part of the latest trend in ERISA class action litigation, in which opportunistic litigants attack routine transactions that have long been part of retirement plans—here, a transaction involving the transfer of pension risk. In "pension risk transfer" transactions, the plan sponsor makes a non-fiduciary decision to purchase annuity contracts under which an insurance company is obligated to pay participants the same benefits on the same schedule as they would otherwise be owed under a defined benefit pension plan formula. Those purchases result in the transfer of underlying plan assets to the insurer to pay insurance premiums, and transfers the covered participants and payment obligations out of the plan and to the insurers. These "pension risk transfer" ERISA class actions each allege—in nearly identical fashion—that there has been a breach of fiduciary duty by failing to select the "safest" (in Plaintiffs' opinion) available insurer.

The use of annuities to provide pension benefits pre-dates ERISA, and continues to play a significant role in managing the private pension system. Plaintiffs allege that employers have increasingly looked to pension risk transfers to manage pension obligations in recent years. (*See* Compl., ECF 45 at ¶¶ 63, 70). But even Plaintiffs admit "they are not new." (*Id.* at ¶ 71.) The Department of Labor ("DOL") reported in June 2024 that, between 2000 and 2022, transactions involving single employer pension plans resulted in the purchase of annuities for more than 2.2 million plan participants, and pension risk transfer transactions totaled more than $52 billion in 2022.[2] Plaintiffs do not cite a single instance in which any of those participants were paid anything less than their ERISA plans would have paid them.

[2] *See* Julie A. Su, Acting Secretary of Labor, Department of Labor Report to Congress on Employee Benefits Security Administration's Interpretive Bulletin 95-1 (June 2024), https://www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/laws/secure-2.0/report-to-congress-on-interpretive-bulletin-95-1.pdf, at 5.

Like the ongoing wave of class actions related to 401(k) expenses that have generated tens of millions in attorneys' fees for the plaintiffs' bar, the large dollar values of these transactions make them attractive targets for class action litigation. Because the cost of defense of even meritless class actions can quickly outstrip settlement costs, plaintiffs do not need to win these cases—or even assert legitimate claims—for them to be economically lucrative. Indeed, the settlement costs incurred by plan sponsors related to 401(k) expenses have been enormous.[3] Opening the door to litigation regarding routine pension risk transfers would be directly contrary to one of the central purposes of ERISA because it would undermine plan sponsors' ability to make settlor decisions and create significant disincentives for employers to establish plans. A pension risk transfer is one of a very limited number of ways in which an employer can act to obtain certainty over the future expenses of its pension benefit plan, and annuitization is a less blunt instrument than freezing future benefit accruals. An employer might well hesitate to offer a defined benefit pension plan, or be less generous in the plan it offers, if the right to employ a pension risk transfer is effectively taken away by the rule Plaintiffs invite this Court to adopt.[4]

Here, in purely conclusory fashion, Plaintiffs allege that Bristol-Myers Squibb Co. ("BMS") improperly "offloaded" $2.6 billion in pension liabilities from the Bristol-Myers Squibb Retirement Income Plan (the "Plan") by purchasing annuity contracts from Athene to provide participants the benefits they would otherwise be owed under the Plan. Plaintiffs in

---

[3]*See* Daniel Aronowitz and Karolina Jozwiak, 401(k) Excessive Fee Litigation Spiked to 'Near Record Pace' in '24, https://www.planadviser.com/401k-excessive-fee-litigation-spiked-near-record-pace-24/ (settlements in ERISA class actions totaled $203.3 million in 2024); Allison Barrett and Joel Townsend, Understanding the rapid rise in excessive fee claims, AIG Whitepaper, at 2, https://www.aig.com/content/dam/aig/america-canada/us/documents/business/management-liability/pension-trustee-excess-fees-fiduciary-whitepaper.pdf (plan sponsors paid more than $1 billion in settlements, including $330 million in legal fees, between 2015 and 2020); Aronowitz, 401(k) Litigation Continues At 'Fever Pitch,' https://www.planadviser.com/401k-litigation-continues-fever-pitch/ (calculating more than $900 million in ERISA class actions settlements since 2020).

[4]Issue Brief: Pension Risk Transfer, Am. Acad. of Actuaries 2–3 (Oct. 2016), https://www.actuary.org/sites/default/files/files/publications/PensionRiskTransfer10.16.pdf.

essence ask the Court to assume that the selection of Athene as annuity provider means the selection process must have been flawed, because Plaintiffs believe Athene to be "riskier" than other insurers in hypothetical, future circumstances. If Plaintiffs' allegations here are sufficient to survive a motion to dismiss, the same basic allegations could be used to challenge *every* pension risk transfer transaction.

Importantly, Plaintiffs do not allege that they have been denied benefits or that their benefits were reduced in any way. The case should end there. In a defined benefit plan, like the Plan, a participant is entitled only to a fixed, defined benefit, as set forth in the plan. *See Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 440 (1999). Plaintiffs here have received—and continue to receive—all benefits owed to them. Thus, Plaintiffs have not suffered a pecuniary injury.

In place of any claim that their benefits have been impacted, Plaintiffs' claims of harm are based on the fact that their benefits will be paid by an insurance company rather than from an ERISA-governed retirement plan. This "harm" is not an invasion of a legally-protected right. To the contrary, even Plaintiffs acknowledge "Plan sponsors are not flatly prohibited by law from transferring pension obligations to insurance companies through annuitizations." (ECF 45 at ¶ 22.) In other words, while defined benefit plan participants are entitled to the benefits they were promised, there is no guarantee that their benefits ultimately come to them from any particular source or sender.

Importantly, ERISA expressly permits pension risk transfers, and the alleged "harms" Plaintiffs plead are natural consequences of every pension risk transfer, regardless of which insurer is involved. Thus, Plaintiffs' claims must fail. Moreover, no fiduciary duty applies to BMS's decision to conduct a pension risk transfer. BMS acted in its settlor capacity as plan sponsor to terminate the Plan, and to replace the Plan's ongoing obligation to provide certain

benefits with the purchase of insurance contracts to provide the benefits owed under the plan. *Beck v. PACE Int'l Union*, 551 U.S. 96 (2007) ("It is well established in this Court's cases that an employer's decision whether to terminate an ERISA plan is a settlor function immune from ERISA's fiduciary obligations."); *Lee v. Verizon Commc'ns, Inc.*, 837 F.3d 523, 537 (5th Cir. 2016) ("[W]e consider the decision to transfer pension assets outside ERISA coverage as a sponsor decision immune from fiduciary obligations."). That plan sponsor decision, by its nature, cost Plaintiffs nothing, and has not changed the amount of any pension benefits they have received or are owed. While the selection of the specific annuity provider may be considered a fiduciary act, the illusory "harm" Plaintiffs are claiming (*i.e.*, their expulsion from an ERISA plan, and replacement of PBGC[5] backing of their benefits with backing by state guaranty associations) does not result from the selection of a specific annuity provider—it would result from *any* pension risk transfer, regardless of the annuity provider.

Ultimately, Plaintiffs have experienced no harm from the transaction they challenge. They do not dispute that, following the transaction, they are still owed the same benefits on the same schedule as they were to receive from the Plan. Their claims of increased "risk" in moving from an ERISA-governed plan to an insurer-backed annuity ignore or attempt to minimize that (1) single-employer pension plans have a demonstrably higher failure rate than insurer-backed annuities, (2) the PBGC does not guarantee pension benefits against all losses, (3) the insurers

[5]The Pension Benefit Guaranty Corporation ("PBGC") is a federally chartered corporation established under ERISA that guarantees payment of certain benefits in the event of a plan termination. *See generally* Dep't of Labor, https://www.dol.gov/general/topic/retirement/erisa. Pre-termination, the Plan was required to participate in the PBGC's termination insurance program, and BMS paid an annual premium to the PBGC for that coverage. *See* 29 U.S.C. §§ 4006, 4007. The text of ERISA provides that, if the Plan becomes insolvent, benefits become guaranteed according to PBGC procedures and limitations. *See* 29 U.S.C. § 1322.

involved in pension risk transfers are highly regulated, and (4) in the hypothetical, remote possibility of an insurer default, insured annuity benefits have multiple layers of protection.

Lest we enter into yet another phase of unfounded ERISA class actions that are designed to compel settlement not because of their merits but because of the costs of defending them, it is imperative that these pension risk transfer claims be soundly rejected at the pleading stage. As the Supreme Court has noted, motions to dismiss, like the ones filed by Defendants here, are an "important mechanism for weeding out meritless [ERISA] claims . . . ." *Fifth Third Bancorp v. Dudenhoeffer*, 573 U.S. 409, 425 (2014). This is because "the prospect of discovery in a suit" challenging fiduciary decisions is "ominous," and "elevates the possibility that a plaintiff with a largely groundless claim will simply take up the time of a number of other people, with the right to do so representing an *in terrorem* increment of the settlement value[.]" *Pension Benefit Guar. Corp. ex rel. St. Vincent Catholic Med. Ctrs. Ret. Plan v. Morgan Stanley Inv. Mgmt. Inc.*, 712 F.3d 705, 719 (2d Cir. 2013). Because Plaintiffs challenge inherent aspects of pension risk transfers—which are undeniably lawful—if these cases survive motions to dismiss, others are sure to follow, at great cost to plans and, ultimately, to plan participants.[6]

In short, the Court should grant Defendants' motion and dismiss the Complaint both because Plaintiffs lack standing and because Plaintiffs plead no viable claim for relief.

II. BACKGROUND

A. Employee Benefit Plans Are Voluntary And May Be Terminated.

The fundamental premise of ERISA's regulation of pension plans is that adopting and continuing such plans is purely voluntary. "Nothing in ERISA requires employers to establish

---

[6]Hallez, Companies transferred billions in pension assets to annuities. Here come the lawsuits, Investment News, March 14, 2024, *available at* https://www.investmentnews.com/life-insurance-and-annuities/news/companies-transferred-billions-in-pension-assets-to-annuities-here-come-the-lawsuits-250826 ("If it happens that the cases lead to large recoveries, or at least survive motions to dismiss or motions for summary judgment and end in settlements, that could mean more such cases.").

employee benefits plans." *Lockheed Corp. v. Spink*, 517 U.S. 882, 887 (1996). Instead, ERISA reflects a series of policy decisions and represents a "careful balancing" between ensuring employees receive the benefits they have earned and encouraging employers to create and maintain benefit plans in the first place. *See Conkright v. Frommert*, 559 U.S. 506, 517 (2010); *Aetna Health Inc. v. Davila*, 542 U.S. 200, 208 (2004). ERISA "induc[es] employers to offer benefits by assuring a predictable set of liabilities, under uniform standards of primary conduct and a uniform regime of ultimate remedial orders and awards when a violation has occurred." *Rush Prudential HMO, Inc. v. Moran*, 536 U.S. 355, 379 (2002).

As part of its "careful balancing," ERISA provides employers with the right to amend or terminate the plans they previously had voluntarily offered, while simultaneously ensuring the security of participant benefits. *See Chait v. Bernstein*, 645 F. Supp. 1092, 1099 (D.N.J. 1986), *aff'd*, 835 F.2d 1017 (3d Cir. 1987) ("[A]n employer may terminate a plan without violating the fiduciary duties it must obey when administering the plan."). In fact, ERISA expressly permits pension risk transfers like those challenged in this latest series of class actions. The statute specifically provides that, in conducting a standard termination, a plan administrator must "purchase irrevocable commitments from an insurer to provide all benefit liabilities under the plan, or . . . in accordance with the provisions of the plan and any applicable regulations, otherwise fully provide benefit liabilities under the plan." 29 U.S.C. § 1341(b)(3).[7] The statute contains no requirement that (1) the annuities be backed by the PBGC, or (2) participants receive any compensation (other than the benefits they are owed under the plan) as a form of

[7] In the preamble to the regulations that first imposed an annuity purchase requirement on terminating plans, the PBGC referred to the possibility of insurer default on these commitments as an "unlikely event." *See* 46 Fed. Reg. 9532, at 9534 (1981).

compensation for the "risk" of having their benefits transitioned to an insurer or the "loss" of PBGC backing.

Outside the context of a plan termination, the purchase of annuities to satisfy pension obligations and transfer the liabilities from the plan to an insurance provider is a recognized pension risk transfer commonly referred to as a "buyout" transaction. These transactions, which have occurred for decades, transfer all or part of a sponsor's pension obligations and assets to an insurer using a bulk annuity contract.[8] Through a buyout transaction, in exchange for payment of a premium, the transferred liabilities are completely removed from the pension plan and are no longer the company's or plan's responsibility.[9] Thus, an insurer—not the plan sponsor—carries responsibilities to meet benefit commitments, after accounting for variabilities in factors like interest rate, inflation, investment performance, and participant mortality.[10]

Through those purchases, a plan sponsor satisfies the statutory duty to provide that a participant will receive a monthly retirement benefit (the terms of which are reflected in the annuity contract), regardless of the financial status of the plan or its sponsor. Thus, while Plaintiffs here claim they were allegedly "harmed" by being removed from participation in an ERISA plan, the statute specifically allows for individuals to cease being ERISA plan participants once their benefits are covered under annuity contracts.[11]

---

[8] *See* De-risking Strategies of Defined Benefit Plans: Empirical Evidence from the United States, Soc'y of Actuaries 11 (Nov. 2020), https://www.soa.org/globalassets/assets/files/resources/research-report/2020/de-risking-strategies.pdf.

[9] *Id.*

[10] *Id.*

[11] Further support that plan participants are not guaranteed their eventual payment will come from any specific plan (and that they are not "harmed" by being removed from a particular plan) can be found in the standards governing plan "spin offs." In a "spin off" transaction, a portion of one plan's liabilities are transferred to a different plan, often in connection with the sale of a portion of a business. Where a participant's right to benefits is the same after the transaction as it was before it, the fact that a different payor is responsible for paying those benefits does not give rise to an actionable claim under ERISA. *See Blaw Knox Ret. Income Plan v. White Consol. Indus., Inc.*, 998 F.2d 1185, 1191 (3d Cir. 1993) (transfer of pension liabilities to new sponsor in spin off transaction did not interfere with employee pension rights).

B. Insurance-Based Annuities Are An Important, Well-Established Part Of The Voluntary Retirement Benefit System.

It should not come as a surprise that ERISA calls for the purchase of insurance commitments to provide post-termination benefits to plan participants. Insurance products have served as one of the primary vehicles for funding pension plans since the early 1920s, and annuity contracts were among the first widely-used investments for funding pension plan obligations.[12] By the late 1980s, it was estimated that more than half a trillion dollars in pension benefits, covering over 54 million people, were provided for under insurance contracts.[13]

Several factors account for the widespread use of annuity products. Among the most significant is that insurance contracts and annuities allow employers to eliminate volatility from their pension costs while still meeting all benefit commitments.[14] In exchange for the premium, the insurer unconditionally guarantees the payment of each participant's retirement benefit in the same amount as provided by the plan.

While Plaintiffs suggest an insurance-backed annuity is somehow riskier for them than an ERISA plan is, insurance regulations generally hold insurance companies to stricter financial standards and more intensive oversight than are applied by pension regulations to single-employer pension plans,[15] and pension plans have far higher failure rates than insurers. Indeed, ERISA itself evinces that Congress was willing to rely on insurance companies and the related

---

[12]*See* Melone, Nature and Development of Private Pensions, in Life and Health Insurance Handbook 521 (D.W. Gregg and V.B. Lucas, 1973 ed.); Consumer Protection Comparison: The Federal Pension System and the State Insurance System, Nat'l Org. of Life and Health Ins. Guaranty Ass'n 10 (May 22, 2016), https://www.nolhga.com/resource/code/file.cfm?ID=2559; *see also* James M. Poterba, Nat'l Bureau of Econ. Res., The History of Annuities in the United States (1997), https://www.nber.org/system/files/working_papers/w6001/w6001.pdf, at 17.
[13]*See* ACLI 1989 Life Insurance Fact Book Update at 25 (1989) (estimating that, as of 1989, life insurance companies held $569 billion under contracts with pension plans).
[14]D. McGill and D. Grubbs, Fundamentals of Private Pensions at 526–27 (6th ed. 1989); *Mack Boring and Parts v. Meeker, Sharkey Moffitt*, 930 F.2d 267, 269 (3d Cir. 1991).
[15]*See* Consumer Protection Comparison at 4.

state regulatory scheme to protect participants' benefits. Plans backed by insurance contracts issued by state-licensed insurers are exempted from ERISA's requirement that plan benefits be backed by a funded trust. *See* 29 U.S.C. § 1103(b)(1).

Plaintiffs cite a lone example, more than 30 years ago, of an insurance company's failure causing losses to annuitants. (*See* ECF 45 at ¶¶ 72–80.)[16] Since the 2008 financial crisis, no active issuer of annuity contracts with remaining annuity obligations has failed, while pension plan failures have claimed at least 931 single-employer plans covering more than 560,000 participants.[17] Indeed, according to the PBGC itself, pension plan failures have triggered $8.5 billion in participant losses.[18]

As to the unlikely event of insurer default, in place of PBGC backing, commitments made by insurers like Athene are backed by an elaborate protective system, including (1) insurance company expertise in managing risk,[19] (2) stringent state regulation of insurers,[20] (3) review of insurers by ratings agencies,[21] (4) the availability of insurance company separate accounts,[22] and (5) state insurance guaranty associations.[23]

The ability to manage pension related liability prospectively through annuity purchases plays a vital role in encouraging plan sponsors to provide retirement benefits. One need only

[16] While Plaintiffs identify four instances of insurer failures in 2024 (ECF 45 at ¶ 139), none of those insurers were actually involved in the transactions challenged here, and Plaintiffs do not allege that any of those insurer failures caused any loss to participants whose benefits had been involved in any pension risk transfer.

[17] Consumer Protection Comparison at 4.

[18] PBGC's Single-Employer Guarantee Outcomes, PBGC 5-6, 10-12 (May 2019), https://www.pbgc.gov/sites/default/files/2016-single-employer-guaranty-study.pdf ("PBGC Study").

[19] *See* Issue Brief: Pension Risk Transfer at 12 ("Life and annuity insurance companies are in the business of managing long-term risks . . . .").

[20] *See* Consumer Protection Comparison at 16–18.

[21] *See id.* at 18.

[22] *See id.* at 15.

[23] *See id.* at 21–24; *see also* Issue Brief: Buy-Out Group Annuity Purchase Primer, Am. Acad. of Actuaries 11–12 (July 2023), https://www.actuary.org/sites/default/files/2023-07/Buy-Out_Group_Annuity_Purchase_Primer.pdf.

look at recent market trends to understand how changes in economic conditions impact an employer's handling of pension obligations. Until very recently, interest rates were at historic lows, which placed pressure on retirement plans and plan sponsors because lower interest rates correlate with higher pension liabilities.[24] The COVID-19 pandemic drove down interest rates even further, placing still more strain on plan sponsors. Together with the rapid rise in interest rates in 2022 and 2023 to address inflation, those interest rate fluctuations highlighted very powerfully the inherent volatility in pension plan obligations. Because rising interest rates make annuity purchases less expensive, buyout transactions in the current economic environment present a natural solution for plan sponsors looking to transfer the myriad of pension-related risks to insurers.

While Plaintiffs here claim they were "harmed" by being removed from participation in an ERISA plan, that claim is belied by ERISA itself, which specifically allows for annuitization of plan benefits, including through removal from ERISA-governed plans. Pension risk transfers, like the one attacked here, are a foundational aspect of our voluntary retirement system, and a vital part of the "careful balance" that encourages plan sponsors to continue to establish and offer defined benefit pension plans.[25] Plan sponsors' ability to responsibly monitor and control benefit costs would be diminished significantly if annuitization were no longer allowed.

III. <u>ARGUMENT</u>

Given all that is at stake in this action—not just for the parties, but for the ability of plan sponsors generally to terminate pension plans or transfer future risk associated with pension liabilities—it is imperative that only well-pleaded claims brought by parties who have standing survive motions to dismiss. For the reasons that follow, Plaintiffs' claims must be dismissed.

[24]De-risking Strategies of Defined Benefit Plans at 7.
[25] *See supra* at 5–6.

A. <u>Plaintiffs Have Not Pleaded A Plausible Claim for Breach of Fiduciary Duty.</u>

Plaintiffs' claims stem from the incorrect and misleading suggestion that ERISA "requires fiduciaries to select the 'safest annuity available.'" (*See* ECF 45 at ¶ 24.) Plaintiffs' pronouncement of this nonexistent requirement is not based on the text of ERISA, but instead on a misinterpretation of Department of Labor Interpretative Bulletin 95-1 ("IB 95-1")—which admittedly does use the term "safest annuity available," though not in the way evoked by Plaintiffs. (*See, e.g.*, ECF 45 at ¶¶ 24, 55.)[26]

In contrast to Plaintiffs' suggestion that IB 95-1 reflects a myopic focus on the outcome of an annuity provider selection—*i.e.*, did the fiduciary pick the purported "safest annuity available"?—the bulletin acknowledges that ERISA's fiduciary duties are focused on a fulsome process that considers a range of factors, and not on outcomes.[27] Rejecting the reading of IB 95-1 Plaintiffs now push here, in *Bussian v. RJR Nabisco, Inc.*, 223 F.3d 286, 297, 298 (5th Cir. 2000), the Fifth Circuit held that the proper standard to be applied to the selection of an annuity provider is that the fiduciaries' "decisions [are] made with an eye single to the interests of the participants and beneficiaries." That standard does not require that a plan fiduciary in a pension risk transfer purchase Plaintiffs' idea of the "safest available annuity." Indeed, the inherently subjective nature of "safest available" presents its own problems. *Cf. Riley v. Murdock*, No. 95-cv-2414, 1996 WL 209613, at *1 (4th Cir. Apr. 30, 1996) (unpublished) (rejecting the same standard advocated by Plaintiffs here).

---

[26] Even if Plaintiffs correctly interpreted IB 95-1, that bulletin was not issued through notice and comment rulemaking, does not have the force of law, and does not create an independent cause of action. *See Bussian v. RJR Nabisco, Inc.*, 223 F.3d 286, 297 (5th Cir. 2000) (explaining enactment of IB 95-1).
[27] IB 95-1, on its face, contradicts Plaintiffs' insistence that fiduciaries must select the "safest annuity available," by explicitly describing situations where fiduciaries are not required to do so. *See* 29 C.F.R. § 2509.95-1(d) ("The Department recognizes that there are situations where it may be in the interest of the participants and beneficiaries to purchase other than the safest available annuity.").

In its June 2024 report to Congress, the DOL described IB 95-1 not as requiring selection of the "safest annuity available," but instead as requiring that "fiduciaries . . . conduct an objective, thorough, and analytical search for purposes of identifying and selecting providers from which to purchase annuities."[28] In reviewing that guidance, the DOL found that IB 95-1 continues to identify a broad range of factors relevant to a prudent and loyal evaluation process for selecting an annuity provider, and stressed that "it is desirable for guidance in this area to remain principles-based."[29] In other words, the DOL's own description of its guidance belies Plaintiffs' suggestion that it requires the selection of the "safest annuity available."

Plaintiffs' suggestion that a fiduciary must select only the safest annuity available is also inconsistent with the Supreme Court's more recent holding that "courts must give due regard to the *range of reasonable judgments* a fiduciary may make based on her experience and expertise." *Hughes v. Nw. Univ.*, 595 U.S. 170, 177 (2022) (emphasis added). This is significant because, if a fiduciary engaged in a prudent process with respect to a challenged decision, the fiduciary is not liable for any subsequent loss. *See Pfeil v. State St. Bank & Trust Co.*, 806 F.3d 377, 385 (6th Cir. 2015), *cert. denied*, 136 S. Ct. 2511 (2016) (despite losses suffered as a result of decision, no question existed as to appropriateness of methods and process used to make decision, and so fiduciary was not liable). Indeed, the better reading of IB 95-1—as recognized in *Bussian*—is that it reflects a framework by which fiduciaries can reach a prudent selection (or, as stated in *Hughes*, choose from among the "range of reasonable judgments"). The Court should reject Plaintiffs' contention that there is, among available insurers in the annuity market, a

[28] *See* Julie A. Su, Acting Secretary of Labor, Department of Labor Report to Congress on Employee Benefits Security Administration's Interpretive Bulletin 95-1 (June 2024), https://www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/laws/secure-2.0/report-to-congress-on-interpretive-bulletin-95-1.pdf, at 4.
[29] *Id.* at 27.

predetermined set of "safest" options from which fiduciaries must select to avoid breaching their duty to the plan.

By relying on the self-serving premise that Defendants were expressly precluded from selecting Athene[30] as the annuity provider for the pension risk transfer because it was not the "safest annuity available," Plaintiffs assert that the fiduciaries breached both the duties of loyalty and prudence. While ERISA's fiduciary duties are indisputably process-based, Plaintiffs notably do not allege anything about the fiduciaries' actual process for selecting Athene.

If purely conclusory allegations (such as Plaintiffs' here) that the purchase of annuities exposed participants to some future possible risk of loss of their benefits are sufficient to state a fiduciary breach claim, then any participant in any pension risk transfer will be invited to file a mirror-image version of this lawsuit. Allowing the claims pleaded here to survive dismissal would throw open the doors to expensive ERISA class action discovery as to every pension risk transfer and would enable participants who have suffered no actual harm to file and litigate claims in federal court. Indeed, the plaintiffs' bar recently expanded its challenges to pension risk transfers beyond transactions involving Athene, to also include those involving Prudential and Reinsurance Group of America.[31] Such a result is wholly incompatible with the fact that these transactions are indisputably a recognized part of ERISA's voluntary pension system.

Moreover, Plaintiffs' claims fail because—even if the selection of Athene was a fiduciary breach—Plaintiffs cannot show a causal connection between that selection and the harm they claim (that is, Plaintiffs' removal from an ERISA plan, the loss of related PBGC protections in the event of a default on their benefits, or any increase in risk that the payor responsible for their

[30] Despite repeated claims of the increased "risks" and supposed harms caused by the selection of Athene, Plaintiffs do not identify a single instance in which Athene has paid any annuity recipients under any plan less than they would have received under their ERISA-governed pension plan.
[31] *See Dempsey v. Verizon Communications, Inc. et al.*, No. 1:24-cv-10004-JGK (S.D.N.Y. Dec. 30, 2024).

benefits might default in the future).[32] Plaintiffs' removal from the Plan did not result from the selection of Athene, but from the decision to transfer a portion of the sponsor's pension risk to an insurer—a decision all agree is *not* subject to ERISA's fiduciary rules. In other words, even if Defendants had selected an annuity provider that Plaintiffs would accept as the "safest available," Plaintiffs would have ceased to be Plan participants, their benefits would not be backed by BMS or the PBGC, and the responsibility for paying their benefits would have transferred from the Plan to the selected insurance provider. Viewed this way, it is all the more apparent that Plaintiffs are not truly challenging the selection of Athene as an annuity provider; they are challenging the non-fiduciary decision to conduct any pension risk transfer.

B. The Annuities Purchased From Athene Provide the Same Benefits As Promised Under The Plan, So Plaintiffs Have No Injury.

The "irreducible constitutional minimum" of Article III standing requires that a plaintiff must have "(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)). Plaintiffs bear the burden of pleading (and, ultimately, establishing) each of the required elements of standing. *Id.*

[32]*See Allison v. Bank One—Denver*, 289 F.3d 1223, 1239 (10th Cir. 2002) ("The phrase 'resulting from' indicates that there must be a showing of 'some causal link between the alleged breach ... and the loss plaintiff seeks to recover.'"); *Kuper v. Iovenko*, 66 F.3d 1447 at 1459 (6th Cir. 1995) ("[A] fiduciary's failure to investigate an investment decision alone is not sufficient to show that the decision was not reasonable. Instead, ... a plaintiff must show a causal link between the failure to investigate and the harm suffered by the plan."); *Friend v. Sanwa Bank Cal*., 35 F.3d 466, 469 (9th Cir. 1994) ("ERISA holds a trustee liable for a breach of fiduciary duty only to the extent that losses to the plan result from the breach."); *Diduck v. Kaszycki & Sons Contractors, Inc*., 974 F.2d 270, 279 (2d Cir. 1992) ("The last element in this cause of action is proof of a causal connection between the fraud perpetrated and the loss complained of."); *Brandt v. Grounds*, 687 F.2d 895, 898 (7th Cir. 1982) ("[A] causal connection is required between the breach of the fiduciary duty and the losses incurred by the plan.").

Here, Plaintiffs allege that participants "no longer enjoy any of the benefits intended by Congress under ERISA, including the protections and backstop provided by the PBGC." (ECF 45 at ¶ 197.) They further allege based on mere speculation that their benefits have been put "in peril" and that there is a "substantial risk that their pension benefits will not be paid." (*Id.* at ¶¶ 1, 47.) In alleging they have standing to bring this action, Plaintiffs assert they have been harmed "by having their accrued pension benefits and future retirement benefits offloaded, from an ERISA-governed pension plan backed by an established multibillion-dollar corporation and the PBGC, to a private equity-controlled insurance company with a highly complex and opaque Bermuda-based structure and risky asset portfolio" which they claim "quantifiably and substantially impaired the value of Plaintiffs' retirement benefits the moment it occurred." (*Id.* at ¶ 463.)

Plaintiffs' suggestion that their pension benefits are "quantifiably less valuable" is nothing more than an artfully pleaded, purely academic argument.[33] As Plaintiffs acknowledge, here (as in all pension risk transfers) Athene assumed responsibility to pay Plaintiffs exactly the benefits they would have received had the transaction not occurred. And there is no allegation anywhere in the Complaint that Athene has failed to meet that commitment, or is on the verge of failing to do so. At most, Plaintiffs allege that they can conceive of a hypothetical set of facts under which Athene might not meet its commitments at some undefined time in the future, and then—if that happens—the state guaranty associations that back Athene's commitments might not be able to provide them their full benefits.[34] Because the hypothetical reality in which they

[33]Because ERISA requires that an individual's pension entitlement cannot be alienated, 29 U.S.C. § 1056(d)(1), the concept of Plaintiffs' pension entitlements shrinking (or growing) in value cannot be used to show injury-in-fact.

[34]As discussed above, the state guarantee associations (followed by claims against the remaining assets of a defaulted insurer) are just the last line of defense in a multi-level system of state regulation and oversight that protects annuitants in the insurance-backed annuity system. *See supra* at 8–9, n. 15, 19–23.

might be harmed cannot be said to be more likely than the current reality in which they continue to receive all benefits to which they are entitled, they do not have standing now to pursue the claims asserted here.[35] *See Knudsen v. MetLife Grp., Inc.*, 117 F.4th 570, 580 (3d Cir. 2024) (affirming dismissal for lack of standing because "allegations that stand on nothing more than supposition" cannot establish injury-in-fact).

If, as Plaintiffs acknowledge in their Complaint, Athene is required to pay Plaintiffs the same benefits they would have received under the Plan, the question becomes how Plaintiffs can allege their pensions have decreased in value. The answer lies in Plaintiffs' reference to uncompensated risk. Plaintiffs assert that, through the pension risk transfer with Athene, their pension benefits were placed at increased risk of default, without compensation to them. (ECF 45 at ¶ 35.) They argue, therefore, as a matter of economic theory, the present value of their pensions was "diminished" and their benefits (despite being paid in identical amounts) are "quantifiably less valuable." (*Id.* at ¶¶ 34, 243.) But Plaintiffs allege no facts plausibly supporting their theory that their benefits are at a greater risk now than they were prior to the pension risk transfer. Indeed, they allege that, in the Plan, the employer bears the risk that the underlying assets will not be sufficient to pay benefit obligations, and that—after the pension risk transfer—the insurer (but not Plaintiffs or the other participants) carry that risk. (*See id.* at ¶¶ 57–59 (in a defined benefit plan, sponsor bears the investment risk); ¶¶ 63–64 (in a pension risk transfer, the insurer assumes responsibility for future benefit payments).)

These protections provide participants with protection at least comparable to PBGC partial guarantees of benefits, and do so in a system with a much lower failure rate.

[35]While Plaintiffs assert this is not a suit about "hypothetical" risk (ECF 45 at ¶ 64), that assertion is belied by the fact that (1) they cannot point to a single instance in which Athene failed to meet its insurance commitments (let alone to the participants in this transaction), and (2) the only example of any failure they do cite involved a different insurer more than 30 years ago, before (as they acknowledge) the law was changed to more closely regulate insurers as annuity providers. (*Id.* at ¶¶ 72–85.)

In reality, Plaintiffs' conclusory assertions and the argument that they have been harmed by the alleged devaluing of their pensions are simply an attempt to obscure that they "have been paid all of their monthly pension benefits so far, and they are legally and contractually entitled to receive those same monthly payments for the rest of their lives." *See Thole v. U. S. Bank N.A*, 590 U.S. 538, 540 (2020).

As a result of the transaction they seek to challenge, Plaintiffs' benefits are secured by irrevocable commitments from a regulated insurance provider, and Athene is obligated to pay Plaintiffs everything they would have received under the Plan. Thus, "under ordinary Article III standing analysis, the plaintiffs lack Article III standing for a simple, commonsense reason: They have received all of their vested pension benefits so far, and they are legally entitled to receive the same monthly payments for the rest of their lives. Winning or losing this suit would not change the plaintiffs' monthly pension benefits." *Thole*, 590 U.S. at 547.

1. Plaintiffs' claimed risk to their pensions is too speculative to be considered "certainly impending."

Relying heavily on a false comparison with the Executive Life failure over three decades ago, and general vilification of private equity, Plaintiffs allege, in purely conclusory fashion, that Athene is a "risky" annuity provider, and that the selection of Athene as the annuity provider has placed their benefits at "substantial risk of default." (*See* ECF 45 at ¶¶ 1, 12–17, 46, 79, 90–172, 213, 242–250.) Critically, Plaintiffs are not claiming they have suffered any benefit reduction now, only that they might experience one in the future. These assertions are devoid of any factual basis.

"Standing under Article III of the Constitution requires that an injury be concrete, particularized, and actual or imminent; fairly traceable to the challenged action; and redressable by a favorable ruling." *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 149 (2010).

"Although imminence is concededly a somewhat elastic concept, it cannot be stretched beyond its purpose, which is to ensure that the alleged injury is not too speculative for Article III purposes—that the injury is certainly impending." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013) (quoting *Lujan*, 504 U.S. at 565 n.2). A theory of standing "which relies on a highly attenuated chain of possibilities[] does not satisfy the requirement that threatened injury must be certainly impending." *See Clapper*, 568 U.S. at 410.

Here, Plaintiffs claim to have suffered an injury because they assert there is a chance that, an unspecified point in the future, Athene might not be able to meet its obligations to pay their benefits. The Supreme Court has long held that injuries premised on chains of hypothetical events are insufficient to establish standing. When a plaintiff "alleges only an injury at some indefinite future time," the injury must "proceed with a high degree of immediacy, so as to reduce the possibility of deciding a case in which no injury would have occurred at all." *Lujan*, 504 U.S. at 564 n.2. Plaintiffs here do not, and cannot, carry that burden. "Allegations of possible future injury are not sufficient" to confer standing. *See Cason v. Nat'l Football League Players Ass'n*, 538 F. Supp. 3d 100, 112 (D.D.C. 2021).

Tellingly, Plaintiffs concede that—both before and after the pension risk transfer—there were hypothetical scenarios in which it was possible they would not receive their full plan benefits. (*See id.* at ¶¶ 246–249.) They attempt to plead around that reality, and to create the illusion of "harm" by labeling the pre-transaction risk as "negligible" and the post-transition risk as "large." (*Id.* at ¶¶ 246–47.) But those labels are merely conjecture on Plaintiffs' part.

Plaintiffs do not—and cannot—allege Athene will ever default on any obligation to them, let alone allege when any potential default might happen. Instead they claim, at most, there is a possibility it could happen in the future, and that Athene might be more likely to default than

certain other insurers. Article III standing requires more, and the Court need not accept as true Plaintiffs' self-serving predictions of possible future harm. "When considering any chain of allegations for standing purposes, [courts] may reject as overly speculative those links which are predictions of future events . . . and those which predict a future injury that will result from present or ongoing actions—those types of allegations that are not normally susceptible of labelling as 'true' or 'false.'" *United Transp. Union v. ICC*, 891 F.2d 908, 912 (D.C. Cir. 1989); *see also Lee*, 837 F.3d at 546 (claims that pension risk transfer increased "relative likelihood" of future benefit default held insufficient to show imminent or impending injury).

2. Losing PBGC coverage is not an injury, and is not unique to selecting Athene as opposed to a different annuity provider.

Plaintiffs allege that, because they are no longer participants in an ERISA plan, they have been injured by no longer having PBGC backing of their pensions, in the event the payor defaults on its obligations. As described above, the consequence they describe is expressly permitted by ERISA, happens by operation of law, and is not an injury to Plaintiffs.[36] Plaintiffs are simply entitled to—and will receive—the benefits they have earned under the Plan; Plaintiffs are not independently entitled to participation in the Plan itself.

Plaintiffs' argument on this point again relies speculatively on the theoretical prospect of future harm—that is, the loss of PBGC backing will matter only if Athene defaults on its obligations. Further, Plaintiffs overvalue PBGC backing. If a pension plan fails and the PBGC needs to take over benefits (known as a "distress termination") the PBGC's guarantees are capped by law and those guarantees can and have resulted in a reduction of promised benefits for participants. In a study of 500 plans trusteed by the PBGC between 1988 and 2012, the PBGC

---

[36]*See* 29 C.F.R. § 2510.3-3(d)(2)(ii) (individual automatically ceases to be plan participant where the individual's benefits are fully guaranteed by an insurance company and legally enforceable at the individual's choice against the insurer).

found that its guarantee limitations reduced the benefits of 16% of all vested participants in those plans.[37] The PBGC found that, for participants affected by any of the PBGC benefits limitations, the average percentage reduction in benefits was nearly 24%.[38] The result? Where participants have had to rely on PBGC backing following a plan failure, they have lost $8.5 billion in benefits.[39] Thus, while the PBGC provides important protections for the participants it covers, it is not the panacea Plaintiffs claim. The suggestion—which pervades the Complaint—that Plaintiffs are now subject to some future risk of benefit loss where none exists under PBGC backing is irrefutably false. Plaintiffs' failure to allege any fact to support the implicit suggestion throughout their Complaint that state guarantees are lower than PBGC's "protected benefits" is sufficient by itself to show Plaintiffs have not met their burden to plead standing.

Finally, even if the loss of PBGC protection were an injury—and, under these circumstances, it is not—that result would follow from *any* annuity buyout, and cannot be said to have been caused by the selection of Athene as the annuity provider (which is the only fiduciary act challenged in the Complaint). Even where plaintiffs have alleged a basis to potentially find injury-in-fact, the standing inquiry requires that plaintiffs demonstrated that their "injury-in-fact" is "fairly traceable" to "the challenged action of the defendant." *Rivera v. Wyeth-Ayerst Lab'ys*, 283 F.3d 315, 321 (5th Cir. 2002) (quoting *Lujan*, 504 U.S. at 560). Here it clearly is not.

As noted above, the decision to transfer all or a portion of plan liabilities to an insurance company through the purchase of annuities is a decision of the plan sponsor and is a settlor decision. *See Beck v. PACE Int'l Union*, 551 U.S. 96, 101 (2007) ("It is well established . . . that

[37]PBGC Study, at *i*, 5-6, 10-12. The maximum insurance limitation imposes a dollar cap on benefit guarantees, the phase-in limitation restricts recent plan benefit improvements provided through a plan amendment, and the accrued-at-normal limitation limits benefits to a monthly amount no greater than the monthly benefit provided as a straight life annuity available at the plan's normal retirement age. *Id.* at 1-3.
[38]*Id.* at 7, Table 3.
[39]*Id.* at 5-6, 10-12.

an employer's decision *whether* to terminate an ERISA plan is a settlor function immune from ERISA's fiduciary obligations.") (emphasis in original). While fiduciary decisions are subject to ERISA's fiduciary duties of prudence and loyalty (among others), settlor decisions are not. *Hughes Aircraft*, 525 U.S. at 444 (settlor decisions do not implicate ERISA's fiduciary duties).

Because the loss of ERISA and PBGC coverage occurred because BMS made the settlor decision to engage in a pension risk transfer, the result would have occurred regardless of which annuity provider was selected and is not traceable to the selection of Athene or to any fiduciary action. It is a legal impossibility that a fiduciary breach caused the harm Plaintiffs allege.

Plaintiffs' assertions that they were harmed by loss of plan-participant status and PBGC protection fail because they do not show any injury-in-fact, and because they were not caused by the selection of Athene (the only fiduciary act challenged in the Complaint). Plaintiffs fail to account for the fact that *any* annuity buyout, with *any* annuity provider, would have removed them from participation in the plan, and caused them to lose PBGC backing. The selection of Athene did not cause the harm Plaintiffs complain about; they are instead scapegoating that selection to create an avenue to attack all pension risk transfers. As Plaintiffs concede, this is a losing proposition because "Plan sponsors are not flatly prohibited by law from transferring pension obligations to insurance companies through annuitizations.." (ECF 45 at ¶ 22.) This case should be dismissed.

IV. CONCLUSION

Should meritless claims like these advance beyond swift dismissal, there is significant risk the floodgates will burst open to plaintiffs' firms looking for a payday. This would be devastating to plan sponsors and, in turn, to the participants who rely on them for jobs and benefits. A pension system in which businesses can manage risk while protecting benefits is good for everyone, including participants. The Court should grant Defendants' motions to dismiss.

THE ERISA INDUSTRY COMMITTEE, THE AMERICAN BENEFITS COUNCIL, AND THE COMMITTEE ON INVESTMENT OF EMPLOYEE BENEFIT ASSETS INC.

By their attorneys,

/s/ *Robert T. Szyba*

Robert T. Szyba
SEYFARTH SHAW LLP
620 Eighth Avenue, 32nd Floor
New York, New York 10018-1405
Telephone: 212-218-5500

Ada W. Dolph (*pro hac vice* forthcoming)
Thomas Horan (*pro hac vice* forthcoming)
SEYFARTH SHAW LLP
233 S. Wacker Drive, Suite 8000
Chicago, IL 60606-6448
Telephone: 312-460-5000
Facsimile: 312-460-7000

DATED: January 23, 2025

CERTIFICATE OF SERVICE

I, Robert T. Szyba, hereby certify that on January 23, 2025, I caused a true and correct copy of the foregoing motion to be filed and served on all counsel of record via ECF

/s/ *Robert T. Szyba*
Robert T. Szyba