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EUCLID FIDUCIARY WHITEPAPER

Debunking Recordkeeping Fee Theories

in "Excessive" Fee Cases

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Introduction

Recordkeeping fees represent less than twenty percent of total fees for defined contribution plans, but the majority of purported excessive fee cases still allege a claim of excess recordkeeping fees. Recordkeeping is essentially the gateway drug for plaintiff law firms trying to cash in on excessive fee litigation. But while the initial lawsuits against universities and other corporate plans might have alleged legitimate claims of high plan administration fees, many of the current purported excessive fee cases are based on pure conjecture, improper benchmarks, and misleading facts. In some cases, the recordkeeping fees alleged are just plain false. And in most cases, the purported recordkeeping benchmarks have no support in reality. But plaintiffs will continue this shameless business model until courts apply a more stringent pleading standard to weed out meritless and implausible cases.

The following is a guide to the common tactics used by plaintiff law firms to stack the deck with misleading claims. The goal in all of these cases is to survive a motion to dismiss and then leverage settlement pressure based on high discovery costs and inflated damage models. Plaintiff firms masquerade as helping plan participants, but as we prove in this analysis, in most cases they are misleading courts with flimsy allegations that lack credibility. The simple fact remains that **most large defined contribution retirement plans in this country have low recordkeeping fees** — fees that are often five to ten times lower than the recordkeeping fees in most under $100 million small-asset plans. But given the rampant misrepresentations of actual fee levels in the excess fee lawsuit claims, federal courts have not been given the proper perspective or context to make informed decisions on threshold pleading motions.

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The Supreme Court held in *Hughes v. Northwestern*, 142 S. Ct. 737 (2022), held that all excess fee claims based on circumstantial evidence must be subjected to context-based scrutiny in order to survive as a plausible lawsuit. We hope to demonstrate in this whitepaper that the only credible way to meet this context-based plausibility standard is **if the fees are egregious based on a reliable, third-party benchmark**. Fees within a reasonable range of established benchmarks — not plaintiff-manufactured benchmarks — are not plausible under the Supreme Court pleadings standard. In a claim of excessive fees, the only context that makes sense is if the fees are actually excessive at the threshold stage of the case. Discovery and the gateway to settlements should not be allowed for plaintiffs who have filed illegitimate and unsupported claims of excess fees.

TACTIC 1

Allegations Without Proof

A $35 or Lower "Benchmark" Without Support

The original tactic used to allege excessive recordkeeping fees was based on pure conjecture: Plaintiffs alleged that a plan's recordkeeping fee was higher than a low number — usually $35 per participant — with no credible attempt to justify their claim. These original claims gave no supporting benchmark to validate their claim.

The 2016 cases filed against university 403b plans used this tactic. For example, in the *Hughes v. Northwestern* case that the Supreme Court remanded back to the Seventh Circuit, the Schlichter law firm alleged without any proof that the recordkeeping fees paid by the Northwestern plans were too high, and that the plan fiduciaries are liable for the alleged overpayments to TIAA and Fidelity. Based on the Amended Complaint, the Northwestern Retirement Plan had $2.34B in assets and 21,622 participants as of 12/31/2015; and (2) the Voluntary Savings Plan had $530M in assets and 12,293 participants as of the same date. The first claim in the Amended Claim is that the plan squandered its leverage of bargaining power by maintaining both TIAA and Fidelity as recordkeepers for the plan. Specifically, Plaintiffs alleged that a reasonable recordkeeping fee would be $1.05m or $35 per participant, compared to $3.3 and $4.1 million paid by the Retirement Plan [between $153 and $213 per participant from 2010 to 2015 — allegedly over 500% higher than a reasonable fee for these services]. The smaller plan allegedly paid between $54 to $87 per participant during the same time period. The TIAA-CREF investments also contained high "revenue sharing kicked back" to TIAA [15 to 24 bps for TIAA investments]. Plaintiffs cite no benchmark to justify their claim that $35 per participant is reliable or even available in the market. Plaintiffs only cite five universities who engaged in a RFP process to lower fees, but do not cite the actual fees of these plans in order to compare those plans fees to the Northwestern plan. Plaintiffs also allege that the plan fiduciaries failed to conduct a competitive bidding process for the Plan's recordkeeping services. With a RFP for recordkeeping services, plaintiffs allege that the plans could have demanded "plan pricing" rebates from TIAA based on the Plans' economies of scale.

We will continue to admit for credibility purposes that the Northwestern case, like most of the original twenty cases filed against university 403b plans, have troubling facts. We are not trying to defend $4m recordkeeping fees for a $2.4B plan. We have seen enough plan fee disclosures to know that most large plans have lower recordkeeping fees, and fees have gone down in the last six years since the case was filed. And we fully recognize that the Northwestern plan committee long ago secured what plaintiffs claim in the amended complaint is a lower $42 per participant recordkeeping fee. So it is clear that the $150+ recordkeeping fee prior to 2016 was higher than other large plans, particularly if revenue sharing was uncapped. Credibility is important if plan sponsors are to convince courts to dismiss illegitimate cases, so we should not try to justify high recordkeeping fees. [We can still argue about the damages model, but should recognize that there are legitimate excess fee cases].

The point is that even if the Northwestern case was a potentially legitimate example of excess recordkeeping fees, it was not pled sufficiently. It should not have met the pleading standard of *Iqbal* and *Twombly* based on circumstantial evidence of a disfavored outcome [$150+ per participant] and an unsupported benchmark of $35 per participant. Plaintiffs provided no support for the $35 fee that they favored. It was totally made up, and it is insufficient to justify forcing a university to spend millions of dollars to defend itself against a claim of malpractice. Just to make clear, plaintiffs failed to allege even a single university that had secured a $35 per participant fee — no evidence whatsoever. The only evidence provided on the third complaint in the case was that five universities had consolidated to a single recordkeeper, but there was no allegation that any one of these universities had secured a $35 recordkeeping fee.

It goes without saying that failing to proffer a legitimate and reliable benchmark does not satisfy the pleading standard required by the Supreme Court in *Hughes v. Northwestern*. Plaintiffs have won the majority of motions based on this tactic, but that does not make it legally correct. *See*, *Tobias v. Nvidia Corporation*, Order Granting

With Leave to Amend Motion to Dismiss Complaint at 25 ["Plaintiffs provide no basis for how they arrived at the $35 per participant figure."] And to the extent there was any doubt in the minds of district court judges whether the stringent pleading standard applies, *Hughes v. Northwestern* has made clear that the mere allegation of excess fees is an insufficient basis upon which to sue plan sponsors.

TACTIC 2

Improper Benchmarks

Distorting Small Plan Recordkeeping Statistics from the 401k Averages Book

A common historical playbook for the excessive fee plaintiffs' bar is to claim that the recordkeeping fees are too high based on comparisons to the 401k Averages Book, which gives examples of the recordkeeping fees paid by small plans. The theory is that if the small-asset plan cited in the 401k Averages Book pays a certain low amount for recordkeeping fees, then a large plan with more bargaining leverage acted imprudently if they do not pay significantly less than the small plan. But the citations to the 401k Averages Book are misleading and misrepresented because they leave out substantial revenue sharing paid by most small plans. Plaintiff lawyers must know these statistics are misleading, including the Capozzi Adler lawyers who used the same misleading statistics in dozens of complaints, but they keep using them as long as the tactic works. Again, plaintiff firms do not appear to care if their evidence is credible. Their goal is to get past a motion to dismiss, because once they get the case into discovery, they can leverage a high damages model and discovery burden. Alas, a court finally called foul on the 401k Averages Book playbook in *Johnson v. The PNC Financial Services Group, Inc.*, W.D. Pa (Case 2:20-cv-01493-CCW), but not before plaintiffs had leveraged substantial settlements in many cases.

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A good example of the misuse of the small plan data is in *Tobias v. Nvidia Corporation*, Case No. 20-CV-06081-LHK (N.D. Ca. 08/28/2020). In that $1.0B plan with 7,822 participants, the Capozzi law firm alleged excess fees based on a purported $63 flat recordkeeping fee to Fidelity that was reduced to $52 in 2017, which did not include $458,130 in revenue sharing. As they allege in paragraph 126 of the complaint:

> "[b]y way of comparison, we can look at what other plans are paying for recordkeeping and administrative costs. One data source, the *401k Averages Book* (20th ed. 2020) studies Plan fees for smaller plans, those under $200 million in assets. Although it studies smaller plans than the Plan, it is nonetheless a useful resource because we can extrapolate from the data what a bigger plan like the Plan should be paying for recordkeeping. That is because recordkeeping and administrative fee should **decrease** as a Plan increases in size. **For example, a plan with 200 participants and $20 million in assets has an average recordkeeping and administration cost (through direct compensation) of $12 per participants**. *401k Averages Book* at p. 95. **A plan with 2,000 participants and $200 million in assets has an average recordkeeping and administration cost (through direct compensation) of $5 per participant**. *Id.* At 108. Thus, <u>the Plan</u>, with between a half-billion and a billion dollars in assets and over 7,000 participants throughout the Class Period, <u>should have had a direct recordkeeping costs below $5 average, which it clearly did not</u>."

To start, this same law firm that alleged a $5 or $12 recordkeeping benchmark in this case has filed dozens of lawsuits with other purported recordkeeping benchmarks — all at different, and higher amounts. If credibility matters, this lacks credibility. But more damning, the purported $5 and $12 benchmarks are deficient because they are false. It is not the recordkeeping fee in the book itself. The 200 Participant/$20M asset plan has been misrepresented, because the actual direct recordkeeping costs in the 401k Averages Book are a range of: $0 low; $12 average; and $190 high. But more importantly, this is not the total recordkeeping costs. The overall bundled costs of the same plans are a range of low/medium/high, or $136/$982/$1,284 — not $12. The Capozzi law firm cited this book in many cases, but always left out this crucial and obvious fact. This means that the recordkeepers for small plans are taking most of the compensation from *revenue sharing* from the investment managers — amounting to hundreds of dollars in the average plan. Similarly, the 2,000 participant/$200M plan in Chart 24.8 of the 401k Averages Book has a $5 *direct* median recordkeeping fee as Capozzi asserts, but the total compensation must include the *indirect* $160 cost per participant of revenue sharing on the chart — with $501 net investment costs — totaling $666 total bunded costs for this plan. This is much higher than the Nvidia plan — up to ten times higher — and thus the Complaint is disingenuous, at best. The misrepresentations of the 401k Averages Book are dramatic and should be embarrassing to any practitioner alleging this kind of nonsense.

The most recent edition of the 401k Average Book has key findings that demonstrate the wide fee disparity between large and small plans. Fees for larger plans with an average range of 1,000 participants and $50 million in assets declined from 0.90% to 0.88% in 2021 [and down from 0.95% in 2017]. And fees for plans with an average range of 100 participants and $5 million in assets declined from 1.20% to 1.19% [and down from 1.25% in 2017]. Notwithstanding this small decline in fees, the fees for $5 million and $50 million-asset plans are multiples higher than the larger plans being used for allegedly excess fees.

BrightScope and the Investment Company Institute publish an annual collaborative research report that analyzes plan-level data gathered from audited Form 5500 filings of private-sector defined contribution plans ["BrightScope Report"]. *See https://www.ici.org/system/files/2021-07/21_ppr_dcplan_profile_401k.pdf* or CLICK HERE. The most recent report published in July 2021 analyzes plan data from 2018. The report is useful to demonstrate how large plans have significantly lower fees than small plans. According to the BrightScope report:

- **The average total plan cost was 0.94% of assets, down from 1.02 in 2009.** The average participant was in a lower-cost plan, with total plan cost of 0.60% of assets in 2018, down from 0.65% in 2009. The average dollar was invested in a plan with a total plan cost of 0.38% in 2018 (down from 0.47% in 2009).

- **The average range of total plan cost is narrow for plans over $1 billion [between 0.15% to 0.45%].** 10 percent of plans had a total plan cost of 0.40 percent or less, while 10 percent of plans had a total plan cost of 1.54 percent or more. By contrast, on a plan-weighted basis, for plans with more than $1 billion in plan assets, that range is narrower, varying from 0.15 percent of assets to 0.45 percent, which is 50% lower than the average cost for all plans.

- **The average investment cost for $1B+ plans is .36%, compared to .69% for <$1m plans.** The average asset-weighted expense ratio for domestic equity mutual funds (including both index and actively managed funds) was 0.69 percent for plans with less than $1 million in plan assets, compared with 0.36 percent for plans with more than $1 billion in plan assets in 2018. The primary reason that large plans have a lower total cost is that a greater share of their assets are invested in index funds.

Total Plan Cost by 401(k) Plan Assets — BrightScope Report

Size of Plan	Total Plan Cost on an Asset-Weighted Basis	Total Plan Cost on a Plan-Weighted Basis
Less than $1m	1.44	1.44
$1m to $10m	1.05	1.12
$10m to $50m	0.76	0.80
$50m to $100m	0.61	0.62
$100m to $250m	0.46	0.47
$250m to $500m	0.42	0.42
$500m to $1B	0.37	0.37
More than $1B*	0.24	0.29
All plans	0.38	0.94

*note that 56% of all plan assets are in $1B+ asset plans

The BrightScope Report conclusively demonstrates the fallacy of citing to the 401k Averages Book to sue large plans. We recognize that this tactic has not been used as frequently in the last six months, but from our perspective, when you are alleging the serious offense of malpractice, credibility matters. And there is absolutely no credibility to the practice of misusing statistics to mislead federal court judges. Plaintiff law firms assert that their "facts" must be deemed true for purposes of a motion to dismiss, but we know of nothing in the federal rules that allow you to fabricate allegations. And we do not understand why more courts did not actually read the mispresented data from the 401k Averages Book. In sum, all the 401k Averages Book does is demonstrate that nearly every large plan in America has substantially lower plan administration fees than small plans under $200m in size — again proving that most excess fee claims lack credibility and do nothing to help plan participants in most large plans that already have low recordkeeping fees.

TACTIC 3

False Facts

Alleging Excess Fees Based on Inaccurate Fee Amounts

The third tactic is to allege a recordkeeping fee for a plan that is just plain wrong. Why this has worked, we do not understand, but plaintiff firms will keep doing it until federal courts allow plan sponsors to correct the record immediately at the pleadings stage. Plaintiff firms know they can allege whatever they want in most courts, and claim that they need "discovery" to find out whether defendants are correct when they refute the false allegations. And as we show below, in some cases, plaintiffs have filed amended complaints with new, lower purported benchmarks when it is proven that the original alleged recordkeeping fees were incorrect.

In the AT&T case, the district court denied four successive motions to dismiss in a case alleging an "excessive" recordkeeping fee of $61 per participant. After expensive discovery, the undisputed record showed that the recordkeeping fee was $20 — one-third the size of the false allegations, and that AT&T had negotiated a "most favored customer" provision that guaranteed the lowest possible fee that Fidelity provides to similarly sized plans. Upon a full evidentiary record, the plan's disclosures showed that all four complaints filed in the case contained false allegations. But the district court had deferred to the complaint allegations as "true" and forced AT&T to spend untold defense costs to defend its plan fiduciaries against false allegations. In fact, the $20 recordkeeping fee charged by Fidelity was so low that the amount of Fidelity's recordkeeping has been redacted from the record! But that has not stopped plaintiffs — even in the face of a $20 rock-bottom recordkeeping fee — from appealing the case. Why? Because they know if they can get to trial, they can cash in on litigation uncertainty. When courts allow illegitimate cases to proceed, then facts, and the truth, do not matter.

The actual recordkeeping fees are sent in fee disclosures every quarter. If this case was not enough to demonstrate that the excess fee lawsuits are part of a con game, it is important to note that there is no mystery to the actual amount of recordkeeping fees. You do not need to accept anything the plaintiffs allege as true, or have elaborate discovery on the actual amount. To the contrary, the Department of Labor mandates that recordkeepers provide the actual per participant recordkeeping fee to plan participants every three months in the 404a5 fee disclosure, and to the plan itself in the quarterly 408b2 plan fee disclosure. The law firm filing a purported excess fee case against AT&T with a false fee amount in four successive complaints had access to his client's rule 404a5 fee disclosure. Why a court allowed this firm to file four complaints with false information is confounding. And why this is not sanctionable conduct by an officer of the court is also perplexing. The true and correct information was on the fee disclosures mandated by the federal regulators. Federal courts must be informed that you cannot trust the accuracy and candor of many of these complaints. Plaintiff firms in examples like the AT&T case must know that they can hide the truth behind a purportedly sympathetic plan participant. But courts need to see through this façade.

TACTIC 4

Inflated Recordkeeing Fees From Form 5500 Filings

Using Form 5500 compensation data that overstates the plan administration costs when rule 404a5 participant disclosures are readily available.

The fourth tactic used to allege excess recordkeeping fees is to claim that the recordkeeper's Form 5500 compensation is the plan's total recordkeeping costs. This is false. The Schedule C that lists the recordkeeper's direct compensation includes more than just recordkeeping fees, as it includes all transaction costs, like QDRO and loan transaction fees, that are not related to recordkeeping. The Form 5500 number is inflated. It also will overstate the recordkeeping fees if revenue sharing is rebated back to participants. Every retirement plan practitioner knows this, including the savvy plaintiff law firms, except apparently the federal court judges being asked to decide whether retirement plan fees are too high.

In *Matousek v. MidAmerican Energy Company*, No. 4:20-cv-00352-CRW-CFB (S.D. Iowa 11/13/2020), for example, plaintiffs claim a recordkeeping fee of $326.17 to $525.20 per participant [$1.9M to $3.1M], computed from the Merrill Lynch compensation disclosed on the plan's Form 5500 Schedule C listing service provider compensation. The company disputed that its recordkeeping fee from Merrill Lynch was only $32 in its motion to dismiss, demonstrating that the number on the Form 5500 was incorrect and inflated, including amounts that have been rebated to participants and transaction fees that are not recordkeeping fees. This shows the dramatic differential between the Form 5500 recordkeeping fee data and actual reality.

Plaintiff firms use inaccurate and inflated recordkeeping fee data from Form 5500 filings in nearly every excess fee case. They know, however, that the actual and correct fees are disclosed to every participant every three months in a fee disclosure from the plan recordkeeper. There is a legitimate and truthful source of the actual fees. There is no mystery as to where to find it. It is in the quarterly rule 404a5 fee disclosure that every plan recordkeeper is required to send to every plan participant. And in the rule 408b2 plan fee disclosure sent every three months. We belabor this point because we have not seen this revealed and discussed in any other source, despite the reams being written on excess fee claims.

The prejudice of allowing plaintiff firms to estimate recordkeeping fees from the Form 5500 number that includes non-recordkeeping transaction fees is material. A good example is the recently announced settlement of the Costco excess fee case. In *Soulek v. Costco Wholesale Corporation*, NO. 20-cv-937 (filed June 23, 2020 E.D. Wisc.), plaintiffs alleged that the plan fiduciaries must have — based on inference — failed to monitor the plan's recordkeeping expenses. The plan is gigantic with $15.5B in assets and 174,403 participants. The only allegation in the complaint related to recordkeeping fees is that "[f]rom 2014 to 2018, recordkeeping costs paid to T. Rowe Price, as disclosed on the Form 5500 forms, rose 500% from around $1,000,000 per year in 2014, to $6,000,000 per year in 2018, while number of participants only went up 21%." [Complaint paragraph 52]. There is no benchmark to put even $6M of recordkeeping fees into perspective. But even if the Form 5500 numbers are the actual recordkeeping costs — which we they are not -- $6m divided by 174,403 participants is $34.4 — below the magic $35 purported reasonable recordkeeping number for large plans, and this plan had extra work given the tens of thousands of former employees in the plan with small balances, but for which recordkeeping services must be performed.

Nevertheless, despite having a reasonable recordkeeping fee — even if you assume the inaccurate and inflated Form 5500 numbers alleged in the complaint are true

— Costco entered into a $5.1m settlement. The plaintiff firm won, but that does not mean that Costco fiduciaries were imprudent. It only shows the material prejudice of allowing distorted and inaccurate information to be pled in federal courts complaints. Plaintiffs had the actual recordkeeping numbers on a per-participant basis from the quarterly fee disclosures, but did not give the court the accurate information made available to each of its clients. It did not reveal the true fees, because the court apparently was not told that truthful numbers were available. The plaintiffs will tout that they contributed to the lowering of retirement fees in American plans, but that does not make it a fair legal result or represent true justice.

Somehow lost in the hundreds of excess fee cases is the obvious source of accurate information. We remain flabbergasted that many defense lawyers have not persuasively informed courts that plaintiffs are filing deceptive and misleading claims. And that the courts can take judicial notice of Department of Labor mandated disclosures that reveal the actual recordkeeping fees.

There is no need to allow inflated Form 5500 fee numbers that include transaction costs that are unrelated to recordkeeping. And there is no justice in assuming false recordkeeping allegations are "true" when they are not, and can be rebutted by regulatory-mandated disclosures already provided to every plaintiff who files an excess fee complaint.

Simply put, courts should not allow estimates of recordkeeping fees when the plaintiffs, who are plan participants, have quarterly fee disclosures that are mandated by the Department of Labor.

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TACTIC 5

Allege that Fidelity has Stipulated on the Record that its Recordkeeping Services are only worth $14–21

The fifth tactic to assert excessive recordkeeping fees is to claim that Fidelity has somehow admitted that its recordkeeping services for large plans are only worth $14–21 per participant. The theory is that any amount over this is excessive and represents fiduciary malpractice that must be restored — after generous plaintiff attorney fees, of course — to plan participants. This tactic is used in numerous cases, including the excess fee cases against Humana, Koch Industries, and most recently against Centene Corporation.

In *Williams v. Centene Corporation*, filed on February 22, 2022, the Capozzi law firm uses this tactic: "Let's start with what Fidelity itself would pay if it were in Defendants' shoes. In a recent lawsuit where Fidelity's multi-billion plan with over 58,000 participants was sued, the "parties [] stipulated that if Fidelity were a third party negotiating this fee structure at arms-length, the value of services would range from $14-21 per person per year over the class period, and that recordkeeping services provided by Fidelity to this Plan are not more valuable than those received by other plans of over $1,000,000,000 in assets where Fidelity is the recordkeeper." Citing *Moitoso et al. v FMR, et al*, 451 F.Supp.3d 189, 214 (D.Mass 2020) [paragraph 89 of the Complaint].

The argument that Fidelity has somehow conceded that its recordkeeping services are only worth $14-21 is used in many excessive fee cases. Nevertheless, it is a false and prejudicial narrative. The *Moitoso* case alleged excessive fees in Fidelity's own plan. The parties in that case entered into a stipulation for the limited purpose of resolving a discovery dispute. Like many stipulations, the *Moitoso* stipulation reflected a compromise between the parties to that case about the value of the recordkeeping services that Fidelity provided to its own plan. The stipulation stated on its face that it was "offered for the purposes of the [*Moitoso*] litigation only," and the parties agreed not to "contest the validity of the stipulation[] in the context of this litigation only." It is not relevant to the allegations in any other case, and it does not reflect the value of the recordkeeping services that Fidelity provides to **different plans** pursuant to **different recordkeeping contracts** for a **different set of services.**

Moreover, if the Capozzi allegations are true, then nearly every large plan in America can be sued — and let us emphasize this so that there is no misunderstanding by judges inclined to be sympathetic: **NEARLY EVERY PLAN IN AMERICA HAS RECORDKEEPING FEES ABOVE $14-21.** Euclid is a prominent fiduciary liability insurance underwriter, and we have reviewed thousands of plan fee disclosures from Fidelity and every other recordkeeper. We have reviewed a larger sample size than most plan consultants or benchmark source. And based on our review of many of the large plans in America, there are only a tiny handful of plans that have recordkeeping fees below $21 per participant. This is just plain fact. It is not fiduciary malpractice to have a recordkeeping fee above $14–21 for a plan of any size.

When Capozzi Adler and other plaintiff law firms allege that all large plan fiduciaries have committed fiduciary malpractice and are liable for millions of dollars in damages by virtue of a recordkeeping fee above $14 or $21, these allegations are improper. More to the point, these allegations are knowingly fraudulent. Plaintiff firms have reviewed hundreds, if not thousands of plans — just like the underwriters at Euclid — and they know that their made-up $21 fake benchmarks are intentionally deceptive to the court reviewing the case. When they argue that they need discovery to evaluate their fake benchmark, it is a litigation tactic — nothing more. It is **not** evidence of fiduciary negligence. But they will keep up this con game until courts wise up and realize it is a fraud on the court — not legitimate evidence.

TACTIC 6

Comparing Cherry-Picked Comparator Plans Without Proper Context

The most recent tactic to allege excess recordkeeping fees is to cite the fees for five or six large plans with super-low fees from across the entire nation. There is no proof that these numbers are correct, but the same plans are cited over and over in many excess fee cases. Here is the chart from in the recent lawsuit in *Williams v. Centene Corporation*, E.D. Mo (2/22/22):

COMPARABLE PLANS' R&A FEES PAID IN 2019

Plan Name	Number of Participants	Assets Under Management	Total R&A Costs	R&A Costs on a Per-Participant Basis*	Recordkeeper
Publicis Benefits Connection 401K Plan	48,353	$2,167,524,236	$995,358	$21	Fidelity
Deseret 401(k) Plan	34,938	$4,264,113,298	$773,763	$22	Great-West
The Dow Chemical Company Employees' Savings Plan	37,868	$10,913,979,302	$932,742	$25	Fidelity
The Savings and Investment Plan [WPP Group]	35,927	$3,346,932,005	$977,116	$27	Vanguard
The Rite Aid 401(k) Plan	31,330	$2,668,142,111	$930,019	$30	Alight Financial

**Euclid Note: Capozzi Adler discloses in footnote 10 of the complaint that its data is based on filed Form 5500s, which we discussed above is not an accurate depiction of recordkeeping fees, because it includes transactions costs and does not account for rebated revenue sharing — something no plaintiff firm has transparently disclosed to federal court judges.*

In the *Centene Corporation* case, plaintiffs allege that the recordkeeping fee of the $3.1 billion dollar Centene plan with 63,000 participants was $42.11 based on their admitted "estimate." They then use the chart of the five plans above as a purported comparator or benchmark that shows that $42.11 was too high. Specifically, Capozzi Adler claims that "a rate of $30 per participant is the outlier," and thus "the [Centene Corporation] Plan, with over 45,534 participants and over $2 billion dollars of assets in 2019, should have been able to negotiate at worst, recordkeeping cost in the low $20 range from the beginning of the Class Period to the present . . . Failure to do so result in millions of dollars of damages to the Plan and its participants."

This same tactic was used in the case against the Kroger plan to allege that a $30 recordkeeping fee was somehow excessive, as we discussed in this blog post: Excessive Fee Lawsuits Without Excessive Fees — The Case of the $30 Recordkeeping Fee. In Sigetich v. The Kroger Co., Case 1:21-cv-00697-SJD, filed in the Western District of Ohio on November 5, 2021, the Kroger Co. 401(k) Retirement Savings Account Plan is alleged to have $5.9 billion in assets with 92,210 participants in 2019.

[**Euclid Note:** The 2019 Form 5500 on file with the Department of Labor has 92,210 participants with account balances, but the total number of active participants at the end of the plan year is much higher — at 119,807. The additional 27,000+ accounts are still the responsibility of the recordkeeper, and cannot be ignored, especially if you are claiming excessive fees on a per participant basis.]

After the typical defined contribution fee lecture found in excessive fee lawsuits, paragraph 93 of the complaint levies its core allegation that the recordkeeping fee is purportedly too high with this chart:

Retirement Plan Services (RPS) Fees

	2015	2016	2017	2018	2019	Average
Participants	83,482	79,408	79,408	90,005	92,210	87,010
Est. RPS Fees	$2,504,460	$2,382,240	$2,698,290	$2,700,150	$2,766,300	$2,610,288
Est. RPS Per Participant	$30	$30	$30	$30	$30	$30

The complaint then inserts a table to "illustrate[] the annual recordkeeping fees paid by other comparable plans of similar sizes with similar amounts of money under management, receiving a similar level and quality of services."

Comparable Plans' Recordkeeping Fees Based on Publicly Available Information

Plan	Participants	Assets	RPS Fee	RPS Fee/pp	Recordkeeper
Kaiser Permanente Savings and Retirement Plan	47,358	$3,104,524,321	$1,298,775	$27	Vanguard
Fidelity Retirement Savings Plan	58,163	$16,119,398,751	$814,282	$14	Fidelity
Sutter Health 403(b) Savings Plan	73,408	$3,681,162,013	$1,908,133	$26	Fidelity
Google LLC 401(k) Savings Plan	82,725	$11,786,824,293	$1,676,4145	$20	Vanguard
Kroger Plan Average Fee	**87,010**	**$4,763,655,000**	**$2,610,288**	**$30**	**Merrill Lynch**
Marriott International, Inc. Employees' Profit Sharing Retirement and Savings Plan and Trust	115,501	$7,660,619,525	$2,636,322	$23	Alight
Apple 401(k) Plan	115,686	$7,400,046,748	$2,114,871	$18	Great-West
Lowes 401(k) Plan	154,402	$5,619,838,861	$2,856,437	$19	Wells Fargo

From this chart of seven purportedly "similar" plans, plaintiffs allege in paragraph 100 that "compared to other plans of similar sizes with similar amounts of money under management, receiving a similar level and quality of services, had Defendants been acting in the best interests of the Plan's Participants, the Plan actually would have paid on average a reasonable effective annual market rate for recordkeeping of approximately $1,740,192 per year in recordkeeping fees, which equates to approximately $20 per participant per year." According to plaintiffs, "a hypothetical prudent plan fiduciary would not agree to pay 50% more than what they could otherwise pay for recordkeeping."

Plaintiffs also allege that the Merrill Lynch fee disclosures fail to accurately disclose plan investments fees. But essentially the entire case is that plaintiffs found seven plans out of the entire universe of 695 or more plans with $1B or more in assets that have lower recordkeeping fees. The chart is really only six plans with purportedly lower fees, because the citation to the Fidelity plan is not the recordkeeping fee that Fidelity charged its own employees in its own sponsored plan. Instead, it is an expert opining as to the cost to Fidelity for recordkeeping its own plan. And needless to say, Fidelity is the nation's leading recordkeeper for large plans.

There are at least two glaring fallacies in plaintiff's allegations: (1) plaintiff failed to make an apples-to-apples comparison of the level and quality of recordkeeping services; and (2) failed to provide a proper benchmark for what the universe of large plans pay for recordkeeping services.

(1) LACK OF COMPARISON OF THE LEVEL AND QUALITY OF RECORDKEEPING SERVICES:

The Complaint has no support for the proposition that the level and quality of services are "similar" between the Kroger plan and the seven other random plans cited in the Complaint. The continued arrogance of the plaintiffs' bar assumes that district courts will not perform a careful, context-specific scrutiny of the complaint. Instead, they know that up to 75% of all courts will give lip service to the *Iqbal* and *Ashcroft* motion to dismiss standard, and assume all facts that plaintiffs allege are true, and allow the case to proceed to discovery. The Kroger complaint is like many other cases that baldly allege "similar" services without any attempt to explain

actual recordkeeping services at all. They assert that recordkeeping is a commodity with no service variables. But that is not true, as there are different levels of service. The key differentiator that affects cost is the level of participant education. A retail company like Kroger likely needs a higher level of service with more participants and a higher need for high-quality participant education. Kroger retail employees are not the same as doctors at Kaiser Permanente or engineers at Google and Apple. But district courts often set a low bar for alleging fiduciary incompetence, and plaintiff here has not bothered to even try to compare level of services — they just claim the services are "similar," assuming the court will presume that is true. They may end up being right that the district court judge will allow a complaint without evidence, but that doesn't mean the courts are following the requirement to review complaints with careful context scrutiny. It just shows that the judicial system is broken.

(2) CHERRY-PICKING OF LOWEST COST PLANS IS NOT EVIDENCE OF FIDUCIARY IMPRUDENCE:

The second fallacy of the Kroger and Centene Corporation complaints is that cherry-picking six or seven plans with super low-cost recordkeeping fees is not a legitimate statistical comparison of the true market for recordkeeping of large plans. We have to caution that the there is no reason to believe that the recordkeeping fees of the seven companies in the chart are correct, because most excessive fee complaints have false and contrived facts. And as we demonstrated earlier, the recordkeeping fee based on active participants of the Kroger plan itself is likely close to the $20 purported benchmark. And it appears that the plan sponsor subsidizes most of the plan administration costs. But data from seven random plans is not evidence of fiduciary imprudence. There are at least 695 plans with $1B or more in assets, and the recordkeeping fees of seven arbitrary plans does not demonstrate statistical proof. Plaintiffs do not offer a reliable benchmark study of $1B plans demonstrating that the proper recordkeeping fee is $20 for mega plans, **because there is no such proof.**

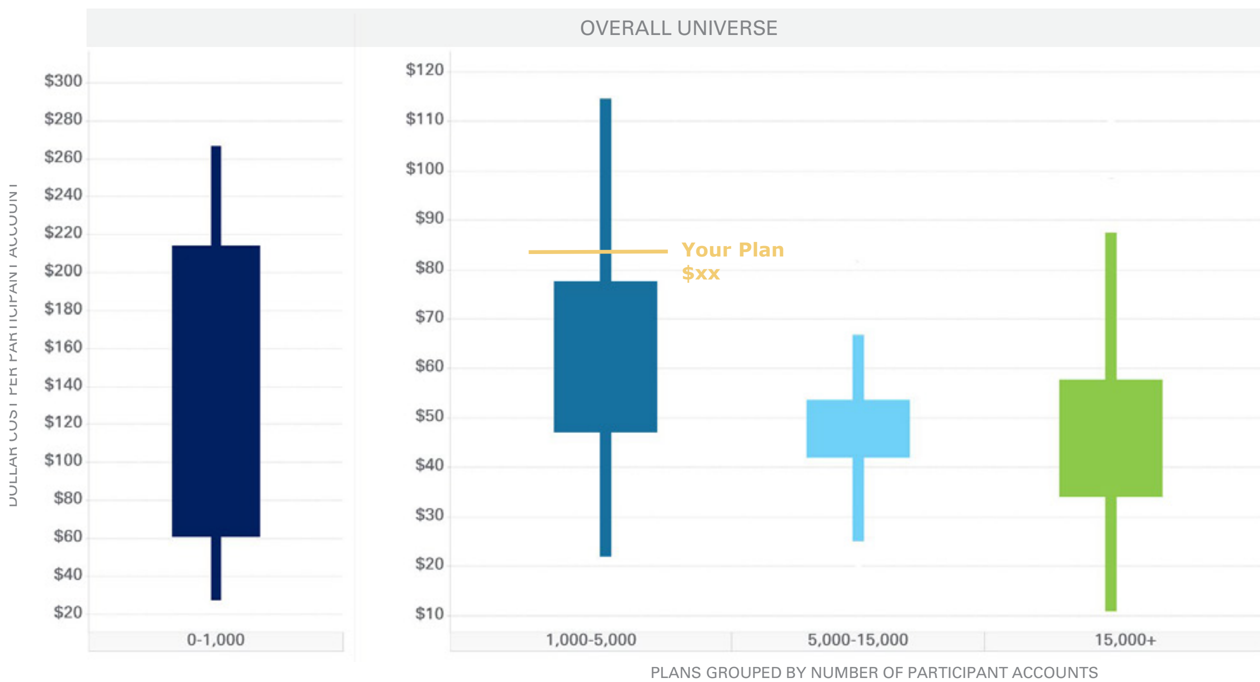
Plaintiffs may have found a handful of plans with super-low recordkeeping fees, but that only proves that there are seven plans with super-low recordkeeping fees. That is it — nothing more.

Plaintiffs have not given a recordkeeping study that validates their $20 recordkeeping target for $2B+ plans, because it does not exist. Euclid underwriters spend our days in the unglamorous task of reviewing plan fee disclosures, and a $30 recordkeeping fee is really low for the Kroger plan. Only a few plans in the entire universe of 800,000+ plans in America have recordkeeping fees on a per participant basis below $30 — likely less than 25 plans in the entire country have lower recordkeeping fees than the Kroger plan. Based on Euclid's review of thousands of plans, the range of recordkeeping fees for mega plans [$1B+/10,000 participant+] is between $25–75 per participant, and sometimes even higher. The fact that plaintiff's counsel found seven plans with $20 recordkeeping fees is evidence of nothing other than there are a few plans in the universe of large defined contribution plans that have slightly lower fees. Plaintiffs do not allege any reliable evidence that the Kroger fiduciaries acted imprudently with a $30 recordkeeping fee. Euclid's experience is that the Kroger plan has one of the lowest recordkeeping fees in the entire market for mega plans. In reviewing the briefs filed by defense counsel and the amicus brief of the Chamber of Commerce, it also appears that the named plaintiff in the case only paid $5-6 annually for plan administration because Kroger subsidizes the fees — another crucial fact that plaintiffs failed to disclose to the court. Simply put, the Kroger recordkeeping fees are super low.

But if you do not want to take our word for it, then look to a national benchmark survey of recordkeeping fees. The most comprehensive for large plans is the annual recordkeeping benchmarking analysis published by NEPC.

NEPC Recordkeeping, Trust, Custody Fee Review

BENCHMARKING BASE FEES



Source: NEPC's 2021 Defined Contribution Plan & Fee Survey.

This data from NEPC shows several things. First, small plans with 0-1,000 participants pay significant more in plan administration fees. Second, mega plans with 15,000+ participants have median costs between $35-58 per participant. Plans with 5,000–15,000 participants have median fees between $42–53. The "reasonable range" from the Supreme Court's Northwestern pleadings standard is met within these real benchmarks. The NEPC data is a legitimate benchmark, and gives more reliable context and perspective than the plaintiff law firms trying to drive huge settlements. Under the NEPC benchmarks, many cases with low recordkeeping fees like Costco, AT&T and Kroger should be dismissed without plan sponsors having to expend millions of dollars of defense fees and having to face settlement pressure based on litigation uncertainty. Stated differently, this third-party, reliable benchmark gives real context as to whether a recordkeeping fee is somehow excessive — not the cherry-picked chart in excessive fee cases, which represent only the lowest-fees in the entire market.

TACTIC 7

A Moving Target of “Reasonable” Fees and Comparator Plans

Another example demonstrating the lack of credibility of most excess recordkeeping fee cases is the tactic of amending complaints with reduced “reasonableness” bars as defendants prove that the original fee claims were false. This was highlighted in the Amicus Curiae Brief filed by the Chamber of Commerce in the *Smith v. Commonspirit Health* case pending before the Sixth Circuit Court of Appeals. In *Moore v. Humana*, the original complaint alleged that reasonable recordkeeping fees were about “$40 per participant,” but after learning that the plan’s fees were less than that, the plaintiffs filed an amended complaint alleging that prudently managed plans paid between $25 and $28 per participant for recordkeeping fees. *See* Mot. to Dismiss at 2, *Moore v. Humana*, No. 3:21-cv-00232-RGJ (W.D. Ky. Sept. 27, 2021), ECF No. 23. The same revisionist history took place in *In re Am. Nat’l Red Cross ERISA Litig.*, No. 1:21-cv-00541-EGJ (D.D.C. June 15, 2021). In the original complaint, plaintiffs alleged that plaintiffs paid $71 per year in recordkeeping fees and that “reasonable” fees would have been $34 per year based on “comparator” plans. But the First Amended Complaint alleged that plaintiffs paid between $31.50 and $45 per year in recordkeeping fees and revising the “reasonableness” level down to $30 based on new “comparator” plans. This is yet more examples of the lack of credibility of the excess fee cases being filed every month in federal courts.

Conclusion

Most courts have allowed claims of excess recordkeeping fees to proceed to discovery, which allows many illegitimate cases to create settlement pressure based on litigation uncertainty and a high damages model. We can only assume it is because courts are sympathetic to plan participants, and want to give participants their day in court. But these cases are not client-driven, and none of these plaintiffs have lost any money. They are based on a plaintiff law firm business model designed to take advantage of weak pleadings standards. Plaintiffs know they can file incorrect or flimsy allegations, claim their allegations are entitled to deference as "true" even when they are not, and then they get entry to the gateway of settlement leverage.

But if we have done our job well here, we have proven that most excessive fee cases alleging excess recordkeeping fees lack credibility because they are based on illegitimate and often false data, and nearly always based on improper and misleading purported benchmarks of comparator plans. When the support for a case lacks credibility, it should be dismissed at the pleadings stage. There may be a minority of excess fee cases that are legitimate — and some of the early university cases alleged high recordkeeping fees. But most of the recent lawsuits are suing plans with reasonable recordkeeping fees that are well within the range of other plans of similar size. Ninety-plus percent of cases alleging excess fees are illegitimate. It is a con game that must be shut down by more discerning court review. Hopefully this paper gives the proper context and evidence to expose the con.

Finally, the Supreme Court has confirmed that excess fee cases based on circumstantial evidence must be subjected to context-based scrutiny to survive a motion to dismiss. The most critical context in an excess fee case is whether the fees are actually excessive. Most courts are allowing plaintiffs to prove in discovery whether the fees are excessive. But this is backwards. The *Iqbal*, *Twombly,* and *Dudenhoeffer* standards require plaintiffs to prove in the pleadings that the recordkeeping fees are somehow well outside the range of reasonableness. Courts should use third-party benchmarks — not plaintiff contrived comparator allegations — to make this critical context-based analysis. As we have proven, if legitimate benchmarks are used, then over ninety percent of excess fees case are illegitimate and not plausible under the proper ERISA pleadings standard.

Ninety-plus percent of cases alleging excess fees are illegitimate. It is a con game that must be shut down by more discerning court review.

About the Author

Daniel Aronowitz is the Managing Principal and owner of Euclid Fiduciary, a leading fiduciary liability insurance underwriting company for America's employee benefit plans. Dan has nearly thirty years of experience in the professional liability industry as a coverage lawyer and underwriter, and is a widely recognized fiduciary liability expert and thought leader. He is the author of Euclid's Fiduciary Liability Insurance Handbook and the fiduciary liability insurance chapter of the Trustee Handbook published by the International Foundation of Employee Benefit Plans. He is a graduate of The Ohio State University and Vanderbilt University School of Law and has achieved the RPLU+ designation from the Professional Liability Underwriting Society

Euclid Fiduciary is an insurance program administration company specializing in fiduciary liability insurance coverage for America's employee benefit plans. Euclid offers best-in-class fiduciary, crime/ERISA fidelity, cyber liability, employment practices, and other professional liability insurance coverages to protect the fiduciaries of U.S. employee benefit plans. Our underwriters and claim professionals are experts in complex fiduciary liability and crime exposures, with decades of fiduciary liability experience and expertise.

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