No. 18-3310

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

FREDERICK ROZO,
Plaintiff-Appellant,

v.

PRINCIPAL LIFE INSURANCE COMPANY,
Defendant-Appellee,

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA – DES MOINES
(No. 4:14-cv-00463-JAJ)

BRIEF OF *AMICI CURIAE* THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND THE AMERICAN BENEFITS COUNCIL IN SUPPORT OF DEFENDANT-APPELLEE

Nancy G. Ross
Jed W. Glickstein
MAYER BROWN LLP
71 S. Wacker Drive
Chicago, IL 60606
(312) 782-0600

Brian D. Netter
MAYER BROWN LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000

Counsel for Amici Curiae
(additional counsel listed in signature block)

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, the undersigned counsel certifies that none of the *amici* is a subsidiary of any other corporation, and that no publicly held corporation owns 10% or more of its stock.

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INTEREST OF *AMICI CURIAE*[1]

The **Chamber of Commerce of the United States of America** (Chamber) is the world's largest business federation. The Chamber represents 300,000 direct members and indirectly represents the interests of more than three million businesses and professional organizations of every size, in every industry sector, and from every region of the country. Its members include many employers that offer ERISA-governed benefit plans to their employees, as well as companies that fund or administer those plans.

The **American Benefits Council** (Council) is a national non-profit organization dedicated to protecting and fostering privately sponsored employee benefit plans. Its approximately 440 members are primarily large, multistate employers that provide employee benefits to active and retired workers and their families. The Council's membership also includes organizations that provide employee-benefit services to employers of all sizes. Collectively, the Council's members either directly sponsor or provide services to retirement and health plans covering virtually every American who participates in employer-sponsored benefit programs.

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[1] Pursuant to Fed. R. App. P. 29(a)(4)(E), *amici* state that no party's counsel authored this brief either in whole or in part, and further, that no party or party's counsel, or person or entity other than *amici*, *amici*'s members, and their counsel, contributed money intended to fund preparing or submitting this brief. Counsel for both parties have consented to the filing of this brief.

The Chamber and the Council regularly participate as *amicus curiae* in cases that affect employee-benefit design or administration. *E.g.*, *Sweda v. Univ. of Pa.*, No. 17-3244 (3d Cir.) (appeal pending); *Fifth Third Bancorp v. Dudenhoeffer*, 134 S. Ct. 2459 (2014); *Renfro v. Unisys Corp.*, 671 F.3d 314 (3d Cir. 2011). In particular, the Chamber and the Council recently filed an *amicus* brief in support of the appellee in *Teets v. Great-West Life & Annuity Insurance Co.*, — F.3d —, 2019 WL 1372319 (10th Cir. Mar. 27, 2019), *aff'g*, 286 F. Supp. 3d 1192 (D. Colo. 2017). In Plaintiff's words, the district court in *Teets* "grant[ed] summary judgment to the defendant on substantially similar ERISA claims for substantially similar reasons" as the district court in this case. Pl. Br. 33-34 n.4.

Here, as in *Teets*, Plaintiff seeks to designate providers of general account stable value funds as fiduciaries merely because those providers set the terms on which their products are offered to plan participants. That designation would impose serious costs and operational constraints on service providers, imperiling the ability of employee benefit plans to offer these valuable products to their participants and, at a minimum, ensuring that stable value funds are offered to participants on less desirable terms. Many of *amici*'s members are plan sponsors or fiduciaries who offer stable value funds and see firsthand how important these products are to participants and their beneficiaries. Plan sponsors and fiduciaries, including *amici*'s members,

have a strong interest in ensuring that general account stable value funds continue to be offered to plan participants on appropriate terms.

SUMMARY OF ARGUMENT

Plaintiff, a participant in the Western Exterminator Company Employees' 401(k) Profit Sharing Plan ("Plan"), contends that Principal Life Insurance Co. ("Principal") violated ERISA by retaining the contractual right to set the crediting rate for its Principal Fixed Income Option ("PFIO"), an investment option offered to Plan participants. The PFIO is an example of a "stable value" product—an investment product that offers participants a compelling combination of principal protection, liquidity, and steady return.

The marketplace for stable value funds and similar products in employer-sponsored retirement plans is robust, and plan fiduciaries monitor available offerings to ensure that their participants have access to suitable funds with an appropriate array of characteristics. Even after a particular stable value fund has been selected, fiduciaries remain free to terminate the selected provider and to find a different stable value fund to offer to participants—or to offer a different capital preservation option entirely. These safeguards adequately protect plans' and participants' interests in obtaining prudent investment options at appropriate prices.

The growth of stable value offerings has been an enormous boon to sponsors and participants, helping to safeguard retirement benefits for millions of Americans.

Unfortunately, Plaintiff would turn one type of these products into a magnet for wasteful litigation. Treating general account stable value fund providers as fiduciaries, either because providers set a fund's crediting rate at regular intervals or because providers receive compensation when participants choose to invest in stable value fund offerings, would severely curtail stable value funds and potentially drive providers out of the market entirely.

Such an outcome is not just bad policy, but also bad law. As the Tenth Circuit and a wave of district court decisions overwhelmingly recognize, ERISA does not treat a fund provider as a fiduciary merely because the provider announces in advance the rate of guaranteed interest the fund will pay for a given period. That is especially true when, as here, plans and participants can exit the fund if they do not like the terms. In these circumstances, plans and participants retain the final say over whether to accept a given crediting rate or to move their investments elsewhere. The Court should reject Plaintiff's attempt to shoehorn Principal into fiduciary status.

ARGUMENT

I. Fiduciaries And Plan Participants Desire Stable Value Funds

A stable value fund is a unique and highly desirable investment product that "typically invest[s] in a mix of short- and intermediate-term securities, such as Treasury securities, corporate bonds, and mortgage-backed securities." *Abbott v. Lockheed Martin Corp.*, 725 F.3d 803, 806 (7th Cir. 2013). "Because they hold

longer-duration instruments," stable value funds "generally outperform money market funds, which invest exclusively in short-term securities." *Id.* (citing A. Zoll, Morningstar, *For Safety-First Savers, Stable-Value Funds Are Tough to Beat* (Apr. 16, 2013)); *see also Tibble v. Edison Int'l*, 711 F.3d 1061, 1084 (9th Cir. 2013). However, because of the way stable value funds are constructed, they are generally less volatile than other products with similar yield. Moreover, it is very difficult for investors to replicate the performance of stable value funds outside an employer-sponsored retirement plan. *See, e.g.*, App. 146 (noting that "[t]he PFIO is not offered outside of retirement plans").

Stable value products can be loosely divided into two categories. In a "guaranteed" stable value fund (like the PFIO), the fund's performance is backed by the general account of the provider, which is typically an insurer. The provider of a guaranteed fund guarantees a return to the investor for a set period of time—in the case of the PFIO, six months—and assumes the risk that the performance of its assets will not be sufficient to cover the guaranteed amount and the costs of providing it during that period.

Alternatively, in "synthetic" or "wrapped" funds, the provider directly owns the underlying assets and separately contracts with a bank or insurance company to

obtain insurance.[2] Under that arrangement, the "wrap" has the effect of "guaranteeling] the fund's principal and shield[ing] it from interest-rate volatility" (*Abbott*, 725 F.3d at 806), so that if interest rates rise or a bond defaults, the loss will be amortized over time in the book value of the fund.

Under either configuration, stable value funds offer a compelling value proposition. The products offer "principal protection and liquidity to individual investors, and steady *returns* that are roughly comparable to intermediate-term bond *yields*, but do not exhibit the volatility of intermediate-term bond *total rates of return*."[3] Thus, compared to a traditional short-term bond fund, a stable value fund's extra yield gives investors saving for retirement the opportunity to offset or even beat inflation, a major risk to the long-term value of a portfolio, while still preserving their capital. Stable value funds have the added advantage of liquidity, as such funds typically do not impose lock-up periods or penalties for withdrawing money outside particular windows.

Department of Labor regulations encourage sponsors of participant-directed individual account plans to offer at least one "safe" investment option—a "relatively

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[2] *See* D. F. Babbel & M. A. Herce, *Stable Value Funds Performance*, 6 RISKS, no. 1, at 2-3 (2018), https://bit.ly/2NlCt9U; G. Mitchell, Pension Plan Inv. Admin. Guide, *A Guide to Stable Value Funds for Pension Plan Sponsors and Advisors*, at 6-7 (Mar. 16, 2015), https://bit.ly/2J6gvFh. For readability, all web links in this brief have been shortened using the Bitly URL shortener. Websites were last visited April 9, 2019.

[3] Babbel & Herce, *supra* n.2, at 3.

safe investment vehicle, described as an 'income producing, low risk, liquid' investment"—to participants. *Ellis v. Fidelity Mgmt. Tr. Co.*, 883 F.3d 1, 3 (1st Cir. 2018).[4] Traditionally, this role has been filled by money market funds that invest in high-grade, short-term debt. But increasingly, sponsors and fiduciaries are using stable value products to give participants an additional or replacement "safe" option for principal preservation.

According to one recent study, 83% of participant-directed individual account plans offered a stable value fund as an investment option, making stable value funds by far "the most prevalent capital preservation option" in such plans. But these funds do not appeal only to sponsors, advisors, and experts; they are also enormously popular with plan participants. As of year-end 2016, plan participants had invested $821 *billion* in stable value funds. Stable value assets comprise 13.5% of total assets in the top 200 private plans and 19% of total assets in the top 200 public plans, an amount roughly on par with the assets devoted to target date funds.[5] Over the past decade, moreover, stable value funds have outperformed both money market and

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[4] Safe-harbor protection under ERISA § 404(c), 29 U.S.C. § 1104(c), is contingent on a plan's offering participants at least three investment alternatives that, among other things, are (1) diversified, (2) have materially different risk and return characteristics, and (3) enable a participant to achieve a portfolio with appropriate risk and return characteristics. 29 C.F.R. § 2550.404c-1(b)(3)(i)(B). In effect, this means that plans will offer a safe option as part of their set menu.

[5] A. Luna et al., T. Rowe Price, *Stable Value: An Increasingly Attractive Principal Preservation Alternative*, at 3 (June 2017), https://trowe.com/2u5CA20.

short-term bond funds (measured over 1-, 3-, 5-, and 10-year periods). If an investor put a dollar into a hypothetical stable value fund in 1988, by 2015 it would be worth more than twice as much in nominal terms as a dollar invested in a traditional money market fund.[6] Stable value products have proved especially valuable for investors as a safe haven during and after the 2008 financial crisis (when they provided consistent, positive returns during a period of market turmoil[7]) and for participants nearing retirement age (who must balance a sensitivity to market volatility against a need to keep up with inflation[8]).

To be sure, not every investor will or should choose to put their money into stable value products. Past returns are no guarantee of future performance, so there is no certainty that stable value funds will outperform money market funds in the future or match or beat inflation. Stable value funds also carry risks and costs that traditional money market funds do not. *Amici*'s members understand that fiduciaries are not expected to offer a particular fund or type of product but rather a suitable mix

[6] Mitchell, *supra* n.2, at 3.

[7] C. Marcks & J. Kalamarides, Prudential, *Assessing Stable Value After 2008: Performing As Designed*, at 2 (Apr. 2013), https://bit.ly/2JwhDm1.

[8] T. Grant, *'Stable value funds' deliver on promise for baby boomers*, Pittsburgh Post-Gazette (Jan. 20, 2015), https://bit.ly/2KXxmvK. Of course, stable value funds can play an important role in any worker's portfolio. *See* K. Bartell, Employee Benefit Adviser, *Three unique stable value fund benefits that help millennials* (Feb. 7, 2018), https://bit.ly/2MZ3JuC.

of investments and related services so that participants can construct a portfolio that matches their own goals and risk tolerances.

Nevertheless, participant demand, academic research, and sponsors' and fiduciaries' own expertise suggest that stable value funds can be an important part of a successful investment lineup for a participant-directed individual account. As a recent study put it, under reasonable assumptions, stable value funds can be a "major component of an optimal portfolio, to the exclusion of money market funds and intermediate-term bonds."[9]

II. Litigation Over Stable Value Funds Has Harmed Plan Participants

Unfortunately, though perhaps unsurprisingly, the growth and solid performance of stable value funds during and after the 2008 financial crisis has coincided with a surge of lawyer-driven lawsuits challenging virtually every aspect of the product. Surveys have shown that many plan sponsors are "as concerned about litigation" as they are about "failing to meet their participants' retirement goals."[10] *Amici*'s members know all too well the costs and burdens such litigation can bring.

[9] Babbel & Herce, *supra* n.2, at 36.

[10] R. Steyer, Pensions & Investments, *Litigation heavy on minds of defined contribution execs* (Mar. 23, 2015), https://bit.ly/2u3wPBZ.

Concern over the prospect of litigation is particularly acute because, in the stable value fund context as in other areas, ERISA defendants often face "diametrically opposed" theories of liability. *Evans v. Akers*, 534 F.3d 65, 68 (1st Cir. 2008). In past years, plaintiffs have sued sponsors, fiduciaries, and providers for:

- offering a money market (or money-market-like) fund instead of a stable value fund;[11]
- offering a fixed annuity instead of a stable value fund;[12]
- offering both a stable value fund *and* a money market fund;[13]
- offering a stable value fund that was supposedly managed *too much* like a money market fund;[14]
- offering a stable value fund that was supposedly *too risky*;[15]
- offering a stable value fund that was supposedly *not risky enough*;[16] and
- offering a stable value fund that was supposedly too expensive relative to its performance.[17]

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[11] *E.g.*, *Schultz v. Edward D. Jones & Co., L.P.*, 2018 WL 1508906, at *2 (E.D. Mo. Mar. 27, 2018); *Pledger v. Reliance Tr. Co.*, 240 F. Supp. 3d 1314, 1333 (N.D. Ga. 2017); *Wilman v. Am. Century Servs., LLC*, 237 F. Supp. 3d 902, 915 (W.D. Mo. 2017); *Bell v. Pension Comm. of ATH Holding Co., LLC*, 2017 WL 1091248, at *5 (S.D. Ind. Mar. 23, 2017); *Ortiz v. American Airlines, Inc.*, 2016 WL 8678361, at *11 (N.D. Tex. Nov. 18, 2016); *White v. Chevron Corp.*, 2016 WL 4502808, at *8 (N.D. Cal. Aug. 29, 2016).

[12] *Henderson v. Emory Univ.*, 252 F. Supp. 3d 1344, 1352 (N.D. Ga. 2017).

[13] *Barrett v. Pioneer Natural Resources USA, Inc.* No. 1:17-cv-01579 (D. Colo.).

[14] *Barchock v. CVS Health Corp.*, 886 F.3d 43, 49 (1st Cir. 2018).

[15] *In re JPMorgan Stable Value Fund ERISA Litig.*, No. 1:12-cv-02548 (S.D.N.Y.).

[16] *Ellis*, 883 F.3d at 4; *Abbott*, 725 F.3d at 814 (alleging that the stable value fund "was *so* low-risk that its growth was insufficient for a retirement asset").

[17] *Austin v. Union Bond & Tr. Co.*, 2014 WL 7359058, at *14 (D. Or. Dec. 23, 2014).

This case is one more facet of this litigation explosion. And, as the recently dismissed *Teets* lawsuit demonstrates, it is hardly the only one of its kind in the pipeline.

The onslaught of litigation against stable value products has real—and substantial—costs. As courts have recognized, the prospect of discovery in ERISA actions is "ominous," entailing "probing and costly inquiries" and the need to retain expensive fiduciary and financial experts. *PBGC ex rel. St. Vincent Catholic Med. Ctrs. Ret. Plan v. Morgan Stanley Inv. Mgmt. Inc.*, 712 F.3d 705, 719 (2d Cir. 2013). Facing the possibility that "a plaintiff with a largely groundless claim" will nonetheless "us[e] discovery to impose asymmetric costs on defendants in order to force a settlement advantageous to the plaintiff" (*id.*), some defendants have chosen to settle these lawsuits, but others have chosen to litigate. In either case, defendants expend massive amounts of time and resources to defend themselves against meritless charges.

This state of affairs may be good for lawyers, but it is bad for plans, providers, and, ultimately, participants and beneficiaries. The direct costs of litigation over stable value funds fall on sponsors, fiduciaries, and providers, who (as the present case illustrates) must pay for legal services, indemnification, and insurance, and endure the burdens of litigation. For the twenty percent of plan sponsors that are

small or mid-sized entities—a number that has already decreased in recent years[18]—there is a risk that the need to defend meritless lawsuits may inflate costs and discourage sponsors from offering, or continuing to offer, employer-sponsored retirement plans under ERISA. That is squarely at odds with Congress's goal in enacting ERISA: "to create a system that is not so complex that administrative costs, or litigation expenses, unduly discourage employers from offering ERISA plans in the first place." *Conkright v. Frommert*, 559 U.S. 506, 517 (2010) (alterations omitted). Providers like Principal, who incur significant costs in offering stable value products and who must guarantee (or procure insurance to guarantee) a full return of principal and earnings on demand regardless of market conditions, must likewise bear the costs of litigation.

In the end, however, it is plan participants who suffer from these lawsuits—whether because sponsors have less money to devote to key aspects of employee-benefit programs, such as retirement matching contributions or lower healthcare premiums; or because stable value or other products that participants want become more

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[18] Deloitte Development LLC, *Defined Contribution Benchmarking Survey*, at 6 (2017), http://bit.ly/2BW7z6d (reporting that more than one-third of plan sponsors surveyed in 2013 and 2014 employed 500 or fewer employees, while just one-fifth employed the same number of employees in 2017).

expensive, less liquid, or cease to be offered altogether. For participants, this litigation tax ultimately means reduced choice, lower returns, and smaller account balances in retirement.

III. Sponsors, Fiduciaries, And The Marketplace Provide Important Checks On Fund Providers

It would be one thing if the costs borne by sponsors and providers, and ultimately by plan participants, were necessary to ensure that stable value offerings were priced appropriately. But that is not the case. There is no reason to believe that providers in the competitive market for stable value funds are overcharging plans or plan participants, and thus no reason to believe that subjecting providers like Principal to litigation over routine decisions about crediting rates will benefit participants in the long run.

Drawn by the strong demand for stable value products from participants, dozens of banks and insurance companies have created stable value offerings. There are now some "forty-three firms" that offer stable value funds in the market. *Barchock*, 886 F.3d at 52 n.9. These offerings have a wide range of features. Some are based on more aggressive underlying asset allocations; others are more conservative, allocating a higher proportion to cash or cash-like assets. *Id*. at 53. Some products are structured as individually managed accounts, others as pooled funds; still others use

insurance company general accounts.[19] Firms compete on these and many other dimensions, such as administrative costs, management skill, diversification, reputation, and historical performance, for plan customers. In all of these dimensions, providers of stable value funds are subject to "basic and obvious market incentives" that constrain their ability to charge more for their products than the market will bear. *Ellis*, 883 F.3d at 9.

These incentives pertain to the fund's crediting rate as well.[20] The crediting rate is a function of many variables, including administrative costs, the performance of the assets backing the fund, and the manager's views about future interest rates or other market risks. Principal's crediting rate in particular is a function not only of a particular Guaranteed Interest Rate but also many prior Guaranteed Interest Rates averaged to produce a Composite Crediting Rate. *See* App. 111-14. A fund that consistently lowballs its crediting rate relative to the risk, expenses, and returns of the underlying assets will, over time, underperform its benchmark and lose market share as plans switch to more competitive options. A fund that offers too generous a crediting rate will face difficulty maintaining capital reserves and satisfying expected redemptions. Sponsors and fiduciaries deciding whether to select a given stable

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[19] Stable Value Inv. Ass'n, *Stable Value Market Segments*, https://bit.ly/2MWwrw8.

[20] The crediting rate is akin to the rate on a certificate of deposit; it essentially represents the interest a stable value fund is guaranteed to pay for a given period. Of course, unlike most certificates of deposit, an investor in a stable value fund can withdraw their investment without penalty during the period.

value fund as part of a menu of investment options necessarily take a hard look at all aspects of the fund, including its crediting rate, when deciding whether to include the offering in their participant-directed plans.

All else equal, products that periodically adjust crediting rates are able to offer higher rates than those that fix rates for the duration of the contract. Adjustable credit rates not only allow a fund to lower rates when market conditions warrant; they also allow a fund to raise rates if the return on the underlying assets exceeds expectations. Requiring providers to set "predetermined" interest rates at the outset of the contract—as Plaintiff suggests ERISA requires (Pl. Br. 19)—would force providers to make a single prediction about how interest rates, administrative costs, and many other factors will evolve years in the future. *Cf. Assocs. In Adolescent Psychiatry, S.C. v. Home Life Ins. Co*, 941 F.2d 561, 565 (7th Cir. 1991) (noting that "[f]ixed annuities carry relatively low (implicit) rates of return" because issuers must "mak[e] conservative assumptions about the return to investment"). Given these uncertainties, forcing providers to decide what crediting rate to offer *ex ante* will mean lower guaranteed rates, harming participants.[21]

[21] A pre-set crediting rate is particularly ill-suited for "guaranteed" stable value products, like Principal's, that are not backed by particular securities but instead by the insurer's entire general account. *See supra* pp. 5-6 Because there are no specific bonds or other assets backing a guaranteed product, providers cannot simply set the crediting rate to reflect the performance of a portfolio minus expenses.

Regardless of whether a fund offers an adjustable rate, however, a stable value fund that consistently misprices its crediting rate must answer to plan sponsors and named fiduciaries, who have a legal obligation to monitor a plan's investment offerings on an ongoing basis. As the First Circuit has stated, this oversight provides an important backstop to ensure that no product can offer a crediting rate that is out of step with the market. *Ellis*, 883 F.3d at 9 ("If Fidelity publishes a benchmark that implies no greater safety but lower returns than those implied by the benchmarks published by competing funds, it risks losing out as plan sponsors choose what options to offer plan participants.").

IV. Defendant Is Not An ERISA Fiduciary

ERISA provides that a person or entity "is a fiduciary with respect to a plan to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets." ERISA § 3(21)(A)(i), 29 U.S.C. § 1002(21)(A)(i). Plaintiff argues that Principal is a fiduciary under this provision because Principal supposedly "exercised binding control over the Contract . . . by setting the interest rate" paid to participants who elected to invest in the PFIO and then supposedly "used its control to profit from that asset." Pl. Br. 16. According to Plaintiff, such arrangements—endorsed by countless plan sponsors and fiduciaries and millions of retirement plan participants—present an "unacceptably high risk of

abuse," such that ERISA "bars them under any circumstances." *Id*. Fortunately for plans and participants, Plaintiff is wrong for several reasons.

First, contrary to Plaintiff's contention (at 16), a provider like Principal cannot "us[e] its control" over the crediting rate to ensure a profit from its plan contract. Principal guarantees the crediting rate ahead of time regardless of the performance of its investments or its own costs. Accordingly, Principal faces the very real possibility that it will lose money in any given period. The only compensation that is determined in advance by the decision to set a particular crediting rate is the compensation for *participants*. Any participant who invests or chooses to leave their investment in the PFIO during the 6-month period will earn the announced rate no matter the performance of the broader market (and will retain the option to withdraw the money penalty-free at any time).

The only way Principal could guarantee its profit by adjusting the PFIO's crediting rate is if Principal knew, in advance, what the return on its general account investments and the costs of administering the PFIO would be. But Principal cannot know that—the return on Principal's investments, the product of countless unpredictable transactions and market forces, is not determinable in advance. Indeed, the uncertainty about how Principal's portfolio of bonds and similar investments will perform over a given period is the very risk that participants wish to offload to the stable value fund provider.

Because a stable value fund provider cannot increase its own profits merely by adjusting the crediting rate, courts agree that the provider is not a fiduciary simply because the provider retains the ability to adjust the crediting rate over time. As the Seventh Circuit has stated, when (as here) an insurer or other provider "guarantee[s] the rate of return in advance," the party lacks the kind of "control over the disposition of [p]lan assets" required to "be a fiduciary under ERISA." *Chicago Bd. Options Exch. v. Conn. Gen. Life Ins.*, 713 F.2d 254, 260 (7th Cir. 1983); *see also, e.g.*, *Insinga v. United of Omaha Life Ins. Co.*, 2017 WL 6884626, at *4 (D. Neb. Oct. 26, 2017) ("Because its compensation is largely controlled by the Plan's choices and other factors outside United's control. . . [t]he effect of the Guaranteed Interest Rate on United's compensation does not make it a fiduciary."); *Assocs. in Adolescent Psychiatry, S.C. v. Home Life Ins. Co.*, 729 F. Supp. 1162, 1190 (N.D. Ill. 1989) ("an insurer's declaration of interest in advance, even coupled with the right to adjust the rates during the life of the contract, insulates the insurer from fiduciary status under § 3(21)(A)(i)"), *aff'd*, 941 F.2d 561 (7th Cir. 1991). These decisions compel dismissal of Plaintiff's fiduciary theory.

Plaintiff's efforts (at 21-22) to analogize to case law in which a defendant *did* exercise unfettered discretion over its specific compensation are unavailing. *See, e.g.*, *Pipefitters Local 636 Ins. Fund v. Blue Cross & Blue Shield of Mich.*, 722 F.3d 861, 868 (6th Cir. 2013) (insurer "*unilaterally* determined whether to collect" an

added fee "and determined the rate" of such fee); *United States v. Glick*, 142 F.3d 520, 528 (2d Cir. 1998) (fiduciary "exercised *unhampered* discretion" in setting own commission); *FH Krear & Co. v Nineteen Named Trustees*, 810 F.2d 1250, 1259 (2d Cir. 1987) (discussing case in which insurer was deemed a fiduciary "with respect to its own compensation where its fees were based on a percentage of claims paid, and Blue Cross had *complete* discretion and control over what claims would be paid"); *Glass Dimensions, Inc. ex rel. Glass Dimensions, Inc. Profit Sharing Plan & Tr. v. State St. Bank & Tr. Co.*, 931 F. Supp. 2d 296, 304 (D. Mass. 2013) (bank had contractual right to set lending fees directly) (emphases added throughout). As discussed above, the reasoning behind these cases does not apply to a provider like Principal because Principal has no ability to set its compensation—or even guarantee that it will receive compensation at all.[22]

[22] The *Santomenno* case cited by Plaintiff (at 23) does not address the question presented. *See Santomenno v. Transamerica Life Ins. Co.*, 883 F.3d 833, 840-41 (9th Cir. 2018) (stating that the case's "narrow" holding is limited to the collection of "definitively calculable and nondiscretionary compensation"). Even though the *Santomenno* court allowed that a service provider's collection of funds in other circumstances *might* present a "different case," the conduct the court hypothesized—a provider "withdr[awing] more than it was entitled to," or collecting a fee "based on self-reported hours worked" or that "involved expenses" (*id*. at 841)—is not remotely analogous to Principal's authority to set a crediting rate in conformance with the terms of its contract.

Second, this Court has held that "a service provider's adherence to its agreement with a plan administrator does not implicate any fiduciary duty where the parties negotiated and agreed to the terms of that agreement in an arm's-length bargaining process." *McCaffree Fin. Corp. v. Principal Life Ins. Co.*, 811 F.3d 998, 1003 (8th Cir. 2016); *accord, e.g.*, *Santomenno*, 883 F.3d at 838 ("[a] service provider is plainly not involved in plan management when negotiating its prospective fees or compiling a list of proposed investment options"). In setting a new crediting rate every six months, Principal does no more than adhere to the terms of its arm's-length bargain with the Plan by offering the PFIO on the agreed-upon terms.

Put another way, the fact that Principal periodically sets a new Guaranteed Interest Rate, and thereby affects the crediting rate investors receive according to a pre-set formula, does not transform Principal into an ERISA fiduciary. Principal announces the rates in advance and does not impose fees or barriers for participants who wish to withdraw their money. Participants also are free not to invest in a stable value product during any particular period. The functional effect of this arrangement is to provide participants with a new prospective investment option each time Principal announces a guaranteed rate for a particular 6-month period. It makes no sense to say that Principal *is not* a fiduciary if it sets the crediting rate at the outset of the contract but *is* a fiduciary every time thereafter. *Cf. Schulist v. Blue Cross of Iowa*, 717 F.2d 1127, 1132 (7th Cir. 1983) (insurer could negotiate future compensation

with an ERISA plan without "incur[ring] the obligations of a fiduciary"). The inquiry under ERISA § 3(21)(A)(i) calls for a "functional analysis" (*DiFelice v. U.S. Airways, Inc.*, 497 F.3d 410, 418 (4th Cir. 2007)). As a functional matter, the effect of these various crediting rates on the plan and its participants is exactly the same.

Third, and relatedly, Principal's exercise of its contractual right to set a Guaranteed Interest Rate does not mean that it has the final say over the terms of participants' investments. As the district court in this case correctly reasoned, *participants* "choose whether to invest subject to the terms of the Contract—they could choose not to invest at all or to retain private investment services separate from those offered by the plan sponsor." *Rozo v. Principal Life Ins. Co.*, 344 F. Supp. 3d 1025, 1034 (S.D. Iowa 2018) (emphasis added). The Tenth Circuit agrees. In *Teets v. Great-West Life & Annuity Insurance Co.*, *supra*, the Tenth Circuit held that a stable value fund provider was not an ERISA fiduciary merely because the provider retained the contractual right "to set the Credited Rate" for a particular fund. 2019 WL 1372319, at *10-11. A participant's ability to accept or reject a particular crediting rate precludes the imposition of fiduciary liability on a provider like Principal as a matter of law.[23]

[23] Cases outside the service provider context support this conclusion. In *Cotton v. Massachusetts Mutual Life Insurance Co.*, 402 F.3d 1267 (11th Cir. 2005), for example, the Eleventh Circuit refused to hold that an insurer that allegedly misrepresented features of its life insurance policies was a functional fiduciary, even though the alleged misrepresentations supposedly continued *after* the insurer extended the

In sum, as the Tenth Circuit has concluded, a service provider like Principal can be deemed a fiduciary only where the service provider "(1) did not merely follow a specific contractual term set in an arm's-length negotiation; and (2) took a unilateral action respecting plan management or assets without the plan or its participants having an opportunity to reject its decision." *Id*. at *7. As demonstrated above, Plaintiff has not satisfied either of those prongs here.

Plaintiff's attempts to resist this conclusion are unpersuasive. Plaintiff argues that if a service provider decides to make a "Ponzi scheme" available as "one of ten options to plan participants," the service provider "would swiftly lose if it argued that participants' ability to exit absolved it of fiduciary status." Pl. Br. 28. The analogy is specious. There is no comparison between a stable value fund—which offers guaranteed interest, principal protection, and liquidity to investors on fully disclosed

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policies to the plaintiffs. As the court reasoned, the insurer "has never exercised discretionary authority or control over plan management or the administration of plan assets because the decisions to purchase, amend, and borrow against the policies were made by the plaintiffs themselves." *Id*. at 1279.

Likewise here, Principal did not exercise discretionary control over the administration of plan assets because the decision to invest in the PFIO—both initially and later at a given crediting rate—was made by each participant individually. Of course, unlike *Cotton*, there is no allegation of any misrepresentation here. Investors in the PFIO received exactly the interest rate they were promised (as well as the benefits of guaranteed principal and liquidity).

terms—and a fraudulent scheme in which outlandish returns are fueled by money raised from unwitting investors.

A participant who invests in a Ponzi scheme has no meaningful chance to decide whether the investment is a wise one (and the answer to that question invariably is that it is not). By contrast, there are myriad reasons why a retirement investor might choose to invest in a stable value fund at an announced rate. A participant who decides to invest in a stable value fund knows that they will receive the crediting rate and liquidity guarantee, and it is up to the *participant* to decide whether those features make the investment worthwhile.

Plaintiff's suggestion (at 30-32) that the "equity wash" provision and other supposed barriers preclude participants from withdrawing their investment is equally unpersuasive. The "equity wash" is a standard provision that protects the fund and its investors from arbitrageurs who may look to trade into and out of the fund based on changing interest rates.[24] Far from hindering participants, it is an important provision to ensure that stable value products can be offered on the most desirable terms. Other "impediments" Plaintiff identifies are not features of the PFIO but features of all 401(k) plans. *See* Pl. Br. 31-32 (noting that some participants do not actively

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[24] *See* Babbel & Herce, *supra* n.2, at 3-4 (noting that "many plans restrict participants from the direct transfer to a competing short-duration bond or money market fund . . . to eliminate arbitrage trading" and "allow the investment contract protections to be purchased for a fraction of what it would cost" otherwise).

manage their retirement portfolios and that withdrawal of funds from a 401(k) plan may be subject to taxes and penalties).[25]

Plaintiff also ignores the role of the plan sponsors and fiduciaries who are responsible for selecting and monitoring Principal, and who undoubtedly pay close attention to crediting rates and the PFIO's performance. Sponsors and fiduciaries have the power to renegotiate terms or even to terminate service providers entirely. Plaintiff argues that because Principal's contracts purport to limit a plan's access to funds for up to a year, the plan fiduciaries do not have sufficient control over the crediting rate to make Principal a non-fiduciary. But Plaintiff has adduced no evidence that the exercise of these contractual rights—which were negotiated at arm's length, fully disclosed, and help support the liquidity guarantees and higher rates of return that make stable value products so attractive to plan participants—has dissuaded any plan from terminating Principal based on supposedly unreasonable crediting rates.

In short, Plaintiff has not shown that Principal is a fiduciary under ERISA. That is consistent with common sense. Sponsors and fiduciaries provide important

[25] Plaintiff additionally points to no evidence that any participant was ever forced to remain invested in the PFIO based on these purported obstacles. *Cf. Teets*, 2019 WL 1372319, at *13-14 (awarding summary judgment where plaintiff "adduced no evidence" that a contractual restriction on offering comparable investment options in a plan "forced participants to accept a Credited Rate or that they felt effectively locked in" to the stable value fund).

and independent safeguards, and designating providers as fiduciaries would make it more difficult for plans to offer participants stable value funds on attractive terms.

CONCLUSION

Participant-directed individual account plans are "designed to offer participants meaningful choices" about how to invest for retirement within the parameters of the plan. *Renfro v. Unisys Corp.*, 671 F.3d 314, 327 (3d Cir. 2011). Plaintiff's wooden, inflexible fiduciary test would limit the choices available to participants, and would increase costs, reduce returns, and jeopardize a product that has given millions of participants and retirees safe, steady retirement income. As the Tenth Circuit's decision in *Teets* confirms, ERISA does not require such a result. The district court's judgment should be affirmed.

Dated: April 9, 2019

Respectfully submitted,

/s/ Brian D. Netter
Brian D. Netter
MAYER BROWN LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000

Nancy G. Ross
Jed W. Glickstein
MAYER BROWN LLP
71 S. Wacker Drive
Chicago, IL 60606
(312) 782-0600

Counsel for Amici Curiae

Steven P. Lehotsky
Janet Galeria
U.S. CHAMBER LITIGATION CENTER
1616 H Street, NW
Washington, DC 20062
(202) 463-5337

Counsel for Amicus Curiae
Chamber of Commerce of the United States of America

Janet M. Jacobson
AMERICAN BENEFITS COUNCIL
1501 M Street, NW, Suite 600
Washington, DC 20005

Counsel for Amicus Curiae
American Benefits Council

CERTIFICATE OF COMPLIANCE

I, Brian D. Netter, counsel for *amici curiae*, certify that I am a member in good standing of the Bar of this Court.

I further certify, pursuant to Fed. R. App. P. 32(g), that the brief is proportionally spaced, has a typeface of 14 points or more, and contains 6,107 words, exclusive of the exempted portions of the brief, as provided in Fed. R. App. P. 32(f).

The brief has been prepared in proportionally-spaced typeface using Microsoft Word 2007 in 14-point Times New Roman font. As permitted by Fed. R. App. P. 32(g)(1), I have relied upon the word-count feature of this word-processing system in preparing this certificate. The electronic brief has been scanned by Microsoft Windows Defender Antivirus with threat definition version 1.291.1488.0 (updated April 9, 2019), which did not detect a virus.

Dated: April 9, 2019

Respectfully submitted,
/s/ Brian D. Netter
Brian D. Netter
MAYER BROWN LLP
1999 K Street, NW
Washington, DC 20006
Tel: (202) 263-3000
Counsel for Amici Curiae

CERTIFICATE OF SERVICE

I hereby certify that, on this date, I caused the foregoing to be electronically filed with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit using the CM/ECF system. I certify that service will be accomplished by the CM/ECF system, which will send notice to all users registered with CM/ECF.

Dated: April 9, 2019

Respectfully submitted,

/s/ Brian D. Netter

Brian D. Netter
MAYER BROWN LLP
1999 K Street, NW
Washington, DC 20006
Tel: (202) 263-3000
Counsel for Amici Curiae