Case No. 14-10553

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

WILLIAM LEE, Individually, and as Representatives of plan participants and plan beneficiaries of the Verizon Management Pension Plan; JOANNE MCPARTLIN, Individually, and as Representatives of plan participants and plan beneficiaries of the Verizon Management Pension Plan; EDWARD PUNDT,

Plaintiffs-Appellants,

v.

VERIZON COMMUNICATIONS, INCORPORATED; VERIZON CORPORATE SERVICES GROUP, INCORPORATED; VERIZON EMPLOYEE BENEFITS COMMITTEE; VERIZON INVESTMENT MANAGEMENT CORPORATION; VERIZON MANAGEMENT PENSION PLAN,

Defendants-Appellees.

Appeal from the United States District Court
For the Northern District of Texas, Dallas Division
USDC No. 3:12-CV-4834

SUPPLEMENTAL BRIEF OF DEFENDANTS-APPELLEES

Jeffrey G. Huvelle
Christian J. Pistilli
David M. Zionts
COVINGTON & BURLING LLP
One CityCenter
850 Tenth Street, NW
Washington, DC 20001
(202) 662-6000

Counsel for Defendants-Appellees

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

OTHER AUTHORITIES

INTRODUCTION

In *Lee v. Verizon Communications, Inc.*, 623 F. App'x 132 (5th Cir. 2015), this Court affirmed the district court's dismissal of Plaintiff Edward Pundt's breach of fiduciary duty claim under the Employee Retirement Income Security Act of 1974 ("ERISA"). The Court held that Plaintiff lacked constitutional standing because he failed to allege any personal harm – or even a non-speculative risk of harm – from the alleged fiduciary breach. *Lee*, 623 F. App'x at 149. The Court further rejected Plaintiff's theory that he "suffered constitutionally cognizable injury through invasion of his statutorily created right . . . to proper Plan management." *Id.* An alleged "breach of fiduciary duty," this Court held, without any resulting harm, is not a concrete, "*de facto* injury" for a participant in an ERISA defined-benefit plan. *Id.*

The Supreme Court's decision in *Spokeo v. Robins*, 136 S. Ct. 1540 (2016), confirms that this Court was correct. The Supreme Court rejected the view that a "statutory violation," without a "concrete," "*de facto* injury," could support Article III standing. *Spokeo*, 136 S. Ct. at 1549. Nothing in that decision undermines this Court's considered conclusion that Plaintiff alleged only a bare statutory violation – and failed to allege a concrete, *de facto* injury – in this case. The Court should therefore reinstate its prior opinion and affirm the judgment of the district court.

BACKGROUND

This case concerns an annuity transaction in which the Verizon Management Pension Plan ("Plan") "transferred benefit obligations for some Plan beneficiaries to a group insurance annuity." *Lee*, 623 F. App'x at 134. Plaintiffs sued on behalf of two classes, one comprised of the "Transferees" and the other the "Non-Transferees." *Id.* Plaintiff Edward Pundt ("Plaintiff"), representing the Non-Transferee Class, alleged that the Plan fiduciaries violated their obligations under ERISA in connection with the annuity transaction. *Id.* at 146.[1]

The complaint alleges that "immediately after the annuity transaction, the plan was 'left in a far less stable financial condition and underfunded by almost $2 billion or only about 66% actuarially funded.'" *Id.* at 148.[2] Under ERISA, "absent plan termination, the employer must cover any shortfall resulting from plan instability." *Id.* at 149. Plaintiff did "not allege a plan termination, an inability by Verizon [to] address a shortfall in the event of a termination, or a direct effect thereof on participants' benefits." *Id.* To the contrary, Plaintiff in the complaint

[1] This Court's original opinion affirmed the dismissal of the claims of the Transferee Class. Plaintiffs do not dispute that the portion of that opinion disposing of the Transferee Class claims should be reinstated.

[2] This Court in its original opinion treated the underfunding allegation as true, and may continue to do so now. Verizon notes, however, that it made over $2.6 billion in voluntary contributions to the Plan between September and December of 2012, and based in part on these contributions, the Plan's enrolled actuary certified that the Plan's funding ratio – calculated using assumptions permitted for purposes of ERISA's minimum funding rules – was in excess of 100 percent for the 2012 Plan year. ROA.1233-47.

characterized Verizon as a "very wealthy, solid . . . corporation" (ROA.1393), and conceded "that the alleged actuarial underfunding resulted in no direct injury to Pundt." *Lee*, 623 F. App'x at 149.

The district court dismissed the claims of the Non-Transferee Class under Federal Rule of Civil Procedure 12(b)(1), finding that Plaintiff "had failed to allege an injury in fact sufficient to support constitutional standing." *Id.* at 147. On appeal, Plaintiff argued that the alleged underfunding of the Plan caused him "individually cognizable harm." *Id.* He further argued that the "'invasion of his statutory right to proper management of Plan assets' is sufficiently concrete to provide standing." *Id.* (quoting Pls.' Opening Br. 52).

This Court disagreed with Plaintiff and affirmed the district court. The Court first held that any alleged injury to Plaintiff's benefits was "dependent on the realization of several additional risks, which collectively render the injury too speculative to support standing." *Id.* at 149. Although Plaintiff alleged that the Plan was underfunded, that "merely increases the relative likelihood that Verizon will have to cover a shortfall," something Plaintiff failed to allege Verizon would be unable to do. *Id.*

The Court further rejected Plaintiff's argument that he "suffered constitutionally cognizable injury through invasion of his statutorily created right, specifically that the alleged fiduciary breach from the mismanagement of Plan

assets constitutes an invasion of his statutory rights to proper Plan management." *Id.* at 149. It explained that while an "invasion of statutory rights might create standing," there still must be a "*de facto* injury, which is not alleged by a breach of fiduciary duty." *Id.* The Court also rejected Plaintiff's related argument that he could claim standing in a representative capacity based on injuries to the Plan. *Id.* at 149-50.

Plaintiff petitioned the Supreme Court for a writ of certiorari, asking the Court to grant plenary review or, in the alternative, to hold the petition until it resolved *Spokeo*. The Supreme Court did the latter. On May 16, 2016, the Supreme Court decided *Spokeo,* vacating a decision of the Ninth Circuit that had found standing based on alleged violations of the Fair Credit Reporting Act ("FCRA"). 136 S. Ct. at 1545. The Supreme Court held that a mere statutory violation of the FCRA was not enough to confer standing and that the Ninth Circuit had "overlooked" the requirement that the plaintiff suffer a "concrete" injury. *Id.* It concluded that the dissemination of false information (the interest protected by the FCRA) does not automatically establish a concrete injury in fact, and remanded to the Ninth Circuit for further consideration of the specific injuries alleged in the case. *Id.* at 1550 & n.8.

Shortly after the Supreme Court's decision in *Spokeo*, it granted Plaintiff's petition, vacated the judgment of this Court, and remanded for further consideration in light of *Spokeo* (the "GVR" order).

LEGAL STANDARD

"When the Supreme Court utilizes its GVR power, . . . it is not making a decision that has any determinative impact on future lower-court proceedings." *Kenemore v. Roy*, 690 F.3d 639, 641 (5th Cir. 2012). This Court is "free to determine whether its original decision is still correct in light of the changed circumstances or whether a different result is more appropriate." *Id.* at 642.

The scope of review following a GVR order is accordingly "limited to determining whether [this Court's original decision] satisfies the legal analysis required by [the intervening Supreme Court precedent]." *Hughes Aircraft Co. v. United States*, 140 F.3d 1470, 1474 (Fed. Cir. 1998), *overruled on other grounds*. "Because the scope of this remand is limited," Plaintiff may not ask this Court to "revisit" issues in its original decision that are unaffected by *Spokeo*. *Id.* at 1474 n.2; *see also United States v. M.C.C. of Fla., Inc.*, 967 F.2d 1559, 1562 (11th Cir. 1992) ("effect of a vacation such as the one at issue was not to nullify all prior proceedings," but "merely required the court to reconsider its opinion . . . in light of the view of the law set forth in" the intervening Supreme Court precedent).

ARGUMENT

Spokeo neither changed the law in this Circuit nor undermined any aspect of the Court's prior standing analysis in this case. To the contrary, *Spokeo* confirms that Plaintiff suffered no injury in fact and therefore lacks standing. Plaintiff's current arguments for standing have little if anything to do with *Spokeo*, and are in any event meritless. Accordingly, the Court should reinstate its prior opinion in full and again affirm the judgment of the district court.

I. *Spokeo* Does Not Affect This Court's Standing Analysis.

Under *Spokeo*, it is clear that the standing theories advanced by Plaintiff below are entirely without merit.

Prior to the filing of his certiorari petition, Plaintiff offered two basic theories for why he suffered a constitutionally sufficient injury from the fiduciary breach he alleged. *First*, Plaintiff argued that the alleged breach directly harmed plan participants because it left the Plan underfunded. *Second*, Plaintiff claimed that the alleged breach constituted an "invasion of [his] statutorily created right" to "proper Plan management," and that this counted as injury in fact. *Lee*, 623 F. App'x at 149.

This Court correctly rejected both theories. It held that Plaintiff's claim of direct harm was too attenuated and speculative, since no participant could be harmed unless, *inter alia*, Verizon was unable to meet its statutory obligations to

make up any shortfall. *Id.* at 147-49. The Court further held that an alleged breach of fiduciary duty is not – in and of itself – a concrete, *de facto* injury giving rise to standing. *Id.* at 149-50. *Spokeo* confirms that this Court was right on both counts.

A. *Spokeo* Does Not Undermine This Court's Conclusion That Pundt Lacks Standing Because His Benefits Are Not In Jeopardy.

This Court previously held that Plaintiff lacks standing because he did not allege that his monthly benefit payments were jeopardized by Defendants' alleged fiduciary breaches. *Spokeo* makes clear that the Court's decision was correct.

The Court's standing analysis properly focused on the distinct nature of a defined-benefit plan under ERISA. *See Lee*, 623 F. App'x at 147-49. A defined-benefit plan "consists of a general pool of assets rather than individual dedicated accounts." *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 439 (1999). Under a defined-benefit plan, the employer "typically bears the entire investment risk" and therefore "must cover any underfunding as the result of a shortfall that may occur." *Id.* "Given the employer's obligation to make up any shortfall, no plan member has a claim to any particular asset that composes a part of the plan's general asset pool." *Id.* at 440. Instead, participants have a right only to "a certain defined level of benefits" payable upon retirement. *See id.* at 439-40. Because of this unique structure, "fiduciary misconduct in a defined-benefit plan 'will not affect an individual's entitlement to a defined benefit unless it creates or enhances the risk of

default by the entire plan.'" *Lee*, 623 F. App'x at 148 (quoting *LaRue v. DeWolff, Boberg & Assocs., Inc.*, 552 U.S. 248, 255 (2008)).

In light of these features, this Court's "sister circuits have concluded that constitutional standing for defined-benefit plan participants requires imminent risk of default by the plan, such that the participant's benefits are adversely affected; in turn, those courts have held that fiduciary misconduct, standing alone without allegations of impact on individual benefits, is too removed to establish the requisite injury." *Lee*, 623 F. App'x at 148 (citing decisions of the Third, Fourth, and Eighth Circuits). This Court agreed. It found that "the direct injury to a participant's benefits is dependent on the realization of several additional risks, which collectively render the injury too speculative to support standing." *Id.* at 149. In this case, the Court observed, Plaintiff's allegations of underfunding "merely increase[d] the relative likelihood that Verizon will have to cover a shortfall." *Id.* Yet Plaintiff did not allege "an inability by Verizon to address a shortfall in the event of a termination," and indeed "concede[d] on appeal that the actuarial underfunding resulted in no direct injury to Pundt." *Id.* Accordingly, this Court concluded that Plaintiff lacked standing.

Plaintiff does not and could not argue that *Spokeo* undermines this analysis. To the contrary, *Spokeo* reaffirmed that a plaintiff's injury must be "actual or imminent, not conjectural or hypothetical." *Spokeo*, 136 S. Ct. at 1548 (quoting

Lujan v. Defs. of Wildlife, 504 U.S. 555, 560 (1992)). The Supreme Court in *Spokeo* noted that "the risk of real harm" can "satisfy the requirement of concreteness," and remanded for a determination of whether the statutory violations the plaintiff alleged "entail a degree of risk sufficient to meet the concreteness requirement." *Id.* at 1549-50. But that is precisely the inquiry this Court has already undertaken: the Court examined the risk of harm to future benefit payments alleged by Plaintiff and correctly concluded that the risk was too speculative and remote to qualify as a concrete injury.

Rather than make an argument that *Spokeo* changes the analysis, Plaintiff argues that "any reliance on *Hughes* and *LaRue* is misplaced" because neither decision addressed "the issue of injury in fact." Pls.' Supp. Br. 15. But this Court already found reliance on *Hughes* and *LaRue* to be appropriate, *see Lee*, 623 F. App'x at 148, and *Spokeo* (which did not concern ERISA) has nothing to say on the matter. *Spokeo* gives this Court no reason to reconsider its well-founded conclusion, based on the Supreme Court's cases specifically addressing ERISA defined-benefit plans, that "the alleged fiduciary misconduct is . . . too attenuated to suffice as direct injury to Pundt." *Lee*, 623 F. App'x at 149.

B. *Spokeo* Does Not Undermine This Court's Conclusion That A Bare Allegation Of A Fiduciary Breach Is Not Concrete Harm.

This Court previously rejected Plaintiff's claim that he "suffered constitutionally cognizable injury through invasion of his statutorily created right

. . . to proper Plan management" on the ground that it improperly "conflat[ed] the concepts of statutory and constitutional standing." *Id.* at 149. Here too, *Spokeo* confirms that the Court's decision was correct.

This Court's prior decision recognized that, under *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), "the invasion of statutory rights might create standing" – but only when the statutory violation "aris[es] from *de facto* injury." *Lee*, 623 F. App'x at 149. As the Court noted, *Lujan* "clarified that a legislative creation of rights does not eliminate the injury requirement for a party seeking review." *Id.* Accordingly, this Court rejected Plaintiff's assertion that the bare "invasion of his statutorily created right" to "proper Plan management" was itself sufficient to confer constitutional standing. *Id.*

Spokeo confirms that the Court's prior holding was correct. There, the Ninth Circuit held that the plaintiff had standing to sue for an alleged violation of the FCRA, relying on circuit precedent that "the violation of a statutory right is usually a sufficient injury in fact." *Spokeo*, 136 S. Ct. at 1546. But the Supreme Court reversed, reaffirming that "Article III standing requires a concrete injury even in the context of a statutory violation." *Spokeo*, 136 S. Ct. at 1549 (holding that a plaintiff does not "automatically satisf[y] the injury-in-fact requirement whenever a statute grants a person a statutory right and purports to authorize that person to sue to vindicate that right"). While "concrete" injuries need not be "tangible," the

Court reiterated that "[a] 'concrete' injury must be '*de facto*'; that is, it must actually exist." *Id.* at 1548-49; *see also id.* at 1548 ("concrete" means "'real,' and not 'abstract'"). Accordingly, a plaintiff cannot "allege a bare procedural violation, divorced from any concrete harm, and satisfy the injury-in-fact requirement of Article III." *Id.* at 1549.

Unlike the Ninth Circuit's *Spokeo* decision, this Court's decision in *Lee* properly applied the requirement of a "concrete" injury. Indeed, this Court applied precisely the rule that the Supreme Court reaffirmed in *Spokeo*: that the mere "invasion of statutory rights" – in this case an alleged breach of fiduciary duty – does not create a "*de facto* injury." *Lee*, 623 F. App'x at 149. Just as "not all inaccuracies [in credit reporting] cause harm or present any material risk of harm," *Spokeo,* 136 S. Ct. at 1550, not all fiduciary breaches "cause harm or present any material risk of harm" to a plan participant's benefits. This Court has already concluded that there is no such risk of harm here, in light of the unique protections of ERISA ensuring that Plaintiff's benefits will be undisturbed. *See Lee*, 623 F. App'x at 148-49. All Plaintiff can point to as an "injury" is the alleged breach of fiduciary duty – a purported statutory violation that, Plaintiff has conceded, "resulted in no direct injury to [him]." *Lee*, 623 F. App'x at 149. As this Court recognized and *Spokeo* confirms, that is not a concrete injury in fact.

Plaintiff attempts to avoid this conclusion by seizing on *Spokeo*'s recognition of "intangible" injuries, and characterizing a breach of fiduciary duty as such an injury. But a bare fiduciary breach is just a *legal* injury, not a concrete but intangible injury in fact. *See, e.g.*, *Spokeo*, 136 S. Ct. at 1549 (offering free speech and religious exercise violations as cognizable intangible injuries); *Lujan*, 504 U.S. at 562-63 (finding standing based on "purely esthetic" injury); *In re Nickelodeon Consumer Privacy Litig.*, __ F.3d __, No. 15-1441, 2016 WL 3513782, at *7 (3d Cir. June 27, 2016) (treating "unlawful disclosure of legally protected information" as intangible injury). Whatever "intangible" injuries might be considered cognizable, *Spokeo* makes clear that a "bare procedural violation" of a statute that results in "no harm" to the plaintiff – like what Plaintiff alleges here – is not enough. 136 S. Ct. at 1550. Otherwise any plaintiff could artfully transform a bare statutory breach from an injury in law into an "intangible" injury in fact.

Plaintiffs also mistakenly claim that Congress's decision to create a cause of action for fiduciary breaches supports constitutional standing. Pls.' Supp. Br. 16-18. As this Court observed, such an argument "conflat[es] the concepts of statutory and constitutional standing." *Lee*, 623 F. App'x at 149. The Supreme Court did not conflate those concepts itself. Rather, it squarely held that a "concrete injury" is necessary "even in the context of a statutory violation." *Spokeo*, 136 S. Ct. at 1549. What *Spokeo* recognized was that the judgment of

Congress is "instructive" when it identifies "intangible harms" that meet Article III requirements. *Id.* But the intangible harms Congress may recognize must still be real, concrete injuries in fact. *Id.* This Court has already held that the legal injury of a fiduciary breach, without more, is *not* a "concrete," "*de facto* injury." *Lee*, 623 F. App'x at 149. Nothing in *Spokeo* provides any grounds to revisit that conclusion.

Finally, Plaintiff renews the argument that he should have standing to claim "disgorgement." Pls.' Supp. Br. 23. When this case was originally before this Court, Plaintiff unsuccessfully sought to bolster his argument for no-injury standing by "invok[ing] principles of disgorgement." *Lee*, 623 F. App'x at 149. Nothing in *Spokeo* even arguably undermines this Court's rejection of Plaintiff's disgorgement argument. Moreover, the cases Plaintiff cites refute his own argument. As those cases make clear, "an ERISA beneficiary suffers an injury-in-fact sufficient to bring a disgorgement claim when a defendant allegedly breaches its fiduciary duty, profits from the breach, *and the beneficiary, as opposed to the plan, has an individual right to the profit*." *Edmonson v. Lincoln Nat'l Life Ins. Co.*, 725 F.3d 406, 418 (3d Cir. 2013) (emphasis added); *accord Pender v. Bank of Am. Corp.*, 788 F.3d 354, 367 (4th Cir. 2015) (following *Edmonson* and allowing disgorgement claim where individual beneficiaries had right to claim profits). As

this Court correctly recognized, *Lee*, *see* 623 F. App'x at 149, an uninjured plan participant lacks standing to claim "disgorgement" on behalf of the Plan.[3]

II. Plaintiff's Newly-Developed Trust Law Theory Is Meritless.

Unable to show that any aspect of this Court's standing analysis was undermined by *Spokeo*, Plaintiff seeks at this late stage of the litigation to develop a new theory of standing. Plaintiff now seeks to premise standing on trust law, which he claims allows a beneficiary to "sue for fiduciary breach without allegations of additional personal harm." Pls.' Supp. Br. 8-9. This argument is not properly before the Court on a GVR and is without any merit.

As an initial matter, nothing in *Spokeo* provides a basis for Plaintiff's eleventh-hour attempt to inject his new trust law theory into the case. A bare fiduciary breach – with no practical consequences for the plan participant – is not a concrete injury in fact for all of the reasons this Court has already concluded. *See supra* § I.B. That is true whether the legal injury is described simply as an ERISA violation, or with added references to "trust law principles" (Pls.' Supp. Br. 13-14).

Even if Plaintiff's newfound reliance on trust law were an appropriate response to the Supreme Court's GVR, his theory that a breach of fiduciary duty automatically gives rise to standing remains flawed. Plaintiff mistakenly

[3] This Court also rejected Plaintiff's related theory that he could "bring suit on behalf of the plan" in a "quasi-representative capacity." *Lee*, 623 F. App'x at 149-50. Plaintiff correctly makes no claim that *Spokeo* rescues this claim to representational standing.

characterizes the rule on standing to enforce a traditional trust in absolute terms. In support of this view, he relies on the Restatement's general description of the "duty of loyalty," which says nothing about standing but merely provides that a trustee may be guilty of a breach, with "no further inquiry" into whether the trustee made a profit. Pls.' Supp. Br. 8-9 (quoting Restatement (Third) of Trusts § 78 cmt. b); *see also* Mark L. Ascher, et al., *Scott and Ascher on Trusts* § 17.2 (5th ed. 2010) (stating that a trustee "is liable" irrespective of harm caused, without discussing standing to sue).

Plaintiffs ignore the Restatement's much more relevant section on "Standing to Enforce a Trust." Restatement (Third) of Trusts § 94 (2012). There, the Restatement recognizes that "[a] suit to enforce a private trust ordinarily . . . may be maintained by any beneficiary *whose rights are or may be adversely affected by the matter(s) at issue*." *Id.* § 94 cmt. b (emphasis added). In other words, mere status as a trust beneficiary is *not* enough to support standing; the beneficiary must actually suffer injury to his personal interests.

The principal trust-law case on which Plaintiff relies, *Scanlan v. Eisenberg*, 669 F. 3d 838 (7th Cir. 2012), also contradicts his view of no-injury standing. Applying Section 94 of the Restatement, *Scanlan* recognized that standing depends on whether the beneficiary was "adversely affected." *Scanlan*, 669 F.3d at 843. In the case before it, the beneficiary's interests were adversely affected; although

distribution was discretionary, "she [was] currently eligible to receive all of the Trusts' corpus." *Id.* at 846. The Seventh Circuit expressly denied that its "holding will lead to *any* beneficiary having standing whether or not its specific interest is affected." *Id.* at 847.

To be sure, the beneficiaries of a typical common-law trust generally would be "adversely affected" by an injury to the corpus of the trust. For example, where a beneficiary holds a life interest in the income of a trust, the beneficiary undisputedly is entitled to "obtain redress in case of breach." *Blair v. Comm'r of Internal Revenue*, 300 U.S. 5, 13 (1937) (cited at Pls.' Supp. Br. 11-12). But that is because the beneficiary has a concrete interest in the trust corpus. ERISA defined-benefit plans are different in precisely this respect. As the Supreme Court has recognized, participants in such plans have "no interest" – equitable or otherwise – in the corpus of the trust. *Hughes*, 525 U.S. at 439. Nor is there any analogue in the common law of trusts to ERISA's minimum funding requirements, which are designed to ensure that impairments to trust assets are replenished by the employer, thereby preventing risk to the plan and harm to plan participants. *See, e.g.*, 29 U.S.C. § 1083(a)(1); *see also LaRue*, 552 U.S. at 255 (employers must satisfy "complex minimum funding requirements").

Under these circumstances, alleged misconduct by a plan fiduciary "*will not affect* an individual's entitlement to a defined benefit unless it creates or enhances

the risk of default by the entire plan." *LaRue*, 552 U.S. at 255 (emphasis added). In other words, a defined-benefit plan participant cannot be harmed by an alleged fiduciary breach unless the breach jeopardizes the participant's benefits, which this Court has already held is not the case here. *See supra* § I.A. There is no traditional rule of trust law that a beneficiary in Plaintiff's position, who was *not* "adversely affected" by the alleged breach, has standing to sue. *See* Restatement § 94 cmt. b.

Unsurprisingly, none of this Court's sister circuits has subscribed to Plaintiff's trust law theory of standing. *See David v. Alphin*, 704 F.3d 327, 336 (4th Cir. 2013) (rejecting claim "that trust law principles extend to the ERISA context to confer Article III standing" on otherwise uninjured plan participants). Although Plaintiff claims that the Fourth Circuit has been inconsistent on this question, he relies on a decision concerning a defined *contribution* plan, which held that participants had standing based on their *individual* claim to profits on investments made with their own contributions. *Pender v. Bank of Am. Corp.*, 788 F.3d 354 (4th Cir. 2015). The Fourth Circuit looked to trust law to confirm that the "plan beneficiaries ha[d] an equitable interest in profits arrived at by way of a decrease in *their* benefits." *Id.* at 367 (emphasis added); *see also Lee*, 623 F. App'x at 148 ("A defined-contribution plan presents a starkly different circumstance than a defined-benefit plan."). *Pender* did not suggest that it was

overruling *David* and holding that trust law allows *any* participant to sue for *any* fiduciary breach. Instead, *Pender* merely stands for the uncontroverted principle that ERISA plan participants have standing to sue where they allegedly suffered "an individual loss" as a result of a claimed fiduciary breach. *See* 788 F.3d at 367.

Plaintiff also attempts to bolster his trust law theory by relying on decisions of the Second Circuit that have nothing to do with trust law. According to Plaintiff, the Second Circuit in 1992 found Article III standing based solely on a violation of ERISA. Pls.' Supp. Br. 9 (citing *Fin. Insts. Ret. Fund v. Office of Thrift Supervision*, 964 F.2d 142 (2d Cir. 1992) ("*FIRF*")). The Second Circuit, however, has narrowed *FIRF*, noting that the plaintiffs in that case "could point to an identifiable and quantifiable pool of assets to which they had colorable claims." *Kendall v. Emps. Ret. Plan of Avon Prods.*, 561 F.3d 112, 121 (2d Cir. 2009). In any event, Plaintiff's broad reading of *FIRF* – as "holding that a violation of ERISA § 404 satisfies the Article III injury requirement" (Pls.' Supp. Br. 9) – would be flatly inconsistent with both this Court's original decision *and* with *Spokeo*.

Plaintiff fares no better in his reliance on *Long Island Head Start Child Development Services, Inc. v. Economic Opportunity Commission of Nassau County*, 710 F.3d 57 (2d Cir. 2013) ("*LIHS*"), which he misleadingly describes as recognizing a right to sue based on ERISA plan participants' "interest in plan

assets." Pls.' Supp. Br. 13-14. Plaintiff relies on a cursory footnote in *LIHS*, which found that a non-profit company belonging to a multi-employer ERISA plan had standing to sue fiduciaries "in a derivative capacity, to recover for injuries to the Plan." *LIHS*, 710 F.3d at 67 n.5. The apparent basis for this decision was that the "representative" plaintiffs, who were separately owed a judgment by the Plan, had strong individual stakes in the recovery. *See id.* at 65; *see also Glanton ex rel. ALCOA Prescription Drug Plan v. AdvancePCS Inc.*, 465 F.3d 1123, 1127 (9th Cir. 2006) (noting "no quarrel with the proposition" that "plan beneficiaries may bring suits on behalf of the plan in a representative capacity" – "so long as plaintiffs otherwise meet the requirements for Article III standing" by having a personal "stake"). But the more fundamental point – again – is that this Court has already rejected Plaintiff's theory of representational standing, and nothing in *Spokeo* could conceivably rescue it. *See Lee*, 623 F. App'x at 149-50.

In short, Plaintiff's heavy reliance on decisions having nothing to do with trust law or "intangible injury" is a telling indication that *Spokeo* changes nothing about this appeal. Plaintiff simply ask this Court to overrule the well-founded conclusions it has already reached. There is no reason for this Court to do so.[4]

[4] For the reasons explained in Part III, *infra*, this Court could also hold that Plaintiff's newly developed trust law theory has been waived. Although Plaintiff points to two passing references to trust law in his opening brief (*see* Pls.' Supp. Br. 24), neither of those two sentences comes close to advancing the argument he is making now: that "a trust beneficiary has standing to sue for a breach of fiduciary duty without an allegation of personal monetary or other additional

III. Plaintiff Has Waived Any Claim To Injunctive Relief.

Without any pretense to a connection with *Spokeo*, Plaintiff argues that he has "standing to pursue injunctive relief without alleging more than the fiduciary breach itself." Pls.' Supp. Br. 21-22. But "an argument not raised at the district court or in the appellant's opening brief is waived." *United States v. McRae*, 795 F.3d 471, 479 (5th Cir. 2015). This argument has clearly been waived.

Although Plaintiff made a generic request for injunctive relief in his complaint, he did not oppose Defendants' motion to dismiss on the ground that he was advancing a distinct injunctive relief claim that relaxed the requirements for standing. In his original brief on this appeal, Plaintiff compounded this waiver by failing to argue that the district court wrongly denied a request for an injunction. Instead, Plaintiff's sole focus in both the district court and on appeal was his request for the payment of money to the Plan. Accordingly, he has waived any claim to non-monetary, injunctive relief.[5]

---

harm." Pls.' Supp. Br. 8. The best indication that Plaintiff put no one "on notice that [he] was relying on trust law to show he suffered injury in fact," Pls.' Supp. Br. 24, is that this Court, in comprehensively addressing and rejecting Plaintiff's arguments, saw no need to mention trust law.

[5] To be sure, Plaintiff sought an order compelling Verizon to pay money to the Plan. That, however, is a claim for compensatory damages, not injunctive relief. *See, e.g.*, *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 255 (1993) ("Although they often dance around the word, what petitioners in fact seek is nothing other than compensatory *damages* – monetary relief for all losses their plan sustained as a result of the alleged breach of fiduciary duties. Money damages are, of course, the classic form of *legal* relief."); *Perelman v. Perelman*, 793 F.3d 368, 373 (3d Cir. 2015) (distinguishing between "claims for injunctive relief" and claims "demanding a monetary . . . remedy").

Plaintiff asks to be excused from his waiver because some courts have allowed "appellants [to] make new arguments in support of claims that were properly raised in district court." Pls.' Supp. Br. 24. This Court, however, holds that such arguments are waived. *McRae*, 795 F.3d at 479. Even if it did not, Plaintiff's proposed rule would be inapposite here because he (1) failed properly to raise his claim for injunctive relief in the district court, and (2) failed to raise this argument in his opening appellate brief. Accordingly, Plaintiff's argument for no-injury standing to bring claims for injunctive relief has been waived.[6]

[6] Although there is no need to reach the issue in light of Plaintiff's clear waiver, the decisions cited by Plaintiff allowing no-injury claims for purely injunctive relief may no longer be good law, given *Spokeo*'s rejection of Article III standing based solely on a statutory violation. *Spokeo*, 136 S. Ct. at 1549. Ordinarily, this Court applies the traditional requirement of injury in fact in all cases, even when the requested relief is an injunction. *See, e.g., Texas v. United States*, 809 F.3d 134 (5th Cir. 2015).

CONCLUSION

For the foregoing reasons, the Court should reinstate its opinion in *Lee v. Verizon Communications, Inc.*, 623 F. App'x 132 (5th Cir. 2015), and affirm the judgment of the district court.

Respectfully submitted,

s/ Christian J. Pistilli
Jeffrey G. Huvelle
Christian J. Pistilli
David M. Zionts
COVINGTON & BURLING LLP
One CityCenter
850 Tenth Street, NW
Washington, DC 20001
(202) 662-6000

August 2, 2016

CERTIFICATE OF SERVICE

It is hereby certified that on August 2, 2016, the foregoing brief was electronically filed with the Clerk of the Court by using the Court's ECF system. The electronic case filing system sent a "Notice of Electronic Filing" to the attorneys of record who have consented in writing to accept this Notice as service of this document by electronic means.

s/ Christian J. Pistilli
CHRISTIAN J. PISTILLI

Counsel for Defendants-Appellees

CERTIFICATE OF COMPLIANCE

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and 5th Cir. R. 32.1 and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Professional Plus 2010 in fourteen-point Times New Roman font with fourteen-point Times New Roman font footnotes. This supplemental brief further complies with the limit of 25 pages, as directed in the Clerk's letter of June 28, 2016.

s/ Christian J. Pistilli
CHRISTIAN J. PISTILLI

Counsel for Defendants-Appellees

ECF CERTIFICATION

It is hereby certified that (i) the required privacy redactions have been made pursuant to 5th Cir. R. 25.2.13; (ii) the electronic submission is an exact copy of the paper document pursuant to 5th Cir. R. 25.2.1; (iii) the document has been scanned for viruses using Symantec End Point Protection, Version 12.1.6, and is free of viruses; and (iv) the paper document will be maintained for three years after the mandate or order closing the case issues, pursuant to 5th Cir. R. 25.2.9.

s/ Christian J. Pistilli
CHRISTIAN J. PISTILLI

Counsel for Defendants-Appellees

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

LYLE W. CAYCE
CLERK

TEL. 504-310-7700
600 S. MAESTRI PLACE
NEW ORLEANS, LA 70130

August 03, 2016

Mr. Christian James Pistilli
Covington & Burling, L.L.P.
850 10th Street, N.W.
1 City Center
Washington, DC 20001-4956

No. 14-10553 William Lee, et al v. Verizon Communications, Inc., et al
USDC No. 3:12-CV-4834

Dear Mr. Pistilli,

The following pertains to your Supplemental brief electronically filed on **August 2, 2016.**

You must submit the 7 paper copies of your brief required by 5TH CIR. R. 31.1 within 5 days of the date of this notice pursuant to 5th Cir. ECF Filing Standard E.1.

Sincerely,

LYLE W. CAYCE, Clerk

By: _____
Nancy F. Dolly, Deputy Clerk
504-310-7683

cc:
Mr. Thomas Leon Cubbage III
Mr. Robert E. Goodman Jr.
Ms. Karen L. Handorf
Mr. Jeffrey George Huvelle
Mr. Curtis L. Kennedy
Ms. Michelle C. Yau