United States Court of Appeals

for the

Fifth Circuit

Case No. 14-10553

WILLIAM LEE, JOANNE MCPARTLIN, and EDWARD PUNDT, Individually, and as Representatives of Plan Participants and Plan Beneficiaries of the VERIZON MANAGEMENT PENSION PLAN,

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.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS, NO. 3:12-CV-4834

SUPPLEMENTAL BRIEF FOR PLAINTIFFS-APPELLANTS FOLLOWING REMAND FROM THE SUPREME COURT

KAREN HANDORF
MICHELLE YAU (ADMISSION PENDING)
COHEN MILSTEIN SELLERS & TOLL PLLC
1100 New York Avenue N.W.
East Tower, Suite 500
Washington, DC 20005
Tel.: (202) 408-4600
Fax: (202) 408-4699

CURTIS L. KENNEDY
8405 E. Princeton Avenue
Denver, Colorado 80237-1741
Tel.: (303) 770-0440
CurtisLKennedy@aol.com

ROBERT E. GOODMAN, JR.
KILGORE & KILGORE LAWYERS
3109 Carlisle Street
Dallas, Texas 75204
Tel.: (214) 969-9099
Fax: (214) 953-0133

Attorneys for Plaintiffs-Appellants

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FACTUAL BACKGROUND AND PRIOR PROCEEDINGS

In 2012 Verizon purchased a single group annuity to cover the retirement benefits of approximately 41,000 retirees (the "Transferee Class") of the Verizon Management Pension Plan ("Plan"). RE 44-45 (Second Am. Compl. at ¶¶1, 4). The approximately 50,000 participants and beneficiaries not transferred remain part of the ongoing Plan (the "Non-Transferee Class"). *Id.* at 86 (¶¶137, 139). The Non-Transferee Class, represented by Plaintiff-Appellant Pundt brought claims under the Employee Retirement Income Security Act ("ERISA"), alleging that Defendants breached their duties of diversification, prudence, loyalty, and compliance with the Plan documents, including the Plan's investments guidelines and asset allocation policies. *Id.* at 83-85 (¶¶130-36).

Specifically, the Non-Transferee Class alleged: (1) that Defendants violated their ongoing duties of loyalty, prudence, and complying with the terms of the Plan by paying corporate-sponsor and unreasonable expenses in connection with the annuity transaction when such expenses left the Plan severely underfunded after the transaction was completed, *id.* at 84, 85 (¶¶132, 134),[1] and (2) that Defendants

[1] It is worth noting that Pundt's claims related to the payment of corporate-sponsor and unreasonable expenses in connection with the annuity transaction were never addressed on the merits because both this Court and the district court found that Pundt lacked constitutional standing to assert any claims. Pundt's claims differ from the Transferee Class's claims in that he brings his claims under ***both*** ERISA § 502(a)(2) and § 502(a)(3), 29 U.S.C. §§ 1132(a)(2) and

breached their duties of loyalty, prudence, diversification, and to comply with the Plan's investment guidelines, when they depleted the Plan's portfolio of fixed income securities and private equity investments in connection with the annuity transaction.[2] *Id.* at 85 (¶135). As a consequence of these many breaches of fiduciary duty, the Plan paid corporate expenses and was left in an unstable financial condition and underfunded by almost $2 billion, or only about 66% funded. *Id.* at 57, 85 (¶¶45, 134). Defendants moved to dismiss all Pundt's claims under 12(b)(1) for lack of standing and challenged the claims related to the improper expenses under 12(b)(6) for failure state a claim.

The Non-Transferee Class asserts claims for all appropriate equitable relief under ERISA § 502(a)(2) and § 502(a)(3), 29 U.S.C. §§ 1132(a)(2) and (a)(3), including the restoration of all losses to the Plan caused by Defendants' many breaches of fiduciary duty, the disgorgement of any ill-gotten profits Defendants obtained through the improper use of the Plan's assets, and injunctive relief. *Id.* at 88-91 (Prayer for Relief).

The district court granted Defendants' Rule 12(b)(1) motion to dismiss the Non-Transferee Class's claims for lack of standing, without prejudice and without

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(a)(3) premised in part on the fact that the allegedly improper expenses left the Plan severely underfunded.

[2] Pundt's fiduciary breach claim based on the depletion of fixed income securities and private equity investments from the Plan's portfolio was never challenged on pleading grounds.

addressing the merits of the Non-Transferee Class's claims. *Id.* at 210. (*Lee v. Verizon Communications Inc.,* No. 3:12-cv-4834-D, 2014 WL 1407416, at *9 (N.D.Tex. Apr. 11, 2014)). This Court affirmed the dismissal and denied Appellants' petition for a panel rehearing. *Lee v. Verizon Commc'ns, Inc., et al.*, 623 F. App'x 132, 134 (5th Cir.), *reh'g denied* (5th Cir. 2015). Specifically, this Court found that Pundt lacked constitutional standing because he had not alleged sufficient personal injury in fact. *Id.* at 149. Pundt petitioned the Supreme Court for certiorari, which the Supreme Court granted, vacating the judgment and remanding to this Court for further consideration in light of *Spokeo, Inc. v. Robins*, 578 U.S. ___, 136 S. Ct. 1540 (2016). *Pundt v. Verizon Communications, Inc.*, ___ S. Ct. ___, No. 15-785, 2016 WL 2945235, at *1 (2016).[3] On June 28, 2016, this Court directed Pundt to file this brief setting forth his position on the disposition this Court should make in light of *Spokeo*.[4]

ARGUMENT

I. Under *Spokeo*, Pundt Has Suffered Injury in Fact.

Under *Spokeo*, Pundt suffered a concrete injury in fact when Defendants breached their fiduciary duties to the Non-Transferee Class. In *Spokeo*, the

[3] In *Spokeo*, the Supreme Court vacated the Ninth Circuit's opinion and remanded the case for the Ninth Circuit to consider whether the plaintiff's injury was sufficiently concrete to satisfy Article III's injury in fact requirement in light of the specific guidance provided in the *Spokeo* opinion. 136 S. Ct. at 1550.

[4] Letter from the Clerk of the Fifth Circuit, June 28, 2016.

Supreme Court explained, "Although tangible injuries are perhaps easier to recognize, we have confirmed in many of our previous cases that intangible injuries can nevertheless be concrete." *Id.* (citing the constitutional rights of free speech and free exercise); *see also Carey v. Piphus*, 435 U.S. 247, 266 (1978) (finding nominal damages appropriate when a plaintiff's constitutional rights are infringed but he cannot show further injury). Thus, Congress may, by statute, identify certain intangible injuries in fact, and "a plaintiff in such a case need not allege any ***additional*** harm beyond the one Congress has identified." *Spokeo*, 136 S. Ct. at 1549 (emphasis in original); *Church v. Accretive Health, Inc.*, No. 15-15708, 2016 WL 3611543, at *2 (11th Cir. July 6, 2016) (quoting *Spokeo*); *see also Havens Realty Corp. v. Coleman*, 455 U.S. 363, 373-74 (1982) (finding Article III injury via infringement of the intangible right to truthful information established by the Fair Housing Act even for "testers" suffering no injury beyond the misrepresentation itself).

The Supreme Court recognized that courts have "long permitted" standing for intangible injuries recognized at common law, such as libel and slander *per se*, without allegation of additional harm. *Spokeo*, 136 S. Ct. at 1549; *see also* Restatement (Second) of Torts § 163 (1977) (recognizing nominal damages for trespass without economic harm); Restatement (Second) of Contracts § 328 (1981) (recognizing nominal damages for breach of contract without economic harm); *cf.*

Tennessee Elec. Power Co. v. TVA, 306 U.S. 118, 137-38 (1939) (recognizing that standing can exist where "the right invaded is a legal right,—one of property, one arising out of contract, one protected against tortious invasion, or ***one founded on a statute which confers a privilege***") (emphasis added).

"In determining whether an intangible harm constitutes injury in fact," *Spokeo* instructed courts to consider two factors: "history and the judgment of Congress." *Id.*; *see also Thomas v. FTS USA, LLC*, No. 3:13-cv-825, 2016 WL 3653878, at *6 (E.D. Va. June 30, 2016) ("[I]t is necessary, as *Spokeo* instructs, to look to the common law and to the judgment of Congress, as reflected in the [statute], to determine whether the violations of that statute alleged by Thomas constitute concrete injuries that satisfy the case or controversy requirement.").

A. Pundt Suffered Concrete Injury.

Pundt suffered a "concrete injury" under *Spokeo* when Defendants breached their fiduciary duties because ERISA's fiduciary enforcement provisions codify Pundt's common law right to sue for fiduciary breach, as Congress intended. This Court in its prior opinion focused on the risk of injury to Pundt's monetary benefits, holding "regardless of whether the plan is allegedly under- or over-funded, the direct injury to a participants' benefits is dependent on the realization of several additional risks, which collectively render the injury too speculative to support standing." *Lee*, 623 F. App'x at 148-49. To hold that the only injury

recognized by Article III is personal monetary loss, i.e., a reduction in a participant's monthly benefit check, is inconsistent with *Spokeo*'s finding that "intangible injuries can nevertheless be concrete." 136 S. Ct. at 1549. Instead, to determine whether an intangible injury is sufficiently concrete to confer Article III standing, this Court must "consider whether the alleged intangible harm has a close relationship to a harm that has traditionally been regarded as providing a basis for a lawsuit in English and American courts." 136 S. Ct. at 1549 (citing *Vt. Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 775-77 (2000)).

Claims by ERISA participants are particularly well-suited for this inquiry since, as the Supreme Court has "often noted," "an ERISA fiduciary's duty is 'derived from the common law of trusts.'" *See Tibble v. Edison Int'l*, 135 S. Ct. 1823, 1828 (2015) (quoting *Cent. States, Se. & Sw. Areas Pension Fund v. Cent. Transp., Inc.*, 472 U.S. 559, 570 (1985)).[5] Noting further that "in determining the contours of an ERISA fiduciary's duty, courts often must look to the law of trusts," the Supreme Court reversed the Ninth Circuit for rejecting the plaintiffs' ERISA claims "without considering the role of the fiduciary's duty of prudence under trust law." *Tibble,* 135 S. Ct. at 1827-28; *see also Harris Trust and Sav. Bank v.*

[5] The Department of Labor (DOL) agrees that participants and beneficiaries of an ERISA defined benefit plan have standing to sue for fiduciary breaches without additional allegations of harm. *See* Brief for the DOL as amicus curiae, *Fletcher v. Convergex Group LLC*, No. 16-cv-734 (2d. Cir. June 27, 2016), *available at* https://www.dol.gov/sol/media/briefs/fletcher_2016-06-27.pdf .

Salomon Smith Barney, Inc., 530 U.S. 238, 250 (2000) (finding that the common law of trusts is incorporated into the analysis of ERISA claims unless inconsistent with the statute's language, structure, or purpose). Here, too, this Court should look to trust law in order to assess whether Pundt asserts an injury in fact, as required by *Spokeo*.

1. English and American courts have long recognized that a fiduciary breach itself causes *de facto* injury.

ERISA § 403, 29 U.S.C. § 1103 requires that, for all defined benefit plans, the plan's assets be held in a trust solely for the benefit of all participants and beneficiaries. Accordingly, here, the Plan's assets are held in a trust and the named beneficiaries of the trust are the Plan participants and beneficiaries, which includes Pundt. Furthermore, because ERISA preempts all state law claims, Pundt's claims to enforce the fiduciary duties owed to him under the trust must be brought in federal court under ERISA. Thus, ERISA's fiduciary enforcement provisions (ERISA § 502, 29 U.S.C. § 1132) simply codify Pundt's common law right to sue for fiduciary breach, which has provided a basis for suit in English and American courts for centuries. Austin Scott, *Importance of the Trust*, 39 U. Colo. L. Rev. 177 (1966-1967) (explaining that the common law of trust began during the 15th Century when English chancellors recognized that trust beneficiaries have a cause of action regarding trust property and made trustees suable in courts of equity).

In trust law, a trust beneficiary has standing to sue for a breach of fiduciary duty without an allegation of personal monetary or other additional harm. For example, the Restatement of Trusts explains that a beneficiary has broad standing to sue a trustee "to enjoin or redress a breach of trust," which is "a failure by the trustee to comply with any duty that the trustee owes, as trustee, to the beneficiaries . . . of the trust." Restatement (Third) of Trusts §§ 93, 94(1). Similarly, the Supreme Court has long recognized that a trust beneficiary has standing to enjoin or remedy any breach of trust based solely on the trustee's obligation to perform his fiduciary duties. *E.g.*, *Clews v. Jamieson*, 182 U.S. 461, 481 (1901) ("in general a trustee is suable in equity in regard to any matters touching the trust" (citing 2 Story's Eq. Jur. 12th ed.)).

Indeed, trust law treaties specifically recognize that a beneficiary has standing to sue his trustee for self-dealing or a breach of loyalty even if that beneficiary does not allege that the breach has caused any tangible harm to either the trust or its beneficiaries other than the harm caused by the breach itself. Mark L. Ascher, et al., *Scott and Ascher on Trusts* § 17.2 (5th ed. 2010) ("[A] trustee who has violated the duty of loyalty is liable without further inquiry into whether the breach has resulted in any actual benefit to the trustee . . . [or] whether the breach has caused any actual harm to either the trust or its beneficiaries."). Under the "no-further-inquiry" rule, a beneficiary only needs to establish that the trustee

engaged in self-dealing or acted under a conflict of interest – nothing more is necessary for liability to attach. *See* Restatement (Third) of Trusts § 78 cmt. b (stating that under the no-further-inquiry rule "it is immaterial that the trustee may be able to show that the action in question was taken in good faith, that the terms of the transaction were fair, and that no profit resulted to the trustee"). Applying the no-further-inquiry rule, 170 years ago, the Supreme Court recognized that when a trustee sells a part of the trust property and "becomes himself interested in the purchase," a trust beneficiary has a cause of action to void the transaction without "any further inquiry" into the nature of the sale or the fairness of the price. *Michoud v. Girod*, 45 U.S. 503, 553, 557, 559 (1846).

Following this well-established trust law principle, modern courts continue to conclude that a trust beneficiary has Article III standing to sue for fiduciary breach without allegations of additional personal harm. *See, e.g.*, *Scanlan v. Eisenberg*, 669 F.3d 838, 844 (7th Cir. 2012) ("by virtue of the fiduciary relationship between Scanlan and the trustee, Scanlan acquires the right to bring an action for breach of fiduciary duty"); *see also Fin. Insts. Ret. Fund v. Office of Thrift Supervision*, 964 F.2d 142, 147-49 (2d Cir. 1992) [hereinafter *FIRF*] (holding that a violation of ERISA § 404 satisfies the Article III injury requirement and rejecting the district court's finding "that injuries cognizable under ERISA must entail at least some risk to plan assets."); *Donoghue v. Bulldog Investors Gen.*

P'ship, 696 F.3d 170, 178 (2d Cir. 2012) (holding that a bare breach of statute-imposed fiduciary duty created sufficient injury in fact)[6]; *Shaver v. Operating Eng'rs Local 428 Pension Trust Fund,* 332 F.3d 1198, 1203 (9th Cir. 2003).

In sum, because a fiduciary breach has been traditionally actionable without additional allegations of personal harm, a fiduciary breach alone causes *de facto* injury under *Spokeo*.[7] *In re Nickelodeon Consumer Privacy Litig.*, No. 15-1441, 2016 WL 3513782, at *7 (3d Cir. June 27, 2016) (finding plaintiff had Article III injury in fact because "Congress has long provided plaintiffs with the right to seek redress for unauthorized disclosures of information that, in Congress's judgment, ought to remain private"); *Church,* 2016 WL 3611543, at *3 (finding plaintiff had Article III injury in fact based on the violation of Congressionally mandated disclosures and noting "the Supreme Court has made clear an injury need not be tangible to be concrete"); *Spokeo*, 136 S. Ct. at 1553 (Thomas, J., concurring) ("A

[6] *Donoghue* discussed *Kendall v. Emps. Ret. Plan of Avon Prods.*, 561 F.3d 112 (2d Cir. 2009), an ERISA case denying standing for fiduciary breach claims. 696 F.3d at 178. *Kendall*, however, did not undermine *FIRF*. Rather, *Kendall* reaffirmed *FIRF*'s holding that "employees had standing to bring a breach-of-fiduciary-duty claim because they were theoretically injured by the funds' mismanagement of assets," but clarified that the fiduciary breach allegation must specifically demonstrate how the breach injured the plaintiff, which the *Kendall* plaintiff failed to do. 561 F.3d at 120-22. In fact, *Donoghue* subsequently recognized that the *Kendall* claim failed because of its generality, not because a bare fiduciary breach claim can never establish standing. *Donoghue*, 696 F.3d at 178.

[7] *Coleman v. Miller*, 307 U.S. 433, 460 (1939) (opinion of Frankfurter, J.) (in crafting Article III, the Framers "gave merely the outlines of what were to them the familiar operations of the English judicial system and its manifestations on this side of the ocean before the Union").

plaintiff seeking to vindicate a statutorily created private right need not allege actual harm beyond the invasion of that right."). Indeed, the Supreme Court in *CIGNA Corp. v. Amara* explicitly acknowledged that the injury from a violation of ERISA may come from "the loss of a right protected by ERISA ***or its trust-law antecedents***." 131 S. Ct. 1866, 1881 (2011) (emphasis added).

2. Trust beneficiaries have an equitable interest in trust property such that a fiduciary breach causing losses to the trust causes harm to the beneficiaries.

Because all Plan assets must be held in trust, all Plan participants and beneficiaries, including Pundt, have an equitable interest in the Plan's assets. Courts have long recognized that, when a trust is created, legal title to trust property (also known as the trust res or corpus) is vested in the trustee and equitable title to trust property is vested in the beneficiaries. Scott, 39 U. Colo. L. Rev. at 178-79 ("Although the trustee has the legal title, the beneficiaries are the equitable owners.") (citing *Senior v. Braden*, 295 U.S. 422 (1935) and *Brown v. Fletcher*, 235 U.S. 589 (1915)); 90 John Bourdeau, et al., C.J.S. Trusts § 265 (2016) ("An equitable or beneficial interest in the trust res [or trust property] is an identifiable interest in property, separate from the trustee's legal interest."); 76 Am. Jur. 2d Trusts § 258-59 (2010) (explaining that courts enforce a beneficiary's equitable interest in trust property, which is regarded as a property interest).

The Supreme Court and many circuits have reaffirmed a beneficiary's equitable interest (or beneficial interest) in trust property for decades. *E.g.*, *Blair v. Comm'r of Internal Revenue*, 300 U.S. 5, 13 (1937) ("The will creating the trust entitled the petitioner during his life to the net income of the property held in trust. He thus became the owner of an equitable interest in the corpus of the property."); *Hawaiian Trust Co. v. Kanne*, 172 F.2d 74, 75 (9th Cir 1949) (recognizing beneficiary's "equitable interests in the corpus of the trust"); *District of Columbia v. Lloyd*, 160 F.2d 581, 583 (D.C. Cir. 1947) ("The right to the income during his life gave [beneficiary] an equitable interest in the [trust] corpus . . . .").

As such, Pundt has an equitable interest in the Plan's assets, and any loss or injury to the Plan's assets results in an injury to Pundt's equitable interest in those assets. This is true even when the losses to the Plan's assets do not immediately threaten his individual benefit payments. *Scanlan*, 669 F.3d at 843-44 (recognizing that trust beneficiaries have an equitable interest in the entire trust corpus and are thus injured by losses to that corpus, even without alleging that the value of the trust after losses was insufficient to pay the beneficiaries' benefits). As a result of his equitable (or beneficial) interest in the trust corpus, Pundt has standing to sue to remedy his injury for a breach of fiduciary duty at the same time that he seeks to remedy the loss to the plan as a whole. *Wilmington Shipping Co. v. New England Life Ins. Co.*, 496 F.3d 326, 335 (4th Cir. 2007) (plaintiff's "injury is no less

concrete because the benefit to him . . . would derive from the restored financial health of the Plan.").

The Second, Fourth, and Seventh Circuits have all found that a fiduciary breach is sufficient for participants to allege injury in fact. In *Scanlan*, the district court held that plaintiff Scanlan did not suffer an Article III injury because Scanlan did not allege that the value of the trust's corpus would ever be insufficient to fund her support payments. 669 F.3d at 847. Rejecting these arguments, the Seventh Circuit explained, the "mere fact that a beneficiary may ultimately never receive trust assets does not prevent that beneficiary from bringing a claim" for breach of fiduciary duty. *Id.* at 844. Based on trust law principles, the Seventh Circuit concluded that plaintiff had "an equitable interest in the corpus of the Trusts" through which "Scanlan acquires standing to enforce the Trusts." *Id.* at 843.

Citing *Scanlan* and trust law treatises, the Fourth Circuit reached the same conclusion in an ERISA case: "[u]nder traditional trust law principles, when a trustee commits a breach of trust, he is accountable" – i.e., he can be sued by an individual beneficiary. *Pender v. Bank of America Corp.*, 788 F.3d 354, 367 (4th Cir. 2015) (internal citations omitted).

The Second Circuit has similarly recognized that ERISA participants have a legally cognizable interest based on their interest in plan assets. In *Long Island Head Start Child Development Services, Inc. v. Economic Opportunity*

Commission of Nassau County, the Second Circuit recognized that claims for fiduciary breach causing quantifiable losses to plan assets were sufficient to allege injury in fact. *See* 710 F.3d 57, 67 n.5 (2d Cir. 2013) [hereinafter *LIHS*].[8] In the instant action, Pundt alleges approximately $1 billion of improperly spent Plan assets—an identifiable and quantifiable pool of assets in which he has a colorable claim via his equitable interest. Thus, the injury to Pundt's equitable interest in the Plan's assets provides independent grounds for standing in this case.

Unlike the *Scanlan* and *Pender* decisions, which found standing based on trust law principles, several court of appeals decisions have concluded that ERISA participants lack standing based primarily on language from *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 439 (1999) and *LaRue v. DeWolff, Boberg & Assocs., Inc.*, 552 U.S. 248, 255-56 (2008). *See See Perelman v. Perelman,* 793 F.3d 368, 374 (3d Cir. 2015) (relying on *LaRue* and *Hughes*); *David v. Alphin*, 704 F.3d 327, 338 (4th Cir. 2013) (same); *Harley v. Minn. Mining & Mfg. Co.*, 284 F.3d 901, 905-06 (8th Cir. 2002) (relying on *Hughes*).[9]

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[8] Although *LIHS* involved a claim for an outstanding judgment against the plaintiffs' plan, the Second Circuit never tied plaintiffs' standing to that judgment. *See LIHS*, 710 F.3d at 65–67 & n.5. There, as here, the plaintiffs had standing because a fiduciary breach depleted plan assets and, as plan participants, plaintiffs had an equitable interest in restoring those assets to the plan.

[9] The *Harley, David,* and *Perelman* courts considered plans that were ***overfunded*** and their reasoning implied that the outcome would be different had the plans been ***underfunded***. 284 F.3d at 908; 793 F.3d at 375. Under *Spokeo*, the approaches adopted by *Harley* and *Perelman* must be rejected because they require a showing of additional harm, namely that the plan is

However any reliance on *Hughes* and *LaRue* is misplaced as neither decision discussed, much less decided, the issue of injury in fact. *LaRue* decided a Rule 12(b)(6) question regarding whether the statutory provision at issue, ERISA § 502(a)(2), 29 U.S.C. § 1132(a)(2), authorized the recovery of the value of plan assets in a participant's individual account. 128 S.Ct. at 1021. Similarly, *Hughes* decided Rule 12(b)(6) issues regarding whether plaintiffs had properly stated a claim under various provisions of ERISA when they sought to force the settlor to increase benefits to participants because the plan had a surplus.[10] See 525 U.S. at 437. The *Hughes* plaintiffs were not found to lack standing; rather the court found the relief they sought was not available under the statutory provisions at issue. In fact, implicit in addressing the *Hughes* claims on the merits is a recognition that plaintiffs had standing to pursue their claim.

Finally, in light of *Spokeo*, the *Harley, David* and *Perelman* decisions were wrongly decided because they failed to consider whether a fiduciary breach was actionable at common law without additional allegations of personal harm.

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underfunded, even though a fiduciary breach "has traditionally been regarded as providing a basis for a lawsuit in English and American courts" without a showing that the trust assets were insufficient to pay the benefits owed under the trust. *Spokeo*, 136 S. Ct. at 1549.

[10] *See Jacobson v. Hughes Aircraft Co*., 105 F.3d 1288, 1291 (9th Cir. 1997) ("Plaintiffs seek a variety of remedies, including a distribution of 'all or a portion of the excess Plan assets' in the form of increased benefits."), *rev'd on other grounds*, 525 U.S. 432 (1999).

3. The judgment of Congress makes clear that a fiduciary breach constitutes concrete injury in fact.

Next, when analyzing constitutional standing for claims brought under a federal statute, *Spokeo* directs courts to consider the intent of Congress. The Supreme Court explained that Congress "is well positioned to identify intangible harms that meet minimum Article III requirements" and thus its "judgment is also instructive and important" for this question. *Spokeo*, 136 S. Ct. at 1549. Applying this instruction, the Supreme Court looked to the Fair Credit Reporting Act—the statute at issue in *Spokeo*—to identify the injury Congress sought to protect against, and then asked the court below to analyze whether the misconduct the plaintiff alleged had actually produced the harm Congress targeted. *Id.* at 1550 (explaining that, in enacting the FCRA, "Congress plainly sought to curb the dissemination of false information . . . "). Thus, under *Spokeo*, this Court must analyze the types of harm Congress sought to protect against by enacting ERISA and whether Pundt alleged such harm.

By enacting ERISA, Congress plainly sought to curb the improper depletion and misuse of pension funds by fiduciaries. Per the express text of ERISA and its legislative history, Congress intended to establish an elaborate statutory scheme with numerous safeguards, only one of which is a participant's right to collect her vested benefits. Section 2(b), 29 U.S.C. § 1001, states that:

> It is hereby declared to be the policy of this chapter [ERISA] to protect interstate commerce and the interests of participants in employee benefit plans and their beneficiaries, by requiring the disclosure and reporting to participants and beneficiaries of financial and other information with respect thereto, by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts.

Moreover, the Supreme Court has recognized that, in enacting ERISA, "the crucible of congressional concern was misuse and mismanagement of plan assets . . . [and] ERISA was designed to prevent these abuses in the future." *Id.* (citing 120 Cong. Rec. 29957 (1974) ("[M]isuse, manipulation, and poor management of pension trust funds are all too frequent") (remarks of Sen. Ribicoff), reprinted in 3 Leg. Hist. 4812 and 120 Cong. Rec. 29961 (1974)).

Central to ERISA's protection of plan assets are the fiduciary enforcement provisions found in ERISA §§ 401 to 414 29 U.S.C. §§ 1101 to 1114. *See* 120 Cong. Rec. 29196-97 (1974) ("These standards . . . will prevent abuses . . . by those dealing with plans"), reprinted in 3 Leg. Hist. 4668. The legislative history also shows that Congress codified the rights available to trust beneficiaries to "establish judicially enforceable standards to insure honest, faithful, and competent management of pension and welfare funds." *Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 140 n.8 (1985).

The statutory text and legislative history of ERISA indicate that Congress created fiduciary duties for those managing employee benefit plans to prevent the misuse and mismanagement of plan assets—exactly the behavior which Pundt alleged in his causes of action. To hold that ERISA participants have standing to sue for fiduciary breach only if they allege personally lost benefits would strip out all of these protections Congress provided to participants and beneficiaries. Such a disregard for Congress's judgment would be inconsistent with *Spokeo*'s instruction.

B. Pundt's Injury is Particularized.

To satisfy the "particularized" requirement, an alleged injury must be "more than a generalized grievance[.]" *League of United Latin Am. Citizens, Dist. 19 v. City of Boerne*, 659 F.3d 421, 428 (5th Cir. 2011) [hereinafter LULAC] "The fact that an injury may be suffered by a large number of people does not of itself make that injury a nonjusticiable generalized grievance." *Spokeo*, 136 S. Ct. at 1548 n.7.

As discussed above, because Pundt is a beneficiary of the trust holding the Plan's assets, he is personally owed various fiduciary duties by the Defendants, and he personally has an equitable interest in the assets of the Plan. *See supra* Part II.A.2. Accordingly, the injury that results from a breach of fiduciary duty is unique to Pundt and the class he represents because they are precisely the people to whom those duties are owed. The generalized public cannot bring these same

claims. *See DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 344 (2006) (contrasting a "concrete and particularized" injury with "a grievance the [plaintiff] suffers in some indefinite way in common with people generally") (internal citations and quotation marks omitted). Accordingly, Pundt's injury is particularized.

C. Pundt's Injury Is Actual or Imminent

The injury alleged must also be actual or imminent and not abstract, conjectural, or hypothetical. *Doe v. Beaumont Indep. Sch. Dist.*, 240 F.3d 462, 466 (5th Cir. 2001) (citing *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs, Inc.*, 528 U.S. 167 (2000)). Pundt's injuries – the breaches of fiduciary duty – are actual because they have already occurred. Whether or not Pundt loses individual benefits in the future is irrelevant to this analysis. A breach of fiduciary duty itself causes *de facto* injury, without an allegation of additional injury flowing from the breach. As Pundt alleged a breach of fiduciary duty, Pundt's injury has already occurred, and is therefore an actual injury.

II. Pundt's Claims Satisfy the Causation and Redressability Requirements.

Although injury in fact is "the 'first and foremost' of standing's three elements," standing requires two additional showings: causation and redressability. *Spokeo*, 136 S. Ct. at 1547 (quoting *Steel Co.*, 523 U.S. at 103). Causation is met when there is a "causal connection between the injury and the conduct complained of—in other words, the injury must be traceable to the defendant and not the result

of the independent action of a third party." *S. Christian Leadership Conference v. Supreme Court of State of La.*, 252 F.3d 781, 788 (5th Cir. 2001) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)). The causation element, however, does not require a party to establish proximate causation, but only requires that the injury be "fairly traceable" to the defendant. *LULAC*, 659 F.3d at 431 (citing *Bennett v. Spear*, 520 U.S. 154, 168-69 (1997)).

Here, Pundt alleges, and Defendants do not dispute, that Defendants' conduct – the acts constituting the breaches of the fiduciary duty of prudence, loyalty and diversification – is the very conduct that caused Plaintiffs' injury and losses to the Plan. Defendants have never argued that other fiduciaries, not before the court, were responsible for maintaining a diversified allocation of the Plan's assets after the annuity transaction. Similarly they have not argued that non-named fiduciaries were responsible for ensuring that the Plan pay only reasonable and proper expenses in connection with the annuity transaction. Accordingly, Defendants' conduct – the acts constituting the breaches of fiduciary duty and self-dealing – is the very conduct that caused Plaintiffs' injury.

Article III's final requirement is that the injury be "redressable by a favorable ruling." *Texas v. United States*, 787 F.3d 733, 753 (5th Cir. 2015) (citing *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1147 (2013)). Pundt seeks various forms of relief under ERISA §§ 502(a)(2) and (a)(3), including the restoration of

losses caused by the fiduciary breaches, the disgorgement of unjust profits, and an injunction preventing further fiduciary breaches or self-dealing.

With respect to the restoration remedy, the Second Circuit held in *LIHS* that participants seeking to restore funds to the plan had standing, in part because such "relief, of course, surely would have benefitted the Plan." *LIHS,* 710 F.3d at 66. Regarding disgorgement, this remedy does not seek to compensate for a loss, it is aimed at depriving the wrongdoers of the benefits of their wrongdoing. Here, denying Defendants the ability to keep ill-gotten gains not only redresses the injury suffered from breaches of fiduciary duty, but it prevents future violations from occurring. Finally there is no question that injunctive relief would redress the injury caused from the alleged breaches of fiduciary duty. For example, an injunction causing the fiduciaries of the Plan to properly diversify the Plan's asset will redress the injury Pundt suffers from having his pension assets held in non-diversified portfolio. Similarly, an injunction preventing the Plan fiduciaries from improperly paying additional corporate sponsor expenses with Plan assets will protect the assets in which Plaintiff has an equitable interest.

III. Pundt Has Standing to Pursue Injunctive Relief and Disgorgement Without Allegations of Additional Harm Beyond the Fiduciary Breach Itself.

As noted previously, Pundt seeks both injunctive relief and disgorgement under ERISA §§ 502(a)(2) and 502(a)(3). RE 88-91 (Prayer for Relief). Many

courts of appeals have held, or recognized, that defined benefit plan participants have standing to pursue injunctive relief without alleging more than the fiduciary breach itself.[11] *See, e.g.*, *Perelman*, 793 F.3d at 373 (3d Cir. 2015) ("for injunctive relief, such injury may exist simply by virtue of the defendant's violation of an ERISA statutory duty"); *Horvath v. Keystone Health Plan E., Inc.*, 333 F.3d 450, 456 (3d Cir. 2003) (ERISA participant "need not demonstrate actual harm in order to have standing to seek injunctive relief requiring that Keystone [the defendant] satisfy its statutorily-created disclosure or fiduciary responsibilities."); *Loren v. Blue Cross & Blue Shield of Mich.*, 505 F.3d 598, 610 (6th Cir. 2007) ("Plaintiffs need not demonstrate individualized injury to proceed with their claims for injunctive relief under § 1132(a)(3); they may allege only violation of the fiduciary duty owed to them as a participant . . . ."); *Shaver*, 332 F.3d at 1203 (when a plaintiff seeks injunctive relief, "[r]equiring a showing of loss in such a case would be to say that the fiduciaries are free to ignore their duties so long as they do no tangible harm, and that the beneficiaries are powerless to rein in the fiduciaries' imprudent behavior until some actual damage has been done. This result is not supported by the language of ERISA, the common law, or common sense."). This

[11] While many of the cases holding an ERISA participant had standing to pursue injunctive relief were decided in the context of an ERISA § 502(a)(3) claim, the logic employed by the opinions did not turn on the difference between ERISA §§ 502(a)(3) and 502(a)(2).

Court should join its sister circuits in holding that an ERISA participant need not allege personal economic harm, beyond the fiduciary breach itself, in order to have standing to pursue her claim.

Several circuits have also held that ERISA participants have standing to pursue claims for disgorgement without showing personal pecuniary harm. *Edmonson v. Lincoln Nat'l Life Ins. Co.*, 725 F.3d 406, 417 (3d Cir. 2013) ("financial loss is not a prerequisite for standing to bring a disgorgement claim under ERISA"); *Pender*, 788 F.3d at 365-366 (same); *Leigh v. Engle*, 727 F.2d 113, 122 (7th Cir. 1984) ("ERISA clearly contemplates actions against fiduciaries who profit by using trust assets, even where the plan beneficiaries do not suffer direct financial loss."). The reason these courts found standing for such claims is that "relief in a disgorgement claim 'is measured by the defendant's profits.'" *Edmonson*, 725 F.3d at 415 (quoting Restatement (Third) of Restitution and Unjust Enrichment § 51 cmt. a (2011)). "This is because disgorgement claims seek not to compensate for a loss, but to 'deprive[] wrongdoers of ill-gotten gains.'" *Id.* (citing *Commodity Futures Trading Comm'n v. Am. Metals Exchange Corp.*, 991 F.2d 71, 76 (3d Cir. 1993)). Here, Pundt's disgorgement claim seeks to deprive the Defendants of their ill-gotten gains, the result of using pension funds to pay corporate expenses, and thus he should be allowed to pursue his claims for disgorgement without showing personal monetary harm.

IV. Pundt Did Not Waive Any Arguments Made Here.

Pundt presented trust law as a basis for finding injury in fact during the previous proceedings before this Court. Pundt argued in his Opening Brief: "Congress, indeed, purposefully required plan fiduciaries to hold plan assets in trust for the exclusive benefit of participants, thereby creating a beneficial interest [i.e. equitable interest] in the trust that is correlative to the plan trustee's fiduciary duties. ERISA Sections 403, 404, 29 U.S.C. §§ 1103, 1104." Pl. Br. 70, August 4, 2014. Pundt further discussed the importance of the history of trust law when determining when an ERISA participant suffers injury in fact, "[c]ourts have traditionally avoided undue benefit to a fiduciary by asserting jurisdiction over cases against a trustee 'even though the trust itself ha[d] suffered no loss." *Id.* at 51 (citing George G. Bogert et al., *Law of Trusts & Trustees* § 861 (2013)). This was more than sufficient to put Defendants on notice that Pundt was relying on trust law to show he suffered injury in fact.

Moreover, any argument that supports Pundt's Article III standing claim is properly before the Court. As the Supreme Court explained, "Once a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below." *Yee v. City of Escondido, Cal.*, 503 U.S. 519, 534 (1992) (citing *Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. 71, 78, n. 2 (1988)). The Second, Third, Fourth, Sixth,

Seventh, Ninth, Eleventh, District of Columbia, and Federal Circuits have all applied the *Yee* rationale at the appellate level, finding that appellants may make new arguments in support of claims that were properly raised in district court. *See United States v. Litvak*, 808 F.3d 160, 175 n.17 (2d Cir. 2015); *Thompson v. Real Estate Mortgage Network*, 748 F.3d 142, 149 n.6 (3d Cir. 2014); *United States v. Robinson*, 744 F.3d 293, 300 n.6 (4th Cir. 2014); *Gallenstein v. United States*, 975 F.2d 286, 290 n.4 (6th Cir. 1992); *United States v. Billups*, 536 F.3d 574, 578 (7th Cir. 2008); *Weissburg v. Lancaster Sch. Dist.*, 591 F.3d 1255, 1259 n.3 (9th Cir. 2010); *Pugliese v. Pukka Dev., Inc.*, 550 F.3d 1299, 1304 n.3 (11th Cir. 2008); *Koch v. Cox*, 489 F.3d 384, 391 (D.C. Cir. 2007); *Pfizer, Inc. v. Lee*, 811 F.3d 466, 471 (Fed. Cir. 2016).

CONCLUSION

Under *Spokeo,* a fiduciary breach itself causes concrete injury in fact. This Court should therefore reverse the district court's opinion dismissing Pundt's claims for lack of standing and remand the case for further proceedings.

Respectfully submitted,

/s/ Curtis L. Kennedy
Curtis L. Kennedy, Esq.
8405 E. Princeton Avenue
Denver, Colorado 80237-1741
Tele: 303-770-0440

CurtisLKennedy@aol.com

Robert E. Goodman, Jr., Esq.
KILGORE & KILGORE, PLLC
3109 Carlisle Street
Dallas, Texas 75204
Tele: 214-969-9099
Fax: 214-953-0133
reg@kilgorelaw.com

Karen L. Handorf
Michelle C. Yau (admission pending)
COHEN MILSTEIN SELLERS & TOLL PLLC
1100 New York Ave. NW
Suite 500, East Tower
Washington, DC 20005
Telephone: (202) 408-4600
Facsimile: (202) 408-4699
khandorf@cohenmilstein.com
myau@cohenmilstein.com

Attorneys for Plaintiffs-Appellants

CERTIFICATE OF COMPLIANCE

The undersigned attorney hereby certifies that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because the text of this brief has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman 14 point font, and the footnotes of this brief are in Microsoft Word in Times New Roman 12 point font. This supplemental brief complies with the 25 page limit, as directed in the clerk's letter of June 28, 2016.

The undersigned attorney also hereby certifies that: A) the required privacy redactions have been made pursuant to 5th Cir. R. 25.2.13; B) the electronic submission is an exact copy of the paper document pursuant to 5th Cir. R. 25.2.1; C) the document has been scanned for viruses and is free of viruses; and D) 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

Dated: July 18, 2016

/s/ Curtis L. Kennedy
Curtis L. Kennedy, Esq.

CERTIFICATE OF SERVICE

I hereby certify that I electronically transmitted the attached document to the Clerk of the Court of the 5th Circuit Court of Appeals using the ECF System of the Court. Counsel for the Appellees are registered in this case and will be served with the brief via the ECF system. The electronic case filing system will send 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.

Dated: July 18, 2016

/s/ Curtis L. Kennedy
Curtis L. Kennedy, Esq.