16-734

IN THE

United States Court Of Appeals

FOR THE SECOND CIRCUIT

LANDOL FLETCHER,
Plaintiff-Appellant,

v.

CONVERGEX GROUP, L.L.C., CONVERGEX SOLUTIONS L.L.C., CONVERGEX GLOBAL MARKETS LTD., CONVERGEX HOLDINGS L.L.C., GTRADE SERVICES L.L.C., "JOHN DOES 1-10,"
Defendants-Appellants.

On Appeal from the United States District Court
for the Southern District of New York
NO.: 13-09150-LLS

BRIEF FOR AARP AND AARP FOUNDATION AS AMICI CURIAE IN SUPPORT OF APPELLANT URGING REVERSAL

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CORPORATE DISCLOSURE STATEMENT

The Internal Revenue Service has determined that AARP is organized and operated exclusively for the promotion of social welfare pursuant to Section 501(c)(4) of the Internal Revenue Code and is exempt from income tax. The Internal Revenue Service has determined that AARP Foundation is organized and operated exclusively for charitable purposes pursuant to Section 501(c)(3) of the Internal Revenue Code and is exempt from income tax. AARP and AARP Foundation are also organized and operated as nonprofit corporations under the District of Columbia Nonprofit Corporation Act.

Other legal entities related to AARP and AARP Foundation include AARP Services, Inc., and Legal Counsel for the Elderly. Neither AARP nor AARP Foundation has a parent corporation, nor has either issued shares or securities.

Dated: June 27, 2016

/s/ *Dara S. Smith*
Dara S. Smith

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INTEREST OF AMICI CURIAE[1]

AARP is a nonprofit, nonpartisan organization dedicated to fulfilling the needs and representing the interests of people age fifty and older. AARP fights to protect older people's financial security, health, and well-being. AARP's charitable affiliate, AARP Foundation, creates and advances effective solutions that help low-income individuals fifty and older to secure the essentials so that they do not fall into poverty during retirement. Among other things, AARP and AARP Foundation seek to increase the availability, security, equity, and adequacy of public and private pension, health, disability and other employee benefits that countless members and older individuals receive or may be eligible to receive including through participation as amicus curiae in state and federal courts.[2]

One of amici's main objectives is to ensure that participants receive those benefits that they have been promised in accordance with the protections of the Employee Retirement Income Security Act of 1974 ("ERISA"). 29 U.S.C. § 1001

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[1] Pursuant to Fed. R. App. P. 29(c)(5), 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 any person or entity other than AARP, AARP Foundation, AARP's members, and their counsel, contributed money intended to fund preparing or submitting this brief. Both parties have consented to the filing of this brief.

[2] *E.g.*, *LaRue v. DeWolff, Boberg & Assocs*., 552 U.S. 248 (2008) (ERISA's civil enforcement provision); *David v. Alphin*, 704 F.3d 327 (4th Cir. 2013) (participant standing to sue defined benefit plan for ERISA violations); *McCullough v. AEGON USA, Inc*., 585 F.3d 1082 (8th Cir. 2009) (same); *Harley v. Minn. Mining & Mfg. Co*., 284 F.3d 901 (8th Cir. 2002) (same).

et seq. The quality of the lives of these workers in retirement depends substantially on their ability to obtain those benefits that they have been promised. To achieve that goal, amici work to ensure that fiduciaries prudently and loyally manage and administer participants' plans.

If employees cannot police their pension plans by suing the plan fiduciaries, it will be impossible for them to ensure proper and prudent plan administration and management of plan assets. Moreover, participants' ability to sue is crucial because the Department of Labor consistently has had inadequate resources to police the retirement system.[3] *See, e.g.*, U.S. Gov't Accountability Office, GAO-07-22, EMPLOYEE BENEFITS SECURITY ADMINISTRATION – ENFORCEMENT IMPROVEMENTS MADE BUT ADDITIONAL ACTIONS COULD FURTHER ENHANCE PENSION PLAN OVERSIGHT 10, 28 (2007); U.S. Gen. Accounting Office,[4] GAO-02-232, PENSION AND WELFARE BENEFITS ADMINISTRATION – OPPORTUNITIES EXIST

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[3] The Employee Benefits Security Administration in the Department of Labor is responsible for policing over "681,000 retirement plans, approximately 2.3 million health plans, and a similar number of other welfare benefit plans, such as those providing life or disability insurance." U.S. Dep't of Labor, *EBSA Restores Over $696.3 Million to Employee Benefit Plans, Participants and Beneficiaries*, https://www.dol.gov/ebsa/pdf/fsfy15agencyresults.pdf (last visited June 22, 2016). It closed 2,441 civil investigations in fiscal year 2015. *Id.*

[4] In 2004, the General Accounting Office changed its name to the Government Accountability Office.

FOR IMPROVING MANAGEMENT OF THE ENFORCEMENT PROGRAM 2-3 (2002); U.S. Dep't of Labor, PWBA TASK FORCE ON ASSISTANCE TO THE PUBLIC (1992).

How the Court decides this case will have a significant impact on the integrity of the administration of employee benefit plans and individual participants' ability both to protect their pension plans from mismanagement and to obtain redress for such mismanagement, if it occurs. In light of the significance of the issues presented by this case, AARP and AARP Foundation respectfully submit this brief because the court decision below unnecessarily limits participants' ability to sue on behalf of their defined benefit plan where fiduciaries have breached their duties of prudence and loyalty to participants.

SUMMARY OF ARGUMENT

In *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, No. 13-1339, 2016 U.S. LEXIS 3046, at *15-16 (May 16, 2016), the Supreme Court reaffirmed that, to have standing, plaintiffs could allege an intangible injury as long as it was concrete and particularized. In determining what constitutes an intangible injury, the Court suggested that if the alleged harm is related to a harm that has been regarded as providing a basis for a lawsuit in English or American courts and Congress has judged the alleged harm to meet Article III standards, then it follows that the plaintiff can satisfy the injury-in-fact criteria. *Id.*

When a participant sues a fiduciary for breaches of the duty of loyalty and prudence under ERISA, such as in this case for self-dealing, the participant is relying both on the fiduciary duties under the common law of trusts that form the foundation of ERISA's fiduciary requirements and Congress' judgment that participants can sue to remedy those breaches. *See Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 142-43, 156 (1985). The participant's injury-in-fact is the breach of the fiduciary's promise to administer and manage the plan prudently and solely in her interests, regardless of any potential economic loss. This injury—grounded in the common law of trusts—is not speculative, but real and concrete, and is sufficient injury-in-fact to support standing under *Spokeo*.

Moreover, Congress authorized participants, along with the Secretary of Labor and plan fiduciaries, to file in a representative capacity on behalf of the plan to recover any losses to the plan. *See* ERISA § 502(a)(2), 29 U.S.C. § 1132(a)(2); *Russell*, 473 U.S. at 142 n.9. The common interest shared by the potential plaintiffs is the "financial integrity of the plan." *Russell*, 473 U.S. at 142 n.9. Congress was concerned with the manner in which fiduciaries administered and managed their plans. *Id*. at 140 n.8. With the common law of trusts as a foundation, Congress expressly intended that private litigants along with the Secretary of Labor prosecute claims against plan fiduciaries arising from injuries to the plan caused by breaches of the fiduciary liability standards imposed under ERISA.

ARGUMENT

I. PARTICIPANTS SUFFER AN INJURY-IN-FACT WHEN FIDUCIARY BREACHES INCREASE RISK TO THE SECURITY OF DEFINED BENEFIT PLAN ASSETS.

A. The Supreme Court Recently Reaffirmed That An Injury-In-Fact Does Not Require Economic Damages.

In this case, the district court reasoned that the potential recovery of $1,600 for the alleged fiduciary breach was inadequate to remedy the $16 billion in underfunding of the Central States Pension Plan. *Fletcher v. Convergex Grp. LLC*, No. 13-civ-9150, 2016 U.S. Dist. LEXIS 20472, at *6 (S.D.N.Y. Feb. 17, 2016). Consequently, the court held that the participant did not have standing. However, the Supreme Court's subsequent decision in *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, No. 13-1339, 2016 U.S. LEXIS 3046 (May 16, 2016), requires both a different analysis and a different result.

The Supreme Court reaffirmed that, although Congress can create federal claims, to have standing a plaintiff must allege an injury-in-fact that (i) is both concrete and particularized, (ii) is traceable to the defendant, and (iii) a federal court can redress. *Id.* at *12. For an injury to be concrete, the Court reiterated that the alleged injury must actually exist; that is, it must be real. The Court also explained that the alleged injury may be tangible or intangible, noting that it has "confirmed in many of [its] previous cases that intangible injuries can nevertheless be concrete." *Id.* at *15-16. Although economic damages clearly indicate that there has been an injury, the Court clarified that economic damages, either direct or indirect, are not required for there to be an injury-in-fact. *Id*. The Court declared that, in determining what constitutes an intangible injury, "both history and the judgment of Congress play important roles." *Id*. It recognized that it is "instructive to consider whether an alleged intangible harm has a close relationship to a harm that traditionally has been regarded as providing a basis for a lawsuit in English or American courts." *Id*. The Court confirmed that Congress' "judgment is also instructive and important" because it "is well positioned to identify intangible harms that meet minimum Article III requirements." *Id*. The Court acknowledged that "a risk of real harm" can "satisfy the requirement of concreteness," even if is difficult to measure. *Id*. Thus, the Court found that some statutory requirements create legally cognizable rights, and a court can assume concrete harm when a defendant breaches these statutory rights. *Id*. at *16-17 (identifying, as examples, libel, slander, and violations of statutes that require government agencies to release certain information to the public).

B. Congress Incorporated The Common Law Of Trusts Into ERISA's Fiduciary Rules To Ensure Participants' Receipt Of Expected Benefits Through A Loyally And Prudently Run Pension Plan.

1. The common law of trusts establishes the duties of loyalty and prudence that fiduciaries owe to trust beneficiaries.

A person in a fiduciary relationship to another is under a duty to act for the benefit of the other as to matters within the scope of the relationship. Restatement (Third) of Trusts § 2 (2007). In the trust context, that relationship concerns the trust assets. Restatement (Second) of Trusts §§ 2, 74 (1959); Restatement (Third) of Trusts §§ 3, 10. Fiduciary duties safeguard the beneficiary's entitlement to the trust assets. Enforcement of fiduciary duties is a means of upholding the beneficiary's interest.

Among the fiduciary duties of a trustee is the duty of loyalty, which requires the trustee "to administer the trust *solely* in the interest of the beneficiary." Restatement (Second) of Trusts §170(l) (emphasis added), *as continued in* Restatement (Third) of Trusts § 170(l); *see also Wendt v. Fischer*, 243 N.Y. 439, 443-44 (N.Y. 1926) ("Only by . . . uncompromising rigidity has the rule of undivided loyalty been maintained against disintegrating erosion."); *Meinhard v. Salmon*, 249 N.Y. 458, 464 (N.Y. 1928) ("A trustee is held to something stricter than the morals of the market place."); *Doud v. Holmes*, 63 N.Y. 635, 636 (N.Y. 1875) (a trustee cannot co-mingle trust funds with his personal funds and invest jointly without beneficiary's ratification). Most importantly, it forbids the trustee from self-dealing with trust assets and from engaging in conflicted transactions adverse to the trust. G. T. Bogert, TRUSTS § 95 (6th ed. 1987); *see also In re Long Island Loan & Tr. Co.*, 92 A.D. 1, 4 (N.Y. App. Div. 1904) ("It has long been settled . . . that a trustee cannot deal in his own behalf with the fund intrusted to his charge for the benefit of another."); *Munson v. Syracuse, Geneva, & Corning R.R. Co.*, 103 N.Y. 58, 73-74 (1886) (common law invalidates all contracts "made by a trustee or fiduciary, in which he is personally interested, at the election of the [beneficiary]."). Even in those instances where the trustee deals with the trust's property for his own use, he must disgorge any profits to the trust, even if he paid fair value of the property. *See, e.g., Hammond v. Pennock*, 61 N.Y. 145, 156 (N.Y. 1874) (a fraudulent trustee, having sold trust property, must account to the defrauded party for all sale proceeds); *Hartman v. Hartle*, 122 A. 615, 615 (N.J. Ch. 1923) (a trustee cannot purchase from himself at his own sale, and thus, the trustee must account to the heirs for the profit realized). The duty of loyalty is prophylactic in that it establishes boundaries for the trustees' actions.

The trustee also owes the beneficiary the fiduciary duty of prudence which is an objective standard of care; that is, one of reasonableness. *See King v. Talbot*, 40 N.Y. 76, 85-86 (N.Y. 1869). "The trustee has a duty to administer the trust as a prudent person would, in light of the purposes, terms, and other circumstances of the trust." Restatement (Third) of Trusts § 77; *see also* Restatement (Second) of Trusts §§ 172-78, 188 (The trustee is "under a duty to the beneficiary in administering the trust to exercise such care and skill as a man of ordinary prudence would exercise in dealing with his own property."); *accord*, A. Hess & G. Bogert, LAW OF TRUSTS AND TRUSTEES § 541 (3d ed. 2009) ("the trustee is required to manifest the care, skill, prudence, and diligence of an ordinarily prudent manager engaged in similar business affairs and with objectives similar to those of the trust in question.").

Other related fiduciary duties such as to keep and render accounts, to furnish information, to invest or preserve trust assets and make them productive, to enforce and defend claims, to diversify investments, and to minimize costs are all under the umbrella of the duties of loyalty and prudence. *Id*.

Accordingly, under the common law of trusts, a beneficiary could sue a fiduciary for a breach of any of these duties because the injury was the breach of trust itself, regardless of any monetary loss. *See generally* John H. Langbein, *The Contractarian Basis of the Law of Trusts*, 105 YALE L.J. 625, 647-48 (1995) (comparing different views on whether equitable tracing arises from property or contract).

2. Congress enacted ERISA to ensure that participants would receive promised benefits.

Prior to the passage of ERISA, there were no federal standards requiring persons operating employee benefit plans to pay promised benefits or to avoid transactions that could dissipate plan assets. *See*, *e.g*., Jeffrey Lewis, et al., EMPLOYEE BENEFITS LAW xcix-ci (4th ed. 2012). Among the events that prompted Congress to regulate retirement plans were the failure of Studebaker and the termination of its pension plan with insufficient assets to pay benefits, the trial of Jimmy Hoffa alleging (and later finding him guilty of) fraud on the Central States Pension Fund, and instances of other trustees embezzling or using pension funds for their own benefit. *See, e.g*., James A. Wooten, THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974: A POLITICAL HISTORY 8-10, 51-80, 112-113, 118 (2004); *Nachman Corp. v. Pension Benefit Guar. Corp.*, 446 U.S. 359, 374 n.22 (1980) (quoting 2 LEGISLATIVE HISTORY OF THE EMPLOYEE RETIREMENT INCOME SECURITY ACT 1599-1600 (1976)) (discussing closure of Studebaker and sale of P. Ballantine and Sons resulting in termination of insufficiently funded pensions plans and workers' loss of substantial portion of pension benefits). As a result of these horror stories, Congress wanted to "make as certain as possible that pension fund assets would be adequate" to meet expected benefits payments and that fiduciaries would act in the best interests of participants. *Nachman Corp.*, 446

U.S. at 375. Congress believed that if fiduciaries were required to operate pension plans loyally and prudently, and without self-dealing, pension plan assets would be available to pay benefits. Accordingly, ERISA establishes "standards of conduct, responsibility, and obligation for fiduciaries" and provides "for appropriate remedies [and] sanctions" for violations of these fiduciary standards. ERISA § 2(b), 29 U.S.C. § 1001(b).

3. Congress incorporated the common law duties of loyalty and prudence into ERISA's fiduciary rules.

For ERISA's fiduciary standards of conduct, Congress incorporated several key measures from the common law of trusts into ERISA. It imposed upon plan fiduciaries duties of loyalty and prudence with respect to plan administration and the management of existing trust funds. ERISA § 404, 29 U.S.C. § 1104; *see also Tibble v. Edison Int'l*, 135 S. Ct. 1823, 1828 (2015) ("In determining the contours of an ERISA fiduciary's duty, courts often must look to the law of trusts."); *Cent. States, Se. & Sw. Areas Pension Fund v. Cent. Transp., Inc.*, 472 U.S. 559, 570 (1985) ("Congress invoked the common law of trusts to define the general scope of [fiduciary] authority and responsibility" under ERISA); 120 CONG. REC. 29,932 (1974) (statement of Sen. Williams), *reprinted in* 1974 U.S.C.C.A.N. 5177, 5186 ("Despite the value of full reporting and disclosure, it has become clear that such provisions are not in themselves sufficient to safeguard employee benefit plan assets from such abuses as self-dealing, imprudent investing, and misappropriation of plan funds.”).

Congress codified the common law duty of loyalty in ERISA by requiring the fiduciary “to discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries.” ERISA § 404(a), 29 U.S.C. § 1104(a). Congress categorically barred certain transactions between the plan and parties in interest to prevent conflict of interests and self-dealing. ERISA § 406, 29 U.S.C. § 1106. Congress found that these transactions were “likely to injure the pension plan.” *Comm’r v. Keystone Consol. Indus., Inc*., 508 U.S. 152, 160 (1993).

Congress also codified the common law duty of prudence in ERISA by requiring fiduciaries to act “with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims.” ERISA § 404(a)(1)(B), 29 U.S.C. § 1104(a)(1)(B).

As the Supreme Court explained:

> It is of course true that the fiduciary obligations of plan administrators are to serve the interests of participants and beneficiaries and, specifically, to provide them with the benefits authorized by the plan. But the principal statutory duties imposed on the trustees relate to the proper management, administration, and investment of fund assets, the maintenance of proper records, the disclosure of specified information . . . .

Russell, 473 U.S. at 142-43. Consistent with the common law of trusts, when a fiduciary breaches his duty to the beneficiary, the beneficiary's injury-in-fact is the breach of the fiduciary's promise to administer and manage the plan prudently and solely in her interests, regardless of any potential economic loss. This injury—grounded in the common law of trusts—is not speculative, but real and concrete, and is sufficient injury-in-fact to support standing under *Spokeo*.

C. Because The Injury Need Not Be Economic, The Plan Participant's Right To Sue For Breaches Of Fiduciary Duties Should Not Be Conditioned On A Plan's Funding Status.

1. Under current jurisprudence, participants are like Goldilocks—they can only sue when the amount of underfunding is "just right."

Prior to *Spokeo*, if the plan was overfunded, a participant did not have standing to sue a defined benefit pension plan, regardless of the type of fiduciary breach or the amount of monetary loss. Indeed, some courts refused even to entertain requests for removal of the fiduciaries or other equitable relief. *See David v. Alphin*, 704 F.3d 327 (4th Cir. 2013); *McCullough v. AEGON USA, Inc.*, 585 F.3d 1082 (8th Cir. 2009); *Harley v. Minn. Mining & Mfg. Co.*, 284 F.3d 901 (8th Cir. 2002). The district court here extended these cases to hold that if the plan is significantly underfunded, participants do not have standing to sue, unless the recovery will substantially reduce the underfunding. *See Fletcher*, 2016 U.S. Dist. LEXIS 20472, at *6-8.

Participants are left in an untenable position. Under the district court's rationale, participants will never able to bring a lawsuit for any breach of fiduciary duty concerning the Central States Pension Plan because of its unprecedented underfunding of $16 billion. Indeed, the district court's rationale would not consider a recovery of even $100 million sufficient to substantially reduce the underfunding, leaving the Central States Pension Fund fiduciaries and their service providers effectively immune from suit. Moreover, when there is a breach of loyalty, like in this case, participants cannot even sue to remedy the fiduciary's self-dealing through disgorgement of any profit and/or removal of the fiduciary. Instead, participants are left in a quandary similar to Goldilocks;[5] they can only sue when the amount of the underfunding is just right. This is not the purpose of Article III standing.

2. Funding status can significantly fluctuate, leading to absurd results as to whether participants can sue to remedy fiduciary breaches.

When a defined benefit plan is underfunded and a fiduciary breaches her duty to the plan by choosing an imprudent investment that results in a loss to the

[5] In *The Three Bears*, a little girl named Goldilocks finds a house owned by three bears. Each bear has its own preference of food and beds. After testing all three examples of both items, Goldilocks determines that one of them is always too much in one extreme (too hot or too large), one is too much in the opposite extreme (too cold or too small), and one is "just right."

plan, there is no question that the risk of the plan having insufficient assets to pay benefits is increased. And, there is no doubt that participants suffer an injury-in-fact due to that increased risk. However, that is not the only type of injury-in-fact that participants may suffer when fiduciaries breach their duties. *See infra* Section I.C.3. Relying on plan funding status alone leads to absurd results, such that participants cannot remedy fiduciary breaches that cause a loss to the plan or cause the plan to be imprudently managed.

The funding status of a plan is based on actuarial formulas that only give a momentary snapshot into the financial health of a plan that is in constant fluctuation. Contribution obligations and plan funding can change drastically within hours, depending upon economic factors and investment performance. Even assuming that a plan was overfunded at the time of the breach or lawsuit, there is no guarantee that the plan will remain overfunded or that participants will be paid all of the defined benefit as promised.[6] Trilbe Wynne, *Corporate pension funding status rises to highest level since 2007*, PENSIONS & INVESTMENTS (Apr. 28, 2014), http://www.businessinsurance.com/article/20140428/NEWS03/140429850.

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[6] Although the Pension Benefit Guaranty Corporation (PBGC) insures private defined benefit pension plans, it caps the amount of benefits it pays, limits the types of benefits it pays, and restricts the distribution options from a plan it terminates. 29 U.S.C. § 1322. Thus, the PBGC provides only a minimum guarantee of benefits.

Measurement of a defined benefit plan's assets and liabilities is much more art than science. On the asset side of the equation, plan assets are estimated to reflect the market value of assets that may be subject to dramatic fluctuation due to: risky financial instruments or reactions of the stock market to economic news, *S&P 500 Historical Annual Returns from 1927-2015*, http://www.macrotrends.net/2526/sp-500-historical-annual-returns (last visited June 22, 2016); changes in monetary policy, *see, e.g.*, Ben S. Bernanke & Kenneth N. Kuttner. *What Explains the Stock Market's Reaction to Federal Reserve Policy*?, 60 J. FIN. 1221 (2005); and trade deficits or potential legislation. *See* Mark Carlson, *A Brief History of the 1987 Stock Market Crash with a Discussion of the Federal Reserve Response* (Nov. 2006), https://www.federalreserve.gov/pubs/feds/2007/200713/200713pap.pdf. In addition, certain plan assets may be inherently difficult to value, such as real property, hedge funds, private equity funds, and other unique and infrequently traded assets. Dana Muir, *ERISA and Investment Issues*, 65 OHIO ST. L.J. 199, 218 (2004). On the liability side of the equation, a defined benefit plan's obligations depend upon estimates of many variables. For example, workforce turnover, participant longevity, future compensation levels, and age at retirement all affect a defined benefit plan's liabilities, but are incapable of exact prediction. *Id.* Once the plan predicts its future liabilities, it must discount those liabilities to a present value, using an estimated interest rate. *Id.*

Defined benefit plan average funding ratios[7] demonstrate these dramatic fluctuations. The average funding ratio for the 100 largest U.S. corporate defined benefit plans ranged from 93.6% in 2005, rising to 108.6% in 2007, and then dropping to 79.1% in 2008, after the Great Recession. Wynne, *supra*. Average funding ratios of all defined benefit pension plans that the PBGC insures have fluctuated from a high of 144% in 2000 to a low of 72% in 2012. Data Book Listing, *PBGC's Single-Employer Program, Funding of PBGC-Insured Plans (1980-2013) Single-Employer Program* 47, Table S-44, http://www.pbgc.gov/documents/2014-data-tables-final.pdf.

Harley v. Zoesch, 413 F.3d 866 (8th Cir. 2005), aptly illustrates these vicissitudes of defined benefit plan valuation. Based on the record evidence, the *Harley* Court determined that 3M's pension plan was overfunded at the time of the alleged breach in 1990. *See id.* at 869-70. By 2002, 3M's plan was underfunded by approximately $600 million dollars, even though 3M had contributed more than $800 million to the plan that year. Muir, 65 OHIO ST. L.J. at 218.

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[7] The funded ratio of a pension plan equals a value of assets in the plan divided by a measure of the pension obligation. Contribution patterns and investment returns are designed to achieve 100% funding. Am. Acad. of Actuaries, *The 80% Pension Funding Standard Myth* (July 2012), http://www.actuary.org/files/80_Percent_Funding_IB_071912.pdf.

Ultimately, because of the fluctuating funding status of plans, underfunding should not be the only measure of injury-in-fact to determine participant standing. Through § 502(a)(2), 29 U.S.C. § 1132(a)(2), Congress made clear that it did not intend for the rights of plan participants and beneficiaries to sue for breach of fiduciary duties to ebb and flow with the constant change of the status of a plan's funding, but rather that their ability be a fixed right used to rectify fiduciary malfeasance. *See Russell*, 473 U.S. at 142-43.

3. When a fiduciary breaches its trust to plan participants through misuse and mismanagement of plan assets, participants should be able to sue to obtain an appropriate remedy to rectify that breach of trust.

ERISA creates a legally protected interest in having a fiduciary properly manage plan assets, even though *direct* economic harm to the participants may not always result from such a breach. ERISA remedies any losses resulting from a breach of that duty by having those losses returned to the plan. By breaching her fiduciary duties, the trustee increases the risk that participants will not receive their expected benefits in the future and increases the risk that the plan will not be prudently run. That is enough to satisfy Article III's injury-in-fact requirement.

An illustrative hypothetical aptly demonstrates the importance of the right of a plan participant to sue a fiduciary for breach of its fiduciary duty. Take the case of a plan fiduciary that goes to Las Vegas and gambles with some of the plan's assets. Assume the fiduciary gambles with $1 million of the plan assets and loses it all. The plan participants should be able to sue the plan fiduciary for breach of the duty of loyalty because she is misusing plan assets by self-dealing. The participants should be able to recover the loss to the plan, regardless of the plan's funding status.

In a slight variation on the hypothetical, the fiduciary goes to Vegas to gamble but neither loses nor wins money and returns the entire $1 million to the plan. The participants should be able to sue the fiduciary for breach of her duty of loyalty due to self-dealing, regardless of the plan's funding status. At minimum, the participants should be able to obtain the removal of the fiduciary and any revenue lost during the period when the fiduciary was using the plan's assets.

Finally, take the case of the plan fiduciary that goes to Vegas, gambles with $1 million of the plan's assets, and doubles the money to $2 million. The fiduciary returns $1 million to the plan. The participants should be able to sue the fiduciary for breach of the duty of loyalty and request that the court order the fiduciary to disgorge the profit of $1 million that she made from the use of the plan's assets, regardless of the plan's funding status.

Under all three scenarios, plan participants should have standing to sue the plan fiduciary for breach of the duty of loyalty under § 502(a)(2) of ERISA. Whether the plan is overfunded or underfunded is irrelevant as to whether the fiduciary has breached her duty of loyalty by misusing the plan assets for her own use, that is, by self-dealing. In the three hypotheticals, the remedies would be different because the injury is different. Clearly, the fiduciary must return the plan's assets, but only in hypothetical number one was there an actual loss to the plan. In hypothetical number three, the fiduciary made a profit on the use of the plan's assets, so in that case the fiduciary must disgorge her profits to the plan. In all three hypotheticals, the court could remove the fiduciary and appoint an independent fiduciary in her place. Regardless, the participants have an injury-in-fact because of the breach of trust, and the plan's funding status bears no relationship to that injury.

Congress designed the fiduciary duty provisions of ERISA to protect against the misuse and mismanagement of plan assets, that is, to guarantee, to the extent possible, a plan free from fiduciary malfeasance. Although Congress was certainly concerned with the tangible monetary loss that comes with plan mismanagement, Congress was also concerned with the increased *risk* of monetary loss to plans that results when fiduciaries engage in the misuse and mismanagement of plan assets. *See supra* Section I.B. Congress recognized that misuse and mismanagement of plan assets increases the risk that plans will be unable to make good on the promise of benefits that defined benefit plans create. *Id.* Therefore, even in the final scenario where the plan has gained from the fiduciary's gambling spree, the focus should not be on monetary gain or loss, or the plan's funding and its ability to absorb a loss. Instead, the focus should be on whether or not the fiduciary has acted in a manner that disloyally or imprudently placed plan assets at *risk*. It is clear that in any of the above scenarios the plan fiduciary put plan assets in jeopardy and acted in a manner inconsistent with the fiduciary duties required under ERISA.

Overfunding does not affect the basic fiduciary obligations outlined in sections 404 and 406 of ERISA. There is no exemption in ERISA for fiduciaries of an overfunded plan to self-deal in the plan assets or make imprudent decisions. It makes no sense to condition the ability to sue for a breach of fiduciary duty on the plan's funding status where the injury is the abuse of trust. Congress wanted to make sure that assets would be available for the payment of benefits and that the plan would be properly managed. If a breach of fiduciary duty is alleged and can be proven, then the plan should be able to recover for the loss from that breach, regardless of its current funding status.

In sum, a proper understanding of participant and beneficiary rights in a defined benefit plan accepts that those rights consist of far more than just a simple right to receive a stream of payments at some time in the future. Instead, as participants in an ERISA-regulated trust, participants enjoy a rich array of legal rights. These rights include a right held by the entire cohort of participants to have all of the plan assets used exclusively for their benefit and invested prudently and a right to membership in a plan free of the types of fiduciary fraud and self-dealing that pre-dated ERISA. *See* Muir, 65 OHIO ST. L.J. at 218. Fiduciaries that, through breach of their statutorily-imposed duty, impinge on any one of these rights do cause harm—and, thus, injury-in-fact to the legal rights of participants that may be remedied by monetary and injunctive relief. *See supra* Section I.B.2., at 11; *Russell*, 473 U.S. at 140 n.8 ("the crucible of congressional concern was misuse and mismanagement of plan assets by plan administrators and that ERISA was designed to prevent these abuses in the future."). This injury-in-fact is sufficient under *Spokeo*.

In this case, Plaintiff alleges that Convergex double charged the plan for its trading fees. Overcharging for services violates the most basic of fiduciary duties: self-dealing or getting something for nothing. *See, e.g.*, *Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 596 (8th Cir. 2009) (concluding fiduciary may have liability for breach of fiduciary duty where service provider fees exceeds the value of services rendered). It is exactly this type of violation that Congress — through ERISA's fiduciary provisions and the common law of trusts — wanted participants to have the ability to remedy. *Spokeo* permits this plaintiff to go forward with his claims.

II. CONGRESS AUTHORIZED ALL ENUMERATED PARTIES IN SECTION 502(A)(2) OF ERISA TO FILE IN A REPRESENTATIVE CAPACITY ON BEHALF OF THE PLAN.

When fiduciaries breach their duties, participants suffer various injuries. In order to recover for violations of ERISA and the terms of the plan, Congress gave the Secretary of Labor, participants, beneficiaries, and fiduciaries the tools necessary to sue on behalf of the plan. In *Varity Corp. v. Howe*, 516 U.S. 489 (1996), the Court acknowledged that § 502(a)(2) of ERISA was the only civil enforcement provision focused on fiduciary obligations related to the plan's financial integrity. 516 U.S. at 512; *see also* S. Rep. No. 93-127, at 35 (1973), *reprinted in* 1 LEGISLATIVE HISTORY OF THE EMPLOYEE RETIREMENT INCOME SECURITY ACT 621 (1976) (describing Senate version of enforcement provisions as intended to "provide both the Secretary and participants and beneficiaries with broad remedies for redressing or preventing violations of [ERISA]"); H.R. Rep. No. 93-533, at 17 (1974), *reprinted in* 2 LEGISLATIVE HISTORY OF THE EMPLOYEE RETIREMENT INCOME SECURITY ACT 2364 (describing House version in identical terms).

In *Russell*, the Court acknowledged that the inclusion of the Secretary of Labor as one of the four classes of party-plaintiffs in § 502(a)(2)[8] demonstrates that

[8] Section 502(a)(2) states that "[a] civil action may be brought . . . by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section

"actions for breach of fiduciary duty [are to] be brought <u>in a representative capacity on behalf of the plan as a whole.</u>" 473 U.S. at 142 n.9 (emphasis added). Indeed, the common interest shared by all four classes is the "financial integrity of the plan." *Id.*

Significantly, the statute makes no distinction among the entities authorized to sue for mismanagement of plan assets. The reason for the absence of such a distinction is simple: Congress was concerned with the manner in which fiduciaries administered and managed their plans. Moreover, Congress had particular trepidation over misuse and mismanagement of plan assets by fiduciaries. *Id.* at 140 n.8. These statutory provisions clearly express Congress's intent that private litigants may serve along with DOL to prosecute claims against plan fiduciaries arising from breaches of the fiduciary liability standards imposed under Section 404 of ERISA. *See* H.R. Rep. No. 93-1280 (1974) (Conf. Rep.), *reprinted in* 1974 U.S.C.C.A.N. 5037, 5107. Quite simply, no one can police a pension plan as well as its participants.

Moreover, if the four classes of party-plaintiffs could not sue for losses to the plan, there would be a significant gap in ERISA's enforcement provisions. It seems counterintuitive that Congress would have passed a participant protective

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409." 29 U.S.C. § 1132(a)(2). ERISA § 409(a) establishes that breaches of "any of the responsibilities, obligations or duties imposed upon fiduciaries" may give rise to a claim. 29 U.S.C. § 1109(a).

statute with no legal standing for participants to actually pursue the remedy Congress specified. As the district court in *Bendaoud v. Hodgson*, 578 F. Supp. 2d 257 (D. Mass. 2008), interpreted *Russell*:

> [R]equiring all plan participants to wait until they had an individuated injury would be to require them to wait until it was too late. Because any individual plaintiff might still be able to draw her full benefits from the remainder of the fund's assets upon retirement, an individual plaintiff could only demonstrate an immediate harm where the loss was so grievous that it threatened the financial integrity of the entire defined benefit plan. *See* [*Russell*, 473 U.S.] at 142-43 & n.9; *see also LaRue*, 128 S. Ct. at 1025 (clarifying *Russell'*s holding). Because ERISA was meant to reach breaches of fiduciary duty that did not endanger the entire plan, the Court interpreted the statute as permitting any participant in a defined benefit plan to sue "on the plan's behalf" for any fiduciary breach — that is, to undo the damage that had been done to the pool of assets, however minuscule an individual share may be. *See Russell*, 473 U.S. at 142.

578 F. Supp. 2d at 265.

The language of ERISA § 502(a)(2) shows Congress's intent to define standing broadly for participants in employee benefit plans by creating an actionable statutory entitlement to prudent, loyal management of funds for each participant. When suing "on behalf of" the plan, the participant is recovering not only his proportion of the plan's loss, but the entire amount by which the plan assets were impaired as well as injury due to the abuse of trust. *Russell*, 473 U.S. at 139-40; *accord*, *LaRue v. DeWolff, Boberg & Assocs*., 552 U.S. 248 (2008).

Together § 502(a)(2) and § 409(a) provide broad relief — but only to the plan. *Russell*, 473 U.S. at 140, 144 (acknowledging that § 409 expressly authorizes only plan-based relief). These sections permit the recovery of "any losses to the plan resulting from each" breach of fiduciary duty, restoration to the plan any profits the fiduciary made through the use of plan assets, and other equitable or remedial relief within the court's discretion, including removal of such fiduciary. 29 U.S.C. §§ 1109(a), 1132(a)(2).

CONCLUSION

For the foregoing reasons, the Court should reverse the district court's decision.

Dated: June 27, 2016

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because the brief contains 5527, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface and type style requirements of Fed. R. App. P. 32(a)(5) and 32(a)(6), respectively, because this brief has been prepared in a proportionately spaced typeface using Microsoft Word 2010 in Times New Roman 14-point font.

Dated: June 27, 2016

/s/ Dara S. Smith
Dara S. Smith

STATEMENT OF RELATED CASES

There are no known related cases pending in this Court.

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Second Circuit using the appellate CM/ECF system on June 27, 2016.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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