No. ________

In The
Supreme Court of the United States

EDWARD PUNDT, Individually, and as Representative of Plan Participants and Plan Beneficiaries of the VERIZON MANAGEMENT PENSION PLAN,

Petitioner,

v.

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

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1001, *et seq.*, codifies the common law of trusts by requiring pension plans to hold plan assets in trust, thereby providing participants with an equitable interest in the trust assets and standing to sue if fiduciaries mismanage such assets. Five circuits disagree about when ERISA defined benefit plan participants have Article III standing to enforce ERISA provisions and have created various inconsistent standards for determining standing. In fact, the United States has filed at least seven amicus curiae briefs in the courts of appeals on this issue and each time disagreed with the ultimate decision of the circuit court. The consequences of this circuit disarray are of grave importance to over 40 million people whose retirement benefits are contingent on the proper management of the $3 trillion in pension assets held in ERISA defined benefit plans.

The question presented is:

Whether a participant in an ERISA defined benefit plan has Article III standing to sue to challenge an ERISA violation, such as a fiduciary breach causing losses to the plan's assets, regardless of loss to her individual benefits?

PARTIES TO THE PROCEEDINGS

Petitioner Edward Pundt represents a certified class (the "Non-Transferee Class") of approximately 50,000 similarly situated plan participants and their beneficiaries who remain in the ongoing Verizon Management Pension Plan after an annuity transaction transferred 41,000 other retirees into a single group insurance annuity.

William Lee and Joanne McPartlin were co-parties with Petitioner Pundt in the Fifth Circuit and district court proceedings, where they represented a certified class of retirees who were transferred out of the Plan and into the single group insurance annuity (the "Transferee Class"). Lee and McPartlin are not named in this petition because their claims presented issues of first impression and thus denial of such claims did not create a conflict with another court of appeals as required by Rule 10. Former co-parties Lee and McPartlin are represented by the same counsel of record as Petitioner Pundt.

Respondents are Verizon Communications, Inc., Verizon Corporate Services Group, Inc., Verizon Employee Benefits Committee, Verizon Investment Management Corporation, and Verizon Management Pension Plan.

CORPORATE DISCLOSURE STATEMENT

Petitioner is an individual and does not fall within the scope of Supreme Court Rule 29.6's corporate disclosure statement.

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The Fifth Circuit's unpublished opinion is reprinted at App. 1 and is available at 2015 WL 4880972 (5th Cir. August 17, 2015). The Fifth Circuit's unpublished order dated September 16, 2015 denying panel rehearing is reprinted at App. 96. The district court's order granting Respondents' motion to dismiss is reprinted at App. 44 and is reported at 2014 WL 1407416 (N.D. Tex. April 11, 2014). The district court's order granting Respondents' motion to dismiss is reprinted at App. 67 and is reported at 954 F.Supp.2d 486 (N.D. Tex. 2013).

STATEMENT OF JURISDICTION

The Fifth Circuit entered judgment on August 17, 2015 and denied a timely petition for panel rehearing on September 16, 2015. App. 1. This Petition was timely filed within 90 days of that ruling. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article III, Section 2 of the United States Constitution provides in relevant part: "The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States" and to certain "controversies."

Section 404(a)(1) of ERISA, 29 U.S.C. § 1104(a)(1), states, in pertinent part:

(a) Prudent man standard of care

(1) Subject to sections 403(c) and (d), 4042, and 4044, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and –

(A) for the exclusive purpose of:

(i) providing benefits to participants and their beneficiaries; and

(ii) defraying reasonable expenses of administering the plan;

(B) with the care, skill, prudence, and diligence under the circumstances 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;

* * *

(D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this subchapter and subchapter III of this chapter.

Section 502(a) of ERISA, 29 U.S.C. § 1132(a), states, in pertinent part:

(a) Persons empowered to bring a civil action.

A civil action may be brought –

*   *   *

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 409 of this title;

(3) by a participant, beneficiary, or fiduciary

(A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or

(B) to obtain other appropriate equitable relief

(i) to redress such violations or

(ii) to enforce any provisions of this subchapter or the terms of the plan;

*   *   *

Section 409(a) of ERISA, 29 U.S.C. § 1109(a), states:

Liability for breach of fiduciary duty

(a) Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter shall be personally liable to make good to such plan any losses to the plan resulting from each such

> breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary. A fiduciary may also be removed for a violation of section 411 of this title.

STATEMENT

ERISA embodies an elaborate statutory scheme designed to assure that defined benefit pension plans nationwide actually pay the benefits they promise. ERISA codifies the common law of trusts by requiring pension plans to hold plan assets in trust, thereby providing participants with an equitable interest in the trust assets and standing to sue if fiduciaries mismanage those assets. The rights of trust beneficiaries to sue a fiduciary for breach of trust have existed in English common law for centuries. The question presented, whether a participant in an ERISA defined benefit pension plan has Article III standing to sue for a fiduciary breach without an individualized loss of benefits, is an important, recurring question that has fractured the courts of appeals. Whether a fiduciary breach under ERISA is an injury in fact has been addressed by five circuits in at least eight cases, each finding different requirements for Article III standing. The consequences of this circuit disarray affect over $3 trillion in pension assets held on behalf of over 40 million people. Unless this Court steps in, the expectations of these pension plan participants and beneficiaries will depend on geography and vary case by case, instead of having the unified national standards intended by ERISA. Circuit courts have acted atextually and ahistorically by adding various requirements for participants to bring suit to redress mismanagement of their pension plans. Such requirements, which differ from circuit to circuit, are neither in ERISA nor in trust law. These decisions undermine the text and intent of ERISA and the repeated directions of this Court to look to trust law in ERISA cases.

Because of the disarray in the circuit courts on this question of significant practical importance, coupled with the fundamental error of the Fifth Circuit in this case, this Court's review is warranted.

I. ERISA's Statutory Scheme

ERISA's fiduciary duties are derived from the common law of trusts. *Varity Corp. v. Howe*, 516 U.S. 489, 496 (1996) ("[R]ather than explicitly enumerating all of the powers and duties of trustees and other fiduciaries, Congress invoked the common law of trusts to define the general scope of their authority and responsibility"). ERISA Section 403 requires that the assets of a covered pension plan "be held in trust by one or more trustee" and for the exclusive benefit of participants and beneficiaries until the plan has terminated and all liabilities have been paid. 29 U.S.C. § 1103. *Mead Corp. v. Tilley*, 490 U.S. 714, 718 (1989). ERISA imposes on plan fiduciaries the duties of prudence, undivided loyalty, diversification, and adherence to plan documents. 29 U.S.C. § 1104(a)(1)(A)-(D). ERISA supplements these fiduciary duties with specific prohibitions against self-dealing and transactions with parties in interest. 29 U.S.C. § 1106(a)-(b). As in trust law, Section 409 provides that any fiduciary "who breaches any of the responsibilities, obligations or duties imposed upon fiduciaries by this title shall be held personally liable" for losses, disgorgement, or other equitable remedies, such as removal. 29 U.S.C. § 1109. Section 502(a)(2) specifically provides plan participants and beneficiaries the right to assert claims against a fiduciary under Section 409. 29 U.S.C. § 1132(a)(2).

II. Factual Background And District Court 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"). The approximately 50,000 participants and beneficiaries not covered by the annuity remain part of the ongoing Plan (the "Non-Transferee Class"). The second amended complaint alleges several breaches of fiduciary duty by Petitioner on behalf of the Non-Transferee Class. Second Amended Complaint, ¶¶ 130-136 reprinted at App. 98. For example, Petitioner alleges that Respondents violated Section 404 of ERISA by depleting the Plan's portfolio of fixed income securities and private equity investments in order to minimize Verizon's costs for the annuity transaction. *Id.* at

¶ 135. Specifically Respondents breached their duties of diversification, prudence, loyalty, and compliance with the plan documents, including the Plan's investments guidelines and asset allocation policies. Respondents' many breaches of fiduciary duty left the Plan in a significantly less stable financial condition. *Id.* at ¶ 134.

The Non-Transferee Class also alleged that Respondents violated their duty of prudence and duty to follow the terms of the plan documents by using the Plan's assets to pay unreasonable amounts of corporate expenses in connection with the annuity transaction. *Id.* at ¶ 132. Specifically, Verizon spent $1 billion of Plan assets on fees for lawyers, accountants, consultants, and other third parties related to the annuity transaction, none of which were "reasonable expenses" of administering the Plan. *Ibid.* As a consequence of these many breaches of fiduciary duty, the Plan was left in an unstable financial condition and underfunded by almost $2 billion, or only about 66% funded. *Id.* at ¶ 45.

The Non-Transferee Class represented by Petitioner Pundt asserts a claim for all appropriate equitable relief under Section 502(a)(2), including the restoration of all losses to the Plan caused by Respondents' many breaches of fiduciary duty and the disgorgement of any ill-gotten profits Respondents obtained through the use of the Plan's assets.

The district court granted Respondents' motion to dismiss. App. 67. The court held that, to show injury in fact, the class had to show a loss to participants' benefit payments, not merely loss of Plan assets. App. 88-92 (954 F. Supp. 2d at 497-98). The court rejected Petitioner's arguments that "ERISA creates a legal right to a properly-managed plan and a corresponding cognizable injury for breach of a fiduciary's management duties." App. 89 (954 F. Supp. 2d at 497). The district court dismissed the Non-Transferee Class's claims in the Second Amended Complaint with prejudice for the same reasons. App. 66 (2014 WL 1407416 at *2).

III. The Court Of Appeals' Decision

The Fifth Circuit affirmed the dismissal. App. 3 (2015 WL 4880972 at *1). The court of appeals found that fiduciary misconduct, even if in violation of ERISA, by itself did not present individually cognizable harm to a defined benefit plan participant. App. 35-37. The injury to participants, the court found, was too attenuated for standing purposes because of stopgaps that may prevent fiduciary mismanagement from impacting a participant's individual benefit payment, including the employer's obligation to cover any underfunding and the protective guaranty (up to a statutory maximum) of the Pension Benefit Guaranty Corporation (PBGC). *Ibid.* The court suggested that a viable claim of fiduciary mismanagement of plan assets should include an allegation of plan termination or an inability by Verizon to address a shortfall. App. 38. The Fifth Circuit further held that standing does not turn on the Plan's status as underfunded. *Ibid.* The court did not consider trust law.

Finally, the court also rejected the arguments that Petitioners had standing under theories of injury to participants via an invasion of their statutory right to proper plan management and of standing in a representative capacity for injury to the Plan. App. 38-43.

Petitioners filed a petition for rehearing. The court of appeals denied the petition.

REASONS FOR GRANTING THE PETITION

The Fifth Circuit's decision that Petitioner does not have constitutional standing is premised on a profound misunderstanding of ERISA and its trust law antecedents: that participants and beneficiaries of an ERISA-governed pension plan do not have a legally cognizable interest in the plan's assets, despite the fact that trust law dictates that beneficiaries (here the participants) have an equitable interest in the trust assets. This decision is contrary to the position of the Department of Labor (DOL) and the PBGC, the two main agencies tasked with administering ERISA, as evidenced by the many amicus curiae briefs filed by the two agencies. *See, e.g.*, App. 103-108, Brief of the Acting Secretary of Labor as Amicus Curiae in Support of Petition for Rehearing En Banc or Panel Rehearing, *David v. Alphin*, 704 F.3d 327 (4th Cir. 2013) (No. 11-2181); Brief of the Pension Benefit Guaranty Corporation in Support of Appellants' Petition for Rehearing En Banc or Panel

Rehearing, *David v. Alphin*, 704 F.3d 327 (4th Cir. 2013) (No. 11-2181).[1]

The government's views are of particular importance on this issue because the PBGC insures the benefits for all ERISA defined benefit plans. As the PBGC has stated, "pension plan underfunding, which may be exacerbated by fiduciary breaches, can have a direct financial impact on the agency and its stakeholders . . . ." App. 105. Moreover, the PBGC itself is gravely underfunded, with a net deficit of $76.3 billion as of the end of September 2015, which

[1] The Secretary of Labor has filed at least four other amicus curiae briefs on the issue of Article III standing for participants in an ERISA defined benefit plan. *See* Brief of the Secretary of Labor as Amicus Curiae in Support of Plaintiffs-Appellants Urging Reversal, *David v. Alphin*, 704 F.3d 327 (4th Cir. 2013) (No. 11-2181) available at http://www.dol.gov/sol/media/briefs/david(A)-12-28-2011.pdf; Brief of the Secretary of Labor as Amicus Curiae in Support of Appellants' Petition for Rehearing and Rehearing En Banc, *Harley v. Minnesota Mining and Mfg. Co.*, 284 F.3d 901 (8th Cir. 2002) (Nos. 00-2214, 01-1213) available at http://www.dol.gov/sol/media/briefs/harleyvMMM(A-R)-5-22-2002.pdf; Brief of the Secretary of Labor as Amicus Curiae in Support of Appellants' Petition for Rehearing En Banc, *McCullough v. AEGON USA, Inc.*, 585 F.3d 1082 (8th Cir. 2009) (No. 08-1952) available at http://www.dol.gov/sol/media/briefs/mccullough(A)-12-01-2009.pdf; and Brief of the Secretary of Labor as Amicus Curiae in Support of Appellants and Reversal, *Harley v. Minnesota Mining and Mfg. Co.*, 284 F.3d 901 (8th Cir. 2002) (No. 00-2214) available at http://www.dol.gov/sol/media/briefs/harleyvMMM(A)-6-12-2000.pdf. The PBGC has filed at least one other amicus curiae brief on this issue. *See* Brief of the Pension Benefit Guaranty Corporation in Support of the Appellants, *David v. Alphin*, 704 F.3d 327 (4th Cir. 2013) (No. 11-2181).

is a record high. *Pension Benefit Guaranty Corporation, FY 2015 Annual Report (November 16, 2015)* available at http://www.pbgc.gov/Documents/2015-annual-report.pdf.

Currently, there is mass confusion in the circuit courts on the issue of when ERISA defined benefit participants have standing to sue. This confusion leaves the 40 million participants in ERISA defined benefit plans guessing as to whether their rights under ERISA are meaningless and leaves the $3 trillion of retirement assets held in these plans unprotected from fiduciary mismanagement.

Because ERISA's fiduciary enforcement provisions merely codify a right to sue for a fiduciary breach that has been recognized in the common law of trusts for centuries, Article III's requirement that judicial power be restricted to "Cases or Controversies" is clearly satisfied. As this Court has stated, "We have often said that history and tradition offer a meaningful guide to the types of cases that Article III empowers federal courts to consider.") *Sprint Commc'ns Co., L.P. v. APCC Services, Inc.*, 554 U.S. 269, 274 (2008). In fact, this Court has 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." *Cigna Corp. v. Amara*, 563 U.S. 421, 423 (2011).

This Court should reverse the Fifth Circuit in this case, clarifying that a participant in an ERISA defined benefit plan has Article III standing to sue for a fiduciary breach causing losses to the plan's assets, without regard to whether the participant has suffered an individual loss of benefits. The Fifth Circuit decision, left as controlling precedent, erases ERISA's fiduciary duty provisions, which have been recognized as the "highest [duties] known to the law." *Kujanek v. Houston Poly Bag I, Ltd.*, 658 F.3d 483, 489 (5th Cir. 2011) (citations omitted).

I. THE COURTS OF APPEALS ARE DIVIDED ON WHEN A PARTICIPANT IN A DEFINED BENEFIT PLAN CAN SUE FOR BREACH OF FIDUCIARY DUTY

The circuit courts are in disarray on the question of whether and when a participant in a defined benefit pension plan has Article III standing to sue for breach of fiduciary duty under ERISA. The threshold requirements, and even the basic inquiry used to determine such standing, differ from circuit to circuit – or in some instances from case to case within the same circuit. The conflicting standards applied by the courts of appeals lead to inconsistent outcomes and undermine ERISA's purpose of creating nationally uniform rights and duties for participants and fiduciaries. The Fifth Circuit in the instant case held that Petitioner Pundt did not have standing to pursue his fiduciary breach claims even though the fiduciary Respondents' mismanagement of his Plan caused $1 billion in losses, caused the Plan to be non-diversified, and left the Plan in a far less stable financial condition and underfunded by almost $2 billion. By contrast, under precedent in the Second, Third, Fourth, and Eighth Circuits, Petitioner would have standing to pursue his claim – though based on a scattershot set of requirements differing in each circuit.

While the Fifth Circuit here, like the Third and Eighth Circuits, held that fiduciary misconduct without direct impact on participants' individual benefits is insufficient injury to establish constitutional standing, the Second and Fourth Circuits have found that participants have standing to enforce ERISA's fiduciary provisions without showing they have suffered harm beyond the fiduciary breach itself.

Adding to the confusion, even those circuits that require a demonstration of risk to individual benefits disagree on the proper threshold to show sufficient risk to confer standing: the Third Circuit requires that pension plans be less than 100% funded under *all* statutory accounting methods in order to show sufficient risk to benefits; the Eighth Circuit requires that pensions be sufficiently underfunded to require additional employer contributions under *any one* statutory accounting method; while the Fifth Circuit in this case affirmed dismissal of claims involving a 66% funded plan, finding underfunding *irrelevant altogether*.

In yet another divergence, the circuits are divided on whether trust law permits beneficiaries to sue trustees for fiduciary breaches regardless of whether a beneficiary has lost benefits, and whether that principle holds true in the ERISA context. The Seventh Circuit holds that trust law permits beneficiaries to sue with allegations of only a trustee's breach, and the Fourth Circuit applies that principle to ERISA. In direct tension with those rulings, the

Eighth and Ninth Circuits found in ERISA cases that under trust law principles ERISA fiduciaries do not owe a duty to participants permitting them to sue for breaches.

This Court should grant review to stem this growing disorder and clarify the proper standing requirements for participants and beneficiaries to bring ERISA claims.

A. The Circuits Are Divided On How Badly A Fiduciary Can Mismanage A Defined Benefit Pension Plan Before The Risk To Participants Is Sufficient To Confer Standing

In this case, the Fifth Circuit held that, in order to sue for fiduciary breach under ERISA, defined benefit plan participants must show imminent risk to individual benefits, regardless of the pension plan's funding level. App. 35-39. The Fifth Circuit found that, even though the fiduciaries squandered a billion dollars of the Plan's assets on unreasonable corporate expenses, which left the Plan underfunded by almost $2 billion (66% funded), that severe underfunding was irrelevant to standing. According to the Fifth Circuit, "regardless of whether the plan is allegedly under- or over-funded, 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." App. 38. The Fifth Circuit proposed that standing would require allegations of imminent risk of default coupled with an inability by the employer to address a shortfall. *Ibid.*

The Fifth Circuit in this case was the first to hold that alleged fiduciary breaches causing a defined benefit pension plan to be underfunded do not sufficiently injure participants to confer standing.[2] This holding directly conflicts with holdings of the Eighth and Third Circuits, where Petitioner Pundt would have had standing because both those circuits focus on the funded status of the plan as determinative of the injury in fact question. However, while both the Eighth and Third Circuits require a plan to be underfunded to establish injury in fact, they differ in their approach to measuring funded status. The Third Circuit in *Perelman v. Perelman*, 793 F.3d 368, 375 (3d Cir. 2015), held that "[w]here a plan's assets exceed its liabilities under a statutorily accepted accounting method, it passes muster as a matter of law," such that no participant of a defined benefit plan can establish an actual injury resulting from any alleged fiduciary breach unless the plan is

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[2] In *David v. Alphin*, 704 F.3d 327, 338 (4th Cir. 2013), the Fourth Circuit came to a similar result where alleged fiduciary breaches diminished plan assets but the plan remained overfunded, suggesting that standing would require showing that the plan was underfunded, at risk of termination, *and* that the PBGC would not pay participants' full benefits. But even there, the Fourth Circuit focused on the plan's funding level as a key determinant of whether "[m]isconduct by the administrators . . . enhances a risk of default by the entire plan." *Ibid.* (quoting *LaRue v. DeWolff, Boberg & Associates, Inc.*, 552 U.S. 248, 255 (2008)).

underfunded.[3] Under *Perelman*, showing that a plan is underfunded by only one of the many possible analytical approaches is not enough for standing; the plan must be underfunded by *all* statutory accounting methods. *Ibid.* By contrast, the Eighth Circuit in *Harley v. Minnesota Mining and Mfg. Co.*, 284 F.3d 901 (8th Cir. 2002), required proof of "absence of a substantial surplus under *any* relevant valuation

[3] *Perelman* also showcases another fault line along which circuits handling ERISA standing diverge, adding to the cacophony of law that is ripe for this Court to standardize. The Third Circuit's standing requirements differ depending on the type of ERISA relief sought: injunctive relief, restitution, or disgorgement. For injunctive relief, injury for constitutional standing only requires "the defendant's violation of an ERISA statutory duty, such as failure to comply with disclosure requirements." *Perelman*, 793 F.3d at 373 (citing *Horvath v. Keystone Health Plan E., Inc.*, 333 F.3d 450, 455-457 (3d Cir. 2003)). For restitution, as stated in text, the Third Circuit requires risk of loss of individual benefits, which can be shown by underfunding. *Ibid.* For disgorgement, the Third Circuit does not require loss of individual benefits, but rather requires defendant's alleged breach of fiduciary duty, profits from the breach, and the plaintiff (as opposed to the plan) having an individual right to that profit. *Id.* at 375 (citing *Edmonson v. Lincoln Nat. Life Ins. Co.*, 725 F.3d 406, 418 (3d Cir. 2013)). The other circuits do not appear to distinguish between the standing requirements for different types of ERISA relief in this way. Notably, ERISA's text does not suggest that different standing requirements apply to different types of relief, since injunctions, restitution, and disgorgement can all be sought as "appropriate equitable relief" under both Section 502(a)(2) (via Section 409) and Section 502(a)(3). In fact, Petitioner Pundt here sought all such types of relief, and the Fifth Circuit dismissed them all under one single standing analysis, plainly diverging from the Third Circuit's trifurcated approach.

method," such that participants have standing in the Eighth Circuit if they can show the employer is required to make additional contributions under any one accounting method. *Id.* at 908 (emphasis added).

The Second Circuit and the Fourth Circuit have taken different approaches altogether. In the Second Circuit, the alleged violation of Section 404 itself is sufficient injury in fact to give participants Article III standing via ERISA's statutory grant of duties and rights. *See Fin. Instits. Ret. Fund v. Office of Thrift Supervision* [hereinafter *FIRF*], 964 F.2d 142, 148-49 (2d Cir. 1992); *L.I. Head Start Child Dev. Servs., Inc. v. Econ. Opportunity Comm'n of Nassau Cnty., Inc.* [hereinafter *LIHS*], 710 F.3d 57, 67 n.5 (2d Cir. 2013). Similarly, the Fourth Circuit, in *Pender v. Bank of America Corp.*, 788 F.3d 354, 367 (4th Cir. 2015), found that an alleged ERISA violation was sufficient injury to confer standing based in part on underlying trust law principles that "ERISA functionally imports." All three of these cases found that a fiduciary breach or other ERISA violation constituted injury in fact for standing purposes regardless of whether there was a risk of imminent financial loss to the participant's individual benefits, conflicting with the holdings of *Lee*, *David*, *Perelman*, and *Harley*.

B. The Circuits Are Divided On Whether Trust Law Permits Beneficiaries To Sue Trustees For Breaches And Whether That Principle Holds True In The ERISA Context

The Seventh Circuit in *Scanlan v. Eisenberg*, 669 F.3d 838, 844, 846 (7th Cir. 2012), held that under trust law, plaintiff Scanlan, a contingent beneficiary of the trust, "has a legally protected interest in [the] Trusts' corpus and in the proper administration of that corpus," and "it is from that equitable interest that Scanlan acquires standing to enforce the Trusts." The court found that because beneficiaries "have 'long been permitted to bring' suits to redress a trustee's breach of trust," it was "'well nigh conclusive' that Article III standing exists." *Id.* at 845 (quoting *Sprint Commc'ns*, 554 U.S. at 274 ("history and tradition offer a meaningful guide to the types of cases that Article III empowers federal courts to consider")). The Seventh Circuit further found that under trust law, "no authority requires a discretionary beneficiary to first allege that the trust corpus is insufficient to fund a distribution when bringing a claim for breach of trust." Although *Scanlan* was not an ERISA case, this Court has repeatedly recognized that ERISA's fiduciary duties are derived from the common law of trusts. *Varity Corp.*, 516 U.S. at 496 ("Congress invoked the common law of trusts to define the general scope of [ERISA fiduciaries'] authority and responsibility").

Following this Court's direction to consider the trust law underpinnings of ERISA, the Fourth Circuit in *Pender* recognized that "ERISA functionally imports traditional trust principles," and relied in part on those principles to find that plan beneficiaries can have standing to sue even without an individual loss of benefits. *Pender*, 788 F.3d at 367 (citing *Scanlan*, 669 F.3d at 845). Like *Scanlan*, *Pender* found that "[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. *Ibid.* In short, *Scanlan*'s and *Pender*'s holdings on trust law principles squarely contradict those of the Third, Fourth, Fifth, and Eighth Circuits requiring underfunding or individual loss of benefits.

The Eighth and Ninth Circuits read trust law differently. The Eighth Circuit in *Harley* finds that because "[a] particular beneficiary cannot maintain a suit for a breach of trust which does not involve any violation of duty to him," trust law does not allow beneficiaries to bring suit on behalf of the trust. *Harley*, 284 F.3d at 907 (quoting *Restatement (Second) of Trusts* § 214 cmt. b). The Ninth Circuit cited the same quote for the same proposition in *Glanton ex rel. ALCOA Prescription Drug Plan v. AdvancePCS Inc.*, 465 F.3d 1123, 1125 n.2 (9th Cir. 2006). Neither the Eighth nor the Ninth Circuit explained how a breach of fiduciary duty under ERISA "does not involve any violation of *duty to him*," *ibid.* (emphasis added), which flatly contradicts the holdings of the Seventh and Fourth Circuits that trustees and fiduciaries do owe a duty to individual beneficiaries and participants.[4] *See, e.g.*, *Scanlan*, 669 F.3d at 843-44 ("A trustee owes a fiduciary *duty to a trust's beneficiaries* . . . by virtue of the fiduciary relationship between Scanlan and the Trustee, Scanlan acquires the right to bring an action for breach of fiduciary duty" (emphasis added)). Unlike the Seventh and Fourth Circuits, the Eighth and Ninth Circuits fail to recognize that under trust law, fiduciaries owe a duty to each beneficiary, and thus fiduciaries of ERISA pension plans owe a duty to each participant.

The Fifth Circuit in this case did not even find it necessary to consider trust law at all, despite this Court's repeated instructions that "in determining the contours of an ERISA fiduciary's duty, courts often must look to the law of trusts." *Tibble v. Edison Int'l*, 135 S.Ct. 1823, 1828 (2015) (vacating and remanding the Ninth Circuit's opinion on ERISA because of its failure to consider trust law). The Fifth Circuit's failure to consider trust law has added to the disarray among the circuits' positions on ERISA standing. Given the discord among the circuits, when the courthouse doors are open to pension plan participants is anybody's guess. This Court should step in to remind the circuits, yet again, to look to trust law

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[4] The Fourth Circuit, ruling in *David* before *Pender*, also contradicted *Scanlan*'s and *Pender*'s trust law holdings by finding "no authority for the proposition that trust-law principles extend to the ERISA context to confer Article III standing" in the particular circumstance of that case. *David*, 704 F.3d at 336.

in ERISA cases, and to harmonize the ERISA standing law that is currently so fractured.

II. REQUIRING INDIVIDUAL MONETARY LOSS TO SUE FOR BREACH OF FIDUCIARY DUTY EMASCULATES SECTION 404 AND ALLOWS MISMANAGEMENT OF PENSION PLANS, PLACING TRILLIONS OF DOLLARS IN RETIREMENT ASSETS AT RISK

The Fifth Circuit's holding undermines ERISA, which this Court has recognized as a "comprehensive and reticulated statute" that provides participants with several critical protections, only one of which is the right to receive the full value of their benefits. *Nachman Corp. v. Pension Benefit Guaranty Corporation*, 446 U.S. 359, 361 (1980). As the DOL, the PBGC, and at least three circuit courts have recognized, requiring risk of loss to individual benefits to have standing effectively immunizes fiduciaries of defined benefit plans from suit, stripping millions of pension plan participants of their congressionally granted rights to protect trillions of dollars in their retirement plans.

A. The Fifth Circuit's Holding Undermines ERISA's Purpose And Subjects Pension Plan Beneficiaries To Risks Similar To Those Prior To ERISA

Congress declared that "the policy of [ERISA]" was "to protect . . . the interests of participants in employee benefit plans . . . by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans." 29 U.S.C. § 1001(b). Currently there are over $3 trillion in retirement assets held in ERISA-covered defined benefit plans and over 40 million people counting on those assets for their retirement benefits.[5] The uncertainty about when participants can sue to enforce ERISA's fiduciary provisions leaves trillions of dollars of retirement assets unprotected from fiduciary mismanagement or self-dealing.

Prior to ERISA, there was no uniform requirement that an employer put pension assets in trust[6]

[5] Justin Owens & Joshua Barbash, *Defined Benefit Plans: A Brief History*, Russell Investments (Nov. 2014), https://www.russell.com/documents/institutional-investors/research/defined-benefit-plans-a-brief-history.pdf.; Page i of *Pension Benefit Guaranty Corporation, FY 2015 Annual Report (November 16, 2015)* available at http://www.pbgc.gov/Documents/2015-annual-report.pdf).

[6] ERISA § 403(a) requires that pension plan assets "shall be held in trust by one or more trustees," and Section 403(c) requires that the assets of a pension plan shall never inure to the employer and shall be held for the exclusive benefit of participants until the plan is terminated and all liabilities have been paid. 29 U.S.C. § 1103(c).

and protect those assets with fiduciary obligations of prudence, loyalty, and diversification. Congress enacted ERISA in response to rampant problems with employers attempting to avoid paying retirement benefits to their employees. For example, when Studebaker, an automotive company, closed its Indiana plant, it cut benefits to zero for many employees and older employees received just 15 cents for every pension dollar promised. One man who worked for Studebaker for 42 years and was just two months short of retirement age received only 15% of the value of his vested benefits. Prior to ERISA, companies also routinely fired employees just before their retirement benefits vested.

To protect the retirement security of the privately employed workforce, ERISA established an elaborate statutory scheme with numerous safeguards. This Court has recognized that, in passing ERISA, "the crucible of congressional concern was misuse and mismanagement of plan assets . . . [and] ERISA was designed to prevent these abuses in the future." *Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 140 n.8 (1985) (citing 120 Cong. Rec. 29957 (1974)) ("[M]isuse, manipulation, and poor management of pension trust funds are all too frequent") ((remarks of Sen. Ribicoff); 120 Cong. Rec. 29961 (1974)). Central to ERISA's protection of plan assets are the fiduciary enforcement provisions found in Sections 401 to 414. *See* 120 Cong. Rec. 29196-97 (1974) ("These standards . . . will prevent abuses . . . by those dealing with plans"). The Fifth Circuit's holding essentially strips out all of these vital protections Congress provided to participants. The Third, Fourth, and Seventh Circuits have recognized these consequences of setting the standing bar improperly high. *See Pender*, 788 F.3d at 366-67; *Edmonson*, 725 F.3d at 415; *Scanlan*, 699 F.3d at 847.

The court's holding also undermines the nationwide uniformity of ERISA's carefully prescribed standards. Participants' legal rights to redress fiduciary mismanagement of defined benefit pension plans should not vary depending on the geographic location of their employer. Indeed, when Congress enacted ERISA, particular concern was expressed that, "[b]ecause of the interstate character of employee benefit plans," it is "essential to provide for a uniform source of law . . . for evaluating fiduciary conduct." S. Rep. No. 127, 93rd Cong. 1st Sess. 35 (1973); *see* 120 Cong. Rec. 15737 (1974) (remarks of Sen. Williams) ("The objectives of these provisions [on fiduciary obligations] are . . . to prohibit exculpatory clauses that have often been used in this field; to establish uniform fiduciary standards to prevent transactions which dissipate or endanger plan assets; and to provide effective remedies for breaches of trust.").

B. The DOL And The PBGC Have Consistently Disputed The Fifth Circuit's Position, Viewing This Issue As One Of Exceptional Importance

The government has viewed the issue in this case as one of exceptional importance. For example, the DOL has participated as amicus curiae in the courts of appeals on several occasions arguing that participants suffered "injury in fact sufficient to confer Article III standing [when] Petitioners alleged millions of dollars of losses to money held in trust on their behalf as a direct result of the fiduciary mismanagement of plan assets in violation of ERISA."[7,8]

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[7] Brief of the Acting Secretary of Labor as Amicus Curiae in Support of Petition for Rehearing En Banc or Panel Rehearing, *David v. Alphin*, 704 F.3d 327 (4th Cir. 2013) (No. 11-2181). App. 109.

[8] The Secretary of Labor has filed at least four other amicus curiae briefs on the issue of Article III standing for participants in an ERISA defined benefit plan. *See* Brief of the Secretary of Labor as Amicus Curiae in Support of Plaintiffs-Appellants Urging Reversal, *David v. Alphin*, 704 F.3d 327 (4th Cir. 2013) (No. 11-2181) available at http://www.dol.gov/sol/media/briefs/david(A)-12-28-2011.pdf; Brief of the Secretary of Labor as Amicus Curiae in Support of Appellants' Petition for Rehearing and Rehearing En Banc, *Harley v. Minnesota Mining and Mfg. Co.*, 284 F.3d 901 (8th Cir. 2002) (Nos. 00-2214, 01-1213) available at http://www.dol.gov/sol/media/briefs/harleyvMMM(A-R)-5-22-2002.pdf; Brief of the Secretary of Labor as Amicus Curiae in Support of Appellants' Petition for Rehearing En Banc, *McCullough v. AEGON USA, Inc.*, 585 F.3d 1082 (8th Cir. 2009) (No. 08-1952) available at http://www.dol.gov/sol/media/briefs/mccullough(A)-12-01-2009.pdf; and Brief of the Secretary of Labor as Amicus Curiae in Support of Appellants and Reversal,

(Continued on following page)

In each of the amicus curiae briefs filed by the DOL, the agency disagreed with the ultimate decision of the circuit court.

The DOL specifically countered part of the rationale for the holdings of the Fourth and Eighth Circuits. Those Circuits stated that their decisions to deny participants Article III standing do "not insulate a fiduciary who invests the assets of an overfunded defined benefit plan from liability to the plan for breach of the duty to invest prudently" because the Secretary is empowered under the statute to bring suit to enforce ERISA. *David v. Alphin*, 704 F.3d 327, 339 (4th Cir. 2013); *Harley*, 284 F.3d at 908 n.5 (8th Cir. 2002). However, the DOL has expressly rejected that reasoning stating, "It is a misapplication of Article III standing principles to define 'injury in fact' so narrowly as to permit obvious harms to plans to go unremedied except in the relatively few cases the Secretary is able to pursue." Brief of the Secretary of Labor as Amicus Curiae In Support of Plaintiffs-Appellants Urging Reversal at 12, *David v. Alphin*, 704 F.3d 327 (4th Cir. 2013) (No. 11-2181). The DOL further argued that denying participants standing to enforce the fiduciary duty provisions of ERISA would put "an untenable burden on the Secretary to monitor and bring suit on behalf of overfunded defined benefit plans if participants in such plans lack standing to remedy fiduciary breaches. The Secretary depends on

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Harley v. Minnesota Mining and Mfg. Co., 284 F.3d 901 (8th Cir. 2002) (No. 00-2214) available at http://www.dol.gov/sol/media/briefs/harleyvMMM(A)-6-12-2000.pdf.

participant suits to enforce ERISA, because she lacks the resources to do so singlehandedly, and plan fiduciaries are commonly defendants in such cases. The constraints on the Secretary's ability to bring suit are recognized by the statute's authorization of suits by private litigants as well as its legislative history, neither of which the district court considered." *Ibid.* (citing H.R. Conf. Rep. No. 101-386).

The PBGC has also participated as amicus curiae in the Fourth Circuit twice taking a position against the court's ultimate decision.[9] The PBGC's views on the standing question presented here is of particular importance because it insures the benefits for over 40 million participants in defined benefit plans and as the PBGC has stated, it has a strong interest in this subject "because pension plan underfunding, which may be exacerbated by fiduciary breaches, can have a direct financial impact on the agency and its stakeholders, including participants." App. 105-106. Avoiding the underfunding that is exacerbated by fiduciary breaches is of particular importance at this juncture, as the PBGC itself is underfunded by $76.3 billion (*Pension Benefit Guaranty Corporation, FY 2015 Annual Report (November 16, 2015)* available at

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[9] *See, e.g.*, App. 103, Brief Amicus Curiae of the Pension Benefit Guaranty Corporation in Support of Appellants' Petition for Rehearing En Banc or Panel Rehearing and Brief Amicus Curiae of the Pension Benefit Guaranty Corporation in Support of Appellants, *David v. Alphin*, 704 F.3d 327 (4th Cir. 2013) (No. 11-2181).

http://www.pbgc.gov/documents/2015-annual-report.pdf) and does not have sufficient reserves to sustain these payments for the long term. *FY 2014 PBGC Projections Report*, Pension Benefit Guaranty Corporation (2014) available at http://www.pbgc.gov/documents/Projections-report-2014.pdf, *supra*, pp. 1-2.

Given the government's longstanding participation on the issues presented by this petition, the Court should seek the government views on certiorari.

C. The Fifth Circuit's Decision Squarely Presents The Issue In This Case

The issue is squarely presented in this case. The court of appeals clearly articulated a new requirement for a participant in a defined benefit plan to bring a fiduciary breach claim that is nowhere in ERISA's text or statutory purpose. The Fifth Circuit required "a direct effect thereof on participants' benefits" to bring a fiduciary breach claim, which essentially erases all of the fiduciary enforcement provisions of ERISA for participants in a defined benefit plan and leaves these participants with only a Section 502(a)(1)(B) benefits claim. The Fifth Circuit's decision does violence to a "'comprehensive and reticulated statute,' which is the product of a decade of congressional study of the Nation's private employee benefit system." *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 251 (1993). Moreover, other circuit courts would have reached the opposite result in this case, based on the many inconsistent standards that have been used by the courts of appeals to determine whether a participant in a defined benefit plan has standing to enforce the fiduciary breach provisions of ERISA. For example, Pundt would have standing to bring his fiduciary breach claim in the Eighth and Third Circuits based on the underfunded status of this Plan under any statutory measure of funded status. Pundt would also have standing in the Second Circuit based on the recognition that a violation of ERISA § 404, without more, confers standing.

III. THE FIFTH CIRCUIT ERRED BECAUSE ERISA PARTICIPANTS HAVE STANDING TO ENFORCE A FIDUCIARY BREACH BASED ON THE TRUST LAW UNDERPINNINGS OF ERISA

ERISA codifies the common law of trusts by requiring pension plans to hold plan assets in trust and requiring a plan fiduciary to manage plan assets prudently and solely in the best interest of plan participants and beneficiaries. For centuries, a trust beneficiary has had a right to sue a trustee for a breach of fiduciary duty. *See infra*, Part III.B.1. Moreover, trust law recognizes that beneficiaries of a trust have a legally cognizable interest in the trust corpus (i.e., the assets of the trust) and thus have standing to sue to protect such assets from breaches of fiduciary duty. *See infra*, Part III.B.3. Ignoring the fact that participants are beneficiaries of the trust holding their pension plan assets who have a right to sue to enforce that trust, the Fifth Circuit held that ERISA participants do not have constitutional standing to enforce a fiduciary breach unless participants allege a loss to their monthly benefits. In so holding, the Fifth Circuit ignored this Court's repeated instruction to consider trust law when interpreting ERISA.

Just as this Court vacated the Ninth Circuit's decision in *Tibble* because the Ninth Circuit rejected petitioners' claims "without considering the role of the fiduciary's duty of prudence under trust law," the Court should reverse the Fifth Circuit's decision here for its failure to consider trust law's clear principle that beneficiaries have standing to sue for breach of trust, and in so doing resolve the conflict in the circuits' treatment of ERISA standing. *Tibble*, 135 S.Ct. at 1827; *see also Harris Trust and Sav. Bank v. 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).

A. Petitioner Pundt Satisfies The Constitutional Standing Requirement Of Injury In Fact

There are three requirements for Article III standing: injury in fact, causation, and redressability. *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992). An "injury in fact" is "an invasion of a *legally protected interest*" that is "concrete and particularized" and "actual or imminent, not conjectural or hypothetical." *Id.* at 560 (emphasis added). The Fifth Circuit's decision was based on its determination that Pundt had not suffered an injury in fact. However, this

Court has recognized that "the injury required by Article III can exist solely by virtue of statutes creating legal rights, the invasion of which creates standing." *Warth v Selden*, 422 U.S. 490, 500 (1975) (internal quotation marks omitted). ERISA §§ 404 and 502(a)(2) specifically assign plan participants and beneficiaries the right to assert claims against a fiduciary under ERISA § 409, which in turn provides that fiduciary breaches under ERISA are subject to the same remedies as under trust law. 29 U.S.C. § 1132(a)(2); 29 U.S.C. § 1109. While the existence of a statutory right does not necessarily dispose of Article III's requirements, in cases where the plaintiff asserts a statutory right that merely codifies a common law right that has existed for centuries, the invasion of that right is an injury in fact.[10]

As discussed below, based on the common law of trusts, beneficiaries have an actionable claim against the fiduciary of the trust for a breach of fiduciary duty, without any allegation of additional harm such as lost benefits or underfunding. Such a trust claim is the sort of case traditionally amenable to the judicial process. *Sprint Commc'ns*, 554 U.S. at 285 ("We find

[10] Indeed, Justice Scalia has explained that the "existence [of Article III standing] in a given case is largely within the control of Congress" because plaintiff's ability to establish a cognizable "injury" will "depend [ ] upon whether the legislature has given her personally a right to be free of [the challenged] action or instead has left "enforcement" of the relevant prohibition "exclusively to public authorities." Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 885 (1983).

this history and precedent 'well nigh conclusive'" on the question of standing because these "cases and controversies [are] of the sort traditionally amenable to, and resolved by, the judicial process.").

Earlier this year this Court reiterated that historical trust law is central to understanding ERISA. "We have often noted that an ERISA fiduciary's duty is 'derived from the common law of trusts.' In determining the contours of an ERISA fiduciary's duty, courts often must look to the law of trusts." *Tibble*, 135 S.Ct. at 1828 (quoting *Central States, Southeast & Southwest Areas Pension Fund v. Central Transport, Inc.*, 472 U.S. 559, 570 (1985)).

B. Trust Law Establishes That Petitioner's Claims Satisfy The Case Or Controversy Requirements Of Article III

1. Trust Beneficiaries Have Standing To Sue For Breach Of Trust

Trust law recognizes a beneficiary's standing to enjoin or remedy any breach of trust based solely on the trustee's obligation to perform his fiduciary duties. *Clews v. Jamieson*, 182 U.S. 461, 481 (1901) (citing 2 Story Eq. Jur. 12th ed. ("in general a trustee is suable in equity in regard to any matters touching the trust")). The Restatement of Trusts explains that a beneficiary has 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). Indeed, the rights of trust beneficiaries to sue fiduciaries for a breach of trust have existed in the English Legal Tradition for centuries. Scott, Austin, *Importance of the Trust*, 39 U. COLO. L. REV. 177, 177-179 (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 other words, the injury caused by the failure of a trustee to comply with his fiduciary duties was actionable under the English common law familiar to the Framers at the time they wrote Article III.[11]

This Court has also repeatedly recognized that a beneficiary of a trust has the right to sue for performance of that trust. *Brown v. Fletcher*, 235 U.S. 589, 599-600 (1915) ("The equity jurisdiction of such [federal] courts extends . . . to suits against trustees for the recovery of an interest in the trust property by the beneficiary or his assignee"); *Clews*, 182 U.S. at 479 (explaining that a court "will compel the trustee to do all the specific acts required of him by the terms of the trust."). Following well-established trust law principles, the Ninth Circuit has concluded that "[t]he

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[11] *Coleman v. Miller*, 307 U.S. 433 at 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").

question of whether a fiduciary violated his fiduciary duty is independent from the question of loss." *Shaver v. Operating Eng'rs Local 428 Pension Tr. Fund*, 332 F.3d 1198, 1203 (9th Cir. 2003). The Fifth Circuit here, by contrast, failed to even consider these basic trust law principles in denying standing.

2. Claims Of Self-Dealing Or A Breach Of Loyalty Do Not Require Allegation Of Tangible Harm Other Than The Breach Itself

Under trust law a beneficiary has standing to sue its trustee for self-dealing or a breach of loyalty even if that beneficiary does not allege that the breach has caused any tangible harm other than 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"). Similarly, over

150 years ago this Court recognized that when a trustee sells a part of the trust corpus and "becomes himself interested in the purchase," a trust beneficiary has a cause of action on the theory that the transaction was void, 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).

Under this Court's clear precedent, therefore, a breach of trust or loyalty by a trustee or fiduciary constitutes injury in fact to a beneficiary regardless of whether he suffers immediate monetary loss. Since this Court has recognized that ERISA invoked the common law of trusts to define fiduciary duties (and thus beneficiaries' rights), *Varity Corp.*, 516 U.S. at 496, the court access available under trust law applies equally under ERISA. The Fifth Circuit ignored this jurisprudence, while other circuits have misapplied it. Were the law as the Fifth Circuit decided it, Congress would have *undermined* the judicial enforceability available under trust law by passing ERISA, when this Court has recognized that ERISA's purpose was the exact opposite: to "establish judicially enforceable standards to insure honest, faithful, and competent management of pension and welfare funds." *Russell*, 473 U.S. at 140 n.8.

3. Pundt And Other Class Members Are Injured By Losses To The Plan's Assets Because They Each Have An Equitable Interest In The Corpus Of The Plan

ERISA § 403 requires that all pension plan assets be held in trust solely for the interests of the participants and beneficiaries of the plan. 29 U.S.C. § 1103(c); *see Tilley*, 490 U.S. at 718. Because the plan assets must be held in a trust vehicle, legal title to the trust property is vested in the fiduciaries of the plan, but equitable title to trust property is vested in the participants and beneficiaries of the plan. Scott, 39 U. COLO. L. REV. at 178-179 ("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)). Indeed, this Court and many circuits have recognized a beneficiary's equitable interest in trust property. *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 a 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."); *Scanlan*, 669 F.3d at 844.

As a result of this equitable interest in trust property, a plan participant has standing to sue to remedy her injury for a breach of fiduciary duty (based on her individual equitable interest) at the same time that she 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 Fifth Circuit held below that Pundt's injury is speculative because he has not alleged that Verizon, the Plan sponsor, cannot make up the losses caused by the Respondents' fiduciary breach or that the PBGC insurance will be insufficient to guarantee the Petitioners' benefit payments. To the contrary, these factors are irrelevant to the injury analysis because Pundt has already suffered injury to his equitable interest in the corpus of the Plan as a result of Verizon's fiduciary breach. *See* 76 Am. Jur. 2d Trusts § 258-259 (2010) (explaining that courts enforce a beneficiary's equitable interest in trust property, which is regarded as a property interest, and is more than a mere chose in action); 90 C.J.S. Trusts § 265 ("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".). Thus, Petitioner's breach of fiduciary duty claims concerning the losses to his equitable interest in the corpus of the Plan meet the Article III injury in fact requirement. The Fifth Circuit erred by not applying these basic trust law principles to find standing.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted. Petitioner respectfully recommends that this Court ask the Government to provide its views on granting this writ of certiorari. At a minimum, this Court should hold this petition pending the Court's resolution of *Spokeo v. Robins*, No. 13-1339. This Court granted certiorari in *Spokeo* to decide "[w]hether Congress may confer Article III standing upon a plaintiff who suffers no concrete harm other than the violation of a private right conferred by a federal statute." On November 2, 2015, *Spokeo* was argued and submitted. If this Court's decision in *Spokeo* bears on this case and the Court does not grant this petition, the Court should remand this case to the Fifth Circuit to reconsider its decision in light of *Spokeo*.

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 14-10553

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
USDC No. 3:12-CV-4834

(Filed Aug. 17, 2015)

Before BENAVIDES, SOUTHWICK, and COSTA, Circuit Judges.

PER CURIAM:*

Before the court is a retirement-plan dispute brought by current and former participants and beneficiaries of Verizon's pension plan ("the Plan"). Plaintiffs, representing two certified classes, allege violations under the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001-1461 ("ERISA"), by the pension plan sponsors and administrators as a result of a plan amendment and subsequent annuity purchase in December of 2012. The certified classes are distinguished by the annuity transaction, which transferred benefit obligations for some Plan beneficiaries to a group insurance annuity, resulting in the following classes: the Transferee Class, represented by Plaintiffs William Lee and Joanne McPartlin (collectively, "Transferee Class representatives"), comprising Plan participants whose retirement-benefit obligations were transferred to the annuity; and the Non-Transferee Class, represented by Plaintiff Edward Pundt ("Pundt"), comprising Plan participants whose retirement-benefit obligations remained with the Plan. Plaintiffs appeal the district court's dismissal of the claims of the Transferee Class for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6), as well as the dismissal of the sole claim of

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

the Non-Transferee Class under Rule 12(b)(1) for lack of constitutional standing.

We affirm.

I. BACKGROUND

A. Factual History

Unless otherwise noted, the following factual history is based on Appellants' allegations in the second amended complaint ("SAC"), the live pleading at the time of the district court's dismissal order.

In August of 2012, Verizon Investment Management Corp. ("VIMCO"), a wholly-owned subsidiary of Verizon Communications Inc. ("Verizon"), retained Fiduciary Counselors, Inc. ("FCI or Independent Fiduciary") as an independent fiduciary to "represent the participants and beneficiaries in connection with the selection of the insurance company (or insurance companies) to provide an annuity" and to negotiate "the terms of the annuity contract or contracts." On or about September 8, 2012, over a month prior to the date of the amendment, the Independent Fiduciary provided a written determination of the transaction's compliance with ERISA.

In October of 2012, Verizon's board of directors amended the Plan terms to provide for an annuity transaction, effective December 7, 2012. The amendment applied to Plan participants who were already receiving benefit payments as of January 1, 2010; this effectively divided the Plan participants into the

41,000 members of the Transferee Class, and the roughly 50,000 members of the Non-Transferee Class. Regarding payments to those retirees, the amendment directed the Plan to purchase an annuity meeting the following requirements: (1) guaranteeing payment of pension benefits for all transferred Plan participants; (2) maintaining benefit payments in the same form that was in effect at the time of the annuity transaction; and (3) relieving the Plan of any benefit obligation for any transferred Plan participants.[1]

Also in October of 2012, Verizon entered into a definitive purchase agreement with Prudential, VIMCO, and FCI. Under the terms of the agreement,

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[1] The relevant provisions of the Amendment are as follows:

(i) The annuity contract shall fully guarantee and pay each pension benefit earned by a "Designated Participant."

(ii) The annuity contract shall provide for the continued payment of the Designated Participant's pension benefit . . . in the same form that was in effect under the Plan immediately before the annuity purchase. . . .

. . . .

(iv) After the annuity purchase . . . , the Plan shall have no further obligation to make any payment with respect to any pension benefit of a Designated Participant. . . . ROA.119-20.

The term "Designated Participant" generally describes members of the Transferee Class, as it includes Plan participants who were receiving benefits at the time of the annuity transaction, and who had retired before January 1, 2010.

Verizon would purchase a single-premium, group annuity contract from Prudential for $8.4 billion, in settlement of $7.4 billion in Plan benefit obligations. Plan fiduciaries notified members of the Transferee Class about the annuity transaction.

Shortly after Plaintiffs' motion for preliminary injunction against the annuity transaction was denied, the annuity parties consummated the annuity transaction on December 10, 2012.

B. Procedural History

The Transferee Class representatives filed their original complaint on November 27, 2012; the complaint was immediately followed by their application for a temporary restraining order.[2] In an order dated December 7, 2012 ("*Lee I*"), the district court denied the application.[3] On January 25, 2013, the Transferee Class representatives filed their first amended complaint, to which Plaintiff Pundt joined, and the district court certified the classes on March 28, 2013.

In an order dated June 24, 2013 ("*Lee II*"), the district court granted Defendants' motion to dismiss the Transferee Class's claims for failure to state a claim under Rule 12(b)(6), and the Non-Transferee

[2] At the request of the Transferee Class representatives, the application for temporary restraining order was converted into a motion for a preliminary injunction.

[3] *Lee v. Verizon Commc'ns Inc.*, 2012 WL 6089041, at *1 (N.D. Tex. Dec. 7, 2012) ("*Lee I*").

Class's claim under Rule 12(b)(1) for lack of constitutional standing.[4] The court also granted Plaintiffs leave to amend.[5]

Plaintiffs filed the SAC on July 12, 2013.[6] In an order dated April 11, 2014 ("*Lee III*"), the district court dismissed the SAC in its entirety for failing to cure the deficiencies identified in *Lee II*.[7] Specifically, the district court reasoned that, as amended, the first and third claims of the Transferee Class, as well as the claim of the Non-Transferee Class, warranted dismissal for the reasons stated in *Lee II*;[8] the district court then more fully addressed the amended allegations regarding the Transferee Class's second claim before dismissing that claim as well.[9]

II. DISCUSSION

A. Standard of Review

This court reviews *de novo* a district court's dismissal for failure to state a claim under Federal

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[4] *Lee v. Verizon Commc'ns Inc.*, 954 F.Supp.2d 486, 499 (N.D. Tex. June 24, 2013) ("*Lee II*").

[5] *Id.*

[6] ROA.1372-1422 ("SAC").

[7] *Lee v. Verizon Commc'ns Inc.*, 2014 WL 1407416, at *9 (N.D. Tex. Apr. 11, 2014) ("*Lee III*").

[8] *See id.* at *2.

[9] *See id.* at *2-9.

Rule of Civil Procedure 12(b)(6).[10] In doing so, the court applies the familiar *Twombly*-plausibility standard, according to which "we must accept as true all well-pleaded facts."[11] "To survive a Rule 12(b)(6) motion to dismiss, a complaint does not need detailed factual allegations, but must provide the plaintiff's grounds for entitlement to relief – including factual allegations that when assumed to be true raise a right to relief above the speculative level."[12]

The court similarly evaluates the Rule-12(b)(1) dismissal of the claim by the Non-Transferee Class for lack of standing. As with a 12(b)(6) dismissal, this court reviews *de novo* a district court's dismissal under 12(b)(1).[13] As a matter of subject matter jurisdiction,[14] standing under ERISA § 502(a) is subject to challenge through Rule 12(b)(1).[15] Where, as here, the movant mounts a "facial attack" on jurisdiction based

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[10] *See Rosenblatt v. United Way of Greater Houston*, 607 F.3d 413, 417 (5th Cir. 2010) (citing *Cuvillier v. Taylor*, 503 F.3d 397, 401 (5th Cir. 2007)).

[11] *Id.* (citing *Baker v. Putnal*, 75 F.3d 190, 196 (5th Cir. 1996)).

[12] *Id.* (internal quotation marks omitted).

[13] *See Ballew v. Continental Airlines, Inc.*, 668 F.3d 777, 781 (5th Cir. 2012) (citing *Ramming v. United States*, 281 F.3d 158, 161 (5th Cir. 2001)).

[14] *See Cobb v. Cent. States*, 461 F.3d 632, 635 (5th Cir. 2006); *see also Hermann Hosp. v. MEBA Med. & Benefits Plan*, 845 F.2d 1286, 1288-89 (5th Cir. 1988) (considering ERISA standing as a question of subject matter jurisdiction).

[15] *See* Fed. R. Civ. P. 12(b)(1).

only on the allegations in the complaint, the court simply considers "the sufficiency of the allegations in the complaint because they are presumed to be true."[16]

B. Duty to Disclose under ERISA § 102(b), 29 U.S.C. § 1022(b)

The Transferee Class first asserts that that the Plan fiduciaries breached their fiduciary duties under ERISA by failing to disclose the annuity transaction's effect on payor responsibilities and participant enrollment in the Plan. At the outset, the following is undisputed: (1) the Plan provided Summary Plan Descriptions ("SPDs"); (2) the Plan fiduciaries promptly disclosed the amendment shortly after its adoption; and (3) the annuity transaction did not change the form or amount of benefits. However, Plaintiffs argue that the pre-amendment SPDs were insufficient because they did not give notice of the annuity transaction.

ERISA § 102(b) requires an SPD to describe "circumstances which may result in disqualification, ineligibility, or denial or loss of benefits."[17] In turn, the pertinent regulation promulgated by the Department of Labor ("DOL") requires an SPD to describe "circumstances which may result in . . . loss [ ] . . . of any benefits that a participant or beneficiary might

[16] *Paterson v. Weinberger*, 644 F.2d 521, 523 (5th Cir. 1981).

[17] 29 U.S.C. § 1022(b) (2012).

otherwise reasonably expect the plan to provide."[18] Appellants first argue that the Verizon Employee Benefits Committee ("VEBC"), a Verizon plan fiduciary, failed to provide compliant SPDs by not disclosing the possibility that benefit obligations could be transferred to an insurance-company annuity absent a plan termination or spin-off/merger. As explained below, this argument lacks merit in light of this court's precedent, which holds that ERISA does not require SPDs to describe future terms, and statutory language requiring only retrospective notice of plan amendments.

First, as Appellees note, we have previously interpreted ERISA disclosure requirements as only extending to current aspects of the plan, and to the exclusion of potential changes which are contingent upon a plan amendment. In *Wise v. El Paso Natural Gas Co.*,[19] this court held that "Section 1022(b) relates to an individual employee's eligibility under then existing, current terms of the Plan and not to the possibility that those terms might later be changed, as ERISA undeniably permits."[20] The decisions cited by Appellants do not vitiate this principle, as both decisions addressed the disclosure of existing plan

[18] 29 C.F.R. § 2520.102-3(*l*) (2015).

[19] 986 F.2d 929 (5th Cir. 1993).

[20] *Id.* at 935.

terms, not potential, amendment-contingent terms.[21] In this case, prior to the October-2012 amendment directing the annuity purchase, the Plan only allowed for the transfer of benefit obligations through the Plan's termination or merger into another pension plan; SPDs issued prior to the amendment were only required to address those circumstances.

Further, it is undisputed that the Plan fiduciaries provided notice shortly after the amendment's adoption, well within the time limits imposed for notice of plan amendment. ERISA only requires that administrators provide a summary description of any material modification or change "not later than 210 days after the end of the plan year in which the change is adopted."[22] In keeping with this language, we previously held in *Martinez v. Schlumberger, Ltd.*[23] that, within the context of ERISA disclosure requirements, there is no employer duty "to affirmatively disclose whether it is considering amending its benefit plan."[24] Appellees also correctly note that the pre-amendment SPDs advised participants of Verizon's reservation of the right to amend the Plan, and the possibility that an amendment might affect their rights under the Plan.

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[21] *See Koehler v. Aetna Health Inc.*, 683 F.3d 182, 189 (5th Cir. 2012); *Layaou v. Xerox Corp.* 238 F.3d 205, 211 (2d Cir. 2001)).

[22] 29 U.S.C. § 1024(b)(1)(B).

[23] 338 F.3d 407 (5th Cir. 2003).

[24] *Id.* at 428.

As a second basis for violation, the Transferee Class alleges that the pre-amendment SPDs failed to advise of the possible "loss of benefits." The district court rejected this claim because the Transferee Class failed to allege a change in the amount of benefits they would receive. On appeal, the Transferee Class acknowledges that the amount of benefits remains unchanged under the terms of the annuity contract. However, the Transferee Class also asserts that the phrase "loss of benefits" encompasses federal protections under ERISA and the Pension Benefit Guaranty Corporation ("PBGC").[25] Appellants, however, provide no authority supporting the inclusion of ERISA and PBGC protections as "benefits" within the meaning of § 102. Countenancing against Appellants' argument, this interpretation of "benefits" is more expansive than the ERISA regulation governing the purchase of annuities by plan fiduciaries ("Annuitization Regulation"), which requires that such transactions guarantee a participant's "entire benefit rights."[26] As discussed further below, the annuity agreement does not guarantee ERISA and PBGC protections, but Appellants do not dispute that the transaction complies with the Annuitization Regulation's guarantee requirement.

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[25] *Id.*

[26] 29 C.F.R. § 2510.3-3(d)(2)(ii) (2015).

Accordingly, we find no error in the district court's dismissal of the Transferee Class's claim under ERISA § 102.

C. Fiduciary Duties under ERISA § 404(a)(1), 29 U.S.C. § 1104

The Transferee Class asserts several breaches of fiduciary duties under ERISA § 404(a)(1)(A), which requires that plan fiduciaries use plan assets "for the exclusive purpose of[ ] . . . providing benefits" and "defraying reasonable expenses of administering the plan."[27] In doing so, a fiduciary must act "solely in the interest of [plan] participants,"[28] and employ the "care, skill, prudence, and diligence" of a "prudent man" acting in like circumstances.[29] Section 8.5 of the Plan mirrors that of § 404, requiring that assets of the Plan be used "for the exclusive benefit of [participants and beneficiaries] and shall be used to provide benefits under the Plan and to pay the reasonable expenses of administering the Plan and the Pension Fund, except to the extent that such expenses are paid by [Verizon]."[30]

Fiduciary vs. Non-Fiduciary Functions. First, it behooves the analysis to distinguish between fiduciary

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[27] 29 U.S.C. § 1104(a)(1)(A) (2012).

[28] *Id.* § 1104(a)(1).

[29] *Id.* § 1104(a)(1)(B).

[30] ROA.83.

and non-fiduciary roles, a function-centric consideration "that is aided by the common law of trusts which serves as ERISA's backdrop."[31] Further, though an employer may, at different times, wear "hats" as both a sponsor and administrator,[32] "fiduciary duties under ERISA are implicated only when it acts in the latter capacity."[33] Thus, where a claim alleges breach of an ERISA fiduciary duty, the threshold question is whether the "person employed to provide services under a plan . . . was acting as a fiduciary (that is, was performing a fiduciary function) when taking the action subject to complaint."[34] In making this threshold evaluation, "[a] person is a fiduciary only to the extent he has or exercises specified authority, discretion, or control over a plan or its assets."[35]

In contrast, we have previously held that actions by a plan sponsor "to modify, amend or terminate the plan" are outside the scope of fiduciary duties; "such

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[31] *Beck v. PACE Intern. Union*, 551 U.S. 96, 101 (2007).

[32] *See Pegram v. Herdrich*, 530 U.S. 211, 225-26 (2000).

[33] *Beck*, 551 U.S. at 101.

[34] *Pegram*, 530 U.S. at 226.

[35] *Kirschbaum v. Reliant Energy, Inc.*, 526 F.3d 243, 251 (5th Cir. 2008) (internal quotation marks omitted); *see also* 29 U.S.C. § 1002(21)(A) (2012) (providing that "[a] person is a fiduciary with respect to a plan to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets [ ] . . . or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan.").

decisions are those of a trust settlor, not a fiduciary."[36] In *Hughes Aircraft Co. v. Jacobson*, the Supreme Court noted that, "[i]n general, an employer's decision to amend a pension plan concerns the composition or design of the plan itself and does not implicate the employer's fiduciary duties which consist of such actions as the administration of the plan's assets," as well as decisions "regarding the form or structure of the Plan. . . ."[37] The *Jacobson* Court emphatically concluded that "without exception, plan sponsors who alter the terms of a plan do not fall into the category of fiduciaries."[38]

Courts have drawn a distinction between decisions to alter a plan, and the implementation of those decisions. For example, in *Beck v. PACE Intern. Union*, the Court noted the distinction between whether to terminate a plan through an annuity purchase, and the fiduciary obligation in its selection of an annuity provider.[39] Appellees rely in part upon *Beck* to support two sponsor-fiduciary distinctions, distinctions which are disputed by Appellants but which affect multiple issues.

Beck involved an employer's filling dual roles as plan sponsor and administrator, and the Court considered the question of whether a plan sponsor's

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[36] *Id.* at 251.

[37] *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 444 (1999).

[38] *Id.* at 444-45.

[39] 551 U.S. 96, 101-02 (2007).

choice of plan termination through the purchase an annuity, rather than merger with another pension plan, constituted a decision as a plan sponsor or fiduciary.[40] The *Beck* Court first noted the general principle that an employer's decisions regarding the form or structure of a plan are immune from ERISA's fiduciary obligations, and that these decisions include termination and (in most cases) merger.[41] Recognizing that ERISA imposed fiduciary obligations on the method of termination, *e.g.* the fiduciary obligation on selecting an annuity provider, the *Beck* Court acknowledged that the choice between possible methods of termination, *i.e.* annuitization or merger, created a plausible basis to consider merger as a fiduciary action within that context.[42] Ultimately, *Beck* did not reach ERISA's fiduciary application to merger, as the Court determined merger was not a permissible method of termination under ERISA.[43]

Appellees first cite *Beck* in support of the proposition that the decision to enter into an annuity is a sponsor decision immune from ERISA's fiduciary obligations. In turn, Appellants argue that *Beck* is inapposite as it analyzed a plan termination, rather than an ongoing plan. This distinction does not vitiate *Beck*'s application to the instant circumstances. The

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[40] *See id.*

[41] *See id.*

[42] *See id.* at 102.

[43] *Id.* at 110.

Beck Court broadly described decisions regarding the form and structure of a plan as those of a plan sponsor, and its primary focus on one type of sponsor decision does not undercut the application to other sponsor decisions regarding a plan's form and structure. Accordingly, we hold the annuity amendment was a sponsor function of plan design, authorized under ERISA through the Annuitization Regulation.

Appellees also cite *Beck* for the principle that an employer's decision to maintain or remove pension liabilities is a design decision and settlor function. In deciding that merger was not a permissible form of termination, the *Beck* Court compared the effect of annuity purchases and merger, emphasizing that the latter "represents a *continuation* rather than a *cessation* of the ERISA regime."[44] Despite discussing the annuity purchase's effect of "formally sever[ing] the applicability of ERISA to plan assets and employer obligations" (including the employer's release from ERISA's requirement to make PBGC premium payments), the *Beck* Court did not impute fiduciary aspects to the sponsor's decision to sever ERISA's applicability.[45] Consistent with *Beck*, therefore, we consider the decision to transfer pension assets outside ERISA coverage as a sponsor decision immune from fiduciary obligations.

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[44] *Id.* at 106 (emphasis in original).

[45] *Id.*

Also relating to the sponsor-fiduciary distinction, Appellants assert that the district court mischaracterized some of their claims as asserted against Verizon and the Plan fiduciaries, VIMCO and VEBC. In Appellants' view, the claim was asserted only against the Plan fiduciaries, and the district court's considering the claim as asserted against Verizon was questionable. However, regarding some of the alleged bases for fiduciary breach, the allegations in the SAC implicate the act of amending the Plan to direct the annuity purchase, an act by Verizon as settlor, as well as the acts involved in implementing the annuity purchase, which involve functions of the Plan fiduciaries. As a result, we hold the district court properly addressed Verizon's role as sponsor, before addressing the implementation of the transaction involving VIMCO and VEBC. We separately consider these alleged breaches below.

1. Alleged Breach by Plan Sponsor

Appellants first assert that Verizon breached its fiduciary duty by entering into the annuity transaction, which resulted in the partial transfer of pension obligation from an ongoing Plan. Because such a transfer during an ongoing plan is not expressly authorized by an ERISA provision or regulation, Appellants posit that Verizon's decision was subject to ERISA's fiduciary duty provisions. This argument lacks merit for several reasons: (1) precedent suggests that the amendment was a settlor function; (2) ERISA and related regulations authorize annuity purchases, and do not prohibit such purchases during an ongoing plan; and (3) even assuming ERISA prohibits annuity purchases during an ongoing plan, Appellants cite no authority that the prohibition's violation would subject an otherwise settlor function to fiduciary requirements.

First, the precedent cited above describes the decision to amend a pension plan concerning the composition or design of the plan as a settlor function, immune from fiduciary strictures. Accordingly, the decision to amend the Plan and transfer assets into an annuity was made solely by Verizon in its settlor capacity. Appellants' argument against this principle, broadly that any action which disposes of plan assets creates fiduciary obligations, is not supported by any authority. The *Beck* Court tangentially addressed Appellants' argument, noting that "[t]he purchase of an annuity is akin to a transfer of assets and liability (to an insurance company)" yet maintaining its position that a decision to enter into an annuity (albeit during a plan termination) was a settlor function.[46]

Secondly, Appellants do not proffer any authority that would prohibit the transfer from an ongoing plan via an annuity transaction. At the same time, Appellees respond with ERISA provisions and regulations which suggest such transactions are authorized, and at least are not foreclosed.

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[46] *Id.* at 102.

In the first instance, ERISA provisions, as well as regulations promulgated by the Department of Labor, set forth several mechanisms by which an employer may remove liabilities from a pension plan, one of which is through transfer to an insurance company by an annuity purchase.[47] Upon transfer via annuity purchase, an individual is no longer "a participant covered under an employee pension plan or a beneficiary receiving benefits under an employee pension plan," so long as the individual's entire benefit rights are (1) guaranteed by the insurance company; (2) enforceable against the insurance company at the sole choice of the individual; and (3) the individual is issued notice of the benefits to which he or she is entitled under the plan.[48] Appellants do not dispute that the annuity transaction complied with these requirements, transferring the entire benefit rights of the Transferee Class and satisfying the three requirements for removal from the Plan.

Regarding the ability of a plan sponsor to perform an annuity transfer *during an ongoing plan*, neither ERISA itself nor the regulations promulgated thereunder speak directly to this point. However, a Department of Labor interpretive bulletin describes circumstances in which a pension plan might purchase annuity contracts, and notes that "*in the case of an ongoing plan*, annuities might be purchased for

[47] *See* 29 C.F.R. § 2510.3-3(d)(2)(ii) (2015). *See also* 29 U.S.C. §§ 1341 (termination); 1058 (merger).

[48] 29 C.F.R. § 2510.3-3(d)(2)(ii) (2012).

participants who are retiring or separating from service with accrued vested benefits."[49] Although the bulletin does not specifically describe this circumstance, the bulletin describes potential circumstances non-exclusively, suggesting that such transfers are permitted, especially when considered in conjunction with the annuity-transfer regulation.

Finally, even assuming *arguendo* that ERISA prohibits annuity purchases during ongoing plans, Appellants cite no authority which would make the amendment a fiduciary function due to violation of that prohibition. In light of the above considerations, we hold that the transfer of pension liabilities from an ongoing plan through an annuity transaction amendment is a settlor function, permitted under ERISA, or, alternatively, that such transactions are not subject to fiduciary duty requirements.

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[49] *See* Interpretive Bulletins Relating to the Employee Retirement Income Security Act of 1974, 60 Fed. Reg. 12328, 12328 (Mar. 6, 1995) (providing,

> [p]ension plans purchase benefit distribution annuity contracts in a variety of circumstances. Such annuities may be purchased for participants and beneficiaries in connection with the termination of a plan, or in the case of an ongoing plan, annuities might be purchased for participants who are retiring or separating from service with accrued vested benefits.).

2. Alleged Breaches by Plan Fiduciaries

The Transferee Class also alleges breach of fiduciary duty in the implementation of the amendment. In this regard, the Transferee Class asserts several grounds, alleging that Plan fiduciaries: (1) failed to hold the annuity contract as a Plan asset; (2) failed to obtain consent of the Transferee Class members; (3) failed to communicate with the Transferee Class members prior to the annuity transaction; (4) violated the terms of § 8.5 of the Plan; and (5) failed to select more than one annuity provider.[50] We consider these breaches *seriatim.*

Failure to Hold Annuity Contract within Plan as Plan Asset. The Transferee Class maintains that Plan beneficiaries should have held the annuity contract as a Plan asset ("internal annuity"), and that such an arrangement would have maintained ERISA and PBGC protections for the benefit of the class members.

However, as the district court reasoned, the plan amendment did not allow for the Plan to remain obligated for the benefit of the Transferee Class. As

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[50] The Transferee Class also alleged that the annuity transaction breached a fiduciary duty by underfunding the Plan in violation of several statutes. The district court dismissed this claim and, although the Transferee Class makes passing reference to underfunding in its brief, it does not substantively urge review the district court's dismissal of this ground on appeal. The issue is therefore waived. *See Cinel v. Connick*, 15 F.3d 1338, 1345 (5th Cir. 1994) (citation omitted).

noted above, the Plan fiduciaries are only responsible for decisions over which they have discretion. Although disputed by Appellants, the terms of the amendment clearly provide that the Plan will have no obligation to make any payment for the pension benefits of the Transferee Class after the annuity transaction. Within the strictures of the amendment terms, Plan fiduciaries were without discretion to maintain pension obligations of the Transferee Class within the Plan.[51]

Failure to Obtain Transferee Consent. The Transferee Class also asserts that the Plan fiduciaries should have obtained the consent of the Transferee Class members before transferring the pension obligations to the annuity contract. In the first instance and as the district court noted, the determination to transfer assets to an annuity was a decision made by Verizon as settlor, and does not fall within the scope of its fiduciary duties. In *Hughes Aircraft Co. v. Jacobson*, the Supreme Court held that three fiduciary claims were foreclosed because "without exception, plan sponsors who alter the terms of a plan do

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[51] The SAC does not describe in any detail how selecting an internal annuity was an amendment-compliant option within the discretion of Plan fiduciaries. At a minimum, however, maintaining the PBGC protections sought by the Transferee Class requires the payment of premiums, *see* 29 U.S.C. § 1307, which would run afoul of the amendment's requirement that, after the annuity transaction, "the Plan shall have no further obligation to make *any payment with respect to any pension benefit* of a Designated Participant." ROA.120 (emphasis added).

not fall into the category of fiduciaries."[52] The Eighth Circuit decision in *Howe v. Varity Corp.*,[53] a pre-*Jacobson* decision to which Appellants cite for the consent requirement, does not succeed in imputing fiduciary obligations to an action which the Supreme Court has deemed immune from those obligations. We further note that Appellants' position is neither supported by the terms of ERISA, which itself contains no such requirement for consent, either in the provisions detailing fiduciary duties,[54] or in the provisions governing ERISA-compliant annuity purchases.[55]

Failure to Communicate with Transferees. The Transferee Class also asserts that Plan fiduciaries breached their duty by not communicating with beneficiaries. Although the Transferee Class asserts that "ERISA and its accompanying regulations" require such communication, the Transferee Class does not cite any actual ERISA provisions, and only cites to the Ninth Circuit decision of *Booton v. Lockheed Med. Benefit Plan*, an inapposite opinion which discussed the ERISA-required documentation following the denial of benefits.[56] Although the Annuity

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[52] *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 443 (1999) (citing *Lockheed Corp. v. Spink*, 517 U.S. 882, 890-91 (1996)).

[53] 36 F.3d 746, 756 (8th Cir. 1994), *aff'd on other grounds,* 516 U.S. 489 (1996).

[54] 29 U.S.C. § 1104(a).

[55] 29 C.F.R. § 2510.3-3(d)(2)(ii).

[56] 110 F.3d 1461, 1463 (9th Cir. 1997).

Regulation does require that participants receive notice of the terms of the benefits to which they are entitled as part of the annuity transaction,[57] it is undisputed that the Transferee Class received this notice. After the annuity transaction, the benefits are no longer governed by ERISA, and any nondisclosure does not give rise to a cognizable action.[58]

Expenses of Annuity Transaction. As part of the annuity transaction, it is undisputed that Verizon paid Prudential a total of $8.4 billion, $1 billion more than the amount of the transferred liabilities. The Transferee Class alleges that Verizon violated § 8.5 of the Plan, requiring that Plan assets be used for the exclusive benefit of Plan beneficiaries and participants, as well as reasonable expenses of administering the Plan and Pension Fund. In the SAC, the Transferee Class alleges as follows:

> However, almost $1 billion more than necessary to cover the transferred liabilities was paid by Prudential by the Plan for amounts other than benefits and reasonable expenses of administering the Plan. The extra $1 billion payment was applied toward expenses, *not for administering the ongoing Plan*, but to enable avoidance of payment of such

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[57] 29 C.F.R. § 2510.3-3(d)(2)(ii).

[58] *See Beck v. PACE Intern. Union*, 551 U.S. 96, 106 (2007).

> expenses by the Plan sponsor, [Verizon], thus violating Section 8.5. . . .[59]
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> The extra $1 billion payment was used to pay Verizon's-the settlor's obligations for third-party costs related to the annuity transaction, including fees paid to outside lawyers, accountants, actuaries, financial consultants and brokers. Those expenses and fees should have been charged to Verizon's corporate operating revenues, not charged to the Plan and Master Trust.[60]

The district court ruled that these allegations failed to state a claim by not specifying "which aspects of the extra $1 billion of expenditures were unreasonable, or how they were unreasonable."[61] The Transferee Class argues that the district court's reasonableness analysis is misplaced, and that the proper inquiry is whether the additional $1 billion in administrative costs was a settlor cost which was wrongfully paid from Plan assets, constituting a fiduciary breach. The Transferee Class supports their position by citing to a Department of Labor advisory opinion discussing plan-related expenses for which a settlor is responsible. The advisory opinion provides:

> Expenses incurred in connection with the performance of settlor functions would not be

[59] SAC at ¶ 114 (emphasis in original).

[60] *Id.* at ¶ 115.

[61] *Lee III*, 2014 WL 1407416, at *4 (citing *Lee II*, 954 F.Supp.2d at 494).

> reasonable expenses of a plan as they would be incurred for the benefit of the employer and would involve services for which an employer could reasonably be expected to bear the cost in the normal course of its business operations. *However, reasonable expenses incurred in connection with the implementation of a settlor decision would generally be payable by the plan.*[62]

Appellants quote the first portion, but omit the italicized portion of the advisory opinion from their brief.[63] The effect of the advisory opinion, upon which Appellants otherwise rely, is two-fold. First, by contemplating that expenses implementing a settlor decision, such as an amendment and restructuring of a plan, are payable by the plan, the advisory opinion refutes Appellants' argument that expenditures not associated with plan administration are unreasonable. Second, since implementation expenses by the plan are permitted to the degree they are reasonable, the advisory opinion focuses the critical inquiry on the reasonableness of the expenses.

In light of the foregoing, reasonableness of the expenses must be addressed by the Transferee Class's allegations. Here, although the allegations enumerate various expenses associated with the implementation

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[62] Dept. of Labor Advisory Opinion 2001-01A (January 18, 2001) (emphasis added). Available at: http://www.dol.gov/ebsa/regs/aos/ao2001-01a.html.

[63] *See* Blue Br. 38-39.

of Verizon's decision as settlor, they wholly fail to address how those expenses are not reasonable expenses which are payable by the plan. To be sure, $1 billion in expenses is a large sum but, in light of the $7.5 billion in attendant obligations, we will not conclude that this allegation alone is sufficient to support unreasonableness under our pleading standards. In light of the threadbare allegations, along with the size and complexity of the annuity transaction, we agree with the district court's dismissal of this ground as insufficiently supported.

Failure to Select Multiple Annuity Providers. The Transferee Class further alleges a breach of fiduciary duty by selecting Prudential as the sole annuity provider. Regarding the selection of an annuity provider, this court described the relevant inquiry in *Bussian v. RJR Nabisco, Inc.*, as follows:

> [W]hether the fiduciary, in structuring and conducting a thorough and impartial investigation of annuity providers, carefully considered [the factors enumerated in the Department of Labor Interpretive Bulletin 95-1] and any others relevant under the particular circumstances it faced at the time of decision. If so, a fiduciary satisfies ERISA's obligations if, based upon what it learns in its investigation, it selects an annuity provider it "reasonably concludes best to promote

> the interests of [the plan's] participants and beneficiaries."[64]

In a later decision, we clarified that the test of fiduciary prudence "is one of conduct, not results."[65] Even where a fiduciary's conduct does not meet that standard, "ERISA's obligations are nonetheless satisfied if the provider selected would have been chosen had the fiduciary conducted a proper investigation."[66]

In support of this showing, the Transferee Class simply alleges that a more prudent choice would have been to contract with more than one insurer, to avoid "put[ting] all of the Plan's eggs in one basket" and "placing everyone in jeopardy of losing retirement benefits based upon the fortunes of a single insurer."[67] The district court ruled that these allegations did not support a fiduciary breach because they were conclusory.[68] While that is a basis for dismissing this ground, the allegations also only implicate the results of the process, and not the conduct of FCI.

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[64] 223 F.3d 286, 300 (5th Cir. 2000) (quoting *Donovan v. Bierwirth*, 680 F.2d 263, 271 (2d Cir. 1982)) (second alteration in original).

[65] *Kirschbaum v. Reliant Energy, Inc.*, 526 F.3d 243, 253 (5th Cir. 2008).

[66] *Bussian v. RJR Nabisco, Inc.*, 223 F.3d 286, 300 (5th Cir. 2000) (citation omitted).

[67] SAC at ¶ 109.

[68] *See Lee III* at 2014 WL 1407416, at *7.

Additionally, however, the SAC includes allegations implicating the conduct of the Plan fiduciaries, asserting that the Prudential selection occurred on the same day as the amendment's adoption and that "VIMCO and Plan fiduciaries did not prudently allow any period of time, much less a reasonable time period for consideration [of the annuity provider(s)]."[69] Acknowledging that these allegations might plausibly assert that the Plan fiduciaries did not consider any annuity provider other than Prudential, the district court ruled that such an interpretation nevertheless was rendered implausible in light of other allegations in the SAC. To wit, the SAC alleges both that VIMCO employed FCI almost two months prior to the alleged date of decision,[70] and that FCI had submitted a written determination of the transaction's compliance with ERISA over a month prior to the date of the amendment.[71]

We agree, and find no error in the district court's dismissal of the Transferee Class's claim for fiduciary breach.

D. Violation of ERISA § 510, 29 U.S.C. § 1140

The Transferee Class also alleged a violation of ERISA § 510 in the Plan amendment's transfer of

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[69] SAC at ¶ 110.

[70] *Id.* at ¶ 29(A).

[71] *Id.* at ¶ 29(C).

benefit obligations for only certain Plan participants, asserting that such expulsion represented intentional interference with rights of the transferred participants .[72]

Section 510 provides that it is "unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant . . . for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan."[73] The district court dismissed this claim, ruling that the Transferee Class failed to allege a viable right with which Verizon intended to interfere.[74]

Although acknowledging that § 510 requires discrimination "for the purpose of interfering with" a right, Appellants posit that § 510 prohibits expulsion without any intent-to-interfere requirement. Appellees

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[72] As an initial point, Appellants argue that this case brings the question of whether a plan amendment can be actionable under § 510 directly before the court, and cites several previous opinions which did not address the issue. *See McGann v. H & H Music Co.*, 946 F.2d 401, 406 n.8 (5th Cir. 1991), *cert. denied sub nom, Greenberg v. H & H Music Co.*, 506 U.S. 981 (1992); *Hines v. Mass. Mut. Life Ins. Co.*, 43 F.3d 207, 210 n.5 (5th Cir. 1995), *overruled on other grounds, Arana v. Ochsner Health Plan*, 338 F.3d 433 (5th Cir. 2003). However, because we hold that Appellants failed to allege a right with which Verizon intended to interfere, the issue is not before us.

[73] 29 U.S.C. § 1140.

[74] *Lee III*, 2014 WL 1407416, at *2 (citing *Lee II*, 954 F.Supp.2d at 495).

argue that the prohibition on expulsion, like that on discrimination, must be made with the intent to interfere with a right under the plan. Neither party provides authority for their positions, and instead rely solely on their interpretation of the provision's language.

Appellees' argument that expulsion must be attended by intent to interfere in order to be actionable, however, is supported by a practical consideration. Appellants' construction would divorce the intent-to-interfere requirement from any prohibition other than discrimination, which would also divorce those prohibitions from the object of the interference, *i.e.* "any right to which such participant may become entitled under the plan." Such a reading, which separates ERISA prohibitions from any rights in the ERISA-governed plan, is overly broad.

Thus reading the expulsion prohibition to require an intent to interfere with a right under the Plan, Appellees proffer two bases for affirming the district court's dismissal of this claim. First, as the district court ruled, the Transferee Class did not identify a viable right with which Verizon interfered. In the SAC, the Transferee Class alleges interference with two rights, their continued participation in the Plan, and ERISA and PBGC protections. The Transferee Class asserts their right to continued participation arises from the language in the SPD, providing: "You are a plan participant as long as you have a vested benefit in the plan that has not been paid to you in full."[75] The district court rejected this argument, noting that the Annuitization Regulation provides that an individual ceases to be a participant when benefit rights are guaranteed by an insurance company.[76] On appeal, Appellants respond that, where the language of an SPD conflicts with that of a regulation, the SPD should control. This argument is unavailing even assuming the SPD controls because the SPD advised participants of the potential amendments which could affect their rights.[77] Although unaddressed by the district court, the Transferee Class assertion of rights in ERISA and PBGC protections is unsupported. As previously discussed regarding Appellants' similar assertion in Issue I, there is little support in ERISA provisions or regulations, or case law, for including ERISA protections and PBGC benefits as rights to which a plan participant is entitled.[78] Further, as Appellees point out, the right to any of ERISA and PBGC protections is dependent on the class members' right to continued participation.

By failing to allege a viable right with which the amendment interfered, the Transferee Class failed to state a claim and we find no error in the dismissal of this claim.

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[75] ROA.77.

[76] *See* 29 C.F.R. § 2510.3-3(d)(2)(ii) (2015).

[77] ROA.75.

[78] *See* III.B., *supra*.

E. Constitutional Standing

On behalf of the Non-Transferee Class, Plaintiff Pundt asserts, through ERISA § 502(a)(2), 29 U.S.C. §§ 1132(a)(2) and (a)(3), a claim for relief under ERISA § 409(a), 28 U.S.C. § 1109, for violation of fiduciary obligations by the Plan fiduciaries. The district court ruled in *Lee III* that Pundt lacked constitutional standing to assert this claim, as asserted in the SAC, by reference to its prior basis for dismissal in *Lee II*.[79] Pundt challenges this ruling on appeal, and we must first address this challenge prior to any consideration of the merits since "[t]he requirement that jurisdiction be established as a threshold matter . . . is inflexible and without exception."[80]

Section 502(a)(2) of ERISA allows a civil action to be brought by "a participant, beneficiary or fiduciary for appropriate relief under [ERISA § 409]."[81] In turn, § 409(a) creates a right to relief against fiduciaries for the restoration of any loss to a plan resulting from the breach of "any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter."[82] On appeal, the Non-Transferee Class asserts that Plan fiduciaries breached fiduciary duties by

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[79] *See Lee III*, 2014 WL 1407416, at *2 (citing *Lee II*, 954 F.Supp.2d at 496).

[80] *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94-95 (1998).

[81] 29 U.S.C. 1132(a)(2) (2012).

[82] 29 U.S.C. 1109 (2012).

paying an excessive and unreasonable expense, echoing the ERISA § 404 basis alleged by the Transferee Class.[83]

The dispute centers not on whether Pundt has statutory standing under § 502, but instead whether he has constitutional standing under Article III.[84] In order to establish the "irreducible, constitutional minimum" of Article-III standing,[85] "a plaintiff must show (1) an injury in fact, (2) a sufficient causal connection between the injury and the conduct complained of, and (3) a likelihood that the injury will be redressed by a favorable decision."[86] The showing involves an injury-in-fact requirement that the plaintiff has a "personal stake in the outcome of the controversy,"[87] such that the injury is "concrete and particularized," and "actual or imminent, not conjectural or hypothetical."[88] "An allegation of future injury may

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[83] As with the allegations by the Transferee Class regarding breach of fiduciary duties under ERISA § 404(a), the Non-Transferee Class alleged below that the annuity transaction underfunded the Plan in violation of ERISA and the Internal Revenue Code. The Non-Transferee Class, however, does not urge review of those allegations on appeal.

[84] U.S. CONST. art. III, § 2.

[85] *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

[86] *Susan B. Anthony List v. Driehaus*, ___ U.S. ___, 134 S.Ct. 2334, 2341 (2014) (quoting *Lujan*, 504 U.S. at 560-61) (internal quotation marks and alterations omitted).

[87] *Id.* (quoting *Warth v. Seldin*, 422 U.S. 490, 498 (1975)).

[88] *Id.* (quoting *Lujan*, 504 U.S. at 560) (internal quotation marks omitted).

suffice if the threatened injury is 'certainly impending,' or there is a 'substantial risk' that the harm will occur.' "[89]

The district court ruled that Pundt had failed to allege an injury in fact sufficient to support constitutional standing. Appellants argue Pundt was injured through "losses to Plan assets held on [Pundt's] behalf as a direct result of the fiduciary mismanagement of Plan assets in violation of ERISA," and that this "invasion of his statutory right to proper management of Plan assets" is sufficiently concrete to provide standing.[90] Appellees argue instead that constitutional standing requires allegations to support injury against an individual's benefit payments, rather than injury to the plan as a whole. We agree with the district court's dismissal for lack of subject matter jurisdiction.

Direct Harm to Participants. Pundt first argues that fiduciary misconduct to his defined benefit plan presents individually cognizable harm, but this position is not supported by case law. The cases cited by Appellants discuss plans which, in contrast to the defined-benefit plan at issue here, present a more direct risk of harm from fiduciary misconduct.[91] For

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[89] *Id.* (quoting *Clapper v. Amnesty Int'l USA*, 568 U.S. ___, ___ n.5, 133 S.Ct. 1138, 1147, 1150 n.5) (internal quotation marks omitted).

[90] Blue Br. 52.

[91] *See Tolbert v. RBC Capital Markets Corp.*, 758 F.3d 619 (5th Cir. 2014) (considering ERISA's application to a wealth

(Continued on following page)

example, as the Supreme Court explained in *LaRue v. DeWolff, Boberg & Assocs.*, "[f]or defined contribution plans . . . fiduciary misconduct need not threaten the solvency of the entire plan to reduce benefits below the amount that participants would otherwise receive."[92] As a result, other circuit courts have held that participants in defined-contribution plans had redressable, Article III standing because alleged fiduciary breaches had a direct effect on the amount of benefits.[93]

A defined-contribution plan presents a starkly different circumstance than a defined-benefit plan, which " 'as its name implies, is one where the employee, upon retirement, is entitled to a fixed periodic payment.' "[94] In contrast to plans in which fiduciary misconduct might present a more direct impact on a participant's interest, 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" since

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accumulation plan, another type of "employee pension benefit plan" whereby benefits are dependent upon individual employee contributions and investment performance); *Leigh v. Engle*, 727 F.2d 113 (7th Cir. 1984) (considering a profit-sharing trust).

92 *LaRue v. DeWolff, Boberg & Assocs., Inc.*, 552 U.S. 248, 255-56 (2008).

93 *See, e.g.*, *Harris v. Amgen, Inc.*, 573 F.3d 728, 735-36 (9th Cir. 2009).

94 *Beck v. PACE Intern. Union*, 551 U.S. 96, 98 (2007) (quoting *Comm'r v. Keystone Consol. Indus., Inc.*, 508 U.S. 152, 154 (1993)).

such a plan "consists of a general pool of assets rather than individual dedicated accounts."[95] As a result, the injury to participants like Pundt is attenuated as, prior to default under the plan, "the employer typically bears the entire investment risk and – short of the consequences of plan termination – must cover any underfunding as the result of a shortfall that may occur from the plan's investments."[96] Moreover, even where an employer is unable to cover underfunding, the impact on participants is not certain since the PBGC provides statutorily-defined protection of participants' benefits.[97]

The degree to which the impact of fiduciary misconduct must be realized on this causal chain in order to establish standing is a matter of first impression for this court. However, considering similar circumstances, our 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

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[95] *LaRue*, 552 U.S. at 255 (contrasting the impact of fiduciary misconduct in defined-contribution and defined-benefit plans).

[96] *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 439 (1999).

[97] *See* 29 U.S.C. § 1322.

establish the requisite injury.[98] The Fourth Circuit found such "risk-based theories of standing unpersuasive, not least because they rest on a highly speculative foundation lacking any discernible limiting principle."[99] It is true that those courts considered plans which remained overfunded after the alleged fiduciary misconduct, while here 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."[100]

However, 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. In the first instance and as previously discussed, absent plan termination, the employer must cover any shortfall resulting from plan instability.[101] Pundt's allegation that the plan was underfunded, and less financially stable, merely increases the relative likelihood that Verizon will have to cover a shortfall.

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[98] *See, e.g.*, *David v. Alphin*, 704 F.3d 327, 338 (4th Cir. 2013); *Harley v. Minn. Mining & Mfg. Co.*, 284 F.3d 901, 906 (8th Cir. 2002), *Perelman v. Perelman*, 919 F.Supp.2d 512, 517-520 (E.D. Pa. Jan. 24, 2013), *aff'd,* 2015 WL 4174537 (3rd Cir. July 13, 2015).

[99] *David*, 704 F.3d at 338.

[100] ROA.1386.

[101] *See Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 439 (1999).

However, Pundt's allegations do not further allege the realization of risks which would create a likelihood of direct injury to participants' benefits. To wit, Pundt does not allege a plan termination, an inability by Verizon address a shortfall in the event of a termination, or a direct effect thereof on participants' benefits; on the contrary, Appellants concede on appeal that the actuarial underfunding resulted in no direct injury to Pundt.

Pundt also asserts that he directly 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, and invokes principles of disgorgement. In *David v. Alphin*, however, the Fourth Circuit rejected a similar argument as conflating the concepts of statutory and constitutional standing.[102] We agree with the Fourth Circuit's reasoning in this regard. Article III standing is distinct from statutory standing, and we decline to undermine this distinction by recognizing the latter as conferring the former. Though the Supreme Court in *Lujan v. Defenders of Wildlife* allowed that the invasion of statutory rights might create standing, *Lujan* addressed constitutional standing arising from *de facto* injury, which is not alleged by a breach of fiduciary duty.[103] Importantly, the *Lujan* Court

[102] *See David*, 704 F.3d at 338.

[103] 504 U.S. 555, 577-78 (1992).

clarified that a legislative creation of rights does not eliminate the injury requirement for a party seeking review.[104] Accordingly, at least with regard to a direct injury to Pundt as a class representative, we conclude that the allegations are insufficient to support his standing to assert this claim.

Harm to Plan as Injury-in-Fact. While the alleged fiduciary misconduct is thus too attenuated to suffice as direct injury to Pundt, Appellants alternatively assert that the injury to the Plan itself is sufficient because Pundt is statutorily authorized to assert the claim on behalf of the Plan.

In support of his argument that a direct-benefit plan participant may bring suit on behalf of the plan, Appellants quote (without attribution) the Supreme Court's discussion in *Sprint Communications Co., L.P. v. APCC Services, Inc.*, of the various examples where courts permit suit for the benefit of parties that are not themselves bringing suit.[105] The *Sprint* Court held that an assignee for collection has Article III standing, even where the recovered proceeds of the claim

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[104] *See id.* at 578.

[105] 554 U.S. 269, 287-88 (2008) (noting that "federal courts routinely entertain suits which will result in relief for parties that are not themselves directly bringing suit. Trustees bring suits to benefit their trusts; guardians ad litem bring suits to benefit their wards; receivers bring suit to benefit their receiverships; assignees in bankruptcy bring suit to benefit bankrupt estates; executors bring suit to benefit testator estates; and so forth.").

are promised to the assignor, and even though the assignee did not originally suffer any injury.[106] Supporting the proposition that "the assignee of a claim has standing to assert the injury in fact suffered by the assignor," the *Sprint* Court cited to *Vermont Agency of Natural Resources v. United States ex rel. Stevens.*[107] In Vermont Agency, the Court held that a relator had Article III standing to bring a qui tam action because, through the government's partial assignment its claim for damages, the government had conferred its injury in fact to the relator.[108] In both Sprint and Vermont Agency, the Court found that the petitioners had standing based on the history and precedent permitting assignees to maintain suit.[109]

In light of this precedent, Appellants posit that Plan participants may bring suit in a quasi-representative capacity, satisfying Article III's injury-in-fact requirement via an injury to the Plan. However, we decline to adopt this position because both *Sprint* and *Vermont Agency* are distinguishable in critical respects. First, those cases involved assignment between the parties, while here the Plan and Plan participants have no such relationship, and the Appellants do not argue that ERISA effects such an

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106 554 U.S. at 285-87.

107 529 U.S. 765 (2000).

108 *See id.* at 773.

109 *See Sprint*, 554 U.S. at 285-86.

assignment (as did the statute in *Vermont Agency*). Since the Court's reasoning in both cases was firmly grounded on the history and tradition of assignment relationships, applying that reasoning to a circumstance in which no such relationship existed is speculative.

Second and even more significant, *Sprint* and *Vermont Agency* both involved the assignor as the injured party. Here, on the other hand, Appellants seek standing based on statutory authorization by an uninjured government, to seek redress by one private party of the injury to another private party. As the Eighth Circuit noted regarding similar circumstances, extending *Sprint* in such a way raises "serious constitutional concerns," because "[i]f Congress could assign an ERISA plan's claim to a participant who is not injured, . . . then what principled reason would preclude Congress from assigning the claim to any stranger?"[110] Collectively, the facts and reasoning of *Sprint* and *Vermont Agency* allow a practical answer to this question, permitting Congress to satisfy the injury-in-fact by statutory assignment, yet only when the government is the injured party. Bearing in mind that "[i]n no event . . . may Congress abrogate Article

[110] *McCullough v. AEGON USA Inc.*, 585 F.3d 1082, 1086 (8th Cir. 2009).

III minima," we decline to otherwise construe and expand the reasoning of *Sprint*.[111]

For those reasons, we find no error the district court's dismissing the claim of the Non-Transferee Class for lack of subject matter jurisdiction.

III. CONCLUSION

For the foregoing reasons, we AFFIRM the judgment of the district court.

[111] *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 100 (1979).

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

WILLIAM LEE, JOANNE MCPARTLIN, and EDWARD PUNDT, Individually, and as Representatives of plan participants and plan beneficiaries of the VERIZON MANAGEMENT PENSION PLAN,	§ § § § § § § §	Civil Action No. 3:12-CV-4834-D
Plaintiffs,	§	
VS.	§ §	
VERIZON COMMUNICATIONS INC., et al.,	§ §	
Defendants.	§	

MEMORANDUM OPINION AND ORDER

(Filed Apr. 11, 2014)

In *Lee v. Verizon Communications Inc.*, 954 F.Supp.2d 486 (N.D. Tex. 2013) (Fitzwater, C.J.) ("*Lee II*"), the court granted defendants' motion to dismiss under Fed. R. Civ. P. 12(b)(1) and (b)(6), dismissed plaintiffs' ERISA-based[1] class action arising from a pension plan's decision to purchase a single premium group annuity contract to settle approximately $7.4

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[1] The Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001-1461.

billion of the plan's pension liabilities, and granted plaintiffs leave to replead. Plaintiffs amended their complaint, and defendants move anew to dismiss under Rules 12(b)(1) and (b)(6). Concluding that plaintiffs have failed to cure the pleading deficiencies identified in *Lee II*, the court grants defendants' motion and dismisses this action.

I

The relevant background facts and procedural history are set out in *Lee II* and need not be repeated at length. *See id.* at 488-89. The court will limit its discussion to what is necessary to understand today's decision.

This is a certified class action brought by plaintiffs William Lee, Joanne McPartlin, and Edward Pundt, individually and as representatives of plan participants and plan beneficiaries of the Verizon Management Pension Plan (the "Plan"). They seek relief against defendants Verizon Communications Inc. ("VCI"), Verizon Corporate Services Group Inc., Verizon Employee Benefits Committee ("VEBC"), Verizon Investment Management Corp. ("VIMCO"), and Verizon Management Pension Plan (collectively, "Verizon," unless the context otherwise requires). In October 2012, VCI entered into a Definitive Purchase Agreement with the Prudential Insurance Company of America ("Prudential"), VIMCO, and Fiduciary Counselors Inc. ("FCI"), under which the Plan agreed to purchase a single premium group annuity contract from Prudential to settle approximately $7.4 billion of the Plan's pension liabilities.[2] Verizon amended the Plan to direct that it purchase one or more annuity contracts according to certain criteria. Under the amendment, the annuity contract applied to Plan participants who had begun receiving Plan payments before January 1, 2010, and it required that the annuity provider fully guarantee and pay each pension in the same form as did the Plan. The annuity transaction was executed in December 2012.

Under the terms of the transaction, Verizon transferred to Prudential Verizon's responsibility to provide pension benefits to approximately 41,000 retirees. These transferred retirees (the "Transferee Class") are no longer Plan participants. The participants and beneficiaries not covered by the transaction ("Non-Transferee Class") – who number approximately 50,000 – remain part of the Plan.

The Transferee Class alleges three claims: Verizon failed to disclose the possibility of the annuity

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[2] In deciding Verizon's Rule 12(b)(6) motion, the court construes the amended complaint in the light most favorable to plaintiffs, accepts as true all well-pleaded factual allegations, and draws all reasonable inferences in plaintiffs' favor. *See, e.g.*, *Lovick v. Ritemoney Ltd.*, 378 F.3d 433, 437 (5th Cir. 2004). "The court's review [of a Rule 12(b)(6) motion] is limited to the complaint, any documents attached to the complaint, and any documents attached to the motion to dismiss that are central to the claim and referenced by the complaint." *Lone Star Fund V (U.S.), L.P. v. Barclays Bank PLC*, 594 F.3d 383, 387 (5th Cir. 2010).

transaction in the summary plan description, in violation of ERISA § 102(b), 29 U.S.C. § 1022(b); Verizon breached its fiduciary duties under ERISA § 404(a), 29 U.S.C. § 1104(a); and Verizon discriminated against the members of the Transferee Class, in violation of ERISA § 510, 29 U.S.C. § 1140. The Non-Transferee Class brings a claim via ERISA § 502(a) (2), 29 U.S.C. § 1132(a)(2), for relief under ERISA § 409, 29 U.S.C. § 1109. It alleges that Verizon breached its fiduciary duties and depleted the Plan's assets by paying an excessive and unreasonable amount of expenses to complete the annuity transaction.

In *Lee II* the court dismissed the claims of the Transferee Class under Rule 12(b)(6) for failure to state a claim on which relief could be granted. *Lee II*, 954 F.Supp.2d at 490-95. The court dismissed the claim of the Non-Transferee Class under Rule 12(b)(1) for lack of constitutional standing. *Id.* at 496-99. It also granted plaintiffs leave to replead. *Id.* at 499-500.

In their second amended complaint for declaratory and injunctive relief under ERISA ("SAC"), plaintiffs identify the paragraphs of the SAC that they maintain address the pleading issues addressed in *Lee II*. *See* SAC at 4 n.3 ("Plaintiffs point out, as a courtesy and for the convenience of the Court and counsel for Defendants that the following paragraphs in this Second Amended Complaint address the pleading issues with respect to the Amended Complaint that were noted in the Court's Memorandum Opinion and Order . . . : 45, 46, 50-52, 59-60, 68-69, 73, 76-77, 79, 91, 108-115, 117, 120-124, 132-133, 137 and Prayer, paragraphs B.8 and B.9." (bold font omitted)). Defendants move anew to dismiss, contending that plaintiffs lack standing to assert claims on behalf of the Non-Transferee Class and that plaintiffs have failed to state claims on behalf of the Transferee Class on which relief can be granted. They maintain that the SAC "does not cure any of the pleading defects that were fatal to the prior complaint. Rather, it merely makes minor tweaks to the prior complaint." Ds. Br. 1. Defendants also assert that "[m]any of Plaintiffs' new allegations, moreover, are either entirely irrelevant or wholly conclusory, and none provides a basis to alter the Court's prior conclusion that Plaintiffs' claims fail as a matter of law." *Id.* Plaintiffs oppose the motion. The court has heard oral argument.

II

The changes that plaintiffs have made in the SAC to the first and third claims of the Transferee Class (first and third claims for relief), the claim of the Non-Transferee Class (fourth claim for relief), and the prayer for relief do not alter the reasoning or result of *Lee II*. And the arguments on which plaintiffs rely in opposition to defendants' motion to dismiss these claims are essentially those that the court declined to accept in *Lee II*. Accordingly, for the reasons explained in *Lee II*, and in the absence of material changes between the amended complaint and the SAC, the court grants defendants' motion to dismiss the first and third claims for relief under Rule 12(b)(6) for failure to state a claim on which relief can be granted, and it grants their motion to dismiss the fourth claim for relief under Rule 12(b)(1) for lack of constitutional standing.

III

The SAC makes more extensive changes to plaintiffs' second claim for relief: a claim by the Transferee Class under ERISA § 502(a)(3) that VEBC and VIMCO are liable for breach of fiduciary duty, in violation of ERISA § 404(a). But the court concludes that plaintiffs have still failed to state a claim on which relief can be granted, and that this claim must be dismissed under Rule 12(b)(6).

A

"In deciding a Rule 12(b)(6) motion to dismiss, the court evaluates the sufficiency of plaintiffs' [SAC] by 'accepting all well-pleaded facts as true, viewing them in the light most favorable to the plaintiff.'" *Bramlett v. Med. Protective Co. of Fort Wayne, Ind.*, 855 F.Supp.2d 615, 618 (N.D. Tex. 2012) (Fitzwater, C.J.) (quoting *In re Katrina Canal Breaches Litig.*, 495 F.3d 191, 205 (5th Cir. 2007) (internal quotation marks and alteration omitted)). To survive defendants' motion, plaintiffs must plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Id.* (quoting *Twombly*, 550 U.S. at 556); *see also Twombly*, 550 U.S. at 555 ("Factual allegations must be enough to raise a right to relief above the speculative level[.]"). "[W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged – but it has not 'shown' – 'that the pleader is entitled to relief.'" *Iqbal*, 556 U.S. at 679 (quoting Rule 8(a)(2)) (alteration omitted). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.* at 678.

B

In plaintiffs' amended complaint, which the court evaluated in *Lee II*, they alleged that Verizon breached its fiduciary duties by violating Plan terms, avoiding ERISA rules that would have applied had the Plan been terminated, and failing to notify Plan participants or beneficiaries or to ask for their consent before amending the Plan. Plaintiffs asserted that Verizon was not acting in the best interests of the Transferee Class members because there was a risk that Prudential would fail, and by removing the class members from the Plan, they caused them to lose the pension guarantee provided by the Pension Benefit Guaranty Corporation ("PBGC"). Plaintiffs also alleged that the annuity transaction was not expressly authorized by any ERISA provision or regulation. *Lee II*, 954 F.Supp.2d at 491.

In *Lee II* the court distinguished Verizon's role as settlor (when it amended the Plan to direct the purchase of one or more annuities for participants meeting certain criteria) and its role as fiduciary (when it managed the Plan, managed or disposed of Plan assets, or exercised discretionary authority in the administration of the Plan). *Id.* at 492-93. The court held that "Verizon was not acting in a fiduciary capacity when it amended the Plan to direct the purchase of an annuity for participants meeting certain criteria." *Id.* at 493.

The court then turned to plaintiffs' allegations that Verizon violated its fiduciary obligations to the Transferee Class. Concerning the assertion that it was unreasonable for Verizon to pay from Plan assets $1 billion more than the value of the transferred pension liabilities for expenses like commissions and third-party professional fees, the court held that, despite the size of the payment, it could not reasonably infer from the allegations of the amended complaint that it was unreasonable to pay Prudential approximately $8.4 billion in total. *Id.* at 493-94. Plaintiffs did not specify which aspects of the extra $1 billion of expenditures were unreasonable, or how they were unreasonable. *Id.* at 494. The transaction involved providing billions of dollars in pension benefits to a large group (41,000) of plan participants and beneficiaries. "Without more than essentially an allegation of the amount that Verizon paid and the conclusory assertion that it was unreasonable, the Transferee Class has failed to state a plausible claim that Verizon violated § 8.5's exclusive benefit rule." *Id.*

As for plaintiffs' claim that Verizon had selected Prudential as "the *lone* insurer to issue an annuity" and that Prudential might fail, and the reference in the amended complaint to a rating agency's cautionary analysis of the effect of the annuity transaction on Prudential, "[t]he court [did] not construe these criticisms as allegations that Verizon breached its fiduciary duty by choosing only Prudential to fund the annuity, because the Transferee Class [did] not allege this specifically or assert that Verizon should have selected another entity or multiple entities to provide the annuity benefits." *Id.*

Finally, with respect to plaintiffs' claim that Verizon harmed the Plan by consummating the annuity transaction while the Plan was less than 80% funded, the court concluded that plaintiffs "[did] not explain how the Plan's funding level affected the amount the Plan needed to pay Prudential, and therefore ha[d] not stated a plausible claim that Verizon harmed the Plan or breached a fiduciary duty on this basis." *Id.*

C

Although the SAC expands somewhat on certain allegations that the court deemed insufficient in *Lee II*, it still fails to plead a plausible claim for breach of fiduciary duty.

Aside from the paragraphs in the SAC that are asserted in support of the second claim for relief and contain essentially editorial changes,[3] the new allegations are found in ¶¶ 91, 108, 109, 110, 111, 112, 113, 114, 115, and 117 of the SAC. Paragraph 91 largely quotes a provision of ERISA, 29 U.S.C. § 1002(21)(A), that defines when someone is a plan fiduciary. Paragraph 117 essentially expands plaintiffs' request for relief.[4] This leaves ¶¶ 108-15, which allege as follows:

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[3] *See* SAC ¶¶ 93, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, and 107.

[4] As amended, ¶ 117 states:

> Pursuant to ERISA Section 502(a)(3), 29 U.S.C. § 1132(a)(3), Plaintiffs ask this Court to grant appropriate class-wide equitable relief, including a declaration that the Verizon EBC and VIMCO each failed to meet and breached statutory fiduciary duties under ERISA Section 404(a)(1), 29 U.S.C. § 1104(a)(1) and the terms of the Plan, by, among other conduct as alleged herein, not maintaining the purchased Prudential annuity as an asset in the ongoing Plan and, thus, preserving the Transferee Class's ERISA protections and the uniform guarantee provided by the PBGC. Pursuant to ERISA Section 502(a)(9), 29 U.S.C. § 1132(a)(9), Plaintiffs ask this Court to grant appropriate class-wide relief, requiring the purchased annuity to be maintained under the Plan so as to restore the Transferee

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108. In June 2013, a federal regulatory agency, the U.S. Treasury's Financial Stability Oversight Council ("FSOC"), decided to designate Prudential as a "systemically important financial institution" because Prudential could trigger massive financial havoc to the whole nation, should Prudential's economic fortunes change. Prudential has decided and will challenge that designation because Prudential does not want *any* federal oversight put in place. Prudential's position to challenge FSOC's planned designation of Prudential is consistent with Prudential's complicity with VIMCO's and Plan fiduciaries' decision that the Transferee Class lose all ERISA federal protections and the PBGC uniform guarantee under the terms of the single group annuity provided by Prudential outside the Plan. Prudential has not and will not act in the best interest of the Transferee Class, 41,000 persons whom were unknowingly sent into the sole care of Prudential.

109. When implementing the Plan sponsor's decision directing the Plan to purchase one or more annuities from one or more

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Class's panoply of ERISA protections and the uniform PBGC guarantee and better assure receipt by the Transferee Class of the amounts provided or to be provided by the Prudential annuity. Plaintiffs request the Court grant Plaintiffs and Transferee Class members temporary, preliminary and permanent injunctive and other appropriate equitable relief.

Id. ¶ 117.

insurance companies, the Verizon Defendants had a fiduciary obligation to do what was in the best interests of all Plan participants. VIMCO and the Plan fiduciaries breached fiduciary duties by imprudently selecting a single group annuity provider, thus placing everyone in jeopardy of losing retirement benefits based upon the fortunes of a single insurer. It would have been best, more prudent, not to put all of the Plan's eggs in one basket but to contract with several or more insurance providers. The Transferee Class should have been allowed a choice in the matter.

110. Ironically, on the very same date the Plan was amended by the Plan sponsor – October 17, 2012 – directing VIMCO to select one or more insurance annuity providers, VIMCO and the Plan fiduciaries selected a single insurer, Prudential, for the massive annuity transaction. Self evidently, VIMCO and Plan fiduciaries did not prudently allow any period of time, much less a reasonable time period for consideration of whether to choose one or more annuity providers. The amendment directing VIMCO in that regard was a ruse, as it was predetermined that Prudential would be the only provider. VIMCO's implementation of the amendment was, therefore, a breach of fiduciary duty. Also, VIMCO and Plan fiduciaries breached their fiduciary duties by not adequately considering the wishes of any of the Transferee Class members. Indeed, no retiree was ever

consulted about his or her wishes with respect to the annuity transaction.

111. The Plan amendment instructing VIMCO to purchase one or more annuities did not mandate that the purchase be made outside of the Plan. (App. 60-62). The Plan amendment did not expressly prohibit VIMCO from purchasing one or more annuities and maintaining that purchase as an asset of the Plan as part of the ongoing Plan's portfolio of assets.

112. VIMCO should have exercised its discretion in favor of the best interests of the Transferee Class when VIMCO was determining the terms of the purchased annuity, and VIMCO and Plan fiduciaries should have required the purchased annuity be maintained as an asset of the Plan, perhaps, designated as an asset to be used solely to fund the retirement payment obligations for the Transferee Class.

113. VIMCO and the Plan fiduciaries should have acted prudently and insured that all retirees maintained ERISA's federal protections and the uniform guarantee provided by the PBGC. That would have been possible if the annuity was purchased and maintained as an asset in the ongoing Plan so that all retirees continued to enjoy ERISA's federal protections and the PBGC uniform financial guarantee.

114. Prior to the Verizon/Prudential annuity transaction, Section 8.5 of the Plan

> required that Plan assets be used for the "exclusive benefit" of participants to "provide benefits under the terms of the Plan" and pay "reasonable expenses" of administering the Plan. (App. 25). However, almost $1 billion more than necessary to cover the transferred liabilities was paid to Prudential by the Plan for amounts other than benefits and reasonable expenses of administering the Plan. The extra $1 billion payment was applied towards expenses, *not for administering the ongoing Plan*, but to enable avoidance of payment of such expenses by the Plan sponsor, Verizon Communications Inc. and corporate subsidiaries, thus violating Section 8.5 and the terms of the Master Trust.
>
> 115. The extra $1 billion payment was used to pay Verizon's – the settlor's obligations for third-party costs related to the annuity transaction, including fees paid to outside lawyers, accountants, actuaries, financial consultants and brokers. Those expenses and fees should have been charged to Verizon's corporate operating revenues, not charged to the Plan and MasterTrust.

SAC ¶¶ 108-15 (bold font omitted).

Interpreted under the Rule 12(b)(6) standard, *see supra* § III(A), ¶¶ 108-15 allege the following four grounds for plaintiffs' breach of fiduciary duty claim: (1) VIMCO and the Plan fiduciaries breached their fiduciary duties by imprudently selecting a single group annuity provider, without prudently allowing any period of time, much less a reasonable period of time, to consider whether to choose one or more annuity providers (¶¶ 108-110); (2) VIMCO and the Plan fiduciaries did not adequately consider the wishes of any Transferee Class members, because no class members were consulted concerning the annuity transaction (¶ 110); (3) VIMCO and the Plan fiduciaries should have required the annuity to be maintained as an asset of the Plan, perhaps designated as an asset to be used solely to fund the retirement payment obligations of the Transferee Class, which would have ensured that all retirees retained the protections of ERISA and the PBGC (¶¶ 111-113); and (4) Verizon violated § 8.5 of the Plan, which requires that Plan assets be used for the exclusive benefit of Plan participants and to provide benefits under the terms of the Plan and pay reasonable expenses of administering the Plan, because almost $1 billion more than was necessary to cover transferred liabilities was paid to Prudential for expenses (including for outside lawyers, accountants, actuaries, financial consultants, and brokers), not for benefits and reasonable expenses of administering the Plan, in order for VCI and its corporate subsidiaries to avoid paying these expenses from corporate operating revenues (¶¶ 114-115).

D

Two of the grounds for plaintiffs' breach of fiduciary duty claim fail because the disputed decisions involve Verizon's role as settlor, not Plan fiduciary. As the court explained in *Lee II*, "[b]ecause amending a plan is not a fiduciary function, Verizon was not acting in a fiduciary capacity when it amended the Plan to direct the purchase of an annuity for participants meeting certain criteria." *Lee II*, 954 F.Supp.2d at 493. Plaintiffs' complaints that the wishes of the Transferee Class were not considered, and that the annuity was not purchased and retained as part of the Plan, pertain to Verizon's decisions as settlor, not as plan fiduciary. *See id.* These two grounds of plaintiffs' breach of fiduciary duty claim therefore fail to state a claim on which relief can be granted.

E

As in their amended complaint, plaintiffs again base their breach of fiduciary duty claim on the expenditure of almost $1 billion from Plan assets for expenses. In *Lee II* the court explained why this ground of their claim failed to state a plausible claim: despite the size of the payment, the court could not reasonably infer from the amended complaint that it was unreasonable to pay Prudential approximately $8.4 billion in total, *id.* at 493-94; the Transferee Class did not specify which aspects of the extra $1 billion of expenditures were unreasonable, or how they were unreasonable, *id.* at 494; the transaction involved providing billions of dollars in pension benefits to a large group (41,000) of plan participants and beneficiaries, *id.*; and "[w]ithout more than essentially an allegation of the amount that Verizon paid and the conclusory assertion that it was unreasonable, the

Transferee Class ha[d] failed to state a plausible claim that Verizon violated § 8.5's exclusive benefit rule," *id.*

The SAC does not cure these deficiencies. And in their response brief to defendants' motion to dismiss, plaintiffs do not even attempt to defend their breach of fiduciary duty claim on this basis. *See* Ps. Br. 5-16. The court therefore concludes that this ground of plaintiffs' breach of fiduciary duty claim fails to state a claim on which relief can be granted.

F

Plaintiffs' remaining ground is their claim that defendants breached their fiduciary duty by selecting a single group annuity provider, without allowing any period of time, much less a reasonable period of time, to consider whether to choose one or more providers.

Such a claim is legally available.

> The relevant inquiry in any case is whether the fiduciary, in structuring and conducting a thorough and impartial investigation of annuity providers, carefully considered [the factors found in Department of Labor Interpretative Bulletin 95-1] and any others relevant under the particular circumstances it faced at the time of decision.

Bussian v. RJR Nabisco, Inc., 223 F.3d 286, 300 (5th Cir. 2000). "If so, a fiduciary satisfies ERISA's obligations if, based upon what it learns in its investigation, it selects an annuity provider it 'reasonably conclude[s] best to promote the interests of [the plan's] participants and beneficiaries.'" *Id.* (quoting *Donovan v. Bierwirth*, 680 F.2d 263, 271 (2d Cir. 1982) (second alteration in original)). "If not, ERISA's obligations are nonetheless satisfied if the provider selected would have been chosen had the fiduciary conducted a proper investigation." *Id.* (citing *In re Unisys Sav. Plan Litig.*, 173 F.3d 145, 153-54 (3d Cir. 1999)).

Plaintiffs do little to defend this claim in their response brief, essentially parroting the SAC and combining it with their contention that the Transferee Class members should have been consulted:

> VIMCO and the Plan fiduciaries breached fiduciary duties by imprudently selecting a single group annuity provider, thus placing everyone in jeopardy of losing retirement benefits based upon the fortunes of a single insurer. It would have been best, more prudent, not to put all of the Plan's eggs in one basket but to contract with several or more insurance providers. The Transferee Class should have been allowed a choice in the matter. Different carriers necessarily afford different degrees of security. A prudent fiduciary would seek the retirees' consent and give them a voice and choice in the matter.

Ps. Br. 11.

This ground of the breach of fiduciary duty claim fails for at least two reasons. First, the allegations of ¶¶ 108-10 that relate to this theory are conclusory, and "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Iqbal*, 556 U.S. at 678.

Second, to the extent they are not conclusory, they are implausible when viewed in tandem with other allegations in the SAC. In ¶ 110, for example, plaintiffs allege:

> Ironically, on the very same date the Plan was amended by the Plan sponsor – October 17, 2012 – directing VIMCO to select one or more insurance annuity providers, VIMCO and the Plan fiduciaries selected a single insurer, Prudential, for the massive annuity transaction. Self evidently, VIMCO and Plan fiduciaries did not prudently allow any period of time, much less a reasonable time period for consideration of whether to choose one or more annuity providers. The amendment directing VIMCO in that regard was a ruse, as it was predetermined that Prudential would be the only provider.

SAC ¶ 110. If this allegation were deemed non-conclusory, it would arguably state a plausible claim that the fiduciaries selected Prudential on October 17, 2012 – without spending any time considering whether to choose one, or more than one, annuity provider, or even a provider other than Prudential, since it had been predetermined that Prudential would be the only provider. But the SAC itself refutes these allegations. Paragraph 29 alleges that VCI and VIMCO entered into an engagement agreement with

FCI on August 24, 2012, under which FCI was appointed "independent fiduciary." *Id.* ¶ 29. Under the engagement agreement – which allegedly was entered into almost two months before the fiduciaries selected Prudential – FCI was assigned duties that included representing the interests of the Plan and the participants and beneficiaries in connection with the selection of the insurance company or companies to provide an annuity, and the terms of the annuity contract or contracts, so that such selection and terms complied with the fiduciary standards, prohibited transaction restrictions, and all other applicable provisions of ERISA. *Id.* ¶ 29(A). FCI also undertook the duty to deliver to VIMCO, on or about September 8, 2012, a written determination stating whether the selection of the annuity provider or providers and the terms of the annuity contract or contracts complied with the fiduciary standards, prohibited transaction restrictions, and all other applicable provisions of ERISA. *Id.* ¶ 29(C). In ¶ 106, plaintiffs suggest that the decision by VEBC and VIMCO either to allow, or to participate in, Verizon's selection of Prudential as the lone insurer was made directly or indirectly in reliance on FCI.[5] And although the SAC makes other

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[5] SAC ¶ 106 alleges:

> The decision by the Verizon EBC and VIMCO either directly or indirectly, by reliance upon FCI as an independent fiduciary proxy, to either allow, or participate in Verizon's selection of, Prudential as the *lone* insurer to issue an annuity subjects Plaintiffs Lee, McPartlin and all Transferee Class members to the

(Continued on following page)

complaints about FCI,[6] it does not allege that FCI failed to perform its duties concerning the selection of an annuity provider or providers well before the fiduciaries selected Prudential on October 17, 2012. Accordingly, the SAC itself alleges in ¶¶ 29 and 106 specific facts that refute the conclusory allegations in ¶ 110 that VIMCO and the Plan fiduciaries did not prudently allow any period of time, much less a reasonable time period, for consideration of whether to choose one or more annuity providers, and that the amendment directing VIMCO in that regard was a ruse, because it was predetermined that Prudential would be the only provider. Defendants therefore reasonably argue that "Plaintiffs' own allegations conclusively disprove their disingenuous suggestion that VIMCO and/or the Independent Fiduciary [FCI] selected Prudential as the sole insurer in a single day." Ds. Br. 15 (bracketed material added). The court concludes that plaintiffs have failed to state a plausible breach of fiduciary duty claim on this ground.

> risk of a single insurer undergoing some future unexpected and catastrophic event that could place many retirees and their beneficiaries in potential financial ruinous circumstances.

Id. ¶ 106.

[6] *See, e.g.*, *id.* ¶ 32 ("When carrying out its appointed duties, FCI never communicated with any Plaintiff nor any of the Transferee Class members.").

G

The court therefore holds that plaintiffs have failed to state a breach of fiduciary duty claim on which relief can be granted, and their second claim for relief is dismissed.

IV

It is apparent from reading the SAC and plaintiffs' response brief that – at least with respect to the Transferee Class – plaintiffs fundamentally disagree with the premise that an ERISA pension plan can, as here, purchase an annuity to fund plan benefits and remove only some plan members, thereby eliminating the protections of ERISA and the PBGC for the removed members. For example, plaintiffs argue:

> There is no federal regulation that either contemplates or countenances the very situation that occurred here. Both the federal regulation and the interpretative bulletin referred to in support of Verizon Defendants' memorandum brief in support of their motion to dismiss address only the situations where there is either an annuity purchase at the beginning of a person's retirement or an annuity purchase when a standard termination occurs, affecting all plan participants. Neither the Annuitization Regulation nor the Interpretative Bulletin provide any approval for the Verizon Defendants' actions, which circumvented the stringent requirements of PBGC oversight attendant to a standard plan termination, as contemplated by ERISA[.]

> Verizon Defendants provide no case law authority construing the Annuity Regulation to cover any transaction other than a purchase of insurance annuity by pension plan at the onset of a participant's retirement or at the point of plan termination under ERISA[.]

Ps. Br. 6-7 (citations omitted). But at bottom, plaintiffs are disagreeing with the rights of a settlor under ERISA, and such a disagreement must be addressed to Congress through requests for legislative changes to ERISA, not through litigation that complains of the decisions that ERISA empowers a plan sponsor as settlor to make.

* * *

Defendants' motion to dismiss plaintiffs' second amended complaint for declaratory and injunctive relief under ERISA is granted. The claims of the Transferee Class are dismissed with prejudice under Rule 12(b)(6) for failure to state a claim on which relief can be granted. The claim of the Non-Transferee Class is dismissed without prejudice under Rule 12(b)(1) for lack of constitutional standing.

SO ORDERED.

April 11, 2014.

/s/ Sidney A. Fitzwater
SIDNEY A. FITZWATER
CHIEF JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

WILLIAM LEE, JOANNE MCPARTLIN, and EDWARD PUNDT, Individually, and as Representatives of plan participants and plan beneficiaries of the VERIZON MANAGEMENT PENSION PLAN,	§	Civil Action No. 3:12-CV-4834-D
Plaintiffs,	§	
VS.	§	
VERIZON COMMUNICATIONS INC., et al.,	§	
Defendants.	§	

MEMORANDUM OPINION AND ORDER

(Filed Jun. 24, 2013)

Defendants move under Fed. R. Civ. P. 12(b)(1) and/or (b)(6) to dismiss this ERISA-based[1] class action arising from the decision of a pension plan to purchase a single premium group annuity contract from a third party to settle approximately $7.4 billion of the plan's pension liabilities to certain plan beneficiaries. For the reasons that follow, the court grants

[1] The Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001-1461.

defendants' motion but also permits plaintiffs to replead.[2]

I

This is a certified class action brought by plaintiffs William Lee, Joanne McPartlin, and Edward Pundt (collectively, "plaintiffs" unless the context otherwise requires), individually and as representatives of plan participants and plan beneficiaries of the Verizon Management Pension Plan (the "Plan"). Plaintiffs seek declaratory and injunctive relief against defendants Verizon Communications Inc. ("VCI"), Verizon Corporate Services Group Inc., Verizon Employee Benefits Committee, Verizon Investment Management Corp., and Verizon Management Pension Plan (collectively, "Verizon," unless the context otherwise requires).

In October 2012 VCI entered into a Definitive Purchase Agreement with the Prudential Insurance Company of America ("Prudential")[3] and others,[4] under which the Plan agreed to purchase a single premium group annuity contract from Prudential to

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[2] On April 26, 2013 plaintiffs filed a motion for leave to file amendment to the operative amended complaint for class action relief under ERISA. Because the court is granting plaintiffs leave to amend, their motion is denied without prejudice as moot.

[3] The parties have stipulated to the dismissal without prejudice of Prudential.

[4] Verizon Investment Management Corp. and Fiduciary Counselors Inc. were also parties to the agreement.

settle approximately $7.4 billion of the Plan's pension liabilities.[5] To accomplish the transaction, Verizon amended the Plan to direct that it purchase one or more annuity contracts according to certain criteria. Under the amendment, the annuity contract applied to Plan participants who had begun receiving Plan payments before January 1, 2010, and it required that the annuity provider fully guarantee and pay each pension in the same form as did the Plan. Plaintiffs neither allege nor contend that the annuity transaction will have any effect on the amount of their benefit payments or their right to payments. Instead, they object in part on the basis that removal from the Plan means they no longer receive ERISA protections and rights and that they have lost the pension protection provided by the Pension Benefit Guaranty Corporation ("PBGC"). The annuity transaction was executed in December 2012, a few days after the court denied plaintiffs' application for a temporary restraining order ("TRO") and preliminary injunction to enjoin Verizon from consummating the

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[5] In deciding Verizon's Rule 12(b)(6) motion, the court construes the amended complaint in the light most favorable to plaintiffs, accepts as true all well-pleaded factual allegations, and draws all reasonable inferences in plaintiffs' favor. *See, e.g.*, *Lovick v. Ritemoney Ltd.*, 378 F.3d 433, 437 (5th Cir. 2004). "The court's review [of a Rule 12(b)(6) motion] is limited to the complaint, any documents attached to the complaint, and any documents attached to the motion to dismiss that are central to the claim and referenced by the complaint." *Lone Star Fund V (U.S.), L.P. v. Barclays Bank PLC*, 594 F.3d 383, 387 (5th Cir. 2010).

transaction. *See Lee v. Verizon Commc'ns Inc.*, 2012 WL 6089041, at *1 (N.D. Tex. Dec. 7, 2012) (Fitzwater, C.J.) ("*Lee I*").[6]

Under the terms of the transaction, Verizon transferred to Prudential Verizon's responsibility to provide pension benefits to approximately 41,000 retirees. These 41,000 transferred retirees are no longer Plan participants. The participants and beneficiaries not covered by the transaction – who number approximately 50,000 – remain part of the Plan. On the parties' joint motion, the court certified each group as a class, defined as a Transferee Class and a Non-Transferee Class.

The Transferee Class alleges the following three claims: Verizon failed to disclose the possibility of the annuity transaction in the summary plan description ("SPD"), in violation of ERISA § 102(b), 29 U.S.C. § 1022(b); Verizon breached its fiduciary duties under ERISA § 404(a), 29 U.S.C. § 1104(a); and Verizon discriminated against the members of the Transferee Class, in violation of ERISA § 510, 29 U.S.C. § 1140. The Non-Transferee Class brings a claim via ERISA § 502(a)(2), 29 U.S.C. § 1132(a)(2), for relief under ERISA § 409, 29 U.S.C. § 1109. The Non-Transferee Class alleges that Verizon breached its fiduciary duties and depleted the Plan's assets by paying an

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[6] Because *Lee I* explains much of the law and the relevant Plan terms, the court restates only what is necessary to understand today's memorandum opinion and order.

excessive and unreasonable amount of expenses to complete the annuity transaction.

Verizon moves to dismiss the Transferee Class's claims under Rule 12(b)(6) and to dismiss the Non-Transferee Class's claim under Rule 12(b)(1) and (b)(6).

II

To survive a motion to dismiss under Rule 12(b)(6), plaintiffs must plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Id.*; *see also Twombly*, 550 U.S. at 555 ("Factual allegations must be enough to raise a right to relief above the speculative level[.]"). "[W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged – but it has not 'shown' – 'that the pleader is entitled to relief.'" *Iqbal*, 556 U.S. at 679 (alteration omitted) (quoting Rule 8(a)(2)). Furthermore, under Rule 8(a)(2), a pleading must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Although "the pleading standard Rule 8 announces does not require 'detailed factual allegations,'" it demands more than "'labels and conclusions.'" *Id.* at 678 (quoting *Twombly*, 550 U.S. at 555). And "'a formulaic recitation of the elements of a cause of action will not do.'" *Id.* (quoting *Twombly*, 550 U.S. at 555).

III

The court turns first to Verizon's Rule 12(b)(6) motion to dismiss the Transferee Class's ERISA § 102(b) claim.

The Transferee Class maintains that Verizon violated § 102(b) by not disclosing in the SPD that it retained the right to remove participants from the Plan by transferring the pension obligations to an insurance company. Section 102(b) requires that an SPD contain certain information, including a description of "circumstances which may result in . . . loss of benefits." In denying plaintiffs' application for a TRO and preliminary injunction, the court held in *Lee I* that this claim was not likely to succeed on the merits because plaintiffs had failed to allege or show that the annuity transaction would result in a loss of the amount or right to benefits, and because § 102(b) only requires a description of existing plan terms, not a disclosure of future plan changes, such as the amendment in question that directed the annuity purchase.[7] *See Lee I*, 2012 WL 6089041, at *2-3.

The Transferee Class also maintains that § 102(b) requires a description of the circumstances under which a participant may be removed from the Plan.[8] It relies solely on its interpretation of an ERISA regulation that prescribes that an SPD must include "a statement clearly identifying circumstances which may result in . . . loss . . . of any benefits that a participant or beneficiary might otherwise reasonably expect *the plan to provide* on the basis of the description of benefits required by paragraphs (j) and (k) of this section." 29 C.F.R. § 2520.102-3(l) (2012) (emphasis added). The Transferee Class interprets this regulation to require that an SPD describe when benefits will not be provided *by the Plan.* The Transferee Class made a similar unavailing argument in *Lee I* – that the Plan's mandate in § 8.5 to use its assets exclusively

[7] The Transferee Class asserts that, because Verizon maintains that it always had the right to conduct this annuity transaction, this means that this was an existing circumstance that might result in a loss of benefits, and Verizon was therefore obligated to disclose it. The court disagrees. Verizon does not maintain that it could have completed the annuity transaction without amending the Plan. And even if Verizon could have done so, and this meant that removal of the Transferee Class from the Plan was an existing circumstance, this argument still fails because the Transferee Class does not allege that the annuity transaction might result in a loss of benefits.

[8] This argument is an iteration of one running throughout the Transferee Class's case – that its members had a right to continued participation in the Plan.

"to provide benefits *under the Plan*" meant that the Plan itself must continue to provide the benefits. *See Lee I*, 2012 WL 6089041, at *3. The Transferee Class mistakenly interprets the regulation's language "circumstances which may result in . . . loss . . . of any benefits that a participant or beneficiary might otherwise reasonably expect *the plan to provide*," 29 C.F.R. § 2520.102-3(l) (emphasis added) to mean that a change in the payer of plan benefits is a circumstance that results in a loss of plan benefits provided by the plan, even if those benefits are provided in full. Instead, the regulation is properly interpreted to mean that an SPD must clearly identify circumstances that might result in an actual loss of benefits that a participant or beneficiary might otherwise reasonably expect the plan to provide. This understanding is supported by interpreting the words "expect the plan to provide" in the context of the phrase "benefits that a participant or beneficiary might otherwise reasonably expect the plan to provide *on the basis of the description of benefits required by paragraphs (j) and (k) of this section.*" 29 C.F.R. § 2520.102-3(l) (emphasis added). Understood in this broader context, it is clear that the regulation is focused on the benefits to be provided under the Plan rather than on the *source* of the benefits *per se* and does not relate to whether the Plan itself must continue to pay the benefits.

Because the Transferee Class has not alleged that the SPD lacked any description that the SPD was required to include, the court dismisses the § 102(b) claim.

IV

The court next considers the Transferee Class's claim, brought under ERISA § 502(a)(3), that Verizon breached its fiduciary duties, in violation of ERISA § 404(a).

A

The Transferee Class contends that Verizon's plan amendment and the resulting annuity transaction are fiduciary functions, and it alleges that Verizon breached its fiduciary duties by violating Plan terms, avoiding ERISA rules that would have applied had the Plan been terminated, and failing to notify Plan participants or beneficiaries or ask for their consent. The Transferee Class posits that Verizon was not acting in the best interest of the class members because there is a risk that Prudential will fail, and by removing the class members from the Plan, they have lost the pension guarantee provided by the PBGC. The Transferee Class also maintains that the annuity transaction is not expressly authorized by any ERISA provision or regulation.

Verizon asserts that amending the Plan and undertaking the annuity transaction are not fiduciary functions and, therefore, that the Transferee Class does not have a claim under § 404(a). Moreover, Verizon maintains that it did not violate any Plan terms and that ERISA regulations authorize an annuity purchase in these circumstances.[9]

B

The threshold issue is whether Verizon engaged in fiduciary functions when it amended the Plan and

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[9] The parties dispute whether ERISA regulations expressly authorize an annuity purchase that removes a group of participants and beneficiaries from a plan without terminating the plan. The Transferee Class does not point to any regulation that prohibits it, and the court has found none. But neither does the authority on which Verizon relies expressly authorize an annuity purchase in these circumstances. Verizon relies on an ERISA regulation and a Department of Labor interpretive bulletin. The ERISA regulation, 29 C.F.R. § 2510.3-3(d)(2)(ii) (2012), provides that individuals are no longer plan participants if, *inter alia*, their entire benefit rights are fully guaranteed by an insurance company. The interpretive bulletin states that this regulation recognizes that a plan can transfer pension liabilities by purchasing an annuity from an insurance company, and the bulletin lists circumstances when an annuity purchase might occur:

> Pension plans purchase benefit distribution annuity contracts in a variety of circumstances. Such annuities may be purchased for participants and beneficiaries in connection with the termination of a plan, or in the case of an ongoing plan, annuities might be purchased for participants who are retiring or separating from service with accrued vested benefits.

Interpretive Bulletins Relating to the Employee Retirement Income Security Act of 1974, 60 Fed. Reg. 12328, 12328 (Mar. 6, 1995). Although this description of available circumstances does not purport to limit when an annuity purchase can be made, neither does it expressly authorize what Verizon did here.

entered into the annuity transaction. If it did not, then Verizon owed no fiduciary duty and the Transferee Class's § 404(a) claim fails as a matter of law. *See Pegram v. Herdrich*, 530 U.S. 211, 226 (2000) ("In every case charging breach of ERISA fiduciary duty, then, the threshold question is not whether the actions of some person employed to provide services under a plan adversely affected a plan beneficiary's interest, but whether that person was acting as a fiduciary (that is, was performing a fiduciary function) when taking the action subject to complaint."); *see also Kirschbaum v. Reliant Energy, Inc.*, 526 F.3d 243, 250-51 (5th Cir. 2008). The court has already held in *Lee I* that Verizon did not engage in a fiduciary function when it amended the Plan. *See Lee I*, 2012 WL 6089041, at *4. But the Transferee Class's allegations can also be construed as challenging the *implementation* of the amendment directing the annuity purchase, which can involve fiduciary obligations.

1

"A person is a fiduciary only 'to the extent' he has or exercises specified authority, discretion, or control over a plan or its assets." *Kirschbaum*, 526 F.3d at 251. This is because, as ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A), provides:

> a person is a fiduciary with respect to a plan to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises

> any authority or control respecting management or disposition of its assets . . . or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan.

Fiduciary duties thus apply to management of a plan, management or disposition of its assets, and discretionary authority in the administration of a plan. Excluded from fiduciary responsibility are decisions of a plan sponsor to modify, amend, or terminate a plan. *Kirschbaum*, 526 F.3d at 251; *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 443-44 (1999).

> In general, an employer's decision to amend a pension plan concerns the composition or design of the plan itself and does not implicate the employer's fiduciary duties which consist of such actions as the administration of the plan's assets. ERISA's fiduciary duty requirement simply is not implicated [for] a decision regarding the form or structure of the Plan such as who is entitled to receive Plan benefits and in what amounts, or how such benefits are calculated.

Hughes Aircraft, 525 U.S. at 444-45 (citations omitted) (rejecting three fiduciary duty claims challenging new benefit structure in plan because, "without exception, plan sponsors who alter the terms of a plan do not fall into the category of fiduciaries" (citation and brackets omitted)).

The Transferee Class maintains that Verizon acted in a fiduciary capacity because, by removing approximately $8.4 billion in assets and 41,000 participants and beneficiaries from the Plan, Verizon managed and disposed of plan assets. According to the Transferee Class, Verizon's exchanging pension plan assets from an ongoing plan for a group annuity contract constitutes a fiduciary function. Verizon responds that, because plan terminations are not considered fiduciary functions, yet terminations deal with disposing of plan assets, its decision to undertake the annuity contract was not a fiduciary function.

The Transferee Class is conflating Verizon's amendment of the Plan with its executing of the annuity contract with Prudential. Because amending a plan is not a fiduciary function, Verizon was not acting in a fiduciary capacity when it amended the Plan to direct the purchase of an annuity for participants meeting certain criteria. What may be fiduciary functions, however, are aspects of Verizon's execution of the amendment's directive. For instance, the selection of the annuity provider is a fiduciary function. *Beck v. PACE Int'l Union*, 551 U.S. 96, 102 (2007) (citing 29 C.F.R. §§ 2509.95-1, 4041.28(c)(3) (2006)).

The Transferee Class's allegations complain of Verizon's implementation of the amendment directing the annuity purchase. They aver that Verizon's expenses related to the annuity transaction were unreasonable and excessive, in violation of the Plan's exclusive benefit rule. They also criticize Verizon for choosing a single insurer as the annuity provider because Prudential might fail, and they maintain that

Verizon's consummating the annuity transaction when the Plan was less than 80% funded harmed the Plan by causing it to fund the entire payment to Prudential.

The Transferee Class alleges that the expenses Verizon paid with Plan assets to complete the annuity transaction were unreasonable and excessive, in violation of § 8.5 of the Plan. Section 8.5 provides, like the exclusive benefit rule in ERISA § 404(a), that Plan assets "shall be used for the exclusive benefit of [participants and beneficiaries] and shall be used to provide benefits under the Plan *and to pay the reasonable expenses of administering the Plan and the Pension Fund*, except to the extent that such expenses are paid by [Verizon]." Ps. App. 25 (emphasis added). The Transferee Class asserts that it was unreasonable for Verizon to pay Prudential $1 billion more than the value of the transferred pension liabilities, which was approximately $7.4 billion. It alleges that the additional $1 billion was applied to expenses like commissions and professional fees paid to third parties.[10]

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[10] The amended complaint is somewhat unclear regarding who received the additional $1 billion from the Plan. The Transferee Class alleges that Prudential was paid the additional $1 billion, but it also states that the payment was applied to pay consultants and legal fees generated by third parties. Therefore, it is unclear whether the sum of $1 billion includes all third-party costs related to the annuity transaction or only the payment to Prudential. This is relevant in determining whether Verizon's expenses were reasonable.

Despite the size of the alleged additional payment, the court cannot reasonably infer from the allegations of the amended complaint that it was unreasonable to pay Prudential approximately $8.4 billion in total. The Transferee Class does not specify which aspects of the extra $1 billion of expenditures were unreasonable, or how they were unreasonable – e.g., that the legal fees exceeded the reasonable rate for similar work or that any commissions exceeded the market rate. The transaction involved providing billions of dollars in pension benefits to a large group (41,000) of plan participants and beneficiaries. Without more than essentially an allegation of the amount that Verizon paid and the conclusory assertion that it was unreasonable, the Transferee Class has failed to state a plausible claim that Verizon violated § 8.5's exclusive benefit rule.[11]

The Transferee Class also criticizes Verizon's selection of Prudential as "the *lone* insurer to issue an annuity," on the basis that Prudential may fail. Am. Compl. ¶ 105. The amended complaint also refers to a rating agency's cautionary analysis of the effect of the annuity transaction on Prudential. *See id.* at ¶ 106. The court does not construe these criticisms as allegations that Verizon breached its fiduciary duty by

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[11] It is unclear what equitable relief the Transferee Class seeks for the alleged violation of § 8.5 of the Plan. If the Transferee Class seeks restitution from Verizon to be recovered by the Plan, the Transferee Class may lack standing to bring this claim. *See infra* § VI(C).

choosing only Prudential to fund the annuity, because the Transferee Class does not allege this specifically or assert that Verizon should have selected another entity or multiple entities to provide the annuity benefits.

The Transferee Class also alleges that Verizon harmed the Plan by consummating the annuity transaction while the Plan was less than 80% funded, which it alleges violated ERISA § 206(g)(3)(C), 29 U.S.C. § 1056(g)(3)(C), and Internal Revenue Code § 436(d)(3), 26 U.S.C. § 436(d)(3), and thus caused the Plan to pay the entire $8.4 billion to Prudential. The Transferee Class does not explain how the Plan's funding level affected the amount the Plan needed to pay Prudential, and therefore has not stated a plausible claim that Verizon harmed the Plan or breached a fiduciary duty on this basis.

Because Verizon's amending the Plan is not a fiduciary function, and the Transferee Class's allegations concerning Verizon's implementing the annuity transaction fail to state a claim on which relief can be granted, the court dismisses the § 404(a) claim.

V

The Transferee Class's final claim is that Verizon discriminated against the members of the class, in violation of ERISA § 510, by removing them from the Plan while other retirees were allowed to remain.

In relevant part, § 510 makes it unlawful "for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary . . . for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan, this subchapter, or the Welfare and Pension Plans Disclosure Act." 29 U.S.C. § 1140. "To prevail on a § 510 claim, a plaintiff must prove that the defendant had a 'specific intent to discriminate among plan beneficiaries on grounds . . . proscribed by section 510." *Lee I*, 2012 WL 6089041, at *5 (quoting *McGann v. H & H Music Co.*, 946 F.2d 401, 408 (5th Cir. 1991)). Prohibited grounds for discrimination include the "specific intent to retaliate for the exercise of an ERISA right, or to prevent attainment of benefits he would become entitled to under the plan." *Chambers v. Joseph T. Ryerson & Son, Inc.*, 2007 WL 1944346, at *12 (N.D. Tex. July 2, 2007) (Fitzwater, J.) (citing *Stafford v. True Temper Sports*, 123 F.3d 291, 295 (5th Cir.1997) (per curiam)).

In *Lee I* the court held that plaintiffs failed to demonstrate a substantial likelihood of success on the merits of this claim because they failed to show that Verizon had a specific intent to interfere with their rights under the Plan and ERISA, or to rebut Verizon's proffered legitimate, nondiscriminatory reason for defining the group of retirees for the annuity contract as it did. *See Lee I*, 2012 WL 6089041, at *5-6. The amended complaint alleges that Verizon had the specific intent to discriminate against the Transferee Class and expel them from the Plan in order to interfere with their rights under the terms of the Plan and ERISA. The only right the Transferee Class asserts, however, is a right to continued participation in the Plan, which it maintains lasts until the members' vested pension benefits are paid in full. The Transferee Class alleges that Verizon was motivated by a desire to deprive the class members of the right to continued participation. The Transferee Class also asserts that Verizon had no legitimate business justification for removing the class members from the Plan, but giving preferential treatment to other groups of retirees who were allowed to remain.

Because a § 510 claim addresses discrimination for the purpose of interfering with the attainment of a right, the court addresses whether the members of the Transferee Class had a right to continued participation in the Plan. In support of this asserted right, the Transferee Class relies on a clause in the SPD that states:

> When participation ends
>
> You are a plan participant as long as you have a vested benefit in the plan that has not been paid to you in full.

Ps. App. 19 (bold font omitted). As the court noted in *Lee I*,

> the SPD's description of being a plan participant until "vested benefits in the plan" are paid in full does not prevent an amendment that removes a beneficiary from the plan in compliance with ERISA and the plan's

> provisions. This SPD language instead simply means that while beneficiaries are in the plan, they are participants until their benefits are paid in full. Plaintiffs' reading would conflict with ERISA regulations that state: "An individual is not a participant covered under an employee pension plan" if, *for example*, the entire benefit rights are fully guaranteed by an insurance company. 29 C.F.R. § 2510.3-3(d)(2)(ii) (2012).

Lee I, 2012 WL 6089041, at *6 n.13. The Transferee Class offers no additional authority supporting a right to continued participation in the Plan. Because the Transferee Class has failed to allege a viable right with which Verizon interfered, it has failed to state a claim on which relief can be granted.[12]

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[12] Because the court is dismissing the Transferee Class's claim on other grounds, it need not decide a question that the Fifth Circuit has not yet resolved: whether "the scope of § 510 is limited to acts that affect the employer-employee relationship; in other words, [whether] plan amendments by themselves cannot be actionable under § 510." *Hines v. Mass. Mut. Life Ins. Co.*, 43 F.3d 207, 210 n.5 (5th Cir. 1995). The court also need not reach whether § 510 claims are limited to interference with the *attainment* of a right, as opposed to interference with an existing, vested right. *See generally Inter-Modal Rail Emps. Ass'n v. Atchison, Topeka & Santa Fe Ry. Co.*, 520 U.S. 510, 516-17 (1997) (recognizing issue but reserving decision because not properly presented); *see also* 29 U.S.C. § 1140 (making it unlawful to discriminate "for the purpose of interfering with the *attainment* of any right to which such participant *may become entitled*" (emphasis added)).

VI

The court now turns to Verizon's Rule 12(b)(1) and (b)(6) motions to dismiss the Non-Transferee Class's claim via ERISA § 502(a)(2), for relief under ERISA § 409(a), alleging that Verizon breached its fiduciary duty by depleting the Plan's assets.

A

Section 409(a) imposes personal liability on fiduciaries to restore any loss to a plan resulting from a breach of "any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter." The Non-Transferee Class alleges that Verizon breached its fiduciary duties and depleted the Plan's assets by paying an excessive and unreasonable amount of expenses to complete the annuity transaction. They also allege that Verizon executed the annuity transaction when the Plan was less than 80% funded, in violation of ERISA § 206 and Internal Revenue Code § 436, which purportedly required the Plan to fund the entire payment to Prudential. Verizon maintains that the Non-Transferee Class lacks constitutional standing to assert a fiduciary duty claim because it has failed to allege an injury in fact. Verizon posits that, in this context, alleging loss to Plan assets is insufficient because the purported misconduct must affect the payment of pension benefits. The Non-Transferee Class responds that it has standing because it alleges that the mismanagement of assets caused losses to the Plan and abridged the class members' statutory right to proper management of Plan assets.

B

Standing is an issue of subject matter jurisdiction, and thus can be contested by a Rule 12(b)(1) motion to dismiss. *See Hunter v. Branch Banking & Trust Co.*, 2013 WL 607151, at *1 (N.D. Tex. Feb. 19, 2013) (Fitzwater, C.J.) (citing *Cobb v. Cent. States*, 461 F.3d 632, 635 (5th Cir. 2006)). A Rule 12(b)(1) motion can mount either a facial or factual challenge. *See id.* at *2 (citing *Paterson v. Weinberger*, 644 F.2d 521, 523 (5th Cir. May 1981)). When a party makes a Rule 12(b)(1) motion without including evidence, the challenge to subject matter jurisdiction is facial. *Id.* The court assesses a facial challenge as it does a Rule 12(b)(6) motion in that it "looks only at the sufficiency of the allegations in the pleading and assumes them to be true. If the allegations are sufficient to allege jurisdiction, the court must deny the motion." *Id.* at *2 (internal citation omitted) (citing *Paterson*, 644 F.2d at 523). If, however, a party mounts a factual attack on subject matter jurisdiction by submitting evidence, such as affidavits or testimony,

> the court is free to weigh the evidence and satisfy itself as to the existence of its power to hear the case. No presumptive truthfulness attaches to plaintiff's allegations, and the existence of disputed material facts will not preclude the trial court from evaluating for itself the merits of jurisdictional claims.

Id. (quoting *Williamson v. Tucker*, 645 F.2d 404, 413 (5th Cir. May 1981)) (internal quotation marks omitted). The plaintiff in a factual challenge, as the party seeking to invoke jurisdiction, must prove subject matter jurisdiction by a preponderance of the evidence. *Id.* (citing *Paterson*, 644 F.2d at 523). While normally a court can decide a factual challenge at the preliminary stage of a Rule 12(b)(1) motion, if the factual findings regarding subject matter jurisdiction are intertwined with the merits of a claim, the court must "assume jurisdiction and decide the case on the merits." *Worldwide Parking, Inc. v. New Orleans City*, 123 Fed. Appx. 606, 609 (5th Cir. 2005) (citing *Bell v. Hood*, 327 U.S. 678, 682 (1946)); *Clark v. Tarrant Cnty., Tex.*, 798 F.2d 736, 741-42 (5th Cir. 1986). In that situation, the defendant can proceed either by moving to dismiss under Rule 12(b)(6) or by moving for summary judgment. *See Worldwide Parking*, 123 Fed. Appx. at 609 & n.4 (citing *Williamson*, 645 F.2d at 415-16). This rule provides protection to plaintiffs so that factual disputes affecting the merits of claims can be addressed in accordance with the Federal Rules and the Seventh Amendment right to a jury trial.

Verizon challenges subject matter jurisdiction on the ground that the Non-Transferee Class lacks constitutional standing. Standing is an "irreducible constitutional minimum" under Article III's case-or-controversy requirement, *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992), and it requires an injury that is "concrete, particularized, and actual or imminent; fairly traceable to the challenged action; and redressable by a favorable ruling." *Clapper v. Amnesty Int'l USA*, ___ U.S. ___, 133 S. Ct. 1138, 1147 (2013) (citation omitted). "[T]he injury must affect the plaintiff in a personal and individual way." *Lujan*, 504 U.S. at 560 n.1.

C

As a threshold matter, the parties dispute what constitutes an injury in fact. The Non-Transferee Class maintains that it need only allege injury to the Plan to satisfy standing, and it posits that ERISA creates a legal right to a properly-managed plan and a corresponding cognizable injury for breach of a fiduciary's management duties. Verizon contends that the Non-Transferee Class must allege that the breach of fiduciary duty injured its members personally by affecting their pension payments.

1

Courts have consistently held that a loss that merely affects plan assets is insufficient to confer standing under § 409. *See David v. Alphin*, 704 F.3d 327, 338 (4th Cir. 2013); *Harley v. Minn. Mining & Mfg. Co.*, 284 F.3d 901, 906 (8th Cir. 2002); *Glanton ex rel. ALCOA Prescription Drug Plan v. AdvancePCS Inc.*, 465 F.3d 1123, 1126-27 (9th Cir. 2006); *Perelman v. Perelman*, ___ F.Supp.2d ___, 2013 WL 271817, at *4-5 (E.D. Pa. Jan. 24, 2013); *see also Loren v. Blue Cross & Blue Shield of Mich.*, 505 F.3d 598, 608-09

(6th Cir. 2007) (applying rule in context of welfare benefit plan). For defined benefit plans such as the Plan, a decrease in the value of plan assets does not necessarily result in an injury in fact because the benefit amount is fixed regardless of the value of assets in the Plan. "[T]he employer typically bears the entire investment risk and – short of the consequences of plan termination – must cover any underfunding as the result of a shortfall that may occur from the plan's investments." *Hughes Aircraft*, 525 U.S. at 439. Therefore, a decrease in the amount of plan assets "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 v. DeWolff, Boberg & Assocs., Inc.*, 552 U.S. 248, 255 (2008). *LaRue* distinguished defined *contribution* plans from defined *benefit* plans, reasoning that, in defined *contribution* plans, "fiduciary misconduct need not threaten the solvency of the entire plan to reduce benefits below the amount that participants would otherwise receive." *Id.* at 255-56. For defined *benefit* plans, however, it takes more than a plan's becoming underfunded to affect benefits payments. If the fiduciary's conduct results in the plan's becoming underfunded, the plan sponsor is required to make additional contributions. *See David*, 704 F.3d at 338; *see also* 26 U.S.C. § 412(a)(2)(A) (describing employer contributions necessary to reach minimum funding standard). And then, even if the plan sponsor is unable to contribute and the plan becomes unable to pay benefits, participants' vested benefits are guaranteed by the PBGC up to a statutory level. *See David*, 704 F.3d at 338; *see also* 29 U.S.C. § 1322 (describing PBGC's guarantee of benefits payments). Accordingly, for the Non-Transferee Class to establish a particularized, concrete, and actual or imminent injury, it must show more than the mere loss of Plan assets. It must show an effect on its members' benefits payments. *See Perelman*, 2013 WL 271817, at *4 (holding that "plan participants cannot establish standing to seek money damages where the plan has substantial surplus assets or the plan sponsor is financially capable of making up any losses suffered by the plan" (citing *Harley*, 284 F.3d at 906)).

The Non-Transferee Class alleges that Verizon caused losses to the Plan by violating the restriction on accelerated benefit distributions when a plan is less than 80% funded, which purportedly caused the Plan to fund the entire $8.4 billion payment to Prudential, and by using Plan assets to pay the $1 billion in expenses for the annuity transaction, in violation of the exclusive benefit rule. The Non-Transferee Class also asserts that Verizon left the Plan in a less stable financial condition, in violation of its fiduciary duties concerning investing Plan assets. It avers that this conduct harms the Plan, leaves it underfunded and insufficient to support all of the expected payments to the Non-Transferee Class, and thus jeopardizes the financial security of the pension benefits of the class members.

The parties dispute whether the Plan was in fact underfunded and whether Verizon violated the Internal Revenue Code or the exclusive benefit rule in entering into the annuity transaction. The court need not address these arguments or the supporting evidence. This is because, assuming *arguendo* that these alleged violations breached Verizon's fiduciary duties and caused loss to the Plan, the Non-Transferee Class has failed to allege that its members have not received the plan benefits to which they are entitled, or, for example, that Verizon as plan sponsor cannot make the necessary contributions to the Plan so that reductions are avoided. Because the Non-Transferee Class has failed to allege such facts, the amended complaint is insufficient to establish the injury in fact necessary for Article III standing. *See Perelman*, 2013 WL 271817, at *5.[13]

2

The court next addresses the Non-Transferee Class's assertion that it has standing through the invasion of a statutorily-created right. It maintains

[13] *Perelman* addressed similar allegations and held that they were insufficient to establish standing. *Perelman*, 2013 WL 271817, at *5. The plan participants alleged that diminution of plan assets jeopardized the plan's ability to provide pension benefits, and that the funding level had dropped below 100%. *See id.* Although in *Perelman* there was no allegation that the losses put the plan in "at-risk status" under the statute, which is contested here, the court concluded that it was more important that the complaint did not allege that the plan sponsor "is financially compromised and thus unable to adequately fund the Plan so that it may meet its future obligations to pay all vested benefits." *Id.*

that ERISA grants participants a legal right to have plan assets managed solely in their interest, and that breach of that fiduciary duty constitutes an injury in fact. The court disagrees.

The Non-Transferee Class relies on the principle that "the injury required by Art. III may exist solely by virtue of statutes creating legal rights, the invasion of which creates standing." *Lujan*, 504 U.S. at 578 (alterations, citation, and internal quotation marks removed). As *Lujan* explained, this principle is generally applied to a *de facto* injury that was inadequate in law before a statute made it legally cognizable. *See id.* (noting examples such as injury to individual's personal interest in living in racially-integrated community). The Non-Transferee Class does not rest its purported statutorily-grounded injury on a *de facto* injury of any kind; it maintains that breach of fiduciary duty in itself is an injury in fact. This argument fails because "it conflates statutory standing with constitutional standing." *David*, 704 F.3d at 338 (rejecting assertion that alleged deprivation of statutory right to have plan operated in accordance with ERISA's fiduciary requirements constituted injury in fact necessary for constitutional standing). The Non-Transferee Class fails to cite any authority holding that there is constitutional standing for plan participants to sue under ERISA § 409 for a breach of fiduciary duty that causes them no harm.[14] *Cf. Lujan*, 504 U.S. at 578 (noting that while statutes may broaden categories of injury that can be alleged in support of standing, that is different than holding that Congress may abandon requirement that plaintiffs must themselves have suffered an injury). The court therefore holds that the Non-Transferee Class lacks constitutional standing to seek relief under § 409 on this basis, and it dismisses the action of the Non-Transferee Class.

VII

Although the court is granting Verizon's motions, it will grant the Transferee Class and the Non-Transferee Class leave to replead. "[D]istrict courts often afford plaintiffs at least one opportunity to cure pleading deficiencies before dismissing a case, unless it is clear that the defects are incurable or the plaintiffs advise the court that they are unwilling or unable to amend in a manner that will avoid dismissal."

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[14] The Non-Transferee Class does cite cases regarding the *per se* ERISA violations listed in § 406, 29 U.S.C. § 1106. But these cases do not stand for the proposition that participants can sue for § 409 relief without showing particularized injury to themselves. Courts addressing § 406 claims still assess whether plaintiffs have constitutional standing. *See, e.g.*, *Faber v. Metro. Life Ins. Co.*, 648 F.3d 98, 102-03 (2d Cir. 2011) (holding that plan beneficiaries had constitutional standing to bring § 406 claim for injunctive relief, although not for disgorgement or restitution (which require particularized injury), where beneficiaries could not show individual harm because they received entire amount of promised benefits).

In re Am. Airlines, Inc., Privacy Litig., 370 F.Supp.2d 552, 567-68 (N.D. Tex. 2005) (Fitzwater, J.) (quoting *Great Plains Trust Co. v. Morgan Stanley Dean Witter & Co.*, 313 F.3d 305, 329 (5th Cir. 2002)). The Transferee Class and the Non-Transferee Class have not stated that they cannot, or are unwilling to, cure the defects that the court has identified. The court will therefore grant them 30 days from the date this memorandum opinion and order is filed to file a second amended complaint. If they replead, Verizon may move anew to dismiss, if it has a basis to do so.

*　　*　　*

Accordingly, defendants' motion to dismiss is granted, and the Transferee Class and the Non-Transferee Class are granted leave to replead.

SO ORDERED.

June 24, 2013.

/s/ Sidney A. Fitzwater
SIDNEY A. FITZWATER
CHIEF JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 14-10553

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

ON PETITION FOR REHEARING

(Filed Sep. 16, 2015)

Before BENAVIDES, SOUTHWICK, and COSTA, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing is DENIED.

ENTERED FOR THE COURT:

/s/ Fortunato P. Benavides
UNITED STATES
CIRCUIT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

WILLIAM LEE, JOANNE McPARTLIN, and EDWARD PUNDT, Individually, and as Representatives of plan participants and plan beneficiaries of the VERIZON MANAGEMENT PENSION PLAN,	§	
Plaintiffs,	§	
vs.	§	CIVIL ACTION NO. 3:12-cv-04834-D
VERIZON COMMUNICATIONS INC., VERIZON CORPORATE SERVICES GROUP INC., VERIZON EMPLOYEE BENEFITS COMMITTEE, VERIZON INVESTMENT MANAGEMENT CORP., and VERIZON MANAGEMENT PENSION PLAN,	§	
Defendants.	§	

SECOND AMENDED COMPLAINT
FOR DECLARATORY AND INJUNCTIVE
RELIEF UNDER ERISA

(Filed Jul. 12, 2013)

*   *   *

FOURTH CLAIM FOR RELIEF
(ERISA Section 502(a)(2) Claim for Appropriate Equitable Relief Against Verizon EBC and VIMCO)

130. Plaintiffs incorporate and reallege by reference the foregoing paragraphs 1 through 129, inclusive, as if they were fully set forth herein.

131. Plaintiff Pundt asserts this claim under ERISA Section 502(a)(2) for the benefit of the Plan, seeking appropriate relief under ERISA Section 409.[14]

132. When the Verizon/Prudential annuity transaction was consummated, there were no excess or surplus Plan assets to be utilized in the transaction. Section 8.5 of the Plan required that Plan assets be used for the "exclusive benefit" of participants to "provide benefits under the terms of the Plan" and pay "reasonable expenses" of administering the Plan. (App. 25). However, the Verizon Defendants permitted the Plan to excessively pay Prudential approximately $1 billion more than was actually necessary to fully support the approximately $7.4 billion in liabilities

[14] ERISA Section 409(a) states: Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary. A fiduciary may also be removed for a violation of section 1111 of this title. 29 U.S.C. § 1109(a).

that were transferred to Prudential. (Docket 32, Waldeck Declaration, p. 5 of 12, ¶ 20). The extra $1 billion payment was applied towards expenses, not for administering the ongoing Plan, but for settlor expenses, including commissions and legal fees generated by many third parties, including consultants to the Verizon/Prudential annuity transaction, thus, violating Section 8.5 and the terms of the Master Trust. There was a breach of the general ERISA duty to use Plan monies to pay only reasonable expenses of Plan administration. Those expenses and fees should have been charged to Verizon's operating revenues, not charged to the Plan and Master Trust. All losses to the Plan should be restored.

133. It would have been in the best interests of all remaining Plan participants not transferred to Prudential (the "Non-Transferee Class") for the group annuity contract purchased by the Plan to have remained in the Plan as part of the Plan's portfolio of assets. The Verizon Defendants breached their fiduciary duty to the Non-Transferee Class when implementing the settlor's decision to purchase a single group annuity and remove that purchase from the ongoing Plan's financial portfolio.

134. The Verizon Defendants have depleted the Plan and Master Trust of necessary funding, undermined and scaled back the Plan's and Master Trust's ability to generate much larger investment returns and, thereby, jeopardized the financial security of Plaintiff Pundt's and the remaining Plan participants'

benefits. After the Verizon/Prudential annuity transaction was consummated, the Plan was left underfunded on an actuarial basis, insufficient to fully support all of the expected payments to Plaintiff Pundt and remaining Plan participants.

135. Upon information and belief, in order to minimize the cost of buying the Prudential group annuity, the Verizon Defendants depleted the Plan's portfolio of fixed income securities (i.e., bonds and U.S. Treasuries) and private equity investments. (Docket 30, Nebens' Declaration, pp. 36-37 of 53, ¶ 7). In so doing, the Plan was left in a less stable financial condition and there was a breach of VIMCO's duty to maintain diversification of Plan assets and comply with the Plan's investment guidelines and asset allocation policies.

136. Plaintiff accordingly requests, pursuant to ERISA Sections 502(a)(2), appropriate equitable relief, including a declaration that VIMCO and Verizon EBC violated ERISA Section 409 and should be required to make the Plan whole. Plaintiff requests the Court grant equitable and remedial relief for the benefit of the Plan, including an order requiring reversal of any transfer of Plan assets by VIMCO

from Verizon's master trust to Prudential and restoration of all losses to the Plan and Master Trust.[115]

[15] The parties reasonably stipulated to the dismissal of Prudential with an agreement that Prudential could be reinstated as a party for purposes of challenging equitable relief ordered by the Court. (Docket 56, ¶¶ 4-5).

NO. 11-2181
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

ELENA M. DAVID, ARLEEN J. STACH,
and VICTOR M. HERNANDEZ,
Plaintiffs-Appellants
v.
J. STEELE ALPHIN, et al.,
Defendants-Appellees

Appeal from Judgment of the U.S District Court
for the Western District of North Carolina

BRIEF AMICUS CURIAE OF THE PENSION BENEFIT GUARANTY CORPORATION IN SUPPORT OF APPELLANTS' PETITION FOR REHEARING EN BANC OR PANEL REHEARING

* * *

STATEMENT OF INTEREST OF THE PENSION BENEFIT GUARANTY CORPORATION AS AMICUS CURIAE

The Pension Benefit Guaranty Corporation ("PBGC") is the federal agency Congress established to administer and enforce the nation's pension insurance program created by Title IV of the Employee Retirement Income Security Act of 1974 ("ERISA").[1] PBGC's board of directors consists of the Secretaries

[1] 29 U.S.C. §§ 1301-1461 (2006 & Supp. V 2011).

of Labor, Treasury and Commerce, and the agency is administered by a Presidentially appointed Director. [2]

PBGC files this brief to urge the Court to grant Petitioners' request for a rehearing en banc, or in the alternative, for a panel rehearing. Petitioners' request should be granted because the panel's finding that Petitioners did not suffer injury required for Article III standing arose from a misapprehension that such an injury depends on the funding level of the plan at the time the allegation of fiduciary breach is made – an arbitrary standard given the well-documented volatility of pension plan finances. Moreover, the decision overlooked that Petitioners can benefit from recoveries to a defined benefit plan even if it does have a "surplus" at termination. En banc review is also appropriate because participants' ability to bring suit on behalf of a plan to recover losses caused by fiduciary breach is a fundamental protection afforded to participants under ERISA,[3] and as such, involves a question of exceptional importance.

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[2] 29 U.S.C. §§ 1302(a), (d). As an agency of the United States, PBGC may file an *amicus curiae* brief without leave of Court. Fed. R. App. Proc. 29(a). Through its independent litigating authority, PBGC may represent itself. 29 U.S.C. § 1302(b)(1).

[3] In enacting ERISA, Congress sought to correct major flaws in the pension system, which was "weak in its limited disclosure requirements and wholly lacking in substantive fiduciary standards." S. REP. NO. 93-127, at 4841 (1973), *reprinted in* 1974 U.S.C.C.A.N. 4838 (1974). The list of fiduciary breaches incorporated into ERISA was meant to "represent the most serious type of fiduciary misconduct" because "the serious-

(Continued on following page)

As amicus, PBGC offers its expertise in defined benefit pension plans and the impact of their funding on the benefits that PBGC pays to participants in terminated plans. As the Supreme Court emphasized in *Beck v. Pace Int'l Union*, PBGC's views on the interpretation of Title IV of ERISA – expressed in that case in an amicus brief – warrant great deference; "to attempt to answer these questions without the views of the agencies responsible for enforcing ERISA, would be to embar[k] upon a voyage without a compass."[4]

* * *

PBGC interest in this case is also strong because pension plan underfunding, which may be exacerbated by fiduciary breaches, can have a direct financial impact on the agency and its stakeholders, including

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ness of the improper practices disclosed indicates the need for additional precautions to insure that these specific examples do not become general conditions. The list of proscriptions is intended to provide this essential protection." *Id.* at 4866-67. Enforcement provisions within ERISA were "designed specifically to provide both the Secretary and participants and beneficiaries with broad remedies for redressing or preventing violations of [ERISA]. The intent of the Committee is to provide the full range of legal and equitable remedies available in both state and federal courts and to remove jurisdictional and procedural obstacles which in the past appear to have hampered effective enforcement of fiduciary responsibilities under state law or recovery of benefits due to participants." *Id.* at 4871.

[4] 551 U.S. 96, 104 (2007) (quoting *Mead Corp. v. Tilley*, 490 U.S. 714, 726 (1989)); *see also Midi v. Holder*, 566 F.3d 132, 136-37 (4th Cir. 2009) (emphasizing deference principles).

participants.[15] The panel's holding effectively removes an important weapon from ERISA's arsenal to prevent imprudent or self-interested investments by plan fiduciaries. It overlooks that the existence of a perceived surplus in plan assets may encourage imprudent action, thereby increasing the likelihood of the plan becoming underfunded and of PBGC having to take the plan in with even greater underfunding. Moreover, it leaves a breaching fiduciary in control of plan assets, substantially increasing the risk that assets will be further depleted. The ruling thus removes one of the major checks Congress placed on plan fiduciaries. If participants cannot sue to recover losses on behalf of their plans due to fiduciary breach, PBGC (and indirectly the Title IV premium-payers) will have to make up any shortfall upon plan termination, and some participants may receive lower pension benefits. Although PBGC, as a successor trustee of a terminated plan, has standing to bring suit for an earlier breach of fiduciary duty, the passage of time and the disappearance of offending parties often make this right illusory.

* * *

[15] In addressing the standing issue, PBGC is not interpreting Title I of ERISA. The Department of Labor, which we understand will address these issues, is the agency that can authoritatively speak to the proper interpretation of Title I. *See Reorg. Plan No. 4 of 1978*, 44 Fed. Reg. 1065 (1978), *reprinted in* 5 U.S.C. app. at 214 (2000).

February 28, 2013

Respectfully submitted,

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No. 11-2181

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

ELENA M. DAVID, et al.,
Plaintiffs-Appellants,
v.
J. STEELE ALPHIN, et al.,
Defendants-Appellees.

On Appeal from the United States District Court
for the Western District of North Carolina

BRIEF OF THE ACTING SECRETARY OF
LABOR AS AMICUS CURIAE IN SUPPORT
OF PETITION FOR REHEARING EN BANC
OR PANEL REHEARING

(Filed Feb. 28, 2013)

*   *   *

. . . The panel held that plan participants had no Article III standing to pursue claims against the fiduciaries of an "over-funded" defined benefit plan, even if the fiduciaries' conduct resulted in multi million dollar losses to the trust holding the assets that fund participants' retirement benefits.

*   *   *

Despite participants' statutorily-protected interest in the trust funds held on their behalf, however, the panel's opinion deprives participants from pursuing appropriate remedies in many circumstances. Under the logic of the panel's Article III opinion, the fiduciary of an overfunded plan could knowingly breach fiduciary duties and engage in prohibited transactions – even steal plan assets for personal use – and plan participants would have no recourse.

* * *

The Department of Labor enforces and interprets ERISA and, accordingly, is directly affected by the panel's opinion on the statute of limitations. Moreover, the Department has limited resources, and private actions necessarily account for the vast majority of ERISA enforcement.

* * *

The panel erred by concluding that Petitioners had not sustained an "injury in fact" sufficient to confer Article III standing. Petitioners alleged millions of dollars of losses to money held in trust on their behalf as a direct result of the fiduciary mismanagement of plan assets in violation of ERISA. The invasion of their statutory right to proper management of plan assets gave them a concrete, personal stake in the case and, hence, the "injury in fact" required for Article III standing.

* * *

ERISA gives employee benefit plan participants legally protected interests in their pension plan and requires fiduciaries to hold plan assets in trust for the exclusive benefit of the plan's participants. 29 U.S.C. §§ 1103, 1104. Petitioners here had the right to have these trust assets managed "solely in [their] interest" with prudence, loyalty, and no self-dealing. Id. §§ 1104, 1106. When the fiduciaries breached those duties, Petitioners had the right to bring a civil action holding fiduciaries liable for the alleged breaches of ERISA's prohibited transaction, prudence, and loyalty provisions and to recover the Plan's resulting losses (allegedly millions of dollars in losses stemming from the impermissible inclusion of overpriced funds affiliated with the plan sponsor). Id. § 1132(a)(2); see Massachusetts Mut. Life Ins. Co. v. Russell, 473 U.S. 134, 143 n.10 (1985). The panel's ruling jeopardizes these fundamental rights and protections.

* * *

. . . Congress purposefully required plan fiduciaries to hold the assets in trust for the exclusive benefit of participants, thereby creating a beneficial interest in the trust that is correlative to the plan trustee's fiduciary duties. 29 U.S.C. §§ 1103, 1104; see Terry v. SunTrust Banks, Inc., 2012 WL 2511066, at *4 (4th Cir. 2012) (Davis, J.) ("When a trust has been created, the beneficiary remains the 'equitable owner of the trust property'") (citation omitted). Even if the Pension Plan remained overfunded, all the plan assets continued to be held in trust for the benefit of plan participants and beneficiaries, and the fiduciary duties Appellees allegedly violated are owed to the Plan on their behalf to secure those assets and the integrity of the fiducaries' administration of them. Thus, when Congress gave statutory standing to the participants to recover plan losses and other "appropriate relief," 29 U.S.C. § 1132(a)(2), it limited the scope of potential plaintiffs to those individuals with a "personal stake in a dispute to render judicial resolution appropriate." Friends of the Earth, 204 F.3d at 153. No more is needed to establish the injury-in-fact required for Article III standing.

*　　*　　*

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