No. 21-16992

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WINSOR, et al.,
Plaintiffs-Appellants

v.

SEQUOIA BENEFITS AND INSURANCE SERVICES LLC, et al.,
Defendants-Appellees

Appeal from the United States District Court
for the Northern District of California
Case No. 3:21-cv-00227-JSC

BRIEF OF THE SECRETARY OF LABOR, AS AMICUS CURIAE IN SUPPORT OF APPELLANTS AND REQUESTING REVERSAL

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STATEMENT OF THE ISSUES

Plaintiffs Winsor and Beichle ("Plaintiffs") are current and former participants in the RingCentral Plan ("Plan") who paid contributions towards their health insurance out of their wages. Their Plan is one of 180 employee welfare benefit plans that participate in the Tech Benefits Multiple Employer Welfare Arrangement ("Tech Benefits MEWA" or "MEWA"). The Plan is covered by the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001, et seq.

Fiduciaries to the Plan, the MEWA administrator and trustee ("Defendants"), allegedly set their own compensation illegally by negotiating with the MEWA's insurers to collect a fixed percentage of the money the insurers receive from participating plans as a kickback, or "commission." Plaintiffs' payments fund these commissions; their contributions fund the plan's payments to the MEWA's trust, which the Plan pays to the insurers, and a portion is then returned to Defendants as their commissions. Defendants also have increased their commissions by keeping the administrative fees paid to insurers artificially high (which increases Plaintiffs' contributions and thus commissions) by refusing to negotiate lower rates.

Plaintiffs filed an action under ERISA section 502(a)(2), 29 U.S.C. § 1132(a)(2) and (a)(3), claiming that Defendants engaged in prohibited transactions and breached their fiduciary duties to participants, in violation of ERISA sections 404 and 406, 29 U.S.C. §§ 1104, 1106. The district court granted Defendants' motion to dismiss and concluded that Plaintiffs lack constitutional standing to bring the action. The Secretary addresses the following question presented:

> Whether the Plaintiffs have constitutional standing to sue either for a refund of (i) their contributions paid to their employee benefit plan that funded illegal commissions for Defendants or (ii) their contributions to their Plan's payment of excessive administrative fees.

STATEMENT OF IDENTITY, INTEREST, AND AUTHORITY TO FILE

The Secretary has an interest in ensuring participants preserve their ability to bring an action to enforce ERISA. Because of limited resources, the federal government cannot "monitor every [ERISA] plan in the country." *Thole v. U.S. Bank, N.A.*, 140 S. Ct. 1615, 1637 (2020) (Sotomayor, J., dissenting) (quoting Secretary of Labor's amicus brief). Congress intended that in addition to the Secretary, individual participants would be able to enforce ERISA's fiduciary duties. *See Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 598 (8th Cir. 2009).

The Secretary also has an interest in ensuring that cases concerning ERISA participants' constitutional standing, such as *Thole v. U.S. Bank, N.A.*, 140 S. Ct. 1615 (2020), are properly interpreted and applied to protect participants' ability to enforce their ERISA rights.

The Secretary files this brief as amicus curiae under Federal Rule of Appellate Procedure 29(a).

STATEMENT OF THE CASE

I. Facts

Defendant Sequoia Benefit and Insurance Services, LLC ("Sequoia") and Defendant Gregory Golub ("Golub") serve as program administrator and trustee, respectively, of the Tech Benefits MEWA. ER-37–38. The MEWA includes over 180 separate employee welfare benefit plans and provides health benefits to over 30,000 employee participants. ER-37.

For the services they provide to the MEWA, Defendants Sequoia and Golub do not receive a fixed salary or compensation amount. Instead, Defendants approve their own fee, which they receive from the insurers that provide benefits to the MEWA. ER-42. Each insurer kicks back a set percentage (for example, the Complaint asserts that Anthem kicks back 6%) of the total money they receive from the MEWA to Defendants. ER-34–35, 42. Defendants then decide to retain this kickback as a commission, instead of refunding this kickback to the Plan or participants. ER-36–37, 42. At the time of filing the Complaint, Defendants had received over $100 million in commissions from the MEWA's insurers since 2015. ER-48.

Plaintiffs partially funded Defendants' $100 million in commissions by contributing monthly amounts from their wages towards their medical, vision and dental benefits provided through the MEWA, in addition to RingCentral's contributions on their behalf. ER-33–34. RingCentral forwarded these contributions to Defendants, who put the contributions in the MEWA's trust fund. ER-34–35. Defendants transferred the contributions to the MEWA's insurers for the plans and participants' insurance and other costs, and some of those contributions were kicked back to Defendants as commissions. ER-34–35.

Defendants, as Plan fiduciaries (ER-37–38), also have the ability to influence the level of commissions they receive in other ways. Plaintiffs allege that the administrative fees they paid were excessive. ER-51–52. Defendants refused to negotiate lower fees because the higher the fees, the higher the amount of money the MEWA's insurers receive, and thus the greater amount Defendants receive from their commission percentage. *Id*.

II. Procedural History

Plaintiffs filed an action under ERISA alleging that Defendants' retention of the commissions and failure to negotiate lower administrative fees violated ERISA sections 404 and 406. *Winsor, et al. v. Sequoia Benefits and Insurance Services LLC, et al.*, No. 3:21-cv-00227-JSC (N.D. Cal.), ECF No. 1 ("*Winsor*"). Defendants filed a motion to dismiss the first amended complaint on July 30, 2021, arguing that (among other deficiencies) Plaintiffs lacked constitutional standing. ER-106.

The district court granted Defendants' motion to dismiss on November 1, 2021, holding that Plaintiffs lacked constitutional standing to bring the action. ER-4–12. Specifically, the court found that (1) Plaintiffs had not alleged that funding the commissions caused them injury because recovery of that money to the Plan would not affect Plaintiffs; (2) Plaintiffs had no non-financial stake in the restoration of the commissions to the Plan; (3) higher administrative fees could be an injury, but Plaintiffs failed to allege that they would pay lower contributions to the Plan if fees were lower; and (4) even if Plaintiffs had alleged an injury-in-fact, the injury was not redressable because Plaintiffs did not allege that the Plan would be forced to refund Plaintiffs. *Id*.

Plaintiffs filed their notice of appeal on November 29, 2021. ER-85.

SUMMARY OF THE ARGUMENT

Plaintiffs satisfy all three elements for Article III standing: injury-in-fact, causation, and redressability.

1. Plaintiffs suffered an injury-in-fact sufficient to confer standing to pursue the return of their contributions. Plaintiffs' allegations that (i) Defendants illegally retained a portion of Plaintiffs' contributions funding their commissions and (ii) failed to negotiate lower administrative fees (paid by Plaintiffs) because

they were conflicted demonstrate that they have suffered economic harm. Overpayment and loss of the use of money are both concrete injuries for Article III purposes.

The district court improperly determined the Plan was a defined-benefit pension plan (despite Plaintiffs' allegations to the contrary) and, relying on *Thole*, assumed that Plaintiffs would not receive any money if they successfully litigated this action. ER-6. This determination ignores allegations that Defendants retain commissions funded by Plaintiffs' money, and that Plaintiffs can recover that money if they prove that Defendants engaged in ERISA violations. The lower court's requirement that Plaintiffs show that they would pay lower contributions if they were successful conflates causation and redressability issues with whether Plaintiffs were injured, and does not negate Plaintiffs' allegations that they overpaid and that Defendants illegally retain their assets.

2. Plaintiffs have also plausibly alleged that Defendants caused their injury. Defendants made the decision to retain commissions funded by Plaintiffs' contributions and to not negotiate lower administrative fees. Regardless of whether the actions of other actors like RingCentral contributed to Plaintiffs' injury, Plaintiffs allege that their harm is traceable to the Defendants' actions.

3. Plaintiffs also assert a redressable injury. If Plaintiffs are successful, their money that funded the commissions and the excess administrative fees will be

returned to the RingCentral Plan. Plaintiffs allege that RingCentral, as plan administrator and a fiduciary, will likely refund the portion that Plaintiffs paid as a credit or distribution. As several circuit courts have held (and guidance issued by the Department of Labor confirms) in analogous contexts, a fiduciary who receives recovery on behalf of a plan must consider the allocation of proceeds to injured participants.

The district court's reliance on *Glanton* to conclude that RingCentral would not return any recovery to participants (and thus Plaintiffs' injury was not redressable) was error. The *Glanton* employer was not acting as a fiduciary with respect to the monies requested as a remedy, and it had no obligation to apply the proceeds for plaintiffs' benefit. In contrast, RingCentral is a fiduciary (as plan administrator) to the proceeds of any recovery and is required to consider participants' interests when receiving proceeds from an action like this one. RingCentral's fiduciary obligations make Plaintiffs' recovery substantially likely—unlike *Glanton*, where the actor receiving the recovery had unfettered discretion to allocate the recovered money.

ARGUMENT

The basis for constitutional standing is straightforward: Plaintiffs alleged that they were economically harmed by Defendants illegally retaining commissions funded by their contributions to the Plan and by paying an excessive amount of fees. Plaintiffs have alleged everything necessary to demonstrate that Defendants' actions have financially harmed them. They paid money to the Plan to pay the MEWA to receive insurance; Defendants illegally retained some of that money as a kickback. Plaintiffs' loss of that money and Defendants' subsequent profit is an Article III injury. Plaintiffs also allege that they paid higher administrative fees because Defendants failed to negotiate with the MEWA's insurers to lower the fees. Their overpayment is also an Article III injury. Plaintiffs claim that if they are successful in this lawsuit, the plan administrator will return their recovered contributions through a distribution or credit—this is their financial stake in the litigation.

Plaintiffs' allegations establish the three necessary components of constitutional standing: Plaintiffs suffered economic harm, Defendants caused that harm, and their harm can be remedied by a favorable decision. Yet, the district court found that Plaintiffs lacked any concrete injury under Article III and could not pursue the return of their money. The district court's holding relied on its misapplication of both *Thole* and *Glanton* and should be reversed.

I. Plaintiffs Established Injury-in-Fact because They Allege that They are Entitled to a Refund of Their Illegally Retained Contributions and the Excessive Administrative Fees

Under Article III of the U.S. Constitution, federal courts only have jurisdiction to address "cases" or "controversies." *See Spokeo, Inc. v. Robins*, 578

U.S. 330, 337–38 (2016). Federal courts have interpreted this limitation by developing three components of constitutional standing: (1) the plaintiff must have suffered an injury-in-fact; (2) that injury must be fairly traceable to the challenged conduct of the defendant; and (3) that injury is likely to be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992).

This Court recognizes economic harm (including loss of use of a plaintiff's money) as a concrete injury sufficient to confer Article III standing. Plaintiffs' allegations that they funded Defendants' illegal commissions with contributions from their wages and paid excessive administrative fees satisfy this standard.

The district court's contrary holding was due to two legal errors. First, the district court disregarded Plaintiffs' allegations that the Plan is an employee welfare benefit plan, in violation of well-established pleading standards, and mistakenly assumed that "[t]he Plan at issue here is a defined benefit plan," ER-8, like the pension plan in *Thole*. Second, comparing the Plan to the *Thole* plan, the district court held that Plaintiffs failed to allege a financial stake in their action.

The district court's analogy was thoroughly flawed—unlike the *Thole* plaintiffs, Plaintiffs' injury focuses on their *money paid* to the Plan that is retained illegally by Defendants, and they have a stake in the return of that money. They have money to gain if they win, which makes this action distinguishable from *Thole* and confers constitutional standing on Plaintiffs.

A. Plaintiffs Have Plausibly Alleged a Financial Stake in the Action

To establish the first Article III element at the pleadings stage, Plaintiffs need only *plausibly allege* that they have suffered a concrete injury. *Namisnak v. Uber Technologies, Inc.*, 971 F.3d 1088, 1092 (9th Cir. 2020); *Food & Water Watch Inc. v. Vilsack*, 808 F.3d 905, 915 (D.C. Cir. 2015); *Ass'n for L.A. Deputy Sheriffs v. Cnty. of L.A.*, 648 F.3d 986, 991 (9th Cir. 2011). Even minor economic harm or loss of the use of money is sufficient to meet this standard. *Czyzewski v. Jevic Holding Corp.*, 137 S. Ct. 973, 983 (2017); *Van v. LLR, Inc.*, 962 F.3d 1160 (9th Cir. 2020) (the inability to have and use money to which the party is entitled is an Article III injury).

Here, Plaintiffs have advanced two theories of economic harm. First, they assert that their contributions to their health plan paid into the MEWA trust are illegally retained by Defendants as commissions in violation of ERISA. ER-32, 34–35, 48–49, 54–55, 55–56. Second, they allege that Defendants have retained artificially high administrative fees for the Plan, causing Plaintiffs to overpay for their benefits. ER-37, 51–52.

With respect to Plaintiffs' first theory regarding the illegal commissions, Plaintiffs allege that they have been injured because they have "suffered the loss of these monies and opportunity costs associated with the payment of these monies to Defendants[,]" ER-55, and that Defendants' retention of those commissions is illegal and Plaintiffs have the right to have their money refunded. ER-35–37, 49, 54–55, 55–56.

The loss of a plaintiff's money and subsequent profiting from that money by a defendant is a plausible injury-in-fact under Article III. *See Van*, 962 F.3d at 1162–63. The Fourth Circuit considered similar allegations in an ERISA action, *Pender v. Bank of America Corp.*, 788 F.3d 354 (4th Cir. 2015). In *Pender*, the plaintiffs transferred their individual accounts to a different defined-benefit pension plan sponsored by their employer, Bank of America. *Id.* at 358. The bank allowed plaintiffs to select hypothetical investments for their money in the pension plan, while actually investing the plaintiffs' money in investments of the bank's choosing. If the bank's investments outperformed plaintiffs' hypothetical investments, the bank kept the difference in performance as its profit. *Id*. at 358–60. The *Pender* plaintiffs filed an ERISA action seeking return of the bank's profit made using their assets. *Id*. at 364. Against a challenge to plaintiffs' standing, the Fourth Circuit determined that plaintiffs "incurred an injury-in-fact" because they had "suffered an individual loss, measured as the 'spread' or difference" between the bank's investments and the amount it paid plaintiffs. *Id*. at 367 (citation omitted).

Plaintiffs have the same financial stake in the refund of their contributions as the *Pender* plaintiffs did in the profit from their assets. While the district court focused on Plaintiffs' failure to allege that their contributions would be lower if they succeed, ER-6, such an allegation is not necessary to establish that Plaintiffs have been injured by Defendants' retention of their contributions.[1]

Indeed, the Department of Labor's guidance supports Plaintiffs' position that they are likely entitled to a refund of their contributions. The Department's Technical Release 2011-04 states that participants in a health plan (like Plaintiffs) may have a financial stake in any refunds or rebates paid to their health plan. An ERISA fiduciary, who "must be someone acting in the capacity of manager, administrator, or financial adviser to a 'plan,'" *Pegram v. Herdrich*, 530 U.S. 211, 222 (2000) (citing 29 U.S.C. § 1002(21)(A)), should consider the interests of participants when determining how to allocate those refunds or rebates. *See* Technical Release 2011-04, *available at* https://www.dol.gov/agencies/ebsa/employers-and-advisers/guidance/technical-releases/11-04#f4 (noting that if the rebates are plan assets, they are subject to ERISA's fiduciary duties and the fiduciary should allocate those rebates for the benefit of participants covered by the

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[1] Even though Plaintiffs do not expressly allege that they would pay lower contributions in the future if Defendants' commissions were eliminated, this would have been a reasonable inference for the district court to draw in Plaintiffs' favor. For example, if Defendants rebated their commissions to the plans, the rebates arguably constitute plan assets that are required to be used for participants' benefit and could be shared with Plaintiffs as rebates or discounts on future premiums. Technical Release No. 2011-04 at 2. Plaintiff Beichle did experience lower contributions to her vision plan between 2018 and 2019 when the overall costs of the plan decreased. Appellants' Br. at 28; ER-34.

policy). Plaintiffs' claim that they have a stake in their illegally retained contributions is sufficient to satisfy the injury-in-fact requirement of Article III.

Plaintiffs' second theory of injury, that they paid excessive administrative fees, also satisfies Article III. Specifically, Plaintiffs claim that Defendants failed to negotiate lower administrative fees because they were subject to a conflict-of-interest—the higher the administrative fees, the higher Defendants' commissions. In turn, this forced Plaintiffs to pay higher contributions. ER-37, 51–52. Other courts have consistently held that allegations that participants pay excessive administrative fees constitute an injury-in-fact under Article III. *Boley v. Universal Health Servs., Inc.*, 498 F. Supp. 3d 715, 724 (E.D. Pa. 2020) (allegations of excessive fees paid by participants constituted injury-in-fact due to additional costs and lower returns); *In re Biogen, Inc. ERISA Litig.*, No. 20-cv-11325-DJC, 2021 WL 3116331, at *4 (D. Mass. July 22, 2021) (same); *see also Maya v. Centex Corp.*, 658 F.3d 1060, 1069 (9th Cir. 2011).

In sum, Plaintiffs' allegations that Plaintiffs are entitled to the refund of their money because (i) Defendants illegally retain and profit off Plaintiffs' contributions to the Plan; and (ii) Plaintiffs overpaid for administrative fees because Defendants failed to negotiate lower fees constitutes injury-in-fact under Article III.

B. The District Court Erred by Treating the RingCentral Plan as a Defined-Benefit Plan

Despite Plaintiffs' claim that they have a financial stake in the refund of their contributions, the district court still concluded that Plaintiffs had failed to "allege facts that support an inference that reimbursement to the Plan would concretely affect them one way or another." ER-5 (citing *Thole*). The court also noted that, like *Thole*, it was similarly decisive here that Plaintiffs had suffered no "injury-in-fact" because the Plan is a defined-benefit plan. ER-9.

The district court's finding is clear error. First, Plaintiffs do not allege that the Plan is a defined-benefit plan (like the *Thole* plan), but expressly state in their Complaint that the Plan is an "employee welfare benefit plan." ER-37. At the pleadings stage, the district court is required to treat this allegation as true and assume that the Plan is an employee welfare benefit plan. *Ass'n for L.A. Deputy Sheriffs*, 648 F.3d at 991. The district court failed to do this.

Even if Plaintiffs had not alleged what type of Plan they paid contributions to, the allegations about the Plan satisfy ERISA's definition of an employee welfare benefit plan, which is a "plan […] established or maintained by an employer […] for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, [] medical, surgical, or hospital care or benefits […] (*other than pensions* […])." ERISA section 3(1);

29 U.S.C. § 1002(1).[2] This fits with Plaintiffs' allegations that they received medical and dental benefits through the Plan. ER-33–34. In contrast, ERISA defines a "defined benefit plan" as "a pension plan other than an individual account plan." 29 U.S.C. § 1002(35). Plaintiffs do not allege that the Plan is a pension plan, and the court's opinion does not include any analysis or support for its determination that the Plan satisfies this definition.

The district court's conclusion that the Plan is a defined-benefit plan not only violates the well-established rules for evaluating pleadings at the motions to dismiss stage, but is also unsupported by ERISA. And in this case, this assumption led to its flawed analysis of whether Plaintiffs had plausibly alleged an injury-in-fact.

C. Because It Assumed that the RingCentral Plan was a Defined-Benefit Plan, the District Court Incorrectly Concluded under *Thole* that Plaintiffs Had No Money to Gain from this Action

The district court's mistaken conclusion that the RingCentral Plan was a defined benefit plan permeated its analysis of whether Plaintiffs had a financial stake in this action. Ultimately, the district court erroneously determined that a

[2] MEWAs also are properly categorized either under the definition of "employee welfare benefit plan" or "any other arrangement," rather than a pension plan. *Compare* 29 U.S.C. §§ 1002(1) &(40)(A) *with* § 1002(35).

successful lawsuit would not impact Plaintiffs one way or another, and thus Plaintiffs had no injury. *See* ER-6.

To reach this conclusion, the district court inappropriately analogized the instant situation to the *Thole* pension plan case. *Thole* concerned mismanagement of assets in the trust of a defined-benefit plan, a type of pension plan. *Thole*, 140 S. Ct. at 1618-19. The plaintiffs sued over an alleged breach of the fiduciaries' duties to participants because the fiduciaries had invested the trust assets using a 100% equities investment strategy, which lost the trust hundreds of millions of dollars after a stock market decline. *Adedipe v. U.S. Bank, National Association*, No. 13-2687, 2015 WL 11217175, at *1 (D. Minn. Dec. 29, 2015). The defendant fiduciaries replaced the lost money to the trust years later and then moved to dismiss the case for lack of Article III standing, arguing that because the money was replaced, the *Thole* plaintiffs were no longer injured. *Id.* at *1, *4–*5.

When *Thole* reached the Supreme Court, the Court found it of "decisive importance" that the plan was a defined-benefit plan, which was "in the nature of a contract" because "participants' benefits are fixed and will not change, regardless of how well or poorly the plan is managed." *Thole*, 140 S. Ct. at 1619–20. Putting money into the plan and the plan's investment performance did not increase or decrease the *Thole* plaintiffs' benefits. As the Court stated, "[w]in or lose, [plaintiffs] would still receive the exact same monthly benefits they are already entitled to receive," and thus they had no concrete stake in the lawsuit. *Thole*, 140 S. Ct. at 1616.

In contrast, the MEWA operates differently from the *Thole* pension plan. Plaintiffs must first pay contributions out of their wages to the MEWA before receiving any benefits. These contributions are connected to Defendants' actions: Defendants set their commission rate (ER-42) and Defendants may negotiate the administrative fees (ER-51), both of which are funded by Plaintiffs' contributions. Defendants then decide whether any savings from refunds or lower administrative fees constitute their commissions or can be paid back to those who had contributed, including Plaintiffs. Meanwhile, the *Thole* plaintiffs' benefits did not vary based on the fiduciaries' actions. *Thole*, 140 S. Ct. at 1619–20. This is a core difference between this case and *Thole*—Defendants are illegally retaining money that may belong to Plaintiffs (when the Plaintiffs may have a right to a refund based on their contributions to the Plan) and Plaintiffs seek the return of that money, whereas in *Thole*, the plaintiffs stood to receive no additional money if they won their lawsuit.

If Plaintiffs win, they can receive their money that Defendants currently illegally retain, which was not true in *Thole*. Plaintiffs have a concrete financial stake in the return of their money retained in violation of ERISA, and *Thole*'s holding does not undermine their standing.

II. Plaintiffs Established a Substantial Probability that Defendants' Actions Caused Their Harm

Although the district court did not address whether Plaintiffs had successfully established causation under Article III, Plaintiffs have plausibly alleged that Defendants caused their injury. First, with respect to the commissions, Plaintiffs' injury is caused by Defendants' decision to retain the commissions and not refund participants' contributions. ER-34–35. Defendants argued below that Plaintiffs' injury is not traceable to their conduct because RingCentral has discretion to set Plaintiffs' contributions and control any recovery. Defendants' Motion to Dismiss at 17-19, *Winsor*, No. 3:21-cv-00227-JSC, ECF No. 60. But Defendants do not need to be the only cause of Plaintiffs' injury—Plaintiffs only need a "substantial probability" that Defendants' conduct caused their injury. *See, e.g.*, *Namisnak v. Uber Techs., Inc.*, 971 F.3d 1088, 1094 (9th Cir. 2020) ("That another cause may exist for Plaintiffs' alleged injuries […] does not change that conclusion [that] Plaintiffs' alleged injury was traceable to Defendants' conduct][.]"); *City of Oakland v. Oakland Raiders*, 20 F.4th 441, 452 (9th Cir. 2021) (a plaintiff need only establish a "substantial probability" that defendants' actions caused his harm). RingCentral's involvement does not negate Defendants' role in causing Plaintiffs' harm.

Next, with respect to the excessive fees, Plaintiffs allege that Defendants are responsible for negotiating the contribution rate paid to the insurers for the

RingCentral Plan and failed to negotiate lower administrative fees. ER-51–52; *see also* 29 U.S.C. § 1104(a)(1)(A)(ii) (fiduciaries must defray costs of administering plans). Plaintiffs plausibly connect their payment of higher fees to Defendants' failure to negotiate lower costs. RingCentral's discretion to set employee contribution rates does not eliminate the connection between Defendants' actions and Plaintiffs' higher payments, *see Namisnak*, 971 F.3d at 1094; thus, Plaintiffs have plausibly alleged that Defendants caused this harm.

III. Plaintiffs Established a Substantial Likelihood that a Successful Lawsuit Would Redress Their Injury

To establish redressability, Plaintiffs need only show that their injury is likely—*not certain*—to be remedied upon a favorable decision. They allege that RingCentral, as plan administrator, is likely to allocate the recovery to Plaintiffs and the injured participants through a credit or distribution because it is subject to a fiduciary duty to act in the best interest of the participants. The district court's conclusion that nothing would require RingCentral to refund the injured participants was a misapplication of *Glanton* because RingCentral is not an actor with unfettered discretion to handle the recovery; it must act in accordance with its fiduciary duties. Because Plaintiffs allege that their contributions that funded the commissions and excessive fees are likely to be returned to them if their lawsuit is successful, they have established redressability for purposes of Article III.

A. As a Fiduciary, RingCentral is Obligated to Act in the Best Interests of Participants and Is Substantially Likely to Refund any Recovery to the Affected Participants

To establish that their injury is redressable, the plaintiff does not have to show that redressability is a certainty; only that it is "likely" or "substantially likely." *White v. University of California*, 765 F.3d 1010, 1023 (9th Cir. 2014) ("likely"); *Los Angeles Cty. Bar Ass'n v. Eu*, 979 F.2d 697, 701 (9th Cir. 1992) ("substantially likely"). Here, where any monetary recovery would be received by a fiduciary to the Plan, the recovery is "substantially likely" to be distributed to Plaintiffs and the other injured participants.

As Plaintiffs allege, RingCentral is plan administrator and a fiduciary to the Plan. ER-39. Plaintiffs assert that if they are successful, RingCentral is likely to refund the portion of the contributions that they paid through a distribution or credit. ER-35–37.

All fiduciaries to ERISA-governed plans must act in accordance with their fiduciary duties under ERISA section 404, 29 U.S.C. § 1104, including their obligation to "discharge [their] duties with respect to a plan solely in the interest of the participants and beneficiaries" and for the "exclusive purpose of providing benefits to participants and their beneficiaries and defraying reasonable expenses." *Id. at* §1104(a)(1)(A). Fiduciaries are also required to restore any losses caused by a breach of fiduciary duty to the plan. ERISA section 409; 29 U.S.C. § 1109.

Courts have held that fiduciaries' duties stretch beyond ensuring return of money lost through a breach of fiduciary duty to the plan; fiduciaries must also ensure the money is used in participants' best interests, including an allocation to any participants harmed by the breach. In *Evans v. Akers*, 534 F.3d 65 (1st Cir. 2008), participants sued fiduciaries for offering an imprudent stock investment in a defined-contribution plan, after they cashed out all their assets in the plan. The First Circuit held that participants had standing to sue for damages—that even though the money would be returned to the plan as a whole, the fiduciaries should "strive to allocate any recovery to the affected participants," which included not only current participants, but the plaintiffs who cashed out of the plan. *Id*. at 74–75. Similarly, the Third Circuit addressed fiduciaries' responsibility to allocate recovery to injured ERISA participants in *Graden v. Conexant Systems, Inc.*, 496 F.3d 291 (3d Cir. 2007). The *Graden* plaintiff cashed out his defined contribution account and then filed an ERISA action for breach of fiduciary duty based on the fiduciaries' retention of an imprudent investment in the plan. *Id.* at 294. In the context of statutory standing, the Third Circuit stated that because participants suffered a direct loss, fiduciaries should allocate any recovery to the plan to the injured participants. *Id.* at 296 n.6.[3]

[3] Other courts, following *Evans* and *Graden*, have concluded that if the recovery goes to an ERISA plan, a plaintiff's injury is redressable because the fiduciary is tasked with allocating that recovery to injured participants. *See Khan v. PTC, Inc.*,

The Department of Labor has also endorsed fiduciaries' responsibility to consider the allocation of refunds from a health plan to the participants covered by the affected policy. The Department's Technical Release No. 2011-4 provides that rebates from insurers required by the Public Health Service Act, to the extent they are plan assets, are subject to ERISA's fiduciary responsibilities. The Technical Release also states that a fiduciary to the group health plan, absent plan terms to the contrary, "should allocate or apply the plan's portion of a rebate for the benefit of participants and beneficiaries who are covered by the policy to which the rebate relates." *Id.*; *see also Ruocco v. Bateman, Eichler, Hill, Richards, Inc.*, 903 F.2d 1232, 1238 (9th Cir. 1990) ("the district court found that the balancing of equities weighed in favor of the plan participants because the premiums for the plan were paid for by the participants").[4] Although the Technical Release is guidance for

No. 20-11710-WGY, 2021 WL 1550929, at *4 (D. Mass. Apr. 20, 2021) ("Recovery for that redressable injury would inure to the benefit of the plan, and thereafter the plan's fiduciaries would reallocate the recovery to the individual accounts injured by the breach.") (quotation omitted); *Russell v. Harman Int'l Indus., Inc.*, 945 F. Supp. 2d 68 (D.D.C. 2013) ("Generally, a plan participant's breach of fiduciary duty claim brought on behalf of defined contribution plan participants is redressable because any recovery under Section 502(a)(2) may eventually be received by the participant even though the recovery might first go to the defined contribution plan rather than directly to the plaintiff.") (citation and quotation omitted); *cf. Harris v. Amgen, Inc.*, 573 F.3d 728 (9th Cir. 2009) (monetary recovery from a breach of fiduciary duty would redress plaintiffs' injury through allocation to plaintiffs' individual accounts in a defined contribution plan).

[4] *But see Stewart v. National Education Assoc.*, 471 F.3d 169, 174 (D.C. Cir. 2006) (holding that premium-paying employees were not entitled to refunds over the plan). In this brief, the Secretary does not address whether Plaintiffs' claims for a

group health plans rebates pursuant to the Medical Loss Ratio Requirements of the Public Health Service Act, the Release's reasoning is applicable here, where the Plan documents do not otherwise instruct the fiduciary how to allocate any recovery to the plan. *See* ER-11.

Because the participants have a plausible stake in the refund of their contributions, the participants have Article III standing to sue under ERISA section 502(a)(2). The Court could, for example, impose a constructive trust on those funds to return them to Plaintiffs as "the true owner" of those contributions and because "the money or property identified as belonging in good conscience to the plaintiff [can] clearly be traced back to particular funds or property in the defendant's possession." *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 213 (2002)). If Plaintiffs satisfy the requirements for a constructive trust under *Great-West*, this is one type of remedy the Court can impose under ERISA section 502(a) to redress Plaintiffs' injury.

RingCentral's status as a Plan fiduciary makes refund of the participants' contributions "substantially likely" because RingCentral's fiduciary obligations require it to act in the best interests of the participants, who partially funded the commissions and excessive administrative fees. Accordingly, the district court

direct refund are meritorious, just that their allegations are sufficiently plausible to satisfy the three elements of constitutional standing.

erred when concluding that Plaintiffs had not plausibly alleged that their injury would likely be redressed with a favorable ruling.

B. The District Court's Application of *Glanton* was Incorrect Because *Glanton* Only Applies When the Actor Receiving the Recovery Has Unfettered Discretion with Respect to the Proceeds

Although the Plaintiffs alleged that RingCentral would be likely to refund their contributions (assuming a successful lawsuit) through a distribution or credit, the district court held that Plaintiffs' injury was not redressable, stating that "even if monies returned to the Plan [no allegations or law] suggests that Plaintiffs themselves would receive anything." ER-11. The Court also noted that "[n]othing in the Plan documents would force the Plan to route funds to Plaintiffs, and nothing in RingCentral's policies would force RingCentral to lower Plaintiffs' contributions." *Id.* (citing *Glanton ex rel. ALCOA Prescription Drug Plan v. AdvancePCS Inc.*, 465 F.3d 1123, 1125 (9th Cir. 2006)).

Glanton's holding concerning redressability, however, is inapposite in a case where a fiduciary receives the recovery to the plan. The independent actors receiving the recovery in *Glanton* and *Winsor* have important differences that the district court ignored. As discussed *supra*, RingCentral is subject to fiduciary obligations to use the recovery for the benefit of participants. But in *Glanton*, although the actor receiving the recovery was the employer (like RingCentral), it was not subject to the same obligations.

This is because the remedy the *Glanton* plaintiffs sought (reducing their co-payments) is not covered by ERISA's fiduciary provisions. Critical to this Court's analysis was that the *Glanton* employer acted as a settlor, rather than a fiduciary, when setting co-payments (a fixed dollar amount participants pay for prescription drugs).[5] And, by design, any changes to the plan's payment for prescription drugs typically does not alter the co-payments paid to the pharmacy. *See Central States Southeast and Southwest Areas Health and Welfare Fund v. Merck-Medco Managed Care, LLC*, 433 F.3d 181, 202–03 (2d Cir. 2005) (stating that an increase in plans' payments for prescription drugs would likely not affect plaintiffs' co-payments, unless their payments, or co-insurance, were based on percentage of the total cost). Consequently, this Court concluded that even if the *Glanton* plaintiffs were successful, nothing would force the employer to lower participants' co-payments for prescription drugs because it did not have to act in the interests of its employees, nor refund prior co-payments that are set by the plan regardless of changes to drug prices. *Glanton*, 465 F.3d at 1125.

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[5] The use of the term settlor derives from ERISA's trust law roots. The employer acts as a settlor when it performs functions analogous to those historically performed by settlors of a trust. *Lockheed Corp. v. Spink*, 517 U.S. 882, 889 (1996). Types of tasks that are deemed settlor tasks include matters of plan design, amending a plan, or setting contribution rates. *See id* at 890; *Bator v. Dist. Council 4*, 972 F.3d 924, 932 (7th Cir. 2020) (sponsor acts as a settlor when setting contribution rates to a plan).

In short, participants' contributions to the premiums provide them a stake in the policy and any refunds therefrom. Co-payments, in contrast, typically remain fixed by plan terms regardless of any changes to the price the plan pays for prescription drugs. In a typical situation, participants do not have the same stake in a refund on the total drug price because that refund does not implicate the participants' required co-pay under the plan. Thus, the *Winsor* independent actor is a fiduciary dealing with assets for which both the Plan and participants have a stake (alleged commissions and refunds from the plan's insurance paid with employee contributions) rather than the *Glanton* independent actor dealing with settlor decisions and recoveries for which the plan or participants had no stake (co-payments are fixed by the settlor and remained unchanged by drug pricing, including any rebates). This creates a significant difference in the likelihood of Plaintiffs' recovery between *Winsor* and *Glanton*. The *Glanton* employer was not required to act in the participants' best interests with respect to the proceeds; RingCentral, however, is so required.[6]

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[6] Although *Glanton* references both "co-payments and contributions," 465 F.3d at 1125, the appellants' brief makes it clear that the alleged injury is higher co-payments. *See* Appellants' Br., *Glanton*, 465 F.3d 1123, at 2 ("Defendant has never refuted the fact that plaintiffs have paid a higher level of co-payments in the past as a result of Defendant's conduct"). This Court recognized this in *Harris*, which distinguished *Glanton* by stating "the *Glanton* plaintiffs relied not directly on fiduciary recovery but on the assumption that the defendants would voluntarily change co-payment requirements." *Harris*, 573 F.3d at 736.

This Court has clarified that *Glanton*'s approach concerning redressability is only appropriate when the independent actor receiving the recovery has *unfettered discretion* with respect to the recovery. In *White v. University of California*, 765 F.3d 1010, 1023 (9th Cir. 2014), the plaintiffs were professors who opposed the repatriation of the La Jolla remains and sought to have the remains stay with the University for research. *Id.* at 1020–22. The University argued that Plaintiffs' injury was not redressable because Plaintiffs could not show that they would be able to study the remains even if they remained with the University, citing *Glanton*. *Id.* at 1023. Plaintiffs pointed out that the University did not have unfettered discretion as to what to do with the remains, because the University had a "Human Remains and Cultural Items" policy that required it to maintain human remains for the public trust, including education and research. *Id.* This Court noted that the plaintiffs only need to show that a favorable decision would be "*likely* to redress [their] injury," and agreed that the policy meant that the University lacked unfettered discretion as to the remains, that *Glanton* was inapplicable, and that Plaintiffs' injury would be likely to be redressed upon a favorable ruling. *Id.* at 1022–23 (quotation omitted).

The same here is true—as a fiduciary, RingCentral does not have unfettered discretion as to how it allocates any recovery. Because of RingCentral's fiduciary obligations to the Plan participants, a recovery to the Plan creates a substantial likelihood that Plaintiffs will receive a refund of their contributions. Accordingly, the *Winsor* Plaintiffs satisfy Article III's redressability requirement.

CONCLUSION

For the reasons above, the Secretary requests that this Court reverse the district court's ruling that Plaintiffs lacked standing to bring this action and remand for further proceedings.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Appellate Rule 32(g) and Circuit Rule 32-1, I certify that this amicus brief:

(i) complies with the word limit of Rule 29(a)(5) because it contains 6,406 words, excluding the parts of the brief exempted by Rule 32(f); and

(ii) complies with the typeface requirements of Rule 32(a)5) and the type-style requirements of Rule 32(a)(6).

Dated: March 16, 2022

/s/ Jamie L. Bowers
Jamie L. Bowers

CERTIFICATE OF SERVICE

I hereby certify that on March 16, 2022, I electronically filed the foregoing brief with the Clerk of this Court using the CM/ECF system. Counsel for all parties will be served by the CM/ECF system.

/s/ Jamie L. Bowers
Jamie L. Bowers