No. 16-1928

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

JAMES THOLE,
Plaintiffs-Appellants,

v.

U.S. BANK, NATIONAL ASSOCIATION,
Defendants-Appellees.

On Appeal from the United States District Court
for the District of Minnesota (No. 13-cv-2687 (JNE/JJK))

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ISSUE PRESENTED

The Secretary will only address this following issue raised in the brief of the defendants-appellees, at 30-31:

> Whether plaintiffs have a cognizable "injury in fact" for purposes of Article III standing in an action to recover losses to their underfunded defined-benefit plan caused by their fiduciaries' violations of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1001, et. seq.

INTEREST OF THE SECRETARY

The Secretary of Labor has primary enforcement authority for Title I of ERISA. Shea v. Esensten, 208 F.3d 712, 714 n.1 (8th Cir. 2000). The Secretary's interests include promoting uniformity of law, protecting beneficiaries, enforcing fiduciary standards, and ensuring the financial stability of employee benefit plan assets. Secretary of Labor v. Fitzsimmons, 805 F.2d 682 (7th Cir. 1986) (en banc). Defendants argue, as an alternative basis for affirmance, that the plaintiff-participants in an underfunded defined-benefit pension plan do not have standing to bring suit for a breach of fiduciary duty until the plan is at imminent risk of default. If these arguments are accepted, such participants would not fulfill their statutory role in enforcing standards imposed by ERISA to protect their own plans' ability to fund their retirement benefits. Id. This result will create a significant burden for the Secretary, as the only person with standing, to bring suits to monitor

and protect the many underfunded defined-benefit pension plans. See Appellees' Br., 8 n.15 (noting that 79% of single-employer defined-benefit plans are underfunded).

STATEMENT OF THE CASE

A. Factual Background

The named plaintiffs in this case – James Thole, Marlene Jackson and Sherry Smith – are former employees and vested participants in the defined-benefit pension plan sponsored by their former employer, U.S. Bank. See Plaintiffs' Appendix ("App.") 40-41 (¶¶ 24-27). They brought suit on their own behalf and on behalf of a class of similarly-situated participants in the Plan against three inter-related corporate defendants and a number of individuals at the corporation.[1] App. 41-45 (¶¶ 28-52). They allege that all of the defendants are plan fiduciaries, with the exception of U.S. Bancorp which they allege is a party-in-interest. App. 48, 95 (¶¶ 68, 283).

Plaintiffs allege that the Plan fiduciaries violated their duties of loyalty and

[1] The three corporate defendants are U.S. Bancorp, the Plan sponsor; U.S. Bank, a wholly-owned subsidiary of U.S. Bancorp and trustee; and Nuveen Management, successor-in-interest to FAF Advisors, Inc., the investment advisor and a subsidiary of U.S. Bank. App. 41-42 (¶¶ 29-30). The individual defendants are the nine members of the U.S. Bancorp Board of Directors, members of the U.S. Bancorp Compensation Committee, and members of the U.S. Bancorp Investment Committee during the class period. App. 42-45 (¶¶ 32-40; 43-51). Both Committees are named fiduciaries, while the Board has the authority to appoint the members of the Committees. App. 42, 43, 45 (¶¶ 31, 42, 51).

prudence; failed to prudently diversify plan assets; and failed to follow plan documents, all as required by ERISA section 404, 29 U.S.C. § 1104. App. 82-94 (¶¶ 228-281). Additionally, plaintiffs allege that defendants violated co-fiduciary duties set forth in section 405, 29 U.S.C. § 1105, and engaged in prohibited transactions in violation of sections 406(a)(1)(D), 406(b)(1) and 406(b)(2), 29 U.S.C. §§ 1106(a)(1)(D), (b)(1), (b)(2). App. 94-104 (¶¶ 282-317). U.S. Bancorp is alleged to have knowingly participated in these breaches and prohibited transactions. App. 104-106 (¶¶ 318-327).

The claims challenge an investment strategy under which virtually all of the Plan's assets were invested in a portfolio of equity stocks managed by defendant FAF Advisors. App. 33 (¶ 4). This strategy, plaintiffs claim, was imprudent and disloyal and led to an undiversified portfolio that was unreasonably risky and out of line with the investment strategy normally applied by defined-benefit plans (which average only 59% in equities). App. 33 (¶ 3). Moreover, according to the complaint, this strategy was designed to, and benefitted, the Plan sponsor by allowing it to report a higher assumed rate of return on the Plan's investments, which reduced to zero the amount that U.S. Bancorp was required to contribute to the Plan while also inflating U.S. Bancorp's stock price. App. 98 (¶ 229). In addition to benefitting the company, the 100% equity investment strategy also allegedly benefited FAF Advisors by enabling FAF Advisors to generate fees for

itself by investing the majority of the Plan assets in its own mutual funds and by drawing other investors to FAF Advisors as a result of its increased assets under management. App. 61 (¶ 140). Plaintiffs also allege that FAF Advisors engaged in an impermissible, deceptive and risky lending arrangement with the Plan. App. 71-75 (¶¶ 174-198). Defendants' fiduciary misconduct allegedly led to a $1.1 billion loss to the Plan in 2008, causing the Plan to become significantly underfunded at that time. App. 33 (¶ 4). In other words, "'the value of the plan assets dropped below the plan liabilities,'" which included the obligation to pay promised benefits. App. 70 (¶ 170).

Plaintiffs sued under ERISA section 502(a)(2), 29 U.S.C. § 1132(a)(2), which, together with section 409(a), 29 U.S.C. § 1109(a), allows plan participants to sue fiduciaries whose breaches have harmed their plan and to recover any losses to the plan or to obtain other equitable and remedial relief for the plan. App. 107 (¶ 329). Plaintiffs also sued under ERISA section 502(a)(3), 29 U.S.C. § 1132(a)(3), see App. 107, which allows plan participants to sue fiduciaries and others for injunctions and "other appropriate equitable relief," and which has been interpreted to encompass relief running to plan participants themselves. See Varity v. Howe, 516 U.S. 489, 513-15 (1996). Plaintiffs request declaratory relief, the recovery of Plan losses from the breaching fiduciaries, disgorgement of any profits made through the use of Plan assets, and other equitable relief, including injunctive

relief, a court-appointed fiduciary, and, as available under applicable law, a constructive trust and restitution. App. 108-109. The Plan was still underfunded when plaintiffs filed their amended complaint on March 20, 2014. App. 71 (¶ 173).

B. Procedural History

After plaintiffs filed an amended complaint, defendants filed a motion to dismiss for lack of constitutional standing. Defendants argued that even though the Plan was underfunded, plaintiffs had not been injured in a constitutional sense by the Plan's loss because plaintiffs' benefit levels were not reduced and U.S. Bancorp, as the plan sponsor, was in a financial position to fully fund the plan's benefits. App. 123. On November 21, 2014, the district court denied the defendants' motion to dismiss. App. 110-156. The district court rejected defendants' reliance on U.S. Bancorp's financial status and the availability of PBGC insurance, finding that by the "relevant measures" set forth in this Court's decision in Harley v. Minnesota Min. and Mfg. Co., 284 F.3d 901 (8th Cir. 2002), plaintiffs "adequately alleged that the Plan lacked a surplus large enough to absorb the losses at issue," and, on that basis, concluded that the plaintiffs "satisfied their burden of alleging that they have suffered a personal injury in fact." App. 130. The court also concluded that plaintiffs adequately alleged that the violations caused a $748 million loss, resulting in an increased risk of default as a result of

the Plan's underfunding, see id. at 131, and that these harms could be fairly redressed, at a minimum, by the restoration of Plan losses that plaintiffs sought from the breaching fiduciaries. Id. The district court dismissed some of plaintiffs' claims on other grounds, but let many of the claims go forward. App. 140.

On December 29, 2015, the district court dismissed the remaining claims on mootness grounds, concluding that the claims had become moot when, earlier in 2015, U.S. Bancorp contributed enough to the Plan for it to become overfunded. App. 178. The court noted that a case becomes moot when the parties lose any "legally cognizable interest in the outcome," and "it becomes impossible for a court to grant any effectual relief whatever to the prevailing party." App. 175 (internal quotations and citations omitted). The court reasoned that under this Court's decisions in McCullough v. AEGEON USA, Inc., 585 F.3d 1082, 1084 (8th Cir. 2009), and Harley, 284 F.3d at 907, once the Plan became overfunded, the participants no longer had a concrete interest in any monetary relief that might be awarded to the Plan because any such award would simply add to the Plan's surplus, which may revert to the plan sponsor upon the Plan's termination. App. 178. The Court also determined that neither plaintiffs' request for various forms of relief under section 502(a)(3) nor their claims for invasion of their statutory rights could save the case from mootness. App. 180-183.

Plaintiffs appealed and filed their opening brief on July 12, 2016.

Defendants filed their response brief on September 12, 2016. In their response brief, in addition to arguing that this Court should affirm the district court's dismissal based on mootness, defendants also argue that this Court could affirm the dismissal on the alternative ground that plaintiffs did not have Article III standing when the complaint was filed. Appellee's Br., 30. In doing so, defendants assert that plaintiffs' allegations that the Plan was underfunded and that the underfunding was caused by defendants' misconduct are insufficient to establish an injury in fact; instead, they argue, plaintiffs had to assert that "the alleged fiduciary breaches created an 'impending' or 'imminent' risk that the Plan would default." Id. at 31.

SUMMARY OF THE ARGUMENT

ERISA imposes a specific framework for defined-benefit plans. Employees work to accrue and vest at a promised level of pension benefits upon retirement, and fiduciaries must abide by stringent statutory duties designed to protect the pool of assets necessary to fund those promised benefits. ERISA expressly grants participants statutory rights to enforce those requirements, including ERISA's requirements that plan fiduciaries manage the plan in a prudent and loyal manner, diversify plan assets, refrain from engaging in conflicted and self-serving transactions and protect the pool of assets so that it can fully fund the promised benefits.

In this case, plaintiffs allege plan fiduciaries breached these duties to their

defined-benefit plan and, in so doing, depleted the plan's assets to such an extent that it could no longer fully fund the participants' promised benefits. Plaintiffs then sued the fiduciaries under ERISA to recover the plan's losses on behalf of the plan. This Court has held that participants in defined-benefit pension plans have no standing to recover losses on behalf of their plan if, at the time of suit, the plan has a surplus of plan assets sufficient to absorb plan losses that have occurred and still pay all promised benefits. As the district court correctly held in this case, under this precedent, participants have standing to sue when, as here, no surplus exists to absorb the loss, and the participants bear the harm of underfunding caused by the plan's losses. When their promised benefits are no longer fully backed by plan assets, each participant's promise of benefits is less secure and devalued. This harm is an Article III "injury in fact." Because, at the time they brought suit, plaintiffs alleged a loss to their plan and no surplus to absorb the loss, the district court correctly held that plaintiffs had standing to sue to recover this loss to the plan. This result is consistent with ERISA's design, with this Court's precedent, and with Article III jurisprudence.

ARGUMENT

Plaintiffs Have Article III Standing Based on the Injury to the Plan and its Participants, Which Depleted the Plan's Assets Below ERISA's Minimum Funding Requirements

In their response brief, defendants argue that, even if the mootness doctrine

does not support dismissal, this Court can affirm the district court's dismissal of the case on an alternative ground that plaintiffs did not have Article III standing to initiate the case. Appellees' Br., 30 n.41. Defendants present two arguments. First, defendants argue that "[a]lthough Harley and McCullough both involved 'overfunded' defined benefit plans, nothing in these decisions suggests that participants [here] in 'underfunded' defined benefit plans necessarily have standing." Appellees' Br., 30. Second, defendants urge the court to adopt a test for Article III standing that requires plaintiffs to plead facts demonstrating that the "alleged fiduciary breaches created an 'impending' or 'imminent' risk that the Plan would default." Id. at 31. In arguing for an "impending" or "imminent" risk requirement, defendants are proposing that this Court import into the defined-benefit context the Supreme Court's approach to standing in Clapper v. Amnesty International USA, 133 S. Ct. 1138, 1147 (2013).

In Clapper, the Supreme Court ruled that private plaintiffs, fearful that amendments to the Foreign Intelligence Surveillance Act creating a framework for surveillance would harm their dealings with individuals living abroad, did not have statutory standing to sue because they did not suffer any current injury and any future injury was not imminent or impending. 133 S. Ct. at 1155. Defendants rely on the Fifth Circuit's recent decision in Lee v. Verizon Communications, No. 14-10553, -- F.3d. --, 2016 WL 4926159 (5th Cir. Sept. 15, 2016), which applied the

Clapper standard to an underfunded defined-benefit plan to find that the alleged underfunding caused by fiduciary misconduct was an "injury too speculative to support standing" where the participants do "not allege a plan termination, [or] an inability by [the employer] to address a shortfall in the event of a termination." Id. at *14-*15 & n. 89.

Both of defendants' arguments are incorrect. First, as discussed in greater detail below, the framework for standing described in Harley and subsequent decisions support a conclusion that participants have constitutional standing to sue on behalf of their underfunded defined-benefit pension plans for losses caused by fiduciary breach. Defendants identify no error in the district court's analysis of Harley and its progeny when the district court found plaintiffs had standing to sue under the Harley framework.

Second, defendants and the Fifth Circuit are simply wrong that the Clapper standard applies to the defined-benefit context. Unlike in Clapper and similar cases where the plaintiffs did not suffer any injury at the time of filing suit but instead based their case on the possibility of future injury, the participants in the defined-benefit plan at issue here have suffered a current injury when their plans suffered losses that caused the plans to become underfunded. The injury implicates the plan fiduciaries' promise to plan participants to protect the pension plan, including the promise of sufficient funding for the employees' promised benefits. In

this context, the participants have been harmed because they are entitled to a properly-managed and a sufficiently-funded plan to ensure that they will receive their promised benefits. See Nachman Corp. v. Pension Ben. Guar. Corp., 446 U.S. 359, 374–75 (1980); Connolly v. Pension Ben. Guar. Corp., 475 U.S. 211, 232 (1986) (O'Connor, J., concurring). ERISA empowers participants to enforce these promises on behalf of the plan and themselves. 29 U.S.C. §§ 1132(a)(2), (3). Thus, the conclusion in Clapper that plaintiffs who suffer no current injury must show that a future injury is "imminent" or "impending" has no relevance to a claim by a plan participant that fiduciary breaches that caused losses to a defined benefit plan resulted in that plan becoming underfunded. As discussed below in further detail, this Court should reject defendants' alternative argument for affirmance based on standing.

1. Under *Harley*'s framework, participants in underfunded plans have standing to sue when their plan suffers losses due to a fiduciary breach

In its decision concluding that plaintiffs had standing to sue, the district court correctly recognized that, in this Circuit, the participants' injury for standing purposes in the defined-benefit context turns on whether or not the plan is fully funded with a surplus. App. 125 (recognizing "the centrality of surplus—or the lack thereof—to Harley's injury-in-fact analysis"). The district court found that plaintiffs "adequately alleged that the Plan lacked a surplus large enough to absorb the losses at issue," and, on that basis, concluded that the plaintiffs here "satisfied

their burden of alleging that they have suffered a personal injury in fact." Id.

The district court's understanding of Harley and its progeny is accurate. Harley concerned a defined-benefit plan's imprudent investment that depleted $20 million dollars in plan assets, but the remaining pool of assets was "more than adequate to pay all accrued or accumulated benefits" promised to participants, because the plan sponsor contributed to the plan beyond its minimum funding requirements to meet all benefit obligations. 284 F.3d at 906-08 (describing the plan's "surplus" beyond the minimum funding requirement as "[t]he actuarial value of the Plan's assets exceeded its actuarial accrued liabilities"); see generally 29 U.S.C. § 1082 ("A plan to which this part applies shall satisfy the minimum funding standard applicable to the plan for any plan year").

This Court acknowledged that the defined-benefit plan itself was harmed by the fiduciary breaches, even though the plan was overfunded at the time that the suit was brought. Id. at 905 ("This loss [caused by the fiduciary breach] reduced the pool of [p]lan assets," and the fiduciary inflicted "cognizable harm" on the plan.). Harley also acknowledged that subsequent contributions from the employer to fund the plan do not offset or eliminate this harm to the plan caused by the reduction in the pool of plan assets. Id.

Harley then addressed whether the participants had "statutory standing" to sue for the plan losses on behalf of the plan pursuant to ERISA section 502(a)(2),

29 U.S.C. § 1132(a)(2). This Court concluded they did not because "if plan assets are depleted but the remaining pool of assets is more than adequate to pay all accrued or accumulated benefits, then any loss is to plan surplus" not to individual participants. 284 F.3d at 906. The Court concluded that the participants were not injured by a loss to their overfunded plan because any recovery of losses would only add to the plan's surplus, which reverts to the employer upon plan termination, and would not directly benefit them in any way. Id. The participants, therefore, had no statutory standing to recover those losses. Id. In reaching this conclusion, this Court relied on principles of constitutional avoidance. Harley, 284 F.3d at 906 (noting that "a contrary construction [of § 1132(a)(2)] would raise serious Article III case or controversy concerns," because it would "permit[ ] participants or beneficiaries who have suffered no injury in fact" to bring an action to enforce ERISA fiduciary duties on behalf of the Plan); see also Braden v. Wal-Mart Stores, Inc., 588 F.3d 585, 593 (8th Cir. 2009).

In a subsequent Harley decision, this Court recognized that "if market conditions had been different when Participants brought suit, or if a different valuation method had been used, they might have met their burden of proof for standing." Harley v. Zoesch, 413 F.3d 866, 872 (8th Cir. 2005). Thus, in this Circuit, "absence of adequate surplus is an element of plaintiffs' standing under [29 U.S.C.] § 1132(a)(2) — proof they are suing to redress a loss to the Plan that is an

actual injury to themselves." Harley, 284 F.3d at 908. See also Braden, 588 F.3d at 593 (same); McCullough, at 585 F.3d 1084 (same); Perelman v. Perelman, 793 F.3d 368, 375 (3d Cir. 2015). Because the plan participants here established an "absence of adequate surplus," they established standing to sue to redress a loss to the Plan under this binding precedent.[2]

Even if this were not the holding of Harley, Harley's rationale counsels this result. There, the Court reasoned that if a plan is overfunded, any loss to the plan only reduces the surplus; therefore, any recovery of those losses will only affect the employer or plan sponsor because the plan sponsor has the "reversionary interest" in the surplus upon plan termination, whereas "Plan beneficiaries have no claim or entitlement to its surplus." 284 F.3d at 906, 908 & n.1. Under this logic,

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[2] In prior amicus curiae briefs, the Secretary noted his disagreement with Harley's framework, which hinges standing for participants who sue on behalf of their defined-benefit plans on an arbitrary snapshot of a plan's funding status at the moment the suit is filed. See Brief of the Secretary of Labor as Amicus Curiae in Support of Appellant's Petition Rehearing En Banc, 2009 WL 4831925, McCullough v. AEGON USA Inc., No. 08-1952 (8th Cir.) (filed Dec. 4, 2009); 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 Manufacturing, Nos. 00-2214, 01-1213 (8th Cir.) (filed May 22, 2002). Agreeing with our position, Judge Bye, in Harley and in subsequent related cases, noted that standing "should be tied to whether the plan had a loss, period, not whether the plan participants arguably suffered a loss at any particular snapshot in time [i.e., when a plan is funded or not], based on fluctuations in the stock market." Harley v. Zoesch, 413 F.3d at 872-73 (Bye, J., concurring); see also Harley, 284 F.3d at 909-910 (Bye, J., dissenting). In this brief, we assume that Harley and its progeny bind this panel, despite our continued disagreement with these decisions and where they draw the "injury in fact" line.

in an underfunded plan, the participants, not the plan sponsor, are injured by the plan's loss because any recovered assets will not simply add to a surplus but will directly advance their interest in a plan that is fully funded and that has sufficient assets to pay all benefits upon the plan termination.

As this Court, in Hawkeye National Life Insurance v. AVIS Indus. Corp., 122 F.3d 490, 497-98 (8th Cir. 1997), recognized, while a plan surplus "may" be distributed to an employer or plan sponsor upon termination once all benefits are paid, the plan's assets otherwise "shall never inure to the benefit of any employer and shall be held for the exclusive purposes of providing benefits to participants in the plan and their beneficiaries and defraying reasonable expenses of administering the plan." (quoting 29 U.S.C. § 1103(c)(1)) (emphasis added). In short, upon termination, plan assets are first used to pay benefits to participants; only residual assets or the "surplus" may be reverted to an employer or plan sponsor. Id. If the Plan terminates as an underfunded plan in a "distress termination," plan assets are distributed to pay benefits to participants. See id.; see also Mead Corp. v. Tilley, 490 U.S. 714, 718 (1989); see generally 29 U.S.C. § 1341 (single employer plan can only terminate voluntarily if it has sufficient assets to pay all benefit liabilities (standard termination) or meets criteria for a distress termination); 29 U.S.C. § 1362 (in a distress termination, any person who is a contributing sponsor of the plan or a member of such sponsor's controlled group is liable for unfunded benefit

liabilities). Outside of the narrow surplus context discussed in Harley and its progeny, participants and beneficiaries clearly have the "exclusive" interest in the plan's assets and in protecting against a depletion of those assets. They are injured by the depletion of those assets, which must be used to pay them their benefits and must not benefit the employer. This injury clearly suffices for standing just as an entity with a "reversionary interest" in the plan's surplus is injured by a depletion of that surplus. Compare Harley, 284 F.3d at 908 n.5 ("any party with a reversionary interest in the plan's surplus ha[s] standing to sue under 29 U.S.C. § 1132(a)(2)").

Moreover, in a distress termination of an underfunded plan, some participants will receive only that portion of their benefits covered by insurance from the Pension Benefit Guaranty Corporation (PBGC), thus forcing some participants to absorb the deficit themselves.[3] See generally Pension Ben. Guar. Corp. v. LTV Corp., 496 U.S. 633, 638–39 (1990). The economic reality is that the alleged billion-dollar loss to the Plan caused by fiduciary breaches in this case creates a tangible economic harm to participants, because the loss decreases the pool of Plan assets available to them and held for their exclusive benefit while increasing the significant risk that they won't receive the full amount of promised benefits. In this underfunded context, the harm and increased risk can be tied

[3] The PBGC's single employer program currently is severely underfunded. See 2015 PBGC ANN. REP.

directly to the Plan's losses and any recovery will directly alleviate that harm and risk instead of simply padding a surplus, as Harley would have it. Unlike in Harley, a breach and resultant loss directly hurt participants, because, to the extent that there are not adequate plan assets to pay for promised benefits, participants, not the employer, most directly bear the effect of the plan losses.

Under Harley's binding framework, plan participants in an underfunded plan, therefore, have a colorable interest in the recovery of losses to the pooled assets in their defined-benefit plan caused by fiduciary breaches. See United States v. Eleven Million Seventy-One Thousand One Hundred & Eighty-Eight Dollars & Sixty-Four Cents ($11,071,188.64) in United States Currency, 825 F.3d 365, 371 (8th Cir. 2016) ("The claimant [a sole shareholder] need only show a colorable interest in the [corporation's] property, redressable, at least in part, by a return of the property."). Accordingly, the district court was correct in interpreting Harley as establishing a rule that when a defined-benefit plan incurs losses caused by a fiduciary breach and the plan fails to meet ERISA's statutory minimum funding requirements and lacks a surplus to absorb that loss, the plan's losses constitute injury in fact sufficient to confer standing on participants to sue on behalf of the plan. Plaintiffs here satisfied that rule; they had standing to sue.

2. In the defined-benefit context, injury in fact results from the diminished value of the promise to pay benefits caused by the plan losses, which, in this case, resulted in the Plan's underfunding

Before the district court and on appeal, defendants have argued that plaintiffs cannot show injury in fact because the plan is an "'ongoing plan, with a financially sound settlor responsible for making up any future underfunding, and there was no evidence that the plan would terminate in the foreseeable future.'" App. 124; Appellees' Br., 32. Instead, according to defendants, participants in a defined-benefit plan are only harmed by the "creat[ion] of an 'impending' or 'imminent' risk that the Plan would default." Appellees' Br., 31 (citing Clapper, 133 S. Ct. at 1146 (emphasis added)). As we have discussed above, a rule that the risk of harm to defined-benefit plans is measured by the plan sponsor's financial resources and whether a plan is at imminent risk of default is inconsistent with Harley and its progeny. As the district court correctly noted, "none of [this Court's] discussions suggest that the analysis of participants' injuries in this context is to turn on the financial health of the plan sponsor[.]" App. 126. Instead, this Court has repeatedly tied the participants' standing solely to the pension plan's funding status at the time of suit. See, e.g., Harley v. Zoesch, 413 F.3d at 872.

Defendants' arguments thus incorrectly frame the injury inquiry as tied to the employer's financial wherewithal. ERISA, which was expressly and primarily enacted to protect against plan mismanagement in the defined-benefit context, established minimum funding requirements precisely to protect against the "default risk." See LaRue v. DeWolff, Boberg & Assocs., Inc., 552 U.S. 248, 255 (2008)

("It was that default risk that prompted Congress to require defined benefit plans . . . to satisfy complex minimum funding requirements."). Indeed, one of ERISA's "central purposes" is to ensure the "soundness and stability of plans with respect to adequate funds to pay promised benefits." Nachman Corp. v. Pension Ben. Guar. Corp., 446 U.S. 359, 374–75 (1980) (quoting ERISA § 2(a), 29 U.S.C. § 1001(a)). Congress wanted to "mak[e] sure that if a worker has been promised a defined pension benefit upon retirement – and if he has fulfilled whatever conditions are required to obtain a vested benefit – he actually will receive it." Id. "To ensure that employee pension expectations are not defeated, [ERISA] establishes minimum rules for employee participation, §§ 1051-1061; funding standards to increase solvency of pension plans, §§ 1081-1085; fiduciary standards for plan managers, §§ 1101-1114; and an insurance program in case of plan termination, §§ 1341-1348." Alessi v. Raybestos-Manhattan, Inc., 451 U.S. 504, 511 n.5 (1981) (emphasis added).

Congress imposed these rules establishing fiduciary standards and "minimum standards of funding" to protect the "interests of participants" in plans to ensure the delivery of promised benefits to participants, see 29 U.S.C. § 1001(b)-(c). See S. Rep. 93-127 at *4846 ("The Promise and commitment of a pension can be fulfilled only when funds are available to pay the employee participant what is owed to him. Without adequate funding, a promise of a pension

which may be illusory and empty.") And the statute gives plan participants "ready access" to the courts to enforce these obligations and vindicate their interests. 29 U.S.C. § 1001(b). See, e.g., Gastronomical Workers Union Local 610 & Metro. Hotel Ass'n Pension Fund v. Dorado Beach Hotel Corp., 617 F.3d 54, 60 (1st Cir. 2010) (enforcing minimum funding obligations using 29 U.S.C. § 1132); Braden, 588 F.3d at 593 (enforcing fiduciary breach obligations using 29 U.S.C. § 1132).

Consequently, under ERISA, a defined-benefit plan promises individual participants not only a fixed pension benefit but a benefit protected by both fiduciary standards in plan management and the employer's obligation to maintain the plan's minimum solvency. Thus, ERISA's funding rules and the funding status of a plan are clearly tied to the statutory goal of protecting employees from harm by ensuring that employers provide the benefits they have promised. Hughes Aircraft Co. v. Jacobson, 525 U.S. 432, 440 (1999). Even without depleted funding, the statute deems critical the participants' right and standing to sue and recover plan losses caused by fiduciary mismanagement in order to protect their plan's solvency and safeguard participants' benefits.

Given these statutory concerns, participants clearly have suffered an injury when the default risk is shifted directly from the employer to them as a result of plan losses that cause or contribute to underfunding (as here), combined with the employer's failure to maintain required minimum funding. Compare Johnson v.

Allsteel, Inc., 259 F.3d 885, 888 (7th Cir. 2001) (granting greater discretion to the plan administrator in denying benefits shifts the risk to participants causing an "injury in fact"); see also Gibbs ex rel. Estate of Gibbs v. CIGNA Corp., 440 F.3d 571, 577 (2d Cir. 2006). In this situation, participants' promised rights to payment from an underfunded plan are simply less valuable (i.e., someone would pay less for it) than similar rights to payment from a fully-funded or overfunded plan. To remedy this injury, plaintiff-participants brought suit seeking to recover losses for the Plan from those who have breached their fiduciary duties and caused the Plan's underfunding, and through this recovery, alleviate the increased risk of default improperly imposed on them.

Consequently, a participant's promise of defined benefits, backed by fiduciary standards and minimum funding provisions, lose their value when these promises of minimum funding and fiduciary standards are broken. This loss of value is a tangible, economic harm. The Supreme Court acknowledged just this kind of harm when it found that retroactively eliminating promises associated with a participant's pension benefits, such as retroactively adding new bases to suspend retirement benefits, made those benefits less "valuable," even if benefits were not lost. See Cent. Laborers' Pension Fund v. Heinz, 541 U.S. 739, 746 (2004) ("In a given case, the new condition may or may not be invoked to justify an actual suspension of benefits, but at the moment the new condition is imposed, the

accrued benefit becomes less valuable, irrespective of any actual suspension.") (emphasis added). Likewise, promised benefits in an underfunded plan are worth less than those in a fully-funded plan, and benefits in a poorly managed and underfunded plan, as here, are less valuable still.

In Carlsen v. GameStop, Inc., No. 15-2453, -- F.3d. -- 2016 WL 4363162 (8th Cir. Aug. 16, 2016), this Court likewise recognized that the devaluation of a previously agreed-upon benefit or arrangement can result in a tangible harm. In Carlsen, the plaintiff subscribed to the "print and online materials published by GameStop, including Game Informer Magazine." Id. at *1. As part of the subscription, the plaintiff became a "party to a binding contract—the terms of service, which included the Game Informer privacy policy—with GameStop." Id. at *3. The plaintiff alleged Gamestop violated this privacy policy by systematically disclosing his personally identifiable information. Id. The Court found the breach of contract itself was sufficient "injury in fact," and "additionally" the plaintiff suffered "damages as a result of GameStop's breach in the form of devaluation of his . . . subscription in an amount equal to the difference between the value of the subscription that he paid for and the value of the subscription that he received, i.e., a subscription with compromised privacy protection." Id. at *3.

Gamestop is relevant here because ERISA plans are often treated like contracts or an exchange of promises, see US Airways v. McCutchen, 133 S. Ct.

1537 (2013), made within a statutory framework, including minimum funding and trust requirements. See, e.g., Gastronomical Workers, 617 F.3d at 62 ("statutory mandates operate in tandem with contractually imposed duties"); see also Lockheed Corp. v. Spink, 517 U.S. 882, 887, 894 (1996); Stearns v. NCR Corp., 297 F.3d 706, 710 (8th Cir. 2002). When covered by ERISA, the plans' terms include ERISA's requirements. See Heinz, 541 U.S. at 742, 750 (ERISA's prohibition on forfeitures proves "a global directive that regulates the substantive content of pension plans" and "adds a mandatory term to all retirement packages that a company might offer"). The losses to an underfunded plan caused by a fiduciary breach injure individual participants because participants continue to work, contribute and accrue pension benefits without the benefit of two valuable components of an ERISA plan: the protections of prudent fiduciary management and adequate minimum funding. Their benefits are now devalued because the plan sponsor has not fulfilled its fundamental promise to meet the minimum funding standards, regardless of whether the company is in fact capable of doing so.

The Gamestop and underfunded plan scenarios are therefore distinguishable from Clapper insofar as Clapper did not involve a diminution in the value of a promised benefit integral to a preexisting relationship or contract, such as the relationships comprehensively defined by ERISA. See Prudential Ins. Co. of Am. v. Nat'l Park Med. Ctr., Inc., 413 F.3d 897, 906 (8th Cir. 2005). For this reason,

defendants can find no help in Clapper, which merely stands for the principle that, outside any preexisting relationship, a plaintiff who suffered no current injury can establish Article III standing only where they can show that a possible future injury is "imminent." 133 S.Ct. at 1143.

This Court's decision in Braitberg v. Charter Communications, Inc., ___F.3d __, 2016 WL 4698283 (8th Cir. Sept. 8, 2016), is likewise distinguishable. In Braitberg, a plaintiff claimed that the company's retention of her personally identifiable information was in "bare procedural" violation of his rights under the Cable Act, but failed to allege that the use of the information benefited the company or hurt him. Id. at *3-*5. Unlike Gamestop and the instant case, Braitberg therefore did not allege that he suffered any economic harm or risk of harm nor, as in Gamestop and here, that the company shifted any risk or harm to him, by breaking a promise to protect against that risk. Id. at *5.

Defendants likewise are not helped by the Supreme Court's recent decision in Spokeo, Inc. v. Robins, 136 S. Ct. 1540 (2016). In Spokeo, the Supreme Court remanded to the circuit court to reconsider its prior holding that an individual had standing to bring suit against a company because it published incorrect information online about that individual even though the individual could not show that he had been harmed by the release of the information. Like the plaintiff in Clapper and Braitberg, the Spokeo plaintiff also had no preexisting relationship or contract for

which defendants promised actions protecting him from any risks of the alleged harm. Spokeo, 136 S. Ct. at 1550 (construing his claims as alleging "violation of a procedural right granted by statute"). In fact, if anything, by recognizing that injuries need not be "tangible," Spokeo reinforces that plaintiffs in this case had established sufficient injury in fact, because they plainly asserted a tangible and economic harm they suffered in the form of devalued benefits; they need not assert an "imminent" loss of their benefits. 136 S. Ct. at 1549-50 (noting, for example, "the law has long permitted recovery by certain tort victims even if their harms may be difficult to prove or measure").

Plaintiffs' benefits here were devalued at the time they filed suit because there was no surplus to absorb the losses caused by the alleged fiduciary breaches and, consequently, any recovery of those losses would increase the value of those benefits by increasing the likelihood of a full pay-out as promised. Unlike the Harley plaintiffs,"[the plaintiffs here] ha[ve] a personal stake in the litigation." Braden, 588 F.3d at 593. Given that Congress imposed the statutory funding requirements as a minimum protection against the risk of default, "absence of an adequate surplus" ought to be sufficient in this Circuit to establish injury in fact to a plan participant from a plan loss caused by a fiduciary breach. See Harley, 284 F.3d at 908.

For these same reasons, this Court should also reject the Fifth Circuit's

recent holding in Lee, 2016 WL 4926159, at *15. Fundamentally, the Fifth Circuit and defendants misunderstand the alleged injury. As Harley recognized, the injury is the fiduciary breach that depleted the pool of plan assets. 284 F.3d at 905 ("the district court's conclusion that there was no loss to the Plan seems contrary to the plain meaning of [29 U.S.C.] § 1109(a)"). The loss of assets sufficient to pay for the benefits is a harm, a harm that devalues the promises of fully-funded benefits, and the participants now seek to remedy that harm by suing those responsible – the fiduciaries that allegedly breached their duties and depleted the plan's assets. The participants merely seek to restore the assets held in trust for their exclusive benefit (29 U.S.C. § 1103). This is a right and a remedy guaranteed by ERISA. 29 U.S.C. § 1132(a)(2), (3). The loss of these plan assets constitutes a direct injury and harm to participants sufficient to confer standing to vindicate their interests.

The injury here is not contingent on the plan sponsor or employer's failure or ability to fund the plan and absorb any loss. See Lee, 2016 WL 4926159, at *14 ("the injury to participants . . . 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'") (citation omitted). To be sure, Harley recognized that the harm to the plan may be borne by a third party, an employer or plan sponsor, who absorbed the fiduciaries' harm to the plan after creating a

surplus in plan assets. 284 F.3d at 906. But, as the district court recognized, Harley focused solely on the plan's funding status at time of suit, rejecting consideration of a plan sponsor's financial status or the availability of PBGC insurance in measuring the risk of harm to participants. App. 126.

Moreover, the reality, as defendants concede, is that employers routinely underfund their pension plans, see Appellees' Br., 8 n.15, a harmful and dangerous circumstance that existed at the time of ERISA's enactment and which ERISA was enacted to counteract. See Nachman Corp., 446 U.S. at 374–75 & n.22 (describing legislative history and ERISA's purposes); see also S. Rep. 93-127 (1973) at *4857 ("actuarially sound funding procedures are indispensable to effective implementation of the purposes of the Act. If employers never went out of business or terminated pension plans before they were completely funded, there would, no doubt, be no persuasive justification for funding standards aside from whatever tax considerations might be applicable. Nevertheless, employers do experience financial or economic difficulties or they undergo varying degrees of corporate reorganization, all of which can lead to premature termination of underfunded plans."). The fact that such problems still exist today counsels the Court to permit participants to bring suit to recover plan losses from breaching fiduciaries when it can still do some good: before their plans are on the verge of collapse and the loss of their benefits is "imminent." Otherwise, ERISA's promises

remain unfulfilled leaving the participants at the mercy of their employers and fiduciaries until their plans are beyond repair. See Nachman Corp., 446 U.S. at 374–75 & n.22; 29 U.S.C. § 1001(a) (imposing enforceable standards on employers and fiduciaries to protect participants).

CONCLUSION

Based on the foregoing, the Secretary respectfully requests that this Court reject defendants' argument for affirmance on an alternative basis that plaintiffs lacked constitutional standing to sue when they brought their case.

Respectfully submitted,

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Dated: October 19, 2016

CERTIFICATE OF SERVICE

I hereby certify that on October 19, 2016, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the appellate CM/ECF system.

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