16-734-cv

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

LANDOL FLETCHER,

Plaintiff-Appellant,

FREDERICK P. POTTER, JR.,

Plaintiff,

v.

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

Defendants-Appellees.

On Appeal from the United States District Court
for the Southern District of New York

BRIEF FOR THE SECRETARY OF LABOR AS AMICUS CURIAE IN SUPPORT OF PLAINTIFF-APPELLANT

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QUESTION PRESENTED

Whether the district court improperly dismissed, for lack of constitutional standing, plaintiff's suit on behalf of himself and his retirement plan asserting that defendant-fiduciaries violated the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 et seq., by dealing with his retirement plan's assets in their own interests in order to earn hidden fees.

THE SECRETARY'S INTEREST

The Secretary of Labor bears primary responsibility for interpreting and enforcing Title I of ERISA. Sec'y of Labor v. Fitzsimmons, 805 F.2d 682, 698 (7th Cir. 1986) (en banc). The Secretary also depends on ERISA plan participants to bring their own fiduciary breach actions to complement the Secretary's enforcement capabilities. See id.

The district court's rejection of plaintiff's standing to assert fiduciary breaches on behalf of his plan would, if allowed to stand, erode participants' ability to protect their plans from fiduciary misconduct and undermine ERISA's comprehensive enforcement scheme. Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 53-55 (1987). The district court's improper holding frustrates Congress's intent to provide plan participants "ready access" to the federal courts to protect their plans. 29 U.S.C. § 1001(b). The court's erroneous conclusion that plaintiff lacks standing to assert his plan's and his individual statutory right to proper fiduciary conduct would shield fiduciaries who breached their statutory duties.

STATEMENT OF THE CASE

Plaintiff Landol Fletcher is a participant in the Central States, Southeast and Southwest Area Pension Plan (the "Plan"), which is a defined benefit plan governed by ERISA.[1] (II:A357). He does not currently receive benefits, but is fully vested in his benefits under the Plan. Id. The Plan "has significant and long-standing financial difficulties. As of 2012, the plan was only 53.9% funded, an underfunding of more than $16 billion." Id.

Defendants are a group of affiliated brokers who manage funds on behalf of the Plan and others. (II:A356). Plaintiff's suit, filed on behalf of himself and the Plan, alleges that defendants breached their fiduciary duties to the Plan and its participants by paying themselves unauthorized and undisclosed revenue collected on trades made on behalf of their clients, including the Plan. (I:A22 ¶ 1; II:356-7). In addition to asserting a claim on his own behalf and on behalf of the Plan,

[1] "A defined benefit plan . . . consists of a general pool of assets rather than individual dedicated accounts. Such a plan, 'as its name implies, is one where the employee, upon retirement, is entitled to a fixed periodic payment.' . . . The asset pool may be funded by employer or employee contributions, or a combination of both . . . . But 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." Hughes Aircraft Co. v. Jacobson, 525 U.S. 432, 439 (1999).

plaintiff brought a putative class action on behalf of all similarly situated ERISA plans to recover damages for undisclosed revenue collected by defendants from their client plans, which may aggregate to a significant sum. (I:A39-41 ¶¶ 56-64). Plaintiff also requested injunctive relief. (I:38 ¶ 55, I:46-47).

Specifically, plaintiff alleges that the defendant brokers charged hidden fees for executing the purchase and sale of securities for multiple plans, including plaintiff's Plan. (I:A23-24 ¶¶ 4-5). Defendants would "generate[ ] . . . additional, undisclosed fees by funneling trade orders for the purchase and sale of securities to an off shore subsidiary broker [who] . . . added a markup on the price, for a purchase, or a markdown, for a sale. By doing so, the subsidiary broker created a 'spread' between the actual price and the reported price . . . and kept the undisclosed and unauthorized 'spread' as additional compensation."[2] (I:A23-24 ¶ 5). Plaintiff alleges defendants were fiduciaries to the Plan because they exercised authority and control respecting the disposition of Plan assets, 29 U.S.C. § 1002(21)(A)(i), by virtue of their control over trade orders and their own compensation from the Plan's trades. (I:A31-32 ¶¶ 32-34). Plaintiff further alleges defendants' "hidden fee" scheme violated defendants' fiduciary duties of prudence and loyalty. (I:A22-23 ¶ 67) (citing 29 U.S.C. § 1104(a)(1)(A), (B)). Plaintiff also

[2] Both the SEC and the Department of Justice opened investigations into these practices and the SEC has settled civil charges against defendants. (I:24-25 ¶ 10, I:A50-66).

alleges defendants' conduct constituted a self-dealing transaction prohibited by ERISA. (I:A43-44 ¶¶ 75-79) ("ERISA prohibits fiduciaries from engaging in certain transactions and imposes strict liability for any losses that result") (citing 29 U.S.C. § 1106(b)).

Defendants moved to dismiss the case for lack of jurisdiction pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure. (I:A67, II:A356). The parties conducted jurisdictional discovery. (II:A357). The evidence demonstrates that defendants had realized unauthorized profits in the amount of $1,577.93 on the trades made for the Plan, (II:A357), and plaintiff asserts that the amount of money misappropriated by defendants from all investors is in excess of $108.6 million, (App. Br. at 8). However, despite this acknowledged undisclosed profit taken from the Plan and the court's conclusion that plaintiff had "statutory standing,"[3] the district court granted defendants' motion, and dismissed plaintiff's claims for lack of constitutional standing under Article III of the Constitution. (II:A358-62).

In assessing constitutional standing, the district court required plaintiff to establish that he himself, and not simply his Plan, had suffered an "injury in fact."

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[3] This Court recently clarified that statutory standing is not an Article III standing issue but simply refers to whether the plaintiff "[has] a cause of action under the applicable statute." Am. Psychiatric Ass'n v. Anthem Health Plans, Inc., No. 14-3993-CV, 2016 WL 2772853, at *4 (2d Cir. May 13, 2016) (citation omitted). Because "statutory standing" is a "misnomer," this Court will not use the phrase "going forward." Id.

(II:A359-61). The district court found plaintiff lacked the requisite "injury in fact" for three reasons. First, because defendants profited only $1,577.93 from the trades made for the Plan, which was underfunded by more than $16 billion, the court concluded that "[t]he extent to which [defendants' actions] enhanced the plan's existing prospect of default [on its obligations to Fletcher] is so minute as to be imaginary and inconsequential rather than an 'injury in fact' and 'actual or imminent' as required for constitutional standing." (II:A360). Second, because the $1,577.93 profit amounted to less than four tenths of a cent per Plan participant, the court reasoned that any reduction in plaintiff's benefits under the Plan was "not attributable to defendants' overcharges." (II:A360-61). Finally, the court reasoned that defendants' breach of their fiduciary duties under ERISA to plaintiff, in and of itself, is not an injury in fact sufficient to give plaintiff standing to sue under Article III. (II:A361).

SUMMARY OF THE ARGUMENT

The district court erred in holding that a participant's or a plan's right to proper fiduciary conduct is insufficient to establish constitutional standing and, in so doing, failed to apply this Court's precedent in Financial Institutions Retirement Fund v. Office of Thrift Supervision, 964 F.2d 142, (2d Cir. 1992) and Donoghue v. Bulldog Investors General Partnership, 696 F.3d 170 (2d Cir. 2012) to analyze the alleged constitutional injury.

In this case, plaintiff seeks to vindicate both his individual rights and his pension plan's rights (as its representative) to proper fiduciary conduct. Plaintiff alleges fiduciary self-dealing that harmed his pension plan. This Court has previously recognized that because ERISA "essentially empowers beneficiaries to bring a civil action to address <u>any</u> violation of the statute's fiduciary requirements," a "violation of ERISA-imposed fiduciary duties" constitutes a sufficient Article III injury. <u>Fin. Insts. Ret. Fund</u>, 964 F.2d at 148-49. This Court, in <u>Donoghue</u>, also permitted representatives to vindicate a represented entity's rights to proper fiduciary conduct in analogous circumstances. 696 F.3d 170. Because a violation of fiduciary duties is itself sufficient injury without showing financial harm, plaintiff has satisfied the low threshold to establish Article III standing by alleging a specific violation of his individual rights and the Plan's rights, as its representative. Moreover, because the Plan suffered indisputable financial harm, this harm also constitutes a sufficient Article III injury to grant plaintiff standing, as the Plan's representative, to exercise his statutory right to vindicate the Plan's interests in court.

ARGUMENT

PLAINTIFF HAS ARTICLE III STANDING TO ASSERT CLAIMS ON BEHALF OF HIS PLAN AND HIMSELF

The district court erred in dismissing plaintiff's claims. His claims clearly establish Article III standing under this Court's prior precedents. "[T]he 'irreducible constitutional minimum' of standing consists of three elements . . . . The plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1547 (2016). Injuries in fact can be "intangible" in nature. Id. at 1549. The district court erroneously dismissed this case because it concluded plaintiff did not suffer an "injury in fact."[4] (II:A360-61).

"Injury in fact is a low threshold," Ross v. Bank of Am., N.A. (USA), 524 F.3d 217, 222 (2d Cir. 2008), and "[t]he injury-in-fact necessary for standing need not be large[;] an identifiable trifle will suffice," In re Methyl Tertiary Butyl Ether (MTBE) Products Liability Litigation, 725 F.3d 65, 105 (2d Cir. 2013) (citation omitted).

[4] While courts have also articulated "a closely related set of prudential principles [related to standing] that limit the circumstances under which federal courts may exercise their jurisdiction," this Court concluded that Congress can override these prudential limitations and in fact did so in enacting ERISA. Fin. Insts., 964 F.2d at 147.

In this case, Fletcher identified at least three bases for Article III standing that satisfy this "low threshold" based on this Court's existing precedents: (1) he suffers an injury when a fiduciary violates its fiduciary duties to plan participants; (2) he can represent the Plan, because the Plan suffered an injury in the form of defendants' breach of fiduciary duties to the Plan; and (3) he can represent the Plan, because the Plan suffered an injury in the form of a monetary loss.

A. Plaintiff has individual standing based on the constitutional injury to the individual participants for violations of fiduciary duties

Plaintiff Fletcher has Article III standing based on the fiduciaries' breach of their duties to the participants and their Plan. Plaintiff seeks relief on behalf of both his Plan and himself as one of its participants. (I:A22 ¶ 1) ("Plaintiff Landol Fletcher brings this action on behalf of himself and . . . an ERISA employee benefit plan in which he is a participant."). A plan participant can vindicate his own interest in fiduciary compliance or represent the plan, as provided by statute under 29 U.S.C. § 1132(a)(2), to vindicate the plan's rights.

This Court has recognized that ERISA fiduciary obligations run to the participants and beneficiaries of the plan. See Donovan v. Bierwirth, 680 F.2d 263, 272 n.8 (2d Cir. 1982) ("fiduciary obligations of the trustees to the participants and beneficiaries of the plan are those of trustees of an express trust -- the highest known to the law"). ERISA requires fiduciaries to serve all participants. "Where fiduciary duties arise under ERISA, they must be enforced without compromise to ensure that fiduciaries exercise their discretion to serve all participants in the plan." John Blair Commc'ns, Inc. Profit Sharing Plan v. Telemundo Grp., Inc. Profit Sharing Plan, 26 F.3d 360, 367 (2d Cir. 1994) (emphasis added). A participant-plaintiff and his plan suffer a constitutional injury when a fiduciary breaches his fiduciary obligations. ERISA's clear imposition of fiduciary duties running to each individual participant establishes constitutional standing for the participant because the plaintiff has a right, as a participant in the Plan, to proper fiduciary conduct; the invasion of that right is sufficient injury in fact to grant Article III standing to the plaintiff to sue the fiduciary for his breach. See Fin. Insts., 964 F.3d at 149 ("a violation of the directors' ERISA-imposed fiduciary duties would 'injure' the intervening participants") (emphasis added).

In facts similar to this case, in Financial Institutions, this Court considered a defined benefit pension plan participant's constitutional standing to sue for fiduciary breaches. The trial court had dismissed the plaintiff's claims for lack of constitutional standing on the rationale that the plaintiff suffered no injury in fact. Fin. Insts. Ret. Fund v. Office of Thrift Supervision, 766 F. Supp. 1302, 1309 (S.D.N.Y. 1991). The district court reasoned that "[t]here is no dispute that . . . employees will receive all the benefits to which they are entitled" and while the breach may risk harm to plan assets, the participant's "standing does not exist based on speculation as to what may or may not occur in the future" with respect to the participant's promised benefits. Id. The district court here similarly rejected Fletcher's standing, concluding that the alleged fiduciary violations' "minute" risk of harm to the participant's benefits was not an "actual or imminent" injury in fact. (II:A360). This Court reversed the Financial Institutions district court ruling, and instead held that a violation of ERISA's fiduciary provisions is itself sufficient "to establish that the plan participants have been injured within the meaning of the statute and therefore also within the meaning of Article III." 964 F.2d at 147, 149. Under the holding of Financial Institutions, Fletcher has alleged a fiduciary violation to plan participants, which suffices as a constitutional injury to him. Id.

B. Plaintiff has representational standing based on the constitutional injury to the Plan for violations of fiduciary duties to the Plan

Plaintiff also has representational standing based on the constitutional injury to his Plan, which are defendants' violations of their fiduciary duties to the Plan. This Court's analogous decision in Donoghue v. Bulldog Investors General Partnership, 696 F.3d 170 (2d Cir. 2012) counsels this result. The Donoghue Court addressed the constitutional standing analysis for a securities law action under 15 U.S.C. § 78p(b) ("section 16(b)"). Section 16(b) prohibits a beneficial owner of more than 10% of a securities issuer from engaging in short-swing trading on the issuer's stock. Id. at 174. The statute permits both the issuer and its security holders to sue the beneficial owner who engages in such conduct. Id. The defendant in Donoghue conceded it engaged in swing-trading. Id. at 172 & n.2. The plaintiff, a security holder, then sued the defendant to disgorge any profits back to the issuer. Id.

This Court made several observations about section 16(b) which are relevant here:

(1) Congress uses section 16(b)'s broad prohibition as a "blunt instrument . . . to curb the evils of insider trading . . . taking the profits out of a class of transactions in which the possibility of abuse was believed to be intolerably great," id. at 174;

(2) Congress "recruits the issuer (and, if necessary, its security holders) as 'policemen' by imbuing them with 'a private-profit motive' to enforce the law's prohibition on short-swing trading by insiders," id.; and

(3) when a security holder sues under this provision, "the claim 'is derivative in the sense that the [issuer] is the instrument . . . for the effectuation of the statutory policy'" and the securities claim is a "'a mere procedural device to enforce' substantive rights belonging to the issuer," because a "security holder 'will have no direct financial interest in the outcome of [§ 16(b)] litigation,

> since any recovery will inure only to the issuer's benefit,'" id. at 175-76 (emphasis added).

Because of the derivative nature of the section 16(b) claim, this Court determined that the constitutional "injury-in-fact" analysis should focus solely on the injury to the issuer. Id. at 176 (quoting Gollust v. Mendell, 501 U.S. 115, 126 (1991)). No separate constitutional injury in fact to the plaintiff is necessary for the security holder plaintiff to establish his representational standing. Id. at 176 n.5. This Court went on to hold that an injury in fact to the issuer, sufficient to support Article III standing, required only the violation of a specific fiduciary duty to the issuer. Id. at 179-80.

Donoghue is relevant here because this Court has viewed ERISA claims under 29 U.S.C. § 1132(a)(2) as similar to "derivative" lawsuits under section 16(b) in the sense that the plaintiff (the plan participant in the ERISA context) represents the claims of another entity (the plan); however, unlike true "derivative" lawsuits, 29 U.S.C. § 1132 (a)(2) claims do not have the same procedural requirements. See Coan v. Kaufman, 457 F.3d 250, 258 (2d Cir. 2006) (discussing differences) (29 U.S.C. § 1132 (a)(2) actions are "brought in a representative capacity on behalf of the plan."); see also Janese v. Fay, 692 F.3d 221, 224 (2d Cir. 2012) ("This is a derivative action brought on behalf of the participants and beneficiaries of the Funds seeking to recover assets . . . wrongfully depleted . . . in violation of . . . fiduciary duties."); L.I. Head Start Child Dev. Servs., Inc. v. Econ. Opportunity Comm'n of Nassau Cty., Inc., 710 F.3d 57, 65 (2d Cir. 2013) ("the district court found that LIHS and the Class were asserting claims in a derivative capacity for the benefit of the Plan as a whole"). Because a suit to recover plan losses under 29 U.S.C. § 1132 (a)(2) is similar to a representational securities suit brought under section 16(b), the constitutional standing analysis in Donoghue for security holders is instructive in the 29 U.S.C. § 1132(a)(2) context as well.

As with section 16(b), which Congress designed to curb insider trading, Congress enacted 29 U.S.C. § 1132(a) to curb fiduciary abuse in the management of ERISA plans and their assets, such as the conduct alleged here. Congress, in crafting ERISA, created stringent fiduciary standards to apply to ERISA benefit plans and an enforcement regime to ensure compliance. 29 U.S.C. §§ 1104, 1106, 1109, 1132(a); see also Pilot Life, 481 U.S. at 53-55. Congress intended plans and their fiduciaries to implement these stringent fiduciary standards and participants to enforce them. See 29 U.S.C. § 1001(a), (b) ("minimum standards be provided assuring the equitable character of such plans and their financial soundness"); 29 U.S.C. § 1132(a)(2), (3) (granting participants rights to enforce fiduciary standards along with fiduciaries and the Secretary); see also Fin. Insts., 964 F.2d at 148 (ERISA section 404, 29 U.S.C. § 1104, "codifies a trustee's common law duties of skill and loyalty [and] requires that plan fiduciaries make their decisions 'with an eye single to the interests of the participants and beneficiaries.'") (citation omitted); id. (ERISA imposes a "high standard on fiduciaries" and fiduciaries are "bound to make [ ] decision[s] consistent with ERISA.").

Here, plaintiff alleges the breach of specific fiduciary duties and seeks losses to his Plan pursuant to 29 U.S.C. § 1132(a)(2), which states, "[a] civil action may be brought . . . (2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under [29 U.S.C. § 1109]." The Supreme Court has recognized that the purpose of section 1132(a) is to combat and "preclude" fiduciary abuse. Ingersoll-Rand Co. v. McClendon, 498 U.S. 133, 137 (1990) (citation and quotation marks omitted). Section 1132(a) allows enforcement of ERISA's fiduciary provisions in order "to apply the law of trusts to discourage abuses such as self-dealing, imprudent investment, and misappropriation of plan assets, by employers and others." Raymond B. Yates, M.D., P.C. Profit Sharing Plan v. Hendon, 541 U.S. 1, 23 (2004). With regard to ERISA, "the crucible of congressional concern was misuse and mismanagement of plan assets by plan administrators and . . . ERISA was designed to prevent these abuses in the future." Mass. Mut. Life Ins. Co. v. Russell, 473 U.S. 134, 140 (1985). As this Court concluded in Financial Institutions, a "broad view of participant standing under ERISA is further supported by ERISA's goal of deterring fiduciary misdeeds." Id. at 149.

Congress thus enacted 29 U.S.C. § 1132(a) to curb fiduciary abuse in the management of ERISA plans and their assets, not just to compensate litigants for financial damages. See LaScala v. Scrufari, 479 F.3d 213, 221-22 (2d Cir. 2007) ("The fact that the Funds may not have suffered any loss as a result of Russell's salary increases may bear on the question of damages, but has no bearing on whether Scrufari breached his fiduciary duties in the first place"). Similarly, this Court in Donoghue did not require any actual damages to meet the threshold for Article III standing because a fiduciary can never take profit from a breach of his duties in any amount; whether the Plan or the issuer was harmed by some indeterminate amount is inapposite. See Donoghue, 696 F.3d at 178 ("The fact that such injury to the issuer is not easily calculated does not make it less real for purposes of identifying an actual case or controversy.").

Like the recruitment of the security holders in section 16(b) to police swing-trading, plan participants such as Plaintiff are statutorily granted the right to police fiduciary obligations through civil actions under 29 U.S.C. § 1132(a)(2). See Fitzsimmons, 805 F.2d at 689 (noting plan beneficiaries traditionally had this role) (citing legislative history and pre-ERISA history); Beck v. Levering, 947 F.2d 639, 642 (2d Cir. 1991) ("[b]ecause of the possibility that the trustees will not act, 29

U.S.C. § 1132(a) (1988) authorizes the Secretary of Labor to bring suit concurrently with private plaintiffs to recover appropriate damages").[5]

Similar to section 16(b), which empowers a security holder to sue to recover improper profits that inure solely to the benefit of the issuer, ERISA section 502(a)(2), 29 U.S.C. § 1132(a)(2), permits a participant to pursue "any losses to the plan" and to seek the restoration to the plan of any improper profits (regardless of loss) realized by a breaching fiduciary. 29 U.S.C. §§ 1109, 1132(a)(2); see LaRue v. DeWolff, Boberg & Assocs., Inc., 552 U.S. 248, 254 (2008). Under section 1132, plaintiff here seeks the recovery of losses to the Plan caused by defendants' hidden fees, a remedy pursuant to 29 U.S.C. § 1109:

> [a]ny 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 . . . .

(emphasis added). "[T]he text of § [1109(a)] characterizes the relevant fiduciary relationship as one 'with respect to a plan,' and repeatedly identifies the 'plan' as the

[5] Notably, section 1132(a)(2) does not name the plan as a person empowered to bring the civil action, requiring that all suits brought to remedy an injury to a plan must be done in a representative capacity by participants, beneficiaries, fiduciaries or the Secretary. See Russell, 473 U.S. at 140 & n.9; Coan, 457 F.3d at 257; see also Am. Psychiatric Ass'n, 2016 WL 2772853, at *7 ("because the psychiatrists [the plaintiffs] are not among those expressly authorized to sue, they lack a cause of action under ERISA").

victim of any fiduciary breach and the recipient of any relief." LaRue, 552 U.S. at 254. Section 16(b), 29 U.S.C. § 1132 (a)(2), and 29 U.S.C. § 1109(a) do not then require the participant or the security holder to suffer a personal injury in fact; the only injury required for representational standing is the injury to the plan or the issuer. Compare Russell, 473 U.S. at 144 with Donoghue, 696 F.3d at 175-76.

After establishing the security holders' right to sue on behalf of the issuer, the Donoghue Court held that a "fiduciary duty was created by § 16(b), and it conferred upon [the issuer] an enforceable legal right to expect [the defendant] to refrain from engaging in any short-swing trading in its stock. The deprivation of this right establishes Article III standing." Id. at 176-77. In reaching this conclusion, the Donoghue Court analogized section 16(b)'s fiduciary duty to the law of trusts, observing that the common law of trusts traditionally required trustees to comply with all "the limitations, obligations and conditions attached to the position" and a violation is treated like a violation of criminal law. Id. at 177 & n.6 (referring to the "'trust law approach' to fiduciary duty"). This Court explained:

> [a] corporate issuer, after all, has an 'interest in maintaining a reputation of integrity, an image of probity,' for its § 16(b) insiders 'and in insuring the continued public acceptance and marketability of its stock.' . . . This interest is injured not only by actual insider trading but by any trading in violation of an insider's fiduciary duty, including the trading altogether prohibited by § 16(b).

Id. at 177-78. Because section "16(b) effectively gives issuers a legally protected fiduciary right to expect statutory insiders not to engage in short-swing trading of their stock," invasion of that right by itself creates an "injury in fact." Id.

With roots in traditional trust law, a violation of a fiduciary duty under ERISA is likewise closely based on a violation of fiduciary duties under traditional trust law, e.g., Bierwirth, 680 F.2d at 272 n.8 (noting that ERISA fiduciaries are akin to traditional trustees); see also Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 110 (1989) ("ERISA abounds with the language and terminology of trust law."). As we noted earlier, this Court in Financial Institutions had already confirmed that a fiduciary breach of a fiduciary duty in ERISA is a sufficient constitutional injury. 964 F.2d at 147, 149.

Therefore, the same reasons that justify constitutional standing for the plaintiff representative in Donoghue apply to plaintiff's claim under ERISA section 1132(a)(2). Like the defendant in Donoghue, 696 F.3d at 176, defendants here cannot dispute the existence of fiduciary obligations running to the Plan or its participants. Like the issuer in Donoghue, 696 F.3d at 177, the Plan has a legally protected interest in upholding those fiduciary obligations and indeed the Plan has suffered an admitted financial loss, albeit a small one, from the alleged fiduciary breaches. An invasion of that legally protected interest is itself sufficient "injury in fact" for the participant to sue on behalf of the injured Plan pursuant to the participant's statutory role. See Donoghue, 696 F.3d at 180; see also Fin. Insts., 964 F.2d at 149. Consequently, no showing of threatened or actual financial loss to plaintiff Fletcher, who represents the Plan, is necessary so long as an injury to the Plan, such as a breach of fiduciary duties to the Plan and resulting losses, has been shown.

The Donoghue Court also recognized for these representational claims that "when an issuer's interests are pursued derivatively by a security holder, a 'serious constitutional question' would arise if the security holder were allowed to maintain the § 16(b) claim even after losing all personal financial interest in the outcome of the litigation." Donoghue, 696 F.3d at 176 (quoting Gollust, 501 U.S. at 126). However, all that is constitutionally necessary is for a representative plaintiff to retain some interest in the outcome of the litigation, even if that interest is indirect; a plaintiff need not establish an Article III injury to his own interests when suing in a representative capacity. See Donoghue, 696 F.3d at 176 n.5. On this subject, the Supreme Court has held that:

> [a] security holder eligible to institute suit will have no direct financial interest in the outcome of the litigation, since any recovery will inure only to the issuer's benefit. Yet the indirect interest derived through one share of stock is enough to confer standing, however slight the potential marginal increase in the value of the share. A bondholder's sufficient financial interest may be even more attenuated, since any recovery by the issuer will increase the value of the bond only because the issuer may become a slightly better credit risk.

> . . . It is consistent, of course, and in light of the congressional policy of lenient standing, we will not read any further condition into the statute, beyond the requirement that a § 16(b) plaintiff maintain a financial interest in the outcome of the litigation sufficient to motivate its prosecution and avoid constitutional standing difficulties.

Gollust, 501 U.S. at 127. Accordingly, a plaintiff asserting section 16(b) claims only needs to show ownership of one share of stock or a bond to satisfy this constitutional requirement for representative claims. Id.

As with section 16(b), standing is broadly construed for ERISA. Fin. Insts., 964 F.2d at 149. Like the security holder in Gollust, 501 U.S. at 127, a participant's interest in lowering the risk of plan default in any possible way "however slight" is an interest inherent to his stake in the Plan as a participant and his dependence on the Plan for retirement. See Geller v. Cty. Line Auto Sales, Inc., 86 F.3d 18, 22 (2d Cir. 1996) ("ERISA is a remedial statute enacted to protect the interests of beneficiaries of private retirement plans by reducing the risk of loss of pension benefits"). Participation in the plan therefore is a sufficient "financial interest in the outcome" for constitutional purposes, just as a security holder's ownership of one stock or bond is sufficient. Gollust, 501 U.S. at 127. In this case, the district court and the parties all agree that defendants' conduct has inflicted a financial injury, albeit a small one, on the Plan. Moreover, because of significant underfunding, the Plan is already at risk for default and the alleged fiduciary violations only increased the risk that the Plan would be unable, ultimately, to pay benefits. This increased risk to the Plan, however small, is sufficient for representational standing. Plaintiff, as a plan participant, can represent the Plan in vindicating its right to proper fiduciary conduct and to deter fiduciary misconduct.

C. The Supreme Court's recent decision in Spokeo confirms this Court's decisions in Financial Institutions and Donoghue.

This Court's prior precedents that support standing based on specific fiduciary violations are fully consistent with the Supreme Court's recent decision in Spokeo, which provides additional guidance on the injury in fact requirement for Article III standing. 136 S. Ct. 1540. At issue in Spokeo was an individual's standing to sue under the Fair Credit Reporting Act ("FCRA"). Id. at 1544. The FCRA requires consumer credit reporting agencies to follow reasonable procedures to assure maximum possible accuracy of consumer reports. Id. at 1545. The FCRA provides that any person who willfully fails to comply with "any requirement" of the FCRA, with respect to an individual, is liable to that individual for actual or statutory damages, attorney's fees, and possible punitive damages. Id. The plaintiff brought an action under the FCRA against Spokeo, alleging it was a "consumer reporting agency" that posted inaccurate information about him online and willfully failed to comply with the FCRA's requirements.

The trial court dismissed the Spokeo plaintiff's complaint for failure to plead an Article III injury in fact. Id. at 1544. The Ninth Circuit reversed, and the

Supreme Court vacated and remanded the Ninth Circuit's decision for failure to consider that an injury in fact must be both "particularized" and "concrete." Id. at 1544, 1550. The Court elaborated that "[t]o establish injury in fact, a plaintiff must show that he or she suffered 'an invasion of a legally protected interest' that is 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.'" Id. at 1548 (citation omitted). The Ninth Circuit had "elided" the independent requirement that an injury be "concrete," the Court reasoned, by concluding that the plaintiff's complaint was concrete because it alleged that Spokeo violated his statutory rights rather than the rights of other people and that the plaintiff's personal interests in the handling of his credit information were individualized rather than collective. Id. The Ninth Circuit's reasons "concern particularization, not concreteness," the Supreme Court concluded. Id.

The Court stated that a "concrete injury" is "real' and not 'abstract,'' and can be intangible. Id. at 1548-49. The Court recognized it had "confirmed in many of our previous cases that intangible injuries can nevertheless be concrete" for constitutional standing purposes. Id. at 1549. The Court elaborated that "[i]n determining whether an intangible harm constitutes injury in fact, both history and the judgment of Congress play important roles." Id. First, "it is instructive . . . whether an alleged intangible harm has a close relationship to a harm that has traditionally been regarded as providing a basis for a lawsuit in English or

American courts." Id. Second, "because Congress is well positioned to identify intangible harms that meet minimum Article III requirements, its judgment is also instructive and important." Id. The Supreme Court did not take a position on whether the complaint alleged a "concrete" injury or not. Id. at 1550. Instead, the Court remanded the case back to the Ninth Circuit so that the Ninth Circuit could conduct the proper analysis. Id.

Both factors identified in Spokeo confirm this Court's prior holdings that a violation of a plan's or participant's specific rights to proper fiduciary conduct is a "concrete" injury. A violation of a fiduciary duty in trust law is traditionally viewed as providing a sufficient basis for a lawsuit in English or American Courts. See, e.g., Scanlan v. Eisenberg, 669 F.3d 838, 846 (7th Cir. 2012) (finding constitutional standing for plaintiff-beneficiary who sues the fiduciary for the invasion of her "protected interest in the prudent and loyal administration of the Trusts") (citing authorities in the law of trusts); cf. Spokeo, 136 S. Ct. at 1551 (Thomas, J., concurring). ("traditional remedies for private-rights causes of action—such as for trespass, infringement of intellectual property, and unjust enrichment—are not contingent on a plaintiff's allegation of damages beyond the violation of his private legal right"). Consistent with the law of trusts, this Court has twice concluded that a violation of fiduciary duty is sufficient by itself as a constitutional injury. Compare Donoghue, 696 F.3d at 175-77 & n.6 and Fin.

Insts., 964 F.2d at 147-149 with Scanlan, 669 F.3d at 846. Second, as this Court recognized in Financial Institutions, congressional intent in enacting ERISA supports a constitutional injury based solely on a violation of an ERISA fiduciary duty and for the deterrence of fiduciary misconduct. 964 F.2d at 147-149 (citing statutory text); see also, supra, pages 13-15 (discussing congressional intent for ERISA civil enforcement to deter fiduciary breach).

Thus, the background trust law and Congress's intent in enacting ERISA establish that injuries in fact under ERISA are not limited to injuries that entail risk to participants' benefits, as the district court incorrectly concluded. See Fin. Insts., 964 F.2d at 147. Instead, ERISA "casts a wider net." Id. Injury in fact "may exist solely by virtue of 'statutes creating legal rights, the invasion of which creates standing.'" Id. (citation omitted). Accordingly, 29 U.S.C. § 1132 "essentially empowers beneficiaries to bring a civil action to redress any violation of the statute's fiduciary requirements," and the "violation of ERISA-imposed fiduciary duties" constitutes an injury sufficient to establish Article III standing. Fin. Insts., 964 F.2d at 148-149.

Moreover, for a representational suit, the "injury in fact" prong of constitutional standing is satisfied by establishing injury to the plan, i.e., a specific violation of a fiduciary duty to the plan (particularly when, as here, the complaint establishes resulting losses to the plan), regardless of whether the named plaintiff can personally establish an actual or likely economic loss. This Court's decisions in Donoghue and Financial Institutions demonstrate that here Fletcher has Article III standing to assert his claim, which can be a specific violation of the Plan's legally-protected interest in proper fiduciary conduct, on behalf of the Plan without showing any financial harm to the plaintiff. The district court thus erred in failing to recognize that an injury in fact can consist of a violation of a fiduciary duty to either the participant or the Plan without needing show some individualized harm to the plaintiff-participant in the form of a financial loss.

D. Plaintiff also has representational standing based on the injury to the Plan in the form of a monetary loss

Plaintiff also has standing to represent the Plan to recover Plan losses. It is undisputed that the Plan suffered a "tangible" loss of $1,577.93 as a result of defendants' improperly charged fees. (II:A360). With a quantified and tangible monetary loss to the Plan, Article III injury is even more apparent here than in Financial Institutions or Donoghue, where this Court found standing based on a fiduciary breach without identifying any loss to the plan or the issuer. See Fin. Insts., 964 F.2d at 149 (affirming dismissal based on the merits); Donoghue, 696 F.3d at 178 (noting that calculating an injury is unnecessary). Although the Plan suffered a small loss, $1,577.93 is greater than an "identifiable trifle" and is therefore sufficient for an injury in fact. See Nat. Res. Def. Council, Inc. v. U.S. Food & Drug Admin., 710 F.3d 71, 85 (2d Cir. 2013) ("incurring the expense of buying . . . soap" was a sufficient financial loss to be an injury for purposes of Article III standing). Therefore, plaintiff also has representational standing to sue on behalf of the Plan for this undisputed financial loss.

E. This Court's other ERISA decisions on Article III standing are inapposite

The district court relied on this Court's decisions in Kendall v. Employees Retirement Plan of Avon Products, 561 F.3d 112, 121 (2d Cir. 2009), and an unpublished, non-precedential, summary decision in Taveras v. UBS AG, 612 F. App'x 27, 29 (2d Cir. April 30, 2015), to justify the dismissal of plaintiff's claim. (II:A358-60). That reliance was misplaced. The panel in Taveras misinterpreted Kendall as standing for the proposition that "[a]n ERISA plan participant lacks standing to sue for ERISA violations that cause injury to a plan but not individualized injury to the plan participant." (II:A358-59) (quoting Taveras, 612 F. App'x at 29) (citing Kendall, 561 F.3d at 119). Kendall does not stand for the stated proposition. Instead, the cited passage in Kendall discusses an ERISA claim by a plan participant under 29 U.S.C. § 1132(a)(3) for personalized relief in the form of increased individual benefits based on correcting benefits formulas in the plaintiff's plan; for that claim, the plaintiff was not suing on behalf of the plan. 561 F.3d at 118-19. Kendall found that the plaintiff lacked constitutional standing to assert this individual entitlement to benefits because she failed to allege an individualized injury to support this relief. Id.

Moreover, the Kendall Court did not end its Article III analysis at that point. Despite its conclusion that the plaintiff there failed to allege an individualized injury, the Kendall Court also examined two other plan-wide claims for constitutional standing based on an alleged fiduciary breach to the Plan and the Plan's alleged non-compliance with ERISA, 561 F.3d at 120-22. Citing Financial Institutions, the Court in Kendall acknowledged "[a] plan participant may allege a constitutional injury-in-fact based on a theoretical injury" but found the plaintiff did not allege "some injury or deprivation of a specific right that arose from a violation of that duty," such as an effect on "an identifiable and quantifiable pool of assets to which [she] had colorable claims." Kendall, 561 F.3d at 121 (emphasis added). Subsequently, this Court in Donoghue, 696 F.3d at 178, confirmed the Kendall plaintiff's claims were dismissed because they alleged only "general" breaches of fiduciary duty without any violation of "specific" rights that arose from the fiduciary breach. Id. (quoting Kendall, 561 F.3d at 119) (emphasis added).

Unlike the plaintiff in Kendall, plaintiff here articulates a deprivation of a specific right that arose from the fiduciary breach. Plaintiff describes in specific detail defendants' "hidden fees" scheme, how the fiduciaries engaged in this self-dealing in violation of their fiduciary duties, and how these acts are also specifically prohibited by ERISA. (I:A:32-37 ¶¶ 36-51) (citing ERISA's fiduciary duty and prohibited transaction provisions, 29 U.S.C. §§ 1104, 1106). In this case, plaintiff also identifies a specific financial harm to the Plan and how defendants' conduct depleted the Plan's assets. (II:A360).

The district court therefore failed to apply Kendall in light of this Court's holdings in Donoghue and Financial Institutions. The decision below is contrary to the logic of Donoghue's holding in the section 16(b) context and the holding of Financial Institutions in the ERISA context. Carefully examining Kendall, rather than accepting the interpretation of Kendall from the quoted section of the non-precedential Taveras decision, clarifies Kendall's holding as fully consistent with Donoghue and Financial Institutions.[6]

Plaintiff alleges that defendants violated their fiduciary duties by taking improper and undisclosed fees on trades made for the Plan. Pursuant to the analytical framework set forth in Financial Institutions and Donoghue, and consistent with the recent guidance from the Supreme Court in Spokeo, these violations of specific fiduciary duties owed to plaintiff and his Plan are sufficient injuries in fact to support Article III standing for the plaintiff to sue under ERISA

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[6] In two related cases, Central States Southeast & Southwest Areas Health & Welfare Fund v. Merck-Medco Managed Care, L.L.C., 433 F.3d 181 (2d Cir. 2005) and Central States Southeast & Southwest. Areas Health & Welfare Fund v. Merck-Medco Managed Care, L.L.C., 504 F.3d 229 (2d Cir. 2007) ("Central States II"), this Court discussed Article III injury for ERISA claims, but explicitly avoided the two questions pertinent to this appeal: whether "[plan participants or beneficiaries] have representational standing . . . and [whether] they have standing to assert the vindication of the intangible right to the honest services of fiduciaries guaranteed to them by ERISA." Central States II, 504 F.3d at 243.

to recover the money improperly taken from the Plan. Moreover, the undisputed Plan losses are a tangible harm sufficient to establish injury in fact for constitutional standing purposes.

CONCLUSION

For the reasons set forth above, the Secretary respectfully requests that this Court reverse the district court's dismissal of Plaintiff's claims.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 29(d) and 32(a)(7)(B)-(C), I certify that this amicus contains 6,997 words.

Dated: June 27, 2016

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CERTIFICATE OF SERVICE

I hereby certify that on this day, June 27, 2016, I electronically filed the foregoing Brief of The Secretary, United States Department of Labor, as Amicus Curiae, in Support of Plaintiffs-Appellees, with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the CM/ECF system. I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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