No. 06-3413

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRUCE G. HOWELL, on behalf of himself and a class of persons similarly situated

Plaintiffs-Appellants,

v.

MOTOROLA, INC., et al.,

Defendants-Appellees.

On Appeal from the United States District Court
for the Northern District of Illinois

BRIEF FOR THE SECRETARY OF LABOR AS AMICUS CURIAE SUPPORTING PLAINTIFFS-APPELLANTS

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STATEMENT OF THE ISSUE

A former employee of defendant Motorola, Inc., who participated in a defined contribution pension plan and took a lump sum distribution after terminating his employment, sought to intervene as the named plaintiff in a putative class action alleging ERISA fiduciary breach claims against the plan fiduciaries who allegedly continued to invest plan assets in Motorola stock during a period when it was imprudent to do so and misled the participants about the stock. The Secretary's amicus curiae brief addresses the following issue:

Whether, under these circumstances, the former employee has standing to sue as a "participant" within the meaning of ERISA section 502(a)(2), 29 U.S.C. § 1132(a)(2).

INTEREST OF THE SECRETARY OF LABOR

The Secretary of Labor has primary authority to interpret and enforce the provisions of Title I of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1001 et seq.; see also Secretary of Labor v. Fitzsimmons, 805 F.2d 682, 689-94 (7th Cir. 1986) (en banc) (Secretary's interests include promoting the uniform application of the Act, protecting plan participants and beneficiaries, and ensuring the financial stability of plan assets). The Secretary therefore has a strong interest in ensuring that ERISA is not interpreted to deny standing to participants where, as here, defendants' alleged fiduciary breaches

caused losses to the plan while the former employee was a participant, and he consequently received less than he should have in a lump-sum distribution.

STATEMENT OF THE FACTS

This case originally was brought as a putative class action by Bruce Howell, a former Motorola employee and participant in the Motorola, Inc. 401(k) Profit Sharing Plan ("Plan"). Joint Appendix (J.A.) 2. The Plan is a "defined contribution" or "individual account" plan within the meaning of ERISA section 3(34), 29 U.S.C. § 1002(34), which provides the participants with various investment options. J.A. 12. These investment alternatives, including an option consisting of Motorola common stock, were selected by the Profit Sharing Committee (Committee), the named fiduciary under the Plan. Id. at 84-85. The Committee had full discretion to choose the options and was not required under the terms of the Plan to choose the Motorola stock fund as an investment alternative. Id. Howell alleged that, near the beginning of the class period, the Plan had invested almost $1 billion, or approximately 15% of the Plan's assets, in Motorola common stock. Id. at 72.

Howell brought suit under ERISA section 502(a)(2) and (a)(3), 29 U.S.C. § 1132(a)(2) and (a)(3), alleging that the Committee and its members and various other Plan fiduciaries, including the company itself, violated their fiduciary duties by continuing to permit Motorola stock to be offered as an investment option for

employees, and by offering misleading information and failing to disclose material information to both the participants and the other fiduciaries. J.A. 70-110. Howell alleged that it was imprudent to allow the Plan to invest in Motorola common stock primarily because of a misleading and risky deal that Motorola had struck with Telsim, a Turkish telecommunications company, under which Motorola publicly stated that Telsim would purchase $1.5 billion in products and services from Motorola, but did not disclose that, in reality, these "purchases" would be financed with $1.7 billion in vendor financing, or loans from Motorola. Id. at 89. Howell alleged that Motorola lost a substantial portion of its value during the class period when the truth about the Telsim contract, and other business problems, came to light. Id. at 89-90. This decline in stock value in turn depleted the Plan's assets, including the amount that the Plan would have earned — and thus the plaintiff would have received in liquidating his account — had its assets been more prudently invested. Id. at 74. Howell requested that the court grant "[a]ctual damages in the amount of any losses the Plan suffered to be allocated among the Participants' individual accounts in proportion to the accounts' losses," as well as unspecified equitable relief, and costs and attorneys' fees. Id. at 109.

The court partially granted the defendants' motion to dismiss, without prejudice, the claims against the Committee defendants, J.A. 189, and Howell filed an amended complaint purporting to correct the deficiencies with regard to those

defendants. Id. at 70-107. Subsequently, in a decision dated September 30, 2005, the district court denied the plaintiff's motion for class certification, without prejudice, and granted the defendants' motion for summary judgment, and dismissed the complaint. Id. at 2-14. The court held that a severance agreement that Howell signed in September 2001 in exchange for increased severance benefits barred him from bringing his suit. Id. at 3, 5. The court thus granted defendants' motion for summary judgment and struck Howell's motion for class certification without prejudice, id. at 15, and Howell appealed.[1]

In the meantime, while the appeal of the September 30, 2005 decision and order dismissing Howell's complaint was pending, John Endsley sought to intervene and file a complaint in intervention, which, except for the identity of the plaintiff, was essentially identical to the original complaint filed by Howell. J.A. 304-348. Like Howell, Endsley was a former employee of Motorola, but, unlike

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[1] The brief for the plaintiff on appeal also raises various issues with regard to the effect of the waiver signed by plaintiff Howell on his claims for relief. The Secretary agrees with those circuit courts that have held that, in appropriate cases, participants can waive such claims in separation or early retirement agreements as long as the waiver is knowing and voluntary. See Lynn v. CSX Trans., Inc., 84 F.3d 970, 975 (7th Cir. 1996) ("[w]hat matters is whether the claimant knew of the claim and knowingly relinquished it"); Leavitt v. Northwestern Bell Tel. Co., 921 F.2d 160, 161-62 (8th Cir. 1990) (enforcing knowing and voluntary release of ERISA claims in separation agreement). The Secretary takes no position on the district court's resolution of the factual issues concerning the breadth of the release executed by Howell or on whether he knowingly and voluntarily released the particular claims at issue here.

Howell, he had not signed a severance agreement containing a waiver provision. The court denied Endsley's motion to intervene in a decision dated August 11, 2006. Id. at 18. The court held that, although Endsley's claim was "colorable," it was not one for "vested benefits" at the time he filed his lawsuit, but was in reality a claim for damages. Id. at 21, 27.

The court reasoned that, unlike the claim in Sommers Drug Store Co. Employee Profit Sharing Plan v. Corrigan, 883 F.2d 345, 350 (5th Cir. 1989), which was "close[r] to a 'simple claim that benefits were miscalculated,' and thus was for vested benefits," Endsley's claim that the assets of the Plan should have been greater than they were was "best characterized as one for damages for breach of fiduciary duty." J.A. 24. The court found its conclusion bolstered by a number of recent standing decisions to the same effect, such as Hargrave v. TXU Corp., 392 F. Supp. 2d 785 (N.D. Tex. 2005) and Graden v. Conexant Sys., Inc., No. 05-0695, 2006 WL 1098233 (D.N.J. Mar. 31, 2006). J.A. 24-26. Furthermore, the court acknowledged that numerous courts have recognized an exception to the strict requirement that a former employee only has standing to the extent that he is seeking vested benefits. The court stated, however, that the exception was limited to the situation where a plaintiff would still have standing "but for" the actions of his employer, as when the employee had been mislead about retirement benefits or fired by the employer to defeat his claim. This "but for" exception to ERISA's

standing requirement, the court concluded, was inapplicable to Endsley's claim for breach of fiduciary duty. J.A. 27-29.

Endsley separately appealed this decision, which is separately docketed in the Seventh Circuit. Although the two appeals have not been consolidated, the plaintiff's brief addresses the standing issue as well as the waiver issue. The Secretary now files this amicus brief addressing the standing issue, which relates to proposed intervenor Endsley, but does not address the waiver issue, which relates to named plaintiff Howell.

SUMMARY OF THE ARGUMENT

Proposed plaintiff Endsley has standing under ERISA to sue as a former employee who seeks to recover losses to be paid to the Motorola defined contribution plan in which he participated. ERISA allows plan participants to sue on behalf of plans to remedy fiduciary breaches, and it broadly defines "participant" as "any employee or former employee of an employer . . . who is or may become eligible to receive a benefit of any type from an employee benefit plan which covers employees of such employer." 29 U.S.C. § 1002(7). Endsley meets this statutory definition and has a "colorable claim" to vested benefits within the meaning of Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 117-18 (1989), because he claims that fiduciary breaches with regard to the Motorola stock component of the defined contribution plan in which he participated at the time of

the breaches caused losses to the Plan and a corresponding diminution in the amount of the benefits that he received upon pay-out. Because his benefits under the Plan were linked directly to the performance of the Plan's assets in that particular investment, 29 U.S.C. § 1002(34), if he prevails on his claim and recovers losses for the Plan, Endsley will be entitled to the payment of additional benefits from the Plan.

To hold otherwise would result in an illogical distinction between the rights of former employees in a defined contribution plan and those of current employees both of whose account balances are equally affected by alleged fiduciary breaches. There is no reason to believe that Congress intended for a participant who has not yet retired to have standing to sue for such breaches, while denying standing to a participant in a defined contribution plan who has retired and received a diminished benefit. Such a result would not promote ERISA's remedial goals nor would it be consistent with the statute's broad definition of participant. Moreover, it would reward a breaching fiduciary for hiding its breaches until participants take distribution of their defined contribution benefits.

ARGUMENT

PLAINTIFF HAS STANDING UNDER ERISA TO BRING THIS SUIT BECAUSE HE HAS A COLORABLE CLAIM THAT HE IS ENTITLED TO ADDITIONAL VESTED BENEFITS UNDER HIS DEFINED CONTRIBUTION PLAN

ERISA was a direct response to inadequacies in existing pension laws that became apparent after the economic collapse of the Studebaker-Packard Corporation left terminated employees without their promised pensions. See Nachman Corp. v. PBGC, 446 U.S. 359, 374–75 & n.22 (1980) (quoting 1 Legislative History of the Employee Retirement Income Security Act of 1974, 94th Cong., 1599–1600 (Comm. Print 1976) (statement of Sen. Williams, a chief sponsor of the Senate bill)). Congress enacted ERISA "to protect . . . the interests of participants in employee benefit plans . . . by establishing standards of conduct, responsibility, and obligation[s] for fiduciaries of [such] plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts." ERISA section 2(b), 29 U.S.C. § 1001(b).

To this end, ERISA's comprehensive civil enforcement scheme provides, in section 502(a)(2), 29 U.S.C. § 1132(a)(2), that "[a] civil action may be brought" by a plan "participant" to obtain "appropriate relief " under the section of ERISA (section 409, 29 U.S.C. § 1109) that makes a breaching plan fiduciary personally liable to the plan for any losses stemming from its breaches. Moreover, to serve its broad remedial purposes, the statute broadly defines "participant" as "any

employee or former employee of an employer . . . who is or may become eligible to receive a benefit of any type from an employee benefit plan which covers employees of such employer." 29 U.S.C. § 1002(7). Endsley qualifies as a "participant" under the plain terms of this definition because he is a "former employee" who "is or may become eligible to receive" additional benefits from the Plan if he succeeds on his fiduciary breach claim.

A. Endsley has standing because he is a former employee who may become eligible to receive additional benefits from his defined contribution plan should he prevail on his allegations of fiduciary breach

Despite his withdrawal of the money in his account, Endsley "may become eligible" to receive additional benefits because he participated in a defined contribution plan, under which "benefits [are] based solely upon the amount contributed to the participant's account, and any income, expenses, gains, and losses . . . which may be allocated to such participant's account." 29 U.S.C. § 1002(34). Participants are vested in their own contributions and the earnings made on those contributions at all times. U.S. Gen. Accounting Office, Publ'n No. GAO-02-745SP, Answers to Key Questions About Private Pension Plans 13 (Sept. 18, 2002) [GAO Report], available at http://www.gao.gov/new.items/d02745sp.pdf. Because the amount of the participant's vested benefits in such a plan increases in direct proportion to investment returns, the way in which a defined contribution

plan is managed, particularly with regard to investments, is a critical factor in determining the amount of the participant's vested benefits at the end of the day.

ERISA protects the interests of plan participants in defined contribution plans, as it protects participants in other plans, by imposing stringent obligations of prudence and undivided loyalty on plan fiduciaries. 29 U.S.C. § 1104(a)(1)(A) and (B); see also Kuper v. Iovenko, 66 F.3d 1447, 1453 (6th Cir. 1995) ("ERISA's imposition of a fiduciary duty . . . has been characterized as 'the highest known to law'" (quoting Sommers Drug Store Co. Employee Profit Sharing Plan v. Corrigan, 793 F.2d 1456, 1468 (5th Cir. 1986)). If it is true, as Endsley alleges, that the defendants knew that the true nature of the Telsim contract was being misrepresented to the detriment of the Plan and its participants, then the Plan fiduciaries breached these obligations and caused a diminution in both the Plan's assets and Endsley's account balance. Thus, Endsley received a smaller distribution of vested benefits than he was entitled to receive when he withdrew his account balance. In seeking restoration to the Plan for alleged fiduciary breaches that took place before he received his benefits, Endsley seeks amounts that should be allocated in a manner that ultimately augments his individual vested benefits.[2] These amounts are precisely the "vested benefits" to which a plan participant in a defined contribution plan is entitled under ERISA. 29 U.S.C. § 1002(34). Thus,

[2] We take no position on Endsley's claim that he actually suffered such a loss in his account balance, a contention that is disputed by the defendants.

Endsley is a "former employee" who is or may become "eligible to receive a benefit" from the Plan in the form of the amount he would have received had the defendants not breached their fiduciary duties. 29 U.S.C. § 1002(7). As such, Endsley is a "participant" with standing to sue under ERISA section 502(a)(2), 29 U.S.C. § 1132(a)(2).

Reading the term "participant" to include Endsley is fully consistent with the Supreme Court's decision in Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101 (1989). In Firestone, the Supreme Court considered ERISA's definition of "participant" in the context of ERISA's plan document disclosure provisions.[3] The

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[3] Although the Department of Labor has not promulgated a definition of "participant" for purposes of Title I of ERISA, the Department has promulgated a definition of the distinct and more narrow statutory term "participant covered under a plan" (see 29 C.F.R. § 2510.3-3(d)), which parallels the statutory use of the term "participant covered under the plan" in Section 101(a) of ERISA, 29 U.S.C. § 1021(a), and narrows the class of people to whom plan administrators must provide information, in many cases without charge and without request, under ERISA's automatic disclosure requirements. See 40 Fed. Reg. 34333, 34528 (1975) (explaining regulatory purpose to define "participant under a plan" for disclosure purposes); see also 29 C.F.R. § 2520.104b-1(c). This definition excludes an "individual [who] has received from the plan a lump-sum distribution or a series of distributions of cash or other property which represents the balance of his or her credit under the plan." Id. § 2510.3-3(d)(2)(B); see 40 Fed. Reg. 24517, 24649 (1975). Even assuming that this regulation would exclude from its scope a former employee such as Endsley who claims that the distribution of benefits he received would have been higher but for the breaches of fiduciary duty, "participant covered under a plan" (see 29 C.F.R. § 2510.3-3(d)) is a term of art under ERISA that is considerably narrower than the class of all participants within the meaning of section 3(7) of ERISA, 29 U.S.C. § 1002(7), and does not define who is a participant for standing purposes. See 29 C.F.R. § 2509.95(1)(b) (interpretive

Court held that, in order to be considered a participant entitled to plan documents, a former employee must either have a "reasonable expectation of returning to covered employment" or "a colorable claim that (1) he or she will prevail in a suit for benefits, or that (2) eligibility requirements will be fulfilled in the future." Id. at 117-18. Endsley has just such a colorable claim that he will prevail in a suit for benefits because he alleges that fiduciary breaches caused losses to the Plan, which reduced the overall amount of vested benefits that he received. This alleged misconduct occurred when Endsley had an account balance in the Plan, and the relief that he seeks (restoration of losses to the Plan), if granted, would lead to an upward adjustment of the plan benefits that he has received. He thus has a colorable claim to additional vested benefits under the Firestone criteria.

To hold otherwise would produce the absurd result that when a fiduciary breach causes significant financial loss to a defined contribution plan, thereby substantially diminishing the benefits payable to the accounts which held such investments, participants will have unequal rights: affected employees who stay in the plan could bring an action to recover their lost benefits, while employees who retired and took a diminished distribution could recover nothing at all. That result

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bulletin explaining that 29 C.F.R. § 2510.3-3(d) does not affect who is a participant for purposes of bringing suit under section 502(a)(2)).

cannot be correct – either all affected employees have a "colorable claim" to additional vested benefits or none do. Certainly, if two participants with equal account balances incur equal losses on the same date, they should both have standing. To find that the participant who had not yet retired retains standing, while the participant who retired—and actually suffered the diminished distribution—does not, would neither comport with its broad definition of "participant" nor promote ERISA's remedial objectives.

Courts that have recognized the nature of benefits under defined contribution plans have correctly accorded standing to plaintiffs who were actively invested in those plans at the time of alleged fiduciary breaches even though they have received their account balances by the time suit was brought. For example, in Sommers Drug Stores Co. Employee Profit Sharing Trust v. Corrigan, 883 F.2d 345 (5th Cir. 1989), the Fifth Circuit held that plaintiffs, former participants in a terminated defined contribution profit-sharing plan, had standing to bring an ERISA action against fiduciaries for losses allegedly resulting from the sale of the trust's stock for less than fair market value.[4] Even though the plan had already

[4] Although the court in Sommers described the plaintiffs' claim as analogous to a "simple claim that benefits were miscalculated," 883 F.2d at 350, the plaintiffs there were not claiming that plan fiduciaries made arithmetic errors or applied the terms of the plan incorrectly, but instead alleged that plan fiduciaries sold the plan stock for less than fair market value, resulting in a diminution of the amount of money held by the plan and, ultimately, the amount received by participants as benefits.

been terminated and the participants had received the entire value of their vested account balances, the court reasoned that plaintiffs' claim to recover the plan's losses gave them standing. Because the plaintiffs had allegedly received reduced distributions as a result of the fiduciary breach, they had a colorable claim for additional vested benefits. Id. at 349–50.

Endsley's claim is of the same kind. Like the plaintiffs in Sommers, Endsley seeks relief that could affect the amount of vested benefits that he will ultimately receive from the Plan. He was a plan participant when the alleged fiduciary breaches occurred and, as in Sommers, he alleges that the breaches caused a loss to the Plan, which reduced the amount of vested benefits that he received. As in Sommers, the Plan distributed his account balance to him in accordance with the plan terms, but the amount of benefits he received allegedly was reduced because of fiduciary misconduct. And, as in Sommers, if Endsley proves his claim and losses to the Plan are restored, his vested benefits will be augmented. Thus, this case and Sommers are identical in all legally significant respects. Despite having received payment of vested benefits when he left the plan, Endsley, like the plaintiffs in Sommers, has a colorable claim that he is still "eligible to receive a benefit of any type" in the form of an additional recovery from the Plan and, accordingly, is a "participant" for purposes of ERISA standing.

Indeed, this Court has rejected application of an "overly technical and narrow reading" of the vested benefits requirement. Panaras v. Liquid Carbonic Indus. Corp., 74 F.3d 786, 791 (7th Cir. 1996). In Panaras, the Court approvingly cited the First Circuit's decision in Vartanian v. Monsanto Co., 14 F.3d 697, 703 (1st Cir. 1994), for the proposition that a "plaintiff 'who would have been entitled to greater benefits but for [the] employer's breach of fiduciary duty was [a] participant for standing purposes.'" 74 F.3d at 791. Although Endsley does not claim that he would not have resigned but for the breach, as in Panaras and Vartanian, Endsley's claim is that he "would have been entitled to greater benefits but for [the defendants'] breach[es] of fiduciary duty," a claim that Panaras recognized as sufficient to confer standing. 74 F.3d at 791. Thus, the logic of Panaras fully supports that Endsley has standing,

Kuntz v. Reese, 785 F.2d 1410 (9th Cir. 1986) (en banc), and other cases involving defined benefit plans, are easily distinguishable. In Kuntz, the court held that former employees who filed suit after they had received all of their vested benefits in a defined benefit plan lacked standing under ERISA. Id. at 1411. In a defined benefit plan, the participant is promised a fixed benefit according to a formula set forth in the plan document, usually dependent on factors like an employee's years of service and final salaried income. GAO Report at 8–10; Wilson v. Bluefield Supply Co., 819 F.2d 457, 459 (4th Cir. 1987) (noting that a

defined benefit plan is "designed and administered to provide fixed—or 'defined'—benefits to the participants based on a benefit formula set forth in the Plan"); see also Phillips v. Alaska Hotel & Rest. Employees Pension Fund, 944 F.2d 509, 512 (9th Cir. 1991).[5] In contrast to defined contribution plans, the amount of the benefit for each participant in a defined benefit plan does not increase or decrease when the plan's investments experience gains or losses. GAO Report at 8-10.[6] Thus, when an employee retires and receives a lump-sum distribution from a defined benefit plan, that employee has received all the benefits that he is entitled to receive under the plan. Thus, Kuntz and other cases involving defined benefit plans, are inapposite; the plaintiffs in Kuntz, unlike Endsley or the plaintiff in

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[5] In such a plan, the employer is required to make contributions to the plan, and the assets of the plan are invested to insure that there will be sufficient money in the plan to cover the promised benefits when employees retire. GAO Report at 8–10.

[6] Unlike defined contribution plans, in defined benefit plans the risk of investment performance is shouldered by the employer. Hughes Aircraft Co. v. Jacobson, 525 U.S. 432, 439 (1999). In addition, defined benefit plans are covered by ERISA's pension insurance program. Connolly v. PBGC, 475 U.S. 211, 230 (1986). In contrast, defined contribution plans are not covered by ERISA's insurance program and, because the amount of retirement benefits under such plans is not guaranteed, and the investment risk in such plans is carried by the employees, GAO Report at 10, the need to stringently enforce the fiduciary duty provisions of ERISA is even more critical in the context of such plans.

Sommers, had received all of the benefits they had been promised, unreduced by any fiduciary breach.[7]

A number of district courts have properly followed Sommers to grant standing to former employees who were actively invested in defined contribution plans at the time of an alleged fiduciary breach. See, e.g., In re Polaroid ERISA Litig., No. 03 Civ. 8335 WHP, 2006 WL 2792202 (S.D.N.Y. Sept. 29, 2006) (holding that former employees have standing as participants where they alleged that the distributions they received from their defined contribution plan were reduced because of fiduciary breaches); In re Mut. Funds Inv. Litig., 403 F. Supp. 2d 434, 441–42 (D. Md. 2005) (holding that former employees have colorable claims to vested benefits when they did not receive all the benefits they were due upon withdrawing from a defined contribution plan as a result of fiduciary breaches); In re Williams Cos. ERISA Litig., 231 F.R.D. 416, 422–23 (N.D. Okla. 2005) (holding that former employees have colorable claims to vested benefits

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[7] Similarly distinguishable are decisions that have denied standing to former employees whom the courts found to have suffered no injuries and thus no diminution in benefits. See, e.g., Sallee v. Rexnord Corp., 985 F.2d 927, 929 (7th Cir. 1993) (finding that because "employees voluntarily elected to leave employment knowing that severance benefits did not vest unless they were terminated," there was "no question but that appellants could not prevail in a suit for benefits"); Crawford v. Lamantia, 34 F.3d 28, 33 (1st Cir. 1994) (holding that a former employee-plaintiff "failed to show that defendants' . . . breach of fiduciary duty had a direct and inevitable effect on his benefits") (emphasis in original). Unlike the plaintiffs in those cases, Endsley alleges that he suffered a diminution of benefits, and the district court agreed that his claim was colorable. J.A. 21.

where their account balances would have been larger at the time they took their distributions from a defined contribution plan if there had been no fiduciary breach); Rankin v. Rots, 220 F.R.D. 511 (E.D. Mich. 2004) (holding that a former employee has standing where he was a participant in the defined contribution plan during the time when the alleged breaches of fiduciary duty occurred); Thompson v. Avondale Indus., Inc., No. Civ. A. 99-3439, 2001 WL 1543497, at *2 (E.D. La. Nov. 30, 2001) (unpublished); Kuper v. Quantum Chem. Corp., 829 F. Supp. 918, 923 (S.D. Ohio 1993) (holding that former employees who claimed that the amount in their defined contribution plan, and thus their lump-sum distributions, were diminished because of fiduciary breaches retained a colorable claim to vested benefits and had standing to sue).

The court below relied instead on three recent district court decisions, all of which are pending on appeal, that have incorrectly denied standing to former employees who were actively invested in defined contribution plans at the time of an alleged fiduciary breach. Vaughn v. Bay Envtl. Mgmt., Inc., No. 03-5725, 2005 WL 2373718 (N.D. Cal. Sept. 26, 2005), appeal docketed, No. 05-17100 (9th Cir. Sept. 27, 2005); Hargrave v. TXU Corp., 392 F. Supp. 2d 785 (N.D. Tex. 2005), appeal docketed, No. 05-11482 (5th Cir. Dec. 29, 2005); Graden v. Conexant Sys., Inc., No. 05-0695, 2006 WL 1098233 (D.N.J. Mar. 31, 2006), appeal docketed, No. 06-2337 (3d Cir. Apr. 27, 2006); accord In re RCN Litig., No. 04-5068, 2006

WL 753149 (D.N.J. Mar. 21, 2006); Holtzscher v. Dynegy, Inc., No. 05-3293, 2006 WL 626402 (S.D. Tex. Mar. 13, 2006), appeal docketed, No. 06-20297 (5th Cir. Apr. 18, 2006); LaLonde v. Textron, Inc., 418 F. Supp. 2d 16 (D.R.I. 2006) (settled on appeal); In re Admin. Comm. ERISA Litig., No. C03-3302, 2005 WL 3454126 (N.D. Cal. Dec. 16, 2005). These cases fail to account for the nature of benefits under a defined contribution plan. Specifically, the decisions disregard the fact that the amount of a participant's vested benefits in a defined contribution plan increases in direct proportion to any increase in overall plan assets and decreases in proportion to any losses. For this reason, they are inconsistent with the statutory text of ERISA and are incorrectly decided.

Moreover, a number of these decisions, including the decision below, rely on dicta in Sommers stressing the need to determine whether the plaintiff's claim is one for damages, as in Kuntz, or a claim for benefits, as in Sommers. J.A. 23-27; see also, e.g., Graden, 2006 WL 1098233, at *3-5. Such an inquiry is both unhelpful and unnecessary where plaintiffs claim, as did the plaintiffs in Sommers, and as does Endsley here, that they received less than all of the benefits to which they are entitled as a direct result of a fiduciary breach that caused losses to their plans. Such a claim states a colorable claim for benefits, even if, in seeking to recover plan losses, the claim also seeks monetary damages. The same cannot be said of the plaintiffs in Kuntz, however, because by the time that they filed their

lawsuit, they had already indisputably received every dollar of benefits to which they were entitled; any further recovery they might have obtained would have been in the form of damages only.

Here, Endsley claims that the defendants breached their duties by, among other actions, imprudently continuing to allow investment of plan assets in Motorola stock despite knowing that the price of the stock did not reflect the true situation with Telsim. Endsley also claims that these breaches caused losses to the Plan, which allegedly resulted in a decrease in the amount of benefits he received when he took a distribution of benefits from his account. Endsley seeks the amount he should have received when he withdrew from the Plan, and that he would have received but for the fiduciary breaches. Because these claims present "a colorable claim" for vested benefits under ERISA, within the meaning of Firestone, 489 U.S. at 117, and 29 U.S.C. § 1002(7), Endsley has standing under the statute.

B. Reading ERISA to deny plaintiffs standing to sue when they have received a lump-sum distribution that was diminished as a result of a fiduciary breach is contrary to the purposes and policies of ERISA

As we have shown, the statutory text, and the relevant appellate and Supreme Court authority, establish that Endsley has standing to sue under ERISA. Furthermore, a decision to the contrary, affirming the district court's narrow reading of ERISA's standing requirements, would undermine the remedial goals of

ERISA, "[t]he primary purpose of [which] is the protection of individual pension rights." H.R. Rep. No. 93-533 (1973), reprinted in 1974 U.S.C.C.A.N. 4639, 4639; see also Martin v. Feilen, 965 F.2d 660, 671 (8th Cir. 1992) (noting that one of ERISA's basic remedies for a breach of fiduciary duty is "to restor[e] plan participants to the position in which they would have occupied but for the breach of trust"). Courts have correctly construed ERISA's standing requirements broadly in order to effectuate these remedial purposes. See Panaras, 74 F.3d at 791; Leuthner v. Blue Cross & Blue Shield, 454 F.3d 120, 128–29 (3d Cir. 2006) (holding that Congress intended "federal courts to construe [ERISA's] statutory standing requirements broadly in order to facilitate enforcement of its remedial provisions"); Vartanian, 14 F.3d at 702 ("[t]he legislative history of ERISA indicates that Congress intended the federal courts to construe the Act's jurisdictional requirements broadly in order to facilitate enforcement of its remedial provisions"). The term "participant" should not be read to close the courthouse doors to former employees who, like the plaintiff here, have allegedly not received all that they are due under their plan.

A holding affirming the district court would mean that when former employees receive a payment of benefits under a defined contribution plan – no matter how far it falls short of the benefits to which they actually are entitled – this payment deprives them of standing to sue under ERISA. This cannot be squared

with the text of ERISA or the Supreme Court's decision in Firestone, and would produce the incongruous result that fiduciaries could deprive employees of the right to seek redress for serious violations of ERISA simply by making distributions or terminating the plan altogether. See Rankin, 220 F.R.D. at 519–20 (recognizing absurdity of allowing employers to cut off participant status simply by paying some level of benefits); Vartanian, 14 F.3d at 702 ("[s]uch a holding would enable an employer to defeat the employee's right to sue for a breach of fiduciary duty by keeping his breach a well guarded secret until the employee receive[d] his benefits or, by distributing a lump sum and terminating benefits before the employee can file suit"); Amalgamated Clothing Textile Workers Union v. Murdock, 861 F.2d 1406, 1418–19 (9th Cir. 1988) ("were we to hold that payment of plan benefits cuts off the standing to sue of plan beneficiaries, we would, in effect, be saying that a fiduciary . . . has the power to deprive plan beneficiaries of standing to sue the fiduciary for misuse of plan assets"). ERISA should not be read to deny employees the right to recover what is rightfully theirs under the plan simply because they received a reduced distribution of benefits.

Finally, the possibility that employees will leave employment and take lump-sum distributions without realizing that their benefits have been reduced by a fiduciary breach is particularly significant in the case of defined contribution plans, like the plan at issue in this case. Defined contribution plans are designed to be

portable—participants can change jobs and take their retirement benefits with them by receiving a distribution of their plan accounts and either rolling the money over into individual retirement accounts or depositing it into their new employer's plan. GAO Report at 10. The interests of former employees in being paid the full amount that they are owed by the plan is no less great than those of current employees who continue to work and participate in the plan. A holding that these former employees lack standing to sue despite the fact that the benefits they received were allegedly diminished because of fiduciary breaches would defeat the purposes of ERISA and endanger employees' retirement security. Nothing in ERISA compels such arbitrary or illogical results. Indeed, ERISA was enacted precisely to ensure that employees and former employees alike receive the amount of pension benefits to which they are entitled.

CONCLUSION

For the reasons stated above, the Secretary respectfully requests that this Court reverse the decision of the district court to the extent that it was based on a conclusion that Endsley had no standing to pursue his claim.

Respectfully submitted,

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I hereby certify that on November 1, 2006, 2 copies of the foregoing Brief for the Secretary of Labor as Amicus Curiae were served using Federal Express courier service, postage prepaid, upon the following:

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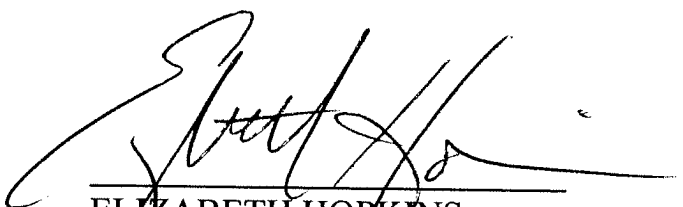

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