No. 06-3241

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

DAVID ROGERS, on behalf of himself and a class of persons similarly situated

Plaintiffs-Appellees,

v.

BAXTER INTERNATIONAL, INC., et al.,

Defendants-Appellants.

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-APPELLEES

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STATEMENT OF THE ISSUE

This appeal stems from an action brought by a class of participants in two defined contribution retirement plans sponsored by Baxter International, alleging that the defendants breached their fiduciary duties under ERISA with regard to managing the company stock components of the plans, and monitoring other fiduciaries. The Seventh Circuit accepted the case for appeal under Rule 23(f) of the Federal Rules of Civil Procedure from an order of the district court granting in part and denying in part the defendants' motion to dismiss.

The question presented is whether participants in these defined contribution retirement plans may seek relief on behalf of the plans pursuant to sections 409(a) and 502(a)(2) of the Employee Retirement Income Security Act, 29 U.S.C. §§ 1109(a) and 1132(a)(2), to recover losses sustained by the plans as a result of fiduciary breaches, where such losses will be allocated to the individual accounts of a subset of participants within the plans.

INTEREST OF THE SECRETARY OF LABOR

As the head of the federal agency with the 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., the Secretary has a strong interest in ensuring that courts correctly interpret ERISA. See 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 defendants-appellants are arguing that the named plaintiff may not sue under ERISA section 502(a)(2) to recover plan losses that were caused by fiduciary misconduct where the recovery will be allocated to the subset of accounts in the defined contribution 401(k) plans that suffered resulting losses. The Secretary has a strong interest in ensuring that such an erroneous interpretation of ERISA is not adopted by the court, both with regard to private litigation and with regard to her own litigation under section 502(a)(2).

STATEMENT OF THE CASE

1. David Rogers is a former employee of Baxter International, Inc., a Delaware corporation headquartered in Illinois that manufactures, distributes and provides healthcare products and services. Short Appendix (SA) 1. Baxter sponsors two pension plans in which Rogers participates, both of which are defined contribution or individual account plans with a company stock fund component. Id. at 1, 2. Rogers brought this class action lawsuit against the company and a number of plan fiduciaries at the company after the value of the company stock dropped significantly in 2002 and again in 2004 following disclosures that Baxter for several years had used improper accounting methods in connection with the company's Brazilian operations. Id. at 2.

In his five count complaint, Rogers alleges that: (1) the defendants mismanaged plan assets by failing to diversify investments and by selecting Baxter stock as an investment option when the defendants knew or should have known that the price of the stock was inflated; (2) the defendants imprudently invested in Baxter stock and allowed it as an investment alternative when they knew or should have known that the price was inflated; (3) the defendants breached their fiduciary duties by making material misrepresentations and failing to disclose material information with regard to the Baxter stock investment alternative; (4) the defendants acted disloyally by engaging in a scheme to personally profit from the inflated price of the stock; and (5) Baxter was liable under principles of respondeat superior for the failure of its Board of Directors to appoint, inform, supervise and monitor the activities of the other fiduciaries. Rogers sued under ERISA sections 502(a)(2) and 502(a)(3), requesting, among other things, "[a]ctual damages in the amount of any losses that the Plans suffered, to be allocated among the Participants' individual accounts in proportion to the accounts' losses." Corrected Amended Class Action Complaint for Breach of Fiduciary Duty (Complaint) at 28.

The defendants moved to dismiss on a number of bases. First, they argued that neither section 502(a)(2) nor section 502(a)(3) provided a basis for the suit. SA 2. With regard to section 502(a)(2), they argued that Rogers was not requesting plan-wide relief, as required by that provision of ERISA, because the

class of plan participants whose accounts stood to gain by the suit represented a subset of the plans' participants. Id. at 3. Furthermore, the defendants argued, section 502(a)(3) did not provide a basis for Roger's suit because the relief that he was seeking was not "appropriate equitable relief" within the meaning of that provision. Id. at 5. Next, the defendants argued that the complaint should be dismissed because it was too conclusory and thus failed to meet the requirements of Rule 8(a)(2) of the Federal Rules of Civil Procedure. Id. Similarly, the defendants argued that Rogers was required, but failed, to meet the "particularity" requirements of Rule 9(b) with regard to the allegations of disloyalty. Id. at 6. Finally, the defendants argued that Rogers had failed to sufficiently allege the fiduciary and co-fiduciary status of each of the defendants. Id. at 7-11.

2. With one exception, the district court disagreed with the defendants' analysis and refused to dismiss the claims. With regard to section 502(a)(2), the court followed "the majority of courts to have considered the question, particularly in recent years," and concluded that "Rogers may bring a claim under 502(a)(2) even though the putative class constitutes a subset of the Plans' Participants." SA 4-5. Turning to Rogers' section 502(a)(3) claim, the court reasoned that although "[t]he basis for Rogers' claim for equitable relief is not entirely clear . . . the court cannot say at this stage of the litigation that Rogers could prove no set of facts that would entitle him to the relief he seeks under 502(a)(3)." Id. at 5. The court then

held that the claim was sufficiently pled for purposes of notice pleading under Rule 8(a)(2) of the Federal Rules of Civil Procedure, but concluded that the divided loyalty claim was actually a claim for fraud and was not sufficiently pled under the heightened pleading standard of Rule 9(b). Id. at 5-6. The court thus granted the defendants' motion to dismiss with regard to Count IV of the complaint. Id. at 7. With regard to the remaining claims, however, the court held that Rogers had sufficiently alleged the fiduciary and co-fiduciary status of each of the defendants. Id. at 7-11. The court thus refused to dismiss any of the remaining claims.[1]

This Court granted the defendants' petition for an interlocutory appeal on the section 502(a)(2) issue.

SUMMARY OF THE ARGUMENT

The plain language of ERISA expressly authorizes the plaintiffs, participants in two defined contribution pension plans, to sue the defendant-fiduciaries to recover monetary losses to the plans stemming from fiduciary breaches with regard to the management of the plans and their assets. This straightforward reading of the statutory language is bolstered by the structure of the statute, particularly the one statutory provision that deals exclusively with individual account plans, and by the primary statutory purpose to protect plans from financial mismanagement by providing ready access to the courts and appropriate remedies.

[1] The court has since certified the proposed class, and, for that reason, we refer not merely to Rogers, but to this class of participants as the plaintiffs.

The defendants' argument that the plaintiffs do not have standing under sections 409(a) and 502(a)(2) of ERISA to seek losses to the plan if those losses will be allocated to some, but not all, of the individual accounts in that plan, fundamentally misconstrues the nature and structure, under ERISA, of defined contribution or individual account plans. These plans are required to provide for individual accounts, but nevertheless must also hold all the assets of the plan in trust for the plan. Given this structure, any monetary recovery necessarily increases the assets of the plan whether the recovery is allocated to one account, every account in the plan, or some number in between.

For these reasons, this Court, and the three other courts of appeals to have addressed this precise issue, have all recognized that similar actions by a subset of defined contribution plan participants are properly brought under ERISA section 502(a)(2). The Supreme Court's decision in Massachusetts Mutual Life Insurance Co. v. Russell, 473 U.S. 134 (1985), is completely consistent with these decisions. Thus, plaintiffs are not limited to seeking injunctive and other equitable relief under section 502(a)(3) of ERISA, or to bringing a related securities law claim under different standards of proof and pleading. Instead, if fiduciary breaches caused losses to their plans, as plaintiffs claim, they may sue to recover those losses under the plain terms of sections 409(a) and 502(a)(2) of ERISA.

ARGUMENT

ERISA SECTIONS 409(a) AND 502(a)(2) ALLOW PLAN PARTICIPANTS TO BRING SUIT TO RECOVER LOSSES TO A PLAN EVEN IF THE LOSSES ARE ALLOCATED TO A SUBSET OF THE INDIVIDUAL ACCOUNTS IN THE PLAN

A. The plain language of the statute, as well as its structure and purposes, establish that plan participants are entitled to recover, without limitation, any losses to the plan stemming from fiduciary breaches

The claims brought by plaintiffs seek to restore significant plan losses stemming from alleged fiduciary breaches. These claims fall within the express language of section 409(a), 29 U.S.C. § 1109(a), which requires a plan fiduciary that breaches "any of the responsibilities, obligations, or duties" imposed on him by ERISA to make good "any losses" to the plan resulting from "each such breach," and section 502(a)(2), which provides that an action may be brought "for appropriate relief under section 1109." 29 U.S.C. § 1132(a)(2). Nothing in sections 409(a) or 502(a)(2) exempts defined contribution pension plans from their scope or supports the defendants' attempt to read a significant limitation into the statute's broad and unqualified language by requiring that losses must occur in every participant's account in a defined contribution plan before they may be recovered. Given the highly reticulated nature of ERISA and the "evident care" with which the civil enforcement provisions were crafted, Mass. Mut. Life Ins. Co. v. Russell, 473 U.S. 134, 147 (1985), this Court should decline to read such a limitation into these broad remedial provisions where none is expressly stated. See

Harris Trust & Sav. Bank v. Salomon Smith Barney Inc., 530 U.S. 238, 246 (2000) (refusing to read a limitation into the universe of possible defendants under section 502(a)(3)). As the Supreme Court has stated, "[i]n a statutory construction case, the beginning point must be the language of the statute, and when a statute speaks with clarity to an issue judicial inquiry into the statute's meaning, in all but the most extraordinary circumstances is finished." Estate of Cowart v. Nicklos Drilling Co., 505 U.S. 469, 475 (1992).

Moreover, this straightforward reading of the fiduciary breach and remedy provisions set forth in sections 409(a) and 502(a)(2) is entirely consistent with the statute's structure and purpose. First, another provision of ERISA applicable to individual account plans, section 404(c), 29 U.S.C. § 1104(c), strongly supports what the plain language of section 409(a) and 502(a)(2) provide: that plan participants in individual account plans may sue breaching fiduciaries for losses to the plans caused by fiduciary breaches. Section 404(c) provides that where an individual account plan "permits a participant or beneficiary to exercise control over assets of his account," and where the participant or beneficiary does so in accordance with the Secretary's regulations, "no person who is otherwise a fiduciary shall be liable under this part for any loss, or by reason of any breach, which results from such participant's . . . exercise or control." 29 U.S.C. § 1104(c)(1)(A)(ii). This exemption from liability for loss would be superfluous or

nonsensical if defendants are correct that fiduciaries to individual account plans have no such liability under any circumstances involving individual account plans. But defendants are not correct. Instead, section 404(c), ERISA's one provision that deals expressly with individual account plans, provides a limited exception (not relevant here) to the statute's general provision in sections 409(a) and 502(a)(2) for a loss remedy to defined contribution plan participants whose plans, and whose accounts in such plans, have been harmed by fiduciary mismanagement or malfeasance.

Second, in enacting ERISA, Congress expressly found that "the continued well-being and security of millions of employees and their dependents are directly affected" by employee benefits plans. 29 U.S.C. § 1001(a). Given the enormous impact of these plans on employment stability and interstate commerce, Congress declared it the policy of ERISA to protect these interests by, among other things, "establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts." 29 U.S.C. § 1001(b) (emphasis added). Considering these statements in the statute, it defies common sense to suggest that Congress intended, without saying so expressly, to exempt defined contribution plans, which hold approximately $2.9 trillion in assets, Board of Governors of the Federal Reserve Sys., Flow of Fund Accounts of the United States: Annual Flows

and Outstandings, Third Quarter 2006, Fed. Res. Statistical Release Z.1, at 113 (June 8, 2006), from ERISA's primary remedial provision governing fiduciary breaches simply because, as will normally be the case with regard to 401(k) plans such as this one, not every plan participant stands to benefit.[2]

B. Losses attributable to one or more individual accounts in a defined contribution plan constitute losses to the plan that may be recovered under section 502(a)(2)

Defendants' argument that plaintiffs here may not sue for losses to the plan under section 502(a)(2) rests on a fundamental misconception of the nature and structure of defined contribution plans, and the method by which benefits are calculated under such plans. Although any recovery will ultimately be allocated to the plan accounts of the individual participants whose accounts were invested in Baxter stock, such a recovery of losses still constitutes "losses to the plan." The necessity of such allocations is inherent in the nature of a defined contribution or

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[2] Because participants in 401(k) plans and similar defined contribution plans are typically presented with numerous investment options, it is highly unlikely that every participant in such plans will be invested in the same investment options during a given period. Therefore, the investment decisions and other actions of fiduciaries to these plans, no matter how egregious, are likely to escape scrutiny under ERISA sections 409(a) and 502(a)(2), and plan participants who have been harmed are likely to be left wholly without relief under these key enforcement provisions, if this Court adopts the defendants' position that any monetary relief must go to all plan accounts or it can go to none. See Colleen E. Medill, Stock Market Volatility, 34 U. Mich. J.L. Reform 469, 538-39 (2001) ("The long-term policy consequence [of such an interpretation] is likely to be a significant undermining of the effectiveness of 401(k) plans in providing retirement income security."). For the reasons we discuss above, there is no cause for the Court to reach this irrational result.

individual account plan, which ERISA defines as "a pension plan which provides for an individual account for each participant and for benefits based solely upon the amount contributed to the participant's account, and any income, expenses, gains and losses, and any forfeitures of accounts of other participants which may be allocated to such participant's account." 29 U.S.C. § 1002(34). The plan's assets – consisting of all contributions and earnings – are required to be held in trust by one or more trustees who have authority and discretion to manage and control the assets of the plan. See 29 U.S.C. § 1103(a); 26 U.S.C. § 401(a). Any "contributions are made to a single funding vehicle, usually a trust," and "as amounts are contributed to the trust, they are allocated to the participant's account." David A. Littell et al., Retirement Savings Plans: Design, Regulation, and Administration of Cash or Deferred Arrangements 6 (1993).

Thus, even after the plan assets are allocated to individual "accounts," the participants have a beneficial interest in, but not legal ownership of, their accounts; legal title to all of the trust assets is held by the trustee. See Rev. Rul. 89-52, 1989-1 C.B. 110 ("While a qualified trust may permit a participant to elect how amounts attributable to the participant's account-balance will be invested . . . it may not allow the participant to have the right to acquire, hold and dispose of amounts attributable to the participant's account balance at will."). The total amount of assets held in the plan are not only used to pay plan benefits, but are also used to

defray the cost of operating the plan, including recordkeeping, legal, auditing, annual reporting, claims processing and similar administrative expenses. Accordingly, it is inherent in the nature and structure of individual account plans, and in ERISA's stringent trust requirements applicable to all pension plan assets, that a recovery that is (and must be) ultimately allocated to one or more of the plan's individual accounts, necessarily increases the overall assets of the plan and must be paid to and held in trust by the plan. See Dana Muir, ERISA and Investment Issues, 65 Ohio St. L.J. 199, 235 (2004) ("[i]n [defined contribution] plans, fiduciary breaches that cause loss to the plan typically cause that loss by affecting the value of individual participants' accounts").

C. The Seventh Circuit, like the other Circuits that have addressed the issue, has concluded that a class of plan participants whose accounts were affected by fiduciary breaches, may sue to recover losses to the plan under section 502(a)(2)

This Court has previously correctly concluded that a subset of participants in a profit sharing defined contribution plan may sue the fiduciaries of their plan under section 502(a)(2). Steinman v. Hicks, 352 F.3d 1101 (7th Cir. 2003). The district court in Steinman, addressing precisely the argument that defendants make here, had held that the plaintiffs could not maintain their action under section 502(a)(2) because they were seeking to "recover their individual losses . . . rather than suing on behalf of" their plan, and thus could bring their claims only as ones for individual relief under section 502(a)(3). Steinman v. Hicks, 252 F. Supp. 2d

746, 756 (C.D. Ill. 2003). Although the Seventh Circuit affirmed the district court's dismissal of the case on other grounds (relating to diversification), this Court rejected the district court's analysis of the scope of section 502(a)(2), reasoning that while "[t]here was some confusion . . . over whether the suit was under section 502(a)(3) or 502(a)(2), . . . it is clearly the latter, because the plaintiffs are asking that the trustees be ordered to make good the losses to the plan caused by their having breached fiduciary obligations." 352 F.3d at 1102.

This analysis is in line with the holdings of the three courts of appeals to have addressed the issue, all of which refused to dismiss fiduciary breach suits on the basis that only a subset of plan participants would benefit. Milofsky v. Am. Airlines, Inc., 442 F.3d 311, 313 (5th Cir. 2006) (en banc), In re Schering-Plough Corp. ERISA Litig., 420 F.3d 231, 232 (3d Cir. 2005) and Kuper v. Iovenko, 66 F.3d 1447, 1453 (6th Cir. 1995). As the Sixth Circuit pointed out in Kuper, "Defendants' argument that a breach must harm the entire plan to give rise to liability under § 1109 would insulate fiduciaries who breach their duty so long as the breach does not harm all of a plan's participants . . . . [and] would contravene ERISA's imposition of a fiduciary duty that has been characterized as 'the highest known to law.'" 66 F.3d at 1453. Accord Kling v. Fid. Mgmt. Trust Co., 270 F. Supp. 2d 121, 126, modified, 291 F. Supp. 2d 1 (D. Mass. 2003) ("Kling does sue on behalf of the Plan; and thus meets the requirements of § 409 as interpreted by

the Supreme Court in Russell. That the harm alleged did not affect every single participant does not alter this conclusion."); In re WorldCom, Inc. ERISA Litig., 263 F. Supp. 2d 745, 765 (S.D.N.Y. 2003) (allowing claim under section 502(a)(2) based on allegations that 401(k) plan fiduciaries "were obligated to but failed to act with prudence regarding the Plan's continued offer of WorldCom stock as a Plan investment").

Furthermore, the Steinman analysis is in no way undercut by the dicta about "relief to the plan as a whole" in the three wholly distinguishable Seventh Circuit cases that defendants' cite, none of which involved any loss or diminution of the plan's assets. Appellants' Br. at 18 (citing Magin v. Monsanto Co., 420 F.3d 679, 687 (7th Cir. 2005) (claim for personal enhanced severance benefits may not be brought under section 502(a)(2)); Plumb v. Fluid Pump Serv., Inc., 124 F.3d 849, 863 (7th Cir. 1997) (assignee of a medical benefit claim may not seek benefits under section 502(a)(2)); Anweiler v. Am. Elec. Power Serv. Corp., 3 F.3d 986, 992 (7th Cir. 1993) (individual claim for proceeds of life insurance policy and for breach of fiduciary duty with regard to payment of policy brought under ERISA section 502(a)(3)). Moreover, although the Fourth Circuit has recently ruled that section 502(a)(2) does not allow a single plan participant who claims losses to his plan and plan account to bring suit under section 502(a)(2), a proposition with which the Secretary disagrees, the court there nevertheless purported to distinguish

such a case from a class action, as here, on behalf of a group of similarly situated plan participants. LaRue v. DeWolff, Boberg & Assocs., 450 F.3d 570, 574 (2006). The Secretary therefore urges this Court to adhere to its correct view of the scope of section 502(a)(2), as expressed in Steinman.

D. The defendants' argument that plaintiffs may not sue for plan losses where the relief will be allocated to the individual accounts of a subset of plan participants finds no support in the Supreme Court's decision in Russell

Contrary to the defendants' argument, the Supreme Court's decision in Russell in no way supports the conclusion that participants in a plan that has been financially harmed by fiduciary breaches may not recover plan losses unless the individual account of every participant will benefit. Unlike this case, Russell involved a claim by a plaintiff for a direct recovery of individual damages stemming from a denial of benefits. In Russell, a plan's disability committee terminated and then reinstated a participant's disability benefits. Claiming losses as a result of the interruption in benefit payments, the participant brought suit under section 502(a)(2) for compensatory and punitive damages, payable not to the plan for a loss of plan assets, but directly to the individual participant for injuries she personally sustained. 473 U.S. at 137-38. After reviewing the text of section 409, the provisions defining the duties of a fiduciary and the provisions defining the rights of a beneficiary, the Supreme Court held that the participant did not have standing to seek extra-contractual compensatory or punitive damages for improper

or untimely processing of a benefit claim under sections 409 and 502(a)(2) of ERISA, because those sections provided relief for "the plan as a whole." Id. at 140.

However, noting that "the crucible of congressional concern was misuse and mismanagement of plan assets by plan administrators," 473 U.S. at 140 n.8, Russell distinguished relief to be paid to a plan as damages for the mismanagement of plan assets, as sought here, from relief to be paid to an individual as damages for personal pain and suffering caused by a benefit payment delay, as sought in Russell. Id. at 143-44. The distinction is critical: Russell could not assert a section 502(a)(2) claim because she did not allege any injury to the plan or reduction of its assets stemming from mismanagement of such assets by the plan fiduciaries, nor did she seek a recovery payable to the plan; here, the plaintiffs have done so. Thus, when the Court stated that recoveries under sections 409(a) and 502(a)(2) must "inure[] to the benefit of the plan as a whole," Id. at 140, there is every reason to believe that the Court had in mind suits, such as this one, for plan losses stemming from the "misuse and mismanagement of plan assets." Id. at 140 n.8; see also Varity Corp. v. Howe, 516 U.S. 489, 511, 512 (1996) (noting that the specific purpose of section 502(a)(2) is to allow suits to enforce "fiduciary obligations related to the plan's financial integrity," in accordance with "a special congressional concern about plan asset management" reflected in section 409).

There is no reason to believe that the Court intended to substitute its descriptive language of the relief provided by sections 409(a) and 502(a)(2) for the actual language of the statute. See St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 515 (1993) ("[W]e think it generally undesirable, where holdings of the Court are not at issue, to dissect the sentences of the United States Reports as though they were the United States Code.").

Likewise, there is no basis for reading Russell so broadly that losses to defined contribution plans caused by fiduciary mismanagement, which significantly diminish the retirement security of participants through the assets held in trust, simply cannot be recovered. Indeed, such claims fall precisely within the area of special congressional concern at which sections 409(a) and 502(a)(2) of ERISA are aimed. The Complaint alleges that the plan fiduciaries mismanaged plan assets and abused their fiduciary positions with regard to the plans' investments in company stock and that, as a direct result of this misconduct, the plans hold millions of dollars less in trust for the participants and beneficiaries. The fact that the plans here, like all defined contribution plans, provide for individual accounts, does not remove them from the protection of ERISA, or make any less applicable Congress' goal to protect retirement plans and their participants. Indeed, to interpret section 409(a) as disallowing relief where losses will be allocated to the individual accounts that make up all defined benefit plans, or as

limiting relief to losses that affect every participant's account, would contradict the Supreme Court's admonition in Russell that courts should be "reluctant to tamper with an enforcement scheme crafted with such evident care as the one in ERISA." 473 U.S. at 147.

Nor does the relief sought here constitute "extra-contractual" damages to the individual within the meaning of Russell, as the defendants argue. Unlike the relief for compensatory and punitive damages that the plaintiff in Russell sought to be paid directly to her, the plaintiffs here seek to have relief paid to the plan for losses suffered by the plan. This is relief for which sections 409(a) and 502(a)(2) expressly provide, as many courts, including this one, have explicitly or implicitly held in allowing analogous claims to proceed under section 502(a)(2).[3] See, e.g., Milofsky, 442 F.3d at 313; Schering-Plough, 420 F.3d at 232; Steinman, 352 F.3d at 1102; Kuper, 66 F.3d at 1453; Kling, 270 F. Supp. 2d at 126-27; In re WorldCom, 263 F. Supp. 2d at 765 (allowing claim for plan losses under section

[3] Even if defendants were correct in viewing this claim as an individual claim by the named plaintiff Rogers, it would not follow that his claim is one for "extra-contractual" damages rather than for benefits. See Appellants' Br. at 39 n.15 (relying, in part, on cases involving former participants to argue that, to the extent that Rogers will benefit from the recovery, his claim is a "request for speculative damages, rather than vested benefits"). As the Secretary has recently argued in a number of amicus briefs involving the standing of former employees who participated in defined contribution plans, such claims are for losses to the plan that, when recovered, will ultimately increase the amount of the participants' vested benefits. See, e.g., Howell v. Motorola, Inc., No. 06-3413 (7th Cir. filed Sept. 11, 2006). Therefore, in those cases, as here, such a claim for plan losses is properly brought under section 502(a)(2), as this Court recognized in Steinman.

502(a)(2) based on allegations that 401(k) plan fiduciaries "were obligated to but failed to act with prudence regarding the Plan's continued offer of WorldCom stock as a Plan investment"); Tittle v. Enron Corp., 284 F. Supp. 2d 511 (S.D. Tex. 2003) (allowing claims against 401(k) and ESOP fiduciaries to proceed under section 502(a)(2)); but see Fischer v. J.P. Morgan Chase & Co., 230 F.R.D. 370, 375 (S.D.N.Y. 2005) (claim for plan losses that will be allocated to individual account is not permitted under section 502(a)(2)).

E. If fiduciary breaches have caused losses to the plans, as plaintiffs contend, they are not limited to seeking injunctive relief under ERISA section 502(a)(3), or relief for fraud under the securities laws, but may seek to recover those losses under the express terms of sections 409(a) and 502(a)(2)

Plaintiffs may sue for monetary relief to the plan to remedy fiduciary breaches under the plain terms of section 502(a)(2). Defendants thus err in arguing that, because any recovery will be allocated to the individual accounts of some but not all participants, the plaintiffs may bring their claims solely under section 502(a)(3), 29 U.S.C. § 1132(a)(3), for "appropriate equitable relief" in the limited form of injunctive relief or disgorgement of unjust enrichment. Indeed, if this Court were to agree with the defendants that plan participants are limited to obtaining injunctive relief under 502(a)(3), participants in a defined benefit plan would be without an effective remedy under ERISA to recover losses to their plan and ultimately to their benefits caused by even the most egregious fiduciary breaches. But, as we discuss below, the defendants are wrong on both counts:

monetary relief from breaching fiduciaries is available under section 502(a)(3) to individual participants who have been harmed by those breaches, but the recovery of monetary losses to a plan is obtained under section 502(a)(2).

First, although a number of courts have rejected the Secretary's view that participants can sue under section 502(a)(3) for direct monetary losses to an individual participant caused by a fiduciary breach, see, e.g., Callery v. United States Life Ins. Co., 392 F.3d 401, 404-05 (10th Cir. 2004), cert. denied, 126 S. Ct. 333 (2005), this Court has correctly held that such relief is available, Bowerman v. Wal-Mart Stores, Inc., 226 F.3d 574, 592 (7th Cir. 2000).[4] But it does not follow from this that the participants are foreclosed from suing under ERISA sections 409(a) and 502(a)(2) when they are claiming that their plan has suffered losses from fiduciary malfeasance. Sections 409(a) and 502(a)(2) expressly provide that

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[4] In Bowerman, this Court recognized that Section 502(a)(3) excludes legal damages, but explained that "'when sought as a remedy for breach of fiduciary duty [this kind of relief, which the Court called restitution] is properly regarded as an equitable remedy because the fiduciary concept is equitable.'" 226 F.3d at 592 (quoting Health Cost Controls of Ill., Inc. v. Wash., 187 F.3d 703, 710 (7th Cir. 1999)). The Secretary agrees and has argued in amicus briefs that such recovery of monetary losses from a breaching fiduciary was a specific category of relief in equity sometimes called surcharge which, as a monetary remedy designed to redress a breach of trust, was not only typically an equitable remedy, but was a remedy that could only be granted by courts of equity. See Restatement (Second) of Trusts § 197 (1959); see also Williams Elecs. Games, Inc. v. Garrity, 366 F.3d 569, 577 (7th Cir. 2004); Clews v. Jamieson, 182 U.S. 461, 479-80 (1901). The Supreme Court's recent decision in Sereboff v. Mid Atlantic Medical Services, Inc., 126 S. Ct. 1869, 1874 (2006), confirms that so long as both the basis for the claim and the nature of the relief are equitable – as is the case with a claim for surcharge against a breaching fiduciary – monetary relief is available.

plan participants may bring suit for losses to the plan resulting from fiduciary breaches and, if given effect, will provide an adequate remedy in such cases. Although there is no need to provide a remedy under both sections 502(a)(2), and 502(a)(3), which the Supreme Court has described as a "catch-all" provision, there is certainly no basis for the denial of such a monetary remedy under both provisions. See Varity, 516 U.S. at 515 ("We are not aware of any ERISA-related purpose that denial of a remedy would serve.").

The defendants likewise err in their rather extraordinary claim that the availability of certain monetary remedies under federal securities law, and the heightened pleading standard required in such cases, somehow forecloses a claim under section 502(a)(2). Although the defendants cite section 514(d) of ERISA, which states that nothing in Title I of ERISA "shall be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States . . . or any rule or regulation issued under any such law," 29 U.S.C. § 1144(d), allowing plaintiffs' ERISA claims to proceed in no way does so. The misrepresentation and prudence claims that plaintiffs make here are consistent with and supplement available securities law actions, and do not in any way conflict with them.

For this reason, the defendants are incorrect in their contention that the ERISA claims here are somehow an end-run around the heightened pleading requirements of a securities fraud case. The district court properly analyzed these

claims under the notice pleading standards of Rule 8(a), as numerous other courts have done in similar contexts. See, e.g., In re XCEL Energy, Inc. Secs., Derivative & ERISA Litig., 312 F. Supp. 2d 1165, 1179 (D. Minn. 2004) ("Here, plaintiffs' breach of fiduciary duty claims are premised on defendants' failure to act in light of the adverse circumstances that were hidden by fraudulent conduct. Defendants' duty to act arose as a result of the adverse conditions, not the alleged fraud."); In re CMS Energy ERISA Litig., 312 F. Supp. 2d 898, 909 (E.D. Mich. 2004); Rankin v. Rots, 278 F. Supp. 2d 853, 866 (E.D. Mich. 2003) ("The heightened pleading requirement under Rule 9(b) will not be imposed where the claim is for a breach of fiduciary duty under ERISA."); Stein v. Smith, 270 F. Supp. 2d 157, 167 (D. Mass. 2003) (holding that Rule 8(a)'s lenient pleading standard and not Rule 9(b)'s standard applies to claim that defendant had fiduciary duty to monitor and evaluate performance of company stock).

The defendants cite no support for their argument that the securities laws somehow foreclose any ERISA claim related to losses to a plan resulting from a significant drop in the price of employer stock. In fact, even where there is a conflict between ERISA and another federal statute, "section 514(d) does not require that the courts ignore ERISA in favor of other federal laws." Heitkamp v. Dyke, 943 F.2d 1435, 1449 n.37 (5th Cir. 1991). Instead, "[t]he specific provisions of ERISA will supersede the general provisions of other federal laws." Id. (citing

Guidry v. Sheet Metal Worker's Nat'l Pension Fund, 493 U.S. 365, 375-76 (1990) (holding that LMRDA's remedial provision did not override ERISA's anti-alienation provision)). But here, there is no conflict. That ERISA subjects those acting as plan fiduciaries to strict fiduciary duties under standards of proof and pleading that are different than those imposed by the federal securities laws in no way undermines or impedes the requirements of those laws. And by the same token, those laws do not provide a barrier behind which the defendants may hide in order to undermine the effectiveness of ERISA.

CONCLUSION

For the reasons stated above, the Secretary respectfully requests that this Court affirm the decision of the district court declining to dismiss the suit.

Respectfully submitted,

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Attorney for Amicus Curiae Secretary of Labor

Dated: 12/8/06

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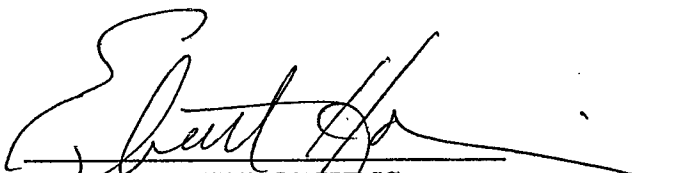

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