Case Nos. 10-4163, 10-4198

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ANN I. TAYLOR
Plaintiff-Appellant Cross-Appellee,

v.

KeyCorp; Thomas C. Stevens; Henry L. Meyers, III; KeyCorp Trust Oversight Committee; Kathleen Egan; Jeffrey B. Weeden; Thomas W. Bunn; Thomas E. Helfrich; Robert L. Morris
Defendants-Appellees Cross-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR TH
E NORTHERN DISTRICT OF OHIO

BRIEF OF THE SECRETARY OF LABOR, HILDA L. SOLIS, AS AMICUS CURIAE SUPPORTING PLAINTIFF-APPELLANT

M. PATRICIA SMITH
Solicitor of Labor

TIMOTHY D. HAUSER
Associate Solicitor, Plan
Benefits Security Division

NATHANIEL I. SPILLER
Counsel for Appellate and
Special Litigation

THOMAS TSO
Attorney
U.S. Department of Labor
Plan Benefits Security Division
200 Constitution Avenue, N.W.
Room N-4611
Washington, D.C. 20210
(202) 693-5632

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTEREST OF THE SECRETARY 1

STATEMENT OF THE ISSUE.. 1

STATEMENT OF THE CASE 1

SUMMARY OF THE ARGUMENT 4

ARGUMENT 5

THE "INJURY IN FACT" PRONG OF ARTICLE III STANDING IS MET 5

A. ..... Plaintiff's Economic Injury 6

B. Plaintiff's Non-economic and Derivative Injuries…….14

CONCLUSION... 24

TABLE OF AUTHORITIES

Federal Cases:

Akers v. Palmer,
71 F.3d 226 (6th Cir. 1995).. 18

Aluminum Co. of America v. Bonneville Power Admin.,
903 F.2d 585 (9th Cir. 1989).. 8

Bell v. Hood,
327 U.S. 678 (1946).. 9

Branson School Dist. RE-82 v. Romer,
161 F.3d 619 (10th Cir. 1998).. 15

Bridges v. American Elec. Power Co.,
498 F.3d 442 (6th Cir. 2007).. 6

Brown v. Medtronic Inc., No. 09-2524,
-- F.3d --, 2010 WL 505954 (8th Cir. 2010).. 10 n.3

California Ironworkers Field Pension Trust v. Loomis Sayles & Co.,
259 F.3d 1036 (9th Cir. 2001).. 10, 11

Carter v. Welles-Bowen Realty, Inc.,
553 F.3d 979 (6th Cir. 2009).. 15, 17, 18

Chao v. Hall Holding Co.,
285 F.3d 415 (6th Cir. 2002).. 18, 19

Courtney v. Smith,
297 F.3d 455 (6th Cir. 2002).. 5

DaimlerChrysler Corp. v. Cuno,
547 U.S. 332 (2006).. 21

Dardaganis v. Grace Capital Inc.,
889 F.2d 1237 (2d Cir. 1989).. 14 n.6

Federal Cases--continued:

Delk v. Ford Motor Co.,
96 F.3d 182 (6th Cir. 1996).. 14 n.6

DeLuca v. Blue Cross Blue Shield of Michigan, No.08-1085
--F.3d --, 2010 WL 4961726 (6th Cir. 2010)................................ 23 n.8

Denney v. Deutsche Bank AG,
443 F.3d 253 (2d Cir. 2006).. 8, 9

Donovan v. Bierwirth,
754 F.2d 1049 (2d Cir. 1985)... 11, 14 n.6

Drutis v. Rand McNally & Co.,
499 F.3d 608 (6th Cir. 2007).. 7

Dura Pharmaceuticals, Inc. v. Broudo,
544 U.S. 336 (2005).. 10 n.3

Eaves v. Penn,
587 F.2d 453 (10th Cir. 1978) 14 n.6

FMC Corp. v. Boesky,
852 F.2d 981 (7th Cir. 1988)... 8, 15

Great-West Life & Annuity Ins. Co. v. Knudson,
534 U.S. 204 (2002)... 19

Grede v. Bank of New York Mellon,
598 F.3d 899 (7th Cir. 2010)... 20

Hamdi ex rel. Hamdi v. Napolitano,
620 F.3d 615 (6th Cir. 2010).. 7

Harris Trust & Sav. Bank v. Salomon Smith Barney Inc.,
530 U.S. 238 (2000).. 11, 18

Havens Realty Corp. v. Coleman,
455 U.S. 363 (1982).. 15, 17

Federal Cases--continued:

Holt Civic Club v. City of Tuscaloosa,
439 U.S. 60 (1978) 9, 22

Int'l Union of Operating Engineers v. Ward,
563 F.3d 276 (7th Cir. 2009) 15

James v. Pirelli Armstrong Tire Corp.,
305 F.3d 439 (6th Cir. 2002) 16

Krohn v. Huron Memorial Hosp.,
173 F.3d 542 (6th Cir.1999) 16

Larson v. Northrop Corp.,
21 F.3d 1164 (D.C. Cir. 1994) 19 n.7

LaRue v. DeWolff, Boberg & Associates, Inc.,
552 U.S. 248 (2008) 14 n.6

Leigh v. Engle,
858 F.2d 361 (7th Cir. 1988) 14 n.6

Loren v. Blue Cross & Blue Shield of Mich.,
505 F.3d 598 (6th Cir. 2007) .... 14 & passim

Mass. Mut. Life Ins. Co. v. Russell,
473 U.S. 134 (1985) 18, 19

McCullough v. AEGON USA, Inc.,
585 F.3d 1082 (8th Cir. 2009) 20, 23 n.8

Mountain States Legal Foundation v. Glickman,
92 F.3d 1228 (D.C. Cir. 1996) 7

NetworkIP, LLC v. F.C.C.,
548 F.3d 116 (D.C. Cir. 2008) 20

Palen v. Kmart Corp.,
215 F.3d 1327 (6th Cir. May 9, 2000) (unpublished) 17

Federal Cases--continued:

Pfahler v. National Latex Products Co.,
517 F.3d 816 (6th Cir. 2007).. 19, 21

Primax Recoveries, Inc. v. Gunter,
433 F.3d 515 (6th Cir. 2006).. 7

Secretary of Labor v. Fitzsimmons,
805 F.2d 682 (7th Cir. 1986) (en banc) 1

Secretary of U.S. Dep't of Labor v. Gilley,
290 F.3d 827 (6th Cir. 2002).. 8

Smith v. Pro Football, Inc.,
593 F.2d 1173 (D.C. Cir. 1978) 8

Sprint Communications v. APCC Servs.,
554 U.S. 269 (2008) 20, 23 n.8

Steel Co. v. Citizens for a Better Env't,
523 U.S. 83 (1998) 6, 7, 10 n.3

Sutton v. St. Jude Medical S.C., Inc.,
419 F.3d 568 (6th Cir. 2005).. 9

Taylor v. KeyCorp,
678 F.Supp.2d 633 (N.D. Ohio 2009).. 4

Tullis v. UMB Bank, N.A.,
515 F.3d 673 (6th Cir. 2008).. 9

U.S. v. Real Property, All Furnishings Known as Bridwell's Grocery,
195 F.3d 819 (6th Cir. 1999).. 8

Warth v. Seldin,
422 U.S. 490 (1975) 6, 15

Federal Cases--continued:

William E. Arnold Co. v. Carpenters Dist. Council of Jacksonville and Vicinity,
417 U.S. 12 (1974) 9, 22

Woosley v. Avco Corp.,
944 F.2d 313 (6th Cir. 1991) 18

Ziegler v. Conn. Gen. Life Ins. Co.,
916 F.2d 548 (9th Cir. 1990) 19 n.7

State Cases:

Uzyel v. Kadisha,
188 Cal.App.4th 866 (Cal. Ct. App. 2010) 12

Federal Statutes:

Employement Retirement Income Security Act of 1974,
as amended, 29 U.S.C. 1001 et seq.:

Section 2, 29 U.S.C. § 1001 1

Section 404, 29 U.S.C. § 1104 .... 18, 19 n.7

Section 404(a), 29 U.S.C. § 1104(a) 18

Section 404(a)(1), 29 U.S.C. § 1104(a)(1) 16, 17

Section 406, 29 U.S.C. § 1106 .... 18, 19

Section 406(a)(1), 29 U.S.C. § 1106(a)(1) 18

Section 409, 29 U.S.C. § 1109 6

Section 502, 29 U.S.C. § 1132 1

Section 502(a)(2), 29 U.S.C § 1132(a)(2) .... 14 & passim

Section 502(a)(3), 29 U.S.C. § 1132(a)(3) 19, 22

Federal Statutes--continued:

Section 505, 29 U.S.C. § 1135 1

Miscellaneous:

Fed.R.App.P. 29(a) 1

Fed.R.Civ.P.
12(b)(1) 3, 4, 23
12(b)(6) 4

Charles A. Wright & Arthur Miller 13A,
Fed. Prac. & Proc. Juris.3d § 3531.4 8

George Bogert, Law of Trusts and Trustees, 3d ed. 708 (2009) 11

Restatement (Second) of Trusts § 213. .... 10, 11

Restatement (Second) of Trusts § 213, cmt a. ....12 & n.4

Restatement (Second) of Trusts § 213, cmt c. 13 n.5

Restatement (Second) of Trusts § 213, cmt e. 12

INTEREST OF THE SECRETARY

Under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 et seq., the Secretary of Labor ("Secretary") has primary responsibility for interpreting and enforcing ERISA. 29 U.S.C. §§ 1132-35; see Secretary of Labor v. Fitzsimmons, 805 F.2d 682, 692-693 (7th Cir. 1986) (en banc). Pursuant to Fed. R. App. P. 29(a), she frequently participates in cases where the standing and rights of plan participants to enforce ERISA's strict fiduciary standards are at stake, and therefore has a strong interest in filing a brief as amicus curiae on the constitutional standing issue presented in this appeal.[1]

STATEMENT OF THE ISSUE

This brief address the following issue: Whether the plaintiff established "injury in fact" sufficient to confer constitutional standing.

STATEMENT OF THE CASE

The KeyCorp 401(k) Savings Plan (the "Plan") includes KeyCorp ("Key") stock among its investment options. Compl., at ¶¶ 2, 54. Plaintiff

---

[1] The Secretary also has a strong interest in the two issues expected to be raised by the cross-appellant concerning the scope of any presumption of prudence with respect to the investment in employer stock, and the duty of an ERISA fiduciary to disclose truthful information when referencing, in plan documents, information contained in SEC filings. Per instructions from the case manager, however, we intend to address those issues in a separate brief in support of cross-appellee Taylor, after the parties brief those issues in subsequent briefs.

Ann Taylor, a Plan participant, brings this case as a putative class action and alleges that the defendant-fiduciaries imprudently allowed investment in Key stock that they knew was overvalued because of misrepresentations about Key's extensive homebuilder construction loans. Compl., at ¶¶ 4-6, 84-110, 173-76. Despite knowledge concerning the loans' high default risk and the downturn in the real estate markets nationwide and particularly in Key's territories, the defendant-fiduciaries continued to make and tout these loans. Id. Similarly, Taylor alleges that the defendant-fiduciaries also misled participant-investors concerning Key's risk of liability from the use of legally questionable tax and accounting practices. Compl., at ¶¶ 84-85, 111-172. Taylor further alleges that the defendant-fiduciaries' misrepresentations inflated the price of Key stock, led to the subsequent drop in stock value when Key's dire financial circumstances became publicly known, and that the fiduciary breaches caused significant losses to the Plan. Id. at ¶¶ 57-58, 173-86, 218-19, 253.

The proposed class are "[a]ll persons who were participants in or beneficiaries of the Plan whose Plan accounts included investments in KeyCorp common stock . . . at any time between December 31, 2006," and the date (Jan. 16, 2009) the complaint was filed. Compl. at ¶ 40. At the class period's start, "[Taylor] owned 1,678.32 units of the Key stock

fund. Ms. Taylor sold all of those units on January 11, 2007, when Key stock was trading at over $37 per share." Doc. 60 (8/12/10 order), at 5. Following that sale, she further acquired "an additional 387.31 units in Key stock through Key's matching program. On February 22, 2008, she sold 268.01 of those units and sold the remainder of her 119.30 units of the Key stock fund on June 25, 2008. Overall, Ms. Taylor sold her Key stock for more money than she actually paid for it, earning a net profit of $6,317." Id. See Plaintiffs' Opposition to Defendants' Rule 12(b)(1) Motion to Dismiss, at 6 n.11; Affidavit of Lassaad Turki, Doc. 48-3, at 22 (Taylor lost $829.53 from the 2/22/08 sale, and $535 from the 6/25/08 sale). Thus, Taylor acquired the additional stock at an artificially inflated price and only sold after the inflation was corrected downward by subsequent public disclosures of Key's allegedly disastrous lending and tax practices; while all sales took place during the class period, there was no overlap in time between the first set of transactions (from which Ms. Taylor profited) and the second set of transactions (from which Ms. Taylor lost money, although not as much as she previously gained).

The district court first rejected the defendants' Rule 12(b)(6) motion to dismiss.[2] The defendants then moved to dismiss under Rule 12(b)(1) on constitutional standing grounds. The court granted the motion on the ground that Taylor was not an injured party because, despite losses on the sale of Key stock acquired after commencement of the class period, "[o]verall, the plaintiff[ ] enjoyed significant profits from the sale of company stock." Doc. 60 (8/12/10 order), at 9.

SUMMARY OF THE ARGUMENT

This case was wrongly dismissed on constitutional standing grounds. Plaintiff Taylor is a participant in an ERISA plan in which she alleges that the fiduciaries knowingly allowed participants to buy company stock at an inflated price, and made misrepresentation about the company's financial condition that caused the stock price to be inflated. Taylor alleges that she obtained price-inflated stock for her plan account and subsequently sold that stock for a loss when the truth about Key's financial conduct and condition finally became public. As a result, she incurred an "injury in fact" sufficient

---

[2] This ruling is the subject of the cross-appeal. See n.1 supra. The court rejected defendants' argument that the "[p]laintiffs must have alleged extreme circumstances such as Key was no longer viable or that it could not weather the economic crisis in order to overcome the presumption [of prudence]." Taylor v. KeyCorp, 678 F.Supp.2d 633, 639 (N.D. Ohio 2009). The court also rejected defendants' arguments for dismissing the misrepresentation claims because the representations were made in securities filings and only incorporated by reference into plan documents. Id. at 642.

to support her constitutional standing to bring the claim, regardless of whether she separately profited from other, earlier stock sales.

Moreover, even if it were proper, at this threshold stage, to net Taylor's gains on some transactions against losses on others, the invasion of her statutory right to faithful fiduciary conduct would be enough to establish constitutional standing. More fundamentally, the relevant loss for "injury in fact" analysis is the loss to *the plan* in this kind of representative action, not the loss to the individual plaintiff. Thus, Taylor's standing to bring the claim is supported by her allegation that the entire plan suffered a significant loss as a result of Key's fiduciary misconduct.

ARGUMENT

THE "INJURY IN FACT" PRONG OF ARTICLE III STANDING IS MET

Courts determine constitutional standing with a three-part test. A plaintiff must establish: "(1) an injury in fact that is concrete and particularized; (2) a connection between the injury and the conduct at issue -- the injury must be fairly traceable to the defendant's action; and (3) [a] likelihood that the injury would be redressed by a favorable decision of the Court.'" Courtney v. Smith, 297 F.3d 455, 459 (6th Cir. 2002) (citation omitted). The district court focused on the first prong and concluded that

Taylor suffered no cognizable injury. 2010 WL 3702423, at *5. The Secretary disagrees.

A. Plaintiff's Economic Injury

Taylor is suing the defendants under ERISA section 502(a)(2) to recover losses to the Plan, which the statute plainly permits her to do as a matter of statutory standing. 29 U.S.C. § 1132(a)(2) ("civil action may be brought . . . by a participant . . . for appropriate relief under section 1109 [i.e., the provision on liability for fiduciary breach]"); Bridges v. American Elec. Power Co., 498 F.3d 442, 445 (6th Cir. 2007). The "injury in fact" requirement under Article III of the Constitution imposes an additional hurdle, which is cleared if the plaintiff can show an "individual" injury stemming from the alleged misconduct causing a loss to her plan. Loren v. Blue Cross & Blue Shield of Mich., 505 F.3d 598, 608-609 (6th Cir. 2007). While, as discussed below, other grounds for establishing constitutional standing exist, normally it is established by a showing that the plaintiff suffered an economic loss if the facts as alleged are true.

It is axiomatic that the constitutional standing inquiry is not a decision on the merits. E.g., Warth v. Seldin, 422 U.S. 490, 498 (1975). Specifically, courts maintain a distinct line between a merits inquiry related to relief and a jurisdictional inquiry. Steel Co. v. Citizens for a Better Env't, 523 U.S. 83,

89 (1998); Hamdi ex rel. Hamdi v. Napolitano, 620 F.3d 615, 628 n.15 (6th Cir. 2010) ("[r]edressability thus depends upon the relief requested, not the relief [the plaintiff] could prove it was entitled to on the merits"); Primax Recoveries, Inc. v. Gunter, 433 F.3d 515, 519-20 (6th Cir. 2006) ("[d]ismissal for lack of subject-matter jurisdiction because of the inadequacy of the federal claim is proper only when the claim is 'so insubstantial, implausible, foreclosed by prior decisions of this Court, or otherwise completely devoid of merit as not to involve a federal controversy'") (quoting Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 89 (1998)); see also Mountain States Legal Foundation v. Glickman, 92 F.3d 1228, 1233 (D.C. Cir. 1996) ("[s]o far as appears no court in the modern era has treated a garden-variety substantive defect in plaintiffs' claim as defeating redressability"). So long as the plaintiff's claim is not "completely devoid of merit" as to possible relief, the plaintiff has standing (and the court has jurisdiction) to proceed. Primax, 433 F.3d at 519; accord Drutis v. Rand McNally & Co., 499 F.3d 608, 612 (6th Cir. 2007) ("Article III standing ultimately turns on whether a plaintiff gets something (other than moral satisfaction) if the plaintiff wins. It does not depend on whether or not there is a disputed statutory impediment to winning. Such an issue goes to the merits").

Correspondingly, the existence of an injury is relevant to the standing inquiry, but the injury's magnitude is not. E.g., U.S. v. Real Property, All Furnishings Known as Bridwell's Grocery, 195 F.3d 819, 821, 823 (6th Cir. 1999); cf. FMC Corp. v. Boesky, 852 F.2d 981, 994 (7th Cir. 1988) (court need not comment on the various "damage theories" for its constitutional standing analysis); Secretary of U.S. Dept. of Labor v. Gilley, 290 F.3d 827, 830 (6th Cir. 2002) (for ERISA cases, "several circuits have held that, in measuring a loss, the burden of persuasion should be placed on the breaching fiduciary"). When considering plaintiffs' standing, therefore, courts do not, as a matter of law, "offset" alleged injuries with potential benefits from a violation. Denney v. Deutsche Bank AG, 443 F.3d 253, 265 (2d Cir. 2006); Charles A. Wright & Arthur Miller, 13A Fed. Prac. & Proc. Juris.3d § 3531.4 n.9 (2009 ed.); see also Aluminum Co. of America v. Bonneville Power Admin., 903 F.2d 585, 590 (9th Cir. 1989); Smith v. Pro Football, Inc., 593 F.2d 1173, 1175 n.2 (D.C. Cir. 1978).

In Denney, the Second Circuit found, for constitutional standing purposes, that the plaintiffs need not offset tax savings that resulted from following erroneous tax advice against their alleged injuries, such as the costs of remedying their erroneous tax returns. 443 F.3d at 265. Taxpayers who actually benefited overall still suffered an "injury in fact," even if they

could not recover any damages. Id. Denney relied on this Court's decision in Sutton v. St. Jude Medical S.C., Inc., 419 F.3d 568, 574 (6th Cir. 2005), which rejected an argument that the plaintiff lacked constitutional standing to sue for increased risk of future harm because he may have benefited from a medical device.

Thus, netting gains and losses is irrelevant to determining whether an "injury in fact" exists for constitutional standing purposes. See William E. Arnold Co. v. Carpenters Dist. Council of Jacksonville and Vicinity, 417 U.S. 12, 19 (1974) ("The nature of the relief available after jurisdiction attaches is, of course, different from the question whether there is jurisdiction to adjudicate the controversy. . . . Any error in granting or designing relief 'does not go to the jurisdiction of the court.'") (citation omitted); accord Holt Civic Club v. City of Tuscaloosa, 439 U.S. 60, 65-66 (1978); Bell v. Hood, 327 U.S. 678, 682 (1946) ("[j]urisdiction, therefore, is not defeated . . . by the possibility that the averments might fail to state a cause of action on which petitioners could actually recover"); see generally Tullis v. UMB Bank, N.A., 515 F.3d 673, 679 (6th Cir. 2008) ("while ERISA may have reflected Congress's attempt to define available remedies, the overarching goal of the statute was to ensure that such relief was available in cases of fiduciary breaches"). As long as constitutional standing

is established based on a plausible theory of loss, questions of liability and appropriate remedy, including whether netting is appropriate, are determinations to be made on the merits. See California Ironworkers Field Pension Trust v. Loomis Sayles & Co., 259 F.3d 1036, 1047-48 (9th Cir. 2001) (categorizing netting in trust law as a tool for calculating damages); Restatement (Second) of Trusts, § 213, cmt. e (recognizing netting as dependent on factual discovery and intertwined with the merits under the trust law).[3]

[3] The Secretary therefore disagrees with the Eighth Circuit's recent application of a "net loss" theory to find no "injury in fact" in Brown v. Medtronic, Inc., No. 09-2524 (8th Cir. 2010). First, like the district court here, the court did not discuss background trust law principles, but instead relied on the "pure logic" of Dura Pharmaceuticals, Inc. v. Broudo, 544 U.S. 336, 342 (2005). Dura's holding of no "loss" where a party sold artificially inflated shares at a profit was not a constitutional standing decision but rather a securities law decision on the merits, which presumably came after the Court satisfied itself that the plaintiff had standing. Id. at 346 (discussing loss causation as a statutory not a constitutional requirement); cf. Steel Co., 523 U.S. at 90 (standing determination must precede determination on merits). Second, Brown's discussion of redressability as an alternative basis for finding lack of standing where the plaintiff is a net beneficiary of the employer's artificially inflated stock, slip op at 9-10, is unpersuasive because it overlooks the fact that, assuming the allegations can be proved, the plan as a whole suffered a loss traceable to the fiduciary breach that is redressable by awarding a monetary recovery to the plan measured by the magnitude of the plan's loss. If proven, therefore, the plaintiff's claim seeking losses on behalf of the Plan is neither for an "'abstract violation' of a fiduciary duty," id. at 9, nor a request for a "purely advisory" opinion, id. at 10.

Furthermore, even when considering the merits of a loss allegation, netting analysis in the ERISA context must be grounded in the law of trusts. See Harris Trust & Sav. Bank v. Salomon Smith Barney Inc., 530 U.S. 238, 250 (2000); California Ironworkers, 259 F.3d at 1047-48; Donovan v. Bierwirth, 754 F.2d 1049, 1054 (2d Cir. 1985). Under trust law, netting is permitted when "a trustee violated investment obligations by means of a single act," but not when "the profits and losses were incurred in separate and distinct transactions." George Bogert, Law of Trusts and Trustees, 3d ed. § 708 (2009). Accordingly,

> [a] trustee who is liable for a loss occasioned by one breach of trust cannot reduce the amount of his liability by deducting the amount of a gain which has occurred through another distinct breach of trust; but if the breaches of trust are not distinct, the trustee is accountable only for the net gain or chargeable only with the net loss resulting therefrom.

Restatement (Second) of Trusts, § 213.

Here, Taylor's claim involves two separate sets of transactions and alleged breaches – (1) the retention of stocks obtained before the class period (i.e., before the alleged fraud on the market) and subsequently sold while the stock price was artificially inflated, and (2) the acquisition of additional company stock at an inflated price during the class period and subsequently sold at a loss. The complaint alleges that the defendants

breached their duty with respect to both sets of transactions. Compl., at ¶¶ 202-04.

Clearly, Taylor suffered a loss from the second set of transactions even if she profited from the first set of transactions. Netting is not allowed because the participant can both accept profits from the breach as to one category of stock holdings that were sold at a gain and seek to recover losses from the breach that caused an overpayment with respect to the other category of stock holdings that subsequently sold at a loss. Restatement of Trusts, 2d, § 213, cmt. a.[4] Moreover, a fiduciary is not immune from liability for subsequent breaches of an ongoing duty merely because prior breaches were profitable for the participant. See Uzyel v. Kadisha, 188

[4] Restatement of Trusts, 2d, § 213, cmt. a, states that:

> [I]f the trustee improperly invests part of the trust funds in securities which he sells at a profit and improperly invests another part of the trust funds in other securities which he sells at a loss, the beneficiary can accept the transaction on which there was a profit and reject that on which there was a loss; he can compel the trustee to account for the profit on the former securities and charge the trustee with the loss on the latter securities.

Cal.App.4th 866, 915-16 (Cal. Ct. App. 2010).[5]

Thus, any loss from the sale of stock acquired at an artificially inflated price after commencement of the class period satisfies the "injury in fact" requirement. Under both constitutional and trust law, it is irrelevant that Taylor had also acquired an even greater quantity of employer stock before the class period and sold it at a profit when the stock's price was still artificially inflated (i.e., before the public disclosure of truthful information that allegedly caused the price of the stock to drop). The district court therefore erred in using a netting theory to weigh gains against losses to determine whether Taylor had constitutional standing to proceed with the case. By measuring and then netting gains and losses, the district court wrongly confused a standing determination with a merits determination.

---

[5] Specifically, the Restatement of Trusts (Second) § 213, cmt. c, presents an analogous situation:

> if the trustee in breach of trust purchases property which he subsequently sells at a profit and he invests the proceeds for the trust in proper trust securities and subsequently he sells the securities and with the proceeds makes a purchase which is not a proper trust investment and which he sells at a loss, he is chargeable with such loss and cannot deduct the amount of the profit which resulted from the previous breach of trust.

Where, as here, the plaintiff suffered a distinct economic injury, the court's jurisdiction to redress a fiduciary claim is established.[6]

B. Plaintiff's Non-economic and Derivative Injuries

Because Taylor established individual economic injury under the above-stated principles, dismissal for lack of constitutional standing to assert a 502(a)(2) claim was improper. See Loren, 505 F.3d at 608-609. Even without individual economic injury, however, i.e., assuming no economic injury under a netting theory, there still was "individual standing," id., because the alleged violation of the plaintiff's statutory right to the prudent

---

[6] Even where a plaintiff profits from a breach, it does not necessarily follow that there was no Article III injury or, ultimately, a measurable loss. ERISA permits remedies for lost opportunity costs from the time of an imprudent investment decision under an "alternative investment" methodology. See LaRue v. DeWolff, Boberg & Associates, Inc., 552 U.S. 248, 253 n.4 (2008); Delk v. Ford Motor Co., 96 F.3d 182, 191 (6th Cir. 1996) ("[t]he Court must evaluate the prudence of the fiduciaries under the circumstances prevailing when they make their decision and in light of the alternatives available to them") (internal citation and quotation marks omitted) (emphasis added); Dardaganis v. Grace Capital Inc., 889 F.2d 1237, 1243 (2d Cir. 1989) ("[i]f, but for the breach, the Fund would have earned even more than it actually earned, there is a 'loss' for which the breaching fiduciary is liable"); Leigh v. Engle, 858 F.2d 361, 367 (7th Cir. 1988) ("comparing the return on the improper investments with that of a reasonably prudent alternative investment"); see also Bierwirth, 754 F.2d at 1056; Eaves v. Penn, 587 F.2d 453, 463 (10th Cir. 1978). At the pleading stage, the court had no reason to disbelieve the plaintiff's allegation here that the defendants' wrongdoing caused her to forego alternative investments that would have netted greater profits. Nevertheless, this Court has no need to reach this issue if it agrees that netting was improper in the circumstances of this case.

management of her plan itself established an "injury in fact" for constitutional standing purposes. Fundamentally, in this representative suit, injury to the plan is also an injury to the participant bringing the suit on behalf of the plan.

1. Economic loss is not a prerequisite to establishing the "injury in fact" prong. Rather, it suffices that "[t]he actual or threatened injury required by Article III . . . exist[s] solely by virtue of statutes creating legal rights, the invasion of which creates standing." Warth, 422 U.S. at 500 (emphasis added); accord Havens Realty Corp. v. Coleman, 455 U.S. 363, 372-74 (1982); Carter v. Welles-Bowen Realty, Inc., 553 F.3d 979, 989 (6th Cir. 2009); see Int'l Union of Operating Engineers v. Ward, 563 F.3d 276, 286 (7th Cir. 2009) (plaintiffs can assert a violation of their legal "right to the faithful performance by [fiduciaries] of the general and specific fiduciary obligations enumerated in" the statute); Branson School Dist. RE-82 v. Romer, 161 F.3d 619, 631 (10th Cir. 1998) (alleged violation of a legal right to fiduciary performance is sufficient injury for constitutional standing purposes); Boesky, 852 F.2d at 992-93 (finding constitutional standing for state-law fiduciary breach claims because the state law created rights to fiduciary performance even if the state law did "not [otherwise] require the plaintiff to show an injury").

In Havens, the Court held that plaintiffs had constitutional standing to sue under section 804 of the Fair Housing Act. The plaintiffs were "testers" sent by non-profits to determine if housing discrimination occurred in particular neighborhoods. The Court found that the Act gave all persons "an enforceable right to truthful information concerning the availability of housing." 455 U.S. at 373. "That the tester may have approached the real estate agent fully expecting that he would receive false information, and without any intention of buying or renting a home, does not negate the simple fact of injury within the meaning of § 804(d)." Id. Instead, the Court determined that the tester "has suffered injury in precisely the form the statute was intended to guard against, and therefore has standing to maintain a claim for damages." Id.

An ERISA 502(a)(2) action provides an even firmer basis for establishing standing: not only is the "suffered injury" – imprudent withholding of truthful information – "in precisely the form the statute was intended to guard against," but the plaintiff as a participant (unlike a tester standing in for the renter in fair housing cases) directly has "an enforceable right to truthful information concerning [her ERISA plan]." Id. at 373; see generally James v. Pirelli Armstrong Tire Corp., 305 F.3d 439, 454-55 (6th Cir. 2002); Krohn v. Huron Memorial Hosp., 173 F.3d 542, 548 (6th

Cir.1999) (recognizing participants' ERISA right to truthful information in communications from fiduciaries). Whether the individual participant personally suffered financially from the statutory violation is immaterial to whether he can enforce his statutory right, as a plan participant, to the fiduciary's prudent management of the plan. Compare Havens, 455 U.S. at 374 (giving any person the right to enforce the statute) with 29 U.S.C. 1132(a)(2) (giving any participant the right to enforce the statute's fiduciary provisions); cf. Palen v. Kmart Corp., 215 F.3d 1327, at *4 (6th Cir. May 9, 2000) (unpublished) (noting that a beneficiary is "entitled" to the fiduciary protections of 29 U.S.C. § 1104(a)(1)).

Similarly, in Carter, this Court held that plaintiffs had Article III standing to sue under the Real Estate Settlement Procedures Act of 1974 ("RESPA"). This Court noted that RESPA is a "remedial statute," 553 F.3d at 986-87 & n.5, which seeks to protect the impartiality of real estate settlement agencies and preserve healthy competition by prohibiting improper financial arrangements between real estate agents and settlement companies. Its purpose is to "prevent certain practices that are harmful to all consumers by establishing that consumers have a right not to be subject to those practices and providing both public and private remedies of that right." Id. at 987 (citation omitted). This Court found that the plaintiffs,

without alleging any economic harm, had Article III standing because they had a right to receive referrals for settlement companies "untainted by conflicts of interest." Id. at 989; see also Woosley v. Avco Corp., 944 F.2d 313, 317 (6th Cir. 1991) (recognizing that the invasion of a right created by collective bargaining agreement conferred Article III standing).

The analysis applies equally to ERISA. Like RESPA, ERISA is a "remedial" statute. Akers v. Palmer, 71 F.3d 226, 229 (6th Cir. 1995). Like RESPA, ERISA's legislative history makes clear that the statute seeks to protect employee benefit plans and their participants from fiduciary breaches. See Mass. Mut. Life Ins. Co. v. Russell, 473 U.S. 134, 140 n.8 (1985) ("[ERISA] will establish judicially enforceable standards to insure honest, faithful, and competent management of pension and welfare funds") (citation omitted). Moreover, ERISA likewise gives particular individuals – participants and beneficiaries – specific rights to benefits "untainted by conflicts of interest" or fiduciary breach. Carter, 553 F.3d at 989; see 29 U.S.C. §§ 1104, 1106. Sections 406 and 404 complement each other in protecting against violations of participant rights to fiduciary performance. See Harris Trust, 530 U.S. at 241-42 ("'[r]esponding to deficiencies in prior law regulating transactions by plan fiduciaries, Congress enacted ERISA § 406(a)(1), which supplements the fiduciary's general duty of loyalty to the

plan's beneficiaries, § 404(a), by categorically barring certain transactions deemed 'likely to injure the pension plan'") (citation omitted; emphasis added); see also Chao v. Hall Holding Co., 285 F.3d 415, 441 n.12 (6th Cir. 2002) (recognizing that violations under section 406 are per se and "no injury was required 'for a court to find a transaction prohibited or otherwise impermissible'") (citation omitted). And Loren, 505 F.3d at 609, found that individual loss is not a prerequisite to standing under section 502(a)(3) to seek equitable relief, which includes equitable restitution or an accounting for losses or profits. See Great-West Life & Annuity Ins. Co. v. Knudson, 534 U.S. 204, 214 n.2 (2002) (recognizing accounting as equitable relief).[7]

2. The "injury in fact" requirement is also met by alleging losses to the Plan, since 502(a)(2) suits may be brought in a representative capacity by plan participants such as Taylor. See Russell, 473 U.S. at 142 n.9 (502(a)(2) allows "actions for breach of fiduciary duty [to] be brought in a representative capacity on behalf of the plan as a whole," because of "the common interest [participants and other potential plaintiffs share] in the financial integrity of the plan"). This Court in Pfahler v. National Latex Products Co., 517 F.3d 816, 825 (6th Cir. 2007), similarly reasoned that

[7] Other courts have found that a violation of section 404 is sufficient to allege a fiduciary breach claim for statute of limitations purposes. See Larson v. Northrop Corp., 21 F.3d 1164, 1170 (D.C. Cir. 1994); Ziegler v. Conn. Gen. Life Ins. Co., 916 F.2d 548, 551 (9th Cir. 1990).

"[b]ecause a § 502(a)(2) suit is a derivative action, a plaintiff bringing suit under this provision cannot obtain personal monetary relief, but must instead seek relief for the plan." This reasoning supports a conclusion that, for a 502(a)(2) "derivative" suit, the "injury in fact" prong of constitutional standing is satisfied by establishing injury to the plan, regardless of whether the named plaintiff can personally establish an economic loss.

This conclusion accords with the Supreme Court's recent decision in Sprint Communications v. APCC Servs., 554 U.S. 269 (2008), which explained that "an assignee can sue based on his assignor's injury," and standing can exist even where the relief will not run to the party bringing suit as when "[t]rustees bring suit to benefit their trusts." Id. at 287-88; accord Grede v. Bank of New York Mellon, 598 F.3d 899, 900 (7th Cir. 2010); McCullough v. AEGON USA, Inc., 585 F.3d at 1089-90 (Bye, J., dissenting). Just as trustees can vindicate the trusts' interests, ERISA participants are statutorily empowered to sue to protect the plan's interests, without necessarily sharing in the recovery. See NetworkIP, LLC v. F.C.C., 548 F.3d 116, 120 n.2 (D.C. Cir. 2008) (finding standing where plaintiff has a right to prosecute but may be only a "pass-through entity" for all recovery). Taylor thus "has Article III standing to bring a claim arising from the Plan's injuries so long as [she] possesses the right to prosecute the Plan's claim

pursuant to [ERISA section 502(a)(2)]." McCullough, 585 F.3d at 1090 (Bye, J., dissenting); accord Pfahler, 517 F.3d at 825 (calling 502(a)(2) actions "derivative actions").

3. The Loren decision, while contemplating the "individual standing" necessary to maintain a 502(a)(2) action to be a pecuniary loss, 505 F.3d at 608-9, does not necessarily preclude basing standing on the infringement of a non-monetized statutory right. In any event, as argued above, Taylor has suffered an economic loss sufficient to meet even the strictest construction of Loren.

In Loren, this Court dismissed claims that a fiduciary caused two self-funded health plans to pay excessive hospital reimbursement rates when it negotiated lower rates for its own HMO because it was "too speculative" that the plans, and, in turn, the plaintiffs were affected. 505 F.3d at 609; compare DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 344 (2006) (recognizing similar types of allegations as too hypothetical for Article III purposes). In holding that the hypothetical injury to the self-funded plans would not necessarily have resulted in injury to any participants (because the employer may not have passed on the additional costs), 505 F.3d at 608, it is not clear that Loren meant to require an individual showing of monetary loss for 502(a)(2) claims where, as here, the loss to the plan (assuming the

allegations can be proved) is not speculative or hypothetical. Compare id. at 609 (agreeing that "ERISA plan beneficiaries may bring suits on behalf of the plan in a representative capacity . . . so long as plaintiffs otherwise meet the requirements for Article III standing.") (citation omitted). Furthermore, as previously noted, Loren simultaneously held that the participant-plaintiffs had standing, without showing individualized economic loss, to seek equitable relief, which would include an accounting for losses or profits, under section 502(a)(3). 505 F.3d at 609 (citing 29 U.S.C. § 1132(a)(2)-(3)). Both 502(a)(2) and 502(a)(3), however, give participants statutory standing to bring the cause of action, and the "injury in fact" prong of constitutional standing does not depend on the type of remedy being sought. William E. Arnold Co., 417 U.S. at 19; see also Holt Civic Club, 439 U.S. at 65-66 ("a federal court should not dismiss a meritorious constitutional claim because the complaint seeks one remedy rather than another plainly appropriate one"). Therefore, Loren's recognition of standing under 502(a)(3), while denying standing under 502(a)(2), appears to be mutually inconsistent, unless limited to circumstances in which there was no plausible injury to the plan. Properly read, there is no reason to believe that Loren would not consider a violation of the plaintiff's statutory rights to "otherwise meet the requirements of Article III standing," id. at 609, provided the asserted

violation was not "too speculative" to constitute "individual standing," id. at 608-9.[8]

[8] The reasoning in the post-Loren Supreme Court decision in Sprint, as previously discussed, "casts doubt" on a reading of Loren that would require individualized economic loss for participant actions under section 502(a)(2). McCullough, 585 F.3d at 1089 (Bye, J., dissenting). Loren, which has never been followed in any subsequent decision, has been further undercut by this Court's recent decision in DeLuca v. Blue Cross Blue Shield of Mich., No. 08-1085, --F.3d.--, 2010 WL 4961726 (6th Cir.2010), where this Court reached the merits in a case that mirrors the Loren facts and held that Blue Cross-Blue Shield was not acting as an ERISA fiduciary when negotiating lower hospital rates for its HMO at the purported expense of other plans that it administered. DeLuca neither cited Loren nor discussed the plaintiffs' standing.

CONCLUSION

For these reasons, the Secretary respectfully requests that this Court reverse the district court's Rule 12(b)(1) dismissal.

Respectfully submitted,

M. PATRICIA SMITH
Solicitor of Labor

TIMOTHY D. HAUSER
Associate Solicitor

/s/ Nathaniel I. Spiller
NATHANIEL I. SPILLER
Counsel for Appellate Litigation

THOMAS TSO
Attorney
U.S. Department of Labor
200 Constitution Ave.
N.W. N-4611
Washington, DC 20210

CERTIFICATE OF COMPLIANCE

I hereby certify that the fore going brief complies with the type-volume limitations provided in Fed. R. App. P. 32(a)(7)(B). The foregoing brief contains 5,395 words of Times New Roman (14 point) regular type. The word processing software used to prepare this brief was Microsoft Office Word 2003.

/s/ Nathaniel I. Spiller
Nathaniel I. Spiller
Counsel for Appellate
and Special Litigation

Dated: January 12, 2011

CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of January, 2011, pursuant to 6th Cir. R. 25, I caused the foregoing brief to be served electronically on the following through the ECF System:

David A. Carney
Scott C. Holbrook
Gretchen L. Lange
James A. Slater, Jr.
Daniel R. Warren
Baker & Hostetler
1900 E. Ninth Street
Suite 3200
Cleveland, OH 44114

Edwin J. Mills
Michael J. Klein
STULL, STULL & BRODY
6 East 45th Street
New York, NY 10017

Robert I. Harwood
Samuel K. Rosen
Tanya Korkhov
HARWOOD FEFFER LLP
488 Madison Avenue
New York, NY 10022

/s/ Nathaniel I. Spiller
Nathaniel I. Spiller
Counsel for Appellate
and Special Litigation

Dated: January 12, 2011

CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of January, 2011, I electronically filed the Brief for Amicus Curiae, Hilda L. Solis, Secretary of Labor, with the Clerk of the Court using the CM/ECP system, which will send notification of such filing to all registered counsel of record.

/s/ Thomas Tso
THOMAS TSO