No. 07-1140

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

KERI EVANS, et al.,
Plaintiffs-Appellants,
v.
JOHN F. AKERS, et al.,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

BRIEF OF THE SECRETARY OF LABOR, ELAINE L. CHAO, AS AMICUS CURIAE IN SUPPORT OF PLAINTIFFS-APPELLANTS AND REQUESTING REVERSAL

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STATEMENT OF THE ISSUE

This case was brought under ERISA sections 409, 29 U.S.C. § 1109 and 502, 29 U.S.C. § 1132, as a putative class action by plaintiffs, former employees of the defendant W.R. Grace & Co. who participated in the defined contribution plan sponsored by their employer. Plaintiffs, who received distributions from the plan after terminating their employment, claim that, while they were still invested in the plan, the defendants breached their fiduciary duties under ERISA and caused substantial losses to the plan. As a result of these losses, the plaintiffs' distributions were less than they should have been. The question presented is whether, under these circumstances, plaintiffs are "participant[s]" who may sue on behalf of the plan under 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 plaintiffs were participants, and they consequently received less than they should have in lump-sum distributions.

STATEMENT OF THE FACTS AND PROCEDURAL HISTORY

1. Plaintiffs Keri Evans and Timothy Whipps are former employees of W.R. Grace & Co., a large manufacturing company. Appendix (App.) 263-64. Among other things, Grace produced asbestos-related products, and as a consequence was a defendant in asbestos product-liability litigation. Id. at 69, 84, 96. While still employed with Grace, plaintiffs participated in the W.R. Grace & Co. Savings Plan (the Plan), a "defined contribution" pension plan within the meaning of ERISA section 3(34), 29 U.S.C. § 1002(34),[1] which offered a company stock fund during the relevant period as one of the investment options for plan participants, and made automatic matching contributions in that fund for those participating in the Plan. App. 263. Claiming that company stock was an

[1] In a defined contribution plan, "benefits [are] 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). In such a plan, participants are vested in their own contributions and earnings made on those contributions at all times. A participant becomes vested in employer contributions and earnings made on those contributions when the participant fulfills the plan's criteria—often a requirement that the participant work for the employer for a certain number of years. See 29 U.S.C. § 1053(a); U.S. Gen. Accounting Office, Publ'n No. GAO-02-745SP, Answers to Key Questions About Private Pension Plans 14 (Sept. 18, 2002) [GAO Report], available at http://www.gao.gov/new.items/d02745sp.pdf.

imprudent investment for the Plan during this period because of the asbestos litigation, plaintiffs brought suit against Plan fiduciaries under ERISA section 409, 29 U.S.C. § 1109 and ERISA section 502, 29 U.S.C. § 1132, as a putative class action on behalf of all current and former employees of W.R. Grace & Co. whose accounts in the Plan held company stock during the class period (from July 1, 1999 though April 19, 2004). App. 94.

Specifically, plaintiffs claim that defendants – 18 company officials, all of whom either served on the Board of Directors or on one of two plan committees, as well as the Plan's investment manager, State Street and its investment arm – breached their fiduciary duties under ERISA section 404(a), 29 U.S.C. § 1104(a), by allowing the Plan to maintain its company stock investments during this period when the price of Grace stock declined precipitously, causing tens of millions of dollars in losses to the plan and a corresponding diminution in the amount of benefits they received on pay-out. App. 70-93, 50-51.[2] Plaintiffs allege that the fiduciaries of the Plan knew or should have known about Grace's significant exposure to liability in pending and anticipated asbestos-related litigation. Id. at 103-05. They also allege that defendants failed to conduct an appropriate

[2] Plaintiffs note that they have not sued the company itself because of the stay against litigation imposed in the bankruptcy proceeding; they further note that, if the stay is lifted, they will move to amend the complaint to add the company as a fiduciary defendant. App. 67.

investigation in deciding whether to continue investing in Grace stock. Such an investigation, plaintiffs claim, would have shown the company's improper accounting methods and practices for asbestos-related claims and the related precarious financial situation at the company. Id. at 109-10. Finally, plaintiffs claim that the defendants failed in their duties to monitor the other fiduciaries and to advise the Plan participants of the dangers of investing in the company stock. Id. at 113-19. Plaintiffs allege that as a result of the failure to act prudently and cease investment in the Grace stock, the Plan suffered substantial losses, as did the individual retirement accounts to the extent they were invested in Grace stock. Id. at 122.

Throughout their complaint, plaintiffs make clear that they are seeking Plan losses. App. 101, 112; see also id. at 75 ("The relief requested in this action is for the benefit of the Plan and its participants/beneficiaries."). Accordingly, plaintiffs request declaratory and equitable relief and an order compelling defendants to "make good to the Plan" all losses resulting from their fiduciary breaches under ERISA. Id. at 124-25. They also request "[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." Id. at 125.

2. Two current Grace employees (Lawrence Bunch and Jerry Howard) and one former employee (David Mueller), filed a separate class action lawsuit,

which was transferred from the Eastern District of Kentucky to the District of Massachusetts and consolidated with the Evans case. App. 27, 277. The Bunch plaintiffs allege that the fiduciaries breached their duties of prudence and loyalty by eventually selling the Grace stock (or allowing the State Street defendants to do so), against the wishes of (or without consulting with) the Plan participants and beneficiaries. They further allege that State Street sold the stock for $3.50 a share, a price that they say State Street knew or should have known did not accurately reflect the true value of the stock. Moreover, the Bunch plaintiffs also question State Street's loyalty, alleging that shortly after selling all the Plan's stock at an all-time low price, State Street itself purchased millions of shares of Grace stock, which then increased in value by nearly 300% in less than 3 months. The Bunch plaintiffs seek declaratory, as well as "extraordinary, equitable and/or injunctive relief" and "restitution and/or remedial relief." App. 277-310.

3. The Evans plaintiffs moved to certify a class of all participants or beneficiaries who had company stock in the Plan during the class period. The district court denied the motion, concluding that the named plaintiffs lacked standing as former participants who had taken pay-outs of their benefits under the Plan. App. 267-73 (Evans v. Akers, 466 F. Supp. 2d 371, 375-78 (D. Mass. 2006)). The court acknowledged that ERISA standing requirements must be interpreted broadly, but reasoned that the proper inquiry is whether plaintiffs have

"a colorable claim to vested benefits." App. 266-67, quoting Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 117-18 (1989).

In finding that the plaintiffs did not have such a claim, the court relied on this Court's decision in Crawford v. Lamantia, 34 F.3d 23 (1st Cir. 1994), which, according to the district court, interpreted this Court's earlier decision in Vartanian v. Monsanto Co., 14 F.3d 697 (1st Cir. 1994), narrowly to apply "only when the former employee would still be a participant but for the employer's alleged malfeasance." App. 269. Unlike the situation in Vartanian, the court noted that the plaintiffs in this action do not allege that the cessation of their employment was causally connected to any alleged misconduct by the fiduciaries. Id.

The district court further relied on the Fifth Circuit's decision in Sommers Drug Stores Co. Employee Profit Sharing Trust v. Corrigan Enters., Inc., 883 F.2d 345, 350 (5th Cir. 1989), which it read as applying a "distinction between benefits and damages" in determining whether the Firestone test of vested benefits had been met. App. 271. While candidly acknowledging that such a distinction "is not easy to articulate," the court reasoned that, unlike the situation in Sommers, where the amount of the alleged undervaluation of the company stock was calculable, the Evans plaintiffs are asking defendants to "make good" the "losses sustained" by the Plan as a result of investment in company stock, amounts that "might have accrued but for Defendants' alleged misconduct." Id. at 271-72. Therefore, according to the court, the claim most closely resembles a "speculative" claim for damages, rather than one for vested benefits under ERISA. Id. at 272. Moreover, the court found additional support for its conclusion that plaintiffs lacked standing in "[t]he nature of the defined contribution plan at issue" in the case. Id. at 273. In this regard, the court reasoned that plaintiffs could have "avoided their losses merely by moving their savings into other funds" and "were not obligated to take the lump sum payments when they did." Id. Having concluded that plaintiffs lacked standing, the court also held that it lacked subject matter jurisdiction over the claim. Consequently, the court refused to certify the class and furthermore, dismissed the case, albeit without mentioning the Bunch plaintiffs. Id. at 274.[3]

Plaintiffs simultaneously petitioned for interlocutory appeal from the denial of class certification under Rule 23(f) of the Federal Rules of Civil Procedure, and filed a notice of appeal under 28 U.S.C. § 1291. This Court denied the Rule 23(f) petition but ordered that the question whether the plaintiffs have appealed from a final order should be addressed by the plaintiffs in their merits brief.[4] Plaintiffs

[3] The Bunch case, which the district court consolidated with this case, is ongoing and has been scheduled for trial. The plaintiffs in that matter filed an amended complaint (similar in substance to the first complaint) shortly after Evans was dismissed.

[4] The Secretary takes no position on the issue of finality, which appears to turn primarily on whether, as a factual matter, the two cases were consolidated for all purposes.

then moved to file an amended complaint in the district court adding a current participant (or to allow this participant to intervene), but the district court denied this motion. App. 335.

SUMMARY OF THE ARGUMENT

ERISA grants plaintiffs a right to sue as former employees who seek to recover losses to be paid to the defined contribution plan in which they 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). Plaintiffs meet this statutory definition and thus have a "colorable claim" to vested benefits within the meaning of Firestone, 489 U.S. at 117-18. They claim that the fiduciary breach caused losses to the Plan and corresponding decreases in the amount of benefits they received upon pay-out. Because their benefits under the Plan were linked directly to the performance of the Plan's assets, 29 U.S.C. § 1002(34), if they prevail on these claims and recover losses for the Plan, plaintiffs will be entitled to the payment of additional benefits from the Plan. Thus, they are or may be eligible to receive "a benefit of any type" from their ERISA-covered pension plan, 29 U.S.C. § 1002(7), making them "participants" with standing under ERISA to state a cause of action on behalf of the Plan for fiduciary breach.

Every court of appeals to have addressed the matter in a similar factual setting has come to this conclusion. Likewise, the reasoning in this Court's decisions in Vartanian and Crawford supports the notion that plaintiffs here qualify as participants within the meaning of the statute.

Recognizing the rights of these plaintiffs to bring suit is not only consistent with the statutory test and the relevant precedent, it is fully consistent with the remedial purposes of ERISA. To hold that plaintiffs may not sue as "participants" would result in an illogical distinction between the rights of former employees in a defined contribution plan and those of current employees, when they 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 a right to sue for such breaches, while denying that right to a participant in a defined contribution plan who has retired or moved to other employment and received a diminished benefit. The receipt of such benefits should not effect a waiver of the right to seek additional benefits that are owed because of an alleged fiduciary breach. Moreover, denying a right to sue to participants who elect to withdraw their shares in the plan would reward a breaching fiduciary for hiding its breaches until participants take distributions of their defined contribution plan benefits.

its 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); see Firestone, 489 U.S. at 117-18.

A. Plaintiffs May Sue Because They Are Former Employees Who Are Or May Become Eligible To Receive Additional Benefits From Their Defined Contribution Plan If They Prevail On Their Allegations Of Fiduciary Breach

Each of the plaintiffs qualifies as a "participant" under the plain terms of the statutory definition because each is a "former employee" who "is or may become eligible to receive" additional benefits from the Plan if his or her fiduciary breach claim is successful. The plaintiffs claim that the balance in their accounts in the Plan, and thus amounts they received upon distribution, were smaller than they would have been if the fiduciaries had acted prudently with regard to the company's stock investments. As two recent decisions from the Third and Seventh Circuit have held in similar circumstances, because each participant held an account in a defined contribution plan, each "was entitled to the net value of his account as it should have been in the absence of any fiduciary mismanagement." Graden v. Conexant Sys., Inc., No. 06-2337, 2007 WL 2177170, at *3 (3d Cir. July 31, 2007); accord Harzewski v. Guidant Corp., 489 F.3d 799, 807 (7th Cir. 2007) ("Benefits are benefits; in a defined-contribution plan they are the value of the retirement account when the employee retires, and a breach of fiduciary duty that diminishes that value gives rise to a claim for benefits measured by the difference between what the retirement account was worth when the employee retired and cashed it out and what it would have been worth then had it not been for the breach of fiduciary duty.").

In a defined contribution plan, "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, and are also vested in employer contributions and earnings made on those contributions once they meet the plan criteria for eligibility. GAO Report at 14, 39. Because the amount of a participant's vested benefits in such a plan increases or decreases 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 ultimate amount of the participant's vested benefits.[5]

[5] The other major type of pension plan is a defined benefit plan. 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 8–9; 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"). In

ERISA protects the interests of plan participants in defined contribution plans, as it protects participants in defined benefit plans, by imposing stringent obligations of prudence and undivided loyalty on plan fiduciaries. 29 U.S.C. § 1104(a)(1)(A), (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 Stores Co. Employee Profit Sharing Trust v. Corrigan Enters., Inc., 793 F.2d 1456, 1468 (5th Cir. 1986)). "In other words, ERISA entitles individual-account-plan participants not only to what is in their accounts, but to what should be there given the terms of the plan and ERISA's fiduciary obligations." Graden, 2007 WL 2177170, at *3 (emphasis in original). If plaintiffs' allegations are true, the Plan's fiduciaries breached these obligations and caused a diminution in both the Plan's assets and plaintiffs' account balances before the plaintiffs received their benefits. As a result, the vested benefits plaintiffs received when their employment terminated and they withdrew their account balances were less than the Plan entitled them to receive, absent the alleged fiduciary misconduct. In seeking restoration to their Plan for alleged fiduciary breaches that took place, plaintiffs seek amounts for the Plan that, when

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such a plan, the employer is required to make contributions to the plan, and the assets of the plan are invested to ensure that there will be sufficient funds in the plan to cover the promised benefits when employees retire. Hughes Aircraft Co. v Jacobson, 525 U.S. 432, 439 (1999).

allocated, will add to their individual vested benefits. Thus, because plaintiffs are "former employee[s]" who are or may become "eligible to receive a benefit" from the Plan in the form of the amount they would have received had the defendants not breached their fiduciary duties, 29 U.S.C. § 1002(7), they are "participants" with standing to sue under ERISA section 502(a)(2), 29 U.S.C. § 1132(a)(2).

This reading of the term "participant" follows not only from the statutory terms, but also from the Supreme Court's decision in Firestone. As the Supreme Court held there in the context of ERISA's plan document disclosure provisions, the term "participant" includes any "former employees who 'have' . . . 'a colorable claim' to vested benefits." 489 U.S. at 117-18 ("In order to establish that he or she 'may become eligible' for benefits, a claimant must have 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. (citations omitted). In other words, Firestone "held that anyone asserting a colorable claim for benefits is a participant." Graden, 2007 WL 2177170, at *9. Plaintiffs have just such a colorable claim that they will prevail in a suit for benefits because, as in Graden, they allege that the defendants breached their "duty of prudent investment" thereby causing losses to the Plan, and reducing the overall amount of vested benefits they received. Id. This alleged misconduct occurred when plaintiffs had account balances in the Plan, and the relief that they seek (restoration of losses to the Plan), if granted, would immediately entitle them to an allocated distribution of Plan benefits over and above what they already received. Accordingly, because each of the plaintiffs colorably "alleges that his benefit payment was deficient on the day it was paid under the terms of the plan and the statute," each states a colorable claim for benefits that "makes him a participant with standing to sue." Id.

For this reason, all courts of appeals to have addressed this issue, have permitted plaintiffs who were actively invested in defined contribution plans at the time of an alleged fiduciary breach to sue even though they received their account balances by the time suit was brought. As we have mentioned, the Third and Seventh Circuits have recently issued decisions so holding. See Graden, 2007 WL 2177170 and Harzewski, 489 F.3d 799. Likewise, the Fifth Circuit, in Sommers held that plaintiffs, former participants in a terminated defined contribution profit-sharing plan, could bring an ERISA action against fiduciaries for losses allegedly resulting from the sale of the trust's stock for less than fair market value. Even though the plan had already been terminated and the participants had received the entire value of their vested account balances, the court reasoned that plaintiffs had a colorable claim for additional vested benefits and could sue because they allegedly had received reduced distributions as a result of the fiduciary breach. Sommers, 883 F.2d at 349-50.[6]

Decisions from this Circuit are to the same effect. Indeed, this Circuit has recognized that ERISA's statutory provisions should not be read to unduly restrict standing to sue. Vartanian v. Monsanto Co., 14 F.3d 697.[7] The case involved a former employee who was a participant in a defined benefit plan that, after his retirement, was altered to add more generous benefits. Before retiring, the plaintiff was told, upon inquiry, that no such changes in his plan were likely to

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[6] Although some district courts (including several cited in the district court opinion here) have held that participants in a defined contribution plan may not sue after receiving plan distributions, numerous other district courts have followed Sommers to allow suits by former employees who were actively invested in defined contribution plans at the time of an alleged fiduciary breach. See, e.g., Champaganie v. Kaufman, No. 3:06-cv-1819 JCH, 2007 WL 1613491, at *5 (D. Conn. June 1, 2007); Smith v. Aon Corp., 238 F.R.D. 609, 616 (N.D. Ill. 2006); In re Polaroid ERISA Litig., 240 F.R.D. 65 (S.D.N.Y. 2006); In re Williams Cos. ERISA Litig., 231 F.R.D. 416, 422–23 (N.D. Okla. 2005); Rankin v. Rots, 220 F.R.D. 511 (E.D. Mich. 2004); Thompson v. Avondale Indus., Inc., No. Civ. A. 99-3439, 2001 WL 1543497 (E.D. La. Nov. 30, 2001); Sotiropoulos v. Travelers Indem. Co. of Rhode Island, 971 F. Supp. 52, 54-55 (D. Mass. 1997); Kuper v. Quantum Chem. Corp., 829 F. Supp. at 918, 923 (S.D. Ohio 1993).

[7] Some courts have analyzed the ability of former employees to pursue their claims as a question of whether the employees have a cause of action, Harzewski, 489 F.3d at 804, while others, including this one, as an issue of statutory standing. Vartanian, 14 F.3d at 702; Graden, 2007 WL 2177170, at *1. Regardless of the nomenclature, the result is the same: former employees who have withdrawn the balances in their plan accounts in a defined contribution plan are eligible to bring claims under section 502(a)(2) to recover the difference between what they received and what they should have received absent a violation of ERISA.

occur, despite the discussions that were then underway at the company about changing the plan. Id. at 699. This Court decided that the plaintiff should be considered a member of the new, altered plan for the purposes of litigation, since his decision to retire was based on the misleading disclosures, which constituted fiduciary breaches. Id. at 702. This Court reasoned that because "at the time of the alleged misrepresentations, Vartanian was a 'participant'" in the original plan, defendants had a fiduciary duty not to mislead him, and his claims thus fell "squarely within the 'zone of interests' that ERISA was designed to protect." Id. (citations omitted).[8]

Similarly, in Crawford, this Court recognized "the general rule that former employees with claims for additional benefits have standing, but ruled that the particular plaintiff in that case lacked standing because he 'failed to show that defendants' alleged breach of fiduciary duty had a direct and inevitable effect on his benefits.'" Graden, 2007 WL 2177170, at *6, quoting Crawford, 34 F.3d at

[8] This Court held in Vartanian that "where the employee shows that in the absence of the employer's breach of fiduciary duty he would have been entitled to greater benefits than those which he received, then his receipt of payment cannot be used to deprive him of 'participant' status and hence, standing to sue under ERISA." 14 F.3d at 703. While the alleged breach of duty here is of a different kind than the misrepresentations alleged in Vartanian, the plaintiffs in this case likewise seek additional benefits that they would have received in the absence of a breach.

33.[9] The plaintiffs in this case, unlike Crawford, are former employees with a colorable claim to vested benefits because the fiduciary breaches they allege, if proven, "had a direct and inevitable effect on [their] benefits." Crawford, 34 F.3d at 33. Accordingly, the district court's reliance on district court decisions that interpreted Crawford as limiting Vartanian in a way that would deny standing to the plaintiffs here is misplaced. See Evans, 466 F. Supp. 2d at 376, citing LaLonde v. Textron, Inc., 418 F. Supp. 2d 16, 19-20 (D.R.I. 2006); Nahigian v. Leonard, 233 F. Supp. 2d 151, 166 (D. Mass. 2002).

A number of decisions, including most of those cited by the court 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. See LaLonde, 418 F. Supp. 2d at 21; Hargrave v. TXU Corp., 392 F. Supp. 2d 785, 789-90 (N.D. Tex. 2005). Such an inquiry is both unhelpful and unnecessary, however, where plaintiffs claim, as did the plaintiffs in Sommers and as do

[9] This same reasoning governs the cases where a participant in a defined benefit plan seeks to bring or maintain an action for fiduciary breach after they have received a lump-sum payment of all the fixed benefits they were due. See, e.g., Kuntz v. Reese, 785 F.2d 1410 (9th Cir. 1986). In such a case, the plaintiff's claim would not result in their receiving any additional benefits, as they received the benefit promised by the plan, regardless of the breach of fiduciary duty. In contrast, benefits under a defined contribution plan are dependent on the performance of the fiduciaries' investment decisions, so that a claim of fiduciary breach is tantamount to a claim for additional benefits.

plaintiffs here, that they received less than all of the benefits to which they were entitled as a direct result of a fiduciary breach that caused losses to their plan. An allegation of this sort states a colorable claim for benefits, even if, in seeking to recover plan losses, the suit also seeks monetary damages for the plan. See Harzewski, 489 F.3d at 807 (disapproving of the distinction in Sommers between benefits and damages); Graden, 2007 WL 2177170, at *6 ("While we believe that Sommers was rightly decided, we cannot endorse the distinction it makes between benefits and damages."). Likewise, the district court erred in relying on language from Sommers that the claim is too "speculative" to be a claim for benefits. 466 F. Supp. 2d at 377; see Sommers, 883 F.2d at 350 (stating that a claim for an "unascertainable amount" would not state a claim for benefits).[10] For one thing, "there is nothing in ERISA to suggest that a benefit must be a liquidated amount in order to be recoverable." Harzewski, 489 F.3d at 807. Furthermore, as in Graden, "here the amount is hardly unascertainable. Rather, the measure of damages is the

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[10] 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.

amount that affected accounts would have earned if prudently invested." 2007 WL 217717, at *7.[11]

Here too, plaintiffs have colorable claims that the defendants breached their fiduciary duties by, among other actions, imprudently continuing to allow or encourage investment of plan assets in the corporation's stock despite knowledge of the asbestos liability that diluted the value of the stock. Plaintiffs also have a colorable claim that the breach caused losses to the Plan, which allegedly resulted in a decrease in the amount of benefits they received when they took distributions of benefits from their accounts. Plaintiffs seek the amount they should have received when they withdrew from the Plan, and that they would have received but

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[11] Nor is there reason to be concerned that a ruling in favor of the plaintiffs will require employers to make costly disclosures to people who have apparently cashed out their plan accounts. See Graden, 2007 WL 2177170, at *9 ("Informational obligations may reattach once the fiduciary is on notice that the person is asserting a claim for benefits . . . but until then, it seems within the fiduciary's discretion to send reports only [to] those participants known to the fiduciary to consider themselves as such."). Indeed, the Department of Labor has promulgated a regulation narrowly defining the statutory term "participant covered under the plan" that appears in the disclosure and reporting provisions of ERISA, 29 U.S.C. § 1021(a), specifically in order to delimit the class of people to whom plan administrators must provide information, in many cases without charge and without request. See 29 C.F.R. § 2510.3-3(d). The regulation, which expressly does not define who is a participant for standing purposes – see 40 Fed. Reg. 34,333, 34,528 (1975); 29 C.F.R. § 2509.95(1)(b) (interpretive bulletin to the same effect) – excludes from the disclosure requirements 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." 29 C.F.R. § 2510.3-3(d)(2)(ii)(B); see 40 Fed. Reg. 24,541, 24,649 (1975).

for the fiduciary breach. Because these allegations present a colorable claim for vested benefits under ERISA, within the meaning of 29 U.S.C. § 1002(7) and Firestone, plaintiffs have stated a claim under ERISA.

B. Reading ERISA To Deny Plaintiffs A Right 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 plaintiffs have a right to sue under ERISA. A holding to the contrary, affirming the district court's narrow reading of ERISA's definition of "participant," would mean that when former employees receive their distribution under a defined contribution plan – no matter how far short it falls of the benefits that they would and should have received in the absence of the fiduciary misconduct – this payment deprives them of a right to sue under ERISA. Such a holding 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 USCCAN 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 [sic] which they would have occupied but for the breach of trust" (quoting Dasler v. E.F. Hutton & Co., 694 F. Supp. 624, 634 (D. Minn. 1988)).

Indeed, a decision affirming the district court would produce a number of unjust and unwarranted results. First, it would mean that when a fiduciary breach causes financial loss to a defined contribution plan, thereby diminishing the benefits payable to all accounts which held the affected investments, participants who stay in the plan could bring an action for fiduciary breach to recover plan losses that led directly to their lost benefits, while employees who retired and took a diminished distribution – no matter how far short it falls of the benefits that they would and should have received in the absence of the fiduciary breach – could recover nothing at all. Such unequal treatment cannot be what Congress intended; 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 a right to sue. To find that the participant who had not yet retired retains that right, while the participant who retired — and actually suffered the diminished distribution — does not, would neither comport with ERISA's broad definition of "participant" nor promote its remedial objectives.

Further, it 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 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"); Graden, 2007 WL 2177170, at *8 (noting that "[s]uch a holding would allow an employer who had mismanaged individual account plan assets to avoid liability by cashing out the participants," and finding "it hard to believe that Congress intended such a result" when "ERISA's legislative history indicates that its standing requirements should be construed broadly to allow employees to enforce their rights"); 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"); Rankin v. Rots, 220 F.R.D. 511, 519–20 (E.D. Mich. 2004) (recognizing absurdity of allowing employers to cut off participant status simply by paying some level of benefits).

Moreover, even if, as the district court pointed out, plaintiffs were not "obligated to take the lump sum payments when they did," 466 F. Supp. 2d at 377, they were entitled to do so. ERISA should not be read to force participants to forego a distribution of benefits to which they are entitled in order to preserve their right to other benefits to which they are also entitled.

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 a defined contribution plan like the one at issue here. 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. 26 U.S.C. § 402(c); 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 a right to sue would endanger employees' retirement security, defeating the very purposes for which ERISA was enacted. Nothing in ERISA compels such an arbitrary and illogical result. Rather, courts, including this one, have sensibly construed ERISA broadly in order to effectuate these remedial purposes. See 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"); Graden, 2007 WL 2177170, at *8 ("The sensible holding, therefore, is that former employees whose benefits would be made whole by a restoration of losses to the plan are participants with standing to sue on behalf of the plan – and take part in the recovery."); Leuthner v. Blue Cross & Blue Shield, 454 F.3d 120, 128 (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"); Panaras v. Liquid Carbonic Indus. Corp., 74 F.3d 786, 791 (7th Cir. 1996). The term "participant" should not be read to close the courthouse doors to former employees who, like the plaintiffs here, have allegedly not received all that they are due under their plan.

CONCLUSION

For the reasons stated above, this Court should reverse the district court's decision dismissing the plaintiffs' claims.

Respectfully submitted,

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(s)______________________________

Attorney for the Secretary of Labor

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