No. 06-3752

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

ERICA HARZEWSKI AND VICTOR VALENZUELA, on behalf of themselves and a class of persons similarly situated
Plaintiffs-Appellants,

v.

GUIDANT CORPORATION, ET AL.,
Defendants-Appellees.

On Appeal from the United States District Court
for the Southern District of Indiana

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

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STATEMENT OF THE ISSUE

Whether former employees who have received lump-sum distributions of benefits from a defined contribution plan have standing to sue under ERISA for fiduciary breaches that occurred before they left the plan, and that allegedly resulted in a diminution in the plan's assets and a resulting decrease in the benefits they received upon payout.

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 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 before they took benefit payouts from the plan, and they consequently received less than they should have in a lump-sum distribution.

STATEMENT OF THE CASE

This case was brought as a putative class action by two former employees of Guidant Corp., Erica Harzewski and Victor Valenzuela, who were participants in

Guidant's defined contribution or individual account plan within the meaning of ERISA section 3(34), 29 U.S.C. § 1002(34). Appendix (Ap.) 9 (Consolidated and Amended Complaint). The plan contains both an employee stock ownership (ESOP) component and a 401(k) saving plan component. Id. at 9-10. Both plaintiffs were employees of Guidant and participants in the plan during the class period, and the accounts of both held Guidant common stock at that time. Id. at 13. Both plaintiffs took cash distributions of the total amount in their accounts, Valenzuela in early 2005, six months before the suit was filed, and Harzewski in late 2005, after the suit commenced but before the plaintiffs filed an amended complaint. Id. at 53 (Order on Defendants' Motion to Dismiss).

The plaintiffs sued the company and other plan fiduciaries under ERISA section 502(a)(2) alleging that the fiduciaries breached their duties under ERISA by: (i) selecting and maintaining Guidant common stock as the investment for the company contributions under both the saving and the ESOP component of the plan; (ii) allowing the plan to hold and contribute Guidant stock during the class period at inflated prices; (iii) failing to properly monitor the plan's holdings in company stock; (iv) failing to provide timely and accurate information concerning the company's true financial performance and product defects; and (v) failing to take steps to mitigate damage to the plan based on what the fiduciaries knew or should have known about undisclosed defects in one of the company's main

products and the resulting artificial inflation of the value of the stock. Ap. 12 (Consolidated and Amended Complaint). More specifically, the plaintiffs allege that company officials knew, but failed to disclose, or gave misleading information about, a fundamental defect with one of the company's main products – implantable cardioverter defibrillators – that was causing injuries and death in some patients who had such products implanted in them. Id. at 22-27. These and related improper practices (such as an alleged payment scheme to doctors who implanted their product) eventually led to multiple state and federal investigations, both criminal and civil, that are still ongoing, to wrongful death and other private claims, to the recall of thousands of the company's products, and to other adverse consequences. Id. at 36-41. As a result, the stock was purchased by the plan for inflated prices during this time period and the plan ultimately suffered losses when the stock price adjusted. Id. at 41. The plaintiffs requested declaratory and injunctive relief, as well as the recovery of actual damages in the amount of any losses that the plan suffered to be allocated among the participants' individual accounts. Id. at 48-49.

The district court granted the defendants' motion to dismiss, concluding that the plaintiffs did not have a colorable claim to vested benefits and thus did not have standing to pursue their claims. Ap. 52 (Order on Defendants' Motion to Dismiss). The court reasoned that the plaintiffs' claims were not like one for

miscalculated benefits, as the court characterized the claim in Sommers Drug Stores Co. Employee Profit Sharing Trust v. Corrigan, 883 F.2d 345, 350 (5th Cir. 1989), but were claims for actual damages to the plan, which, the court explained, "clearly" could not be "classified as 'vested benefits.'" Ap. 58. Although the court acknowledged the plaintiffs' argument that they sought vested benefits because they sought the additional amounts that would have accrued in their plan accounts absent the breaches, the court concluded that "such an amount is speculative, rather than based on specific allocations or principles of the Plan." Id. Therefore, the court concluded, the relief sought was "was more akin to damages than to a vested benefit." Id. (citing Howell v. Motorola, Inc., No. 03 C 5044, 2006 WL 2355586, at *4-6 (N.D. Ill. Aug. 11, 2006); In re AEP ERISA Litig., 437 F. Supp. 2d 750, 760-62 (S.D. Ohio 2006); Crawford v. Lamantia, 34 F.3d 28, 30-31 (1st Cir. 1994)). The court further concluded that, although this result left the plaintiffs "without a remedy for what they feel is a wrong," the plaintiffs did not have standing to sue because they were not forced by the defendants to withdraw from the plan, as in Panaras v. Liquid Carbonic Indus. Corp., 74 F.3d 786 (7th Cir. 1996), and did not receive less than they should have because of a miscalculation of benefits or other administrative error. Ap. 59. The court thus granted the defendants' motion to dismiss.

SUMMARY OF THE ARGUMENT

The plaintiffs have standing under ERISA to sue as former employees who seek to recover losses to be paid to the Guidant 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). The plaintiffs meet this statutory definition and have a "colorable claim" to vested benefits within the meaning of Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 117-18 (1989), because they claim that fiduciary breaches with regard to the Guidant stock component of the defined contribution plan in which they participated at the time of the breaches caused losses to the plan and a corresponding diminution in the amount of the benefits that they received upon pay-out. Because their benefits under the plan were linked directly to the performance of the plan's assets in that particular investment, 29 U.S.C. § 1002(34), if they prevail on the claim and recover losses for the plan, they will be entitled to the payment of additional benefits from the plan.

To hold otherwise would result in an illogical distinction between the rights of former employees in a defined contribution plan and those of current employees, both of whose account balances are equally affected by alleged fiduciary breaches.

There is no reason to believe that Congress intended for a participant who has not yet retired to have standing to sue for such breaches, while denying standing to a participant in a defined contribution plan who has retired and received a diminished benefit. Such a result would not promote ERISA's remedial goals, nor would it be consistent with the statute's broad definition of participant. Moreover, it would reward a breaching fiduciary for hiding its breaches until participants take distribution of their defined contribution benefits.

ARGUMENT

PLAINTIFFS HAVE STANDING UNDER ERISA TO BRING THIS SUIT BECAUSE THEY HAVE A COLORABLE CLAIM THAT THEY ARE ENTITLED TO ADDITIONAL VESTED BENEFITS UNDER THE GUIDANT DEFINED CONTRIBUTION PLAN

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

for appropriate remedies, sanctions, and ready access to the Federal courts." ERISA section 2(b), 29 U.S.C. § 1001(b).

To this end, ERISA's comprehensive civil enforcement scheme provides, in section 502(a)(2), 29 U.S.C. § 1132(a)(2), that "[a] civil action may be brought" by a plan "participant" to obtain "appropriate relief " under the section of ERISA (section 409, 29 U.S.C. § 1109) that makes a breaching plan fiduciary personally liable to the plan for any losses stemming from its breaches. Moreover, to serve its broad remedial purposes, the statute broadly defines "participant" as "any employee or former employee of an employer . . . who is or may become eligible to receive a benefit of any type from an employee benefit plan which covers employees of such employer." 29 U.S.C. § 1002(7). Harzewski and Valenzuela qualify as "participants" under the plain terms of this definition because they are "former employee[s]" who "[are] or may become eligible to receive" additional benefits from the plan if they succeed on their fiduciary breach claims.

A. Plaintiffs have standing because they are former employees who may become eligible to receive additional benefits from their defined contribution plan should they prevail on their allegations of fiduciary breach

Despite the withdrawal of the money in their accounts, the plaintiffs "may become eligible" to receive additional benefits because they participated in a defined contribution plan, under which, by definition "benefits [are] based solely upon the amount contributed to the participant's account, and any income,

expenses, gains, and losses . . . which may be allocated to such participant's account." 29 U.S.C. § 1002(34). Participants are vested in their own contributions and the earnings made on those contributions at all times. U.S. Gen. Accounting Office, Publ'n No. GAO-02-745SP, Answers to Key Questions About Private Pension Plans 13 (Sept. 18, 2002) [GAO Report], available at http://www.gao.gov/new.items/d02745sp.pdf. Because the amount of the participant's vested benefits in such a plan increases in direct proportion to investment returns, the way in which a defined contribution plan is managed, particularly with regard to investments, is a critical factor in determining the amount of the participant's vested benefits at the end of the day.

ERISA protects the interests of plan participants in defined contribution plans, as it protects participants in other plans, by imposing stringent obligations of prudence and undivided loyalty on plan fiduciaries. 29 U.S.C. § 1104(a)(1)(A) and (B); see also Kuper v. Iovenko, 66 F.3d 1447, 1453 (6th Cir. 1995) ("ERISA's imposition of a fiduciary duty . . . has been characterized as 'the highest known to law'" (quoting Sommers Drug Store Co. Employee Profit Sharing Plan v. Corrigan, 793 F.2d 1456, 1468 (5th Cir. 1986)). If it is true, as the plaintiffs allege, that the defendants acted imprudently by, among other things, knowingly allowing the plan to purchase Guidant stock at inflated prices, then the plan fiduciaries breached these obligations and caused a diminution in both the plan's assets and the

plaintiffs' account balances. Thus, the plaintiffs received a smaller distribution of vested benefits than they were entitled to receive when they withdrew their account balances. In seeking restoration to the plan for alleged fiduciary breaches that took place before they received their benefits, the plaintiffs seek amounts that should be allocated in a manner that ultimately augments their individual vested benefits. These amounts are precisely the "vested benefits" to which each plan participant in a defined contribution plan is entitled under ERISA. 29 U.S.C. § 1002(34). Thus, participants are "former employees" who are or may become "eligible to receive a benefit" from the plan in the form of the amount they would have received as a distribution of benefits had the defendants not breached their fiduciary duties. 29 U.S.C. § 1002(7). As such, the plaintiffs are "participants" with standing to sue under ERISA section 502(a)(2), 29 U.S.C. § 1132(a)(2).

Reading the term "participant" to include the plaintiffs is fully consistent with the Supreme Court's decision in Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101 (1989). In Firestone, the Supreme Court considered ERISA's definition of "participant" in the context of ERISA's plan document disclosure provisions.[1]

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[1] Although the Department of Labor has not promulgated a definition of "participant" for purposes of Title I of ERISA, the Department has promulgated a definition of the distinct and more narrow statutory term "participant covered under a plan" (see 29 C.F.R. § 2510.3-3(d)), which parallels the statutory use of the term "participant covered under the plan" in Section 101(a) of ERISA, 29 U.S.C. § 1021(a), and narrows the class of people to whom plan administrators must provide information, in many cases without charge and without request, under ERISA's

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

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automatic disclosure requirements. See 40 Fed. Reg. 34333, 34528 (1975) (explaining regulatory purpose to define "participant under a plan" for disclosure purposes); see also 29 C.F.R. § 2520.104b-1(c). This definition excludes an "individual [who] has received from the plan a lump-sum distribution or a series of distributions of cash or other property which represents the balance of his or her credit under the plan." Id. § 2510.3-3(d)(2)(B); see 40 Fed. Reg. 24517, 24649 (1975). Even assuming that this regulation would exclude from its scope former employees such as Harzewski and Valenzuela who claim that the distribution of benefits they received would have been higher but for the breaches of fiduciary duty, "participant covered under a plan" is a term of art under ERISA that is considerably narrower than the class of all participants within the meaning of section 3(7) of ERISA, 29 U.S.C. § 1002(7), and does not define who is a participant for standing purposes. See 29 C.F.R. § 2509.95-1(b) (interpretive bulletin explaining that 29 C.F.R. § 2510.3-3(d) does not affect who is a participant for purposes of bringing suit under section 502(a)(2)).

To hold otherwise would produce the anomalous result that when a fiduciary breach causes significant financial loss to a defined contribution plan, thereby substantially diminishing the benefits payable to the accounts which held such investments, participants will have unequal rights: affected employees who stay in the plan could bring an action to recover their lost benefits, while employees who retired and took a diminished distribution could recover nothing at all. That result cannot be correct – either all affected employees have a "colorable claim" to additional vested benefits or none do. Certainly, if two participants with equal account balances incur equal losses on the same date, they should both have standing. To find that the participant who had not yet retired retains standing, while the participant who retired—and actually suffered the diminished distribution—does not, would neither comport with its broad definition of "participant" nor promote ERISA's remedial objectives.

Courts that have recognized the nature of benefits under defined contribution plans have correctly accorded standing to plaintiffs who were actively invested in those plans at the time of alleged fiduciary breaches even though they have received their account balances by the time suit was brought. For example, in Sommers Drug Stores Co. Employee Profit Sharing Trust v. Corrigan, 883 F.2d 345 (5th Cir. 1989), the Fifth Circuit held that plaintiffs, former participants in a terminated defined contribution profit-sharing plan, had standing to bring an

ERISA action against fiduciaries for losses allegedly resulting from the sale of the trust's stock for less than fair market value.[2] 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' claim to recover the plan's losses gave them standing. Because the plaintiffs had allegedly received reduced distributions as a result of the fiduciary breach, they had a colorable claim for additional vested benefits. Id. at 349–50.

The plaintiffs' claim here is of the same kind. Like the plaintiffs in Sommers, the plaintiffs in this case seek relief that could affect the amount of vested benefits that they will ultimately receive from the plan. Both Harzewski and Valenzuela were plan participants when the alleged fiduciary breaches occurred and, as in Sommers, they allege that the breaches caused a loss to the plan, which reduced the amount of vested benefits that they received. As in Sommers, the plan distributed their account balances to them in accordance with the plan terms, but the amount of benefits they received allegedly was reduced because of fiduciary misconduct. And, as in Sommers, if the plaintiffs prove their

[2] 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.

claims and losses to the plan are restored, their vested benefits will be augmented. Thus, this case and Sommers are identical in all legally significant respects. Despite having received payment of vested benefits when they left the plan, Harzewski and Valenzuela, like the plaintiffs in Sommers, have a colorable claim that they are still "eligible to receive a benefit of any type" in the form of an additional recovery from the plan and, accordingly, they are "participants" for purposes of ERISA standing.

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

Kuntz v. Reese, 785 F.2d 1410 (9th Cir. 1986) (en banc), and other cases involving defined benefit plans, as opposed to defined contribution plans, are easily distinguishable. In Kuntz, the court held that former employees who filed suit after they had received all of their vested benefits in a defined benefit plan lacked standing under ERISA. Id. at 1411. In a defined benefit plan, the participant is promised a fixed benefit according to a formula set forth in the plan document, usually dependent on factors like an employee's years of service and final salaried income. GAO Report at 8–10; Wilson v. Bluefield Supply Co., 819 F.2d 457, 459 (4th Cir. 1987) (noting that a defined benefit plan is "designed and administered to provide fixed – or 'defined' – benefits to the participants based on a benefit formula set forth in the Plan"); see also Phillips v. Alaska Hotel & Rest. Employees Pension Fund, 944 F.2d 509, 512 (9th Cir. 1991).[3] In contrast to defined contribution plans, the amount of the benefit for each participant in a defined benefit plan does not increase or decrease when the plan's investments experience gains or losses. GAO Report at 8-10.[4] When an employee retires and

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[3] In 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. GAO Report at 8–10.

[4] Unlike defined contribution plans, in defined benefit plans the risk of investment performance is shouldered by the employer. Hughes Aircraft Co. v. Jacobson, 525 U.S. 432, 439 (1999). In addition, defined benefit plans are covered by ERISA's pension insurance program. Connolly v. PBGC, 475 U.S. 211, 230 (1986). In contrast, defined contribution plans are not covered by ERISA's insurance program

receives a lump-sum distribution from a defined benefit plan, that employee has received all the benefits that he is entitled to receive under the plan. Thus, Kuntz and other cases involving defined benefit plans, are inapposite; the plaintiffs in Kuntz, unlike the plaintiffs in this case or the plaintiff in Sommers, had received all of the benefits they had been promised, unreduced by any fiduciary breach.[5]

A number of district courts have properly followed Sommers to grant standing to former employees who were actively invested in defined contribution plans at the time of an alleged fiduciary breach. See, e.g., In re Polaroid ERISA Litig., No. 03 Civ. 8335 WHP, 2006 WL 2792202 (S.D.N.Y. Sept. 29, 2006) (holding that former employees have standing as participants where they alleged that the distributions they received from their defined contribution plan were reduced because of fiduciary breaches); In re Mut. Funds Inv. Litig., 403 F. Supp.

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and, because the amount of retirement benefits under such plans is not guaranteed, and the investment risk in such plans is carried by the employees, GAO Report at 10, the need to stringently enforce the fiduciary duty provisions of ERISA is even more critical in the context of such plans.

[5] Similarly distinguishable are decisions that have denied standing to former employees whom the courts found to have suffered no injuries and thus no diminution in benefits. See Ap. 58 (Order on Defendants' Motion to Dismiss) (citing Crawford, 34 F.3d at 33 (holding that a former employee-plaintiff "failed to show that defendants' . . . breach of fiduciary duty had a direct and inevitable effect on his benefits") (emphasis in original)); see also Sallee v. Rexnord Corp., 985 F.2d 927, 929 (7th Cir. 1993) (finding that because "employees voluntarily elected to leave employment knowing that severance benefits did not vest unless they were terminated," there was "no question but that the appellants could not prevail in a suit for benefits"). Unlike the plaintiffs in those cases, Harzewski and Valenzuela allege that they have suffered a diminution of benefits.

2d 434, 441–42 (D. Md. 2005) (same); In re Williams Cos. ERISA Litig., 231 F.R.D. 416, 422–23 (N.D. Okla. 2005) (same); Rankin v. Rots, 220 F.R.D. 511 (E.D. Mich. 2004) (holding that a former employee has standing where he was a participant in the defined contribution plan during the time when the alleged breaches of fiduciary duty occurred); Thompson v. Avondale Indus., Inc., No. Civ.A. 99-3439, 2001 WL 1543497, at *2 (E.D. La. Nov. 30, 2001) (holding that former employee had standing because the recovery of funds to his defined contribution plan would result in additional vested benefits to be paid to him) (unpublished); Kuper v. Quantum Chem. Corp., 829 F. Supp. 918, 923 (S.D. Ohio 1993) (same).[6]

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[6] There are a number of recent district court decisions, many of which are pending on appeal, that have incorrectly denied standing to former employees who were actively invested in defined contribution plans at the time of an alleged fiduciary breach. Vaughn v. Bay Envtl. Mgmt., Inc., No. 03-5725, 2005 WL 2373718 (N.D. Cal. Sept. 26, 2005), appeal docketed, No. 05-17100 (9th Cir. Sept. 27, 2005); Hargrave v. TXU Corp., 392 F. Supp. 2d 785 (N.D. Tex. 2005), appeal docketed, No. 05-11482 (5th Cir. Dec. 29, 2005); Graden v. Conexant Sys., Inc., No. 05-0695, 2006 WL 1098233 (D.N.J. Mar. 31, 2006), appeal docketed, No. 06-2337 (3d Cir. Apr. 27, 2006); accord In re RCN Litig., No. 04-5068, 2006 WL 753149 (D.N.J. Mar. 21, 2006); Holtzscher v. Dynegy, Inc., No. Civ. A. H 05-3293, 2006 WL 626402 (S.D. Tex. Mar. 13, 2006), appeal docketed, No. 06-20297 (5th Cir. Apr. 18, 2006); LaLonde v. Textron, Inc., 418 F. Supp. 2d 16 (D.R.I. 2006) (settled on appeal); In re Admin. Comm. ERISA Litig., No. C03-3302, 2005 WL 3454126 (N.D. Cal. Dec. 16, 2005). These cases fail to account for the nature of benefits under a defined contribution plan. Specifically, the decisions disregard the fact that the amount of a participant's vested benefits in a defined contribution plan increases in direct proportion to any increase in overall plan assets and decreases in proportion to any losses. For this reason, they are inconsistent with the statutory text of ERISA and are incorrectly decided.

The decision below relies 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. Ap. 58 (Order on Defendants' Motion to Dismiss). Such an inquiry is both unhelpful and unnecessary where plaintiffs claim, as did the plaintiffs in Sommers, and as do the plaintiffs here, that they received less than all of the benefits to which they are entitled as a direct result of a fiduciary breach that caused losses to their plans. Such a claim states a colorable claim for benefits, even if, in seeking to recover plan losses, the claim also seeks monetary damages. The same cannot be said of the plaintiffs in Kuntz, however, because by the time that they filed their lawsuit, they indisputably already had received every dollar of benefits to which they were entitled; any further recovery they might have obtained would have been in the form of damages only.

Here, the plaintiffs claim that the defendants breached their duties by, among other actions, imprudently continuing to allow investment of plan assets in Guidant stock despite knowing that the price of the stock did not reflect the true situation at the company, particularly with respect to defects in Guidant's implantable cardioverter defibrillators. The plaintiffs also claim that these breaches 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. The plaintiffs seek the amount they should have received when they withdrew from the

plan, and that they would have received but for the fiduciary breaches. Because these claims present "a colorable claim" for vested benefits under ERISA, within the meaning of Firestone, 489 U.S. at 117, and 29 U.S.C. § 1002(7), the plaintiffs have standing under the statute.

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

As we have shown, the statutory text, and the relevant appellate and Supreme Court authority, establishes that the plaintiffs have standing to sue under ERISA. Furthermore, a decision to the contrary, affirming the district court's narrow reading of ERISA's standing requirements, would undermine the remedial goals of ERISA, "[t]he primary purpose of [which] is the protection of individual pension rights." H.R. Rep. No. 93-533 (1973), reprinted in 1974 U.S.C.C.A.N. 4639, 4639; see also Martin v. Feilen, 965 F.2d 660, 671 (8th Cir. 1992) (noting that one of ERISA's basic remedies for a breach of fiduciary duty is "to restor[e] plan participants to the position in which they would have occupied but for the breach of trust"). Courts, including this one, have correctly construed ERISA's standing requirements broadly in order to effectuate these remedial purposes. See Panaras, 74 F.3d at 791; Leuthner v. Blue Cross & Blue Shield, 454 F.3d 120, 128–29 (3d Cir. 2006) (holding that Congress intended "federal courts to construe [ERISA's] statutory standing requirements broadly in order to facilitate

enforcement of its remedial provisions"); Vartanian, 14 F.3d at 702 ("[t]he legislative history of ERISA indicates that Congress intended the federal courts to construe the Act's jurisdictional requirements broadly in order to facilitate enforcement of its remedial provisions"). Consequently, the term "participant" should not and need 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.

A holding affirming the district court would mean that when former employees receive a payment of benefits under a defined contribution plan – no matter how far it falls short of the benefits to which they actually are entitled – this payment deprives them of standing to sue under ERISA. This cannot be squared with the text of ERISA or the Supreme Court's decision in Firestone, and would produce the incongruous result that fiduciaries could deprive employees of the right to seek redress for serious violations of ERISA simply by making distributions or terminating the plan altogether. See Rankin, 220 F.R.D. at 519–20 (recognizing absurdity of allowing employers to cut off participant status simply by paying some level of benefits); Vartanian, 14 F.3d at 702 ("[s]uch a holding would enable an employer to defeat the employee's right to sue for a breach of fiduciary duty by keeping his breach a well guarded secret until the employee receive[d] his benefits or, by distributing a lump sum and terminating benefits

before the employee can file suit"); Amalgamated Clothing Textile Workers Union v. Murdock, 861 F.2d 1406, 1418–19 (9th Cir. 1988) ("were we to hold that payment of plan benefits cuts off the standing to sue of plan beneficiaries, we would, in effect, be saying that a fiduciary . . . has the power to deprive plan beneficiaries of standing to sue the fiduciary for misuse of plan assets"). ERISA should not be read to deny employees the right to recover what is rightfully theirs under the plan simply because they received a reduced distribution of benefits.

Finally, the possibility that employees will leave employment and take lump-sum distributions without realizing that their benefits have been reduced by a fiduciary breach is particularly significant in the case of defined contribution plans, like the plan at issue in this case. Defined contribution plans are designed to be portable—participants can change jobs and take their retirement benefits with them by receiving a distribution of their plan accounts and either rolling the money over into individual retirement accounts or depositing it into their new employer's plan. GAO Report at 10. The interests of former employees in being paid the full amount that they are owed by the plan is no less great than those of current employees who continue to work and participate in the plan. A holding that these former employees lack standing to sue despite the fact that the benefits they received were allegedly diminished because of fiduciary breaches would undermine the purposes of ERISA and endanger employees' retirement security.

Nothing in ERISA compels such arbitrary or illogical results. Indeed, ERISA was enacted precisely to ensure that employees and former employees alike receive the amount of pension benefits to which they are entitled.

CONCLUSION

For the reasons stated above, the Secretary respectfully requests that this Court reverse the decision of the district court.

Respectfully submitted,

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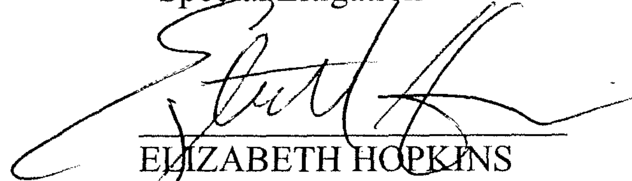

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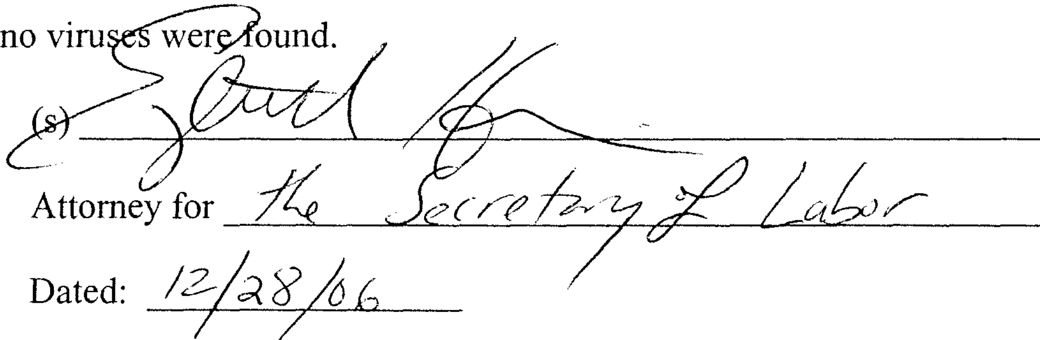

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Dated: 12/28/06

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