No. _____

IN THE

Supreme Court of the United States

JOHN HANCOCK LIFE INSURANCE COMPANY (U.S.A.); John Hancock Investment Management Services; John Hancock Funds, LLC; John Hancock Distributors, LLC,

Petitioners,

v.

Danielle SANTOMENNO, for the use and benefit of the JOHN HANCOCK TRUST and the John Hancock Funds II; Karen Poley and Barbara Poley, for the use and benefit of the John Hancock Funds II; Danielle Santomenno, Karen Poley and Barbara Poley individually and on behalf of Employee Retirement Income Security Act of 1974, as amended ("ERISA"), employee benefit plans that held, or continue to hold, group variable annuity contracts issued/sold by John Hancock Life Insurance Life Insurance Company (U.S.A.), and Participants and beneficiaries of all such ERISA covered employee benefit plans; and Danielle Santomenno individually and on behalf of any person or entity that is a party to, or has acquired rights under, an individual or group variable annuity contract that was issued/sold by John Hancock Life Insurance Company (U.S.A.) where the underlying investment was a John Hancock proprietary fund contained in the John Hancock Trust,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR WRIT OF CERTIORARI

JAMES O. FLECKNER
Counsel of Record
DANIEL P. CONDON
ALISON V. DOUGLASS
GOODWIN PROCTER LLP
Exchange Place
53 State Street
Boston, Mass. 02109
jfleckner@goodwinprocter.com
(617) 570-1000
Attorneys for Petitioners

August 13, 2012

QUESTION PRESENTED

In the Employee Retirement Income Security Act of 1974 ("ERISA"), Congress mandated an employee benefit plan governance structure under which administrators and trustees who are selected by the employer sponsoring a plan are entrusted with the fundamental authority and responsibility to manage the plan and its assets. Consistent with that congressional mandate, the Eleventh Circuit has ruled that plan participants who wish to bring suit on behalf of a plan against a third party who provides services to the plan must first present that claim to the administrator or trustee who engaged the service provider on the plan's behalf. In direct contrast, the Third Circuit in the case below held that a participant may sue a third-party service provider derivatively on behalf of a plan without involving, or even contacting, the plan administrator or trustee who contracted with the provider, departing from ERISA's plan governance structure and centuries-old trust law.

The specific question presented is:

> Whether a participant in an employee benefit plan governed by ERISA may commence and control litigation on the plan's behalf against a service provider hired by a plan administrator or trustee without first presenting the plan's claim to the administrator or trustee?

CORPORATE DISCLOSURE STATEMENT

Petitioners John Hancock Life Insurance Company (U.S.A.), John Hancock Investment Management Services, LLC, John Hancock Funds, LLC, and John Hancock Distributors, LLC are wholly-owned subsidiaries of Manulife Financial Corporation, which is their parent corporation. No other entity holds 10% or more of Petitioners' stock.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit affirming in part and vacating and remanding in part the decision of the United States District Court for the District of New Jersey is reported at 677 F.3d 178 and is reproduced in the Petitioners' Appendix ("Appendix" or "App."). App. 1a-20a. The opinion of the United States District Court for the District of New Jersey is not reported and is reproduced in the Appendix. App. 21a-31a.

JURISDICTION

The United States Court of Appeals for the Third Circuit issued its judgment on April 16, 2012 (App. 1a), and denied Petitioners' timely petition for rehearing and rehearing *en banc* on May 15, 2012 (App. 35a-36a). This Petition is filed within ninety days of that date. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The following provisions of the Employee Retirement Income Security Act of 1974 ("ERISA") are reproduced in the Appendix: 29 U.S.C. § 1002(16) (App. 37a), 29 U.S.C. § 1102 (App. 37a-39a), 29 U.S.C. § 1103(a)-(b) (App. 39a-41a), 29 U.S.C. § 1104(a)(1) (App. 41a-42a), 29 U.S.C. § 1105(c) (App. 42a-43a), 29 U.S.C. § 1106 (App. 43a-45a), 29 U.S.C. § 1109 (App. 45a-46a), 29 U.S.C. § 1132(a)(1)-(3) (App. 46a), and 29 U.S.C. § 1132(e) (App. 46a-47a).

STATEMENT OF THE CASE

This case presents a direct split of circuit authority on a question of crucial importance to ERISA plans and to companies that contract to provide services to

ERISA plans: whether a participant in an employee benefit plan governed by ERISA may commence and control litigation on the plan's behalf against a service provider hired by a plan administrator or trustee without first presenting the plan's claim to the administrator or trustee.

The Eleventh Circuit answered this question in the negative. *See Bickley v. Caremark, RX, Inc.*, 461 F.3d 1325, 1328-29 (11th Cir. 2006). In contrast, the Third Circuit's decision in this case allows an ERISA plan participant to sue a third-party service provider on behalf of the plan without even notifying plan trustees, let alone providing them an opportunity to decide whether to bring or negotiate the claim. App. 20a.

The Third Circuit's decision is at odds with both fundamental principles of trust law, applicable under ERISA, and the plan governance structure mandated by the statute. Congress explicitly entrusted the management of ERISA plans and their assets to administrators and trustees who are appointed by the employer sponsoring the plan. As Chief Justice Roberts recently observed, one way that ERISA encourages the formation of benefit plans is by "[e]nsuring that reviewing courts respect the discretionary authority conferred on" plan administrators and trustees. *Metro. Life Ins. Co. v. Glenn*, 554 U.S. 105, 120 (2008) (Roberts, C.J., concurring). The congressional objective of expanding plan coverage is significantly impeded by uncertainty as to whether critical decisions concerning plan management—such as whether to sue counterparties to plan service contracts—will be left to the discretion of plan administrators and trustees, or instead can be usurped by any plan participant.

The continued expansion of the private retirement system under ERISA is of paramount national importance. Social Security assets are expected to be exhausted within twenty-one years.[1] ERISA retirement plans, on the other hand, hold well over five trillion dollars in assets[2] and cover more than 86 million employees.[3] The Third Circuit's decision, unfortunately, will not encourage employers to establish benefit plans. It will instead deter plan formation by driving up the costs of plan administration, as third-party service providers must factor into the cost of their services the risk of suits by individual plan participants.

For the following reasons, certiorari should be granted.

I. ERISA'S PLAN GOVERNANCE STRUCTURE

ERISA was established by Congress in 1974 as a result of a "careful balancing" that sought "to ensure that employees would receive the benefits they had earned" and to "encourage[] the creation of [employee benefit] plans." *Conkright v. Frommert*, 130 S. Ct. 1640, 1648-49 (2010) (internal quotations omitted). Consistent with these goals, the statute was designed to ensure that "plans and plan sponsors [employers]

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[1] THE BD. OF TRS., FED. OLD-AGE & SURVIVORS INS. & FED. DISABILITY INS. TRUST FUNDS, THE 2012 ANNUAL REPORT OF THE BOARD OF TRUSTEES OF THE FEDERAL OLD AGE AND SURVIVORS INSURANCE AND FEDERAL DISABILITY INSURANCE TRUST FUNDS, H.R. DOC. NO. 112-102, at 3 (2012).

[2] PATRICK PURCELL & JENNIFER STAMAN, CONG. RESEARCH SERV., RL34443, SUMMARY OF EMPLOYEE RETIREMENT INCOME SECURITY ACT (ERISA) 4 (May 19, 2009).

[3] H.R. DOC. NO. 112-102, at 3.

would be subject to a uniform body of benefits law." *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 142 (1990). Congress did not want a system whereby "administrative costs, or litigation expenses, unduly discourage employers from offering ERISA plans in the first place." *Conkright*, 130 S. Ct. at 1649 (internal citations and quotations omitted).

This balance is reflected in the specific plan governance structure mandated by ERISA. "The plan's sponsor (*e.g.*, the employer), like the trust's settlor, creates the basic terms and conditions of the plan [and] executes a written instrument containing those terms and conditions." *CIGNA Corp. v. Amara*, 131 S. Ct. 1866, 1877 (2011). That written instrument names the plan's trustee, who (subject to limited exceptions) is vested by ERISA with "exclusive authority and discretion to manage and control the assets of the plan." 29 U.S.C. § 1103(a). Trustee obligations are so central to plan governance that trustees must accept their appointment in writing and they cannot delegate their responsibilities to "manage and control" plan assets. *Id.*; *see also id.* § 1105(c)(1), (c)(3).

Under another plan governance provision of ERISA, 29 U.S.C. § 1002(16)(A)(i), the written plan instrument established by the employer must also identify "the plan's administrator, a trustee-like fiduciary [who] manages the plan." *CIGNA*, 131 S. Ct. at 1877; *see also* 29 U.S.C. § 1102(a)(1) (written plan instrument "shall provide for one or more named fiduciaries who jointly or severally shall have authority to control and manage the operation and administration of the plan").

Thus, ERISA's plan governance provisions mandate that the sponsoring employer select the plan administrator and trustee, who, under the statute, have fundamental discretionary authority and responsibility over management of the plan and its assets consistent with common law trustee duties. In performing their statutorily-mandated functions of managing the plan and its assets, administrators and trustees are subject to "strict standards of trustee conduct . . . derived from the common law of trusts." *Cent. States, Se. & Sw. Areas Pension Fund v. Cent. Transp.*, 472 U.S. 559, 570 (1985). The statutory authority to control the plan and its assets includes the selection, retention, and monitoring of service providers who provide administrative and investment services to retirement plans. *See* Department of Labor Advisory Opinion 97-16A, issued May 22, 1997.

II. RESPONDENTS' PLANS

This case implicates the tens of thousands of ERISA retirement savings plans for which John Hancock Life Insurance Company (U.S.A.) ("JHUSA") performs administrative services pursuant to contracts with plan administrators or trustees. Respondents participate in two of those plans, each with its own trustees. JA 34-35 (Second Amended Complaint ("SAC") ¶¶ 51-52).[4] Those trustees contracted with JHUSA to provide certain services "for the Contractholder [the plans' trustee]" through group annuity contracts. JA 329. Those services aid the trustees in providing plan benefits. They include preparation of tax forms, provision of

[4] "JA" refers to the Joint Appendix filed in the Third Circuit.

information required to complete Department of Labor forms, plan installation services, provision of an administrative manual, enrollment of participants, record keeping services, and distribution of educational materials. JA 46 (SAC ¶ 114); JA 331.

The trustees also contracted for access to a platform of investment options for the plans and their participants. JA 26-27 (SAC ¶¶ 18-19); JA 260, 318. JHUSA affiliates John Hancock Investment Management Services, LLC, John Hancock Distributors, LLC, and John Hancock Funds, LLC, perform investment management and distribution services with respect to some of those investment options. JA 35-36 (SAC ¶¶ 58; 60-61).

The contracts between Petitioners and the plans' trustees provided that the trustees held all rights of ownership under the contracts. JA 272, 330. The contracts also provided that Petitioners' fees would be paid from the assets invested under the contracts. JA 266, 273, 277, 323, 333, 340. The trustees of each plan have since terminated their contracts with JHUSA. JA 360-61.

III. RESPONDENTS' LAWSUIT

Respondents sued Petitioners for allegedly breaching ERISA fiduciary duties and engaging in prohibited transactions by collecting supposedly excessive fees under the contracts between Petitioners and the plans' trustees. App. 21a, 23a-24a; JA 143-73 (SAC Counts I-VII). Respondents alleged that JHUSA was an ERISA fiduciary with respect to the plans' fees, and that the other Petitioners were liable as non-fiduciaries.

Respondents brought their ERISA claims "as a derivative action on behalf of" their benefit plans. JA 35 (SAC ¶ 53). One of the two ERISA provisions under which they sued, 29 U.S.C. § 1132(a)(2), which allows private suits for relief under 29 U.S.C. § 1109(a), provides for relief only to a "plan." Respondents brought their derivative suit on behalf of a putative class "of [all] ERISA covered employee benefit plans . . . that held, or continue to hold, group annuity contracts with [JHUSA] and on behalf of the participants and beneficiaries of all such ERISA covered employee benefit plans." JA 135 (SAC ¶ 445).

Respondents did not join the trustees of their respective plans in this litigation. They do not allege that the trustees breached any duties in entering the contracts with Petitioners or in failing to bring claims against Petitioners on behalf of the plans. Nor do Respondents allege (i) that they made any pre-suit demand on the trustees to assert plan claims against Petitioners or to enforce the plans' rights, (ii) that Respondents exhausted any plan administrative procedures prior to bringing suit, or (iii) that any such demand or exhaustion would have been futile.

IV. THE DISTRICT COURT'S DECISION

On May 23, 2011, the District Court dismissed Respondents' claims in their entirety. App. 31a. It had jurisdiction pursuant to 29 U.S.C. § 1132(e) and 28 U.S.C. § 1331. The District Court held that Respondents could not state a derivative claim against Petitioners under ERISA absent any allegation that would allow Respondents, rather than the trustees, to sue on behalf of the plans. App. 29a.

The District Court followed traditional principles of trust and derivative law, which provide that litigation

may be brought by a participant on a plan's behalf against third parties only if the participant first makes pre-suit demand on the trustee. The District Court accordingly dismissed the ERISA claims, given that Respondents had not alleged that the trustees had breached their fiduciary duties in entering into the contracts, nor had they alleged that Respondents made a pre-suit demand on the trustees or that demand should be excused due to futility, nor had they joined the trustees, or made any "allegation[], which, if proven, would establish that the trustees improperly refused to bring suit." App. 29a.[5]

V. THE THIRD CIRCUIT'S DECISION AND SUBSEQUENT PROCEEDINGS

On April 16, 2012, the Third Circuit reversed dismissal of Respondents' ERISA claims. App. 20a.

In so doing, the Third Circuit stated that ERISA's remedial provisions, 29 U.S.C. § 1132(a)(2) and (a)(3), are "silent as to pre-suit demand and mandatory joinder of trustees" and contain "no preconditions on a participant or beneficiary's right to bring a civil action to remedy a fiduciary breach." App. 16a. Relying on cases brought against plan trustees (and not third parties, as here), the Third Circuit held that the "protective purposes of ERISA would be subverted if the section covering fiduciary breach required beneficiaries to ask trustees to sue themselves." *Id.* at 18a.

The Third Circuit explicitly rejected the application under ERISA of centuries-old trust law principles that repose authority to sue third parties on behalf of a

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[5] The District Court also dismissed Respondents' non-ERISA claims, which are not at issue here. App. 29a-31a.

trust with the trustee, not the trust beneficiaries, absent satisfaction of preconditions such as pre-suit demand. App. 19a-20a. It did so based on a congressional committee report of an unenacted bill, which it read to reflect "that Congress did not intend to impose obstacles such as pre-suit demand or mandatory joinder of trustees with respect to claims brought under [§ 1132(a)]." *Id.* at 18a-19a (citing S. REP. NO. 93-127, at 3 (1973), *reprinted in* 1974 U.S.C.C.A.N. 4838, 4871).

Petitioners timely petitioned for rehearing and rehearing *en banc*, which petition was denied on May 15, 2012. App. 35a-36a.

REASONS FOR GRANTING THE PETITION

The Third Circuit ruled that ERISA plan participants may sue a plan's service providers on behalf of the plan without any requirement to first present the plans' claims to the trustees. That decision conflicts directly with the Eleventh Circuit's decision in *Bickley*, 461 F.3d 1325, which held that a participant may not bring such a suit without first presenting the plan's claim to the plan administrator or trustee.

This split undermines the uniformity of benefit plan administration under ERISA. Participants in the same multi-state plan either will or will not be able to bring claims derivatively against service providers without first presenting the claims to the plan administrator or trustee, based on the happenstance of the circuit in which they live.

Moreover, the Third Circuit's decision is contrary to fundamental trust and derivative law principles, as well as the statutorily-mandated plan governance

structure. The decision will hinder the effective operation of employee benefit plans by removing decision-making over plan litigation functions from plan administrators and trustees. It will foster judicial inefficiency by allowing litigation to proceed without passing through the plan governance structure established by Congress. The costs of plan operation will rise and employers will be discouraged from establishing and maintaining employee benefit plans.

I. THE PETITION SHOULD BE GRANTED TO RESOLVE THE INTER-CIRCUIT CONFLICT

A. The Third Circuit's Decision Directly Conflicts with a Decision of the Eleventh Circuit

The Third Circuit ruling in this case directly conflicts with the decision of the Eleventh Circuit in *Bickley v. Caremark*.

Bickley and *Santomenno* both were breach of ERISA fiduciary duty suits brought by plan participants on behalf of their plans against service providers contracting with the plan administrators or trustees with respect to the service providers' receipt of contractual fees. The defendants in *Bickley* were pharmacy benefits managers hired by the plan administrator, Georgia-Pacific Corporation. Here the defendants provided administrative and investment services for trustees of two 401(k) plans. The district courts in both cases dismissed the claims, holding that the participants were required to first present plan claims against the service providers to the plan administrator or trustees.

The Eleventh Circuit affirmed, holding that the plaintiff could not proceed with the plan's claim without exhausting administrative remedies that would allow the plan administrator to "receive and review" the claim and "respond" before suit was filed. *Bickley*, 461 F.3d at 1329-30. The Eleventh Circuit observed that requiring the participant to present the plan's claim first to the plan administrator would allow the administrator to decide whether to "pursu[e] a claim" against the service provider. *Id.* at 1330 n.9. Given the administrator's authority over plan management, the Eleventh Circuit reasoned, the administrator had "the duty to consider the pursuit of breach of fiduciary duty claims on behalf of the Plan." *Id.* at 1330. In particular, where "the alleged injury to the Plan arises from a contractual relationship between [the plan administrator] and [the provider]," the administrator should be allowed "an opportunity to fully consider [the participant]'s allegations [to] determine, as trustee of the Plan, whether it is in the best interest of the Plan to pursue such allegations." *Id.*

The Eleventh Circuit explained the numerous benefits of requiring a participant to first present breach of fiduciary duty claims to the plan administrator before seeking relief in court. That procedure:

> reduce[s] the number of frivolous lawsuits under ERISA, minimize[s] the cost of dispute resolution, enhance[s] the plan's trustees' ability to carry out their fiduciary duties expertly and efficiently by preventing premature judicial intervention in the decisionmaking process, and allow[s] prior fully considered actions by pension plan

> trustees to assist courts if the dispute is eventually litigated.

461 F. 3d at 1330 (alteration in original) (quoting *Mason v. Cont'l Grp., Inc.*, 763 F.2d 1219, 1227 (11th Cir. 1985), *cert. denied*, 474 U.S. 1087 (1986)).

The Eleventh Circuit recognized that a participant would not be required to first present plan claims for breach of fiduciary duty challenging a service provider's fees if "it would be futile or the remedy inadequate." 461 F. 3d at 1328. In *Bickley*, however, the participant did not adequately allege futility or inadequacy of remedy, resulting in dismissal of the complaint. *Id.* at 1330 & n.9.

By contract, as described above, the Third Circuit reached a directly contrary result here. It allowed plan participants to sue service providers for alleged breach of fiduciary duties as to the fees under contracts with the plan trustees without any requirement that the derivative claims first be presented to the plan trustees. Accordingly, under indistinguishable facts, the Third Circuit and the Eleventh Circuit have reached opposite conclusions.

B. The Inter-Circuit Conflict Creates Inconsistent Obligations

This split of authority between the Third and Eleventh Circuits warrants the Court's review because the decisions are "so inconsistent in theory as to leave the intent and meaning of the statute in a state of confusion." EUGENE GRESSMAN, ET AL., SUPREME COURT PRACTICE 268 (9th ed. 2007) [hereinafter GRESSMAN]. This unresolved split creates precisely the type of "serious hindrance to effective administration of the law" that warrants

review by this Court. *Id.* at 267. This Court has long recognized that standards for bringing derivative claims are "too important to be denied review." *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949) (granting certiorari to determine bond requirements for derivative suit).

This inter-circuit conflict impedes uniform application of ERISA. In the Eleventh Circuit, plan administrators and trustees will have the ability to control decisions regarding litigation on behalf of the plan concerning service provider fees. But in the Third Circuit, administrators and trustees may be completely bypassed by plan participants when it comes to plan litigation decisions. This discrepancy fundamentally undermines ERISA's central goal of "nationally uniform administration of employee benefit plans." *N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 657 (1995); *see also Conkright*, 130 S. Ct. at 1649 (citing *Rush Prudential HMO, Inc. v. Moran*, 536 U.S. 355, 379 (2002)).

Not only are different plans subject to different rules in light of the split created by the Third Circuit's decision, but in many cases the contradictory rules will apply to the *very same plan*. For example, *Bickley* was brought in the Northern District of Alabama by one of the 40,000 employees of the Georgia-Pacific Corporation—over 700 of whom work in Georgia-Pacific facilities located in the Third Circuit.[6] The *Bickley* service provider also operates

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[6] *See* Georgia-Pacific Company Overview, http://www.gp.com/aboutus/companyOverview/index.html (last visited July 13, 2012); *see also* Georgia-Pacific Locations, http://www.gp.com/facilitydirectory/index.html (last visited July 13, 2012).

throughout the country, including in the Third Circuit, where it provides the pharmacy benefit services challenged in *Bickley*.[7] Thus, if a Georgia-Pacific employee residing in the Third Circuit sues a *Bickley* plan service provider, the precise suit that the Eleventh Circuit disallowed could proceed against the same defendant with respect to the very same conduct.

That inconsistent result defeats the congressional goal of uniformity in the administration of ERISA plans and thwarts the larger congressional objective of encouraging employers to offer employee benefits. This Court has long recognized that uniformity encourages employers—who have no obligation to establish or maintain benefit plans—to continue to offer these critical programs: "A patchwork scheme of regulation would introduce considerable inefficiencies in benefit program operation, which might lead those employers with existing plans to reduce benefits, and those without such plans to refrain from adopting them." *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 11 (1987). Given the essential role of voluntary employer retirement plans in providing for the financial security of millions of Americans, the importance of this split can hardly be overstated.

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[7] *See* CVS Caremark Locations, http://info.cvscaremark.com/careers/locations (last visited July 13, 2012).

C. This Case Presents the Court with a Rare Opportunity to Address an Important Issue of Plan Administration that Broadly Impacts Employee Benefit Plans

The fundamental divide between the Third and the Eleventh Circuits' approaches to a core statutory question raises a new issue under ERISA. Allowing this conflict to go unaddressed will create significant confusion over (i) ERISA's plan governance structure, (ii) the circumstances under which participants can usurp the decision-making authority of plan administrators and trustees, and (iii) whether a service provider to an ERISA plan can be confident in dealing with the administrator or trustee as counterparty to a contract. That confusion will impact millions of plan participants and beneficiaries who receive vital benefits through ERISA plans. The Third Circuit's decision materially increases exposure to those who perform critical functions for employee benefit plans, with the effect that fees to plans will ultimately increase to compensate for the additional litigation risk. This, in turn, could affect the decisions employers make regarding whether to establish or maintain these plans.

This Court's review is necessary to provide clarity and guidance in this important area of federal law. Given that this specific circuit split has arisen just now, nearly forty years after ERISA's passage, the Court may not have another foreseeable opportunity to address this critical question of national importance.

II. THE INTER-CIRCUIT CONFLICT REFLECTS A LONG-STANDING AND DEEP DIVISION AMONG THE COURTS OF APPEALS OVER A BROADER QUESTION ABOUT ERISA'S REMEDIES

The inter-circuit split created by this case arises against the backdrop of the broader question whether exhaustion is required for breach of ERISA fiduciary duty claims—a question that was expressly left open in *LaRue v. DeWolff, Boberg & Assocs., Inc.*, 552 U.S. 248, 253 n.3 (2008) ("we do not decide whether petitioner . . . was required to exhaust remedies set forth in the Plan before seeking relief in federal court pursuant to [§ 1132(a)(2)]"); *see also id.* at 259 n.* (Roberts, C.J., concurring) ("Sensibly, the Court leaves [this issue] open.").

Even though nothing in the statutory remedial sections explicitly provides for a pre-suit requirement, all circuits require participants to exhaust their plans' administrative remedies before bringing suit for plan benefits, typically under 29 U.S.C. § 1132(a)(1)(B).[8] The Eleventh and Seventh

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[8] *See Drinkwater v. Metro. Life Ins. Co.*, 846 F.2d 821, 826 (1st Cir. 1988); *Leonelli v. Pennwalt Corp.*, 887 F.2d 1195, 1199 (2d Cir. 1989); *Kilkenny v. Guy C. Long, Inc.*, 288 F.3d 116, 123 (3d Cir. 2002); *Makar v. Health Care Corp. of the Mid-Atl. (Carefirst)*, 872 F.2d 80, 82 (4th Cir. 1989); *Bourgeois v. Pension Plan for Emps. of Santa Fe Int'l Corps.*, 215 F.3d 475, 479 (5th Cir. 2000); *Hill v. Blue Cross & Blue Shield of Mich.*, 409 F.3d 710, 720 (6th Cir. 2005); *Edwards v. Briggs & Stratton Ret. Plan*, 639 F.3d 355, 365 (7th Cir. 2011); *Wert v. Liberty Life Assurance Co. of Bos., Inc.*, 447 F.3d 1060, 1063 (8th Cir. 2006); *Diaz v. United Agr. Emp. Welfare Benefit Plan & Trust*, 50 F.3d 1478, 1483 (9th Cir. 1995); *Held v. Mfrs. Hanover Leasing Corp.*, 912 F.2d 1197, 1206 (10th Cir. 1990); *Springer v. Wal-Mart Assocs.' Grp. Health Plan*, 908 F.2d 897, 899 (11th Cir.

Circuits have extended this principle to require exhaustion before participants may litigate ERISA statutory claims, such as claims for breach of fiduciary duty.[9] Other circuits, however, require pre-suit exhaustion only with respect to claims for benefits.[10] The Sixth Circuit has avoided addressing this "difficult issue,"[11] as has the Second Circuit.[12] Simply put, the circuits are in "sharp disagreement" regarding whether exhaustion is required for ERISA suits other than those seeking benefits. *Smith v. Sydnor*, 184 F.3d at 364; *see also Mason*, 474 U.S. at 1087 (White, J., dissenting from denial of certiorari).

This continued circuit split will invite wasteful litigation and forum shopping. The same fact pattern can often be presented either as a claim for benefits or a claim for breach of fiduciary duty. *See LaRue*,

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1990); *Commc'ns Workers of Am. v. AT & T*, 40 F.3d 426, 432 (D.C. Cir. 1994).

[9] *See Mason*, 763 F.2d at 1227; *Lindemann v. Mobil Oil Corp.*, 79 F.3d 647, 650 (7th Cir. 1996).

[10] *See Zipf v. AT & T Co.*, 799 F.2d 889, 891-95 (3d Cir. 1986); *Smith v. Sydnor*, 184 F.3d 356, 364 (4th Cir. 1999); *Milofsky v. Am. Airlines, Inc.*, 442 F.3d 311, 313 (5th Cir. 2006); *Amaro v. Cont'l Can Co.*, 724 F.2d 747, 752 (9th Cir. 1984); *Held*, 912 F.2d at 1205.

[11] *Hill*, 409 F.3d at 717.

[12] While the Second Circuit has declined to require pre-suit demand when a participant sues a trustee, *see Coan v. Kaufman*, 457 F.3d 250, 258 (2d Cir. 2006), it has not addressed whether a participant can sue a third-party service provider hired by the trustee absent pre-suit demand or other condition. It has acknowledged that the broader question regarding whether a participant bringing "statutory claims" must exhaust administrative remedies remains open in that circuit. *Nechis v. Oxford Health Plans, Inc.*, 421 F.3d 96, 102 (2d Cir. 2005).

552 U.S. at 257-58 (Roberts, C.J., concurring); *Drinkwater*, 846 F.2d at 826. It logically follows that in circuits requiring that only benefits claims first be presented to the plan administrator, litigation over whether a claim is better characterized as seeking benefits or relief for breach of fiduciary duty will occupy the courts' scarce resources. The opportunity to provide guidance that will help to clarify this broader question provides yet another reason to grant the petition.

III. THE PETITION SHOULD BE GRANTED BECAUSE THIS CASE WOULD ALLOW THE COURT TO ADDRESS AN IMPORTANT FEDERAL ISSUE ABOUT THE ROLE OF TRUST LAW IN ERISA'S PLAN GOVERNANCE STRUCTURE

The Third Circuit decision rejects well-settled principles of trust law and derivative litigation, undercuts the congressionally-mandated plan governance structure, and relies on a committee report concerning unenacted legislation that has been specifically rejected by this Court as not persuasive in interpreting ERISA's remedial provisions. The question presented therefore raises important matters of federal law warranting certiorari under Supreme Court Rule 10(c), in addition to the need to resolve a serious circuit split.

A. The Third Circuit Repudiated Trust and Derivative Law Protections Adopted Over Centuries of Common Law Development

The Third Circuit's rejection of relevant trust law jeopardizes the valuable protections for beneficiaries, and checks on trustees' authority, erected through centuries of evolution of trust and derivative law.

This Court has long recognized that "Congress invoked the common law of trusts to define the general scope of [the] authority and responsibility" of ERISA trustees. *Cent. States*, 472 U.S. at 570. Indeed, "ERISA abounds with the language and terminology of trust law." *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 110 (1989). "[T]he law of trusts . . . 'serves as ERISA's backdrop.'" *Kennedy v. Plan Adm'r for DuPont Sav. & Inv. Plan*, 555 U.S. 285, 294 (2009) (quoting *Beck v. PACE Int'l Union*, 551 U.S. 96, 101 (2007)). Accordingly, "the common law of trusts . . . informs [the Court's] interpretation of ERISA's fiduciary duties." *LaRue*, 552 U.S. at 253 n.4. This Court "look[s] to 'principles of trust law' for guidance" when "ERISA's text does not directly resolve the matter." *Conkright*, 130 S. Ct. at 1646 (quoting *Firestone*, 489 U.S. at 109).

In this regard, trust law has developed a framework based on centuries of judicial experience devoted to protecting beneficiaries and to the appropriate regulation of trustee authority. One bedrock principle of trust law is that, subject to certain exceptions, "[i]t is for the trustee and not for the beneficiaries to sue the third party" on behalf of a trust. 5 AUSTIN WAKEMAN SCOTT ET AL., SCOTT AND ASCHER ON TRUSTS § 28.2 at 1941 (5th ed. 2008) [hereinafter SCOTT AND ASCHER ON TRUSTS]; *accord*

GEORGE T. BOGERT, TRUSTS § 166 at 609-10 (6th ed. 1987); RESTATEMENT (SECOND) OF TRUSTS [hereinafter RESTATEMENT] § 282(1) (1959).

Jurisprudence developed over four hundred years establishes that trustees, not beneficiaries, are the appropriate parties to commence and manage litigation on behalf of a trust. *See, e.g.*, *Lord Compton's Case*, (1586) 74 Eng. Rep. 629 (C.P.) (beneficial owner of land cannot sue a third party taking land from the trustee); SCOTT AND ASCHER ON TRUSTS § 28.2 at 1940-41. This Court, for example, has previously noted that "[i]n most cases, a trustee has the exclusive authority to sue third parties who injure the beneficiaries' interest in the trust . . . ." *Chauffeurs Local No. 391 v. Terry*, 494 U.S. 558, 567 (1990) (citation omitted).

The principle that, absent an exception, only a trustee may sue a third party on behalf of a trust applies where, as here, the third party is alleged to have breached fiduciary duties to the trust and its beneficiaries. *See, e.g.*, *Slaughter v. Swicegood*, 591 S.E.2d 577, 582-84 (N.C. Ct. App. 2004); *Saks v. Damon Raike & Co.*, 8 Cal. Rptr. 2d 869, 874-75 (Cal. Ct. App. 1992). A trustee is obligated to protect the interests of the entire trust and all of its beneficiaries through litigation, if necessary—*i.e.*, controlling the trust's chose in action—just as the trustee is obligated to protect the trust through its control of other trust assets. *See* RESTATEMENT § 282 cmt. a. Individual beneficiaries, of course, have no such responsibility to the trust as a whole or to other beneficiaries.

Exceptions to this rule have developed over the years, however, which provide limitations on trustees

under specific circumstances. For example, a beneficiary may sue a third party on behalf of the trust if the beneficiary first makes a demand on the trustee to sue and the demand is improperly rejected. *Firestone v. Galbreath*, 976 F.2d 279, 283-84 (6th Cir. 1992), *aff'd in relevant part and rev'd in part*, 25 F.3d 323 (6th Cir. 1994). Another exception applies if the plaintiff demonstrates that demand would be futile. GEORGE G. BOGERT & GEORGE T. BOGERT, THE LAW OF TRUSTS AND TRUSTEES § 869 (2d ed. rev. 1995).

These trust law principles are similar to the rules that govern derivative litigation under other legal regimes, which also require a person suing on another's behalf to make pre-suit demand or satisfy another precondition to suit. *See Corbus v. Alaska Treadwell Gold Mining Co.*, 187 U.S. 455, 463 (1903) (corporate derivative law); *Hawes v. City of Oakland*, 104 U.S. 450, 454 (1882) (same, as applied to corporate directors and trustees). The pre-suit demand requirement in the corporate derivative law context "delimit[s] the respective powers of the individual shareholder and of the directors to control corporate litigation." *Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 95-96 (1991). The rule "provides a safeguard against abuse that could undermine the principle of corporate governance that the decisions of a corporation, including the decision to initiate litigation, should be made by the board of directors." 13 WILLIAM MEADE FLETCHER ET AL., FLETCHER CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 5963 (rev. vol. 2004).

These principles should equally apply in the context of employee benefit plans whose administrators and trustees are vested with

exclusive decision-making authority on behalf of plans. Courts have long recognized the value of deferring to the judgment of ERISA trustees: "[b]ecause of the trustees' presumed expertise and familiarity with the fund, it is for trustees, not judges, to choose between various reasonable alternatives." *Elser v. I. A. M. Nat'l Pension Fund*, 684 F.2d 648, 654 (9th Cir. 1982) (internal citations omitted); *accord Mahoney v. Bd. of Trs., Bos. Shipping Ass'n-Int'l Longshoremen's Ass'n*, 973 F.2d 968, 972 (1st Cir. 1992) (deferring to ERISA "trustees' discretion and expertise") (Breyer, C.J.).

Allowing administrators and trustees to first evaluate the validity of a plan's claims also gives them the ability to seek other resolutions to the claims—including appropriate (and less burdensome) out-of-court solutions. *See Bickley*, 461 F.3d at 1330. And it provides a well-calibrated balance that still affords participants the ability to sue if the trustees improperly refuse to do so or are otherwise impaired.

Pre-suit demand and the other preconditions to suit applied under trust and derivative-litigation law thus provide appropriate trustee regulation, protection for beneficiaries, and clarity for those who, like Petitioners, rely on the authority of trustees in contracting to provide services. These rules also foster judicial efficiency by allowing plan administrators and trustees to first review claims, which "reduces the number of frivolous lawsuits under ERISA . . . and allows prior fully considered actions by pension plan trustees to assist courts if the dispute is eventually litigated." *Bickley*, 461 F.3d at 1330 (quoting *Mason*, 763 F.2d 1219, 1227 (11th Cir. 1985)).

The facts here demonstrate why the trustees should have had an opportunity to review the claims against Petitioners. The operative complaint spans 215 pages. JA 14-229. It asserts seven ERISA counts challenging multiple aspects of the complex service provider arrangement and the fees that the trustees authorized. "As in many ERISA matters, the facts of this case are exceedingly complicated." *Conkright*, 130 S. Ct. at 1644. Accordingly, this is precisely the type of "complex or technical factual context" that benefits from a review by ERISA plan administrators or trustees before plan claims are brought in court. *Cf. McCarthy v. Madigan*, 503 U.S. 140, 145 (1992) (describing benefits to exhaustion under the Civil Rights of Institutionalized Persons Act).

In sum, the Third Circuit erred in holding that fundamental trust law principles are not applicable to ERISA.

B. The Third Circuit's Decision Disregards the Central Statutory Role of Trustees and Administrators in ERISA Plan Governance

Not only did the Third Circuit reject trust and derivative law principles, but its decision undercuts the plan governance structure required by statute.

Plan administrators and trustees are central to ERISA's plan governance structure, as described above in the Statement of the Case. ERISA requires that the trustees named by the employer have "*exclusive authority* and discretion to manage and control the assets of the plan." 29 U.S.C. § 1103(a)

(emphasis added).[13] It also requires the employer to name "the plan's administrator, a trustee-like fiduciary [who] manages the plan." *CIGNA*, 131 S. Ct. at 1877. *See generally* 29 U.S.C. § 1102(a) ("named fiduciaries" have "authority to control and manage the operation and administration of the plan"). Administrators and trustees are subject to strict fiduciary duties in carrying out their responsibilities on behalf of their plans. *Id.* §§ 1104, 1106.

Thus, ERISA's plan governance provisions mandate that the plan administrators and trustees have fundamental discretionary authority and responsibility over management of the plan and its assets, consistent with common law trustee-like duties. That governance structure necessarily contemplates that plan administrators and trustees will be afforded the opportunity to control decisions to sue entities with whom they contract to provide services to their plans, just as common law trustees can control litigation on behalf of their trusts. *See* RESTATEMENT §§ 177, 192 (describing trustee power to enforce, compromise, and abandon claims on behalf of trusts). As this Court has long recognized, "ERISA clearly assumes that trustees will act to

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[13] Plan assets include the plan's claims against third parties. *See generally Sec'y of Labor v. Doyle*, 675 F.3d 187, 203-04 (3d Cir. 2012); *In re Halpin*, 566 F.3d 286, 290 (2d Cir. 2009); *In re Luna*, 406 F.3d 1192, 1199-2000 & n.5 (10th Cir. 2005); *cf.* RESTATEMENT § 82 cmt. a (1959) (chose in action is a trust asset); RESTATEMENT §§ 192, 280. The statutory exceptions to the exclusive trustee role over plan assets (29 U.S.C. § 1103(b)) do not apply where, as here, the plans at issue are in fact managed by the trustees.

ensure that a plan receives all funds to which it is entitled." *Cent. States*, 472 U.S. at 571.

The congressional understanding of the role of an administrator and trustee in litigation is embodied in the ERISA provisions that grant administrators and trustees, as plan fiduciaries, the authority to bring claims on behalf of the plan to remedy fiduciary breaches committed by others. *See* 29 U.S.C. §§ 1109(a), 1132(a)(2). While § 1132(a)(2) also provides that such actions "may be brought" by a plan participant for "appropriate relief," the statute does not expressly address whether a participant seeking to bring an action on behalf of the plan against someone other than the plan administrator or trustee must—in light of the trust law principles and plan governance structure described above—first present that claim to the plan administrator or trustee.

By ignoring the statutory governance provisions—and focusing instead only on the absence of an express pre-suit requirement in ERISA's remedial provisions, 29 U.S.C. § 1132(a)(2) and (3)—the Third Circuit failed to heed this Court's caution that "a statute is to be read as a whole . . . since the meaning of statutory language, plain or not, depends on context." *King v. St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991). The Court requires that courts "construe statutes, not isolated provisions." *Gustafson v. Alloyd Co.*, 513 U.S. 561, 568 (1995) (citing *Philbrook v. Glodgett*, 421 U.S. 707, 713 (1975)); *see also LaRue*, 552 U.S. at 254 (reviewing "ERISA as a whole") (citing *Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 142 n.9 (1985)).

Looking at ERISA as a whole, this Court has repeatedly recognized the primary authority of plan administrators and trustees over matters of plan management. In *Firestone*, for example, the Court held that a plan fiduciary's discretionary benefits determination should be afforded deference and reviewed only for abuse of discretion. 489 U.S. at 111. Even though that deferential standard does not appear in the statute, application of this trust law rule effectuates the congressional intent to empower employers to determine plan governance: "*Firestone* deference . . . permit[s] an employer to grant primary interpretive authority over an ERISA plan to the plan administrator." *Conkright*, 130 S. Ct. at 1644, 1649.

Deference to the decision-making authority of trustees and plan administrators is not only required when looking at the statute as a whole, but it also advances Congress's goal of encouraging plan formation by promoting "predictability" and "uniformity." *Conkright*, 130 S. Ct. at 1649. It allows employers to "rely on the expertise of the plan administrator" and avoid a "patchwork" of different outcomes. *Id.* The deference afforded to plan administrators and trustees is so important to ERISA's governance structure and remedial scheme that this Court has held that even where an administrator has committed a good-faith error in plan administration, continued deference to the administrator's decision is nonetheless appropriate. *Conkright*, 130 S. Ct. at 1647. This deference can apply even where the plan administrator has a conflict of interest. *Glenn*, 554 U.S. at 115-16.

Allowing plan administrators and trustees to fulfill their statutory role in managing their plan's

affairs is therefore a critical component of encouraging employers to establish voluntary, yet vitally important, employee benefit plans. As Chief Justice Roberts has explained, "[e]nsuring that reviewing courts respect the discretionary authority conferred on ERISA fiduciaries encourages employers to provide . . . benefits to their employees through ERISA-governed plans." *Glenn*, 554 U.S. at 120 (Roberts, C.J., concurring).

By contrast, the Third Circuit's ruling effectively turns the statutory plan governance structure on its head—granting participants exclusive authority to determine whether suit will be brought on behalf of the plan, while excluding administrators and trustees completely from that determination.

The Third Circuit's decision is also illogical in that, although administrators and trustees are typically exclusively responsible for selecting, hiring, monitoring, and even firing service providers, its decision allows plan participants to decide whether a plan should litigate against the same provider with respect to the same conduct. Participants—who do not have any responsibility as to hiring, monitoring, or firing service providers, and are not required to take into account the needs of an entire plan—should not be allowed to usurp the authority of administrators and trustees to decide whether to sue providers.[14] The Third Circuit's judgment is equally

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[14] The concern expressed by the Third Circuit that a pre-suit demand requirement would "subvert[]" the protective purposes of ERISA by "requir[ing] beneficiaries to ask trustees to sue themselves" is simply inapposite because the split with the Eleventh Circuit involves only suits against *third-party service providers*, not suits against trustees. App. 18a. In any event, similar derivative claims in other contexts (such as such

inappropriate from the perspective of the service provider, who generally should be entitled to rely on the administrator or trustee with whom it negotiated and contracted to provide the challenged services.

C. The Third Circuit Improperly Interpreted ERISA by Reference to a Committee Report of an Unenacted Bill—Legislative History that Was Specifically Rejected by This Court

The Third Circuit also erred by justifying its rejection of trust law principles based upon the legislative history of a bill that was never enacted. App. 19a-20a (quoting S. REP. NO. 93-127). Doing so provides yet another rationale for this Court to hear this case, particularly where the Third Circuit relied upon the committee report of an unenacted proposal that (i) did not contain the plan governance structure of the final bill and (ii) was rejected by this Court as unhelpful in construing ERISA's remedial provisions.

The unenacted legislative proposal to which the cited committee report pertains is inapposite because it contained no governance role for a trustee at all, did not require plan assets to be held in trust, and did not even allow a trustee to sue. *See* App. 19a (citing S. REP. NO. 93-127, at 3).[15] By contrast,

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shareholder derivative litigation under corporate law) have long been an effective way to protect the interests of corporate entities notwithstanding the unusual posture under which corporate decision-makers must, in the first instance, be demanded to correct the challenged conduct before they may be sued.

[15] *See* S. 4, 93d Cong. §§ 15, 603 (as reported by S. Comm. on Labor & Pub. Works, Jan. 4, 1973), *reprinted in* 1 LEGISLATIVE HISTORY OF THE EMPLOYEE RETIREMENT INCOME SECURITY ACT

ERISA as enacted places trustees at the heart of the plan governance structure and expressly affords them statutory standing to sue. *See supra* at Statement of the Case; 29 U.S.C. § 1132(a)(2)-(3). The legislative history of the final version of the law emphasizes the "special responsibilities with respect to plan assets" imposed upon trustees.[16]

The Third Circuit's mistaken use of inapposite legislative history is particularly troubling because this Court has previously rejected this very committee report as a basis upon which to expand ERISA remedies. *See Russell*, 473 U.S. at 145-46 (S. REP. NO. 93-127 "is of little help" in interpreting ERISA because it addresses language different from that which was "ultimately adopted"). *See also Lafoy v. HMO Colo.*, 988 F.2d 97, 100 n.4 (10th Cir. 1993) (reliance on S. REP. NO. 93-127 is "erroneous" because the bill "ultimately passed did not contain [the] provision" to which the Senate report pertained).

For these reasons as well, the Court should accept this case so that it may correct the Third Circuit's erroneous decision. *See generally* GRESSMAN at 281 (case is reviewable where the "lower court's decision is patently incorrect").

OF 1974, at 565-77, 579-80 (1976) (fiduciary standards and enforcement provisions of the Retirement Income Security For Employees Act (1973)).

[16] H.R. REP. NO. 93-1280, at 298 (1974) (ERISA Conf. Rep.), *reprinted in* 1974 U.S.C.C.A.N. 5038, 5078.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

JAMES O. FLECKNER
Counsel of Record
DANIEL P. CONDON
ALISON V. DOUGLASS
GOODWIN PROCTER LLP
Exchange Place
53 State Street
Boston, Mass. 02109
jfleckner@goodwinprocter.com
(617) 570-1000
Attorneys for Petitioners

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 11–2520

DANIELLE SANTOMENNO, for the use and benefit of the John Hancock Trust and the John Hancock Funds II, et al.,
Plaintiffs,

v.

JOHN HANCOCK LIFE INSURANCE COMPANY (U.S.A.), et al.,
Defendants.

Argued February 9, 2012
Decided April 16, 2012

Before: SLOVITER and VANASKIE, *Circuit Judges*, and POLLACK*, *District Judge*.

VANASKIE, *Circuit Judge*.

Danielle Santomenno, Karen Poley, and Barbara Poley (collectively, "Participants") brought suit against John Hancock Life Insurance Company (U.S.A.) and its affiliates (collectively, "John Hancock") under the Employment Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1001 et seq., and the Investment

* Honorable Louis H. Pollak, Senior Judge of the United States District Court for the Eastern District of Pennsylvania, sitting by designation.

Company Act of 1940 (ICA), 15 U.S.C. § 80a–1 et seq., for allegedly charging their retirement plans excessive fees on annuity insurance contracts offered to plan participants. The District Court granted John Hancock's motion to dismiss. It dismissed the ICA excessive fee claims because only those maintaining an ownership interest in the funds in question could sue under the derivative suit provision enacted by Congress and the Participants are no longer investors in the funds in question. As to the ERISA claims, the District Court found that dismissal was warranted because Participants failed to make a pre-suit demand upon the plan trustees to take appropriate action and failed to join the trustees as parties. We affirm the District Court's judgment with regards to the ICA claims, but vacate and remand on the ERISA counts.

I.

This action arises out of the administration of employer-sponsored 401(k) benefit plans. The trustees of these plans entered into group annuity contracts with John Hancock. Participants brought this action on March 31, 2010. The basis of Participants' complaint is that John Hancock charged a variety of excessive fees in providing investment services to these plans. Santomenno was a security holder in the relevant funds from July 2008 through sometime in June 2010, K. Poley from July 2004 to sometime in January 2010, and B. Poley from January 2009 to sometime in January 2010. Counts I through VII were brought under Section 502(a) of ERISA, 29 U.S.C. § 1132(a). Count VIII was brought under Section 36(b) of the ICA, 15 U.S.C. § 80a–35(b), and Count IX was brought under Section 47(b) of the ICA, 15 U.S.C. § 80a–46(b).

John Hancock moved to dismiss under FED. R. CIV. P. 12(b)(6). Drawing upon the common law of trusts, the District Court found that all of Participants' theories of liability under ERISA were derivative and dismissed all seven ERISA counts because Participants did not first make demand upon the trustees of the plan and did not join the trustees in the lawsuit. As the District Court explained:

> In short, absent demand, or allegations going to demand futility, or some allegations, which if proven, would establish that the trustees improperly refused to bring suit, it would appear that the beneficiaries of an ERISA plan cannot bring a claim under Section 502. Likewise, any such suit must join the plan's trustees. Here, because there are no such factual allegations and because the trustees have not been joined, dismissal of the ERISA counts, counts I through VII, would seem to be proper.

Santomenno ex rel. John Hancock Trust v. John Hancock Life Ins. Co. (U.S.A.), No. 2–10–cv–01655, 2011 WL 2038769, at *4 (D.N.J. May 23, 2011) (citing *McMahon v. McDowell,* 794 F.2d 100, 110 (3d Cir. 1986)).

The District Court dismissed Count VIII, brought under section 36(b) of the ICA, because Participants no longer owned any interest in John Hancock funds. The District Court observed that "continuous ownership throughout the pendency of the litigation [is] an element of statutory standing." *Id.* at *5 (citing *Siemers v. Wells Fargo & Co.,* No. C 05–04518 WHA, 2007 WL 760750, at *20 (N.D. Cal. Mar. 9, 2007)). The District Court proceeded to dismiss Count IX because, in its view, Section 47(b) of the ICA could only provide

relief to Participants if they could "show[ ] a violation of some other section of the Act." *Id.* (quoting *Tarlov v. Paine Webber Cashfund, Inc.,* 559 F. Supp. 429, 438 (D. Conn. 1983)). Because Participants' Section 36(b) claim had been dismissed in Count VIII, the District Court reasoned that "the Section 47(b) claim would seem to fail also." *Id.*

II.

The District Court had subject-matter jurisdiction pursuant to Section 502(e) of ERISA, 29 U.S.C. § 1132(e), and Section 44 of the ICA, 15 U.S.C. § 80a–43. We have appellate jurisdiction under 28 U.S.C. § 1291. Our review of an order granting a motion to dismiss is plenary. *Anspach ex rel. Anspach v. City of Phila., Dep't of Pub. Health,* 503 F.3d 256, 260 (3d Cir. 2007). When reviewing a Rule 12(b)(6) dismissal, we accept as true all well-pled factual allegations in the complaint, and view them in the light most favorable to the plaintiffs. *Id.*

A.

We begin by addressing the ICA issues. The first question is whether continuous ownership of securities in the fund in question during the pendency of litigation is required for actions brought under Section 36(b) of the ICA. Section 36(b), in pertinent part, provides:

> For the purposes of this subsection, the investment adviser of a registered investment company shall be deemed to have a fiduciary duty with respect to the receipt of compensation for services, or of payments of a material nature, paid by such registered investment company, or by the security holders thereof, to such investment adviser or any affiliated

> person of such investment adviser. An action may be brought under this subsection by the Commission, or by a security holder of such registered investment company on behalf of such company, against such investment adviser, or any affiliated person of such investment adviser, or any other person enumerated in subsection (a) of this section who has a fiduciary duty concerning such compensation or payments, for breach of fiduciary duty in respect of such compensation or payments paid by such registered investment company or by the security holders thereof to such investment adviser or person.

15 U.S.C. § 80a–35(b). A suit brought under Section 36(b) is similar to a derivative action in that it is brought on behalf of the investment company. Because the action is brought on behalf of the company, "any recovery obtained in a § 36(b) action will go to the company rather than the plaintiff." *Daily Income Fund, Inc. v. Fox,* 464 U.S. 523, 535 n.11 (1984) (citations omitted). Accordingly, "[i]n this respect, a § 36(b) action is undeniably 'derivative' in the broad sense of that word." *Id.* (citations omitted).

In the context of derivative suits governed by FED. R. CIV. P. 23.1, courts have imposed a requirement of continuous ownership.[1] This requirement:

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[1] FED. R. CIV. P. 23.1(a) provides:

This rule applies when one or more shareholders or members of a corporation or an unincorporated association bring a derivative action to enforce a right that the corporation or association may properly assert but has failed to enforce. The derivative action may not be maintained if it appears that the plaintiff does not fairly and adequately represent the interests of shareholders or members who are similarly situated in enforcing the right of the corporation or association.

> [D]erives from the first sentence of Rule 23.1, which refers to actions 'brought by one or more shareholders to enforce a right of a corporation . . . .' The rule's provision that a 'derivative action may not be maintained if it appears that the plaintiff does not fairly and adequately represent the interests of the shareholders . . . similarly situated in enforcing the right of the corporation . . . ,' has served as an anchor for the concept that ownership must extend throughout the life of the litigation.

Lewis v. Chiles, 719 F.2d 1044, 1047 n.1 (9th Cir. 1983) (citations omitted).

Section 36(b) plainly requires that a party claiming a breach of the fiduciary duty imposed by that legislative provision be a security holder of the investment company at the time the action is initiated. *See, e.g., Dandorph v. Fahnestock & Co.,* 462 F. Supp. 961, 965 (D. Conn. 1979). Imposing a *continuous* ownership requirement throughout the pendency of the litigation assures that the plaintiff will adequately represent the interests of the security holders in obtaining a recovery for the benefit of the company.

Participants assert that "there is no basis upon which to impose a continuing ownership requirement on an ICA § 36(b) claim." (Appellant's Br. at 33.) (citations omitted). Several arguments are advanced in support of Participants' position. First, citing two District Court decisions— *In re American Mutual Funds Fee Litigation,* cv–04–05593, 2009 WL 8099820, at *1 (C.D. Cal. Jul. 14, 2009), and *In re Mutual Funds Investment Litigation,* 519 F. Supp. 2d 580, 590 (D. Md. 2007)—Participants contend that FED. R. CIV. P. 23.1 does not apply to suits brought under Section 36(b). Participants also attempt to distinguish *Siemers,*

2007 WL 760750, at *20, the primary case relied upon by the District Court in dismissing the ICA section 36(b) claim. Participants assert that "[*Siemers*] is distinguishable because [that] plaintiff did not have an interest in the investment fund when he filed his complaint. Here, Plaintiff Danielle Santomenno did, but the Poleys did not." (Appellant's Br. at 35.) Participants further offer a policy argument: "the imposition of a continuous-ownership requirement would effectively deter a plaintiff, who wishes to mitigate damages by selling his or her investment, from suing—a result at odds with the salutary goals of the ICA." (Appellant's Br. at 35.)

We disagree with Participants' contentions. First, we note that *In re Mutual Funds Investment Litigation,* one of two cases relied upon by Participants, did not concern the continuous ownership question. Instead, the District Court in that case addressed the *contemporaneous* ownership requirement rather than the *continuous* ownership requirement—the idea "that, *at the time of the alleged harm,* plaintiffs must have owned shares in the fund." 519 F. Supp. 2d at 590 (emphasis added). There was no question in that case that the plaintiffs continued to hold shares in one of the mutual funds in question.[2]

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[2] Notably, the District Court ruled that the plaintiffs did not have standing to assert claims under Section 36(b) on behalf of mutual funds in the same family of funds, *i.e.*, funds sharing a common investment advisor, because Section 36(b) mandates that the plaintiff "be a 'security holder of' the entity on whose behalf he seeks to bring suit." 519 F. Supp. 2d at 589. Thus, to this extent, the District Court acknowledged the derivative nature of a Section 36(b) claim. See also *Kauffman v. Dreyfus Fund, Inc.*, 434 F.2d 727, 735–36 (3d Cir. 1970) (a shareholder

This leaves Participants with *In re American Mutual Funds Fee Litigation*, an opinion that goes against the weight of authority on this topic,[3] and is premised upon an overly expansive reading of the Supreme Court's decision in *Daily Income Fund.* The District Court in *In re American Mutual Funds Fee Litigation* viewed *Daily Income Fund* as dispensing with a continuous ownership standing requirement because such a requirement was recognized in the context of cases arising under FED. R. CIV. P. 23.1, and that rule does not apply to Section 36(b) claims. *Id.* at *1. *Daily Income Fund,* however, addressed only the pre-suit demand requirement of a common derivative action to which Rule 23.1 applies, *i.e.,* that before bringing suit a shareholder must make demand upon the corporation's directors to take appropriate action with respect to a right "the corporation could itself

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of mutual funds who sues on behalf of those funds cannot sue derivatively on behalf of other similarly situated mutual funds because "[s]tanding is justified only by this proprietary interest created by the stockholder relationship and the possible indirect benefits the nominal plaintiff may acquire *qua* stockholder of the corporation which is the real party in interest").

[3] *See, e.g., Siemers,* 2007 WL 760750, at *20 ("For Section 36(b) standing purposes, it is important that the fund be continuously owned during the pendency of the action."); *In re Lord Abbett Mut. Funds Litig.,* 407 F. Supp. 2d 616, 633 (D.N.J. 2005) (plaintiffs cannot bring a Section 36(b) claim "on behalf of Funds in which they have no ownership interest" because such a claim is derivative, *i.e.,* brought on behalf of the Funds), *partially vacated on other grounds,* 463 F. Supp. 2d 505 (D.N.J. 2006); *Brever v. Federated Equity Mgmt. Co. of Pa.,* 233 F.R.D. 429, 431 (W.D. Pa. 2005) (plaintiff who sold his shares after filing suit "divested himself of standing" to bring suit under Section 36(b)); *In re Franklin Mut. Funds Fee Litig,* 388 F. Supp. 2d 451, 468 n. 13 (D.N.J. 2005) (plaintiffs may only bring a Section 36(b) claim "against the . . . funds they owned").

have enforced in court." 464 U.S. at 529 (citations omitted). Because the right created by Section 36(b) could not be read as one belonging to the company itself, the Court held that there was no basis for imposing a pre-suit demand requirement. *Id.* at 542 *Daily Income Fund* did not address the question of whether a securities holder must maintain that status throughout the pendency of the litigation.

Participants mistakenly assume that the root of the continuous ownership requirement is Rule 23.1. Instead, the prerequisite arises from the fact that Congress directed that only the Securities and Exchange Commission and securities holders, *acting on behalf of the investment company,* could bring an action to enforce the rights created by Section 36(b). As the Court recognized in *Daily Income Fund,* any recovery in an action brought under Section 36(b) belongs to the investment company. 464 U.S. at 535 n.11. When a plaintiff disposes of his or her holdings in the company, that plaintiff no longer has a stake in the outcome of the litigation because any recovery would inure to the benefit of existing securities holders, not former ones. A continuous ownership requirement gives effect to this "undeniably 'derivative' " nature of a Section 36(b) claim. *Id.* Stated otherwise, a continuous ownership requirement "reflects a shareholder's real interest in obtaining a recovery for the corporation which increases the value of his holdings." *Chiles,* 719 F.2d at 1047 (citing *Lewis v. Knutson,* 699 F.2d 230, 238 (5th Cir. 1983); *Schilling v. Belcher,* 582 F.2d 995, 1002 (5th Cir. 1978)). As Participants no longer own John Hancock funds, they lack any real interest in securing a recovery.

Participants' policy argument — that a continuous ownership requirement deters a plaintiff from

mitigating damages by preventing him or her from selling shares during the pendency of litigation — is unconvincing. First, because the recovery belongs to the company, not the security holder, *see Daily Income Fund,* 464 U.S. at 535 n.11, it would not seem appropriate to impose a duty to mitigate damages on individual security holders. Moreover, it has long been recognized that only those parties who would actually benefit from a suit may continue to prosecute the action, a rationale that we explicitly adopted in *Kauffman:*

> Standing is justified only by this proprietary interest created by the stockholder relationship and the possible indirect benefits the nominal plaintiff may acquire *qua* stockholder of the corporation which is the real party in interest. Without this relationship, there can be no standing, "no right in himself to prosecute this suit."
>
> 434 F.2d at 735–36 (citations omitted).

Furthermore, we note that even if continuous ownership were not a requirement of Section 36(b), Participants' claim under that Section still fails. As observed above, a plain reading of Section 36(b) indicates that ownership when the suit is first filed is an indisputable prerequisite. The Poleys' interests in the John Hancock funds were terminated prior to the filing of the original complaint. Therefore, they cannot be classified as "security holder[s]" under Section 36(b). Santomenno, meanwhile, still owned John Hancock funds when the case was first initiated, but no longer had any interest in the funds when the Second Amendment Complaint was filed on October 22, 2010. It is the Second Amended Complaint that is

the operative pleading for standing purposes. As the Supreme Court observed in *Rockwell International Corp. v. United States,* 549 U.S. 457 (2007):

> The state of things and the originally alleged state of things are not synonymous; demonstration that the original allegations were false will defeat jurisdiction. So also will the withdrawal of those allegations, unless they are replaced by others that establish jurisdiction. Thus, when a plaintiff files a complaint in federal court and then voluntarily amends the complaint, courts look to the amended complaint to determine jurisdiction.

Id. at 473–74 (citations omitted). Even if we were to hold that continuous ownership is not required by the statute, Participants' Section 36(b) claim would fail because their interests in the John Hancock funds were terminated prior to the filing of the Second Amended Complaint. As a result, they are not security holders entitled to bring an action on behalf of the investment company. Accordingly, dismissal of Participants' Section 36(b) claim was proper.

B.

The second ICA issue is whether Participants' claim under Section 47(b) of the ICA survives a motion to dismiss. Section 47(b), in pertinent part, provides that:

> A contract that is made, or whose performance involves, a violation of [the ICA], or of any rule, regulation, or order thereunder, is unenforceable by either party . . . unless a court finds that under the circumstances enforcement would produce a more equitable result than nonenforcement and would not be inconsistent with the purposes of [the ICA].

15 U.S.C. § 80a–46(b)(1).

Participants argue that the District Court incorrectly dismissed their Section 47(b) claim by erroneously believing it was premised upon a breach of the fiduciary duty provision of Section 36(b) of the ICA. Participants assert that the Section 47(b) claim is not based upon a violation of Section 36(b), but is instead premised upon an alleged violation of Section 26(f) of the ICA, 15 U.S.C. § 80a–26(f), which requires that "the fees and charges deducted under [a registered separate account funding variable insurance contract], in the aggregate, are reasonable in relation to the services rendered, the expenses expected to be incurred, and the risks assumed by the insurance company." 15 U.S.C. § 80a–26(f)(2)(A). While conceding that Section 26(f) does not establish a private cause of action, Participants contend that "its standards are enforceable in an action brought under ICA § 47(b)." (Appellant's Br. at 38.)

Participants contend that because amendments made in 1980 to Section 47(b) "substantially tracked" Section 215 of the Investment Advisers Act of 1940 (IAA), 15 U.S.C. § 80b–15, which had been "previously construed by the Supreme Court [in *Transamerica Mortgage Advisors, Inc. v. Lewis,* 444 U.S. 11, 19 (1979)] to provide a right of action," Section 47(b) similarly creates a private right of action in their favor to seek rescission and restitution. (Appellant's Reply Br. at 24.) Citing *Alexander v. Sandoval,* 532 U.S. 275 (2001), Participants contend that the District Court should have read Section 47(b) of the ICA as the Supreme Court read Section 215 of the IAA — as creating a private right of action: "the Court's reasoning . . . that similarly-worded statutes should be similarly construed, especially when the

statute at issue was enacted after a provision is judicially construed, supports Plaintiffs' position here." (Appellant's Reply Br. at 24–25.)

Participants misread *Sandoval,* which made it clear that only Congress could create private rights of action. 532 U.S. at 286 ("Like substantive federal law itself, private rights of action to enforce federal law must be created by Congress."). Congress empowered the Securities and Exchange Commission to enforce all ICA provisions through Section 42, *see* 15 U.S.C. § 80a–41, while creating an exclusive private right of action in Section 36(b). In *Sandoval,* the Court observed that "[t]he express provision of one method of enforcing a substantive rule suggests that Congress intended to preclude others . . . ." 532 U.S. at 290 (citations omitted).

Unlike Section 36(b) of the ICA, the IAA construed in *Transamerica* did not expressly provide for a private cause of action. *See* 444 U.S. at 14. The *Transamerica* Court observed that where the same statute contains private causes of action in other sections (such as with the ICA), "it is highly improbable that 'Congress absentmindedly forgot to mention an intended private action.' " 444 U.S. at 20 (quoting *Cannon v. University of Chicago,* 441 U.S. 677, 742 (1979) (Powell, J., dissenting)). As the Court explained, "it is an elemental canon of statutory construction that where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it." *Id.* at 19. Thus, one reason why a right of action exists in Section 215 of the IAA but not Section 47(b) of the ICA is because "Congress intended the express right of action set forth in Section 36(b) [of the ICA] to be exclusive;

there was no similar exclusive, express right of action in [the IAA]." *Tarlov,* 559 F. Supp. at 438.

Another reason not to imply the existence of a cause of action under Section 47(b) to enforce the standards of Section 26(f) of the ICA is that Section 26(f) itself does not create investor rights. Section 26(f) states that "[i]t shall be unlawful for any registered separate account funding variable insurance contracts, or for the sponsoring insurance company of such account, to sell any such contract . . . unless the fees and charges deducted under the contract, in the aggregate, are reasonable." 15 U.S.C. § 80a–26(f)(2). As recognized in *Olmsted v. Pruco Life Insurance Co. of New Jersey,* 283 F.3d 429 (2d Cir. 2002), this is not "rights-creating language." *Id.* at 432. The focus of the section is on the insurance company, not on the investors. This focus on the insurance companies rather than the investors is precisely what the Supreme Court meant in *Sandoval* when it observed that "[s]tatutes that focus on the person regulated rather than the individuals protected create 'no implication of an intent to confer rights on a particular class of persons.' " 532 U.S. at 289 (quoting *California v. Sierra Club,* 451 U.S. 287, 294 (1981)). This led the Second Circuit to conclude in *Olmsted* that "[n]o provision of the ICA explicitly provides for a private right of action for violations of . . . § 26(f) . . . and so we must presume that Congress did not intend one." 283 F.3d at 432.

Furthermore, it is not clear that even the *Transamerica* Court would have found a private right of action in Section 47(b) due to the differences in text and structure between the ICA and the IAA. While Section 47(b) of the ICA does track Section 215 of the IAA closely, there are important differences between the two. While the latter states that "[e]very contract

made in violation of any provision of this subchapter . . . shall be *void,*" 15 U.S.C. § 80b–15(b) (emphasis added), the former stipulates that "[a] contract that is made, or whose performance involves, a violation of this subchapter . . . is *unenforceable*." 15 U.S.C. § 80a–46(b) (emphasis added). This difference, while seemingly slight, is significant. The Court specifically noted in *Transamerica* that "the legal consequences of voidness are typically not . . . limited [to defensive use]. A person with the power to void a contract ordinarily may resort to a court to have the contract rescinded and to obtain restitution of consideration paid." 444 U.S. at 18 (citations omitted). The use of the term "void" in § 215 prompted the Court to conclude that "Congress . . . intended that the customary legal incidents of voidness would follow, including the availability of a suit for rescission or for an injunction against continued operation of the contract, and for restitution." *Id.* at 19.

The use of the term "unenforceable" in Section 47(b), by way of contrast, carries no such legal implications. Indeed, courts have held that the language of Section 47(b) creates "a remedy rather than a distinct cause of action or basis of liability." *Stegall v. Ladner,* 394 F. Supp. 2d 358, 378 (D. Mass. 2005); *see also Mutchka v. Harris,* 373 F. Supp. 2d 1021, 1027 (C.D. Cal. 2005).

In summary, neither the language nor the structure of the ICA supports Participants' effort to insinuate their excessive fees claim into Section 47(b). Such a claim is cognizable under Section 36(b), but Participants lack standing to sue under that provision. They cannot circumvent their standing deficiency by resort to Section 47(b). Accordingly, Participants' Section 47(b) claim was properly dismissed.

C.

We now turn to whether pre-suit demand and mandatory joinder of trustees is required for Participants' claims brought under Sections 502(a)(2) and (a)(3) of ERISA. The relevant sections state:

> (a) Persons empowered to bring a civil action
>
> A civil action may be brought—. . .
>
> (2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title;
>
> (3) by a participant, beneficiary, or fiduciary
>
> (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or
>
> (B) to obtain other appropriate equitable relief
>
> (i) to redress such violations or
>
> (ii) to enforce any provisions of this subchapter or the terms of the plan.

29 U.S.C. §§ 1132(a)(2), (a)(3).

The text is silent as to pre-suit demand and mandatory joinder of trustees—in fact, no preconditions on a participant or beneficiary's right to bring a civil action to remedy a fiduciary breach are mentioned at all. This led the Supreme Court to hold in *Harris Trust & Savings Bank v. Salomon Smith Barney, Inc.,* 530 U.S. 238 (2000), that Section 502(a)(3):

> [A]dmits of no limit (aside from the "appropriate equitable relief" caveat) on the universe of possible defendants. Indeed § 502(a)(3) makes no mention at all of which parties may be proper defendants — the focus, instead, is on redressing the "*act or practice* which violates any provision of [ERISA Title I]." Other provisions of ERISA, by contrast, expressly address who may be a defendant.

Id. at 239 (quoting 29 U.S.C. § 1132(a)(3)) (citing 29 U.S.C. § 1109(a)). The text of Sections 502(a)(2) and 502(a)(3) thus does not require joinder of trustees. Furthermore, no Court of Appeals has found pre-suit demand a requirement for civil actions brought under Sections 502(a)(2) or (a)(3). *See, e.g., Katsaros v. Cody,* 744 F.2d 270, 280 (2d Cir. 1984) ("[A]lthough common law may have required a prior demand before bringing an action, Congress did not incorporate that doctrine into the ERISA statute. The ERISA jurisdictional statute, 29 U.S.C. § 1132(a)(3), contains no such condition precedent to filing suit."); *Licensed Div. Dist. No. 1 MEBA/NMU v. Defries,* 943 F.2d 474, 479 (4th Cir. 1991) (citing *Katsaros* for the proposition that no prior demand requirement is incorporated into ERISA).

The District Court, relying on *Diduck v. Kaszycki & Sons Contractors, Inc.,* 874 F.2d 912 (2d Cir. 1989), and the common law of trusts, held that pre-suit demand upon the trustees and joinder of the trustees as parties were prerequisites to Participants' ERISA claims. *Diduck,* however, was decided under Section 502(g)(2) of ERISA, 29 U.S.C. § 1132(g)(2), not Sections 502(a)(2) and (a)(3), under which Participants proceed. Indeed, the Second Circuit itself has explained that its holding in *Diduck* is limited to claims brought under

Section 502(g)(2), which "authorizes fiduciaries, but no one else, to obtain unpaid contributions pursuant to ERISA § 515, 29 U.S.C. § 1145, which requires employers participating in multi-employer ERISA plans to make obligatory contributions to the plans." *Coan v. Kaufman,* 457 F.3d 250, 258 (2d Cir. 2006). As the Second Circuit explained:

> Because section 502(g)(2) only applies to suits by fiduciaries, it is sensible to require plan participants, if they may assert the fiduciaries' right of action at all, to follow Rule 23.1, which applies when the appropriate plaintiff has "failed to enforce a right which may properly be asserted by it." FED. R. CIV. P. 23.1. Section 502(a)(2), unlike section 502(g)(2), provides an express right of action for participants — presumably because the drafters of ERISA did not think fiduciaries could be relied upon to sue themselves for breach of fiduciary duty. *Id.*

One reason for this lack of a demand requirement for Section 502(a)(2) and (a)(3) claims is that the protective purposes of ERISA would be subverted if the section covering fiduciary breach required beneficiaries to ask trustees to sue themselves. Accordingly, the District Court erred in concluding that Section 502(g) claims are "akin" to Section 502(a) claims. *Santomenno,* 2011 WL 2038769, at *3. "Because plan participants are expressly authorized to bring suit under section 502(a)(2), the situation here is not controlled by *Diduck*." *Coan,* 457 F.3d at 258.

In addition to the text, structure, and purpose of ERISA, the legislative history of the statute also indicates that Congress did not intend to impose obstacles such as pre-suit demand or mandatory

joinder of trustees with respect to claims brought under Section 502(a):

> The enforcement provisions have been designed specifically to provide both the Secretary [of Labor] and participants and beneficiaries with broad remedies for redressing or preventing violations of the [Act] . . . . The intent of the Committee is to provide the full range of legal and equitable remedies available in both state and federal courts and to remove jurisdictional and procedural obstacles which in the past appear to have hampered effective enforcement of fiduciary responsibilities under state law or recovery of benefits due to participants.

S. REP. NO. 93–127, at 3 (1973), *reprinted in* 1974 U.S.C.C.A.N. 4838, 4871. As we noted in *Leuthner v. Blue Cross & Blue Shield of Northeastern Pennsylvania,* 454 F.3d 120 (3d Cir. 2006), "ERISA's legislative history indicates that Congress intended the federal courts to construe the statutory standing requirements broadly in order to facilitate enforcement of its remedial provisions." *Id.* at 128.

In dismissing the ERISA counts, the District Court relied on "guidance from the common law of trusts." *Santomenno,* 2011 WL 2038769, at *3. We believe this reliance was misplaced, as the statute unambiguously allows for beneficiaries or participants to bring suits against fiduciaries without pre-suit demand or joinder of trustees. The common law of trusts is not incorporated en masse into ERISA. On the contrary, "trust law will offer only a starting point, after which courts must go on to ask whether, or to what extent, the language of the statute, its structure, or its purposes require departing from common-law

trust requirements." *Varity Corp. v. Howe,* 516 U.S. 489, 497 (1996). As noted above, the language of the statute, the legislative history, and the structure of this remedial legislation compel the conclusion that neither a pre-suit demand requirement nor joinder of the plan trustees is a prerequisite to Participants' claims. Accordingly, the District Court should not have dismissed Counts I through VII due to the lack of a pre-suit demand upon the plan trustees and the absence of the trustees as parties to this action.

III.

For the foregoing reasons, we affirm the District Court's judgment on the ICA counts, but vacate the District Court's dismissal of the ERISA claims and remand for further proceedings.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Civil Action No. 2:10–cv–01655

DANIELLE SANTOMENNO, for the use and benefit of the John Hancock Trust and the John Hancock Funds II, et al.,
Plaintiffs,

v.

JOHN HANCOCK LIFE INSURANCE COMPANY (U.S.A.), et al.,
Defendants.

Decided May 23, 2011

WILLIAM J. MARTINI, *District Judge*.

I. INTRODUCTION

Plaintiffs are beneficiaries or participants in employer-sponsored 401(k) retirement plans. The trustees of these plans made contracts with Defendants to supply a variety of investment services to the plans. The gravamen of the Plaintiffs' Second Amended Complaint is that Defendants purportedly charged the plans excessive fees for investment services. Counts I through VII are brought under the Employment Retirement Income Security Act (ERISA), 29 U.S.C. § 1001 et seq., and relate to Defendants' operation of their group annuity accounts. Count VIII is brought under Section 36(b) of the Investment Companies Act (ICA), Pub. L. No. 76–768, 54 Stat. 841 (1940), and count IX is brought under Section 47(b) of the ICA. Counts VIII and IX relate to Defendants' operation

of both their group and individual annuity accounts. Defendants have moved to dismiss. For the reasons elaborated below, the Court will GRANT the motion.

II. FACTUAL BACKGROUND ALLEGED IN THE COMPLAINT

Defendant John Hancock Life Insurance Company (U.S.A.) (JHUSA), a Michigan corporation, operates 401(k) plans through group annuity contracts (GACs). JHUSA establishes a GAC by selecting a menu of investment options or funds. The options may be affiliated with JHUSA or independent of JHUSA. JHUSA provides the menu of options to the employer who then selects a subset of the funds. Generally, the investment options are drawn from three John Hancock Series Trusts (JH Trusts), including: John Hancock Trust (JHT), John Hancock Funds II (JHFII), and John Hancock Funds III (JHFIII). Each trust contains a portfolio of funds. Defendant John Hancock Investment Management Services, LLC (JHIMS), a Delaware limited liability company, provides investment advice to the JH Trusts and to the funds within them. Defendants John Hancock Distributors, LLC (JHD) and John Hancock Funds, LLC (JHF), Delaware limited liability companies and affiliates of JHIMS, make distributions from the JH Trusts' individual funds or portfolios to participants or beneficiaries. Participants in a portfolio offered by JHUSA direct their monies into their own separate sub-accounts, where they are allocated into particular funds within the portfolio. JHUSA charges plan sponsors (a contract level fee) and charges plan participants fees for their investment in the sub-accounts.

Plaintiff Danielle Santomenno invested assets in two JHT Funds: a sub-account of the Money Market Portfolio, and a sub-account of the Small Cap Growth Portfolio. She also invested assets in a single JHFII Fund: a sub-account of the Blue Chip Growth Portfolio. Plaintiff Karen Poley invested assets in a JHFII Fund: a sub-account of the Lifestyle Fund–Balanced Portfolio. Plaintiff Barbara Poley also invested assets in JHFII Funds: a sub-account of the Lifestyle Fund–Balanced Portfolio, a sub-account of the Lifestyle Fund–Aggressive Portfolio, and a sub-account of the Lifestyle Fund–Growth Portfolio.

Count I alleges that Defendant JHUSA's sales and service is excessive and in violation of ERISA. In regard to Count I, the purchased funds are John Hancock funds. Count II differs from Count I in that the funds purchased are independent funds.

Counts III alleges that Defendants JHUSA, JHIMS, JHD, and JHF allowed payment of 12b-1 fees in violation of ERISA. Count IV makes a similar allegation, but here the 12b–1 fees were tied to independent funds.

Count V alleges that JHUSA wrongfully allowed JHIMS to charge Plaintiffs an advisory fee in violation of ERISA.

Count VI alleges that JHUSA wrongfully received revenue sharing payments from Plaintiffs' investments into sub-accounts in violation of ERISA.

Count VII alleges that JHUSA wrongfully selected JHT Money Market Trust as an investment option notwithstanding poor performance, high fees, and wrongfully retained JHIMS as an advisor, notwithstanding that it had been disciplined by the SEC, all purportedly in violation of ERISA. In regard

to Counts I through VII, Plaintiffs assert that the Defendants were ERISA fiduciaries (or otherwise knowingly participated in a breach of duty by a fiduciary).

Count VIII seeks recovery of purportedly excessive investment management fees charged by JHIMS under ICA § 36(b). Count IX seeks relief for unjust enrichment and rescission under ICA § 47(b).

III. STANDARD OF REVIEW

The Defendants' motion to dismiss is brought pursuant to the provisions of Federal Rule of Civil Procedure 12(b)(6). This rule provides for the dismissal of a complaint, in whole or in part, if the plaintiff fails to state a claim upon which relief can be granted. The moving party bears the burden of showing that no claim has been stated, *Hedges v. United States,* 404 F.3d 744, 750 (3d Cir. 2005), and dismissal is appropriate only if, accepting all of the facts alleged in the complaint as true, the plaintiff has failed to plead "enough facts to state a claim to relief that is plausible on its face," *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 570 (2007) (abrogating "no set of facts" language found in *Conley v. Gibson,* 355 U.S. 41, 45–46 (1957)). The facts alleged must be sufficient to "raise a right to relief above the speculative level." *Twombly,* 550 U.S. at 555. This requirement "calls for enough fact[s] to raise a reasonable expectation that discovery will reveal evidence of" necessary elements of the plaintiff's cause of action. *Id.* Furthermore, in order to satisfy federal pleading requirements, the plaintiff must "provide the grounds of his entitlement to relief," which "requires more than labels and conclusions, and a formulaic recitation of the elements

of a cause of action will not do." *Phillips v. County of Allegheny,* 515 F.3d 224, 231 (3d Cir. 2008) (quoting *Twombly,* 550 U.S. at 555).

IV. ANALYSIS

The nine-count complaint alleges liability under ERISA and the ICA. Each theory of liability is discussed in turn.

A. COUNTS I THROUGH 7: THE ERISA THEORIES OF LIABILITY

Defendants argue that Plaintiffs' ERISA counts are derivative. That is, these claims belong to the plans and Plaintiffs as plan participants or beneficiaries are asserting claims which belong to the plan and, should relief be granted, the relief would be awarded to the plan. See ERISA § 502(a)(2), 29 U.S.C. § 1132(a)(2) ("A civil action may be brought--by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title"); *LaRue v. DeWolff, Boberg & Assocs., Inc.*, 552 U.S. 248, 253 (2008) (authorizing "plan participants [and] beneficiaries . . . to bring actions on behalf of a plan"). Defendants argue that in such circumstances, Plaintiffs, before bringing the derivative claim, must first make demand upon the trustees of the plan. Apparently no such demand has been made, nor are the trustees listed as defendants in this action. Plaintiffs take the position that ERISA's statutory language nowhere expressly requires demand on a plan's trustees, although it otherwise authorizes suit by a plan's beneficiaries. Furthermore, Plaintiffs point to persuasive authority where courts in other circuits have rejected imposing pre-suit demand grounded in application of Federal Rule of Civil Procedure 23.1.

The Third Circuit has not spoken to this precise question. *Struble v. N.J. Brewery Employees' Welfare Trust Fund,* 732 F.2d 325, 338 (3d Cir. 1984) ("We are not called upon to decide at this time whether beneficiaries in the present type of derivative action are required to make a 'demand' on the Trustees to bring suit in the name of the Trust Fund or whether, if such demand is generally required, it should be excused [as futile] in the present circumstances."), *overturned on other grounds Firestone Tire & Rubber Co. v. Bruch,* 489 U.S. 101 (1989). The Second Circuit has held that in relation to an ERISA § 502(g) claim, which is akin to the Section 502(a) claims here, "[a] participant in a fund governed by ERISA can sue derivatively on behalf of the fund only if the plaintiff first establishes that the *trustees* breached their fiduciary duty." *Diduck v. Kaszycki & Sons Contractors, Inc.,* 874 F.2d 912, 916 (2d Cir. 1989) (emphasis added). Arguably, this would seem to preclude suit here — because Plaintiffs' complaint makes no allegations against the Plans' trustees. More importantly, *Diduck* was applying the well-known rule mandating demand on the trustees, except when such demand is futile. Again, this would seem to preclude suit here: Plaintiffs have made no allegations against the trustees (as opposed to the named Defendants who Plaintiffs allege to be non-trustee fiduciaries) suggesting that they (the trustees) violated any fiduciary duty or that demand is otherwise futile. Judge Van Graafeiland was more explicit:

> Because the right to sue for promised [ERISA] contributions belongs to the trustees, fund participants such as Diduck cannot exercise the right derivatively without first giving the trustees

> the opportunity to compel payment . . . . Before a participant such as Diduck can sue an employer for promised fund contributions, he must show either that he made a demand upon the trustees for suit or that such a demand would have been futile.

Id. at 923 (Van Graafeiland, J., dissenting).

To the extent that gap filling the meaning of the ERISA statute is a matter of federal common law, it would appear to follow the common law of trusts. Indeed, in expounding on ERISA law, courts often seek guidance from the common law of trusts. *See, e.g., LaRue,* 552 U.S. at 253 n.4; *Zavolta v. Lord, Abbett & Co. LLC,* 2010 WL 686546, at *5 (D.N.J. Feb. 24, 2010) (same). "Ordinarily the *trustee,* and he alone, is permitted to sue the wrongdoer." GEORGE T. BOGERT, TRUSTS 610 (6th ed. 1987) (emphasis added); RESTATEMENT (SECOND) OF TRUSTS § 282 cmt. a (1959) ("As long as the trustee is ready and willing to take the proper proceedings against . . . third persons [who wrong the trust], the beneficiary cannot maintain a suit in equity against [third parties]."). The broad language of these authorities—using "wrongdoer" and "third persons"—would seem to extend to JHUSA and to the other John Hancock defendants, even if they are, as alleged by Plaintiff, non-trustee fiduciaries vis-à-vis the ERISA plans.

Alternatively, to the extent that gap filling the meaning of the ERISA is a matter of substantive state law, one would turn to the choice of law provision of the plan or the law under which the plan was organized (assuming it is formally organized). *Cf. Kamen v. Kemper Fin. Servs., Inc.,* 500 U.S. 90, 97 (1991) (holding that contours of the demand

requirement under the ICA follow state law in which the entity was organized). Although, the plans at issue here have not been filed as exhibits, the Court is aware of no state which does not impose a demand requirement. Generally, the variations in state law in regard to the demand requirement go not to the existence of the demand requirement, but to the extent, if any, of the futility exception to the demand requirement. *See, e.g., Va. M. Damon Trust v. N. Country Fin. Corp.,* 325 F. Supp. 2d 817, 821 (W.D. Mich. 2004) ("Michigan has adopted a universal demand rule, mandating pre-suit demand upon the corporation in all circumstances and providing no possibility for circumvention of this rule by assertions of futility . . . ."); *Lola Cars Int'l Ltd. v. Krohn Racing, LLC,* 2009 WL 4052681, at *7 (Del. Ch. Nov. 12, 2009) ("Because [plaintiff] did not make a demand upon [the limited liability company's] board, the inquiry then turns to whether it alleged demand excusal with particularity.").

If demand on the Plans' trustees in this case were futile, then there would be some reason to consider excusing demand. But here, the complaint fails to name the plans' trustees, fails to make well-pled allegations as to whether they joined in the alleged fiduciary breaches by the named Defendants, and fails to join the trustees as defendants. Even assuming that demand on the trustees is not required, the Third Circuit has required such trustee-related factual allegations. "Under traditional trust law doctrine, *incorporated into ERISA,* if a trustee holds in trust a . . . right against a third person and the trustee *improperly* refuses to bring an action to enforce the [right], the beneficiaries can maintain a suit . . . against the *trustee* joining the [third person] as

co-defendant." *McMahon v. McDowell,* 794 F.2d 100, 110 (3d Cir. 1986) (emphasis added). In short, absent demand, or allegations going to demand futility, or some allegations, which if proven, would establish that the trustees improperly refused to bring suit, it would appear that the beneficiaries of an ERISA plan cannot bring a claim under Section 502. Likewise, any such suit must join the plan's trustees. *McMahon,* 794 F.2d at 110. Here, because there are no such factual allegations and because the trustees have not been joined, dismissal of the ERISA counts, counts I through VII, would seem to be proper.

B. COUNT VIII: THE INVESTMENT COMPANIES ACT SECTION 36(b) CLAIM

ICA § 36(b), 15 U.S.C. § 80a–35(b), authorizes an "action . . . under this subsection by the Commission, or by a security holder of such registered investment company on *behalf of such company."* Because such a suit is brought upon behalf of the company, it can be broadly characterized as derivative. *Daily Income Fund, Inc. v. Fox,* 464 U.S. 523, 535 (1984). Following both the statutory language and the well-known rule in derivative actions requiring continuous ownership of stock as a precondition of suit, other courts have dismissed Section 36(b) claims where the plaintiff, although holding stock at the commencement of the action, no longer holds stock at some point thereafter during the pendency of the suit. *See, e.g., Siemers v. Wells Fargo & Co.,* 2007 WL 760750, at*20 (N.D. Cal. Mar. 9, 2007) ("For Section 36(b) standing purposes, it is important that the fund be continuously owned during the pendency of the action.").

Plaintiffs' position is that Section 36(b) standing exists if a plaintiff is a security holder merely at the

time suit is filed, even if the plaintiff loses his security holder status during the pendency of the litigation. However, because *"any* recovery obtained in a § 36(b) action will go to the company rather than the plaintiff," *Daily Income Fund,* 464 U.S. at 535 n.11 (emphasis added), a former security holder would have no concrete interest in the outcome of the litigation. *Bender v. Williamsport Area School Dist.,* 475 U.S. 534, 543–544 (1986) (school board member who "has no personal stake in the outcome of the litigation" has no standing). It would seem to follow that a former security holder—where all sought after relief flows to the entity—would seem to lack Article III standing. *Cf. Lewis v. Chiles,* 719 F.2d 1044, 1047 (9th Cir. 1983) ("[A]s a practical matter, the continuous ownership requirement stems from the equitable nature of derivative litigation which allows a shareholder to step into the corporation's shoes and to seek in its right the restitution he could not demand in his own. This equitable principle reflects a *shareholder's real interest in obtaining a recovery for the corporation which increases the value of his holdings."* (emphasis added)). This strongly counsels in favor of interpreting the statutory standing provisions of the Investment Companies Act along the lines suggested by the *Siemers* court, and, therefore, requiring continuous ownership throughout the pendency of the litigation as an element of statutory standing. *See Siemers,* 2007 WL 760750, at *20. *But see In re Am. Mut. Funds Fee Litig.,* 2009 WL 8099820, at *1 (C.D. Cal. July 14, 2009) (rejecting the *Siemers* position, but failing to consider the implications for Article III standing).

It is not contested that the contracts between the Plans' trustees and the Defendants have been terminated. *I.e.,* Plaintiffs do not currently own

any interests in the Defendants' funds. In these circumstances it would appear that the Section 36(b) claim must be dismissed.

C. COUNT IX: THE INVESTMENT COMPANIES ACT SECTION 47(b) CLAIM

Count IX is brought pursuant to ICA § 47(b). *See* Plts.' Br. 50 ("Plaintiffs are not suing under ICA § 26."). "A plaintiff can seek relief under Section 47 only by showing a violation of some other section of the Act." *Tarlov v. Paine Webber Cashfund, Inc.,* 559 F. Supp. 429, 438 (D. Conn. 1983); *Hamilton v. Allen,* 396 F. Supp. 2d 545, 558–59 (E.D. Pa. 2005) ("Moreover, to the extent Plaintiffs' other Investment Company Act claims fail, their Section 47(b) claim must necessarily fail because a violation of the Act is a predicate to the remedy provided therein. A plaintiff asserting a claim under the Investment Company Act may seek relief under Section 47 only after a violation of some other section of the Act has been established."). Because this Court has already dismissed Plaintiffs' Section 36(b) claim, the only other cause of action under the ICA, the Section 47(b) claim would seem to fail also.

V. CONCLUSION

For the reasons elaborated above, the Court GRANTS Defendants' motion to dismiss. This terminates this action.

/s/ William J. Martini
William J. Martini, U.S.D.J.

Dated: May 23, 2011

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 11-2520

DANIELLE SANTOMENNO, for the use and benefit of the John Hancock Trust and the John Hancock Funds II, et al.,
Plaintiffs,

v.

JOHN HANCOCK LIFE INSURANCE COMPANY (U.S.A.), et al.,
Defendants.

Danielle Santomenno, Karen Poley, Barbara Poley,
Participants

On Appeal from the United States District Court for the District of New Jersey
(D.C. Civil No. 2-10-cv-01655) District Judge:
Honorable William J. Martini

SUR PETITION FOR REHEARING WITH SUGGESTION FOR REHEARING EN BANC

Entered May 15, 2012

Present: MCKEE, *Chief Judge*, SLOVITER, SCIRICA, RENDELL, AMBRO, FUENTES, SMITH, FISHER, CHAGARES, JORDAN, HARDIMAN, GREENAWAY, JR. and VANASKIE, *Circuit Judges*, and POLLAK, *District Judge*[*]

The petition for rehearing filed by Appellants having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges in regular active service, and no judge who concurred in the decision having asked for a rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the Court en banc, the petition for rehearing by the panel and the Court en banc is DENIED.

BY THE COURT:
/s/ Thomas I. Vanaskie
Circuit Judge

Dated: May 15, 2012
PDB/cc: All Counsel of Record

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* The petition for rehearing was submitted to the Honorable Louis H. Pollak, Senior District Judge for the United States District Court for the Eastern District of Pennsylvania, sitting by designation, who passed away prior to the entry of this order.

APPENDIX D

UNITED STATES COURT OF APPEALS FOR
THE THIRD CIRCUIT

No. 11-2520

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Present: MCKEE, *Chief Judge*, SLOVITER, SCIRICA, RENDELL, AMBRO, FUENTES, SMITH, FISHER, CHAGARES, JORDAN, HARDIMAN, GREENAWAY, JR. and VANASKIE, *Circuit Judges*, and POLLAK, *District Judge*[*]

The petition for rehearing filed by Appellees having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges in regular active service, and no judge who concurred in the decision having asked for a rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the Court en banc, the petition for rehearing by the panel and the Court en banc is DENIED.

BY THE COURT:
/s/ Thomas I. Vanaskie
Circuit Judge

Dated: May 15, 2012
PDB/cc: All Counsel of Record

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* The petition for rehearing was submitted to the Honorable Louis H. Pollak, Senior District Judge for the United States District Court for the Eastern District of Pennsylvania, sitting by designation, who passed away prior to the entry of this order.

APPENDIX E

STATUTORY PROVISIONS INVOLVED

29 U.S.C. § 1002(16)

For purposes of this subchapter: . . .

(16)

(A) The term "administrator" means--

(i) the person specifically so designated by the terms of the instrument under which the plan is operated;

(ii) if an administrator is not so designated, the plan sponsor; or

(iii) in the case of a plan for which an administrator is not designated and a plan sponsor cannot be identified, such other person as the Secretary may by regulation prescribe.

(B) The term "plan sponsor" means (i) the employer in the case of an employee benefit plan established or maintained by a single employer, (ii) the employee organization in the case of a plan established or maintained by an employee organization, or (iii) in the case of a plan established or maintained by two or more employers or jointly by one or more employers and one or more employee organizations, the association, committee, joint board of trustees, or other similar group of representatives of the parties who establish or maintain the plan.

29 U.S.C. § 1102

(a) Named fiduciaries

(1) Every employee benefit plan shall be established and maintained pursuant to a written instrument. Such instrument shall provide for one or more named fiduciaries who jointly or severally shall have authority to control and manage the operation and administration of the plan.

(2) For purposes of this subchapter, the term "named fiduciary" means a fiduciary who is named in the plan instrument, or who, pursuant to a procedure specified in the plan, is identified as a fiduciary (A) by a person who is an employer or employee organization with respect to the plan or (B) by such an employer and such an employee organization acting jointly.

(b) Requisite features of plan

Every employee benefit plan shall--

(1) provide a procedure for establishing and carrying out a funding policy and method consistent with the objectives of the plan and the requirements of this subchapter,

(2) describe any procedure under the plan for the allocation of responsibilities for the operation and administration of the plan (including any procedure described in section 1105(c)(1) of this title),

(3) provide a procedure for amending such plan, and for identifying the persons who have authority to amend the plan, and

(4) specify the basis on which payments are made to and from the plan.

(c) Optional features of plan

Any employee benefit plan may provide--

(1) that any person or group of persons may serve in more than one fiduciary capacity with respect to the plan (including service both as trustee and administrator);

(2) that a named fiduciary, or a fiduciary designated by a named fiduciary pursuant to a plan procedure described in section 1105(c)(1) of this title, may employ one or more persons to render advice with regard to any responsibility such fiduciary has under the plan; or

(3) that a person who is a named fiduciary with respect to control or management of the assets of the plan may appoint an investment manager or managers to manage (including the power to acquire and dispose of) any assets of a plan.

29 U.S.C. § 1103 (a)-(b)

(a) Benefit plan assets to be held in trust; authority of trustees

Except as provided in subsection (b) of this section, all assets of an employee benefit plan shall be held in trust by one or more trustees. Such trustee or trustees shall be either named in the trust instrument or in the plan instrument described in section 1102(a) of this title or appointed by a person who is a named fiduciary, and upon acceptance of being named or appointed, the trustee or trustees shall have exclusive authority and discretion to manage and control the assets of the plan, except to the extent that--

(1) the plan expressly provides that the trustee or trustees are subject to the direction of a named fiduciary who is not a trustee, in which case the trustees shall be subject to proper directions of such fiduciary which are made in accordance with the terms of the plan and which are not contrary to this chapter, or

(2) authority to manage, acquire, or dispose of assets of the plan is delegated to one or more investment managers pursuant to section 1102(c)(3) of this title.

(b) Exceptions

The requirements of subsection (a) of this section shall not apply--

(1) to any assets of a plan which consist of insurance contracts or policies issued by an insurance company qualified to do business in a State;

(2) to any assets of such an insurance company or any assets of a plan which are held by such an insurance company;

(3) to a plan--

(A) some or all of the participants of which are employees described in section 401(c)(1) of Title 26; or

(B) which consists of one or more individual retirement accounts described in section 408 of Title 26;

to the extent that such plan's assets are held in one or more custodial accounts which qualify under section 401(f) or 408(h) of Title 26, whichever is applicable.

(4) to a plan which the Secretary exempts from the requirement of subsection (a) of this section and which is not subject to any of the following provisions of this chapter--

(A) part 2 of this subtitle,

(B) part 3 of this subtitle, or

(C) subchapter III of this chapter; or

(5) to a contract established and maintained under section 403(b) of Title 26 to the extent that the assets of the contract are held in one or more custodial accounts pursuant to section 403(b)(7) of Title 26.

(6) Any plan, fund or program under which an employer, all of whose stock is directly or indirectly owned by employees, former employees or their beneficiaries, proposes through an unfunded arrangement to compensate retired employees for benefits which were forfeited by such employees under a pension plan maintained by a former employer prior to the date such pension plan became subject to this chapter.

29 U.S.C. § 1104(a)(1)

(a) Prudent man standard of care

(1) Subject to sections 1103(c) and (d), 1342, and 1344 of this title, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and--

(A) for the exclusive purpose of:

(i) providing benefits to participants and their beneficiaries; and

(ii) defraying reasonable expenses of administering the plan;

(B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;

(C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and

(D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this subchapter and subchapter III of this chapter.

29 U.S.C. § 1105(c)

(c) Allocation of fiduciary responsibility; designated persons to carry out fiduciary responsibilities

(1) The instrument under which a plan is maintained may expressly provide for procedures (A) for allocating fiduciary responsibilities (other than trustee responsibilities) among named fiduciaries, and (B) for named fiduciaries to designate persons other than named fiduciaries to carry out fiduciary responsibilities (other than trustee responsibilities) under the plan.

(2) If a plan expressly provides for a procedure described in paragraph (1), and pursuant to such procedure any fiduciary responsibility of a named fiduciary is allocated to any person, or a person is designated to carry out any such responsibility, then such named fiduciary shall not be liable for an act or omission of such person in carrying out such responsibility except to the extent that--

(A) the named fiduciary violated section 1104(a)(1) of this title--

(i) with respect to such allocation or designation,

(ii) with respect to the establishment or implementation of the procedure under paragraph (1), or

(iii) in continuing the allocation or designation; or

(B) the named fiduciary would otherwise be liable in accordance with subsection (a) of this section.

(3) For purposes of this subsection, the term "trustee responsibility" means any responsibility provided in the plan's trust instrument (if any) to manage or control the assets of the plan, other than a power under the trust instrument of a named fiduciary to appoint an investment manager in accordance with section 1102(c)(3) of this title.

29 U.S.C. § 1106

(a) Transactions between plan and party in interest

Except as provided in section 1108 of this title:

(1) A fiduciary with respect to a plan shall not cause the plan to engage in a transaction, if he knows or should know that such transaction constitutes a direct or indirect--

(A) sale or exchange, or leasing, of any property between the plan and a party in interest;

(B) lending of money or other extension of credit between the plan and a party in interest;

(C) furnishing of goods, services, or facilities between the plan and a party in interest;

(D) transfer to, or use by or for the benefit of a party in interest, of any assets of the plan; or

(E) acquisition, on behalf of the plan, of any employer security or employer real property in violation of section 1107(a) of this title.

(2) No fiduciary who has authority or discretion to control or manage the assets of a plan shall permit the plan to hold any employer security or employer real property if he knows or should know that holding such security or real property violates section 1107(a) of this title.

(b) Transactions between plan and fiduciary

A fiduciary with respect to a plan shall not--

(1) deal with the assets of the plan in his own interest or for his own account,

(2) in his individual or in any other capacity act in any transaction involving the plan on behalf of a party (or represent a party) whose interests are adverse to the interests of the plan or the interests of its participants or beneficiaries, or

(3) receive any consideration for his own personal account from any party dealing with such plan in connection with a transaction involving the assets of the plan.

(c) Transfer of real or personal property to plan by party in interest

A transfer of real or personal property by a party in interest to a plan shall be treated as a sale or exchange if the property is subject to a mortgage or similar lien which the plan assumes or if it is subject to a mortgage or similar lien which a party-in-interest placed on the property within the 10-year period ending on the date of the transfer.

29 U.S.C. § 1109

(a) Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary. A fiduciary may also be removed for a violation of section 1111 of this title.

(b) No fiduciary shall be liable with respect to a breach of fiduciary duty under this subchapter if such breach was committed before he became a fiduciary or after he ceased to be a fiduciary.

29 U.S.C. § 1132(a)(1)-(3)

(a) Persons empowered to bring a civil action

A civil action may be brought--

(1) by a participant or beneficiary--

(A) for the relief provided for in subsection (c) of this section, or

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title;

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan;

29 U.S.C. § 1132(e)

(e) Jurisdiction

(1) Except for actions under subsection (a)(1)(B) of this section, the district courts of the United States shall have exclusive jurisdiction of civil actions under this subchapter brought by the

Secretary or by a participant, beneficiary, fiduciary, or any person referred to in section 1021(f)(1) of this title. State courts of competent jurisdiction and district courts of the United States shall have concurrent jurisdiction of actions under paragraphs (1)(B) and (7) of subsection (a) of this section.

(2) Where an action under this subchapter is brought in a district court of the United States, it may be brought in the district where the plan is administered, where the breach took place, or where a defendant resides or may be found, and process may be served in any other district where a defendant resides or may be found.