No. 12-202

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; and 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 Company (U.S.A.), and the 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

RESPONDENTS' OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTER STATEMENT TO PETITIONERS' QUESTION PRESENTED

Whether this Court should ignore the plain meaning of ERISA[1] §§ 502(a)(2) and (3), 29 U.S.C. §§ 1132(a)(2) and (3), and engraft on to both of these provisions a requirement that a pre-suit demand be made on a plan trustee prior to bringing suit against another plan fiduciary?[2]

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[1] ERISA is the acronym for the Employee Retirement Income Security Act of 1974, as amended.

[2] Plaintiffs in this case have also filed a Petition for Writ of *Certiorari* (Docket No. 12-208), claiming, as explained in further detail in their Petition, that the Third Circuit Court of Appeals decision that a private right of action does not exist under Investment Company Act § 47(b), 15 U.S.C. § 80-46(b), should be reversed because it conflicts with (i) decisions of this Court construing similar statutes, (ii) the Seventh Circuit Court of Appeals holding in *Mathers Fund Inc. v. Colwell Co.*, 564 F.2d 780, 783 (7th Cir. 1977) and (iii) the position of the Securities and Exchange Commission.

LIST OF PARTIES

Plaintiffs-Respondents are Danielle Santomenno, Karen Poley and Barbara Poley. Petitioners-Defendants are John Hancock Life Insurance Company (U.S.A.), John Hancock Investment Management Services, John Hancock Funds, LLC, and John Hancock Distributors, LLC.

CORPORATE DISCLOSURE STATEMENT

Petitioners, Danielle Santomenno, Karen Poley and Barbara Poley, are natural persons.

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OPINIONS OF COURTS BELOW

The opinion of the United States Court of Appeals for the Third Circuit, for which review is sought, is reported at *Santomenno v. John Hancock Life Ins. Co.*, 677 F.3d 178 (3d Cir. 2012) (reproduced in Petitioners' Appendix ("Pet. JHUSA App.") pp. 1a-20a). The decision was issued on April 16, 2012. On May 15, 2012, the Third Circuit Court of Appeals denied Petitioners' request for a panel and/or *en banc* rehearing. (Pet. JHUSA App. pp. 35a-36a).

The decision of the Third Circuit Court of Appeals affirmed in part, and reversed in part, a decision of the United States District Court for the District of New Jersey, *Santomenno v. John Hancock Life Ins. Co.*, 2011 WL 2038769, Docket No. 2:10-CV-01655 (D.N.J. May 23, 2011) (Pet. JHUSA App. pp. 21a-31a).

STATEMENT FOR BASIS OF JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED IN THE CASE

ERISA § 2(b), 29 U.S.C. § 1001(2)(b), ERISA § 409, 29 U.S.C. § 1109, ERISA §§ 502(a)(2) and (3) and (g)(2), 29 U.S.C. §§ 1132(a)(2) and (3) and (g)(2). Portions of these statutes are reproduced in this response and all statutes are reproduced in their entirety at pages 1 to 3 of Respondents' Appendix.

STATEMENT OF THE CASE

Petitioner, John Hancock Life Insurance Company (U.S.A.) ("JHUSA"), is a company engaged in the provision of retirement planning products, typically 401(k) plans. JHUSA claims that it "specializes in providing services to small and medium-sized business. . . ." (Respondents' Appendix ("Resp. App.") p. 37). Respondents are participants in 401(k) plans which were established by their employers and were serviced by JHUSA. Respondents have brought suit against JHUSA in its capacity as a fiduciary, alleging claims that derive in large part from excessive fees charged by JHUSA. Notwithstanding JHUSA's characterization of itself as a non-fiduciary service provider in its Petition, Respondents are suing JHUSA in its capacity as a fiduciary.

Respondents have brought claims under ERISA § 502(a)(2), 29 U.S.C. § 1132(a)(2), against JHUSA, in its fiduciary capacity, for two categories of ERISA statutory violations: breach of fiduciary duties under ERISA § 404, 29 U.S.C. § 1104, and commission of prohibited transactions under ERISA § 406(b), 29 U.S.C. § 1106(b). With respect to their prohibited transaction claims, which JHUSA committed in its fiduciary capacity, Respondents are also seeking equitable relief under ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3), against the JHUSA affiliates[3] that benefitted from JHUSA's fiduciary misconduct. As ERISA §§ 502(a)(2) and (3), 29 U.S.C. §§ 1132(a)(2) and (3), do not contain pre-suit demand requirements, Respondents were not required to, and did not, make a pre-suit demand prior to filing suit.

In their Complaint, Respondents set forth several reasons why JHUSA is an ERISA fiduciary as that term is used in ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A) (Resp. App. pp. 38-54). For example, JHUSA exercises control over Plan assets by virtue of holding them in a separate account (Resp. App. pp. 47-49). It provides investment advice, recommending that participants select specific JHUSA investment options, which JHUSA characterizes as "a professionally constructed and mixed portfolio." (Resp. App. p. 55). JHUSA also provides the "John Hancock USA Fiduciary Standards Warranty," which it uses in "selecting and monitoring the investment options. . . ." (Resp. App. pp. 56-57). Further, JHUSA unilaterally adds and deletes investment options available to participants pursuant to its alleged "ongoing review and monitoring process." (Resp. App. p. 58). These are just some of the reasons as to why JHUSA is a fiduciary. Based on less extensive allegations, a Court has already ruled that JHUSA is an ERISA fiduciary. *Charters v. John Hancock Life Ins. Co.*, 583

[3] Those affiliates are John Hancock Investment Management Services, John Hancock Funds, LLC, and John Hancock Distributors, LLC.

F. Supp. 2d 189, 197-99 (D. Mass. 2008). Further, JHUSA, in this action has conceded for purposes of its Appeal that it is a fiduciary, ("We accept for purposes of this argument – . . . – that John Hancock should be treated as a fiduciary" (Resp. App. p. 63)), but in its argument before this Court, ignores that concession implying that it is a non-fiduciary service provider.

In view of JHUSA's fiduciary status, contrary to Petitioner's Question Presented, the question before this Court is whether the Court should ignore the plain meaning of ERISA §§ 502(a)(2) and (3), 29 U.S.C. §§ 1132(a)(2) and (3), and engraft on to both of these provisions a requirement that a pre-suit demand be made on a plan trustee prior to bringing suit against another plan fiduciary.

This was the issue presented to and decided by the Third Circuit Court of Appeals when Petitioners moved to dismiss Respondents' Second Amended Complaint: "Plaintiff cannot sue JHUSA without first making a demand upon their Plans' trustees. . . ." (Resp. App. p. 36). Petitioners' argument to dismiss Respondents' First Amended Complaint was no different: "Plaintiff has not pleaded that she made a pre-suit demand on her Primary Fiduciary." (Resp. App. p. 34). This case is not, and never has been, about the need to exhaust administrative remedies, the doctrine addressed by the Eleventh Circuit Court of Appeals in *Bickley v. Caremark RX, Inc.*, 461 F.3d 1325 (11th Cir. 2006) which forms the basis of Petitioners' application to this Court.

Here, the Third Circuit Court of Appeals refused to impose a pre-suit demand requirement finding that "no Court of Appeals has found pre-suit demand a requirement for civil actions brought under Sections 502(a)(2) or (a)(3)." *Santomenno v. John Hancock Life Ins. Co.,* 677 F.3d 178, 188 (3d Cir. 2012). *See also Department of Labor's amicus brief* filed in this matter with the Third Circuit Court of Appeals (Resp. App. pp. 4-32).

Petitioners' contention, in the introduction to their Question Presented – that a split exists between the Eleventh Circuit Court of Appeals, and every other Court of Appeals to consider the issue – is incorrect. That argument is premised upon a confusion between the doctrine of exhaustion of administrative remedies, addressed in *Bickley*, and the pre-suit demand and joinder of trustee argument rejected in *Santomenno*, and every other opinion to consider the issue.

The only discussion of a possible pre-suit demand requirement in *Bickley* appears in the opinion of the United States District Court which, like the Court of Appeals for the Third Circuit in *Santomenno*, rejected such a requirement:

> Specifically, Caremark says Bickley has failed to make demand on the Plan or the Plan Administrator . . . or . . . allege . . . demand would be futile [under FED. R. CIV. P. 23.1].
>
> [C]ompliance with ERISA itself is sufficient, and that it would be at odds with ERISA's statutory scheme to graft onto an ERISA. . . . action the additional requirements of . . . 23.1.

Bickley v. Caremark RX, Inc., 361 F. Supp. 2d 1317, 1334 (N.D. Ala. 2004), *aff'd on other grnds.* 461 F.3d 1325 (11th Cir. 2006).

On appeal, the Eleventh Circuit Court of Appeals simply "affirm[ed] the district court's dismissal of Bickley's complaint without prejudice **for failure to exhaust his administrative remedies**," (emphasis added), and never reviewed that portion of the lower Court's decision which had refused to impose a pre-suit demand requirement. *Bickley v. Caremark RX, Inc.*, 461 F.3d 1325, 1330 (11th Cir. 2006). While the District Court did *not* dismiss plaintiff's claims for failing to make a pre-suit demand, even if it had, the Eleventh Circuit was clear to note that "**[b]ecause we affirm the district court's judgment for dismissal on the basis of exhaustion, we need not address the alternative grounds for dismissal.**" *Id.* at 1330 n. 10 (emphasis added).

Since the pre-suit demand issue was not before the Eleventh Circuit Court of Appeals, that Court could not, notwithstanding Petitioners' suggestion to the contrary, have issued a decision that conflicts with that of all other Courts to have considered the issue. Insofar as Petitioners are now arguing – for the first time – that Respondents should have exhausted administrative remedies, that argument should not be considered on a petition for *certiorari*. *See Tennessee v. Dunlap*, 426 U.S. 312, 314 n. 2 (1976) ("Never adequately alleged, and not considered by the District Court or the Court of Appeals, this assertion is not before us."); *Pennsylvania Dept. of Corr. v. Yeskey*, 524

U.S. 206, 212-13 (1998) ("'Where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them.'" citing *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 147, n. 2 (1970).

REASONS FOR THE DENIAL OF THE PETITION

There are seven reasons why JHUSA's Petition should be denied.

First, contrary to Petitioners' assertion, a Circuit split does not exist with respect to the issue of whether a participant must make a pre-suit demand prior to filing suit under ERISA §§ 502(a)(2) and (3), 29 U.S.C. §§ 1132(a)(2) and (3). *Santomenno*, 677 F.3d at 188. ("[N]o Court of Appeals has found pre-suit demand a requirement for civil actions brought under Sections 502(a)(2) or (a)(3).") *See also Department of Labor's amicus brief* filed in this matter ("Thus, all the courts that have addressed the issue have correctly concluded that there is no such prerequisite to a fiduciary breach suit.") (Resp. App. p. 21). Further, any decision to infer a pre-suit demand requirement would run afoul of this Court's admonition that "[i]f the statute is clear and unambiguous that is the end of the matter, for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Sullivan v. Stroop*, 496 U.S. 478, 482 (1990). The ERISA provisions at issue here contain no pre-suit demand or joinder requirement. Moreover, imposition of such a demand or joinder requirement would be inconsistent with this Court's "reluctan[ce] to tamper with an enforcement scheme crafted with such evident care as the one in ERISA." *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 147 (1985).

Second, the theory which underlies the Petition and forms the basis of the *Bickley* decision, that Respondents must exhaust (in this case, non-existent) administrative remedies, was not raised at any stage of this litigation. Petitioners below did not contend in any filing that *Bickley* supported their pre-suit demand or mandatory joinder argument. Despite filing two motions to dismiss in the United States District Court, as well as a brief before the Third Circuit Court of Appeals, along with a subsequent request for a panel and/or an *en banc* review, Respondents have not claimed – until now – that the Eleventh Circuit's decision in *Bickley* supports their pre-suit demand or mandatory joinder argument. Having never argued, prior to the filing of this Petition, that the exhaustion doctrine applies in this case, the issue is not appropriate for consideration on *certiorari* by this Court.

Third, FED. R. CIV. P. 23.1, which imposes a pre-suit demand requirement, applies only to actions brought by shareholders (ERISA plan participants are not shareholders) on behalf of corporations and unincorporated associations (ERISA plans are not corporations or unincorporated associations). Thus, were the Court to extend the application of FED. R. CIV. P. 23.1, to cases brought under ERISA §§ 502(a)(2) and

(3), 29 U.S.C. §§ 1132(a)(2) and (3), it would, by implication, amend both ERISA and FED. R. CIV. P. 23.1.

Fourth, as the text of ERISA § 502(g)(2), 29 U.S.C. § 1132(g)(2), confirms, when Congress sought to place an impediment to a participant bringing a suit under ERISA, it knew how to do so. *See Jama v. Immigration & Customs Enforcement*, 543 U.S. 335, 341 (2005) ("We do not lightly assume that Congress has omitted from its adopted text requirements that it nonetheless intends to apply, and our reluctance is even greater when Congress has shown elsewhere in the same statute that it knows how to make such a requirement manifest.").

Fifth, inferring a pre-suit demand requirement into ERISA §§ 502(a)(2) and (3), 29 U.S.C. §§ 1132(a)(2) and (3), would be inconsistent with the purposes of ERISA, as the drafters eschewed such a requirement in this highly reticulated statute that is "the product of a decade of congressional study of the Nation's private employee benefit system. . . ." *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 251 (1993).

Sixth, Petitioners misconstrue the role and substance of trust law in the ERISA context. As this Court stated in *Varity Corp. v. Howe*, 516 U.S. 489, 528 (1996), "[t]hough we have recognized that Congress borrowed from the common law of trusts in enacting ERISA we must not forget that ERISA is a statute, and in every case involving construction of a statute, the starting point . . . is the language itself." (internal citation and quotations omitted). *See also Hughes*

Aircraft Co. v. Jacobson, 525 U.S. 432, 446 (1998) ("Application of the wasting trust doctrine in this context would appear to be inconsistent with the language of ERISA's termination provisions."). Trust law, in fact, supports the determination of the Third Circuit Court of Appeals. As noted by the Department of Labor in its *amicus brief*, under trust law "the trust beneficiary always had the right to sue the trustees and other fiduciaries for their own fiduciary breaches without making a demand." (Resp. App. pp. 28-29). Under trust law, only when a trust beneficiary seeks to sue a non-fiduciary are his or her rights more circumscribed.

Seventh, Petitioners' position is inconsistent with that of the Department of Labor, which is "charged with interpreting and enforcing the provisions of Title I of [ERISA]." *Department of Labor's amicus brief* (Resp. App. p. 10). The Department of Labor filed with the Third Circuit Court of Appeals a detailed *amicus brief* in this case in support of Respondents' position, and a copy of that brief is included in Respondents' Appendix at pages 4 to 32.

I. Petitioners' Position Is Inconsistent With The Articulated Goals Of ERISA. Petitioners' Argument Contradicts The Plain Meaning Of ERISA §§ 502(a)(2) And (3), 29 U.S.C. §§ 1132(a)(2) And (3). There Is No Circuit Split With Respect To The Issue Before The Court.

A. ERISA Is Intended To Promote Access To The Courts.

ERISA § 2(b), 29 U.S.C. § 1001(b), entitled "Protection of . . . Beneficiaries. . . ." states, in relevant part: "[i]t is hereby declared to be the policy of this Act [ERISA] to protect . . . the interests of participants in employee benefit plans and their beneficiaries . . . by providing for . . . ready access to Federal courts." ERISA §§ 502(a)(2) and (3), 29 U.S.C. §§ 1132(a)(2) and (3), provide participants with standing to sue for statutory violations of ERISA. To fulfill ERISA's goal, to provide participants with "ready access to Federal courts," neither provision at issue in this case requires a participant to make a pre-suit demand upon the plan's sponsor prior to filing suit against a fiduciary.

B. ERISA §§ 502(a)(2) And (3), 29 U.S.C. §§ 1132(a)(2) And (3), Permit A Plan Participant To Sue Without Making A Pre-suit Demand.

ERISA §§ 502(a)(2) and (3), 29 U.S.C. §§ 1132(a)(2) and (3), provide in part as follows:

> (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[4] 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. . . .[5]

(Emphasis added).

Since neither section contains a pre-suit demand in order to sue a fiduciary, none should be inferred. *See Sullivan*, 496 U.S. at 482 ("If the statute is clear and unambiguous that is the end of the matter, for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."). *See also LaRue v. DeWolff, Boberg & Associates, Inc.*, 552 U.S. 248, 261 (2008) (Thomas, J., concurring):

> Although I agree with the majority's holding, I write separately because my reading of §§ 409 and 502(a)(2) is not contingent on trends in the pension plan market. Nor does it depend on the ostensible "concerns" of

[4] ERISA § 409, 29 U.S.C. § 1109, imposes personal liability on any fiduciary that "breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by" ERISA.

[5] Failure to follow the terms of a plan is a statutory violation. *See* ERISA § 404(a)(1)(D), 29 U.S.C. § 1104(a)(1)(D).

> ERISA's drafters. **Rather, my conclusion that petitioner has stated a cognizable claim flows from the unambiguous text of §§ 409 and 502(a)(2) as applied to defined contribution plans.** Section 502(a)(2) states that "[a] civil action may be brought" by a plan "participant, beneficiary or fiduciary," or by the Secretary of Labor, to obtain "appropriate relief" under § 409, 29 U.S.C. § 1132(a)(2).
>
> (Emphasis added).

C. There Is No Split Among The Circuit Courts.

No Court has ever inferred a pre-suit demand requirement into ERISA §§ 502(a)(2) or (3), 29 U.S.C. §§ 1132(a)(2) or (3). *Santomenno,* 677 F.3d at 188. ("[N]o Court of Appeals has found pre-suit demand a requirement for civil actions brought under Sections 502(a)(2) or (a)(3)."). *See also Department of Labor's amicus brief* filed in this matter ("Thus, all the courts that have addressed the issue have correctly concluded that there is no such prerequisite to a fiduciary breach suit.") (Resp. App. p. 21). The Courts of Appeals that have considered the specific question before this Court are the Second, Third, Fourth and Ninth Circuit Courts of Appeals and their opinions uniformly reject a pre-suit demand requirement.

In *Coan v. Kaufman*, 457 F.3d 250, 257 (2d Cir. 2006), the Second Circuit Court of Appeals declined to impose a pre-suit demand requirement in ERISA

§§ 502(a)(2) and (3), 29 U.S.C. §§ 1132(a)(2) and (3) cases. *See also Katsaros v. Cody*, 744 F.2d 270, 280 (2d Cir. 1984). Similarly, in this case, the Third Circuit Court of Appeals held: "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).**" *Santomenno*, 677 F.3d at 178 (emphasis added).

Consistent with the decisions of the Second and Third Circuit, the Fourth Circuit Court of Appeals has held:

> This may be a good reason for denying standing in a derivative stockholders' suit, see FED.R.CIV.P. 23.1, but it should play no part in a suit under § 1132(a)(2). Congress has not expressly adopted such a limitation on the right to sue under ERISA, the rationale of Rule 23.1 to prohibit champertous litigation and strike suits is inapposite to suits under § 1132(a)(2), and the adoption of such a limitation would frustrate the broad remedial objectives of ERISA.

Brink v. DaLesio, 667 F.2d 420, 428 (4th Cir. 1981).

Finally, the Ninth Circuit Court of Appeals has ruled:

> Although this suit may be characterized as "derivative" in the broad sense, it clearly does not fall within the terms of Rule 23.1. That rule applies only to derivative actions

> "brought by one or more shareholders or members to enforce a right of a corporation or of an unincorporated association." Plaintiffs here are not suing as "shareholders" or "members" to enforce the right of any "corporation" or "unincorporated association." Rather, they are suing as plan beneficiaries to enforce the right of the plan against its fiduciaries.

Kayes v. Pacific Lumber Co., 51 F.3d 1449, 1462-63 (9th Cir. 1995). *See also Department of Labor's amicus brief* ("The plain language of ERISA sections 502(a)(2) and (a)(3) expressly gives participants and beneficiaries the right to bring a civil action to remedy fiduciary breaches, without procedural or other preconditions.") (Resp. App. p. 21).

Petitioners now suggest, for the first time in this litigation, that the Eleventh Circuit Court of Appeals reached a contrary conclusion in *Bickley*. Petitioners err. *See Santomenno,* 677 F.3d at 188. ("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 also Department of Labor's amicus brief* ("Thus, all the courts that have addressed the issue have correctly concluded that there is no such prerequisite to a fiduciary breach suit.") (Resp. App. p. 21).

In *Bickley*, the District Court, whose decision was affirmed by the Eleventh Circuit Court of Appeals, rejected the very argument advanced here:

E. Rule 23.1

Caremark seeks to dismiss Bickley's Amended Complaint on the grounds that it does not meet the requirements of FED. R. CIV. P. Rule 23.1. Specifically, Caremark says Bickley has failed to make demand on the Plan or the Plan Administrator (Georgia Pacific) that suit be filed or to allege that such a demand would be futile. . . .

At the risk of repeating itself, the court incorporates by reference the discussion earlier and in F., Exhaustion, *infra*, about ERISA's integrated and comprehensive statutory enforcement scheme and says that, lacking definitive precedent to follow, it believes compliance with ERISA itself is sufficient, and that it would be at odds with ERISA's statutory scheme to graft onto an ERISA enforcement action the additional requirements of Rule 23.1. Caremark's Rule 23.1 Motion is not well taken and it is not necessary for an ERISA plaintiff to fulfill those requirements if the plaintiff's pleading otherwise satisfies ERISA's requirements.

F. Exhaustion

* * *

Bickley does not allege he has exhausted administrative remedies. He says the SAC satisfies the "futility" exception.

* * *

> The court is persuaded that, if there is to be a balancing of interests here, the scale tilts towards requiring exhaustion of administrative remedies.

Bickley v. Caremark RX, Inc., 361 F. Supp. 2d 1317, 1334 (N.D Ala. 2004). Thus, the District Court recognized the distinction between a pre-suit demand and the need to exhaust administrative remedies.

The Eleventh Circuit Court of Appeals simply affirmed the District Court's decision: "we affirm the district court's dismissal of Bickley's complaint without prejudice for failure to exhaust his administrative remedies." *Bickley v. Caremark RX, Inc.,* 461 F.3d 1325, 1330 (11th Cir. 2006). The Eleventh Circuit Court of Appeals never reviewed the District Court's rejection of the pre-suit demand requirement noting that "[b]ecause we affirm the district court's judgment for dismissal on the basis of exhaustion, we need not address the alternative grounds for dismissal." *Id.* at 1330 n. 10.

As the pre-suit demand issue was not before the Eleventh Circuit Court of Appeals, that Court could not, as Petitioners assert, have reached a conclusion that conflicted with the opinion of any other Circuit. *See Santomenno*, 677 F.3d at 188; *Department of Labor's amicus brief* (Resp. App. p. 21).

Apparently cognizant of the limited holding of *Bickley*, Petitioners did not, in their motion to dismiss, appellate brief, or motion for reconsideration or *en banc* review, advance the argument that *Bickley* or any of the cases cited in their present brief had held that a plaintiff must make a pre-suit demand or join a plan sponsor as a condition of prosecuting an ERISA statutory violation. In fact, the only time Petitioners cited to *Bickley* in any brief, prior to their instant petition, is in the twenty-fourth footnote of their initial brief to the Third Circuit Court of Appeals where Petitioners acknowledged that the Court of Appeals in *Bickley* never reached the pre-suit demand issue:

> Participants' district court cases also are inapposite because each addressed the applicability of Rule 23.1. There, they acknowledged that the Court of Appeals never resolved the pre-suit demand issue. *See e.g. Blankenship v. Chamberlain*, 695 F. Supp. 2d 966 (E.D. Mo. 2010); *In re AEP ERISA Litig.*, 327 F.Supp.2d 812 (S.D. Ohio 2004); ***Bickley***, 361 F.Supp.2d 1317 (N.D. Ala. 2004), ***aff'd on other grounds***, 461 F.3d 1325 (11th Cir. 2006). . . .

(Emphasis added.) (Resp. App. p. 61). Those other grounds were that the plaintiff had failed to exhaust his administrative remedies.

In sum, "no Court of Appeals has found pre-suit demand a requirement for civil actions brought under Sections 502(a)(2) or (a)(3)." *Santomenno*, 678 F.3d at 188. *See also Department of Labor's amicus brief* (Resp. App. p. 21). There is no split among the Circuits since no Circuit Court has inferred such a demand or any other procedural condition under either section of ERISA. To do so would contravene this Court's pronouncements that statutes should be interpreted in accordance with their plain meaning, *Sullivan*, 496 U.S. at 482, and this Court's holding that a court should not "tamper with an enforcement scheme crafted with such evident care as the one in ERISA." *Massachusetts Mut. Life Ins. Co.*, 473 U.S. at 147.

Further, as both participants and the Department of Labor stand on equal footing under ERISA § 502(a)(2), 29 U.S.C. § 1132(a)(2) ("A civil action may be brought – . . . (2) **by the Secretary, or by a participant**" (emphasis added)), were this Court to hold that participants must make a pre-suit demand prior to filing suit, the holding would apply as well to the Department of Labor.

II. Petitioner Is Raising A New Argument Which Was Not Raised Before Or Considered By The Third Circuit Court Of Appeals.

Here, Petitioners never argued that Respondents' claims should be dismissed for failing to exhaust administrative remedies through a claims procedure under ERISA § 503, 29 U.S.C. § 1133. ERISA requires that an employer provide an employee, who has been denied coverage for a specific benefit (i.e., coverage for a medical procedure, coverage for an experimental medication), with an internal review procedure whereby the employee can have the denial of coverage decision reconsidered. *See* ERISA § 503, 29 U.S.C. § 1133 (which requires an employer "to afford a reasonable opportunity to any participant whose **claim for benefits has been denied** for a full and fair review by the appropriate named fiduciary of the decision denying the claim."). ERISA does not contain a comparable internal review procedure for alleged statutory violations; determining whether a statute has been violated is the responsibility of a Court, not an employer. Relief for statutory violations (which are different than claims for benefits) is sought under ERISA §§ 502(a)(2) and (3), 29 U.S.C. §§ 1132(a)(2) and (3), and

> [t]he text [of both statutes] 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. . . . Furthermore, no Court of Appeals has found pre-suit demand a requirement for civil actions brought under Sections 502(a)(2) or (a)(3).

Santomenno, 677 F.3d at 188. *See also Department of Labor's amicus brief* ("Thus, all the courts that have addressed the issue have correctly concluded that there is no such prerequisite to a fiduciary breach suit." (Resp. App. p. 21)).

Notably, nowhere in its Petition does JHUSA quote a single word from any of its many filings advancing the exhaustion argument. Instead Petitioners' arguments have focused exclusively on the purported need for a pre-suit demand. *See* Resp. App. pp. 34 and 36 ("Plaintiff has not pleaded that she made a pre-suit demand on her Primary Fiduciary"; "Plaintiff cannot sue JHUSA without first making a demand upon their Plans' trustees. . . .") Having never argued, prior to the filing of this Petition, that the exhaustion doctrine applies in this case, the issue is not appropriate for consideration on *certiorari* by this Court. *See Tennessee*, 426 U.S. at 314 ("Never adequately alleged, and not considered by the District Court or the Court of Appeals, this assertion is not before us."); *Pennsylvania Dept. of Corr.*, 524 U.S. at 212-13 ("'Where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them.'") quoting *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 147, n. 2 (1970).

III. As ERISA § 502(g), 29 U.S.C. § 1132(g), Confirms, When Congress Sought To Place An Impediment To A Participant Bringing Suit, It Knew How To Do So.

As noted by the Department of Labor, "[u]nlike sections 502(a)(2) and (a)(3), section 502(g)[2][6] does

[6] As explained by the Department of Labor, in its *amicus brief* (bracketed text in the original):

> section 502(g) provides:
>
> (g)(2) In any action under this [title] by a fiduciary for or on behalf of a plan to enforce [section 515] . . . in which a judgment in favor of the plan is awarded, the court shall award the plan –
>
> (A) the unpaid contributions . . .
>
> 29 U.S.C. § 1132(g)(2)(A) (emphasis added). Thus, section 502(g), by its express language, gives the right to

(Continued on following page)

not empower plan participants themselves to sue, but only authorizes suit by plan fiduciaries to recover delinquent contributions." (Resp. App. p. 17). Thus, when Congress wanted to place an impediment to a participant filing a suit, it knew how to do that. This distinction between ERISA § 502(g)(2), 29 U.S.C. § 1132(g)(2), and ERISA §§ 502(a)(2) and (3), 29 U.S.C. §§ 1132(a)(2) and (3), provides further support for the conclusion, which is consistent with every other Court of Appeals, that neither ERISA §§ 502(a)(2) nor (3), 29 U.S.C. §§ 1132(a)(2) nor (3), contain a pre-suit demand or joinder requirement. *See Jama v. Immigration & Customs Enforcement*, 543 U.S. at 341:

> We do not lightly assume that Congress has omitted from its adopted text requirements that it nonetheless intends to apply, and our reluctance is even greater when Congress has shown elsewhere in the same statute

---

sue to enforce section 515 only to fiduciaries; participants and beneficiaries have no such right under this section. (Resp. App. p. 24).

* * *

Section 515 provides: "Every employer who is obligated to make contributions to a multiemployer plan under the terms of the plan or under the terms of a collectively bargained agreement shall, to the extent not inconsistent with law, make such contributions in accordance with the terms and conditions of such plan or such agreement." Section 515 is enforced through section 502(g)(2), 29 U.S.C. § 1132(g)(2), which is set forth above in text. (Resp. App. p. 23 n. 2).

> that it knows how to make such a requirement manifest.

See also Coan, 457 F.3d at 258; and *Department of Labor's amicus brief* (Resp. App. p. 22).

IV. The Imposition Of A Pre-suit Demand Requirement Would Be Contrary To The Text Of FED. R. CIV. P. 23.1.

For the Court to accept Petitioners' argument, it would not only have to engraft on to ERISA §§ 502(a)(2) and (3), 29 U.S.C. §§ 1132(a)(2) and (3), a pre-suit demand requirement, it would also have to ignore the plain language of FED. R. CIV. P. 23.1. Furthermore, the imposition of a pre-suit demand requirement could not be reconciled with this Court's interpretation of FED. R. CIV. P. 23.1 in *Daily Income Fund, Inc., v. Fox*, 464 U.S. 523, 529 (1984).

FED. R. CIV. P. 23.1 provides that it:

> 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.

An ERISA plan is not a corporation or an unincorporated association; its participants are not shareholders. Therefore, FED. R. CIV. P. 23.1 is inapplicable to ERISA claims. *Coan*, 457 F.3d at 257.

Petitioners' position cannot be reconciled with this Court's holding in *Daily Income Fund*. In that case this Court held that a mutual fund investor need not make a pre-suit demand on the fund's board of directors prior to filing a derivative action on behalf of the fund under section 36(b) of the Investment Company Act of 1940 ("ICA"), 15 U.S.C. § 80a-35(b). The Court reached this conclusion for two reasons. First, it noted that FED. R. CIV. P. 23.1 "governs only suits 'to enforce a right of a corporation' when the corporation itself has 'failed to enforce a right which may properly be asserted by it' in court." *Id.* at 533-34. Second, because:

> 36(b) . . . provides that "[a]n action may be brought under this subsection by the [Securities and Exchange] Commission, or by a security holder of such registered investment company on behalf of such company" against the adviser and other affiliated parties. By its terms, then, the unusual cause of action created by § 36(b) differs significantly from those traditionally asserted in shareholder derivative suits. Instead of establishing a corporate action from which a shareholder's right to sue derivatively may be inferred, § 36(b) expressly provides only that the new corporate right it creates may be enforced by the Securities and Exchange Commission (SEC) and security holders of the company.

Id. at 534-35 (bracketed text in original).

Like ICA § 36(b), 15 U.S.C. § 80a-35(b), ERISA § 502(a)(2), 29 U.S.C. § 1132(a)(2), explicitly provides that suits may be brought under it "by the Secretary, **or by a participant**, beneficiary or fiduciary for appropriate relief under section 1109. . . ." Similarly, ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3), includes among those who may seek "appropriate equitable relief," a "participant, beneficiary, or fiduciary. . . ." Thus, under ERISA §§ 502(a)(2) and (3), 29 U.S.C. §§ 1132(a)(2) and (3), a plan may *not* bring a suit; a suit, may only be brought by participants, beneficiaries and the Department of Labor. These similarly worded ERISA statutes should, in this respect, be construed in the same manner as this Court construed ICA § 36(b), U.S.C. § 80a-35(b), in *Daily Income Fund.* There is simply no conceptual basis, given the holding in *Daily Income Fund* and the language of ERISA §§ 502(a)(2) and (3), 29 U.S.C. §§ 1132(a)(2) and (3), upon which to base a pre-suit demand requirement under these sections of ERISA.

The Circuit Courts of Appeals have uniformly rejected the application of FED. R. CIV. P. 23.1 to ERISA §§ 502(a)(2) and (3), 29 U.S.C. §§ 1132(a)(2) and (3) claims. *See Coan*, 457 F.3d at 257 ("[b]y its terms [Fed. R. Civ. P. 23.1] does not apply to section 502(a)(2) suits, which are neither brought by shareholders or members nor are brought to enforce the right of a corporation or of an unincorporated association."); *Kayes*, 51 F.3d at 1462-63 and *Brink,* 667 F.2d at 428.

V. Ignoring The Statutory Text Of ERISA §§ 502(a)(2) And (3), 29 U.S.C. §§ 1132(a)(2) And (3), By Imposing A Pre-suit Demand Requirement, Would Frustrate The Purposes Of ERISA.

For two reasons, engrafting a pre-suit demand requirement on to ERISA §§ 502(a)(2) and (3), 29 U.S.C. §§ 1132(a)(2) and (3), would frustrate the purposes of ERISA. First, it would likely increase the costs incurred by employers and possibly discourage small-to-medium-sized employers from adopting 401(k) plans. Second, it would impose a condition on access to courts which the drafters of ERISA decided not to include in a statutory scheme that, as this Court has observed, is "comprehensive" and "the product of a decade of congressional study of the Nation's private employee benefit system. . . ." *Mertens*, 508 U.S. at 251.

Petitioners claim that the failure to engraft a pre-suit demand provision would enhance the cost of operating ERISA plans. It is unclear as to why this would be and far more likely that a demand requirement would increase administrative costs. If a demand were required, an employer who received such a demand, would be compelled to incur costs to investigate the claim and then personally fund the litigation to prosecute it. If the employer felt the demand had merit, it would have to incur expenses to redress the violation. These increased costs could discourage plan sponsors from adopting plans in the first place. If

JHUSA, the entity that charged and collected the alleged impermissible fees, is directly sued, than the "small to medium-sized businesses" (Resp. App. p. 37) whom JHUSA targets with its product avoid incurring legal fees, on account of fees charged by JHUSA.

As this Court stated in *Mertens*, 508 U.S. at 251, "ERISA is, we have observed, a 'comprehensive and reticulated statute,' the product of a decade of congressional study of the Nation's private employee benefit system." As observed by the Department of Labor, "ERISA's expressly stated intent [is] to remove procedural barriers and to provide plan participants and beneficiaries 'ready access to the Federal courts.' 29 U.S.C. § 1001(b)." (Resp. App. p. 17). The result of those ten years of study that preceded the adoption of ERISA, is reflected in the text of ERISA §§ 502(a)(2) and (3), 29 U.S.C. §§ 1132(a)(2) and (3), which contain no pre-suit demand requirement. Thus a pre-suit demand requirement should not now, contrary to the text of ERISA and purpose of its drafters, be engrafted into the statute. To do so would be inconsistent with this Court's stated reluctance to "tamper with an enforcement scheme crafted with such evident care as the one in ERISA." *Massachusetts Mut. Life Ins. Co.*, 473 U.S. at 147 (emphasis added). *See also LaRue*, 552 U.S. at 260 (Thomas, J., concurring):

> Although I agree with the majority's holding, I write separately because my reading of §§ 409 and 502(a)(2) is not contingent on trends in the pension plan market. Nor does it depend on the ostensible "concerns" of

> ERISA's drafters. Rather, my conclusion that petitioner has stated a cognizable claim flows from the unambiguous text of §§ 409 and 502(a)(2) as applied to defined contribution plans. Section 502(a)(2) states that "[a] civil action may be brought" by a plan "participant, beneficiary or fiduciary," or by the Secretary of Labor, to obtain "appropriate relief" under § 409. 29 U.S.C. § 1132(a)(2).

VI. Under Trust Law, A Beneficiary Is Not Required To Make A Pre-suit Demand Prior To Filing Suit Against A Fiduciary, And Trust Law Is Not, In Its Entirety, Incorporated Into ERISA.

Petitioners argue that this Court should ignore the plain meaning of ERISA §§ 502(a)(2) and (3), 29 U.S.C. §§ 1132(a)(2) and (3), and rely on trust law to engraft a pre-suit demand requirement into those statutes. There are two problems with this argument.

First, under trust law, a beneficiary may always sue a fiduciary, such as JHUSA, without making a pre-suit demand. As noted by the Department of Labor, in its *amicus brief* before the Third Circuit:

> [T]he trust beneficiary always had the right to sue the trustees and other fiduciaries for their own fiduciary breaches without making a demand. *See* Restatement § 199, at 437 (beneficiary of a trust can maintain a suit to compel the trustee to perform his duties and to redress a breach of trust); George G. Bogert & George T. Bogert, The Law of

> Trusts and Trustees § 861, at 33 (rev. 2d ed. 1995) ("The beneficiary's basic remedies are against the trustee individually or for recovery of trust property or its product.").

(Resp. App. pp. 28-29). *See also* Restatement (Second) of Trusts, § 200 (1959):

> No one except a beneficiary or one suing on his behalf can maintain a suit against the trustee to enforce the trust or to enjoin or obtain redress for a breach of trust.

Similarly, section 199 of the Restatement (Second) of Trusts (1959) also recognizes that a beneficiary can maintain an action against a fiduciary:

> The beneficiary of a trust can maintain a suit
>
> > (a) to compel the trustee to perform his duties as trustee;
> >
> > (b) to enjoin the trustee from committing a breach of trust;
> >
> > (c) to compel the trustee to redress a breach of trust. . . .

Since, at common law, the right belongs to the beneficiary, there is no doctrinal basis upon which to premise a pre-suit demand.

Petitioners' brief erroneously invokes common law principles which are only applicable to third party actions. This argument is inconsistent with JHUSA's concession, for purposes of appeal, that JHUSA is a fiduciary.

Furthermore, to the extent that the common law of trusts might be construed to impose a pre-suit demand requirement, it would not control. "ERISA departs from trust law by its imposing exacting duties of conduct and loyalty not just on trustees, but on all those who act as fiduciaries to ERISA plans; and it does so by intentionally expanding the common law definition of fiduciary beyond trustees and other named fiduciaries, to all those who function as fiduciaries." *Department of Labor's amicus brief* (Resp. App. p. 29).

Thus, as this Court held in *Varity Corp.*, 516 U.S. at 528, in construing ERISA, the entire body of trust law is not incorporated into ERISA:

> Though we have recognized that Congress borrowed from the common law of trusts in enacting ERISA, we must not forget that ERISA is a statute, and in every case involving construction of a statute, the starting point . . . is the language itself. (Internal citations and quotations omitted).

See also Hughes Aircraft Co., 525 U.S. at 447:

> As an initial matter, because ERISA is a "comprehensive and reticulated statute," *Nachman*, 446 U.S., at 361, 100 S.Ct. 1723, and is 'enormously complex and detailed,' *Mertens v. Hewitt Associates*, 508 U.S. 248, 262, 113 S.Ct. 2063, 124 L.Ed.2d 161 (1993), **it should not be supplemented by extra-textual remedies, such as the common-law doctrines advocated by respondents.**

> *See Guidry v. Sheet Metal Workers Nat. Pension Fund*, 493 U.S. 365, 376, 110 S.Ct. 680, 107 L.Ed.2d 782 (1990) (explaining that, "[a]s a general matter, courts should be loath to announce equitable exceptions to legislative requirements or prohibitions that are unqualified by the statutory text"). **Application of the wasting trust doctrine in this context would appear to be inconsistent with the language of ERISA's termination provisions.**

See also LaRue, 552 U.S. at 260 (Thomas, J. concurring):

> [M]y conclusion that petitioner has stated a cognizable claim flows from the unambiguous text of §§ 409 and 502(a)(2) as applied to defined contribution plans. Section 502(a)(2) states that '[a] civil action may be brought' by a plan 'participant, beneficiary or fiduciary,' or by the Secretary of Labor, to obtain 'appropriate relief' under § 409, 29 U.S.C. § 1132(a)(2).)

CONCLUSION

For the foregoing reasons Petitioners' Petition for Certiorari should be denied.

Respectfully submitted,

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Statutory Provisions Involved

Employee Retirement Income Security Act of 1974, as amended ("ERISA") § 2(b), 29 U.S.C. § 1001(2)(b):

Congressional findings and declaration of policy: . . .

(b) Protection of interstate commerce and beneficiaries by requiring disclosure and reporting, setting standards of conduct, etc., for fiduciaries

It is hereby declared to be the policy of this chapter to protect interstate commerce and the interests of participants in employee benefit plans and their beneficiaries, by requiring the disclosure and reporting to participants and beneficiaries of financial and other information with respect thereto, by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts.

ERISA § 409(a), 29 U.S.C. § 1109(a):

Liability for breach of fiduciary duty

(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.

ERISA §§ 502(a)(2) and (3), 29 U.S.C. §§ 1132(a)(2) and (3):

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;

* * *

ERISA § 502(g)(2)(A), 29 U.S.C. § 1132(g)(2)(A):

(g) Attorney's fees and costs; awards in actions involving delinquent contributions

. . .

(2) In any action under this subchapter by a fiduciary for or on behalf of a plan to enforce section 1145 of this title in which a judgment in favor of the plan is awarded, the court shall award the plan –

(A) the unpaid contributions,

* * *

Santomenno *Amicus* Brief, in support
of appellants and requesting reversal

No. 11-2520

**IN THE UNITED STATES COURT OF
APPEALS FOR THE THIRD CIRCUIT**

DANIELLE SANTOMENNO, et al.

Appellants,

v.

JOHN HANCOCK LIFE INSURANCE CO., et al.

Appellees.

On Appeal from the United States District Court
for the District of New Jersey

**BRIEF OF THE SECRETARY OF LABOR,
HILDA L. SOLIS, AS AMICUS CURIAE
IN SUPPORT OF APPELLANTS
AND REQUESTING REVERSAL**

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4 Austin W. Scott, *Law of Trusts* § 282.1 (3d ed. 1967)

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STATEMENT OF THE ISSUE

ERISA sections 502(a)(2) and (a)(3), 29 U.S.C. §§ 1132(a)(2), (a)(3), expressly authorize plan participants to sue plan fiduciaries who have breached their statutory duties for remedial, injunctive and other equitable relief. The question presented is whether the district court erred in requiring plan participants to first request that plan trustees bring suit against breaching fiduciaries as a condition to exercising their independent statutory right to sue under sections 502(a)(2) and (a)(3).

STATEMENT OF IDENTITY, INTEREST AND AUTHORITY TO FILE

The Secretary of Labor is charged with interpreting and enforcing the provisions of Title I of the Employee Retirement Income Security Act of 1974 ("ERISA"), as amended, 29 U.S.C. § 1001 *et seq.* Accordingly, the Secretary has significant interests in the proper application of the safeguards Congress established through ERISA for the administration of employee benefit plans and the protection of participants in those plans. These interests include promoting uniformity of law, protecting beneficiaries, enforcing fiduciary standards, and ensuring the financial stability of employee benefit plan assets.

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

Although the Secretary of Labor has primary interpretative and enforcement authority for Title I of ERISA, the Secretary does not have the resources to pursue litigation regarding every allegation of fiduciary imprudence. Accordingly, the Secretary has an interest in ensuring that courts do not erect unwarranted barriers to the ability of private litigants to sue to protect their statutory rights under ERISA. The district court's erroneous conclusion that plan participants must first make a pre-suit demand on the trustees of their plans before exercising their right to sue for fiduciary breach under ERISA undermines this interest.

The Secretary files this brief as amicus curiae under Federal Rule of Appellate Procedure 29(a).

STATEMENT OF FACTS

1. Defendant John Hancock Life Insurance Co. (U.S.A.) (John Hancock) is a Michigan company that, among other things, issues and administers group annuity contracts to sponsors of 401(k) plans. Plaintiffs-appellants are participants or beneficiaries in ERISA-covered 401(k) retirement plans that invested in these group annuity contracts. Joint Appendix ("JA") 8.

In establishing each group annuity contract, John Hancock selects a menu of investment options, both from John Hancock funds and from several independent funds that pay John Hancock revenue-sharing payments. John Hancock generally selects funds for their menus of investment options from three John Hancock series trusts, each trust containing a portfolio of funds: John Hancock Trust (JHT), John Hancock Funds II (JHF II), and John Hancock Funds III (JHF III) (collectively, the JH Trusts). JA 23-24.

John Hancock provides a menu of options to employers, who select subsets of the funds to offer to the 401(k) plans that they sponsor. Once the array of funds has been selected for each plan, plan participants then direct their monies into their own separate sub-accounts, and from there the monies are allocated into particular funds within the portfolios. John Hancock charges plan sponsors a contract level fee, and charges participants and beneficiaries fees for their investments in the sub-accounts. JA 8-9.

Defendant John Hancock Investment Management Services, LLC (JHIMS) provides investment advice to the JH Trusts and all of the investment funds/portfolios within them. Defendants John Hancock Funds, LLC (JHF) and John Hancock Distributors, LLC (JHD) are JHIMS subsidiaries that make distributions from the JH Trusts' individual funds or portfolios to participants or beneficiaries. JA 9.

The named plaintiffs in this case, Danielle Santomenno, Karen Poley and Barbara Poley were participants in 401(k) plans sponsored by their employers, whose assets were invested in one or more of the John Hancock funds described above. They filed suit in 2010 in the United States District Court for the District of New Jersey challenging various investment fees under various provisions of the Investment Company Act of 1940 (which the Secretary's brief does not address) and ERISA, on behalf of themselves and a putative class of all participants and all retirement plans whose trustees contracted with John Hancock for retirement plan services. JA 8.

With regard to their ERISA claims, the plaintiffs allege that John Hancock is a fiduciary under ERISA section 3(21)(A), 29 U.S.C. § 1002(21)(A), based on various activities it performs related to their plan investments. In particular, they allege that John Hancock is a fiduciary because it "retains the authority, at its discretion, to add or delete the available investment options" ; "select[s], monitor[s] and replac[es] the plans' investment options" ; "holds all of Plaintiffs' investments in its separate accounts" ; and "negotiate[s] and/or extract[s] revenue sharing payments, which are derived from Plaintiffs investments, from the advisors to the independent funds and the sub advisers, unaffiliated with the defendants, to funds/portfolios contained in the JHT, the JHFII and the JHFIII."[1] .JA 53, 59, 61.

[1] The plaintiffs do not allege that the other John Hancock entities are fiduciaries, but instead seek to impose equitable liability against these entities under ERISA section 502(a)(3), 29 U.S.C. § 1132(a)(3), for their knowing participation in John Hancock's fiduciary breaches.

In Counts I and II, plaintiffs alleged that John Hancock breached its duties of prudence and loyalty under ERISA section 404, 29 U.S.C. § 1104, and engaged in prohibited transactions under ERISA section 406, 29 U.S.C. § 1106, through its receipt of excessive fees for sales and service of JH Funds and the independent funds that it offers, and through its receipt of an allegedly spurious administrative charges. JA 143-49. In Counts III and IV, the plaintiffs allege that all of the defendants allowed payment of 12-b(1) fees connected with JH funds and the independent funds, and that John Hancock engaged in prohibited transactions and violated its prudence and loyalty obligations in doing so and the other defendants knowingly participated in John Hancock's breaches in this regard. JA 150-57. In Count V, plaintiffs allege that John Hancock acted imprudently, disloyally and in violation of section 406 by wrongfully allowing JHIMS to charge advisory fees. JA 148-64. In Count VI, plaintiffs allege that John Hancock wrongfully received revenue-sharing payments from plaintiffs' investment into sub-accounts, in violation of ERISA. JA 165-68. In Count VII, plaintiffs allege that John Hancock acted in violation of ERISA in selecting JHT Money Market Trust as an investment option to be offered in its menus, despite poor performance and high fees, and wrongfully retained JHIMS as an advisor, despite the fact that it had been disciplined by the SEC. JA 169-73. The plaintiffs seek declaratory relief, as well as disgorgement of all fees and earnings that the defendants obtained in violation of ERISA, damages in the amount sufficient to restore the plaintiffs to the position they would have been in but for the breaches, and attorneys' fees and costs. JA 191-93.

2. On May 23, 2011, the court dismissed the ERISA claims based on its conclusion that participants and beneficiaries cannot sue under ERISA section 502(a)(2) without first making a demand on the plan trustees to bring a fiduciary breach suit. *Santomenno v. John Hancock Life Ins. Co.*, No. 2:10-CV-01655, 2011 WL 2038769 (D.N.J. May 23, 2011) (JA 8-13). Reasoning that section 502(a)(2) claims for fiduciary breach are "akin to" claims for unpaid contributions brought under section 502(g)(2) of ERISA, 29 U.S.C. § 1132(g)(2), the court cited cases that have held that delinquent contribution claims cannot be brought without first making a demand on the trustees that they bring suit for the contributions or establishing that such a demand would be futile. JA 11. To the extent that ERISA left a gap on the issue, the court reasoned that it should follow the common law of trusts under which it is ordinarily the trustee alone who is permitted to sue a third-party wrongdoer, and noted that, to the extent state law was relevant, state corporate law universally requires a demand on the corporation of its board of directors before a shareholder can file suit. JA 11-12.

The court found that there had been no such demand and that the complaint failed to name the trustees, failed to make well-pled allegations as to whether they joined in the alleged breaches, and failed to join the trustees as defendants. JA 11. The court noted that even if "demand on the trustees is not required, the Third Circuit has required such trustee-related factual allegations." *Id.* (citing *McMahon v. McDowell*, 794 F.2d 100, 110 (3d Cir. 1986)). Thus, the court held that "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," and that any such suit "must join the plan's trustees." *Id.* (citing *McMahon*). And, the court concluded that "because there are no such factual allegations and because the trustees have not been joined" dismissal "would seem to be proper." *Id.*

SUMMARY OF THE ARGUMENT

The district court erred in holding that the plaintiffs were required to make a demand on the plan trustees before filing their suit in federal court alleging that John Hancock, as an alleged fiduciary to their defined contribution pension plans, acted imprudently and disloyally and engaged in prohibited transactions with regard to the investment fees that it retained. The remedial provisions under which they sued, ERISA sections 502(a)(2) and (a)(3), expressly give plan participants and beneficiaries the co-equal right with plan fiduciaries and the Secretary to sue plan fiduciaries who violate ERISA. These provisions do not condition the participants' right to file suit in any way or imply that, prior to bringing their own action, plan participants must first request that plan trustees file suit. The court's holding is therefore fundamentally at odds with the statutory text of ERISA's "carefully crafted and detailed enforcement scheme," *Mertens v. Hewitt Associates*, 508 U.S. 248, 254 (1993) (citation omitted), as well as with ERISA's expressly stated intent to remove procedural barriers and to provide plan participants and beneficiaries "ready access to the Federal courts." 29 U.S.C. § 1001(b).

Given the clear statutory text, the district court erred in relying upon ERISA case law concerning suits to recover delinquent plan contributions under ERISA section 502(g)(2), 29 U.S.C. § 1132(g)(2). Unlike sections 502(a)(2) and (a)(3), section 502(g) does not empower plan participants themselves to sue, but only authorizes suit by plan fiduciaries to recover delinquent contributions. In that context, some courts have applied the common law demand rule to allow plan participants to sue for these contributions when the plan fiduciaries have refused to do so. But even in the trust law where the demand rule arose, the rule applies only where a trust beneficiary seeks to enforce a trust's rights (usually contractual) against non-fiduciary third-parties, not where a trust beneficiary sues a fiduciary for breach of its own duties. Because the plaintiffs in this case alleged that John Hancock was a fiduciary, and brought suit against it based on alleged fiduciary breaches (and against the related non-fiduciary defendants for knowingly participating in John Hancock's breaches), application of the trust law rule in this case would not, in any event, require a pre-suit demand. But even if the trust law rule (and the related rule that courts have applied in the corporate context) required such a demand in similar situations, ERISA sections 502(a)(2) and (a)(3), which clearly empower plan participants to sue without precondition, must be viewed as a departure from the common law in this regard.

ARGUMENT

THE DISTRICT COURT ERRED IN CONCLUDING THAT A PLAN PARTICIPANT MUST FIRST DEMAND THAT THE PLAN TRUSTEE BRING SUIT BEFORE FILING AN ACTION AGAINST OTHER FIDUCIARIES UNDER SECTIONS 502(a)(2) AND 502(a)(3) OF ERISA

A. The Plain Language of the Statute Gives Plan Participants the Right to Bring an Action Against Breaching Fiduciaries Without Precondition

ERISA is a comprehensive statute designed to promote the interests of employees and their beneficiaries in employee benefit plans. *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 90 (1983). It does this primarily by imposing a number of stringent duties on plan fiduciaries, including a duty of loyalty, a duty to act for the exclusive purpose of providing plan benefits and defraying reasonable expenses, and a duty of care and prudence. ERISA section 404(a)(1)(A) and

(B), 29 U.S.C. § 1104(a)(1)(A), (B). The statute also flatly prohibits fiduciaries from engaging in certain transactions that are likely to harm the plans they serve. ERISA section 406, 29 U.S.C. § 1106. And, significantly, the statute ensures that not only plan fiduciaries and the Secretary of Labor, but also plan participants and their beneficiaries are granted "ready access to the Federal courts" (29 U.S.C. § 1001(b)) to enforce these fiduciary duties, to recover plan losses stemming from the breach of these duties, and to receive other equitable relief as appropriate. 29 U.S.C. §§ 1109, 1132(a)(2), (a)(3).

Plaintiffs here alleged that, by negotiating and retaining certain investment fees, John Hancock violated its fiduciary duties under ERISA sections 404 and 406, and was liable under ERISA section 409(a), which provides:

> (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 [title] shall be personally liable to make good to such plan any losses to the plan resulting from such breach . . . and shall be subject to such other equitable or remedial relief as the court may deem appropriate.

29 U.S.C. § 1109(a). They sued John Hancock (and the other John Hancock entities) under ERISA sections 502(a)(2) and (a)(3), which provide:

> (a) A civil action may be brought –

. . . .

> (2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under [§ 409; or] . . .
>
> (3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this [title] 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 [title] or the terms of the plan.

29 U.S.C. §§ 1132(a)(2), (a)(3).

In these subdivisions of section 502, "ERISA specifically designates the individuals who are authorized to bring a civil action in 29 U.S.C. § 1132. This section is essentially a standing provision. . . . It is clear under §[§] 1132[(a)(2), (a)(3)] that a civil action may be brought by a participant, beneficiary, fiduciary and the Secretary." *Rofi v. Connecticut Gen. Life Ins. Co.*, No. CIV. A. 91-2985, 1993 WL 224728, *3-*4 (E.D. Pa. June 23, 1993) (citing *Northeast Dep't ILGWU v. Teamsters Local Union No. 229,* 764 F.2d 147, 153 (3d Cir. 1985) (section 1132 must be read literally)); *see Hermann Hosp. v. MEBA Med. & Benefits Plan*, 845 F.2d 1286, 1288-89 (5th Cir. 1988) ("Where Congress has defined the parties who may bring a civil action founded on ERISA, we are loathe to ignore the legislature's specificity."). Given ERISA's "carefully crafted and detailed enforcement scheme," *Mertens v. Hewitt Associates*, 508 U.S. 248, 254 (1993) (citing *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 146-47 (1985)), there is no reason to believe that Congress inadvertently omitted additional requirements to bring a claim under sections 502(a)(2) and (a)(3).

The plain language of ERISA sections 502(a)(2) and (a)(3) expressly gives participants and beneficiaries the right to bring a civil action to remedy fiduciary breaches, without procedural or other preconditions. The plaintiffs in this case availed themselves of this right, as vast numbers of plaintiffs have done under ERISA, without first making a demand on the trustees or other named fiduciaries.

Thus, all the courts that have addressed the issue have correctly concluded that there is no such prerequisite to a fiduciary breach suit. *See 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/NUM v. Defries*, 943 F.2d 474, 478-79 (4th Cir. 1991) (citing *Katsaros* for the proposition that no prior demand requirement is incorporated into ERISA); *Brink v. DaLesio*, 667 F.2d 420, 428 (4th Cir. 1981) (adoption of a demand requirement would frustrate ERISA's remedial purposes); *Kayes v. Pac. Lumber Co.*, 51 F.3d 1449, 1462-63 (9th Cir. 1995) (no demand requirement for fiduciary breach claim under ERISA section 502(a)(2)).

Not only does a demand requirement on the trustees of the sort the district court imposed here find no support in the statutory language, it is also inconsistent with ERISA's protective purposes. In many instances, the trustees (or named fiduciaries) are among the parties being accused of falling short in their duties under ERISA and thus are unlikely to take action. Even in cases where the plan participants are accusing only fiduciaries other than the trustees of breaching their duties, the trustees themselves may well be concerned about their own exposure as co-fiduciaries and for this reason may be hesitant to take action, or, at a minimum, will be operating under a conflict in deciding whether or not to do so. Given these practical concerns, a demand rule of the kind imposed by the district court would necessarily lessen the protective scope of ERISA.

Because Congress itself placed no such impediment on participants' ability to file suit to remedy fiduciary breaches, the district court was not justified in doing so. *See Coan v. Kaufman*, 457 F.3d 250, 258 (2d Cir. 2006) ("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."); *cf. Beck v. Levering*, 947 F.2d 639, 642 (2d Cir. 1991) (because trustees may be faced with potential liability and their interest in absolving themselves may conflict with the private litigants' interest in fair adjudication of the issues and full recovery, section

502(a) authorizes the Secretary to bring suit concurrently with private plaintiffs to recover appropriate damages).

B. Delinquent Contributions Cases Brought Under Section 502(g) are not Relevant Because that Statutory Section does not Give Participants and Beneficiaries the Right to Sue Directly

In dismissing the plaintiffs' action based on their failure to make a demand to sue upon the trustees of their plans, the district court relied on cases brought under section 502(g) of ERISA, which, unlike section 502(a), does not grant participants a direct right to enforce the statute. *See Coan*, 457 F.3d at 258 (distinguishing sections 502(a)(2) and (g) on this basis). The district court relied primarily on this Court's decision in *McMahon v. McDowell*, 794 F.2d 100 (3d Cir. 1986) and the Second Circuit's decision in *Diduck v. Kaszycki & Sons Contractors*, 874 F.2d 912, 916 (2d Cir. 1989), which concerned a "derivative claim" by plan participants under ERISA section 502(g) to collect delinquent contributions owing to the plan under ERISA section 515, 29 U.S.C. § 1145.[2]

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[2] Section 515 provides: "Every employer who is obligated to make contributions to a multiemployer plan under the terms of the plan or under the terms of a collectively bargained agreement shall, to the extent not inconsistent with law, make such contributions in accordance with the terms and conditions of such plan or such agreement." Section 515 is enforced through

(Continued on following page)

Unlike sections 502(a)(2) and (a)(3), which expressly allow suit by plan participants, section 502(g) provides:

> (g)(2) In any action under this [title] by a *fiduciary* for or on behalf of a plan to enforce [section 515] . . . in which a judgment in favor of the plan is awarded, the court shall award the plan –
>
> (A) the unpaid contributions . . .

29 U.S.C. § 1132(g)(2)(A) (emphasis added). Thus, section 502(g), by its express language, gives the right to sue to enforce section 515 only to fiduciaries; participants and beneficiaries have no such right under this section.

Because section 502(g) does not by its terms authorize participants to sue the plan sponsor for unpaid contributions, some courts have held that their only remedy is to sue plan fiduciaries for their own failure to bring suit if such a suit would have been justified. *See Moore v. American Fed'n of Television & Radio Artists*, 216 F.3d 1236, 1246-47 (11th Cir. 2000). Other courts, however, such as the Second Circuit in *Diduck*, 874 F.2d at 916, and this Court in *McMahon*, 794 F.2d at 109-10, have concluded that participants can derivatively sue the plan sponsor for unpaid contributions, but only if they establish that

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section 502(g)(2), 29 U.S.C. § 1132(g)(2), which is set forth above in text.

the fiduciaries breached their duties by failing to bring suit. These courts have relied on the common law trust rule that "'if the trustee holds in trust a contract right against a third person and the trustee improperly refuses to bring an action to enforce the contract, the beneficiaries can maintain a suit in equity against the trustee joining the obligor as a co-defendant. . . . If the trustee does not commit a breach of trust in failing or declining to bring an action against the third person, the beneficiaries cannot maintain a suit against the trustee and the third person.'" *Struble v. New Jersey Brewery Emps' Welfare Trust Fund*, 732 F.2d 325, 337 (3d Cir. 1984) (quoting 4 Austin W. Scott, *Law of Trusts* § 282.1, at 2339 (3d ed. 1967)), *overturned on other grounds by Firestone Tire & Rubber Co. v. Brunch, 489 U.S. 101 (1989)*; *McMahon*, 794 F.2d at 110 (same); *see also* Restatement (Second) of Trusts ("Restatement") § 282, at 44 (1959) (where a trustee can maintain an action against a third person, the beneficiary cannot maintain a suit against the third person, except "[i]f the trustee improperly refuses or neglects to bring an action against the third person, the beneficiary can maintain a suit in equity against the trustee and the third person."). A similar rule has been applied by states in the corporate context to shareholder derivative suits and by federal courts to such derivative actions under Federal Rule of Civil Procedure 23.1. *See, e.g.*, *Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90 (1991).

In the ERISA context, that common law rule has been applied only to delinquent contribution suits, which combine an equitable action against the breaching trustee with what is essentially a contract action against the delinquent employer on behalf of the plan. Importantly, the common law rule does not pertain at all to fiduciary breach actions brought by participants under section 502(a), as a number of courts have expressly recognized. *Katsaros v. Cody*, 744 F.2d at 280; *Coan*, 457 F.3d at 258 ("Because plan participants are expressly authorized to bring suit under section 502(a)(2), the situation here is not controlled by *Diduck*."); *Defries*, 943 F.2d at 478-79; *Kayes*, 51 F.3d at 1462-63; *cf. Donovan v. Schmoutey*, 592 F. Supp. 1361, 1404 (D. Nev. 1984) (no conditions precedent to the Secretary's authority to file a suit to enforce ERISA). Indeed, no circuit court has ever required that plan participants make a demand on the trustees before filing suit for fiduciary breach against other fiduciaries, *see*, *supra* at 12-13, or that they also sue the trustees alleging fiduciary breach in failing to sue.[3] Indeed, because ERISA's fiduciary liability is joint and several, *see In re Masters Mates & Pilots Pension Plan & IRAP Litig.*, 957 F.2d 1020,

[3] Similarly, because plan participants suing for fiduciary breach "assert the right of the fund as if they themselves were trustees," the Third Circuit has held that they need not exhaust the claims procedure applicable to benefit claims. *Molnar v. Wibbelt*, 789 F.2d 244, 250 n.3 (3d Cir. 1986). *But see Lanfear v. Home Depot, Inc.*, 536 F.3d 1217, 1223-24 (11th Cir. 2008) (imposing exhaustion requirement on fiduciary breach claims).

1023 (2d Cir. 1992), numerous courts, including this one, have held that plan participants and other plaintiffs may sue some fiduciaries without suing all of them. *Struble*, 732 F.2d at 332; *District 65 Ret. Trust for Members of Bureau of Wholesale Sales Representative v. Prudential Secs., Inc.*, 925 F. Supp. 1551, 1565 (N.D. Ga. 1996).

Further, the district court here, in relying on *Diduck*, ignored the fact that, on remand, the district court in *Diduck* correctly construed *Katsaros* and distinguished it on the grounds that *Katsaros* was brought under 502(a)(3), a section that "allows for direct actions for equitable relief by beneficiaries and participants," and "[t]hus, the lack of a demand requirement as enunciated in *Katsaros*, was not in the context of a derivative action but in the context of a direct action by pension plan participants for equitable relief pursuant to section 502(a)(3) and a breach of fiduciary claim." *Diduck*, 737 F. Supp. 792, 800 (S.D.N.Y. 1990), *reversed in part on other grounds*, 974 F.2d 270 (2d Cir. 1992). More fundamentally, the court misunderstood that the demand rule that this Court addressed in *McMahon* applies only where a "trustee holds in trust a contract right against a third person and the trustee improperly refuses to bring an action to enforce the contract," 794 F.2d at 110 (internal quotation marks and citations omitted), and not to a fiduciary breach claim of the kind brought against John Hancock here (or to the related knowing participation claims against the related John Hancock entities). This is because, under trust law, the trustee had exclusive authority over trust assets, including the trust's claims against third parties. Therefore, before a beneficiary could bring an action against a third party who wronged the trust, he first had to show that the trustee improperly refused or neglected to bring that action. *See* Restatement § 282, cmt. a, at 44 ("Ordinarily the interest of the beneficiary is protected against third persons acting adversely to the trustee through proceedings brought against them by the trustee and not by the beneficiary. As long as the trustee is ready and willing to take the proper proceedings against such third persons, the beneficiary cannot maintain a suit in equity against them.").

In contrast, when a trustee breached its obligations to a beneficiary, the right to bring the action was vested directly in the beneficiary. *See* Eduard A. Lopez, *Equitable Remedies For Breach Of Fiduciary Duty Under ERISA After Varity Corp. v. Howe*, 18 Berkeley J. Emp. & Lab. L. 323, 340 (1997) ("A trust beneficiary could bring a suit in equity to compel the trustee to perform, or to enjoin him from violating, his duties. A trust beneficiary also could sue to enforce a trustee's personal liability for breach of trust . . . as well as recover for the trust any proceeds held by the trustee from the wrongful sale of trust property.") (citing 2 Thomas Lewin, *A Practical Treatise on the Law of Trusts* at *900 (8th ed. 1888); and Frederic W. Maitland, *Equity* at 217-18 (2d ed. 1936)). Thus, the trust beneficiary always had the right to sue the trustees and other fiduciaries for their own fiduciary breaches without making a demand. *See* Restatement § 199, at 437 (beneficiary of a trust can maintain a suit to compel the trustee to perform his duties and to redress a breach of trust); George G. Bogert & George T. Bogert, *The Law of Trusts and Trustees* § 861, at 33 (rev. 2d ed. 1995) ("The beneficiary's basic remedies are against the trustee individually or for recovery of trust property or its product.").

However, even if the trust law would have treated an entity like John Hancock as a third party that could only be sued by plan participants if they made a demand on their plan trustee and then joined it in a suit against the trustee for breach of its duty, it would not control. ERISA departs from the trust law by its imposing exacting duties of conduct and loyalty not just on trustees, but on all those who act as fiduciaries to ERISA plans; and it does so by intentionally expanding the common law definition of fiduciary beyond trustees and other named fiduciaries, to all those who function as fiduciaries. *See* 29 U.S.C. § 1002(21)(A); *Mertens*, 508 U.S. at 251. Thus, whatever the case may have been under the trust law, this Court should follow the text of ERISA's remedial provision, which expressly allows the plan participants to sue John Hancock based on allegations that John Hancock functioned as a fiduciary with respect to the plans and breached its duties under ERISA, and that the other John Hancock entities knowingly participated in those breaches. *See Harris Trust & Sav. Bank v. Salomon Smith Barney, Inc.*, 530 U.S. 238, 246, 254 (2000) (in holding that ERISA allows plan participants to sue non-fiduciary third parties who participate in fiduciary breaches, the Supreme Court declined "to depart from the text" of section 502(a)(3), which imposes "no limits on the universe of possible defendants").

When Congress enacted ERISA, it was concerned with the difficulties workers were having in enforcing their rights and remedies against fiduciaries to their employee benefit plans and it sought to remedy that problem. As the Report of the Senate Labor and Public Welfare Committee states:

> The enforcement provisions [of ERISA] 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. 127, 93rd Cong., 2d Sess. 3 (1974), *reprinted in* 1974 U.S.C.C.A.N. 4838, 4871 (emphasis added).

Thus, while ERISA draws from the common law of trusts, "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); *see also Donovan v. Cunningham*, 716 F.2d 1455, 1464 (5th Cir. 1983) (legislative history indicates that Congress intended to incorporate in ERISA the core principles of fiduciary conduct that were developed in the common law of trusts, "but with modifications appropriate for employee benefit plans.").

The Third Circuit, construing that Senate Report, has noted that "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." *Leuthner v. Blue Cross & Blue Shield*, 454 F.3d 120, 128 (3d Cir. 2006). Far from facilitating enforcement, the district court's novel application of a demand rule not found in ERISA's carefully-crafted enforcement provision to dismiss, on the pleadings, the participants' statutorily-authorized fiduciary breach suit erects just the kind of jurisdictional and procedural barrier that Congress sought to avoid.

CONCLUSION

For the foregoing reasons, the Secretary respectfully requests that the Court reverse the decision of the district court.

Respectfully submitted,

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UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

DANIELLE SANTOMENNO, et al., Plaintiffs, vs. John Hancock Life Insurance Company (U.S.A.), John Hancock Life Insurance Company of New York, John Hancock Investment Management Services, LLC, John Hancock Funds, LLC, and John Hancock Distributors, LLC, Defendants.	Civil Action No.: 2:10-cv-01655-WJM-MF ***Document electronically filed.*** ***ORAL ARGUMENT REQUESTED***

BRIEF IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS PLAINTIFF'S FIRST AMENDED CLASS ACTION COMPLAINT

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* * *

[47] D. **Plaintiff Fails to Plead that the Primary Fiduciary of Her Plan has Improperly Refused to Sue JHUSA/ JHNY**

All of Plaintiff's ERISA claims also should be dismissed because Plaintiff has not pleaded that she made a pre-suit demand on her Primary Fiduciary.

* * *

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

DANIELLE SANTOMENNO, et al., Plaintiffs, vs. John Hancock Life Insurance Company (U.S.A.), John Hancock Life Insurance Company of New York, John Hancock Investment Management Services, LLC, John Hancock Funds, LLC, and John Hancock Distributors, LLC, Defendants.	Civil Action No.: 2:10-cv-01655-WJM-MF ***Document electronically filed.*** ***ORAL ARGUMENT REQUESTED***

BRIEF IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS PLAINTIFF'S SECOND AMENDED CLASS ACTION COMPLAINT

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* * *

[32] A. Plaintiffs Fail to Plead that the Trustees of Their Plains Plans Have Improperly Refused to Sue JHUSA

As a threshold matter, all of Plaintiffs' ERISA claims should be dismissed because Plaintiffs cannot sue JHUSA without first making a demand upon their Plans' trustees to assert claims that they believe the Plans possess.

* * *

John Hancock

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*   *   *

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John Hancock

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A leader in the market place

John Hancock is constantly focused on providing the highest standard of quality and service to the organizations we do business with. Our retirement plan business specializes in providing services to small and medium-sized businesses to help their employees with saving for their retirement. . . .

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UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

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	**Honorable William J. Martini** **Civil Action No. 2:10-cv-01655-WJM-MF** **SECOND AMENDED CLASS ACTION COMPLAINT AND JURY DEMAND**

held, or continue to hold, group variable annuity contracts issued/sold by John Hancock Life Insurance Company (U.S.A.), and the 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

Plaintiffs,

vs.

John Hancock Life Insurance Company (U.S.A.), John Hancock Investment Management Services, LLC, John Hancock Funds, LLC, and John Hancock Distributors, LLC,

Defendants.

* * *

VII. FIDUCIARY STATUS OF DEFENDANT JOHN HANCOCK (U.S.A.) PURSUANT TO ERISA AND FIDUCIARY STATUS OF DEFENDANT JOHN HANCOCK INVESTMENT MANAGEMENT SERVICES PURSUANT TO THE ICA

A. ERISA

154. Defendant John Hancock (U.S.A.) is a fiduciary for the Plaintiff Plans pursuant to ERISA §3(21)(A), 29 *U.S.C.* §1002(21)(A).

1. Defendant John Hancock (U.S.A.)'s Ability To Change The Fund Menu And Share Class Of The Underlying Fund in Which Plaintiff Participants' Retirement Assets Are Invested Renders It An ERISA Fiduciary To The Plaintiff Plans

155. Once Defendant John Hancock (U.S.A.) establishes the menu of funds available to a Plaintiff Plan, Defendant John Hancock (U.S.A.) retains the authority, at its discretion, to add or delete the available investment options.

156. The John Hancock website contains the following disclosure:

> Beginning in late April and concluding in May 2010, subject to regulatory approval, some Funds available under your company's qualified retirement plan under John Hancock may be changing. These changes are

> part of our ongoing review and monitoring process, helping to give you access to high-quality and well diversified portfolios. . . .

157. Certain versions of the John Hancock (U.S.A.) booklet, entitled Your Investment Options, contain the following disclosures, all of which demonstrate that Defendant John Hancock (U.S.A.) retains the authority to change the funds in which Plaintiff Participants retirement assets are invested:

> This sub-account previously invested in a different underlying portfolio [the then underlying fund]. It began investing in the current underlying portfolio [American Century Vista Fund] effective on or about May 7, 2005.
>
> This sub-account previously invested in a different underlying portfolio [the then underlying fund]. It began investing in the current underlying portfolio [Lifestyle Fund-Aggressive Portfolio] effective October 14, 2005.
>
> This sub-account previously invested in a different underlying portfolio [the then underlying fund]. It began investing in the current underlying portfolio [U.S. Government Securities Fund] effective October 14, 2005.
>
> This sub-account previously invested in a different underlying portfolio [the then underlying fund]. It began investing in the current underlying portfolio effective on or about November 6, 2006 [International Core Fund].

> This sub-account previously invested in a different underlying portfolio [the then underlying fund]. It began investing in the current underlying portfolio [Davis New York Venture Fund] effective April 30, 2001.
>
> This sub-account previously invested in a different underlying portfolio [underlying fund]. It began investing in the current underlying portfolio [Oppenheimer Global Fund] effective February 9, 2004.

158. Review of the 2008 and 2009 versions of the booklet entitled Your Investment Options reveals that in 2009, Defendant John Hancock (U.S.A.) deleted the "John Hancock Classic Value Fund" as an underlying investment option and replaced it with the "T. Rowe Price Equity Income Fund."

159. According to Exhibit H attached to the Declaration of Counsel for Defendants, which accompanied their July 16, 2010 Motion to Dismiss (hereinafter these exhibits are referred to as "Defense Exhibit [ ]"), Defendant John Hancock (U.S.A.) operates a "FundCheck Fund Review and Scorecard" program. Defendant John Hancock (U.S.A.) uses this program to evaluate, twice per year, the investment options it offers to the Plaintiff Plans. Defendant John Hancock (U.S.A.) distributes copies of these evaluations to the Plaintiff Plans as well as notifications of the changes Defendant John Hancock (U.S.A.) has made to the menu of investment options it offers to the Plaintiff Plans. (Defense Exhibit H

page 885 (page references are to the page numbers inserted by the ECF system)).

160. As further evidence of Defendant John Hancock (U.S.A.)'s authority to change the investment options offered to Plaintiffs at its discretion, Defense Exhibit I, which is a prospectus for a contract that may be used with 401(k)s (see page 976) states on page 929 that Defendant John Hancock (U.S.A.) "reserve[s] the right, subject to compliance with applicable law, to add other Subaccounts, eliminate existing Subaccounts, combine Subaccounts or transfer assets in one Subaccount to another Subaccount that we, or an affiliated company may establish."

161. As further evidence of Defendant John Hancock (U.S.A.)'s authority to change the investment options offered to Plaintiffs at its discretion, Defendant John Hancock (U.S.A.) stated: "[i]f it is determined that the investment option is no longer able to deliver its value proposition to our clients and there is a viable replacement available, the underlying fund may be replaced."

162. Defendant John Hancock (U.S.A.) also retains the authority to change the share class, with respect to each fund, in which Plaintiffs' retirement monies are invested.

163. The 2009 version of the booklet entitled Your Investment Options contains the following statements:

- This sub-account [referring to The Growth Fund of America] previously invested in a different share class of the underlying portfolio. It began investing in the current share class effective on or about July 28, 2009.
- This sub-account [referring to the Oppenheimer Global Fund] previously invested in a different share class of the same underlying portfolio. It began investing in the current share class effective on or about November 10, 2008.
- Effective on or about November 9, 2009, this sub-account [referring to the Euro Pacific Growth Fund] began investing in a different share class of the same underlying portfolio.

164. Because Defendant John Hancock (U.S.A.) has the authority to change, at its discretion, both the underlying funds and share classes available to Plaintiffs, Defendant John Hancock (U.S.A.) exercises discretionary authority and/or discretionary control with respect to the management of Plaintiff Plans and/or their assets and is therefore a fiduciary pursuant to ERISA §3(21)(A)(i), 29 *U.S.C.* §1002(21)(A)(i).

165. Because Defendant John Hancock (U.S.A.) has the authority to change, at its discretion, both the underlying funds and the share classes available to Plaintiffs, Defendant John Hancock (U.S.A.) renders investment advice for a fee with respect to assets of the Plaintiff Plans, and/or has the authority to do so, and therefore is a fiduciary to the Plaintiff Plans

pursuant to ERISA 3(21)(A)(ii), 29 *U.S.C.* §1002(21)(A)(ii).

166. Because Defendant John Hancock (U.S.A.) has the authority, at its discretion, to change both the underlying funds and the share classes available to Plaintiffs, Defendant John Hancock (U.S.A.) has discretionary authority and/or discretionary responsibility in the administration of the Plaintiff Plans and is a fiduciary to such plans pursuant to ERISA 3(21)(A)(iii), 29 *U.S.C.* §1002(21)(A)(iii).

2. Defendant John Hancock (U.S.A.) Is An ERISA Fiduciary To The Plaintiffs Plans Because Plaintiffs' Employers Are "Rubberstamping" Defendant John Hancock (U.S.A.)'s Investment Option Recommendations

167. In order for a plan sponsor to acquire the John Hancock (U.S.A.) Fiduciary Standards Warranty, the sponsor must include, from the fund menu assembled by Defendant John Hancock (U.S.A.), "at least one fund from each of the following classes of funds offered by John Hancock (U.S.A.)."

168. The classes to which Defendant John Hancock (U.S.A.) refers are nineteen in number, each corresponding to a different category of investment strategy for a fund (i.e., large cap stock funds, international stock funds, etc.).

169. In order to receive the Fiduciary Standards Warranty, which is allegedly at no additional charge to the plan sponsor, plan sponsors are required to select nineteen funds that are "offered by John Hancock (U.S.A.)."

170. Defendant John Hancock (U.S.A.) "warrants and covenants that the investment options Plan fiduciaries select to offer to Plan participants: Will satisfy the prudence requirement of section 404(a)(1)(B) of ERISA. . . . "

171. According to Defendant John Hancock (U.S.A.), "the revenue John Hancock (U.S.A.) receives from many of its internally-managed Funds . . . may be higher than those advised or sub-advised exclusively by unaffiliated mutual fund companies."

172. Defendant John Hancock (U.S.A.), by conditioning receipt of the Fiduciary Standards Warranty, at allegedly no additional charge, on a sponsor's selection of nineteen John Hancock funds, rather than funds in the same investment category offered by an independent mutual fund company, is rendering investment advice.

173. he investment menus offered to Plaintiffs Santomenno, K. Poley and B. Poley offered at a minimum, nineteen John Hancock funds/portfolios. Therefore, on information and belief, these Plaintiff Plans were covered by the Fiduciary Standards Warranty.

174. n order to receive the Fiduciary Standards Warranty, plan sponsors are required to include nineteen John Hancock funds, each of a specific investment category and advised by a John Hancock affiliate, and therefore Defendant John Hancock (U.S.A.) is rendering investment advice for a fee with respect to assets of the Plaintiff Plans.

175. Through the Fiduciary Standards Warranty, Defendant John Hancock (U.S.A.) is a fiduciary pursuant to ERISA §3(21)(A)(i), (ii) and (iii), 29 *U.S.C.* §1002(21)(A)(i), (ii) and (iii).

3. Defendant John Hancock U.S.A. Is An ERISA Fiduciary to the Plaintiff Plans Pursuant To ERISA §401(c)(5)(B), 29 *U.S.C.* §1101(c)(5)(B), And 29 *C.F.R.* 2550.401c-1(d)(2)(c)

176. ERISA §401(c)(5)(B), 29 *U.S.C.* §1101(c)(5)(B), provides:

> No person shall be subject to liability under [ERISA] . . . on the basis of a claim that assets of an insurer (other than plan assets held in a separate account) constitute assets of the plan, except – . . . as otherwise provided by the Secretary in regulations intended to prevent avoidance of the regulations issued under paragraph (1). . . .

177. Defendant John Hancock (U.S.A.) holds all of Plaintiffs' investments in its separate accounts and

therefore is a fiduciary pursuant to ERISA §401(c)(5)(B), 29 *U.S.C.* §1101(c)(5)(B).

178. 29 *C.F.R.* 2550.401c-1(d)(2)(c) provides as follows:

> In general, an insurer is subject to ERISA's fiduciary responsibility provisions with respect to the assets of a separate account (other than a separate account registered under the Investment Company Act of 1940) to the extent that the investment performance of such assets is passed directly through to the plan policyholders. ERISA requires insurers, in administering separate account assets, to act solely in the interest of the plan's participants and beneficiaries; prohibits self-dealing and conflicts of interest; and requires insurers to adhere to a prudent standard of care.

179. The JHFII is a series trust registered under the ICA as an open-end management investment company and contains funds/portfolios that are offered by Defendant John Hancock (U.S.A.) to the Plaintiff Plans as investment options, including the following Example Plan JH Funds: All Cap Value Fund, Blue Chip Growth Fund, Global Bond Fund, International Value Fund, Real Return Bond Fund, Small Company Value Fund, Total Return Fund, U.S. Government Securities Fund, Lifestyle Fund-Aggressive Portfolio, Lifestyle Fund-Moderate Portfolio,

Lifestyle Fund-Balanced Portfolio, Lifestyle Fund-Growth Portfolio and Lifestyle Fund-Conservative Portfolio.

180. The Example JH Plan Funds listed in the preceding paragraph are listed in the 2008 and 2009 versions of the booklet entitled Your Investment Options as the underlying investment for thirteen of the investment options available to Plaintiffs.

181. According to a JHFII exemption filing with the SEC "[s]hares of JHF II [the JHFII] are offered . . . to certain separate accounts of JHLICO (USA) [Defendant John Hancock (U.S.A.)] . . . that are not registered as investment companies under the Act [ICA]. . . ."

182. On information and belief, when Plaintiffs elect to invest in any fund/portfolio contained in the JHFII that is offered with their Plaintiff Plan by Defendant John Hancock (U.S.A.) (including the thirteen investment options listed in the 2008 and 2009 versions of the booklet entitled Your Investment Options) the underlying investment performance of those investments is determined by the performance of assets that are held in unregistered separate accounts of Defendant John Hancock (U.S.A.) (i.e., the performance of the assets in an unregistered separate account are directly passed through to the plan policyholders). Therefore, pursuant to 29 *C.F.R.* 2550-401c-1(d)(2)(c), Defendant John Hancock (U.S.A.) is a fiduciary under ERISA.

4. Defendant John Hancock (U.S.A.), As An Insurance Company, Is An ERISA Fiduciary To The Plaintiff Plans

183. Since Defendant John Hancock (U.S.A.) has control over group insurance contracts purchased by employee benefit plans, it is a fiduciary under ERISA.

184. Since Defendant John Hancock (U.S.A.) is an insurance company that can affect the amount of Plaintiffs retirement benefits through (A) the fees it charges them on the investment of their retirement monies and (B) the selection of the share class of a fund, and the specific fund it makes available to Plaintiffs for the investment of their retirement monies, it is a fiduciary pursuant to ERISA §3(21)(A)(i), (ii) and (iii), 29 *U.S.C.* §1002(21)(A) (i), (ii) and (iii).

5. By Negotiating For Revenue Sharing Payments Derived From Plaintiffs' Investments Defendant John Hancock (U.S.A.) Is An ERISA Fiduciary To The Plaintiff Plans

185. By negotiating and/or extracting revenue sharing payments, which are derived from Plaintiffs investments, from the advisors to the independent funds and the subadvisers, unaffiliated with the Defendants, to funds/portfolios contained in the JHT, the JHFII and the JHFIII, that it offers as investment options with its group annuity contracts,

Defendant John Hancock (U.S.A.) is a fiduciary pursuant to ERISA §3(21)(A)(i), (ii) and (iii), 29 *U.S.C.* §1002(21)(A)(i), (ii) and (iii). On information and belief, only if an advisor to an independent fund agrees to make revenue sharing payments to Defendant John Hancock (U.S.A.), will this Defendant offer that fund as an investment option with a Plaintiff Plan.

6. Defendant John Hancock (U.S.A.) By Taking The Fiduciary Role Of Selecting and Monitoring the Plaintiff Plans Investment Options Is An ERISA Fiduciary To The Plaintiff Plans

186. Defendant John Hancock (U.S.A.) correctly states that it is a fiduciary's responsibility to select and monitor a plan's investment options.

187. In selecting the underlying investment options for the Plaintiff Plans Defendant John Hancock (U.S.A.) promises to "scour a large universe of funds, applying our [Defendant John Hancock (U.S.A.)] proprietary selection process to bring you a select group of investment choices that meet very stringent criteria . . . " (Defense Exhibit H, p. 885).

188. Defendant John Hancock (U.S.A.) promises plan sponsors:

> In selecting and monitoring investment options that we make available to qualified retirement plans that are subject to ERISA

> (the 'Plans'), we apply generally accepted investment theories and prevailing industry practices. Those are the same standards that ERISA imposes on fiduciaries for satisfying their investment duties under ERISA's prudent man rule.

189. Defendant John Hancock (U.S.A.) states "[p]ortfolios are monitored on a daily, monthly, quarterly, and annual basis." In connection with this monitoring process, Defendant John Hancock (U.S.A.) allegedly engages in various monitoring activities.

190. Defendant John Hancock (U.S.A.), in connection with its monitoring of the investment options it selects for the Plaintiff Plans has, what it describes as an "Underlying fund Replacement Regimen." Through this program, Defendant John Hancock (U.S.A.) allegedly engages in various evaluation services with respect to any poorly performing investment option and "[i]f it is determined that the investment option is no longer able to deliver its value proposition to our clients and there is a viable replacement option, the underlying fund may be replaced."

191. Defendant John Hancock (U.S.A.) operates a "FundCheck Fund Review and Scorecard" program. Defendant John Hancock (U.S.A.) uses this program to evaluate, for all of the Plaintiff Plans, on a Plaintiff Plan by Plaintiff Plan basis, twice per year, the investment options it offers to a specific Plaintiff Plan. Defendant John Hancock (U.S.A.) distributes copies of these evaluations to the Plaintiff Plan as

well as notifications of the changes Defendant John Hancock (U.S.A.) has made to the menu of investment options it offers to the Plaintiff Plan as a consequence of the results of the evaluations of the "FundCheck Fund Review and Scorecard" program.

192. Defendant John Hancock (U.S.A.) by selecting, monitoring and replacing the Plaintiff Plans' investment options is a fiduciary pursuant to ERISA §3(21)(A)(i), (ii) and (iii), 29 *U.S.C.* §1002(21)(A)(i), (ii) and (iii).

7. Defendant John Hancock (U.S.A.) By Rendering Investment Advice to Plaintiff Participants Is An ERISA Fiduciary

193. Defendant John Hancock (U.S.A.) receives fees from the Plaintiffs.

194. Defendant John Hancock (U.S.A.) stated on participant enrollment forms that (A) "[i]f you prefer not to pick your own investment options, choose a professionally constructed and mixed portfolio . . . " (and then directed Plaintiffs to John Hancock funds/portfolios) and (B) "[a]llocating assets to only one or a small number of the investment options (other than professionally constructed and mixed Portfolios) [the Portfolios are all John Hancock funds/portfolios]." In making these statements Defendant John Hancock (U.S.A.) is rendering investment advice and is a fiduciary pursuant to ERISA §3(21)(A)(ii) and 29 *U.S.C.* §1002(21)(A)(ii).

195. Each of the Fund Sheets produced by Defendant John Hancock (U.S.A.) associated with each of the investment options in the 2008 and 2009 versions of the Your Investment Options booklets, advises the Plaintiff Participants, based on their investment goals, when investing in a particular investment option is appropriate. Therefore, Defendant John Hancock (U.S.A.) is rendering investment advice and is a fiduciary pursuant to ERISA §3(21)(A)(ii) and 29 *U.S.C.* §1002(21)(A)(ii).

*   *   *

[John Hancock Investment Selection Form]

*   *   *

ALLOCATION INSTRUCTIONS [sic] You have a range of investment options to choose from. If you prefer not to pick up your own individual investment options choose a professionally constructed and mixed portfolio. . . .

*   *   *

John Hancock USA's Fiduciary Standards

WARRANTY CERTIFICATE

In selecting and monitoring the investment options that we make available to qualified retirement plans that are subject to ERISA (the "Plans"), we apply generally accepted investment theories and prevailing investment industry practices. Those are the same standards as ERISA imposes on fiduciaries for satisfying their investment duties under ERISA's prudent man rule. While we are not acting as a fiduciary for the Plan in selecting and monitoring the investment options in our offering, we stand behind our products.

Our Fiduciary Standards Warranty

If the Plan fiduciaries satisfy the conditions set forth herein below, and subject to the provisions set forth below under "Conditions and Limitations on Our Fiduciary Standards Warranty":

1. John Hancock Life Insurance Company (U.S.A.) ("John Hancock USA" or "we") hereby represents, warrants and covenants that the investment options that the Plan fiduciaries select to offer to Plan participants:

    - Will satisfy the prudence requirement of section 404(a)(1)(B) of ERISA that the investment options be selected according to prevailing investment practices and generally accepted investment theories (the "prudence requirement"),

- Will satisfy the requirement set forth in the United States Department of Labor regulation under section 404(c) of ERISA relating to participant-directed retirement plans, 29 C.F.R. § 2550.404c-1(b)(3), that such plans offer a broad range of investment alternatives (the "broad range requirement"), and
- Will be appropriate for long-term investing, such as investing for retirement benefits by participant.

*　　*　　*

[John Hancock Warranty Emblem Not Reproduced]

John Hancock

Your Account | Personal finance topics | Investment options

updates

latest updates

Upcoming Spring Fund Changes

(March 01, 2010)

Beginning in late April and concluding in May 2010, subject to regulatory and other approvals, some of the Funds available in your company's qualified retirement plan under John Hancock may be changing. These changes are part of our ongoing review and monitoring process, helping to give you access to high-quality and well-diversified portfolios to help you meet your retirement goals.

For more information contact you plan administrator or our toll-free telephone service at 1-800-395-1113 with any questions.

* * *

No. 11-2520

IN THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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 Company (U.S.A.), and the 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

Plaintiffs-Appellants,

v.

JOHN HANCOCK LIFE INSURANCE COMPANY (U.S.A.), JOHN HANCOCK INVESTMENT MANAGEMENT SERVICES, LLC, JOHN HANCOCK

FUNDS, LLC and JOHN HANCOCK DISTRIBUTORS, LLC,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
DISTRICT OF NEW JERSEY
CIVIL ACTION NO. 2:10-cv-01655 (WJM)(MF)
The Honorable William J. Martini

BRIEF OF DEFENDANTS-APPELLEES

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*　　*　　*

[30] Moreover, all but one of these cases is inapposite for the additional reason that they address the applicability of Fed. R. Civ. P. 23.1.[24]

* * *

[24] Participants' district court cases also are inapposite because each addresses the applicability of Rule 23.1. *See, e.g.*, *Blankenship v. Chamberlain*, 695 F. Supp. 2d 966 (E.D. Mo. 2010); *In re AEP ERISA Litig.*, 327 F. Supp. 2d 812 (S.D. Ohio 2004); *Bickley*, 361 F. Supp. 2d 1317 (N.D. Ala. 2004), *aff'd on other grounds*, 461 F.3d 1325 (11th Cir. 2006); and *Moeckel v. Carmark RX, Inc.*, 385 F. Supp. 2d 688 (M.D. Tenn. 2005).

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

DANIELLE SANTOMENNO, et al.,	Case No. 11-2520
Appellants,	21400 U.S. Courthouse 601 Market Street Philadelphia, PA 19106
v.	
JOHN HANCOCK LIFE INSURANCE COMPANY, et al.,	
Appellees.	February 9, 2012

TRANSCRIPT OF HEARING
BEFORE THE HONORABLE DOLORES K. SLOVITER
UNITED STATES THIRD CIRCUIT CHIEF JUDGE
and THE HONORABLE THOMAS I. VANASKIE
UNITED STATES THIRD CIRCUIT JUDGE
and THE HONORABLE LOUIS H. POLLAK
UNITED STATES DISTRICT COURT SENIOR JUDGE

APPEARANCES:

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* * *

[23] THE COURT: Do you agree that the second amended complaint at least adequately alleges that John Hancock is a fiduciary?

Mr. Fleckner: We've disputed that in the District Court and Judge Martini didn't rule on that alternative ground. We accept for purposes of this argument –

THE COURT: All right.

Mr. Fleckner: – that John Hancock should be treated as a fiduciary although we dispute it.

* * *