Nos. 10-4163, 10-4198

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

ANN I. TAYLOR,

Plaintiff-Appellant Cross-Appellee,

v.

KEYCORP; THOMAS C. STEVENS; HENRY L. MEYER, III;
KEYCORP TRUST OVERSIGHT COMMITTEE; KATHLEEN EGAN;
JEFFREY B. WEEDEN; THOMAS W. BUNN; THOMAS E. HELFRICH;
ROBERT L. MORRIS,

Defendants-Appellees Cross-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
No. 1:08 CV 1927

**BRIEF FOR
CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA
AS *AMICUS CURIAE* SUPPORTING DEFENDANTS-APPELLEES
AND URGING AFFIRMANCE**

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INTEREST OF *AMICUS CURIAE*[1]

This case is the latest in a series of recent cases in which ERISA plan participants who have themselves suffered no economic injury have sued plan fiduciaries to attempt to recover alleged losses to the plan. The federal courts of appeals, including this Court, have uniformly held that ERISA-participant plaintiffs lack standing under Article III of the U.S. Constitution to sue for money damages unless they can show individualized losses caused by a breach of fiduciary duty. *E.g.*, *Loren v. Blue Cross & Blue Shield*, 505 F.3d 598, 606-07 (6th Cir. 2007).

It is undisputed that plaintiff Ann Taylor obtained a net benefit from her investment in the KeyCorp Stock Fund option in that company's 401(k) plan. Accordingly, the district court dismissed the case against Taylor because she lacked Article III standing, as she could not establish the constitutionally requisite injury-in-fact.

In support of appellant Taylor, the Secretary of Labor as *amicus curiae* nonetheless urges this Court to adopt the unprecedented argument that a participant in an ERISA-covered plan can sue on its behalf to recover plan losses even if the

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[1] *Amicus* files this brief with the consent of all parties. Pursuant to Fed. R. App. P. 29(c)(5), the Chamber states that no counsel for a party authored this brief in whole or in part, and no party or its counsel made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae* or its counsel made a monetary contribution to the preparation or submission of this brief.

participant suffered no financial loss and, indeed, earned a profit from the alleged breach of fiduciary duty. This novel argument would effectively make each plan participant a private Secretary of Labor, empowered to sue on the plan's behalf for any and all perceived violations of ERISA. If the Secretary's views prevailed in this Court, it would have far-reaching consequences for fiduciaries of ERISA plans within the Sixth Circuit, including the fiduciaries of many plans sponsored by members of the Chamber of Commerce of the United States of America ("Chamber").

The Chamber files this brief as *amicus curiae* to respond to the arguments raised by the Secretary in her brief, to aid the Court in its understanding of the constitutional principles at stake, and to highlight the deleterious impact that a reversal could have on all plans containing employer stock. The Chamber has an interest in the issues raised by this appeal because it is the world's largest business federation, representing 300,000 direct members and indirectly representing an underlying membership of three million professional organizations of every size, in every industry sector, and from every region of the country. Many of the Chamber's members sponsor 401(k) plans that, like the KeyCorp 401(k) Savings Plan, offer employer stock funds in the form of an Employee Stock Ownership Plan ("ESOP") as an investment vehicle, and all of those members may potentially be affected by the Court's decision.

STATEMENT OF FACTS

The KeyCorp 401(k) Savings Plan (the "Plan") offers employee participants the option of investing in the company's stock through an ESOP, which is one of the investment options in the Plan. Class Action Complaint ¶¶ 2, 54. Plaintiff Ann Taylor, a Plan participant, alleges on behalf of a putative class of participants that the Plan fiduciaries imprudently allowed investment in KeyCorp stock. *Id.* ¶¶ 4-5. The fiduciaries allegedly made misrepresentations about the default risk of Key-Corp's homebuilder construction loans, as well as certain tax and accounting practices, and thus knew that the stock was overvalued. *Id.* ¶¶ 4, 6, 84-85. Taylor alleges that these misrepresentations caused the price of KeyCorp stock to be artificially inflated, led to a subsequent decline in the value of its stock once the true facts surrounding KeyCorp became public, and ultimately caused losses to the Plan. *Id.* ¶¶ 57-58, 218-19, 253. She sued various Plan fiduciaries primarily under ERISA Section 502(a)(2), which authorizes participants to seek "appropriate relief" under Section 409, which, *inter alia*, makes plan fiduciaries "personally liable to make good to [a] plan any losses to the plan resulting from [a] breach" of fiduciary duty. 29 U.S.C. §§ 1109, 1132(a)(2).

Taylor, however, suffered no personal losses on account of the fiduciaries' alleged breach of duty. On December 31, 2006, the first day of the putative class period, Taylor owned 1,678.32 units of Key Corp stock in her individual ESOP account. *Taylor v. KeyCorp*, No. 1:08-cv-1927, 2010 U.S. Dist. LEXIS 96614, at *7-8 (N.D. Ohio Aug. 12, 2010). She sold all of those units for a profit on January 11, 2007, when KeyCorp stock was trading at over $37 per share. *Id.* at *8. Following that sale, Taylor acquired an additional 387.31 shares of KeyCorp stock through the Company's matching contributions program. *Id.* On February 22, 2008, Taylor sold 268.01 of those shares, and she sold the remaining 119.30 shares on June 25, 2008, in both instances for a small loss. *Id.*; Department of Labor Brief ("DOL Br.") at 3.

"Overall, Ms. Taylor sold her [KeyCorp] stock for more money than she actually paid for it, earning a net profit of $6,317." *KeyCorp*, 2010 U.S. Dist. LEXIS 96614, at *8; DOL Br. 3. The district court, accordingly, dismissed Taylor's case for lack of Article III standing, because "[a]s someone who benefitted from Defendants' alleged breaches, Ms. Taylor has not been damaged." *KeyCorp*, 2010 U.S. Dist. LEXIS 96614, at *11. She thus lacks the constitutionally required injury-in-fact necessary to sustain a suit in federal court. *See id.*

ARGUMENT

Although Ms. Taylor brought this action to recover "losses" that she and other participants of the Plan allegedly sustained in their 401(k) accounts by their investment in KeyCorp stock, she suffered no losses—and indeed, profited—from that investment and thus lacks the injury necessary for Article III standing. Lack-ing standing herself, Ms. Taylor cannot represent a putative class of allegedly injured participants in the Plan. *O'Shea v. Littleton*, 414 U.S. 488, 494 (1974).

A plaintiff cannot sue under ERISA unless she has standing under both ERISA itself and under Article III of the Constitution. *See* U.S. Const. art. III. As this Court said in *Loren v. Blue Cross & Blue Shield*, 505 F.3d 598, 606-07 (6th Cir. 2007), "even where statutory standing pursuant to ERISA is satisfied, the elements of Article III must be met." *See also Cent. States Se. & Sw. Areas Health & Welfare Fund v. Merck-Medco Managed Care, L.L.C.*, 433 F.3d 181, 201 (2d Cir. 2005). Although Taylor undoubtedly has statutory standing under Section 502(a)(2) because she is a Plan participant (29 U.S.C. § 1132(a)), she cannot satisfy the familiar three elements that comprise the "irreducible constitutional minimum of standing"—injury-in-fact, traceability, and redressability. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992); *see Vt. Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 771 (2000) (describing these elements as the "essential" and "unchanging part[s]" of Article III's case or controversy requirement) (internal quotation marks omitted).

In particular, Taylor cannot show that she has suffered an injury-in-fact that is "concrete and particularized" and "actual or imminent, not conjectural or hypothetical." *Lujan*, 504 U.S. at 560 (internal quotation marks omitted). The Supreme Court has "consistently stressed that a plaintiff's complaint must establish that [she] has a 'personal stake' in the alleged dispute, and that the alleged injury suffered is particularized as to [her]." *Raines v. Byrd*, 521 U.S. 811, 819 (1997). Taylor cannot satisfy this requirement merely by suing on behalf of a class, because all plaintiffs "must allege and show that they personally have been injured, not that injury has been suffered by other, unidentified members of the class to which they belong and which they purport to represent." *Warth v. Seldin*, 422 U.S. 490, 502 (1975). The Secretary's arguments to the contrary notwithstanding, Taylor can point to no cognizable injury that she has suffered as a result of her profitable investment in KeyCorp stock.

I. Because It Is Undisputed That Taylor Profited From Her Investment In KeyCorp Stock, The District Court Correctly Dismissed The Complaint For Lack Of Standing.

A. Taylor Cannot Establish That She Suffered Any Economic Loss Sufficient To Satisfy The Injury Component Of Article III Standing.

The Secretary of Labor concedes that "normally [Article III standing] is established by a showing that the plaintiff suffered an economic loss if the facts as alleged are true." DOL Br. 6; *see also Cent. States*, 433 F.3d at 200 (a participant who seeks monetary relief on behalf of an ERISA plan must "satisfy the strictures of constitutional standing by demonstrat[ing] *individual loss*") (alteration in original, emphasis added, and internal quotation marks omitted). The Secretary further concedes that plaintiff Taylor "sold her Key stock for more money than she actually paid for it, earning a net profit of $6,317." DOL Br. 3 (internal quotation marks omitted). She nonetheless argues that, because Taylor suffered a small loss in two of three *individual* transactions in KeyCorp stock, she has Article III standing despite the fact that she profited overall from any breach of duty. *See id.* at 8-10.

The Secretary is incorrect. Even assuming the allegations in Taylor's complaint are true, her lawsuit is at most a classic case of *injuria absque damno*—"[a] legal wrong that will not sustain a lawsuit because no harm resulted from it." Black's Law Dictionary 801 (8th ed. 2004). Indeed, in ERISA cases substantially similar to this one, where Plan participants have realized a net benefit from alleged breaches in fiduciary duty, courts have held that the participant plaintiffs in those cases lacked Article III standing as they had not sustained an injury-in-fact (and, likewise, that no remedy could be fashioned to redress the alleged breaches). *See, e.g.*, *Brown v. Medtronic, Inc.*, 628 F.3d 451, 455 (8th Cir. 2010) (to establish standing in breach of fiduciary case based on alleged stock-price inflation, "at a minimum, a plaintiff must allege a *net loss* in investment value that is fairly traceable to the defendants' challenged actions") (emphasis added); *Piazza v. Ebsco Indus., Inc.*, 273 F.3d 1341, 1354 (11th Cir. 2001) (because a Plan participant "was not injured by the alleged pre-sale undervaluations [of company stock] (which, if anything, increased his retirement distributions), he lacks standing to raise a claim based on the pre-sale undervaluation of the [company] stock"); *In re Bos. Sci. Corp. ERISA Litig.*, 254 F.R.D. 24, 31 (D. Mass. 2008) ("Plan participants who benefit from a fiduciary's breach of duty suffer no injury and have no constitutional standing."); *Vermeylen v. ProQuest Co.*, No. 06-12327, 2007 WL 1218713, at *5 (E.D. Mich. Apr. 23, 2007) (finding no standing where, "if plaintiff's allegations are to be believed, she actually benefitted from cashing out her [employer's] stock when she did").

Most recently, in *Brown v. Medtronic*, for example, the plaintiff participant "had completely liquidated his ESOP account" before news of one of the employer's allegedly deceptive practices became public—thus, he "had to have realized any share price inflation caused by the allegedly improper" activity. 628 F.3d at 458. Because the participant profited from the sale, the Eighth Circuit concluded that the participant had not suffered any injury traceable to the fiduciary breach. *Id.* The participant also failed to explain "how an ERISA fiduciary's breach could be redressed by our court in the event the breach actually conferred a financial benefit on a plan participant who has already liquidated his shares." *Id.* at 457.

The Secretary's attempt to distinguish *Brown*, and to encourage this Court to create a circuit split, is unavailing. The Secretary criticizes the Eighth Circuit for relying on principles of securities law, rather than trust law, in concluding that a plan participant suffered no economic losses. DOL Br. 10 n.3. Securities law, however, helps illuminate the fact that shareholders who sell stock at an inflated price suffer no economic injury from the inflation. *See, e.g.*, *Dura Pharms., Inc. v. Broudo*, 544 U.S. 336, 342 (2005) ("[I]f . . . the purchaser sells the shares quickly before the relevant truth begins to leak out, the misrepresentation will not have led to any loss."). That, as the *Brown* court observed, is simply the "pure logic" of the matter. 628 F.3d at 456 (quoting *Dura*, 544 U.S. at 342). And the Secretary fails to explain how the conceded fact that Taylor profited from her investments in company stock constitutes the sort of concrete injury necessary for standing.

Cases like *Brown*, *Piazza*, *Boston Scientific*, and *Vermeylen* refute the Secretary's contention that "courts do not, as a matter of law, 'offset' alleged injuries with potential benefits from a violation" in determining Article III standing. DOL Br. 8. The cases the Secretary cites for that proposition involve situations outside the ERISA "stock drop" context in which "netting" would be impossible or highly speculative because the plaintiff's injuries were difficult to quantify or the gains and losses were different in kind. *See, e.g.*, *Denney v. Deutsche Bank AG*, 443 F.3d 253, 265 (2d Cir. 2006) (declining to offset increased "risk of being assessed a penalty" from IRS audit with savings from following questionable tax strategy); *Sutton v. St. Jude Med. S.C., Inc.*, 419 F.3d 568, 571-72 (6th Cir. 2005) ("increased risk of future harm" from implantation of potentially defective pacemaker is injury-in-fact notwithstanding potential medical benefits of device). Here, Taylor's net profit of $6,317 is undisputed, and results from similar sales of the same type of security. DOL Br. 3.

In contrast to the well-supported logic of cases like *Brown*, the Secretary's misguided position would permit Plan participants to survive a motion to dismiss, seek intrusive discovery on Plan fiduciaries, and perhaps even impose the costs of trial, in situations where all parties agree that the plaintiff has suffered no individual injury and the court cannot order any effective individual relief. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 97 (1998) ("the proposition that the court can reach a merits question when there is no Article III jurisdiction opens the door to all sorts of generalized grievances," and "take[s] the court into vast, uncharted realms of judicial opinion giving") (internal quotation marks omitted).

B. Trust Law Permits "Netting" Gains And Losses Related To The Same Breach Of Fiduciary Duty.

Moreover, contrary to how the Secretary would have it, principles of trust law also support the "netting" of gains and losses when determining whether a beneficiary has suffered any injury from an alleged breach of fiduciary duty. The Secretary argues that even if it were appropriate in general to "net" gains and losses to determine a plaintiff's standing, it would be inappropriate in this case under principles of trust law, because Taylor incurred the profits and losses in separate transactions. DOL Br. 11. But "netting" will ***always*** involve offsetting gains and losses from separate transactions. The test under the Restatement of Trusts is not whether the transactions at issue occurred at different points in time, but whether the gains and losses resulted from "separate and distinct breaches of trust." Restatement (Second) of Trusts § 213 cmt. f, illus. 7.

Although Taylor initially sold stock that she possessed at the start of the class period, and later sold stock that she obtained through KeyCorp's matching contributions program (DOL Br. 2-3), those facts have no bearing on whether the resulting gains and losses were caused by different alleged breaches of trust. To the contrary, the Secretary elsewhere admits that the *same* alleged misrepresentations both "inflated the price of Key stock, [and] led to the subsequent drop in stock value when Key's dire financial circumstances became publicly known." *Id.* at 2. Thus, the same purported breach of trust caused *both* Taylor's gains and losses. It is appropriate to "net" the difference to determine whether she has suffered any injury.

The examples the Secretary cites in the Restatement are not apposite, because they involve *distinct investments* on the part of the trustee, which do not require offsetting gains and losses. *See* Restatement (Second) of Trusts § 213 cmt. a, illus. 1 (investments in stocks of X Company and Y Company, both in violation of the terms of the trust); *id.* § 213 cmt. c, illus. 4 (successive investments in bonds and speculative shares of stock). By contrast, the Secretary conveniently ignores a third example in the Restatement that is directly on point: "[I]f the trustee in breach of trust purchases at one time several *securities of the same general character*, and subsequently sells some of them at a profit and others at a loss, he is accountable only for the net profit or is chargeable with the net loss." *Id.* § 213 cmt. f, illus. 7. Because Taylor's several sales were all of "securities of the same general character"—KeyCorp stock—the defendant fiduciaries are accountable only for the "net profit" on the transactions. Because Taylor has received that amount in full, she has no further cognizable injury.

Furthermore, the examples in the Restatement selected by the Secretary involve separate investment decisions made by a *trustee*. Here, the separate transactions resulted from the happenstance that the *participant* decided to sell the stock in her individual ESOP account at different points in time. The Plan fiduciaries did not direct those investment decisions. The Secretary does not and cannot explain how the profits and losses realized by the participant's voluntary actions could possibly result from "separate and distinct" breaches of trust by any KeyCorp fiduciary.

C. The Availability Of "Alternative Investments" Does Not Confer Article III Standing On A Participant Who Benefited From Allegedly Inflated Stock Prices.

The Secretary suggests in a footnote that Taylor could also establish Article III standing because "alternative investments" may have yielded a higher return than her sales of KeyCorp stock. DOL Br. 14 & n.6.[2] That too is incorrect.

Courts have routinely rejected claims that a participant can establish Article III standing absent a concrete showing that a Plan that complied with the terms of ERISA would have produced a greater benefit to the participant than the Plan that actually existed in fact. *See, e.g.*, *Schulz v. Windstream Commc'ns, Inc.*, 600 F.3d 948, 952 (8th Cir. 2010) (participants failed to show "actual harm" sufficient to confer standing to challenge Plan amendment because "even if this court invalidated the Amendment . . . , these Appellants would still receive benefits," thus "how [the Amendment] was adopted does not affect them"); *McCullough v. AEGON USA, Inc.*, 585 F.3d 1082, 1085 (8th Cir. 2009) (plaintiff lacked standing to assert an ERISA breach-of-fiduciary-duty claim where the defined-benefit plan at issue was at all relevant times substantially overfunded). Rather, courts have required plaintiffs to "point to an identifiable and quantifiable pool of assets to which they had colorable claims," as opposed to an "as-yet-to-be-determined increase in benefits as a result" of speculative changes in fiduciary behavior. *Kendall v. Emps. Ret. Plan of Avon Prods.*, 561 F.3d 112, 121 (2d Cir. 2009). Neither Taylor nor the Secretary has pointed to any such "identifiable and quantifiable" pool of assets here.

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[2] Taylor makes the same argument in her brief. *See* First Br. of Appellant Taylor ("Taylor Br.") at 9-14.

In any event, the Secretary errs in arguing that an "alternative investment" methodology would be a proper assessment of damages in this case. Under principles of trust law, a trustee may be held to account for "lost profits" only where "the trustee in breach of trust sells or otherwise disposes of trust property which it was his duty to retain, [or] where the trustee in breach of trust fails to purchase property which it was his duty to purchase for the trust." Restatement (Second) of Trusts § 205 cmt. i. The authorities cited by the Secretary involve cases that fall within the scope of this rule—for example, because a Plan fiduciary's purchase or sale of stock failed to comply with the terms of the Plan, or because the fiduciary ignored a participant's investment instructions.[3] That rule has no application in this case, however, where the breach of trust did not result from any sale or failure to buy securities in violation of the Plan's terms, but from the fiduciaries' inclusion of KeyCorp stock as an *investment option* in the Plan.

It may make sense to consider alternative investments when a breach of trust consists of improper investment activity by the fiduciary, because the opportunity cost of alternative investments is "fairly traceable" to the fiduciary's conduct. *See*

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[3] *See, e.g.*, *LaRue v. DeWolff, Boberg & Assocs.*, 552 U.S. 248, 251, 253 n.4 (2008) (discussing "lost profits" measure of damages where fiduciary's breach consisted of an alleged failure to follow participant's investment directions); *Dardaganis v. Grace Capital Inc.*, 889 F.2d 1237, 1239 (2d Cir. 1989) (plan trustees violated investment guidelines prohibiting investments above a particular percentage of plan assets in common stock).

Brown, 628 F.3d at 458; *cf. LaRue*, 552 U.S. at 253 n.4. But where the alleged breach consists of misrepresentations that inflated the price of one type of security offered by the Plan, the only damages "fairly traceable" to the fiduciary are the out-of-pocket losses attributable to the inflated price.

As the Second Circuit explained in a case cited by the Secretary, where "the market price of securities was manipulated by the defendants or information that would affect the market price was improperly withheld from the plaintiffs," the unlawful conduct "caused the plaintiffs to sell too cheaply or to buy too dearly." *Donovan v. Bierwirth*, 754 F.2d 1049, 1054-55 (2d Cir. 1985). "[I]n such instances, it is appropriate to hold such defendants liable for the difference between what the plaintiffs paid or received in payment and what the stock was in fact worth." *Id.* at 1055. Here, the difference between what KeyCorp stock was actually worth and the sales prices that Taylor received for her stock resulted in a net profit. She has thus suffered no loss traceable to any alleged breach of duty.

Indeed, under plaintiffs' misrepresentation theory, KeyCorp stock should have been divested from the Plan at the beginning of the class period. The fiduciaries could only do so by first revealing the undisclosed material information that arguably caused the inflation or otherwise made KeyCorp stock an imprudent investment—as failing to disclose would violate the securities laws, and ERISA does not excuse fiduciaries from the operation of those laws. *See Edgar v. Avaya, Inc.*, 503 F.3d 340, 350 (3d Cir. 2007); *Harzewski v. Guidant Corp.*, 489 F.3d 799, 808 (7th Cir. 2007); *Wright v. Or. Metallurgical Corp.*, 360 F.3d 1090, 1098 n.4 (9th Cir. 2004); 29 U.S.C. § 1144(d) (nothing in ERISA "shall be construed to alter, amend, modify, invalidate, impair, or supersede, any law of the United States . . ."). However, upon the disclosure of the allegedly adverse information, the price of KeyCorp stock would have declined in the same manner it did when that information actually became public. The inflation would then be purged from the price of the stock, and the very reason that it was imprudent to continue offering KeyCorp stock would have been eliminated. *See Edgar*, 503 F.3d at 350-51 (fiduciaries did not violate duty to disclose under ERISA where, under the "efficient capital markets hypothesis," an earlier disclosure would have resulted in the same losses to company stock). Thus, there would have been no reason to divest the stock from the Plan and offer an "alternative investment." The only loss that a participant investing in KeyCorp stock could have sustained would be the out-of-pocket loss due to the failure to disclose the adverse information at an earlier time.

Finally, if the "alternative investment" methodology were the standard for determining injury-in-fact, then Article III standing would turn on the counterfactual and hypothetical question of whether a participant would have made an investment that performed better than the actual investment in company stock. For example, Taylor notes in her brief that the S&P 500 outperformed KeyCorp stock from the start of the class period through the date that Taylor sold her last remaining shares. Taylor Br. 16-17. She does this with the benefit of hindsight. It was entirely unknowable from an *ex ante* perspective whether a participant's investment in KeyCorp would have performed better or worse than the S&P 500. *Cf. Eckstein v. Balcor Film Investors*, 58 F.3d 1162, 1169 (7th Cir. 1995) (whether alleged misrepresentation is material under the securities laws proceeds from an "ex ante perspective," and is not dependent on ultimate outcome). Thus, a claim for damages based on "alternative investments" is too speculative to support standing.

II. The Mere Invasion Of A Statutory Right Or Alleged Losses To The Plan As A Whole Do Not Confer Article III Standing.

The Secretary also maintains that, even assuming Taylor suffered no individual economic harm, she still has standing "because the alleged violation of [her] statutory right to the prudent management of her plan itself establishe[s] an 'injury in fact.'" DOL Br. 14-15. To the contrary, "Congress cannot erase Article III's standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing." *Raines*, 521 U.S. at 820 n.3; *see also Gladstone, Realtors, et al. v. Vill. of Bellwood*, 441 U.S. 91, 100 (1979). "[A]lthough a suitor may derive great comfort and joy from the fact that . . . a wrongdoer gets his just deserts, or that the Nation's laws are faithfully enforced, that psychic satisfaction is not an acceptable Article III remedy because it does not redress a cognizable Article III injury." *Steel Co.*, 523 U.S. at 107.

The Secretary's reliance on cases like *Warth v. Seldin*, 422 U.S. at 500, and *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 373 (1982), for the proposition that Article III standing may exist "solely by virtue of statutes creating legal rights," is misplaced. DOL Br. 15 (internal quotation marks omitted). As the Supreme Court clarified in *Lujan*, the quoted language from *Warth* merely means that Congress may create a cause of action to remedy "concrete, *de facto* injuries that were previously inadequate in law." *Lujan*, 504 U.S. at 578. It does *not* mean that Congress may, by virtue of creating a new cause of action, "abandon[] the requirement that the party seeking review must himself have suffered an injury." *Id.* (internal quotation marks omitted). Because Taylor profited from her sale of KeyCorp stock during the class period, she has not "suffered an injury" due to the alleged violation of Section 502(a)(2). She therefore lacks Article III standing.[4]

It is no answer that a participant may sue on behalf of her plan to recover alleged injuries to the plan under ERISA § 502(a)(2). The Secretary cites *Massachusetts Mutual Life Insurance Co. v. Russell*, 473 U.S. 134, 142 n.9 (1985), for

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[4] To be sure, an Article III injury does not always need to be economic, but it still must be "concrete," not an abstract desire to enforce ERISA, and an "injury," not a benefit. The Secretary's own authorities illustrate this point. *See, e.g.*, *Carter v. Welles-Bowen Realty, Inc.*, 553 F.3d 979, 989 (6th Cir. 2009) (standing under RESPA for right to referral services untainted by conflicts of interest limited to those "individuals who receive a loan that is accompanied by an unlawful referral").

the proposition that actions under Section 502(a)(2) are "brought in a representative capacity on behalf of the plan as a whole." DOL Br. 19 (internal quotation marks omitted). The Secretary, however, ignores the Supreme Court's more recent decision in *LaRue*, which held that the Court's "references to the 'entire plan' in *Russell*, which accurately reflect the operation of [ERISA] in the defined benefit context, are beside the point in the defined contribution context." 552 U.S. at 256.

Nothing in *Russell* relieved the suing plaintiff of the need to have a personal injury. In the defined benefit context, all participants share a common interest in the financial integrity of the Plan as they each own an undifferentiated interest in all the assets of the Plan. *See Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 440 (1999). Consequently, a plan loss affects all participants. By contrast, in a 401(k) defined contribution plan, each participant has an interest only in the assets in his or her account and has no interest in the assets in the accounts of other participants. As the court made plain in *LaRue*, a fiduciary breach may only diminish the assets in a single participant's account, a result not possible in the context of defined benefit plans. 552 U.S. at 256.

Moreover, because "the law of trusts is the starting point in interpreting and applying ERISA's fiduciary duties," those principles inform what constitutes a cognizable Article III injury in this context. *Harley v. Minn. Mining & Mfg. Co.*, 284 F.3d 901, 907 (8th Cir. 2002); *see also Varity Corp. v. Howe*, 516 U.S. 489, 496-97 (1996). Under the law of trusts, "[a] particular beneficiary cannot maintain a suit for a breach of trust which does not involve any violation of duty *to him*." *Harley*, 284 F.3d at 907 (emphasis added) (quoting Restatement (Second) of Trusts § 214 cmt. b); *Glanton v. AdvancePCS, Inc.*, 465 F.3d 1123, 1125 & n.2 (9th Cir. 2006) (same). For example, "if the breach of trust consists only in the failure to pay income to a life beneficiary, the beneficiary entitled to the principal cannot maintain a suit for breach of trust." Restatement (Second) of Trusts § 214 cmt. b. Similarly, here, where the alleged breach of trust consists only of the artificial inflation of company stock, a participant that *benefited* from that inflation lacks standing to sue.[5]

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[5] Because ERISA jurisprudence looks for guidance to principles of trust law, the Secretary's reliance on *Sprint Communications Co. v. APCC Services*, 554 U.S. 269 (2008), is inapposite. DOL Br. 20-21. *Sprint* held that assignees can sue to recover injuries suffered by an assignor, based on a unique "history and tradition" dating back to the 17th century permitting such suits. *Sprint*, 554 U.S. at 274, 276. To be sure, as the Secretary notes, there is a similar history permitting *trustees* to sue on behalf of trusts without alleging individual injury. *See* Restatement (Second) of Trusts § 280; DOL Br. 20. But as explained above, there is no similar historical pedigree to derivative suits by plan *participants*. Courts have rightfully been wary of extending unique exceptions to the "injury in fact" requirement to contexts where historically they have not applied. *See, e.g.*, *Glanton*, 465 F.3d at 1125-26 (refusing to extend historical exception of *qui tam* plaintiff recovering injuries suffered by the state to ERISA context). And, unlike common law trustees or ERISA fiduciaries, a plan participant has no fiduciary duty to the plan or other participants and cannot be held accountable for breaching that duty by, for example, mishandling the litigation in such a manner that turns a winnable case into a loser.

For these reasons, this Court had recognized that "[m]erely because Plaintiffs claim that they are suing on behalf of their respective ERISA plans [under 502(a)(2)] does not change the fact that they must also establish individual standing." *Loren*, 505 F.3d at 608. Indeed, all other federal courts of appeals to consider this precise issue have unanimously concluded that plan participants that have not suffered individual economic loss lack standing under Article III to seek money damages on behalf of a plan. *See Glanton*, 465 F.3d at 1125; *Cent. States*, 433 F.3d at 200; *Horvath v. Keystone Health Plan E., Inc.*, 333 F.3d 450, 455-56 (3d Cir. 2003); *Harley*, 284 F.3d at 906-07. As the Eighth Circuit held in *Harley*, the "limits on judicial power imposed by Article III counsel against permitting participants or beneficiaries who have suffered *no* injury in fact from suing to enforce ERISA fiduciary duties on behalf of the Plan." 284 F.3d at 906.

If the Secretary's view were the law, it would entrust every Plan participant with a roving commission to root out perceived ERISA violations wherever they occur, regardless of whether the individual Plan participant suffered any injury. For example, in *LaRue*, 552 U.S. 248, a case on which the Secretary relies, the participant (LaRue) allegedly suffered highly individualized injuries due to the Plan administrator's failure to make certain changes to investments in his ESOP account, pursuant to his instructions. *See id.* at 250-51. Under the Secretary's view, any employee who participated in the 401(k) plan at issue in *LaRue* would have "derivative standing" to sue for losses to LaRue's individual account—because a loss to his account represented a loss to the plan. *See id.* at 256 (holding that "plan injuries" under section 502(a)(2) included "fiduciary breaches that impair the value of plan assets in a participant's individual account"). There is nothing in ERISA that suggests that a participant that has suffered no injury can hijack the right to sue of another participant who has suffered loss.

Indeed, the Secretary's theory would permit an ERISA plaintiff to achieve the *in terrorem* effect of a class action—imposing higher discovery costs and potential liability on employers for any and all injuries suffered by non-party plan participants—without satisfying the rigorous Rule 23 requirements for representative class actions that are designed to protect absent plaintiffs. For example, Taylor could never satisfy the typicality and adequacy requirements of Rules 23(a)(3) and (4), because one who has suffered *no* injury is by definition not a typical or adequate representative of others who have. *See, e.g.*, *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 625-28 (1997); *Littleton*, 414 U.S. at 494. Thus, in any lawsuit where the named plaintiff has suffered no damages, plaintiffs' counsel would have every incentive to prioritize the recovery of attorneys' fees and prospective, injunctive relief (which, if anything, is all that could benefit the named participant) over the interests of unnamed, non-party participants who may have suffered actual monetary losses. *See, e.g.*, *Ortiz v. Fibreboard Corp.*, 527 U.S.

815, 852 (1999); *Kohen v. Pac. Inv. Mgmt. Co.*, 571 F.3d 672, 679-80 (7th Cir. 2009).

The Secretary's theory also raises issues of *res judicata*. In "suits brought by trustees . . . [or] fiduciaries," because those parties have unique obligations to protect the rights of plan participants and represent their interests in court, an adverse judgment against one of them precludes a plan participant from suing at a future date to recover individual losses. *Taylor v. Sturgell*, 553 U.S. 880, 894 (2008). If the Secretary were correct, however, that any plan participant could "stand in the shoes" of the plan and sue to recover losses to another individual's ESOP account, then under the same principles of *res judicata*, it stands to reason that the beneficial owner of the ESOP account could not sue at a future date to recover those losses. The Supreme Court, however, has disapproved of extending the doctrine of "virtual representation" beyond the limited contexts in which it historically has been permitted—such as suits by trustees. *See id.* at 895-96; *see also supra* note 5.

But unless *res judicata* effect were given to an unsuccessful suit by a participant suing on behalf of the "plan as a whole," plan fiduciaries would be subject to seriatim suits, which would upset the balance that ERISA strikes between the interests of participants and the interests of plan fiduciaries. *See Mertens v. Hewitt Assocs.*, 508 U.S. 248, 262 (1993) (noting that ERISA is "an enormously complex and detailed statute that resolved innumerable disputes between powerful competing interests—not all in favor of potential plaintiffs"). The resolution of this dilemma is clear—plan participants should not be permitted to bring derivative lawsuits on behalf of a plan to recover losses incurred by a non-party participant.

In short, the Secretary's position would subject plan sponsors, like members of this *amicus*, to ERISA liability that extends far beyond what Congress (or the framers of the Constitution) intended. To be sure, some courts have observed that plan participants may have standing to seek injunctive relief under ERISA Section 502(a)(3) to enforce certain non-economic rights under ERISA, such as the right to statutorily defined disclosures. *Loren*, 505 F.3d at 609; *Horvath*, 333 F.3d at 456; *cf. Havens*, 455 U.S. at 373. But this is not a case in which the plaintiff's goal is to obtain "injunctive or other equitable relief." Taylor is seeking to recover losses allegedly sustained in her investment in KeyCorp stock in her 401(k) account. That, as the Supreme Court said in *Mertens*, is a claim for damages, "the classic form of *legal* relief." 508 U.S. at 255.[6]

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[6] In any event, any request for injunctive relief would now be moot, as the relevant disclosures related to KeyCorp company stock have since been made public, and thus there is no injunctive relief that a court could fashion to redress any perceived violation of law. Moreover, Taylor cannot show that it is at all likely she will be wronged in the future as a result of a similar breach of duty—a prerequisite to establish standing to seek an injunction. *City of Los Angeles v. Lyons*, 461 U.S. 95, 111 (1983). To the contrary, all evidence to date shows that any alleged breach of duty has only inured to her benefit.

The Secretary nonetheless suggests that under Section 502(a)(3) a plaintiff could still seek certain forms of equitable relief, such as "equitable restitution or an accounting for losses or profits." DOL Br. 19. As this Court held in *Helfrich v. PNC Bank, Kentucky, Inc.*, 267 F.3d 477 (6th Cir. 2001), however, a 502(a)(3) plaintiff cannot "denominate[] his requested relief as 'restitution' while measuring that relief with references to his losses rather than [defendant's] gains." *Id.* at 482-83. Rather, the measure of losses to the participant "is the hallmark of money damages," and is therefore legal relief, *not* "equitable relief" available under Section 502(a)(3). *Id.* at 483; *see also Great-W. Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 212-14 (2002); *Loren*, 505 F.3d at 609.

Furthermore, unlike claims for injunctive relief, claims for restitution "are individual in nature and therefore require [a plaintiff] to demonstrate individual loss." *Horvath*, 333 F.3d at 456. As explained at length, Taylor has not suffered any individual loss; she thus lacks Article III standing to seek restitution—or an accounting for losses that she did not suffer and that did not affect her personally.

Ultimately, the Secretary all but concedes that this Court's decision in *Loren* forecloses her argument that mere losses to the Plan can confer individual standing to sue. DOL Br. 21-22. In *Loren*, this Court held that participants in health plans lacked standing to sue a plan fiduciary for allegedly causing the plans to pay excessive hospital reimbursement rates, because it was "too speculative" that the plans would pass on the costs to participants, leading to "higher deductibles, co-payments, and/or contributions from participants." *Loren*, 505 F.3d at 608-09. While the Secretary admits that this analysis "contemplat[es]" that a "pecuniary loss" is required to establish Article III standing under 502(a)(2), DOL Br. 21, she claims it is "not clear" whether a derivative suit could proceed if losses to the Plan were not conjectural. *Id.* at 21-22. But *Loren* did not hold that losses to the Plan were conjectural; it held that the plan *participants* had not suffered any monetary losses. The same is true here. And *Loren* relied on *Central States*, *Harley*, and *Glanton* in reaching its conclusion—all of which concluded that ERISA plaintiffs must show individual economic injury to have standing to sue for any monetary recovery. Neither the Secretary nor plaintiff Taylor (whose arguments on the standing issue for the most part track those of the Secretary) have provided the Court with any basis to depart from its past precedent.

CONCLUSION

The district court's order granting defendants-appellees' motion to dismiss for lack of Article III standing should be affirmed.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE PURSUANT TO RULE 32(a)(7)

I certify that, pursuant to Fed. R. App. P. 32(a)(7)(C), the attached *amicus* brief is proportionately spaced, has a Times New Roman typeface of 14 points, and contains 6,627 words. This word count excludes the table of contents, table of authorities, and signatures and certificates of counsel.

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