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No. 10-708

In the Supreme Court of the United States

FIRST AMERICAN FINANCIAL CORPORATION,
SUCCESSOR IN INTEREST TO
THE FIRST AMERICAN CORPORATION, AND
FIRST AMERICAN TITLE INSURANCE COMPANY,
Petitioners,

v.

DENISE P. EDWARDS, INDIVIDUALLY AND ON BEHALF
OF ALL OTHERS SIMILARLY SITUATED,
Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF *AMICI CURIAE* OF TRUST LAW AND ERISA LAW PROFESSORS IN SUPPORT OF RESPONDENT

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STATEMENT OF INTEREST

Amici and counsel are a group of law professors who teach, study, and write about trust law.[1] Among the group are law professors who are co-authors of leading casebooks and treatises in the field of Trusts and Estates. *Amici* include:

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SUMMARY OF ARGUMENT

I. Petitioners argue that even if First American's obligation to refrain from making payments in exchange for referrals can be characterized as a duty of loyalty, Respondent has no standing to hold First American accountable for violating that duty because "the law does not recognize an abstract claim for breach of a duty of loyalty in the absence of pecuniary harm." This statement misunderstands both Respondent's claim and the law. For centuries, the law has recognized that a trust beneficiary has standing to sue its trustee for breach of the fiduciary duty of loyalty even if that beneficiary does not claim that the trustee's self-dealing caused pecuniary damage to the trust. Under the no-further-inquiry rule, all a beneficiary needs to establish is that the trustee engaged in unauthorized self-dealing or acted under a conflict of interest. In the face of such a showing, the court may award disgorgement of profits, removal of the fiduciary, or other relief.

The no-further-inquiry rule thus gives a beneficiary a "right" to a conflict-free fiduciary. When a beneficiary is deprived of that right, the injury suffered is not "abstract," but very real. The beneficiary has been denied what was promised; a fiduciary who would advance the beneficiary's best interest and not its own.

II. This Court has adjudicated cases involving the no-further-inquiry rule since at least the mid-nineteenth century. Never has it suggested that it might lack jurisdiction over such a case because a

plaintiff could not or did not prove that the agent's act of self-dealing caused pecuniary injury. Instead, this Court has rightfully assumed that the very act of an agent's self-dealing causes injury to the principal. Courts of Appeal and District Courts are in accord.

ERISA's structure adopts the logic of the no-further-inquiry rule, imposing *per se* liability and equitable remedies when fiduciaries violate their duty of loyalty.

III. In awarding the consumer the equitable remedy of disgorgement of triple the purchase price, RESPA adopts the logic of the no-further-inquiry rule. Congress recognized that the relationships between home purchasers and real estate professionals are characterized by information asymmetries and power imbalances, and that payments for referrals prevent meaningful market competition. For that reason, Congress sought to create a strong deterrent to undisclosed self-dealing and conflict-of-interest transactions. Accordingly, RESPA penalizes real estate professionals who give or take kickbacks upon a simple showing that a kickback occurred. Like trust law, the statute allows the consumer to seek recovery from both agents and those who knowingly profit from tainted transactions. By adopting a trust-law construct, the statute grants consumers a right to untainted transactions. Accordingly, a violation of that statutorily-granted right must be understood as satisfying Article III's injury requirement.

ARGUMENT

I. A TRUST BENEFICIARY HAS STANDING TO SUE A TRUSTEE WHO HAS ENGAGED IN A SELF-DEALING TRANSACTION EVEN WHEN THE BENEFICIARY HAS SUFFERED NO PECUNIARY DAMAGES AS A RESULT OF THE TRANSACTION

A. The Duty of Loyalty and the No-Further-Inquiry Rule.

Petitioners argue that even if First American's obligation to refrain from making payments in exchange for referrals can be characterized as a duty of loyalty, they should not be held liable for breaching that duty because "the law does not recognize an abstract claim for breach of a duty of loyalty in the absence of pecuniary harm." (Pet'rs' Br. at 15.) This description of legal doctrine is wrong for two reasons: it states that one cannot sue for breach of the duty of loyalty absent proof of pecuniary injury, and it suggests that courts view self-dealing transactions that cause no pecuniary damage as creating an "abstract" -- as opposed to a very real -- injury. For centuries, trust law has provided that a beneficiary may sue his or her trustee for breach of the duty of loyalty even if the beneficiary has suffered no pecuniary injury as a result of the trustee's disloyal act.

The "no-further-inquiry" rule holds that a

trustee is *per se* in breach of its fiduciary duty if he or she engaged in self-dealing without advance approval. *See* Restatement (Third) of Trusts § 78 cmt. b (stating that under the no-further-inquiry rule "it is immaterial that the trustee may be able to show that the action in question was taken in good faith, that the terms of the transaction were fair, and that no profit resulted to the trustee"); Robert H. Sitkoff, *Trust Law, Corporate Law, and Capital Market Efficiency*, 28 J. Corp. L. 565, 573 (2003) ("Under the no-further-inquiry rule, even if the self-dealing transaction is objectively fair, the beneficiaries need only show the existence of the trustee's self-interest in order to prevail. Once the beneficiaries prove the fact of self-dealing, there is 'no further inquiry' and the transaction is voided."); Mark L. Ascher, et al., *Scott and Ascher on Trusts* § 17.2 (5th ed. 2010) (hereinafter "Scott and Ascher") ("[A] trustee who has violated the duty of loyalty is liable without further inquiry into whether the breach has resulted in any actual benefit to the trustee . . . [or] whether the breach has caused any actual harm to either the trust or its beneficiaries."); *Davoue v. Fanning*, 2 Johns. Ch. 252 (N.Y. Ch. 1816) (allowing a devisee to sue an executor for selling to executor's wife, despite fact that the sale occurred at a public auction and brought a fair price); *see also,* G. Bogert & G. Bogert, *The Law of Trusts and Trustees* § 543 (2d 1993) (hereinafter "Bogert & Bogert"). If a trustee genuinely believes that a transaction involving self-dealing or conflict of interest in is

the best interest of the trust beneficiaries, it must provide full disclosure and obtain advance approval for the transaction from a court or the trust beneficiaries. *See* Restatement (Third) of Trusts § 78 cmt. c(1); *see also* Bogert & Bogert § 543. Courts construe claims of advance approval strictly, against the trustee. *Id.*

On a showing that an unapproved conflict existed, a beneficiary may sue to rescind the transaction, recover damages, if any, or demand disgorgement of profits or other equitable relief. *See* Bogert & Bogert § 861; *see also* Unif. Trust Code § 1002 (amended 2005). In providing for disgorgement of profits in the absence of pecuniary injury, the no-further-inquiry rule defines the trustee's act of self-dealing as an injury in itself. Put differently, the essence of the trust arrangement is the trustee's promise to place the beneficiaries' best interests ahead of the trustee's personal interests. *See* Scott and Ascher § 17.2 ("The duty of loyalty is . . . the fruit of the courts' efforts to regulate behavior of trustees when their duties as trustee require them to act in ways that may or do conflict with their own personal interests."); Melanie B. Leslie, *In Defense of the No Further Inquiry Rule: A Response to Professor John Langbein*, 47 Wm. & Mary L. Rev. 541, 559 (2005) (arguing "trustees hold themselves out as being trustworthy; that is the essence of the service they offer"). When a trustee operates against the backdrop of an undisclosed conflict of interest, the beneficiaries are deprived of what was promised: a fiduciary who would zealously

act for their best interests. In considering its own interests, the trustee captured some of the value of the transaction for itself.

For example, in *In Re Paxson Trust I,* 893 A.2d 99 (Sup. Ct. Pa. 2006), the husband/wife, who were both trustees and life beneficiaries of a trust created by the wife's father, repeatedly used the trust property as collateral for loans to finance the purchase of property to which they took title in their individual names. When their children, the remainder beneficiaries, sued them for breach of the duty of loyalty, the trustees countered that they should incur no liability because their actions had not harmed the trust. The trial court agreed, but the appellate court reversed, citing a case from 1888 to hold that the trustees were required to disgorge to the children all profits made from resale of the properties. *Id.* at 122 (citing *Appeal of Baker*, 13 A.2d 487, 494-95 (1888)). In so holding, the court emphasized that "'it matters not that there was no fraud meditated and no injury done; *the rule [forbidding self-dealing] is not intended to be remedial of actual wrong, but preventive of the possibility of it*.'" *Id.* at 120 (emphasis in original) (quoting *Banes Estate,* 305 A.2d 723, 727 (1973)).

Finally, in order to provide maximum protection for the vulnerable beneficiary, trust law has long provided that a court has the authority to order a non-fiduciary third party who knowingly participates in a trustee's self-dealing transaction to disgorge profits to the injured beneficiary. *See*

Bogert & Bogert § 701. Professor Scott acknowledged that the rule existed "as far back as 1465." *See* Austin W. Scott, *Participation In a Breach of Trust*, 34 Harv. L. Rev. 454, 455 (1921). Such a party "is a participant in the breach of trust and liable therefore to the beneficiary." *Seminole Nation v. United States*, 316 U.S. 286, 296-97 (1942).

B. The Logic of the No-Further-Inquiry Rule.

The no-further-inquiry rule has endured because it compensates for problems inherent in the trustee-beneficiary relationship. First, trust beneficiaries are in a poor position to discover trustee conflicts of interest. Melanie B. Leslie, *In Defense of the No Further Inquiry Rule: A Response to Professor John Langbein*, 47 Wm. & Mary L. Rev. 541, 559 (2005). To determine whether the trustee is profiting from its position of trust, the beneficiary must know the nature and extent of the trustee's interests and corporate relationships, information that is not often readily available. Unless the trustee volunteers this information, it can be difficult or impossible to figure out. *Id.* The no-further-inquiry rule compensates for underdeterrence by penalizing a trustee for self-dealing unless he fully discloses it and obtains advance approval.

Second, even if the beneficiary detects a conflict, he or she may have difficulty evaluating whether the deal is in her best interests. *See* Restatement

(Third) of Trusts § 78 cmt. b (recognizing that beneficiaries' attempts to monitor trustee performance are likely to be "inefficient if not ineffective" because monitoring efforts will be "wastefully expensive" and will suffer from a lack of information, resources, and necessary knowledge and experience); *see also* Robert H. Sitkoff, *An Agency Costs Theory of Trust Law*, 89 Cornell L. Rev. 621, 680 (2004) (arguing that relying on liability rules is problematic because "beneficiaries are often unsuited to monitor the trustee . . . because they are unborn, incapacitated, or simply irresponsible"). To monitor the fairness of a deal made by the trustee, the beneficiary must engage in a comparative analysis of other options, an activity that the beneficiary may lack the sophistication to undertake. Among other issues, the beneficiary must determine whether the transaction is necessary and whether the trustee could have engaged in the same transaction on terms more favorable to the trust. In short, to evaluate the transaction adequately, the beneficiary would have to possess the same knowledge of the market and level of financial and business sophistication that the trustee enjoys. This would defeat the purpose of the principal-agent relationship.

Third, it is difficult for a court to determine after the fact whether the terms of the deal advance the beneficiaries' best interests; the market is a better indicator of fair market value than an *ex post* judgment by the court. Although courts have some experience making judgments about market value, they are less able to make *ex*

post evaluations about whether the services the trustee contracted for were necessary in the first place, and whether the services could better have been performed by someone else. *See* Melanie B. Leslie, *In Defense of the No Further Inquiry Rule: A Response to Professor John Langbein*, 47 Wm. & Mary L. Rev. 541, 546 (2005).

The no-further-inquiry rule's bright-line prohibition on self-dealing without advance approval and the severe remedy it authorizes (disgorgement of all profits, even if the trust was not harmed) create the strongest possible disincentives to self-dealing. *See* Restatement (Third) of Trusts § 78 cmt. b (holding that "in transactions that violate the trustee's duty of undivided loyalty, under the so-called 'no further inquiry' principle it is immaterial that the trustee may be able to show that the action in question was taken in good faith, that the terms of the transaction were fair, and that no profit resulted to the trustee"); Bogert & Bogert § 543; John H. Langbein, *Questioning the Trust Law Duty of Loyalty: Sole Interest or Best Interest?*, 114 Yale L.J. 929, 931-32 (2005); Robert H. Sitkoff, *Trust Law, Corporate Law, and Capital Market Efficiency*, 28 J. Corp. L. 565, 573-74 (2003).

In recent years, academics, policy makers and courts have questioned the extent to which the no-further-inquiry rule should continue to be applied to self-dealing by a private trustee. *See* John Langbein, *Questioning the Trust Law Duty of Loyalty: Sole Interest or Best Interest?*, 114 Yale L.J. 929, 989-90 (2005) (arguing that the rule

should be replaced by the corporate law rule, which presumes liability for self-dealing but allows a fiduciary to rebut the presumption by showing that the self-dealing transaction was fair); *see also* Melanie B. Leslie, *In Defense of the No Further Inquiry Rule: A Response to Professor John Langbein*, 47 Wm. & Mary L. Rev. 541, 544-46 (2005) (defending the no-further-inquiry rule because it best compensates for poor monitoring by forcing advance disclosure and defense of self-dealing transactions). Banks have successfully lobbied for legislation exempting certain types of transactions from the rule's grasp. Melanie B. Leslie, *In Defense of the No Further Inquiry Rule: A Response to Professor John Langbein*, 47 Wm. & Mary L. Rev. 541, 575 n.159. Courts occasionally relax the rule when family member trustees acting in good faith unknowingly violate its advance approval requirement. *See*, *e.g., Massara v. Henery*, No. 19646, 2000 Ohio App. LEXIS 5425 (Ohio Ct. App. Nov. 22, 2000) (holding that the no-further-inquiry rule was inapplicable and placing the burden on the beneficiary to show that he was damaged by the trustee's action); *Warehime v. Warehime*, 761 A.2d 1138 (Pa. 2000) (holding that the appellate court erred as a matter of law in applying the no-further-inquiry rule because a "good faith" standard was more appropriate). *But see* Restatement (Third) of Trusts § 78 cmt. b (2007) (reaffirming the no-further-inquiry rule); Unif. Trust Code § 1002 (amended 2005) (same).

Nonetheless, one thing remains constant – there is complete agreement on what the no-further-inquiry rule is and has been for hundreds of years.

No one – not one scholar, commentator, or court – has suggested that the rule's imposition of liability upon a simple showing of conflict creates a Constitutional standing question.

II. FEDERAL COURTS, INCLUDING THE SUPREME COURT, HAVE ROUTINELY ADJUDICATED CLAIMS INVOKING THE NO-FURTHER-INQUIRY RULE WITHOUT RAISING ARTICLE III AS A BAR

The no-further-inquiry rule is not limited to trust law – state courts and state and federal statutes have extended the rule's "strict liability" approach to a variety of relationships characterized by power imbalances and information deficits. *See*, *e.g.*, *Daniel v. Aon Corp.*, No. 99-11893, 2003 WL 25711532, at *11 (Ill. Cir. Nov. 4, 2003) (holding that a customer who sued an insurance broker for taking kickback "need not allege or establish actual damages or harm to proceed with their breach of fiduciary duty claim"); *Arst v. Stifel, Nicolaus & Co.*, 954 F. Supp. 1483, 1493 (D. Kan. 1997) (applying state law rule and ordering corporate fiduciary to disgorge to shareholder profits realized from unauthorized self-dealing transaction, even though plaintiff did not seek or prove damages); *Hendry v. Pelland*, 73 F.3d 397 (D.C. 1996) (stating that a client whose attorney breached his duty of loyalty was not required to prove pecuniary injury under state law, and ordering attorney to disgorge fees).

As this Court has noted, courts are "obliged to examine standing *sua sponte* where standing has erroneously been assumed below." *Adarand Constructors Inc., v. Mineta,* 534 U.S. 103, 110 (2001). Yet when an agent transacts under a conflict of interest and the no-further-inquiry rule applies, federal courts (including this Court) take for granted that the principal has satisfied Article III's injury requirement. This makes sense. Federal courts understand that a rule imposing *per se* liability upon a showing of conflict creates a common law or statutory right – the right of the principal to an un-conflicted agent – and that violation of that right constitutes an injury. *See*, *e.g.*, *FMC Corp. v. Boesky*, 852 F.2d 981, 993 (7th Cir. 1988) (stating that the injury required by Article III may exist solely because state law rights have been infringed, and giving as an example state-law breach-of-fiduciary duty claims that do not require plaintiffs to prove pecuniary injury). To hold otherwise would be to deprive federal courts of the power to adjudicate a wide variety of state and federal law claims based on deterrence-oriented statutes. Courts' and legislatures' ability to create effective rules to deter self-dealing by fiduciaries would be materially frustrated.

A. This Court and lower federal courts have long recognized that violation of a principal's right to unbiased management by a fiduciary constitutes an injury for Article III purposes.

Since at least the mid-nineteenth century, this Court has implicitly recognized that it has jurisdiction to adjudicate a fiduciary duty of loyalty claim involving the no-further-inquiry rule. *See Michoud v. Girod*, 45 U.S. 503, 557 (1846) (applying the no-further-inquiry rule to void a sale tainted by an executor's conflict of interest). For example, in *Robertson v. Chapman*, 152 U.S. 673 (1894), the Court considered whether an attorney had engaged in self-dealing by secretly purchasing the principal's property. In explaining the law to be applied, the Court announced:

> If an agent to sell effects a sale to himself, under the cover of the name of another person, he becomes, in respect to the property, a trustee for the principal, and at the election of the latter . . . will be compelled to surrender it, or, if he has disposed of it to a bona fide purchaser, to account, not only for its real value, but for any profit realized by him on such resale. And this will be done upon the demand of the principal, although it may not appear that the property, at the time the agent fraudulently

> acquired it, was worth more than he paid for it. *The law will not, in such a case, impose upon the principal the burden of proving that he was in fact injured, and will only inquire whether the agent has been unfaithful in the discharge of his duty*.

Robertson, 152 U.S. at 681 (emphasis added). Although the Court ultimately determined that the attorney had not been on both sides of the transaction, it never entertained the thought that it might lack jurisdiction over the case because the plaintiff did not prove pecuniary injury. It simply assumed, as federal courts have always done, that the agent's violation of the principal's right to unbiased representation would constitute an injury in fact.

Forty years later, this Court again implicitly recognized that an agent invoking the no-further-inquiry rule met Article III's injury requirement. In *Jackson v. Smith*, 254 U.S. 586 (1921), the court held that an agent breached his duty of loyalty by purchasing an interest in the principal's property. In so holding, the Court stated that,

> The course taken was one which a fiduciary could not legally pursue. Since he did pursue it and profits resulted the law made him accountable to the trust estate for all the profits obtained by him and those who were associated with him in the matter, *although the estate may not*

have been injured thereby.

Id. at 588-89 (emphasis added) (citation omitted). At no time did the court suggest that it lacked jurisdiction over the case because the plaintiff did not establish it had suffered pecuniary injury. *See also Weil v. Neary*, 278 U.S. 160, 173 (1929) (assuming it had jurisdiction to void a contract on conflict-of-interest grounds even if the contract benefitted the principal); *Woods v. City Nat'l Bank & Trust Co.*, 312 U.S. 262, 268 (1941) (assuming it had jurisdiction to disallow payment of fees in bankruptcy proceeding where agent had several conflicts of interest even though the transactions caused no unfairness to the estate); *United States v. Carter*, 217 U.S. 286 (1910) (affirming judgment awarding disgorgement of profits gained from contracts tainted by conflicts of interest).

On numerous occasions, lower federal courts have applied state law no-further-inquiry rules to breach of fiduciary duty claims, and have never once suggested that they might lack jurisdiction because plaintiffs did not or could not prove that a fiduciary's self-dealing caused pecuniary injury. For example, in *Fisher v. Miocene Oil and Gas Ltd.*, 335 Fed. App'x. 483 (5th Cir. 2009), a trust beneficiary alleged that her mother, the trustee, had breached her duty of loyalty by selling trust property to the trustee's son and other related parties without the beneficiary's knowledge or consent. The beneficiary did not attempt to prove that the transactions were detrimental to the trust, but simply sued to rescind them. The district court dismissed plaintiff's claim, not on Article III

grounds, but on the mistaken view that state law required plaintiff to establish actual pecuniary injury to be entitled to rescind the transactions. *Id*. at 492-93. The Fifth Circuit reversed, emphasizing that under Texas law "self-dealing transactions may be attacked by the beneficiary *even though he has suffered no damages* and even though the trustee has acted in good faith." *Id*. at 486 (emphasis in original) (quoting *Crenshaw v. Swenson*, 611 S.W.2d 886, 890 (Tex. Civ. App. 1980)). As the court explained, "a self-dealing transaction itself constitutes an injury *vel non,* the undoing of which is an available remedy." *Fisher*, 335 Fed. App'x. at 487. At no time did the trustee argue or did the court suggest that the beneficiary could not meet Article III's injury requirement. It went without saying that the violation of the beneficiary's state-law right to unbiased trust management constituted an injury in fact.

In *Hendry v. Pelland*, 73 F.3d 397 (D.C. 1996), the court ordered an attorney to disgorge the fees he had earned by representing five members of one family in a breach of contract suit. *See Hendry*, 73 F.3d 397. Although the members of the Hendry family had materially conflicting interests in the suit, at no time did their attorney explain or discuss those conflicts. The court found that the attorney breached his duty of loyalty, and rejected his claim that the Hendrys could recoup fees only if they could establish that they had suffered actual injury as a result of the breach. As the court explained, proof of actual injury would be necessary if the Hendrys sought *compensatory* damages, since those damages "make plaintiffs whole for the

harms that they have suffered as a result of defendants' actions." *Id.* at 402. But because the Hendrys did not seek compensation for actual pecuniary injury they were entitled to disgorgement of legal fees upon a simple showing that the attorney had a conflict of interest.

Petitioners suggest that *Hendry* supports their point, claiming that the court based its decision (and implicitly, its assumption that it had jurisdiction over the case) on a finding that the Hendrys had suffered some sort of pecuniary injury. In support of this reading of the case, Petitioners quote the court as stating that "forfeiture [of attorney's fees charged by a faithless fiduciary] reflects … the decreased value of the representation itself." (Pet'rs' Br. at 35 n.17 (quoting *Hendry*, 73 F.3d at 402)). Petitioners argue that Edwards was not similarly injured because "she did not claim that she paid First American or Tower City for advice about title insurance or that she did not get what she paid for." (Pet'rs' Br. at 35 n.17.)

But a reading of the court's *full* statement provides clarity; according to the court, "forfeiture reflects *not the harms clients suffer from the tainted representation,* but the decreased value of the representation itself." *Hendry*, 73 F.3d at 402 (emphasis added). In other words, the court simply re-stated the basic rule: by definition, an agent who self-deals injures the principal, because the *per se* liability rule gives the principal the right to a conflict-free transaction, and self-dealing is a violation of that right. The principal did not get

what it paid for. And as the *Hendry* opinion reminds us, there are good reasons for this approach: it deters fiduciary misconduct, "a goal worth furthering regardless of whether a particular client has been harmed," and prevents fiduciaries from "profit[ing] from their disloyalty." *Id.*

Fisher and Hendry are just two of many federal cases finding "injury" in the very fact of an agent's self-dealing. *See Huber v. Taylor*, 469 F.3d 67 (3d Cir. 2006) (determining that Texas law, which does not require clients to prove damages to obtain disgorgement of attorneys fees when attorney breaches fiduciary duty, applied in diversity case and remanding to district court for order disgorging fees; *Arst*, 954 F. Supp. 1483 (applying state law rule and ordering corporate fiduciary to disgorge profits realized from unauthorized self-dealing transaction, even though plaintiff did not seek or prove damages); *Hendry*, 73 F.3d 397 (stating that client whose attorney breached his duty of loyalty was not required to prove pecuniary injury, and ordering attorney to disgorge fees); *Woods*, 312 U.S. at 268 (1941) (disallowing payment of fees to indenture trustee under Bankruptcy Act because agent had several conflicts of interest even though "fraud or unfairness were not shown to have resulted" because . . . "'[w]hat is struck at in the refusal to enforce contracts of this kind is not only actual evil results but their tendency to evil in other cases'") (quoting *Weil*, 278 U.S. at 173); *Weil,* 278 U.S. at 173-74 (voiding contract between attorneys for division of fees in bankruptcy proceedings on conflict-of-interest grounds, because "even if the ultimate results" of the transaction

"were good," enforcing such contracts would "destroy the safeguards of the law and lessen the prevention of abuses"); *cf. Foster Poultry Farms, Inc. v. SunTrust Bank*, 377 Fed. App'x. 665 (9th Cir. 2010) (awarding claimant disgorgement of profits against bank that breached confidentiality agreement where plaintiff could not prove that breach caused it actual injury).

B. Federal courts have jurisdiction to adjudicate ERISA claims when a plan participant establishes that a fiduciary has violated plaintiff's statutory rights, even when that plaintiff cannot prove pecuniary injury.

In support of its erroneous claim that a plaintiff cannot sue a fiduciary for breach of duty absent a showing of "financial injury," Petitioners cite a handful of ERISA cases that it purports establish that point. (Pet'rs' Br. at 34.) Here, Petitioners misunderstand ERISA law. ERISA embraces the trust law duty of loyalty and the logic of the no-further-inquiry rule. Federal courts considering ERISA claims regularly award equitable relief, such as disgorgement, without suggesting that a plaintiff who cannot prove pecuniary injury lacks standing. When properly read in the context of ERISA as a whole, the cases Petitioners cite *undermine* rather than support their argument.

1. ERISA embraces the logic of the

no-further-inquiry rule.

The legislative history of ERISA demonstrates that the driving force behind the statute was the concern with "'misuse and mismanagement of plan assets', particularly self-dealing by plan managers." *Lowen v. Tower Asset Mgmt., Inc.*, 829 F.2d 1209 (2d. Cir. 1987) (quoting *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 141 n.8 (1985)). Prior to ERISA, the relationships between pension plans and administrators were governed by the standard applicable to arms-length transactions. S. Rep. No. 383, 93d Cong., 1st Sess. 32 (1974), *reprinted in* 1974 U.S.C.C.A.N. 4890, 4917. In recognition of the fact that this standard failed to protect plan beneficiaries from fiduciary self-dealing, ERISA imposes strict fiduciary duties on managers. *Id.*

The fiduciary provisions of ERISA are derived from the common law of trusts. *Varity Corp. v. Howe*, 516 U.S. 489 (1996). Because Congress was especially focused on the potential for self-dealing by plan managers, ERISA contains multiple provisions setting forth specific fiduciary duties.[2] ERISA codifies the common law duty of loyalty,

[2] To quote, "a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and for the exclusive purpose of: (i) providing benefits to participants and their beneficiaries; and (ii) defraying reasonable expenses of administering the plan." *See* § 404(a)(1)(A).

directing that a fiduciary "shall not deal with the assets of the plan in his own interest or for his own account," engage in transactions involving a conflict of interest, or receive any kickbacks in any transaction involving assets of the plan. § 406, 29 U.S.C. § 1106(b). As in trust law, fiduciaries that violate these provisions can be held personally liable for damages, disgorgement, or other equitable remedies, such as removal.

To create the greatest possible deterrent to self-dealing and conflict-of-interest transactions, ERISA goes further than the common law by listing specific types of transactions that are absolutely prohibited. *See* § 406, 29 U.S.C. § 1106. In recognition of the fact that plan participants are exceptionally handicapped in their ability to spot, monitor and evaluate transactions tainted by self-dealing, section 406 provides even greater protection than the no-further-inquiry rule by eliminating the advance approval exception. *Donovan v. Cunningham,* 716 F.2d 1455, 1464-65 (5th Cir. 1983) (citing *Cutaiar v. Marshall,* 590 F.2d 523, 529 (3d Cir. 1979)). As one court explained,

> This rule both assures protection to plan beneficiaries and provides notice to plan fiduciaries of their obligations. It protects *beneficiaries* by prohibiting transactions tainted by a conflict of interest and thus highly susceptible to self-dealing. It gives notice to fiduciaries that they must either avoid the transactions described in Section 406(b) or cease serving in their

> capacity as fiduciaries, no matter how sincerely they may believe that such transactions will benefit the plan. Such protection of beneficiaries and notice to fiduciaries requires that Section 406(b) be broadly construed, and that liability be imposed even where there is "no taint of scandal, no hint of self-dealing, no trace of bad faith."

Lowen, 829 F.2d at 1213 (emphasis added) (citations omitted).

Fiduciaries who engage in prohibited transactions are *per se* liable for their actions, even if those actions were taken in a good faith attempt to benefit the plan. *See*, *e.g.*, *Patelco Credit Union v. Sahni*, 262 F.3d 897, 911 (9th Cir. 2001) (upholding summary judgment of fiduciary breach and requiring no further inquiry beyond that "the undisputed facts established that [defendant] engaged in self-dealing" in administering credit union's ERISA plan). Plaintiffs may hold such fiduciaries liable for damages, if any, or may force disgorgement of profits or seek other equitable relief. *See Massachusetts Mut. Life Ins. Co.*, 473 U.S. 134; *Cutaiar*, 590 F.2d at 530; *Freund v. Marshall & Ilsley Bank,* 485 F. Supp. 629, 637 (D. Wis. 1979) (citing *Marshall v. Kelly,* 465 F. Supp. 341, 354 (W.D. Okl. 1979)). Courts have also held that non-fiduciaries who participate in prohibited transactions can be required to disgorge "ill gotten plan assets or profits obtained through participation" in those transactions. *See Herman v. S. Carolina Nat'l Bank*, 140 F.3d 1413, 1421-22

(11th Cir. 1998); *see also Mertens v. Hewitt Assocs.*, 508 U.S. 248, 260-61 (1993) (acknowledging that section 502(a)(5) allows plan participants to sue non-fiduciaries for disgorgement of profits obtained through involvement in prohibited transactions). Thus, the statute embraces the logic of the no-further-inquiry rule by granting to plan participants and beneficiaries the right to plan management that is free from the taint of conflict of interest and self-dealing.

2. Federal courts recognize that a plaintiff who seeks disgorgement of profits from a plan fiduciary who has violated its duty of loyalty has standing even if plaintiff has suffered no pecuniary injury.

Cases decided under section 406 provide the best evidence that violation of a federal statutory right constitutes an injury for Article III purposes even absent a showing of pecuniary injury. Courts adjudicating prohibited transaction claims understand that section 406 gives plan participants a right to plan management that is free from certain types of conflicts of interests, and that fiduciaries who engage in such transactions cause injury to plans and to plan participants. For example, in *Chao v. Linder*, No. 05-3812, 2007 WL 1655254 (N.D. Ill. May 31, 2007), the court determined that defendants should be held liable for engaging in a prohibited transaction, rejecting their argument that they could not be held liable unless the plaintiff could establish that the

transactions caused harm to the plan:

> We do not agree that harm to the plan must be shown. The *per se* nature of the § 406 prohibitions cuts against the need-to-show harm to the plan. "Even in the absence of bad faith, or in the presence of a fair and reasonable transaction, [§ 406(b)] establishes a blanket prohibition of certain acts, easily applied, in order to facilitate Congress' remedial interest in protecting employee benefit plans.

Id., at *8 (quoting *Lowen,* 635 F. Supp. at 1553, *quoting Gilliam v. Edwards,* 492 F. Supp. 1255, 1263 (D.N.J. 1980)). It is critical to note that the court did not suggest that it lacked jurisdiction to adjudicate the section 406 claims because plaintiff could not show pecuniary injury.

In fact, not one court adjudicating a prohibited transaction claim has suggested that the fact that the plaintiffs could not establish that the prohibited transaction resulted in pecuniary injury raised Article III concerns. *See*, *e.g.*, *Chao v. Hall Holding Co.*, 285 F.3d 415, 439 (6th Cir. 2002); *Reich v. Valley Nat'l Bank of Arizona,* 837 F. Supp. 1259 (S.D.N.Y. 1993); *Marshall*, 465 F. Supp. 341; *Cutaiar*, 590 F.2d 523.

3. The cases cited by Petitioners *support* rather than undermine the proposition that violation of a statutory right to an unconflicted

fiduciary is an "injury" for Article III purposes.

Petitioners cite a few ERISA cases for the proposition that plaintiffs cannot maintain suit for breach of fiduciary duty unless they can show pecuniary injury. But the cases Petitioners cite undermine, rather than support, Petitioners' argument.

To the extent that Petitioners' ERISA cases deny standing for particular claims, they do so for reasons irrelevant here. ERISA grants plan participants, among others, various rights to enforce fiduciary duties. Section 502(a). Under section 502(a)(2), plan participants and others may bring what are essentially derivative suits on behalf of the plan – suits claiming breaches of duties owed to the plan. Plaintiffs may sue on behalf of the plan to recover damages caused by breach of fiduciary duty, and for other equitable relief. Section 502(a)(3), by contrast, authorizes a participant, beneficiary or fiduciary to bring suit *in an individual capacity* to redress violations, enforce provisions of ERISA or the plan terms, or to obtain "other appropriate equitable relief." *See* 502(a)(3). This Court has held that plaintiffs suing under 502(a)(3) are limited to equitable relief and cannot recover individual pecuniary damages. *See Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204 (2002); *Varity Corp.* 516 U.S. 489, 509-514.

Taken together, the portions of the cases that Petitioners cite establish two propositions: first, when a plaintiff brings a derivative suit seeking to

recover damages on behalf of the plan under 502(a)(2), plaintiff must allege he has suffered pecuniary injury as a result of the breach of duty owed to the plan.[3] Second, a plaintiff cannot get around 502(a)(3)'s failure to provide for a damages remedy to individual plan participants by dressing up damages claims as "restitution or disgorgement."[4] Neither of these propositions has

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[3] *See Kendall v. Emps. Ret. Plan of Avon Prods.*, 561 F.3d 112,122 (2d Cir. 2009) (denying standing for plaintiff's (a)(2) and (a)(3) because plaintiff's claim of injury was premised on the speculation that she would receive more in benefits if the plan conformed to ERISA. To the extent that the opinion suggests that a plan participant must show pecuniary injury to be entitled to equitable relief, the case is in error, and is, of course, not binding on this Court); *Loren v. Blue Cross & Blue Shield of Michigan*, 505 F.3d 598 (6th Cir. 2007) (no standing to the extent plaintiffs sought restitution of funds on the theory that a fiduciary charged their employers too much for hospital services, which caused their employers to demand higher deductibles, co-payments, and/or contributions from participants); *Glanton v. AdvancePCS Inc.*, 465 F.3d 1123 (9th Cir. 2006) (holding that where plaintiffs claimed that a fiduciary charged their plan too much for prescription drugs, which increased their co-payments and contributions, there was no redressability – and thus no standing – because plaintiffs could not show that those payments and contributions might decrease if the lawsuit were successful).

[4] In *Horvath v. Keystone Health Plan E., Inc.*, 333 F.3d 450, (3d. Cir. 2003), the court dismissed plaintiff's claim for "restitution and/or disgorgement of the amount she and other members of the putative class allegedly overpaid as a result of Keystone's failure to disclose … information." Although plaintiff characterized her claim as one seeking "disgorgement or restitution" -- apparently to get around the fact that ERISA § 502(a)(3) entitled her only to equitable

(footnote continued...)

any relevance to this case. The question before the Court has nothing to do with plaintiffs who seek compensatory damages based on a breach of duty owed to another entity.

Two of the principal cases Petitioners cite actually support the Respondent's argument in this case. For example, in *Loren v. Blue Cross & Blue Shield of Michigan*, 505 F.3d 598, 610 (6th Cir. 2007) the plaintiff sought both damages for the

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relief -- her calculation of the amount owed was a classic compensatory damages calculation: she sought the difference between "the value of the plan as she perceived it (*i.e.*, without a physician incentive structure) and the value of the plan as actually configured (*i.e.*, with physician incentives)." *Id*. at 453. In other words, she sought to be compensated for losses caused by the fiduciary's breach of fiduciary duties. *See Great-West Life & Annuity Ins. Co.*, 534 U.S. at 210 (noting "[a]lmost invariably … suits seeking (whether by judgment, injunction, or declaration) to compel the defendant to pay a sum of money to the plaintiff are suits for 'money damages,' as that phrase has traditionally been applied, since they seek no more than compensation for loss resulting from the defendant's breach of legal duty") (internal citation omitted). But, as the court pointed out, she could not prove that the plan would have paid less for benefits had the physician incentive structure been disclosed, nor could she establish that her employer would have passed any such savings on to its employees. *Id*. at 214; *cf., McCullough v. AEGON USA, Inc.*, 585 F.3d 1082, 1084 (8th Cir. 2009) (declining to address standing issue, and following precedent to hold that ERISA § 1132(a)(2) "does not permit a participant in a defined-benefit plan to bring suit claiming liability under § 1109 for alleged breaches of fiduciary duties when the plan is overfunded") (citations omitted).

plan under section 502(a)(2) and injunctive relief for her own benefit under section 502(a)(3). Although the court found that she lacked standing to bring a claim for damages for the plan, it did find that she had standing to pursue her claim for injunctive relief for herself, stating:

> Plaintiffs need not demonstrate individualized injury to proceed with their claims for injunctive relief under § [502](a)(3); they may allege only violation of the fiduciary duty owed to them as a participant in and beneficiary of their respective ERISA plans. Plaintiffs claim that BCBSM breached its fiduciary duty with respect to the Ford and Axle plans to which Plaintiffs belong. This is sufficient to establish injury-in-fact for purposes of constitutional standing under § 1132(a)(3).

Id. at 610. And in *Horvath*, 333 F.3d 450, the court held that plaintiff met the requirements of Article III to the extent she sought injunctive relief for herself, because ERISA creates a statutory right to full disclosure of certain plan documents and failure to provide those documents constitutes an injury, even absent a showing of individual harm. *Id.* at 456. *Horvath* and *Loren* are consistent with other ERISA cases in establishing that when a federal statute grants a statutory right, violation of that right is an "injury" for Article III purposes.

III. IN AWARDING A CUSTOMER RECOVERY OF TRIPLE THE PURCHASE PRICE UPON A SHOWING THAT THE PROFESSIONAL RECEIVED A KICKBACK OR "THING OF VALUE" IN EXCHANGE FOR A REFERRAL, RESPA IS CONSISTENT WITH THE LOGIC OF THE NO-FURTHER-INQUIRY RULE

The purchaser of settlement services is poorly situated to identify and evaluate the market for services. S. Rep. No. 93-866, at 1 (1974), *reprinted in* 1974 U.S.C.C.A.N. 6546, 6547. For that reason, the purchaser depends on real estate professionals to provide full information about the availability and quality of market place alternatives. *See id.* Accordingly, if the professionals on whom the purchaser relies are acting pursuant to undisclosed conflicts of interest, the purchaser, similar to the trust beneficiary, will be unable to detect it or evaluate how the conflict might affect the transaction. *See generally* U.S. Gov't Accountability Off., *Actions Needed to Improve Oversight of the Title Industry and Better Protect Consumers* (Apr. 2007). Even when the price of a good or service is regulated, the purchaser will have difficulty comparing the service record and product quality of competing companies. *Id.* And when professionals operate pursuant to hidden referral agreements, they deprive the purchaser of the protection that market forces might provide. S. Rep. No. 93-866, at 1. If, as the American Land Title Association admits, exclusivity agreements in exchange for equity investments are truly the norm in the title

insurance industry (Pet'rs' Br. at 7), the effect is to eliminate robust and efficient market competition. *See* U.S. Gov't Accountability Off., *Actions Needed to Improve Oversight of the Title Industry and Better Protect Consumers*. Because purchasers are generally unaware of these arrangements they may not even realize that they have been deprived of the protection that the market place would ordinarily provide. *Id*.

RESPA compensates for these difficulties just as trust law does: by granting the purchaser the right to demand compensation upon a simple showing that the broker or company engaged in self-dealing, here defined as accepting or paying a kickback in exchange for a referral. 12 U.S.C. § 2607(a), (d). It allows the consumer to seek damages from the agent or from other parties who profited from the conflicted deal. It grants the consumer a statutory right to a transaction free from conflicts of interest. Like the no-further-inquiry rule, the statute defines a violation of that right as an "injury" to ensure compensation for hard-to-detect injuries and create a strong deterrent to self-dealing. *Id*.

Respectfully submitted,

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