Nos. 13-2128 and 13-2168

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

DENISE MERRIMON and BOBBY S. MOWERY,

Plaintiffs-Appellees/Cross-Appellants

v.

UNUM LIFE INSURANCE COMPANY OF AMERICA,

Defendant-Appellant/Cross-Appellee.

On Appeal from the United States District Court for the District of Maine

BRIEF OF DRI – THE VOICE OF THE DEFENSE BAR AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANT-APPELLANT/CROSS-APPELLEE AND REVERSAL OF THE DECISION BELOW

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I. STATEMENT OF INTEREST OF *AMICUS CURIAE*

This brief is being filed by DRI – The Voice of the Defense Bar ("DRI"), which supports the Defendant-Appellant/Cross-Appellee, Unum Life Insurance Company of America ("Unum"), in seeking the reversal of the decision and judgment below. DRI is an international organization of more than 22,000 attorneys engaged in the defense of civil litigation. DRI is committed to enhancing the skills, effectiveness, and professionalism of defense attorneys. Consistent with this commitment, DRI seeks to address issues germane to defense attorneys, to promote the role of the defense attorney, and to improve the civil justice system. DRI has long supported efforts to make the civil justice system more fair and efficient. To promote these objectives, DRI participates as *amicus curiae* in cases, such as this one, that raise issues of import to its members, to their clientele, and to the judicial system.

This class action lawsuit challenges an insurer's conduct in connection with the industry practice of paying life insurance proceeds to beneficiaries through the use of retained asset accounts ("RAAs"), whereby an account is created in a beneficiary's name at the insurance company, and the beneficiary is provided with personalized drafts payable through a bank (similar to checks) to access the funds in his or her account. The funds in the account earn interest, and the account holder has the flexibility to write drafts – including drafts to himself or herself for immediate withdrawal of the funds – for up to the full amount in the account at any time.

State insurance commissioners, the Department of Labor, and two courts of appeals (the Second and Third Circuits) have recognized the lawfulness and/or benefits of RAAs for plan participants and beneficiaries. Even the district court's decision below found that RAAs were an acceptable means of paying life insurance proceeds to beneficiaries and that Unum complied with the terms of the applicable plan documents, which required that benefits be paid via RAA.

Nevertheless, the district court held that Unum had an independent fiduciary duty under the Employee Retirement Income Security Act of 1974, as amended, 29 U.S.C. §§1001, *et seq.* ("ERISA") – after it had established the RAAs – to pay interest on the accounts at a variable rate different from the rate Unum selected and communicated to beneficiaries. The rate ordered by the district court is (1) not required by the terms of the applicable plans; (2) not consistent with the communications provided to plan beneficiaries; (3) not used by any other insurance companies for RAAs or any other purpose; (4) not used by any other industries or businesses; and (5) was sometimes higher than, and sometimes lower than, the rate actually used by Unum.

DRI and its members have extensive experience in defending civil actions under ERISA, including lawsuits that challenge the widely recognized industry practice of paying life insurance benefits via RAAs. Based on this extensive practical experience, DRI is uniquely suited to explain why the district court's decision is at odds with ERISA and should be reversed.

First, ERISA protects contractually defined benefits by ensuring a predictable set of liabilities under uniform standards of conduct. The district court's opinion imposes fiduciary standards, and fiduciary liability, where *even the Department of Labor agrees that no such fiduciary duty should apply*. The district court's decision also is at odds with decisions from other jurisdictions, thus threatening ERISA's fundamental interests in uniformity and predictability. It also is at odds with the terms of the applicable plan documents, which did not require that interest be paid at any particular rate. If affirmed, the district court's novel theory of liability would expose insurers offering RAAs to significant liability only in this jurisdiction.

Moreover, because the rate selected by the district court was *lower* than the rate Unum paid and communicated to beneficiaries *for approximately half of the class period*, the district court's order does not make beneficiaries better off or afford any principles to guide how insurance companies should operate their RAA programs going forward. DRI has a strong interest in ensuring that the clients that DRI members represent can conduct business with a measure of predictability of the costs of providing benefits. And the entire judicial system benefits if potential litigants (here, insurance companies and beneficiaries paid via RAAs) know the applicable standards of conduct, so that they can adjust their behavior – e.g., for insurance companies, how much to charge employers for life insurance benefits to be paid via RAA, and for beneficiaries, whether to keep their money in an RAA or find an alternative savings vehicle for their funds.

Accordingly, DRI urges this Court to reverse the decision and judgment of the district court.

II. ARGUMENT

A. The District Court's Opinion Undermines ERISA's Interests In Predictability And Uniformity.

The district court held that Unum satisfied its fiduciary duties under ERISA by paying life insurance benefits through RAAs as required by the express terms of the plans. February 3, 2012 Order on Cross-Motions for Summary Judgment and Class Certification ("Feb. 3 Order") at 18-19. The district court then held, however, that Unum breached a fiduciary duty under ERISA after it established the RAAs by crediting 1% interest to the accounts – even though (1) the plans at issue did not require that interest be paid at a particular rate and (2) the 1% rate was disclosed to beneficiaries at the time the RAAs were created. *Id.* at 17-18.

Allowing a claim for breach of fiduciary duty on these facts undermines two of ERISA's fundamental purposes:

- "to protect contractually defined benefits." *US Airways, Inc. v. McCutchen*, 133 S. Ct. 1537, 1548 (2013) ("ERISA's principal function [is] to protect contractually defined benefits.") (citation and internal quotations omitted).

- to promote predictability and uniformity so as to keep down costs and encourage employers to offer ERISA plans in the first instance. *Conkright v. Frommert*, 559 U.S. 506, 517 (2010) (ERISA "induc[es] employers to offer benefits by assuring a predictable set of liabilities, under uniform standards of primary conduct and a uniform regime of ultimate remedial orders and awards when a violation has occurred") (citation and internal quotations omitted). Such a result cannot stand.

1. **The District Court's Holding Is At Odds With The Department Of Labor And Other Courts, Thereby Exposing Insurers To Liability Only In This Jurisdiction.**

As a threshold matter, the district court properly determined that the funds used to back the RAAs were not plan assets and, thus, Unum did not breach its fiduciary duties under Section 406(b) of ERISA for self-dealing in plan assets. Feb. 3 Order at 13-16; *see also Faber v. Metropolitan Life Ins. Co.*, 648 F.3d 98, 106 (2d Cir. 2011) (concluding that the funds in RAAs do not become plan assets because the SPDs and customer agreements with beneficiaries when the accounts were opened reflected that the plan did not have "any ownership interest –

beneficial or otherwise" in the funds); U.S. Dep't of Labor ("DOL") *Amicus* Brief, *Faber v. Metlife*, February 17, 2011 ("DOL *Amicus* Br.") at 9-11 (same).

Nevertheless, the district court determined that Unum remained a fiduciary even after it provided the benefits to Plaintiffs via RAAs in accordance with the terms of the plans. Feb. 3 Order at 16-17. The district court reasoned that, because Unum retained discretion to set the interest rates on the RAAs, Unum was engaged in plan administration governed by ERISA's fiduciary duties and was thus required to maintain interest rates to "optimize the beneficiaries' earnings." *Id.* at 17-18. The district court concluded that Unum breached this fiduciary duty under Section 404(a) because the 1% interest rate Unum credited to the RAAs was, for some years of the class period, below "the average of the prevailing annual rate credited on money market mutual funds and the prevailing annual rate credited on money market bank accounts throughout the class period." *See* September 11, 2013 Order and Opinion ("Sept. 11 Op.") at 22.

The district court's holding is at odds with the DOL and all courts in other jurisdictions that have considered the issue. Specifically, the DOL, the Second Circuit, and the Third Circuit have all concluded that where a plan authorizes the payment of benefits through an RAA, once an insurance company establishes the RAA in accordance with plan terms, ERISA's fiduciary duties end and the RAA terms – including the interest rate, the number of drafts that can be written on the

RAA, how long it takes for drafts to clear, etc. – are governed by state law and the terms of the RAA contracts, not ERISA. *See Faber*, 648 F.3d at 106-07 (holding that insurance company discharged its fiduciary duty when it established RAAs in accordance with employee benefit plans and did not misuse "plan assets" by holding and investing the funds backing the RAAs); *Edmonson v. Lincoln Nat'l Life Ins. Co.*, 725 F.3d 406, 426 (3d Cir. 2013) (concluding that insurer "completed its obligations with respect to managing or administering the plan once it established the [RAA]. Accordingly, [the insurer] was not managing or administering the plan when it invested the retained assets"); *Vander Luitgaren v. Sun Life Assurance Co. of Canada*, No. 09-11410, 2013 WL 4058916, at *5 (D. Mass. Aug. 9, 2013), *appeal pending* (1st Cir.) (holding that insurer "did not breach any outstanding fiduciary duty to plaintiff when it paid his benefits by means of a retained-asset account, and provided interest on that account in an amount that allowed defendant to make more than a *de minimis* profit").

In *Faber*, as here, the plans specifically required that payment of benefits be made through RAAs but did not provide for any specific interest rate once the RAAs were established. 648 F.3d at 101. Both the Second Circuit and the Department of Labor in its *amicus* brief found that once RAAs were established in accordance with the plans, ERISA fiduciary obligations end and the relationship is governed by state law:

> MetLife discharged its fiduciary obligations as a claims administrator and ceased to be an ERISA fiduciary when, in accordance with the Plans, it created Plaintiffs' TCAs [MetLife's name for RAAs], credited them with amount of benefits due, and issued checkbooks enabling Plaintiffs to withdraw their proceeds at any time.
>
> * * *
>
> To the extent MetLife remained obligated to honor the account holder's "checks" and pay interest at a guaranteed rate, we believe that this arrangement constituted a straightforward creditor-debtor relationship governed by the Customer Agreements and state law, not ERISA.

Id. at 104; *see also* DOL *Amicus* Br. at 11 (same). Significantly, even though the insurer in *Faber* "retain[ed] discretion over the interest rates credited each week[,]" the DOL confirmed that, after the RAA is created and the beneficiary is given control over the account, "ERISA no longer governs the relationship between [the insurer] and the [RAA] account holders." DOL *Amicus* Br. at 10-11.

Even where the plan is silent as to the mode of payment of benefits, the Third Circuit found no breach of fiduciary duty in the selection of an RAA as a method of payment, and no fiduciary duty at all when it invested the retained assets. *See Edmonson*, 725 F.3d at 424-429. In *Edmonson*, the Third Circuit held that the insurer's decision regarding how to invest RAA funds was not subject to ERISA's fiduciary duties because the insurer "had completed its obligations with respect to managing or administering the plan once it established the [RAAs]." *Id.* at 426. The Third Circuit further concluded that the insurer's decision not to pay the plaintiffs more interest on the RAAs was not an independent discretionary act. *Id.* at 424 n.14.

Likewise, in *Vander Luitgaren*, the district court found that the insurer's decision to pay 2% interest on the RAA was not governed by any fiduciary duty under ERISA, even though the insurer remained obligated to pay the promised interest rate, because the plan documents did not "establish any additional management or administration duties" after the RAA was created. 2013 WL 4058916, at *5.

This Court's decision in *Mogel v. Unum Life Insurance Company of America*, 547 F.3d 23 (1st Cir. 2008), does not dictate a different result. Instead, it simply stands for the proposition that a claims administrator must follow the plan's language as to the mode of benefit payment and that ERISA fiduciary duties are not discharged until the claims administrator has made payment in accordance with the plan's terms. *Id.* at 26 ("UNUM cannot be said to have completed its fiduciary functions under the plan when it set up the [RAAs]" because "delivery of the checkbook did not constitute a 'lump sum payment' called for by the policies."); *see also Faber*, 648 F.3d at 107 (distinguishing *Mogel* as "predicated on the fact, not present here, that the insurer failed to abide by plan terms requiring it to distribute benefits in lump sums”).[1]

Here, the plans required payment via RAA – not a “lump sum payment” as in *Mogel*. Thus, pursuant to *Mogel* (and *Faber*, *Edmonson*, and the DOL), Unum satisfied its fiduciary duties once it paid benefits via RAA as required and, after that point, its obligations were governed by its RAA contracts and state law. As such, the district court’s opinion is at odds with every other case to have addressed the issue, which holds that an insurer is no longer acting as an ERISA fiduciary after it establishes an RAA in accordance with the terms of the governing plan.[2] Stated otherwise, ERISA does not prohibit an insurer from operating RAAs as any other business venture – trying to be competitive, exercising its business judgment, and earning a profit, all in keeping with its contractual obligations to customers.

[1] *See also* DOL *Amicus* Br. at 10 (“In contrast to the facts in *Mogel*, the Kodak and GM Plans here specifically contemplate distribution through the creation of a[n] [RAA]. . . . Thus, the Plans discharge their obligation by opening a MetLife account, which the beneficiary controls pursuant to a contractual arrangement with the insurer.”); *Edmonson*, 725 F.3d at 425 (“But the terms of the policy in *Mogel* required an immediate lump sum payment upon receipt of proof of a claim. Because the policy here is silent as to the form of payment, [the insurer] had discretion as to how to comply with its requirements, under its contractual obligations and, as we concluded above, under ERISA. Accordingly, [the insurer] fulfilled its obligation to pay Edmonson when it established the [RAA].”).

[2] Although an insurer may have other obligations beyond those in the plans, such as making required disclosures or avoiding misrepresentations to participants or beneficiaries concerning benefits, “such fiduciary obligations do not extend to the otherwise distinct responsibilities for managing non-plan assets.” DOL *Amicus* Br. at 15.

Cf. Wachtel v. Health Net, 482 F.3d 225, 234-36 (3d Cir. 2007) (an ERISA insurance company claims fiduciary "has a substantial and legitimate interest in the management of its [own] assets – even while it engages in fiduciary acts" dictated largely by its contractual obligations).

The district court's opinion to the contrary produces an anomalous result that is inconsistent with approaches taken by courts in this and other circuits. Upholding the district court's opinion would thus expose insurers offering RAAs similar to those at issue in this case, and in those cases discussed above, to liability only in this jurisdiction. Insurers like Unum issue group life insurance policies to employers with employees throughout the country. As such, these insurers pay benefits on the policies to beneficiaries across various jurisdictions. Brought on an individual basis, suits by participants or beneficiaries challenging the interest rates set on RAAs may lead to a patchwork interpretation of a plan for different participants or beneficiaries, and thus inconsistent fiduciary liability under ERISA, depending on where legal action is filed.[3] *See Conkright*, 559 U.S. at 517 (noting ERISA's goal of uniformity seeks to "avoid a patchwork of different interpretations of a plan, like the one here, that covers employees in different jurisdictions").

[3] *Cf.* 29 U.S.C. § 1132(e)(2) (permitting suit "where the plan is administered, where the breach took place, or where a defendant resides or may be found").

More importantly, however, pursued on a class-wide basis, insurers could be subject to significant liability in the First Circuit under the plan administration fiduciary duty standard created by the district court. Here, for example, after certifying a nation-wide class of beneficiaries in multiple jurisdictions, the district court entered judgment against Unum in the amount of $12,128,916, plus prejudgment interest. Sept. 11 Op. at 25. No liability would attach if the case had been brought in another jurisdiction. *See supra*, at pp. 6-9. Such result would undermine and frustrate ERISA's important goals of "assuring a predictable set of liabilities, under uniform standards of primary conduct and a uniform regime of ultimate remedial orders and awards when a violation has occurred." *Conkright*, 559 U.S. at 517.

2. The District Court's Opinion Improperly Extending Fiduciary Obligations Beyond What ERISA Requires Is Unworkable.

As discussed above, contrary to the DOL and other courts that have considered the extent of an insurer's fiduciary obligations in paying benefits through RAAs, the district court held that Unum was subject to fiduciary duties under ERISA, even after it provided the RAAs to Plaintiffs under the terms of the plans, because it was engaging in plan administration by retaining discretion to choose the interest rates credited to the RAAs. *See supra*, at p. 6. In fashioning a remedy for this breach, the district court ordered that Unum pay Plaintiffs the difference between the 1% interest that Unum credited to the RAAs and the "the average of the prevailing annual rate credited on money market mutual funds and the prevailing annual rate credited on money market bank accounts throughout the class period." Sept. 11 Op. at 22. In so doing, the district court rejected the models put forth by the parties' experts and made up its own benchmark against which the RAA interest rate should be measured. *Id.* at 11-12, 22.

This remedy further demonstrates that the district court's opinion is unworkable not only because it fails to establish a clear standard for when an insurer is acting in a fiduciary capacity under ERISA, but also because it does not provide any meaningful way for a fiduciary to determine how to fulfill its purported fiduciary obligations. The "benchmark" rate ordered by the district court is (1) not required by the terms of the applicable plans; (2) not consistent with the communications provided to plan beneficiaries; (3) not used by any other insurance companies for RAAs or any other purpose; and (4) not used by any other industries or businesses.

Moreover, the district court recognized that the 1% interest rate actually credited by Unum to the RAAs was *higher* than the benchmark rate that the district court created for awarding damages in half of the years in the class period. *See id.* at 22 n.19 (explaining that "[i]n 2004 and 2009–2012, the 1% rate credited by Unum exceeded the average" benchmark interest rate determined by the district court). This alone demonstrates the reasonableness of the rate actually selected by Unum and communicated to beneficiaries – and which beneficiaries accepted by keeping their funds in the RAA.

Instead of acknowledging these facts, the district court created a new standard of fiduciary conduct for paying interest at a new minimum variable interest rate that never existed previously in any form. Indeed, the district court did not even credit the "excess" interest paid by Unum to beneficiaries in 2004 and 2009-2012 – when the benchmark was lower than 1% – against the "underpaid" interest paid in the years in which the district court's benchmark was higher than 1%. *See id.* In other words, for beneficiaries whose RAAs were initially opened in 2008 and remained open throughout 2012, for example, the district court awarded damages for 2008 without even considering whether that beneficiary actually suffered any damages over the entire period that his or her RAA was open.

B. Plaintiffs Lack Constitutional Standing Under Article III To Bring An Action For Disgorgement Under ERISA's Breach Of Fiduciary Duty Provisions.

An important and threshold issue in this case is Plaintiffs' lack of constitutional standing to bring their claims and, thus, the Court's ability to have subject matter jurisdiction over this matter.[4] Beneficiaries, like Plaintiffs, who

[4] The district court did not address the issue of constitutional standing. However, Article III standing goes to a federal court's ability to resolve a dispute and, thus, a court must examine the issue *sua sponte* during its review of the case

have received all plan benefits to which they were entitled under the terms of a plan have not suffered an injury-in-fact sufficient to confer constitutional standing to maintain a breach of fiduciary duty claim for disgorgement under ERISA.

Article III of the United States Constitution limits the jurisdiction of federal courts to "Cases" and "Controversies." U.S. Const. art. III, § 1. "It goes without saying that those who seek to invoke the jurisdiction of the federal courts must satisfy the threshhold [sic] requirement imposed by Article III of the Constitution by alleging an actual case or controversy." *City of Los Angeles v. Lyons*, 461 U.S. 95, 101 (1983). Article III thus "requires the party who invokes the court's authority to 'show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant.'" *Valley Forge Christian Coll. v. Am. United for Separation of Church and State, Inc.*, 454 U.S. 464, 472 (1982). To establish constitutional standing, a plaintiff must show (1) an injury in fact that is concrete and particularized; (2) a connection between the injury and the conduct at issue – the injury must be fairly traceable to the defendant's action; and (3) a likelihood that the injury would be redressed by a

even if not raised by the parties. *See Henderson ex rel. Henderson v. Shinseki*, 131 S. Ct. 1197, 1202 (2011) ("[F]ederal courts have an independent obligation to ensure that they do not exceed the scope of their jurisdiction, and therefore they must raise and decide jurisdictional questions that the parties either overlook or elect not to press."); *In re Sony BMG Music Entm't*, 564 F.3d 1, 3 (1st Cir. 2009) ("When an issue relates to subject-matter jurisdiction, we are duty bound to address the issue even if the parties have eschewed it.").

favorable decision of the Court. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992); *Katz v. Pershing, LLC*, 672 F.3d 64, 71 (1st Cir. 2012).

1. Plaintiffs Cannot Demonstrate An Injury-In-Fact That Arises Under ERISA To Confer Constitutional Standing Because They Received The Full Amount Of Benefits To Which They Were Entitled Under The Plans And All Of The Rights And Privileges Owed to Them, Including Interest Credited To Their RAAs While The Accounts Were Open.

As discussed above, the district court properly held that the funds backing the RAAs were not plan assets. *See supra*, at pp. 5-6. Plaintiffs were therefore not required to proceed under Section 502(a)(2) to seek redress of the alleged fiduciary breaches on behalf of the plans. *See infra*, at p. 22. Instead, Plaintiffs pursued claims under Section 502(a)(3), ERISA's "catchall" provision, to the extent they could demonstrate that they were beneficiaries under ERISA seeking a plan benefit to which they were entitled but did not receive.[5] Feb. 3 Op. at 21. This alone, however, is insufficient to confer constitutional standing to litigate the claims in this case for alleged breaches of fiduciary duty that may have arisen from investing the funds backing the RAAs.

[5] *See* 29 U.S.C. § 1132(a)(3) ("[A] participant, beneficiary, or fiduciary" may bring an action "to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan," or "to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan."); 29 U.S.C. § 1002(8) (defining "beneficiary" as someone "who is or may become eligible to receive a benefit of any type from an employee benefit plan").

Plaintiffs have no contractual or expectancy interest in Unum's alleged profits – or any interest other than what was communicated to them – since they cannot point to any provision of the plans or other communications they were provided that gives them rights to investment returns beyond the interest to be credited to their accounts while they are open. Plaintiffs were entitled to and did earn interest on the funds in the RAAs at the 1% rate set by Unum and communicated to them. What they seek, therefore, is the amount that Unum earned over and above what it owed Plaintiffs under the plans.

a. The District Court In *Faber* Dismissed The Plaintiffs' Claim For Disgorgement For Lack Of Constitutional Standing.

The district court in *Faber v. Metropolitan Life Insurance Company,* No. 08-10588, 2009 WL 3415369 (S.D.N.Y. Oct. 23, 2009), *aff'd*, 648 F.3d 98 (2d Cir. 2011), dismissed the plaintiffs' claim for disgorgement of profits allegedly earned through a life insurer's use of RAAs because the plaintiffs could not demonstrate constitutional standing. 2009 WL 3415369, at *5. In *Faber*, as here, the plaintiffs alleged that they were ERISA plan beneficiaries under life insurance policies issued by the defendant requiring payment via RAAs and that the defendant insurer's payment of policy benefits via RAAs violated Section 502(a)(3) of ERISA. *Id.* at *1-3. In dismissing the plaintiffs' claim for disgorgement, the district court explained that the Second Circuit has recognized a distinction between constitutional standing to bring a claim for injunctive relief and a claim for disgorgement or restitution under ERISA, the latter of which requires a showing that the plaintiffs themselves suffered a particularized injury-in-fact:

> [T]he Second Circuit held that standing to bring an ERISA claim for injunctive relief is to be viewed broadly, and a plaintiff need not demonstrate actual harm to have standing to seek such relief. *See Central States Southeast & Southwest Areas Health & Welfare Fund v. Merck–Medco Managed Care, L.L.C.*, 433 F.3d 181, 199–200 (2d Cir. 2005). With respect to claims for restitution and/or disgorgement, the Second Circuit found that to obtain such relief, "ERISA requires that a plaintiff satisfy the strictures of constitutional standing by demonstrating individual loss; to wit, that they have suffered an injury in fact." *Id.* at 200 (internal citations and quotation marks omitted); *see also Kendall [v. Employees Retirement Plan of Avon Prods.*, 561 F.3d 112, 119-120, 121 (2d Cir. 2009)]. To have standing to bring a claim for restitution or disgorgement as a result of an alleged breach of fiduciary duties under ERISA, therefore, plaintiffs "must show that they were injured by the alleged breach of the duty." *Kendall*, 561 F.3d at 120. It is not sufficient for a plaintiff to claim that he was injured by the breach of the duty itself; rather, he must show a particularized injury to himself. *Id.* at 121.

Faber, 2009 WL 3415369, at *4.

Applying this standard, the district court held that the plaintiffs in *Faber* had failed to show an injury-in-fact that arose under ERISA because they received the full amount of benefits to which they were entitled under the terms of the plans. *Id.* at *5. Significantly, even though the plaintiffs claimed an entitlement to additional amounts of money due to the alleged breach of fiduciary duty, they had received RAAs into which the amount of money owed under the plans was deposited and also received the interest. *Id.* Accordingly, any monies the plaintiffs sought over and above the amount of benefits they were owed was simply not due to the plaintiffs under ERISA. *Id.*

Unlike Plaintiffs in this case, however, the plaintiffs in *Faber* sought both disgorgement or damages and an injunction to prevent the insurer from engaging in such conduct in the future. *Id.* at *4. The district court found that the plaintiffs were permitted to bring a claim for injunctive relief because the plaintiffs were not required to show actual harm to have standing to pursue such a claim under Section 502(a)(3). *Id.* at *6. Notably, the plaintiffs' RAAs in *Faber* remained open at the time of litigation. *Id.*

The Court of Appeals for the Second Circuit affirmed the district court in *Faber*, but did not address the issue regarding standing for disgorgement claims on appeal, other than agreeing with the district court that a plaintiff must demonstrate individual loss to have Article III standing to bring a claim for disgorgement under ERISA. *See Faber*, 648 F.3d at 102-03. Rather, the Second Circuit concluded that the plaintiffs had constitutional standing to seek injunctive relief, *id.* at 103, and explicitly declined to reach the question of whether the plaintiffs had standing to seek damages or disgorgement, *id.* ("[O]ur merits analysis does not depend on whether *Faber* also has standing to seek disgorgement . . . . In light of our ultimate conclusion that the complaint fails to state a claim, we are not required to answer th[is] question[ ].").[6]

Here, the named Plaintiffs had already closed out their RAA accounts. *See* Feb. 3 Order at 4-6. As a result, they did not and could not seek injunctive relief – on behalf of themselves or the class. Moreover, the district court held that Unum had paid more in interest than required for the last four years in any event, so no injunctive relief was, or could be, awarded. Under these circumstances, Plaintiffs lack constitutional standing to pursue their claims for "damages" or disgorgement

[6] Even though the Third Circuit in *Edmonson* held that the plaintiff had constitutional standing to bring her claim for disgorgement of profits, the majority reached the same conclusion on the merits as the dissent did when the dissent found there was no constitutional standing – that the plaintiff had no right to recover the retained assets the defendant invested. 725 F.3d at 424 (holding that, "even assuming there was a breach, [plaintiff] is not entitled to relief because the breach did not directly *cause the injury* for which she seeks relief, [defendant's] investment for its own profit" and, thus, plaintiff has no claim "to the disgorgement of [defendant's] profit based on its decision to establish the [RAA]" or for investing the retained assets) (emphasis added); *id.* at 432 (Jordan, J., dissenting) (concluding plaintiff had no constitutional standing to seek disgorgement because she could not demonstrate individual loss sufficient to constitute an injury-in-fact since plaintiff was entitled to a fixed amount of benefits and had no claim to defendant's profits). Addressing the threshold issue of constitutional standing before the merits, like the dissent in *Edmonson* and the district court in *Faber*, will prevent plaintiffs from being able to pursue a claim for disgorgement, and subject defendants to costly litigation, by simply alleging that a breach of fiduciary duty in itself satisfies Article III's requirements. *See id.* (Jordan, J., dissenting) ("[A] fiduciary duty breach is sufficient to confer standing on an ERISA plaintiff only 'with regard to injunctive relief.'") (quoting *Horvath v. Keystone Health Plan East, Inc.*, 333 F.3d 450, 456 (3d Cir. 2003)).

and their claim should be dismissed for lack of subject matter jurisdiction. *See Faber*, 2009 WL 3415369 at *5-6.

b. A Finding That Plaintiffs Lack Constitutional Standing Is Not Inconsistent With *Mogel.*

A finding that Plaintiffs lack constitutional standing in this case is not inconsistent with *Mogel*. As discussed above, the situation presented here is unlike *Mogel* because, in that case, the plaintiffs alleged that Unum violated the terms of their ERISA plans (i.e., their contracts) by not paying them benefits in accordance with the terms of their plans. The plaintiffs in *Mogel*, therefore, arguably established an injury-in-fact that was redressible under ERISA.

Here, however, as explained above, when a plan requires payment via an RAA, ERISA fiduciary duties are discharged upon establishment of the account in accordance with the plan language that gives a beneficiary control over his or her account. Stated otherwise, an insurer satisfies its obligations to a plan beneficiary, in accordance with the terms of the plan, when it establishes an RAA for the beneficiary, gives the beneficiary full and immediate access to the RAA through a "checkbook," and promises to credit interest on the account balance. *See* DOL *Amicus* Br. at 11, 15. At that point, there is no injury arising under ERISA because all post-RAA conduct is not governed by ERISA and is not fiduciary activity. Nothing prohibits an insurer from profiting from the investments or requires the insurer to credit the RAA with an interest rate to optimize earnings for the account holders. Therefore, a beneficiary cannot show an individual right of recovery for purposes of constitutional standing.

2. To The Extent The Funds Backing The RAAs Are Truly Plan Assets, Plaintiffs Still Lack Constitutional Standing To Seek Disgorgement On Behalf Of The Plans.

Section 502(a)(2) of ERISA, 29 U.S.C. § 1132(a)(2), not invoked here by Plaintiffs, provides for damages or disgorgement of profits to restore losses suffered by a plan under Section 409(a).[7] To the extent Plaintiffs argue that the district court's holding was incorrect and that the funds backing the RAAs were truly plan assets, Plaintiffs were required to bring suit under Section 502(a)(2) on behalf of the plans in which they participated and are not permitted to recover individually for any alleged ill-gotten gains. *Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134 (1985) (remedy for breach must benefit plan as a whole, rather than individual participants). Of course, while Section 502(a)(2) creates statutory standing to allow beneficiaries to sue in such circumstances, it does not, and cannot, supplant the requirements of Article III. *See, e.g.*, *Raines v. Byrd*, 521 U.S. 811, 820 n.3 (1997) ("It is settled that Congress cannot erase Article III's standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing."). In other words, even had Plaintiffs sought to remedy

[7] *See* 29 U.S.C. § 1109(a) (allowing for recovery "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").

Unum's alleged breach of fiduciary duties regarding alleged "plan assets," they would still have to prove the requirements of constitutional standing. *See Glanton ex rel. ALCOA Prescription Drug Plan v. AdvancePCS, Inc.*, 465 F.3d 1123, 1127 (9th Cir. 2006).

Plaintiffs were entitled to receive a set level of benefits that was unaffected by the investment performance of Unum's general account assets. Thus, even if Unum's general account funds were plan assets, Plaintiffs cannot show that they personally have any claim to additional interest – or profits (if any) – above and beyond the 1% interest credited to the RAAs. Therefore, they lack constitutional standing. *See, e.g.*, *David v. Alphin*, 704 F.3d 327, 338 (4th Cir. 2013) (holding that participants in a fully funded ERISA defined benefit pension plan who challenged certain investments of plan assets had not suffered harm sufficient to confer constitutional standing to pursue their fiduciary breach claims under Section 502(a)(2) because they had not been denied benefits promised under the plan and "the risk that Appellants' pension benefits w[ould] at some point in the future be adversely affected as a result of the present alleged ERISA violations [wa]s too speculative"); *Palmason v. Weyerhaeuser Co.*, No. 11-0695, 2013 WL 4511361, at *9 (W.D. Wash. Aug. 23, 2013) (holding that plaintiffs, a participant and a beneficiary of a defined benefit pension plan, lacked constitutional standing to assert claims for monetary damages under Section 502(a)(2) for breach of fiduciary duty because they "failed to show that the alleged diminution in the value of the plan assets posed a threat to the plaintiffs' interests or that a damage award in favor of the plan would in any way benefit them").

III. CONCLUSION

For all of the foregoing reasons, in addition to the reasons stated in the Defendant-Appellant/Cross-Appellee's principal brief, DRI respectfully urges this Court to reverse the decision and judgment below.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I, Jeremy Blumenfeld, certify:

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