No. _____

In The
Supreme Court of the United States

CONVERGEX GROUP LLC, CONVERGEX EXECUTION SOLUTIONS LLC, CONVERGEX GLOBAL MARKETS LTD., CONVERGEX HOLDINGS LLC, G-TRADE SERVICES LLC,

Petitioners,

v.

LANDOL FLETCHER,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a participant in a defined-benefit ERISA plan may claim "representational" standing and rely on only his plan's injuries to satisfy Article III's standing requirement, as the Second Circuit has held, or whether the participant must establish his own Article III standing to proceed, as the Third, Fourth, Fifth, Sixth, Eighth, and Ninth Circuits have held.

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

The parties to the proceedings include those listed on the cover.

Petitioner Convergex Group, LLC (now known as Cowen Execution Holdco LLC) certifies that it owns 10% or more of the equity of Petitioner Convergex Execution Solutions LLC (now known as Cowen Execution Services LLC). Petitioner Convergex Group, LLC certifies that it is a 100% owned subsidiary of Cowen CV Acquisition LLC. Agency Brokerage Holding, LLC and GTCR Fund VIII AIV, L.P. each owns 10% or more of the stock of Petitioner Convergex Holdings, LLC.

Petitioners furthermore certify that Petitioner Convergex Global Markets Ltd. and G-Trade Services LLC no longer exist, as Convergex Global Markets Ltd. dissolved, and G-Trade Services LLC was merged into another entity, effective February 20, 2015 and April 1, 2015, respectively.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Convergex Group LLC, Convergex Execution Solutions LLC, and Convergex Holdings LLC ("Convergex") respectfully submit this petition for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Second Circuit.[1]

OPINIONS AND ORDERS BELOW

The order denying panel rehearing and rehearing *en banc* (App., *infra* 15-16) is unreported. The panel decision (App., *infra* 1-4) is unreported and available at 679 F. App'x 19 (2d Cir. 2017). The district court's decision (App., *infra* 5-12) is reported at 164 F. Supp. 3d 588 (S.D.N.Y. 2016).

STATEMENT OF JURISDICTION

The court of appeals entered its order denying rehearing on April 4, 2017. An application to extend the time to file a petition for a writ of certiorari was granted on June 26, 2017, making the petition due on or before September 1, 2017. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

[1] Two parties below—Convergex Global Markets Ltd. and G-Trade Services LLC—have since been dissolved.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the requisite injury a defined-benefit ERISA plan participant must show to invoke federal jurisdiction.

29 U.S.C. § 1109. Liability for breach of fiduciary duty

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

29 U.S.C. § 1132. Civil enforcement

(a) Persons empowered to bring a civil action.

A civil action may be brought—* * *

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

Article III, Section 2 of the United States Constitution provides that "[t]he judicial Power shall extend

to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made * * * *"

STATEMENT

The Employee Retirement Income Security Act (ERISA) imposes statutory duties on plan fiduciaries and provides the "Secretary [of Labor], [plan] participant[s], beneficiar[ies], [and] fiduciar[ies]" with a cause of action "for appropriate relief" for the violation of those duties. 29 U.S.C. § 1132(a)(2). But as this Court has recently instructed, "Article III standing requires a concrete injury even in the context of a statutory violation." *Spokeo, Inc.* v. *Robins*, 136 S. Ct. 1540, 1549 (2016). The Second Circuit has dispensed with that requirement for ERISA claims under Section 1132(a)(2) based on a theory of "representational" standing that conflicts with every other court of appeals to have considered the question, with this Court's decision in *Spokeo*, and with this Court's ERISA jurisprudence.

ERISA defined-benefit-plan participants enjoy a right to fixed future plan payments, but they do not own or have an interest in any particular plan asset. *Hughes Aircraft Co.* v. *Jacobson*, 525 U.S. 432, 439 (1999). Thus this Court has explained that "[m]isconduct by the administrators of a defined benefit plan will not affect an individual's entitlement to a defined benefit unless it creates or enhances the risk of default

by the entire plan." *LaRue* v. *DeWolff, Boberg & Assocs., Inc.*, 552 U.S. 248, 255 (2008) (emphasis added).

Respondent Landol Fletcher is a participant in a defined-benefit plan who asserts various theories of fiduciary misconduct that, if true, imposed a $1,577.93 loss on a plan with assets totaling tens of billions of dollars and more than 400,000 participants. Fletcher did not allege that he has been denied any benefits under the Plan; indeed, he has neither alleged that he is *due* any benefits, nor that the Plan has repudiated or modified the future benefits to which he will be entitled. Nor can he plausibly claim that his benefits will be reduced because of the $1,577.93 loss. Nonetheless, the Second Circuit permitted Fletcher to proceed on a theory of representational standing, where Fletcher may rely on the Plan's alleged lost assets—in which he has no interest—to satisfy Article III's requirements. Under the Second Circuit's theory of representational standing, an ERISA plan beneficiary who has suffered no *personal* Article III injury may nonetheless sue on behalf of his *plan's* injuries.

In so holding, the Second Circuit created a circuit split with every other Circuit to have considered the question—all of which have squarely rejected representational (or "derivative") standing under ERISA. See *Lee* v. *Verizon Commc'ns, Inc.*, 837 F.3d 523, 547-48 (5th Cir. 2016), cert. denied, 137 S. Ct. 1374 (2017); *Perelman* v. *Perelman*, 793 F.3d 368, 375-76 (3d Cir. 2015); *David* v. *Alphin*, 704 F.3d 327, 334-35 (4th Cir. 2013); *McCullough* v. *AEGON USA Inc.*, 585 F.3d 1082, 1086 (8th Cir. 2009); *Loren* v. *Blue Cross & Blue Shield*

of Mich., 505 F.3d 598, 608-09 (6th Cir. 2007); *Glanton ex rel. ALCOA Prescription Drug Plan* v. *AdvancePCS Inc.*, 465 F.3d 1123, 1125 (9th Cir. 2006).

The Second Circuit's approach introduces intolerable uncertainty into the administration of ERISA plans—an area of the law that, as this Court has acknowledged, particularly requires national uniformity. See, e.g., *Rush Prudential HMO, Inc.* v. *Moran*, 536 U.S. 355, 379 (2002). This Court's intervention is required to resolve the conflict and restore uniformity on this exceedingly important question of Article III standing and ERISA law.

1. Petitioner Convergex is a group of securities broker-dealers who offer brokerage trading services to institutional investors, including asset managers who manage funds on behalf of ERISA plans. App. 6. Among those ERISA plans is the Central States Plan. *Id.* at 7.

2. Respondent Landol Fletcher is a participant in the Central States Plan. App. 2-3. That Plan is a defined-benefit plan under ERISA, and it is designed to guarantee the payment of specific defined pension benefits to participants. Unlike participants in defined-*contribution* plans, participants in defined-*benefit* plans receive fixed future payments. Because the benefit is defined beforehand, those individuals receive only the amount promised and are not entitled to any of the plan's underlying assets. *Hughes Aircraft*, 525 U.S. at 439-40.

3. Fletcher sued Convergex on behalf of members of the Central States Plan and members of all other plans allegedly impacted by alleged overcharges on securities trades executed on behalf of the plans' asset managers. App. 6. As relevant here, he claimed that his Plan was overcharged by an amount revealed during discovery to be $1,577.93 over the six-year putative class period—and brought claims for breach of fiduciary duties and prohibited transactions under ERISA. *Id.* at 6, 7. He did not claim that he had been denied any benefits to which he was entitled under the terms of the defined-benefit Plan, and he is not yet eligible to receive any benefits under the Plan. *Id.* at 7.

4. Convergex moved to dismiss for lack of subject-matter jurisdiction, asserting that Fletcher did not claim any individualized harm as a result of Convergex's alleged conduct and did not attempt to establish an actual or imminent injury-in-fact for Article III standing. App. 6. After extensive jurisdictional discovery, the district court agreed and dismissed the case. *Id.* at 12. The district court held that the $1,577.93 charged to the Plan—which was underfunded by $16 billion long before the alleged overcharges occurred—could not give rise to Article III standing because Fletcher was only entitled to his defined benefit, which was entirely unaffected by Convergex's alleged conduct. *Id.* at 10-11. The overcharges, the court found, "increased the Plan's deficiency by less than one-hundred-thousandth of one percent. The extent to which that enhanced the Plan's existing prospect of

default is so minute as to be imaginary and inconsequential" rather than amounting to an actual or imminent injury sufficient to confer standing. *Id.* at 10.

5. On appeal, Fletcher offered three arguments for standing. First, he claimed that the amount at issue, no matter how small, created an enhanced risk that he would not receive his pension benefits. App. 3. Second, he argued that a statutory violation alone—i.e., a mere allegation that Convergex breached a fiduciary duty under ERISA—was sufficient to confer standing. *Ibid.* Third, he claimed that he could assert claims on behalf of his Plan for *its* injuries under a theory of "representative standing." *Ibid.*

As it has done in similar cases across the Nation, the Department of Labor filed an *amicus* brief embracing Fletcher's theories of standing—arguing that "[b]ecause a violation of fiduciary duties is itself sufficient injury without showing financial harm, [Fletcher] has satisfied the low threshold to establish Article III standing by alleging a specific violation of his individual rights and the Plan's rights, as its representative." Br. of Dep't of Labor as *Amicus Curiae* at 6, *Fletcher* v. *Convergex Grp., LLC*, 679 F. App'x 19 (No. 16-734), ECF No. 54.[2]

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[2] See also Jacklyn Wille, *DOL Continues Uphill Battle On Pension Plan Standing*, BNA PENSION & BENEFITS REPORTER, Oct. 21, 2016; Jacklyn Wille, *DOL Holds Modest Sway With Courts on Benefits Issues*, BNA PENSION & BENEFITS REPORTER, July 20, 2016 (noting that the Labor Department, "despite several setbacks, is still trying to convince federal courts to make it easier for pension

The Second Circuit, relying only on Fletcher's third argument, reversed. App. 3-4. The panel concluded that the allegations of fiduciary breach and ERISA violations, coupled with the "resulting [$1,577.93] loss sustained by the Central States Plan" were "sufficient to confer Article III standing on Fletcher in his representative capacity as a Plan participant." *Id.* at 3. In doing so, the Second Circuit expressly relied on ERISA's statutory provision authorizing the Secretary of Labor, plan participants, beneficiaries, and fiduciaries to bring suit. *Ibid.* (citing 29 U.S.C. § 1132(a)(2)).[3]

The Second Circuit denied Convergex's petition for rehearing *en banc* or panel rehearing. App. 16.

REASONS FOR GRANTING THE PETITION

In embracing the notion of "representational" or "derivative" standing for beneficiaries of ERISA defined-benefit plans who have suffered no personal losses, the Second Circuit has created an irreconcilable

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plan participants to sue over plan mismanagement and investment losses" and pointing out that the Department of Labor "has had no success convincing courts that pension plan participants have standing to sue over mismanagement regardless of how well their plan is funded").

[3] The panel also noted Fletcher's additional request to represent members of other ERISA plans—which the district court had also rejected "without separately analyzing [it]"—and remanded the case for the district court to consider that issue in the first instance. App. 4.

conflict with every other court of appeals to have considered the question. It has departed from this Court's precedents on both ERISA and Article III injury-in-fact. And it has sown confusion and unpredictability in an area of the law that this Court has repeatedly recognized as requiring certainty and uniformity.

If permitted to stand, the Second Circuit's decision opens the door for class actions against the spectrum of ERISA plan sponsors, service providers, and fiduciaries, threatening not only stability in the financial and benefits industries, but also employers' continued willingness to offer such plans. See, e.g., *Conkright* v. *Frommert*, 559 U.S. 506, 517 (2010) (ERISA uniformity "avoid[s] a patchwork of different interpretations, * * * a result that 'would introduce considerable inefficiencies in benefit program operation, which might lead those employers with existing plans to reduce benefits, and those without such plans to refrain from adopting them'" (citation omitted)). The petition for certiorari should be granted.

I. The Second Circuit's Decision Recognizing Representational Standing In ERISA Cases Creates A Conflict With Every Other Circuit That Has Decided The Issue.

A defined-benefit-plan participant has no stake in his plan's assets, but merely an interest in the defined benefit he is to receive at some future date when he retires. *Hughes Aircraft*, 525 U.S. at 439. As a result, a defined-benefit-plan participant like Fletcher only

has standing to challenge alleged actions by the Plan if he can show that those actions created a substantial increase in the risk of the Plan's default. See *Spokeo*, 136 S. Ct. at 1549; *LaRue*, 552 U.S. at 255; *Hughes Aircraft*, 525 U.S. at 439-40. Fletcher cannot make that showing, because if the Plan defaults, the $1,577.93 will not have caused it—the preexisting $16 billion shortfall will have. The only way, then, that the Second Circuit could have found that Fletcher has standing was to accept the notion of representational standing—which every other Circuit to have considered the question has rejected.

Specifically, it was the "financial loss sustained by the Central States Plan," according to the Second Circuit, that provided Fletcher with standing "in his representative capacity as a Plan participant." App. 3. In finding a basis for constitutional standing absent individualized harm, the Second Circuit cited the *statutory* provision authorizing suit to a plan participant, effectively conflating threshold requirements for statutory standing with the constitutional mandates of Article III.

This doctrine of representational standing without individual injury has been rejected by every other court of appeals to have considered the question—each of which has held that an ERISA plan participant like Fletcher—who has not suffered any individualized injury—does not have Article III standing to sue for injuries suffered by an ERISA plan. See *Lee*, 837 F.3d at 547-48; *Perelman*, 793 F.3d at 375-76; *Alphin*, 704 F.3d at 334-35; *McCullough*, 585 F.3d at 1086;

Loren, 505 F.3d at 608-09; *Glanton*, 465 F.3d at 1125. That irreconcilable conflict demands resolution.

The Fifth Circuit's recent decision in *Lee* is illustrative. See 837 F.3d at 547-48. The Fifth Circuit had previously held that participants in an ERISA-defined benefit plan lacked constitutional standing to assert fiduciary breach claims where the plan, but not the individual, had been injured. *Lee* v. *Verizon Commc'ns, Inc.*, 623 F. App'x 132, 150 (5th Cir. 2015) (rejecting the claim that "Plan participants may bring suit in a quasi-representative capacity, satisfying Article III's injury-in-fact requirement via an injury to the Plan"). Following *Spokeo*, this Court remanded the case to the Fifth Circuit for consideration in light of that case.

On remand, the Fifth Circuit reexamined the argument that a plan participant had standing to sue in the absence of any individualized harm to his "defined level of benefits," concluding that its prior decision "remain[ed] valid in light of *Spokeo*." *Lee*, 837 F.3d at 529. The "bare allegation of improper defined-benefit-plan management under ERISA, without concomitant allegations that any defined benefits are even potentially at risk" could not satisfy Article III, "'even in the context of a statutory violation.'" *Id.* at 530 (quoting *Spokeo*, 136 S. Ct. at 1549). In doing so, the Fifth Circuit reaffirmed its holding that no such "representational standing" exists for ERISA plan participants like Fletcher.

The Fourth Circuit has likewise held that Article III prevents federal courts from entertaining claims by

ERISA plan participants for injuries not suffered by the individual. *Alphin*, 704 F.3d at 334-35. In *Alphin*, the plaintiffs argued that they should have "the same kind of representational standing as a trustee, fiduciary, or assignee." *Id.* at 334 (citation omitted). The court rejected this argument, holding that, "in the ERISA context, specifically in the case of a defined benefit plan where all plan participants are equally situated, extending the * * * theory of [representational] standing" could create considerable litigation costs for alleged breaches of fiduciary duty. *Id.* at 336. "Where there is no actual injury, we see little to be gained from an abstract challenge to alleged fiduciary misconduct at the cost of the plan * * * *" *Ibid.*

The court held that "the risk that [the plaintiffs'] pension benefits will at some point in the future be adversely affected as a result of the present alleged ERISA violations is too speculative to give rise to Article III standing" and the claims were dismissed. *Id.* at 338. The court also rejected the plaintiffs' contention that a violation of their statutory right alone conferred standing, finding "this theory of Article III standing is a non-starter as it conflates statutory standing with constitutional standing." *Ibid.*

Following *Alphin* (and other courts), the Third Circuit also recently rejected the argument that a plaintiff "need not prove an individualized injury insofar as he seeks monetary equitable remedies in a 'derivative' or 'representational' capacity on behalf of the Plan." *Perelman*, 793 F.3d at 375-76. The Third Circuit noted that its "own case law provide[d] no support for this

theory, and other federal appellate courts have unanimously rejected it." *Id.* at 376. The plaintiff could "provide[ ] no authority or other convincing reason for [the Third Circuit] to break from the reasoned consensus of [its] sister circuits." *Ibid.* The plaintiff also attempted to show that the risk of his plan's default increased with the actions at issue, but the court rejected that claim as well, finding it entirely too speculative to support standing. *Id.* at 375.

Similarly, the Eighth Circuit has held that the statutory provision at issue here—29 U.S.C. § 1132(a)(2)—does not give a plan participant, uninjured by the alleged action, standing to bring a claim on behalf of the plan for losses to the plan. *Harley* v. *Minn. Mining & Mfg. Co.*, 284 F.3d 901, 906-07 (8th Cir. 2002). That court was clear that a mere statutory entitlement to sue could not be enough under Article III. *Ibid.* ("If the statute authorized any stranger to the plan to bring such an action, would that suffice to confer standing? Surely not, for Article III forecloses the conversions of courts of the United States into judicial versions of college debating forums."). A contrary interpretation—such as one allowing "representational standing" without individual injury—"would raise serious Article III case or controversy concerns." *Id.* at 906.

The Sixth Circuit addressed the same issue, holding that only plaintiffs who had been injured individually could bring claims under Section 1132(a)(2). *Loren*, 505 F.3d at 608-09. While the individuals could sue on behalf of the plan, no recovery was available to them under the statute and they were still required to

show individual harm. *Ibid.* Because the injuries there were "too speculative to establish constitutional standing," the claims were dismissed. *Id.* at 609. This reasoning tracks with an earlier Ninth Circuit decision reaching the same conclusion. *Glanton*, 465 F.3d at 1127 ("[Plaintiffs assert that] ERISA plan beneficiaries may bring suits on behalf of the plan in a representative capacity. We have no quarrel with this proposition—so long as plaintiffs otherwise meet the requirements for Article III standing.").

Until now, no circuit has endorsed a representational theory of standing by which a defined-benefit ERISA plan participant might rely on his plan's injuries. The Second Circuit stands alone in its capacious theory of standing—a theory that reduces Article III's requirements to, at most, a mere pleading formality. Such an expansion of Article III must be rejected, and the conflict created by the Second Circuit resolved.

II. The Second Circuit's Theory Of Representational Standing Conflicts With This Court's Cases.

No other Circuit has adopted the Second Circuit's theory of standing for good reason—this Court's precedents squarely foreclose it.

Few principles are as firmly ensconced in this Court's Article III precedents than the requirement of a *personal* injury-in-fact. "To meet the standing requirements of Article III, '[a] plaintiff must allege *personal injury* fairly traceable to the defendant's

allegedly unlawful conduct and likely to be redressed by the requested relief.'" *Raines* v. *Byrd*, 521 U.S. 811, 819 (1997) (citation omitted). "For [the Court's] purposes, the italicized words in this quotation * * * are the key ones." *Id.* at 820.

The actual, real-world injury must belong *to the plaintiff*, not to an entity of which he is a member, much less to an ERISA plan of which he is a participant. Members of Congress cannot rely on an institutional injury to Congress to establish their standing. *Id.* at 829. (One would presume that if this Court were inclined to permit a pure theory of representational standing, the strongest possible case would be for Representatives.) A member of a school board cannot rely on an injury to the board to establish his standing. *Bender* v. *Williamsport Area Sch. Dist.*, 475 U.S. 534, 544-45 (1986). And nothing makes Fletcher different: he is certainly not entitled to standing based on the injuries of another to a greater extent than a member of Congress can represent the Legislative Branch.

The Second Circuit's representational-standing theory would run headlong into this Court's precedents even had the Court said nothing about when fiduciary misconduct harms an ERISA beneficiary. But the Second Circuit's decision conflicts with this Court's cases in that additional respect.

This Court has twice explained the circumstances under which ERISA defined-benefit plan participants articulate a personal harm based on a plan's losses. In *Hughes Aircraft*, this Court held that participants in a

defined-benefit plan have no "claim to any particular asset that composes a part of the plan's general asset pool." 525 U.S. at 440. Instead, participants have only "a right to a certain defined level of benefits." *Ibid.* The Court took care to distinguish defined-*benefit* plans from defined-*contribution* plans: a defined-contribution-plan participant "is entitled to whatever assets are dedicated to his individual account," while a defined-benefit-plan participant is entitled only to a fixed-payment stream from a "general pool of assets." *Id.* at 439. In other words, defined-contribution-plan participants own certain specific assets in the plan; defined-benefit-plan participants do not.

This Court reaffirmed that distinction in *LaRue*, clearly spelling out when an ERISA plan participant can demonstrate a personal harm for purposes of the cause of action on which Fletcher relies. 552 U.S. at 253. Whether a plan participant states a cause of action for fiduciary misconduct under ERISA—in the language of ERISA, articulates losses resulting from such breach of fiduciary duties, 29 U.S.C. § 1109(a)—depends on the participant's benefits under the plan. If the participant belongs to a "defined-contribution plan," where he owns certain assets held by the plan on his behalf, he shows a harm attributable to fiduciary misconduct when the breach "diminishes plan assets payable to all participants * * * or only to persons tied to particular individual accounts" that include his. *Larue*, 552 U.S. at 256. But if he belongs to a "defined-benefit plan," where he is entitled to a certain level of benefits, but *not* to certain assets in the plan,

"[m]isconduct by the administrators of a defined benefit plan" does not suffice "unless it creates or enhances the risk of default by the entire plan." *Id*. at 255.

If an ERISA plan participant can show a cognizable loss resulting from a breach of a fiduciary duty merely by pointing to a loss suffered by his plan, however, this Court's explanation in *LaRue* is quite beside the point. After all, ERISA's fiduciary-duty provision tracks precisely what one would intuit a practical, real-world injury would be from fiduciary misconduct: a "loss * * * resulting from such breach" of fiduciary duties. Yet this Court sharply distinguished losses for defined-*contribution*-plan participants, on one hand, from losses for defined-*benefit*-plan participants, on the other. The reason is straightforward. A defined-contribution participant owns some share of the plan's property: a fiduciary loss that either reduces *his* account, or otherwise reduces *all* accounts, inflicts on him a tangible, pocketbook injury. *Hughes Aircraft*, 525 U.S. at 439. But a defined-benefit-plan participant owns only the right to future payments, and is harmed in a real, practical sense only by actions that make those future payments meaningfully less likely to occur.

The Second Circuit's decision, however, entirely elides the distinction this Court has so carefully drawn between defined-benefit and defined-contribution plans. An actual, personal loss of approximately $1,600 is the kind of real-world injury that, assuming it could be fairly traced to a defendant and redressed, would establish Article III standing—and had Fletcher lost

$1,600 from a defined-contribution plan, all else equal, he may well have made a sufficient showing for Article III's purposes. But the Second Circuit premised Fletcher's standing not on his *own* losses, but on his *plan's*. App. 3-4. Indeed, everyone agrees that Fletcher personally lost absolutely nothing—not a dollar, not a cent. *Id.* at 11. Under this Court's cases, a defined-benefit-plan participant like Fletcher can only show a real-world, practical injury where these losses "create[] or enhance[] the risk of default by the entire plan." *LaRue*, 552 U.S. at 255.

The losses alleged in this case—just shy of $1,600—amount to, in the district court's estimation, less than one-one-hundred-thousandth of a percent (or under 0.000001 percent) of the amount that Fletcher's plan was already underfunded.[4] If an increment this small is enough to satisfy Fletcher's obligation to plead an "injury-in-fact" that is "concrete" and "actual," rather than "speculative," then anything is.

Without a real-world financial loss, Fletcher's claimed harm—to the extent that he claims one at all—is that the plan's fiduciaries violated their statutory duties, and that this violation is itself sufficient to

[4] This ratio understates matters: Fletcher's plan is underfunded by $16 billion, and the district court stated that it was approximately 54 percent funded. App. 7. If this is accurate, Fletcher's plan is worth approximately $18.7 billion, and a loss of $1,600 ranks on the order of several millionths of a percent of total value. If Fletcher's plan does become insolvent and he is not paid, one struggles to imagine how that unhappy outcome could be "fairly traced" to a loss measured in the millionths of a percentage point.

establish Article III standing. App. 3. But that, too, is precluded by this Court's decision in *Spokeo*. Fletcher does not satisfy "the injury-in-fact requirement" simply because ERISA "grants [him] a statutory right and * * * authorize[s] him to sue to vindicate that right." *Ibid*. He has shown nothing more, and the Second Circuit's approach to the "irreducible constitutional minimum" of Article III cannot be reconciled with this Court's precedents.

III. The Question Presented Is Exceptionally Important, Critical To ERISA Plan Administration, And Cleanly Presented.

The administration of ERISA plans—and exposure to liability for doing so—is of paramount importance to the over one hundred million Americans who participate in such plans across the Nation, not to mention to the employers who sponsor those plans, and the financial institutions that act as their service providers and fiduciaries. The Second Circuit's decision to break from six other circuits in recognizing representational ERISA standing—and eliding the fundamental distinctions between defined-benefit and defined-contribution ERISA plans—intolerably threatens the "efficiency, predictability, and uniformity" that ERISA plans and their administration require. *Conkright*, 559 U.S. at 518; *Rush Prudential*, 536 U.S. at 379 ("[ERISA] induc[es] employers to offer benefits by assuring a predictable set of liabilities"). Only this Court can resolve the conflict and restore the uniformity that

ERISA requires—and this case is a clean vehicle for doing so.[5]

Indeed, if the decision below is permitted to stand, the Second Circuit—which is home to the Nation's financial industry—can be expected to become a litigation magnet for ERISA class actions pressed by plaintiffs with admittedly no personal injury—leading to the intolerable situation that the outcome of these cases can, and no doubt will, depend more on where they are brought than on their actual merits.[6] ERISA's broad venue provision—which allows suit to be brought in the district where the plan is administered, where the alleged breach took place, or where a defendant resides or may be found, 29 U.S.C. § 1132(e)(2)—increases the likelihood of forum shopping and enhances the need for this Court to resolve the conflict.

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[5] The importance of the issue is further confirmed by the Department of Labor's nationwide effort via *amicus* briefs to urge courts of appeals to adopt representational standing in ERISA cases, see *supra*, at 7—an effort that met with no success until the Second Circuit's decision in the instant case.

[6] Although the Second Circuit's decision below is unpublished, courts within the Second Circuit rely on it to allow ERISA plan participants with no personal injury to bring putative class actions against ERISA plans. See, e.g., *Carver* v. *Bank of N.Y. Mellon*, No. 15-CV-10180 (JPO), 2017 WL 1208598, at *4 (S.D.N.Y. Mar. 31, 2017) (relying on the Second Circuit's decision in this case and concluding that where a plaintiff brings claims "exclusively on behalf of the plan * * * courts 'do not require plaintiffs to demonstrate individualized injuries for purposes of Article III standing' " (citation omitted)).

Forum-shopping presents an especially acute problem in the class-action context, where the hydraulic pressure to settle even meritless claims rather than risk exposure to bet-the-company liability can be enormous. See, e.g., *Microsoft* v. *Baker*, 137 S. Ct. 1702, 1705 (2017) (noting that "class certification often leads to a hefty settlement" of even meritless claims); *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 476 (1978) (highlighting that a defendant facing the specter of classwide liability may "abandon a meritorious defense"). The Second Circuit has now made itself a venue of choice for ERISA class actions—and given the trillions of dollars in ERISA plans nationwide, plaintiffs will surely take advantage of the opportunity absent this Court's intervention.

Regrettably, the decision below is not an isolated incident in the Second Circuit. ERISA plans are regularly subjected to suits in that Circuit premised on standing requirements rejected by every other court of appeals to have considered them. The decision below, for example, relied on Second Circuit precedent—predating this Court's decision in *Spokeo*—that confers standing in ERISA suits on "plaintiffs whose 'common interest * * * is in the financial integrity of the plan' to seek remedies against the 'misuse of plan assets.'" *L.I. Head Start Child Dev. Servs.* v. *Econ. Opportunity Comm'n of Nassau Cty., Inc.*, 710 F.3d 57, 65 (2d Cir. 2013) (citation omitted).[7]

[7] No certiorari petition was filed in *Head Start*.

These plaintiffs may therefore "assert * * * claims on" their "plan's behalf," and "it is of no moment that recovery inuring to the plan may ultimately benefit particular Participants." *Id*. at 66. (This gets matters exactly backwards: for Article III standing, the question of whether a particular plaintiff will have his injury relieved by a suit is *all* that matters.) The panel below relied exclusively on *Head Start* for its representational theory of standing, App. 3-4, which is not surprising given that no other Circuit would permit a suit based on that theory. But as district courts in the Second Circuit have observed, absent intervention by this Court "*Head Start*'s holding controls" and "plan participants have constitutional standing to sue in a derivative capacity for injuries to a Plan." *Allen* v. *Bank of Am. Corp.*, No. 15 Civ. 4285 (LGS), 2016 WL 4446373, at *5 (S.D.N.Y. Aug. 23, 2016).

The fact that the Second Circuit is the outlier makes the need for this Court's review even more pressing, given the number of cases that arise from that Circuit, especially concerning the Nation's financial industry.[8] The Second Circuit's expansive notion

[8] This Court's recent denial of the petition in *Pundt* v. *Verizon Communications, Inc.*, 137 S. Ct. 1374 (2017), which raised the same issue of representational standing, does not militate against granting the petition here. For one thing, the Fifth Circuit reached the correct result in that case by rejecting the same theory of standing that the Second Circuit embraced here. For another, Convergex's petition for rehearing was still pending when this Court denied the petition in *Pundt*, so it was not yet clear whether the Second Circuit would act to resolve the conflict on its own, which would have made this Court's intervention unnecessary. Now, of course, the Second Circuit has denied rehearing and

of ERISA standing thus translates into an inordinately large number of ERISA plans now subject to class actions filed by plaintiffs who have suffered no personal—much less monetary—injury whatsoever, yet threaten to expose ERISA plans to significant litigation and settlement costs.

This case is an ideal vehicle for this Court to address the important question presented.[9] There are no disputed-fact issues, only pure legal questions. Fletcher admits that he suffered no monetary loss, App. 7, so no other theory could support standing. And rejecting the Second Circuit's theory of standing would definitively resolve this case, which would have been dismissed for lack of subject-matter jurisdiction in every other jurisdiction that has addressed the issue of representational standing.

No further development or percolation is needed, especially given the pronounced split that exists on this important question—not to mention that the Second Circuit has refused to resolve the split itself, and

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this Court's intervention is needed to bring the Second Circuit back into conformity with the other Circuits.

[9] By contrast, this Court need not—and should not—wait to resolve the questions presented through review of the Ninth Circuit's recent decision on remand in *Robins* v. *Spokeo, Inc.*, No. 11-56843, 2017 WL 3480695 (9th Cir. Aug. 15, 2017). Whatever the merits of the Ninth Circuit's conclusion, it examines actual, real-world harms to Robins, such as reduced employment prospects and related emotional harms. *Id*. at *7. That framework could not be further from the Second Circuit's representational standing doctrine—and thus that case cannot resolve this particular Article III question.

there is no reason to think that it will do so in the foreseeable future. This case therefore presents this Court with an important opportunity to resolve the conflict, restore the uniformity ERISA requires, and enforce the proper bounds of Article III.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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2017 WL 549025

United States Court of Appeals,
Second Circuit.

Landol FLETCHER, Plaintiff-Appellant,
v.
CONVERGEX GROUP, L.L.C., Convergex Execution Solutions L.L.C., Convergex Global Markets Ltd., Convergex Holdings L.L.C., Gtrade Services L.L.C., and "John Does" 1-10, Defendants-Appellees.*

No. 16-734-cv
|
February 10, 2017

[Holding:] The Court of Appeals held that participant adequately alleged cognizable injury in fact as required for Article III standing.

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* The Clerk of Court is respectfully requested to amend the caption as set forth above.

Vacated and remanded.

Appeal from a judgment of the United States District Court for the Southern District of New York (Louis L. Stanton, *Judge*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the District Court is **VACATED AND REMANDED**.

Attorneys and Law Firms

FOR PLAINTIFF-APPELLANT: JAMES A. MOORE, McTigue Law LLP, Washington, D.C. (David Steven Preminger, Keller Rohrback, L.L.P., New York, NY, Erin M. Riley, Keller Rohrback, L.L.P., Seattle, WA, on the brief).

FOR DEFENDANTS-APPELLEES: MELISSA D. HILL (Brian T. Ortelere, Jeremy P. Blumenfeld, on the brief), Morgan, Lewis & Bockius LLP, New York, NY.

PRESENT: ROSEMARY S. POOLER, PETER W. HALL, RAYMOND J. LOHIER, JR., Circuit Judges.

SUMMARY ORDER

Landol Fletcher appeals from the judgment of the United States District Court for the Southern District of New York (Stanton, *J.*) dismissing his claims against Convergex Group LLC and others ("Convergex" or "Defendants") for lack of subject matter jurisdiction. Fletcher, a participant in a defined benefit plan (the

"Central States Plan" or the "Plan"), brought this putative class action pursuant to the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1132(a)(2). Fletcher alleges that Convergex engaged in an undisclosed scheme to double charge Plan participants for securities transactions. That conduct, Fletcher claims, "violated ERISA fiduciary duties of prudence and loyalty and constituted prohibited transactions in violation of ERISA," causing financial losses to the Plan, in violation of 29 U.S.C. §§ 1104(a)(1)(B) & 1106(b). Fletcher seeks to bring the action on behalf of himself and in a representative capacity as a participant of the Central States Plan. He also seeks to represent members of other ERISA plans affected by Convergex's double-charging scheme.

On appeal, Fletcher asserts that the District Court erred in concluding that (1) he failed to establish a cognizable injury in fact sufficient to confer Article III standing in either his individual or representative capacities, and (2) he lacks Article III standing to bring claims on behalf of plans of which he is not a member. We assume the parties' familiarity with the facts and record of the prior proceedings, to which we refer only as necessary to explain our decision to vacate and remand.

We conclude that allegations describing Convergex's breach of fiduciary duties of prudence and loyalty under ERISA, its violation of ERISA's prohibited transactions provision, and the resulting financial loss sustained by the Central States Plan are sufficient to

confer Article III standing on Fletcher in his representative capacity as a Plan participant. *See L.I. Head Start Child Dev. Servs., Inc.* v. *Econ. Opportunity Comm'n of Nassau Cty., Inc.*, 710 F.3d 57, 67 n.5 (2d Cir. 2013); *see also* 29 U.S.C. § 1132(a)(2).

Having erroneously held that Fletcher did not have standing to represent other members of his own ERISA plan, the District Court understandably also ruled that Fletcher had no standing to represent members of ERISA plans of which he was not a member, without separately analyzing that issue. We therefore vacate that ruling and remand to the District Court to determine in the first instance whether the conduct alleged by Fletcher relating to the Central States Plan "implicates the same set of concerns" as the conduct by Convergex that is "alleged to have caused injury" to putative class members who are not participants in that Plan. *NECA-IBEW Health & Welfare Fund* v. *Goldman Sachs & Co.*, 693 F.3d 145, 162 (2d Cir. 2012); *see also Ret. Bd. of the Policemen's Annuity & Ben. Fund* v. *Bank of N.Y. Mellon*, 775 F.3d 154, 160-63 (2d Cir. 2014), *cert. denied sub nom. Ret. Bd. of the Policemen's Annuity & Annuity & Ben. Fund* v. *Bank of N.Y. Mellon*, ___ U.S. ___, 136 S.Ct. 796, 193 L.Ed.2d 711 (2016).

For the foregoing reasons, the judgment of the District Court is **VACATED AND REMANDED** for further proceedings consistent with this order.

164 F. Supp. 3d 588
United States District Court,
S.D. New York.

Landol Fletcher, Fredrick P. Potter, Jr., and all others similarly situated, Plaintiffs,
v.
Convergex Group LLC, Convergex Execution Solutions LLC, Convergex Global Markets Ltd., Convergex Holdings LLC, G-Trade Services LLC, and Does 1-10, Defendants.

13 Civ. 9150 (LLS)
|
Signed February 17, 2016

[Holding:] The District Court, Louis L. Stanton, J., held that participant did not suffer injury in fact from brokers' alleged misappropriation of $1,577.93 from pension plan.

Motion granted.

Attorneys and Law Firms

James A. Bloom, Keller Rohrback P.L.C., Phoenix, AZ, James Brian McTigue, James Moore, McTigue & Veis LLP, Jonathan Gans Axelrod, Beins Axelrod P.C., Washington, DC, David Steven Preminger, Keller Rohrback L.L.P., New York, NY, Derek W. Loeser, Erin M. Riley, Lynn Lincoln Sarko, Margaret E. Wetherald, Thomas David Copley, Keller Rohrback L.L.P., Seattle, WA, for Plaintiffs.

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MEMORANDUM & ORDER

LOUIS L. STANTON, UNITED STATES DISTRICT JUDGE.

Defendants move to dismiss plaintiff Landol Fletcher's ERISA claims for lack of subject-matter jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(1).[1] The motion is granted because Mr. Fletcher lacks constitutional standing to bring his claims.

BACKGROUND

Defendants are a group of related brokers whose customers include asset managers who manage funds on behalf of ERISA retirement plans, including Mr. Fletcher's retirement plan. Mr. Fletcher claims that, from 2006 to 2011, defendants added unauthorized and undisclosed markups and markdowns to the trades they executed on behalf of their customers. That gave the brokers extra revenue from their customers' trades, and breached their fiduciary duties under ERISA, among other standards.

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[1] Defendants also moved to dismiss plaintiff Fredrick Potter's claims for lack of subject-matter jurisdiction or for summary judgment on the merits dismissing Mr. Potter's claims. While the motion was pending, Mr. Potter voluntarily dismissed his claims without prejudice. Accordingly, as it pertains to Mr. Potter's former claims, defendants' motion is dismissed as moot.

Mr. Fletcher is a participant in the Central States, Southeast and Southwest Area Pension Plan ("Central States Plan"),[2] an ERISA defined-benefit employee pension plan. His benefits have vested, but he is not presently receiving them because he is still working. After extensive discovery, the evidence shows that defendants booked unauthorized "trading profits" of $1,577.93 on trades for the Central States Plan.

The Central States Plan has significant and long-standing financial difficulties. As of 2012, the plan was only 53.9% funded, an underfunding of more than $16 billion.

During the pendency of this motion, the Central States Plan on October 1, 2015 announced a rescue plan designed to stave off its insolvency. Under the rescue plan, Mr. Fletcher's benefits would be reduced by 28% or $1,035.73 per month. Pursuant to the Multiemployer Pension Reform Act of 2014, Public Law 113-235, div. O, 128 Stat. 2274, several steps remain before the rescue plan is implemented and his (and others') benefits are reduced, including approval by the

[2] Mr. Fletcher seeks to represent a class of participants, beneficiaries, and named fiduciaries of other ERISA plans that were also charged undisclosed markups and markdowns by defendants. Because he is not "a participant, beneficiary or fiduciary" (29 U.S.C. § 1132(a)(2)) of any of those plans, those class allegations are also dismissed. *See Slaymon* v. *SLM Corp.*, 506 Fed.Appx. 61, 65 (2d Cir. 2012) (affirming dismissal of class allegations because "Plaintiffs were never participants in the Retirement Plan and lack constitutional standing to bring claims against fiduciaries of that Plan.").

U.S. Department of Treasury and approval by a majority vote of affected plan participants or a decision by the Treasury Department that (among other things) the suspension of benefits is "systemically important," *i.e.*, its non-implementation would cause payments by the Pension Benefit Guaranty Corporation of over a billion dollars. 26 U.S.C. § 432(e)(9)(H)(v).

DISCUSSION

"A case is properly dismissed for lack of subject matter jurisdiction under Rule 12(b)(1) when the district court lacks the statutory or constitutional power to adjudicate it." *Makarova* v. *United States*, 201 F.3d 110, 113 (2d Cir. 2000).

"A plan participant suing under ERISA must establish both statutory standing and constitutional standing, meaning the plan participant must identify a statutory endorsement of the action and assert a constitutionally sufficient injury arising from the breach of a statutorily imposed duty." *Kendall* v. *Employees Ret. Plan of Avon Products*, 561 F.3d 112, 118 (2d Cir. 2009).

> The "irreducible constitutional minimum" of standing requires, *inter alia*, that (1) the plaintiff "have suffered an 'injury in fact'—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical," and (2) the injury be "fairly trace[able] to the challenged action of the defendant." *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555,

> 560-61, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992) (other internal quotation marks and citations omitted). An ERISA plan participant lacks standing to sue for ERISA violations that cause injury to a plan but not individualized injury to the plan participant. *See Kendall* v. *Employees Retirement Plan of Avon Products*, 561 F.3d 112, 119 (2d Cir. 2009).

Taveras v. *UBS AG*, 612 Fed.Appx. 27, 29 (2d Cir. 2015) (alteration in *Taveras*).

For constitutional standing, there are three components of "cases" and "controversies" subject to United States' judicial power (U.S. Const. art. III, § 2):

> First, the plaintiff must have suffered an injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court. Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Lujan v. *Defs. of Wildlife*, 504 U.S. 555, 560-61, 112 S.Ct. 2130, 2136, 119 L.Ed.2d 351 (1992) (footnote, citations, internal quotation marks, ellipsis, and brackets omitted).

Mr. Fletcher makes several arguments that he has constitutional standing. First, he argues that defendants' scheme diminished the Central States Plan's assets and increased the risk that he will not receive his promised benefits or that the reduction in his benefits will be greater than it would have otherwise been.

"The Supreme Court has held that a participant in a defined benefit pension plan has an interest in his fixed future payments only, not the assets of the pension fund." *David* v. *Alphin*, 704 F.3d 327, 338 (4th Cir. 2013) (citing *Hughes Aircraft Co.* v. *Jacobson*, 525 U.S. 432, 439-40, 119 S.Ct. 755, 761, 142 L.Ed.2d 881 (1999) (explaining the "difference between defined contribution plans and defined benefit plans," and the rights of each's beneficiaries)). Fiduciary misconduct "will not affect an individual's entitlement to a defined benefit unless it creates or enhances the risk of default by the entire plan." *LaRue* v. *DeWolff, Boberg & Assocs., Inc.*, 552 U.S. 248, 255, 128 S.Ct. 1020, 1025, 169 L.Ed.2d 847 (2008).

Here, it seems that defendants misappropriated $1,577.93 from a pension plan which, as of 2012, was underfunded by more than $16 billion. Defendants' overcharges increased the plan's deficiency by less than one hundred-thousandth of one percent. The extent to which that enhanced the plan's existing prospect of default is so minute as to be imaginary and inconsequential rather than "an injury in fact" and "actual or imminent" as required for constitutional standing. *Lujan*, *supra.*

Second, Mr. Fletcher argues that the reduction in his own benefits under the Central States' rescue plan establishes his constitutional standing. That might be so, but the reduction is not attributable to defendants' overcharges, but to the plan's long-running and multi-billion-dollar underfunding. The $1,577.93 misappropriated by defendants, spread across 400,000 plan participants, is less than four-tenths of a cent.

Finally, the Second Circuit has firmly rejected Mr. Fletcher's argument that defendants' violation of their statutory duties under ERISA is in and of itself an injury in fact to Mr. Fletcher:

> While plan fiduciaries have a statutory duty to comply with ERISA under [29 U.S.C.] § 1104(a)(1)(D), Kendall must allege some injury or deprivation of a specific right that arose from a violation of that duty in order to meet the injury-in-fact requirement. *See FIRF* [v. *Office of Thrift Supervision*], 964 F.2d [142] at 147 (1992). Kendall cannot claim that either an alleged breach of fiduciary duty to comply with ERISA, or a deprivation of her entitlement to that fiduciary duty, in and of themselves constitutes an injury-in-fact sufficient for constitutional standing.

Kendall, 561 F.3d at 121.

Accordingly, Mr. Fletcher has not established constitutional standing to sue for the incremental loss he, as a plan participant, suffered from defendants' overcharges to the plan. It is simply unrecognizably small, as are the overcharges' enhancement of the prospect of

default already independently posed by the plan's multi-billion-dollar underfunding.

CONCLUSION

Defendants' motion to dismiss the amended complaint as to plaintiff Landol Fletcher for lack of subject-matter jurisdiction (Dkt. No. 29) is granted. As Mr. Fletcher is the sole remaining plaintiff, the Clerk shall enter judgment accordingly, dismissing the amended complaint with costs and disbursements according to law.

So ordered.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

---------- X

LANDOL FLETCHER, FREDERICK P. POTTER, JR., and all others similarly situated,

Plaintiffs,

-against-

CONVERGEX GROUP LLC, CONVERGEX EXECUTION SOLUTIONS LLC, CONVERGEX GLOBAL MARKETS LTD., CONVERGEX HOLDINGS LLC, G-TRADE SERVICES LLC, and DOES 1-10,

Defendants.

---------- X

13 **CIVIL** 9150 (LLS)

JUDGMENT

Defendants having moved plaintiff Landol Fletcher's ERISA claims for lack of subject-matter jurisdiction pursuant to Fed. R. Civ. P. 12(b)(1), and the matter having come before the Honorable Louis L. Stanton, United States District Judge, and the Court, on February 17, 2016, having rendered its Memorandum and Order granting Defendants' motion to dismiss the amended complaint as to plaintiff Landol Fletcher for lack of subject-matter jurisdiction, and as Mr. Fletcher is the sole remaining Plaintiff, directing the Clerk to enter judgment accordingly, dismissing

the amended complaint with costs and disbursements according to law, it is,

ORDERED, ADJUDGED AND DECREED: That for the reasons stated in the Court's Memorandum and Order dated February 17, 2016, defendants' motion to dismiss the amended complaint as to plaintiff Landol Fletcher for lack of subject-matter jurisdiction is granted; the amended complaint is dismissed with costs and disbursements according to law.

Dated: New York, New York
February 19, 2016

RUBY J. KRAJICK

/s/ _____
Clerk of Court

BY: /s/ _____
Deputy Clerk

THIS DOCUMENT WAS ENTERED
ON THE DOCKET ON _____

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 4th day of April, two thousand seventeen.

Landol Fletcher,

Plaintiff-Appellant,

v.

Convergex Group, L.L.C., Convergex Execution Solutions L.L.C., Convergex Global Markets Ltd., Convergex Holdings L.L.C., GTrade Services L.L.C., "John Does" 1-10,

Defendants-Appellees.

ORDER

Docket No: 16-734

Appellees, Convergex Group, L.L.C., Convergex Execution Solutions L.L.C., Convergex Global Markets Ltd., Convergex Holdings L.L.C., GTrade Services L.L.C., and "John Does" 1-10, filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk

[SEAL]

/s/ Catherine O'Hagan Wolfe