No. 99-579

IN THE SUPREME COURT OF THE UNITED STATES

HARRIS TRUST AND SAVINGS BANK, ETC., ET AL.,
Petitioners,

v.

SALOMON BROTHERS, INC., ET AL.
Respondents.

BRIEF FOR THE RESPONDENTS

Filed March 23, 2000

QUESTION PRESENTED

Does the Employee Retirement Income Security Act ("ERISA") affirmatively authorize a private cause of action against a nonfiduciary party-in-interest on the theory that a nonfiduciary's entry into a "prohibited transaction" constitutes a "direct" violation of ERISA § 406(a), 29 U.S.C. § 1106(a), notwithstanding that: (a) the language of § 406(a) ("a fiduciary ... shall not cause the plan to engage" in a prohibited transaction) prohibits conduct only by fiduciaries; (b) the legislative history demonstrates that Congress specifically considered imposing civil liability on nonfiduciary parties-in-interest for participating in prohibited transactions, but opted not to; and (c) this Court has expressed an unwillingness to infer private causes of action under ERISA?

Even if this Court were to allow the posited private cause of action, there is an alternative ground for affirmance that presents a subsidiary question: whether liability under any such implied cause of action may be imposed upon a nonfiduciary party-in-interest even if it did *not* know that the fiduciary who caused the plan to engage in the transaction was violating § 406(a); here, petitioners failed to proffer admissible evidence that respondent Salomon knew that a fiduciary was violating § 406.

CORPORATE DISCLOSURE STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

Respondents Salomon Smith Barney Inc. and Salomon Brothers Realty Corp. are wholly owned by Salomon Brothers Holding Company Inc., which in turn is wholly owned by Salomon Smith Barney Holdings Inc., which in turn is wholly owned by Citigroup Inc., whose stock is publicly traded.

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R.	Record in the District court (*see* docket entries listed on JA 1-28)
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STATEMENT OF THE CASE

The Seventh Circuit unanimously held that ERISA does not provide a private cause of action against a nonfiduciary party-in-interest under ERISA § 406, rejecting petitioners' theory that such nonfiduciary's entry into a prohibited transaction constitutes a "direct" violation of § 406(a).

1. Factual background. Petitioner Ameritech Pension Trust ("APT") is a trust for two employer-funded defined-benefit plans sponsored by petitioner Ameritech Corporation ("Ameritech Corp.").[1] *See* Sal. C.A. App. 354. APT purchased from Salomon four participation interests in cash flow and appreciation of four groups of motel properties. *See* JA 182-87, 192-99, 343. The purchases followed extensive negotiations between Salomon and two fiduciaries of APT — Ameritech Corp. and National Investment Services of America ("NISA"), APT's investment manager. *See* JA 343; Sal. C.A. App. 359, 373-88, 639-47, 668-73, 681-83. Ameritech Corp. and NISA executives analyzed and negotiated the purchases on APT's behalf. *See id.* At the time, APT was approximately the tenth largest pension fund in the country, with about $10 billion of assets. *See id.* at 357.

At the time, none of those involved regarded Salomon as a party-in-interest or believed that the transactions were ERISA prohibited transactions: not Ameritech's own chief investment officer (JA 96-98), not the CEO of fiduciary NISA (JA 65-67), and not the Salomon executives (JA 52, 55-56). *See also* Sal. C.A. App. 393-406, 635-38. For each of the years 1987-1989 (when the transactions occurred), Ameritech filed reports with the Government that represented that no prohibited transactions had occurred. *See* JA 165-70; Sal. C.A. App. 397-406, 735-40.

But in 1990, the lodging market began to collapse. *See* JA 99-100, 112-14, 117-18, 343; Sal. C.A. App. 624, 630, 652-

[1] Petitioners are sometimes collectively referred to herein as "Ameritech" and respondents as "Salomon". References to "APT" and "Ameritech Corp." are to those individual entities.

57. Motels of America ("MOA"), which owned three of the four groups of motels involved, filed for bankruptcy in December 1990. *See* Sal. C.A. App. 299, 367. Also in 1990, the Ameritech pension plans' management changed, and new management revisited earlier investment policies and decisions. *See* Sal. C.A. App. 360-61, 592, 627, 629, 648, 667. By 1991, fiduciaries Ameritech Corp. and NISA had agreed to cooperate in litigation against Salomon. *See* JA 218; Sal. C.A. App. 364. Also in 1991, APT sold its three MOA participation interests to a company that acquired control of MOA, and MOA also agreed to cooperate in litigation against Salomon. *See* JA 156-59; Sal. C.A. App. 364-66.

In 1992, Ameritech filed suit, seeking to hold Salomon alone responsible for APT's participation-interest losses. Fiduciary Ameritech Corp. elected not to sue itself; having agreed to cooperate in litigation against Salomon, fiduciary NISA was not sued either. Ameritech concedes that no employee ever contributed any money to the plans; that Ameritech Corp. is obliged to pay fixed benefits irrespective of investment performance; and that any losses suffered by APT on the participation-interest investments were borne by Ameritech Corp. and did not cost any employee or retiree any money. *See* JA 221-22.

2. Proceedings in the courts below. The district court's June 1996 Order granted summary judgment dismissing Count I — alleging that Salomon breached its fiduciary duties — because there was no evidence that Salomon was a fiduciary of APT. *See* JA 289-99. The district court also dismissed Count III — alleging that fiduciary NISA caused APT to enter into prohibited transactions in violation of § 406 and that Salomon "knowingly participated" in NISA's breach — on the ground that nonfiduciaries cannot be held liable for knowing participation in a fiduciary's breach. *See* JA 320-21.

Count II alleged that "Salomon caused the Plan to engage in" § 406(a) prohibited transactions. JA 39-42. The district court dismissed any claim in Count II "premised on an alleged breach of fiduciary duty" (JA 324), but upheld Count II in part, to the extent that (as recharacterized by Ameritech) Count II asserted a purported "direct" cause of action against Salomon on the theory that Salomon, even if *not* a fiduciary, violated § 406 as a party-in-interest by entering into prohibited transactions. *See* JA 299-310.

On a § 1292(b) interlocutory appeal, Salomon sought reversal of the district court's ruling upholding Count II in part. Ameritech did *not* cross-appeal or otherwise contest the dismissal of Counts I and III and partial dismissal of Count II. The court of appeals unanimously reversed the district court's ruling upholding Count II and granted summary judgment to Salomon. *See* JA 354. The panel circulated its opinion to all judges of the court in regular active service. Only one judge voted to rehear the case *en banc*. *See id.*[2]

3. Response concerning matters not before this Court. The validity of Ameritech's allegations that Salomon was a party-in-interest and that the transactions were nonexempt prohibited transactions (*see* PB 7-8) is not before this Court. The courts below did not rule on the merits of these allegations, and Salomon disputes them. *See* JA 347. As noted above, none of those involved at the time believed Salomon was a party-in-interest or that the transactions were prohibited. APT transacted with Salomon at arm's length and Salomon was just one of dozens of securities firms with whom APT and its outside investment managers dealt. *See* JA 71-72, 98, 123, 183-84, 186-87, 193-94, 197-98; Sal. C.A. App. 419-43; Sal. C.A. Reply App. 481-500. Salomon disputes Ameritech's contention that arm's-length dealings in principal transactions or nondiscretionary equity trades (including trades where the plan is represented by its own investment-manager fiduciary) make a broker-dealer a "per-

[2] The Court of Appeals did not reach Salomon's alternative argument seeking reversal of the district court's dismissal of Salomon's contribution counterclaim, which Salomon reserves. *See* Resp. Opp. 14 n.7.

son providing services" to a plan and thus a party-in-interest under ERISA § 3(14)(B). *See* R.141, pp. 10-13; R.143 (Vol. F, ¶¶ 271-337); Sal. C.A. Reply App. 474-500; R.167 pp. 1-8. Were there to be further proceedings, Salomon would also dispute many "facts" asserted by Ameritech *(see* PB 6-8), including Ameritech's "sound bites" from testimony of two MOA employees. *Compare* PB 8 *with* JA 81-95, 102-15, 131-46, 156-59, 219. Salomon's position is that the participation interests had substantial value at the time they were sold and offered the potential for large gains (*see, e.g.*, JA 44-49; Sal. C.A. App. 444-55; Sal. C.A. Reply App. 508-22), but were subject to substantial risks that Ameritech fully understood (*see, e.g.*, JA 125-26, 128-29; Sal. C.A. App. 436-43, 674; Sal. C.A. Reply App. 522-41), and that APT's losses resulted from an adverse turn in the market (*see* pp. 1-2, *supra*).[3]

SUMMARY OF ARGUMENT

Ameritech would have this Court read into ERISA duties and civil liabilities of nonfiduciary parties-in-interest that are not expressed in the statute, and thereby infer a cause of action to enforce such implied duties and liabilities. Ameritech argues that liability may be imposed even upon defendants that are *not* violators and *not* wrongdoers. But Ameritech's positions find no support in the text of ERISA and require an approach to statutory construction alien to that employed in this Court's decisions.

Section 406 prohibits conduct by fiduciaries. Subsection 406(a)(1) provides that "a fiduciary with respect to a plan shall not cause the plan to engage in" certain transactions, some (but not all) of which are between a plan and a party-in-interest. JA 242-44. But Salomon was *not* a fiduciary of APT. *See* p. 2, *supra*. Ameritech contends that Salomon is

[3] Ameritech's parol evidence of a supposed agreement by Salomon to monitor the investments (PB 8 n.6) is not germane to any issue before this Court, was disputed, and (as the district court observed in ruling it inadmissible) is contradicted by the terms of the assignments. *See* JA 295-99.

a nonfiduciary party-in-interest on the theory that it is "a person providing services" to APT. However, in contrast to the express prohibition directed at fiduciaries, § 406(a)(1) does *not* prohibit conduct by a *non*fiduciary party-in-interest. And in contrast to § 409 (which provides expressly for the imposition of liability on any "fiduciary" "who breaches" any of the "duties imposed upon fiduciaries" by Title I of ERISA), there is *no* provision in Title I that provides that a *non*fiduciary party-in-interest shall be liable for entering into a transaction prohibited by § 406. *See* Point I.A.1, *infra*.

There is no statutory basis for Ameritech's claim that a *non*violator may be held liable under ERISA for "equitable relief" "to redress" *someone else's* violation of ERISA duties. Section 502(a) simply provides that specified parties may bring suit for particular *relief*; relief under § 502(a)(3)(B)(i) is limited to "other appropriate equitable relief" "to redress" violations of Title I or the terms of a plan. JA 254. By its terms, § 502(a)(3)(B) does not prohibit any conduct, impose any duties, or provide for civil liability. To determine what violations may be redressed by suit under § 502(a)(3) one must look to *other* provisions of Title I or to the terms of the plan. In any event, this nonviolator-liability claim was not pled in the sole count before this Court and was not presented in the court of appeals, and thus has been waived. *See* Point I.A.2, *infra*.

The legislative history confirms that Congress meant what it said. Congress specifically focused on whether to create a cause of action against parties-in-interest who participate in prohibited transactions — and decided *not* to. Thus, the House bill limited liability to fiduciaries. *See* JA 277-81. By contrast, the Senate proposed to provide for civil liability of parties-in-interest (for damages and disgorgement), and authorize civil actions "against *any person* who has transferred or *received* any of the assets of a plan". JA 275-76 (emphasis added). The Conference Committee staff recommended that the conferees "adopt the approach of

the House bill and *not provide civil liability for parties-in-interest*". JA 281-82 (emphasis added). That recommendation was followed. *See* Point I.B, *infra*.

Finally, even if the posited cause of action exists, there is an alternative ground for affirmance: Knowledge of the fiduciary's violation of § 406(a) must be an element of the claim, because the nonfiduciary's liability would be dependent upon proof of the fiduciary's violation. Here, Ameritech failed to proffer admissible evidence that Salomon knew that a fiduciary was violating § 406. *See* Point II, *infra*.

ARGUMENT

I. ERISA DOES NOT PROVIDE A PRIVATE CAUSE OF ACTION AGAINST A NONFIDUCIARY PARTY-IN-INTEREST THAT ENTERS INTO A TRANSACTION PROHIBITED BY § 406.

A. The statutory text does not authorize the posited private cause of action.

In evaluating whether a cause of action exists under ERISA, this Court has looked to whether ERISA "expressly authorize[s]" the suit. *See Massachusetts Mut. Life Ins.* v. *Russell*, 473 U.S. 134, 145 (1985); *see also Mertens* v. *Hewitt*, 508 U.S. 248, 255 n.5 (1993) ("affirmatively authorizes"). No ERISA provision expressly authorizes a cause of action against a nonfiduciary party-in-interest.

1. A nonfiduciary party-in-interest cannot violate § 406.

a. Section 406 prohibits conduct by fiduciaries only. The text of § 406(a)(1) prohibits fiduciary conduct only: "A *fiduciary* with respect to a plan *shall not cause* the plan to engage in a transaction, if *he* knows or should know that such transaction constitutes" a nonexempt prohibited transaction (emphasis added). Section 406(a) does *not* contain any

comparable prohibition addressed to *non*fiduciary parties-in-interest. No words of duty or prohibition, such as "shall not", are used to proscribe conduct by nonfiduciary parties-in-interest. In addition, § 406(a) contains an express culpability standard for fiduciaries who cause plans to enter into prohibited transactions, but contains no culpability standard for nonfiduciary parties-in-interest — an omission that makes sense only if § 406 does not impose duties upon them.

The "act" that "violates" § 406 — and thus may potentially be subject to civil suit under § 502(a) — can only be the act that § 406 prohibits: a "fiduciary['s] ... caus[ing] the plan to engage in [the] transaction". As the Seventh Circuit stated, the "mere fact that § [406] mentions 'parties in interest' when it describes the transactions that fiduciaries must avoid does not mean that parties in interest are liable when a fiduciary does engage in a prohibited transaction". JA 349. Ameritech faults the court of appeals for reading § 406(a) "as merely prohibiting fiduciaries from *causing* plans to engage in transactions with parties in interest". PB 19. But that is what § 406(a) says.

Instead of reading § 406 as it is written, Ameritech argues that "Congress intended to prohibit *transactions* between plans and parties in interest" and, therefore, "the prohibitions of Section 406(a) apply to parties in interest". PB 20. But Ameritech's conclusion does not follow from its premise. Since it is the fiduciary who has the power to cause the plan to engage in the transaction, effecting the desired prohibition by prohibiting fiduciaries — and fiduciaries alone — from causing plans to enter into prohibited transactions makes eminent sense. Indeed, if nonfiduciary parties-in-interest who receive plan assets could be sued, there would exist the specter of fiduciaries, through their choice of whom to sue, seeking to shift to nonfiduciaries responsibility for § 406 violations — as Ameritech Corp. attempts to do here. *See* p. 2, *supra*. A prohibition directed against only one party to a transaction is not unique to § 406: Another section

of ERISA, § 206(e)(1), prohibits a fiduciary from permitting what is defined as a "prohibited payment" during a period in which a plan has a liquidity shortfall; this provision too is directed only to a fiduciary ("the fiduciary ... shall not permit"). And the United States Code contains other provisions entitled "prohibited transactions" that proscribe conduct of only one party to the transaction.[4]

Ameritech's contention that "it is the *transaction* that is prohibited" (PB 21) also ignores that prohibitions are not abstractions — rather prohibitions regulate the behavior of a class of persons. In § 406, Congress chose to regulate fiduciaries: "A fiduciary ... shall not". Notably, both § 406(a) and § 406(b) use the same language ("[a] fiduciary ... shall not"), yet § 406(b) does not even mention the term party-in-interest (nor does § 406(a)(1)(E)). The heading "prohibited transactions" signifies only that § 406 specifies the transactions in which a fiduciary is prohibited from engaging.

Ameritech seeks to distinguish parties-in-interest from other nonviolators with a meaningless tautology: a "*party-in-interest* is a necessary counter-party to a prohibited transaction between a plan and a *party-in-interest*". PB 46 (emphasis altered). But some of the transactions enumerated in § 406 may not involve a party-in-interest counterparty. *See* § 406(a)(1)(D)-(E) and § 406(b). For example, a fiduciary causing a plan to purchase employer securities in excess of § 407's limits violates § 406(a)(1)(E) even if the seller has no connection at all to the plan. And cases Ameritech itself relies upon involve *non*-parties-in-interest as counterparties.[5]

[4] *See, e.g.*, 12 U.S.C. § 371c-1(b)(1)(A) ("Prohibited transactions ... A member bank or its subsidiary ... shall not ..."); 15 U.S.C. § 80b-6 ("Prohibited transactions by investment advisers ... It shall be unlawful for any investment adviser [to] ..."); 22 U.S.C. § 2780(b)(1) ("Prohibited transactions by United States Persons ... A United States person may not ....").

[5] *See Reich* v. *Compton*, 57 F.3d 270, 286-87 (3d Cir. 1995) (§ 406(a)(1)(D)); *LeBlanc* v. *Cahill*, 153 F.3d 134, 151-53 (4th Cir. 1998) (§ 406(b)).

Conversely, fiduciary violations of *other* ERISA provisions, such as § 404(a), *also* may involve counterparties (who may or may not be parties-in-interest). The *sine qua non* of a violation of § 406, like a violation of § 404(a), is the fiduciary's conduct — *not* the presence of a party-in-interest counterparty. Similarly, that a party-in-interest has "full control over its role" in a transaction (USB 25) does not distinguish a party-in-interest from any other counterparty.

b. The statutory context confirms that § 406 does not provide the predicate duty and liability for a cause of action against a nonfiduciary party-in-interest. Section 406 is found in Title I, Subtitle B, Part 4 of ERISA, which concerns "Fiduciary Responsibility". Where Congress sought to impose duties in Part 4, it did so expressly. Thus, § 404 sets forth certain affirmative fiduciary duties: "a fiduciary shall ..." § 404(a)(1). In parallel fashion, §§ 406(a)(1) and (b) set forth prohibitions on fiduciary conduct: "[a] fiduciary ... shall not". The linguistic parallel between §§ 404 and 406 confirms what § 406's words convey: § 406 "simply describes another variety of fiduciary breach". JA 348. Section 406, like § 404(a), does *not* impose duties upon *non*fiduciary counterparties, whether they are parties-in-interest or not.

This Court itself has recognized that § 406, like § 404, establishes duties applicable to fiduciaries: In *Massachusetts Mut.* v. *Russell*, 473 U.S. at 143 n.10, this Court explained that ERISA establishes "duties of loyalty and care *for fiduciaries. With regard to loyalty, the principal provision is § 406*, which in general prohibits self-dealing and sales or exchanges between the plan ... and 'parties in interest'.... With regard to the duty of care, § 404, among other obligations, imposes a 'prudent person' standard...." (emphasis added); *see also Hughes Aircraft* v. *Jacobson*, 525 U.S. 432, 437, 444-45 (1999) (referring to § 406 as one of ERISA's "fiduciary provisions").

Similarly, where Congress sought to provide for civil liability for breach of duties, it did so expressly. Thus, § 409 expressly imposes civil liability on: "a fiduciary ... who breaches any of the ... duties imposed upon fiduciaries by this title". In parallel fashion, § 410 precludes only exculpatory provisions that "purport[ ] to relieve a fiduciary from responsibility or liability".

Congress also expressly addressed what class of persons should bear civil liability for participation in a fiduciary's breach of duty — and provided that only other fiduciaries would bear such liability. Thus, § 405(a) provides that: "a fiduciary ... shall be liable for a breach of fiduciary responsibility of another fiduciary" in specified circumstances, including when "he participates knowingly in" the fiduciary breach. *See Mertens,* 508 U.S. at 254; *see also Central Bank* v. *First Interstate Bank,* 511 U.S. 164, 184 (1994) ("The fact that Congress chose to impose some forms of secondary liability, but not others, indicates a deliberate congressional choice with which the courts should not interfere.").

And Congress specified express standards of culpability that vary from section to section, depending upon whether the defendant-fiduciary is a primary violator (*e.g.*, § 406(a)(1)) or liable for participation in another fiduciary's violation (*e.g.*, § 405(a)). If Congress had intended to provide a cause of action against a nonfiduciary party-in-interest, Congress would have said so — and would have expressly selected a standard of culpability — as the proposed, but rejected, Senate bill did. *See* p. 27, *infra.*

By their terms, §§ 404, 405, 406 and 409 apply only to fiduciaries. No provision of Title I of ERISA imposes comparable express duties or civil liability on *non*fiduciary parties-in-interest. This was neither inadvertent nor because Congress was unable to find the right words. In ERISA's Title *II* excise-tax provisions, Congress was explicit that excise taxes may be imposed upon certain parties-in-interest

(called disqualified persons) who "participate[ ] in the prohibited transaction". IRC § 4975(a) & (b). And the Senate had proposed a provision that would have expressly imposed civil liability upon parties-in-interest — but it was rejected. *See* Point I.B, *infra.* Plainly, "[i]f Congress had wanted to place remedial power against nonfiduciaries in the hands of private parties it would have done so more explicitly as it did in the case of fiduciaries and in the case of co-fiduciaries." JA 350. Indeed, that several sections in Part 4 ("Fiduciary Responsibility") impose duties upon *non*fiduciaries (*see* PB 22 n.11) only further supports *Salomon*'s position by demonstrating that when Congress wished to impose duties or prohibitions upon nonfiduciaries in Part 4, it did so explicitly.

To infer the posited cause of action would do violence to fundamental principles this Court has prescribed for the interpretation of statutes generally and ERISA in particular. As this Court reiterated last Term in another ERISA case: "[I]n any case of statutory construction, our analysis begins with 'the language of the statute.' ... And where the statutory language provides a clear answer, it ends there as well." *Hughes Aircraft* v. *Jacobson,* 525 U.S. at 438; *see also, e.g., Central Bank,* 511 U.S. at 176-78 (since the text of § 10(b) "does not itself" encompass aiders and abettors, "that conclusion resolves the case"); *Garcia* v. *United States,* 469 U.S. 70, 75 (1984).

These general principles apply with particular force to ERISA cases: This Court has pronounced its "*unwillingness to infer causes of action in the ERISA context,* since that statute's carefully crafted and detailed enforcement scheme provides 'strong evidence that *Congress did not intend to authorize other remedies that it simply forgot to incorporate expressly.*'" *Mertens,* 508 U.S. at 254 (quoting *Russell,* 473 U.S. at 146-47) (emphasis added).[6]

[6] Apart from the absence of a substantive duty or liability upon nonfiduciary parties-in-interest, Ameritech fails to show that it seeks "appropriate equitable relief". Ameritech acknowledges that "[r]estitution is an

2. Section 502(a)(3) does not authorize a cause of action against nonviolators.

As the court of appeals noted, Ameritech's position before that court was "that *Salomon violated* [ERISA] by engaging in a transaction prohibited by § [406]" and that "[*t*]*herefore* [Ameritech] may seek 'appropriate equitable relief' ... against Salomon under § [502(a)(3)]". JA 347 (emphasis added). Ameritech's claim that "Salomon violated" is answered in Point I.A.1, *supra*. Now, in Ameritech's merits brief before this Court, Ameritech advances an additional claim. Ameritech argues that under § 502(a)(3) a court may hold a nonfiduciary party-in-interest liable — even if it did *not* violate § 406 (or any other ERISA Title I provision) and even if it did *not* engage in wrongdoing — in order to "redress" a violation by *someone else*. *See* PB 13, 15-18, 20, 28-31.

Ameritech thus recasts § 502(a)(3) as expanding the class of persons who may be liable and thereby establishing what might aptly be called "nonviolator liability". To support this nonviolator-liability claim, Ameritech now argues that "the answer to the question presented ... does *not* ultimately depend on whether a non-fiduciary party in interest ... violates § 406(a)". PB 20 (emphasis added). This is the opposite of Ameritech's position in the court of appeals, where it

equitable remedy when sought in a case in equity, and a legal remedy when sought in a case at law". PB 29 n.14 (citing, *inter alia*, *Reich* v. *Continental Cas. Co.*, 33 F.3d 754, 755-56 (7th Cir. 1994)). *Continental Casualty* explained that a suit seeking restitution from a nonfiduciary would "normally be a suit at law", but the case before it had a "special wrinkle" — the equitable theory of aiding and abetting a fiduciary breach. *See id.* Ameritech fails to articulate any theory under which a hypothetical "direct" claim against a nonfiduciary party-in-interest for its own "violation" of § 406 would be "a case in equity". In fact, that claim would be legal. It posits a direct statutory tort by a nonfiduciary. Instead of defending the supposed equitable nature of the "direct" claim it presented to the court of appeals, Ameritech now attempts to interject a separate, purportedly equitable claim against Salomon to redress *fiduciary NISA's* violation of § 406. But as discussed in Point I.A.2, this claim is not legally viable and in any event has been waived.

argued that the question "depends *entirely* on the meaning of § [406(a)]". Brief of Appellees at 18 (emphasis added).

Ameritech's nonviolator-liability claim cannot logically be confined to party-in-interest liability for prohibited transactions — § 502(a)(3) does not mention parties-in-interest, or prohibited transactions, or even, specifically, a *fiduciary* violation. Rather, under Ameritech's theory, *any person* could be sued for "equitable relief" under § 502(a)(3) to "redress" *some other person's* violation. As shown below, there is no merit to this claim and, in any event, it has been waived.

a. There is no statutory basis for holding *non*violators liable to redress someone else's violation. Ameritech's nonviolator-liability claim ignores the basic requirement that there be a substantive basis for *liability* of a party before *relief* will be awarded against it. The text of § 502(a)(3) does not provide a basis for holding *non*violators liable for *other* persons' violations. Thus, § 502(a)(3) does not prohibit any conduct or impose any duties: It contains no language such as the familiar "shall not" used elsewhere in ERISA, such as in § 406. Nor does § 502(a)(3) expressly impose civil liability: Phrases such as "shall be liable" (§ 405(a)) and "shall be personally liable" (§ 409(a)) are nowhere to be found in § 502(a)(3).

Rather, § 502(a)(3) simply permits specified parties to bring suit for particular *relief*; in the case of § 502(a)(3)(B)(i) relief is *limited* to "other appropriate equitable relief" "to redress" violations of Title I or the terms of a plan. To determine what violations may be redressed by suit under § 502(a)(3) one must look elsewhere: to *other* provisions of Title I or to the terms of the plan. As the Seventh Circuit observed, § 502(a)(3) "only serves to provide a private cause of action for violations of ERISA; it does not expand the scope of liability under the Act". JA 349. Ameritech attempts to turn § 502(a)(3) into something it is not — a provision imposing substantive *duties and liabilities*.

This Court has recognized that the threshold issues of duty and liability are separate and distinct from the nature of the relief sought. As stated in *Mertens*: § 502(a)(3) "does not ... authorize 'appropriate equitable relief' *at large*, but only 'appropriate equitable relief' for the purpose of redress[ing any] violations or ... enfor[cing] any provisions of ERISA or an ERISA plan." 508 U.S. at 253-55 & n.5 (questioning whether any "remediable wrong has been alleged" since "no provision explicitly requires [nonfiduciaries] to avoid participation (knowing or unknowing) in a fiduciary's breach of fiduciary duty") (emphasis added) (internal quotation marks omitted); *see also Central Bank*, 511 U.S. at 175 ("While plaintiffs had a remedy against nonfiduciaries at common law, that was because 'nonfiduciaries had a *duty* to the beneficiaries not to assist in the fiduciary's breach.' No comparable duty [is] set forth in ERISA") (emphasis added) (quoting *Mertens*, 508 U.S. at 255 n.5); Point I.D, *infra*.[7]

Ameritech argues that Congress did not restrict who may be sued under § 502(a)(3). *See* PB 17. But the fact that § 502(a)(3) only identifies who may be a *plaintiff* does not mean Congress intended that anyone — including *non*violators — could be held liable as *defendants*. Rather, to determine who can be held liable one must consult the other provisions of Title I (or the terms of a plan) imposing duties and liabilities.

Ameritech also points to the use of the term "any" in § 502(a)(3) ("*any* act or practice which violates *any* provision of this title"). *See* PB 16-17. But "any" means only that any violation of Title I or the terms of a plan can be the predicate for suit. It does not mean that when a fiduciary violates a provision of Title I (or the terms of a plan), relief may be obtained against *someone else* — a nonviolator.

[7] *See also Lockheed* v. *Spink*, 517 U.S. 882, 888-91 (1996) (since *defendant* Lockheed did not act in a fiduciary capacity, "there can be no violation of § 406(a)(1) to warrant relief" under § 502(a)(3)); *Peacock* v. *Thomas*, 516 U.S. 349, 353 (1996) (claim against nonfiduciary who allegedly siphoned assets from fiduciary, seeking to recover unpaid judgment previously entered against such fiduciary for breach of fiduciary duties, does not arise under § 502(a)(3)).

Ameritech's reliance on *Varity* v. *Howe*, 516 U.S. 489 (1996), is misplaced. In *Varity*, the defendant was a fiduciary sued for its *own* violation of § 404(a) (*id.* at 503, 506, 508); *Varity* does not suggest that nonviolators can be sued under § 502(a)(3) to redress someone else's violation. It is one thing to view § 502(a)(3) as a "catchall" provision authorizing suits against persons subject to express duties and liabilities provided elsewhere in Title I. But it is quite a different matter to assume that Congress would have set forth express provisions for duties and liabilities with painstaking detail throughout Title I, yet intended that § 502(a)(3) impliedly create other duties and liabilities on a "catchall" basis.

The common-sense interpretation of § 502(a)(3) as authorizing specified plaintiffs to seek "appropriate equitable relief" against *violators* of provisions that appear elsewhere in Title I does not render §§ 502(a)(3) and (a)(5) "superfluous". *See* PB 17 n.8. As *Varity* itself demonstrates, there are suits against fiduciaries that can be brought under (a)(3) or (a)(5), but not (a)(2). And nonfiduciaries may also be sued under §§ 502(a)(3) and (a)(5) — if they commit an "act or practice" that "violates" Title I or the terms of a plan.[8]

b. Section 502(a)(3) does not incorporate a body of common law under which a nonfiduciary party-in-interest could be liable as a nonviolator. Ameritech argues that the phrase "appropriate equitable relief" incorporates into ERISA principles of the common law of trusts. *See* PB 18,

[8] The cases abound. For examples of actions against nonfiduciaries for Title I violations *not* involving prohibited transactions, see, *e.g.*, *Nero* v. *Industrial Molding Corp.*, 167 F.3d 921, 927, 931 (5th Cir. 1999); *American Fed'n* v. *WCCO Television, Inc.*, 934 F.2d 987, 990 & n.3 (8th Cir. 1991). The § 502(a)(3) cases the United States cites (USB 12 n.3) are examples of actions for violation of the terms of a plan.

28-31. But just last Term, this Court unanimously admonished that "because ERISA is a comprehensive and reticulated statute and is enormously complex and detailed, it should not be supplemented by extra-textual remedies, such as the common-law doctrines advocated by respondents." *Hughes Aircraft* v. *Jacobson*, 525 U.S. at 447 (internal quotation marks omitted). The Court continued: "Although trust law may offer a 'starting point' for analysis in some situations, it must give way if it is inconsistent with 'the language of the statute, its structure, or its purposes.'" *Id.* (quoting *Varity*, 516 U.S. at 497).

The phrase "appropriate equitable relief" — which *limits* the type of *relief* available in suits brought under § 502(a)(3) (*see Mertens*, 508 U.S. at 255-63) — does not purport to import into ERISA *duties and liabilities* existing under the common law of trusts, much less any supposed doctrine imposing liability upon nonviolators for someone else's violation. With respect to fiduciaries, Congress did not simply sweep duties and liabilities under the common law of trusts into ERISA through general language in § 502 identifying available remedies. Rather, Congress specified what conduct by fiduciaries would generate liability, including liability arising from participation in another fiduciary's breach. *See, e.g.*, §§ 404, 405, 406, 409. In a few cases, duties and prohibitions in Title I are expressly extended beyond fiduciaries (*e.g.*, § 412). It would be wholly illogical (as well as unsupported by the statute) to think that Congress intended to sweep into ERISA — through language in § 502(a)(3) identifying equitable *relief* as an available *remedy* — whatever other duties and liabilities of nonfiduciaries (or even fiduciaries, for that matter) that may exist under the common law for which equitable relief could serve as a remedy. Such a reading would turn a limitation on relief into an expansion of liability.

Thus, even if a duty and liability of nonfiduciary counterparties hypothetically did exist under the common law of trusts, there would be no justification for implying it into ERISA. As stated in *Mertens*: "The authority of Courts to develop a 'federal common law' under ERISA ... is not the authority to revise the text of the statute." 508 U.S. at 259.[9]

In any event, the common law of trusts never recognized the cause of action Ameritech advances. Ameritech fails to distinguish the issue of (i) whether a liability exists under applicable substantive principles from (ii) the "relief" *if* a substantive liability exists. *See, e.g.*, Dobbs, *Law of Remedies* § 4.1(1) at 552 (2d ed. 1993). Cases and authorities concerning available remedies where a substantive liability exists do not address the question of whether a substantive liability would exist under the common law of trusts here, which it would not.

First, under the common law of trusts, if the trustee did not commit a breach, a transferee of trust property had no liability. *See Restatement (Second) of Trusts* § 283 (1959); IV Scott & Fratcher, *Law of Trusts* § 283 (4th ed. 1989). A trustee's causing the trust to enter into a transaction with a service provider to the trust was not a breach of duty under the common law; *a fortiori* the service provider could have no liability for entering into the transaction. Indeed, under the common law, there was no blanket prohibition against trustees causing trusts to deal with parties related *even to themselves*. Rather, a trustee's sale of trust property to a party *related to the trustee* was not a breach unless the trustee was improperly influenced by his relationship to the

[9] Cases such as *Firestone Tire & Rubber Co.* v. *Bruch*, 489 U.S. 101 (1989) did not import common law principles to establish duties, liabilities and causes of action not expressed in ERISA. *Firestone*, for example, involved a suit for benefits; the plan established substantive rights and § 502(a)(1)(B) provided an express cause of action. In *Health Cost Controls* v. *Washington*, 187 F.3d 703 (7th Cir. 1999), *cert. denied*, 120 S. Ct. 979 (2000), substantive rights arose under the plan, and the suit was one to redress violations of, or to enforce, the terms of the plan.

purchaser such that he sold the property on less favorable terms, or "otherwise abused his discretion in making the sale". *Restatement (Third) of Trusts (Prudent Investor Rule)* § 170 cmt. e, at 196 (1990); *see also*, IIA Scott & Fratcher, § 170.6, at 334-35. The provisions of § 406 regulating a fiduciary's ability to transact with certain parties with relationships to the plan, and the defined term "parties-in-interest", are entirely statutory creations.

Ameritech thus proposes a hybrid cause of action that combines (i) substantially broader prohibitions under ERISA against conduct by *fiduciaries* with (ii) supposed common-law grounds upon which nonfiduciaries may be liable for participation in transactions that *do* involve a fiduciary breach under the common law. On Ameritech's theory, a cause of action exists against a nonfiduciary party-in-interest even though ERISA does *not* expressly impose duties and liabilities upon the nonfiduciary *and* the nonfiduciary would have *no* duties and liabilities under the common law.

Second, the common law in any event never recognized anything like the strict-liability cause of action that Ameritech posits. Rather, only culpable participation in a violation of duty was actionable. *See*, *e.g.*, *Mertens*, 508 U.S. at 254, 261-62 (referencing "knowing participation" liability under common law of trusts); IV Scott & Fratcher, § 326.1, at 293-95 (seller of property to a trust can be held liable if he "has actual knowledge that the trustee is committing a breach"). Ameritech asserts that "restitution" is not "limited to wrongdoers". *See* PB 30. But again Ameritech confuses the separate issues of (i) liability and (ii) "relief" *if* liability exists. None of Ameritech's authorities states that a third-party who sells property to a trust can be held liable for a trustee's breach of trust absent culpable knowledge of the trustee's breach. *Compare*, *e.g.*, V Scott & Fratcher, § 462.2 (recognizing there must be an underlying substantive liability for unjust enrichment, such as in cases of fraud, mistake or a

gratuitous transfer made in breach of trust) *with* IV Scott & Fratcher, § 326.1, cited above.[10]

As Ameritech acknowledges in a footnote, there is no claim at common law against "bona fide" purchasers for value, *i.e.*, non-gratuitous transferees that did not know of the trustee's breach. *See* PB 30 n.15. Salomon gave value here — even if one accepts *arguendo* the claim that the Fee Agreements "proved to be nearly worthless" (PB 8). *See Restatement (Second) of Trusts* § 298 ("If money is paid or other property is transferred or services are rendered as consideration for the transfer of trust property, the transfer is for value"); *id.* cmt. i. And even if one hypothesizes that *Salomon* "failed to make timely disclosure" (PB 8) *to* APT's fiduciaries, that would not constitute the requisite knowledge by Salomon of a breach of a common-law trust duty *by* APT's fiduciaries.

Plainly there is no warrant for *implying* duties and liabilities into ERISA's "carefully crafted and detailed enforcement scheme" (*Mertens*, 508 U.S. at 254) that (for multiple reasons) do not exist even under the common law.

c. Ameritech waived any claim that Salomon can be held liable even if Salomon did *not* violate § 406. Ameritech's nonviolator-liability claim is a creation of its Supreme Court merits brief. It is not pled in Count II (the only claim before this Court), was never presented to the court of appeals and was not advanced — at least not explicitly and directly — in the petition for certiorari.

The district court correctly understood Count II to rest upon allegations that *Salomon* had violated § 406(a) and was

[10] The United States recognizes that *Mertens*, 508 U.S. at 255 n.5, contradicts its assertion that "restitution from a transferee of trust property was not based on the nonfiduciary's *own* breach". USB 23. And the *Strauss* and *Cahn* cases involved knowing-participation in fiduciary breach. *See* 63 F.2d 174, 175-78 (4th Cir. 1933); 62 A. 819, 821-22 (Md. 1906). Bogert & Bogert, § 901 deals with the trust beneficiary's "Right that Third Party Shall Not Knowingly Participate in a Breach of Trust."

being sued under § 502(a)(3) to remedy *Salomon's own* violation. *See, e.g.*, JA 305 ("whether Salomon is a proper defendant" turns "on whether it violated ERISA"); JA 311, 320, 323. Count II makes no allegation that someone *other than* Salomon violated § 406 and that, therefore, Salomon could be liable even if it did *not* violate § 406. *See* JA 39-41. By contrast, Count *III* was premised upon violation of § 406 by someone else — NISA. *See* JA 42. However, Count III was dismissed in the June 1996 order and was thereafter waived when Ameritech did not contest on appeal the dismissal of Count III (or any other aspect of that order). *See* Resp. Opp. 5-10. On Ameritech's nonviolator-liability claim, liability of the nonviolator (Salomon) is dependent upon whether the fiduciary (NISA) violated § 406(a) and it is assertedly not even necessary to show that Salomon engaged in wrongdoing or had knowledge of NISA's alleged violation. *See* PB 13, 15-18, 20, 28-31. This is at best a more extreme variant of the previously dismissed Count III secondary-liability claim.[11]

[11] Thus, the distinction between direct Rule 10b-5 claims and dependent secondary-liability claims (as to which *Central Bank* rejected a private right of action) has turned on whether proof of a violation by another is required: (1) "primary violators" could be sued for their own misconduct irrespective of conduct of others, but (2) a dependent secondary claim had required the existence of a "primary violation." *See, e.g., Central Bank*, 511 U.S. at 194 ("the existence of a primary violation" was an element of the 10b-5 aiding-and-abetting claim recognized in the lower courts); Loss & Seligman, *Securities Regulation*, Chap. 11c at 4479 (3d ed. 1989) (same).

As noted, Ameritech now asserts that a defendant can be liable even if it did *not* violate ERISA or engage in wrongdoing. By contrast, pre-*Mertens* secondary-liability cases required proof that the nonfiduciary party-in-interest knew that the fiduciary violated § 406. *See* p. 48, *infra*. And proof that the defendant provided substantial assistance to the violator typically is an additional requirement for secondary liability. *See, e.g., Central Bank*, 511 U.S. at 168 ("substantial assistance given to the primary violator by the aider and abettor" was an element of the 10b-5 aiding-and-abetting claim that the Court rejected); *Restatement (Second) of Torts* § 876(b) (1979).

Furthermore, in the court of appeals, Ameritech expressly relied on the claim that Salomon was liable as a violator, stating that "Salomon's argument that there is no private right of action under [§ 502(a)(3)] to redress *party in interest violations* of § [406] *depends entirely* on the meaning of § [406(a)]." Brief of Appellees at 18 (emphasis added); *see id.* at 14 ("thrust" of Count II is "that Salomon, a party-in-interest ... violated ... § 406(a)...."), 15, 17, 20, 22, 28, 29, 33, 35, 37 ("'Salomon's liability is premised on a direct violation of §[406]'"), 39. And, as noted, the court of appeals understood Ameritech's claim to turn on whether "*Salomon violated* [ERISA] by engaging in a transaction prohibited by § [406]". JA 347 (emphasis added); *see also* JA 348 ("The 'act' alleged here is *Salomon*'s participation in a transaction prohibited by § [406]") (emphasis added).

Salomon's opposition to certiorari explicitly objected that Ameritech had waived its secondary-liability claim. *See* Resp. Opp. pp. 5-10. On reply, Ameritech did not dispute its waiver, but argued that this was no reason to deny certiorari, stating in effect that there was no serious secondary-liability argument to be made. *See* Pet. Reply 2-3, 6 n.5. Ameritech in a footnote suggested that the "question presented" was general enough to "fairly include[ ]" a secondary-liability theory. *Id.* at 3 n.2. But Ameritech cannot use its formulation of the "question presented" to this Court to relieve itself of its prior waiver in the court of appeals where it (i) failed to contest the dismissal of Count III, its secondary-liability count, and (ii) relied solely on a claim that *Salomon* violated § 406(a). Moreover, the formulation of a question presented must be read in conjunction with what the underlying claim is; here, a claim that Salomon was liable as a violator.

The Court should deem Ameritech's nonviolator-liability claim waived and decline to consider it. *See* cases cited in Resp. Opp. p. 7; *see also, e.g., Pennsylvania Dep't of Corrections* v. *Yeskey*, 524 U.S. 206, 212-13 (1998). A finding of waiver is especially appropriate in light of the far-reaching

implications of Ameritech's nonviolator-liability theory. *See South Cent. Bell Tel. Co.* v. *Alabama*, 526 U.S. 160, 170-71 (1999).

3. Ameritech's arguments based on statutory context lack merit.

None of the other statutory provisions Ameritech relies upon (PB 22-27) are Title I provisions that impose a duty upon nonfiduciary parties-in-interest, breach of which could constitute a violation of Title I and give rise to civil liability.

Section 408. That § 408 authorizes exemptions for "any fiduciary or transaction, or class of fiduciaries or transactions" does not indicate that it is the *transaction* that is prohibited. Rather, § 408 indicates that Congress chose to permit the Secretary of Labor to exempt either particular fiduciaries or particular transactions (regardless of what fiduciaries are involved). Other clauses in § 408(a) and § 408(c) likewise refer only to fiduciaries: "[a]n exemption ... shall not relieve a *fiduciary* ..."; "[n]othing in section 406 ... shall be construed to prohibit any *fiduciary*..." (emphasis added). That these clauses of § 408 refer only to fiduciaries underscores that § 406 prohibits conduct only by fiduciaries.

Section 502(i). Section 502(i) provides for *administrative* assessment of penalties by the Secretary of Labor in the case of a prohibited transaction "by a party in interest" — a penalty of up to 100% may apply if the transaction is not "corrected". A separate provision, § 502(a)(6), provides express authority for suit to collect the penalty. Section 502(i) does *not* provide for duties or liabilities enforceable in a civil cause of action. In any event, § 502(i) does not apply to tax-qualified plans such as the plans involved here (*see* PB 35) and thus cannot conceivably create any duty here. But what §§ 502(a)(6) and 502(i) do demonstrate is that Congress knew how to create an express remedy that would extend to nonfiduciary parties-in-interest when it wanted to do so.

Section 502(l). Section 502(l) was added in 1989, 15 years after enactment of ERISA, to provide additional civil penalties on violations by fiduciaries. Neither § 502(l) nor the "legislative history" surrounding it (even if accurately depicted) can have any bearing on what Congress provided 15 years earlier in § 406. *See, e.g., South Dakota* v. *Yankton Sioux Tribe*, 522 U.S. 329, 355 (1998). In any event, this Court has specifically rejected similar reliance by a private litigant upon § 502(l). *See Mertens*, 508 U.S. at 259-61. Since § 502(l)(1)(B) would permit assessment of civil penalties upon co-fiduciaries who are liable under § 405(a) for knowing participation in another fiduciary's breach, one does not need to adopt the position that a cause of action exists against *non*fiduciaries in order to give meaning to § 502(l)(1)(B). *Id.* at 260-61. In fact, the distinction between the liability of a fiduciary "who breaches" (§ 409(a)) and a co-fiduciary who is liable under § 405(a) because it "participates knowingly in" the breach, is echoed in the distinction in § 502(l)(1) between "breach of fiduciary responsibility" and "knowing participation in" the breach. And § 502(l)(4) could apply if Fiduciary X violated § 406(a) by causing a plan to enter into a nonexempt transaction with Fiduciary Y, who knowingly participated in Fiduciary X's breach. If Fiduciary Y paid a § 502(i) penalty or § 4975 tax, § 502(l)(4) would provide an offset against its § 502(l)(1)(B) penalty.

IRC § 4975 (ERISA Title II, § 2003). Under § 4975, the IRS may impose excise taxes on certain parties-in-interest (including certain nonfiduciaries) who participate in nonexempt prohibited transactions with tax-qualified plans — a 100% tax applies if the transaction is not "corrected". But IRC § 4975 (ERISA § 2003) is part of *Title II (not* Title I) of ERISA. *See* table of contents of P.L. 93-406, 3 *Legislative History of ERISA* ("Leg. Hist.") 4836-38. Thus, "violations" of § 4975 cannot be the predicate for a civil action under § 502(a)(3), which is limited to violations of Title I.

C.I.R. v. *Keystone Consol. Indus.*, 508 U.S. 152, 160 (1993), a tax decision under IRC § 4975, does *not* discuss which parties have duties under § 406 that may give rise to civil liability. That "Congress' goal [in § 406] was to bar categorically a transaction that was likely to injure the pension plan" (*id.* at 160) says nothing about *whose* conduct is prohibited by § 406 or which parties may violate a Title I provision and be subject to civil liability.

Section 4975(h) merely provides for administrative coordination between the Secretaries of Labor and Treasury, giving Labor an "opportunity to obtain a correction ... or to comment on the imposition of [the] tax". Ameritech's § 4975(h) argument ignores the "or to comment" clause and assumes, *inter alia*, that the *only* means by which the Secretary of Labor could ever seek a correction of *any* transaction would be by civil suit against a *non*fiduciary party-in-interest. In some cases, including cases in which the counterparty is another fiduciary, Labor might seek correction by proceeding only against fiduciaries. Other prohibited transactions may not involve receipt of plan assets by a nonfiduciary at all (*e.g.*, §§ 4975(c)(1)(E) and (F)). And even as to nonfiduciaries, Labor could seek correction *administratively* through use of the threat of IRS assessment of excise taxes *or* at least "comment". That § 4975(h)'s reference to "opportunity to obtain a correction" does not have the significance Ameritech ascribes to it is underscored by the fact that the parallel provision in ERISA § 3003(a) provides only that "in accordance with [§ 4975(h)]" Treasury shall "afford the Secretary [of Labor] an opportunity to comment."

Section 3003 (ERISA Title III). Section 3003(c) does not attempt to define who can violate § 406; the text of § 406 does that. Rather, § 3003(c) appears in ERISA Title III and concerns transmission of information by the Secretary of Labor to the Secretary of the Treasury. Since the reports go to Treasury, it is not surprising that § 3003(c) uses the terms "party-in-interest or disqualified person" — persons who (in

appropriate cases) may be subject to the excise tax administered by Treasury. But § 3003(c) qualifies those terms with the phrase "is violating section 406". In the universe of parties-in-interest and disqualified persons, there are some who can violate § 406 — namely, fiduciaries who cause a plan to engage in a prohibited transaction (all fiduciaries are by definition parties-in-interest and disqualified persons, *see* § 3(14)(A); IRC § 4975(e)(2)(A)). Section 3003(c) requires Labor to report these violators. Indeed, a fiduciary who deals with plan assets for his own account in violation of § 406(b)(1) must be reported as a "party-in-interest or disqualified person [who] is violating section 406" even if no nonfiduciary is involved.

4. ERISA's explicit provisions for liabilities and sanctions underscore the absence of the posited cause of action.

Congress's choice to impose (i) civil liability on breaching fiduciaries (§ 409(a)) and on participating fiduciaries (§ 405(a)), and (ii) excise taxes under § 4975 or penalties under § 502(i) against certain parties-in-interest, "only makes the absence of a specific provision imposing civil liability on parties in interest all the more striking." JA 350.

This Court has held that where a statutory scheme expressly provides alternative methods of addressing allegedly prohibited conduct, "it cannot be assumed that Congress intended to authorize by implication additional judicial remedies for private citizens suing under the statute." *Meghrig* v. *KFC Western*, 516 U.S. 479, 488 (1996) (internal quotation marks omitted). Rather, "'[i]t is an elemental canon of statutory construction that where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it.'" *Id.*; *accord, e.g.*, *Karahalios* v. *Nat'l Fed'n of Fed. Employees*, 489 U.S. 527, 533 (1989); *Russell*, 473 U.S. at 147; *Northwest Airlines, Inc.* v. *Transport Workers Union*, 451 U.S. 77, 93-94, 97 (1981) ("The presumption that a remedy was deliberately

omitted from a statute is strongest when Congress has enacted a comprehensive legislative scheme including an integrated system of procedures for enforcement.").

The United States argues that the "primary focus" of the excise-tax and penalty provisions is "obtaining restitution to a plan from a nonfiduciary party in interest", and that obtaining such redress "takes priority over assessing against the party in interest a civil penalty or tax." USB 20-21. But if the posited causes of actions existed, a plan fiduciary (or the Secretary under § 502(a)(5)) could sue to *compel* restitution. The excise-tax and penalty provisions would then be unnecessary as a means of forcing restitution. The United States' position requires one to assume that Congress intended that the posited causes of actions be available (but *neglected* to say so expressly), yet did articulate expressly and in detail excise-tax and penalty provisions whose "primary focus" — obtaining restitution to the plan — would be redundant of the causes of actions this Court is asked to infer.

B. The legislative history confirms what the statutory text reflects: Congress made a deliberate choice *not* to provide the posited cause of action.

1. Congress designed the prohibited-transaction rules to regulate fiduciary conduct. From the outset in the 93rd Congress, the original pension-reform bills included prohibited-transaction provisions to complement ERISA's affirmative fiduciary duties and establish "a twofold duty on every fiduciary". *See, e.g.*, H.R. Rep. No. 93-533, at 13 (1973), 2 Leg. Hist. 2360; S. Rep. 93-127, at 30 (1973), 1 Leg. Hist. 616. The Department of Labor's explanatory statement to its proposed pension-reform bill described the prohibited-transaction rules as being part of:

> a *twofold duty on every fiduciary*: to act in his relationship to the plan's fund as a prudent man in a similar situation ... and to act solely in the interest of the participants and beneficiaries of the plan; *that is, to refrain from involving himself in situations or transactions (especially transactions with known parties in interest) where his personal interests might conflict* with the interests of the participants and beneficiaries.... Thus, section 14(b)(1) sets out the prudent man standard and the attendant affirmative duties.... *There follows a list of proscriptions (section 14(b)(2)) which represent the most serious types of fiduciary misconduct....* (119 Cong. Rec. 12,076 (1973), 1 Leg. Hist. 275-76.)[13]

2. Congress rejected the Senate's proposals to impose civil liability upon parties-in-interest and authorize suits against persons who receive plan assets in violation of ERISA. The Senate Finance Committee decided to propose that parties-in-interest be subject to civil liability for engaging in prohibited transactions. To that end, the Finance Committee crafted an express provision for party-in-interest liability. It provided that "[a]ny party in interest who participates in a [prohibited] transaction ... knowingly, or with reason to know that the transaction was [prohibited], shall be personally liable" for damages ("to make good to the fund any losses") and for disgorgement ("to pay to the fund any profits realized by him from such transaction"). JA 274-75.

Ultimately, in 1974, the House and Senate passed competing bills numbered H.R. 2. The House bill limited liability for engaging in prohibited transactions to fiduciaries. *See* JA 277-81. By contrast, the Senate bill included the provision to impose civil liability for damages and disgorgement on parties-in-interest. *See* JA 275, 281. The two bills also differed in their enforcement provisions. Unlike the House provision, the Senate enforcement provision authorized civil

[13] Other references to the precursors of § 406 likewise speak only of prohibiting fiduciaries — as opposed to parties-in-interest — from engaging in specified transactions. *See, e.g.*, H.R. Rep. No. 93-1280, at 294 (1974), 3 Leg. Hist. 4561; H.R. Rep. No. 93-533, at 21 (1973), 2 Leg. Hist. 2368; 120 Cong. Rec. 3980 (1974), 2 Leg. Hist. 3300; 119 Cong. Rec. 30,009 (1973), 1 Leg. Hist. 1614 (Remarks of Sen. Ribicoff); Summary of Major Provisions of S. 4, 1 Leg. Hist. 200.

actions against "*any person* who has transferred *or received* any of the assets of a plan". *Compare* JA 280-81 *with* JA 275-76 (emphasis added). Thus, the relief that Ameritech seeks here is what hypothetically might have been available to it under the Senate bill. Additionally, the Senate bill imposed a two-tier excise tax on disqualified persons (defined similarly to parties-in-interest) that engage in prohibited transactions. The House bill did not contain an excise-tax provision. *See, e.g.*, 3 Leg. Hist. 4267.

The Conference Committee reported out a Conference substitute of H.R. 2 that Congress enacted as ERISA. Regarding party-in-interest liability, the Conference Committee staff recommended that the conferees "adopt the approach of the House bill and *not provide civil liability for parties-in-interest*". JA 281-82, 3 Leg. Hist. 5259 (emphasis added). Following this recommendation, the conferees dropped the Senate's party-in-interest liability provision. *See* P.L. 93-406, Title I, Part 4, 3 Leg. Hist. 4881-97. The Conference substitute enforcement provisions (including what became §§ 502(a)(3) and (a)(5)) also generally conformed to the form and substance of the provisions in the House bill, as discussed below. Specifically, the Conferees did *not* adopt the Senate's very different proposal to permit civil actions against "any person who has ... received ... assets of a plan". *See* pp. 31-32, *infra*. However, as part of overall compromises, the Conferees did accept the Senate's provisions for excise taxes and also added a provision for penalties applicable to certain parties-in-interest. *See* P.L. 93-406, §§ 502(i), 2003, 3 Leg. Hist. 4899-4900, 4978-86.

The Conference Report contrasts the Conference substitute with the Senate bill. Under the Senate bill, "[f]iduciaries (*and parties-in-interest*) [would] be personally liable under the labor provisions". H.R. Rep. No. 93-1280 ("Conf. Rep."), at 295 (1974), 3 Leg. Hist. 4562 (emphasis added). But under the Conference substitute, only fiduciaries would be subject to civil liability under Title I:

> *Fiduciary responsibility rules, in general*
>
> The conference substitute establishes rules governing the conduct of plan *fiduciaries* under the *labor* laws (title I) and also establishes rules governing the conduct of disqualified persons (who are generally the same people as "*parties in interest*" under the labor provisions) with respect to the plan under the *tax* laws (title *II*). This division corresponds to the basic difference in focus of the two departments. The labor law provisions apply rules and remedies similar to those under traditional trust law *to govern the conduct of fiduciaries*. The tax law provisions apply an excise tax on disqualified persons who violate the new prohibited transaction rules ....
>
> *Civil liability*
>
> *Fiduciaries.* — Under the labor provisions (but not the tax provisions) of the substitute, a fiduciary who breaches the fiduciary requirements of the bill is to be personally liable for any losses to the plan resulting from this breach....
>
> *Party-in-interest.* — A party-in-interest who engages in a prohibited transaction with respect to a plan that is not qualified ... under the Internal Revenue Code may be subject to a civil penalty of up to 5 percent of the amount involved in the transaction. If the transaction is not corrected after notice from the Secretary of Labor, the penalty may be up to 100 percent of the transaction.

Conf. Rep. at 295, 320, 3 Leg. Hist. 4562, 4587; *see also id.* at 307, 3 Leg. Hist. 4574 ("Under the labor provisions a fiduciary will be liable for losses to a plan from a prohibited transaction in which he engaged...."); *id.* at 327, 3 Leg. Hist. 4594 ("Under the conference agreement, civil actions may be brought ... for relief from breach of fiduciary responsibility").

When the Senate Conferees explained the Conference substitute to their colleagues, their explanations yet again underscored the Conferees' decision to subject nonfiduciary parties-in-interest to potential excise taxes or penalties only. Thus, Senator Williams told the Senate that:

> Under the conference substitute, enforcement of the fiduciary provisions would primarily lie with the Secretary of Labor who would be empowered to bring civil actions to redress or restrain violations on the part of *fiduciaries*. He is also authorized to impose civil *penalties* on *parties in interest* who participate in prohibited transactions with welfare plans which are not subject to the tax qualification provisions of the Internal Revenue Code. However, *the Internal Revenue Service would have responsibility for dealing with those who are "disqualified persons"* — similar to the parties in interest defined in the labor portion of the conference substitute — with authority to impose *excise taxes* on violators.

120 Cong. Rec. 29,933 (1974), 3 Leg. Hist. 4745 (emphasis added); *see also id.* at 29,954, 3 Leg. Hist. 4803 (Remarks of Sen. Nelson).

3. Ameritech's legislative-history arguments lack merit. Ameritech takes out of context the Conference Report statement that "the conference substitute prohibits plan fiduciaries *and parties-in-interest* from engaging in a number of specific transactions". *See* PB 39-40. The statement appears in section "V" of the Conference Report, which (as the section heading makes clear) discusses *both* ERISA Title I provisions *and Title II tax provisions*. *See* Conf. Rep. at 294, 3 Leg. Hist. 4561. And the paragraph from which Ameritech excerpts goes on to say:

> Under the labor provisions (title I), the fiduciary is the main focus of the prohibited transaction rules. This corresponds to the traditional focus of trust law and of *civil enforcement of fiduciary responsibilities through the courts*. On the other hand, the tax provisions (title II) focus on the disqualified person.... (Conf. Rep. at 306, 3 Leg. Hist. 4573, emphasis added).

Taken in context, then, the statement that the Conference substitute "prohibits" parties-in-interest from engaging in prohibited transactions at most suggests that IRC § 4975 (in Title II) — as distinct from § 406 (in Title I) — imposes a "prohibition" on nonfiduciary parties-in-interest. But that proposition cannot advance Ameritech's case because § 502(a)(3) is limited to violations of Title I of ERISA.

In fact, the legislative history repeatedly evidences Congress's intent to prohibit only fiduciary conduct in § 406, as the statute states. Thus, the Conference Report explains: "The labor provisions ... provide general standards of conduct for *fiduciaries*, and make certain specific transactions 'prohibited transactions' which plan *fiduciaries* are not to engage in." Conf. Rep. at 295, 3 Leg. Hist. 4562 (emphasis added). And in presenting the conference substitute to the Senate, Senator Williams stated: "The bill prohibits *fiduciaries* from engaging in transactions involving the transfer of assets between the plan and parties in interest...." 120 Cong. Rec. 29,933 (1974), 3 Leg. Hist. 4743 (emphasis added); *accord, e.g.*, 120 Cong. Rec. 29,954 (1974), 3 Leg. Hist. 4803 (Remarks of Sen. Nelson); *see also* pp. 26-27 & n.13, *supra*.

Ameritech argues that "§ 502(a)(3) and (a)(5) originated in the Senate bill[ ]" and that the "other appropriate equitable relief" clause supposedly reflected a decision by the Conferees "to insert language from the Senate bill". PB 41. These assertions are not supported by what Ameritech cites and are wrong. In reality, §§ 502(a)(3) and (a)(5) as enacted were based on the House bill. *Compare* House bill § 503(e)(3), JA 280-81, 3 Leg. Hist. 4047 *with* Senate bill §§ 692, 693, JA 275-76, 3 Leg. Hist. 3815-17. The sentence on page 327 of the Conference Report, which immediately

precedes the sentence Ameritech quotes from twice (PB 41, 43), expressly states: "The conference agreement generally conforms to the provisions as passed by the *House*." Conf. Rep. at 327, 3 Leg. Hist. 4594 (emphasis added).[14]

The phrase "other appropriate equitable relief", added by the conferees in a new clause (B) in § 502(a)(3), remained tied to the phrase "act or practice which violates any provision of this title" in clause (A) — the precise language used in the House bill. *Compare* § 503(e)(3), JA 280-81, 3 Leg. Hist. 4047, *with* § 502(a)(3), JA 254. By contrast, the Senate proposal for civil actions against "any person who has ... received ... assets of a plan" (JA 275-76) was *not* enacted. It makes no sense to think that, by adding the phrase "other appropriate equitable relief", Congress intended to subject to civil liability a party who did *not* violate a Title I provision or the terms of a plan — much less to import into ERISA through the back door *rejected* Senate provisions imposing civil liability, for damages *and disgorgement*, upon parties-in-interest".[15]

Obviously Congress did not "inadvertent[ly] omi[t]" civil liability for parties-in-interest, or "simply forg[e]t" to provide it. *See Russell*, 473 U.S. at 146. "Few principles of statutory construction are more compelling than the proposition that Congress does not intend sub silentio to enact statutory language that it has earlier discarded...." *I.N.S.* v. *Cardoza-Fonseca*, 480 U.S. 421, 442-43 (1987).

[14] This sentence concerned what became § 502(a)(5). The language of § 502(a)(3) parallels that of § 502(a)(5).

[15] A 1973 *Senate* Report reference to constructive trusts as a potential remedy (*see* PB 18 n.9, 29; USB 22) obviously cannot suggest that in 1974 the Conferees intended to make constructive trust available as a remedy against nonfiduciary parties-in-interest, whom the Conferees had determined would *not* have civil liability.

C. Inferring the posited cause of action would interfere with Congress's policy choices and raise separation-of-powers concerns.

In this Court, Ameritech seeks to undo the legislative compromise to subject nonfiduciary parties-in-interest to excise taxes and penalties (in appropriate cases), but not civil liability. But this Court has been clear that it will "respect the 'policy choices reflected in the inclusion of certain remedies and the exclusion of others'" in ERISA. *Varity* v. *Howe*, 516 U.S. at 515 (quoting *Pilot Life Ins. Co.* v. *Dedeaux*, 481 U.S. 41, 54 (1987)). Thus, "[t]he federal judiciary will not engraft a remedy on a statute, no matter how salutary, that Congress did not intend to provide." *Russell*, 473 U.S. at 145 (1985) (internal quotes omitted). This approach recognizes that "the authority to construe a statute is fundamentally different from the authority to fashion a ... remedy which Congress has decided not to adopt.... The judiciary may not, in the face of such comprehensive legislative schemes, fashion ... remedies that might upset carefully considered legislative programs." *Northwest Airlines*, 451 U.S. at 97.

The posited cause of action is so at odds with the statutory text and history of ERISA's comprehensive enforcement scheme that upholding it would not only depart from settled principles of statutory construction, but would also raise separation-of-powers concerns. *See id.* at 94, 95 ("the federal lawmaking power is vested in the legislative, not judicial, branch of government"); *see also Public Citizen* v. *United States*, 491 U.S. 440, 470 (1989) (Kennedy, J., concurring) (discussing the "unhealthy process of amending the statute by judicial interpretation"). Whatever one's views on the proper objectives and methods of statutory interpretation in light of separation-of-powers concerns, surely no one would dispute that there is something terribly wrong with the notion that the legislative branch can decide to "*not provide civil liability for parties in interest*" in ERISA (JA 281-82), only

to have the judicial branch "interpret" ERISA as providing that civil liability.

D. This Court's ERISA decisions support rejection of the posited cause of action.

This Court has declined to infer causes of action under ERISA. In *Massachusetts Mut.* v. *Russell*, 473 U.S. 134 (1985), the Court held that a plan-participant could not recover extracontractual damages under §§ 409 and 502(a)(2) for a fiduciary's delay in the payment of benefits, reasoning that it could not find "express authority" for the posited cause of action in the text of § 409. 473 U.S. at 144; *see also id.* ("[n]othing ... expressly provides for" such recovery). Having decided that "neither the statute nor the legislative history reveals a congressional intent to create a private right of action", the Court held that the inquiry goes no further. *See id.* at 148. The Court stated that it was "reluctant to tamper with an enforcement scheme crafted with such evident care as the one in ERISA". *Id.* at 147.

Mertens reiterates *Russell*'s approach to construction of ERISA's enforcement provisions. *Mertens* held that § 502(a)(3) does not authorize compensatory damages, but instead permits only "equitable relief". *See* 508 U.S. at 251, 255-63. In dictum, the Court expressed pointed doubt about the threshold issue: whether a nonfiduciary's participation ("knowing or unknowing") in a fiduciary's breach violates ERISA, and thus whether ERISA "affirmatively authorizes" a cause of action against such a nonfiduciary — reemphasizing this Court's "unwillingness to infer causes of action in the ERISA context". 508 U.S. at 253-55 & n.5. One year later, this Court reiterated that the "omission of knowing participation liability in ERISA 'appears ... deliberate'" and observed that *Mertens* "rejected" the argument that a "knowing participation cause of action ... should be available under ERISA". *Central Bank*, 511 U.S. at 175, 184.

Further, *Mertens* expressly sets forth that: (i) ERISA is "a 'comprehensive and reticulated statute,' the product of a decade of congressional study" (*id.* at 251); (ii) provisions of Title I that assign duties to fiduciaries, and that make fiduciaries liable for breach of those duties, by their terms apply only to fiduciaries — there are no equivalent provisions directed to nonfiduciaries (*id.* at 251-53); and (iii) § 502(a)(3) — one of "ERISA's 'six carefully integrated civil enforcement provisions'" (*id.* at 252) — should not be read to apply to nonfiduciaries in the absence of "explicit[ ]" provisions in Title I imposing duties and liabilities on such nonfiduciaries. *Id.* at 253-55 & n.5.

The Seventh Circuit read in proper context dicta in *Mertens* on which Ameritech relies. *See* JA 350-51. *Mertens* states:

> Professional service providers ... must disgorge assets and profits obtained through participation as parties-in-interest in transactions prohibited by § 406, and pay related civil penalties, see § 502(i), 29 U.S.C. § 1132(i), or excise taxes, see 26 U.S.C. § 4975; and (assuming nonfiduciaries can be sued under § 502(a)(3)) may be enjoined from participating in a fiduciary's breaches, compelled to make restitution, and subjected to other equitable decrees. (508 U.S. at 262.)

The "disgorge assets and profits" clause does not refer to civil liability. Rather, it refers to the "correction" of a prohibited transaction required to avert a 100% penalty (under § 502(i)) or excise tax (under § 4975(b)).[16] And the "related civil penalties" or "excise taxes" refers to the 5% penalty (under § 502(i)) or the excise tax (under § 4975(a)) to which the party-in-interest could still be subject even after correcting. In other words, the Secretary of Labor or IRS can seek to force certain parties-in-interest to correct prohibited

[16] A definition of "correction" appears in the agency regulations. *See* 26 C.F.R. § 53.4941(e)-1(c); 26 C.F.R. § 141.4975-13; 29 C.F.R. § 2560.502i-1(c).

transactions "at peril of a ... penalty". JA 351. That the ensuing clause discusses the assumption that "nonfiduciaries can be sued under § 502(a)(3)" — for injunctive relief, restitution, and other equitable decrees — underscores that the preceding "disgorge assets and profits" clause does *not* refer to civil liability under § 502(a)(3). And the parenthetical phrase — "assuming nonfiduciaries can be sued under § 502(a)(3)" — was stating an assumption concerning the potentiality of a cause of action against nonfiduciaries for participation in a fiduciary's breach — an assumption that a majority of the Court previously had made clear it was unwilling to make. *See* JA 351; 508 U.S. at 253-55 & n.5.

Mertens' further statement that "ERISA contains various provisions that can be read as imposing obligations upon nonfiduciaries" (508 U.S. at 253-54 & n.4) does not address the issue here: whether a nonfiduciary party-in-interest who enters into a prohibited transaction violates § 406(a) and may be held liable in a private suit. Even if ERISA "can be read" — in light of § 502(i) and IRC § 4975 — "as imposing obligations upon nonfiduciaries", that does not mean that § 406(a) imposes any such obligation or that ERISA "affirmatively authorizes" (*id.* at 253-55 & n.5) *civil actions* to impose *civil liabilities* upon nonfiduciaries — as distinct from the authorizations in §§ 502(a)(6) and (i) and § 4975 for penalties, suits to collect such penalties, or excise taxes.

Thereafter, this Court observed in *Spink* that: (i) these statements in *Mertens* "were in any event dicta"; and (ii) even "[i]nsofar as [these statements] apply to § 406(a)" — which "was not at issue" in *Mertens* — these statements "suggest liability for parties in interest *only* when a *violation* of § 406(a) has been established — which ... *requires* a showing that *a fiduciary caused* the plan to engage in the transaction in question". 517 U.S. at 889 n.3 (emphasis added).

In sum, *Mertens* makes clear that "where ERISA does not expressly impose a duty, there can be no cause of action". JA 348-49. The Seventh Circuit correctly applied that principle in declining to infer a cause of action here, since, "by its plain terms", § 406 does not regulate nonfiduciary conduct, and "imposes no explicit duty on parties in interest". JA 348; *see also* JA 353-54. The principles set forth in *Mertens*, and reiterated in *Central Bank*, also make it clear that § 502(a)(3) does not permit suit against persons who have not *themselves* violated an ERISA duty on a theory that such nonviolators participated in *someone else's* violation.

In *Spink* as well, this Court declined to read into ERISA duties not expressly provided. The Ninth Circuit held the defendant-employer-plan-sponsor liable as a party-in-interest that benefited from a § 406 prohibited transaction. This Court reversed, ruling that the Ninth Circuit "erred by not asking whether fiduciary status existed in this case" on the part of the defendant "before it found a violation of § 406(a)(1)(D)". 517 U.S. at 889. *Spink* concludes that a prerequisite to any § 406 claim is a showing "that a *fiduciary caused* the plan to engage in the allegedly unlawful transaction": "Unless a plaintiff can make that showing, *there can be no violation of § 406(a)(1) to warrant relief under the enforcement provisions*". *Id.* 888-89 (emphasis added). *Spink* underscores that "the only transactions rendered impermissible by § 406(a) are transactions caused by fiduciaries" and that § 406 "prohibits fiduciaries...", and "regulates the conduct of plan fiduciaries". *Id.* at 887-89 & n.3, 893.

Spink leaves open whether ERISA provides a cause of action against nonfiduciary parties-in-interest who benefit from a fiduciary's violation of § 406(a). *See id.* 889 n.3. Nevertheless, this Court's approach to whether Lockheed and its directors were liable is instructive. In Part III.A the Court unanimously concluded that these defendants were not acting as fiduciaries and so could not be liable under § 406(a), even though Lockheed had allegedly received a benefit. The

Court did *not* address in Part III.A whether some *other* person was a fiduciary who had caused the plan to enter into a prohibited transaction, although there were other persons who were alleged to be fiduciaries who violated § 406(a): Lockheed's Retirement Committee. Rather, the Court viewed the *non*fiduciary status of a defendant as ending the inquiry as to that defendant.[17]

After *Spink*, Ameritech conceded that "*fiduciary causation* is a *prerequisite* for nonfiduciary party-in-interest liability under § 406" and that "[t]he presence of a party-in-interest alone is not enough". Sal. C.A. App. 478-79 (emphasis added); *see also* PB 48. But Ameritech does not confront the significance of this facet of *Spink*. In light of *Spink*, any liability of a nonfiduciary party-in-interest — were it to exist — would be *dependent upon* the court first finding that a fiduciary violated § 406. It is wholly illogical to think that Congress, without expressly saying so, intended to establish a cause of action against a nonfiduciary party-in-interest that would turn on — not the culpability of such nonfiduciary — but rather on whether the fiduciary acted with the requisite culpability and thus violated § 406.

E. Congress's decision not to provide the posited private cause of action does not compromise the ERISA enforcement scheme Congress enacted.

Policy-based arguments for why the excise-tax and penalty sanctions that Congress chose to provide are supposedly inadequate cannot overcome ERISA's text. The *Mertens* plaintiffs similarly argued that a construction of ERISA under which plans lack remedies, including those available at common law, contradicts ERISA's "basic purpose." *See*

[17] *Spink* involved a motion to dismiss a complaint alleging that the Retirement Committee members were fiduciaries and had violated, *inter alia*, § 406. *See* 517 U.S. at 886; JA 225-32. (In Part III.B, seven justices concluded that "[i]t is not necessary for us to decide ... whether the Retirement Committee members acted as fiduciaries," 517 U.S. at 892, because their conduct did not violate § 406.)

508 U.S. at 261. But this Court held that "vague notions of a statute's 'basic purpose' are nonetheless inadequate to overcome the words of its text regarding the *specific* issue under consideration.... This is especially true with legislation such as ERISA", which "resolved innumerable disputes between powerful competing interests — not all in favor of potential plaintiffs". *Id.* at 261-62 (internal citation omitted); *accord, e.g., Board of Governors* v. *Dimension Fin. Corp.*, 474 U.S. 361, 373-74 (1986) ("Invocation of the 'plain purpose' of legislation at the expense of the terms of the statute itself takes no account of the processes of compromise, and, in the end, prevents effectuation of congressional intent.").

The policy arguments are fundamentally misguided. Congress chose to place the onus of avoiding prohibited transactions on fiduciaries, and also chose to provide that only those fiduciaries would bear civil liability for violations of § 406. The use of the excise tax and penalty scheme with an allocation of enforcement responsibility between Treasury and Labor was likewise a Congressional choice. Any issues concerning the adequacy of agency incentives or resources to carry out that scheme was inherent in that Congressional choice. This Court has held that it will not substitute its judgment for that of Congress. *See* p. 33, *supra*.

The policy arguments are also often unsupported or based on incorrect premises: (1) Ameritech presents no data to show that there in fact is an enforcement gap that a private right of action could remedy (*e.g.*, no data showing the number of instances in which a private party has asked Treasury or Labor to act, but Treasury or Labor has failed to act because of lack of resources). (2) The contention that collection of the excise tax "depends largely on voluntary self-assessment by the disqualified persons" (PB 36-37) is misleading — it is plan fiduciaries or sponsors (such as Ameritech Corp. here) who file annual reports with Labor and Treasury. *See* JA 165-70; ERISA § 104; IRC § 6058. (3) The fact that § 502(i) "applies only to a subset of ERISA plans"

(PB 35) is beside the point — § 4975 applies to the rest (including the Ameritech plans here, *see* PB 35). (4) The fact that a somewhat smaller class of persons are disqualified persons than are parties-in-interest (PB 37-38) only shows that Congress chose to limit which parties-in-interest it would subject to enforcement. For example, the definition of party-in-interest picks up *all* employees of certain parties-in-interest, whereas only "highly compensated employees" are deemed disqualified persons (PB 37).

Furthermore, Ameritech gives short shrift to the adequacy of the remedies that do exist, even apart from the potential in appropriate cases for the government to use excise taxes and penalties (each as much as 100% or more of the amount involved) to force the undoing of prohibited transactions. *First*, there are civil actions for damages and other relief against fiduciaries who cause a plan to enter into a prohibited transaction and any other fiduciaries who knowingly participate in that violation. *See* §§ 405, 406, 409. Here, *if* there was any violation of § 406, there has been no showing that the responsible fiduciaries, Ameritech Corp. and NISA, could not compensate APT for any losses — and Ameritech Corp., with its $20 billion in assets, clearly can. *See* Sal. C.A. App. 353, 789. Indeed, any losses suffered by APT are borne by Ameritech Corp., *not* its retirees or employees. JA 221-22. And even if the responsible fiduciaries cannot respond to a judgment, there is still the potential of recoveries from insurers of liable fiduciaries.[18]

Second, even though there is no cause of action under ERISA against nonfiduciary parties-in-interest, counterparties potentially are subject to suit under other federal or state laws, particularly if there is fraudulent conduct. A party-in-interest may potentially be subject to suit under other *federal* statutory schemes, ranging from the federal securities laws to RICO. Even assuming that *state* law claims

[18] Plans, fiduciaries and employers can purchase insurance to cover fiduciary liability for violations of ERISA. *See* § 410(b).

against a party-in-interest would be preempted (an issue that is *not* before the Court here), ERISA does not preempt other federal statutory remedies. *See* § 514(d). And if the counterparty is *not* a party-in-interest, it may potentially be subject to state-law claims as well. In any event, concern about the potential for preemption of state-law claims cannot overcome the text of the statute on the issue that is before the Court. *See Mertens*, 508 U.S. at 261.[19]

Third, allowing private civil actions *only* against fiduciaries may do more to further ERISA's aims than allowing suits against nonfiduciary parties-in-interest as well. Permitting a fiduciary to shift liability for a § 406 violation to a *non*fiduciary party-in-interest could dilute the force of the statutory proscription that a "fiduciary ... shall not cause" a plan to engage in a prohibited transaction. In many cases, the fiduciary that caused the alleged § 406(a) violation, or a cofiduciary who violated § 405, also controls who is sued. As this case demonstrates, fiduciaries with that control will rarely sue themselves. Here, there is substantial evidence that executives of fiduciary Ameritech Corp. caused APT to buy the participation interests or, at least, actively participated in making the investments.[20] And fiduciary NISA agreed that it would not knowingly engage in any prohibited transaction. JA 151. Yet Ameritech Corp. is a plaintiff, not a defendant, and NISA is not a party. APT's fiduciaries are

[19] Here, Salomon denies that it is a party-in-interest. Salomon also denies that the transactions were nonexempt prohibited transactions, disputes that there was any unjust enrichment, asserts various equitable and statutory defenses, and disputes the applicability of either § 4975 or § 502(i). Ameritech did not assert federal securities-law claims and its RICO claims were dismissed. *See* Sal. C.A. App. 72-76. Salomon asserted that Ameritech's state-law claims were defective on numerous state-law grounds. *See* R.123, R.210. Whether a remedy in fact exists against a particular party does not detract from the fact that Congress provided expressly for some remedies but omitted others.

[20] *See, e.g.*, JA 68-71, 74-80, 120-21, 128-30, 147-48, 154-55, 161-63, 188-89, 200-03; Sal. C.A. App. 373-93, 459-69, 595-99, 609-10, 612-13, 639, 668-74, 677-78, 681-83, 687-92, 694-95, 724-28, 741-42, 758-68.

attempting to shift to Salomon — a nonfiduciary — responsibility for an alleged violation of § 406 that Congress placed squarely on them.

Finally, it is by no means certain that creating the posited cause of action against nonfiduciaries that transact with ERISA plans will ultimately benefit the plans. *Mertens* noted the countervailing policy concern that expanding nonfiduciary liability could "impose high insurance costs upon persons who regularly deal with and offer advice to ERISA plans, and hence upon ERISA plans themselves." 508 U.S. at 262. And the specter of civil liability on Ameritech's theory may also prompt some nonfiduciaries to curtail transactions with plans, leaving plans with a less competitive market in which to invest. *Mertens* correctly recognized that this Court should not "adjust the balance" that Congress struck between competing goals. *Id.* at 263.

F. The posited cause of action would open the door to a wide range of potential suits that Congress did not contemplate or provide for in ERISA.

Not only would private suits against nonfiduciary parties-in-interest open the door to the disquieting prospect of fiduciaries attempting to hold nonfiduciaries responsible for a fiduciary's breach, but the pernicious impact of such suits would be compounded if (as Ameritech has asserted) nonfiduciaries could be liable on a basis akin to strict liability or without regard to whether the defendant was a violator or wrongdoer. The pernicious impact would be further compounded if one seeks, as Ameritech does, to stretch the definition of parties-in-interest to include outside parties transacting at arm's length with professional asset managers for multi-billion dollar plans.

Yet additional unsettling consequences emerge when one considers that many of the exemptions to § 406 are highly technical and often depend on information or circumstances beyond the knowledge and control of nonfiduciary parties-

in-interest. For instance, Prohibited Transaction Exemption 84-14 exempts certain transactions involving a defined class of "qualified professional asset managers", or "QPAMs". *See* 49 Fed. Reg. 9494 (1984).[21] Suppose Manager, a QPAM, invests (as part of a diversification strategy) a small amount of Executive Plan's assets in interests in an oil-drilling venture sold by Driller. Driller is a diversified company whose data-processing subsidiary provides ongoing computer services to Executive Plan, allegedly making Driller a party-in-interest. *See* §§ 3(14)(B) & (H). After the price of oil unexpectedly plummets, Manager realizes that at the time the investment was made the assets it managed for Executive Plan — when combined with the assets it managed for Employees Plan, an affiliate of Executive Plan — exceeded 20% of Manager's total client assets. The exemption thus does not apply and the transaction may be prohibited. *See* PTE 84-14, §§ I(e) and V(c)(1), 49 Fed. Reg. at 9504-06. On Ameritech's theory, a plan fiduciary — including even Manager, the fiduciary that violated § 406, who should monitor its own compliance with exemptions — could sue Driller for "equitable" relief.

Consider next PTE 75-1, which exempts certain securities transactions with certain parties-in-interest. The exemption imposes specific record-keeping requirements on the fiduciary. *See* 40 Fed. Reg. 50,845 (1975). Suppose Fiduciary X invests plan assets in securities issued in a private placement by Web.com. The securities are purchased in the secondary market from Broker, whose subsidiary provides ongoing custodial services to the plan, allegedly rendering Broker a party-in-interest. The pertinent conditions of PTE 75-1 obtain at the time of the transaction. But subsequently, the Internet investment "bubble" bursts. Fiduciary Y is brought

[21] The Prohibited Transaction Exemptions discussed here as examples are safe harbors. For example, PTE 84-14 states that "the fact that a transaction is subject to an administrative or statutory exemption is not dispositive of whether the transaction is in fact a prohibited transaction." 49 Fed. Reg. at 9504; *accord* 40 Fed. Reg. 50,845 (PTE 75-1).

in to replace Fiduciary X, and discovers that Fiduciary X carelessly misplaced the required records and that the transaction may thus be deemed prohibited. *See* PTE 75-1, § II(e), 40 Fed. Reg. at 50,847. PTE 75-1 would continue to exempt Broker from excise taxes or penalties, but would not expressly exempt Broker from the "restrictions of § 406(a)". *Id.* On Ameritech's theory that § 406(a) could be the predicate for civil liability, Broker would have no exemption from civil liability and Fiduciary Y could sue Broker for "equitable" relief.[22]

It would be of little consolation to inform Driller and Broker that a court will not compel them to make restitution to the plan unless they were unjustly enriched. Driller and Broker could still be dragged into court and subjected to litigation over technical exemptions and arguments — with the benefit of 20/20 hindsight — over "unjust enrichment".

Moreover, as noted, Ameritech's nonviolator-liability theory cannot logically be confined to liability of parties-in-interest for prohibited transactions. Rather, on this theory, *any person* can be sued under § 502(a)(3) for *some other person's* violation of Title I or the terms of a plan. Thus, suppose Fiduciary Z violates its duty under § 404(a) to diversify investments by using all of a plan's assets to purchase a highly leveraged equity-interest in an office building from Seller, who had never before dealt with the plan. Then the real estate market collapses. On Ameritech's theory, Fiduciary Z could now sue Seller for restitution to "redress" the fiduciary's own violation of § 404(a) — even absent any violation or wrongdoing by Seller. Or assume a plan provides that only Fiduciary A is authorized to make real-estate investments, but Fiduciary B purchases an apartment building for the plan from Seller. The investment is prudent in all respects. But then the market declines and the plan violation is detected. On Ameritech's theory, either Fiduciary A or B could sue Seller to "redress" Fiduciary B's violation of the terms of the plan, and yet more litigation over "unjust enrichment"-in-hindsight ensues — litigation that Congress neither authorized nor intended.[23]

[22] In a case where an exemption is lost because of a fiduciary's misfeasance, there is no rational reason for PTE 75-1 to exempt a nonfiduciary party-in-interest from excise taxes and penalties yet subject it to civil suit. Thus, the omission from § II(e)(1) of any reference to continued exemption of nonfiduciary parties-in-interest from the "restrictions of § 406(a)" shows that the Departments of Labor and Treasury originally presumed that such parties were *not* subject to civil liability. The fact that PTE 75-1 provides exemptions applicable to nonfiduciary parties-in-interest in no way suggests that such parties potentially are subject to civil liability. The explicit purpose of PTE 75-1's application to nonfiduciary parties-in-interest is to exempt them from excise taxes and penalties.

G. The Secretary of Labor's "interpretation" is not entitled to deference.

Ameritech — but *not* amicus United States — argues that the Secretary of Labor's "interpretation" of the statutory language is entitled to deference. However, Congress did not delegate questions regarding the existence and scope of causes of action under ERISA to the Secretary of Labor. Rather, whether § 502(a)(3) authorizes a civil action is for the courts to decide. *See* §§ 502(e) & (f). As stated in *Adams Fruit Co.* v. *Barrett*, 494 U.S. 638, 649-50 (1990), "Congress has expressly established the Judiciary and not the Department of Labor as the adjudicator of private rights of action arising under the statute." None of the cases Ameritech cites

[23] The hypothetical of a party-in-interest who bribes a plan fiduciary to invest in its real-estate development (*see* USB 23-24) does not support implying the posited cause of action. *First*, the harm to the plan arising from the fiduciary's acceptance of a bribe is the same whether the briber is a party-in-interest or not. And in either case the fiduciary would violate, *e.g.*, § 406(b)(3), and the plan would have full recourse against the fiduciary. *Second*, the party-in-interest would potentially be subject to disgorging the investment, or be subject to an excise tax or penalty of 100% or more under IRC § 4975 or § 502(i). *Third*, both the fiduciary *and* the briber could be criminally liable and, additionally, their conduct may constitute a RICO predicate act. *See* 18 U.S.C. §§ 1954, 1961(1).

involved judicial deference to an agency's "interpretation" of a statutory cause of action.

Moreover, even if the matter is within the purview of the agency, where — as here — "the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron* v. *Natural Resources Defense Council*, 467 U.S. 837, 842-43 (1984). Finally, Ameritech does not contend that the Department of Labor has expressed its position in any regulation or other interpretative pronouncement. Rather, Ameritech points only to positions taken in litigation. This Court has properly questioned whether agency positions expressed in litigation, as opposed to administrative regulation, are entitled to judicial deference. *See, e.g., Bowen* v. *Georgetown Univ. Hosp.*, 488 U.S. 204, 213 (1988) ("Deference to what appears to be nothing more than an agency's convenient litigating position would be entirely inappropriate."). Deference would be particularly inappropriate here since Labor's current litigation position contradicts the implicit assumption of the Departments of Labor and Treasury in class exemption PTE 75-1 that nonfiduciary parties-in-interest are *not* subject to civil liability. *See* p. 44 n.22, *supra*.

H. The court-of-appeals decisions that infer the posited cause of action are wrongly decided.

The court-of-appeals decisions that infer the posited cause of action explicitly or implicitly engage in a dramatic burden shifting in which the cause-of-action inquiry becomes whether the statute does not bar such a suit instead of "whether the statute affirmatively *authorizes* such a suit". *Compare Mertens*, 508 U.S. at 255 n.5 *with, e.g., Herman* v. *SCNB*, 140 F.3d 1413, 1419-22 (11th Cir. 1998) (asserting that § 406(a) "does not address, much less limit, who shall be personally liable", and "§ 502(a)(5) does not restrict the type

of parties who can be so sued") (internal quotation marks omitted) (emphasis added).

Further, the circuit decisions almost entirely *ignore* the legislative history that demonstrates Congress decided not to impose civil liability upon parties-in-interest. The decisions of five of the six circuits do not even mention that Congress rejected an express civil-liability provision for parties-in-interest. Only the Tenth Circuit, in *Reich* v. *Stangl*, 73 F.3d 1027 (10th Cir. 1996), even refers to this fact. Yet not even the Tenth Circuit addressed the fact that this rejection followed the Conference staff's recommendation to "not provide civil liability for parties in interest". Finally, several of the circuit decisions pre-dated this Court's decision in *Lockheed* v. *Spink*, which characterizes the *Mertens* passages on which several of them rely as "dicta" "not at issue" in *Mertens*, and which holds that "the only transactions rendered impermissible by § 406(a) are transactions caused by fiduciaries". *See* 517 U.S. at 889 n.3. And the post-*Spink* decisions do not consider the implications of *Spink*'s ruling discussed in Point I.D, above.

II. AMERITECH'S FAILURE TO PROFFER ADMISSIBLE EVIDENCE THAT SALOMON KNEW A FIDUCIARY WAS VIOLATING § 406 PROVIDES AN INDEPENDENT GROUND TO AFFIRM.

In the Seventh Circuit, Salomon argued in the alternative that — even if the posited cause of action exists — a plaintiff must prove that the nonfiduciary party-in-interest knew at the time that the fiduciary that caused the plan to engage in the transaction was violating § 406(a). Yet Ameritech had presented *no* admissible evidence that Salomon had the requisite knowledge. The Seventh Circuit never reached this alternative ground. Nevertheless, Salomon is entitled to rely on it for affirmance. *See, e.g., United States* v. *X-Citement Video, Inc.*, 513 U.S. 64, 78 (1994).

A. Knowledge that a fiduciary was violating § 406(a) must be an element.

Ameritech would turn statutory silence into a virtue: The statutory text provides no standard of culpability applicable to the counterparty to the transaction, *ergo*, on such reasoning, liability may attach without regard to culpability or wrongdoing. Indeed, the district court concluded that "under § [406(a)] defendants are held to a standard that approximates strict liability ...". JA 337; *see also* JA 311.

For the fiduciaries § 406(a) does expressly regulate, § 406(a) includes an express culpability standard ("knows or should know"). And the *rejected* Senate bill that would have imposed civil liability on nonfiduciary parties-in-interest did include an express culpability standard. *See* Point I.B.2, *supra*. On Ameritech's theory, nonfiduciaries sued for § 406(a) violations could be in a *worse* position than had the Senate proposal been adopted. Plainly, the silence of ERISA as enacted concerning any culpability standard applicable to a *non*fiduciary only further underscores that ERISA does not provide the cause of action Ameritech posits.

In any event, *Spink* makes clear that a nonfiduciary party-in-interest cannot be liable unless the court first finds that a fiduciary violated § 406. *See* Point I.D, *supra*. It follows from the dependent nature of any hypothetical claim against a nonfiduciary party-in-interest that knowledge by it that the fiduciary was violating § 406 must be an element. Knowledge of the fiduciary's breach was required for the *knowing* participation claim that *Mertens* in dictum rejected. *See, e.g., McDougall* v. *Donovan*, 539 F. Supp. 596, 598 (N.D. Ill. 1982).[24] If knowledge of the fiduciary's violation was

[24] In ruling that a nonfiduciary party-in-interest could be held liable, *McDougall* erroneously relied on language from a Senate committee report on a proposed bill (S. 4). *See* 539 F. Supp. at 598 (citing S. Rep. No. 93-127, at 35 (1973), 1 Leg. Hist. 621). That Senate bill was *not* enacted, and the underlying provision on which the report commented differs significantly from ERISA as enacted. This Court itself has rejected reliance on that same language from the Senate committee report. *See Russell*, 473 U.S. at 145-46.

required for a pre-*Mertens*, dependent, knowing-participation claim, it surely must be required for any (hypothetical) dependent claim against a nonfiduciary party-in-interest that might exist after *Mertens* and *Spink*. One cannot fairly construe *Mertens* — with its emphasis on restricting remedies and rights of action — as *expanding* the circumstances under which a nonfiduciary party-in-interest can be liable by (implicitly) overruling pre-*Mertens* case law that required proof of *knowing* participation.

Furthermore, even a co-fiduciary who participates in a prohibited transaction caused by another fiduciary can be liable only if such co-fiduciary "*know[s] such act or omission [by the other fiduciary] is a breach*" (§ 405(a)(1)) (emphasis added) — *i.e.*, knows that the fiduciary who caused the plan to enter into the transaction is violating § 406. *See also* Conf. Rep. at 299, 3 Leg. Hist. 4566 (to be liable, the co-fiduciary, among other things, "must know that he participated in the act that constituted a breach, and must know that it was a breach"). Civil liability should not be imposed upon a *non*fiduciary party-in-interest upon less proof than required to hold a participating fiduciary liable.

Ameritech suggests that this Court need not define the elements of the posited claim against nonfiduciary parties-in-interest now, but should leave that to the future. *See* Pet. Reply 6 n.6. But the very fact that the elements of the posited claim — including even the standard of culpability — require judicial determination underscores the perils of implying a cause of action into a statute that not only provides detailed express duties, liabilities, and remedies, but also provides explicit standards of culpability.

B. Ameritech did not offer evidence that Salomon knew a fiduciary was violating § 406(a).

Ameritech offered *no* admissible evidence that Salomon knew at the time of the transactions (1987-1989) that a fiduciary of APT was violating § 406(a). At the time, *no one* thought that the transactions violated § 406. *See, e.g.*, p. 1, *supra*. Indeed, Ameritech represented in its 1987, 1988 and 1989 reports to the Government that there were *no* non-exempt prohibited transactions. *See* p. 1, *supra*. That Ameritech and NISA did not at the time believe the transactions violated § 406 underscores the total absence of evidence that *Salomon* somehow knew this (to say nothing of the absence of evidence that Salomon knew that Ameritech Corp. or NISA knew that *they* were violating § 406).

Ameritech has previously argued that, if any knowledge requirement exists, it is sufficient for Ameritech to offer evidence that Salomon (supposedly) knew that it was a service provider, that it transacted with a plan and that NISA was a fiduciary that caused the plan to enter into the transactions. *See* Pet. Reply 6. But even putting aside that Ameritech's own Chief Investment Officer and NISA's CEO have testified that *they* did not regard or identify Salomon as a party-in-interest (*see* p. 1, *supra*), the matters to which Ameritech points — even assuming *arguendo* they were all true — do not establish that Salomon knew that NISA was violating § 406. Among other things, § 406(a) provides for exceptions: "Except as provided in [§ 408]". If a transaction falls within an exemption — which may turn on matters that are within the fiduciary's knowledge or control (*see* Point I.F, *supra*) — one does not have to go further; there simply can be no violation by the fiduciary.

CONCLUSION

The Court should affirm the judgment of the court of appeals.

Respectfully submitted,

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