UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

JAMES P. DAY, et al.,	)	
	)	
Plaintiffs	)	
	)	
v.	)	***Civil No. 98-353-P-H***
	)	
JOHN J. JOYCE, et al.,	)	
	)	
Defendants	)	

RECOMMENDED DECISION ON DEFENDANTS' MOTIONS TO DISMISS

James P. Day and Lewiston Raceway, Inc. ("Raceway") filed the instant suit on October 16, 1998 against the Maine State Grocers Association ("Association") and twelve individual defendants. Complaint (Docket No. 1) at 1. Raceway was a co-sponsoring employer of the Maine State Grocers Association Insurance Trust ("Trust") from 1988 through 1996; Day, a Raceway employee, was a participant in the Trust from 1988 through 1996.[1] *Id*. ¶¶ 1, 33. The plaintiffs sought on behalf of the Trust to recover significant losses it incurred as a result of the misappropriation of Trust funds from 1987 to 1995 by defendant John J. Joyce, then managing trustee of the Trust — misconduct allegedly facilitated by the negligence of the Association, certain members of its board of directors and the co-trustees of the Trust. *Id*. ¶ 1. The plaintiffs also sought equitable relief in the form of an

[1]According to the plaintiffs, the Trust was formed for the purpose of providing a plan of health, dental, life insurance and accidental death and disability benefits to eligible employees of participating employers. *Id*. ¶ 23.

order directing defendant Ellie Bickmore, then current managing trustee of the Trust, to seek damages and other appropriate legal and equitable relief on behalf of the Trust.[2] *Id.* ¶¶ 1, 6.

Bickmore subsequently resigned as managing trustee and was dismissed from the instant suit without prejudice. Motion To Dismiss Defendant Ellen Bickmore Without Prejudice (Docket No. 35) & endorsement thereon. All remaining defendants except Joyce filed motions to dismiss pursuant *inter alia* to Fed. R. Civ. P. (12)(b)(1), addressing dismissal for lack of subject-matter jurisdiction. Motion of John Buck To Dismiss, etc. ("Buck Motion") (Docket No. 20); Defendant Frank C. Frisbee, II's Motion To Join Motion of John Buck, etc. (Docket No. 24); Motion [by Mark Irving] To Dismiss, etc. (Docket No. 26); Motion by Defendants Roy Joseph and Richard Goodwin To Dismiss, etc. (Docket No. 29); Motion by Defendants Robert Carbone and William S. Bird To Dismiss, etc. (Docket No. 30); Motion [by Charles E. Wilkins] To Dismiss, etc. (Docket No. 31); Defendant Paul Poore's Motion To Dismiss, etc. (Docket No. 32); Motion by Defendant Maine State Grocers Association To Dismiss, etc. (Docket No. 33); Motion by Defendant, Frans Jongerden, To Dismiss, etc. (Docket No. 34).[3]

At a conference of the court and counsel held June 10, 1999 counsel for the plaintiffs indicated that he intended to file a motion seeking leave to substitute Thomas Kelly, new managing trustee of the Trust, for both Day and Raceway in order to address the standing defense that was the

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[2]The remaining ten individual defendants, William S. Bird, John Buck, Robert H. Carbone, Frank Frisbee, Richard Goodwin, Mark Irving, Frans Jongerden, Roy Joseph, Paul Poore and Charles Wilkins, were alleged to have been co-trustees of the Trust and/or members of the Association's board of directors. *Id.* ¶¶ 17-18.

[3]A final judgment subsequently was entered against the Association. Final Judgment, etc. (Docket No. 69). Subsequent references to the defendants' motions to dismiss thus should be understood to exclude that of the Association.

subject of the several pending motions to dismiss. Report of Conference of Counsel and Order ("Report") (Docket No. 63) at 2 & Endorsement to Objection to Report, etc. (Docket No. 65). The defendants agreed that if the court allowed a motion to amend the complaint by substituting Kelly for the existing plaintiffs the pending motions to dismiss would become moot. *Id*.

In due course the plaintiffs filed the contemplated motion. Motion of Thomas J. Kelly To Intervene and/or Join as a Plaintiff and Plaintiffs' Motion To Amend and Substitute Parties, etc. ("Motion To Amend") (Docket No. 67).[4] In opposition thereto defendants Buck and Irving raised a show-stopping point: that the court was powerless to grant the motion (at least insofar as the motion sought relation back of the amended complaint) because it could not in such fashion cure a fundamental flaw in subject-matter jurisdiction. Opposition of Defendants John Buck and Mark Irving, etc. (Docket No. 77) at 6-7. This was so, Buck and Irving argued, inasmuch as (i) Day and Raceway lacked standing to bring the claims set forth in the Complaint and (ii) a court may not remedy such a jurisdictional defect by permitting the later substitution of a plaintiff or plaintiffs who do have standing. *Id*.

Standing is indeed essential to subject-matter jurisdiction. *See, e.g., Dubois v. United States Dep't of Agric.*, 102 F.3d 1273, 1281 (1st Cir. 1996); *Crawford v. Lamantia*, 34 F.3d 28, 32 (1st Cir. 1994). The First Circuit apparently has not had occasion to address the question whether a lack of standing may be cured by the substitution of plaintiffs; however, the bulk of such authority as I can glean suggests that the court is powerless to permit it. *See, e.g., Corbin v. Blankenburg*, 39 F.3d 650, 653 (6th Cir. 1994) (had ERISA action been brought by person not statutorily authorized to bring

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[4]The Motion To Amend superseded a previous motion to amend. *See* Report at 2 n.2; Plaintiffs' Motion To Amend Complaint, etc. (Docket No. 45).

it, absence of subject-matter jurisdiction could not have been cured by substitution of authorized plaintiff); *Aetna Cas. & Sur. Co. v. Hillman*, 796 F.2d 770, 776 (5th Cir. 1986) (in diversity-based case, "[j]urisdiction cannot be created retroactively by substituting a diverse claimant for a nondiverse party"); *Pressroom Unions-Printers League Income Sec. Fund v. Continental Assurance Co.*, 700 F.2d 889, 893 (2d Cir. 1983) ("longstanding and clear rule is that 'if jurisdiction is lacking at the commencement of [a] suit, it cannot be aided by the intervention of a [plaintiff] with a sufficient claim'") (citations omitted); *Pianta v. H.M. Reich Co.*, 77 F.2d 888, 890 (2d Cir. 1935) ("right to intervene presupposes an action duly brought"); *but see Laborers' Pension Fund v. Leopardo Constr., Inc.*, 139 F.R.D. 634, 636 (N.D. Ill. 1991) (disagreeing with basic premise of *Pressroom* that court must have subject matter jurisdiction of original complaint to permit filing of amended complaint).

I therefore find it necessary as a threshold matter to delve into the standing and jurisdictional issues at the heart of the motions to dismiss, which I recommend be granted pursuant to Fed. R. Civ. P. 12(b)(1) on the basis of lack of subject-matter jurisdiction. I accordingly do not reach the Motion To Amend.[5]

I. Applicable Legal Standards

When a defendant moves to dismiss pursuant to Rule 12(b)(1) the plaintiff bears the burden of demonstrating that the court has jurisdiction. *Lundquist v. Precision Valley Aviation, Inc.*, 946

[5]Adoption of my recommended decision would moot the Motion To Amend as well as all other pending motions, which include Defendant Roy Joseph's Motion for Summary Judgment, etc. (Docket No. 50); Defendant Frank Frisbee's Motion for Summary Judgment, etc. (Docket No. 55); Defendant Frank C. Frisbee, II's Motion To Join Opposition of Defendants John Buck and Mark Irving to Motion of Thomas J. Kelly To Intervene, etc. (Docket No. 80); and Plaintiffs' Motion To Strike, etc. (Docket No. 81).

F.2d 8, 10 (1st Cir. 1991); *Lord v. Casco Bay Weekly, Inc.*, 789 F. Supp. 32, 33 (D. Me. 1992). For purposes of a motion to dismiss under Rule 12(b)(1) only, the moving party may use affidavits and other matter to support the motion. 5A C. Wright & A. Miller, *Federal Practice and Procedure* § 1350 at 213 (2d ed. 1990). The plaintiff may establish the actual existence of subject matter jurisdiction through extra-pleading material. *Id.*; *Hawes v. Club Ecuestre el Comandante*, 598 F.2d 698, 699 (1st Cir. 1979) (question of jurisdiction decided on basis of answers to interrogatories, deposition statements and an affidavit).

II. Analysis

The complaint filed by Day and Raceway in October 1998 set forth the following claims: (i) Count I — a claim against Joyce under the Employee Retirement Income Security Act ("ERISA") for breach of fiduciary duty in violation of 29 U.S.C. §§ 1106(a)(1), 1106(b) and 1109(a); (ii) Count II — an ERISA claim against defendant co-trustees and the Association pursuant to 29 U.S.C. §§ 1104(a)(1) and 1105(a) for breach of fiduciary duty; (iii) Count III — an ERISA claim against defendant co-trustees, the Association and certain committee members pursuant to 29 U.S.C. §§ 1112 and 1132 for failure to maintain adequate insurance coverage; (iv) Count IV — a claim against certain committee members for negligence; and (v) Count V — a claim for equitable relief against Bickmore and defendant co-trustees based on breach of Bickmore's fiduciary obligations pursuant to Title I of ERISA. Complaint ¶¶ 59-94. With respect to Counts I through IV, the plaintiffs sought payments to the benefit plan established by the Trust. *Id.* ¶ 23 & pp. 19-20. With respect to Count V, the plaintiffs sought an order directing Bickmore to seek such legal and equitable relief as might be available against the Association, defendant co-trustees and certain committee members for violation of their duties in the manner described in the Complaint. *Id.* at 20. The plaintiffs also

requested reasonable attorneys fees and costs and reimbursement for their lost time and wages incurred in bringing suit. *Id*.

The defendants first argue, and Raceway does not contest, that Raceway as an employer lacks standing to bring ERISA claims. *See* Buck Motion at 3-4; Plaintiffs' Opposition to Defendants' Motions To Dismiss, etc. ("Opposition to Dismissal") (Docket No. 44) at 16-21; *Kwatcher v. Massachusetts Serv. Employees Pension Fund*, 879 F.2d 957, 964-65 (1st Cir. 1989) (noting omission of employers from among those authorized to bring ERISA civil-enforcement action pursuant to 29 U.S.C. § 1132(a)). The plaintiffs contend, however, that (i) Raceway sufficiently pleads a federal common-law claim for restitution and conversion that is not preempted by ERISA and (ii) Raceway has standing to bring state-law claims that likewise are not preempted by ERISA. Opposition to Dismissal at 16-21.

Raceway alleges that Joyce's misappropriations led to the Trust's discontinuation of health and dental insurance coverage, as a result of which Raceway was forced to obtain more expensive benefits coverage elsewhere. *Id*. at 17; Complaint ¶ 48. Raceway asserts that it sufficiently sets forth a federal common-law claim for conversion and breach of contract for which it seeks restitution. Opposition to Dismissal at 17-18. The Complaint, however, is barren of any such claims. Indeed, the Complaint seeks no direct relief for Day or Raceway apart from reimbursement of various costs associated with bringing suit.

Even assuming *arguendo* that such claims were sufficiently pled, Raceway's attempts to eke out a viable federal common-law cause of action still would fall short. "[T]he Supreme Court has adamantly ruled that ERISA's express remedies are a signal to courts not to create additional remedies of their own." *Turner v. Fallon Community Health Plan, Inc.*, 127 F.3d 196, 199 (1st Cir.

1997). Caselaw cited by the plaintiffs reveals only one narrow carveout pertaining to employers, entailing claims for restitution of monies overpaid to a benefit plan or a beneficiary. *Provident Life & Accident Ins. Co. v. Waller*, 906 F.2d 985, 986-87, 992-94 (4th Cir. 1990) (permitting federal common-law action by plan administrator for reimbursement of duplicative payment made to beneficiary); *Whitworth Bros. Storage Co. v. Central States, S.E. & S.W. Areas Pension Fund*, 794 F.2d 221, 234, 236 (6th Cir. 1986) (permitting federal common-law action to recover alleged overpayments made by employer to pension plan).[6]

Raceway does not claim that it made any overpayments for which it seeks restitution. Rather, it argues that, as a result of Joyce's misappropriations, certain benefit programs were terminated and, as a result of that termination, it was forced to obtain coverage elsewhere at greater expense. It thus seeks arguably remote consequential damages.[7] Nothing in the caselaw cited by the plaintiffs

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[6]Other cases cited by the plaintiffs are inapposite. *Self-Insurance Inst. of Am., Inc. v. Korioth*, 993 F.2d 479 (5th Cir. 1993), concerns the standing of a trade group (representing employers, among others) to assert the preemption of state tax laws by ERISA. The court found that because the group's claim was predicated as much on the Supremacy Clause of the United States Constitution as on ERISA, the group had standing. *Id*. at 483-84. The plaintiffs also cite a string of cases for the proposition that courts have developed federal common law (often based on the importation of state-law principles) in construing ERISA. Opposition to Dismissal at 19-21. These cases, however, beg the central questions at issue here: whether the plaintiffs have standing to assert either an ERISA cause of action or a federal common-law cause of action related to ERISA.

[7]As Buck points out, the Trust discontinued its provision of health insurance more than a year after the discovery of Joyce's misappropriations, weakening the chain of proximate cause between Joyce's misconduct and termination of the benefit. Defendant John Buck's Reply, etc. (Docket No. 49) at 3 n.10; Complaint ¶¶ 32, 35, 39-40, 43. In any event, Raceway had no vested interest in continuation of the Trust or any particular plans it maintained. Plan sponsors generally are free, under ERISA, for any reason at any time to adopt, modify or terminate plans. *Boucher v. Williams*, 13 F.Supp.2d 84, 97 (D. Me. 1998). In addition, the Declaration of Trust at issue in this case empowered the Association to amend or terminate the benefit plan at any time, and employers to terminate their participation as to their employees on thirty days' notice. Agreement and Declaration

(continued...)

supports the existence or creation of such a federal cause of action in the shadow of the comprehensive ERISA scheme.

Raceway next argues that it has standing to pursue any state-law claims, citing an unreported decision from the Court of Appeals for the Fourth Circuit for the proposition that ERISA does not foreclose plaintiffs who lack standing thereunder from bringing state-law claims pertaining to ERISA plans. Opposition to Dismissal at 19; *Gardner v. E.I. DuPont de Nemours & Co.*, 1998 WL 743669 (4th Cir. 1998). Even assuming *arguendo* that this were so, it would not help Raceway. Neither Raceway nor (for reasons discussed below) Day has standing to assert any federal claim alleged in the Complaint. Nor do the plaintiffs assert jurisdiction based on diversity of citizenship. Accordingly, there is no basis upon which the court could assume jurisdiction over any remaining state-law claims. *See, e.g., Pejepscot Indus. Park, Inc. v. Maine Cent. R.R. Co.*, Civ. No. 99-112-P-C, slip op. at 12 (D. Me. July 26, 1999) (court may not exercise supplemental jurisdiction in absence of proper basis for federal subject-matter jurisdiction).

For his part, Day asserts first that he has standing to bring the ERISA claims in the Complaint. Opposition to Dismissal at 5-15. ERISA provides in relevant part that a civil action may be brought

> (1) by a participant or beneficiary —
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> ***
>
> (B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;
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> (2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief

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[7](...continued)
of Trust, attached as Exh. A to Opposition to Dismissal, §§ 7.01, 7.03.

> under section 1109 of this title;[8]
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> (3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan;

29 U.S.C. § 1132(a). A "participant" is defined as:

> [A]ny employee or former employee of an employer, or any member or former member of an employee organization, who is or may become eligible to receive a benefit of any type from an employee benefit plan which covers employees of such employer or members of such organization, or whose beneficiaries may be eligible to receive any such benefit.

29 U.S.C. § 1002(7).

As this court has observed, the Supreme Court has construed section 1002(7) as providing "for two distinct categories of ERISA participants: 1) employees in, or reasonably expected to be in, currently covered employment; or 2) former employees who have a reasonable expectation of returning to covered employment and/or a colorable claim to vested benefits." *Boucher*, 13 F.Supp.2d at 102 (citation and internal quotation marks omitted).

Day contends that he fits the literal definition of a "participant" inasmuch as he harbors a "reasonable expectation" of returning to covered employment and has a "colorable claim." Opposition to Dismissal at 10. He notes that he has never left his employment with Raceway and that the Trust, although it no longer provides benefits, continues to exist as a legal entity. *Id*. at 10-11. If the Trust could overcome its financial difficulties and its benefit plans were reestablished, he asserts, there is a reasonable expectation that Raceway would re-enroll its eligible employees in those plans. *Id.* at 11. Day argues that he possesses a "colorable claim" inasmuch as he seeks to enforce

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[8]Section 1109 provides remedies against fiduciaries, including personal liability, for breach of fiduciary duty with respect to a plan. 29 U.S.C. § 1109.

rights that include the return to the Trust of his stolen contributions, together with any earnings that otherwise would have been realized thereon, and his right to receive future benefits under the terms of the plan in the form of the insurance that could have been purchased but for Joyce's misappropriations. *Id.* at 11-12. Day reasons that, in any event, he need not show particularized harm to himself inasmuch as participants have standing to bring claims for plan-wide relief under 29 U.S.C. §§ 1132(a)(2) and (3). *Id*. at 13-14.

I am not persuaded that Day has demonstrated that he is a "participant" as that term is defined in section 1002(7) and construed by the Supreme Court. First, because the Trust no longer provides benefits, Day is not in currently "covered" employment. Nor is he "reasonably expected to be in" covered employment. That the Trust could overcome its financial difficulties and once again offer benefit plans, and that those plans (which might or might not be the same as those originally chosen) would be attractive enough to Raceway to induce it to re-sign its workforce, are matters of sheer speculation. Nor does Day, a current employee, fit within the second category of ERISA participants: former employees.

Day argues that he nonetheless fits within a more expansive definition of "participant" espoused in certain cases in which former participants in terminated plans were found to have standing to press for equitable (albeit not legal) remedies on behalf of all plan participants. Opposition to Dismissal at 13-15. Standing in these cases turned, however, on the existence of "equitably vested benefits" that would arise from imposition of a constructive trust on alleged ill-gotten profits and be payable to former plan participants and beneficiaries. *Waller v. Blue Cross of Calif.*, 32 F.3d 1337, 1339 (9th Cir. 1994) (plaintiffs had standing to pursue equitable remedy of constructive trust to distribute profits from defendants' allegedly ill-gotten profits to former

participants, beneficiaries of plan); *Amalgamated Clothing & Textile Workers Union v. Murdock*, 861 F.2d 1406, 1419 (9th Cir. 1988) (for purposes of standing, ill-gotten profits held in constructive trust for plan participants, beneficiaries may be construed as equitably vested benefits under ERISA plan). Thus, the former plan participants still were required to demonstrate a colorable claim to vested benefits under an ERISA plan.[9]

Day demonstrates no such claim. He does not contend that he or other former plan participants or beneficiaries are personally entitled to any benefit apart from continuation of the plans on the same favorable terms previously offered by the Trust. That interest, in turn, cannot fairly be characterized as a "vested" benefit because neither Day nor any other former participant or beneficiary possessed an entitlement to continuation of the Trust or any of its specific benefit programs.

Day next contends that, even if not a "participant" in the literal sense, he has standing to sue under ERISA pursuant to an exception recognized by the First Circuit. Opposition to Dismissal at 5-9. Per this exception, an employee retains standing to sue for an alleged breach of fiduciary duty to the extent that the alleged breach caused the employee either to give up his right to benefits or to fail to participate in a plan. *Id.* at 6. These are cases in which, but for the employer's conduct alleged to be in violation of ERISA, the employee would have had standing because he or she would have remained a plan participant. *Id.*

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[9]Other cases cited by Day are of no help. In *Dall v. Chinet Co.*, 33 F.Supp.2d 26, 38 (D. Me. 1998), this court observed that pursuant to 29 U.S.C. § 1132(a)(3), individual plan participants may sue directly for a breach of fiduciary duty so long as they seek an equitable remedy. However, inasmuch as appears, no issue was raised concerning Dall's standing to sue. Moreover, while a "participant" is among those empowered to sue a fiduciary for restitution to a plan, *see, e.g.*, *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 140 (1985), such a plaintiff must still, as a threshold matter, qualify as a "participant" to be able to maintain such a claim.

The First Circuit permitted such an exception in *Vartanian v. Monsanto Co.*, 14 F.3d 697 (1st Cir. 1994), holding that:

> where an employee alleges a decision to retire based on alleged misrepresentations by his employer amounting to a breach of fiduciary duty, and the true facts are not available to the employee until after the employee has received all his vested benefits under a plan; and further, where the employee shows that in the absence of the employer's breach of fiduciary duty he would have been entitled to greater benefits than those which he received, then his receipt of payment cannot be used to deprive him of "participant" status and hence, standing to sue under ERISA.

Id. at 703.

Day argues that, like the plaintiff in *Vartanian*, he alleges that fiduciary misconduct and misrepresentations resulted in termination of the Trust's benefits and loss of his coverage in 1996. Opposition to Dismissal at 7. But for these breaches, he would still be a plan participant. *Id*. at 7-8. He contends that recognition of the exception is particularly appropriate in this case because of the egregiousness of the underlying breaches of fiduciary duty. *Id*. at 8-9. This court recently rebuffed a nearly identical argument. In *Boucher*, the plaintiffs alleged that the general mismanagement of a benefit fund had rendered the fund financially unstable, leading to the adoption of an amendment that effectively stripped them of their "participant" status by causing the forfeiture of their so-called "allocation accounts." *Boucher*, 13 F.Supp.2d at 103. The court first observed that the actual act that stripped the plaintiffs of participant status — the amendment — was not itself a species of wrongful conduct. *Id*. Further, the plaintiffs had failed to offer any evidence suggesting that in the absence of the alleged mismanagement the defendants would have maintained their allocation accounts indefinitely. *Id*. Finally, the plaintiffs' position "stretche[d] the limited holding of *Vartanian*, a case involving vested pension benefits, too far." *Id*. The First Circuit had "since limited the *Vartanian* holding to cases where, unlike here, the plaintiffs can establish that they were

former employees with a colorable claim to vested benefits." *Id*. (citing *Crawford*, 34 F.3d at 33 n.7). The court therefore declined to extend the *Vartanian* holding "to situations involving non-vested welfare benefits where the alleged breach of fiduciary duty resulted in no redressable harm to Plaintiffs, and where the Defendants had at all times a legal right to terminate Plaintiffs' accounts through proper plan amendment." *Id*. (footnote omitted).

So, too, in Day's case there is no evidence that the decision to terminate Trust benefits was itself wrongful or that those Trust benefits would have continued indefinitely but for Joyce's misappropriation of funds. Nor does Day make out a colorable claim to vested benefits; his desire to see continuation of the Trust benefits simply is not tantamount to a "vested" interest. Day therefore fails to establish any basis for his standing to assert causes of action premised upon ERISA.

Day lastly asserts that, regardless of the status of his standing under ERISA, he possessed standing to bring a federal common-law cause of action for negligence (set forth in Count IV). Opposition to Dismissal at 16, 19-21. Such an action, however, would be cumulative of the comprehensive causes of action for breach of fiduciary duty available under ERISA that are asserted elsewhere in the Complaint. There is thus no reason to recognize a separate federal cause of action for negligence. *See, e.g., Hughes Aircraft Co. v. Jacobson*, 119 S.Ct. 755, 764-65 (1999) (noting that, as a general matter, ERISA should not be supplemented by extra-textual remedies); *Turner*, 127 F.3d at 199 (same).

For these reasons, neither Raceway nor Day had standing to bring the Complaint. The court is powerless to cure that underlying defect in its jurisdiction to hear the case.[10] The Complaint

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[10]Day and Raceway argue that even if the court should find that they lacked standing to bring the original Complaint, it should nonetheless estop the defendants from asserting the defense of (continued...)

accordingly must be dismissed.

III. Conclusion

For the foregoing reasons, I recommend that the defendants' motions to dismiss be **GRANTED**.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this 10th day of August, 1999.

David M. Cohen
United States Magistrate Judge

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[10](...continued)
statute of limitations inasmuch as, but for Bickmore's wrongful refusal to join as plaintiff, the ERISA claims of the managing trustee would have been asserted in the Complaint. Reply Memorandum in Support of Motion To Intervene, etc. (Docket No. 87) at 5. Such a claim can neither trump nor survive the court's lack of jurisdiction to hear the case.