No. 18-487-cv

In the U.S. Court of Appeals For the Second Circuit

TIMOTHY D. LAURENT, on behalf of himself and all others similarly situated, and SMEETA SHARON,
Plaintiff-Appellants,

MICHAEL A. WEIL,
Plaintiff,

v.

PRICEWATERHOUSECOOPERS LLP, THE RETIREMENT BENEFIT ACCUMULATION PLAN FOR EMPLOYEES OF PRICEWATERHOUSECOOPERS LLP, THE ADMINISTRATIVE COMMITTEE TO THE RETIREMENT BENEFIT ACCUMULATION PLAN FOR EMPLOYEES OF PRICEWATERHOUSECOOPERS LLP,
Defendant-Appellees.

On Appeal from the U.S. District Court
for the Southern District of New York
Case No. 06-cv-2280

Brief for the U.S. Secretary of Labor as Amicus Curiae Supporting Plaintiff-Appellants

KATE S. O'SCANNLAIN
Solicitor of Labor

G. WILLIAM SCOTT
Associate Solicitor
for Plan Benefits Security

THOMAS TSO
Counsel for Appellate
and Special Litigation

BRENDAN BALLARD
Trial Attorney

U.S. Department of Labor
Office of the Solicitor
Plan Benefits Security Division
200 Constitution Ave. NW, N4611
Washington, DC 20210
202.693.5592 (t) | 202.693.5610 (f)
ballard.brendan@dol.gov

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QUESTIONS PRESENTED

1. Whether participants in employee benefit plans covered by the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1001 et seq., have a remedy under ERISA section 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B), to recover benefits required by ERISA when the written plan terms do not provide those benefits.

2. Whether ERISA section 502(a)(3), 29 U.S.C. § 1132(a)(3), allows the court to declare plan terms that violate ERISA's requirements void and order the plan enforced in compliance with ERISA's requirements if plan participants do not have an adequate remedy under ERISA section 502(a)(1)(B).

THE SECRETARY'S INTEREST

The Secretary of Labor has primary enforcement and regulatory authority for Title I of ERISA. See 29 U.S.C. §§ 1001, 1132-35; Sec'y of Labor v. Fitzsimmons, 805 F.2d 682, 688-91 (7th Cir. 1986) (en banc). The district court denied plan participants a remedy under both section 502(a)(1)(B) and section 502(a)(3) for an undisputed violation of Title I of ERISA. If allowed to stand, the district court's order would erode the enforcement of ERISA's requirements. Unsupported restrictions on remedies available to enforce ERISA's requirements undermine the Secretary's ability to ensure uniform compliance with ERISA and to redress harm resulting from fiduciary breaches and other violations of ERISA.

Herman v. South Carolina Nat'l Bank, 140 F.3d 1413, 1423 (11th Cir. 1998). The Secretary has authority to file this brief pursuant to Federal Rule of Appellate Procedure 29(a)(2).

STATEMENT OF THE CASE

Plaintiffs are former employees of PricewaterhouseCoopers LLP ("PwC") and participants in the Retirement Benefit Accumulation Plan for Employees of PwC ("Plan"), which is governed by ERISA. Plaintiffs allege that the Plan's terms do not comply with ERISA's vesting and accrual requirements, ERISA sections 203-04, 29 U.S.C. §§ 1053-54, and deprive them of what are commonly called "whipsaw" benefits. See Esden v. Bank of Boston, 229 F.3d 154 (2d Cir. 2000).[1] This Court previously held that the Plan violates ERISA. The question now before the Court is whether ERISA affords Plaintiffs a remedy.

The Plan is a cash balance plan, which is a type of defined-benefit plan. A defined-benefit plan guarantees a defined level of benefits to each plan participant, expressed in the form of an annual benefit ("annuity") commencing at "normal retirement age." ERISA section 3(23)(A), 29 U.S.C. § 1002(23)(A). Unlike traditional defined-benefit plans, cash balance plans use hypothetical accounts to track the accrual of benefits for each plan participant consisting of (1) the

[1] In 2006, Congress passed the Pension Protection Act, 29 U.S.C. § 1053(f)(1)(B), which eliminated the mandatory whipsaw benefits at issue here.

employer's hypothetical contributions expressed as pay credits, and (2) hypothetical investment returns on the money in the account, which are tied to a set index and expressed as interest credits. Esden, 229 F.3d at 158. Cash balance plans may offer a departing employee the option of an annuity commencing at normal retirement age or an immediate lump-sum payment. Laurent v. PwC ("Laurent V"), 794 F.3d 272, 274 (2d Cir. 2015) (citation omitted). Pursuant to this Court's decision in Esden, the present value of the lump-sum payment must be worth at least as much as the stream of income from the annuity commencing at normal retirement age. Id. at 275 (citing Esden, 229 F.3d at 163). The difference between (1) the value of a cash balance account, and (2) the value of the account as an annuity commencing at normal retirement age is the "whipsaw calculation" and determines the whipsaw benefit amount. Id. To perform the whipsaw calculation, the hypothetical account balance is increased by the plan's interest rate multiplied by the time to normal retirement age, then discounted back to present value at a set rate, usually the interest rate on 30-year Treasury securities. Id.

Here, the Plan defines "normal retirement age" as the earlier of the date a participant attains age 65 or completes five years of service. Laurent V, 794 F.3d at 276-77. That definition was designed to make an employee's normal retirement age coincide with the date on which the employee's benefits vest so that PwC could "avoid paying future interest credits" to departing employees who elected to receive their benefits in a lump-sum distribution. Id. at 277. In addition, the Plan uses the 30-year Treasury rate as the interest rate for calculating future interest credits ("projection rate"), which is lower than the interest rate actually used to provide interest credits to the cash balance accounts and the same as the discount rate back to present value used for the whipsaw calculation. Laurent v. PwC ("Laurent VI"), No. 06-CV-2280 (JPO), 2017 WL 3142067, at *1 (S.D.N.Y. July 24, 2017). After fully vesting, attaining the Plan's normal retirement age, and terminating their employment, Plaintiffs received their retirement benefits in lump-sum distributions.

On March 23, 2006, Plaintiffs filed suit against PwC, the Plan, and the Administrative Committee to the Plan. They alleged that (1) the Plan's definition of "normal retirement age" violates ERISA sections 203(a) and 3(24), and (2) the Plan's projection rate undervalues the future interest credits, in violation of ERISA section 204(c)(3), thereby forcing participants who elect to receive their benefits in the form of a lump-sum to forfeit whipsaw benefits, in violation of section 203(a). Laurent VI, 2017 WL 3142067, at *2. Defendants' motion to dismiss was denied. See Laurent v. PwC, 963 F. Supp. 2d 310 (S.D.N.Y. 2013). In an interlocutory appeal, this Court affirmed, holding that the Plan's definition of "normal retirement age" violates ERISA because it does not bear a reasonable relationship to an age at which the Plan's participants would normally retire. Laurent V, 794 F.3d at 286,

289. This Court stated that "PwC's retirement plan violates ERISA," because "in substance, the Plan accomplishes precisely what we forbade in Esden, by choosing a methodology for calculating actuarial equivalence that effectively withholds that statutory protection from plaintiffs' accounts." Id. at 286.

On remand, Defendants argued that, even though the challenged Plan terms violate ERISA, neither ERISA section 502(a)(1)(B) nor section 502(a)(3) provides a remedy for Plaintiffs.[2] Laurent VI, 2017 WL 3142067, at *3. On July 24, 2017, the district court granted Defendants' motion for judgment on the pleadings. Id. at *9. The court held that Plaintiffs had no remedy under section 502(a)(1)(B) because altering the projection rate to comply with ERISA was reforming the Plan—not recovering benefits or enforcing rights "under the terms of the plan." Id. at *4. The court also held that Plaintiffs had not alleged the elements required for reformation under section 502(a)(3). Id. at *7. In the absence of an adequately pled claim for reformation, the court held that relief under section 502(a)(3) required a fiduciary breach which could not have occurred because PwC was not acting as a fiduciary when calculating and paying benefits. Id. The court also adopted Defendants' argument that the relief sought consisted of money damages, which is not an equitable remedy. Id.

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[2] For purposes of their motion, Defendants did not dispute that it was improper to use the 30-year Treasury rate as the projection rate. Laurent VI, 2017 WL 3142067, at *4.

SUMMARY OF THE ARGUMENT

ERISA section 502(a)(1)(B) specifically allows participants to bring actions to recover benefits or clarify rights to future benefits due "under the terms of the plan." In contrast, ERISA section 502(a)(3) is a "'catchall' provision[ ] [that] act[s] as a safety net, offering appropriate equitable relief for injuries caused by violations that § 502 does not elsewhere adequately remedy." See Varity Corp. v. Howe, 516 U.S. 489, 512 (1996) (emphasis added). Relief for Defendants' ERISA violations can be found in either section 502(a)(1)(B) or section 502(a)(3).

1. Plaintiffs' claims that Defendants failed to provide whipsaw benefits in violation of ERISA are cognizable under section 502(a)(1)(B). ERISA mandates that plans adhere to minimum vesting and accrual requirements, and to the extent they do not, courts have long held that ERISA's requirements override illegal plan terms. Thus, Defendants and the Court must interpret the Plan's terms to adhere to ERISA's requirements and apply that interpretation to Plaintiffs' claims. Accordingly, Plaintiffs' claims are for "benefits under the terms of the plan" and/or to clarify "rights to future benefits under the terms of the plan" within the meaning of section 502(a)(1)(B).

2. ERISA section 502(a)(3) provides an alternative basis for relief. Section 502(a)(3) empowers courts to "enjoin any act or practice which violates any provision" of ERISA or "obtain other appropriate equitable relief" to "redress

such violations." Here, the parties do not dispute the illegality of the Plan terms. The continued application or reliance on those terms also constitutes a fiduciary breach. Once the district court declares the Plan terms illegal, it may enjoin the continued use of those illegal terms in calculating benefits and the further breach of fiduciary duties. An injunction can also include an order to the Plan and its administrator to recalculate the benefits due to Plaintiffs without relying on those illegal Plan terms. Such relief clearly falls within section 502(a)(3)'s authorization to "enjoin any act or practice which violates" ERISA or as a form of "appropriate equitable relief" that redresses a violation.

ARGUMENT

I. ERISA PLAN PARTICIPANTS HAVE A REMEDY UNDER ERISA SECTION 502(a)(1)(B) TO RECOVER BENEFITS REQUIRED BY ERISA EVEN THOUGH THE WRITTEN PLAN TERMS DO NOT PROVIDE THOSE BENEFITS.

A. ERISA Plans Must Be Interpreted And Applied To Adhere To ERISA's Requirements.

ERISA section 502(a)(1)(B) provides in relevant part that "[a] civil action may be brought by a participant . . . 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." 29 U.S.C. § 1132(a)(1)(B) (emphasis added). The phrase "terms of the plan" must be interpreted to include the terms that ERISA mandates to be in the plan. In other words, ERISA's statutory requirements direct the substantive content in ERISA plans by adding mandatory terms and circumscribing contrary terms. See, e.g., Central Laborers' Pension Fund v. Heinz, 541 U.S. 739, 750 (2004) ("Section 203(a), 29 U.S.C. § 1053(a), reads that '[e]ach pension plan shall provide that an employee's right to his normal retirement benefit is nonforfeitable upon the attainment of normal retirement age.' This is a global directive that regulates the substantive content of pension plans; it adds a mandatory term to all retirement packages that a company might offer."); Esden, 229 F.3d at 173 ("[It] is correct [to say] that a pension benefit is defined according to the terms of the plan; but ERISA is quite explicit that those terms are circumscribed by statutory requirements and restrictions. The Plan cannot contract around the statute."); May Dep't Stores Co. v. Fed. Ins. Co., 305 F.3d 597, 601 (7th Cir. 2002) (same); Korotynska v. Metro. Life Ins. Co., 474 F.3d 101, 107 (4th Cir. 2006) (same).

Neither plan administrators nor the courts can properly resolve benefit claims if they ignore ERISA's mandates, because ERISA specifies that plan terms are operative only to the extent that they "are consistent with" the statutory provisions. See 29 U.S.C. § 1104(a)(1)(D) (providing that "a fiduciary shall discharge his duties . . . in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of [Title I and Title IV]"); see also Eisenrich v. Minn. Retail Meat

Cutters & Food Handlers Pension Plan, 574 F.3d 644, 648 (8th Cir. 2009) ("a benefits decision that is inconsistent with ERISA is an abuse of discretion."). Consequently, ERISA requires plan administrators to apply ERISA's Title I requirements, including the vesting and accrual requirements, when deciding benefit claims. The principle that ERISA plans incorporate the statutory requirements of ERISA is consistent with the fundamental principle of contract law that "[l]aws which subsist at the time and place of the making of a contract, and where it is to be performed, enter into and form a part of it, as fully as if they had been expressly referred to or incorporated in its terms." Norfolk & W. Ry. v. American Train Dispatchers Ass'n, 499 U.S. 117, 130 (1991); see also Resolution Tr. Corp. v. Diamond, 45 F.3d 665, 673 (2d Cir. 1995) ("When parties enter into a contract, they are presumed to accept all the rights and obligations imposed on their relationship by state (or federal) law.").

This Court has already held that "PwC's retirement plan violates ERISA," because "the methodology for calculating actuarial equivalence . . . effectively withholds that statutory protection from plaintiffs' accounts." Laurent V, 794 F.3d at 289. As a consequence, the district court should interpret the Plan consistent with ERISA sections 203-04, and should then award additional benefits to the participants based on a whipsaw calculation that conforms to ERISA's requirements.

This Court and other circuits have so held in similar situations. In Esden, this Court clearly endorsed the use of ERISA section 502(a)(1)(B) to provide plaintiffs with ERISA-mandated whipsaw payments, 229 F.3d at 162, 177, and in Laurent V, this Court relied on Esden without condition, 794 F.3d at 275-76, 285-87. Similarly, in Berger v. Xerox Corp. Retirement Income Guarantee Plan, 338 F.3d 755, 763 (7th Cir. 2003), Judge Posner explained that the declaration sought by the plaintiffs in that case—"that Xerox's method of computing the lump sums to which withdrawing employees are entitled is unlawful"—was a suit "by plan participants suing 'to recover benefits'" under ERISA section 502(a)(1)(B). The Sixth Circuit thoroughly analyzed the same questions presented in this case and held that the plaintiff could recover additional plan benefits under section 502(a)(1)(B) through the district court's use of an ERISA-compliant whipsaw calculation, even if the calculation conflicted with some of the written plan terms. West v. AK Steel Corp., 484 F.3d 395, 404-10 (6th Cir. 2007), cert. denied, 555 U.S. 1097 (2009). The Sixth Circuit explained that "although ERISA [section] 502(a)(1)(B) offers redress only for the recovery of benefits, enforcement of rights, or clarification of rights to future benefits under the terms of the Plan, those terms must nevertheless comply with ERISA." Id. at 405.

Like the participants in Esden, Berger, and AK Steel, Plaintiffs seek the additional retirement benefits to which they are entitled under the Plan as interpreted to adhere to ERISA's requirements. Specifically, Plaintiffs are entitled to a lump-sum distribution under section 5.4 of the Plan,[3] the amount of which "shall not be less than the Actuarial Equivalent of the Participant's Normal Retirement Benefit." Laurent V, 2017 WL 3142067, at *1 (citing Plan §§ 5.4(a) and (b)). Plaintiffs' claim to benefits under this provision is unaffected by the Plan's use of both an unlawful definition of "normal retirement age" and an unlawful projection rate, which reduced their benefits below the "actuarial equivalent" that ERISA required. ERISA bars the incorporation of those terms into the Plan or their application.

B. Amara Does Not Change Settled Law That ERISA Plans Must Be Interpreted And Applied To Adhere To ERISA's Requirements.

The district court erroneously concluded that the Supreme Court's 2011 decision in Amara foreclosed the availability of section 502(a)(1)(B) as a remedy for whipsaw claims. The district court reasoned that "the striking out of the 30-year Treasury rate and its replacement with a different rate[,]" is not "'the simple enforcement of a contract as written,'" but rather is "a 'change[] akin to the reform of a contract,'" which Amara held was not available under section 502(a)(1)(B). Laurent VI, 2017 WL 3142067, at *6 (quoting Amara, 563 U.S. at 436). Here, the

[3] The Plan is attached to the Declaration of Daniel J. Thomasch in support of Defendants' Motion for Judgment on the Pleadings, ECF 210-3-10.

district court disregarded settled law that ERISA "adds . . . mandatory term[s]" to retirement plans, Central Laborers' Pension Fund, 541 U.S. at 750, and that ERISA requires the application of its mandatory terms in reviewing benefit claims.

Unlike this case—where the Plan terms as written violate ERISA—the Amara plan terms as written complied with ERISA. The source of the ERISA violation in Amara was the plan administrator's conduct. The plan administrator provided inaccurate summary plan descriptions, which misled plan participants as to the actual plan terms, in violation of ERISA sections 102(a) and 104(b), 29 U.S.C. §§ 1022(a) and 1024(b).[4] Amara held that the appropriate remedy was to equitably reform the plan to make its terms match what the plan administrator had promised in the summary plan descriptions. Amara, 563 U.S. at 438-442; Amara v. CIGNA Corp. ("Amara II"), 925 F. Supp. 2d 242, 251–55 (D. Conn. 2012); Amara v. CIGNA Corp. ("Amara III"), 775 F.3d 510 (2d Cir. 2014). Unlike Amara— where the court changed the plan's terms to equitably remedy the plan administrator's misrepresentations—in this case, ERISA automatically supplants the Plan terms. In effect, ERISA's mandatory terms are the Plan terms.

[4] The plan administrator also violated ERISA section 204(h), 29 U.S.C. § 1054(h), which prohibits an amendment of a pension plan that would "provide for a significant reduction in the rate of future benefit accrual" unless the plan administrator also sent a "written notice" that provided either the text of the amendment or summarized its likely effects. Amara, 563 U.S. at 432.

Amara specifically carved out cases like the present, where the legality of plan terms themselves are at issue and where the plaintiff seeks to enforce plan terms as mandated by ERISA. As support for the proposition that section 502(a)(1)(B) "allows a court to look outside the plan's written language in deciding what those terms are," Amara cited UNUM Life Ins. Co. v. Ward, 526 U.S. 358, 377-379 (1999) and described its holding as "permitting the insurance terms of an ERISA governed plan to be interpreted in light of state insurance rules." 563 U.S. at 436. In UNUM, the Supreme Court held that a state insurance law that was saved from ERISA preemption "effectively create[d] a mandatory contract term that required the insurer to prove prejudice before enforcing a timeliness-of-claim provision," and thereby overrode any contrary plan terms. 526 U.S. 358, 374, 376-77 (internal quotation omitted). UNUM specifically noted that the participant's claim was one "to recover benefits due . . . under the terms of his plan," even though the state law notice-prejudice rule overrode the terms of the plan and "supplied the relevant rule of decision." Id. at 377.

The district court reasoned that the relief requested in this case goes farther than UNUM because, rather than "reading . . . a state-law notice requirement into the plan," "the Court would need to fully replace a term of the plan." Laurent VI, 2017 WL 3142067, at *6. The district court, however, erroneously elevated form over substance. In Rush Prudential HMO, Inc. v. Moran, 536 U.S. 355, 356, 380

(2002), the Supreme Court applied UNUM and supplanted plan terms that granted interpretive authority to the insurer with a state law that "replaced" the insurer with an independent reviewer as the interpreter of the relevant plan terms. In both UNUM and Rush Prudential, the conflict between the plan and the state law prompted the Court to impose the state law's requirements on the plan when adjudicating benefits. Likewise, the challenged Plan provisions here conflict with ERISA's mandatory minimum vesting and accrual provisions, so the court should similarly impose ERISA's requirements on the Plan instead. Because ERISA imposes these requirements on the Plan directly, 29 U.S.C. §§ 1053-54, Amara's discussion of equitable reformation as a remedy for a fiduciary breach is distinguishable.

Post-Amara cases confirm this view. In Heimeshoff v. Hartford Life Ins., 571 U.S. 99 (2013), the Supreme Court made clear that its ruling in Amara does not foreclose a court from interpreting an ERISA plan as adhering to controlling law, even if such an interpretation ignores the terms of the plan as written. Quoting Amara, Heimeshoff noted that section 502(a)(1)(B) "speaks of 'enforc[ing]' the 'terms of the plan,' not of changing them," and stated that "for that reason, we have recognized the particular importance of enforcing plan terms as written in § 502(a)(1)(B) claims." Id. at 108 (citations omitted). Nevertheless, Heimeshoff recognized an exception, concluding that a court is not required to enforce a plan's limitations provisions if "a controlling statute prevents the limitations provision from taking effect." Id. (internal quotations and citations omitted).

After Amara, the Seventh Circuit affirmed an award of whipsaw benefits where the plan included a methodology for calculating lump-sum distributions that violated ERISA's requirements. Thompson v. Ret. Plan for Emps. of S.C. Johnson & Son, Inc., 716 F. Supp. 2d 752 (E.D. Wis. 2010), aff'd in relevant part, 651 F.3d 600 (7th Cir. 2011). The Seventh Circuit specifically characterized the claim in Thompson as "a claim to recover benefits under § 502(a)." 651 F.3d at 604 (emphasis added). Two years later, the Seventh Circuit affirmed an award of whipsaw benefits under section 502(a)(1)(B) in Ruppert v. Alliant Energy Cash Balance Pension Plan, No. CACR 09-799, 2010 WL 5464196 (W.D. Wis. Dec. 29, 2010), aff'd, 726 F.3d 936 (7th Cir. 2013).

The distinction between remedies for illegal conduct in Amara versus remedies for illegal plan terms in this case is also consistent with general contract law. In Amara, the plan administrator's misrepresentation made the otherwise valid plan terms voidable, e.g., 563 U.S. at 432 (acknowledging violation "permit[s]" invalidation, but did not require it), id. at 444-45 (recognizing surcharge as an alternative remedy instead of actually reforming the plan), whereas illegal plan terms are void ab initio and unenforceable, even in claims adjudications. See, e.g., Sphere Drake Ins. Ltd. v. Clarendon Nat. Ins. Co., 263 F.3d 26, 31 (2d Cir. 2001).

Contrary to these authorities, the district court stated that "[a]fter Amara, courts have consistently refused to allow" relief similar to the relief requested in this case under ERISA section 502(a)(1)(B). Laurent VI, 2017 WL 3142067, at *6. The district court did not, however, appreciate that the cases it cited did not involve plan terms that themselves violate ERISA's requirements and are therefore, like Amara, distinguishable from this case. See Pender v. Bank of Am. Corp., 788 F.3d 354, 361-63 (4th Cir. 2015) (involving investment scheme, not plan terms, that violated ERISA); Soehnlen v. Fleet Owners Ins. Fund, 844 F.3d 576, 583 n.2 (6th Cir. 2016) (dismissing for a lack of constitutional standing and citing in dicta to Pender in a footnote); Singletary v. United Parcel Serv., Inc., 828 F.3d 342, 349 (5th Cir. 2016) (plaintiff did not seek to enforce plan, but rather sought "relief from the provisions of the [p]lan because of lack of notice of something that she does not dispute is actually in the [p]lan"). Nothing in Amara abrogates longstanding case law providing relief for whipsaw claims under section 502(a)(1)(B).

II. IN THE ALTERNATIVE, THE DISTRICT COURT MAY DECLARE PLAN TERMS THAT VIOLATE ERISA VOID AND ORDER THE PLAN ENFORCED IN COMPLIANCE WITH ERISA'S REQUIREMENTS UNDER ERISA SECTION 502(a)(3).

Under ERISA section 502(a)(3), "[a] civil action may be brought by a participant . . . (A) to enjoin any act or practice which violates any provision of [Title I of ERISA] . . . or (B) to obtain other appropriate equitable relief [] to redress such violations." 29 U.S.C. § 1132(a)(3). Amara declared that the term "appropriate equitable relief" in section 502(a)(3) refers to "those categories of relief that, traditionally speaking (i.e., prior to the merger of law and equity) were typically available in equity." Amara, 563 U.S. at 439 (citations omitted). Amara then noted that the district court's "affirmative and negative injunctions obviously fall within this category." Id. at 440 (citation omitted). Indeed, section 502(a)(3) specifically permits courts to "enjoin any act or practice which violates any provision of [Title I of ERISA]." Amara further recognized other remedies were "appropriate equitable relief" because they "closely resembled" three traditional equitable remedies: (1) "reformation of the terms of the plan, in order to remedy the false or misleading information CIGNA provided," 563 U.S. at 440-41; (2) "equitable estoppel" to hold CIGNA to what it had promised, id. at 441; and (3) "surcharge" or "make-whole relief" "in the form of monetary compensation for a loss resulting from a breach of fiduciary duty, or to prevent a trustee's unjust enrichment." Id. at 441-42 (internal citation and quotation omitted). Relying on

Amara, this Court has held that "declaratory and injunctive relief" prohibiting a defendant from violating ERISA and "monetary compensation for any losses" resulting from a fiduciary breach are available under section 502(a)(3) because they "'closely resemble[]' the traditional equitable remedies of injunctive relief and surcharge." New York State Psychiatric Ass'n v. UnitedHealth Group, 798 F.3d 125, 135 (2d Cir. 2015) (quoting Amara, 563 U.S. at 440). In this case, Plaintiffs are undoubtedly entitled to injunctive or "appropriate equitable relief" under section 502(a)(3) to remedy Defendants' ERISA violations.

A. The Plan's Illegal Terms Provide A Basis For Equitable Relief.

Independent of a fiduciary breach, plan terms that violate Title I of ERISA may be remedied through declaratory and injunctive relief under ERISA section 502(a)(3). See New York State Psychiatric Ass'n, 798 F.3d at 135 (allowing "declaratory and injunctive relief" prohibiting the defendant from violating ERISA available under section 502(a)(3)).[5] ERISA plans are considered "trust-contract hybrid(s)." Amara III, 775 F.3d at 524. Under contract law, "where part of a contract is contrary to public policy, and therefore unenforceable, a court may nevertheless enforce the remainder of the contract." Beth Israel Med. Ctr. v.

[5] Although the basis for the plaintiffs' section 502(a)(3) claim in New York State Psychiatric Ass'n was breach of fiduciary duty arising out of a statutory violation, this Court made clear that section 502(a)(3) "'admits of no limit . . . on the universe of possible defendants.'" 798 F.3d at 133 (quoting Harris Trust and Savings Bank v. Salomon Smith Barney Inc., 530 U.S. 238, 246 (2000)).

Horizon Blue Cross & Blue Shield of New Jersey, Inc., 448 F.3d 573, 581, 589 (2d Cir. 2006); see also, e.g, Restatement (Second) of Contracts § 184(1) (1981); Restatement (First) of Contracts § 601 (example 4), 603 (1932) (same). Contract law specifically authorizes such relief when contracts with illegal terms are created for the benefit of an innocent party, such as cases where the plaintiff is a beneficiary in a trust relationship and relief is consistent with public policy. See generally 8 Williston on Contracts § 19:82 (4th ed. 2002). Consistent with contract law, in situations where the trust document contains a term that is "unlawful or against public policy," trust law also permits beneficiaries to seek guidance from the court, and such an invalid provision "may be subject to modification (either by court . . . or by beneficiary consent . . .)." Restatement (Third) of Trusts § 72 (2007).[6]

In this case, the Plan provides that participants are entitled to a lump-sum distribution, the amount of which "shall not be less than the Actuarial Equivalent of the Participant's Normal Retirement Benefit." Laurent VI, 2017 WL 3142067, at *1 (citing Plan §§ 5.4(a) and (b)). The Plan also provides, however, that the "Normal Retirement Benefit" is "calculated by projecting the Deemed Account Balance to Normal Retirement Age using the Deemed Plan Interest Rate," which

[6] For example, ERISA voids exculpatory clauses as against public policy within otherwise valid and enforceable plans. See 29 U.S.C. § 1110; see also Kayes v. Pac. Lumber Co., 51 F.3d 1449, 1460 (9th Cir. 1995).

the Plan sets as the 30-year Treasury rate (Plan §§ 5.1 and 2.6). Id. at *1 & n.3. This Court has already held that the definition of "normal retirement age" used in the Plan's benefit calculation methodology violates ERISA. Laurent V, 794 F.3d at 286, 289. And Defendants concede that the 30-year Treasury rate is too low of a projection rate. Laurent VI, 2017 WL 3142067, at *4. Thus, there is no dispute that the benefit calculation methodology violates ERISA, which, as a matter of public policy, dictates certain minimum requirements for vesting and accruals. See, e.g., 29 C.F.R. § 2530.200a-1. As a remedy, the Court may declare the Plan's illegal benefit calculation methodology void and order PwC to enforce section 5.4 of the Plan by providing lump-sum distributions as promised with an actuarial equivalence calculation that comports with ERISA's requirements.

ERISA section 502(a)(3) plainly permits participants "(A) to enjoin any act or practice which violates any provision of [Title I of ERISA]" and "(B) to obtain other appropriate equitable relief [] to redress such violations." When a plan term violates ERISA's minimum standards, section 502(a)(3) would be rendered toothless if courts were unable to prevent the enforcement of such illegal terms. Here, one form of "appropriate equitable relief" is a declaration that the illegal Plan terms are void and an affirmative injunction ordering PwC to enforce the Plan in compliance with ERISA's requirements. See Laurent V, 794 F.3d 272, n.19 ("Since ERISA grants a private cause of action to enforce, inter alia, the terms of the plan, 29 U.S.C. § 1132(a)(3), PwC may be compelled to act in accordance with the documents and instruments governing the plan' insofar as they accord with the statute.") (internal quotations and citations omitted).[7] Specific authority to "enjoin" PwC from relying on the illegal terms when calculating and paying benefits promised in Plan section 5.4 can also be found in ERISA section 502(a)(3)(A).

B. PwC's Breach of Fiduciary Duties Provides An Additional Basis for Equitable Relief.

In addition to holding that section 502(a)(3) does not provide a remedy for illegal plan terms, the district court also held that equitable relief was unavailable because there was no breach of fiduciary duty. Laurent VI, 2017 WL 3142067, at *8-9. The district court reasoned that PwC was not acting as a fiduciary when denying whipsaw benefits because, rather than making a "discretionary determination," it was "was merely adhering to the terms of the Plan and distributing benefits calculated ministerially according to the Plan's terms." Id. at *8. Even if a fiduciary breach is necessary, this conclusion was erroneous.

In addition to being the Plan sponsor, PwC was the Plan administrator (Plan § 10.4) and named fiduciary (Plan § 2.26), "charged with the full power and the

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[7] ERISA also requires the plan administrator and sponsor to ensure that the plan and any summary plan descriptions to accurately reflect the operative plan terms. 29 U.S.C. §§ 1102(a), 1103(b)(6).

responsibility for administering the Plan in all its details." Plan § 10.4; see also 29 C.F.R. 2509.75-8, D-3 ("a plan administrator or a trustee of a plan must, be the very nature of his position, have 'discretionary authority or discretionary responsibility in the administration' of the plan within the meaning of section 3(21)(A)(iii) of the Act. Persons who hold such positions will therefore be fiduciaries."). ERISA section 404(a)(1)(D) provides that "a fiduciary shall discharge his duties . . . in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of [Title I of ERISA]." 29 U.S.C. § 1104(a)(1)(D) (emphasis added). The Supreme Court has held that that section 404(a)(1)(D)'s "requirement . . . makes clear that [ERISA's fiduciary duty provisions] trump[ ] the instructions of a plan document[.]" Fifth Third Bancorp. v. Dudenhoeffer, 134 S. Ct. 2459, 2468 (2014). Likewise, this Court has noted that "[t]here is no doubt that . . . [ERISA section 404(a)(1)(D)] imposes a general fiduciary duty to comply with ERISA." New York State Psychiatric Ass'n, 798 F.3d at 131. Additionally, ERISA treats a pension plan's fiduciary as a trustee, Amara, 563 U.S. at 439, and trust law provides that "[t]he normal duty of a trustee to obey the terms of the trust also does not apply to provisions that are invalid because they are unlawful or against public policy." Restatement (Third) of Trusts § 76 (2007), cmt b(1); see also Restatement (Third) of Trusts § 72 (2007). Accordingly, PwC breached its

ERISA-imposed fiduciary duties when it made claims decisions that violated ERISA.

Moreover, even assuming PwC as Plan administrator did not exercise discretion in following Plan terms that PwC drafted as Plan sponsor, this Court has stated that it would be "inequitable" to deny participants relief based on ERISA's distinction between roles, where, as here, PwC allegedly used its multiple roles to deprive participants of benefits. Amara III, 775 F.3d at 526 ("We agree with the district court that to deny reformation solely due to the general distinction between sponsor and administrator in ERISA would be inequitable in the circumstances here, where CIGNA performed both roles and used that dual position intentionally to mislead employees about plan terms.").

In any event, Plaintiffs allege a systemic mis-adjudication of benefits by relying on illegal terms to reduce benefits for a class of participants, which is a fiduciary breach. See, e.g., Hill v. Blue Cross & Blue Shield of Michigan, 409 F.3d 710, 718 (6th Cir. 2005) ("Only injunctive relief of the type available under § 1132(a)(3) will provide the complete relief sought by Plaintiffs [to individual participants] by requiring BCBSM to alter the manner in which it administers all the Program's claims for emergency-medical-treatment expenses.").

For these reasons, injunctive or other appropriate equitable relief is available to Plaintiffs under ERISA section 502(a)(3) based on PwC's breach of fiduciary duties. As set forth above, a declaration that the illegal Plan terms are void and an affirmative injunction ordering PwC to enforce the Plan in compliance with ERISA's requirements constitutes such relief in this case.

C. The District Court Can Award Monetary Relief Under ERISA Section 502(a)(3) As Part Of An Affirmative Injunction Ordering PwC To Enforce The Plan In Compliance With ERISA.

As a consequence of being ordered to enforce section 5.4 of the Plan in compliance with ERISA's requirements without relying on illegal terms, PwC will be required to recalculate and pay whipsaw benefits due to the class of former employees that received deficient lump-sum distributions. The district court held that any such monetary remedy is not available under section 502(a)(3) because it is tantamount to "impos[ing] personal liability on [another party] for a contractual obligation to pay money—relief that was not typically available in equity.'" Laurent VI, 2017 WL 3142067 at *9 (citing Great–West Life & Annuity Ins. Co. v. Knudson, 534 U.S. 204, 210 (2002)). To the contrary, Amara makes clear that, in cases involving a fiduciary and an equitable claim based on the terms of the plan, relief that "require[s] the plan administrator to pay to already retired beneficiaries money owed them under the plan . . . does not remove it from the category of traditionally equitable relief" even if it "takes the form of a money payment." Amara, 563 U.S. at 439, 441-42. To the extent Amara leaves any room for doubt, this Court stated in Osberg v. Foot Locker, Inc. that "monetary relief" is available under section 502(a)(3) as a consequence of granting the reformation of a pension plan retrospectively. 555 F. App'x 77, 81 (2d Cir. 2014); see Frommert v. Becker, 153 F. Supp. 3d 599, 616 (W.D.N.Y. 2016) (reforming the plan and ordering the defendants to pay retirement benefits in accordance with the plan as reformed); see also Baltzer v. Raleigh & Augusta Air–Line R. Co., 115 U.S. 634, 645 (1885) (supporting this principle); Hogg v. Maxwell, 218 F. 356, 358 (2d Cir. 1914) (same). The court's use of declaratory and injunctive relief to bar reliance on Plan terms that are void under ERISA in paying benefit claims can be analogized to the injunctive relief requiring payment of benefits according to a reformed plan in Amara and Osberg.[8] Thus, this Court's rationale for permitting monetary relief in Amara and Osberg applies with equal force here.

[8] This Court has recognized that "terms violative of ERISA" may be a "basis for reformation." Nechis v. Oxford Health Plans, Inc., 421 F.3d 96, 103 (2d Cir. 2005) (citing DeVito v. Pension Plan of Local 819 I.B.T. Pension Fund, 975 F. Supp. 258, 270 (S.D.N.Y. 1997) (ordering defendants to reform pension plan containing illegal terms to comply with ERISA and inform plaintiff of her benefits under the reformed plan)); see also McDonald v. Pension Plan of the NYSA-ILA Pension Trust Fund, 450 F.3d 91, 95-96 (2d Cir. 2006) (affirming order reforming pension plan to provide benefits required by ERISA); Carrabba v. Randalls Food Mkts., Inc., 145 F. Supp. 2d 763, 770-71 (N.D. Tex. 2000), aff'd, 252 F.3d 721 (5th Cir. 2001) (affirming order reforming pension plan under section 502(a)(3) "to address violations of, and to give effect to, the accrual and vesting provisions of ERISA"). This Court has also held that "[a] contract may be reformed due to the mutual mistake of both parties, or where one party is mistaken and the other commits fraud or engages in inequitable conduct." Frommert v. Conkright, 738 F.3d 522, 525 (2d. Cir. 2013). Under this Court's test for reformation in ERISA, the inclusion of plan terms that violate ERISA may still constitute "inequitable conduct" and may warrant reformation if the illegal plan terms cause participants

In deciding a motion for judgment on the pleadings, this Court applies the "same . . . standard applicable to dismissals pursuant to [Rule] 12(b)(6)[,] . . . accepting all factual allegations in the [C]omplaint as true and draw[ing] all reasonable inferences in [the plaintiffs'] favor." L-7 Designs, Inc. v. Old Navy, LLC, 647 F.3d 419, 429 (2d Cir. 2011). Plaintiffs here plead plausible alternative claims to relief under sections 502(a)(1)(B) and (a)(3) that are "available" under ERISA; this is sufficient to survive dismissal. See New York State Psychiatric Ass'n, 798 F.3d at 134-35.[9]

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to be mistaken about what rights and/or benefits they are afforded under ERISA. See Pearce v. Chrysler Group LLC Pension Plan, 893 F.3d 339, 348 (6th Cir. 2018) (quoting SEC v. Capital Gains Research Bureau, Inc., 375 U.S. 180, 193-94 (1963)) (holding "[f]raud has a broader meaning in equity" and "'properly includes all acts, omissions and concealments which involve a breach of legal or equitable duty, trust, or confidence, justly reposed, and are injurious to another, or by which an undue and unconscientious advantage is taken of another.'") (emphasis added). While the district court held that Plaintiffs did not allege fraud or inequitable conduct in this case, Laurent VI, 2017 WL 3142067, at *8, this Court's decision should not preclude parties from raising these grounds for reformation in future cases involving plan terms that violate ERISA.

[9] Like Amara and New York Psychiatric Ass'n, the fiduciary breach in this case also supports a plausible allegation of "surcharge" against the fiduciary for harm caused by its breach or violation, instead of recouping the benefits from the Plan. See Amara, 563 U.S. at 441-442 (describing injunction to enforce the plan as reformed or a surcharge against the trustee as available equitable remedies); New York State Psychiatric Ass'n, 798 F.3d at 135.

CONCLUSION

The Secretary respectfully requests that this Court reverse the district court's dismissal of Plaintiffs' claims.

Respectfully submitted,

KATE O'SCANNLAIN
Solicitor of Labor

G. WILLIAM SCOTT
Associate Solicitor
for Plan Benefits Security

THOMAS TSO
Counsel for Appellate
and Special Litigation

/s/ Brendan Ballard
Brendan Ballard
Trial Attorney
U.S. Department of Labor
Office of the Solicitor
Plans Benefits Security Division
200 Constitution Ave., NW
Room N-4611
Washington, DC 20210

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 29(G), 32(g)(1), and 32(a)(7)(B) and Local Rule 29.1(c), I certify that this amicus brief contains 6,447 words.

Dated: August 22, 2018

/s/ Brendan Ballard
Brendan Ballard

CERTIFICATE OF SERVICE

I hereby certify that on this day, August 22, 2018, I electronically filed the foregoing, Brief for the U.S. Secretary of Labor as Amicus Curiae in Support of Plaintiff-Appellants, with the Clerk of the Court for the U.S. Court of Appeals for the Second Circuit by using the CM/ECF system. I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/ Brendan Ballard
Brendan Ballard