18-487

United States Court of Appeals for the Second Circuit

TIMOTHY D. LAURENT and SMEETA SHARON, on behalf of themselves and all others similarly situated,

Plaintiffs-Appellants,

MICHAEL A. WEIL,

Plaintiff,

v.

PRICEWATERHOUSECOOPERS LLP, THE RETIREMENT BENEFIT ACCUMULATION PLAN FOR EMPLOYEES OF PRICEWATERHOUSECOOPERS LLP, and THE ADMINISTRATIVE COMMITTEE TO THE RETIREMENT BENEFIT ACCUMULATION PLAN FOR EMPLOYEES OF PRICEWATERHOUSECOOPERS LLP,

Defendants-Appellees.

On Appeal from the United States District Court for the Southern District of New York

PAGE PROOF BRIEF FOR DEFENDANTS-APPELLEES

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CORPORATE DISCLOSURE STATEMENT

1. Defendant-Appellee PricewaterhouseCoopers LLP has no parent corporation and there is no publicly held corporation that owns 10 percent or more of its stock.

2. Defendant-Appellee The Retirement Benefit Accumulation Plan for Employees of PricewaterhouseCoopers LLP has no parent corporation and there is no publicly held corporation that owns 10 percent or more of its stock.

3. The Administrative Committee to The Retirement Benefit Accumulation Plan for Employees of PricewaterhouseCoopers LLP has no parent corporation, there is no publicly held corporation that owns 10 percent or more of its stock, and it is no longer in existence.

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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1) Whether after interlocutory appeal from the denial of PwC's Rule 12(b)(6) motion, the District Court correctly determined that PwC was entitled to raise a distinct legal defense to relief that had not been raised or addressed in either the Rule 12(b)(6) motion or the interlocutory appeal.

2) Whether the District Court correctly determined that neither ERISA § 502(a)(1)(B) nor § 502(a)(3) authorizes an injunction or other relief changing the terms of PwC's pension plan governing the calculation of lump-sum benefits, where the only basis alleged for changing those terms is that the lump-sum methodology used when Plaintiffs exited the plan violated ERISA at that time, and where the requested relief is, in substance, nothing more than an order compelling the payment of money damages.

3) Whether ERISA Section 502(a), which defines the exclusive remedies available under Title I, and Supreme Court and Second Circuit authority interpreting that Section, foreclose arguments by Plaintiffs and the Secretary of Labor that ERISA's purpose and policy necessitate creation of a judicial remedy for a violation of Title I.

PRELIMINARY STATEMENT

The Plaintiff Class consists of former PricewaterhouseCoopers LLP ("PwC") personnel who, before August 17, 2006, ended their participation in PwC's defined-benefit plan by taking benefits in the form of lump sums. Plaintiffs admit that when they elected to take lump sums, they were paid the exact amount due them under the terms of the plan. Plaintiffs thus further admit that their claim for additional benefits depends on changing the plan's terms. Specifically, Plaintiffs propose a two-step mechanism of relief, identifying as "Step 1" an "affirmative injunction enforcing ERISA's plan-content requirements." Appellants' Opening Brief ("AOB-") 31 (capitalization omitted). Plaintiffs claim that their right to such an injunction follows directly from their allegation that the plan's lump-sum-calculation methodology violated the statute at the time of their distributions. "Step 2" is an award of benefits under judicially-changed plan terms. AOB-28.

PwC moved for judgment on the pleadings under Rule 12(c) on the grounds that, regardless of Plaintiffs' allegation that the plan's lump-sum methodology violated the statute (taken as true solely for purposes of the motion), ERISA Section 502(a) does not provide a statutory endorsement for Plaintiffs' money-damages claim. In three well-reasoned decisions, the District Court analyzed whether Plaintiffs' claim for relief could proceed under either § 502(a)(1)(B) or

§ 502(a)(3). It concluded that neither provision endorsed Plaintiffs' claim and granted judgment for PwC.

Plaintiffs present their appeal as implicating only two issues—whether the interlocutory appeal in this matter precluded the District Court from even entertaining PwC's Rule 12(c) motion, and whether the District Court erred by finding that it was "powerless" to provide any remedy to the Class based on allegedly illegal plan terms. The District Court properly recognized that the statutory-endorsement issue was not raised or decided in the interlocutory appeal, leaving PwC free to raise that defense subsequently, and correctly determined that its power to order relief was constrained by the statutory language and controlling case-law, which do not permit these Plaintiffs to recover the additional, monetary benefits they seek.

Plaintiffs' appeal fails because the Class is not entitled to an injunction changing the terms of the plan under any provision of Section 502(a) based solely on an allegation that those terms violated ERISA at the time they received their distributions. First, *CIGNA Corp. v. Amara*, 563 U.S. 421 (2011), makes clear that § 502(a)(1)(B) does not empower a court to change plan terms or to award benefits based on changed plan terms.

Second, *Great-West Life & Annuity Insurance Co. v. Knudson*, 534 U.S. 204 (2002), precludes Plaintiffs' requested relief under § 502(a)(3); there, the Supreme

Court reaffirmed that § 502(a)(3) only permits relief that would have been "typically available" from premerger courts of equity, and directed courts to resolve that issue by examining "'the basis for [the plaintiff's] claim' and the nature of the underlying remedies sought." 534 U.S. at 213. Here, Plaintiffs request an injunction changing the plan's lump-sum methodology based on an alleged statutory violation, not fraud or mistake; thus their claim is an action at law. Furthermore, the requested injunction bears the hallmarks of a legal claim because it is simply a vehicle for the recovery of "money past due" by plaintiffs who allege past injury and could not benefit from prospective relief.

Thus, while Plaintiffs are "agnostic" as to whether the Court selects § 502(a)(1)(B) or § 502(a)(3) as authority for changing the plan's terms (AOB-29), the statutory text and binding precedent make clear that ***neither*** subsection endorses that relief. That precedent supersedes *Esden v. Bank of Boston*, 229 F.3d 154 (2d Cir. 2000), on which Plaintiffs principally rely.

Although Plaintiffs and the Secretary of Labor ("Secretary") contend that relief must be available to the Class if a Title I violation can be proven, courts are "not free to fill in unwritten gaps in ERISA's civil remedies" by "fashion[ing] an appropriate remedy" where, as here, the statute does not provide for one. *Central States, Se. & Sw. Areas Health & Welfare Fund v. Gerber Life Ins. Co.*, 771 F.3d 150, 159 (2d Cir. 2014). This Court should affirm the judgment.

STATEMENT OF THE CASE

I. Statement of Facts

A. PwC's Pension Plan

The plan provisions at issue in this case were first adopted on July 1, 1994, as part of what subsequently became known as the Retirement Benefit Accumulation Plan for Employees of PricewaterhouseCoopers LLP ("RBAP" or "Plan"). Dkt. 153 ¶¶ 1, 25. Those provisions were set forth in a written "Agreement." JA___. The RBAP, a defined-benefit plan with "a formula . . . commonly referred to as a 'cash balance' formula" was funded entirely by PwC, with no participant contributions. JA___-___ ¶ 27 (Second Amended Complaint ("SAC")), JA___.

For each payroll period, PwC credited a percentage of a participant's compensation (a "pay credit") to her notional cash balance account. JA___-___. Each participant could allocate the total balance of her notional account among one or more investment opportunities, ranging from money-market funds to higher-risk options, and could change these elections at any time. JA___-___. The Plan did "not guarantee any set rate of return" (*Laurent v. PricewaterhouseCoopers LLP*, 794 F.3d 272, 276 (2d Cir. 2015)); instead, the balance in a participant's account would "appreciate[] or depreciate[] in the form of daily-adjusted interest credits, according to the participant's chosen investment option." *Id.*; *see also* JA___-___.

The combined notional value of a participant's periodic pay credits and investment performance was the participant's "accrued benefit" under the Plan. JA___.

The Normal Retirement Benefit under the Plan was a single life annuity commencing at or after the Plan's Normal Retirement Age. JA___. The Plan, however, offered vested participants who had terminated employment the option of leaving their accounts in the RBAP, taking an annuity, or exiting the plan by taking a lump-sum cash payment. JA___-___, JA___. In the event a participant elected a lump sum, the "amount of the lump sum payment" was calculated by projecting the participant's account balance to Normal Retirement Age using the 30-year Treasury securities rate, and discounting that amount to present value using the same rate.[1] JA___. Under this methodology, the lump sum would always equal a participant's notional account balance at the time of distribution, as the RBAP Summary Plan Descriptions explained. *E.g.*, JA___ ("The amount of the lump sum payment shall be equal to your vested account balance.").

All claims for benefits under the Plan were submitted to the Plan Administrator. JA___-___. The Plan specifies that "[t]he Plan Administrator shall

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[1] RBAP participants taking lump sums had the option to immediately rollover such proceeds into, *inter alia*, the PwC 401(k) plan, which offered investment options similar to the RBAP. JA___-___, JA___, JA___.

have no power to add to, subtract from, or modify any of the terms of the Plan, or to change or add to any benefits provided by the Plan." JA___-___.

In 1996, the IRS approved the RBAP—containing all of the provisions explained above—as tax-qualified under 26 U.S.C. § 401(a). JA___. That approval requires numerous findings, including that a plan "satisfies the requirements of [26 U.S.C §] 411 (relating to [ERISA's] minimum vesting standards)." *See* 26 U.S.C. § 401(a)(7) (2012). In 2004, the IRS again approved the RBAP as tax-qualified. JA___.

B. Whipsaw

In 1996, the IRS announced its position that, when the terms of a cash-balance plan permitted a participant to take benefits before normal retirement age in the form of a lump sum, two calculations were required if future interest credits were promised by the plan: (1) projecting the participant's account balance out to the plan's normal retirement age, to add an amount reflecting the value of the future interest credits that would have accrued had the account balance remained in the plan until that future date; and (2) discounting that projected total back to the distribution date using the plan's discount rate (as limited by a statutory maximum). I.R.S. Notice 96-8, 1996-1 C.B. 359 (Jan. 18, 1996). This forward-and-back calculation was called a "whipsaw." *See Esden*, 229 F.3d at 159.

Two design features of the RBAP, in place at the time of both IRS approvals, independently had the effect of precluding whipsaw payments: The Plan provided for (1) simultaneous vesting and attainment of Normal Retirement Age (at "five (5) Years of Service" (JA___))—meaning that a projection forward to Normal Retirement Age was typically unnecessary; and (2) a projection rate equal to the statutory discount rate in the event a projection to Normal Retirement Age was ever required (*e.g.*, for an employee who died before attaining Normal Retirement Age and, thereby, vested immediately). JA___, JA___-___, JA___-___, JA___-___.

C. The Pension Protection Act of 2006

In 2006, Congress passed the Pension Protection Act, which expressly states that a cash-balance plan "shall not be treated as failing" to comply with ERISA's vesting and accrual requirements solely because it makes pre-normal-retirement-age lump-sum distributions "equal to" the participant's current account balance. *See* Pub. L. 109-280, 120 Stat. 780, § 701(a)(2) ("PPA"). The Act eliminated whipsaw calculations for participants in cash-balance plans who, after the PPA's effective date (August 17, 2006), elect lump-sum distributions before attaining normal retirement age. *Id.*

D. The IRS Recognizes the Plan's Post-PPA Compliance with ERISA Requirements for Lump Sums

After its second approval of the RBAP in 2004, the IRS audited the Plan and, in 2014, issued a Technical Advice Memorandum to PwC ("TAM"). JA___. The TAM recognized that PwC had amended the RBAP in 2008 to change the Plan's lump-sum methodology. That amendment (effective for distributions on or after August 17, 2006) eliminated the project-and-discount methodology for lump-sum distributions, and instead, as described by the IRS, provides for "a lump sum distribution equal to the Deemed Account Balance, ***as permitted under PPA***." JA___ (emphasis added).

The TAM further observed that, when a projection had ***previously*** been required under Plan terms for "lump sum distributions with initial annuity starting dates prior to August 17, 2006," the variable market-based investment indexes made available to participants differed from the fixed rate designated for projecting accounts to Normal Retirement Age—a structural "mismatch" that could result in a violation of either ERISA's backloading rules or its anti-forfeiture requirements "***depending on*** whether the interest crediting rate is higher ***or*** lower than the rate for projecting accounts." JA___-___ (emphasis added). The TAM reached no conclusion as to whether the Plan's projection rate was higher than or lower than its variable interest-crediting rate, and did ***not*** find that the projection rate violated

ERISA's "anti-forfeiture requirements" with regard to lump-sum distributions calculated and paid prior to August 17, 2006.

In light of the IRS's two prior approvals of the Plan, and PwC's reliance thereon in "good faith," the IRS assessed no penalty on PwC for the pre-amendment RBAP design, concluding that: "Retroactive application of the conclusions reached in [the TAM] would be detrimental to the Plan, the Plan sponsor and the Plan Participants." JA___-___.

E. Procedural History

1. Plaintiffs' Claims

The original complaint filed in the Southern District of New York alleged four counts. Counts Two, Three, and Four were dismissed in 2006 on PwC's initial motion to dismiss. The Second Amended Complaint was filed in 2012, containing six counts, including the counts that were previously dismissed and are not at issue. JA___-___.

Plaintiffs allege that they are former PwC personnel who "terminat[ed] employment with PwC" after completing five "years of service" and had vested Plan benefits. *Id.* ¶¶ 5, 20-21, 32. All Plaintiffs exited the Plan by electing lump-sum distributions of their accrued benefits, and each Plaintiff received her current notional account balance. *Id.* ¶¶ 5, 20-21, 34, 87. Plaintiffs' action challenges the "legality of the [RBAP's] design," and alleges that its lump-sum methodology

"result[ed] in an unlawful forfeiture of accrued benefits" under ERISA. *Id.* ¶¶ 1, 117-118.

The crux of Plaintiffs' "unlawful forfeiture" contention is that PwC calculated Plaintiffs' lump sums in conformity with Plan terms. Counts One and Five allege that PwC wrongfully "did not ***disregard***" two unlawful Plan terms (JA___-___ ¶ 87) (emphasis added): (1) a Normal Retirement Age that is impermissibly low (*id.* ¶ 115); and (2) a projection rate to Normal Retirement Age that undervalues participant's future interest credits (*id.* ¶¶ 117-118, 131-132).

Although Count Six alleges that Defendants made "false and misleading statements and omissions regarding the Plan's normal retirement age definition" (*id.* ¶¶ 134-136), the complaint nowhere alleges that PwC made false or misleading statements regarding the Plan's projection rate.

The SAC seeks "all relief under ERISA § 502(a)." JA___.

2. Litigation Focused on Normal Retirement Age

From 2006 until 2015, the bulk of this litigation concerned the validity of the Plan's definition of Normal Retirement Age—a Plan term that, if found lawful under ERISA § 3(24), would have disposed of Plaintiffs' claims because whipsaw projections were only ever required when lump sums were distributed ***before*** the attainment of Normal Retirement Age. In response to Plaintiffs' filing of the SAC, PwC filed a Rule 12(b)(6) motion on the ground that the Plan's "five years of

service" Normal Retirement Age was valid as a matter of law. JA___. The District Court denied that motion, but certified its Order for interlocutory review. JA___, JA___.

3. Interlocutory Appeal

In April 2014, this Court, pursuant to 28 U.S.C. § 1292(b), accepted interlocutory review of the District Court's Order denying PwC's Rule 12(b)(6) motion. JA___. The Court expressly limited its review to the first of the three holdings in the District Court's Order, *i.e.*, whether "five years of service" was a valid normal retirement age under ERISA § 3(24). *Laurent*, 794 F.3d at 273. The Court affirmed that holding "without reaching" other issues, reasoning that although Normal Retirement Age can be defined by years of service, five years of service at PwC was too low. *Id.*

PwC's appeal separately challenged the District Court's apparent determination that the Plan's Normal Retirement Age was age 65. *Id.* at 289. This Court did not rule on that issue, concluding that the District Court had not entered such a judgment when denying PwC's Rule 12(b)(6) motion. The Court stated that the question of "appropriate relief" was a matter for the District Court "to address in the first instance." *Id.* The Court's mandate issued following PwC's unsuccessful petition for certiorari. JA___.

4. Class Certification

In October 2013, after the denial of PwC's Rule 12(b)(6) motion, Plaintiffs moved for class certification. Dkt. 161. Plaintiffs sought class-wide relief under Counts 1 and 5 consisting of "declarations" that the RBAP's "method of computing the lump sums" paid to Plaintiffs "is unlawful," and that their lump sums would have to be recalculated

> using the rate that the Court determines would have been the most reasonable projection rate to estimate the amount of . . . future credits at the time of the lump sum payments[.]

JA___-___. Plaintiffs argued that "[i]f the [District] Court were to make these declarations, . . . Defendants would have no choice but to calculate any pension benefits that are still owed to members of the Class pursuant to the terms of the Plan as the Court declares they must be interpreted and applied." JA___.

Plaintiffs did "not move[] to certify" Count 6 regarding Normal Retirement Age—their only claim for equitable relief. JA___. And Plaintiffs explicitly disclaimed reformation and other equitable remedies under ERISA § 502(a)(3) because their whipsaw claim was "'***not equitable***.'" JA___ (emphasis added).

While the interlocutory appeal was pending, the District Court certified a class consisting of participants "who elected to take lump-sum distribution of their benefits under [the RBAP] between March 23, 2000, and August 17, 2006." Dkt. 175 at 9.

5. Proceedings Following Interlocutory Appeal

After the interlocutory appeal, PwC moved in the District Court for judgment on the pleadings on the grounds that the whipsaw relief Plaintiffs seek is not authorized by ERISA § 502(a). Dkt. 210. Shortly thereafter, Plaintiffs moved for summary judgment seeking judicial imposition of a replacement projection rate for the Plan and recalculation of Plaintiffs' lump-sum benefits using that rate. Dkt. 217. When PwC moved under Rule 12(c), no trial had been scheduled. JA___.

The District Court heard oral argument on PwC's Rule 12(c) motion. In response to the District Court's questions at that hearing, Plaintiffs' counsel conceded that Plaintiffs have not alleged, and do not claim, "that [PwC] committed fraud with the projection." JA___.

On July 24, 2017, the District Court granted PwC's Rule 12(c) motion and denied Plaintiffs' motion for summary judgment. JA___-___. Plaintiffs moved for reconsideration, which the District Court denied. JA___-___. The District Court entered final judgment dismissing the case with prejudice (JA___), following which Plaintiffs moved for "clarification" under Rule 60 (Dkt. 246). The District Court denied that motion. JA___-___. This appeal followed.

SUMMARY OF ARGUMENT

PwC's Rule 12(c) motion raised a defense that it had not advanced in its earlier interlocutory appeal. Nonetheless, Plaintiffs contend that this Court should

be presumed to have rejected the defense PwC did not raise when this case was on interlocutory appeal, such that a so-called "mandate waiver rule" precluded PwC from advancing the defense. But Plaintiffs' argument—one of waiver—applies only to appeals of final judgments. Here, the prior appeal was interlocutory. Moreover, that appeal did not involve, and this Court did not consider, the independent defense to relief that PwC first raised following interlocutory appeal. Rule 12(h)(2) authorized PwC to make a subsequent motion for failure to state a claim upon which relief could be granted, and the interlocutory appeal did not extinguish that right. Thus, the District Court properly reached the merits of PwC's motion.

In addition to being procedurally correct, the District Court's determination was substantively correct: There is no statutory endorsement under ERISA Section 502(a) for Plaintiffs' whipsaw claim per ERISA's statutory language and controlling precedent. Because Plaintiffs' claim for relief depends on ***changing*** the terms of the RBAP to conform them to the alleged requirements of ERISA, they cannot proceed under § 502(a)(1)(B). That holding follows from the text of Section 502(a) and *Amara*, and is consistent with the two subsequent appellate decisions that have addressed statutory-violation claims under § 502(a)(1)(B).

The District Court also correctly rejected Plaintiffs' alternative argument that § 502(a)(3) permits the relief they seek in this case, *i.e.*, changing the terms of

the RBAP as they existed during the Class Period and directing recalculation of benefits under the changed plan terms. Although Plaintiffs now argue that plan terms can be changed through an "affirmative injunction," neither the ***basis for their whipsaw claim*** nor the ***nature of their requested remedy*** qualifies as "equitable," as the *Great-West* framework requires for relief under § 502(a)(3).

In addition to their claim being based on a statutory violation (and thus sounding in law not equity), Plaintiffs cannot satisfy the threshold requirements for injunctive relief. Plaintiffs rely only on past injuries and do not identify any ongoing or future harm that would be redressed by the injunction they seek, a prerequisite to obtaining an injunction. In addition, having disclaimed fraud in connection with the Plan's projection methodology, Plaintiffs identify no typically available equitable relief allowing restatement of contract terms. Indeed, no person—not even current RBAP participants—is entitled today to an injunction to "enforce" ERISA's requirements as they existed during the 2000-2006 Class Period; ERISA has been amended and the Plan's current lump-sum methodology accords with the amended law.

Plaintiffs' argument that the District Court incorrectly departed from *Esden*—which they assert establishes their entitlement to whipsaw relief—fails in light of ERISA's statutory text and the Supreme Court's subsequent decisions in *Great-West* (2002) and *Amara* (2011). *Esden* did not address the defense raised in

PwC's Rule 12(c) motion, and *Esden*'s assumption that a whipsaw remedy could be awarded consistent with Section 502(a) has been superseded by Supreme Court authority.

Plaintiffs cannot circumvent their failure to meet the requirements for relief under § 502(a)(1)(B) or § 502(a)(3) by arguing (for the first time on appeal) that those separate subsections can be combined to authorize a remedy that neither one alone endorses. That argument has been forfeited, and in any event is wrong because the subsections of Section 502(a) define distinct avenues of relief.

Finally, policy concerns do not justify the fashioning of a judicial remedy not authorized by the text of Section 502(a).

STANDARD OF REVIEW

The District Court's denials of Plaintiffs' motion for reconsideration and Rule 60 motion are reviewed for "abuse of discretion" (*Shrader v. CSX Transp., Inc.,* 70 F.3d 255, 257 (2d Cir. 1995); *Legg v. Ulster Cty.*, 820 F.3d 67, 78 (2d Cir. 2016)), while statutory questions and the scope of the mandate are reviewed *de novo*.

ARGUMENT

I. PWC'S STATUTORY-ENDORSEMENT DEFENSE WAS PROPERLY RAISED AND ADDRESSED.

Plaintiffs' argument that "the mandate waiver rule" precluded PwC from making a Rule 12(c) motion for judgment on a defense not raised in the interlocutory appeal is wrong. AOB-51. No such rule exists. At root, Plaintiffs are arguing waiver alone: Their contention is that "PwC's failure to make the no-remedy argument in its 2014 interlocutory appeal waived the theory forever." AOB-51-52. That assertion is contrary to controlling law.

Rule 12(c) allows a party to move for judgment on the pleadings "[a]fter the pleadings are closed—but early enough not to delay trial." Plaintiffs' waiver argument assumes that the authority granted by Rule 12(c) is nullified once a defendant has obtained interlocutory review under § 1292(b). In that circumstance, Plaintiffs posit that Rule 12 contains an unwritten exception deeming all Rule 12(b)(6) defenses "forever" waived if they are not included in the interlocutory appeal. AOB-50-54. No case stands for that proposition. To the contrary, as the Second Circuit has recognized, the fact that a party takes an interlocutory appeal does not eliminate independent arguments "as to matters not relied on in the first appeal and not considered in this court, that he would have had if no appeal from the interlocutory decree had been taken." *W. States Mach. Co. v. S.S. Hepworth Co.*, 152 F.2d 79, 80-81 (2d Cir. 1945); *accord McLain Lines v. The Ann Marie*

Tracy, 176 F.2d 709, 710-12 (2d Cir. 1949) (rejecting argument that party "waived its right" to later argue case-dispositive issue "which might have been but [was] not raised on the prior [interlocutory] appeal") (citing *S.S. Hepworth*). Because Rule 12(h)(2) expressly permits successive motions for failure to state a claim, PwC would have been able to assert its statutory-endorsement defense after losing its Rule 12(b)(6) motion had there been no interlocutory appeal, and did not lose its right to do so by seeking review under § 1292(b).

Plaintiffs' case citations provide no support for their "mandate waiver" argument. Four of the eleven cases Plaintiffs cite (AOB 53-54) have nothing to do with waiver, and (as relevant here) address only what issues an appellate court ***may*** reach on interlocutory appeal, *i.e.*, "any issue ***fairly included within the certified order***." *Yamaha Motor Corp., USA v. Calhoun*, 516 U.S. 199, 205 (1996) (emphasis added); *see Castellanos-Contreras v. Decatur Hotels, LLC*, 622 F.3d 393, 399 (5th Cir. 2010); *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 191 n.52 (2d Cir. 2010) (Leval, J., concurring in judgment); *Bersch v. Drexel Firestone, Inc.*, 519 F.2d 974, 993-94 (2d Cir. 1975). None of those cases concerns what issues may be litigated after interlocutory appeal. *See* 16 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 3929.1 (3d ed. 1998) ("Even if a § 1292(b) appeal is perfected, failure to include a matter that might have been included should forfeit review of the omitted matter on final-

judgment appeal ***only if it was central to the interlocutory appeal*** or involves a disfavored dilatory argument.") (emphasis added).

Plaintiffs' remaining seven cases do involve the issue of waiver—but, in all seven, the issue arose only after a ***final judgment***. *See* AOB-50-54. After ***final*** judgment, all case-dispositive arguments are ripe for appellate review, and any arguments that an appellant does not present are waived in subsequent proceedings.[2] *S.S. Hepworth* and its progeny show that a different rule applies in the case of interlocutory appeals, and that PwC was not required to raise all possible grounds for reversal in that procedural setting.

Nor is there support for Plaintiffs' subsidiary argument that the *Laurent* mandate foreclosed consideration "on remand" (AOB-51) of whether the SAC fails to state a claim for whipsaw relief. As an initial matter, there was no "remand" here; a discrete issue was previously before this Court on interlocutory appeal under Section 1292(b), while the case proceeded below. Moreover, Plaintiffs do not cite any mandate cases, let alone acknowledge the settled principle that an appellate mandate "does not extend to issues [the] appellate court did not address" (*New Eng. Ins. Co. v. Healthcare Underwriters Mut. Ins. Co.*, 352 F.3d 599, 606

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[2] For instance, in *United States* v. *Ben Zvi*, 242 F.3d 89 (2d Cir. 2001), the trial court on remand was "foreclosed from reconsidering the underlying merits of the conviction" because the earlier appeal "ha[d] already fully considered the merits of the conviction." *Id.* at 95.

(2d Cir. 2003)). Instead, effectively conceding that *Laurent* did not ***expressly*** discuss the statutory authority for whipsaw relief, Plaintiffs assert that this Court's ruling constituted a "*de facto* holding (for mandate-rule purposes) [] that the Complaint states a claim upon which relief can be granted." AOB-55. That is incorrect.

Plaintiffs rely chiefly on footnote 19 of *Laurent* as directing whipsaw relief for the Class (AOB-32-33), but that argument ignores the procedural context of the footnote. In *Laurent*, PwC raised an independent contention that the District Court, in denying PwC's Rule 12(b)(6) motion, improperly went further by entering judgment against PwC that the RBAP's Normal Retirement Age was "age 65." This Court disagreed that the District Court had entered judgment on that issue, and indicated that "the appropriate relief" remained open for the District Court's resolution.[3] Footnote 19 cannot fairly be construed as precluding PwC's subsequent reliance on an ***independent defense*** not considered or decided by this Court on interlocutory appeal. *Cf. Sompo Japan Ins. Co. of Am. v. Norfolk S. Ry. Co.*, 762 F.3d 165, 175-76 (2d Cir. 2014) (mandate left distinct defenses open on

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[3] Following interlocutory review, PwC argued that—if the District Court were to reach that issue—imposing a normal retirement age of 65 across-the-board for Plan participants without fact development would be inappropriate because, *inter alia*, most PwC partners and principals are required to retire at age 60. Dkt. 224 at 25.

remand). Moreover, even if this Court had implicitly decided an issue never argued, the "*de facto* holding" that Plaintiffs seek to attribute to this Court is contrary to controlling authority and would warrant fresh review. *McLain*, 176 F.2d at 710 ("[T]he district court was not required to carry into the final decree errors which had lurked unnoticed by this court in the interlocutory decree.") (quotation marks omitted).

Nor can the *Laurent* affirmance, standing alone, be read as a "*de facto* holding" that the whipsaw remedy Plaintiffs seek is "relief [that] can be granted" consistent with Section 502(a) (AOB-54-55). In an appeal from the denial of a Rule 12(b)(6) motion, there is no basis to enter judgment for the plaintiff on any issue—indeed, this Court held as much in determining that the District Court's denial of PwC's Rule 12(b)(6) motion did not amount to a holding that the normal retirement age under the Plan was "age 65." *Laurent*, 794 F.3d at 289.[4] Given that the Court disclaimed any judgment for Plaintiffs on the Normal-Retirement-Age issue that ***was*** briefed and argued on appeal, there is no basis for Plaintiffs to contend that the affirmance of the denial of PwC's Rule 12(b)(6) motion

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[4] Plaintiffs repeatedly claim that in *Laurent*, this Court held that multiple "provision**s** of the [RBAP] that were used to calculate Plaintiffs' lump-sum benefit distributions violated ERISA." AOB-3 (emphasis added); AOB-1, 18. That is false. The legality of the Plan's projection-rate provision has never been adjudicated in this case, and PwC's Rule 12(c) motion was based on the defense that ***even if*** the projection rate is invalid, Plaintiffs are not entitled to relief.

constituted judgment for Plaintiffs on the statutory-endorsement issue that ***was not*** briefed or argued on appeal. Nothing about the *Laurent* mandate precluded the District Court from considering legal defenses not previously addressed in the case. *S.S. Hepworth*, 152 F.2d at 80-81. Consequently, PwC was free to raise the statutory-endorsement defense, and the merits of that defense are properly before this Court.

II. PLAINTIFFS ARE NOT ENTITLED TO AN INJUNCTION UNDER SECTION 502(A) TO "ENFORCE" PROVISIONS OF ERISA.

On the merits of PwC's legal defense, the District Court correctly held that Section 502(a) does not contain "a statutory endorsement" for the relief Plaintiffs seek, as is essential "to maintain an action under ERISA." JA___ (quotation marks omitted) (collecting authority). In challenging that ruling, Plaintiffs describe their desired relief as consisting of two steps:

> "Step 1 is an 'affirmative . . . injunction' compelling PwC to conform the text of the Plan to ERISA's requirements" (AOB-29) (alteration in original), which "the Supreme Court in *Amara III* expressly held (as shown below) to be authorized under ERISA §502(a)(3)" (AOB-22); and
>
> "Step 2 is an award of benefits under the terms of the plan 'as reformed,' authorized under ERISA §502(a)(1)(B), as the Supreme Court also recognized in *Amara III*" (AOB-22-23).

Alternatively, Plaintiffs argue that "Step 1" is authorized under § 502(a)(1)(B); that "Step 2" is authorized under § 502(a)(3); and that either subsection alone, or both working together, provide remedial authority for an injunction changing the terms of the Plan and awarding recalculated benefits under the changed terms. (AOB-30-

31). But neither § 502(a)(1)(B) nor § 502(a)(3) entitles Plaintiffs to judicial restatement of the RBAP's lump-sum methodology based on the allegation that the methodology violates ERISA—the common predicate underlying ***all*** of Plaintiffs' theories of relief.

First, the structure of Section 502(a) makes clear that actions to enforce "[the] provisions of [the statute]" (AOB-38) are reserved for § 502(a)(3), and cannot proceed under § 502(a)(1)(B). Furthermore, in *Amara*, the Supreme Court held that § 502(a)(1)(B) cannot be used to enforce terms external to a plan because that subsection is limited to enforcing the terms of a plan, ***as written***. And, subsequently, courts of appeals have applied *Amara*'s holding to reject § 502(a)(1)(B) claims seeking, as here, to enforce ERISA by substituting ERISA-compliant terms for plan terms alleged to be illegal. The District Court was presented with, and correctly applied all of that authority.

Second, § 502(a)(3) does not provide Plaintiffs with an avenue for relief because they are not entitled to equitable relief of any sort, including an "affirmative injunction" change the Plan's terms. As the Supreme Court held in *Mertens v. Hewitt Associates*, 508 U.S. 248, 256 (1993), and has reaffirmed, § 502(a)(3) is limited to "those categories of relief that were ***typically*** available in" premerger courts of equity. Premerger courts of equity did not "typically" issue an injunction changing the terms of a contract where, as here, (i) the only basis for the

requested change is alleged non-compliance with a ***statutory command***, (ii) the "injunction" sought would produce an award of ***money damages*** that would redress only ***past injuries*** affecting former plan participants, ***not prevent future harm***, and (iii) current Plan participants would get no benefit from the requested injunction because the RBAP's lump-sum methodology ***complies with current law***. The District Court thus correctly concluded that the remedy Plaintiffs seek is not cognizable "equitable relief" under § 502(a)(3).

A. Subsection 502(a)(1)(B) Provides No Authority to Change the Terms of a Plan to Enforce Compliance With ERISA.

1. The Text of Section 502(a) Makes Clear that Actions to Enforce the Provisions of ERISA Are Not Authorized Under § 502(a)(1)(B).

Whether labeled "judicial restatement" (AOB-36), "'reformation'" (AOB-39), "correction" (*id.*), or "revision" (AOB-43), Step 1 of Plaintiffs' desired remedy consists of changing the RBAP's unambiguous projection rate to an entirely different rate so that they can get additional monies. Relying chiefly on *May Department Stores v. Federal Insurance Co.*, 305 F.3d 597, 601 (7th Cir. 2002), Plaintiffs contend that "ERISA's plan-content standards" (AOB-36), which are "implied by law" into "'the terms of'" every plan, are the source of the new rate (AOB-30). But that is just another way of saying that Plaintiffs seek to "'enforce [the] provisions of [the statute]' governing what [plan] terms must say" (AOB-38) (first and second alterations in original): Plaintiffs want a judicially

restated projection rate that, they allege, would comply with ERISA by reflecting the value of future interest they would have earned on their accounts through Normal Retirement Age. Subsection 502(a)(1)(B) does not permit such relief.

It is axiomatic that "[s]tatutory construction begins with the plain text and, if that text is unambiguous, it usually ends there as well." *Centurion v. Sessions*, 860 F.3d 69, 75 (2d Cir. 2017) (quotation marks omitted). The only provision of Section 502(a) that allows private enforcement of ERISA's so-called "plan-content standards" (AOB-36) is § 502(a)(3). That subsection authorizes a civil action:

> by a participant, beneficiary, or fiduciary
>
> (A) to ***enjoin*** any act or practice which ***violates any provision of this subchapter*** . . . , or
>
> (B) to obtain other appropriate equitable relief (i) to ***redress such violations*** or (ii) ***to enforce any provisions of this subchapter*** . . . .

29 U.S.C. § 1132(a)(3) (emphases added). By contrast, § 502(a)(1)(B) only permits actions predicated on "***the terms of [the] plan***." 29 U.S.C. § 1132(a)(1)(B) (emphasis added). The insertion of "provisions of this subchapter" into § 502(a)(3)—and the omission of that phrase from § 502(a)(1)(B)—shows that no private action to "enforce" the provisions of ERISA can proceed under § 502(a)(1)(B). Relying on the statutory text, this Court has held that claims alleging a "right" to "benefits" due under the terms of a ***statute*** rather than under the "terms of [the] plaintiffs' ERISA plans" ***do not*** state a cause of action under

§ 502(a)(1)(B). *See Wurtz v. Rawlings Co., LLC*, 761 F.3d 232, 242 (2d Cir. 2014). Claims alleging that plan terms should be "implied by law" under § 502(a)(1)(B) cannot be reconciled with the structure of the statute.[5]

2. In *Amara*, the Supreme Court Held that A District Court May Not Rewrite Plan Terms Using § 502(a)(1)(B) and Then Award Benefits Under Those Rewritten Terms.

The Supreme Court confirmed in *Amara* that the text of § 502(a)(1)(B) does not empower a court to enforce terms ***external to*** the unambiguous "terms of a plan" as if they are plan terms. In *Amara*, the district court's initial award of relief ordered (i) the terms of the plan to be reformed, and (ii) recalculation of remedial benefits under those judicially-compelled terms. *Amara*, 563 U.S. at 434-37. The district court reasoned that recalculated benefits under rewritten plan provisions "constitute[d] 'benefits under the terms of the plan,'" and thus that ERISA § 502(a)(1)(B) "provided the legal authority" for such relief. *Amara*, 563 U.S. at 434 (quoting district court). The Supreme Court disagreed, vacated the entirety of the district court's two-step judgment recalculating benefits, and held that Step 1

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[5] The non-ERISA case *Norfolk Railway* is irrelevant because the court there found a "clear statutory command" to "override" "contractual obligations." Brief of the Secretary of Labor ("Amicus-Br. ") 9 (citing 499 U.S. 117, 130, 134 (1991)). And *Korotynska* had nothing to do with whether § 502(a)(1)(B) authorizes "adding mandatory terms" to a plan derived from ERISA's "substantive content" requirements (Amicus-Br. 8). It was about "abusive claims administration procedures." 474 F.3d 101, 103-04 (4th Cir. 2006).

(changing plan terms) was not available under § 502(a)(1)(B) because there existed no "authority in that section to reform CIGNA's plan as written":

> Where does § 502(a)(1)(B) grant a court the power to ***change*** the terms of the plan as they previously existed? The statutory language speaks of '***enforc[ing]***' the 'terms of the plan,' not of ***changing*** them.

Id. at 435-36, 438 (alteration in original).

Plaintiffs, along with their amicus, insist that *Amara* did not foreclose ***every*** circumstance warranting a change to plan terms, and left open the possibility of recalculating benefits under § 502(a)(1)(B) pursuant to an "affirmative injunction to 'enforce [the] provisions of the [statute]'" over contrary provisions of a plan. AOB-38 (alterations in original); *see also* AOB-22; Amicus-Br. 7, 12. That argument cannot be reconciled with *Amara*'s reasoning that the relief under § 502(a)(1)(B) begins and ends with the terms of a plan, "***as written***." The only exception *Amara* recognized was for ***interpretation***, where outside sources might be consulted to ascertain "what the [plan] language means." 563 U.S. at 436 (citing *UNUM Life Ins. Co. of Am. v. Ward*, 526 U.S. 358 (1999)). But here, it is not possible to "interpret" the RBAP's projection rate—"the interest rate on 30-year Treasury securities" (JA___)—to mean any interest rate other than that on 30-year Treasury securities. As this Court has held in the ERISA context, "a court must not rewrite, under the guise of interpretation, a term of the contract when the

term is clear and unambiguous . . . ." *Burke v. PricewaterhouseCoopers LLP*, 572 F.3d 76, 81 (2d Cir. 2009) (quotation marks omitted).

Omitting the context in which *Amara* cited to *UNUM*, the Secretary suggests that "*Amara* specifically carved out cases like the present, where . . . the plaintiff seeks to enforce plan terms as mandated by ERISA." Amicus-Br. 13. That argument misreads *Amara*'s treatment of *UNUM*. *UNUM* did not purport to impose or enforce any ***new plan term*** governing the content of benefits, nor did it purport to enforce any provision of ERISA governing the content of an ERISA plan. Instead, *UNUM* was a preemption case that turned on ERISA's saving clause (29 U.S.C. § 1144(a)-(b)), which mandates enforcement of ***State laws*** regulating procedural prerequisites for benefits claims under insurance contracts. *UNUM*, 526 U.S. at 367. *UNUM* has no application here.[6]

The Secretary's reliance on *Rush Prudential HMO, Inc. v. Moran*, 536 U.S. 355 (2002) is similarly misplaced. *Rush*, another preemption case, held that ERISA's expansive "saving clause [was] entitled to prevail" such that a state regulation permitting "independent medical review" of benefit denials—which the

[6] Plaintiffs and the Secretary rely on the pre-*Amara* case, *Central Laborers' Pension Fund v. Heinz*, 541 U.S. 739 (2004), for the proposition that the language of § 502(a)(1)(B) ("the terms of the plan") "must be interpreted to include the terms that ERISA mandates to be in the plan." Amicus-Br. 7-8; *see also* AOB-5. *Heinz* does not say that; Section 502(a) is not even mentioned.

Court viewed as akin to the "claims-procedure rule" in *UNUM*—took precedence over the plan's benefit-review provisions. *Id*. at 380, 387. Notably, the Supreme Court emphasized that "the relief ultimately available [to participants] would still be ***what ERISA authorizes*** in a suit for benefits ***under § 1132(a)***," and did "***not*** involve [an] additional claim or remedy" beyond what ERISA authorizes. *Id*. at 381 (relying on *UNUM*) (emphases added). By contrast, Plaintiffs' whipsaw claim seeks an "***additional*** . . . remedy" beyond what ERISA authorizes in a suit for benefits under § 502(a).[7]

3. Both Courts of Appeals That Have Addressed the Issue After *Amara* Have Rejected Benefit Claims Premised On the Enforcement of ERISA Under § 502(a)(1)(B).

Following *Amara*, two courts of appeals have determined that § 502(a)(1)(B) does not authorize benefit claims premised on ERISA's minimum standards rather than plan terms.

In *Pender v. Bank of America Corp.*, 788 F.3d 354 (4th Cir. 2015), the plaintiffs claimed that plan amendments violated ERISA's "anti-cutback" rule (29 U.S.C. § 1054(g)(1)) and had the effect of depriving participants of the value of all investment gains realized upon their accounts. 788 F.3d at 360-61. Under the

[7] Equally unavailing is the Secretary's reliance on *Heimeshoff v. Hartford Life & Accident Insurance. Co.*, 571 U.S. 99 (2013) (Amicus-Br. 14-15), which did not hold that a court may "ignore[] the terms of the plan as written" to ensure compliance with ERISA (Amicus-Br. 14); *Heimeshoff* held that the plan's terms were to "be enforced as written . . . ." 571 U.S. at 611.

terms of the plan, the plaintiffs were not entitled to any additional benefits. *Id.* at 361-62. But the *Pender* plaintiffs argued—just as Plaintiffs allege here—that because the defendant had failed "to administer the plan in a manner 'consistent with ERISA's minimum standards,'" the plan's provisions were unenforceable and required replacement with ERISA-compliant provisions. *Compare id.* at 361, *with* JA___-___ ¶¶ 1-3, 118. The Fourth Circuit held that *Amara* "explicitly preclud[ed] [the plaintiffs] from using [§ 502(a)(1)(B)] to recover the relief they seek" because they "sought to enforce the plan not as written, but as it should properly be enforced under ERISA." 788 F.3d at 362. The court rejected plaintiffs' argument that applying the benefits "'formula'" consistent with "'ERISA's minimum standards'" was equivalent to enforcing the terms of the plan under § 502(a)(1)(B). *Id*. at 361-62.

In *Soehnlen v. Fleet Owners Insurance Fund*, 844 F.3d 576 (6th Cir. 2016), another statutory-violation case, the Sixth Circuit adopted the same reading of *Amara* as the Fourth Circuit did in *Pender*. Recognizing that the plaintiffs' claim alleged "that the terms of the Plan do not comply with the law" governing minimum ERISA benefits—which "tacitly concede[d] that the relief [the plaintiffs] seek exists outside the scope of their plan"—the court noted that the case would likely fail "on the merits" because "an action attempting to rewrite the terms of a plan is unavailable under § [502](a)(1)(B)." *Id.* at 583 n.2 (citing *Amara*).

The Secretary attempts to distinguish *Pender* and *Soehnlen* on the ground that those cases "did not involve plan terms that themselves violate ERISA's requirements." Amicus-Br. 16. That is incorrect. In both cases, the courts understood that the plaintiffs challenged plan terms as illegal, and in neither case were the plaintiffs permitted to obtain recalculated benefits under § 502(a)(1)(B).

In the only two post-*Amara* whipsaw cases Plaintiffs and the Secretary cite, judgment had been entered in the plaintiffs' favor in the district court before issuance of the *Amara* decision. *Thompson v. Ret. Plan for Emps. of S.C. Johnson & Son, Inc.*, 651 F.3d 600 (7th Cir. 2011); *Ruppert v. Alliant Energy Cash Balance Pension Plan*, 726 F.3d 936 (7th Cir. 2013) (cited at AOB-29; Amicus-Br. 15). There is no indication that the defendant in either case invoked *Amara* in the appeals court as foreclosing the plaintiffs' whipsaw claim as a matter of law. And the Seventh Circuit neither referenced *Amara* nor examined whether, after *Amara*, § 502(a)(1)(B) can be read to authorize changing plan terms to conform them to statutory requirements. Accordingly, as the District Court properly determined, those cases deserve no weight. *See* JA___-___.

B. Subsection 502(a)(3) Does Not Permit the Issuance of an "Injunction" Compelling PwC to Revise the Plan's Lump-Sum Methodology.

Plaintiffs suggest that because they are seeking what they call an "affirmative injunction" (echoing terminology the Supreme Court used once in

Amara) which "orders an affirmative act or course of conduct", *a fortiori* Step 1 is "clearly authorized as an equitable injunction under ERISA § 502(a)(3)" (AOB-29-30). But, as the District Court correctly found, the issue here has nothing to do with the distinction between affirmative and prohibitory injunctions; it is whether Plaintiffs can satisfy the basic prerequisites for ***any*** injunction. Labeling the relief they seek an "affirmative injunction" does nothing to establish Plaintiffs' right to relief under § 502(a)(3), and the "affirmative act or course of conduct" (AOB-31) they seek to compel is nothing more than the payment of money damages for an allegedly past-due obligation. In substance, the basis and nature of Plaintiffs' requested relief is legal not equitable, and it is therefore not cognizable under § 502(a)(3). *See Central States*, 771 F.3d at 154 ("[Plaintiffs'] claims are, in essence, legal ones for money damages even though they are covered by an equitable label.").

1. Because Plaintiffs Base Their Claim for Injunctive Relief On an Alleged Statutory Violation, Their Claim Is Legal.

As this Court recognized in *Central States*, "courts must examine 'the basis for the plaintiff's claim'" for relief before deciding whether it qualifies as "equitable." *Central States*, 771 F.3d at 153 (quoting *Great-West*). Here, Plaintiffs base their claim entirely on an alleged statutory violation: they describe the "source of '[their] rights under the plan'" to whipsaw payments as "***the ERISA***

statute" (as interpreted by Notice 96-8) (AOB-43). ERISA case-law confirms that the basis for Plaintiffs' claim is legal, not equitable.

In the era of the divided bench, a claim "to redress the breach of a statutory obligation to pay a sum certain" constituted "an action of assumpsit (a form of trespass on the case)," and was considered "***an action at law***." *Crosby v. Bowater Inc. Ret. Plan for Salaried Emps. of Great N. Paper, Inc.*, 382 F.3d 587, 596 (6th Cir. 2004) (emphasis added); *see also Curtis v. Loether*, 415 U.S. 189, 195 (1974) (holding that Title VII claim is properly considered "an action at law" because it is an action "for enforcement of statutory rights" that seeks redress for their violation), *cited with approval in Mertens*, 508 U.S. at 255. Thus, in *Crosby*, the Sixth Circuit rejected an action for "benefits . . . not claimed to be due under terms of the plan, strictly speaking, but under the terms of a statute—in this case ERISA § 203(a), 29 U.S.C. § 1053(a)—setting forth requirements that the plan must satisfy," because it "did not qualify as 'equitable relief' of the sort authorized by ERISA § 502(a)(3)." *Id.* at 593-94.

Adopting that reasoning, the Sixth Circuit held in 2007 that whipsaw relief ***cannot*** be awarded "under § 502(a)(3)" because the source of the "'money claimed to be due'" was a "statutory violation," and "[l]awsuits seeking to compel the defendant to pay a sum of money . . . almost invariably are suits for money

damages, the classic form of legal relief." *West v. AK Steel Corp.*, 484 F.3d 395, 403-04 (6th Cir. 2007) (citing *Crosby*).[8]

Plaintiffs dismiss that aspect of *West* as *dicta* (AOB-47). It is not. The *West* court squarely addressed the defendant's argument "that the plaintiffs cannot recover the [whipsaw] relief they request under ERISA § 502(a)(3)," and agreed that the complaint did not "assert a proper equitable claim under § 502(a)(3) where the heart of the plaintiff's prayer for relief was a request for recovery of additional lump sum benefits" (484 F.3d at 402-03) (quotation marks omitted)—exactly the relief sought here.

Plaintiffs also contend that both *Crosby* and *West* were "later abrogated" by *Durand v. Hanover Insurance Group*, 560 F.3d 436 (6th Cir. 2009) (AOB-47-48 & n.4). But *Durand* addressed only whether the plaintiffs had to administratively exhaust claims alleging plan illegality before bringing suit; the opinion does not discuss the limits of Section 502(a)—let alone abrogate *sub silentio* ***two*** prior panel

[8] Although Plaintiffs' whipsaw relief rests exclusively on an alleged plan-design violation, the Secretary argues that "injunctive or other appropriate equitable" relief is available here because "PwC breached its ERISA-imposed fiduciary duties when it made claims decisions that violated ERISA." Amicus-Br. 22-23. No response is needed: "[A]n issue raised only by an *amicus curiae* is normally not considered on appeal." *In re Quigley Co., Inc.*, 676 F.3d 45, 53 & n.5 (2d Cir. 2012) (quotation marks omitted). In any event, the District Court heard (*see* Dkt. 234; Dkt. 235) and properly rejected arguments concerning breach of fiduciary duty (JA___-___).

holdings interpreting § 502(a)(3). Plaintiffs have not identified any *en banc* ruling or intervening Supreme Court authority that affected *Crosby*'s and *West*'s § 502(a)(3) holdings. Accordingly, those cases remain persuasive authority. *See Darrah v. City of Oak Park*, 255 F.3d 301, 309-10 (6th Cir. 2001) (conditions necessary for implied abrogation of prior panel opinions).

2. Because There Is No Threat of Future Injury to Any Class Member, the Requested "Injunction" Is Only a Vehicle for an Award of Money Damages to Redress Past Injuries and Is Not Authorized Under § 502(a)(3).

Plaintiffs' use of the label "injunction" to characterize the relief they seek fails for the additional reason that "courts must examine the . . . underlying nature of the remedies sought" to determine whether "claims are viable." *Central States*, 771 F.3d at 155 (citing *Great-West*). Specifically, the Supreme Court explained that Congress's reference in § 502(a)(3)(B) to "***other*** appropriate equitable relief" means that every assertedly injunctive remedy under § 502(a)(3) must qualify as ***equitable***, and is subject to "the limitations upon [an injunction's] availability that equity typically imposes." *Great-West*, 534 U.S. at 211 n.1. "Without this rule of construction," the Court continued, "a statutory limitation to injunctive relief would be meaningless, since any claim for legal relief can, with lawyerly inventiveness, be phrased in terms of an injunction." *Id*. In other words, Plaintiffs cannot dress up what is fundamentally a demand for money damages as an "affirmative injunction."

Every Class member exited the RBAP between twelve and eighteen years ago, and their claim turns on the allegation that PwC wronged them when it distributed their lump sums before August 17, 2006 without disregarding allegedly illegal Plan terms. Inherent to the Class definition is that there is no Plaintiff who would benefit in any way from the Step 1 decree (restated Plan terms) alone. If the Court did not proceed to Step 2 of Plaintiffs' desired relief—and "[a]ward benefits to Plaintiffs under the Plan's corrected terms" (AOB-29)—the "affirmative injunction" would be meaningless. AOB-9. Under these circumstances, Plaintiffs are not entitled to injunctive relief.

It is black-letter law that a plaintiff seeking an injunction "cannot rely solely on past injuries," but must show "a sufficient likelihood that he or she will again be wronged in a similar way." *Marcavage v. City of New York*, 689 F.3d 98, 103 (2d Cir. 2012) (alterations and quotation marks omitted). Simply put, to obtain an injunction, a plaintiff must be within the group of persons who would benefit from a decree preventing present or future harm. *See City of Los Angeles v. Lyons*, 461 U.S. 95, 111 (1983) ("If Lyons has made no showing that he is realistically threatened by a repetition of his experience of October, 1976, then he has not met the requirements for seeking an injunction in a federal court, whether the injunction contemplates intrusive structural relief or the cessation of a discrete practice."). As the Supreme Court has underscored, "[t]he sole function of an

action for injunction is to forestall future violations," as distinguished from "reparations for those past," which must be pursued as "action[s] for damages by those injured." *United States v. Ore. State Med. Soc.*, 343 U.S. 326, 333 (1952). The Court further noted that absent "contemporary violation of a nature likely to continue or recur[,] . . . it adds nothing that the calendar of years gone by might have been filled with transgressions." *Id.*

This Court applied the prospective-relief test in *Amara* and concluded that an injunction could be awarded there consistent with § 502(a)(3) because the *Amara* class "s[ought] prospective injunctive relief and ***involve[d] members that would benefit from such a decree***." *Amara v. CIGNA Corp.*, 775 F.3d 510, 524 n.9 (2d Cir. 2014) (emphasis added) (distinguishing *Hecht v. United Collection Bureau¸ Inc.*, 691 F.3d 218 (2d Cir. 2012), where no class member would have benefited prospectively from the decree other than by using it as a platform for money damages). In other words, the Second Circuit in *Amara* allowed former plan participants to benefit ***incidentally*** from injunctive relief that was available ***because*** the *Amara* class included current plan participants who would benefit from the injunction.

Unlike in *Amara*, the Class here is exclusively comprised of ***former*** Plan participants. Because there are no current plan participants in the Class, there is no basis for an injunction in the first instance, and thus the predicate for incidental

benefits for cashed-out Plaintiffs does not exist. Plaintiffs seek to restate the terms of a plan they no longer participate in—relief that would not address any ongoing or threatened harm to them. No "reasonable plaintiff[]" would bring suit to obtain such "injunctive relief" ***unless*** a money-damages award flowed from the court decree. *See Hecht*, 691 F.3d at 223. The whipsaw remedy Plaintiffs seek is thus an "[i]nsignificant or sham request[] for injunctive relief" designed only to get money into their hands.[9] *Id.* at 223; *see also Coan v. Kaufman*, 457 F.3d 260, 264 (2d Cir. 2006) (agreeing with district court that "injunction requiring the defendants to restore funds . . . to be distributed to former participants, does not transform what is effectively a money damages request into equitable relief") (quotation marks omitted). Plaintiffs' argument that cashed-out former participants qualify as "participants" under Section 502(a) (AOB-49) misses the

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[9] The Secretary's suggestion that § 502(a)(3)(A) provides "specific authority" for an injunction here is misplaced (Amicus-Br. 21). That subsection, written in the present tense, authorizes only injunctions that would "enjoin" ongoing (or future) acts. *See, e.g.*, *Carr v. United States*, 560 U.S. 438, 447-48 (2010) (statute phrased "in the present tense" did not reach conduct that occurred in the past); *Wallace v. Cutten*, 298 U.S. 229, 237 (1936) (vacating suspension for illegality that antedated complaint because statute only authorized suspending trader who "'is violating'" the Act); 1 U.S.C. § 1 (2012) (when construing statutes, "words used in the present tense include the future as well as the present"). As discussed above, former plan participants face no current or future acts to be enjoined.

point—these Plaintiffs are not entitled to the relief they seek because it is not "equitable" relief under ERISA § 502(a)(3).

Plaintiffs dismiss the distinction between former and current plan participants as "obviously wrong, indeed 'silly,'" citing *Johnson v. Meriter Health Services Employee Retirement Plan*, 702 F.3d 364, 369 (7th Cir. 2012), which they assert "is in all relevant respects identical to this case." AOB-41, 48. Far from identical, *Johnson* is inapposite. There, the Seventh Circuit did not address the scope or limitations of Section 502(a). *Johnson* addressed ***only*** whether a class had properly been certified under Federal Rule of Civil Procedure 23. 702 F.3d at 365 ("The district court certified this ERISA suit as a class action, and we granted the petition of the defendants . . . ***to appeal the certification***.") (emphasis added). *Johnson* did not once cite or refer to Section 502(a), let alone to *Amara*, *Mertens*, or *Great-West*.

Although *Johnson* never addressed § 502(a)(3), Plaintiffs suggest that the Second Circuit's 2014 *Amara* decision "agreed with" *Johnson*'s analysis in providing the *Amara* class with § 502(a)(3) relief. AOB-42. That is demonstrably wrong. *Amara*'s discussion of *Johnson* was limited to the issue of whether ***class-wide*** relief was appropriately ordered under Rule 23(b)(2) in a class that comprised current and former plan participants. *Amara*, 775 F.3d at 519-520. The Rule 23 aspect of *Johnson* and *Amara* is irrelevant to this case, and this Court's analysis in

Amara as to the class's entitlement to § 502(a)(3) relief did not rely on *Johnson*. The injunctive relief in *Amara* was incidental to the primary remedy of reformation, which those plaintiffs were awarded after demonstrating fraud.

Cases issuing injunctions as incidental relief are of no benefit to Plaintiffs, who are former Plan participants who claim to be seeking nothing more than an injunction. Cashed-out former plan members cannot obtain an injunction based only on past ERISA violations. The leading authority on this point is *West v. AK Steel*, which held that plaintiffs who had "'cashed out' of their participation in the Plan" with lump-sum payments were ineligible for an injunction awarding whipsaw relief under § 502(a)(3) because their claim was legal, not equitable. 484 F.3d at 403-04. The Ninth and Fifth Circuits agree that former participants cannot obtain such injunctions under § 502(a)(3). *See DeFazio v. Hollister Emp. Share Ownership Tr.*, 612 F. App'x 439, 441 (9th Cir. 2015) (plaintiffs who proved defendants had violated ERISA's fiduciary provisions had no standing to request prospective equitable relief under § 502(a)(3) because they "ha[d] ***already cashed out of the Plan***") (emphasis added) (citing *Lyons*); *Hendricks v. UBS Financial Services, Inc.*, 546 F. App'x 514, 516 & n.6 (5th Cir. 2013) (rejecting plaintiffs' attempt to avoid arbitration on grounds that they were seeking injunctive relief under § 502(a)(3) because the so-called injunction would not have prospective effect; "their relationship (and that of the class members they seek to represent)

with [the employer] ha[d] ***ended***, and they unabashedly seek ultimately to recover ***monetary*** relief") (emphasis added).

3. Absent Fraud Or Mistake, Premerger Courts of Equity Would Not Typically Revise Contracts.

Plaintiffs (and the Secretary) argue that premerger equity courts would compel the revision of contracts retroactively—in the "colloquial sense of 'change'"—to "correct any written instrument 'which ***for some reason*** does not conform to the actual rights and duties of the parties.'" AOB-39-40 (quoting *Pomeroy*, § 112, p. 146); *see also* Amicus-Br. 18-19. Based on that supposed practice, Plaintiffs disclaim any need to prove fraud or mistake to "compel the revision of a pension plan's terms" under § 502(a)(3). AOB-43. Plaintiffs' argument, resting chiefly on sentence fragments from equity treatises and citations without explication (AOB-31, 39-40), fails to demonstrate how the enforce-and-recalculate remedy is "equitable relief [that] was typically available in premerger equity courts." *Montanile v. Bd. of Trs. of the Nat'l Elevator Indus. Health Benefit Plan*, 136 S. Ct. 651, 657, 660 n.3 (2016) (announcing that "our interpretation of 'equitable relief' in *Mertens*, *Great-West*, and *Sereboff v. Mid Atlantic Medical Services, Inc.*, 547 U.S. 356 (2006), remains unchanged" after *Amara*). Plaintiffs do not once acknowledge the "typically available" limitation on § 502(a)(3) relief.

Judicial restatement of ***contract terms*** solely to "'meet minimum legal standards'" (AOB-24 (quoting 1 D. B. Dobbs, *Law of Remedies* § 11.6(1), at 743

(2d ed. 1993))) was a controversial and infrequent phenomenon in premerger equity. *See* Dobbs § 4.3(7), at 619. Plaintiffs twice point this Court to Dobbs § 11.6(1) (AOB-24, 40), but fail to mention that § 11.6(1) contains an explicit cross reference to § 4.3(7), which identifies § 11.6(1) as "***Nontraditional***" reformation that equity courts "sometimes" employed to revise contracts for reasons other than mistake (Dobbs § 11.6(1), at 743 & n.3; Dobbs § 4.3(7) at 619) (emphasis added). On its face, Dobbs' reference to ***non***traditional reformation that was "sometimes" used defeats Plaintiffs' assertion that Dobbs supports their § 502(a)(3) argument. *See Great-West*, 534 U.S. at 216 (finding unpersuasive dissenting view that "***some*** restitutionary remedies were typically available in equity" on the ground that § 502(a)(3) authorizes only the "form[s] of restitution traditionally available in equity"). Indeed, Dobbs elsewhere confirms that the type of reformation Plaintiffs seek—"reformation to reflect legal standard[s]"—was a "special instance[]," distinct from "the traditional purpose of reformation." Dobbs § 9.5, at 614-15.[10]

[10] Plaintiffs' remaining citations to equity treatises are similarly inapposite. Dobbs § 2.9(3) addresses injunctions compelling compliance with statutory commands to prevent irreparable harm, under circumstances where no contract governed the parties' relations. And the sentence fragment Plaintiffs cite from *Pomeroy* does not state that contract correction to conform to statutory requirements was typically available from a premerger court of equity.

Moreover, Dobbs confirms that the typical practice of equity courts, when presented with an assertedly illegal contract, was to ***rescind*** the contract altogether rather than use "reformation . . . to foist upon the parties a contract they never made." 2 Dobbs § 11.6(2), p. 748; *see also* E. Merwin, *The Principles of Equity and Equity Pleading*, ¶ 477, p. 258 (H. Merwin, ed., 1895) ("[E]quity will never make a new contract for the parties."); *id.*, ¶ 571(a), p. 305; J. Eaton, *Handbook of Equity Jurisprudence*, ¶ 312, p. 625 (1901); 1 J. Story, *Commentaries on Equity Jurisprudence* § 298, pp. 241-42 (12th ed. 1877); J. Adams, Jr., *The Doctrine of Equity: A Commentary on the Law as Administered by the Court of Chancery* 170 (7th Am. ed. 1881); *id.* at 175 ("The prayer . . . must be confined to cancellation of the contract, and must not couple relief in affirmance of it, such as specific performance or reformation of error.").

If, as here, the remedy sought was contract ***revision***, not rescission, equity courts would ***typically*** grant that form of relief in only two limited circumstances: (1) mutual mistake about the meaning of contract terms, or (2) fraud by one party that caused the other party to be mistaken about contract terms. *See, e.g.*, *Amara*, 563 U.S. at 440-41; *accord Amara*, 775 F.3d at 525-26; *Gabriel v. Alaska Elec. Pension Fund*, 773 F.3d 945, 955 (9th Cir. 2014); *Morales v. Intelsat Glob. Serv. LLC*, 554 Fed. App'x 4, 5 (D.C. Cir. 2014); 4 S. Symons, *Pomeroy's Equity*

Jurisprudence § 1375, at 1000 (5th ed. 1941) (reformation "chiefly occasioned by fraud or mistake").

Plaintiffs rely on *Osberg v. Foot Locker, Inc.*, 555 F. App'x 77 (2d Cir. 2014), to show that former plan participants can get unpaid benefits under the plan "'as it should be once reformed'" (AOB-8-9), overlooking, however, that *Osberg* underscored that ***fraud*** is an essential predicate to plan reformation. *Osberg* relied on two premerger cases as instructive on the circumstances necessary for contract revision, *Baltzer v. Raleigh & Augusta Air-Line R. Co.*, 115 U.S. 635 (1885) (also relied on by the Supreme Court in *Amara*), and *Hogg v. Maxwell*, 218 F. 356 (2d Cir. 1914). Notably, both *Baltzer* and *Hogg* stand for the proposition that "equity will withhold" relief amounting to contract revision ***unless*** "mistake or fraud were shown." *Baltzer*, 115 U.S. at 645; *Hogg*, 218 F. at 357. Nothing in *Osberg* suggests that reformation is available for statutorily non-compliant terms ***unaccompanied by fraud***. And, contrary to the Secretary's suggestion, the District Court here did not deny reformation solely because the Class seeks a ***monetary*** recovery (Amicus-Br. 24). Rather, the District Court correctly understood that "the equitable remedy of reformation is available in cases of fraud and mutual mistake—neither of which is at issue here." JA___.

Plaintiffs and the Secretary cite a handful of cases that supposedly stand for the proposition that courts can revise ERISA plan terms to bring them into

conformity with the statute. *See* AOB-5, 40; Amicus-Br. 25 n.8. Those cases shed no light on whether § 502(a)(3) permits former plan participants to obtain plan reformation in order to recalculate already-distributed benefits under such reformed terms. Neither *Nechis v. Oxford Health Plans, Inc.*, 421 F.3d 96 (2d Cir. 2005), nor *DeVito v. Pension Plan of Local 819 I.B.T. Pension Fund*, 975 F. Supp. 258 (S.D.N.Y. 1997), reformed a plan, much less on the basis of allegedly illegal plan terms. In the *Frommert* case (*Conkright v. Frommert*, 559 U.S. 506 (2010)), the Second Circuit, as statutorily authorized, enforced the plan "without regard to" an amendment (29 U.S.C. § 1054(h)(6)(a)(i)) because the sponsor failed to provide adequate ***notice*** to participants. In contrast, Plaintiffs do not allege any such defective communication between PwC and Plan participants, and there is no corollary to § 1054(h)(6)(a)(i) authorizing the plan revision Plaintiffs seek.

Both *McDonald v. Pension Plan of the NYSA-ILA Pension Trust Fund*, 320 F.3d 151, 154 (2d Cir. 2003), and *Swede v. Rochester Carpenters Pension Fund*, 467 F.3d 216, 218 (2d Cir. 2006) (cited at AOB-5), involved current plan participants receiving monthly benefits who sought judicial revision of plan terms. Neither is inconsistent with PwC's position here. Subsection 502(a)(3)(A) expressly permits current plan participants to bring claims to enforce statutory rights. But that subsection, and cases like *McDonald* and *Swede*, are inapposite to

this case, which involves a Class comprised solely of former plan participants. *Supra* pp. 36-41.

The out-of-circuit cases Plaintiffs cite are not persuasive because they do not address the basis for the District Court's determination. *Page v. PBGC*, 968 F.2d 1310, 1311 (D.C. Cir. 1992), considered an Administrative Procedure Act challenge to the PBGC's interpretation of a different section of ERISA (29 U.S.C. § 4022(a)), and says nothing about the limitations on relief under ERISA Section 502(a) later clarified by the Supreme Court. And in *Carrabba v. Randalls Food Markets, Inc.*, 145 F. Supp. 2d 763, 766 (N.D. Tex. 2000), the defendants apparently disputed only "the nature and level of the benefits the court should afford the Class," ***not*** whether "financial benefits" based on "the requirements of ERISA" constitutes a typically available equitable remedy under § 502(a)(3) (assumed to be the case, without discussion).[11]

[11] In an argument never presented to the District Court, Plaintiffs and the Secretary suggest (in footnotes) that "[t]he statutory illegalities that PwC committed could be construed, if need be, as a species of fraud, mistake, or inequitable conduct" in support of reformation (AOB-40 n.3; Amicus-Br. 25-26 n.8). Plaintiffs cannot now reclaim by implication the factual predicate of "fraud or inequitable conduct" that they explicitly conceded did not exist. *Supra* p. 14; *see United States v. Fairchild*, 189 F.3d 769, 780 (8th Cir. 1999).

4. Because the PPA Has Eliminated Whipsaw Calculations, the Injunction Plaintiffs Seek Could Not Even Benefit Current RBAP Participants, Were Any in the Class.

Plaintiffs are not entitled to an "affirmative injunction . . . to 'enforce [the] provisions of [the statute]' governing what [plan] terms must say" (AOB-38) (alterations in original) for the additional reason that, under current ERISA law, ***no one*** (including ***current*** Plan members) could obtain such an "injunction." In 2006, the PPA amended ERISA "to explicitly state that cash balance plans are not required to employ the whipsaw calculation when figuring lump-sum distributions" for any participant who requests a pre-normal-retirement-age lump-sum distribution after August 17, 2006. *West*, 484 F.3d at 411 (citing 29 U.S.C. § 701). And, as the IRS later recognized, the RBAP's amended lump-sum methodology is "permitted under PPA." *Supra* p. 9.

Thus, even if some Plaintiffs were current RBAP participants, the requested injunction to change the Plan's lump-sum provisions could not issue because (i) although the parties disagree about the legality of the RBAP's ***pre***-existing terms under ***pre***-PPA law, those provisions are no longer in effect for any RBAP member, and (ii) paying lump-sum distributions in amounts equal to the "balance in the hypothetical account," as the RBAP currently specifies, does not violate ERISA.

Plaintiffs dismiss the significance of the PPA (AOB-12 n.1), but it presents an insurmountable obstacle to injunctive relief for the Class, and Plaintiffs' pleading amendments reflect as much.[12] The original complaint proposed a "Lump Sum Subclass" comprised of all participants "who received ***or may in the future receive*** a lump sum distribution of all or any portion of their accrued benefit under the Plan"; following the PPA, Plaintiffs limited the case to those participants "who at any point ***before August 17, 2006 received*** a lump sum distribution of all or any portion of their accrued benefit under the Plan." *Compare* Dkt. 1 ¶ 87 *with* JA___-___ ¶ 138 (emphases added). Plaintiffs have no interest in an injunction compelling compliance with ERISA ***as it currently exists***, because ERISA does not currently require whipsaw payments. Rather, they seek to compel PwC to recalculate benefits retroactively using judicially amended terms that would apply only to the RBAP's pre-2006 lump-sum methodology and only with respect to this Class of former participants. That relief amounts to class-wide compensatory damages, and describing it as the product of an "injunction" does not make it

[12] Citing *West*, this Court stated in *Laurent* that the parties "agree that the [PPA] does not apply to this case." 794 F.3d at 276. It appears this Court meant that neither side on interlocutory appeal challenged the Sixth Circuit's conclusion in *West* that the PPA does not retroactively eliminate whipsaw calculations for pre-PPA lump-sum distributions. Nevertheless, the PPA does bear on the availability of an injunction ordering whipsaw relief—a separate question—and *West* held that former plan participants were ***not*** entitled to an injunction under § 502(a)(3). *See supra* pp. 41.

"equitable" (or even "appropriate") under § 502(a)(3), which gives a court "the power to deny [] relief (even if it is a form of equitable relief[)] . . . if it deems such relief not 'appropriate' ***under the particular facts of the case***." *Pender v. Bank of Am. Corp.*, 736 F. App'x 359, 368-72 (4th Cir. 2018) (affirming denial of § 502(a)(3) relief following Title I violation) (emphasis added).[13] Courts of equity would not typically issue a past-tense "injunction" requiring a defendant to comply with a historical legal obligation ***that no longer exists***. *See, e.g.*, *Cont'l Sec. Co. v. Interborough Rapid Transit Co.*, 207 F. 467, 471 (S.D.N.Y. 1913) ("[E]quity acts

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[13] Plaintiffs' requested summary adjudication—seeking an interest-projection rate of 12.7% (AOB-58, JA___ ¶¶ 25, 40) for the time period between the date Class members received lump sums and the date they attain age 65—would not be ***appropriate*** equitable relief (even apart from its total lack of record support). Such relief would have the effect of providing former Plan participants with consistently positive interest credits, guaranteed over multiple decades, that were ***never available under the Plan to any participant***. Given the magnitude of the spread between the requested projection rate and the statutory discount rate, Plaintiffs' theory seeks windfall damages in the billions of dollars for participants who already received the full current value of their account balances. *See Conkright*, 559 U.S. at 519-20 (Roberts, C.J.) (criticizing district court's award, "which does not account for the fact that respondents were able to use their past distributions as they saw fit for over 20 years" because it "would place respondents in a better position than employees who never left the company"). Thus, even were the Court to vacate the judgment, further proceedings would be necessary to determine which, if any, Class members would appropriately be entitled to equitable relief under § 502(a)(3), given that no Class member could state a claim for additional benefits under the terms of the Plan as written. *See* § 502(a)(1)(B); *supra* pp. 25-32.

in the present tense," and molds its "decree to actualities not history"), *aff'd*, 221 F. 44 (2d Cir. 1915).

5. *Esden* Did Not Require the District Court to Reject PwC's Rule 12(c) Motion On the Merits.

Lacking authority post-dating *Great-West* and *Amara* that analyzed and permitted the revision of plan terms on the basis of a statutory violation, Plaintiffs look to *Esden*, which they assert "held that the obvious remedy for [a] ***violation of the statute***" was to enjoin the defendant plan sponsor to rewrite the plan's illegal terms to make them comply with ERISA and then recalculate benefits in accordance with the revised terms (AOB-43-44). *Esden*, however, does not control the analysis here.

As the District Court correctly held, post-*Esden* authority announcing limitations on the remedies authorized by § 502(a)(1)(B) and § 502(a)(3) shows "that § 502(a) does not authorize the form of relief that Plaintiffs seek." *See* JA___-___; *supra* pp. 23-51.[14] Plaintiffs contend that none of that subsequent authority matters because *Esden* itself has not been explicitly overruled. But that misstates how this Court regards the authority of prior panel opinions. A panel is

[14] Neither party in *Esden* appears to have raised the statutory-endorsement issue, and the Court did not address it. *Esden*'s reference to Section 502(a) is merely an observation—drawn from the complaint—that the plaintiff had "brought this class action pursuant to ERISA §§ 502(a)(1)(B) and (a)(3)." *Esden*, 229 F.3d at 161-62.

not bound by a prior panel decision when an "intervening Supreme Court decision . . . casts doubt on our controlling precedent." *Wojchowski v. Daines*, 498 F.3d 99, 106 (2d Cir. 2007) (quotation marks omitted). "[F]or this exception to apply, the intervening decision need not address the precise issue already decided by our Court." *Union of Needletrades, Indus. & Textile Emps., AFL-CIO, CLC v. U.S. I.N.S.*, 336 F.3d 200, 210 (2d Cir. 2003); *see also Janese v. Fay*, 692 F.3d 221, 225-27 (2d Cir. 2012) (holding that prior panel ERISA opinion had been abrogated "by the combined effect of three decisions of the Supreme Court"); *Gerosa v. Savasta & Co., Inc.*, 329 F.3d 317, 322 (2d Cir. 2003) (holding that a prior panel opinion "imply[ing] a damages remedy" to avoid frustrating "the underlying purposes of ERISA . . . has not survived subsequent Supreme Court determinations").

Thus, whether "*Esden* and all of the other reported whipsaw cases (in multiple Circuits) were wrongly decided" ***at the time*** (AOB-4) is irrelevant.[15] *Great-West*, *Amara*, *Montanile*, and their progeny confirm that Section 502(a) does

[15] Although Plaintiffs contend that the *Laurent* Court directed the District Court to "implement the established *Esden* framework" for "enforce-and-recalculate" whipsaw relief (AOB-18), the recalculation of benefits Plaintiffs seek requires ***changing*** the RBAP's projection rate, which is something the *Laurent* Court did not address. *Laurent* did not discuss *Esden* in regard to the circumstances under which any ***relief*** is available under Section 502(a)—that issue is presented to this Court for the first time here.

not permit an award of benefits based on changed plan terms under subsection (a)(1)(B), or authorize recalculating benefits in favor of former plan participants based on an alleged statutory violation under subsection (a)(3). *Supra* Part II.

C. Plaintiffs' Step-By-Step Remedy, Combining § 502(a)(3) and § 502(a)(1)(B), Has Been Forfeited, and Is Incorrect.

In a tacit concession that neither § 502(a)(1)(B) nor § 502(a)(3) individually authorizes recalculated benefits under judicially restated plan terms, Plaintiffs argue—for the first time on appeal—that the sum of Section 502(a)'s parts is greater than the whole. They contend that a mix-and-match approach, with each step grounded in a different subsection of Section 502(a), could lead to whipsaw relief. This new theory has been forfeited and is wrong.

1. Plaintiffs Have Forfeited Their New Mix-and-Match Argument.

Plaintiffs' arguments below were limited to two independent bases: (1) that whipsaw relief is available under § 502(a)(1)(B) ***alone*** as "a straightforward contract interpretative exercise" (JA___); and (2) that § 502(a)(3) alone provides "***an alternative path to relief***" (JA___) (emphasis added). The District Court considered each basis separately and rejected both. JA___-___. In their seriatim reconsideration motions, Plaintiffs pivoted to § 502(a)(3) as the exclusive avenue for whipsaw relief in the guise of surcharge, restitution, and/or disgorgement. JA___-___, JA___-___. The Court denied both motions. JA___-___, JA___-___.

Not once did Plaintiffs advance the theory they press on appeal—*viz.*, that § 502(a)(3) authorizes Step 1 of their whipsaw remedy via an "affirmative injunction," with § 502(a)(1)(B) separately authorizing a Step 2 award of recalculated benefits for the Class under new, ERISA-compliant plan terms. The law is clear that "[a]n argument raised for the first time on appeal is typically forfeited." *Katel LLC v. AT&T Corp.*, 607 F.3d 60, 68 (2d Cir. 2010); *see also Hall v. Kodak Ret. Income Plan*, 363 F. App'x 103, 107 (2d Cir. 2010).

2. Even If Considered, Plaintiffs' Argument That § 502(a)(3) and § 502(a)(1)(B) Can Combine To Support A Single Overall Remedy Is Contrary to Law.

Plaintiffs claim that *Amara* supports their mix-and-match approach to Section 502(a) because the Supreme Court's "central point" was that "multi-step remedy awards were allowed, but courts should take care to ***cite the specific authority for each step***" from within ERISA § 502(a). AOB-26, 49 (emphasis added). That distorts *Amara* beyond recognition. In *Amara*, the district court had awarded a reform-and-recalculate remedy under § 502(a)(1)(B) premised upon findings of fraudulent communications about plan benefits. The Supreme Court "***vacate[d] the judgment***"—not for a lack of citation, but rather because § 502(a)(1)(B) does not allow the award of benefits under a plan as reformed, ***even if*** the predicate for equitable reformation (fraud) exists. *Amara*, 563 U.S. at 445 (emphasis added). Having reached that holding, the Court provided guidance on

"equitable principles that the court might apply on remand" under the "***alternative*** subsection" § 502(a)(3). *Id.* at 425, 438 (emphasis added). Critically, the Court made no further mention of § 502(a)(1)(B). Thus, there is no basis in *Amara* for Plaintiffs' portrayal of that case as holding that "an award of benefits under the terms of the plan 'as reformed,' [is] authorized under ERISA § 502(a)(1)(B)" (AOB-29-30). Nothing in *Amara* endorses the two-step remedy Plaintiffs seek.

Plaintiffs cite four out-of-circuit district court opinions to support their flawed reading of *Amara*. All four are unavailing. Only one of those cases, *England v. Marriott International, Inc.*, 764 F. Supp. 2d 761 (D. Md. 2011), suggested the availability of a combined § 502(a)(1)(B) and § 502(a)(3) remedy—and that case predates *Amara*. There is no indication in *Amara* that *England* or any other pre-*Amara* case "got it right" by endorsing multi-step remedies (AOB-26). Moreover, none of Plaintiffs' three other post-*Amara* cases "reached" holdings (AOB-50) awarding two-step relief of the form Plaintiffs seek.[16]

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[16] *See Plotnick v. Comput. Sci. Corp. Deferred Comp. Plan for Key Execs.*, 182 F. Supp. 3d 573, 605-06 (E.D. Va. 2016); *Schleben v. Carpenters Pension Tr. Fund-Detroit & Vicinity*, 2014 WL 4604000, at *6–7, 12 (E.D. Mich. Sept. 15, 2014); *Virtue v. Int'l Bhd. of Teamsters Ret. & Family Prot. Plan*, 886 F. Supp. 2d 32, 36 (D.D.C. 2012). Plaintiffs also suggest that *Moyle v. Liberty Mutual Retirement Benefit Plan*, 823 F.3d 948 (9th Cir. 2016), endorsed using § 502(a)(3) to authorize "Step 1" of a two-step remedy involving § 502(a)(1)(B). AOB-30-31. But *Moyle* ***dismissed*** plaintiffs' § 502(a)(1)(B) claim altogether; the plaintiffs were permitted to proceed under § 502(a)(3) because they alleged fraud. 823 F.3d at 959.

Plaintiffs' mix-and-match approach has been rejected by courts of appeals. In *Eichorn v. AT&T Corp.*, 484 F.3d 644 (3d Cir. 2007), the plaintiffs requested that the Court (i) change the terms of the plan through an "'equitable' injunction" under § 502(a)(3) (based on an alleged Title I violation), which (ii) would immediately obligate defendants "to pay the plaintiffs [under § 502(a)(1)(B)] money that was rendered 'past due' by operation of the court's decree." *Id.* at 653-55. The Third Circuit rejected that reform-and-recalculate approach, affirming summary judgment for the defendant.

The Ninth Circuit reached a similar conclusion in *Goeres v. Charles Schwab & Co., Inc.*, 220 F. App'x 663 (9th Cir. 2007). There, it affirmed the rejection of a proposed chimeric § 502(a)(1)(B)/§ 502(a)(3) remedy "for the reasons stated by the district court," which were:

> At the hearing on this motion, plaintiff characterized his request for equitable relief as the first step in a two-step process. Plaintiff argued that placing him back into the Retirement Plan as of a certain date is equitable relief, regardless of what flows from such relief. Once in his desired position, plaintiff would bring suit under ERISA section [502(a)(1)] to recover benefits due to him under the terms of the Retirement Plan. Bifurcating this process, however, does not make the requested relief equitable; the substance of the remedy plaintiff seeks remains monetary compensation.

Goeres v. Charles Schwab & Co., Inc., 2004 WL 2203474, at *4 (N.D. Cal. Sep. 28, 2004) (citation omitted).

III. POLICY ARGUMENTS PROVIDE NO BASIS FOR FASHIONING JUDICIAL REMEDIES BEYOND THOSE PROVIDED BY CONGRESS.

The interpretation of Section 502(a) that Plaintiffs and the Secretary proffer is essentially an appeal to this Court to disregard settled "restrictions on remedies available to enforce ERISA's requirements" whenever they would "leave[] a court powerless to award a remedy for a violation of the statute." Amicus-Br. 1; AOB-20. The Supreme Court, however, has rejected an ends-means approach to Section 502(a) that relies on "vague notions of [ERISA's] 'basic purpose.'" *Great-West*, 534 U.S. at 220 (quotation marks omitted); *see also id.* at 221 n.5 ("*Varity Corp.* did not hold . . . that § 502(a)(3) is a catchall provision that authorizes ***all*** relief that is consistent with ERISA's purposes and is not explicitly provided elsewhere."). The Supreme Court has consistently denied legal relief under § 502(a)(3) and denied extra-contractual relief under § 502(a)(1)(B). That interpretation of Section 502(a) disposes of Plaintiffs' claims.

Moreover, subsequent to *Great-West*, courts of appeals have rejected the assumption that ERISA compels a remedy for all violations of Title I. Specifically, in cases alleging violations of Section 510 of ERISA—an integral part of ERISA's Title I guarantees prohibiting interference with benefit rights—three courts of appeals have held that § 502(a)(3) precludes relief even where a statutory violation is undisputed.

In *Eichorn*, the Third Circuit denied Section 502(a) relief, notwithstanding the undisputed allegation that the employer had violated Title I by eliminating benefits. 484 F.3d at 652, 656-58. Relying on *Mertens* and *Great-West*, the Third Circuit held that relief "requiring [the employer] to adjust its pension records retroactively to create an obligation to pay the plaintiffs more money, both in the past and going forward" was "in essence, a request for compensatory damages merely framed as an 'equitable' injunction," which "is not available under § 502(a)(3)." *Id*. at 655. For the same reasons, the Sixth and Tenth Circuits denied demands for benefits under Section 502(a), despite undisputed violations of ERISA Section 510. *See Alexander v. Bosch Automotive Systems, Inc.*, 232 F. App'x 491, 501-02 (6th Cir. 2007) (holding that plan participants were left "without a remedy" for Section 510 violation); *Millsap v. McDonnell Douglas Corp.*, 368 F.3d 1246, 1252-61 (10th Cir. 2004) (denying § 502(a)(3) remedy because relief sought for Section 510 violation constituted "compensatory damages").

Affirmance here would not mean that plan participants have no recourse in the face of illegal plan terms. Although ***former*** plan participants complaining about an illegal plan design (JA___-___ ¶ 1) cannot seek recalculated benefits on the basis of a statutory violation alone, § 502(a)(3) allows ***current*** plan participants to seek injunctive relief against illegal plan terms. Current plan participants can

also challenge allegedly illegal plan terms through an action in the Tax Court. 26 U.S.C. § 7476; *Flynn v. Comm'r*, 269 F.3d 1064, 1066 (D.C. Cir. 2001).

In *Central States*, this Court held that courts are "not free to fill in unwritten gaps in ERISA's civil remedies" by "fashion[ing] an appropriate remedy" where beneficiaries might otherwise be "considerably worse off." 771 F.3d at 154, 159. That holding followed from the Court's recognition that remedies previously assumed to be available had been foreclosed by "the Supreme Court's limiting interpretation of 'appropriate equitable relief' and its restriction of federal common law remedies . . . ." *Id.* at 158.[17]

Since *Central States*, the Supreme Court has ***reaffirmed*** the limitations on § 502(a)(3) established in *Mertens* and *Great-West*. *Montanile*, 136 S. Ct. at 660 n.3. And while, in response to *Mertens*, Congress amended Section 502(a) in 1994 to add a new subsection ((a)(9)) authorizing money damages for breaches of fiduciary duty, it did ***not*** overturn the *Mertens* limitation of "typically available" equitable relief under § 502(a)(3). Pension Annuitants Protection Act of 1994,

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[17] *Central States* negates the value of comments from out-of-circuit opinions that § 502(a)(3) authorizes a court to "enter[] the world of equity" and "fashion appropriate relief" for an ERISA violation. *See* AOB-37 (citing *Cummings by Techmeier v. Briggs & Stratton Ret. Plan*, 797 F.2d 383, 390 (7th Cir. 1986), and *Kifafi v. Hilton Hotels Ret. Plan*, 701 F.3d 718, 726 (D.C. Cir. 2012)).

Pub. L. 103-401, 108 Stat. 4172. Plaintiffs' claim for relief, therefore, is beyond the remedies endorsed by Section 502(a).

CONCLUSION

The District Court judgment should be affirmed.

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New York, New York

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

1. This brief complies with the type-volume limitations of Local Rule 32.1(a)(4)(A) because this brief consists of 13,976 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in Times New Roman 14-point font.

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STATUTORY ADDENDUM

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29 U.S.C. § 1132 (2012) – Civil Enforcement

[ERISA § 502]

(a) Persons empowered to bring a civil action

A civil action may be brought--

(1) by a participant or beneficiary--

(A) for the relief provided for in subsection (c) of this section, or

(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;

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

(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[.]