No. 06-856

IN THE
Supreme Court of the United States

JAMES LARUE, PETITIONER

v.

DEWOLFF, BOBERG & ASSOCIATES, INC.; AND DEWOLFF, BOBERG & ASSOCIATES, INC., EMPLOYEES' SAVINGS PLAN

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases:

Statutes and Rule:

Miscellaneous:

REPLY BRIEF FOR THE PETITIONER

I. SECTION 502(A)(2) OF ERISA AUTHORIZES PETITIONER TO SEEK RESTORATION OF PLAN LOSSES CAUSED BY FIDUCIARY BREACH

The Fourth Circuit erred in holding that the relief sought by petitioner is not available under section 502(a)(2) of ERISA. As explained below, respondents and their *amici* cannot dispute that the text of sections 502(a)(2) and 409 of ERISA plainly authorizes the relief at issue in this case. See Section I.A., *infra*. Indeed, respondents and their *amici* labor mightily to persuade this Court to ignore the plain text of the statute by misrepresenting the position of petitioner and the United States; see Section I.B., *infra*; by mischaracterizing this Court's decision in *Massachusetts Mutual Life Insurance Co. v. Russell*, 473 U.S. 134 (1985), see Section I.C., *infra*; and by advancing baseless reasons to affirm the judgment on alternative grounds; see Section I.D., *infra*. Once this brushwood is swept aside, it is quite clear that petitioner is seeking the restoration of "losses to the [DeWolff] plan" as permitted by section 502(a)(2) of ERISA. As such, the judgment of the court of appeals must be reversed.

A. The Relief Sought by Petitioner Is Authorized By the Plain Text of 502(a)(2) and 409 of ERISA

Section 502(a)(2) of ERISA authorizes a retirement plan participant to sue a plan fiduciary to restore "any losses to the plan resulting from [fiduciary] breach." 29 U.S.C. 1132(a)(2) (cross-referencing 29 U.S.C. 1109 which contains the language quoted above). The first question on which this Court has granted certiorari is:

> Does § 502(a)(2) of ERISA permit a participant to bring an action to recover losses attributable to his account in a "defined contribution plan" that were caused by fiduciary breach?

Pet. i. The resolution of this question turns entirely on the meaning of "any losses to the plan" in the context of a defined contribution retirement plan such as the 40(k) plan involved in this case.

"It is elementary that the meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain, [] the sole function of the courts is to enforce it according to its terms." *Caminetti v. United States*, 242 U.S. 470, 485 (1917); see also *Hughes Aircraft Co. v. Jacobson,* 525 U.S. 432, 438 (1999) ("[W]here the statutory language provides a clear answer, it ends there as well."); *Connecticut Nat'l Bank v. Germain,* 503 U.S. 249, 253-254 (1992) ("[C]ourts must presume that a legislature says in a statute what it means and means in a statute what is says there.")

The plain meaning of "any losses to the plan" necessarily includes any diminution in value of a plan's total assets. Pet. Br. 17. Unsurprisingly, this uncontroversial proposition is never contested by respondents or any of their *amici*. Such acquiescence is important because, as explained at length in petitioner's opening brief, the funds allocated to every individual account in a 401(k) plan are, by definition, assets of the plan. *Id.* at 17-19. In this case, the total value of the assets held by the DeWolff Plan decreased as a result of the fiduciary breach alleged by petitioner. *Id.* at 20. As such, petitioner has properly alleged that respondents' fiduciary breach has caused "losses to the plan."[1] The plain text of ERISA requires nothing more.[2]

[1] The procedure for restoration of plan losses after a successful 502(a)(2) action is discussed by Law Professor *amici*. See Law. Prof. Br. 12-14.

[2] Nor does common sense. If a hypothetical plan had 10 individual account holders, each having $10 allocated to their individual accounts, the plan's assets would total $100. If a fiduciary breach resulted in the plan having $90 in total assets, those lost ten dollars would be "plan losses." Whether the ten dollars in losses reduced all ten accounts to $9 or one

Cornered by ERISA's explicit terms, respondents and their *amici* attempt to edit—rather than propose an alternative interpretation of—the relevant statutory language. Specifically, respondents argue that petitioner has not sought to recover "losses to the plan" because he did not allege that "the interest of any other participant in the Plan was affected by the fiduciary breach asserted." Resp. Br. 16. Few, if any, litigation positions run so directly contrary to the simple text of a statute. ERISA *nowhere* requires that plan losses must affect more than one participant. To the contrary, the statute makes clear that "*any*" plan losses will do. See, *e.g.*, *United States v. Gonzales*, 520 U.S. 1, 5, 9 (1997) (noting that when Congress uses the word "any," there is "no room to speculate about congressional intent" because "[r]ead naturally, the word 'any' has an expansive meaning that is '*one* or some indiscriminately of whatever kind.'" (quoting *Webster's Third New International Dictionary* 97 (1976) (emphasis added)). As petitioner explained in his opening brief, respondents urge this court to read section 502(a)(2) as requiring "any losses to the plan *but only if such losses affect some unspecified number of plan participants that is greater than one.*" Pet. Br. 22 (emphasis added). But that is not what the statute says. Nor would it have been difficult to express if that were Congress' intention.[3]

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account to $0 does not somehow change the fact that *the plan* suffered ten dollars in losses.

[3] Respondents also maintain that the violation of an "individual duty" is not remediable under section 502(a)(2). See Resp. Br. 19 (arguing that petitioner is not entitled to relief under section 502(a)(2) because "there is no allegation [in this case] of any breach of duty to the Plan in any meaningful sense"). As with their "individual loss" argument, respondents' "individual duty" claim is foreclosed by the unambiguous text of ERISA. See 29 U.S.C. 1109(a) (imposing personal liability on a fiduciary "who breaches *any* of the responsibilities, obligations, or duties imposed upon fiduciaries by this title.") (emphasis added). The statute includes no exception for fiduciary breaches that harm only one or some small number of participants. See U.S. Br. 10-12. In any event, a duty to follow investment instructions—which necessarily involves plan assets—is properly

Respondents' only other attempt to confront the text of sections 502(a)(2) and 409 of the statute is the curious suggestion that petitioner has alleged "lost profits" but not "losses." Resp. Br. 12. In essence, respondents distinguish (1) "decline-loss," *i.e.*, any loss attributable to an actual decline in the value of an asset from (2) "appreciation-loss," *i.e.,* any loss attributable to unrealized asset appreciation. Respondents then urge this Court to interpret the word "losses" in the phrase "losses to the plan" so as to encompass the former but *not* the latter. There is absolutely no basis for such an interpretation. The plain meaning of the phrase "losses to the plan" is not limited to only certain *types* of plan losses. Nor do sections 502(a)(2) and 409 of ERISA give any indication whatsoever that "lost profits" are not compensable "losses" under the statute. This is true for good reason. Imagine, for example, that a fiduciary promised to invest all plan assets in a combination of stocks and bonds, but instead put all such assets in a non-interest bearing savings account. Under respondents' theory, even if *every single participant* in the plan were affected by such imprudence, there would be no available relief under section 502(a)(2) because no participant would have suffered "losses." Of course, there is no evidence—textual or otherwise—that Congress intended such an absurd result.[4]

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conceived of as a duty owed *to the plan*. See Pet. Br. 23-24; Law Prof. Br. 7-9.

[4] In any event, petitioner *did* allege decline-loss in his complaint. See BIO App. 3a (alleging that "Plaintiff's interest in the plan has been *depleted* approximately $150,000") (emphasis added). Depleted, in the ordinary sense of the term, means that the described subject actually declined in value. See, *e.g.*, *Webster's Third International Dictionary* 605 (1981) (defining "to deplete" as "to lessen in number, quantity, significant content, or force in vital power or value as a result of such lessening").

B. Respondents Seek to Avoid the Plain Text of 502(a)(2) and 409 of ERISA by Misrepresenting the Position of Petitioner and the United States

Having misread ERISA's text, respondents and their *amici* next misread petitioner's brief, accusing petitioner and the United States of urging that "any losses incurred by an individual participant in the plan" are remediable under section 502(a)(2). Resp. Br. 16. Respondents are confused. The position urged by petitioner and by the United States is that *plan losses that affect an individual* are remediable, because "any" plan losses are remediable. The position urged by petitioner and by the United States is *not* that "any losses incurred by an individual participant" are remediable. The latter is a straw man propped up by respondents and their *amici* to avoid the actual 502(a)(2) Question. To be clear: fiduciary breaches often result in "losses incurred by an individual" that are *not* plan losses, and thus not compensable under section 502(a)(2). For example, fiduciary breaches may cause pain and suffering,[5] negative tax consequences,[6] or the forfeiture of a right to a defined benefit.[7] The foregoing are all "losses incurred by an individual," but not "plan losses that affect an individual." These examples serve to

[5] *Russell*, *supra*, extensively discussed in petitioner's opening brief, is one such example. See Pet. Br. 24-27. The plaintiff in *Russell* expressly acknowledged that she was seeking relief for individual injuries (*i.e.,* pain and suffering) that occurred outside of the plan. *Id.* at 25. Indeed, in the welfare plan context, fiduciary breach often results in individual (but *not* plan) "losses." *Id.* at 25 n.17.

[6] See, *e.g.*, *Farr v. U.S. West Commc'ns, Inc.*, 151 F.3d 908 (CA9 1998) (plan participants incurred additional personal taxes when plan fiduciaries knowingly withheld information regarding material tax consequences).

[7] See, *e.g.*, *Callery v. U.S. Life Ins. Co.*, 392 F.3d 401 (CA10 2004) (participant unable to collect proceeds upon death of spouse because fiduciary failed to inform participant of eligibility conditions for life insurance policy), cert. denied, 546 U.S. 812 (2005).

illustrate the clear difference between the position advanced by petitioner and respondents' straw man.[8]

C. Respondents Seek to Avoid the Plain Text of 502(a)(2) and 409 by Mischaracterizing *Russell*

Respondents and their *amici* argue or intimate that this Court *already* decided in *Russell*, *supra*, that losses suffered by one individual are not plan losses for purposes of section 502(a)(2). See, *e.g.*, Resp. Br. 6 (claiming that "LaRue and his *amici* ask the Court to reconsider its decision in * * * *Russell*"). As explained at length in petitioner's opening brief, however, respondents grossly misread *Russell*. Pet. Br. 24-29. In particular, what respondents and their *amici* fundamentally misunderstand is the fact that *Russell* presented a factual situation that had *absolutely nothing to do with plan losses*. The plaintiff in that case, Mrs. Russell, was seeking extra-contractual damages which allegedly resulted from a denial of disability benefits. Those alleged damages caused a personal "loss" to Mrs. Russell; however, they did not reduce the total assets held by the plan. As such, Mrs. Russell was not seeking to recover *plan* losses.[9]

Because *Russell* did not involve so much as an *allegation* of plan losses, this Court did not address the issue presented in this case. Contrary to the suggestion of respondents and their *amici*, this Court did not hold or suggest in *Russell* that a decrease in the value of plan assets fails to constitute a plan loss if it affects only one plan participant. Put another way: Mrs. Russell was not prevented from seeking extra-

[8] Respondents mistakenly suggest that the United States has changed its position regarding what constitutes "losses to the plan" under section 502(a)(2) of ERISA. Resp. Br. 17 n.6 ("The Government makes no attempt to explain its change of position."). This erroneous assertion is entirely the result of respondents' mischaracterization of the position asserted by the United States in *this* case.

[9] Nor did Mrs. Russell seek to restore to the plan "any profits of [the] fiduciary which ha[d] been made through use of assets of the plan by the fiduciary." 29 U.S.C. 1109(a).

contractual damages because she was the only person affected by the alleged fiduciary breach. She was prevented from seeking such damages *because they are not losses to the plan*. The interpretation advanced by respondents, *i.e.,* that *Russell* somehow turns on *how many* participants are affected rather than the *type* of damages suffered, completely misses the mark. There can be little, if any, doubt that this Court's construction of section 502(a)(2) would have been no different in *Russell* if the alleged extra-contractual damages had affected 20, 200, or 2000 plan participants or beneficiaries.[10]

D. Respondents and Their *Amici* Seek to Avoid the 502(a)(2) Question Entirely By Asserting Baseless Alternative Grounds for Affirmance

This Court does not generally address alternative grounds for affirmance that are not subsumed within the questions on which certiorari has been granted. See, *e.g.*, *Glover v. United States*, 531 U.S. 198, 204 (2001) ("[Respondent] makes various arguments for alternative grounds to affirm the Court of Appeals. * * * As a general rule[, however,] we do not decide issues outside the questions presented by the petition for certiorari.") (citations omitted); *West v. Gibson*, 527 U.S. 212, 223 (1999) ("Respondent asks us to affirm on alternative grounds the Seventh Circuit's judgment. * * * These matters fall outside the scope of the question presented in the [] petition for certiorari. We remand the case so that the Court of Appeals can determine whether these questions have been properly raised and, if

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[10] This case would be governed by *Russell* if petitioner were seeking personally to recover non-plan damages that he incurred as a result of fiduciary breach. For example, assume that petitioner had alleged that he suffered from a medical condition that had deteriorated because his depleted 401(k) account deprived him of the wherewithal to afford proper treatment and that he sought damages associated with his worsened medical condition. In such a case, petitioner would not be entitled to relief under section 502(a)(2) because the worsening of a medical condition is not a loss to the plan.

so, decide them.") (citation omitted).[11] Despite this fact, respondents and their *amici* devote much of their briefs to three new arguments in favor of affirmance, *none* of which is subsumed within the two questions on which this Court has granted certiorari. Even if the Court wishes to address these new arguments, however, none provides a legitimate basis on which to affirm the judgment of the Fourth Circuit.

1. The claim that petitioner waived his right to proceed under 502(a)(2) is erroneous and, in any event, should be addressed on remand

One of respondents' *amici* urges this Court to affirm the judgment of the Fourth Circuit on the ground that petitioner waived his right to proceed under section 502(a)(2) of ERISA by failing to expressly mention this subsection of the statute in his complaint. See Chamber Br. at 3 ("The threshold reason that the Court should affirm the judgment of the Court of Appeals is that the Complaint does not even place at issue ERISA Section 502(a)(2)."). For clarity, petitioner will refer to this as the "502(a)(2) Waiver Argument."

As an initial matter, there is no reason for this Court to reach the 502(a)(2) Waiver Argument. The allegation of waiver presents no obstacle to the resolution of the 502(a)(2) Question by this Court. See, *e.g.*, U.S. CVSG Br. 13 n.2; Law Prof. Pet. Br. 15; Cert. Reply 2 n.2. Moreover, the 502(a)(2) Waiver Argument was not advanced by respondents in their Brief in Opposition and, as such, has not been

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[11] This is particularly true when such alternative grounds have not been presented in a counterstatement of the questions presented, see *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 281 (1993) (acknowledging that former S. Ct. R. 24.2—now R. 15.2—"giv[es] respondents the right, in their brief in opposition, to restate the questions presented"), or in a conditional cross-petition, see *Atkins v. Parker*, 472 U.S. 115, 123 (1985) (holding that cross-petition procedures exist in order to permit parties who may be drawn into an appellate proceeding to seek to expand a judgment in their favor).

fully briefed before this Court.[12] Put simply, it is more appropriate for this issue to be litigated on remand should petitioner obtain reversal. Should the Court choose to address the issue, however, it should reject the 502(a)(2) Waiver Argument because it is wrong to suggest that petitioner did not "place at issue ERISA Section 502(a)(2)." The Federal Rules of Civil Procedure have made it "clear that it is unnecessary to set out a legal theory for the plaintiff's claim for relief" in the complaint. 5 Fed. Prac. & Proc. Civ. 3d § 1219 (2007) (Statement of the Claim—Theory of the Pleadings Doctrine). Rather, a plaintiff must merely put defendants on notice as to the allegedly wrongful conduct about which the plaintiff is complaining and the relief sought. Fed. R. Civ. Pro. 8. In this case, there can be no doubt that respondents were put on notice of petitioner's substantive claim (*i.e.*, that respondents' failure to follow petitioner's instructions constituted a breach of fiduciary duty). See BIO App. 2a-5a (petitioner's complaint at para IV, IX, XI, and XVIII). Similarly, there can be no doubt that respondents were put on notice regarding the specific relief sought by petitioner. See Pet. Br. 11 n.9.[13]

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[12] Even in their merits brief, respondents do not advance this argument as an alternative grounds for affirmance of the judgment.

[13] Even if petitioner had failed to identify section 502(a)(2) of ERISA as his basis for recovery, such omission would not be fatal. As this Court noted in a similar circumstance:

> [Respondent] asserts that petitioners waived this theory [regarding 502(a)(3) of ERISA] by neglecting to present it to the courts below. According to [respondent], petitioners' claim (until their merits brief in this Court) has been that [respondent] may be sued under 502(a)(3) only because [respondent] "violated" 406(a). But, even assuming that petitioners did not pellucidly articulate this theory before the Seventh Circuit, it appears to us that the Seventh Circuit understood the tenor of the argument.

Harris Trust v. Salomon Smith Barney, Inc., 530 U.S. 238, 245 n.2 (2000). In this case, petitioner did not fail to reference section 502(a)(2) in identi-

2. The claim that petitioner did not properly plead fiduciary breach is erroneous and, in any event, should be addressed on remand

Respondents and their *amici* repeatedly suggest that petitioner has not sufficiently pled a fiduciary breach. See, *e.g.*, Resp. Br. 19-20 n.9 ("There is a substantial question as to whether LaRue even pled a valid cause of action for breach of fiduciary duty"); Chamber Br. 8-9 ("There is another pleading deficiency in Petitioner's Complaint * * * [T]here are no allegations of fact showing *why* [either respondent] is a 'fiduciary' as that term is defined in ERISA."). For clarity, petitioner will refer to this argument as "the Fiduciary Pleading Argument." As with the 502(a)(2) Waiver Argument discussed in Section I.D.1., *supra*, respondents advance the Fiduciary Pleading Argument in the hopes that this Court will affirm the judgment of the Fourth Circuit on alternative grounds. This Court should decline such an invitation.

As an initial matter, the Fiduciary Pleading Argument is substantively without merit. ERISA requires a fiduciary to act with "with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims." 29 U.S.C. 1104(a)(1)(B). No prudent fiduciary would ignore instructions from a participant or beneficiary regarding the investment of funds.[14] Ignoring

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fying the relief that he sought. See also BIO App. 47a (petitioner's reply to respondents' motion to dismiss) (quoting and describing the precise statutory language at issue in the 502(a)(2) Question as "legally, exactly on point").

[14] See, *e.g.*, *Donovan v. Mazzola*, 716 F.2d 1226, 1231 (CA9 1983) (alleging breach of fiduciary duty under section 502(a)(2) for failure to investigate investments and noting that "the source for the prudent person test set forth in [ERISA] is the prudent person test as developed in the common law of trusts."). As the Restatement of Trusts itself makes clear:

instructions obviously violates the ERISA-imposed fiduciary duties of care and diligence.

In any event, the Fiduciary Pleading Argument is procedurally unsound. The argument does not present a valid ground on which to affirm the Fourth Circuit's judgment because such affirmance will afford respondents relief (*i.e.*, dismissal of petitioner's complaint *with prejudice*) that would not have been available to them in the lower courts. Respondents chose *not* to move for judgment on the pleadings based on the Fiduciary Pleading Argument. As such, the argument was never addressed by the lower courts. See, *e.g.*, Pet. App. 16a (where the Fourth Circuit noted that "[a]ccepting the allegations as pled, as we must, we shall assume without deciding that defendants' alleged conduct amounted to a breach of their fiduciary duties"). If respondents had asserted (and the district court had accepted) this argument, petitioner would undoubtedly have been granted leave to amend. Of course, respondents will have the opportunity on remand to move for summary judgment on the ground that they are not fiduciaries or did not commit fiduciary breach. But such non-pleading issues are not before this Court.

3. The claim that petitioner could, and should, have proceeded under 502(a)(1) is baseless

One of respondents' *amici* argues that petitioner could have brought his claim under section 502(a)(1)(B) of ERISA and that, as such, any claim under sections 502(a)(2) or 502(a)(3) is barred. ERIC Br. 6-7. Tellingly, respondents' *amici* does not cite *a single case* that has endorsed its radical section 502(a)(1)(B) theory to bar a participant from asserting a section 502(a)(2) claim to recover plan losses. Equally

> If the trustee fails to purchase specific property which it is his duty to purchase, the beneficiary can charge him with its value at the time of the decree together with the income which would have accrued thereon if he had purchased it.

Rest. 2d Trusts § 211. See also *id.*, cmt c, ill 1.

telling is the fact that respondents did not make this argument before the lower courts and do not advance the argument before this Court.[15]

This case involves an alleged fiduciary breach that resulted in plan losses. Under such circumstances, sections 502(a)(2) and 409 of ERISA expressly render a fiduciary "personally responsible" to restore such plan losses. Such a remedy is not available under section 502(a)(1)(B) of ERISA. In contrast to section 502(a)(2), section 502(a)(1)(B) authorizes relief "under the terms of the plan," *against the plan itself* in situations where the terms of the plan obligate it to pay certain benefits to a participant or beneficiary. For this reason, a section 502(a)(1)(B) claim brought by petitioner in this case (if permitted at all) would have as its object the recovery of monies from a defendant (the DeWolff Plan) *that is not in possession of such funds*.[16] In practical terms, a section 502(a)(1)(B) claim in this case, if permitted to proceed at all, would be seeking a monetary judgment that is either (1) unenforceable or (2) that would be enforced against the beneficial interest of innocent third parties (*i.e.*, the other individual account holders in the DeWolff Plan whose interests in the plan would need to be reduced in order for petitioner to receive a recovery under section 502(a)(1)(B)). As such, it is unsurprising that no court has *ever* endorsed the

[15] Instead, respondents state in a footnote that "[i]t is conceivable" that petitioner could have pursued his claim under section 502(a)(1)(B) of the statute. Resp. Br. 28 n.16.

[16] This is a central difference between a section 502(a)(1)(B) claim and a section 502(a)(2) claim. The former can be thought of as seeking benefits that were withheld in violation of plan terms; the latter can be thought of as seeking to recover for the plan monies the plan no longer has due to fiduciary breach. This is the latter scenario. As the Fourth Circuit put it: "[Plaintiff] does not challenge a denial of benefits or an action related to a denial of benefits, but rather the *conduct* of [defendants] that he claims has lowered the value of his and the other participants' 401(k) Plan accounts." *Smith v. Sydnor*, 184 F.3d 356, 363 (CA4 1999) (emphasis in original).

radical theory advanced by respondents' *amici.* So it should remain.[17]

II. SECTION 502(A)(3) OF ERISA AUTHORIZES PETITIONER TO SEEK SURCHARGE OF LOSSES CAUSED BY FIDUCIARY BREACH

The Fourth Circuit also erred in holding that the relief sought by petitioner is not available under section 502(a)(3) of ERISA. As explained by petitioner in his opening brief, this Court has held that a plaintiff seeking to bring a claim for equitable relief under section 502(a)(3) must demonstrate that (1) the basis of her claim is equitable and (2) the remedy sought was typically available in pre-merger equity courts under the circumstances at bar. Pet. Br. 30-32. Both conditions are satisfied in this case. Respondents and their *amici* never dispute that the basis of petitioner's claim (*i.e.*, fiduciary breach) is equitable. Instead they assert, with little actual analysis, that the remedy sought by petitioner (*i.e.*, surcharge) is no more than compensatory "legal relief" that was not "typically available" in equity. As explained below, respondents and their *amici* misunderstand the conceptual architecture that this Court has erected to interpret section 502(a)(3) of the statute.

A. Section 502(a)(3) Does Not Bar a Remedy Merely Because It Serves a Compensatory Function

Respondents and their *amici* operate under the assumption that a remedy is necessarily "legal" relief if it serves a compensatory function. Such an assumption ignores this

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[17] Respondents' *amici* claims that if a section 502(a)(2) claim is permitted under the circumstances of this case, every participant in an ERISA-governed plan who wishes to litigate a benefit denial claim will then sue under section 502(a)(2) for fiduciary breach in order to circumvent the administrative exhaustion requirements associated with section 502(a)(1)(B) claims. That danger is vanishingly small for many reasons the most of important of which is this: *few benefit denials actually involve losses to the plan* or otherwise implicate section 502(a)(2).

Court's jurisprudence as well as the historical reality of pre-merger equity practice.

Monetary relief generally serves one of two purposes: restitution or compensation. This Court has rejected the simplistic notion that *all* restitutionary relief is "equitable" and, thus, available under section 502(a)(3). As this Court expressly recognized in *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204 (2002), restitutionary remedies that result in a monetary award can be either legal or equitable, depending on the circumstances in which they are asserted. See *id.* at 212 (explaining that "restitution was available in certain cases at law, and in certain others in equity."). Similarly, this Court has rejected the notion that *all* compensatory relief is "legal" and, thus, unavailable under section 502(a)(3).[18] As this Court expressly recognized in *Sereboff*, *supra*, monetary remedies that perform a compensatory function may be equitable, depending upon the specific circumstances which trigger the remedy. See 126 S. Ct. at 1875 (distinguishing "equitable lien sought as a matter of restitution" with "equitable lien 'by agreement'").[19]

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[18] Such a blithe equivalence is precisely what respondents and their *amici* urge upon this Court. Eschewing any meaningful historical analysis, respondents' argument, in total, is that surcharge bears some similarity to legal damages and is thus unavailable. Respondents' analysis completely ignores this Court's textured standard for determining whether a remedy is equitable and utterly fails to confront the litany of historical and judicial authorities cited by petitioner and his *amici* in support of the claim that surcharge was a typically available equitable remedy. See, *e.g.*, *Sereboff v. Mid Atlantic Medical Services, Inc.*, 126 S. Ct. 1869, 1874 (2006) ("To decide whether the restitutionary relief sought by Great-West was equitable or legal, we examined cases and secondary legal materials to determine if the relief would have been equitable '[i]n the days of the divided bench.'").

[19] At the *Sereboff* oral argument, Justice Scalia sharply corrected counsel for assuming that monetary relief must be restitutionary in order to qualify as equitable:

> MR. STRIS: *** A remedy of an equitable lien by assignment, as we explained in our opening brief, is not a restitutionary

As explained in petitioner's opening brief, surcharge is a recognized equitable remedy that would have been available to petitioner in pre-merger equity courts under the factual circumstances of this case. Pet. Br. 32-39; see also Sections II.B and II.C., *infra* (discussing the availability of surcharge in pre-merger courts). That the remedy may serve, *inter alia*, a compensatory function does not disqualify it under section 502(a)(3). See Pet. Br. 39-40. Contrary to the suggestion of respondents and their *amici*, nothing in this Court's 502(a)(3) jurisprudence warrants a contrary conclusion.[20]

B. The Remedy of Surcharge Was Typically Available in Equity

Respondents and their *amici* also dispute that the remedy of surcharge was "typically available in equity." They reach this erroneous conclusion by mistakenly treating the term "typically available" as synonymous with "frequently

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> remedy. No unjust enrichment need be proved. No tracing need be proved. It's purely a contractual remedy.
>
> Now, as a result, courts of equity historically developed this remedy to give priority to one creditor over another if there was a present intent on the part of the promisor to pledge that specific property as security.
>
> JUSTICE SCALIA: But we – but, you know, our opinions haven't said only certain kinds of equitable relief, only restitutionary equitable relief. We've simply said whether equitable relief would normally be available. And now you're – you're trying to rewrite our cases to say that only certain types of equitable relief are -- are available.

Transcript of Oral Argument in *Sereboff v. Mid Atlantic Medical Services, Inc.*, O.T. 2005, No. 05-260, at 9 (Mar. 28, 2006), *available at* <http://www.supremecourtus.gov/oral_arguments/argument_transcripts/05-260.pdf>.

[20] To be clear: surcharge often serves a restitutionary function. In fact, every case in which a fiduciary's improper gains are surcharged is an example of restitution. Even the surcharge of a trust loss (without any corresponding gain to the fiduciary) may constitute a request for restitutionary relief.

employed in" or "employed in most" equity cases. This is not how the phrase "typically available" was used by this Court in *Mertens v. Hewitt Assocs.*, 508 U.S. 28 (1993). In *Mertens*, the petitioners and the United States argued that legal damages in breach of trust cases must qualify as equitable relief under section 502(a)(3) because such damages were awarded against trustees in pre-merger equity courts. The Court rejected that argument, explaining that the mere possibility that an equity court could, in some cases, award what was indisputably legal relief, did not transform such a remedy into equitable relief. See Pet. Br. 30. Instead, the relief needed to be "typically available in equity" to qualify under the statute. *Mertens*, 508 U.S. at 256.

Although the *Mertens* Court did not painstakingly define the term "typically available in equity," the doctrinal aim (later expounded upon in *Great-West*, *supra*), was to distinguish (1) legal relief sometimes available in equitable fora—which section 502(a)(3) does not permit—from (2) genuine equitable relief, the latter being those defined remedial mechanisms commonly recognized by pre-merger authorities to be equitable (rather than legal) constructs. See *Great-West*, 534 U.S. at 210 (explaining that the aim of *Mertens* was to exclude from "equitable relief" those "legal remedies that would otherwise be beyond the scope of the equity court's authority."). Surcharge falls within the latter category, being widely recognized as a remedial construct *native* to equity. See Pet. Br. 36-39; see also U.S. Br. 16-19 (collecting and discussing authorities).[21]

[21] According to this Court, another example of an acknowledged equitable construct is equitable lien by agreement—which, although only employed as a remedial mechanism by pre-merger equity courts in those rare cases in which very specific triggering conditions were present—is nonetheless an equitable construct and thus available under 502(a)(3). *Sereboff*, 126 S. Ct. at 1875-76 (noting that equitable lien by agreement was a "different species of relief" than equitable lien by restitution). Indeed, the *Sereboff* decision shows that the simplistic analysis advanced by respondents and their *amici* is incorrect.

As petitioner noted in his opening brief, the initial Restatement of Trusts, published in 1935, in a section entitled, "*Equitable* Remedies of Beneficiaries," specifically included surcharge, namely: "the beneficiary of a trust can maintain a suit * * * to compel the trustee to redress a breach of trust." Restatement (First) of Trusts §199 (1935) (emphasis added). Legal remedies were set forth in section 198, and that section neither includes surcharge nor is it otherwise applicable to the facts of this case. *Id.* §198; see also Pet. Br. 35-37. Thus, surcharge was not a "legal" remedy occasionally awarded in equity courts; it was fundamentally understood to be a remedial device native to equity.[22] Indeed, surcharge was so clearly recognized as a native and routine equitable construct by pre-merger authorities that, to deny it as being "typically available in equity" because it "feels" compensatory would amount to a *sub rosa* rejection of this Court's holdings in *Mertens*, *Great-West*, and *Sereboff.*

C. This Case Presents a Paradigmatic Example of Circumstances Under Which a Surcharge Remedy Was Available in Pre-Merger Equity Courts

Finally, respondents assert that surcharge is not available in this case by grafting conditions onto the remedy that were never required by pre-merger courts and which run counter to common sense. Resp. Br. 36-37.

Respondents contend that because petitioner has suffered no "out of pocket" loss, the remedy of surcharge is unavailable. Resp. Br. 36 (claiming that "[t]here is scant his-

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[22] According to respondents, petitioner argues that surcharge is equitable merely because it was brought against trustees in equity courts. Resp. Br. 34-35. Petitioner, however, *explained in his opening brief* how the fact that a remedy was brought against trustees in equity courts is not in itself enough to make the remedy equitable. Pet. Br. 30. Respondents thus attribute to petitioner a position that *petitioner* disavowed as overbroad. Surcharge is permissible under section 502(a)(3) because it was universally recognized as a fundamental equitable construct—*not* because it was brought against trustees in pre-merger equitable courts.

torical authority to support the assertion that surcharge was available in a case, like this one, involving no actual out-of-pocket losses by the plaintiff"). This argument is baseless. The remedy of surcharge was commonly employed to charge a breaching fiduciary with losses *incurred by the trust*.[23] Restatement (Second) of Trusts § 205 (1959) ("If the trustee commits a breach of trust, he is chargeable with * * * any loss or depreciation *in value of the trust estate* resulting from the breach of trust.") (emphasis added). That a trust beneficiary suffered no "out of pocket" loss is irrelevant; the assets were never in his proverbial pocket. Perhaps by "out of pocket" respondents mean to argue that lost profits suffered from fiduciary breach are not recoverable through surcharge. Such, however, was never the rule. Chargeable to the trustee was "[a]ny profit which would have accrued to the trust estate if there had been no breach of trust." Restatement (First) of Trusts § 205(c); see also *Shepherd v. Mouls*, 4 Hare 503, 504 (1845) (if trustee bound to purchase security by trust terms, beneficiary may charge trustee with "the amount of stock which they might have purchased with the money"); *Pride v. Fooks*, 2 Beav. 430, 432-33 (1840) (trustee chargeable with appreciation that would have arisen if the directed investment had been made). Unsurprisingly, respondents do not cite *any* authority for their contrary assertion.

Respondents also contend that the remedy of surcharge was not available unless a fiduciary engaged in willful mis-

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[23] Several *amici* take issue with the possible use of the surcharge remedy in connection with ERISA plans that are not structured as trusts—such as many welfare plans. Although the Government argues that the remedy of surcharge, based on the contours of its historical use, is properly available in a variety of circumstances, this Court need not reach that question. Petitioner's case presents the paradigmatic situation in which surcharge was historically awarded (*i.e.,* a fiduciary breach has resulted in the decline in value of trust assets and the trust beneficiary is seeking a personal monetary recovery from the fiduciary for such losses). The scope of the surcharge remedy need not be defined by this Court in this case.

conduct. Resp. Br. 36-37. But the availability of a surcharge remedy in pre-merger courts was always available in cases of negligent violation of fiduciary duties. See *Pit v. Cholmondeley,* 28 Eng. Rep. 360 ("[I]f any of the parties can show an omission, for which credit ought to be, that is a surcharge: or if any thing is inserted, that is a wrong charge, he is at liberty to shew it, and that is falsification."); *Brownell v. Brownell*, 29 Eng. Rep. 35 (an account settled ten years before bill was filed, although containing gross errors, could not be opened, but the plaintiff was permitted to surcharge and falsify); see also Restatement (Second) of Trusts § 201, cmt a ("Ordinarily a trustee does not commit a breach of trust if he does not intentionally *or negligently* do what he ought not to do or fail to do what he ought to do.") (emphasis added).[24]

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[24] "'[S]urcharge' * * * is most fittingly defined as '[t]he imposition of personal liability on a fiduciary for willful *or negligent* misconduct in the administration of his fiduciary duties.'" *In re Mailman Steam Carpet Cleaning Corp.* 196 F.3d 1, 7 (CA1 1999) (quoting *Black's Law Dictionary* 1441 (6th ed. 1990) (emphasis added). Indeed, as surcharge was a remedy asserted against fiduciaries, making it available only if willful misconduct were present would run counter to the baseline presumption that fiduciaries owe heightened duties to their beneficiaries. As then-Judge Cardozo famously described: "Many forms of conduct permissible in a workaday world for those acting at arm's length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior." *Meinhard v. Salmon*, 164 N.E. 545, 546 (N.Y. 1929).

CONCLUSION

For the foregoing reasons and those set forth in petitioner's opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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