No. 17-528

In The
Supreme Court of the United States

JENNIFER STRANG,

Petitioner,

v.

FORD MOTOR COMPANY GENERAL RETIREMENT PLAN and FORD MOTOR COMPANY,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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REPLY BRIEF

A fiduciary breaches its duty when it deliberately prevents an ERISA plan participant from making a proper claim for benefits. That is exactly what happened when Ford refused to provide John Strang with the proper forms for electing a lump sum distribution of his pension. Mr. Strang's request for a lump sum distribution clearly would have been granted if Ford had provided him with the proper forms when he requested them, but solely because Ford breached its fiduciary duty by refusing to provide Mr. Strang with the proper means to make an election, the ultimate denial of benefits became a *fait accompli*. Nevertheless, the Sixth Circuit has ruled that Mr. Strang's beneficiary, Jennifer Strang, cannot avail herself of any remedy under ERISA other than a certainly doomed claim for benefits pursuant to Section 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B). In its brief, Ford argues that the Sixth Circuit was correct in this limitation of the remedies available under ERISA. We disagree.

ARGUMENT

I. The Sixth Circuit Decision is Untenable in the Aftermath of *Amara*

Mr. Strang repeatedly requested Ford to provide him with the proper forms to elect a lump sum distribution of his pension, but Ford refused to provide the forms, deliberately preventing Mr. Strang from making a proper claim. Am. Comp. ¶¶ 13-22. The claim

was then denied due to Mr. Strang's failure to use the proper forms. Am. Comp. ¶ 43. Such circumstances give rise to a claim for appropriate equitable relief in the form of surcharge against the fiduciary pursuant to Section 502(a)(3) of ERISA, 29 U.S.C. § 1132(a)(3). *CIGNA Corp. v. Amara*, 563 U.S. 421, 441-44 (2011). The surcharge remedy extends to "a breach of trust committed by a fiduciary encompassing any violation of a duty imposed upon that fiduciary." *Id*. at 442. Equitable in nature, "surcharge" is a "kind of monetary remedy against a trustee," *id*., typically ordering "a trust or beneficiary made whole following a trustee's breach of trust." *Id*. at 444. Consequently, it comes as no surprise that the amount of the monetary remedy imposed against the breaching fiduciary may be equivalent to the amount of plan benefits lost due to the breach.

But the Sixth Circuit has ruled that an ERISA plan participant cannot even plead such a claim for breach of fiduciary duty where the alleged harm involves a loss of plan benefits, and Ford argues that this is consistent with this Court's precedents. Pet. App. 11-13, Ford Br. 15-17. Conflating the fiduciary's breach with the ultimate denial of benefits, and relying on its pre-*Amara* precedent, the Sixth Circuit ruled that it is impermissible to plead a claim for breach of fiduciary duty pursuant to Section 502(a)(3) where it is possible to plead a claim for benefits pursuant to Section 502(a)(1)(B), unless *the relief sought* by the two claims is different. Pet. App. 12-13, citing *Wilkins v. Baptist Healthcare System, Inc.*, 150 F.3d 609, 615 (6th Cir.

1998). Applied to this case, the Sixth Circuit determined that the surcharge claim based on "Ford's withholding of the election forms" constituted the "same injury" as the ensuing denial of benefits because "the remedy sought is the same: the $463,254.78 difference between what Appellant received and what she would have received had Mr. Strang's election been effective." Pet. App. 12-13. The Sixth Circuit emphasized that this prohibition against pleading claims for breach of fiduciary duty applies "*irrespective of the degree of success obtained*" in the doomed claim for benefits. Pet. App. 12, quoting with emphasis *Rochow v. Life Ins. Co. of North America*, 780 F.3d 364, 372 (6th Cir. 2015).

This analysis automatically defeats any surcharge claim that seeks to remedy the loss of trust benefits resulting from the trustee's breach of trust, notwithstanding this Court's express approval of the surcharge remedy in such situations. *Amara*, 563 U.S. at 444. Both the Sixth Circuit's ruling and Ford's present argument incorrectly rely on the notion that Ms. Strang seeks the surcharge remedy for the "same injury" as the denial of benefits. Pet. App. 11-13; Ford Br. 15-17. To get there, the Sixth Circuit apparently defines "injury" to mean the relief sought, not the action that caused the harm. Although Ms. Strang claimed that Ford's refusal to provide John Strang with proper election forms upon request was the injury giving rise to the breach of fiduciary duty claim, distinct from the subsequent denial of benefits, the Sixth Circuit regarded them as the same injury strictly because they

would result in granting the same relief – recovery of lost plan benefits. Pet. App. 12-13. As the Sixth Circuit views the law, ERISA plan beneficiaries "can bring a claim under § 1132(a)(3) only if they 'may not avail themselves of § 1132's other remedies.'" *Donati v. Ford Motor Co.*, 821 F.3d 667, 673 (6th Cir. 2016). In *Donati*, the Sixth Circuit more fully explained its reliance on the relief sought as being determinative, rather than the nature of the fiduciary's wrongdoing, citing this Court's decision in *Varity Corp. v. Howe*, 516 U.S. 489 (1996) and pre-*Amara* Sixth Circuit precedent:

> Since *Varity*, this court has repeatedly held that beneficiaries can bring a claim under § 1132(a)(3) only if they "may not avail themselves of § 1132's other remedies." *Wilkins v. Baptist Healthcare Sys., Inc.*, 150 F.3d 609, 615 (6th Cir. 1998); see also *Marks v. Newcourt Credit Grp., Inc.*, 342 F.3d 444, 454 (6th Cir. 2003). In deciding whether a plaintiff may bring a claim under § 1132(a)(3), it is essential to look at the "adequacy of relief to redress the claimant's injury, not the nature of the defendant's wrongdoing." *Rochow v. Life Ins. Co. of N. Am.*, 780 F.3d 364, 371 (6th Cir. 2015) (en banc); see also *Moss v. Unum Life Ins. Co.*, 495 F. App'x 583, 589-90 (6th Cir. 2012).
>
> Here, Plaintiff seeks the exact same relief in both of her claims: the $230,361.49 that Ford originally promised Donati. She does not seek any equitable relief in addition to the money Ford promised. The only difference between her two claims is the nature of the alleged wrongdoing – misrepresenting the cash-out

value of her benefits, as opposed to wrongfully denying her benefits. Under *Rochow*, this distinction alone is insufficient to allow a breach-of-fiduciary-duty claim.

Plaintiff argues that she pleaded her breach-of-fiduciary-duty claim as an alternative to her wrongful-denial-of-benefits claim, but that fact makes no difference. "The deciding factor" in determining whether a plaintiff can state a claim for breach of fiduciary duty under § 1132(a)(3) "is not whether a plaintiff has recovered under § 1132(a)(1)(B)" successfully, "but rather, whether a plaintiff may recover." *Moss*, 495 F. App'x at 589 (emphasis added). Because Plaintiff's two claims are for the same relief, her breach-of-fiduciary-duty claim is barred by our precedents in *Wilkins*, *Marks*, and *Rochow*.

Plaintiff cites *Hill v. Blue Cross & Blue Shield of Michigan*, 409 F.3d 710, 718 (6th Cir. 2005), in which the plaintiffs were allowed to bring claims under both § 1132(a)(1)(B) and § 1132(a)(3). But in *Hill*, the claim under § 1132(a)(1)(B) was for the recovery of benefits allegedly owed to the plaintiffs, while the claim under § 1132(a)(3) was for an injunction mandating the correction of systemic, plan-wide problems. *Ibid*. The two claims sought different forms of relief. Here, Plaintiff does not seek a plan-wide injunction. Both of her claims involve her individual claim for benefits. *Hill* is therefore inapplicable.

Donati, 821 F.3d at 673-74. This is the same fallacious analysis followed in this case, where the Sixth Circuit claimed that Ms. Strang's breach of fiduciary duty claim was "one and the same" as her claim for benefits simply because "the remedy sought is the same: the $463,254.78 difference between what Appellant received and what she would have received had Mr. Strang's election been effective." Pet. App. 13. The Sixth Circuit openly rejected the premise that "the nature of the defendant's wrongdoing" actually matters in ERISA. *Id.* at 673, quoting *Rochow*, 780 F.3d at 371. If allowed to stand, the Sixth Circuit's decision would preclude pleading of surcharge claims whenever the relief sought is equivalent to the loss of plan benefits, simply ignoring this Court's express approval of such a surcharge remedy. *Amara*, 563 U.S. at 441-44. The Sixth Circuit's formulation simply cannot be reconciled with *Amara*, and therefore, the writ should be granted in this case.

II. There is a Clear Circuit Split Regarding the Question Presented

The Sixth Circuit is unique in prohibiting the pleading of an alternative claim for breach of fiduciary duty when the relief at stake is the amount of plan benefits lost due to the fiduciary's breach. Ford calls this split "illusory," arguing that the other circuits are in harmony with the Sixth Circuit on the issue. Ford Br. 8-14. However, the cases cited by Ford confirm the opposite conclusion: there is a clear circuit split regarding the question presented.

Ford first cites *Silva v. Metropolitan Life Insurance Co.*, 762 F.3d 711 (8th Cir. 2014), as being consonant with this case because "the plaintiff 'present[ed] two alternative – as opposed to duplicative – theories of liability' and was therefore 'allowed to plead both.' " Ford Br. 9, citing *Silva*, 762 F.3d at 726. But *Silva* actually permitted a claim for breach of fiduciary duty under Section 502(a)(3) that sought the exact same relief available in a claim for benefits pursuant to Section 502(a)(1)(B) – recovery of "benefits owed under the Plan." *Id*. at 718. Because the two claims seek the same relief, the claim for breach of fiduciary duty in *Silva* undoubtedly would be barred in the Sixth Circuit. Pet. App. 11-13; *Donati*, 821 F.3d at 673-74. It does not matter that Ms. Strang posited a different theory based on Ford's deliberate effort to prevent John Strang from making a proper election, because "the nature of the defendant's wrongdoing" is deemed irrelevant in the Sixth Circuit. *Rochow*, 780 F.3d at 371. Indeed, unlike the deliberate malfeasance alleged in this case, *Silva* involved a claim for breach of fiduciary duty based on failure to provide a summary plan description which would have explained the requirement to submit a specific form. *Silva*, 762 F.3d at 720-22. *Silva* permitted such a claim, expressly rejecting the argument that it was prohibited simply because it sought the same relief that may be available in a claim for benefits: "Contrary to Defendants' argument, *Varity* does not limit the number of ways a party can initially seek relief at the motion to dismiss stage." *Id*. at 726. More recently, the Eighth Circuit has permitted an alternative claim for breach of fiduciary duty seeking "functionally

identical relief" to a benefit claim based on the fiduciary's actions during the benefit claim process. *Jones v. Aetna Life Ins. Co.*, 856 F.3d 541, 547 (8th Cir. 2017). The Sixth Circuit and the Eighth Circuit are definitely split on this issue.

Ford also claims that the Second Circuit agrees with the Sixth Circuit. Ford Br. at 10, citing *New York State Psychiatric Ass'n v. UnitedHealth Grp*., 798 F.3d 125 (2d Cir. 2015). But the Second Circuit rejected the argument that a plaintiff cannot plead a claim under Section 502(a)(3) simply because similar relief may be available under Section 502(a)(1)(B). *Id*. at 133-35. While it would be appropriate to reject *additional* equitable relief *after* awarding a claim for benefits, *Frommert v. Conkright*, 433 F.3d 254, 268-72 (2d Cir. 2006), it is inappropriate to dismiss the claim for breach of fiduciary duty at the pleading stage simply because it seeks the same relief as the benefit claim. *New York State Psychiatric Ass'n v. UnitedHealth Grp.*, 798 F.3d at 134. The Sixth Circuit and the Second Circuit are split on this issue.

Contrary to Ford's argument, Ford Br. 10-11, the Ninth Circuit has gone even further, declaring that: "While *Amara* did not explicitly state that litigants may seek equitable remedies under § 1132(a)(3) if § 1132(a)(1)(B) provides adequate relief, *Amara*'s holding in effect does precisely that." *Moyle v. Liberty Mut. Ret. Benefit Plan*, 2016 U.S. App. LEXIS 15202, at *26 (9th Cir. Aug. 18, 2016). The Ninth Circuit found that its previous precedents, which like this case addressed the issue at the pleading stage, "are now 'clearly

irreconcilable' with *Amara* and are no longer binding." *Id*. at *30, rejecting *Ford v. MCI Communs. Corp. Health & Welfare Plan*, 399 F.3d 1076, 1083 (9th Cir. 2005). Moreover, unlike the Sixth Circuit analysis in this case, the Ninth Circuit distinguished *Rochow* as applying only at judgment, not at the pleading stage. *Id*. at *29-30, citing *Rochow*, 780 F.3d at 375. In direct conflict with the Ninth Circuit, the Sixth Circuit applies *Rochow* to prohibit the initial pleading of a claim under Section 502(a)(3) if it offers an alternative theory to obtain the same relief sought under Section 502(a)(1)(B). Pet. App. 11-13.

In a final attempt to reconcile the Sixth Circuit formula with the holdings of other circuits, Ford argues that the Sixth Circuit permits claims brought pursuant to Section 502(a)(3) where they are "premised on theories other than the denial of benefits." Ford Br. 14, n.3, citing *Hill*, 409 F.3d at 718. But the Sixth Circuit has expressly rejected this analysis, limiting *Hill* to situations where a plaintiff seeks different forms of relief. *Donati*, 821 F.3d at 674. In contrast to *Hill*, the *Donati* plaintiff alleged different theories for seeking "the exact same relief in both of her claims" – the amount of benefits lost – and "*Hill* is therefore inapplicable." *Id*. at 673-74. The Sixth Circuit does not concern itself with different allegations regarding "the nature of the defendant's wrongdoing," but simply prohibits the pleading of otherwise plausible claims under Section 502(a)(3) if they provide an alternate means of recovering plan benefits that may be pursued under Section 502(a)(1)(B). *Id*. The Sixth Circuit analysis stands in

direct conflict with the Second, Eighth, and Ninth Circuits. Because there is a clear split among the circuit courts that ought to be resolved by this Court, the writ should be granted in this case.

III. This Case is an Appropriate Vehicle for Resolving the Question Presented

Finally, Ford argues that this case presents a poor vehicle for resolving the question presented "because petitioner's breach-of-fiduciary-duty claim would inevitably fail on the merits," Ford Br. 17, but Ford's argument is flawed for several reasons. First, of course, the claim for breach of fiduciary duty was dismissed at the pleading stage because "it would duplicate relief available under other ERISA sections," and no examination of the merits was permitted. Pet. App. 22-23. Second, Ford infers from the Sixth Circuit decision on the benefit claim that Ford's exercise of its fiduciary responsibilities "was not arbitrary or capricious," Ford Br. 17, but that is not the correct standard of review for equitable claims such as breach of fiduciary duty, "which are addressed in the first instance in the district court under the normal standard of review, not the highly deferential standard of 'arbitrary and capricious' review." *Moore v. Lafayette Life Ins. Co.*, 458 F.3d 416, 427 (6th Cir. 2006). Third, Ford now attacks the language of Mr. Strang's self-made election letter, Ford Br. 18, but during the administrative phase of the case Ford never disputed Mr. Strang's intent to make the election, and Ford denied the benefit claim solely because Mr. Strang did not use the proper forms at the proper

time. See AR 338-39. This merely lends further support to the allegation that, if Ford provided Mr. Strang with the proper forms when he requested them, he would have received the lump sum distribution that he clearly intended to elect.

Ms. Strang exhaustively pursued the claim for benefits pursuant to Section 502(a)(1)(B), but relief under that section has proven woefully inadequate as a result of Ford's breach of its fiduciary duty, thereby justifying resort to appropriate equitable relief pursuant to Section 502(a)(3). *Varity*, 516 U.S. at 512. An alternative claim for surcharge based on Ford's breach of fiduciary duty is certainly appropriate under the circumstances of this case. *Amara*, 563 U.S. at 441-44. Therefore, this case presents an appropriate vehicle for resolving the narrow question presented, and the writ should be granted.

CONCLUSION

For all of these reasons, a writ of certiorari should be granted in this case.

Respectfully submitted,

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