APPENDIX

APPENDIX

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PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 21-2207

JODY ROSE, as Administratrix of the Estate of Kyree Devon Holman,

Plaintiff - Appellant,

v.

PSA AIRLINES, INC.; PSA AIRLINES, INC. GROUP BENEFIT PLAN; UMR, INC.; QUANTUM HEALTH, INC., a/k/a MyQHealth by Quantum; MCMC, LLC,

Defendants - Appellees

and

PSA AIRLINES GROUP INSURANCE PLAN; PSA AIRLINES GROUP HEALTH BENEFIT PLAN; PSA AIRLINES PLAN B EMPLOYEE BENEFIT PLAN; PSA AIRLINES SHARED SERVICES ORG.,

Defendants.

Appeal from the United States District Court for the Western District of North Carolina, at Charlotte. Graham C. Mullen, Senior District Judge. (3:19-cv-00695-GCM-DCK)

Argued: December 9, 2022 Decided: September 11, 2023

Amended: September 12, 2023

Before RICHARDSON, QUATTLEBAUM, and HEYTENS, Circuit Judges.

Affirmed in part, vacated in part, and remanded by published opinion. Judge Richardson wrote the opinion, in which Judge Quattlebaum joined. Judge Heytens wrote an opinion concurring in part and dissenting in part.

ARGUED: Norris Arden Adams, II, ESSEX & RICHARDS, P.A., Charlotte, North Carolina, for Appellant. Edward Joseph Meehan, GROOM LAW GROUP, CHARTERED, Washington, D.C.; Brian D. Boone, ALSTON & BIRD LLP, Charlotte, North Carolina, for Appellees. **ON BRIEF:** Caitlin Hale Walton, ESSEX RICHARDS, P.A. Charlotte, North Carolina, for Appellant. Ross P. McSweeney, GROOM LAW GROUP, CHARTERED, Washington, D.C., for Appellees PSA Airlines, Inc. and PSA Airlines, Inc. Group Benefit Plan. Brandon C.E. Springer, ALSTON & BIRD LLP, Charlotte, North Carolina, for Appellee UMR, Inc. Rachel Ann Smoot, TAFT STETTINIUS & HOLLISTER, LLP, Columbus, Ohio, for Appellee Quantum Health, Inc. Victoria Therese Kepes, Alfred Victor Rawl, Jr., GORDON REES SCULLY MANSUKHANI LLP, Charleston, South Carolina, for Appellee MCMC, LLC.

RICHARDSON, Circuit Judge:

The Employee Retirement Income Security Act's § 502(a)(1)(B) allows a beneficiary to "recover benefits due to him under the terms of his plan." And ERISA's § 502(a)(3) allows a beneficiary to sue for "other appropriate equitable relief." This case requires us to answer when—and under what conditions—a plaintiff may seek monetary relief under one of those provisions.

Jody Rose's son had a rare heart condition. He died at the age of twenty-seven, awaiting a heart transplant, which Rose says that Defendants—who administered her son's employer-based health benefits program—wrongfully denied. So she sued on behalf of his estate, seeking monetary relief under both § 502(a)(1)(B) and § 502(a)(3). The district court dismissed both claims. As to Rose's (a)(1)(B) claim, the court held that money was not one of the "benefits" that her son was owed "under the terms of his plan." And, as to her (a)(3) claim, the court held that her requested monetary relief was too similar to money damages and was thus not "equitable."

We now affirm in part and vacate in part. The district court correctly held that money was not one of the "benefits" that Rose's son was "due" "under the terms of his plan." So it was right to dismiss her (a)(1)(B) claim. But we must vacate its complete dismissal of Rose's (a)(3) claim. While the district court correctly noted that compensatory, "make-whole" monetary relief is unavailable under § 502(a)(3), it did not consider whether Rose plausibly alleged facts that would support relief "*typically*" available in equity. *Montanile v. Bd. of Trs.*, 577 U.S. 136, 142 (2016). We thus remand for the district court to decide in the first instance whether Rose can properly allege such a theory based on a Defendant's unjust enrichment,

including whether an unjust gain can be followed to "specifically identified funds that remain in the defendant's possession" or to "traceable items that the defendant purchased with the funds." *Id.* at 144–45

I. Factual and Procedural Background

It was Christmas Eve in 2018 when Rose's son, Kyree Devon Holman, first found out that he had a heart condition called myocarditis. Less than two months later—and only a few short weeks after his twenty-seventh birthday—he was dead.

At the time, Kyree was working as a flight attendant for PSA Airlines, Inc. Like many Americans, Kyree received health benefits through his employer. PSA Airlines runs a "health and welfare benefit plan" for its employees, governed by ERISA. J.A. 13. The Plan is "fully self-funded," meaning that PSA Airlines "assumes the sole responsibility for funding the Plan benefits out of its general assets." J.A. 13. PSA Airlines is the named "Plan Administrator" and "fiduciary" of the Plan. J.A. 14. But a smattering of other companies—including UMR, Inc., Quantum Health, Inc., and MCMC, LLC—help PSA Airlines provide administrative services, like reviewing benefits claims, for the Plan.[1]

When doctors discovered Kyree's health condition, they determined that he needed a heart transplant to survive and prepared to proceed with surgery as soon as his benefits claim was approved. By the second week of January 2019, Kyree's doctors had submitted the required information and had twice requested approval for the surgery. Yet, on January 17, Defendants denied his request,

[1] The Plan's terms are not themselves in the record. But because we are at the pleading stage, our characterization of the Plan's terms—like all the facts that we recount here—are taken from Rose's complaint, read in the light most favorable to her.

asserting that the treatment that he sought was experimental. When Kyree pushed for a re-evaluation, his claim was once again denied, this time on the grounds that he did not meet certain alcohol-abuse criteria.

The terms of Kyree's plan, however, contained no such criteria. So Kyree's doctors appealed once more, noting that Kyree would not survive without a heart transplant. But once more—despite realizing the life-or-death nature of the decision—Defendants denied Kyree's request, based on these same supposed criteria.

By now it was February 1, and time was running short. Kyree's doctors thus sought an "expedited" external claim review, which was conducted by MCMC. Yet, although federal law requires "expedited" reviews to be completed within—at most—seventy-two hours, *see* 45 C.F.R. § 147.136(d)(3)(iv) (2019), MCMC treated Kyree's review as a "standard" review to be completed within forty-five days. Kyree died a little over a week after submitting his external review application (five days after a decision should have been rendered). Ultimately, after completing its review on March 6, MCMC vindicated Kyree, overturning the previous claim denials. But it was too little, too late: By then, Kyree had been dead for almost a month.

Rose, as administratrix of Kyree's estate, sued PSA Airlines, the Plan, UMR, Quantum, and MCMC, seeking relief for a wrongful denial of benefits under ERISA § 502(a)(1)(B) or, alternatively, for a breach of fiduciary duty under § 502(a)(3).[2] She sought declaratory and in-

[2] Subparagraph 502(a)(1)(B) and § 502(a)(3) of ERISA are codified at 29 U.S.C. § 1132(a)(1)(B) and (a)(3), respectively. But, in keeping with the trend in this practice area, we refer to them and the other

junctive relief, monetary damages, and "appropriate equitable relief" including "surcharge, disgorgement, constructive trust, restitution, [and] equitable estoppel." J.A. 40–41. But the district court granted Defendants' motion to dismiss both claims under Rule 12(b)(6). Rose timely appealed that dismissal, which we review de novo. *See Mays v. Sprinkle*, 992 F.3d 295, 299 (4th Cir. 2021).

II. Background on ERISA

ERISA governs "employee benefit plans" that cover employees' retirement benefits, death benefits, and, as relevant for this case, health benefits. ERISA has a host of provisions, one of which imposes fiduciary duties on those who administer these plans. *See Varity Corp. v. Howe*, 516 U.S. 489, 496 (1996).

If an ERISA fiduciary breaches their fiduciary duty, § 409 makes them liable to the plan. And § 502(a)(2) allows plan participants to bring a derivative action to enforce § 409 and "to obtain recovery for losses sustained by the plan because of breaches of fiduciary duties." *In re Mut. Funds Inv. Litig.*, 529 F.3d 207, 210 (4th Cir. 2008).

But recovery under § 502(a)(2) goes to the plan, not to the beneficiary bringing the action. *Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 140 (1985). Of course, the beneficiary might benefit indirectly by increasing their plan's assets. Yet if the beneficiary wants to recover directly, like Rose does, then she would need to sue under a different provision of § 502's enforcement scheme.

There are two major provisions to pick from. Subparagraph 502(a)(1)(B) allows a "beneficiary" to bring suit "to recover benefits due to [her] under the terms of [her] plan, to enforce [her] rights under the terms of the plan, or to

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statutory provisions by their ERISA designation, not by their place in the U.S. Code.

clarify [her] rights to future benefits under the terms of the plan." If that doesn't provide the beneficiary with the relief that she seeks, then she can resort to § 502(a)(3), the enforcement scheme's "catchall" provision, *see Varity*, 516 U.S. at 512, which allows a beneficiary to sue "to enjoin any act or practice which violates [ERISA] or the terms of the plan," or "to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce [ERISA] or the terms of the plan."

With that background in mind, we turn to Rose's claims under § 502(a)(1)(B) and § 502(a)(3).

III. Subparagraph 502(a)(1)(B) Claim

Rose's § 502(a)(1)(B) claim must fail. Plaintiffs seeking relief under § 502(a)(1)(B) generally have two options: either (1) pay for the treatment yourself and seek reimbursement later, or (2) seek an injunction to force the plan provider to give you the treatment. *See Aetna Health, Inc. v. Davila*, 542 U.S. 200, 211 (2004). And these two choices are reflected in the statutory text, which says that a plaintiff may sue either "to *recover benefits* due to him under the terms of his plan" (i.e., seek reimbursement—"recovery"—of out-of-pocket expenses), or "to *enforce his rights* under the terms of the plan" (i.e., seek an injunction).[3] § 502(a)(1)(B) (emphasis added). But § 502(a)(1)(B) does not authorize a plaintiff to seek the monetary cost of a benefit that was never provided.

The reason is that both provisions of § 502(a)(1)(B) are limited by "*the terms of the plan*." That "statutory language speaks of '*enforcing*' the 'terms of the plan,' not of

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[3] Subparagraph 502(a)(1)(B) also allows a plaintiff to sue "to clarify his rights to future benefits under the terms of the plan." 29 U.S.C. § 1132(a)(1)(B). But because Kyree is dead, he has no rights to future health benefits. So the declaratory relief that this provision authorizes does not apply.

changing them." *CIGNA Corp. v. Amara*, 563 U.S. 421, 436 (2011) (cleaned up). Though the terms of the Plan are not in the record—we are at the pleading stage, after all—Rose has not alleged in her complaint that the Plan's terms contemplated paying money directly to Kyree. Instead, Rose alleges that Kyree's doctors requested that the Plan approve coverage for Kyree's surgery—meaning Kyree, through his doctors, filed a claim with the Plan which, if approved, would then pay the doctor to operate on Kyree. So the "benefit" that Kyree would be getting under the "terms of the plan" would be the surgery, not a direct monetary payment. Perhaps, if he had been able to pay for the costly surgery out-of-pocket, then the Plan would have been required to reimburse him. *See Davila*, 542 U.S. at 211. But that did not happen here.

In short, Rose does not seek to recover a benefit under the terms of the Plan. She seeks to recover the *monetary cost* of the benefit that was never provided. But that is a remedy that § 502(a)(1)(B)—which requires us to enforce the Plan's terms *as written*—does not allow. While *Davila*'s choice of remedies (pay now and seek reimbursement, or sue for an injunction and wait) may leave plan beneficiaries like Kyree in a bind, we must do what the statute commands. And that requires affirming the dismissal of Rose's § 502(a)(1)(B) claim.

IV. Paragraph 502(a)(3) Claims

Because Rose cannot prevail under § 502(a)(1)(B), we must consider whether she is entitled to relief under § 502(a)(3), the "catchall" provision of ERISA's civil enforcement scheme. *Varity*, 516 U.S. at 512.[4] That provision allows a plan beneficiary to seek an injunction or

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[4] Defendants contended in their briefing that Rose cannot proceed with her § 502(a)(3) claim because she also pursued a claim for denial

"other appropriate equitable relief" to either (1) "enforce" ERISA's terms or "the terms of the plan," or (2) "redress" a violation of those terms.

The key question that we must answer is whether the relief that Rose seeks—the monetary cost of the surgery that her son was wrongfully denied—qualifies as "equitable relief" under the statute. As the district court recognized, compensatory damages intended to provide "monetary relief for all losses . . . sustained as a result of the alleged breach of fiduciary duties" are legal, not equitable, relief. J.A. 85 (quoting *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 255(1993)). So the district court was correct not to give her the cost of the surgery as compensation for Kyree's death. But Rose also alleges the defendants have been unjustly enriched by keeping the money they should have paid Kyree's doctors.[5] And—subject to certain limits—monetary relief based on a defendant's unjust enrichment can be "equitable."

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of benefits under § 502(a)(1)(B). And it is true that "where Congress elsewhere provided adequate relief for a beneficiary's injury," the beneficiary cannot also obtain relief under § 502(a)(3) since such relief would not be "appropriate." *Varity*, 516 U.S. at 515. But alternative "relief" is only "adequate" if the plaintiff's "injury is redressable elsewhere in ERISA's scheme." *Korotynska v. Metro. Life Ins. Co.*, 474 F.3d 101, 106 (4th Cir. 2006). Rose's *incorrect* argument that her son's injury was redressable under § 502(a)(1)(B) does not mean that it was. Plaintiffs are allowed to plead in the alternative, "so nothing would have prevented [Rose] from suing under both provisions," § 502(a)(1)(B) and § 502(a)(3). *Hayes v. Prudential Ins. Co. of Am.*, 60 F.4th 848, 855 (4th Cir. 2023).

[5] Though Rose frames the relief that she requests under § 502(a)(3) in many ways—discussing "surcharge, disgorgement, constructive trust, [and] restitution," J.A. 40–41—the Supreme Court has emphasized that the "labels" for such benefits-based relief are unimportant. *See Liu v. SEC*, 140 S. Ct. 1936, 1942–44 (2020) ("[E]quity practice

A. When is monetary relief "equitable"?

Courts must often determine whether a plaintiff's requested relief is "equitable." That is because many federal statutes authorize courts to award "equitable relief" or "equitable remedies" to plaintiffs suing under their terms. *See* Samuel L. Bray, *The Supreme Court and the New Equity*, 68 Vand. L. Rev. 997, 1013 n.76 (2015) (listing some statutes). Over the past thirty years, the Supreme Court has taken an interest in deciding what relief counts as "equitable" under those statutes. The bulk of the Court's cases, like this one, arose under § 502(a)(3) of ERISA. *See Mertens v. Hewitt Assocs.*, 508 U.S. 248 (1993); *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204 (2002); *Sereboff v. Mid Atl. Med. Servs., Inc.*, 547 U.S. 356 (2006); *CIGNA Corp. v. Amara*, 563 U.S. 421 (2011); *US*

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long authorized courts to strip wrongdoers of their ill-gotten gains, with scholars and courts using various labels for the remedy," including "accounting," "restitution," "disgorgement," and "constructive trust."). And "[n]o matter the label," the Court has said, a "profit-based measure of unjust enrichment reflected a foundational principle: "It would be inequitable that a wrongdoer should make a profit out of his own wrong." *Id.* at 1943 (cleaned up) (quoting *Root v. Railway Co.*, 105 U.S. 189, 207 (1881)). At base, Rose argues that it would be inequitable for defendants to benefit—i.e., retain the cost of the surgery—because they breached their fiduciary duty to Kyree. So unjust enrichment is the allegation we most closely analyze.

To the extent that Rose seeks "equitable estoppel," that remedy is plainly inapplicable to her case. Estoppel is not a monetary remedy at all. Instead, it is a remedy aimed at holding the defendant to their promises when those promises engender good faith reliance by the plaintiff. 3 John Norton Pomeroy, *A Treatise on Equity Jurisprudence* § 804, at 189 (Spencer W. Symons ed., 5th ed. 1941). But Rose does not contend that the plan's terms were misrepresented to Kyree, thereby inducing him to give up something; instead, her argument is that the actual terms were not followed. So she does not actually seek anything resembling "estoppel."

Airways, Inc. v. McCutchen, 569 U.S. 88 (2013); *Montanile v. Bd. of Trs.*, 577 U.S. 136 (2016). But the approach that it developed did not end there. Instead, the Court has extended that approach to other statutes too. *See Liu v. SEC*, 140 S. Ct. 1936, 1942 (2020) (citing *Mertens*, *Great-West*, *Amara*, and *Montanile* when considering the meaning of "equitable relief" under the Securities Act of 1933).

The focus of these cases is often on whether a plaintiff's plea for money is a request for an "equitable" remedy or a "legal" remedy. Our focus is the same. To answer that question, we first consider—more broadly—what distinguishes legal remedies from equitable ones. Then we investigate how to apply this distinction to Rose's monetary claims.

1. The distinction between "legal" and "equitable" remedies

The term "equitable relief" references the Anglo-American tradition of "the divided bench." *Great-West*, 534 U.S. at 212. That is, in both England and the United States, there were once separate "courts of law" and "courts of equity." These courts used different procedures, had different substantive rules, and—most critically here—offered different remedies. Bray, *The New Equity*, *supra*, at 998–99. While the separate courts were gradually merged over the course of the nineteenth and twentieth centuries, the distinction between "legal" and "equitable" remedies remains salient. *Id.*

Untangling the situations when equitable relief was appropriate from those in which legal relief was available is difficult. The remedies that courts of equity traditionally offered were complicated and nuanced because those courts' jurisdiction was complicated and nuanced as well. But, as a baseline, equity existed only on the backdrop of the law; its role was to provide relief where the law was

inadequate. *See* F.W. Maitland, *Equity: A Course of Lectures* 19 (John Brunyante ed., 2d ed. 1936).

Sometimes, that meant merely providing different remedies for a given cause of action. For instance, perhaps a party suing for breach of contract thought that money damages could not compensate them adequately for the breach. So—rather than sue in a court of law for money damages—the party could instead choose to sue in equity for specific performance. Thus, in a sense, courts of equity shared "concurrent jurisdiction" with courts of law over contract disputes. *See id.* at 18–20; Samuel L. Bray, *Equity, Law, and the Seventh Amendment*, 100 Tex. L. Rev. 467, 470 (2022). And we might think that the critical distinction between "equitable" and "legal" remedies is that "equitable" remedies were offered by equitable courts—but not courts of law—in these concurrent-jurisdiction cases.

Other times, suits were brought in equity because the courts of law didn't recognize a cause of action for them *at all*. The canonical example is the "law" of trusts—i.e., the concept that one person could own legal title to property but be obligated to manage it as a fiduciary on behalf of someone else—which was developed in equity.[6] *See* Bray, *Equity, Law, and the Seventh Amendment*, *supra*, at 470. Courts of law refused to recognize the law of trusts. *See* R.H. Helmholz, *The Early Enforcement of Uses*, 79 Colum. L. Rev. 1503, 1503 & n.2, 1304 & n.5–6 (1979). So

[6] It bears stating clearly that the equitable remedy of the constructive trust and the more substantive "law" of trusts are quite different. "An express trust and a constructive trust are not divisions of the same fundamental concept. They are not species of the same genus. They are distinct concepts." Restatement (First) of Restitution § 160 cmt. a. Our references to "trust-specific remedies" do not include constructive trusts but rather refer to the remedies, like surcharge, that are attendant and unique to the substantive law of trusts.

trust suits had to be brought in courts of equity, making them fall within equity's "exclusive jurisdiction." *See* Bray, *Equity, Law, and the Seventh Amendment, supra*, One could thus fairly characterize any remedy available in these exclusive-jurisdiction cases as an "equitable," rather than "legal," remedy since it was only available in an equity court.

This dichotomy meant that courts of equity could offer broader relief within their exclusive jurisdiction because they did not have to worry about what relief was available in courts of law. Remember, equity steps in where the law runs out. If there is no law, then equity can do things that the law would normally cover. But if there is law, then equity is excluded from taking certain actions. So, in concurrent-jurisdiction cases, courts of law and courts of equity offered notably different relief. That was the whole point of the concurrent jurisdiction—to offer uniquely "equitable" remedies. But in "exclusive jurisdiction" cases, like suits for breach of trust, only courts of equity could hear the case, and they offered a correspondingly wider range of remedies that often looked a lot like the remedies traditionally seen at law.

2. Adding money to the picture

To this point, we have been speaking about historical "remedies" broadly. But it is now time to address what matters to these parties: money. While courts of law and equity created a dividing line between themselves for claims involving money, that division, like everything in this field, is nuanced.

As first-year law students might learn in their Civil Procedure class, the quintessential legal remedy—both before and after the courts of law and equity merged—is compensatory damages: money "ordered to be paid to . . . a person as compensation for loss or injury." *Damages*,

Black's Law Dictionary (11th ed. 2019). And the quintessential equitable remedy is the injunction. (Students might also learn about the equitable remedy of specific performance in their Contracts class.) Those students might thus come to think that a "legal" remedy is just another term for *monetary* remedies, while an "equitable" remedy simply means *non-monetary* ones.

The actual history is less simple. Money does not neatly divide, and never has neatly divided, law from equity. There were many non-monetary legal remedies. *See* Samuel L. Bray, *The System of Equitable Remedies*, 63 UCLA L. Rev. 530, 558–62 (2016) (discussing, among others, the writs of mandamus, habeas corpus, replevin, and ejectment). And, likewise, there were many monetary equitable remedies. *See id.* at 554–55 (discussing the constructive trust and the equitable lien). Moreover, the types of monetary relief available in equity differed depending on whether the suit was within equity's exclusive or concurrent jurisdiction.

The general proposition that equitable courts could offer broader remedies in exclusive-jurisdiction cases than in concurrent-jurisdiction cases carried through to monetary remedies. So courts of equity acting in exclusive-jurisdiction cases had a relatively free hand to award financial remedies. At times, they could even order defendants to pay "equitable compensation"—in trust cases, called a "surcharge"—which is a remedy essentially equivalent to money damages. Samuel L. Bray, *Fiduciary Remedies*, *in* The Oxford Handbook of Fiduciary Law 449, 456 (Evan J. Criddle et al. eds., 2019). Like legal damages, "equitable compensation" or "surcharge" subjected the trustee to

personal liability based on the *plaintiff's losses*. *Id.* at 456–58.[7]

Courts of equity in concurrent-jurisdiction cases could sometimes provide monetary relief too, but they were more constrained. Most relevantly, a court of equity could use money to remedy "unjust enrichment." *See* Bray, *The System of Equitable Remedies*, *supra*, at 553–56. Unjust enrichment is somewhat self-defining: "A person is unjustly enriched if the retention of [a] benefit would be unjust." Restatement (First) of Restitution § 1 cmt. a (1937). Sometimes that benefit was money, and courts of equity could award equitable restitution by ordering the unjustly enriched to give that "wrongfully obtained" money to its rightful owner either via a constructive trust or an equitable lien.[8] *See* 1 Dan B. Dobbs & Caprice L. Roberts, Law

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[7] One "central" remedy in breach-of-trust cases was an "accounting for profits," an "investigative process that culminates in an award to the plaintiff of the defendant fiduciary's profits." *See* Bray, *Fiduciary Remedies*, *supra*, at 456; *see also* Bray, *Equity, Law, and the Seventh Amendment*, *supra*, at 493–94 (describing fiduciary law as "an outgrowth of trust law . . . belonging to the exclusive jurisdiction" of equity). In other words, if the accounting discovered that the trustee had wrongfully profited off of trust property, then a beneficiary could sue him for the profits through the mechanism of an accounting. And, in contrast to most equitable monetary remedies, an accounting subjected the trustee to personal liability, as tracing the misappropriated property was not required. *See* Bray, *Fiduciary Remedies*, *supra*, at 454. But unlike legal damages, the accounting remedy turned on the trustee's gain and not the plaintiff's loss. *See id.*; *see also Great-West*, 534 U.S. at 214 n.2.

[8] "Rightful" owner does not necessarily mean "original" owner. At equity, plaintiffs could seek a defendant's unjustly gained benefit rather than merely trying to recover their losses. *See* 1 Dobbs & Roberts, *supra* § 1.1, at 4 (explaining that equitable restitution, unlike legal damages, is "measured by defendant's gains, not by plaintiff's losses"); Restatement (First) of Restitution § 1 cmt. e; *id.* §1 cmt. b

of Remedies § 1.1, at 4–5 (3d ed. 2018); Bray, *Fiduciary Remedies*, *supra*, at 553–56. Yet—unlike with exclusive-jurisdiction monetary remedies—the plaintiff had to identify the specific property (funds) that the defendant wrongfully possessed and that rightfully belonged to the plaintiff. *See Great-West*, 534 U.S. at 213 ("[A] plaintiff could seek restitution in equity, ordinarily in the form of a constructive trust or an equitable lien, where money or property identified as belonging in good conscience to the plaintiff could clearly be traced to particular funds or property in the defendant's possession."); *see also Montanile*, 577 U.S. at 145; *McCutchen*, 569 U.S. at 95; *Sereboff*, 547 U.S. at 362–63.

3. When can plaintiffs get money as "equitable relief" under ERISA?

This set up naturally raises a question: Because courts of equity could provide a remedy that looked like money damages in breach-of-trust cases, does that mean that

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(noting that a "benefit" includes saving the defendant from an expense). Thus, if Tayloe steals ten dollars of Landry's to invest in a company that goes on to cure cancer, a court of equity might award Landry all of Tayloe's profits.

And while the plaintiff had to suffer some type of harm at the hands of the unjustly enriched that made him the rightful owner of the enrichment, that harm did not have to be a tangible loss. *See* George E. Palmer, 1 Law of Restitution §2.11 (1978); Restatement (First) of Restitution § 1 cmt. e. Instead, the harm may be a wrongful interference with the plaintiff's rights that caused the unjust gain. For instance, if a man uses another man's egg washer without permission, he must give the owner the ill-gotten egg profits—even if he does not damage the machine—because he has interfered with the owner's exclusive-use rights. *See Olwell v. Nye & Nissen Co.*, 26 Wash. 2d 282, 285–86 (1946). Likewise, a fiduciary who profits by breaching his duty "is ordinarily accountable to his beneficiary for the profit, although the beneficiary suffered no loss." Restatement (First) of Restitution § 1 cmt. e; Palmer, *supra*, §2.12.

such a remedy is "equitable relief" under ERISA? *See, e.g.*, John H. Langbein, *What ERISA Means by Equitable*, 103 Colum. L. Rev. 1317 (2003) (arguing that trust-law remedies should be available under ERISA). In other words, does "equitable relief" under ERISA include relief available in exclusive-jurisdiction cases rather than just the relief available in concurrent-jurisdiction cases?

No. Plaintiffs can get monetary relief under § 502(a)(3) only if such relief was "*typically* available in equity." *Montanile*, 577 U.S. at 142 (quoting *Mertens*, 508 U.S. at 256). Exclusive-jurisdiction remedies—like the trust remedy of surcharge—were not "typically" available. Rather, as the Supreme Court has used the term, to be a "typically" available remedy, the relief must have been traditionally available in concurrent-jurisdiction cases. And in concurrent-jurisdiction cases—as the Supreme Court has acknowledged and as we have explained—equitable courts could sometimes award monetary restitution for unjust enrichment,[9] but they could not award the broad, personal, and compensatory relief available in law and in exclusive-jurisdiction cases.

In short: A plaintiff can recover money under § 502(a)(3) only if a court of equity could have awarded it in a concurrent-jurisdiction case, and a court of equity could award money when a plaintiff pointed to specific funds that he rightfully owned but that the defendant possessed as a result of unjust enrichment. *See Montanile*, 577 U.S. at 142–43. There's a lot going on there. And a great deal went into building this framework. Its thus

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[9] To be clear, we are not saying that the only time a court of equity could award monetary relief in concurrent-jurisdiction cases was when remedying unjust enrichment. That question is not before us. But we focus on unjust enrichment because that is the only plausible path to recovery on Rose's allegations.

worth going over the steps the Supreme Court took to erect it.

The Court laid its first bricks in *Mertens v. Hewitt Associates*, 508 U.S. 248 (1993). *Mertens* announced that courts looking to see whether a sought remedy is "equitable" under ERISA may look only to "those categories of relief that were *typically* available in equity." *Mertens*, 508 U.S. at 256 (focusing on the divided law-equity bench and its technical refinements). And "compensatory damages" were not typically available in equity.[10] *Id. Mertens* eschewed remedies that courts of equity could award only in "exclusive jurisdiction" cases because it rejected a reading that would allow relief available only in breach-of-trust cases *Mertens*, 508 U.S. at 256–57. Trust law, *Mertens* held, cannot determine the outer bounds of "equitable relief" under ERISA since the remarkable remedies available in such exclusive-jurisdiction cases were "purely legal" and ordinarily "beyond the scope" of an equity court's authority. *Mertens*, 508 U.S. at 256 (quoting 1 Pomeroy, *supra*, § 181, at 257). *Real* equitable remedies are those that were *typically* available, not those that were available only in specialized cases.[11] About a decade

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[10] One might say that the first brick was actually laid in *Massachusetts Mutual Life Insurance Company v. Russell*, 473 U.S. 134, 148 (1985), when the Court explained that "there is a stark absence—in [ERISA] itself and in its legislative history—of any reference to an intention to authorize the recovery of extracontractual damages."

[11] The Court additionally reasoned that "equitable relief" could not include trust-specific remedies because that would make the modifier "equitable" superfluous. *Mertens*, 508 U.S. at 257–58. In § 502(a)(3), the word "equitable" was intended to work as a limitation on what relief a court could provide. Yet if the word were taken to include "*all* relief available for breach of trust," *id.* at 257, including relief akin to money damages, *id.* at 256, then the statute would mean the same

after *Mertens*, the Supreme Court revisited the issue of what ERISA means by "equitable relief" in *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204 (2002). And *Great-West* reinforced the same approach used in *Mertens*: "the term 'equitable relief' in § 502(a)(3) must refer to 'those categories of relief that were *typically* available in equity.'" *Id.* at 219 (quoting *Mertens*, 508 U.S. at 256). The "special equity-court powers applicable to trusts [do not] define the reach of § 502(a)(3)." *Id.* Instead, the "trust remedies are simply inapposite" because they were *special* to trust cases, not *typical* of cases brought in equity more broadly. *Id.* To determine what relief was *typically* available in equity, we cannot look to equity's exclusive domain.

Great-West did not just confirm the *Mertens* approach: it added layers to it, explaining what that approach means for monetary remedies. The Court discussed the concept of equitable restitution—a remedy awarding money to the plaintiff "where money or property identified as belonging in good conscience to the plaintiff could clearly be traced to particular funds or property in the defendant's possession." *Great-West*, 534 U.S. at 213 (citing 1 Dobbs & Roberts, *supra*, § 4.3, at 587–88; *see also Great-West*, 534 U.S. at 229 (Ginsburg, J., dissenting). According to *Great-West*, however, not all restitutionary remedies count as "equitable." *See* 534 U.S. at 212. Some, like the constructive trust and the equitable lien, certainly qualify. *Id.* at 213. But that label—"equitable" or "legal"—"depends on 'the basis for the plaintiff's

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thing whether the word "equitable" was included or not. That would "deprive of all meaning the distinction Congress drew between . . . 'equitable' and 'legal' relief" within § 502. *Id.* at 258 (citing 29 U.S.C. § 1132(g)(2)(E)). That outcome, the Court stated, was "unacceptable." *Id.*

claim' and the nature of the underlying remedies sought." *Id.* (cleaned up) (quoting *Reich v. Cont'l Cas. Co.*, 33 F.3d 754, 756 (7th Cir. 1994) (Posner, J.)). And, "for restitution to lie in equity, the action generally must seek not to impose personal liability on the defendant, but to restore to the plaintiff particular funds or property in the defendant's possession." *Great-West*, 534 U.S. at 214.

In other words, *Great-West* tells us that, to qualify as "equitable," restitutionary relief imposed to remedy unjust enrichment must be *proprietary*, not *personal*: The plaintiff cannot recover out of the defendant's general assets. Instead, the plaintiff must (1) identify certain property or money "belonging in good conscience" to him, and (2) that property must "clearly be traced to particular funds or property in the defendant's possession." *Great-West*, 534 U.S. at 213; *see also* Bray, *Fiduciary Remedies*, *supra*, at 455 (discussing the difference between "personal" and "proprietary" remedies). Only after performing this "tracing" could courts of equity "order a defendant to transfer title (in the case of the constructive trust) or to give a security interest (in the case of the equitable lien) to a plaintiff who was, in the eyes of equity, the true owner." *Great-West*, 534 U.S. at 214.

Montanile is the most recent Supreme Court case to take up this issue, and it follows the same line. *Montanile* reiterates that "equitable relief" in ERISA refers to "those categories of relief that were *typically* available in equity." *Montanile*, 577 U.S. at 142 (quoting *Mertens*, 508 U.S. at 256). And it explains that "[e]quitable remedies are, as a general rule, directed against some specific thing; they give or enforce a right to or over some particular thing rather than a right to recover a sum of money generally out of the defendant's assets." *Id.* at 145 (cleaned up).

To sum up, these cases teach the same lessons. First is a lesson about how to interpret "equitable relief." We must ask what relief was "*typically* available in equity." That means that we must look to equity's traditional concurrent jurisdiction; pointing to its exclusive jurisdiction is not enough.[12] True, the Supreme Court did not use the term "concurrent." But its application of the "typically available" test made it clear that is what it meant: The Court consistently rejected trust-specific remedies on the grounds that they were from the equity courts' "exclusive jurisdiction." *Mertens*, 508 U.S. at 256; *see also Great-West*, 534 U.S. at 219.

That leads us to the second lesson: A plaintiff alleging unjust enrichment can get a monetary remedy under ERISA only if she seeks specific funds that are wrongfully in the defendant's possession and rightfully belong to her. Courts cannot award her relief that amounts to personal liability paid from the defendant's general assets to make the plaintiff whole.[13]

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[12] Indeed, in some cases, even pointing to concurrent jurisdiction may not be enough if the remedy was available only in a small sliver of concurrent-jurisdiction cases. *See Great-West*, 534 U.S. at 211–12 (acknowledging that an injunction for past-due money was available in some breach-of-contract cases but was not "typically available in equity").

[13] This should sound familiar. As we saw when we reviewed the history of equity, the decision to so limit restitution for unjust enrichment flows naturally from the choice to limit "equitable relief" under § 502(a)(3) to what was available in concurrent-jurisdiction cases. Another natural consequence of tying ERISA's "equitable relief" to the relief historically available in concurrent-jurisdiction cases is that the funds sought need not have originated with the plaintiff. It is enough that the funds are an unjust benefit that rightfully belong to the plaintiff—either because they were stolen from him or because the defendant interfered with the plaintiff's interests to get them. *See supra* note 8.

The Supreme Court has not, however, been perfectly consistent in its view. In between *Great-West* and *Montanile*, the Supreme Court decided *CIGNA Corp. v. Amara*, 563 U.S. 421 (2011). There, the Supreme Court suggested it might allow certain plaintiffs to pursue "make-whole," loss-based, monetary relief under § 502(a)(3). *Id.* at 442. And it did so because such relief was analogous to "surcharge," an "exclusively equitable" remedy under the law of trusts. *Id.* It thus broke with *Mertens* and *Great-West*'s explicit refusal to look to trust-law remedies and their implicit distinction between exclusive and concurrent jurisdiction.[14]

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[14] *Amara* ignored *Mertens* and *Great-West*'s refusal to look to trust-law remedies in defining § 502(a)(3)'s "appropriate equitable relief." But *Amara* was not actually faced with interpreting § 502(a)(3). The plaintiff there had sued their employer for adopting a new plan. *Amara*, 563 U.S. at 424. The district court agreed that the employer had "violated its obligations under ERISA" and ordered the plan to be "reformed" and the employer "to pay benefits accordingly." *Id.* at 425. It rooted its decision in § 502(a)(1)(B). As you may recall from above, that provision only allows a plaintiff to seek relief under "the terms of the plan." And the plaintiff's gripe in *Amara* was not that his employer had violated the terms of his plan but that the employer had violated ERISA by wrongfully changing those terms. So, the Supreme Court held, § 502(a)(1)(B) did not authorize the district court to reform the plaintiff's plan and award benefits. *See Amara*, 563 U.S. at 435–38. It thus vacated and remanded.

You might think the opinion would stop there. But the Court continued to "identify equitable principles that the court *might* apply on remand." *Id.* at 425 (emphasis added). The "equitable principles" that *Amara* then identified are inconsistent with *Mertens* and *Great-West*. *Amara* suggested that the plaintiff could seek "make-whole relief," but only by reference to trust law: Because he alleged a "breach of trust," the plaintiff could seek a "surcharge." 563 U.S. at 442. In other words, "the fact that the defendant in this case, unlike the defendant in *Mertens*, is analogous to a trustee makes a critical difference." *Id.*

As the Supreme Court has since acknowledged, this part of *Amara* was dicta. *See Montanile*, 577 U.S. at 148 n.3; *see also McCravy v. Metropolitan Life Ins. Co.*, 690 F.3d 176, 181 n.2 (4th Cir. 2012) (assuming *Amara* was dicta). And, as we have recognized, adopting it would be a "striking development" that "expanded the relief" available under §502(a)(3) to include "make-whole relief" such as "surcharge." *McCravy*, 690 F.3d at 180 (citation omitted). Still, we followed *Amara*'s dicta shortly after it was decided, allowing, for the first time in our Circuit, plaintiffs to seek "make-whole relief" under § 502(a)(3) because it was available in courts of equity in trust cases. *McCravy*, 690 F.3d at 180 (citation omitted).[15] And we

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But any such distinction is not one that matters under the reasoning of *Great-West* and *Mertens*. *Great-West* and *Mertens* required looking to "those categories of relief that were *typically* available in equity." *Mertens*, 508 U.S. at 256. *Mertens* rejected the idea that the statutory phrase "equitable relief" meant "whatever relief a court of equity [would be] empowered to provide in the particular case at issue." *Id.* In other words, according to *Mertens*, whether a given remedy is "equitable" under the statute does not depend on the "particular case" that plaintiff brings, or on the identities of the plaintiff and the defendant. On this logic, it should not matter whether the defendant is analogous to a trustee because trust-specific remedies are "simply inapposite." *See Great-West*, 534 U.S. at 219.

[15] On the same day the Supreme Court handed down its decision in *Amara*, we had issued a panel decision in *McCravy*. In the original opinion, the *McCravy* panel rejected the claim that the special equity-court powers applicable to trusts defined ERISA's reach. *See McCravy v. Metropolitan Life Ins. Co.*, 650 F.3d 414, 418–20 (4th Cir. 2011); *see also LaRue v. DeWolff, Boberg & Assocs.*, 450 F.3d 570, 575–77 (4th Cir. 2006) (reaching the same conclusion), *vacated on other grounds*, 552 U.S. 248 (2008). But, recognizing that *Amara* advocated for a dramatically different rule from *Mertens* and *Great-West* about what relief was available under § 502(a)(3), we granted a panel rehearing, vacated that earlier decision, and replaced it with a new one. *See McCravy*, 690 F.3d 176.

have adhered to that understanding, applying it just two years ago in *Peters v. Aetna, Inc.*. 2 F.4th 199, 216 (4th Cir. 2021) ("The Supreme Court has recognized surcharge as a form of 'appropriate equitable relief' available under § 502(a)(3)." (quoting *Amara*, 563 U.S. at 439, 441–42)).

The problem is that the Supreme Court has since rejected the turn that it contemplated in *Amara* and therefore rejected the turn that we took in *McCravy.* In *Montanile*, the Court went beyond labeling *Amara*'s reasoning "dicta" and expressly declared that the "interpretation of 'equitable relief' in *Mertens* [and] *Great-West* . . . *remains unchanged*." *Montanile*, 577 U.S. at 148 n.3 (emphasis added). And, as discussed, that interpretation is flatly inconsistent with *Amara*'s suggestions. Indeed, aside from these chidings, *Montanile* did not otherwise cite *Amara*. The implication was clear: *Amara*'s approach is antithetical to a proper § 502(a)(3) analysis.

Since *Montanile's* approach—which is really *Mertens*'s and *Great-West*'s approach—is inconsistent with *Amara*'s approach, it is also inconsistent with ours. We currently allow plaintiffs suing for breach of fiduciary duty to seek make-whole, compensatory relief under § 502(a)(3) on the logic that such relief was available for breach of trust. Even the name that we give such relief—"surcharge"—is a term specific to trust law. *See* Bray, *Fiduciary Remedies*, *supra*, at 456 (calling "surcharge" a name "redolent of trusts"). But *Mertens* and *Great-West* made plain that trust-law remedies do not count as "equitable" unless they were "*typically* available in equity." *Mertens*, 508 U.S. at 256; *Great-West*, 534 U.S. at 210. And *Montanile* reinforced that test: "In many situations"—that is, in equity's *exclusive* jurisdiction—"an equity court could establish purely legal rights and grant legal reme-

dies which would otherwise be beyond the scope of its authority." 577 U.S. at 147 (internal quotation marks omitted) (quoting *Mertens*, 508 U.S. at 256). Yet "these legal remedies were not relief 'typically available in equity.'" *Id.* at 147 (quoting *Mertens*, 508 U.S. at 256). "Typical" relief is defined by equity's *concurrent* jurisdiction. So, while our Circuit's resort to trust law might have made sense in the immediate aftermath of *Amara*, it no longer does.[16] *Montanile* revived *Mertens* and *Great-West* and put *Amara*'s discussion to rest.

It is time that we did too. We have never considered *Montanile*'s effect on *Amara*. *Peters* conceptually followed *McCravy*'s lead, relying on both *McCravy* and *Amara*. It also sequentially followed *Montanile*. Yet it did not explain why we should stick with *McCravy* and *Amara* in *Montanile*'s wake. In fact, it did not so much as cite *Montanile*. *See generally Peters*, 2 F.4th 199. Where "prior decisions" in our Circuit use "reasoning inconsistent with Supreme Court authority," "we are not bound to follow them." *United States v. Banks*, 29 F.4th 168, 178 (4th Cir. 2022). That is true even where some of the prior panel decisions "were decided after" the Supreme Court case rendered them untenable. *Id.* Absent an indication that *Peters* considered the viability of *Amara*'s rule after *Montanile*—and there is no such indication—it cannot

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[16] The Supreme Court's recent decision in *Liu v. SEC*, 140 S. Ct. 1936 (2020), reinforces that trust-specific remedies do not qualify as remedies "*typically* available in equity." When noting that an "accounting"—"an equitable remedy requiring disgorgement of ill-gotten profits"—qualified as a remedy "typically available in equity," the Court showed that the remedy was not merely used in "cases involving a breach of trust or of fiduciary duty" and that courts of equity "authorized profits-based relief in patent-infringement actions where no trust or special relationship existed." *Id.* at 1944.

bind us to a path inconsistent with the Supreme Court's dictates.

Accordingly, we return to the same rule that applied at the Supreme Court, and in this Circuit, before *Amara*: Plaintiffs that seek "merely personal liability upon the defendants to pay a sum of money" ask for legal, not equitable, relief under § 502(a)(3). *See LaRue*, 450 F.3d at 575 (cleaned up) (quoting *Great-West*, 534 U.S. at 213). But plaintiffs that seek to strip away defendant's unjust gains might have better luck. Their sought relief qualifies as "equitable," so long as the plaintiff can trace those unjust gains to "specifically identified funds that remain in the defendant's possession or against traceable items that the defendant purchased with the funds." *Montanile*, 577 U.S. at 144–45.

A. Has Rose sought an "equitable" remedy?

With those rules in mind, we agree with the district court that compensatory "make-whole" monetary relief is unavailable under § 502(a)(3). But the district court did not consider whether Rose plausibly alleged facts that would support relief that was "typically" available in equity. *Montanile*, 577 U.S. at 142. As we have discussed, one such remedy is based on the defendant's unjust enrichment. But the question remains whether Rose has plausibly alleged facts that would entitle her to such relief by alleging (1) that a defendant was unjustly enriched by interfering with Kyree's rights[17] and (2) that the fruits of that unjust enrichment remain in the defendant's possession or can be traced to other assets.

Rather than determine for ourselves whether Rose properly alleged such a theory, we remand for the district

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[17] Such as by breaching their fiduciary duties to him. *See* Restatement (First) of Restitution § 1 cmt. e; Palmer, *supra*, §2.12.

court to decide in the first instance whether Rose has met this burden for each defendant.[18]

* * *

Rose has not plausibly alleged facts that could entitle her to monetary relief on behalf of her son's estate under § 502(a)(1)(B) because that provision only authorizes a beneficiary to sue to recover the benefits that they were due *under the terms of their plan*. Kyree's health plan did not entitle him to money; only to the surgery, which he never received. So the district court was correct to dismiss Rose's § 502(a)(1)(B) claim.

Yet § 502(a)(3) authorizes Rose to seek "equitable relief." And, while monetary relief awarded to compensate for a plaintiff's loss does not qualify as "equitable" under the Supreme Court's test, relief awarded under an unjust-enrichment theory may indeed qualify. We thus remand for the district court to determine whether Rose has—or can—plausibly allege such a claim.

Accordingly, the district court's decision is

AFFIRMED IN PART,
VACATED IN PART,
AND REMANDED.

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[18] Other questions may also remain. For example, if UMR, Quantum, or MCMC were somehow unjustly enriched by the refusal to pay, then the district court may need to decide whether UMR, Quantum, or MCMC were "fiduciaries" under ERISA.

TOBY HEYTENS, Circuit Judge, concurring in part and dissenting in part:

I agree the district court correctly dismissed Rose's 502(a)(1)(B) claim and that the 502(a)(3) claim should be remanded for further proceedings. In my view, however, Rose need not show the fruits of a defendant's wrongdoing are traceable to particular funds remaining in that defendant's possession to state a claim under ERISA. Instead, I would hold Rose need only plead and prove the defendant was a fiduciary and that any money sought represents "make-whole relief" for a "violation of a duty imposed upon that fiduciary." *CIGNA Corp. v. Amara*, 563 U.S. 421, 442 (2011).

The relevant statutory provision authorizes Rose to sue for an injunction or "other appropriate equitable relief." 29 U.S.C. § 1132(a)(3). This provision empowers district courts to provide "those categories of relief that were *typically* available in equity." *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 256 (1993). And in *Amara*, the Supreme Court told us that "the category of traditionally equitable relief" includes "monetary 'compensation' for a loss resulting from a trustee's breach of duty"—"sometimes called a 'surcharge'"—and that remedy is available against "the plan administrator" of an ERISA plan. 563 U.S. at 441–42. Two previous published opinions of this Court have understood *Amara* in precisely this way. See *Peters v. Aetna, Inc.*, 2 F.4th 199, 216 (4th Cir. 2021) ("The Supreme Court has recognized surcharge as a form of 'appropriate equitable relief' available under § 502(a)(3) because it was 'typically available in equity[.]'" (quoting *Amara*, 563 U.S. at 439, 441–42)); *McCravy v. Metropolitan Life Ins. Co.*, 690 F.3d 176, 181 (4th Cir. 2012) (describing *Amara* as "stand[ing] for the proposition that

remedies traditionally available in courts of equity, expressly including . . . surcharge, are indeed available to plaintiffs suing fiduciaries under Section [502](a)(3)").

The Court's opinion offers several potential justifications for departing from what *Amara* said and what *Peters* and *McCravy* held. I am unconvinced.

For example, the opinion spends considerable time suggesting *Amara* misunderstood the relevant history and that its approach departed from the Supreme Court's earlier decisions in *Mertens v. Hewitt Associates*, 508 U.S. 248 (1993), and *Great-West Life & Annuity Insurance Co. v. Knudson*, 534 U.S. 204 (2002). But we are bound by the Supreme Court's formulation of the relevant principles even when we think the Court may have gotten those principles—or their application—wrong. This seems all-the-more-true here, where the relevant portion of the Supreme Court's opinion in *Amara* extensively discussed both *Mertens* and *Great-West*. See *Amara*, 563 U.S. at 438–39.

True, *Amara*'s discussion of Section 502(a)(3) was "not essential to resolving that case" and was thus arguably dicta. *Montanile v. Board Trs. Nat'l Elevator Indus. Health Benefit Plan*, 577 U.S. 137, 148 n.3 (2016). But a previous panel of this Court has already considered that fact and decided it should follow *Amara*'s lead here anyway. See *McCravy*, 690 F.3d at 181 n.2. And, under our well-settled procedures, "one panel cannot overrule another." *McMellon v. United States*, 387 F.3d 329, 333 (4th Cir. 2004) (en banc).

The issue that gives me the most pause is the Supreme Court's treatment of *Amara* in its 2016 decision in *Montanile*. I agree, of course, that previous "panel precedent"—here, this Court's decisions in *Peters* and

McCravy—"is not binding if it subsequently proves untenable considering Supreme Court decisions." *Carrera v. E.M.D. Sales Inc.*, 75 F.4th 345, 352 (4th Cir. 2023) (quotation marks omitted). "But that is a high standard, and I am not confident it is satisfied here." *United States v. Brown*, 67 F.4th 200, 217 (4th Cir. 2023) (Heytens, J., concurring in the judgment).

To show the Supreme Court has rejected *Amara*'s blessing of surcharge as a proper remedy under Section 502(a)(3)—and thus has abrogated *Peters* and *McCravy*—the Court's opinion relies on a footnote in *Montanile.* In that footnote, the Supreme Court noted the relevant discussion in *Amara* was "not essential to resolving that case" and stated that—notwithstanding *Amara*—the Court's "interpretation of 'equitable relief' in *Mertens*, *Great-West*, and *Sereboff v. Mid Atlantic Medical Services, Inc.*, 547 U.S. 356 (2006), remains unchanged." 577 U.S. at 148 n.3; see *id.* (also referencing *US Airways, Inc. v. McCutchen*, 569 U.S. 88 (2013)).

To me, that is not enough to permit a panel of this Court to depart from our previous holdings in *Peters* and *McCravy*. *Montanile* did not say *Amara* had been inconsistent with the Court's previous decisions. Nor did it say the Court was now adopting an approach contrary to *Amara*. Instead, *Montanile* rejected a litigant's broad reading of *Amara* that would have "all but overrul[ed]" *Mertens* and *Great-West*, emphasizing that *Amara* "reaffirmed" the traditional equitable limitations covering "a lien or a constructive trust" that drove the Court's decision in *Montanile*. See *Montanile*, 577 U.S. at 148 n.3. Viewed in this light, *Amara*'s explanation of why its discussion of surcharge was consistent with *Mertens* covers *Great-West*, *Sereboff*, *McCutchen*, and *Montanile* as well. As *Amara* noted, surcharge was not available against just anyone. Rather, surcharge only "extended to a breach of

trust committed *by a fiduciary* encompassing any violation of a duty imposed upon that fiduciary," which is why "the fact that the defendant in [*Amara*], unlike the defendant in *Mertens*, [was] analogous to a trustee ma[de] a critical difference." 563 U.S. at 442 (emphasis added). Like the defendants in *Great-West*, *Sereboff*, and *McCutchen*, however, the defendant in *Montanile* was not a fiduciary. Instead, those cases all involved situations where a fiduciary (an ERISA plan administrator) was suing a non-fiduciary (the plan's own beneficiaries) to claw back benefits that had been paid out. See *Montanile*, 577 U.S. at 139; *Sereboff*, 547 U.S. at 359; *Great-West*, 534 U.S. at 208; *McCutchen*, 569 U.S. at 91.[*]

The fact that *Amara* can be reconciled with *Montanile* in this way means *Peters* and *McCravy* can too. I have no doubt one could have a robust debate about whether a fiduciary versus non-fiduciary line makes sense as a matter of history or first principles or if it was, in fact, consistent with *Mertens* and *Great-West*. But that distinction comes directly from the Supreme Court's decision in *Amara*. It is reflected in this Court's decisions in *Peters* and *McCravy*—both of which were premised on the defendants' status as fiduciaries. See *Peters*, 2 F.4th at 227;

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[*] *Montanile* also quoted a leading treatise's statement that "[e]quitable remedies are, as a general rule, directed against some specific thing . . . rather than a right to recover a sum of money generally." 577 U.S. at 145 (quoting 4 S. Symons, Pomeroy's Equity Jurisprudence § 1234, p. 694 (5th ed. 1941)). Saying something is generally true is different from saying it always is. *Montanile* also states that "*all* types of equitable liens must be enforced against a specifically identified fund in the defendant's possession." *Id.* at 146. But Rose does not seek an equitable lien—which, *Montanile* notes, "is simply a right of special nature *over*" a "specifically identified" thing. *Id.* at 145.

McCravy, 690 F.3d at 181. And it is not "impossible to reconcile" with the Supreme Court's terse footnote in *Montanile*. See *Carrera*, 75 F.4th. at 352. To me, that should be the end of the matter.

* * *

This Court "do[es] not lightly presume that the law of the circuit has been overturned . . . or rendered no longer tenable." *Carrera*, 75 F.4th at 352 (quotation marks omitted). Because I do not believe that high standard is satisfied here, I believe this panel remains bound by *Peters* and *McCravy*, and would conclude that Rose's ability to obtain relief does not turn on an ability to show traceability.

FILED: October 6, 2023

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF
NORTH CAROLINA
CHARLOTTE DIVISION
3:19CV695-GCM-DCK

JODY ROSE, Plaintiff, vs. PSA AIRLINES, INC. GROUP INSURANCE PLAN, *et al.*, Defendants.	)))))))))))	ORDER

This matter is before the Court upon the Memorandum and Recommendation of United States Magistrate David C. Keesler, filed March 24, 2021. The parties were advised that pursuant to 28 U.S.C. § 636(b)(1)(C), written objections to the Memorandum and Recommendation must be filed within 14 days after service of the memorandum. Plaintiff as well as all Defendants timely filed objections.

The Court conducted a *de novo* review of the Memorandum and Recommendation, as well as the Defendants' and the Plaintiff's objections thereto. Based upon this *de novo* review, the Court concludes that the recommendation to grant to the Defendants' Motion to Dismiss Plaintiff's section 502(a)(1)(B) claim (wrongful denial of benefits) is correct and in accordance with law, and the Court affirms the same. However, the Court further concludes that the recommendation to deny Defendants' Motion to

Dismiss as to Plaintiff's Section 502(a)(3) claim is in error and the Court rejects this recommendation.

The facts in this ERISA case are accurately and thoroughly set out in the Memorandum and Recommendation and will not be repeated herein. The Court will address only the magistrate's analysis with regard to Plaintiff's Section 502(a)(3) claim.

In her Second Claim for Relief, Plaintiff alleges that all named Defendants acted in a fiduciary capacity and breached their fiduciary duties to the deceased, Kyree Holman, who died awaiting a heart transplant. Plaintiffs seeks "equitable relief in the form of the full value of the heart transplant and any related services, as well as other associated benefits to which [the deceased] would have been entitled had he lived." (Compl. ¶ 130).

Section 502(a)(3) of ERISA, 29 U.S.C. 1132(a)(3), authorizes a plan beneficiary to bring a civil action (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain *other appropriate equitable relief* (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan. 29 U.S.C. § 1132(a)(3) (emphasis added). The magistrate correctly noted that any claim for injunctive or declaratory relief under § 502(a)(3) is rendered moot in light of Mr. Holman's death. Accordingly, the only avenue of relief potentially available to the Plaintiff is "other equitable relief." The question before the Court then becomes whether the monetary value of the heart transplant sought by Plaintiff can be considered "other equitable relief."

In *Mertens v. Hewitt Assocs.*, 508 U.S. 248 (1993), the plaintiff sought "compensatory damages" under § 502(a)(3) in the form of "monetary relief for all losses . . .

sustained as a result of the alleged breach of fiduciary duties." *Id.* at 255 (emphasis omitted). The Supreme Court held that these types of damages are "the classic form of legal relief,"—not equitable relief—and therefore are not available under § 502(a)(3). *Id.* (citations omitted*); see also Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 210 (2002) ("[T]he term 'equitable relief' in § 502(a)(3) must refer to 'those categories of relief that were typically available in equity") (internal quotations, citations, and emphasis omitted); *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 144 (1985) (holding that ERISA does not create a right of action for extracontractual damages caused by improper or untimely processing of benefit claims).

The magistrate relies on the Supreme Court's decision in *CIGNA Corp. v. Amara*, 563 U.S. 421 (2011) in concluding that Plaintiff may have viable claim under § 502(a)(3) under the equitable remedy of surcharge. In *Amara*, the Court suggested, in *dicta*, that plan participants and beneficiaries may, in certain circumstances, be able to recover monetary relief under § 502(a)(3) pursuant to various equitable theories, specifically the equitable theory of "surcharge." 563 U.S. at 442. Other than describing surcharge as an equitable theory that allows for "make whole relief," *id*. at 442, and noting that it requires a showing of "actual harm" and causation, *id*. at 444, the Court did not set forth any more specific contours of this remedy. Instead, it remanded to the district court to decide whether or not relief was appropriate on the facts of the case. *Id*. at 445.

Under traditional equitable principles, "'surcharge' is not simply the moniker given to any monetary payment for an equitable harm—if it were, then there would be no need for other equitable remedies, such as restitution, equitable estoppel, or a constructive trust." *Kenseth v. Dean*

Health Plan, Inc., 722 F.3d 869, 893 (7th Cir. 2013) (Manion, J., concurring). The post-*Amara* Fourth Circuit cases addressing the surcharge remedy under § 502(a)(3) all involve a situation where the plaintiffs were seeking to be made whole—i.e., put in the position that they would have been but for the fiduciary's alleged breach. *Retirement Comm. of DAK Americas LLC v. Brewer*, 867 F.3d 471, 486 (4th Cir. 2017) (reversing district court's grant of summary judgment to allow claim for surcharge remedy brought by a participant in a defined benefit pension plan who relied on fiduciary's misrepresentation "to his financial detriment"); *McCravy v. Metro Life Ins. Co.*, 690 F.3d 176, 181 (4th Cir. 2012) (noting that plaintiff may be able to recover under a remedy of surcharge "the amount of life insurance proceeds lost because of [the] trustee's breach of fiduciary duty"). Indeed, in *Amara* itself the plaintiffs simply sought to be placed in the same position they would have been in but for allegedly misleading summary plan descriptions. *Amara*, 563 U.S. at 441 (noting that the relief ordered by the district court consisted of "injunctions [that] require the plan administrator to pay to already retired beneficiaries money owed them under the plan as reformed"). This type of relief was arguably "typically available in equity."

Here, by contrast, Plaintiff is not asking the Court to put her in the same position that she would have been in had the benefits been paid. Instead, she is seeking a monetary windfall that, in reality, could have never come to pass. Even if Defendants had timely approved of Mr. Holman's claim for benefits, that approval would not have resulted in Mr. Holman receiving the monetary value of a heart transplant and other medical treatment. Instead, Mr. Holman would possibly have received the transplant, and his medical providers would have been paid for their services. In other words, had Holman's claim for benefits

been approved, he would possibly have received the medical treatment itself, but under no circumstances would he have received the monetary value of that treatment. Awarding Plaintiff the monetary value of medical treatment that Mr. Holman did not receive—and cannot now receive— is not the type of "make whole relief" authorized under the equitable remedy of surcharge.

The Court finds that regardless of whether the Defendants acted as fiduciaries, Plaintiff cannot obtain the relief sought because it is merely a claim for compensatory damages and does not constitute "appropriate equitable relief" under § 502(a)(3). *See Zavala v. Trans-System,* 258 Fed. App'x. 155, 157 (9th Cir. 2007) (affirming holding of the district court that the monetary value of a denied benefit in the form of a medical procedure that the beneficiary cannot receive due to his death is not permissible under § 502(a)(3)). While the facts of this case are undoubtedly tragic, it is not for this Court to fashion a remedy under ERISA for these particular circumstances, rather that is the job of Congress.

IT IS THEREFORE ORDERED that the Defendants' Motions to Dismiss are hereby GRANTED.

Signed: September 22, 2021

[h/w signature]

Graham C. Mullen

United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF
NORTH CAROLINA
CHARLOTTE DIVISION
CIVIL ACTION NO. 3:19CV695-GCM-DCK

JODY ROSE,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	**MEMORANDUM**
	)	**AND RECOM-**
PSA AIRLINES, INC. GROUP	)	**MENDATION**
INSURANCE PLAN,	)	
PSA AIRLINES GROUP	)	
HEALTH BENEFIT PLAN,	)	
PSA AIRLINES PLAN B	)	
EMPLOYEE BENEFIT PLAN,	)	
QUANTUM HEALTH, INC.,	)	
PSA AIRLINES, INC.,	)	
MCMC, LLC,	)	
PSA AIRLINES SHARED	)	
SERVICES ORG.,	)	
UMR, INC.,	)	
	)	
Defendants.	)	
	)	

THIS MATTER IS BEFORE THE COURT on "PSA Airlines Defendants' Motion To Dismiss" (Document No. 40), "Defendant Quantum Health, Inc.'s Notice Of Joinder In PSA Defendants' Motion To Dismiss And Supplemental Motion To Dismiss" (Document No. 42), "UMR, Inc.'s Motion Under Federal Rule of Civil Procedure 12(b)(1) And 12(b)(6) To Dismiss The Amended

Complaint" (Document No. 44), and "Defendant MCMC, LLC's Rule 12(b)(6) Motion To Dismiss For Failure To State A Claim" (Document No. 51). These motions have been referred to the undersigned Magistrate Judge pursuant to 28 U.S.C. § 636(b) and are now ripe for disposition. In the interests of judicial economy and efficient case management, the undersigned will consider the pending motions together in this Memorandum and Recommendation. Having carefully considered the arguments, the record, and the applicable authority, the undersigned will respectfully recommend that the motions be granted in part and denied in part.

I. BACKGROUND

Plaintiff Jody Rose ("Plaintiff" or "Rose") initiated this action with the filing of a "Complaint" in this Court on December 20, 2019 against Defendants PSA Airlines, Inc. Group Insurance Plan, PSA Airlines Group Health Benefit Plan, PSA Airlines Plan B Employee Benefit Plan, PSA Airlines, Inc., PSA Airlines Shared Services Org.,[1] UMR, Inc. ("UMR"), Quantum Health, Inc. (also known as "MyQHealth by Quantum") ("Quantum"), and MCMC, LLC ("MCMC") (collectively, "Defendants"). (Document No. 1). On January 29, 2020, Plaintiff filed an "Amended Complaint" against Defendants. (Document No. 15). In the Amended Complaint, Plaintiff alleges two claims against Defendants. The first claim against Defendants is for wrongful denial of health benefits under the Employee Retirement and Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1132(a)(1)(B). Id. at pp. 16-

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[1] As the "PSA Airlines Defendants' Motion To Dismiss" notes, the properly named PSA Defendants include PSA Airlines, Inc. and PSA Airlines, Inc. Group Benefit Plan (collectively, "PSA Defendants"). The other Defendants that Plaintiff names in the Complaint and the Amended Complaint were improperly included.

20. The second claim against Defendants is for breach of fiduciary duties under ERISA, 29 U.S.C. § 1132(a)(3). Id. at pp. 20-29. Plaintiff contends that all Defendants "are fiduciaries under ERISA." Id. at p. 4.

Plaintiff's claims arise out of a tragic set of facts. Plaintiff Rose is the "Administratrix of the Estate of Kyree Devon Holman [('Holman')]," filing the present lawsuit "for the exclusive benefit of the next of kin and beneficiaries of Kyree Devon Holman," acting "as the lawful representative of [Holman's] Estate." Id. at p. 1. Holman died tragically at age 27 on February 9, 2019 after doctors at Duke University Hospital diagnosed him with giant cell myocarditis while "waiting for his [heart] transplant to be approved by Defendants." Id. at pp. 5, 14. The Amended Complaint details Holman's background as a flight attendant employed by PSA Airlines. Id. at p. 4. As an employee of PSA Airlines, Holman had health and welfare benefits through PSA's "fully self-funded" health benefit plan ("the Plan"), which Plaintiff claims is an "employee welfare benefit plan" under ERISA. Id. at p. 2. In late December 2018, Holman began to develop "flu-like symptoms," upon which he "went to an urgent care facility…and was treated for acute bacterial bronchitis." Id. at pp. 4-5. On December 23, 2018, Holman "passed out in his hotel room in Canada on a work layover and was flown back to Charlotte, North Carolina." Id. at p. 5. The next day, he "was admitted to Novant Hospital in Charlotte" and was "treated with cardioversion." Id. After his condition worsened, Holman "was medically air transferred to Duke University Hospital ("Duke") with acute heart failure and ventricular tachycardia." Id. A series of biopsies revealed "giant cell myocarditis" – prompting doctors at Duke to recommend Holman for a heart transplant. Id. According to the Amended Complaint, "[o]n information

and belief, [Holman] was number one on the heart transplant waiting list and Duke was prepared to move forward with [the] heart transplant immediately upon Defendants' approval of [Holman's] claim." Id. at p. 6.

The non-PSA Defendants – including UMR, Quantum, and MCMC – seem to have served various support functions to the Plan. The Amended Complaint alleges that Defendant UMR "provides claim administrative services for the Plan such as making claim payments for medical claims and is the named 'claims appeal fiduciary for medical claims' by the Plan." Id. at p. 3. Plaintiff contends that Defendant Quantum performs the same services, as "UMR contracted with Quantum to perform certain of UMR's claim administration responsibilities, including as they related to the handling [of] the claim and appeal processing and determinations and the external review coordination at issue in this lawsuit." Id. at pp. 3-4. Quantum, the Amended Complaint alleges, was also a "named 'claims appeal fiduciary for medical claims' by the Plan." Id. According to Plaintiff, MCMC "contracted to provide external review services for the claim at issue in this lawsuit on behalf of or at the direction of some or all of the other defendants." Id. at p. 4.

Given the deterioration in and severity of Holman's condition, Duke began the process of submitting information in support of his claim for coverage of the heart transplant under the Plan just days after determining that Holman was a heart transplant candidate in early January 2019. Id. at pp. 5-6. Duke allegedly indicated that the claim was "urgent." Id. at p. 6. After Duke submitted medical information "related to [Holman's] condition to Defendants in support of [Holman's] claim for a heart transplant," Defendants allegedly denied the claim on January 17, 2019. Id. at pp. 6-7. In a letter denying the claim, Defendants allegedly indicated that "according to

summary plan description language…this treatment is considered experimental or investigational…because the effectiveness has not been established," and the Plan did not cover "experimental drugs and medicines." Id.

Duke allegedly resubmitted the claim following the initial denial, upon which "Defendants ordered a medical review to be performed by AllMed Healthcare Management." Id. at p. 7. The doctor performing the review indicated that the denial should be "upheld" because Holman did "not meet all the InterQual criteria." Id. Plaintiff indicates that "[t]he clinical criteria relied upon to deny [Holman's] claim for a heart transplant by Defendants [] were the InterQual 2018.2 Procedures Criteria related to Cardiac Transplantation," which, according to Plaintiff, do "not contain any requirement, recommendation, or guideline that a heart transplant candidate have no prior history of alcohol misuse or be alcohol-free for 6 months." Id. at p. 8. These criteria, according to Plaintiff, "are not included in the Plan, are not referenced by the Plan, are not incorporated into the Plan, and are not otherwise implicated by the Plan." Id. at p. 12. Based, however, on the belief that the criteria did contain such a requirement, Defendants denied Holman's claim for coverage of the heart transplant procedure a second time, using letterhead containing both PSA Airlines and Quantum's names. Id. at p. 8.

A second round of internal appeal allegedly ensued. Duke "reiterated the exigency of [Holman's] situation to Defendants, stating that '[t]here is no other option but heart transplant at this time.'" Id. at p. 9. After ordering "medical review of the claim to be performed by Medical Review Institute of America, LLC," Defendants allegedly denied the claim a third time, based on the same finding in the medical review that the "InterQual criteria are not

met (abstinence from alcohol for > 6 months)," thus rendering the "requested heart transplant [] not [] medically necessary." Id. at p. 10. The same medical review, though, that led to the third denial also indicated that Holman "will not survive without heart transplant." Id.

Duke sought as a last attempt an "expedited external review." Id. at p. 12. Defendants allegedly contracted with MCMC to perform the external review, which allegedly "performed [Holman's] external review as a 'standard' review to be decided within 45 days and not as an 'expedited' review to be decided [] expeditiously…in no event more than 72 hours after receipt of [the] request." Id. at p. 13. During the waiting period in which the external review was taking place, Holman died on February 9, 2019 from "worsening heart failure," after developing "an intracranial hemorrhage which progressed to the point that heart transplantation was no longer a viable option." Id. at p. 14. Ultimately, "MCMC overturned the denial of Kyree's heart transplant" on March 6, 2019 – but it was too late, given that Holman had already died. Id. at p. 15.

On April 6, 2020, the PSA Defendants filed a "Motion To Dismiss" (Document No. 40) and an accompanying "Brief In Support Of PSA Airlines Defendants' Motion To Dismiss" (Document No. 41). Defendant Quantum filed a "Notice Of Joinder In PSA Defendants' Motion To Dismiss And Supplemental Motion To Dismiss" (Document No. 42) and an accompanying "Brief In Support Of Its Supplemental Motion To Dismiss" (Document No. 43) on April 6, 2020. Defendant UMR filed a "Motion Under Federal Rule of Civil Procedure 12(b)(1) and 12(b)(6) To Dismiss The Amended Complaint" (Document No. 44) and an accompanying "Memorandum Supporting Its Motion Under Federal Rule Of Civil Procedure 12(b)(1) And 12(b)(6) To Dismiss The Complaint" (Document No. 45) on April

6, 2020. On April 27, 2020, Defendant MCMC filed a "Motion To Dismiss For Failure To State A Claim" (Document No. 51) and an accompanying "Memorandum In Support Of Motion To Dismiss" (Document No. 51-1). Plaintiff filed a "Response In Opposition To Defendants' Motions To Dismiss" on June 5, 2020. (Document No. 55). On June 8, 2020, the undersigned granted Plaintiff leave to file a corrected response brief and supporting documents by June 10, 2020. (Document No. 57). Plaintiff filed the corrected "Response In Opposition To Defendants' Motions To Dismiss" on June 8, 2020. (Document No. 58). Defendants filed reply briefs on July 6, 2020. Specifically, the PSA Defendants filed a "Reply Brief In Support Of Defendants' Motion to Dismiss Plaintiff's Amended Complaint For Failure To State A Claim" (Document No. 59), Quantum filed a "Reply Brief In Support Of Its Motion To Dismiss" (Document No. 60), MCMC filed a "Reply In Support Of Motion To Dismiss" (Document No. 61), and UMR filed a "Reply Supporting Its Motion Under Civil Procedure Rule 12(b)(1) and 12(b)(6) To Dismiss The Amended Complaint" (Document No. 62).

The motions have now been fully briefed and are ripe for review and a recommendation to the presiding district judge.

II. STANDARD OF REVIEW

Motion to Dismiss Under Rule 12(b)(1)

A motion to dismiss under Rule 12(b)(1) seeks to dismiss a complaint for lack of subject-matter jurisdiction. Fed.R.Civ.P. 12(b)(1). The plaintiff has the burden of proving that subject-matter jurisdiction exists. See Richmond, Fredericksburg & Potomac R.R. Co. v. United States, 945 F.2d 765, 768 (4th Cir. 1991). The existence of subject-matter jurisdiction is a threshold issue the Court must address before considering the merits of the case.

Jones v. Am. Postal Workers Union, 192 F.3d 417, 422 (4th Cir. 1999). "The subject matter jurisdiction of federal courts is limited and the federal courts may exercise only that jurisdiction which Congress has prescribed." Chris v. Tenet, 221 F.3d 648, 655 (4th Cir. 2000) (citing Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375, 377 (1994)).

When a defendant challenges subject-matter jurisdiction pursuant to Fed.R.Civ.P. 12(b)(1), "the district court is to regard the pleadings as mere evidence on the issue, and may consider evidence outside the pleadings without converting the proceeding to one for summary judgment." Richmond, 945 F.2d at 768. The district court should grant the Rule 12(b)(1) motion to dismiss "only if the material jurisdictional facts are not in dispute and the moving party is entitled to prevail as a matter of law." Id.; see also Evans v. B.F. Perkins Co., 166 F.3d 642, 647 (4th Cir. 1999).

Motion To Dismiss Under Rule 12(b)(6)

A motion to dismiss pursuant to Fed.R.Civ.P. 12(b)(6) tests the "legal sufficiency of the complaint" but "does not resolve contests surrounding the facts, the merits of a claim, or the applicability of defenses." Republican Party of N.C. v. Martin, 980 F.2d 943, 952 (4th Cir. 1992); Eastern Shore Markets, Inc. v. J.D. Assoc. Ltd. Partnership, 213 F.3d 175, 180 (4th Cir. 2000). A complaint attacked by a Rule 12(b)(6) motion to dismiss will survive if it contains "enough facts to state a claim to relief that is plausible on its face." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570 (2007)); see also Robinson v. American Honda Motor Co., Inc., 551 F.3d 218, 222 (4th Cir. 2009). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Iqbal, 556

U.S. at 678. "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." Id.

The Supreme Court has also opined that

> Federal Rule of Civil Procedure 8(a)(2) requires only "a short and plain statement of the claim showing that the pleader is entitled to relief." Specific facts are not necessary; the statement need only "'give the defendant fair notice of what the ... claim is and the grounds upon which it rests.'" In addition, when ruling on a defendant's motion to dismiss, a judge must accept as true all of the factual allegations contained in the complaint.

Erickson v. Pardus, 551 U.S. 89, 93-94 (2007) (quoting Twombly, 550 U.S. at 555-56).

"Although for the purposes of this motion to dismiss we must take all the factual allegations in the complaint as true, we are not bound to accept as true a legal conclusion couched as a factual allegation." Papasan v. Allain, 478 U.S. 265, 286 (1986). The Court "should view the complaint in the light most favorable to the plaintiff." Mylan Labs, Inc. v. Matkar, 7 F.3d 1130, 1134 (4th Cir. 1993).

In ruling on the motion to dismiss, the Court can consider documents "integral to and explicitly relied on in the complaint." Phillips v. LCI Int'l, Inc., 190 F.3d 609, 618 (4th Cir. 1999); accord E.I. du Pont de Nemours & Co. v. Kolon Indus., Inc., 637 F.3d 435, 448 (4th Cir. 2011).

III. DISCUSSION

Given that the four pending motions to dismiss Plaintiff's Amended Complaint are related, and also given that the arguments that Defendants make in their respective motions are remarkably similar, the Court will address

each of those arguments in turn below. The discussion is separated into subsections according to the arguments advanced in the Defendants' briefs. Where individualized consideration of any Defendant's argument is necessary because that argument pertains only to that individual Defendant, the undersigned will consider such argument when warranted.

A. Section 502(a)(1)(B) of ERISA Does Not Permit Claims for the Monetary Value of Denied Benefits

Each Defendant (the PSA Defendants, UMR, Quantum, and MCMC) advances the argument in its respective motion to dismiss that Plaintiff's first claim for relief for wrongful denial of benefits under ERISA at 29 U.S.C. § 1132(a)(1)(B) should be dismissed because the statute does not permit recovery of the monetary value of benefits that Holman never received because of his tragic and unfortunate death. See (Document No. 41, pp. 5-9); (Document No. 42, pp. 1-2); (Document No. 45, pp. 13-14); (Document No. 51-1, pp. 5-7). Plaintiff, on the other hand, contends in response that the Estate actually seeks "recoupment of benefits due under the Plan," and Defendants "mischaracterize the Estate's claim for relief as seeking the value of the benefits owed." (Document No. 15, p. 29); (Document No. 58, p. 3). Plaintiff seems to contradict herself, though, because at another point in the Amended Complaint, she indicates that she "seeks the full value of the heart transplant and any related services, as well as all other associated benefits to which Kyree would have been entitled had he lived." (Document No. 15, p. 20). Defendants' contention, then, that what Plaintiff truly seeks is the monetary value of the benefit – rather than the benefit itself – is supported by this statement in the Amended Complaint. Given the tragic death of Mr. Holman, the ac-

tual "benefit" at issue here – the heart transplant – logically cannot be recouped through this lawsuit. Instead, the Estate must, necessarily, only seek the *value* of that heart transplant (rather than the procedure itself). The undersigned will analyze Defendants' argument for dismissal of Plaintiff's first claim below.

According to the Supreme Court, ERISA contains "carefully integrated civil enforcement provisions," and courts should be "reluctant to tamper with an enforcement scheme crafted with such evident care as the one in ERISA." Massachusetts Mut. Life Ins. Co. v. Russell, 473 U.S. 134, 147 (1985); see also Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 54 (1987) ("[t]he deliberate care with which ERISA's civil enforcement remedies were drafted and the balancing of policies embodied in its choice of remedies argue strongly for the conclusion that ERISA's civil enforcement remedies were intended to be exclusive").

ERISA permits a "participant or beneficiary" to bring "[a] civil action" in order "to recover *benefits* due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan." 29 U.S.C. § 1132(a)(1)(B) (emphasis added). If Congress had wished to provide a participant or his estate the remedy of seeking the value of benefits wrongfully denied but never received, courts must assume that it would have included language to that effect. See Russell, 474 U.S. at 147 (declining to read extratextual remedies into the ERISA statute that were not expressly provided for in the statutory text); accord Northwest Airlines, Inc. v. Transp. Workers Union of Am., AFL-CIO, 451 U.S. 77, 97 (1981) ("[t]he presumption that a remedy was deliberately omitted from a statute is strongest when Congress has enacted a comprehensive legislative scheme including an integrated system of pro-

cedures for enforcement"). The Supreme Court has articulated clear guidelines about the forms of relief available under this civil enforcement provision of ERISA at § 502(a)(1)(B). While the specific *facts* of this case have rarely been presented in federal courts, given the clear law regarding the available relief under § 502(a)(1)(B), it is of little import that cases with similar facts are rare in federal jurisprudence. Moreover, the one case that Plaintiff cites in support of its position was effectively overruled by the Fifth Circuit, as explained below.

If a benefit plan refuses to provide coverage for some medical benefit, a participant has two options for "seeking provision of those benefits": (1) paying "for the treatment [himself] and then [seeking] reimbursement through a § 502(a)(1)(B) action;" or (2) seeking "a preliminary injunction." Aetna Health, Inc. v. Davila, 542 U.S. 200, 211 (2004). Approximately twenty years prior to deciding the Davila case, the Supreme Court stated in Russell that where a participant has wrongfully been denied benefits, he or she can file a lawsuit pursuant to § 502(a)(1)(B) "to recover accrued *benefits*, to obtain a declaratory judgment that she is entitled to benefits under the provisions of the plan contract, and to enjoin the plan administrator from improperly refusing to pay benefits in the future." 473 U.S. at 146-47 (emphasis added). The Russell Court also held that the statute did not provide for compensatory or punitive damages on account of "delay in the plan administrators' processing of a disputed claim" – suggesting that even where, as here, a claim for coverage is ultimately (but belatedly) approved following a participant's death, compensatory damages for the delay are not available. Id. at 144.

Taken together, these two cases suggest that where a participant is in a position to actually receive the benefit under ERISA (here, a heart transplant), then he or she

can (1) sue to enjoin the benefit plan from refusing to provide such covered benefit; (2) pay for the benefit himself or herself and seek reimbursement; (3) seek declaratory relief that he or she is entitled to such benefit; and (4) sue to enjoin the benefit plan from refusing to pay such rightfully owed benefits going forward. Nowhere in these cases does the Supreme Court indicate that a participant (or his estate) can sue to recover the *value* of the benefit that was not provided. Indeed, the only monetary award contemplated by the Supreme Court under § 502(a)(1)(B) is reimbursement for a benefit that a participant paid for him or herself. Case law from other circuits confirms these principles.

The Fifth Circuit decided a case in 2013 with similar facts to those in the present case. An individual was diagnosed with leukemia, and after complications developed, his doctors recommended stem cell transplant therapy. Hamann v. Independence Blue Cross, 543 F. App'x 355, 356 (5th Cir. 2013). The individual's doctors repeatedly submitted claims to his benefit plan for coverage of the stem cell therapy, which were repeatedly denied. Id. Eventually—as in the instant case—coverage for the procedure was approved. Id. Unfortunately, though, the approval came too late – the individual's "health had deteriorated, [and] he could not undergo" the medical procedure, dying "shortly thereafter." Id. Plaintiffs sought "to recover the value of [the stem cell treatment] as a 'benefit owed' under [the benefit plan]," even though the decedent "never [] received or paid for the requested treatment." Id. The Fifth Circuit, in examining the statute, found that despite the "approval of the" treatment coming "tragically [] too late," the appellate court was "bound by the specific relief provided by Congress under § 502(a)(1)(B)" – which did *not* "provide that beneficiaries can recover benefits they did not, and now cannot, receive." Id. at 357-

58; see also Zavala v. Trans-Sys., 2006 WL 898019, at *1, *5 (D. Or. Apr. 4, 2006) (denying claim under § 502(a)(1)(B) for monetary value of stem cell transplant when decedent died from cancer without receiving the treatment).

The Ninth Circuit confirmed this principle in Durham v. Health Net – and although the Plaintiff there did not die (and thus brought suit herself rather than her estate suing on her behalf), the principle stood firm that "[t]here is no authority [under § 502(a)(1)(B)] which would allow a recovery for the value of withheld medical treatment" when the patient did not actually receive the treatment. 108 F.3d 337 (9th Cir. 1997); see Durham v. Health Net, 1995 WL 429252, at *1 (N.D. Cal. June 22, 1995) (indicating that Plaintiff "did not obtain the treatment" for which she sought recovery of the monetary value).

Plaintiff contends that "[s]ince a beneficiary is expressly entitled to receive 'medical, surgical, or hospital care' benefits from" an ERISA-qualifying plan, and since the statute defines a "beneficiary" to include "person[s]" (which includes an estate), the "plain language" of the statute provides the relief that she seeks – the monetary value of the heart transplant that Mr. Holman never received. (Document No. 58, pp. 5-6, 9) (citing 29 U.S.C. §§ 1002(1), (8), (9)). Just because the ERISA statutory text *allows* for estates to benefit from an ERISA-qualifying health plan does not mean that this Court can interpret another section of ERISA – section 502(a)(1)(B) – to supply a remedy for which it does not provide. Plaintiff's argument extrapolates the implications of the definition section of ERISA too far. The Court does not here decide whether the Estate is a "beneficiary" under the terms of the Plan. Assuming it was, though, if Mr. Holman had, for example elected to receive the heart transplant, pay for it on his own, and later seek reimbursement, his Estate

could sue under § 502(a)(1)(B) to recover the reimbursement value of the heart transplant *if he actually received the procedure*. Here, since he did not receive the transplant, federal jurisprudence interpreting this section of ERISA indicates that his Estate cannot now sue for the value of a medical procedure that Mr. Holman did not actually undergo – just as he could not himself sue for this same relief if he had lived.

Plaintiff's next argument, attempting to find refuge in the part of § 502(a)(1)(B) that permits suit to "enforce [] rights under the terms of the plan," similarly fails. (Document No. 58, pp. 6-7). As stated above, courts have interpreted § 502(a)(1)(B) to provide for various rights and remedies when a participant is wrongfully denied a benefit. Recovering the monetary value of a covered benefit that decedent never received is not one of those rights.

In a footnote, the Fifth Circuit in Hamann acknowledged the Plaintiffs' argument that if the court in that case refused to permit an estate to recover the value of benefits rightfully owed to a decedent that were denied by a health plan, health plans would be incentivized to deny expensive services and be absolved of liability for such services that a decedent never receives once he or she dies. 543 F. App'x at 357 n.3 (citing Erwin v. Texas Health Choice, L.C., 187 F. Supp. 2d 661, 669 (N.D. Tex. 2002)). Nonetheless, despite the appeal of such a policy argument, the Fifth Circuit stated that it was "bound by ERISA's terms which do not provide the relief the Plaintiffs seek." 543 F. App'x at 357 n.3. The Fifth Circuit's Hamman decision acknowledged Erwin and subsequently dismissed its rationale to reach an opposite result – implying that Erwin (a district court case) can no longer be relied upon. Indeed, the Erwin case—which held that a decedent's estate could recover the value of a liver transplant that the decedent did not receive before he died—is

the *only* case that provides support for Plaintiff's position. 187 F. Supp. 2d at 668-69. Although Plaintiff contends that the Hamman case "is readily dismissable, as it relies too heavily on an arbitrarily narrow view of what a benefit is and when it is payable," the undersigned finds that the case law interpreting ERISA's § 502(a)(1)(B) civil enforcement provision squarely supports the Fifth Circuit's holding. (Document No. 58, p. 6).

Plaintiff's understandable desires for what the law *should* be unfortunately do not translate to provision of a remedy that the statute does not supply. The undersigned is persuaded by Defendants' convincing arguments to this effect, even where that *might* "mean that [Plaintiff] may be left with no remedy." (Document No. 41, p. 8). Plaintiff protests that Mr. Holman's alternatives – either seeking an injunction for the provision of the heart transplant benefit or paying for the transplant himself and later seeking reimbursement – are wholly impractical. (Document No. 58, pp. 8-9). Plaintiff indicates that because of the administrative exhaustion requirement under the plan, Mr. Holman would have had just a few days' time to seek an injunction. Id. Furthermore, Plaintiff also contends that the idea that a "27-year-old flight attendant" should have paid "in excess of a million dollars" for a heart transplant and later sought reimbursement is an impractical proposition. Id. at p. 9. The Court is aware that these avenues are not well-suited to a gravely ill individual who urgently needs a life-saving, very expensive medical procedure. Still, the Court is constrained by the statute and guidance from case law, both of which point toward dismissal of this claim.

Given the Supreme Court's hesitance to read into the ERISA statute a remedy that does not exist in the text – particularly given the statute's complexity and comprehensiveness – the undersigned declines to do that here

and read ERISA section 502(a)(1)(B) as permitting a novel form of relief that Plaintiff seeks. See Russell, 473 U.S. at 147. Even in cases presenting the most tragic and seemingly unjust set of facts, as in this case, courts are "bound by ERISA's terms," and only Congress has the power to remedy any resulting injustice by amending the statute. Hamman, 543 F. App'x at 357 n.3.[2] The undersigned therefore respectfully recommends that Defendants' motions to dismiss Plaintiff's section 502(a)(1)(B) claim be granted.

B. Plaintiff's Claim Under Section 502(a)(3) of ERISA Should Not Be Dismissed Because Adequate Relief Does Not Exist at Section 502(a)(1)(B) of ERISA and Because Plaintiff Has Adequately Stated a Claim for Relief Under Section 502(a)(3) at the Motion to Dismiss Stage

Defendants argue in each of their respective motions to dismiss that Plaintiff's second claim for relief – for breach of fiduciary duty under 29 U.S.C. § 1132(a)(3) – should be dismissed because it presents "the exact same claim, and demand[s] the same essential relief" as her first claim pursuant to ERISA section 502(a)(1)(B) for wrongful denial of benefits. (Document No. 41, pp. 11-12);

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[2] Given the undersigned's recommendation that Defendants' motions to dismiss Plaintiff's first claim for relief pursuant to section 502(a)(1)(B) be granted, there is no need for the Court to address the argument advanced by Quantum, UMR, and MCMC that they are not proper defendants for a claim under this section of ERISA. See (Document No. 43, pp. 4-5); (Document No. 45, pp. 15-16); (Document No. 51-1, pp. 4-5). For this same reason, the Court will not address MCMC's argument that Plaintiff's section 502(a)(1)(B) claim must fail against it because "MCMC made the determination that Plaintiff seeks—*i.e.*, that Holman was due benefits under the Plan." (Document No. 51-1, p. 5).

(Document No. 43, pp. 7-8); (Document No. 45, pp. 18-20); (Document No. 51-1, pp. 7-8). In her Amended Complaint, Plaintiff states that she seeks "the full value of the heart transplant and any related services, as well as all other associated benefits to which Kyree would have been entitled had he lived" in conjunction with her second claim for relief. (Document No. 15, p. 28). Plaintiff, in response to Defendants, argues that although it "may not ultimately *recover* simultaneous relief or duplicative relief under both sections, [] it may – and certainly at the pleading stage – allege both theories of recovery; particularly where, as here, the Estate specifically alleged the claims for relief in the alternative." (Document No. 58, pp. 14-15).

At least as to Quantum, UMR, and MCMC, these Defendants also contend that even were Plaintiff permitted to plead both a section 502(a)(1)(B) claim and a section 502(a)(3) claim, the Court should dismiss the 502(a)(3) claim (impliedly, on the basis of futility) because § 502(a)(3) permits only "appropriate equitable relief." They argue that Plaintiff seeks compensatory damages under this section, which "fall[] outside § 502(a)(3)'s scope." (Document No. 43, p. 8); see also (Document No. 45, pp. 20-21); (Document No. 51-1, pp. 10-12). Plaintiff, in response, argues that such an argument ignores the Supreme Court's decision in CIGNA Corp. v. Amara, 563 U.S. 421 (2011), which expanded the understanding of available "equitable relief" under § 502(a)(3). (Document No. 58, p. 24). She argues that "the Supreme Court has now made clear that the monetary relief sought herein is properly considered equitable relief under the exact facts of this case." Id. at p. 27. The undersigned will examine both arguments for dismissal below.

1. Plaintiff Is Not Barred From Simply Asserting Both A Section 502(a)(1)(B) Claim And A Section 502(a)(3) Claim At The Motion To

Dismiss Stage, Particularly Where the 502(a)(1)(B) Claim Does Not Provide "Adequate Relief"

The Supreme Court in Varity Corp. v. Howe limited the ability of a Plaintiff presenting a wrongful denial of benefits claim to recover under multiple sections of the ERISA statute. 516 U.S. 489, 515 (1996). In Varity, the Supreme Court specifically discussed the relationship between § 502(a)(1)(B) and § 502(a)(3) and held that "where Congress elsewhere provided adequate relief for a beneficiary's injury, there will likely be no need for further equitable relief, in which case such relief normally would not be 'appropriate.'" 516 U.S. at 515. In that case, where relief was unavailable under § 502(a)(1)(B), the Court allowed the Plaintiffs to proceed with their claim under § 502(a)(3) because otherwise "they have no remedy at all" – which would not be consistent with ERISA's "literal language [], the Act's purposes, and pre-existing trust law." Id. Indeed, "ERISA's basic purposes favor a reading of [§ 502(a)(3)] that provides the plaintiffs with a remedy." Id. at 513. Section 502(a)(3) is thus a "'catchall' provision[] [that] act[s] as a safety net, offering appropriate equitable relief for injuries caused by violations that § 502 does not elsewhere adequately remedy." Id. at 512.

At the motion to dismiss stage, the question is not whether the Plaintiff *will* recover on the merits of her claims, but rather whether she can proceed with a claim because it has facial plausibility. Iqbal, 556 U.S. at 678. The undersigned thus analyzes Defendants' arguments in light of the early stage of the proceedings. The Ninth Circuit has interpreted Varity to mean that where a § 502(a)(1)(B) claim fails, and "a plan participant has no remedy under another section of ERISA, she can assert a claim for breach of fiduciary duty under" § 502(a)(3). Moyle v. Liberty Mut. Retirement Benefit Plan, 823 F.3d

948, 961-62 (9th Cir. 2016) (quoting Devlin v. Empire Blue Cross & Blue Shield, 274 F.3d 76, 89 (2d Cir. 2001)). The Second Circuit has highlighted that there is a difference between pleading a cause of action under both ERISA sections and actually recovering on both claims – the latter of which *would* be incompatible with Varity. New York State Psychiatric Ass'n, Inc. v. UnitedHealth Grp., 798 F.3d 125, 134 (2d Cir. 2015). To dismiss a § 502(a)(3) claim at the motion to dismiss stage is premature when Plaintiff does not have an adequate remedy under § 502(a)(1)(B) – given that the undersigned respectfully recommends that such claim for wrongful denial of benefits be dismissed.[3] See Silva v. Met. Life Ins. Co., 762 F.3d 711, 726 (8th Cir. 2014) ("Varity does not limit the number of ways a party can initially seek relief at the motion to dismiss stage," for that case prohibits only "duplicate *recoveries*").

Plaintiff acknowledges that she "may not make a double recovery against defendants," and she does not seek a "duplicative" recovery – thus pleading the breach of fiduciary claim under § 502(a)(3) in the alternative to the first

[3] The Court highlights that the present scenario – in which the undersigned is respectfully recommending dismissal under Rule 12(b)(6) of the section 502(a)(1)(B) claim because Plaintiff has not stated a claim for relief under that ERISA section – is different from a scenario in which there *would* be adequate relief under section 502(a)(1)(B) despite that claim ultimately being lost on the merits, thus precluding assertion of a claim under section 502(a)(3). See Ogden v. Blue Bell Creameries U.S.A., Inc., 348 F.3d 1284, 1287 (11th Cir. 2003) ("the availability of relief under Section 502(a)(3) was in no way dependent on the success or failure of the Section 502(a)(1)(B) claim because the availability of an adequate remedy under the law for *Varity* purposes, does not mean, nor does it guarantee, an adjudication in one's favor"). Here, there is no adjudication on the merits of Plaintiff's 502(a)(1)(B) claim – she has not stated a claim at all under that section, and thus, there is no adequate relief. She must be allowed, per Varity, then, to pursue her section 502(a)(3) claim.

claim for relief under § 502(a)(1)(B). (Document No. 58, pp. 18, 21). Defendants, however, contend in their various briefs that a case from the Fourth Circuit, Korotynska v. Met. Life Ins. Co., 474 F.3d 101 (4th Cir. 2006), prohibits Plaintiff from pursuing relief under both § 502(a)(1)(B) and § 502(a)(3). See (Document No. 41, p. 11); (Document No. 43, pp. 7-8); (Document No. 45, p. 18); (Document No. 51-1, p. 7).

That case, however, does not directly address the facts in this case. Although Korotynska was decided on a motion to dismiss, the Plaintiff in that case *never* brought a claim for relief under § 502(a)(1)(B) – instead, pleading *only* a § 502(a)(3) claim. 474 F.3d at 103. Thus, the Fourth Circuit held that Plaintiff had adequate relief available to her through § 502(a)(1)(B), but she failed to assert a claim under that section of the statute simply because it was "undesirable" to her. Id. at 107, 108. Since she had a possible remedy under that section, she could not pursue her claim for equitable relief under § 502(a)(3) because to do so would violate the Varity Court's admonition that a denial of benefits claim can be allowed to proceed under § 502(a)(3) only where relief under the more logical section for such a claim – § 502(a)(1)(B) – was "inadequate." Id. at 108. The Plaintiff in Korotynska admitted to reserving her § 502(a)(1)(B) claim for suit at a later time, while here, Rose explicitly indicates that she is *only* pleading a breach of fiduciary duty claim under § 502(a)(3) in the alternative to her first claim for relief. (Document No. 15, p. 21). Korotynska did not hold that a plaintiff who cannot plead a § 502(a)(1)(B) claim – as here, because of the recommended dismissal – is left completely without a remedy. In fact, adopting Defendants' strained interpretation of Korotynska in such a manner would contravene both the remedial purposes of the ERISA statute and the Supreme Court's explicit guidance in Varity that contradict

Defendants' position – that where § 502(a)(1)(B) does not provide adequate relief, pursuit of a § 502(a)(3) claim is appropriate so that a plaintiff is not left without a possible remedy. 516 U.S. at 515.

In recommending that the § 502(a)(3) claim is not dismissed on this ground alone – that is, for the reason that Defendants proffer, that the claim is duplicative of the first claim and thus barred – the undersigned does not conclude whether Plaintiff will ultimately *prevail* on such a claim. Resolution of the merits of her § 502(a)(3) claim is left for a later stage of the litigation.

2. Whether Plaintiff's Requested Relief in the Form of the Full Value of the Heart Transplant Is Permissible Relief Under § 502(a)(3) Depends Upon Whether Defendants Are Plausibly Considered Fiduciaries And Whether Defendants Breached Fiduciary Duties Owed to Decedent

For the reasons stated above, although Plaintiff is allowed to *present* her claim for relief under § 502(a)(3), the undersigned at the motion to dismiss stage must next decide whether that claim for relief is *plausible*. Resolution of this question turns upon whether Plaintiff *can* recover the relief that she seeks – the "full value of the heart transplant and any related services, as well as all other associated benefits to which Kyree would have been entitled had he lived." (Document No. 15, p. 28).[4] If she cannot

[4] Plaintiff's claim for injunctive and declaratory relief under section 502(a)(3) is rendered moot as a result of Mr. Holman's death, because Plaintiff "cannot benefit from a declaration of" Defendants' obligations under the Plan. Harrow v. Prudential Ins. Co. of Am., 279 F.3d 244, 249 (3d Cir. 2002); see United States v. Iaquinta, 701 F. App'x

seek this kind of relief, her § 502(a)(3) claim will not be "legally sufficien[t]," and thus it should be dismissed. Martin, 980 F.2d at 952. Given that § 502(a)(3) permits a plaintiff to seek either an injunction or "other appropriate equitable relief," the question is whether monetary compensation to Plaintiff in the amount of the value of the heart transplant (that Mr. Holman did not actually receive) can be considered equitable. Defendants Quantum,

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271, 272 (4th Cir. 2017) ("[a] case becomes moot when the issues presented are no longer live or the parties lack a legally cognizable interest in the outcome") (internal quotations and citations omitted). The PSA Defendants argue that the mootness issue presents a subject-matter jurisdiction problem for this Court, and the undersigned agrees with that argument. (Document No. 40, p. 2); see Johnson v. Jones, 42 F.3d 1385 (4th Cir. 1994). The undersigned is persuaded by Defendants' convincing argument that dispenses with Plaintiff's analogy, in which she attempts to suggest a parallel between the life insurance context and the health insurance context here. (Document No. 58, pp. 38-39). Plaintiff suggests that a claim for injunctive and declaratory relief in the life insurance context is not rendered moot by virtue of the decedent's death, just as it should not be rendered moot here. Not so. Declarations of rights and forward-looking relief can benefit an estate in the life insurance context because "life insurance plans are designed to provide a benefit to the insured's decedents, while health benefit plans such as the one at issue here operate for the benefit of the covered individual." (Document No. 59, p. 9). Thus, while an estate in the life insurance context has a live claim for injunctive and declaratory relief, here, Plaintiff in the health insurance context does not. The Court's conclusion on this point has no impact on whether the estate can ultimately recover monetary relief that Mr. Holman was potentially rightfully owed – in the event that the Court later finds breach of fiduciary duty. The Harrow court explicitly recognized as much, finding in that case that the estate's damages claim was not mooted. 279 F.3d at 249. Given that Mr. Holman tragically passed away, the injunctive and declaratory relief sought becomes a moot claim because "there is no reasonable expectation [] that the alleged violation will recur" as to Mr. Holman. Los Angeles Cty. v. Davis, 440 U.S. 625, 631 (1979) (internal quotations and citations omitted).

UMR, and MCMC argue that what Plaintiff is seeking is a classic articulation of compensatory damages – which are not provided for under § 502(a)(3). (Document No. 43, p. 8); see also (Document No. 45, pp. 20-21); (Document No. 51-1, pp. 10-12). Plaintiff, in opposition, argues that Defendants interpret the scope of equitable relief available under § 502(a)(3) too narrowly. In her response brief, Plaintiff contends that "[w]hile the Supreme Court's early jurisprudence on this issue indeed seemed to suggest that 'appropriate equitable relief' excluded the remedy of make-whole monetary relief," the Supreme Court's Amara case expanded earlier interpretations, holding that equitable relief under § 502(a)(3) "may include monetary relief against fiduciaries," for example, in the form of surcharge. (Document No. 58, p. 24).

Before the Court can analyze whether Plaintiff's pursuit of the full value of the heart transplant qualifies as permissible equitable relief under § 502(a)(3), two threshold questions must be answered – whether Defendants are fiduciaries, and whether Defendants breached those fiduciary duties. Resolution of those questions is inappropriate at this motion to dismiss stage for the reasons explained below, and the undersigned would therefore respectfully recommend that Defendants' respective motions to dismiss Plaintiff's second claim for relief under § 502(a)(3) be denied, pending further discovery on these threshold issues that could clarify the merits of this claim.

At the outset, the undersigned highlights that the Supreme Court's decision in Amara indicated that some forms of monetary relief can appropriately be considered "equitable" under § 502(a)(3). 563 U.S. at 439, 441, 444. Thus, the Supreme Court's earlier jurisprudence that may have suggested that *any* form of monetary relief could not be considered equitable and thus was barred under § 502(a)(3) was qualified in Amara. See Mertens v.

Hewitt Assocs., 508 U.S. 248, 255 (1993) ("[a]lthough they often dance around the word, what petitioners in fact seek is nothing other than compensatory *damages* – monetary relief for all losses their plan sustained as a result of the alleged breach of fiduciary duties…[m]oney damages are, of course, the classic form of *legal* relief"); accord Great-West Life & Annuity Ins. Co. v. Knudson, 534 U.S. 204, 210 (2002) (same). The Supreme Court clarified in a later opinion that Amara did not overrule Mertens and Great-West – rather, the Court suggested that the traditional understanding of the divide between compensatory and equitable relief persisted post-Amara (with Amara just clarifying those earlier cases). See Montanile v. Bd. of Trs. of Nat. Elevator Indus. Health Benefit Plan, 577 U.S. 136, 148 n.3 (2016). According to the Fourth Circuit, "the portion of *Amara* in which the Supreme Court addressed Section 1132(a)(3) stands for the proposition that remedies traditionally available in courts of equity, expressly including estoppel and surcharge, are indeed available to plaintiffs suing fiduciaries under Section 1132(a)(3)." McCravy v. Met. Life Ins. Co., 690 F.3d 176, 181 (4th Cir. 2012). Courts can award plaintiffs presenting claims under § 502(a)(3) a surcharge remedy – an equitable remedy that "provide[s] relief in the form of monetary 'compensation' for a loss resulting from a trustee's breach of duty, or to prevent the trustee's unjust enrichment." Amara, 563 U.S. at 441.

As explained below, whether Plaintiff can seek the relief that she seeks – the full value of the heart transplant – in conjunction with her claim under section 502(a)(3) depends upon whether the Court will consider such relief "equitable." Plaintiff's response indicates that the Court should consider the relief that she seeks as "surcharge." (Document No. 58, p. 25). As stated, whether Plaintiff has stated a plausible claim for relief under section 502(a)(3)

depends in part on whether she can ultimately recover the relief that she seeks. See Zavala v. Trans-Sys., 258 F. App'x 155, 158 (9th Cir. 2007) (affirming district court's dismissal of the plaintiff's § 502(a)(3) claim because the plaintiff in that case sought compensatory damages, which are not available as equitable relief under that section of ERISA). And, as also already stated, whether surcharge is an appropriate remedy in this case will rest upon resolution of the fiduciary duty issues, about which the Court here does not make a determination on the merits. To arrive at that next stage of the motion to dismiss analysis, though, the undersigned highlights at the outset that it assumes – without deciding this issue – that there is an argument to be made that the PSA Defendants, at least, were unjustly enriched on account of their actions such that the surcharge remedy *could be* appropriate. Again, determination of this issue is left for a later stage of the litigation once the threshold issues are clarified by further fact discovery. Still, the Amara Court made clear that a fiduciary who is unjustly enriched by a violation of its duties might have to pay a surcharge. 563 U.S. at 441.

Here, despite ultimately approving coverage of the heart transplant, the Plan never paid out the value of that heart transplant to decedent or his estate. Since the Plan is "self-funded," the massive expense of the heart transplant procedure was never pulled from its pool of assets, leaving the value of the procedure for some other use. (Document No. 58-2, p. 5); see Bast v. Prudential Ins. Co. of Am., 150 F.3d 1003, 1011 (9th Cir. 1998) (crucially, a pre-Amara case that affirmed the district court's grant of summary judgment to the defendant because the value of a procedure that a decedent never received could not be recovered as "equitable relief" under section 502(a)(3) – but, the court in that case importantly noted that the

"amount of money [the plan] saved by not paying for the [] procedure" may have led to "unjust enrichment").

As to the other Defendants (UMR, Quantum, and MCMC), surcharge might still be appropriate as a remedy against them because the undersigned is persuaded that Plaintiff could demonstrate "actual harm" – through "loss of a right protected by ERISA" – seemingly irrespective of unjust enrichment. Amara, 563 U.S. at 444. Defendants attempt to argue that "Mr. Holman's death is not a type of harm contemplated by the surcharge remedy," but the undersigned is not convinced by such contentions because Quantum and MCMC offer little support for those statements. (Document No. 60, p. 9); (Document No. 61, p. 11). *If* Defendants breached their fiduciary duties, and *if* those breaches are shown at a later stage of the litigation to have caused Mr. Holman's death, Plaintiff would satisfy the "actual harm" standard to garner the surcharge remedy.[5]

Thus, the relief that Plaintiff seeks *could* be classified as surcharge under this unjust enrichment theory – but the undersigned does not decide that here. Rather, the Court simply concludes that there is a plausible argument for ultimate recoupment of such relief such that it will continue to analyze the Plaintiff's § 502(a)(3) claim under the 12(b)(6) motion to dismiss standard.

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[5] UMR and MCMC make arguments that Plaintiff cannot recover extracontractual damages for pain and suffering. (Document No. 45, p. 16); (Document No. 51-1, p. 11). The undersigned notes that Defendants mischaracterize Plaintiff's Amended Complaint, as she states in her response brief to Defendants' motions. Plaintiff "has made no claim for pain and suffering" – rather, she uses such language to support her argument that she has shown the "actual harm" required to satisfy Amara's standard for a surcharge equitable remedy. (Document No. 58, p. 35).

In order to adequately plead a claim under § 502(a)(3) for the surcharge remedy, a Plaintiff must demonstrate that a "fiduciary" committed a "violation of a duty imposed upon that fiduciary" by showing "actual harm." Amara, 563 U.S. at 442, 444. Evidently, deciding whether Plaintiff adequately alleges that Defendants are properly considered fiduciaries with respect to Mr. Holman and whether they breached fiduciary duties that they owed to him are necessary conclusions before the Court can decide whether the relief that Plaintiff seeks is appropriate under § 502(a)(3). But, as stated, actually resolving those issues is premature at this motion to dismiss stage. The undersigned will merely evaluate the plausibility of Plaintiff's arguments on these fronts.

As to the PSA Defendants, there is no question that Plaintiff adequately alleges that they were fiduciaries with respect to Mr. Holman. Indeed, PSA Airlines is the "[n]amed [f]iduciary" in the Plan document, attached as Exhibit 2 to Plaintiff's response brief. (Document No. 58-2, p. 6). Given that an ERISA fiduciary is one who "performs specified discretionary functions with respect to the management, assets, or administration of a plan," certainly, the plan itself and the plan administrator *clearly* fall within this definition. Custer v. Sweeney, 89 F.3d 1156, 1161 (4th Cir. 1996). As to UMR, too, there can be no question that Plaintiff has adequately plead that UMR was a fiduciary, given that it is specifically named in the Plan document as the "[c]laims [a]ppeal [f]iduciary [f]or [m]edical [c]laims." (Document No. 58-2, p. 6).

As to Quantum and MCMC, determination of whether these Defendants are fiduciaries with respect to Mr. Holman's claims is premature. Undoubtedly, though, Plaintiff has alleged sufficient facts to persuade the undersigned that she should survive a motion to dismiss because her claim is plausible as to Quantum and MCMC. Given that

"[d]etermining a defendant's level of discretion is a fact-specific inquiry not suited for a motion to dismiss," the Court concludes that discovery is needed to unearth whether Quantum and MCMC had "functional control and authority" over plan administration. Moon v. BWX Techs., Inc., 577 F. App'x 224, 229 (4th Cir. 2014) (quoting Wilmington Shipping Co. v. New England Life Ins. Co., 496 F.3d 326, 343 (4th Cir. 2007)). Plaintiff alleges that "UMR contracted with Quantum to perform certain of UMR's claim administration responsibilities, including as they related to handling the claim and appeal processing and determinations and the external review coordination at issue in this lawsuit." (Document No. 15, p. 4). Plaintiff also alleges that the January 25 claim determination letter denying Mr. Holman's claim contained Quantum's letterhead. Id. at p. 8. As to MCMC, Plaintiff alleges that it performed the external review of Mr. Holman's claim, overturning the denial of coverage for the heart transplant – but failing to conduct the external review on an expedited basis. Id. at pp. 14-15. Thus, as to both Quantum and MCMC, Plaintiff has alleged sufficient facts to survive a motion to dismiss the § 502(a)(3) claim because she alleges that they performed discretionary functions that relate to plan administration – thus plausibly suggesting that they might be fiduciaries.

Still, though, resolution of the larger question – whether Plaintiff can recover the monetary value of the heart transplant were her claim under § 502(a)(3) to succeed – depends not only upon whether Defendants are fiduciaries, but whether Plaintiff has adequately pled that they *breached* fiduciary duties. Plaintiff alleges a number of fiduciary breaches by Defendants, which, as to PSA, UMR, and Quantum, generally include the "callous and reckless use of the wrong guidelines and their misapplication of guidelines to Plaintiff's specific medical condition."

(Document No. 15, pp. 22-27). As to MCMC, Plaintiff alleges a breach of fiduciary duties related to "the handling, timing, and processing of the external review." Id. at p. 27. At this motion to dismiss stage, the undersigned concludes that Plaintiff has adequately stated a claim for relief – therefore, the undersigned declines to resolve the merits of whether there was a fiduciary breach. See Sentara Virginia Beach Hosp. v. LeBeau, 182 F. Supp. 2d 518, 524 n.7 (E.D. Va. 2002) ("[t]he court expresses no opinion on whether there was a breach of such [fiduciary] duty in ruling on the motion to dismiss pursuant to Rule 12(b)(6)").

The undersigned will highlight here that Defendants' protests that Plaintiff has impermissibly engaged in "group pleading" have no merit – Plaintiff has provided a detailed account of the factual background to her Amended Complaint, and Defendants lack credibility when they argue that they were not put on notice of the allegations against them after a read of the Amended Complaint. See (Document No. 15, pp. 4-15). Clearly, her Complaint satisfies notice pleading requirements sufficient to satisfy the Rule 8(a)(2) standard under Twombly. Twombly, 550 U.S. at 555; Fed.R.Civ.P. 8(a)(2). Where she designates all "Defendants," the undersigned is convinced by her argument that she does so because it was "the most inclusive mechanism for purposes of notice pleading." (Document No. 58, p. 37). She clearly describes the role – to the extent possible at the pleading stage with the information that she has – of each individual Defendant, and thus, Defendants cannot credibly contend that "[i]t is impossible to discern from the Complaint which defendant is alleged to have done what." (Document No. 41, p. 12). Moreover, since "the circumstances surrounding alleged breaches of fiduciary duty may frequently defy

particularized identification at the pleading stage…we relax pleading requirements where the relevant facts are known only to the defendant." Concha v. London, 62 F.3d 1493, 1503 (9th Cir. 1995).

Thus, the undersigned will respectfully recommend that Defendants' motions to dismiss Plaintiff's second claim for relief under ERISA § 502(a)(3) be denied. After an analysis of Plaintiff's allegations in the Amended Complaint, the undersigned concludes that Plaintiff has pled sufficient facts to demonstrate that Defendants were plausibly acting as fiduciaries and plausibly may have breached their fiduciary duties – which is enough to survive a motion to dismiss under Rule 12(b)(6). The Court leaves for a later stage of this litigation following discovery a determination on the merits of whether Defendants actually were fiduciaries and whether they actually breached their duties. Such a determination will clarify whether Plaintiff can recoup the relief that she seeks – the full value of the heart transplant – as a "surcharge" remedy. Resolution of those latter outstanding issues are not decided here.[6]

[6] In making the respectful recommendation that Defendants' motions to dismiss Plaintiff's § 502(a)(3) claim should be denied, the undersigned notes that it does not address UMR, Quantum, and MCMC's arguments that they do not hold property belonging to the estate (thus arguing that Plaintiff is precluded from garnering any monetary relief from any of them). (Document No. 43, p. 9); (Document No. 45, pp. 21-22); (Document No. 51-1, p. 12). The Amara Court did not specify that traceability of recoverable funds to Defendants was a necessary prerequisite to award of the surcharge remedy. 563 U.S. at 441-44; see also DeRogatis v. Bd. of Trs. of the Welfare Fund of the Int'l Union of Operating Eng'rs Local, 385 F. Supp. 3d 308, 319 (S.D.N.Y. 2019); Horan v. Reliance Standard Life Ins. Co., 2014 WL 346615, at *12 n.4 (D.N.J. Jan. 30, 2014) (same).

IV. RECOMMENDATION

FOR THE FOREGOING REASONS, the undersigned respectfully recommends that "PSA Airlines Defendants' Motion To Dismiss" (Document No. 40), "Defendant Quantum Health, Inc.'s Notice Of Joinder In PSA Defendants' Motion To Dismiss And Supplemental Motion To Dismiss" (Document No. 42), "UMR, Inc.'s Motion Under Federal Rule of Civil Procedure 12(b)(1) And 12(b)(6) To Dismiss The Amended Complaint" (Document No. 44), and "Defendant MCMC, LLC's Rule 12(b)(6) Motion To Dismiss For Failure To State A Claim" (Document No. 51) be **GRANTED in part** and **DENIED in part**, as discussed herein.

V. TIME FOR OBJECTIONS

The parties are hereby advised that pursuant to 28 U.S.C. § 636(b)(1)(C), and Rule 72 of the Federal Rules of Civil Procedure, written objections to the proposed findings of fact, conclusions of law, and recommendation contained herein may be filed within **fourteen (14) days** of service of same. Responses to objections may be filed within fourteen (14) days after service of the objections. Fed.R.Civ.P. 72(b)(2). Failure to file objections to this Memorandum and Recommendation with the District Court constitutes a waiver of the right to *de novo* review by the District Court. Diamond v. Colonial Life, 416 F.3d 310, 315-16 (4th Cir. 2005); United States v. Benton, 523 F.3d 424, 428 (4th Cir. 2008). Moreover, failure to file timely objections will preclude the parties from raising such objections on appeal. Id. "In order 'to preserve for appeal an issue in a magistrate judge's report, a party must object to the finding or recommendation on that issue with sufficient specificity so as reasonably to alert the district court of the true ground for the objection.'" Martin v. Duffy, 858 F.3d 239, 245 (4th Cir. 2017) (quoting

United States v. Midgette, 478 F.3d 616, 622 (4th Cir. 2007)).

IT IS SO RECOMMENDED

Signed: March 24, 2021

[h/w signature]
David C. Keesler
United States Magistrate Judge

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 21-2207
(3:19-cv-00695-GCM-DCK)

JODY ROSE, as Administratrix of the Estate of Kyree Devon Holman

Plaintiff - Appellant

v.

PSA AIRLINES, INC.; PSA AIRLINES, INC. GROUP BENEFIT PLAN; UMR, INC.; QUANTUM HEALTH, INC., a/k/a MyQHealth by Quantum; MCMC, LLC

Defendants - Appellees

and

PSA AIRLINES GROUP INSURANCE PLAN; PSA AIRLINES GROUP HEALTH BENEFIT PLAN; PSA AIRLINES PLAN B EMPLOYEE BENEFIT PLAN; PSA AIRLINES SHARED SERVICES ORG.

Defendants

ORDER

The court denies the petition for rehearing and rehearing en banc. No judge requested a poll under Fed. R. App. P. 35 on the petition for rehearing en banc.

Entered at the direction of the panel: Judge Richardson, Judge Quattlebaum, and Judge Heytens.

For the Court

/s/ Nwamaka Anowi, Clerk