UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 17-1485

WILLIAM L. PENDER; DAVID L. MCCORKLE,

Plaintiffs - Appellants,

and

ANITA POTHIER; KATHY L. JIMENEZ; MARIELA ARIAS; RONALD R. WRIGHT; JAMES C. FABER, JR., On behalf of themselves and on behalf of all others similarly situated,

Plaintiffs,

v.

BANK OF AMERICA CORPORATION; BANK OF AMERICA, NA; BANK OF AMERICAN PENSION PLAN; BANK OF AMERICA 401(K) PLAN; BANK OF AMERICA CORPORATION CORPORATE BENEFITS COMMITTEE; BANK OF AMERICA TRANSFERRED SAVINGS ACCOUNT PLAN,

Defendants - Appellees,

and

UNKNOWN PARTY, John and Jane Does #1-50, Former Directors of NationsBank Corporation and Current and Former Directors of Bank of America Corporation & John & Jane Does #51-100, Current/Former Members of the Bank of America Corporation Corporate Benefit; PRICEWATERHOUSE

COOPERS, LLP; CHARLES K. GIFFORD; JAMES H. HANCE, JR.; KENNETH D. LEWIS; CHARLES W. COKER; PAUL FULTON; DONALD E. GUINN; WILLIAM BARNETT, III; JOHN T. COLLINS; GARY L. COUNTRYMAN; WALTER E. MASSEY; THOMAS J. MAY; C. STEVEN MCMILLAN; EUGENE M. MCQUADE; PATRICIA E. MITCHELL; EDWARD L. ROMERO; THOMAS M. RYAN; O. TEMPLE SLOAN, JR.; MEREDITH R. SPANGLER; HUGH L. MCCOLL; ALAN T. DICKSON; FRANK DOWD, IV; KATHLEEN F. FELDSTEIN; C. RAY HOLMAN; W. W. JOHNSON; RONALD TOWNSEND; SOLOMON D. TRUJILLO; VIRGIL R. WILLIAMS; CHARLES E. RICE; RAY C. ANDERSON; RITA BORNSTEIN; B. A. BRIDGEWATER, JR.; THOMAS E. CAPPS; ALVIN R. CARPENTER; DAVID COULTER; THOMAS G. COUSINS; ANDREW G. CRAIG; RUSSELL W. MEYER-, JR.; RICHARD B. PRIORY; JOHN C. SLANE; ALBERT E. SUTER; JOHN A. WILLIAMS; JOHN R. BELK; TIM F. CRULL; RICHARD M. ROSENBERG; PETER V. UEBERROTH; SHIRLEY YOUNG; J. STEELE ALPHIN; AMY WOODS BRINKLEY; EDWARD J. BROWN, III; CHARLES J. COOLEY; ALVARO G. DE MOLINA; RICHARD M. DEMARTINI; BARBARA J. DESOER; LIAM E. MCGEE; MICHAEL E. O'NEILL; OWEN G. SHELL, JR.; A. MICHAEL SPENCE; R. EUGENE TAYLOR; F. WILLIAM VANDIVER, JR.; JACKIE M. WARD; BRADFORD H. WARNER,

Defendants.

Appeal from the United States District Court for the Western District of North Carolina, at Charlotte. Graham C. Mullen, Senior District Judge. (3:05-cv-00238-GCM)

Argued: March 21, 2018 Decided: June 5, 2018

Before KEENAN, WYNN, and FLOYD, Circuit Judges.

Affirmed by unpublished opinion. Judge Wynn wrote the majority opinion, in which Judge Floyd joined. Judge Keenan wrote a dissenting opinion.

ARGUED: Julia Penny Clark, BREDHOFF & KAISER, PLLC, Washington, D.C., for Appellants. Carter Glasgow Phillips, SIDLEY AUSTIN LLP, Washington, D.C., for Appellees. **ON BRIEF:** Eli Gottesdiener, GOTTESDIENER LAW FIRM, PLLC, Brooklyn, New York; Thomas D. Garlitz, THOMAS D. GARLITZ, PLLC, Charlotte, North Carolina, for Appellants. Irving M. Brenner, MCGUIREWOODS LLP, Charlotte, North Carolina; Anne E. Rea, David F. Graham, Tacy F. Flint, Steven J. Horowitz, SIDLEY AUSTIN LLP, Chicago, Illinois, for Appellees.

Unpublished opinions are not binding precedent in this circuit.

WYNN, Circuit Judge.

This Employment Retirement Income Security Act of 1974 ("ERISA") case returns to the Court for a third time. *See Pender v. Bank of Am. Corp.*, 788 F.3d 354 (4th Cir. 2015); *McCorkle v. Bank of Am. Corp.*, 688 F.3d 164 (4th Cir. 2012). Plaintiffs, a class of current

and former employees of Bank of America and certain of its predecessors (collectively, with the Bank's Pension Plan, the "Bank"), seek an equitable accounting for any profits accruing to the Bank resulting from its unlawful transfer of the balances of Plaintiffs' 401(k) Plan accounts into the general account of the Bank's Pension Plan. *Pender*, 788 F.3d at 358. In 2015, this Court ruled that the district court erred in dismissing Plaintiffs' accounting action, and remanded the case to the district court to determine whether the Bank retained any profit as a result of the unlawful transfers and its use of the transferred funds. *Id.* at 368, 370.

On appeal, as it did before the district court, the Bank advances a simple, if somewhat surprising, argument—that the Pension Plan's investment strategy for the unlawfully transferred funds, which was developed and implemented by the Bank's trained asset managers, *performed far worse* than Plaintiffs' investment strategies, as reflected in their 401(k) account investment allocations. Because Plaintiffs' investment allocations outperformed the Bank's investment strategy—and the Pension Plan was responsible for making up any shortfall between the performances of the Bank's investment strategy and Plaintiffs' allocations—the Bank maintains that it did not profit from the transfers. After conducting a four-day bench trial, during which the parties presented fact and expert testimony and evidence, the district court agreed with the Bank and, therefore, dismissed Plaintiffs' action as moot. *Pender v. Bank of Am. Corp.*, No. 3:05-CV-00238,

2017 WL 1536234, at *23 (W.D.N.C. Apr. 27, 2017). For the reasons that follow, we affirm.

I.

In 1998, the Bank amended its 401(k) Plan to provide eligible participants with the opportunity to transfer their account balances to the Bank's defined-benefit Pension Plan. *Pender*, 788 F.3d at 358. Once transferred to the Pension Plan, beneficiaries could continue to allocate their account balances among various investment options. *Id.* at 358. However, unlike with balances held in the 401(k) Plan, which were actually invested in the selected investment options, beneficiaries who elected to transfer their accounts to the Pension Plan would have only notional (or hypothetical) accounts—the Bank could invest the beneficiaries' account balances however it saw fit. *Id.* In return for beneficiaries' agreement to transfer their balances to the Pension Plan and the use of the beneficiaries' funds, the Bank guaranteed that such beneficiaries' account balances would not fall below the amount in their account at the time of the transfer. *Id.* The Bank offered the transfer option because it believed it could obtain a higher return with the beneficiaries' money than the beneficiaries were obtaining. Many beneficiaries elected to transfer their 401(k) Plan account balances to the Pension Plan, with beneficiaries in aggregate transferring nearly $2 billion in their 401(k) Plan balances to the Pension Plan for the Bank's use.

In 2005, the Internal Revenue Service (the "IRS") concluded that the transfers violated ERISA's "anti-cutback provision," 29 U.S.C. § 1054(g)(1), which bars plan amendments from decreasing a participant's "accrued benefit." *Id.* at 363. The IRS found, and this Court later agreed, that stripping beneficiaries of the 401(k) Plan's "separate account feature" deprived beneficiaries of a meaningful benefit because it subjected plan participants to the risk that the Bank would invest the transferred assets poorly, and therefore lack sufficient funds to satisfy all of the returns a beneficiary obtained in his notional investment account. *Id.* at 363–64 ("[T]he Bank's promise that the value of the transferred funds will not decrease below a certain threshold—even if, for example, it invests Pension Plan assets poorly and loses money—is not the same as actually not decreasing the account balance.").

In 2008, the IRS reached a closing agreement[1] with the Bank, pursuant to which the Bank "(1) paid a $10 million fine to the U.S. Treasury, (2) set up a special purpose 401(k) plan, (3) . . . transferred Pension Plan assets that were initially transferred from the 401(k) Plan to the special-purpose 401(k) plan," and (4) made additional payments to certain plan participants whose hypothetical return in their notional account was less than a defined amount. *Id.* at 360. The Bank completed those transfers in 2009. *Id.* Importantly, as a result of the transfers to the special-purpose 401(k)

[1] A closing agreement is a binding agreement finally and conclusively settling—*i.e.*, closing the file as to—a tax issue between the IRS and a taxpayer.

plan and the additional payments to certain plan participants, all Plaintiffs' current account balances are at least as large as they would have been had the funds in Plaintiffs' accounts actually been invested in accordance with their notional allocations. *Pender v. Bank of Am. Corp.*, No. 3:05-CV-238, 2013 WL 4495153, at *10 (W.D.N.C. Aug. 19, 2013), *rev'd on other grounds*, 788 F.3d 354.

Around the same time that the IRS began to take action, Plaintiffs filed a variety of equitable and statutory claims related to the transfers. *Pender*, 788 F.3d at 360. All but one of those claims were dismissed and are not at issue in this appeal. *McCorkle*, 688 F.3d at 169 n.4, 177. Plaintiffs' lone remaining claim is premised on the Bank's violation of the anti-cutback provision. In 2013, the district court dismissed that claim on grounds that the remedial provisions in the IRS closing agreement rendered such claims moot because it restored the 401(k) Plan's separate account feature. *Pender*, 2013 WL 4495153, at *5–9.

This Court reversed, explaining that Plaintiffs suffered a legally cognizable ongoing injury if the Bank retained a profit as a result of its unlawful transfer of the 401(k) Plan balances to the Pension Plan, and its investment of those balances. *Pender*, 788 F.3d at 364–65. In reaching that conclusion, this Court held that Plaintiffs could pursue relief under ERISA Section 502(a)(3), which authorizes a plan beneficiary to obtain any "appropriate equitable relief" to redress "any act or practice which violates" certain ERISA provisions, including the anti-cutback provision. *Id.* at 363. This

Court further concluded that the "accounting for profits" sought by Plaintiffs is one form of "equitable relief" available under Section 502(a)(3). *Id.* at 364–65.

On remand, the district court conducted a four-day bench trial to determine "whether, after it restored the separate account feature and paid a $10 million fine to the IRS, the Bank nevertheless profited from its transfer strategy." *Pender*, 2017 WL 1536234, at *4. At trial, as they do on appeal, Plaintiffs and the Bank offered distinct approaches to determining whether the Bank retained a profit as a result of the transfer of the beneficiaries' 401(k) Plan account balances to the Pension Plan.

On the one hand, Plaintiffs focused on the undisputed fact that the transferred 401(k) Plan balances were "pooled" or "commingled" with—rather than segregated from—the funds of the Pension Plan. *Id.* Plaintiffs argued that, as a matter of black-letter equity law, when improperly obtained funds are commingled with other funds, a plaintiff is entitled to a share of the returns on all of the commingled funds in proportion to the unlawfully obtained assets' share of the commingled fund as a whole. *Id.* To that end, one of Plaintiffs' experts, Lawrence Deutsch, calculated—and the Bank does not dispute—that the Pension Plan as a whole had a cumulative rate of return of 28.6% over the 1998 to 2009 period when the 401(k) Plan assets were pooled with the Pension Plan assets. *See id.* Allocating a proportionate share of the Pension Plan's retained profit based on that return rate to the 401(k) Plan participants who transferred their funds to the Pension Plan,

Deutsch calculated that the Bank retained $379 million in profit, including accrued interest, from the unlawful transaction. *Id.* Although the Bank did not introduce its own analysis using Plaintiffs' proportionate-share-of-the-whole methodology, a Bank executive testified—in accordance with Deutsch's analysis—that the Pension Plan as a whole outperformed the beneficiaries' notional allocations during the relevant time period.

By contrast, the Bank asserted—and the district court found—that the Bank relied on a different, contemporaneously documented, "Investment Strategy" for the 401(k) balances transferred to the Pension Plan than for the remaining funds in the Pension Plan. *Id.* at *4, *8. In particular, "[t]he core of the [Pension] Plan's Investment Strategy was to invest the assets used to fund the [transferred 401(k) accounts] more heavily in equities than participants invested their hypothetical accounts, on the theory that equities would be expected to outperform fixed income options over the long term. The [Pension] Plan did this by matching or 'hedging' participant equity investments with [Pension] Plan equity investments and investing approximately 60% of participant fixed income investments in equities." *Id.* at *5.

The Bank's expert, Dr. Russell Wermers, sought to determine whether the transferred balances returned a profit to the Bank under the Investment Strategy. To do so, Wermers analyzed the performance of three asset classes included in the Pension Plan's general investment portfolio: domestic equities, international

equities, and fixed income assets. *Pender*, 2017 WL 1044965, at *7. Wermers used three benchmark indices to estimate the returns of those asset classes over the relevant time period—the Russell 3000 for domestic equities, the MSCI EAFE Index for non-U.S. equities, and the Lehman Brothers Aggregate Bond Index for fixed income assets. *Id.* Although the Pension Plan did not necessarily invest in these indices, the Investment Policy identified these indices as benchmarks for their respective asset classes, and directed the investment managers to "[e]qual or exceed the return of the benchmark, net of fees, at a comparable level of risk." J.A. 841.

Wermers found that the two equity indices (Russell 3000 and MSCI EAFE) declined during the relevant period, whereas the bond index increased by 81.1%. *Pender*, 2017 WL 1536234, at *7. Because (1) the Investment Strategy had the effect of overweighting equity investments by matching 401(k) Plan participants' equity allocations and treating their fixed income investments as part of the Pension Plan's general investment account and (2) equities performed worse than fixed income assets during the relevant time, Wermers opined that the transfer strategy must have resulted in a loss to the Pension Plan—in the amount of the difference in performance between the Bank's (underperforming) allocation and the notional allocations by 401(k) Plan participants, which were less heavily weighted toward equities. *Id.*

In addition to Wermers' opinion, the Bank also introduced contemporaneously recorded and maintained

spreadsheets, which, on an aggregate basis, tracked "participants' hypothetical equity and fixed income investments" and compared those returns to the returns realized by Pension Plan's Investment Strategy. *Id.* at *8. Based on these spreadsheets, a Bank executive responsible for monitoring the Pension Plan's investments, David Andreasen, calculated that the Investment Strategy of overweighting equity investments resulted in a net investment loss to the Bank. *Id.* In particular, Andreasen testified that the Investment Strategy for the transferred balances yielded a return of 3.5% over the relevant period, compared to a 16.5% aggregate return on Plaintiffs' notional investments, leading to a loss of $149 million. Put differently, Andreasen concluded that the Bank's investment allocation performed far worse than the beneficiaries' notional allocations. Adding the costs associated with the IRS closing (such as the IRS penalty and the costs of creating and transferring funds into the special purpose 401(k) plan), Andreasen testified that the transfer resulted in a cumulative loss of $272 million. *Id.*

Finding that "[b]oth the Plaintiffs['] and the Defendants['] experts . . . presented a coherent and facially plausible story for their parties" and none of their testimony was "contradicted by objective evidence," the district court nonetheless found that "Defendants' experts provided evidence at trial that is more credible than the testimony provided by the Plaintiffs' experts." *Id.* at *4. In rendering this finding, the district court determined that Deutsch's approach was "not the appropriate measure of profits due to the

transfer," because it focused on the performance of the Pension Plan as a whole, not profits on the transferred 401(k) balances attributable to the Investment Strategy. *Id.* at *12; *id.* at *13 ("The Bank's profit from the transfer (if any) is best measured using the returns from the Investment Strategy that the [Pension] Plan actually used to fund the [transferred 401(k) Plan balances]."). Put differently, the district court concluded that use of Plaintiffs' *pro rata* or "proportionate-share-of-the whole" approach "would be inappropriate because it would produce 'profits' having nothing to do with the transfers and therefore is contrary to the purpose of this inquiry." *Id.* at *18.

The district court further determined that "[t]he appropriate way to determine whether there was a profit retained as a result of its investment strategy applied to the transferred assets is to look at the returns *attributable* to that 'investment strategy.'" *Id.* (emphasis added) (internal quotation marks omitted); *see also id.* at *19 (stating that in assessing a claim for an accounting for profits a court must "'reach the best approximation it can under the circumstances' of the profit attributable to the conduct at issue" (quoting *Restatement (Third) of Restitution & Unjust Enrichment* § 51 cmt. g (2011))). The court said it embraced the Bank's "attribution" approach because "Plaintiffs' use of total [Pension] Plan returns would confer an inappropriate windfall on participants, act as a penalty and otherwise be inequitable." *Id.* at *19. Applying the Bank's attribution approach and crediting Wermers' and Andreasen's analyses, the district court held that

the Bank did not retain any profit as a result of the transfer and, therefore, dismissed Plaintiffs' claim for an accounting for profits as moot. *Id.* at *23. Plaintiffs timely appealed.

II.

On appeal, Plaintiffs argue that the district court reversibly erred in relying on the Bank's Investment Strategy to determine whether the Bank profited from the unlawfully transferred funds—and therefore denying Plaintiffs equitable relief—rather than calculating all profits accruing to the Pension Plan during the course of the commingling of the funds and awarding Plaintiffs a proportionate share of those profits.[2] When, as here, a district court renders a decision after a bench trial, "we review the district court's factual findings for clear error and its legal conclusion de novo." *F.T.C. v. Ross*, 743 F.3d 886, 894 (4th Cir. 2014); *see also* Fed. R. Civ. P. 52. Likewise, we review a district court's decision to award or deny "equitable relief for abuse of discretion, accepting the court's factual findings absent clear error, while examining issues of law de novo." *Dixon v. Edwards*, 290 F.3d 699, 710 (4th Cir. 2002); *see also Griggs v. E.I. Du Pont de Nemours & Co.*, 237 F.3d

[2] Plaintiffs further argue that this Court should direct the district court to conclude that Deutsch correctly determined the Bank's profit from the transaction and that the Bank is not entitled to seek certain set-offs from or assert equitable defenses to that determination. As detailed below, we conclude that the district court did not reversibly err in denying Plaintiffs equitable relief. Accordingly, we need not—and thus do not—address these additional arguments.

371, 385-86 (4th Cir. 2001) ("leav[ing] it to the sound discretion of the district court" to determine whether, and in what form, an award of equitable relief under Section 502(a)(3) was "appropriate").

To resolve Plaintiffs' appeal, we must address two questions: (A) whether the district court was *required* to follow Plaintiffs' proposed "proportionate-share-of-the-whole" approach and, if not, (B) whether the district court reversibly erred in relying on the Bank's attribution approach in determining that the Bank did not profit from the transfer.

A.

As to the first question, the proportionate-share-of-the-whole approach advanced by Plaintiffs finds substantial support in Restatements, treatises, and case law. For example, the *Restatement (First) of Trusts* provides that "[w]here the trustee wrongfully mingles trust property with his individual property in one indistinguishable mass" and "exchanges the mingled mass for other property" that "becomes more valuable than the mingled mass with which it is acquired, the beneficiary is entitled to a proportionate share of the property, and thus to secure the profit which arises from the transaction." *Restatement (First) of Trusts* § 202 cmt. h (1935); *see also Restatement (Second) of Trusts* § 202 (same); *Restatement (First) of Restitution* § 209 cmt. a (1937) ("The person whose money is wrongfully mingled with money of the wrongdoer does not thereby lose his interest in the money, although the

identity of his money can no longer be shown, but he acquires an interest in the mingled fund. His interest is such that he is entitled in equity to claim *a proportionate share of the mingled fund* or a lien upon it." (emphasis added)); *id.* at § 210.

Likewise, authoritative legal commentators support the proportionate-share-of-the-whole approach. *See*, *e.g.*, 2 Dan B. Dobbs, Law of Remedies § 6.1(4), at 16–17 (2d ed. 1993) ("[W]hen the defendant uses the entire commingled fund to purchase property . . . the plaintiff is not entitled to a constructive trust on the entire property purchased, but he is entitled to a trust for a share in the property proportionate to his share in the fund."); Austin W. Scott, *The Right to Follow Money Wrongfully Mingled with Other Money*, 27 Harv. L. Rev. 125, 127 (1913) ("[W]here the claimant's money is mingled with that of the wrongdoer, and is therefore only partly instrumental in earning the profit[,] [t]he claimant should be entitled to a share of the profit, in so far as his property contributed to earning the profit.").

Both this Court and the Supreme Court also have endorsed use of the proportionate-share-of-the-whole approach to determine the profit obtained by a defendant as a result of its use of unlawfully commingled funds. *See*, *e.g.*, *Henkels v. Sutherland*, 271 U.S. 298, 302 (1926) ("Since the proceeds resulting from the sale of Henkels' property have been commingled with the proceeds of other sales and thus invested, an account must be taken to ascertain the average rate of interest received by the Treasury upon all the proceeds

invested and thereupon . . . a proportionate allocation made in respect of the proceeds belong to Henkels for the period of their investment."); *MacBryde v. Burnett*, 132 F.2d 898, 900 (4th Cir. 1942) ("[I]f trust funds are mingled with personal funds of a trustee, the whole is impressed with a trust until separation of the trust property can be made, and that the trust [beneficiaries are] entitled to a proportionate part of the profits realized by the trustee in dealings with the fund in which the trust funds are mingled.").

And other circuits also have applied the proportionate-share-of-the-whole approach in such circumstances. *See*, *e.g.*, *Provencher v. Berman*, 699 F.2d 568, 570 (1st Cir. 1983) (Breyer, J.) (explaining that when "a 'conscious wrongdoer' . . . uses commingled funds to buy property, . . . the innocent party can choose either to enforce a lien on the property for the value of the estate's funds or" claim "the proportionate share of the real estate"); *Bartlett & Co., Grain v. Commodity Credit Corp.*, 307 F.2d 401, 409 (8th Cir. 1962) ("The amount of the actual yield of the bills is known, and the claim of Commodity for the period now in question should be limited to *its pro rata share of the yield.*" (emphasis added)); *Bird v. Stein*, 258 F.2d 168, 177 (5th Cir. 1958) (Wisdom, J.); *Marcus v. Otis*, 169 F.2d 148, 150 (2d Cir. 1948) (A. Hand, J.) ("[W]here a wrongdoer mingles his own funds with other funds which he has misappropriated . . . he is liable only for a proportionate part of the profits realized based upon the ratio of the amount of money he misappropriated to the original commingled mass."). Additionally, at least one court has applied the

proportionate-share-of-the-whole methodology in an analogous ERISA case. *Rochow v. Life Ins. Co. of N.A.*, 737 F.3d 415, 429-30 (6th Cir. 2013) (concluding that a district court did not abuse its discretion in ascertaining profits to be disgorged when unlawfully obtained funds were commingled with defendant's general assets by applying "the principle that where funds are not traceable, an appropriate remedy is to order disgorgement of a proportionate share of the wrongdoer's profits"), *rev'd on rehearing on other grounds* 780 F.3d 364 (6th Cir. 2015) (en banc).

Notwithstanding the proportionate-share-of-the-whole approach's widespread application, *see Provencher*, 699 F.2d at 570 (describing the proportionate-share-of-the-whole approach as "virtually universal"), a few courts took—and continue to take—other approaches in determining whether, and to what extent, a defendant profited from the use of unlawfully obtained, and mingled, money, *see*, *e.g.*, *Parke v. First Reliance Standard Life Ins. Co.*, 368 F.3d 999, 1009 (8th Cir. 2004) (holding, in ERISA breach of fiduciary duty case, that the plaintiff was entitled to disgorgement of profits in the form of interest because the fiduciary " 'gains' from the wrongful withholding of the plaintiff's benefits even if the plaintiff does not prove specific financial profit. In particular, the defendant receives a benefit from having control over the money"); *In re Mowrey's Estate*, 232 N.W.82, 86 (Iowa 1930) (requiring executor, who commingled estate funds with personal funds to obtain mortgages, to pay interest on commingled funds at the statutory rate).

That the proportionate-share-of-the-whole approach appears to have been widely, if not universally, embraced by courts and commentators does not necessarily mean, however, that the district court was *required* to follow that approach in this case—the question this Court must resolve. As to that question, Plaintiffs contend that the district court was required to apply the proportionate-share-of-the-whole approach in this case for two reasons.

First, Plaintiffs argue that "[b]ecause 'courts of equity must be governed by rules and precedents no less than courts of law,' . . . the Supreme Court has been insistent that any time equity has already developed a specific rule for dealing with a recurring fact pattern, equity courts are forbidden from 'exercis[ing] [their] background equitable powers' . . . to engage in '*ad hoc* equitable departures.'" Appellants' Br. 28 (second and third alterations in original) (quoting *Lonchar v. Thomas*, 517 U.S. 314, 323–24, 327 (1996)). *Lonchar*, however, does not bear the weight Plaintiffs claim.

Without question, *Lonchar* supports the proposition that, for a variety of compelling reasons—predictability, uniformity, and fairness, to name a few—courts generally should follow equitable rules, like the proportionate-share-of-the-whole methodology. *Lonchar*, 517 U.S. at 324 ("[E]quitable rules that guide lower courts reduce uncertainty, avoid unfair surprise, minimize disparate treatment of similar cases, and thereby help all litigants."). But *Lonchar* dealt with a meaningfully distinct question—"whether a federal court may dismiss a first federal habeas petition for general

'equitable' reasons beyond those embodied in the relevant statutes, Federal Habeas Corpus Rules, and prior precedents." *Id.* at 316. That question turned on a complex regulatory and statutory scheme that specifically addressed the relevant issue and did not expressly confer equitable authority to resolve that question. *Id.* at 322–28.

By contrast, ERISA Section 502(a)(3), under which Plaintiffs seek relief, expressly empowers courts to invoke their equitable authority and determine whether equitable relief is "appropriate." 29 U.S.C. § 1132(a)(3). More significantly, the Supreme Court subsequently recognized that, notwithstanding *Lonchar*'s statement that courts of equity "must be governed by rules and precedents no less than the courts of law," the "exercise of a court's equity powers . . . *must be made on a case-by-case basis.*" *Holland v. Florida*, 560 U.S. 631, 649–50 (2010) (emphasis added) (internal quotation marks omitted). "In emphasizing the need for flexibility and avoiding mechanical rules . . . we have followed a tradition in which courts of equity have sought to relieve hardships which, from time to time, arise from a hard and fast adherence to more absolute legal rules, which, if strictly applied, threaten the evils of archaic rigidity." *Id.* at 650 (internal quotation marks omitted). Accordingly, neither *Lonchar* nor Supreme Court precedent *requires* courts to invariably follow equitable rules.

Second, Plaintiffs argue that even if district courts generally retain discretion as to the application of equitable rules, ERISA Section 502(a)(3) does not afford district courts any such discretion. Appellants' Br.

30–31. In support of their position, Plaintiffs emphasize this Court's holding in *Pender* that "[t]he Supreme Court has interpreted the term 'appropriate equitable relief,' as used in Section 502(a)(3), to refer to 'those categories of relief that, traditionally speaking (*i.e.*, prior to the merger of law and equity [in 1938]) were *typically* available in equity.'" *Pender*, 788 F.3d at 364 (quoting *CIGNA Corp. v. Amara*, 563 U.S. 421, 439 (2011)). As detailed above, Plaintiffs are correct that their proportionate-share-of-the-whole approach appears to have been the predominant way of conducting an accounting of profits when unlawfully obtained funds were commingled with other funds. But the language from *Amara* upon which *Pender* relied dealt with what *forms* of "equitable relief" were available—*e.g.*, restitution, disgorgement, accounting for profits, etc.—not with whether a court was *required* to award a particular form of relief—or calculate such relief in a particular way—the relevant question here.

Both the language of the statute and case law contradict Plaintiffs' claim that "courts in ERISA cases *cannot* rely on their judgment to devise relief that is fair, reasonable, and 'equitable' in the particular circumstances of the case." Appellants' Br. 30–31 (emphasis in original). To begin, whereas *Pender*, and the Supreme Court cases upon which it relied, focused on the meaning of "equitable relief" in Section 502(a)(3), *788 F.3d at 364*, that provision also requires that the award of such relief be "appropriate," indicating that a court has the power to deny such relief (even if it is a *form* of equitable relief available under Section

502(a)(3)), if it deems such relief not "appropriate" under the particular facts of the case. To that end, after concluding that the remedies sought in *Amara* were "equitable relief," the Supreme Court remanded the case because it was unclear "whether the District Court will find it *appropriate* to exercise its *discretion* under § 502(a)(3) to impose that remedy on remand." *Amara*, 563 U.S. at 442 (emphasis added).

Likewise, in *Griggs v. E.I. DuPont de Nemours & Co.*, this Court held that "even if the redress sought by a beneficiary under ERISA Section 502(a)(3) is a classic form of equitable relief, it must be *appropriate* under the circumstances." 237 F.3d at 385 (emphasis retained). And in *McCravy v. Metropolitan Life Insurance Co.*, this Court considered whether a breach of fiduciary action seeking equitable relief in the form of estoppel and surcharge was available under ERISA Section 502(a)(3). 690 F.3d 176, 182 (4th Cir. 2012). After concluding that estoppel and surcharge actions were "traditionally available in [pre-merger] courts of equity"—and therefore available under Section 502(a)(3)—we remanded the case to the district court, stating: "Whether [the plaintiff's] breach of fiduciary duty claim will ultimately succeed and whether surcharge is an *appropriate* remedy under Section [502(a)(3)] *in the circumstances of this case* are questions appropriately resolved in the first instance before the district court." *Id.* at 180–82 (emphasis added). Accordingly, this Court has held that even if a form of equitable relief is available under Section 502(a)(3), a district court has discretion to deny such relief if the

court deems such relief inappropriate under the particular facts of the case.

Other circuit courts have reached the same conclusion. For example, the Third Circuit held that "the term 'appropriate' . . . confer[s] discretion on district courts, sitting as courts of equity, to limit equitable relief by doctrines and defenses traditionally available at equity." *Nat'l Sec. Sys., Inc. v. Iola*, 700 F.3d 65, 101–02 (3d Cir. 2012). Applying that rule, the Third Circuit upheld a district court's award of only *partial* disgorgement, notwithstanding that the traditional equitable rule afforded full disgorgement, because some of the unlawful payments at issue had been passed on to innocent third-parties. *Id.* The *National Security Systems* court ruled that because courts sitting in equity are entitled "to fashion relief tailored to the unique circumstances of a case," the district court did not abuse its discretion in limiting the disgorgement when it found that the facts of the case so warranted. *Id.* at 102.

Likewise, the Seventh Circuit has explained that "the fact that a transaction is prohibited under ERISA *does not necessarily mandate a remedy*, although it is a very dangerous area for trustees to explore, let alone attempt to exploit." *Etter v. J. Pease Constr. Co., Inc.*, 963 F.2d 1005, 1009 (7th Cir. 1992) (emphasis added). "Rather, the decision to impose a remedy lies within the court's discretion and should be in tune with the case's realities." *Id.* (internal quotation marks omitted); *see also Gearlds v. Entergy Servs., Inc.*, 709 F.3d 448, 452 (5th Cir. 2013) ("We leave to the district court

the determination whether Gearlds's breach of fiduciary duty claim may prevail on the merits and whether the *circumstances of the case* warrant the relief of surcharge." (emphasis added)); *McDonald v. Pension Plan of NYSA-ILA Pension Tr. Fund*, 320 F.3d 151, 161 (2d Cir. 2003) ("[Section 502(a)(3)] does not require district courts to grant particular relief; rather, it affords district courts the discretion to fashion appropriate equitable relief."). By contrast, Plaintiffs cite no authority, nor have we found any, holding that a district court is barred from declining to award equitable relief under Section 502(a)(3)—even if the requested form of equitable relief is available under that statute—if it determines the award of such relief would be inappropriate under the facts of the case.

Accordingly, ERISA Section 502(a)(3) did not *require* the district court to award Plaintiffs relief based on the proportionate-share-of-the-whole methodology. Rather, the district court retained discretion to consider other approaches in determining whether equitable relief was "appropriate" under the particular facts of the case.

B.

Having concluded that the district court was not required to follow the proportionate-share-of-the-whole approach in determining whether, and to what extent, the Bank profited from the unlawful transfers, we next must decide whether the district court permissibly exercised its discretion in determining equitable

relief was not appropriate in this case. Under the governing deferential standard of review, we uphold the district court's decision denying Plaintiffs equitable relief.

The district court's decision rested on extensive factual findings, none of which Plaintiffs challenge on appeal as clearly erroneous. Those factual findings reflect contemporaneous Bank records maintained in the ordinary course of business outlining the Bank's Investment Strategy, which the district court found treated the transferred 401(k) balances differently than the other funds in the Pension Plan's general account. *Pender*, 2017 WL 1536234, at *8. The district court further found that the contemporaneously documented Investment Strategy, to which the Bank adhered, required the Pension Plan "to invest assets to fund [the transferred 401(k) account balances] in a higher concentration of equities than participants invested their hypothetical accounts." *Id.* at *9. The district court also found that the Bank contemporaneously tracked, on a monthly basis, the performance of the transferred 401(k) balances, separate and apart from the performance of the remaining funds in the Pension Plan's general account. *Id.* at *8, *13. And the district court found—and Plaintiffs do not dispute—that the returns for the transferred 401(k) balances realized under "the Investment Strategy were . . . less than participants' hypothetical returns." *Id.* at *9.

Based on these undisputed factual findings, the district court repeatedly asserted it would not be "appropriate" to award Plaintiffs equitable relief under

the proportionate-share-of-the-whole approach because that approach would not measure whether any profits accrued to the Bank "due to the transfer." *Id.* at *12; *see also*, *e.g.*, *id.* at *5 ("[A]s a matter of equity, the Court finds that [the proportionate-share-of-the-whole] methodology is inappropriate and inferior to calculating profit based on the actual Investment Strategy utilized with respect to the [transferred funds]."); *id.* at *18–19. Again emphasizing the distinct, contemporaneously documented Investment Strategy for the transferred funds, the district court further determined it would be inappropriate to apply the proportionate-share-of-the-whole approach because "doing so would have the effect of being a penalty, and, conversely, would create a windfall for Plaintiffs, because much of what would be captured as 'profits' under such a methodology would be investment returns the Plan would have realized in any event regardless of the transfer." *Id.* at *14.

It was within the district court's discretion to determine that awarding Plaintiffs equitable relief using the proportionate-share-of-the-whole methodology would be inappropriate *in this case.* The proportionate-share-of-the-whole approach was designed to address situations in which a defendant mingles unlawfully obtained funds with money of his own so that the "whole forms one indistinguishable mass[;] . . . it can no longer be identified." Scott, *supra* at 125.

Here, the district court did not clearly err in determining that the extensive contemporaneous evidence outlining the Investment Strategy for the unlawfully

transferred funds and separately tracking the performance of the funds invested under that strategy made it possible to "identif[y]" the performance of the unlawfully mingled funds, *id.*, thereby rendering application of the proportionate-share-of-the-whole methodology inappropriate in this particular case, *cf. Sheldon v. Metro-Goldwyn Pictures Corp.*, 309 U.S. 390, 406 (1940) ("Where there is a commingling of gains, [the wrongdoer] must abide the consequences [and disgorge all commingled gains], *unless he can make a separation of the profits* so as to assure the injured party all that justly belongs to him." (emphasis added)). Put differently, the extensive contemporaneous evidence identifying the performance of the unlawfully commingled funds provided the district court with an adequate factual basis to deviate from the proportionate-share-of-the-whole methodology, which courts widely apply to assess whether, and to what extent, a wrongdoer profits from unlawfully commingled funds.

Likewise, courts and commentators have cautioned against awarding a plaintiff equitable relief, and disgorged profits in particular, to the extent doing so would amount to a windfall or penalize a defendant. *Id.* at 404, 408 (explaining that "[e]quity is concerned with making a fair apportionment so that neither party will have what justly belongs to the other" and therefore does not permit "inflict[ing] an unauthorized penalty"); *Griggs*, 237 F.3d 371, 385 (4th Cir. 2001) (stating that an ERISA plaintiff seeking equitable relief was "not entitled to a windfall"); *Restatement (Third) of Restitution and Unjust Enrichment* § 51

(2011) ("[T]he unjust enrichment of a conscious wrong-doer . . . is the net profit attributable to the underlying wrong. The object of restitution in such cases is to eliminate profit from wrongdoing while avoiding, so far as possible, the imposition of a penalty."); 1 Dobbs, *supra* § 4.5(3), at 642 ("Even the willful wrongdoer should not be made to give up that which is his own; the principle is disgorgement, not plunder."). In light of these authorities, which the district court explicitly referenced, the district court did not abuse its discretion in determining that use of the proportionate-share-of-the-whole methodology to award Plaintiffs equitable relief would amount, *in this specific case*, to a windfall to Plaintiffs, and inappropriately penalize the Bank. *Pender*, 2017 WL 1536234, at *14, *16, *19. In particular, there is no dispute that as a result of the transfers and payments required by the IRS closing agreement, Plaintiffs' current 401(k) account balances are at least as large as they would have been had the funds in their accounts actually been invested in accordance with their notional allocations. *Pender*, 2013 WL 4495153, at *10. And the contemporaneous records introduced by the Bank, which separately tracked the performance of the transferred funds, provided the district court with a factual basis to determine that the Bank did not profit from the transaction and that any further payment to Plaintiffs would serve only to penalize the Bank.

The extensive evidence of the distinct, contemporaneously documented Investment Strategy credited by the district court sets this case apart from the

"hypothetical example" set forth by our colleague in dissent. *See post* at 27–28. Under that example, "the investor never explains how he could maintain a separate investment strategy that benefits only his share of the commingled funds." *Id.* But the district court credited the Bank's evidence documenting the separate investment strategy and establishing that the returns accruing the unlawfully commingled funds invested pursuant to that strategy could be separately tracked. Plaintiffs have not challenged those factual findings as clearly erroneous, and therefore we have no basis to conclude that the district court abused its discretion in relying on those findings to deny Plaintiffs equitable relief.

That we conclude that the district court did not abuse its discretion in determining that equitable relief was not appropriate *in this case* does not mean that we necessarily would have rendered the same judgment were we addressing the question in the first instance. Having access to the additional funds obtained through the unlawful transfers may have impacted the Bank's investment strategy for the Pension Plan as whole, even if it sought to hedge its risk by mirroring the 401(k) beneficiaries' equity investments, meaning that the benefits accruing to the Pension Plan may not have been entirely independent of the losses related to the 401(k) balances, as the attribution approach assumed. Additionally, as the Eighth Circuit recognized, a "defendant receives a benefit from having control over the money" even if a profit cannot be demonstrated. *Parke*, 368 F.3d at 1009. And the attribution

approach advanced by the Bank, and relied on by the district court, is generally applied in situations when a defendant's skill or ingenuity independently contributed to profits obtained, in part, by a defendant's unlawful use of another's property. *See*, *e.g.*, *Sheldon v. Metro-Goldwyn Pictures Corp.*, 309 U.S. at 404–08. By contrast, here the Bank maintains that its *lack of skill* in investing the transferred funds—as evidenced by the Bank's Investment Strategy yielding significantly lower returns than Plaintiffs' notional allocations—warranted application of the attribution approach.

Nonetheless, in light of the extensive contemporaneous records documenting the Investment Strategy for the transferred funds and tracking the performance of those funds—which provided the district court with an adequate factual basis to find that the performance of the transferred funds could be separately identified—it was within the district court's discretion to decline to award equitable relief based on the proportionate-share-of-the-whole approach.

In affirming the district court's exercise of its discretion, we do not—as our dissenting colleague suggests—"depart" from our prior holding that if " 'Section 204(g)(1)[] . . . is to have any teeth, the available remedies must be able to reach situations like the one this case presents, i.e., where a plan sponsor benefits from an ERISA violation, but plan participants—perhaps through luck or agency intervention—suffer no monetary loss.' " *Post* at 29 (quoting *Pender*, 788 F.3d at 358, 364-65). On the contrary, we simply determine that the district court did not *clearly err* in finding that—based

on the contemporaneous records documenting the Investment Strategy for the transferred funds and tracking the performance of those funds—the Bank did not benefit from the violation. In determining that the district court did not clearly err, we in no way retreat from this Court's previous holding that Section 502(a)(3) entitles plan participants to an accounting for profits attributable to an ERISA violation, even if the participants suffered no monetary harm from the violation. ERISA does not allow a plan sponsor to wrongfully use plan participant funds for the sponsor's benefit. In such circumstances, the plan sponsor must disgorge its ill-gotten benefit to plan participants.

III.

For the foregoing reasons, we affirm the judgment of the district court.

AFFIRMED

BARBARA MILANO KEENAN, Circuit Judge, dissenting:

I agree with the majority that a court examining an ERISA violation is not *required* to apply a proportionate-share-of-the-whole approach when a wrongdoer has profited from the use of commingled funds. A court's exercise of its equitable powers must be made on a fact-specific basis, rather than by imposing absolute outcomes without regard to factual context. *See Holland v. Florida*, 560 U.S. 631, 649-50 (2010); *see also*

29 U.S.C. § 1132(a)(3) (allowing participant to bring claim for "appropriate equitable relief"). However, based on the Bank's particular conduct here, I depart from the majority's holding allowing the Bank to profit by using the plaintiffs' money for the Bank's own purposes. In my view, the district court plainly abused its discretion in permitting the Bank to profit from its own misconduct, which even the Bank concedes was illegal.

A simple example easily illustrates the Bank's self-dealing logic, which the majority accepts today. Imagine that you agree to give $100 to an investor who holds $900 of other funds, so that he can invest the commingled funds of $1,000 and guarantee you a *minimum* return on your investment of 5%. When the $1,000 in commingled funds yields an overall 25% gain, for a total of $1,250, you naturally expect to earn $25 in profit on your investment of $100, yielding a total payment to you of $125.

To your dismay, however, the investor pays you only the guaranteed $105. He tells you that, unfortunately, his investment strategy with respect to *your* $100 share of the single pot of commingled funds failed miserably in the market, causing him to suffer a loss of 10% on your $100 investment. And, astoundingly, he says that he is entitled to all the remaining profit from using your commingled funds because his *separate* strategy for the other commingled funds in the single pot was far more successful. Remarkably as well, the investor never explains how he could maintain a *separate* investment strategy that benefits only his share of the commingled funds, but not yours. Instead, the

investor, who is far more sophisticated and powerful in the marketplace than you are, simply tells you how fortunate you are to have received the guaranteed 5% gain, declares victory, and pockets the entire remaining profit from investing the commingled funds.

This hypothetical example captures the essence of the Bank's wrongdoing and windfall in this case.[3] Thus, the example illustrates the fallacy of the district court's reasoning when it rejected the proportionate-share-of-the-whole approach, a longstanding equitable principle. As we explained in the context of a trust in *MacBryde v. Burnett*, 132 F.2d 898 (4th Cir. 1942), when "funds are mingled with personal funds of a trustee, the whole is impressed with a trust until separation of the trust property can be made," and the beneficiaries ordinarily should receive "a proportionate part of the profits realized." *Id.* at 900.

When there has been commingling of funds by a wrongdoer, most courts have applied the proportionate-share-of-the-whole approach when formulating appropriate equitable relief. *See Henkels v. Sutherland*, 271 U.S. 298, 302 (1926); *Provencher v. Berman*, 699 F.2d 568, 570 (1st Cir. 1983); *Bartlett & Co., Grain v.*

[3] I recognize that the plaintiffs here were informed prior to the transfer that they would earn either the greater of their hypothetical investments or the original balance of their transferred assets. But this initial expectation does not bear on fashioning a remedy for the Bank's wrongdoing. The issue before us is whether the district court abused its discretion in rejecting the plaintiffs' request for disgorgement of the Bank's profits obtained from using the plaintiffs' assets.

Commodity Credit Corp., 307 F.2d 401, 409 (8th Cir. 1962); *Marcus v. Otis*, 169 F.2d 148, 150 (2d Cir. 1948). And, as the majority observes, the Sixth Circuit has applied this approach in the context of an ERISA violation involving commingled funds. *Rochow v. Life Ins. Co. of N. Am.*, 737 F.3d 415, 429-30 (6th Cir. 2013), *rev'd on rehearing on other grounds*, 780 F.3d 364 (6th Cir. 2015) (en banc). Nevertheless, in the face of this compelling case law and our own decision in *MacBryde*, the majority swims against the strong tide of equity.

In our previous decision in this case, we remanded the matter for the district court to consider the plaintiffs' claim under ERISA Section 502(a)(3) for an accounting of profits after the Bank unlawfully transferred the plaintiffs' 401(k) Plan investments (the transferred assets) into the Bank's Pension Plan. *Pender v. Bank of Am. Corp.*, 788 F.3d 354, 358, 364-65 (4th Cir. 2015). We explained that in filing suit against the Bank, the plaintiffs sought "profits generated using assets that belonged to them," reduced by the amount the Bank already had paid the plaintiffs pursuant to the IRS settlement. *Id.* at 364. And, importantly, we emphasized that if "Section 204(g)(1)[] . . . is to have any teeth, the available remedies must be able to reach situations like the one this case presents, i.e., where a plan sponsor benefits from an ERISA violation, but plan participants—perhaps through luck or agency intervention—suffer no monetary loss." *Id.* at 365. It seems that the majority now has departed from our prior admonition.

Somehow, the Bank convinced the district court on remand that the plaintiffs were lucky to have been paid anything, because the Bank's "investment strategy" with respect to the plaintiffs' portion of the commingled funds had failed. However, the strategy only failed with respect to *amounts equal to* the transferred assets. *See Nickel v. Bank of Am. Nat'l Trust & Sav. Ass'n*, 290 F.3d 1134, 1138 (9th Cir. 2002) (discussing disgorgement and stating that "[m]oney is fungible. Once in the bank's accounts . . . the specific sums taken from the trusts could never be identified again."). The undisputed evidence showed that nearly $3 billion of transferred assets were pooled, indistinguishably, with the Pension Plan assets into one "pot" worth about $9 billion. And this "pot" profited by a margin of 28.6% during the relevant period, despite one failed aspect of the overall investment strategy.

Under its strategy, the Bank had intended to enhance the Plan's "pot" by investing amounts equal to the transferred assets more heavily in equities than the plaintiffs themselves would have invested. In that case, the Bank would pay the plaintiffs guaranteed minimum investment earnings, and pocket the additional earnings. *See Pender*, 788 F.3d at 358-59. Because the equities failed to perform as expected, the Bank claimed that the plaintiffs' portion of the commingled funds had shrunk, even though the "pot" actually profited by about $379 million, including accrued interest.

In concluding that these profits from the commingled funds were not attributable to the Bank's

"transfer strategy," the district court answered the wrong question. *See Pender v. Bank of Am. Corp.*, No. 3:05-CV-00238, 2017 WL 1536234, at *4 (W.D.N.C. Apr. 27, 2017). The court should have focused instead on the question articulated in *MacBryde*, namely, what was the proportionate share of the profits made by investing the plaintiffs' portion of the funds. 132 F.2d at 900.

Although the district court appeared to couch its decision as a credibility determination, *Pender*, 2017 WL 1536234, at *4, in reality, the decision merely reflected the court's rejection of an established equitable remedy in favor of preserving the Bank's profit margin. Accordingly, we are not presented with an issue of competing facts that we review for clear error. *See Dixon v. Edwards*, 290 F.3d 699, 710 (4th Cir. 2002) (reviewing a district court's award of equitable relief for abuse of discretion and findings of fact for clear error). Moreover, "even if a district court applies the correct legal principles to adequately supported facts, the discretion of the trial court is not boundless and subject to automatic affirmance," when we have "a definite and firm conviction that the court below committed a clear error of judgment" in its conclusion. *Westberry v. Gislaved Gummi AB*, 178 F.3d 257, 261 (4th Cir. 1999); *see Huskey v. Ethicon, Inc.*, 848 F.3d 151, 158 (4th Cir. 2017). In my view, the district court committed a clear error of judgment and abused its discretion in refusing to order the Bank to disgorge the wrongful gains the Bank reaped.

As we explained in our prior decision, "ERISA borrows heavily from the language and the law of trusts."

Pender, 788 F.3d at 367. And, under those principles, the Bank should be required to pay the plaintiffs the profits "which in equity and good conscience belonged" to the plaintiffs, rather than to use those profits to enhance the Bank's bottom line. *See id.* at 364 (quoting 1 D. Dobbs, Law of Remedies § 4.3(5), p. 608 (2d ed. 1993)). Therefore, I cannot abide the decision by the district court and the majority to allow the Bank to profit lavishly from its wrongful use of the plaintiffs' money.

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE **DIVISION**
CIVIL ACTION NO. 3:05-CV-00238-GCM

WILLIAM L. PENDER, ET AL., **Plaintiff,** v. BANK OF AMERICA CORP., ET AL., **Defendant.**	)))))))))	**AMENDED ORDER** (Filed Apr. 27, 2017)

THIS MATTER is before the Court following a bench trial held November 7, 2016 – November 14, 2016. After hearing the evidence presented at trial and reviewing both parties' Proposed Findings of Fact and Conclusions of Law (Docs. Nos. 355, 356) the Court finds in favor of the Defendant, Bank of America Corp. et al, on all issues for the reasons set forth below.

I. Overview of the Case

This matter arises out of the decision by NationsBank, a company that subsequently merged with Bank of America ("the Bank"), to allow its employees to transfer their 401(k) assets to a cash balance defined benefit plan ("the Pension Plan"). Because the decade-long procedural history in this case has been well documented elsewhere, the Court will recite only the facts

relevant to the present proceeding. *See Pender v. Bank of America*, 2013 WL 4495153, No. 3:05-cv-00238-GCM (W.D.N.C. Aug. 19, 2013); *see also Pender v. Bank of Am. Corp.*, 756 F. Supp. 2d 694, 696 (W.D.N.C. 2010), *aff'd sub nom. McCorkle v. Bank of Am. Corp.*, 688 F.3d 164 (4th Cir. 2012).

The Fourth Circuit described the Pension Plan as follows:

> [Under] [t]he 401(k) Plan[,] participants' accounts reflected the *actual* gains and losses of their investment options. In other words, the money that 401(k) Plan participants directed to be invested in particular investment options was actually invested in those investment options, and 401(k) Plan participants' accounts reflected the investment options' net performance.
>
> By contrast, Pension Plan participants' accounts reflected the *hypothetical* gains and losses of their investment options. Although Pension Plan participants selected investment options, this investment was purely notional. . . . Instead, the Bank invested Pension Plan assets in investments of its choosing, periodically crediting each Pension Plan participant's account with the greater of (1) the hypothetical performance of the participant's selected investment option, or (2) the Transfer Guarantee.

Pender v. Bank of America Corp., 788 F.3d 354, 358–359 (4th Cir. 2015) (footnote omitted) (emphasis in original).

A. IRS Involvement

Following the appearance of a *Wall Street Journal* article covering the BAC transfers, the IRS opened its audit of the Bank's retirement plans on or about July 20, 2000. During the audit, the Bank and the IRS engaged in a series of correspondences regarding the Internal Revenue Code's ("IRC") requirement of a separate account feature for any employee 401(k) plan assets that are transferred into a defined benefit plan such as the BAC plan. In these correspondences, the Bank's position was that the separate account feature was not violated if a defined benefit plan such as the BAC plan provided a benefit not less than the transferred 401(k) plan benefits, adjusted at a 'going rate' for periods after the transfer. (Doc. No. 295-29 at 1-2).

On December 9, 2005, the IRS issued its Liability Technical Advice Memorandum ("TAM"), which concluded that the transfers of participants' 401(k) assets into the BAC plan resulted in a loss of the separate account feature required for defined contribution plans. (Doc. No. 295-5 at 26). The IRS reasoned that, "to preserve the separate account feature, the separate defined contribution account must be determined by the investment experience of the contributions made on the participant's behalf." (Doc. No. 295-5 at 25). Thus, according to the IRS, the BAC plan's hypothetical investment credits failed to preserve the separate account feature.

In *ex parte* settlement negotiations concerning this alleged violation3 the IRS submitted that, in order

to restore the separate account feature, the Bank should pay participants the greater of (a) the original TSA amount plus BAC trust earnings (actual earnings) or (b) the hypothetical TSA account balance. (Doc. No. 295-12 at 1). The Bank disagreed with this restoration method and instead proposed its "Rescission Plus" method. [See Doc. No. 295-35 at 4]. By this method: (1) the hypothetical balance of participants' TSAs would be transferred out of the BAC trust and into individual 401(k) plan accounts; (2) the balance of the TSA would be maintained as a sub-account within participants' 401(k) plan accounts; (3) the restored funds would actually be invested at the direction of the individual participants; (4) the balance guarantee in the BAC plan would be maintained to ensure that no participant received less than his initial TSA balance in the course of shifting the 401(k) assets out of the BAC trust, into individual accounts; and (5) a minimum rate of return would be guaranteed to BAC plan participants. (Doc. No. 295-7 at 7-10).

Within a few days following a July 20, 2007 settlement meeting between the Bank and the IRS, the parties reached an agreement to settle the ongoing audit. The determination letters the IRS issued in connection with the Closing Agreement stated that they related only to the status of the Bank plans under the IRC and did not amount to a determination regarding the application of other federal statutes. (Doc. No. 295-8). Under the settlement, the Bank paid 10 million dollars to the U.S. Treasury and spent approximately 10 million dollars applying its Rescission Plus method to shift

participants' 401(k) assets out of the commingled trust, back into separate accounts. (Doc. No. 295-7 at 3, 9).

B. BAC Benefit Recalculations

Per the Closing Agreement with the IRS, the Bank established a new special purpose defined contribution plan. Effective April 15, 2009, for participants who still had TSA accounts under the BAC plan, the Bank implemented steps to transfer BAC participants' TSA account balances out of the BAC plan, into individual accounts in the name of each participant. (Doc. No. 295-7 at 7-10). The transferred TSA balance reflected a participant's originally transferred 401(k) balance plus hypothetical investment credits to date. After this transfer from the BAC plan occurred, a participant's TSA assets would actually be invested in the options a participant chose and would receive investment credits based on the actual performance of those options. (*Id.*).

In addition to delivering on its guarantee against investment loss under the BAC plan, the Bank amended its BAC plan to guarantee a minimum rate of return on transferred 401(k) assets that were invested in the BAC plan. For participants who had not received their benefit payment before January 1, 2007, this minimum rate of return was 11.6%. According to the Bank, 11.6% represented the difference between (a) the rate of return the Bank earned by investing participants' 401(k) assets in the BAC trust between July 1, 1998 and December 31, 2006 and (b) the average

hypothetical return earned by participants during the same period. (*Id.* at 8).

The benefit calculation method for participants who received their benefit payment before January 1, 2007 was different. The guarantee against investment loss remained. But the guaranteed minimum rate of return was not 11.6%. Rather, the minimum rate of return for such a participant was calculated by (a) taking the actual return the transferred BAC assets made between the participant's original 401(k) transfer date and the date on which the participant received payment from the BAC plan and (b) comparing that actual return to the average hypothetical return earned by all participants over the same period. The participant's guaranteed minimum rate of return was equal to the positive difference, if any, between (a) the actual rate of return on participants' transferred 401(k) assets and (b) the average hypothetical rate of return for the period when the participant's 401(k) assets were invested in the BAC trust. (*Id.* at 8).

C. Fourth Circuit Remand

In its most recent opinion directed at an issue in this case, the Fourth Circuit held "that Plaintiffs have both statutory and Article III standing" and remanded this case for further proceedings. *Pender v. Bank of America Corp.*, 788 F.3d 354, 358–359 (4th Cir. 2015).

The court first held that the Plaintiff has statutory standing to bring their claim under ERISA § 502(a)(3). *Id.* at 363. For Section 502(a)(3) to apply to these facts,

the transfers must have violated a covered ERISA provision and the Plaintiff must seek "'appropriate equitable relief' within the meaning of the statute." *Id.* at 363.

The transfers violated a covered ERISA provision, Section 204(g)(1), because the transfers eliminated the defined contribution plan's separate account feature. This feature "constitutes an 'accrued benefit' that 'may not be decreased by amendment of the plan'" under ERISA § 204(g)(1). *Id.*

Consequently, the only remaining question was whether Plaintiffs sought relief that was equitable in nature. The court found that the Plaintiffs seek the following relief, which constitutes appropriate equitable relief as used in Section 502(a)(3):

> Here, Plaintiffs seek the difference between (1) the actual investment gains the Bank realized using the assets transferred to the Pension Plan, and (2) the transferred assets' hypothetical investment performance, which the Bank has already paid Pension Plan participants. In other words, Plaintiffs seek the profit the Bank made using their assets. This is the hornbook definition of an accounting for profits.

Pender, 788 F.3d at 364.

The court explained that an accounting for profits is "a restitutionary remedy based upon avoiding unjust enrichment," which "holds the defendant liable for his profits, not for damages." *Id.* at 364–5. Because this

type of relief is quintessentially equitable, Plaintiffs could proceed with their claims under § 502(a)(3). *Id.* at 367.

Next, the court went through Article III standing analysis and found that the Plaintiffs satisfied all requirements. *Id.* at 366.

In addition, the court addressed Defendants' argument that the case was moot because they had restored the separate account features of Plaintiffs' accounts and because Plaintiffs had suffered no monetary harm as a result of the temporary elimination. *Id.*; *see also id.* at 366 ("Requiring a financial loss for disgorgement claims would effectively ensure that wrongdoers could profit from their unlawful acts as long as the wronged party suffers no financial loss. We reject that notion."). The panel explained:

> The Bank rightly notes that its closing agreement with the IRS restored Plaintiffs' separate account feature. That restoration, however, did not moot the case. Plaintiffs contend that the Bank retained a profit, even after it restored the separate account feature to Plaintiffs and paid a $10 million fine to the IRS. Defendants do not rebut this argument, noting only that there has been no discovery to this effect. If an accounting ultimately shows that the Bank retained no profit, the case may well then become moot.

Id. at 368.

The Fourth Circuit vacated this Court's grant of summary judgment "based on its erroneous standing determination" and remanded for further proceedings without additional instructions on how the required accounting for profits should be calculated. *See id.* at 370.

On March 10, 2016 this Court issued an order on how best to implement the instructions set out by the Fourth Circuit: the analysis of whether or not the Bank retained a profit must be conducted in the aggregate. *See* Doc. 347. The Court concluded that the Fourth Circuit decision did not call for "60,000 separate and distinct" account-by-account examinations of "the profits or losses derived from each separate transaction." Doc. 347 at 8-9. The Court also rejected Plaintiffs' proposal to count "gains" and not "losses," holding that there was "no basis for finding that a subset of the Plaintiff class is equitably entitled" to a temporary surplus generated using their assets, when "all members of the class suffered the same injury—the temporary loss of their separate account feature—and received all of their promised benefits." *Id.* at 7. The order set a bench trial to be held on the issue of whether, after it restored the separate account feature and paid a $10 million fine to the IRS, the Bank nevertheless profited from its transfer strategy. *Id.*

Each party was allowed to present two experts to testify on their behalf. The Court carefully considered the four experts' testimony, the documents admitted into evidence, and the parties' respective Findings of Fact and Conclusions of Law. For the reasons indicated

herein the Court finds that the Defendants established that it did not retain a profit from the Pension Plan, even after it restored the separate account feature to Plaintiffs and paid a $10 million fine to the IRS.

II. Discussion

After holding the bench trial and reviewing the parties' arguments and relevant case law, the Court finds in favor of Bank of America Corp et al on all counts.

A. Defendants' Experts' Testimony was More Credible than Plaintiff's Experts' Testimony

Both the Plaintiffs and the Defendants experts have presented a coherent and facially plausible story for their parties. The Plaintiffs' expert, Lawrence Deutsch, argues that since the Plaintiffs' transferred assets were comingled with other assets in the Pension Plan, the transferred assets should be considered undifferentiated Plan assets. So, all investment returns on all assets in the Plan should be used to calculate the profit and the transferred funds would be assigned a pro rata share of those returns. Mr. Deutsch's calculation finds the investment gains retained by the Bank from the transferred assets are $379 million. The Plaintiffs' other expert Clark Maxam argues that the Bank must disgorge that greater of the aggregate gains the Bank still retains from the transferred accounts or the market interest the Bank hypothetically

would have paid to receive a loan of the transferred assets. Dr. Maxam calculated the retained interest savings of the transferred assets to be $275 million.

The Defendants' expert Russell Wermers opines that through the use of accepted investment return benchmarks, he can assess whether the Plan's Investment Strategy could have produced a profit. Dr. Wermers found that during the transfer period equities significantly declined, while fixed income investments substantially increased. Since the Plan's Investment Strategy caused the Plan to invest more heavily in equities than the hypothetical investments made by participants, Dr. Wermers found that the transfer strategy did not result in a profit for the Bank. The Defendant's other expert, David Andreasen, argues that the returns of the Investment Strategy can be calculated by tracking the returns for each month for the Equity Hedge strategy and the overweighting equity strategy. The participants' hypothetical equity and fixed income investments were also tracked each month and Mr. Andreasen argues that whether the Pension Plan retained any profit from the transferred assets should be calculated by comparing these two values. Mr. Andreasen's calculations show a loss of $278 million as a result of the transfer assets.

The four experts' testimony are not contradicted by objective evidence and so this Court is in the position where it must make a determination to credit the testimony of either the Plaintiffs' or Defendants' experts based on the Court's understanding of and belief in what was said at trial. On that basis, the Court finds

that the Defendants' experts provided evidence at trial that is more credible than the testimony provided by the Plaintiffs' experts.

III. Findings of Fact

Having reviewed and carefully considered the evidence and arguments presented at trial, the Court makes the following findings of fact:

A. Summary

1. The core of the Plan's Investment Strategy was to invest the assets used to fund the TSAs more heavily in equities than participants invested their hypothetical accounts, on the theory that equities would be expected to outperform fixed income options over the long term. The Plan did this by matching or "hedging" participant equity investments with Plan equity investments and investing approximately 60% of participant fixed income investments in equities.

2. In fact, the Investment Strategy failed. During the transfer period, equity markets experienced historic downturns, and the Plan's greater allocation to equity investments caused its investment returns to be significantly less than the aggregate returns credited to participant accounts. The Court finds, having observed the testimony of the witnesses, assessed their credibility, and considered the entirety of the evidence, that Defendants did not retain a profit as a result of the transfer. To the contrary, the evidence persuasively

shows that the Plan experienced a net investment loss as a result of the Investment Strategy applicable to the TSAs, because it was more weighted in equities during a period when equity markets significantly underperformed fixed income investments.

3. Defendants have provided calculations of the amount of the Plan's losses resulting from the transfer including, as set forth in more detail below, calculations based on contemporaneous records of investment returns maintained in the ordinary course of business. Those calculations show that the Plan incurred an investment loss of approximately $149 million attributable to the transfer.

4. In addition, Defendants paid participants approximately $108 million in Transfer Guarantee payments and made more than $21 million in payments to the IRS and to restore separate accounts in the TSA Plan as required by the Closing Agreement. In total, Defendants' calculation of the losses attributable to the transfer exceeds $270 million.

5. Plaintiffs have criticized various aspects of the investment loss calculations presented by Defendants' expert, Dr. Russell Wermers, and David Andreasen, a senior Vice President of the Bank responsible for Pension Plan investments. But Plaintiffs have failed to quantify or credibly explain how their criticisms would turn a failed Investment Strategy from a loss into a profit. What matters here is whether Defendants retained a profit as a result of the transfer; the precise amount would be relevant only if the Court found that

the evidence demonstrates a profit. The Court finds the evidence does not support a conclusion that Defendants realized a profit.

6. Plaintiffs' expert witnesses presented two alternative analyses allegedly showing a profit. Plaintiffs' expert Lawrence Deutsch opined that the Plan actually profited by more than $379 million. Mr. Deutsch calculates profit based on all investment returns earned on all assets in the Plan—including investment returns on legacy fixed-benefit obligations that pre-date the transfer. For the reasons discussed below, the Court rejects this approach, finding it to be a less accurate and reliable means of measuring whether there was any profit retained from the transfer because it captures investment returns that the Plan would have earned even if the transfer did not occur. In addition, as a matter of equity, the Court finds that this proposed methodology is inappropriate and inferior to calculating profit based on the actual Investment Strategy utilized with respect to the TSAs. This methodology also appears to be at odds with the type of assessment contemplated by the Fourth Circuit and the method for determining investment return "spread" that the IRS approved.

7. In various submissions, Plaintiffs have also suggested an individual-by-individual calculation of participants' hypothetical returns, which excludes from the calculation individual participants for whom there was a negative "spread"—i.e., whose hypothetical investments outperformed the Plan, causing the Plan to incur losses. The Court has already rejected this

approach as inconsistent with the Fourth Circuit's ruling. But even if it were not, the Court finds that this approach to calculating "profit" would not serve the purposes of equity here and would instead be punitive in nature, particularly given that participants have already received all benefits which they were promised.

8. Plaintiffs' second expert, Dr. Clark Maxam, offers an entirely separate theory. Dr. Maxam opines that the Plan was unjustly enriched by the imputed "use value" of the transferred assets, which Dr. Maxam states was $346 million. As set forth below, Dr. Maxam's imputed use value theory is not a reliable or appropriate way of measuring "profit," particularly under the facts and circumstances of this case. In addition, the Court finds that such a methodology would not serve the purposes of equity as compared to the method proposed by Defendants, which focuses on actual profit. For that and other reasons, the Court does not accept the measurement of unjust enrichment based on use value.

9. In sum, the evidence demonstrates that the Plan suffered a loss and that Plaintiffs' various analyses are flawed. Accordingly, the Court finds that Defendants did not retain a profit as a result of the transfer. Having found that there was no profit, the Court need not make findings regarding the other equitable defenses that Defendants have raised in this litigation (which were not the subject of this trial).[1]

[1] As Plaintiffs advance an equitable claim, their claim is subject to equitable defenses. See Griggs v. E.I. DuPont de Nemours & Co., 385 F.3d 440, 449-50 (4th Cir. 2004). If the Court found in

B. The Evidence Demonstrates That There Was No Retained Profit

a. The Plan's Heavy Concentration In Equities During A Time When Equities Underperformed Fixed Income Investments Compels A Finding That The Plan Experienced A Loss

10. Defendants' expert, Dr. Wermers, opined that the Plan did not retain a profit, and he presented various explanations and analyses in support of that conclusion. The Court finds Dr. Wermers' testimony credible and his analyses to be persuasive and helpful.

11. Dr. Wermers is a Professor of Finance at the Smith School of Business at the University of Maryland and Director of the Center for Financial Policy at the University of Maryland. Dr. Wermers' expertise includes quantitative equity strategies, investment manager performance, and measuring performance of actively managed pension plan sub-portfolios. He has taught courses on Quantitative Equity Portfolio Management, Corporate Finance Theory, Security Analysis, and Investment Theory, among other topics. He has written academic papers on pension plans that have focused on benchmarking and measuring the performance of their actively managed sub-portfolios in different asset classes, and co-authored a scientific

---

this trial that Plaintiffs had proved a prima facie case that Defendants retained a profit, Defendants would then have an opportunity to advance their equitable defenses to Plaintiffs' claim. Such equitable defenses include, for example, laches, estoppel, and consent. See Doc. 265 at 55-56.

textbook on how to measure the performance of portfolio managers. He has provided advisory services to the Quantitative Strategies group at Goldman Sachs Asset Management, as well as the Office of Financial Research of the United States Treasury Department.

12. Dr. Wermers opined that the outcome of the transfer strategy can be determined even without directly analyzing the specific hypothetical investment elections participants made and the specific investments the Plan made. Specifically, Dr. Wermers assessed whether the Plan's Investment Strategy applied to the TSAs could reasonably have produced a profit in light of the performance of accepted investment return benchmarks during the relevant period. Using the investment return benchmarks specified in the Plan's Investment Policy Statements, Dr. Wermers evaluated: the performance of the Plan's domestic equity investments by looking to the Russell 3000 Index; the performance of the Plan's international equity investments by looking to the MSCI EAFE Index; and the performance of the Plan's fixed income investments by looking to the Lehman Brothers Aggregate Bond Index.

13. Dr. Wermers observed that during the transfer period, equities experienced significant declines, while fixed income investments experienced substantial increases. Indeed, between July 1, 1998 through March 31, 2009, the difference between equities and fixed income investments was very significant. The Russell 3000 (Equity) Index *declined* 11.2%, and the MSCI EAFE (Equity) Index *declined* 3.5%, while the Lehman

Brothers Aggregate Bond Index (a fixed income index) *increased* 81.1% during the same period.[2]

14. Because the Plan's Investment Strategy intentionally caused the Plan to invest more heavily in equities than the hypothetical investments made by participants, given the relative performance of equity and fixed income investments during the transfer period, it is clear that the transfer strategy resulted in a loss to the Plan, not a profit, as Dr. Wermers testified and the Court finds.

15. Dr. Wermers further confirmed this conclusion by constructing a model based on the Plan's Investment Strategy and participant-directed accounts. The model hedged participant equity investments and invested participant fixed income investments in a 60%/40% mix of equity and fixed income investments, in accordance with the Plan's Investment Policy Statements. Dr. Wermers then used the model to test the Plan's net investment performance for every possible participant-directed allocation, from 100% equity to 100% fixed

[2] Dr. Wermers explained that he selected the Russell 3000 Index because the Plan's Investment Policy Statement specifically provides that the Russell 3000 Index is to be used to benchmark the performance of the Pension Plan's allocation to U.S. equities. (D.E. 15 at 4.) Dr. Wermers further explained that using the Russell 1000 and Russell 2000 indices as Dr. Maxam has suggested would not change the outcome of his analyses, as returns on those indices also were significantly less than returns on the Lehman fixed-income index. The Russell 1000 Index declined 12.3%, and the Russell 2000 Index gained only 6.4%, compared to gains of 81.1% on the Lehman index.

income, based on the performance of the Plan's investment benchmarks during the transfer period.

16. Using this approach, Dr. Wermers concluded that there is no participant-directed allocation that would have resulted in an aggregate investment gain for the Plan. For every possible hypothetical investment combination that participants directed, the Plan's Investment Strategy called for the Plan to invest in, at a minimum, a share of equities *equal* to participant hypothetical equity investments, and most often a *higher* share of equities (if participants allocated any portion of their hypothetical investments to fixed income options).

17. Because equities substantially underperformed fixed income investments during the relevant period, and because the Plan's investments were more heavily concentrated in equities than were participant-directed hypothetical investments, it is unsurprising that the Plan would have experienced a net loss.[3]

b. The Plan's Records Show A Substantial Loss From The Transfer

18. Defendants' analysis, based on contemporaneous records that the Plan maintained in the ordinary

[3] The Court found the slides 4-6 shown during Mr. Andreasen's testimony to be particularly illustrative to the point that the Plan's Investment Strategy to overweight equity selections caused the Plan to have a net loss during the relevant time period. These were tendered as part of the court records, though not tendered into evidence.

course of business, produced calculations and estimates consistent with the conclusion that the Plan realized a loss on the transfer as a result of the underperformance of equities during the relevant period.

19. In order to track the performance of the Investment Strategy, the Plan, through its investment consultant, Callan Associates, measured returns each month separately for (a) its Equity Hedge strategy and (b) its 60/40 strategy. The Plan's investments, including investments made pursuant to the Equity Hedge strategy, were not tracked and investment returns were not measured on an individual participant-by-participant basis.

20. The Plan also tracked each month, on an aggregate basis, participants' hypothetical equity and fixed income investments. These were recorded in monthly "trial balance" documents, which are documents that reflect Plan liabilities, including changes in such liabilities, and which were maintained by the Plan's recordkeeper in the ordinary course of business.

21. These contemporaneous records were compiled into the Return Data Spreadsheet, which was created and admitted as a summary for this litigation. The Return Data Spreadsheet used these primary inputs to calculate the monthly and cumulative percentage returns of the Pension Plan's Investment Strategy, on the one hand, and participants' hypothetical investment performance, on the other. The Plan's net investment performance was determined by subtracting aggregate

participant percentage returns (*i.e.*, liabilities) from the Plan's percentage returns attributable to the Investment Strategy (*i.e.*, assets). The net investment returns on a percentage basis were then multiplied by the aggregate balance of the TSAs each month.

22. Using the data in the Return Data Spreadsheet, the Bank—through Mr. Andreasen, with assistance from Callan Associates—calculated the cumulative totals in the Return Data Spreadsheet. This calculation shows that the Plan experienced a cumulative net investment loss on the Investment Strategy related to TSAs.

23. Beyond this investment loss, the Bank also accounted for other payments associated with the transfer. It subtracted the total amount of Transfer Guarantee payments made by the Pension Plan to participants. It subtracted the total amount of the additional Transfer Guarantee payments made by the Pension Plan to participants pursuant to the Closing Agreement. It subtracted the $10 million IRS payment pursuant to the Closing Agreement. And finally, it subtracted expenses for the restoration of separate accounts as required by the Closing Agreement. Combining these figures, the Bank's calculations showed a cumulative loss of approximately $278 million resulting from the transfer.

24. As discussed below, Plaintiffs dispute the Plan's cumulative investment loss. There is no dispute, however, as to the accuracy of the figures contained in Defendants' Exhibit 104, or that these payments were

actually made. Instead, Plaintiffs argue that certain of these payments should not be considered in determining whether there was any retained profit.

25. The Court finds that the payments in Defendants' Exhibit 104, which total approximately $129 million, are properly included in assessing whether Defendants retained profit from the transfer. All of these expenditures resulted directly from the Bank's transfer strategy and would not have been incurred if the transfer had not occurred. The Court finds that it would be both inaccurate and inequitable to measure whether Defendants realized and retained a profit without considering these expenditures, all of which were required payments and direct consequences of the transfer strategy and its unwinding.

26. The Transfer Guarantee Payments were part and parcel of the transfer strategy, and were undertakings made at the time of the transfer election to induce participants to choose that option. Their payment cannot reasonably be ignored in assessing whether Defendants realized and retained a profit from the transfer strategy.

27. Defendants' payments to the IRS and to restore separate accounts under the IRS Closing Agreement were a direct result of the Bank's unwinding of the transfer, and were costs that would not have been incurred if not for the transfer. These payments must fairly be considered in an equitable assessment of the overall financial results of the transfer.

28. Plaintiffs contend that the $10 million payment to the IRS under the Closing Agreement should be ignored because the Closing Agreement provided that no Bank payment to the IRS would be considered "compensation to, or the discharge of any obligation or liability of, any employee or former employee" of the Bank. Doc. 295-7 at 4 ¶ 3b. But this provision has no application to the equitable issue before the Court. As noted earlier, it is undisputed that Plaintiffs have received all benefits and compensation to which they are entitled, and Defendants have not argued that the payment to the IRS had any effect on the benefits owed to Plaintiffs or should be considered compensation to employees or former employees or discharges of any obligations *to those employees*. The question before the Court is not one of amounts owed to employees but whether Defendants retained any profit from the transfer that should be disgorged to Plaintiffs—not as a result of an "obligation or liability" to the employees but as an equitable matter. Payments Defendants incurred as a result of the transfer and its unwinding must be considered in that equitable determination.

c. Plaintiffs' Criticisms Do Not Undermine The Finding That The Plan Had A Net Loss

29. Plaintiffs do not dispute that the Plan's written Investment Policy Statements directed the Plan to invest assets to fund TSAs in a higher concentration of equities than participants invested their hypothetical accounts. Nor do Plaintiffs dispute that the Plan

followed this Investment Strategy. Plaintiffs also do not dispute that fixed income investments substantially outperformed equities over the transfer period.

30. These undisputed facts essentially are determinative of the inquiry whether the Plan retained a profit due to the transfer. The Plan's assets funding the TSAs were concentrated more heavily in equities than were the Plan's liabilities on the TSAs. Equities performed worse than fixed income investments. The Plan's returns on the Investment Strategy were accordingly less than participants' hypothetical returns. Having taken in less in investment returns than it was obligated to pay out to participants, and paid nearly an additional $129 million as described in FOF ¶¶ 23-28 above, the Plan would not have retained a profit from the transfer. No persuasive evidence to the contrary was presented by Plaintiffs.

31. Plaintiffs' criticisms of some of the particulars of Dr. Wermers' analysis and Mr. Andreasen's calculations do not change the bottom line conclusion. Plaintiffs have not shown that any errors they claim would change the conclusion of a net loss, and Plaintiffs have made no reliable effort to quantify the actual effects of the supposed errors.

i. Transferred Asset Liabilities/Cash Balance Liabilities

32. Plaintiffs' expert Lawrence Deutsch criticizes Mr. Andreasen's loss calculations for assuming that

participant hypothetical investment returns are the same for the TSAs as they are for the cash balance accounts.

33. The Plan employed a single Investment Strategy for all participant-directed accounts—including both TSAs and cash balance accounts. As explained above, that strategy was designed to match or "hedge" participants' hypothetical investments in equities, and to employ a 60% equity/40% fixed income asset allocation in connection with participants' hypothetical fixed income investments. The Plan's records tracked assets and liabilities associated with all participant-directed accounts. Specifically, the trial balances reported on hypothetical investments for all participant-directed accounts. Similarly, the Equity Hedge and the 60/40 strategy were tracked by the Plan's investment consultant, Callan Associates, Inc.

34. The TSAs represented a substantial portion of the participant-directed accounts during the relevant period. Participants with both TSAs and cash balance accounts were required to elect a single set of investment allocations that applied to both accounts, and if they reallocated their hypothetical investments the reallocation applied to both accounts.

35. Plaintiffs have not presented non-speculative evidence reliably showing that any difference between the TSA and cash balance account investment returns is so substantial that it would change the Plan's losses attributable from the transfer into a gain. In fact, the

evidence does not support a finding that there is any difference that is so substantial.

36. Dr. Wermers testified that the Plan's concentration in equities, and the poor performance of equities during the transfer period, mean that there is no reasonable possibility that the Plan would not have suffered a loss *regardless* of the asset allocation TSA participants may have chosen. The sensitivity analyses presented by Dr. Wermers reflecting a variety of participant allocations further support his opinion that any difference between the TSA investment returns and cash balance account investment returns would not be of sufficient magnitude to change the Bank's sizeable loss into a profit. The Court finds Dr. Wermers' analysis to be persuasive. Again, what matters is not the precise amount of any loss, but *whether* there was a Plan loss as opposed to a profit.

37. In addition, the Court notes that the IRS used the same approach that Defendants propose here for calculating investment "spread" attributable to the TSAs. The IRS used the same business records Defendants use here, including records relating to the returns on the Investment Strategy and the trial balances that considered both TSA and cash balance accounts, as sufficiently reliable for its purposes. While not in and of itself determinative, this is further evidence that Defendants' calculations are sufficiently reliable. This evidence also is a more reliable measure of the investment returns on the transfer strategy than alternative measures proposed by Mr. Deutsch.

ii Compounding

38. Plaintiffs' expert Mr. Deutsch also criticizes Mr. Andreasen's calculation of returns attributable to the Investment Strategy on the ground that the analysis does not account for the effects of "compounding" returns while the transferred assets remained in the Plan. As Mr. Deutsch concedes, however, "compounding" would affect the Plan's returns in both directions—compounding gains as well as losses—and Mr. Deutsch offered no opinion at trial that accounting for compounding in the Bank's analysis would cause the results to change such that the Plan would retain a profit.

39. By contrast, Dr. Wermers addressed this issue and opined that because the Plan suffered a loss, compounding would more likely exacerbate the loss, not erase it. As Dr. Wermers explained, for any month in which the Plan outperformed participants, the excess returns would be available to invest according to the Plan's 60/40 strategy—*i.e.*, the 60% equity/40% fixed income asset allocation associated with non-Equity Hedge assets. Conversely, for any month in which participants outperformed the Plan, the Plan would have a shortfall in investment returns which would have to be funded from Plan assets that would otherwise have been invested using the same 60/40 strategy (resulting in a "compounding" loss over time). Based on this analysis, Dr. Wermers opined that compounding applying the 60% equity/40% fixed income rate of return to the gain or loss each month results in an even greater loss than Mr. Andreasen presented in his calculations. The

Court finds Dr. Wermers' analysis on this issue to be persuasive.

iii. Other Criticisms of Dr. Wermers' Analysis

40. Dr. Wermers testified regarding plaintiffs' criticism that Dr. Wermers' model fails to account for participant loans and in- service adjustments. However, the monthly trial balances on which Mr. Andreasen's profit calculation is based do account for participant loans and other adjustments. Mr. Deutsch did not demonstrate in any non-speculative manner, or persuasively or reliably, that the impact of loans and adjustments would be likely to reverse the conclusion of Dr. Wermers' model that the Plan experienced a substantial loss.

41. Mr. Deutsch also criticizes Mr. Andreasen's analysis for supposedly failing to account for inflows and outflows of assets and changes in participant allocations during the relevant period. However, the monthly trial balances on which Mr. Andreasen's profit calculation is based do account for inflows and outflows and changes in participant allocations. Dr. Wermers testified that he deliberately—and expressly—omitted these considerations to simplify his model, because it was clear that the flows during the transfer period would not change losses into profits. Mr. Deutsch presented no evidence or analysis at trial that support a contrary conclusion.

42. Dr. Wermers testified that the point of his model is that, in light of equities' underperformance of fixed-income investments, there is no reasonable possibility that the Plan would *not* have suffered losses no matter how participants allocated their hypothetical investments. That applies equally to reallocations. Again, Mr. Deutsch presented no evidence or analysis that shows that this factor would produce a net gain from the Investment Strategy applied to the transfers, rather than a net loss.

iv. Reliability Of Records

43. Plaintiffs' experts criticize Defendants' calculations on the ground that the aggregate monthly records maintained by the Plan's investment consultant and recordkeeper allegedly contain some errors and therefore are claimed to be unreliable. The Court disagrees. The records on which Defendants' profit calculation relies were contemporaneously made and maintained in the ordinary course of business as part of the Plan's procedures to track, monitor and report on investment performance. The Plan had every incentive to maintain accurate records at the time, and the Court finds that they are sufficiently reliable for purposes of the present inquiry into the issue of whether any profit was realized and retained.

44. Mr. Deutsch opines that a participant-by-participant review is necessary to obtain greater precision and avoid the introduction of errors that may result from using the aggregate data relied on by the Plan. Prior to trial, Plaintiffs also proposed that these

issues be referred to a special master to review each of more than 60,000 individual accounts, including the individual transactions for each of these participants.

45. The Court rejects the contention that analysis of all the transactions in each individual account for more than 60,000 participants is necessary to arrive at a reliable conclusion as to whether the Plan realized a gain or loss from the transfer. Going through a process of collecting and "auditing" all individual participant data would undoubtedly be a lengthy and time-consuming task because it would require individualized review of recordkeeping data for each of over 60,000 individuals, covering millions of transactions on those accounts over more than eleven years. Such an approach is unnecessary given that Defendants' approach is supported by data maintained in the ordinary course of business that already aggregates the innumerable individual transactions on participants' accounts. Indeed, this is the very reason why the Plan, in the ordinary course of its operations, tracked investment returns on participant accounts on an aggregate basis.

46. The Court also finds that Plaintiffs' proposal for a participant-by-participant review of individual account results would end up comparing apples to oranges. As discussed elsewhere, Plaintiffs propose to aggregate the Plan's investment returns in their measure of profit on the asset side, but decline to aggregate participants' hypothetical investment returns in their measure of profit on the liability side. For this reason, what Plaintiffs propose to measure on the asset side

(aggregate investment returns) does not correspond with what they propose to measure on the liability side (individual account results). By contrast, in Defendants' analysis, the measurements on both the asset side and the liability side correspond to the same thing: aggregate results for participant-directed accounts.

47. Moreover, while Plaintiffs criticize the use of aggregated data maintained in the ordinary course of business by the Plan, they themselves use such aggregated data in connection with the "total Plan return" approach they advocate, discussed further below. *See* Part. III.A.1, *infra*. Plaintiffs' claim that the aggregated data is sufficiently reliable for their purposes but not for others is not persuasive.

v. Criticisms As A Whole

48. Considering these and Plaintiffs' remaining criticisms of the analyses presented by Defendants, the Court finds that the evidence supports the Bank's conclusion that no profit was realized or retained from the transfers. The Bank used a specific equity-weighted Investment Strategy in connection with the TSAs, and that strategy led to significant investment losses as a result of the underperformance of equities compared to fixed income investments.

C. The Court Does Not Accept Plaintiffs' Alternative Calculations Of Profit

49 Plaintiffs' experts have not presented any profit or loss calculations which are based upon or take into account the returns of the Investment Strategy used to fund the actual liabilities associated with the transferred accounts. Instead, Plaintiffs' experts have proposed two alternative approaches to the profit calculations. The Court rejects both proposed approaches as being neither reliable nor persuasive, including for the reasons discussed herein.

a. Mr. Deutch's Analysis Is Based On Inappropriate Measures And Inconsistent With This Court's Rulings.

50. Mr. Deutsch estimates that the Plan retained a profit of $379 million. The Court does not accept this estimate.

i. Total Trust Returns Are Not The Appropriate Measure Of Profits Due To The Transfer

51. Mr. Deutsch's calculations are premised on the view that profit should be determined by reference to the investment returns on *all* assets in the Plan. According to Mr. Deutsch, this measure should be used because the Plan did not segregate the transferred assets in a separate sub-trust or in individual separate accounts. The Court rejects this contention for multiple reasons. As addressed in the Conclusions of Law, Mr.

Deutsch's opinions on this issue are inconsistent with prior rulings of this Court and the Fourth Circuit. In addition to these legal considerations, the Court rejects Plaintiffs' and Mr. Deutsch's claims that profit should be determined by reference to the investment returns on *all* assets in the Plan for two separate reasons: (1) it is contrary to the weight of the evidence, and (2) this approach to measuring returns would also not serve the interests of equity in the particular circumstances here.

52. The purpose of this trial is to determine the answer to one question: "whether, after it restored the separate account feature and paid a $10 million fine to the IRS, the Bank nevertheless profited ***from its transfer strategy***." Doc. 347 at 12 (emphasis added). Using investment returns on all assets in the Plan does not answer that question.

53. As detailed above, the Pension Plan's assets funded a mix of liabilities, which can be divided into two major categories: (1) assets funding participant-directed accounts, and (2) assets funding legacy benefit obligations, which pre-dated the adoption of participant notional accounts in 1998 or were from other established plans that merged with Bank of America. The evidence demonstrated that Plan assets funding participant-directed accounts (which included both the TSAs and cash balance accounts) were invested according to a specific Investment Strategy that differed from the asset allocation used to fund legacy benefits.

54. In particular, only the Investment Strategy for participant-directed accounts included the Equity Hedge, which resulted in the assets funding participant-directed accounts to be concentrated much more heavily in equities than the assets used to fund legacy liabilities. The investment strategy for funding legacy benefits had no Equity Hedge, and assets were invested according to a 60% equity/40% fixed income target allocation. While assets transferred from the 401(k) Plan were not formally segregated in the Pension Plan, it is undisputed that following transfer the Plan used the Equity Hedge strategy to fund TSA liabilities and not legacy liabilities, and the investment returns on the Equity Hedge were separately tracked and measured in the Plan's ordinary course of business.

55. Mr. Deutsch opined that in his view, total Plan investment returns should be used because the transferred assets were "commingled" in one trust and not segregated from other Plan assets. But regardless whether assets were "commingled," the Investment Strategy was a separate, documented strategy used by the Plan to invest assets to fund the TSAs.

56. The Bank's profit from the transfer (if any) is best measured using the returns from the Investment Strategy that the Plan actually used to fund the TSAs. Plaintiffs' proposal to measure Plan investment returns based on all assets in the Plan would count returns on assets that funded legacy benefit obligations entirely unrelated to the transfer *and that the Plan*

would have earned regardless of whether the transfer occurred.

57. In addition, Mr. Deutsch's opinion that the commingling of assets in the Plan requires the Court to measure profits by reference to total Plan investment returns is contrary to the approach taken by the IRS in the Closing Agreement. The IRS was aware that the Plan did not segregate the transferred assets and that assets were commingled in the Pension Plan, as that was the basis for its conclusion that the transfer constituted an ERISA violation because it deprived participants of the separate account feature.

58. In approving a remedy for this violation, the IRS required the Plan to calculate the investment return "spread" at the time of the audit. Despite the commingling of funds, the IRS determined that the remedy was properly calculated based on "the investment earnings or loss, as applicable, of the Pension Plan *attributable to the Investment Strategy related to the TSAs*." Doc. 295-7 at 8 (emphasis added).

59. Mr. Deutsch criticizes the calculation of returns based on the Plan's Investment Strategy, because it counts returns on assets that funded both TSAs and cash balance accounts. But using a measure of *total* Plan return on *all* assets would include a far larger amount of assets not subject to the Investment Strategy that have nothing to do with the transfer and would be even less accurate. The Court is not required to use a *less* accurate profit measure when a *more* accurate measure is available, simply because the latter

may not be perfect. To the contrary, the Court is to "reach the best approximation it can under the circumstances" of what profit is attributable to the misconduct at issue. Restatement (Third) of Restitution and Unjust Enrichment § 51 cmt. g. Here, the "best approximation" of the Bank's profit from the transfer is to consider the Plan's Investment Strategy that actually applied to the transferred assets, not the total Plan returns.

60. The Court further finds that using total Plan investment returns to assess whether there was a profit from the transfer would not serve the interests of equity when compared to using the returns of the Investment Strategy. Instead, doing so would have the effect of being a penalty, and, conversely, would create a windfall for Plaintiffs, because much of what would be captured as "profits" under such a methodology would be investment returns the Plan would have realized in any event regardless of the transfer.

61. In sum, the Court finds that total Plan returns are an inappropriate measure of profit under these circumstances. Because Mr. Deutsch's profit calculations rest on total Plan returns, the Court rejects those calculations

ii. Plaintiffs' Proposed Participant-By-Participant Analysis, and Inclusion of Only Those For Whom There Were "Gains," Is Inconsistent With The Court's Prior Ruling And Inequitable

62. Mr. Deutsch also contends that the issue of retained profit should be calculated for each TSA participant individually. Plaintiffs also contended in pretrial proceedings that, if the Plan's investment returns exceeded an individual participant's hypothetical TSA return the gain to the Plan should be counted as retained profit. However, if a participant's TSA returns outperformed the Plan's returns, Plaintiffs argued that the loss to the Plan should be disregarded and not offset against the Plan's gains in connection with other participants.

63. The Court in its March 10, 2016 opinion and order already considered and rejected Plaintiffs' proposal to calculate the Plan's profit by considering only gains to individual participants and ignoring losses. As the Court explained, the Fourth Circuit opinion identified this Court's task on remand as being to determine whether the Bank retained a *net* profit, which would constitute unjust enrichment subject to disgorgement.

64. Yet even if this issue had not already been decided, the Court finds that that the proposal to consider only "gains" as to individual participants while ignoring "losses" is one that would not be fair or reliable, or that would serve equity. The Court's role is not

to penalize the Bank or the Plan, which would be the necessary result of accounting for only the Plan's gains while disregarding the Plan's losses, as Plaintiffs' analysis does.

iii. Mr. Deutsch Fails To Account For Other Payments Related To The Transfer

65 Mr. Deutsch's proposed profit calculations also fail to account for other payments Defendants incurred as a result of the transfer in addition to the Plan's investment losses. Those expenditures include supplemental Transfer Guarantee payments required by the IRS Closing Agreement, Transfer Guarantee payments made after April 15, 2009, the $10 million payment to the IRS, and $11 million in expenses required under the IRS Closing Agreement for restoration of separate accounts.

66. As detailed in Paragraphs 22-27, supra, the Court finds that these payments are properly included in the determination of whether the Bank retained a profit due to the transfer strategy.

iv. Dr. Maxam's Analysis Is Inapplicable To The Facts Of This Case And Unreliable

67. Plaintiffs offer, as an alternative measure of profits, a "use value" figure. Plaintiffs' theory, articulated by Dr. Maxam, is that the Bank realized an imputed

benefit by having the "use" of participants' money during the transfer period.

68. Dr. Maxam calculated the Bank's supposed "use value" as follows. First, he assumed that, rather than transferring assets from the 401(k) Plan to the Pension Plan, the Bank had instead gone into the open market and, one month at a time, borrowed the funds it obtained from the participants (approximately $3 billion in assets). Dr. Maxam opined that a proper hypothetical interest rate for such "loans" is the one-month AA Financial Commercial Paper rates during the transfer period. He treated the hypothetical investment returns earned by TSAs as "interest payments" on the "loan." The overall use value, according to Dr. Maxam, was the "netted" interest rate (i.e., the Commercial Paper rate minus the hypothetical TSA investment return rate for each month), multiplied by the value of the transferred assets for that month. Applying this analysis, Dr. Maxam opined that a "reasonable estimate" of the use value of the transferred assets was $346 million.

69. The Court rejects Plaintiffs' use value analysis for multiple reasons.

1. Plaintiffs' Use Value claim Is Inconsistent With Their Prior Positions Expressed To The Court

70. Before submission of the expert report from Dr. Maxam, Plaintiffs had not previously identified "use value" as a measure of profit in this case—and their

current position is contrary to their prior statements to the Court. Plaintiffs argued to the Fourth Circuit that they sought "the difference between (1) the actual investment gains the Bank realized using the assets transferred to the Pension Plan, and (2) the transferred assets' hypothetical investment performance." *Pender*, 788 F.3d at 364 (emphasis added). This, the Fourth Circuit explained, is the definition of "the profit the Bank made using their assets." *Id.*

71. Plaintiffs repeated that argument to this Court. Plaintiffs consistently argued that profit is determined based on whether "[t]he Bank's actual investments [did or] did not exceed [a participant's] hypothetical return." Doc. 340 at 8. Plaintiffs further made clear that "[t]he Bank is liable for restitution (disgorgement) only to the [participants] in the class who were paid *less* than the *actual investment earnings* generated with their separate-account assets[.]" Doc. 343-1 at 2 (second emphasis added).

72. When the Court explicitly instructed Plaintiffs to "present their arguments in support of their proposed alternative" method of measuring profits, Doc. 336 at 1, Plaintiffs failed to identify use value as an alternative measure.

2. Use Value Is Not Actual Profit or Loss

73. "Use value" is not profit. Use value is a hypothetical, imputed gain—not a real-life measure of what actually occurred. It is not appropriate to rely on use

value when, as here, the issue is whether a profit was actually realized and retained, which is a matter of actual gains and losses.

74. The Court finds that profit—not use value—is the appropriate measure here.

3. Plaintiffs' Use Value Theory Is Inconsistent With The Facts Of This Case

75. Dr. Maxam's proposed "use value" measurement is also inappropriate, unreliable and unsupported by the facts and circumstances here, which do not factually or equitably support a "use value" assessment even if such an assessment were relevant.

74. First, in return for consideration, the participants authorized the transfer of assets and liabilities to the Plan and the Plan's investment of the transferred assets—and they retained the consideration they received following restoration of the separate accounts. Those participants who earned a positive return based on their investment choices have retained those returns, and those who made investment decisions that lost money have retained the benefit of the Bank's guarantee of the principal amount transferred, increased as a result of the IRS Closing Agreement.

75. Second, Dr. Maxam's use value remedy radically transforms the parties' agreement. The consideration provided to the participants included a guarantee against *loss*. Dr. Maxam's use value remedy in effect

guarantees them a *gain* equal to the Commercial Paper interest rate.

76. Third, participants were not deprived of the "use" of their transferred accounts. Within the Pension Plan, participants had the ability to direct the hypothetical investment of their TSAs using the same menu of investment options as in the 401(k) Plan and to earn the identical investment returns on their hypothetical investments that they would have earned in the 401(k) Plan. Participants also had the ability to take withdrawals on their transferred accounts and obtained the additional benefit of the Transfer Guarantee and the ability to take loans on the transferred balance. In short, they had the same or greater "use" of funds that they had in the 401(k) Plan.

77. Fourth, contrary to Dr. Maxam, the Bank did not have the "use" of the transferred assets. Dr. Maxam is incorrect in asserting that the 401(k) transfer was the equivalent of a "loan" to the Bank, which the Bank could "use." In fact, the assets were transferred from one ERISA-segregated trust (the 401(k) Plan trust) to another ERISA-segregated trust (the Pension Plan trust), both of which were solely to benefit participants.[4] Accordingly, the Bank had no "use" of the funds in the Pension Plan trust.

---

[4] ERISA § 403(c)(1) ("the assets of a plan shall never inure to the benefit of any employer and shall be held for the exclusive purposes of providing benefits to participants in the plan and their beneficiaries and defraying reasonable expenses of administering the plan.")

78. Plaintiffs have also introduced no evidence that the Bank's funding of the Plan, either during or after the transfer period, was in any way deferred or reduced as a result of the transfer of 401(k) assets. There is no evidence that the transfer reduced the amount of the Bank's borrowing, or that the Bank would have borrowed this sum if the transfer had not occurred.

4. Use Value Is Not An Accurate Measure Of Unjust Enrichment

79. The Court also rejects Dr. Maxam's use value calculation as an inequitable and unreliable measure of the Plan's or the Bank's unjust enrichment.

80. Plaintiffs contend that they are entitled to the *greater* of the "use value" or profit. In other words, even if the Plan incurred substantial investment losses in connection with the transfer, Plaintiffs contend that they are still entitled to disgorgement for the hypothetical "use value" of the transferred assets.

81. The Court rejects this approach. As the Court has previously explained (quoting the Restatement (Third) of Restitution and Unjust Enrichment § 51 (2011)), " '[t]he unjust enrichment of a conscious wrongdoer . . . is the net profit attributable to the underlying wrong. The object of restitution in such cases is to eliminate profit from wrongdoing while avoiding, so far as possible, the imposition of a penalty.' " Doc. 347 at 8.

82. Awarding Plaintiffs the alleged "use value" of the transferred assets *even where the Plan incurred a loss* from the transfer would go beyond "eliminat[ing]" the Plan's "net profit," and instead would impose a penalty on the Plan, and a windfall on Plaintiffs. Moreover, it would do so at the expense of decreasing the Plan's funding for its other existing pension obligations, despite the fact that the Plan already suffered a loss from the transfers. Use value is accordingly an inequitable, unreliable and unfair measure of unjust enrichment.

D. Conclusions of Law

a. Prior Rulings

i. 2015 Fourth Circuit Decision.

1. This case is before the Court on remand from the Fourth Circuit. This Court is bound by the rulings of the Fourth Circuit under the mandate rule. "The mandate rule prohibits lower courts, with limited exceptions, from considering questions that the mandate of a higher court has laid to rest." *See Doe v. Chao*, 511 F.3d 461, 465 (4th Cir. 2007). As the Fourth Circuit has explained, "[t]he mandate rule is a more powerful version of the law of the case doctrine. Few legal precepts are as firmly established as the doctrine that the mandate of a higher court is controlling as to matters within its compass. The principle that a district court may not violate the mandate of a circuit court of appeals and may not alter the law of the case so established is basic." *Id.* at 464-65 (citations and internal quotation marks omitted).

2. The Fourth Circuit held that plaintiffs' only potential avenue to relief was an equitable claim under ERISA § 502(a)(3). Specifically, the Fourth Circuit held that Plaintiffs could seek an accounting for profit under § 502(a)(3) in order to recover "the difference between (1) the actual investment gains the Bank realized using the assets transferred to the Pension Plan, and (2) the transferred assets' hypothetical investment performance, which the Bank has already paid Pension Plan participants." *Pender*, 788 F.3d at 364. The court recognized, however, that the case would be moot if the Bank had not retained a profit after the conclusion of the transfer strategy. *Id.* at 368.

b. Plaintiffs' Claim To An Accounting For Profit

3. "An accounting for profits 'is a restitutionary remedy based upon avoiding unjust enrichment.' 1 D. Dobbs, Law of Remedies § 4.3(5), p. 608 (2d ed. 1993) (hereinafter Dobbs). It requires the disgorgement of 'profits produced by property which in equity and good conscience belonged to the plaintiff.' Id." Pender, 788 F.3d at 364. "The profit for which the wrongdoer is liable . . . is the net increase in the assets of the wrongdoer, to the extent that this increase is attributable to the underlying wrong." Restatement (Third) of Restitution and Unjust Enrichment § 51(5) (2011), cmt. e.[5]

---

[5] All references hereinafter to the Restatement are to the Restatement (Third) of Restitution and Unjust Enrichment unless otherwise noted.

4. In a claim for an accounting for profit, "the claimant has the burden of producing evidence from which the court may make at least a reasonable approximation of the defendant's unjust enrichment. If the claimant has done this much, the defendant is then free . . . to introduce evidence tending to show that the true extent of unjust enrichment is something less." Restatement § 51(5), cmt. i. The plaintiff must produce

> a coherent theory of recovery in unjust enrichment. The claimant's case is not merely that the defendant has committed a wrong to the claimant, but that the wrong has proximately resulted in an unjust gain to the defendant. Allegations that the defendant is a wrongdoer, and that the defendant's business is profitable, do not state a claim in unjust enrichment. By contrast, a claimant who is prepared to show a causal connection between defendant's wrongdoing and a measurable increase in the defendant's net assets will satisfy the burden of proof as ordinarily understood.

Id.

5. In other words, it is Plaintiffs' burden to prove "that the wrong has proximately resulted in an unjust gain to the defendant," although a "reasonable approximation" of the extent of the profit will suffice if "the evidence allows no greater precision." *Id.* The Court "will reach the best approximation it can under the circumstances." *Id.* § 51, cmt. g.

6. Plaintiffs attempt to equate the phrase "accounting for profits" with an "audit" of each participant's

account. However, that misunderstands the concept of an "accounting for profits." In the context applicable here, the term "accounting for profits" simply refers to the remedy of unjust enrichment or restitutionary "disgorgement." *Pender*, 788 F.3d at 358, 364-65; Restatement § 51(5) & cmt. a (explaining that the terms "disgorgement" and "accounting" an "accounting for profits" refer to "the same" remedial issue: "the identification and measurement of those gains to the defendant that should be regarded as unjust enrichment, in that they are properly attributable to the defendant's interference with the claimant's legally protected rights"). This use of the term "accounting" to refer to a restitutionary remedy is distinct from the concept of bringing a suit in a court of equity to obtain discovery of a defendant's financial books or to unravel a complex account, as Plaintiffs suggest. *See* 1 Dobbs, Law of Remedies § 4.3(5), at pp. 608-10 (distinguishing different uses of the term "accounting, or accounting for profits," which reflect "disparate aspects of its history," and explaining that "[i]n its most important meaning, it is a restitutionary remedy based upon avoiding unjust enrichment"); Joel Eichengrun, *Remedying the Remedy of Accounting*, 60 Ind. L. J. 463, 467-68, 476 (1985) (explaining that original use to obtain discovery is "now obsolete" and replaced by modern discovery practice).

7. Moreover, here the initial inquiry is whether Defendants realized and retained any profit from the transfers. That question can be reliably answered without resort to a participant-by-participant, transaction-by-transaction analysis.

c. Legal Conclusions Related To Determination Of Profit Or Loss

8. The proper and equitable analysis for determining whether Defendants retained a profit is to review the Plan's actual investment gains and losses attributable to the transferred assets in the aggregate and to subtract from any net profit the $10 million IRS fine and other payments associated with the transfer.

9. The Fourth Circuit directed that the relevant question was whether "the Bank retained a profit, even after it restored the separate account feature and paid a $10 million fine to the IRS." 788 F.3d at 368. And this Court accordingly instructed that its task is to determine "whether, after it restored the separate account feature and paid a $10 million fine to the IRS, the Bank nevertheless profited from its transfer strategy." Doc. 347 at 12 (footnote omitted).

10. The IRS payment and other payments described in FOF ¶¶ 23-28 above must and should, be included in the profit calculation in order to achieve an equitable outcome. These expenditures would not have been incurred if not for the transfer, they were either promised in connection with the transfer or required in connection with the restoration of separate accounts for participants, and they resulted in actual losses to the Bank and Plan. Accordingly, they must be included if the determination whether Defendants have retained any profit from the transfer is to be an accurate one, and the failure to do so would act as a penalty.

11. The Court concludes that Plaintiffs' alternative proposed profit measures are inconsistent with this analysis and would not achieve a result consistent with the equitable purposes of this proceeding.

1. The Court Will Not Consider Returns For The Pension Plan As A Whole

12. Plaintiffs contend that the Court should measure the Bank's profits based on the Pension Plan's investment returns on all assets—including assets funding legacy liabilities that pre-dated and had no connection to the transfer. While the Court previously reserved this issue for trial, Doc. 347 at 12 n.6, the Court now concludes that profit should not be measured based on total Plan returns for three separate and independent reasons:

A. As a factual matter, for reasons described earlier, the Court has found that such a methodology is flawed and unreliable, and inferior to the investment measurement proposed by Defendants;

B. As an equitable matter, such a methodology would serve as a penalty and not produce equitable results; and

C. As a legal matter, the Court finds that such a methodology would be inappropriate because it would produce "profits" having nothing to do with the transfers and is therefore contrary to the purpose of this inquiry.

13. As this Court stated in its March Order, the issue is "whether the Bank, *as a result of its investment strategy*, was unjustly enriched." *Id.* at 11 (emphasis added).

14. The appropriate way to determine whether there was a profit retained "as a result of its investment strategy" applied to the transferred assets is to look at the returns attributable to that "investment strategy." Using total Plan returns, by contrast, counts returns on assets that had nothing to do with the transfer. The Plan would have earned the same investment returns on assets funding legacy benefits even if the transfer had never occurred. A measure of profits that incorporates gains from the investment of the assets used to fund legacy plan benefits is not a measure of profit *due to the transfer* and is bound to misstate any profit realized from the transfer.

15. The Court is to "reach the best approximation it can under the circumstances" of the profit attributable to the conduct at issue. Restatement § 51 cmt. g; *see also Sheldon v. Metro-Goldwyn Pictures Corp.*, 309 U.S. 390, 402 (1940) (profits are properly apportioned when "the evidence is sufficient to provide a fair basis of division" between profits attributable to the misconduct and other profits); *Orgel v. Clark Boardman Co.*, 301 F.2d 119, 121 (2d Cir. 1962) ("it is the duty of the court to make some apportionment" where "the evidence suggests that some division . . . may be rationally used."). Here, the "best approximation" of the profit or loss on the transfer is to consider the returns from the

Investment Strategy that actually applied to the transferred assets.

16. Plaintiffs also contend that the use of total Plan returns is required by the definition of a defined contribution plan in ERISA § 3(34), which requires separate accounts. This Court previously rejected this argument in its March 2016 order and it does so again. Doc. 347. The Court's task is *not* to "reconstruct" the Plan "as a defined contribution plan" under § 3(34) and pay benefits under the "reconstructed" plan. As this Court previously ruled, participants "have already received the benefits they are owed, and the question is whether the Bank nevertheless derived profits from its overall transfer strategy that ought to equitably be disgorged." *Id.* at 11.

17. Moreover, the Fourth Circuit and IRS were both aware that the transferred assets had been commingled with other Plan assets in the course of the transfer strategy. Yet both recognized that the relevant inquiry is whether there was an investment profit realized on the transferred assets, which the IRS expressly concluded must be based on the "strategy for the investment of assets attributable to the TSAs." *See* FOF ¶¶ 23, 35, 37, *supra*; Doc. 295-7 at 8.

18. Equally unsupported is Plaintiffs' assertion that total Plan returns should be considered because the Plan measured returns on all participant-directed accounts, including both TSAs and cash balance accounts.

19. The Court has found as a factual matter that the investment returns attributable to all participant-directed accounts are a fair approximation of returns attributable to the TSAs for purposes of the inquiry here, and a more accurate and fair approximation than total Plan returns would be.

20. Moreover, the Court concludes that adopting Plaintiffs' approach would be inequitable, including for reasons set forth in these findings and conclusions. Plaintiffs' use of total Plan returns would confer an inappropriate windfall on participants, act as a penalty and otherwise be inequitable. *See, e.g., Griggs*, 237 F.3d at 385 (because potential relief under ERISA was "equitable in nature, [plaintiff] is not entitled to a windfall").

2. The Court Rejects "Use Value" As A Measure Of Profit

21. Plaintiffs propose "use value" as an alternative measure of profit. The Court concludes that use value is not an appropriate measure of profit for the following separate and independent reasons:

A. As a factual matter, for reasons described earlier, the Court has found that (i) Plaintiffs' "use value" methodology is flawed and unreliable as a means of measuring "profit," and inferior to the approach proposed by Defendants, and (ii) in any event, no "use value" to the Bank has been demonstrated;

B. As an equitable matter, the Court has found that Plaintiffs' "use value" methodology would serve as a penalty and not produce equitable results; and

C. As a legal matter, the Court finds that Plaintiffs' "use value" methodology would be inappropriate because (i) it is contrary to the Fourth Circuit's mandate, (ii) use value is not actual profit, and (iii) the restitutionary concept of "use value" is in any event inapplicable when (a) any "use" of the transferred assets was authorized in exchange for consideration, and (b) the participants were not deprived of the use of the funds.

D. In addition, the Court holds that Plaintiffs have forfeited any claim to use value by failing to timely raise such a suggested methodology when required to do so by the Court.

3. Plaintiffs' Use Value Analysis Is Inconsistent With The Fourth Circuit's Instructions

22. The Fourth Circuit remanded this case to determine whether the Bank actually retained a "profit" after it restored separate accounts, holding that if there was no profit the case would be moot. Pender, 788 F.3d at 368. The opinion makes it clear what the court meant by "profit": the "actual investment gains the Bank realized using the assets transferred to the Pension Plan." *Id.* at 364 (emphasis added).

> Plaintiffs seek the difference between (1) ***the actual investment gains*** the Bank ***realized*** using the assets transferred to the Pension Plan, and (2) the transferred assets' hypothetical investment performance, which the Bank has already paid Pension Plan participants. In other words, Plaintiffs seek the profit the Bank made using their assets. This is the hornbook definition of an accounting for profits.
>
> An accounting for profits "is a restitutionary remedy based upon avoiding unjust enrichment." It requires the disgorgement of "***profits produced*** by property which in equity and good conscience belong to the plaintiff."

Id. (emphasis added; citation omitted).

23. Leaving no doubt about the required approach, the Fourth Circuit explained that Plaintiffs' "injury in fact" is "measured as the 'spread' or difference between the ***profit the [Bank] earned by investing the retained assets*** and the [amount] it paid to [them].'" *Id.* at 367 (bracketed material added by the Fourth Circuit; citation omitted). *See also id.* at 361 (describing the remedy sought by Plaintiffs as the "spread between what they were paid and the ***actual investment gains*** of the assets that were originally in the 401(k) Plan") (emphasis added); *id.* at 360 (referring to "the Bank's actual rate of return" and "the actual investment returns").

24. Plaintiffs' claim of use value fundamentally departs from the analysis that the Fourth Circuit

ordered. Use value is merely a hypothetical, imputed benefit. Plaintiffs concede that use value is completely independent of the investment gains or losses *actually* generated with the transferred assets. Use value, therefore, is not an appropriate measure of the *actual* profit that may be subject to disgorgement.

25. Yet even if the Fourth Circuit had been silent on the matter, the Court would conclude that use value is not an appropriate measure here of profit for restitutionary purposes, particularly if the Plan otherwise suffered an actual loss from the transfers. In addition, even if it were hypothetically a permissible measure, it would be inequitable and inappropriate to treat "use value" as profit under the facts and circumstances here.

4. Plaintiffs' Use Value Analysis Is An Inappropriate Measure Based On The Facts Of This Case

26. Even if "use value" were permitted to be considered as a potential measure of profit, the concept does not fit the facts and circumstances established by the evidence. Use value may be an appropriate remedy when a defendant deprives a plaintiff of use of the plaintiffs' assets without authorization, and "makes unauthorized investments" of those assets. Restatement § 51(5)(b); see also id. § 53, cmt. b. ("[A] defendant is liable for the market value of the unauthorized use.") In effect, "use value" is an attempt to construct a hypothetical arms-length bargain in order to determine the

amount an unconsenting plaintiff could have obtained if the defendant had not used the plaintiff's property without authorization.

27. Here, however, the parties did enter into a transaction in exchange for bargained-for consideration, making a use value analysis inappropriate.

28. The transfers here were authorized. The plan participants freely and voluntarily entered into a contractual bargain to transfer their 401(k) Plan assets to the Pension Plan.

29. The Plan participants received consideration in exchange for their informed authorization, and they have retained that consideration. Those participants who earned a positive return based on their investment choices have retained those returns. And those participants who made investment choices that reduced their transferred balance have retained the benefits of the Bank's guarantee of the principal amount transferred.

30. To be sure, Plaintiffs' consent to the transfer cannot excuse an ERISA violation. However, the Court's task is not to assess whether the transfer complied with ERISA, but to determine whether the Defendants retained a profit from the transfer that should as a matter of equity be disgorged to Plaintiffs. Plaintiffs' consent *is* relevant to determining the appropriate equitable remedy, if any. *See* Restatement § 51(5)(b) (use value is a remedy for a "conscious wrongdoer or a defaulting fiduciary who makes *unauthorized* investments of the claimant's assets") (emphasis added);

Metz v. Indep. Trust Corp., 994 F.2d 395 (7th Cir. 1993) (plaintiff who authorized transaction could not sue for breach of trust despite later determination that transaction violated IRS rules). The fact that the participants here authorized the transfer and retained its benefits supports the conclusion that under the equitable principles of restitution, "use value" is not a proper remedy here.

31. In addition, participants were not deprived of the "use" of their assets. To the contrary, they continued to have use of their money even after it was transferred from the 401(k) Plan to the Pension Plan. Participants' notional accounts were credited with investment returns on their hypothetical investments, participants were permitted to withdraw funds from their accounts, and, following transfer, participants could obtain tax-free loans.

32. The Bank, on the other hand, did *not* have "use" of the transferred assets. The transferred assets remained at all times in the Pension Plan, an ERISA-segregated trust maintained solely for the benefit of Plan participants. Section 403(c)(1) of ERISA provides that "the assets of a plan shall never inure to the benefit of any employer and shall be held for the exclusive purposes of providing benefits to participants in the plan and their beneficiaries and defraying reasonable expenses of administering the plan." 29 U.S.C. § 1103(c). Thus, the Bank could not have used these funds for any purpose other than to benefit the participants themselves.

33. Nor does Plaintiffs' "use value" theory purport to measure any savings realized by the Bank as a result of reducing its obligation to fund the Plan. Plaintiffs have not identified any *actual* use of the transferred assets that produced any *actual* cost-savings for either the Plan (whose function was to hold assets and fund benefits for the sole benefit of participants) or the Bank (which did not have any access to the transferred assets at all).

34. For all of these reasons, an analysis of the hypothetical "use value" of the transferred assets is inapposite. *See* 1 Dobbs, *Law of Remedies* § 4.5(2), p. 635-36 (2d ed. 1993) (explaining that "[u]njust enrichment does not invariably require restitution for the use value of a benefit," such as where both parties benefited from a transaction or "may intend to preclude use-value charges"). Here, the parties reached an *actual* agreement, in exchange for *actual* consideration. Having deemed the agreement unlawful, the Fourth Circuit has instructed this Court to determine whether the Bank had *actual* gains or losses as a result of the agreement. *See* FOF ¶ 37, *supra*. Plaintiffs' hypothetical use value analysis has no application here.

35. In any event, even if use value were an acceptable measure of the Bank's profit, the Court concludes in its equitable discretion that use value is inappropriate. Although Plaintiffs' consent to the transaction is not cognizable for purposes of determining an ERISA violation, that consent is relevant to the Court's equitable analysis, as are the absence of any harm to Plaintiffs and the fact that Plaintiffs were never deprived of

meaningful use of their assets. For these reasons as well, the Court rejects Plaintiffs' claim to the use value of the transferred assets.

5. Plaintiffs' Have Forfeited Use Value As An Available Measure Of Profit

36. Forfeiture is "'the failure to make the timely assertion of a right.'" Brickwood Contractors, Inc. v. Datanet Eng'g, Inc., 369 F.3d 385, 395 n.3 (4th Cir. 2004) (quoting United States v. Olano, 507 U.S. 725, 733 (1993)). A claim to particular relief is "forfeited if the party asserting the rule waits too long to raise the point." Kontrick v. Ryan, 540 U.S. 443, 456 (2004) (affirming holding that party forfeited argument that claim was untimely by failing to raise timeliness before the court ruled on the merits).

37. Plaintiffs here have forfeited use value as an available measure of profit because they failed to raise any claim to use value before the Court determined how the profit analysis would be undertaken.

38. In its December 3, 2015 order, the Court instructed the parties to submit briefs identifying "how the Court should conduct an accounting for profits as required by the Fourth Circuit's opinion in Pender." Doc. 336 at 1. The Court specifically instructed Plaintiffs to "respond to Defendant's method of conducting an accounting and present their arguments in support of their proposed alternative." *Id.* (emphasis added).

39. The Plaintiffs failed to identify use value as an appropriate measure of profit in the accounting for profit required by the Fourth Circuit. To the contrary, when Plaintiffs outlined their proposed methodology, they affirmatively stated that if there was no profit based on "actual investment earnings," then that would end the inquiry:

> The Bank is liable for restitution (disgorgement) *only* to the "Jills" in the class who were paid *less* than the ***actual investment earnings*** generated with their separate-account assets.

Doc. 343-1 at 2 (emphasis added). "The only way to faithfully comply with *Pender* is for the Bank to return . . . the net actual investment gain." Doc. 340 at 14. *See also* Doc. 341 at 2-3 ("If the Actual Account [defined as participant's "starting balance as adjusted by gains and losses generated by the assets in her account"] at cash-out was smaller tha[n] the amount paid based on the Participant's Hypothetical Account, ***the Bank did not unlawfully retain a profit*** from her account investments") (emphasis added).

40. Thus, when the Court ordered Plaintiffs to detail their proposed methodology, they not only failed to propose any "use value" theory, but they affirmatively stated that if there was no profit based on "actual investment earnings," then that would end the inquiry.

41. Having failed to raise their claim to use value when the Court instructed them to, Plaintiffs may not now inject the issue into this trial.

d. The Court Will Not Conduct A Participant-By-Participant Analysis

42. Plaintiffs offer as an alternative measure of profits one in which the Plan's gains and losses are determined participant by participant instead of in the aggregate, and only gains are counted—with no offset for losses.

43. The Court has already considered and rejected this approach as inconsistent with the Fourth Circuit's instructions and, separately and independently, as inconsistent with the principles of equity under the facts and circumstances here. Doc. 347. Having heard the evidence at trial, the Court again concludes that such an approach would be inequitable. The issue here is not individual participant entitlements or benefits, all of which have been satisfied already. Instead, it is whether Defendants retained any additional profit that should be disgorged. What matters for purposes of that assessment is what the Bank and the Plan realized in the aggregate, not what happened with respect to individual participants' accounts.

44. In addition, the Court separately rejects Plaintiffs' contention that, at least in the event their experts' profit estimates are not accepted, they or a special master should be granted further review of all participant-by-participant transaction records for purposes of conducting a participant-by-participant analysis and then cumulating the results in order to determine any profit. In its March 2016 Order setting the trial date and discovery schedule, this Court ordered that if any

party needed additional discovery, it was to request a conference with the Court and that any motion "should be filed as soon as possible." Doc. 347 at 13. Plaintiffs could have filed a motion for additional data pursuant to this order, but they did not; nor did they make any request to the Court for appointment of a special master. Plaintiffs' requests to the Court for additional data now, after the close of the discovery period and submission of all expert reports, are untimely, and granting them would be prejudicial to Defendants and wasteful of judicial resources. Similarly, Plaintiffs' attempt to reserve the possibility of a second bite at the apple after trial through appointment of a special master is also untimely, and would be prejudicial and wasteful.

e. Under The Appropriate Analysis, The Court Concludes That The Bank Did Not Retain Any Profit

45. The Plaintiffs have not carried their burden as claimants of an accounting for profit to establish that any profit was retained as a result of the transfer.

46. Regardless of which party bears the burden of proof, the Court concludes that the Defendants did not retain any profit as a result of the transfer strategy.

47. Plaintiffs' claim is accordingly moot.

48. Judgment shall be entered in favor of Defendants and against all Plaintiffs.

IT IS SO ORDERED.

Signed: April 27, 2017

/s/ Graham C. Mullen

Graham C. Mullen
United States District Judge

[SEAL]

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 14-1011

WILLIAM L. PENDER; DAVID L. MCCORKLE,

Plaintiffs – Appellants,

and

ANITA POTHIER; KATHY L. JIMENEZ; MARIELA ARIAS; RONALD R. WRIGHT; JAMES C. FABER, JR., On behalf of themselves and on behalf of all others similarly situated,

Plaintiffs,

v.

BANK OF AMERICA CORPORATION; BANK OF AMERICA, NA; BANK OF AMERICAN PENSION PLAN; BANK OF AMERICA 401(K) PLAN; BANK OF AMERICA CORPORATION CORPORATE BENEFITS COMMITTEE; BANK OF AMERICA TRANSFERRED SAVINGS ACCOUNT PLAN,

Defendants – Appellees,

and

UNKNOWN PARTY, John and Jane Does #1-50, Former Directors of NationsBank Corporation and Current and Former Directors of Bank of America Corporation & John & Jane Does #51-100, Current/Former Members of the Bank of America Corporation Corporate

Benefit; CHARLES K. GIFFORD; JAMES H. HANCE, JR.; KENNETH D. LEWIS; CHARLES W. COKER; PAUL FULTON; DONALD E. GUINN; WILLIAM BARNETT, III; JOHN T. COLLINS; GARY L. COUNTRYMAN; WALTER E. MASSEY; THOMAS J. MAY; C. STEVEN MCMILLAN; EUGENE M. MCQUADE; PATRICIA E. MITCHELL; EDWARD L. ROMERO; THOMAS M. RYAN; O. TEMPLE SLOAN, JR.; MEREDITH R. SPANGLER; HUGH L. MCCOLL; ALAN T. DICKSON; FRANK DOWD, IV; KATHLEEN F. FELDSTEIN; C. RAY HOLMAN; W. W. JOHNSON; RONALD TOWNSEND; SOLOMON D. TRUJILLO; VIRGIL R. WILLIAMS; CHARLES E. RICE; RAY C. ANDERSON; RITA BORNSTEIN; B. A. BRIDGEWATER, JR.; THOMAS E. CAPPS; ALVIN R. CARPENTER; DAVID COULTER; THOMAS G. COUSINS; ANDREW G. CRAIG; RUSSELL W. MEYER-, JR.; RICHARD B. PRIORY; JOHN C. SLANE; ALBERT E. SUTER; JOHN A. WILLIAMS; JOHN R. BELK; TIM F. CRULL; RICHARD M. ROSENBERG; PETER V. UEBERROTH; SHIRLEY YOUNG; J. STEELE ALPHIN; AMY WOODS BRINKLEY; EDWARD J. BROWN, III; CHARLES J. COOLEY; ALVARO G. DE MOLINA; RICHARD M. DEMARTINI; BARBARA J. DESOER; LIAM E. MCGEE; MICHAEL E. O'NEILL; OWEN G. SHELL, JR.; A. MICHAEL SPENCE; R. EUGENE TAYLOR; F. WILLIAM VANDIVER, JR.; JACKIE M. WARD; BRADFORD H. WARNER; PRICEWATERHOUSE COOPERS, LLP,

Defendants.

Appeal from the United States District Court for the Western District of North Carolina, at Charlotte. Graham C. Mullen, Senior District Judge.

Argued: January 27, 2015 Decided: June 8, 2015

Before KEENAN, WYNN, and FLOYD, Circuit Judges.

Reversed in part, vacated in part, and remanded by published opinion. Judge Wynn wrote the opinion, in which Judge Keenan and Judge Floyd joined.

ARGUED: Eli Gottesdiener, GOTTESDIENER LAW FIRM, PLLC, Brooklyn, New York, for Appellants. Carter Glasgow Phillips, SIDLEY AUSTIN, LLP, Washington, D.C., for Appellees. **ON BRIEF:** Thomas D. Garlitz, THOMAS D. GARLITZ, PLLC, Charlotte, North Carolina, for Appellants. Irving M. Brenner, MCGUIRE-WOODS LLP, Charlotte, North Carolina; Anne E. Rea, Christopher K. Meyer, Chicago, Illinois, Michelle B. Goodman, David R. Carpenter, SIDLEY AUSTIN LLP, Los Angeles, California, for Appellees.

WYNN, Circuit Judge:

In this Employee Retirement Income Security Act of 1974 ("ERISA") case, an employer was deemed to have wrongly transferred assets from a pension plan that enjoyed a separate account feature to a pension plan that lacked one. Although the transfers were voluntary and the employer guaranteed that the value of

the transferred assets would not fall below the pre-transfer amount, an Internal Revenue Service audit resulted in a determination that the transfers nonetheless violated the law.

Plaintiffs, who held such separate accounts and agreed to the transfers, brought suit under ERISA and sought disgorgement of, *i.e.*, an accounting for profits as to, any gains the employer retained from the transaction. The district court dismissed their case, holding that they lacked statutory and Article III standing. For the reasons that follow, we disagree and hold that Plaintiffs have both statutory and Article III standing. Further, we hold that Plaintiffs' claim is not time-barred. Accordingly, we reverse and remand the matter for further proceedings.

I.

A.

In 1998, NationsBank[1] ("the Bank") amended its defined-contribution plan ("the 401(k) Plan") to give eligible participants a one-time opportunity to transfer their account balances to its defined-benefit plan ("the Pension Plan"). The Pension Plan provided that participants who transferred their account balances would have the same menu of investment options that they did in the 401(k) Plan. Further, the Bank amended the

[1] In September 1998, NationsBank merged with BankAmerica Corporation. The resulting entity was named Bank of America Corporation. Here, "the Bank" collectively refers to the defendants.

Pension Plan to provide the guarantee that participants who elected to make the transfer would receive, at a minimum, the value of the original balance of their 401(k) Plan accounts ("the Transfer Guarantee").

The 401(k) Plan participants' accounts reflected the *actual* gains and losses of their investment options. In other words, the money that 401(k) Plan participants directed to be invested in particular investment options was actually invested in those investment options, and 401(k) Plan participants' accounts reflected the investment options' net performance.

By contrast, Pension Plan participants' accounts reflected the *hypothetical* gains and losses of their investment options. Although Pension Plan participants selected investment options, this investment was purely notional. By design, Pension Plan participants' selected investment options had no bearing on how Pension Plan assets were actually invested. Instead, the Bank invested Pension Plan assets in investments of its choosing,[2] periodically crediting each Pension Plan participant's account with the greater of (1) the hypothetical performance of the participant's selected investment option, or (2) the Transfer Guarantee.

Plaintiffs William Pender and David McCorkle (collectively with those similarly situated, "Plaintiffs")

---

[2] The record does not state precisely what the Bank invested in, but nothing in the Pension Plan documents required the Bank to invest in the menu of investment options available to the 401(k) and Pension Plan participants.

are among the eligible participants who elected to transfer their account balances. Participants who elected to transfer their 401(k) Plan balances to the Pension Plan may not have appreciated the difference between the plans, particularly if they maintained their original investment options. But for the Bank, each transfer represented an opportunity to make money.[3] As long as the Bank's actual investments provided a higher rate of return than Pension Plan participants' hypothetical investments, the Bank would retain the spread. And although the spread generated by each account might have been relatively small, in the aggregate and over time, this strategy could yield substantial gains for the Bank.[4]

B.

To illustrate by way of example, consider 401(k) Plan participants Jack and Jill. They each have account balances of $100,000, and each has selected the

---

[3] In communications to 401(k) Plan participants leading up to the transfers, the Bank explained that "[e]xcess proceeds would decrease plan costs, saving money for the company." J.A. 364. *See also* J.A. 375 ("What's in it for the Company? . . . When associates take advantage of the one-time 401(k) Plan transfer option, there is a potential *savings to the company–the* more money transferred, the greater the savings potential."). Although the Bank characterized the primary effect of the transfer option as generating "savings," the difference between savings and profit in this context is merely semantic. Regardless of which term is used, the Bank made money.

[4] The Bank expressly noted this in its communication to transfer-eligible plan participants. J.A. 375 ("[T]he more money transferred, the greater the savings potential.")

same investment option, which generates a 60-percent return over a 10-year period. Jack decides to keep his 401(k) Plan account, and Jill decides to make the transfer to the Pension Plan.

When Jill transfers her assets to the Pension Plan, she selects the same 60-percent-return investment option she had in the 401(k) Plan. But instead of actually investing the $100,000 Jill transferred to the Pension Plan according to her selected investment option, the Bank periodically notes the value that her assets would have gained on her selected investment options but actually invests it in an investment portfolio that generates a 70-percent return over 10 years.

Fast forward ten years: Jack's actual investment of the initial $100,000 generates $60,000 in actual returns. Jill's hypothetical investment of the $100,000 she transferred from the 401(k) Plan to the Pension Plan generates $60,000 in investment credits. The accounts are both valued at $160,000.

Jack's $160,000 401(k) Plan account balance represents the full value of the initial balance plus his actual investment performance. But the $160,000 balance of Jill's Pension Plan account does not represent the full value of the $100,000 that she transferred from the 401(k) Plan and the actual investment performance of that money. Because the Bank actually invested that money in investment options with a 70-percent return over the ten-year period, it generated $70,000. Due to the difference between the Bank's actual rate of return and the rate of return of Jill's selected investment

option, the Bank retains $10,000 after it credits her Pension Plan account with $60,000. The spread between the actual investment returns ($70,000) and the hypothetical returns ($60,000) may be small on the individual account level ($10,000 for Jill's Pension Plan account). But it is greater than the amount of money the Bank stands to gain from Jack's account ($0). And with the thousand of Jills working for a large employer like the Bank, it has the potential to add up.

C.

In the wake of a June 2000 *Wall Street Journal* article covering these types of retirement plan transfers,[5] the Internal Revenue Service opened an audit of the Bank's plans. In 2005, the IRS issued a technical advice memorandum, in which it concluded that the transfers of 401(k) Plan participants' assets to the Pension Plan between 1998 and 2001 violated Internal Revenue Code § 411(d)(6) and Treasury Regulation § 1-411(d)-4, Q&A-3(a)(2). According to the IRS, the transfers impermissibly eliminated the 401(k) Plan participants' "separate account feature," meaning that participants were no longer being credited with the actual gains and losses "generated by funds contributed on the participant[s'] behalf." J.A. 518.

In May 2008, the Bank and the IRS entered into a closing agreement. Under the terms of the agreement,

[5] Ellen E. Schultz, *Firms Expand Uses of Retirement Funds: Bank of America Offers Staff Rollovers Into Pension Plan*, Wall St. Journal, June 19, 2000, at A2.

the Bank (1) paid a $10 million fine to the U.S. Treasury, (2) set up a special-purpose 401(k) plan, (3) and transferred Pension Plan assets that were initially transferred from the 401(k) Plan to the special-purpose 401(k) plan. The Bank also agreed to make an additional payment to participants who had elected to transfer their assets from the 401(k) Plan to the Pension Plan if the cumulative total return of their hypothetical investments was less than a certain amount.[6] All settlement-related transfers were finalized by 2009.

D.

Plaintiffs filed their original complaint against the Bank in the U.S. District Court for the Southern District of Illinois in 2004, alleging several ERISA violations stemming from plan amendments and transfers. The Bank moved under 28 U.S.C. § 1404(a) to change venue, and the case was transferred to the Western District of North Carolina. There, the district court dismissed three of the four counts contained in the complaint. *See McCorkle v. Bank of America Corp.*, 688 F.3d 164, 169 n.4, 177 (4th Cir. 2012).

[6] For a more detailed discussion of how the Bank determined whether participants qualified for this additional payment, see *Pender*, 2013 WL 4495153, at *4.

Plaintiffs' lone remaining claim alleges a violation of ERISA § 204(g)(1), 29 U.S.C. § 1054(g)(1),[7] which states that an ERISA-plan participant's "accrued benefit" "may not be decreased by an amendment of the plan" unless specifically provided for in ERISA or regulations promulgated pursuant to ERISA. According to Plaintiffs, the Bank improperly decreased the accrued benefit of the separate account feature. Relying, at least in part, upon the IRS's declaration that the transfers from the 401(k) Plan to the Pension Plan violated both Treasury Regulation § 1.411(d)-4, Q&A-3(a)(2) and the statute it implements, I.R.C. § 411(d)(6)(A)[8], Plaintiffs sought to use ERISA's civil enforcement provision, ERISA § 502(a), 29 U.S.C. § 1132(a), to recover the profits the Bank retained after it transferred the effected Pension Plan accounts to the special-purpose 401(k) plan.

At the hearing on the parties' cross-motions for summary judgment, the Bank argued that (1) its closing agreement with the IRS stripped Plaintiffs of Article III standing because it restored the separate account feature, and (2) the statute of limitations barred Plaintiffs' claims. Plaintiffs countered with a request for declarations that (1) they are entitled to any spread between what they were paid and the actual investment gains of the assets that were

---

[7] This opinion uses a parallel citation to the United States Code and the ERISA code the first time a statute is cited and thereafter refers only to the ERISA code citation.

[8] I.R.C. § 411(d)(6)(A) is the Internal Revenue Code analogue to ERISA § 204(g)(1).

originally in the 401(k) Plan, and (2) the agreement between the Bank and the IRS did not extinguish their ERISA claims. The district court granted the Bank's motion, denied Plaintiffs' motion, and dismissed the case on the basis that Plaintiffs lacked standing. *Pender v. Bank of Am. Corp.*, No. 3:05-CV-00238-GCM, 2013 WL 4495153, at *11 (W.D.N.C. Aug. 19, 2013). Plaintiffs appealed.

II.

We review a district court's disposition of cross-motions for summary judgment de novo, examining each motion *seriatim. Libertarian Party of Virginia v. Judd*, 718 F.3d 308, 312 (4th Cir.), *cert. denied*, 134 S. Ct. 681 (2013). We view the facts and inferences arising therefrom in the light most favorable to the non-moving party to determine whether there exists any genuine dispute of material fact or whether the movant is entitled to judgment as a matter of law. *Id.* And we review legal questions regarding standing de novo. *David v. Alphin,* 704 F.3d 327, 333 (4th Cir. 2013).

III.

On appeal, Plaintiffs contend that they are entitled to the full value of the investment gains the Bank realized using the assets transferred to the Pension Plan. To assert such a claim under ERISA, Plaintiffs must possess both statutory and Article III standing,

David, 704 F.3d at 333, which we now respectively address.

A.

To show statutory standing, Plaintiffs must identify the portion of ERISA that entitles them to bring the claim for the relief they seek. Plaintiffs argue that ERISA § 502(a)(1)(B), which allows a beneficiary to recover benefits due under the terms of the plan, enables them to bring their claim. In the alternative, they argue that Sections 502(a)(2) and 502(a)(3) also entitle them to the relief they seek. We consider each.

1.

Under ERISA § 502(a)(1)(B), "[a] civil action may be brought by a participant or a beneficiary 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*." (emphases added). Plaintiffs argue that ERISA § 502(a)(1)(B) is the proper section under which to bring a claim for benefits due based on a misapplied formula and that the Bank " 'misapplied' [the] formula" when it failed to administer the plan in a manner "consistent with ERISA's minimum standards." Appellants' Br. at 45-46 (emphasis omitted). However, *CIGNA Corp. v. Amara*, 131 S. Ct. 1866 (2011), explicitly precludes them from using this provision to recover the relief they seek.

In *Amara*, as here, the plaintiffs sought to enforce the plan not as written, but as it should properly be enforced under ERISA. The district court ordered the terms of the plan "reformed" and then enforced the changed plan. *Id.* at 1866. But as the Supreme Court underscored, "[t]he statutory language speaks of enforcing the terms of the plan, not of changing them." *Id.* at 1876-77 (internal quotation marks, citation, and emphasis omitted). Indeed, "nothing suggest[ed] that [Section 502(a)(1)(B)] authorizes a court to alter those terms . . . where that change, akin to the reform of a contract, seems less like the simple enforcement of a contract as written and more like an equitable remedy." *Id.* at 1877.

Here, as in *Amara*, Plaintiffs' requested remedy would require the court to do more than simply enforce a contract as written. Rather, as we will soon discuss, what they ask sounds in equity. Accordingly, Section 502(a)(1)(B) provides no avenue for bringing their claim.

2.

Under ERISA § 502(a)(2), a plan beneficiary may bring a civil action for "appropriate relief" when a plan fiduciary breaches its statutorily imposed "responsibilities, obligations, or duties," ERISA § 409, 29 U.S.C. § 1109. Plaintiffs argue that they may seek relief under Section 502(a)(2) because the Bank breached a fiduciary obligation by failing to "act with the best interest of participants in mind" and by "ignor[ing] the

terms of the amendments to the extent the amendments were inconsistent with ERISA." J.A. 236. However, again Plaintiffs' claim is precluded by Supreme Court precedent because *Pegram v. Herdrich*, 530 U.S. 211 (2000), bars recovery under this provision.

Unlike traditional trustees who are bound by the duty of loyalty to trust beneficiaries, ERISA fiduciaries may wear two hats. "Employers, for example, can be ERISA fiduciaries and still take actions to the disadvantage of employee beneficiaries, when they act as employers (e.g., firing a beneficiary for reasons unrelated to the ERISA plan), or even as plan sponsors (*e.g.*, modifying the terms of a plan as allowed by ERISA to provide less generous benefits)." *Pegram*, 530 U.S. at 225. Thus, the "threshold question" we must ask here is whether the Bank acted as a fiduciary when "taking the action subject to complaint." *Id.* at 226.

Under ERISA, a person is a fiduciary vis-à-vis a plan "to the extent" that he (1) "exercises any discretionary authority or discretionary control respecting management of such plan or . . . its assets," (2) "renders investment advice for a fee or other compensation," or (3) "has any discretionary authority or discretionary responsibility in the administration of such plan." ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A). Accordingly, the Bank is a fiduciary only to the extent that it acts in one of these three capacities.

As we read Count IV of Plaintiffs' Fourth Amended Complaint, i.e., Plaintiffs' one remaining claim, they assert two fiduciary breaches: (1) the Bank breached a

fiduciary duty when it amended the 401(k) Plan and Pension Plan to permit the transfers; and (2) the Bank breached a fiduciary duty when it permitted the voluntary transfers between the plans. Neither holds water.

The first claim fails because "[p]lan sponsors who alter the terms of a plan do not fall into the category of fiduciaries." *Lockheed Corp. v. Spink*, 517 U.S. 882, 890 (1996). Instead, these actions are analogous to those of trust settlors. *Id*.

The second claim fails for the simple reason that the Bank did not exercise discretion regarding the transfers. The transfers between the 401(k) Plan and the Pension Plan occurred only for those plan participants who affirmatively and voluntarily directed the Bank to take such action. Because following participants' directives did not involve discretionary plan administration so as to trigger fiduciary liability as required under ERISA § 3(21)(A), that action cannot support an ERISA § 502(a)(2) claim.

3.

Finally, under Section 502(a)(3), a plan beneficiary may obtain "appropriate equitable relief" to redress "any act or practice which violates" ERISA provisions contained in a certain subchapter of the United States Code. To determine whether Section 502(a)(3) applies to these facts, we must answer two questions: (1) Did the transfers violate a covered ERISA provision? And if so, (2) does the relief Plaintiffs seek

constitute "appropriate equitable relief" within the meaning of the statute? The answer to both questions is yes.

i.

ERISA § 204(g)(1), which is also known as the anti-cutback provision, is a covered provision under Section 502(a)(3). It provides that a plan amendment may not decrease a participant's "accrued benefit." ERISA § 3(23)(B), 29 U.S.C. § 1002(23)(B), defines the accrued benefit in a 401(k) plan as "the balance of the individual's account." In the technical advice memorandum, the IRS concluded that the transfers between the 401(k) Plan and the Pension Plan violated I.R.C. § 411(d)(6) and Treasury Regulation § 1.411(d)-4, Q&A-3. *See* J.A. 519. I.R.C. § 411(d)(6) provides–in language nearly identical to ERISA § 204(g)(1)–that a plan amendment may not decrease a participant's "accrued benefit." Treasury Regulation § 1.411(d)-4, Q&A-3(a)(2), which implements I.R.C. § 411(d)(6), further provides that the "separate account feature of an employee's benefit under a defined contribution plan" is a protected benefit within the meaning of I.R.C. § 411(d)(6).

According to the IRS's interpretation of the relevant statutes and regulations, "'separate account feature' describes the mechanism by which a [defined contribution plan] accounts for contributions and actual earnings/losses thereon allocated to a specific defined contribution plan participant with the risk of

investment experience being borne by the participant." J.A. 517. In a defined contribution plan like the 401(k) Plan, assets are actually invested in participants' chosen investment. 401(k) Plan participants bear the investment risk, but this is unproblematic because their account balances are identical to the actual performance of their actual investments.

By contrast, because Pension Plan participants' "investments" are hypothetical, there is no guaranteed correlation between their account balances and the assets available to cover Pension Plan liabilities. Depending on the success of the Bank's actual investments, the Pension Plan's assets may lack sufficient funds to satisfy all of its liabilities (or may run a surplus).

Turning to a textual analysis, we insert the relevant language from Section 3 (23) (B) into Section 204 (g) (1): "The [balance of the individual's account] may not be decreased by an amendment of the plan. . . ." The Transfer Guarantee provides assurances that individuals will receive no less than the monetary value of their 401(k) Plan accounts at the time of transfer. But the Bank's promise that the value of the transferred funds will not decrease below a certain threshold–even if, for example, it invests Pension Plan assets poorly and loses the money–is not the same as actually not decreasing the account balance. It brings to mind the (instructive, even if distinguishable) difference between making a loan that the borrower promises to repay and leaving your money in your bank account.

Assuming all goes well, the end result may well be the same; but they plainly are not the same thing.

In essence, Section 204(g)(1)'s prohibition against amendments that decrease defined contribution plan participants' account balances is a variation on a trustee's duty to preserve trust property. *See* Restatement (Second) of Trusts § 176. An ERISA plan sponsor is under no duty to ensure that defined contribution plan participants do not decrease their account balances through their own actions. But the plan sponsor cannot take actions that decrease participant account balances.

For these reasons, and in light of the similarities between I.R.C. § 411(d)(6) and ERISA § 204(g)(1), and the IRS's persuasive analysis, we hold that a defined contribution plan's separate account feature constitutes an "accrued benefit" that "may not be decreased by amendment of the plan" under Section 204(g)(1). The transfers at issue here resulted in a loss of the separate account feature and thus violated Section 204(g)(1).

ii.

Although the Bank's violation of Section 204(g)(1) is a necessary component of Plaintiff's claim for relief under Section 502(a)(3), that violation alone is insufficient to confer statutory standing. Plaintiffs must also seek "appropriate equitable relief." This, they do.

The Supreme Court has interpreted the term "appropriate equitable relief," as used in Section 502(a)(3), to refer to "those categories of relief that, traditionally speaking *(i.e.*, prior to the merger of law and equity) were *typically* available in equity." *Amara*, 131 S. Ct. at 1878 (quoting *Sereboff v. Mid Atl. Med. Servs., Inc.*, 547 U.S. 356, 361 (2006)) (internal quotation marks omitted). Further, because Section 502(a)(3) functions as a "safety net, offering appropriate equitable relief for injuries caused by violations that § 502 does not elsewhere adequately remedy," *Varity Corp. v. Howe*, 516 U.S. 489, 512 (1996), equitable relief will not normally be "appropriate" if relief is available under another subsection of Section 502(a). *Id.* at 515.

Here, Plaintiffs seek the difference between (1) the actual investment gains the Bank realized using the assets transferred to the Pension Plan, and (2) the transferred assets' hypothetical investment performance, which the Bank has already paid Pension Plan participants. In other words, Plaintiffs seek the profit the Bank made using their assets. This is the hornbook definition of an accounting for profits.

An accounting for profits "is a restitutionary remedy based upon avoiding unjust enrichment." 1 D. Dobbs, Law of Remedies § 4.3(5), p. 608 (2d ed. 1993) (hereinafter Dobbs). It requires the disgorgement of "profits produced by property which in equity and good conscience belonged to the plaintiff." *Id.* It is akin to a constructive trust, but lacks the requirement that plaintiffs "identify a particular *res* containing the profits sought to be recovered." *Great-W. Life & Annuity*

Ins. Co. v. Knudson, 534 U.S. 204, 214 n.2 (2002) (citing 1 Dobbs § 4.3(1), at 588; *id.*, § 4.3(5), at 608).

In *Knudson*, the Supreme Court expressly noted that, unlike other restitutionary remedies, an accounting for profits is an equitable remedy. 534 U.S. at 214 n.2. The Court also suggested that an accounting for profits would support a claim under Section 502(a)(3) in the appropriate circumstances. *See id.* (noting that the petitioners did not claim profits produced by certain proceeds and were not entitled to those proceeds). This case presents those appropriate circumstances.

Unlike the petitioners in *Knudson*, Plaintiffs seek profits generated using assets that belonged to them. And, as explained above, Section 502(a)'s other subsections do not afford Plaintiffs any relief. If Section 204(g)(1)'s proscription against decreasing accrued benefits is to have any teeth, the available remedies must be able to reach situations like the one this case presents, i.e., where a plan sponsor benefits from an ERISA violation, but plan participants–perhaps through luck or agency intervention–suffer no monetary loss. *See McCravy v. Met. Life Ins. Co.*, 690 F.3d 176, 182-83 (4th Cir. 2012) ("[W]ith *Amara*, the Supreme Court clarified that [various equitable] remedies . . . are indeed available to ERISA plaintiffs. . . . [O]therwise, the stifled state of the law interpreting [Section 502(a)(3)] would encourage abuse."). Because it "holds the defendant liable for his profits, not for damages," 1 Dobbs § 4.3(5), at 611, the equitable remedy of accounting for profits adequately addresses this concern. *Cf. Amalgamated Clothing & Textile Workers Union, AFL-CIO v. Murdock*,

861 F.2d 1406, 1413-14 (9th Cir. 1988) (holding that a constructive trust was an "important, appropriate, and available" remedy under Section 502(a)(3) for breach of trust, even when plaintiffs had "received their actuarially vested plan benefits").

In sum, Plaintiffs have statutory standing under Section 502(a)(3) to bring their claim.

B.

The Bank argues that even if it violated certain provisions of ERISA, the district court properly granted summary judgment because Plaintiffs lack Article III standing. The Bank argues that the transfers from the Pension Plan to the special-purpose 401(k) plan mooted any injury.

For the federal courts to have jurisdiction, plaintiffs must possess standing under Article III, § 2 of the Constitution. *See David*, 704 F.3d at 333. There exist three "irreducible minimum requirements" for Article III:

> (1) an injury in fact (*i.e.*, a 'concrete and particularized' invasion of a 'legally protected interest');
>
> (2) causation (*i.e.*, a 'fairly . . . trace[able]' connection between the alleged injury in fact and the alleged conduct of the defendant); and
>
> (3) redressability (*i.e.*, it is 'likely' and not merely 'speculative' that the plaintiff's injury

> will be remedied by the relief plaintiff seeks in bringing suit).

Sprint Commc'ns Co., L.P. v. APCC Serv., Inc., 554 U.S. 269, 273-74 (2008) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)).

1.

Our analysis first focuses on whether Plaintiffs have demonstrated an injury in fact. The crux of the Bank's standing argument is that Plaintiffs have not suffered a financial loss. We, however, agree with the Third Circuit that "a financial loss is not a prerequisite for [Article III] standing to bring a disgorgement claim under ERISA." *Edmonson v. Lincoln Nat. Life Ins. Co.*, 725 F.3d 406, 417 (3d Cir. 2013), *cert. denied*, 134 S. Ct. 2291 (2014); *see also Vander Luitgaren v. Sun Life Ins. Co. of Canada*, No. 09-CV-11410, 2010 WL 4722269, at *1 (D.Mass. Nov. 18, 2010) (rejecting argument that plaintiff lacked standing to sue for disgorgement of profit earned via a retained asset account).[9]

---

[9] *But see Kendall v. Employees Ret. Plan of Avon. Prods.*, 561 F.3d 112, 119 (2d Cir. 2009). In *Kendall*, the Second Circuit articulated the requirement that ERISA plaintiffs seeking disgorgement must show individual loss. 561 F.3d 112. But such a limitation would foreclose an action for breach of fiduciary duty in cases where the fiduciary profits from the breach but the plan or plan beneficiaries incur no financial loss. ERISA, however, provides for a recovery in such cases, and we reject such "perverse incentives." *McCravy*, 690 F.3d at 183. We thus similarly reject the Second Circuit's view.

As an initial matter, it goes without saying that the Supreme Court has never limited the injury-in-fact requirement to financial losses (otherwise even grievous constitutional rights violations may well not qualify as an injury). Instead, an injury refers to the invasion of some "legally protected interest" arising from constitutional, statutory, or common law. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 578 (1992). Indeed, the interest may exist "solely by virtue of statutes creating legal rights, the invasion of which creates standing." *Id.* (internal quotation marks and citation omitted). Thus, "standing is gauged by the specific common-law, statutory or constitutional claims that a party presents." *Intl Primate Prot. League v. Adm'rs of Tulane Educ. Fund*, 500 U.S. 72, 77 (1991). We therefore examine the principles that underlie Plaintiffs' claim for an accounting for profits under ERISA § 502(a)(3) to discern whether there exists a legally protected interest.

It is blackletter law that a plaintiff seeking an accounting for profits need not suffer a financial loss. *See* 1 Dobbs § 4.3(5), at 611 ("Accounting holds the defendant liable for his profits, not damages."); *see also* Restatement (Third) on Restitution and Unjust Enrichment § 51 cmt. a (2011) (noting that the object of an accounting "is to strip the defendant of a wrongful gain"). Requiring a financial loss for disgorgement claims would effectively ensure that wrongdoers could profit from their unlawful acts as long as the wronged

party suffers no financial loss. We reject that notion. *Edmonson*, 725 F.3d at 415.[10]

As the Third Circuit recently underscored–in a fiduciary breach case that, while distinguishable, we nevertheless find instructive–requiring a plaintiff seeking an accounting for profits to demonstrate a financial loss would allow those with obligations under ERISA to profit from their ERISA violations, so long as the plan and plan beneficiaries suffer no financial loss. *Edmonson*, 725 F.3d at 415. Such a result would be hard to square with the overall tenor of ERISA, "a comprehensive statute designed to promote the interests of employees and their beneficiaries in employee benefit plans." *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 137 (1990) (internal quotation marks omitted). In addition, it would directly contradict ERISA's provision covering liability for breach of fiduciary duty, which requires a fiduciary who breaches "any of [his or her statutory] responsibilities, obligations, or duties" to restore "any profits" to the plan. ERISA § 409(a).

Finally, we note that ERISA borrows heavily from the language and the law of trusts. *See Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 110 (1989)

---

[10] The district court supported its ruling that Plaintiffs failed to satisfy Article III's injury-in-fact requirement with a citation to *Horvath v. Keystone Health Plan East, Inc.*, 333 F.3d 450, 456 (2003), which it said stood for the proposition that an ERISA plaintiff seeking disgorgement must show individual loss. *Pender*, 2013 WL 4495153, at *9. Yet the Third Circuit itself has made plain that "[n]othing in *Horvath* . . . states or implies that a net financial loss is required for standing to bring a disgorgement claim." *Edmonson*, 725 F.3d at 417.

("ERISA abounds with the language and terminology of trust law.").[11] Under traditional trust law principles, when a trustee commits a breach of trust, he is accountable for the profit regardless of the harm to the beneficiary. *See* Restatement (Second) of Trusts § 205, cmt. h; *see also* 4 Scott & Ascher on Trusts § 24.7, at 1682(5th ed. 2006) ("It is certainly true that a trustee who makes a profit through a breach of trust is accountable for the profit. But it is also true that a trustee is accountable for all profits arising out of the administration of the trust, regardless of whether there has been a breach of trust.").

By proscribing plan amendments that decrease plan participants' accrued benefits–i.e., harm beneficiaries' existing rights–ERISA functionally imports traditional trust principles. Here, these principles dictate that plan beneficiaries have an equitable interest in profits arrived at by way of a decrease in their benefits.[12]

In sum, for standing purposes, Plaintiffs incurred an injury in fact, i.e., an invasion of a legally protected

---

[11] Courts have also looked to trust principles to answer questions regarding Article III standing in appropriate cases. *E.g.*, *Scanlan*, 669 F.3d at 845 ("[W]e see no reason why canonical principles of trust law should not be employed when determining the nature and extent of a discretionary beneficiary's interest for purposes of an Article III standing analysis.").

[12] *Accord United States v. $4,224,958.57*, 392 F.3d 1002, 1005 (9th Cir. 2004) (holding that if claimants proved their constructive trust claim they would have an equitable interest in the defendant property, which would provide them with Article III standing).

interest, because they "suffered an individual loss, measured as the 'spread' or difference between the profit the [Bank] earned by investing the retained assets and the [amount] it paid to [them]." *Edmonson*, 725 F.3d at 417.

2.

Continuing the Article III standing analysis, Plaintiffs satisfy the causation and redressability requirements. But for the Bank's improper retention of profits, Plaintiffs would not have suffered an injury in fact. And the relief Plaintiffs seek is not speculative in nature; the Bank invested those assets, and the profits made by those investments should be readily ascertainable.

3.

The Bank argues that even if Plaintiffs had Article III standing at the time they filed the suit, its closing agreement with the IRS restored any loss of the separate account feature and mooted Plaintiffs' claims. Here, too, we disagree.

The Supreme Court has repeatedly referred to mootness as "the doctrine of standing set in a time frame." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 170 (2000) (quoting *Arizonans for Official English v. Arizona*, 520 U.S. 43, 68 (1997)). If a live case or controversy ceases to exist after a suit has been filed, the case will be deemed moot

and dismissed for lack of standing. *Lewis v. Cont'l Bank Corp.*, 494 U.S. 472, 477 (1990). But "[a] case becomes moot *only* when it is impossible for a court to grant any effectual relief whatever to the prevailing party." *Knox v. Serv. Employees Int'l Union, Local 1000*, 132 S. Ct. 2277, 2287 (2012) (quoting *Erie v. Pap's A.M.*, 529 U.S. 277, 287 (2000) (internal quotation marks omitted)) (emphasis added).

The Bank rightly notes that its closing agreement with the IRS restored Plaintiffs' separate account feature. That restoration, however, did not moot the case. Plaintiffs contend that the Bank retained a profit, even after it restored the separate account feature to Plaintiffs and paid a $10 million fine to the IRS. Defendants do not rebut this argument, noting only that there has been no discovery to this effect. If an accounting ultimately shows that the Bank retained no profit, the case may well then become moot. "But as long as the parties have a concrete interest, however small, in the outcome of the litigation, the case is not moot." *Ellis v. Bhd. of Ry., Airline & S.S. Clerks, Freight Handlers, Exp. & Station Employees*, 466 U.S. 435, 442 (1984) (citing *Powell v. McCormack*, 395 U.S. 486, 496-98 (1969)).

In sum, we hold that Plaintiffs have Article III standing to bring their claims.

IV.

The Bank argues that even if Plaintiffs have standing, their claims are time-barred by the applicable statute of limitations. To determine what the

applicable statute of limitations is, we engage in a three-part analysis. First, we identify the statute of limitations for the state claim most analogous to the ERISA claim at issue here. Second, because of the 28 U.S.C. § 1404(a) transfer, we must determine whether the Fourth Circuit's or the Seventh Circuit's choice-of-law rules apply. And third, we apply the relevant choice-of-law rules to determine which state's statute of limitations applies.

A.

"Statutes of limitations establish the period of time within which a claimant must bring an action." *Heimeshoff v. Hartford Life & Acc. Ins. Co.*, 134 S. Ct. 604, 610 (2013). When ERISA does not prescribe a statute of limitations, courts apply the most analogous state-law statute of limitations. *White v. Sun Life Assur. Co.*, 488 F.3d 240, 244 (4th Cir. 2007), *abrogated on other grounds by Heimeshoff*, 134 S. Ct. 604.

Although the parties have suggested that the statute of limitations for contract claims is most analogous, we disagree. It would be incongruous to hold that Plaintiffs are unable to pursue relief under Section 502(a)(1)(B) because their claim sounds in equity instead of contract, and then apply the statute of limitations for a breach of contract claim.

In our view, the most analogous statute of limitations is that for imposing a constructive trust. As noted above, the equitable remedy of an accounting for

profits is akin to a constructive trust. *Knudson*, 534 U.S. at 214 n.2.

Both North Carolina and Illinois recognize such remedies. In North Carolina, a constructive trust may be "imposed by courts of equity to prevent the unjust enrichment of the holder of title to, or of an interest in, property which such holder acquired through . . . circumstance[s] making it inequitable for him to retain it against the claim of the beneficiary of the constructive trust." *Variety Wholesalers, Inc. v. Salem Logistics Traffic Servs., LLC*, 723 S.E.2d 744, 751 (N.C. 2012) (quoting *Wilson v. Crab Orchard Dev. Co.*, 171 S.E.2d 873, 882 (N.C. 1970)). Likewise, Illinois's highest court has stated that "[w]hen a person has obtained money to which he is not entitled, under such circumstances that in equity and good conscience he ought not retain it, a constructive trust can be imposed to avoid unjust enrichment." *Smithberg v. Illinois Mun. Ret. Fund*, 735 N.E.2d 560, 565 (Ill. 2000). Furthermore, neither state requires wrongdoing to impose a constructive trust. *See id.* (citing several cases); *Houston v. Tillman*, 760 S.E.2d 18, 21-22 (N.C. Ct. App. 2014) (citing *Variety Wholesalers, Inc.*, 723 S.E.2d at 751-52).

In Illinois, the applicable statute of limitations is five years. *Frederickson v. Blumenthal*, 648 N.E.2d 1060, 1063 (Ill. App. Ct. 1995) (citing 735 Ill. Comp. Stat. 5/13-205; *Chicago Park District v. Kenroy, Inc.*, 374 N.E.2d 670 (Ill. App. Ct. 1978), *aff'd in part, rev'd in part by* 402 N.E.2d 181 (Ill. 1980)). In North Carolina, a ten-year statute of limitations applies to "[a]ctions seeking to impose a constructive trust or to obtain an

accounting." *Tyson v. N. Carolina Nat. Bank*, 286 S.E.2d 561, 564 (N.C. 1982).

B.

We next turn to the question of which circuit's choice-of-law rules apply. Plaintiffs initially filed this case in the District Court for the Southern District of Illinois. The Bank moved, pursuant to 28 U.S.C. § 1404(a), to change the venue of the case by having it transferred to the District Court for the Western District of North Carolina. We must therefore determine whether the choice-of-law rules of the transferor court or those of the transferee court apply.

The majority of circuits to consider the issue apply the transferor court's choice-of-law rules. *See, e.g.*, *Hooper v. Lockheed Martin Corp.*, 688 F.3d 1037, 1046 (9th Cir. 2001); In *re Ford Motor Co.*, 591 F.3d 406, 413 n.15 (5th Cir. 2009); *Olcott v. Delaware Flood Co.*, 76 F.3d 1538, 1546-47 (10th Cir. 1996; *Eckstein v. Balcor Film Investors*, 8 F.3d 1121, 1127 (7th Cir. 1993).[13] This conclusion makes sense: "The legislative history of [Section] 1404(a) certainly does not justify the rather startling conclusion that one might get a change of law as a bonus for a change of venue." *Van Dusen v. Barrack*, 376 U.S. 612, 635-36 (1964) (internal quotation

---

[13] *But see Lanfear v. Home Depot, Inc.*, 536 F.3d 1217, 1223 (11th Cir. 2008) (holding that the transferee court may apply its own choice-of-law rules when the case involves interpreting federal law); *Menowitz v. Brown*, 991 F.2d 36, 41 (2d Cir. 1993) (same).

marks omitted). We join the majority of our sister circuits and hold that the transferor court's choice-of-law rules apply when a case has been transferred pursuant to 28 U.S.C. § 1404(a). Accordingly, the Seventh Circuit's choice-of-law rules apply here.

C.

Under the Seventh Circuit's choice-of-law rules, we look to the forum state "as the starting point." *Berger v. AXA Network LLC*, 459 F.3d 804, 813 (7th Cir. 2006). But "[i]f another state with a significant connection to the parties and to the transaction has a limitations period that is more compatible with the federal policies underlying the federal cause of action, that state's limitations law ought to be employed because it furthers, more than any other option, the intent of Congress when it created the underlying right." *Id.*

Here, although Illinois may be the forum state, *see Atl. Marine Const. Co. v. U.S. Dist. Court for W. Dist. of Texas*, 134 S. Ct. 568, 582-83 (2013) (noting that the "state law applicable in the original court also appl[ies] in the transferee court" unless a Section 1404(a) motion is "premised on the enforcement of a valid forum-selection clause"); J.A. 462-64 (memorandum and order discussing reasons for granting the Bank's motion to change venue), it is clear to us that North Carolina has a "significant connection" to the dispute for the same reasons for which the district court granted the Bank's Section 1404(a) motion: "the decision to 'permit' the 'voluntary' transfer of 401(k) Plan assets to the converted

cash balance plan took place in the Western District of North Carolina" and "virtually all the relevant witnesses reside in the Western District of North Carolina." J.A. 462-64.

Further, the Pension Plan contains a choice-of-law provision applying North Carolina law when federal law does not apply. *See Berger*, 459 F.3d at 813-14 (considering a choice-of-law clause as a non-controlling but relevant factor in selecting a limitations period). Finally, North Carolina's ten-year limitations period is "more compatible with the federal policies" underlying ERISA than Illinois's five-year limitations period; the longer period provides aggrieved plaintiffs with more opportunities to advance one of ERISA's core policies: "to protect . . . the interests of participants in employee benefit plans and their beneficiaries . . . by providing for appropriate remedies, sanctions, and ready access to the Federal courts." 29 U.S.C. § 1001(b).

The first of the transfers in question took place in 1998. Plaintiffs filed suit in 2004, a full four years before the ten-year statute of limitations would have run. Accordingly, Plaintiffs' claims are not time-barred by the applicable ten-year limitations period. The statute of limitations therefore cannot serve as a basis for affirming the district court's grant of summary judgment to the Bank.

V.

For the foregoing reasons, we reverse the district court's grant of summary judgment in favor of the

Bank, vacate that portion of the district court's order denying Plaintiffs' motion for summary judgment based on its erroneous standing determination, and remand for further proceedings.

REVERSED IN PART,
VACATED IN PART,
AND REMANDED

FILED: July 3, 2018

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 17-1485
(3:05-cv-00238-GCM)

WILLIAM L. PENDER; DAVID L. MCCORKLE

Plaintiffs - Appellants

and

ANITA POTHIER; KATHY L. JIMENEZ; MARIELA ARIAS; RONALD R. WRIGHT; JAMES C. FABER, JR., On behalf of themselves and on behalf of all others similarly situated

Plaintiffs

v.

BANK OF AMERICA CORPORATION; BANK OF AMERICA, NA; BANK OF AMERICAN PENSION PLAN; BANK OF AMERICA 401(K) PLAN; BANK OF AMERICA CORPORATION CORPORATE BENEFITS COMMITTEE; BANK OF AMERICA TRANSFERRED SAVINGS ACCOUNT PLAN

Defendants - Appellees

and

UNKNOWN PARTY, John and Jane Does #1-50, Former Directors of NationsBank Corporation and Current and Former Directors of Bank of America

Corporation & John & Jane Does #51-100, Current/
Former Members of the Bank of America
Corporation Corporate Benefit;
PRICEWATERHOUSE COOPERS, LLP;
CHARLES K. GIFFORD; JAMES H. HANCE, JR.;
KENNETH D. LEWIS; CHARLES W. COKER;
PAUL FULTON; DONALD E. GUINN; WILLIAM
BARNETT, III; JOHN T. COLLINS;
GARY L. COUNTRYMAN; WALTER E. MASSEY;
THOMAS J. MAY; C. STEVEN MCMILLAN;
EUGENE M. MCQUADE; PATRICIA E. MITCHELL;
EDWARD L. ROMERO; THOMAS M. RYAN;
O. TEMPLE SLOAN, JR.; MEREDITH R.
SPANGLER; HUGH L. MCCOLL; ALAN T.
DICKSON; FRANK DOWD, IV; KATHLEEN F.
FELDSTEIN; C. RAY HOLMAN; W. W. JOHNSON;
RONALD TOWNSEND; SOLOMON D. TRUJILLO;
VIRGIL R. WILLIAMS; CHARLES E. RICE;
RAY C. ANDERSON; RITA BORNSTEIN; B. A.
BRIDGEWATER, JR.; THOMAS E. CAPPS;
ALVIN R. CARPENTER; DAVID COULTER;
THOMAS G. COUSINS; ANDREW G. CRAIG;
RUSSELL W. MEYER-, JR.; RICHARD B. PRIORY;
JOHN C. SLANE; ALBERT E. SUTER; JOHN A.
WILLIAMS; JOHN R. BELK; TIM F. CRULL;
RICHARD M. ROSENBERG; PETER V. UEBERROTH;
SHIRLEY YOUNG; J. STEELE ALPHIN; AMY
WOODS BRINKLEY; EDWARD J. BROWN, III;
CHARLES J. COOLEY; ALVARO G. DE MOLINA;
RICHARD M. DEMARTINI; BARBARA J. DESOER;
LIAM E. MCGEE; MICHAEL E. O'NEILL;
OWEN G. SHELL, JR.; A. MICHAEL SPENCE;
R. EUGENE TAYLOR; F. WILLIAM VANDIVER, JR.;
JACKIE M. WARD; BRADFORD H. WARNER

Defendants

ORDER

The petition for rehearing en banc was circulated to the full court. No judge requested a poll under Fed. R. App. P. 35. The court denies the petition for rehearing en banc.

For the Court

/s/ Patricia S. Connor, Clerk

---

29 U.S.C.
United States Code, 2011 Edition
Title 29–LABOR
CHAPTER 18–EMPLOYEE RETIREMENT INCOME SECURITY PROGRAM
SUBCHAPTER I–PROTECTION OF EMPLOYEE BENEFIT RIGHTS
Subtitle B–Regulatory Provisions
part 5–administration and enforcement
Sec. 1132–Civil enforcement
From the U.S. Government Publishing Office, www.gpo.gov

§1132. Civil enforcement

(a) Persons empowered to bring a civil action

A civil action may be brought–

(1) by a participant or beneficiary–

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

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

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

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress

such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan;

(4) by the Secretary, or by a participant, or beneficiary for appropriate relief in the case of a violation of 1025(c) of this title;

(5) except as otherwise provided in subsection (b) of this section, by the Secretary (A) to enjoin any act or practice which violates any provision of this subchapter, or (B) to obtain other appropriate equitable relief (i) to redress such violation or (ii) to enforce any provision of this subchapter;