No. 08-13233

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BINITA L. COOK, et al.,
Plaintiffs-Appellees

v.

BOYD CAMPBELL, et al.,
Defendants-Appellants.

On Appeal from the United States District Court for the Middle District of Alabama
(I. DeMent)

BRIEF OF THE SECRETARY OF LABOR, HILDA L. SOLIS, AS AMICUS CURIAE IN SUPPORT OF APPELLANTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes and Regulations:

Miscellaneous:

INTEREST OF THE SECRETARY

The Secretary of Labor has the primary responsibility for interpreting and enforcing Title I of ERISA. See Secretary of Labor v. Fitzsimmons, 805 F.2d 682, 692-693 (7th Cir. 1986) (en banc) (the Secretary's interests include promoting the uniform application of the Act, protecting plan participants and beneficiaries, and ensuring the financial stability of plan assets). The Secretary has a substantial interest in ensuring that participants in individual account plans, such as the Employee Stock Ownership Plan (ESOP) involved in this case, have standing to state a claim under section 502(a)(2) of ERISA, 29 U.S.C. 1132(a)(2), to recover losses sustained in their plan accounts as a result of fiduciary misconduct.

In filing this amicus brief, the Secretary believes the district court erred in dismissing the ERISA claims on the pleadings, but takes no position on the ultimate merits of the claims asserted. The Secretary's participation as amicus curiae is thus limited to the expression of her views on the important legal issues raised by the district court's dismissal of the fiduciary breach claim contained in Count Ten of the Plaintiffs' amended complaint regarding the alleged overpayment by the Employee Stock Option Plan ("ESOP" or Plan) for employer stock. The Secretary does not take a position on the fact-intensive question whether the Career Transition

Assistance Plan ("CTAP") is an ERISA-covered plan and thus on whether the district court properly held that ERISA preempted the Plaintiff's state-law claims; nor does she take a position on the other violations of ERISA alleged by Plaintiffs in their amended complaint regarding alleged misrepresentations or underpayment of benefits concerning the CTAP.

The Secretary specifically seeks to correct the district court's misinterpretation of the nature of the claims and the corresponding relief available under ERISA sections 502(a)(2) and 502(a)(1)(B). If, as Plaintiffs allege, the plan's fiduciary caused the ESOP to overpay for employer stock, ERISA provides a monetary remedy on behalf of the plan for the resulting losses; and the Secretary has an interest in establishing that plan fiduciaries cannot evade responsibility for losses caused by a fiduciary breach by recharacterizing plan participants' claims for fiduciary misconduct as claims for benefits that were improperly stated or inadequately pled. Contrary to the decisions below, therefore, the Secretary argues that Plaintiffs' overpayment claim sufficiently stated a 502(a)(2) claim and should be permitted to go forward on that basis. Furthermore, the Secretary has an interest in allowing participants to bring section 502(a)(2) and section 502(a)(1)(B) claims in the same case on alternative theories of liability and available remedy in order to give full effect to ERISA's remedial purposes and thus disagrees with the district court to the extent, in its denial of reconsideration, it based its additional holding on the premise that a 502(a)(2) claim is unavailable where plaintiffs could have brought a benefits claim under 502(a)(1)(B).

STATEMENT OF THE ISSUES

The questions addressed by the Secretary of Labor in this amicus brief are:

1. Whether the district court erred in holding that Plaintiffs did not adequately plead a claim under section 502(a)(2) of ERISA, 29 U.S.C. § 1132(a)(2).

2. Whether Plaintiffs' claim that the plan trustee breached his fiduciary duty by permitting the plan to purchase the stock for more than adequate consideration was properly brought under section 502(a)(2), 29 U.S.C. § 1132(a)(2), as a fiduciary breach claim, instead of, or as an alternative claim to, a claim for benefits under section 502(a)(1)(B) of ERISA, 29 U.S.C. § 1132(a)(1)(B).

STATEMENT OF THE CASE

1. Background and Procedural History. Plaintiffs worked for Central Alabama Homes Health Services, Inc. ("Central Alabama") and participated in the company's ESOP, an ERISA-governed pension plan. Plaintiffs were also covered by the CTAP, the severance package that Central Alabama established in May 1997. Under the CTAP, employees who chose to terminate their employment with Central Alabama had the opportunity to receive a one-time severance payment equivalent to three months' salary, 12 months of medical, dental and life insurance coverage, and ESOP and pension benefits "based on their eligibility as of July 1, 1997 pursuant to the plan descriptions for each of these benefits." Employees could choose to participate in the CTAP between July 7, 1997 and July 11, 1997.[1]

Also in May 1997, Central Alabama's owner and president, George Hutchinson, sold 80 percent of his Central Alabama stock (500,000 shares) to the ESOP for $13.83 per share. The $13.83 price per share was based on an independent appraisal conducted by Sansome Street Appraisers on March 31, 1997. Boyd Campbell became the ESOP trustee on May 13, 1997, the day before Hutchinson's sale of stock to the ESOP.

[1] As previously stated above, the Secretary takes no position on the disputed question whether the CTAP was also an ERISA-governed plan.

In 1997, one hundred-twenty five employees, including Plaintiffs, terminated their employment with the stated expectation of receiving, pursuant to the CTAP, shares of ESOP benefits calculated using the $9.43 value of their shares as determined at the 1997 year-end (June 30, 1997) valuation. However, when Plaintiffs finally received their lump sum payments in 1999, the ESOP's Central Alabama stock was valued at the June 30, 1998 year-end valuation of $2.37 a share, or a fraction of the price at which the plan had purchased it from Hutchinson.[2]

The Plaintiffs filed suit in October 2001 in the Circuit Court of Montgomery County, Alabama, against Boyd Campbell individually and as trustee of the ESOP, and against Central Alabama. The Plaintiffs alleged a federal racketeering (RICO) claim and a number of state law claims relating to the alleged mishandling of the ESOP and CTAP, but did not include ERISA claims in their initial complaint. On August 16, 2002, after the state court found the state claims preempted by ERISA, the case was removed to the United States District Court for the Middle District of Alabama, and the

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[2] In the mid-1990s, the Department of Labor investigated the Central Alabama ESOP. The Department found various flaws in the valuation used for the ESOP's purchase of stock from Hutchinson in May 1997. To compensate for the deficiencies the Department identified in the valuation, Hutchinson issued additional shares of stock to the ESOP. The Department was also involved in reviewing the 1998 valuation process, which resulted in the $2.37 per share valuation on which the Plaintiffs' payout was based but the Department took no action with respect to that valuation.

district court ordered the Plaintiffs to file an amended complaint alleging ERISA causes of action.

Plaintiffs added a number of ERISA counts to their complaint. The ERISA counts alleged, among other things, that Campbell “fail[ed] to act prudently and solely in the interest of plan participants and beneficiaries”; "fail[ed] to conduct a good-faith independent" evaluation of the stock purchase from Hutchinson; and "permitt[ed] the plan to purchase stock for more than adequate consideration". First Am. Compl. at 3, Count 10 ¶¶ 2-3. Like most of the other counts, the count alleging that the Hutchinson stock was purchased for more than adequate consideration did not identify the provision of ERISA that provided the cause of action. The count did allege, however, that "[p]laintiffs have been damaged" as a result of the violation. First Am. Compl. at 3, Count 10 ¶¶ 2-4. In their prayer for relief, Plaintiffs sought benefits due them under the Plan and "such other and further relief as this Court deems appropriate." First Am. Compl. at 6.

2. District Court Decisions. On March 30, 2007, following the dismissal of Central Alabama from the case, the district court granted, in part, Defendant Campbell's motion for judgment on the pleadings and dismissed with prejudice the Plaintiff's 502(a)(2) and 502(a)(3) claims for relief. Cook v. Campbell, 482 F.Supp.2d 1341, 1356 (M.D. Alabama 2007).

The court found that the Plaintiffs did not adequately state a claim for relief under 502(a)(2) because they asked for individual relief and failed to bring their claims on behalf of the Plan or request that losses be returned to the Plan.[3] The court allowed the Plaintiffs to proceed on a 502(a)(1)(B) claim, reasoning that while the Plaintiffs had not mentioned 502(a)(1)(B) in their complaint, they had successfully put Campbell on notice that he was the subject of a claim for benefits.[4]

On March 15, 2008, the Plaintiffs filed a motion for the court to reconsider the March 30, 2007 order dismissing the Plaintiffs' claims for relief under 502(a)(2). They based their motion on the recent holding in LaRue v. DeWolff, Boberg & Associates, Inc., 128 S. Ct. 1020 (2008), which held that a participant could sue under section 502(a)(2) to recover

[3] ERISA section 502(a)(2) provides: "A civil action may be brought by the Secretary, or by a participant, beneficiary, or fiduciary for appropriate relief under section 1109 of this title". Section 1109 provides that : "Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this title shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary. A fiduciary may also be removed for a violation of §411 of this Act."

[4] ERISA section 502(a)(1)(B) provides: "A civil action may be brought by a participant or 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."

losses to a plan caused by a trustee's breach of fiduciary duties that primarily affected his individual account. On May 12, 2008, the court rejected the Plaintiffs' reconsideration motion on the grounds that LaRue did not affect the reasons for the court's denial of Plaintiffs' 502(a)(2) claim. The court acknowledged that Plaintiffs' allegations that Campbell's breach of his fiduciary obligations affected the ESOP as a whole constituted a viable and cognizable 502(a)(2) claim consistent with the Court's holding in LaRue, but decided that the claim was still doomed by Plaintiffs' request for relief in the form of individual benefits rather than losses to the Plan. Cook v. Campbell, 2008 WL 2039501, at *10 (M.D. Ala. 2008).

Apart from its decision to foreclose a section 502(a)(2) claim on the basis of the Plaintiffs' pleadings, the court made an alternative finding that, consistent with Chief Justice Roberts' concurrence in LaRue, Plaintiffs' 502(a)(2) claim was in essence "plan-derived benefit claims" that Plaintiffs should have brought under section 502(a)(1)(B).[5] In addition, citing the Chief Justice's discussion of the holding in Varity Corp. v. Howe, 516 U.S.

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[5] The court noted that while it would not reach the issue of exhaustion of administrative remedies, the issue remained unsettled because the Plaintiffs had failed to invoke the claims procedures set out in the CTAP, which required participants to file "a claim in writing in order to secure benefits under the Plan, or to secure a review of any other matter related to the Plan if they believe they have been treated unfairly with respect to the Plan." Cook, 2008 WL 2039501, at *12 n.6.

489 (1996), that relief is not "appropriate" under section 502(a)(3) when another section of ERISA offers an adequate remedy, the district court suggested that relief was not "appropriate" in this case under section 502(a)(2) because Plaintiffs had an adequate remedy under section 502(a)(1)(B). Cook, 2008 WL 2039501, at *13.

SUMMARY OF THE ARGUMENT

I. The district court held that Plaintiffs failed to adequately plead a claim under section 502(a)(2) of ERISA because they did not request plan-related relief or allege losses to the ESOP Plan. The validity of a pleading is based on whether it asserts a plausible claim for relief and puts the defendant on notice of the claims against him, not whether the prayer for relief specifically enumerates every potential form of relief.

Here, Plaintiffs adequately described in the amended complaint a 502(a)(2) claim when they alleged that the ESOP trustee breached his fiduciary duty by "permitting the ESOP to purchase the Hutchinson shares for more than adequate consideration." Moreover, the Plaintiffs demanded "such other and further relief as the court deems appropriate," a demand broad enough to encompass relief under section 502(a)(2). In the Secretary’s view, there is no question Plaintiffs pled the facts supporting the asserted misconduct with sufficient specificity to give the Defendant notice of the allegation, and no mistaking Plaintiffs' intent to state a claim to recover for the Plan losses allegedly suffered by the Plan to the detriment of all the participants as a result of the trustee's asserted overpayment. This claim sounds squarely in section 502(a)(2), and the court erred in dismissing it on the pleadings.

II. The district court wrongly held that Plaintiffs' claim that the ESOP overpaid for stock under section 502(a)(2) was a disguised claim for benefits that should have been – and thus could only be – brought under section 502(a)(1)(B). In our view, it is always appropriate to bring an action under section 502(a)(2) against a plan fiduciary that purchases stock for a plan in violation of his fiduciary obligations. The purpose of such an action is to restore losses to the plan and to vindicate ERISA's stringent fiduciary provisions.

The purpose of an action under section 502(a)(1)(B), by contrast, is to adjudicate a participant's specific entitlement to benefits under the terms of the Plan, which is not what Plaintiffs are seeking in their claim alleging that Defendants permitted the plan to overpay Hutchinson for his shares of the employer stock. An action under section 502(a)(1)(B) would neither restore Plan losses, nor hold the fiduciary accountable for his misconduct, and therefore is not a substitute for a section 502(a)(2) action, which is specifically designed to recover losses caused by fiduciary misconduct. To be sure, a recovery under section 502(a)(2) puts more assets back into the plan, which in the case of an individual account plan (such as an ESOP) is likely to lead to a greater distribution of benefits to the participants when they eventually cash out, but that consequence from a successful 502(a)(2) action does not change the nature of the claim or convert it into a 502(a)(1)(B) claim alleging a denial of benefits.

Moreover, even if Plaintiffs' 502(a)(2) claim could be recast as a claim for benefits under Section 502(a)(1)(B), Plaintiffs were entitled to plead both claims in the alternative since the nature of the claim and the relief available under 502(a)(1)(B) is substantively different from the nature of the claim and the relief available under 502(a)(2) and neither provision provides a substitute for the other. Particularly at the pleadings stage when the court has not fully considered the factual underpinnings of plaintiffs' claims, precluding plaintiffs from pursuing claims under both 502(a)(2) and 502(a)(1)(B) unnecessarily prevents plaintiffs from obtaining complete relief for their injuries, and defeats the remedial purposes of ERISA. Here, the court's premature dismissal of Plaintiffs' 502(a)(2) claim effectively prevented them from pursuing any form of relief for their injuries since the court later determined that their 502(a)(1)(B) claim was barred by res judicata. Had the court allowed Plaintiffs to bring claims under 502(a)(2), in addition to under 502(a)(1)(B), Plaintiffs might have been able to obtain relief under a legal theory that had equal applicability to the facts of the case as Plaintiffs' 502(a)(1)(B) claim. Thus, regardless of whether the starting point for both claims was the desire to obtain the plan benefits they believed were promised to them, Plaintiffs should have been able to make separate claims for distinct forms of relief based on distinct legal theories under section 502(a)(1)(B) and section 502(a)(2).

ARGUMENT

I. Plaintiffs Adequately Pled a Claim under Section 502(a)(2) of ERISA, 29 U.S.C. § 1132(a)(2)

Under ERISA, claims of fiduciary breach involving mismanagement of plan assets, such as causing a plan to purchase overpriced stock, are brought under section 502(a)(2), 29 U.S.C. § 1132(a)(2), which is the sole civil enforcement provision designed to enforce section 409 of ERISA, 29 U.S.C. § 1109, the Act's fiduciary misconduct provision. Section 502(a)(2) provides that "a civil action may be brought by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title." In turn, section 1109, paragraph (a), imposes personal liability on any fiduciary "who breaches any of the responsibilities, obligations, or duties imposed on fiduciaries by this subchapter," and, among other "equitable or remedial relief as the court may deem appropriate," requires the fiduciary to "make good to [the] plan any losses to the plan resulting from such breach."

In their amended complaint, Plaintiffs alleged that the ESOP trustee breached his fiduciary duties by "failing to conduct a good faith investigation of the buyout transactions involving the stock of George E. Hutchinson to determine whether the transactions were fair to the ESOP" and by "permitting the ESOP to purchase the Hutchinson shares for more than adequate consideration." First Am. Compl. at 3, Count 10 ¶¶ 2-3. Such conduct, if found to be true, would constitute a breach of fiduciary duties under ERISA and would make the responsible fiduciary liable for any resulting losses. The amended complaint thus clearly alleged the type of breach against the type of defendant to which section 409 is directed and for which section 502(a)(2) provides the means for redress.

Notwithstanding Plaintiffs' clear intent, in its order dated March 30, 2007, and again in its May 12, 2008 denial of reconsideration, the district court held that Plaintiffs failed to adequately plead a claim under section

502(a)(2) of ERISA because they did not explicitly allege losses to the ESOP or request plan-related relief.

In so dismissing the claim, the court set the pleading standard for asserting a fiduciary breach claim under ERISA too high. Federal pleading requirements are not so strict. Federal Rule of Civil Procedure 8(a) requires: (1) a short and plain statement of the grounds for the court's jurisdiction, unless the court already has jurisdiction and the claim needs no new jurisdictional support; (2) a short and plain statement of the claim showing that the pleader is entitled to relief; and (3) a demand for the relief sought, which may include relief in the alternative or different types of relief.

The allegations contained in Count Ten of the Plaintiffs' amended complaint met the requirements of Federal Rule of Civil Procedure 8(a). Fairly read, the Plaintiffs' description of the fiduciary breach Campbell is alleged to have committed in authorizing the ESOP to overpay for Hutchinson's stock implicitly encompassed a demand for recovery of the ESOP's overpayment through Campbell's restoration of losses to the Plan. Since the sufficiency of a pleading under Rule 8(a) depends upon the statement of the claim for relief and not the remedial demand, the detailed allegations underlying the Plaintiffs' claim should have been enough for the plaintiffs to successfully defend a motion to dismiss on the pleadings. See 5

Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1255 (3d ed. 2004).

The requirements of Rule 8(a) are met because this claim plainly alleges the type of fiduciary breach in the management of plan assets over which section 502(a)(2) of ERISA gives the district court jurisdiction and for which restoration of losses to the plan is the available remedy. No explicit demand for such plan-related relief was therefore necessary to meet the pleading standard, given the clear nature of the violation alleged and factually supported in the complaint; under the liberal notice pleadings requirements that pertain in federal court, a request for specific forms of relief is not necessary for the survival of a claim.

But even if this court were to hold that Plaintiffs' allegation that Campbell breached his fiduciary duties by enabling the ESOP to overpay for stock falls short because it did not contain an implicit demand for losses to the Plan, Plaintiffs' request for "such other and further relief that the Court deems appropriate" certainly presented a sufficient demand for relief in the alternative consistent with the requirements of Rule 8(a). See Levine v. World Financial Network Nat'l Bank, 437 F.33d 1118, 1123-24 (11th Cir. 2006). As the Supreme Court has held, "a formulaic misstep by counsel is not fatal under the notice pleading standard of Federal Rule of Civil

Procedure 8(a)." Swierkiewicz v. Sorema, N.A., 534 U.S. 506, 514 (2002) (interpreting Rule 8(a) as focusing the "litigation on the merits of a claim"). Thus, a failure to explicitly request the remedy of restoration of losses to the plan should not doom the Plaintiffs' claim because the Plaintiffs' description of the fiduciary breach caused by Campbell's alleged imprudent approval of Hutchinson's sale of stock to the ESOP put the Defendant on notice of the claims against him and plausibly indicated that the Plaintiffs may be entitled to statutorily appropriate relief of some type other than the individual benefits the court thought Plaintiffs were seeking. Id.

The Supreme Court's recent decision in Bell Atlantic Corp. v. Twombly, 127 S. Ct. 1955, 1965 n.3 (2007), emphasized the importance of the substance of the parties' claims in determining the sufficiency of a pleading, while holding that a "pleading must contain something more . . . than . . . a statement of facts that merely creates the suspicion [of] a legally cognizable right of action." Twombly therefore set out a "plausibility standard" whereby a plaintiff must go beyond a "formulaic recitation of the elements" of his claim to lay out the "grounds" of his "entitle[ment] to relief" and to plead enough facts to render his claim plausible rather than just conceivable or speculative. 127 S. Ct. at 1964-5. The Court decided Erickson v. Pardus, 127 S. Ct. 2197 (2007), two weeks after it decided

Twombly. In Erickson, the Court reaffirmed notice pleading, emphasizing that the pleading need only put the defendant on notice of the claims against him and the grounds upon which the claims rest. Id. at 2200.

The Plaintiffs' pleadings presented a plausible claim consistent with the standards set by Twombly and Erickson because they included sufficiently detailed facts about Hutchinson's sale of stock to the ESOP that, if true, would give rise to liability under ERISA. Erickson, 127 S.Ct. at 2200 (2007). Specifically, Plaintiffs' allegations that Campbell breached the fiduciary duties of loyalty and prudence when he failed to investigate the transaction involving Hutchinson's sale of stock to the ESOP and allowed the ESOP to purchase stock from Hutchinson for more than adequate consideration amounted to a quintessential 502(a)(2) claim for a breach of fiduciary duty resulting in loss to the plan itself, and provided ample notice of the basis for and nature of the claim against Campbell. First Am. Compl. at 3, Count 10 ¶¶ 2-3. Indeed, this Court has held that even a failure to refer specifically to a "breach of fiduciary duty" does not doom an ERISA claim where the facts alleged by the plaintiff in his ERISA complaint relating to the defendant's failure to disclose information were consistent with a claim for breach of fiduciary duty. Hamilton v. Allen-Bradley Co., Inc., 244 F.3d

819, 825 (11th Cir. 2001). Here, the amended complaint specifically alleged a breach of fiduciary duty, and so unmistakably stated an ERISA claim,

By pleading specific facts that were consistent with a fiduciary breach and sufficient to place Campbell on notice of the claims against him, Plaintiffs presented a plausible claim for relief that went beyond a formulaic recitation of the elements of a cause of action under ERISA. In Secretary of Labor v. Labbe, 2008 WL 4787133 (11th Cir. 2008) (unpublished), a Fair Labor Standards Act case, this Court held that allegations of similar specificity to those made in the Plaintiffs' complaint were sufficient to withstand a post-Twombly motion to dismiss. See Wilchombe v. Teevee Toons, Inc., 555 F.3d 949, 958 (11th Cir. 2009) ("a plaintiff must provide enough factual allegations, which are assumed to be true, 'to raise a right to relief above the speculative level'"(quoting Twombly, 127 S. Ct. at 1965)). Thus, Plaintiffs' failure specifically to request relief to the Plan was not a justifiable basis upon which to dismiss their 502(a)(2) claim at the pleadings stage.

The Sixth Circuit examined a scenario similar to the present case in Tullis v. UMB Bank, N.A., 515 F.3d 673, 681 (6th Cir. 2007). The plaintiffs in Tullis filed a fiduciary breach claim alleging that a fiduciary's imprudent investment of plan assets caused them to suffer losses as individuals. However, the plaintiffs failed to include a request for "losses to the plan." Id. The court held that "although the face of the complaint does not include the exact words 'losses to the plan' (i.e., that the plan suffered damages), it clearly indicates that the plaintiffs, as participants in an ERISA-governed plan, are seeking recovery for losses to their plan accounts caused by fiduciary breaches." Id. Tullis noted that the plaintiffs' attempt to seek recovery for losses that occurred to their plans was implied by the language in the complaint indicating that the value of the ERISA plans diminished because of the defendant's actions. Id.

In the instant case, the Plan's purchase of stock for more than adequate consideration, if proven, would have caused the Plan to hold fewer assets than would have been the case had the stock been properly priced. Such harm to the Plan may also have resulted in Plaintiffs receiving a lower payout from the Plan, but, as the court acknowledged, this claim asserts a clearly defined allegation of breach of fiduciary duties: that Campbell 'fail[ed] to conduct a good faith independent investigation of the buyout transactions involving the stock of George E. Hutchinson to determine whether the transactions were fair to the ESOP' and 'permit[ed] the ESOP to purchase the Hutchinson shares for more than adequate consideration.'" Cook v. Campbell, 2008 WL 2039501, at *3 n.2. Even without the request for "such other and further relief as the court deems appropriate," the court should have followed the Sixth Circuit's Tullis example to conclude that a 502(a)(2)-grounded demand for relief to the Plan in the form of recovery of losses stemming from the overpayment was implicit in the complaint.

Nor should Plaintiffs' general request for "benefits" have precluded treating the allegations as stating a 502(a)(2) claim. Because district courts have the power to grant any relief to which a party may be entitled regardless of the party’s request for relief, the court could have properly characterized this request consistent with the nature of the fiduciary breach allegations and recognized Plaintiffs' request as one for plan-wide relief under section 502(a)(2). See, e.g., New Amsterdam Cas. Co. v. Waller, 323 F.2d 20 (4th Cir. 1963); Smith v. Hundley, 190 F.3d 852 (8th Cir. 1999). In any event, since requesting an appropriate remedy is not necessary for the survival of the claim, the court should have first heard the 502(a)(2) claim and concerned itself later with fashioning an appropriate plan-related remedy. To dismiss a cognizable 502(a)(2) claim at the pleadings stage on such a formalistic basis disregards the purpose of notice pleading, and undermines ERISA's grant of representative standing on participants to bring claims of fiduciary breach on behalf of, and for the benefit of, plans.

II. Plaintiffs' 502(a)(2) Claim was not a "Disguised" 502(a)(1)(B) Claim for Benefits, and Plaintiffs were not Precluded from Asserting Both a 502(a)(2) Fiduciary Breach Claim and a 502(a)(1)(B) Benefits Claim

In its May 12, 2008 reconsideration decision, the district court gave an additional reason for dismissing the fiduciary breach claim that the ESOP overpaid for stock: it held that this claim was a disguised claim for benefits that should have been brought under section 502(a)(1)(B) rather than as a fiduciary breach claim under section 502(a)(2) of ERISA. 2008 WL 2039501, at *6.[6] This holding fundamentally places too narrow a construction on ERISA's civil-enforcement structure.

As discussed above, section 502(a)(2) is the sole civil enforcement provision designed to enforce the Act's fiduciary misconduct provision (section 409), and thus to remedy losses to plans caused by a fiduciary breach involving mismanagement of plan assets. The other two main civil enforcement provisions serve different purposes: section 502(a)(1)(B)

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[6] The court held in a separate decision that any 502(a)(1)(B) claim was barred by res judicata arising out of the disposition of the bankruptcy proceeding involving the plan sponsor, Central Alabama Home Health Services, Inc. As argued in the Plaintiffs' merits brief (at pp. 40-48), the res judicata ruling may not survive scrutiny, because the requirements of identity of parties and identity of cause of action in the two proceedings do not appear to be satisfied. Because we fundamentally believe that the Plaintiffs' fiduciary breach (502(a)(2)) claim cannot be recharacterized as a benefit (502(a)(1)(B)) claim, however, we do not further address this aspect of the court's decision.

provides participants with a cause of action to recover benefits wrongfully denied under the terms of the plan, while section 502(a)(3), 29 U.S.C. 1132(a)(3) [and its parallel provision, section 502(a)(5), 29 U.S.C. § 1132(a)(5)] is a "catchall provision" that authorizes claims for "appropriate equitable relief" to redress violations of plan terms or the statute that fall outside the other two provisions. See Varity Corp. v. Howe, 516 U.S. 489, 519 (1996).[7]

Last term in LaRue v. DeWolff, Boberg and Assoc., Inc., 128 S. Ct. 1020 (2008), the Supreme Court definitively held that section 502(a)(2) is available for any claim involving mismanagement of plan assets by a fiduciary, and is not limited to allegations of misconduct that affected all participants in a plan equally or that caused losses to the plan "as a whole." In particular, it held that losses to defined contribution (or individual account) plans, even where ultimately allocated only to a single individual account, constitute "losses to plans" for purposes of sections 502(a)(2) and

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7 Courts have held, for example, that individual participants can bring suit under 502(a)(3) to obtain equitable relief for fiduciary breaches, such as a fiduciary's misrepresentations or omissions, that resulted in individual harm but did not cause losses to the plan. In addition, whereas 502(a)(2) offers recovery for losses only against fiduciaries, and 502(a)(1)(B) offers recovery against the plan for benefits that have wrongfully been denied, the equitable relief available under 502(a)(3) is not limited to relief against fiduciaries, since non-fiduciaries who knowingly participate in a fiduciary breach may also be held liable under that provision. See Harris Trust v. Salomon Smith Barney, Inc., 120 S.Ct. 2180 (2000).

409 since individualized allocations are inherent in the nature of such plans. Id. at 1025. The Court also noted that a claim that a fiduciary's breach resulted in a loss to the account of a plan participant was consistent with the remedial provisions in ERISA sections 502(a)(2) and 409 since those provisions were included to protect “the financial integrity of the plan," whether it was an individual account plan or a more traditional defined benefit plan. 128 S. Ct. at 1024; see id. at 1026 ("We therefore hold that although § 502(a)(2) does not provide a remedy for individual injuries distinct from plan injuries, that provision does authorize recovery for fiduciary breaches that impair the value of plan assets in a participant's individual account.").

Disregarding the basic thrust of the LaRue decision, the district court based its alternative holding here on Chief Justice Roberts' concurrence in that case. In his concurrence, joined only by Justice Kennedy, the Chief Justice agreed that an individual account participant like plaintiff LaRue can bring a claim for fiduciary breach under section 502(a)(2) on behalf of "the plan in its entirety," but suggested that his claim against the trustee for losses to his individual account plan caused by the trustee's failure to follow plaintiff's investment directions could also be viewed as a claim for benefits instead of a fiduciary breach claim resulting in losses to the plan. LaRue, 128 S. Ct. at 1026. The concurrence reasoned that because it was likely that the plan in that case contained terms describing how investment instructions were to be carried out, it was therefore possible that LaRue was contesting the application of the plan terms governing investment options and how to exercise them, and that LaRue's claim could potentially be resolved through a claims procedure rather than through district court litigation. Id.

This suggestion in the concurrence, of course, was not a holding, and, even as a concurrence, it was stated in unusually speculative terms as something the Court of Appeals should consider on remand rather than as the fully developed opinion of the concurring Justices.[8] LaRue, 128 S. Ct. at 1027-28. LaRue was clearly seeking losses that had to be restored to the plan, and not benefits that were already held as plan assets but had not been properly distributed. To award someone like LaRue benefits, without first restoring losses to the plan, would diminish the amount of money contained in the trust and available for other participants, contrary to the plan's terms and, in that case, the nature of individual-account (defined contribution) plans.

In any event, even if the concurrence were correct that LaRue's claim could somehow be viewed as a claim grounded in plan terms, Plaintiffs'

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[8] LaRue later withdrew his appeal in the remand proceeding. See BNA Daily Labor Report, 209 DLR A-7 (Oct. 29, 2008).

claim in this case that the ESOP overpaid for the stock that it purchased from Hutchinson cannot be characterized as anything but a 502(a)(2) claim for losses to the Plan. Rather than allege that a particular participant was denied something promised by the Plan, Plaintiffs asserted that Campbell failed to investigate the value of the stock being purchased by the ESOP and failed to ensure that the stock was purchased for not more than adequate consideration. Thus, regardless of its merits on the particular facts of LaRue, Roberts' concurrence has no application to the facts of this case.

To bolster its holding that Plaintiffs were claiming plan benefits rather than asserting a fiduciary breach, the district court misguidedly relied on Coyne & Delany Co. v. Blue Cross & Blue Shield, 102 F.3d 712 (4th Cir. 1996). In Coyne, a plan fiduciary asserted that the improper denial of medical benefits constituted a fiduciary breach claim under sections 502(a)(2) or (a)(3) of ERISA. The Fourth Circuit concluded that because the lower court's order granted individual benefits to a single participant, it was "the quintessential example of relief that is not available under section 502(a)(2)" insofar as it did not inure to the plan's benefit. Id. at 716 (emphasis in original). Instead, the court held that such a claim is properly brought as a section 502(a)(1)(B) claim, although because the plaintiff was a plan fiduciary and not a participant or beneficiary, he was not a proper party to bring such a claim. Id. But while a claim challenging a denial of benefits is a quintessential 502(a)(1)(B) claim, at least when asserted by a proper party, the claim in this case, seeking restoration of losses to the plan to remedy its overpayment for stock, is just as clearly a 502(a)(2) claim. And, contrary to the district court's reading of the case, 2008 WL 2039501 at *6, Coyne stands for the proposition that relief for a denial of benefits is inherently distinct from relief for a fiduciary breach.

Thus, even if the recovery of plan losses translates into an increase in plan assets available for the payment of benefits, a claim that fiduciary misconduct, such as overpayment for company stock, caused losses to the plan is conceptually distinct from a claim that a plan has failed to pay promised benefits. The latter situation results in a loss to the participant but does not diminish (and may actually increase) the amount of assets held by the plan. A claim that a plan overpaid for plan assets (here, company stock), however, obviously entails a claim of losses to the plan; and requiring a 502(a)(1)(B) benefit claim to be brought in that situation is, at best, a prescription for further litigation, because the plan fiduciary might then be obligated to turn around and bring its own section 502(a)(2) suit to restore the losses to the plan to cover the benefits it was required to pay in the 502(a)(1)(B) suit or had paid voluntarily in the claims proceeding. If there was a loss here, it was a loss to the plan. If there was a violation, it was a breach of fiduciary duty for which the fiduciary bears personal liability. Thus, the district court's application of the concurrence in LaRue overlooks the actual holding in LaRue and wrongly conflates the nature of the claims that can be brought under sections 502(a)(2) and 502(a)(1)(B) of ERISA.[9]

The court's error did not stop there, however. Again borrowing from Chief Justice Roberts' concurrence in LaRue, 128 S. Ct. at 1026-27 (citing Varity v. Howe, 516 U.S. 489 (1996)), the district court held that, even if section 502(a)(2) were otherwise available, relief under section 502(a)(2) would not be "appropriate" within the meaning of that provision because section 502(a)(1)(B) offered an adequate remedy. Cook, 2008 WL 2039501,

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[9] In the Secretary's view, unlike a claim for benefits, a fiduciary breach claim does not require exhaustion of remedies. See Held v. Manufacturers Hanover Leasing Corp., 912 F.2d 1197, 1205 (10th Cir.1990); Zipf v. American Tel. & Tel. Co., 799 F.2d 889, 891-94 (3rd Cir.1986); Amaro v. Continental Can Co., 724 F.2d 747, 750-53 (9th Cir.1984); LaRue, 128 S. Ct. at 1027 (Roberts, Chief J., concurring in part and concurring in judgment); but see Lanfear v. Home Depot, Inc., 536 F.3d 1217, 1225 (11th Cir. 2008) (exhaustion requirement applies equally to claims for benefits and claims for violations of ERISA itself). Even if Plaintiffs were to file an administrative claim under some provision of the Plan requiring the ESOP to pay no more than adequate consideration for stock, there is no administrative remedy for the losses suffered by the Plan. Success on an administrative claim would not result in the Plan obtaining the losses from a breaching fiduciary and returning them to the Plan to be distributed among the injured participants. We therefore disagree with the premise of Lanfear that exhaustion of remedies serves a necessary, or even useful, purpose outside the benefit claim context.

at *6. The Secretary disagrees. As we have described at length, sections 502(a)(1)(B) and 502(a)(2) provide for relief for different entities, from different party-defendants, based on different violations, and cannot serve as substitutes for one another. Accordingly, in the instant case, participants' ability to recover plan losses under 502(a)(2) is distinct from whatever right they may have had to bring separate claims under 502(a)(1)(B).[10] The court was therefore incorrect to find that the ability to assert a claim under 502(a)(2) was in any way affected by the availability of relief under 502(a)(1)(B).

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[10] A number of courts of appeals, including this one, have held that plaintiffs cannot seek relief under section 502(a)(3) of ERISA if their claim could have been brought and adequately remedied under section 502(a)(1)(B). See Ogden v. Blue Bell Creameries U.S.C., Inc. 348 F.3d 1284, 1285, 1287-1288 (11th Cir. 2003); see also, e.g., Tackett v. M & G Polymers, USA, LLC, No. 07-4515, 2009 WL 874459, *11 (6th Cir. Apr. 3, 2009). The Secretary of Labor has consistently argued to the contrary that, under ERISA's civil enforcement scheme and consistent with Varity, participants and beneficiaries can simultaneously seek relief under ERISA sections 502(a)(1)(B) and 502(a)(3). In any event, this brief addresses the separate issue of whether relief can be sought in the same case for fiduciary misconduct under section 502(a)(2) and for plan benefits under section 502(a)(1)(B), and does not address the availability of relief under section 502(a)(3) to plaintiffs who are also seeking relief under 502(a)(1)(B).

CONCLUSION

For the reasons discussed above, the Secretary, as amicus curiae, requests that this Court reverse the decision of the district court.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation set forth in FRAP 32(a)(7)(B). This brief contains 6,658 words.

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

The Secretary of Labor, Hilda L. Solis, as amicus curiae in support of appellants, certifies that, as known to her, the parties having an interest in the outcome of the case in addition to the parties included in the first brief are:

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<u>CERTIFICATE OF SERVICE</u>

I hereby certify that I have served a copy of this brief upon all counsel of record, by mailing same, postage prepaid and addressed as follows, on this the 21st day of April, 2009:

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