In The

United States Court of Appeals

for the

First Circuit

Case No. 15-1923

BRIAN O'SHEA, through his Executor Michael O'Shea; MICHAEL O'SHEA, in his personal capacity, on his own behalf as Plan Beneficiary, and on behalf of other Plan Beneficiaries, Meghan O'Shea, John O'Shea and Colleen O'Shea,

Plaintiffs-Appellants,

v.

UPS RETIREMENT PLAN; UNITED PARCEL SERVICE OF AMERICA, INC.; UPS RETIREMENT PLAN ADMINISTRATIVE COMMITTEE,

Defendants-Appellees,

DOE DEFENDANTS 1, 2 AND 3,

Defendants.

Appeal from an Order entered from the United States District Court of Massachusetts, Boston

REPLY BRIEF FOR PLAINTIFFS-APPELLANTS

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I. UPS OVERSTATES THE SCOPE OF AN ADMINISTRATOR'S DISCRETION IN INTERPRETING PLAN TERMS

The O'Sheas explained in their Opening Brief the standards established in this Circuit that govern an administrator's interpretation of plan terms where the administrator has been granted discretion. *See* Opening Brief at pp. 21-24. As explained in the O'Sheas' Opening Brief, interpretive discretion may be granted to an administrator, but the law of this Circuit places clear boundaries on the scope of that discretion. *See id.*

As detailed in the O'Sheas' Opening Brief, this Court directly addressed this issue in *D & H Therapy Associates, LLC v. Boston Mutual Life Ins. Co.*, 640 F.3d 27 (1st Cir. 2011), where the Court provided a detailed review of the standards that govern arbitrary and capricious review in the context of plan interpretation. This Court made clear in *D & H Therapy* that a determination of whether "a plan construction was unreasonable," and therefore arbitrary and capricious, was dependent on a multi-faceted evaluation of the relevant plan terms and how those terms fit together with the facts of the matter before the court. *Id*. at 36. In *D & H Therapy*, this Court found that the administrator's "construction of the ERISA plan at issue stretche[d] beyond the bounds of reasonableness" because the administrator's interpretation failed to align comfortably with the relevant plan terms in light of the facts of the case. *Id* at 38-41. Even though the administrator was granted discretion under the plan, this Court still delved into a textual analysis

of the plan and found that the administrator's interpretation was arbitrary and capricious because it was not sufficiently persuasive given the actual terms used in the plan.

This is a far cry from UPS's overly generous depiction of the breadth of discretion granted to it. UPS asserts that the arbitrary and capricious standard, and the grant of discretionary review provided to the administrator, mean that its decision to deny the annuity payments to the O'Sheas need only be "plausible" and "reasonable" to be upheld.[1] *D & H Therapy* makes clear that nothing could be further from the truth.

In contrast to *D & H Therapy*, the cases relied upon by UPS for its assertion that its decision must be upheld and its interpretation found to not be arbitrary and capricious so long as it is simply reasonable, without any other examination of the administrator's reasoning or determination, solely involve cases explaining the standards that govern judicial review of an administrator's "benefit determinations [that] involve the application of contested facts to uncontested plan terms." *D & H Therapy* at 35. These decisions, and the standard of review applied in them, have no application to the present matter, which does not involve a benefit

[1] *See* UPS's brief at 24(UPS's determination "must be upheld as long as the committee's decision is 'plausible in light of the record as a whole.'"), and at 25 ("the committee's decision does not have to be right; instead the arbitrary and capricious standard simply asks whether the committee's determination was 'reasonable'").

determination involving disputed facts being considered under "uncontested plan terms." *Id*. Instead, the instant appeal is entirely about contested plan terms.

UPS, just like the District Court below,[2] does not apply the appropriate standards that govern an administrator's discretion in interpreting plan terms. As a result, UPS's entire argument in its brief, which is based entirely on an overbroad view of the scope of an administrator's discretion, fails.

II. THIS COURT'S RECENT DECISION IN *NIEBEAUER V. CRANE* REQUIRES OVERTURNING THE DISTRICT COURT'S JUDGMENT

As detailed in the O'Sheas' Opening Brief, the District Court relied on section 5.4 of the plan for its determination, stating that "the most important provision of the plan" for purposes of its ruling was section 5.4. A202. Further,

[2] UPS suggests that the District Court found that the administrator's interpretation was not just plausible but also correct. This is inaccurate. The District Court held that the administrator's decision should be upheld because it met the standard of plausibility that the District Court was applying, and then further stated only that the plan administrator's interpretation "also strikes the court as correct." A202. The District Court clearly applied plausibility as the base level for its determination. The District Court did not analyze whether the plan administrator's interpretation was, in fact, correct under the governing legal standards or under the actual terms of the plan, and instead relied for its decision on its finding that the plan administrator's determination was plausible. Moreover, as discussed in the O'Sheas' Opening Brief and in this reply brief, had the District Court applied those standards, it could not properly have concluded that UPS's interpretation was correct, and any such conclusion by the District Court would have to be reversed as a result.

UPS's argument in its brief is premised almost exclusively on section 5.4 and on the argument that the terms of section 5.4 supposedly mandated denying the annuity payments.

However, when UPS originally denied the O'Sheas' claim for the annuity payments under the plan, UPS did not rely on any portion of section 5.4 and, in fact, did not even consider that provision sufficiently relevant to even warrant mentioning in their letter denying benefits to Mr. O'Shea's beneficiaries. A630. As this Court explained in *Niebeauer v. Crane & Co., Inc*., 783 F 3rd 914, 927(1st Cir. 2015), the notice requirements of ERISA require that a plan administrator's initial decision to deny a claim for benefits explain the basis and justification for the denial to a degree that will allow the plan participant or beneficiary "to address the determinative issues and to have a fair chance to present [his] case" in appealing the denial to the plan administrator. In its initial denial letter, UPS utterly failed to reference section 5.4 at all, yet alone to explain - as it attempts to do in its opposition brief before this Court - how and why the terms of section 5.4 require denying annuity payments to Mr. O'Shea's beneficiaries. This failure on the part of UPS eliminated any possibility that the O'Sheas could address in an appeal to the plan administrator "the determinative issues" – in the words of this Court, *Niebeauer*, 783 F.3d at 927- concerning section 5.4 that UPS relies upon now before this Court.

This failure by UPS deprived the O'Sheas of the opportunity to fairly present to the administrator on an internal administrative appeal the question of whether benefits are due in spite of the language used in section 5.4. There are numerous issues raised by section 5.4 that were never considered as part of the administrative appeal process before the plan administrator as a result. For instance, as is discussed in detail in the O'Sheas' Opening Brief, section 5.4 does not actually contain any terms expressly stating that a participant's death after electing retirement and having his retirement elections approved by UPS eliminates payment of the annuity to his beneficiaries if he dies before the annuity start date. The plan administrator's failure to raise the impact of section 5.4 in the initial denial letter precluded any opportunity for the O'Sheas to challenge that contention as part of the administrative appeal process. This same failure denied the O'Sheas the opportunity to request that the administrator investigate the drafting history, as well as the contemporaneous evidence related to that drafting, in order to determine whether it is appropriate to read such a restriction into section 5.4.

Likewise, it deprived the O'Sheas of the opportunity to request that the administrator investigate, and document in the administrative record, how the plan administrator had interpreted such language in section 5.4 in other prior claims. UPS's handling of prior similar claims may not have been consistent with the

interpretation of section 5.4 relied upon now by UPS, and which was applied by the District Court below.

Furthermore, as is discussed in detail in the O'Sheas' Opening Brief, every single written communication issued by UPS, including the retirement election forms submitted by Mr. O'Shea that were written by UPS and the summary plan description written by UPS, are completely devoid of the restriction on payment of the benefits that UPS in its Opening Brief, and the District Court in its opinion, found to be located in section 5.4. The plan administrator's failure to rely upon section 5.4 in the initial denial letter prevented the O'Sheas from raising this discrepancy and having the plan administrator investigate and determine whether the plan was intended to allow, or instead exclude, payment of the annuity under these circumstances, given what was consistently stated in all plan communications that were ever provided to Mr. O'Shea.

There is no question, under these circumstances, that the O'Sheas were not "able to address the determinative issues and have a fair chance to present [their] case" to the administrator as part of the administrative review of their claim, *Niebeauer*, 783 F.3d at 927, solely because UPS failed to raise, in the initial denial letter, the issues that: (1) it now relies upon to justify its denial of the annuity payments; (2) it relied upon below to defend its denial of the annuity payments; and (3) the District Court relied upon to find in UPS's favor.

Moreover, the simple fact that these issues were then litigated in the District Court after the final decision by UPS on the O'Sheas' claim for the annuity payments did not eliminate the prejudice suffered by the O'Sheas as a result of UPS's violation of its statutory and regulatory obligations. In litigating Count I of the O'Sheas' complaint, which sought the payment of benefits under the terms of the plan, the record before the District Court consisted of the evidence considered by the administrator in reaching its final decision of the O'Sheas' claim for benefits, including their appeal of the plan administrator's initial denial. That record was devoid of key evidence concerning the scope, meaning and prior application of the terms of section 5.4 because UPS did not timely raise the application of that plan term. A617.

Had UPS timely raised the alleged impact of section 5.4, the record in this case would be different and the O'Sheas would have had the opportunity to test UPS's position concerning section 5.4 against the record, both on appeal to the plan administrator and before the District Court. The O'Sheas lost that opportunity, and were therefore prejudiced by UPS's statutory and regulatory violations. The District Court's decision on the benefits claim must therefore be reversed and, at a minimum, the case remanded to the administrator for further proceedings with regard to UPS's claims that section 5.4 requires denying the O'Sheas' claim for benefits.

III. THE PLAN'S LANGUAGE DOES NOT CONTAIN THE RESTRICTION ON PAYMENT OF THE ANNUITY THAT IS CLAIMED BY UPS

In its brief, UPS continually asserts that section 5.4 of the plan precludes payment to surviving beneficiaries of the ten years of guaranteed annuity payments if the retiring participant elects that benefit, elects a retirement date, has his retirement elections approved by the plan administrator, but then dies seven days before the first annuity payment. As is discussed extensively in the O'Sheas' initial brief, the plan never says this, neither in section 5.4 nor anywhere else. As is discussed in detail in the O'Sheas' Opening Brief, none of the plan terms relied upon by UPS at any point in this litigation-including those terms, such as section 5.4, that were never raised in the plan administrator's denial letter-contained any such express restriction. Instead, both UPS in its Opening Brief and the District Court below have read that restriction in by implication.

As discussed in extensive detail in the O'Sheas' Opening Brief, the standards established by this Court in its prior decisions addressing the scope of the discretion granted to plan administrators in interpreting plan terms does not allow UPS to interpret sections 5.4 and 5.6 to preclude payment of the annuity by reading in, by implication, the restrictions set forth in UPS's brief.

Moreover, to the extent that this Court suggested in *Dutkewych v. Standard Ins. Co.*, 781 F.3d 623, 636 (1st Cir.2015), that the principles that govern a plan

administrator's interpretation of a plan term under a discretionary grant of authority is open to further development in the Circuit, both the conclusions of other circuits on this issue and the trust law principles that underlie discretionary review under ERISA preclude a plan administrator, such as UPS, from denying a benefit by reading in language that does not actually exist in a plan. For example, the Sixth Circuit holds that a plan administrator's "discretion to interpret a plan…does not include the authority to add" requirements that cannot be located in the plan's terms itself. *Jones v. Metrolife Insurance Co*., 385 F 3rd 654, 661(6th Cir. 2004). Applying that principle, the Sixth Circuit held in *Jones* that the plan administrator, despite having been granted discretion to interpret the plan, acted arbitrarily and capriciously when it interpreted the relevant plan term "in a manner that adds requirements not found in the plan documents." *Id*. As is discussed in detail in the O'Sheas' Opening Brief, the restriction on the guaranteed annuity payments that UPS claims in its brief are in the plan can, in fact, be located nowhere in the plan's express terms. It instead exists only by implication, at most, or, more accurately, by reading in terms that UPS itself never elected to include in the plan when the plan was written and instituted.

The standards of trust law that underlie arbitrary and capricious review likewise preclude adopting UPS's interpretation of its plan. As this Court has acknowledged, the Supreme Court has held that plan interpretation is controlled by

principles of trust law. *D & H Therapy*, 640 F.3d at 37 .This Court, however, has not delved into the application of those principles to plan interpretation in depth. *See Dutkewych*, 781 F.3d at 636 n.8. Other Circuits, however, as this Court noted in *D & H Therapy*, 640 F.3d at 36-38, have addressed in detail the principles of plan interpretation that are imposed by the law of trusts.

One of the most complete analyses of the question was provided by the United States Court of Appeals for the Eighth Circuit in *Administrative Committee of Wal-Mart Stores, Inc. Associates' Health & Welfare Plan v. Gamboa*, 479 F.3d 538 (8th Cir. 2007). The Court explained that it is necessary to "look to the law of trusts when interpreting ERISA plan documents" and that this requires interpreting the terms "by considering the provisions of the instrument as interpreted in light of all the circumstances and such other evidence of the intention of the settlor with respect to the trust as is not inadmissible." *Id.* at 542 (internal punctuation omitted). "[R]easonableness review of a plan administrator's interpretation" under trust principles requires a court to consider "whether the [administrator's] interpretation renders any plan language internally inconsistent or meaningless, whether the administrator has interpreted the words at issue consistently, whether the interpretation is consistent with the plan's goals, and whether the interpretation conflicts with any substantive or procedural requirements of ERISA." *Id.* (internal citations omitted).

These principles of trust law do not allow a finding that UPS's interpretation of the plan in the instant matter is reasonable. In the first instance, as the Eighth Circuit observed in *Wal-Mart*, trust law demands that the terms be interpreted in light of all of the surrounding circumstances and, most importantly, by considering all relevant evidence of the settlor's intent. Under trust law, it is the settlor's intent that controls the question, not how its lawyers later in litigation seek to interpret the terms of a plan. As discussed in detail in the O'Sheas' Opening Brief, every single written plan communication issued by UPS described the annuity benefit, once selected, as guaranteed, even after death, and none ever stated – or even implied – that this was conditional upon being alive to receive the initial annuity payment. This was true with regard, in particular, to the actual retirement election documents that were created by UPS, provided by UPS to Mr. O'Shea, read and executed by Mr. O'Shea, and formally accepted and approved by UPS. *See* O'Sheas Opening Brief at 40-45.

The Plan does not state that the annuity is lost if the participant does not live until the first annuity payment, nor does it state that the annuity payments are only guaranteed if the participant lives long enough to receive the first annuity payment. Every single other plan related document created by UPS, such as the Summary Plan Description and the retirement election forms, likewise provides only that the annuity is guaranteed and never even suggests that, once the retirement elections

are accepted by UPS, the payments can nonetheless be lost by the beneficiaries if the participant himself was not alive to receive the first of the 120 guaranteed payments. *Id.* UPS's constant and consistent depiction of the annuity payments as guaranteed to the participant and his beneficiaries, without ever stating that the annuity could be lost once elected and retirement approved by UPS, constitutes overwhelming evidence that the intention of the settlor – UPS – was never to eliminate the guaranteed annuity payments under the circumstances of the present matter, where a participant elects the ten year guaranteed annuity, submits retirement election forms to the plan administrator, has his retirement elections approved by the plan administrator, ceases working, but then dies several days before the first annuity payment is due. Trust principles preclude interpreting the plan language in a manner that contradicts all of this surrounding evidence of the settlor's intent.

In fact, all of the specific factors that the Eighth Circuit identified in *Wal-Mart* as being required by trust law to be considered in passing on the reasonableness, under arbitrary and capricious review, of an administrator's interpretation of contested plan terms dictate the conclusion that, under trust law, UPS's interpretation of the plan was arbitrary and capricious. As the *Wal-Mart* court explained, trust law requires that the reasonableness of an administrator's interpretation be considered based upon several specific factors. One is "whether

the [administrator's] interpretation renders any plan language internally inconsistent or meaningless." *Wal-Mart*, 479 F.3d at 542. As discussed in detail in the O'Sheas' Opening Brief, and on a more cursory level in this reply brief, UPS's interpretation simply renders meaningless every single provision of the plan in which UPS "guaranteed" the annuity payments, even though nowhere in the plan's terms does it ever state that death before receipt of the first annuity payment forfeits the benefits. It should not escape this Court's notice that, in their brief, UPS, despite insisting that the plan's terms have exactly that effect, does not direct the Court to any specific plan provision that expressly so states.

A second factor that trust law requires be fully considered is "whether the administrator has interpreted the words at issue consistently." *Id*. As discussed in detail in the O'Sheas' Opening Brief, UPS routinely used the word "guarantee"[3] in the plan to denote that a participant's beneficiaries would receive all remaining annuity payments after death. Nowhere in the plan's terms is there an express limitation, carving out of the word "guarantee" in this context, annuity payments if a participant dies before the first annuity payment but after satisfying all conditions for retirement. UPS used the word "guarantee" throughout the plan in a manner that matches the word's textbook definition as a definitive inviolable promise, and only now, in this litigation, does it claim that the term has a different meaning in

[3] Or, to the same effect, the past tense version, "guaranteed."

the plan if a participant dies before the first annuity payment is made. Allowing UPS to carve up the word "guarantee" so as to have different meanings depending on factual circumstances that occur independent of the plan itself (such as the date of a participant's death) gives rise to a variable usage of that word, which trust law does not allow.

Trust law also required consideration of "whether [UPS's] interpretation is consistent with the plan's goals, and whether the interpretation conflicts with any substantive or procedural requirements of ERISA." *Id.* UPS's interpretation of the plan terms at issue runs contrary to the plan's goals in including that language and to multiple substantive requirements of ERISA.

In the first instance, UPS's interpretation, when combined with UPS's practices with regard to retirement, would, if upheld, place UPS in violation of ERISA's statutory mandate that a plan must be administered "for the exclusive purpose [of] providing benefits to participants and their beneficiaries." 29 U.S.C. §1104. UPS admits, and the District Court found, that it was standard practice for retirees to – just as Mr. O'Shea did – submit retirement papers and cease working, but delay the technical retirement date and the corresponding first annuity payment for several weeks. UPS blessed this practice, knew of it and approved of it. Addendendum 43. UPS cannot, with one hand, have approved this practice and, with the other, have believed that the plan denied payment if the participant died

during the resulting interregnum, as this would have had the effect of encouraging plan participants to – entirely without their knowledge – place their retirement benefits at risk. Such a course of practice and plan interpretation runs counter to the statutory obligation to administer the plan for the purpose of protecting participants' benefits, as it creates a hidden risk of forfeiting benefits, which is exactly what occurred in the instant matter. As the *Wal-Mart* court explained, trust law does not allow for "an interpretation [of plan terms that] conflicts with any substantive or procedural requirements of ERISA," 479 F.3d at 542, and UPS's interpretation of its plan has exactly that impact here.

Further, however, this is not the only provision of ERISA that is contradicted by UPS's interpretation of its plan terms, even though UPS is barred by trust law from interpreting the plan in a manner that contradicts those statutory directives. As discussed in detail in the O'Sheas' Opening Brief, all of the language in the plan that concerns linking benefit payments to the annuity starting date is taken directly from the Retirement Equity Act of 1984, which was added to ERISA by Congress for the express and sole purpose of ensuring that plans provide a retirement annuity to the surviving spouses of plan participants who die prior to retirement. As discussed in detail in the O'Sheas' Opening Brief, UPS relies upon the term Annuity Starting Date in the plan and upon plan terms granting a joint and survivor annuity to a surviving spouse, but those terms are only in the plan because

they are mandated by the Retirement Equity Act and for the sole purpose of effectuating the purposes of that act. There is no reference anywhere in the plan to those terms and provisions having any other purpose and, in fact, the key plan terms at issue in the present matter were copied verbatim from the Retirement Equity Act itself.

The plan terms relied upon by UPS in refusing to pay the annuity to Mr. O'Shea's beneficiaries were therefore clearly included in the plan solely for purposes of effectuating the Retirement Equity Act and of complying with a congressional mandate that plans include the applicable terms for purposes of protecting the income streams of surviving spouses of deceased employees. UPS's interpretation of those plan terms as serving a different purpose – to void Mr. O'Sheas' annuity under circumstances that are not governed by the Retirement Equity Act – is therefore inconsistent with the statute itself, with the purposes of the Retirement Equity Act, and with the reason that the plan terms at issue were placed in the plan in the first place. Trust law, as the Eighth Circuit explained in *Wal-Mart*, does not allow an administrator to interpret plan terms in a manner that contradicts both the plan's goal in using the language in question and the statutory requirements of ERISA itself. UPS's interpretation of the plan does so, and – under trust law – is arbitrary and capricious as a result.

In the end, UPS, in its brief, consistently ascribes to itself a broader freedom of action in interpreting the plan than the law allows. As discussed in the O'Sheas' Opening Brief, the law of this Circuit governing plan interpretation does not give UPS the freedom to apply the plan's terms as loosely as it did, and the District Court should have deemed its interpretation arbitrary and capricious under controlling precedent in this Circuit. Further, as discussed above, the extraordinarily broad scope of discretion that UPS claims for itself in its brief before this Court does not even exist under trust law, which ultimately controls the extent of UPS's discretion in this regard. For all of these reasons, UPS's arguments as to the extent of its discretion in its brief to this Court must be rejected.

IV. THE DISTRICT COURT'S ERRONEOUS DISMISSAL OF COUNT II CANNOT BE AFFIRMED ON ALTERNATIVE GROUNDS

A. Count II Is Not Barred by the Statute of Limitations

UPS argues that this Court should affirm the District Court's dismissal of Count II because, according to UPS, the claims pled in Count II are barred by the applicable statute of limitations. However, UPS relies on the wrong statute of limitations and its argument fails as a result.

UPS claims that the equitable relief claims in Count II of the Complaint are subject to ERISA's statute of limitations, found at ERISA §413, applicable to claims for breach of fiduciary duty. UPS does not cite even one case that so holds. This is because courts throughout the country – including in this District – have instead consistently borrowed the applicable state's statute of limitations for contract claims for purposes of determining the timeliness of claims seeking equitable relief under ERISA §502(a)(3).

The O'Sheas' equitable relief claims seek the value of the annuity benefits lost by them if, as UPS claims, they are not entitled to the payments under the express terms of the plan. UPS claims that the annuity payments are not owed under the plan because Mr. O'Shea died before the first annuity payment, but all of UPS's written communications literally described the payments as guaranteed and none stated that the annuity payments would be lost if Mr. O'Shea died before receiving the first annuity payment. If informed that the plan did not require payment of the annuity to his survivors if he died before the first payment, as UPS currently claims, Mr. O'Shea would never have delayed receipt of payments for over two months, given that he was terminally ill and could not know whether he would live until the initial payment date that he selected based on the information and written communications provided by UPS. In light of this, the O'Sheas' equitable relief claims in Count II sought to have the amount of the benefits paid to

them either on the basis that UPS is estopped from refusing to pay those benefits, or must pay them as a surcharge based on misleading statements made by UPS.

Equitable relief claims of this nature, which seek recovery equivalent to the benefits lost by the misleading statements of the plan administrator, are not governed by ERISA's statute of limitations for breach of fiduciary duty claims but, instead, by the applicable state's statute of limitations governing breach of contract claims. This widely accepted principle of law has been applied by federal courts across the country, including the district courts of this Circuit, and, *sub silentio*, this Circuit itself. For example, the Western District of Wisconsin addressed this question last year in considering a suit seeking additional benefit payments based on a series of equitable relief claims related to plan communications, notices and amendments. *Johnson v. Meriter Health Servs. Employee Ret. Plan*, 29 F. Supp. 3d 1175, 1181-82, 1184 (W.D. Wis. 2014). The *Johnson* court held that "ERISA does not provide an express statute of limitations for these claims," that "instead, courts look to the most analogous statute of limitations from state law" and that "Wisconsin's six-year statute of limitations for breach of contract claims should apply to plaintiffs' claims" seeking to recover plan benefits by means of equitable relief claims under ERISA §502(a)(3). *Id*. at 1184.

Similarly, in *Gashlin v. Prudential Ins. Co. of Am. Ret. Sys. for U.S. Employees & Special Agents*, 286 F. Supp. 2d 407 (D.N.J. 2003), the District of

New Jersey was presented with an action that, identical to the instant matter, alleged both a claim for benefits and a claim for equitable estoppel under ERISA. The Court held that both claims were subject to the "state statute of limitations for contract claims." *Id*. at 421.

Likewise, in *Bond v. Marriott Int'l, Inc*., 971 F. Supp. 2d 480 (D. Md. 2013), *aff'd* in relevant part, 2016 WL 360801 (4th Cir. 2016), "the Plaintiffs ask[ed] the Court for the following relief: (1) to declare that the plan is subject to ERISA's substantive requirements; (2) to enjoin Marriott from continuing to administer the plan in violation of ERISA; (3) to order Marriott to reform the plan to comply with ERISA's substantive requirements; and (4) to order Marriott to recalculate and distribute additional benefits under the reformed, ERISA-compliant plan terms." *Id*. at 488. The Court held that ERISA did not provide a statute of limitations for such equitable relief claims brought under ERISA §502(a)(3) and that, instead, the claims were governed by the "most analogous state [statute] of limitations [which was] Maryland's statute of limitation[s] for breach of contract actions." *Id.*[4]

District Courts in this Circuit have, in turn, likewise recognized and applied this principle, holding that it is Massachusetts' six year statute of limitations for

[4] On January 29, 2016, the United States Court of Appeals for the Fourth Circuit affirmed the District Court's holding that such equitable relief claims under ERISA are governed by the applicable state's statute of limitations for contract actions. *Bond*, 2016 WL 360801 at *4 ("Maryland's three year statute of limitations for contract actions applies").

contract actions that applies to claims for equitable relief under §502(a)(3) of ERISA. *E.g. Laurenzano v. Blue Cross and Blue Shield of Massachusetts, Inc. Retirement Income Trust*, 134 F.Supp.2d 189, 205 (D.Mass. 2001).

This Court recently adopted this approach to the question of the applicable statute of limitations for equitable relief claims brought under ERISA §502(a)(3). In *Riley v. Metro. Life Ins. Co.*, 971 F. Supp. 2d 186 (D.Mass. 2013) *aff'd*, 744 F.3d 241 (1st Cir. 2014), the District Court explained that it was unclear whether the plaintiff's claims "to correct MetLife's miscalculation of his long-term disability benefits, and to recover resulting unpaid benefits" was brought under ERISA §502(a)(1)(B) (which allows a plan participant to recover benefits due to him under the terms of his plan) or ERISA §502(a)(3) (which allows a plan participant to obtain appropriate equitable relief). *Riley*, 971 F.Supp.2d at 189. The District Court found that under both theories of liability, the plaintiff's "claim is most closely analogous to a claim for breach of contract, and thus the six-year statute of limitations [for breach of contract actions] under Massachusetts law applies." *Id.* at 189. This Court, in turn, found that the "six-year period Massachusetts applies to breach of contract claims" was applicable. *Riley v. Metro. Life Ins. Co.*, 744 F.3d 241, 244 (1st Cir.) cert. denied, 135 S. Ct. 94, 190 L. Ed. 2d 39 (2014).

Case law, including in this Circuit, clearly establishes that the state statute of limitations applicable to contract actions governs the equitable relief claims contained in Count II of the Complaint. ERISA §413 simply is inapplicable as a matter of law.[5]

B. *Varity Corp. v. Howe* Does Not Provide an Alternative Ground for Affirming the Dismissal

There is no validity to UPS's argument that Count II, which sought equitable relief, had to be dismissed because the O'Sheas also alleged a claim in Count I for benefits under ERISA §502(a)(1)(B). The Supreme Court did not hold in *Varity Corp. v. Howe*, 516 U.S. 489 (1996), that a participant or beneficiary cannot make both claims in a complaint, but only held that if the participant or beneficiary could recover under ERISA §502(a)(1)(B), then she could not also recover under ERISA §502(a)(3). Court after court has recognized this point.

For example, the United States Court of Appeals for the Eighth Circuit analyzed this exact argument in *Silva v. Metro. Life Ins. Co.*, 762 F.3d 711 (8th Cir. 2014), finding that a participant could allege both claims in a complaint, but

[5] UPS's assertion that, if a state law statute of limitation is to be borrowed, it should be Massachusetts' statute of limitations for negligent misrepresentation claims, fails for the same reason as does its argument that ERISA §413 applies. All relevant case law, including in this Circuit, requires application of Massachusetts' statute of limitations for contract claims.

could only recover under one. The Eighth Circuit explained that *Varity* merely "prohibit[s] duplicate recoveries when a more specific section of the statute, such as § 1132(a)(1)(B),[6] provides a remedy similar to what the plaintiff seeks under the equitable catchall provision." *Id.* at 726. Explaining that the Supreme Court's decision in *Varity* did not preclude pleading both claims in the alternative in the complaint, and then waiting for the court to decide under which relief should be granted, the Eighth Circuit stated:

> *Varity Corp.* does not hold that when an ERISA plaintiff alleges facts supporting both a § 1132(a)(1)(B) and a § 1132(a)(3) claim, a court must or should grant a defendant's Rule 12(b)(6) motion to dismiss the latter claim. *Varity Corp.* did not deal with pleading but rather with relief.
>
> Further, nothing in *Varity Corp*. overrules federal pleading rules. And, under such rules, a plaintiff may plead claims hypothetically or alternatively. To dismiss an ERISA plaintiff's § 1132(a)(3) claim as duplicative at the pleading stage of a case would, in effect, require the plaintiff to elect a legal theory and would, therefore, violate the Federal Rules of Civil Procedure.

Id. (internal punctuation and citation omitted).

The District Court below reached the same interpretation of *Varity* fifteen years ago, in *Laurenzano v. Blue Cross and Blue Shield of Massachusetts, Inc. Retirement Income Trust*, 134F.Supp.2d 189 (D.Mass.2001). In *Laurenzano*, the defendant, Blue Cross, argued that the plaintiff had made a claim for benefits under

[6] Practitioners and courts use references to §502 and to §1132 – which are, in fact, cites to the same statutory section of ERISA – interchangeably. The O'Sheas have not edited out references to §1132 in quotations from cases contained in this reply brief.

§502(a)(1)(B) in the complaint and therefore, pursuant to *Varity*, could not also bring a claim for equitable relief under §502(a)(3). *Laurenzano*, 134 F. Supp.2d at 194-95. The District Court rejected the argument, holding that *Varity* did not preclude a plaintiff from pleading both claims in the alternative and only precluded a plaintiff from recovering under both claims. The Court explained that the argument raised by the defendant in that action, and by UPS here, actually "flies in the face of Varity, which specifically allowed relief under ERISA § 502(a)(3) because the plaintiffs could not proceed under ERISA § 502(a)(1)(B)" and held that "Varity does not force a plaintiff to elect his remedy before filing a complaint, but rather prohibits a plaintiff from receiving equitable relief under ERISA § 502(a)(3) in addition to some other form of relief." *Id.*

Court after court has now found that, consistent with both *Silva* and *Laurenzano*, a plaintiff suing under ERISA may bring both claims in a complaint, that the equitable relief claim is not subject to dismissal under those circumstances, and that, instead, *Varity* means simply that the plaintiff may recover under only one of the two theories. For instance, the Northern District of California held in 2014 that a "claim for relief under section (a)(1)(B) does not automatically preclude a claim under section (a)(3), particularly at the pleading stage," and that instead "(a)(3) claims remain viable even when an (a)(1)(B) claim is asserted."

Zisk v. Gannett Co. Income Prot. Plan, 73 F. Supp. 3d 1115, 1118 (N.D. Cal. 2014).

The Northern District of Alabama reached the same conclusion in 2015 in *Newton v. Hartford Life & Acc. Ins. Co*., 2015 WL 1498868, at *3-4 (N.D. Ala. 2015). The Court recognized that, under *Varity*, equitable relief under ERISA §502(a)(3) is "available only when a plaintiff has no other claim for relief under ERISA," but rejected enforcement of this rule at the pleadings stage. *Newton*, 2015 WL 1498868, at *3-4. The Court held that the plaintiff is allowed to "plead dual claims . . . even though the plaintiffs would ultimately be barred from recovering under both (a)(1)(B) and (a)(3) at summary judgment or trial, [and] [a]t the end of the day . . . will not be able to recover under both theories." *Id.*

Indeed, the Supreme Court's seminal decision on equitable relief claims under ERISA, *CIGNA Corp. v. Amara*, 563 U.S. 421, 131 S. Ct. 1866, 179 L. Ed. 2d 843 (2011), which affirmed the expansive nature of such relief, soundly supports the interpretation given to *Varity* by these numerous courts. In *Amara*, the Supreme Court held that the plaintiffs could not recover under §502(a)(1)(B) because they were not entitled to the benefits they sought under the actual terms of the plan. The Supreme Court then declared that the appropriate remedy could instead be found under the equitable relief prong, §502(a)(3). The Supreme Court did not find that the existence of a claim under the denial of benefits prong

precluded the plaintiffs from pursuing equitable relief but that instead, once it was determined that benefits could not be awarded under the denial of benefits remedial provision, the plaintiffs could instead look to the equitable relief prong of the statute's remedial provisions. *See Silva*, 762 F.3d at 726-27 ("[t]he Court [in *Amara*] addressed the issue in terms of available relief and did not say that plaintiffs would be barred from initially bringing a claim under the § 1132(a)(3) catchall provision simply because they had already brought a claim under the more specific portion of the statute, § 1132(a)(1)(B)").

Contrary to the arguments made by UPS, this Circuit has never held that a plaintiff cannot plead both claims in the alternative, or that a District Court in this Circuit must dismiss an equitable relief claim under ERISA §502(a)(3) simply because it is pled in a complaint alongside a claim for benefits under ERISA §502(a)(1)(B). UPS cites to two decisions of this Circuit and a decision from the District Court below in support of its argument, but none actually address the point at issue.

Mauser v. Raytheon Co. Pension Plan for Salaried Employees, 239 F.3d 51 (1st Cir.2001) was an appeal from the entry of summary judgment below at the District Court, in favor of the plan. This Court nowhere discussed the issue presented by this appeal, which is whether a complaint can plead both a denial of benefits claim and a claim for equitable relief, leaving it to the merits stage to

decide under which, but not both, theories the plaintiff could recover. This Court, in fact, was not even considering the intersection of those two types of claims when it referred in *Mauser* to the Supreme Court's decision in *Varity*, but was instead considering the relationship between certain claims for breach of fiduciary duty and claims alleging estoppel. This Court cited *Varity* simply in recognition of the "the general principle reiterated in *Varity* and in *Bruch* that we should avoid creating duplicative remedies for violations of ERISA's provisions." *Id*. at 58.

In *LaRocca v. Borden, Inc.*, 276 F.3d 22 (1st Cir. 2002), this Court did not hold that *Varity* bars a participant from bringing claims at the same time for both denial of benefits under §502(a)(1)(B) and equitable relief under §502(a)(3). This Court instead held that participants who were entitled to plan benefits under the plan's actual terms, and thus able to recover under §502(a)(1)(B), could not also sustain a claim for equitable relief under §502(a)(3) because *Varity* barred a plaintiff from obtaining equitable relief when the plaintiff could obtain benefits under the denial of benefits prong of the statute. *LaRocca*, 276 F.3d at 28. Moreover, this Court was considering a decision on the merits below and not, as here, the question of whether both such claims could be pled side by side at the outset of a case.

The only other case relied upon by UPS, *Joyce v. John Hancock Financial Services, Inc.*, 462 F.Supp.2d 192 (D.Mass. 2006), provides no more support than

do *Mauser* and *LaRocca* for UPS's argument. *Joyce* was a decision on the merits, in response to the parties' cross-motions for summary judgment. The District Court was not deciding a motion to dismiss and never considered the question that is presented by UPS's arguments in the instant appeal, which is whether a plaintiff can plead denial of benefit and equitable relief claims in the alternative in a complaint, and then recover only under one of the claims at the merits stage of the litigation. Further, in *Joyce*, the District Court found against the plaintiff because his claim for benefits failed on the merits, and then found against the plaintiff on the equitable relief claim as well because his equitable relief claim was simply identical to the benefits claim. This is not and was not, the case in the instant matter where the denial of benefits claim and the equitable relief claim are premised on different theories, evidence and factual predicates: the O'Sheas' denial of benefits claim is based on the argument that the plan's terms themselves require payment of the annuity, and their equitable relief claim is premised on the fact that, if not, Mr. O'Shea was not told the truth about his benefits and UPS should be estopped from refusing to pay the benefits in question and/or required to disgorge the additional money it kept by avoiding paying the annuity to Mr. O'Shea's beneficiaries.

V. CONCLUSION

For the additional reasons discussed above, this Court should reverse the District Court's decisions in favor of UPS.

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1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(a)(B) because this brief contains 6,995 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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Dated: February 8, 2016

CERTIFICATE OF FILING AND SERVICE

I, Stephen D. Rosenberg, hereby certify that, on this 8th day of February, 2016, I electronically filed the foregoing document with the United States Court of Appeals for the First Circuit by using the CM/ECF system. I certify that the following parties or their counsel of record are registered ECF filers and that they will be served by the CM/ECF system: J. Timothy McDonald, Megan S. Glowacki and James F. Radke, counsel for UPS Retirement Plan, United Parcel Service of America, Inc., and UPS Retirement Plan Administrative Committee.

/s/ *STEPHEN D. ROSENBERG*
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