No. 15-163

# In The Supreme Court of the United States

TODD ROCHOW and JOHN ROCHOW,
Personal Representatives of the
Estate of Daniel J. Rochow,

*Petitioners,*

v.

LIFE INSURANCE COMPANY
OF NORTH AMERICA,

*Respondent.*

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

## BRIEF IN OPPOSITION


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## QUESTION PRESENTED

Whether the "catchall" provision for "appropriate equitable relief" in 29 U.S.C. § 1132(a)(3)—ERISA § 502(a)(3)—allows disgorgement of profits as a remedy for a breach of fiduciary duty based exclusively on a wrongful denial of benefits when the denial of benefits already is remediable (and remedied) under 29 U.S.C. § 1132(a)(1)(B)—ERISA § 502(a)(1)(B).

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## STATEMENT

While one might (understandably) not realize it from the petition for certiorari, this case is not about "the appropriate type of redress addressing the delay between the occurrence and correction of an ERISA violation." Pet. 15. The petition poses a question the court of appeals was not asked, did not answer, and is premature besides. Even a cursory analysis of the decision below makes plain that this case has never been about the overbroad category of "redress" for various unspecified violations of ERISA. It is about the much narrower question whether a plaintiff may bring a claim for the denial of ERISA benefits—under 29 U.S.C. § 502(a)(1)(B)—and an equitable claim for breach of fiduciary duty seeking disgorgement of profits—under 29 U.S.C. § 502(a)(3)—based on the same denial of benefits. There is no split on that issue, which the courts of appeals have uniformly, consistently, and correctly answered "no" in accord with the text and structure of ERISA, this Court's precedents, and sound public policy.

To manufacture a split, the petition resorts to muddling two distinct concepts—prejudgment interest and disgorgement. Prejudgment interest reflects the basic principle of the time value of money—i.e., that a dollar today is worth more than a dollar tomorrow. Because a denial of benefits will cost the beneficiary more than just the face value of his benefits claim, making the beneficiary whole requires additional monies to compensate for lost interest. See, e.g., *West Virginia* v. *United States*, 479 U.S. 305, 310

(1987) ("Prejudgment interest is an element of complete compensation."). Prejudgment interest also prevents the fiduciary from being unjustly enriched at the beneficiary's expense. *Trustmark Life Ins. Co.* v. *Univ. of Chicago Hosps.*, 207 F.3d 876, 885 (7th Cir. 2000). It is not, however, punitive. See *Gen. Motors Corp.* v. *Devex Corp.*, 461 U.S. 648, 656 n.10 (1983) ("The traditional view, which treated prejudgment interest as a penalty awarded on the basis of the defendant's conduct, has long been criticized on the ground that prejudgment interest represents 'delay damages' and should be awarded as a component of full compensation.").

Disgorgement of profits is an entirely different concept. It involves paying the beneficiary any money made on the profit of the withheld benefits and, unlike prejudgment interest, is only paid if a profit was made. This equitable concept, unlike prejudgment interest, is punitive and perhaps makes sense in cases where a fiduciary's misconduct is tied to something beyond a dispute about plan coverage (such as a prohibited transaction or a fiduciary breach actionable under 29 U.S.C. § 1109). See, e.g., *Edmonson* v. *Lincoln Nat'l Life Ins. Co.*, 725 F.3d 406, 412 (3d Cir. 2013) (seeking relief under § 502(a)(3) for self-dealing actions not taken for beneficiary's interest), cert. denied, 134 S. Ct. 2291 (2014).

But without exception, courts have refused to allow double-dipping of ERISA's statutory enforcement provisions to award disgorgement under § 503(a)(3) when, as here, the alleged breach consists solely of

the denial of benefits actionable under § 502(a)(1)(B). That is not surprising given this Court's teaching that when there are two different potential ERISA violations, the availability of a legal remedy for one violation confirms the unavailability of an additional equitable remedy for the other violation. *Varity Corp.* v. *Howe*, 516 U.S. 489, 512-15 (1996). With no split or conflict on that issue, and no dispute that a prevailing beneficiary is entitled to prejudgment interest on an (a)(1)(B) award, there is no reason for this Court's review.

Even if there were a split, this case would be a poor vehicle for resolving it. As petitioner himself explained in the court of appeals, the facts of this case are "extraordinary" and the issue arises infrequently. See Appellees' Supplemental *En Banc* Brief, *Rochow* v. *Life Ins. Co. of N. Am.*, 780 F.3d 364 (6th Cir. 2015) (*en banc*) (No. 12-2074), at 8, 19 [hereinafter Appellees' Supplemental *En Banc* Brief]. The case is interlocutory (the amount of prejudgment interest has not been determined yet) and ongoing proceedings in the district court may obviate the need for this Court's review. And even to reach the question presented, this Court would first need to resolve a factbound, splitless jurisdictional issue. For all these reasons, the petition should be denied.

1. In December 2002, Daniel Rochow filed an administrative claim for long-term disability benefits. App. 4a. Respondent Life Insurance Company of North America (LINA) denied the claim. *Id.* at 124a-27a. After exhausting the administrative appeal

process, Rochow filed suit in September 2004 challenging the denial of benefits. *Id.* at 5a, 127a-28a. Rochow asserted two claims: (1) a claim for disability benefits under § 1132(a)(1)(B); and (2) a claim for breach of fiduciary duty under § 1132(a)(3) based on the same denial of benefits. *Id.* at 28a.[1]

ERISA § 502(a)(1)(B) provides for a civil action to 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." 29 U.S.C. § 1132(a)(1)(B).

ERISA § 502(a)(3) allows "a participant, beneficiary, or fiduciary" to enjoin acts that violate ERISA or "to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan." 29 U.S.C. § 1132(a)(3).

The parties, as is common in denial of benefits cases, took no discovery and filed cross-motions for summary judgment based on the administrative record. Defendant's Motion for Summary Judgment, RE 11, Page ID # 32-51; Plaintiff's Motion for Summary

[1] Rochow died while this litigation was pending, and "the representative of his estate, Patrick Rochow, was substituted as plaintiff * * * * Later, Todd R. Rochow and John D. Rochow were substituted as administrators of [the] estate and as plaintiffs in this case" (petitioners in this Court). App. 7a n.1. For consistency, this brief refers to petitioners collectively as "Rochow" as the court of appeals did below.

Judgment, RE 12, Page ID # 52-68. Rochow asserted in his motion—styled as a motion for partial summary judgment—"only that LINA erroneously denied him benefits pursuant to § 1132(a)(1)(B)." App. 29a. While the relief sought included "[a] full and accurate accounting," it was an accounting of the disability benefit computations "so that Plaintiff may ascertain that his benefits are being paid in the proper amount." *Id.* at 29a n.1. The breach of fiduciary duty claim was neither briefed nor argued to the district court at that time. *Ibid.*

The district court granted Rochow's motion for summary judgment, ruling that LINA's benefit determination was "arbitrary and capricious and unsupported by the administrative record." *Id.* at 127a. Though noting that "the fact that [Rochow] was able to work [during the period for which he claimed total disability benefits] was evidence for the Defense," the court ruled in Rochow's favor nonetheless. *Id.* at 128a.

The same day, the district court entered a Rule 58 final judgment ordering the case "DISMISSED," and the judgment was appealed to the Sixth Circuit pursuant to 28 U.S.C. § 1291. *Id.* at 29a.

2. On appeal in *Rochow I*, the Sixth Circuit affirmed the district court's judgment in its entirety. *Rochow* v. *Life Ins. Co. of N. Am.*, 482 F.3d 860 (6th Cir. 2007) (*Rochow I*); App. 6a. Applying the standard of review set out in this Court's decision in *Firestone Tire & Rubber Co.* v. *Bruch*, 489 U.S. 101, 115 (1989),

the court of appeals concluded that the record "support[ed] the district court's decision that the Plan Administrator's denial of [petitioner's] claims was arbitrary and capricious." App. 129a-30a. The district court's order was affirmed with no portion remanded to the district court. *Id.* at 131a.

3. Over a year and a half after the mandate issued from *Rochow I*, Rochow sought to revive the breach of fiduciary duty claim and asked the district court to award an additional "disgorgement of profits" remedy on that claim under § 502(a)(3). App. 8a. Specifically, Rochow argued that LINA's decision to deny benefits (already adjudicated before the district court and the Sixth Circuit) also was a breach of fiduciary duty. *Ibid.* The district court granted Rochow's motion for an equitable accounting of profits and disgorgement. *Ibid.* The district court then approved Rochow's calculation of the amount and ordered disgorgement of almost $4 million. *Id.* at 10a. A divided panel of the Sixth Circuit affirmed that decision in *Rochow II*, "holding that disgorgement was properly ordered under ERISA § 502(a)(3) for LINA's breach of fiduciary duty." *Rochow* v. *Life Ins. Co. of N. Am.*, 737 F.3d 415 (6th Cir. 2013) (*Rochow II*); App. 11a.

4. The Sixth Circuit granted rehearing *en banc* to determine "essentially one issue[:]" whether Rochow was "entitled to recover under both ERISA § 502(a)(1)(B) and § 502(a)(3) for LINA's arbitrary and capricious denial of long-term disability benefits." App. 11a. In answering no to that question, the majority (in an

opinion by Judge McKeague) assumed not only that the district court had made a finding that LINA breached a fiduciary duty owed to Rochow, but also (evidently) that the finding was still reviewable even after the final judgment and issuance of the mandate in *Rochow I*. *Id.* at 12a-13a n.3. Even so, the court held that Rochow was "made whole under § 502(a)(1)(B) through recovery of his disability benefits and attorney's fees, and potential recovery of prejudgment interest." *Id.* at 14a. Allowing recovery of "disgorged profits under § 502(a)(3), based on the claim that the wrongful denial of benefits also constituted a breach of fiduciary duty, would * * * result in an impermissible duplicative recovery." *Ibid.*

The *en banc* majority relied heavily on this Court's precedent in *Varity Corp.*, noting that "§ 502(a)(3) 'functions as a safety net, offering appropriate equitable relief for injuries caused by violations that § 502 does not elsewhere adequately remedy.'" *Id.* at 15a (quoting *Varity Corp.*, 516 U.S. at 513). The majority went on to hold that this Court limited the § 502(a)(3) "expansion of ERISA coverage by noting that 'where Congress elsewhere provided *adequate* relief for a beneficiary's *injury*, there will likely be *no need* for further equitable relief.'" *Ibid.* (quoting *Varity Corp.*, 516 U.S. at 515). In sum, the majority held that "a claimant cannot pursue a breach-of-fiduciary-duty claim under § 502(a)(3) based solely on an arbitrary and capricious denial of benefits where the § 502(a)(1)(B) remedy is adequate to make the claimant whole." *Id.* at 16a. The majority

reasoned that if disgorgement were available for every arbitrary and capricious denial of benefits, equitable relief would be virtually always available —a result "plainly beyond and inconsistent with ERISA's purpose to make claimants whole." *Ibid.*

The *en banc* majority rejected Rochow's argument that disgorgement was necessary to remedy "an injury entirely distinct from the injury remedied by recovery of his benefits." *Id.* at 21a. Though Rochow claimed a "second 'injury' when LINA used the funds it owed him to generate $3.7 million in profits for its own account without remitting the profits to him," the majority recognized that "in an action for wrongful denial of benefits, * * * the denial of benefits *necessarily* results in a continued withholding of benefits until the denial is either finalized or rectified." *Ibid.* (emphasis added). Rochow's loss was not altered by LINA's use of the withheld benefits and there was no theory under which the § 502(a)(1)(B) remedy did not make him whole. *Id.* at 21a-22a. Because that remedy was not inadequate, "it follows that permitting Rochow to obtain further equitable relief for the same injury under § 502(a)(3) would contravene the scheme established by Congress as well as the Supreme Court's teaching in *Varity*." *Id.* at 22a.

The *en banc* majority rejected Rochow's argument that under this Court's decision in *CIGNA Corp.* v. *Amara*, 131 S. Ct. 1866, 1881 (2011), a second injury is unnecessary. *Id.* at 23a. The majority reasoned that while *Amara* indisputably holds "that 'appropriate

equitable relief' may be obtained under § 502(a)(3) to redress an ERISA violation by a plan fiduciary," Rochow "did not suffer an injury remediable under § 502(a)(3) *in this case*. Rochow suffered the wrongful denial of his benefits, an injury adequately remedied under § 502(a)(1)(B)." *Ibid.* (emphasis added).

The majority emphasized that Rochow can still seek prejudgment interest on the § 502(a)(1)(B) claim, but only as a compensatory measure to be awarded in the district court's discretion. *Id.* at 25a-26a. "An excessive prejudgment interest rate would 'contravene ERISA's remedial goal of simply placing the plaintiff in the position he or she would have occupied but for the defendant's wrongdoing.'" *Id.* at 27a (quoting *Schumacher* v. *AK Steel Corp. Ret. Accumulation Pension Plan*, 711 F.3d 675, 686 (6th Cir. 2013)).[2]

Judge Gibbons, joined by Judges Batchelder and Cook, wrote separately to explain that while the majority's "reasoning [wa]s entirely correct" in her view, she would have dismissed the claim for disgorgement on jurisdictional grounds. *Id.* at 2a, 28a. Because Rochow abandoned that claim by not seeking its

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[2] Rochow did not argue in the Sixth Circuit about the amount of prejudgment interest available for the denial of benefits claim or that Sixth Circuit law regarding the methodology for determining an appropriate rate was incorrect. Here, moreover, Rochow stipulated in the district court that "any determination with regard to the awarding of interest under ERICA [sic] is discretionary," a stipulation that is fully consistent with the Sixth Circuit's *en banc* opinion. See Stipulation and Order, RE 33, Page ID # 168-69.

resolution after the summary judgment order but before the Sixth Circuit's affirmance and appellate mandate, Judge Gibbons would have held that the district court "violated the mandate rule when it ordered disgorgement." *Id.* at 32a.[3]

## REASONS FOR DENYING THE PETITION

### I. The Sixth Circuit's Rejection Of Duplicative Relief Is Consistent With Other Circuits.

No court has ever held that disgorgement is an available equitable remedy under ERISA § 502(a)(3) for a denial of benefits remedied under ERISA § 502(a)(1)(B). Instead, many courts have expressly noted that prejudgment interest—which all courts allow—is the proper means of avoiding any unjust enrichment. See, e.g., *Trustmark Life Ins.*, 207 F.3d at 885. Thus no court has viewed disgorgement as "appropriate equitable relief" where, as here, only a denial of benefits claim is at stake. Rochow's alleged circuit split rests on a mischaracterization of what the Sixth Circuit actually held in this case, together with a misreading of what courts have actually held in other cases. Rochow's alleged split is illusory and the petition should be denied for that reason alone.

[3] Five judges dissented, explaining that they would have allowed disgorgement, App. 2a, 71a, but would have vacated and remanded for the district court to rectify several errors in calculating the amount. *Id.* at 70a-71a.

First, Rochow mischaracterizes what the Sixth Circuit did in this case. The assertion that courts in the Sixth Circuit "may not—in addition to ordering payment of improperly withheld benefits—adopt a remedy intended to prevent unjust enrichment" (at 17) is demonstrably false. Courts in the Sixth Circuit routinely award prejudgment interest on these claims. See, e.g., App. 27a-28a. The courts also award remedies under § 502(a)(3) for fiduciary breaches, provided they are separate from denials of benefits. See, e.g., *Stiso* v. *Int'l Steel Grp.*, 604 F.App'x 494, 500 n.4 (6th Cir. 2015).

But no court—in the Sixth Circuit or anywhere else—has ever allowed a plaintiff the remedy of disgorgement where, as here, the sole injury is the denial of benefits. That is where, as here, the fiduciary's act violates § 502(a)(1)(B), the remedy is the one set forth in the statute and courts presume that Congress's chosen remedy is sufficient. App. 15a. This is why the *en banc* court specifically stated that "a claimant cannot pursue a breach-of-fiduciary-duty claim under § 502(a)(3) *based solely* on an arbitrary and capricious denial of benefits where the § 502(a)(1)(B) remedy is adequate to make the claimant whole." *Id.* at 16a (emphasis added).

This distinction is critical because, as Rochow expressly argued in the Sixth Circuit but implicitly assumes here, his theory is that the undisgorged profits that necessarily result from a denial of benefits is a separate injury distinct from the denial of benefits. *Id.* at 21a. But the Sixth Circuit rejected this circular

logic by recognizing that a § 502(a)(1)(B) claim "*necessarily* results in a continued withholding of benefits until the denial is either finalized or rectified." *Ibid.* Indeed, the Sixth Circuit has since recognized the narrow scope of its holding in *Rochow* in a way that further undermines the claimed split.[4]

The Sixth Circuit thus recognizes that disgorgement of profits may be a remedy available under ERISA in appropriate circumstances, but not where the only alleged conduct is a denial of benefits remediable under § 502(a)(1)(B). See, e.g., *Marks* v. *Newcourt Credit Grp., Inc.*, 342 F.3d 444, 454 (6th Cir. 2003) ("[A] participant cannot seek equitable relief for a breach of fiduciary duty under the catchall provision of § 502(a)(3) if the alleged violations are

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[4] See *Stiso*, 604 F.App'x at 500 n.4 ("Our court's recent decision in *Rochow* v. *Life Insurance Company of North America*, 780 F.3d 364 (6th Cir. 2015) (*en banc*), does not control. There, we held that a plan participant could not recover both plan benefits under § 502(a)(1)(B) and disgorgement of the defendant's profits under § 502(a)(3) for a single injury. *Id.* at 370-74. Here, plaintiff seeks one remedy under § 502(a)(3) for one injury—the defendants' breach of fiduciary duty in providing a summary plan description to plan participants that did not fully and accurately communicate the plan provisions. This path to equitable relief was expressly recognized in *Amara*, 131 S. Ct. at 1880-82."); see also *Pearce* v. *Chrysler Grp., L.L.C. Pension Plan*, No. 13-2374, 2015 WL 3797385, at *7 (6th Cir. June 18, 2015) (allowing claim under § 502(a)(3) based on conflict between plan and summary plan description of plan where the plaintiff was not entitled to benefits under the plan terms, but the "conflict between the [plan] and the [summary plan description] permits [plaintiff] to seek equitable relief under ERISA § 502(a)(3).").

adequately remedied under other provisions of § 502."); *Wilkins* v. *Baptist Healthcare Sys., Inc.*, 150 F.3d 609, 615 (6th Cir. 1998); see also *McDannold* v. *Star Bank*, 261 F.3d 478, 486 (6th Cir. 2001) (noting that "authority within this Circuit * * * permit[s] an action for disgorgement of profits against an ERISA non-fiduciary"). The Sixth Circuit's approach is consistent with that of every other court—as evidenced most clearly by Rochow's inability to cite a single case in which any court has ever allowed disgorgement where the sole injury is a denial of benefits.

To manufacture a split nonetheless, Rochow resorts to over-reading the cases he cites in support of his argument that § 502(a)(3)'s "appropriate equitable remedy" should include disgorgement even where § 502(a)(1)(B) has provided a remedy. See Pet. 18-26. In particular, he seizes on language in those opinions discussing the need to avoid unjust enrichment. See, e.g., *id.* at 19 (citing Third Circuit's explanation that prejudgment interest "make[s] the claimant whole and prevent[s] unjust enrichment"). But those courts were not awarding disgorgement—they were simply explaining the uncontroversial principle that an award of prejudgment interest can also serve the purpose of avoiding unjust enrichment. *Ibid.*

Thus, while Rochow is correct that the Third Circuit in *Skredtvedt* v. *E.I. DuPont de Nemours*, 372 F.3d 193, 209 (3d Cir. 2004), *Fotta* v. *Trustees of United Mine Workers of America*, 165 F.3d 209, 211 (3d Cir. 1998), and *Anthuis* v. *Cold Industries Operating Corp.*, 971 F.2d 999, 1010 (3d Cir. 1992), mentioned

unjust enrichment as a reason for prejudgment interest, those rulings do not answer the question at issue. In none of these cases did the Third Circuit hold that the concept of unjust enrichment could support an award of disgorgement—a separate remedy sought by Rochow under a separate statutory provision. Rochow similarly over-reads the Third Circuit's decision in *National Security Systems, Inc.* v. *Iola*, 700 F.3d 65, 103 (3d Cir. 2012). The Third Circuit in *Iola* merely affirmed an award of prejudgment interest at the federal post-judgment interest rate (which the district court very well might do in the instant case on remand from the Sixth Circuit). *Id.* at 102. While that interest was not necessarily "needed or justifiable as a remedy to make the beneficiaries whole" (Pet. 20), that is because the prejudgment interest was being paid on an underlying disgorgement awarded under § 502(a)(3) for a violation of ERISA's prohibited transaction rules, 29 U.S.C. § 1106(b), not a denial of benefits under 29 U.S.C. § 1132(a)(1)(B). *Iola*, 700 F.3d at 100-03. In fact, the Third Circuit in *Iola* distinguished the circumstances in that case from denial of benefits cases (like this one) on precisely those grounds. *Id.* at 103 ("Alternatively, relying on a denial-of-benefits case, Barrett argues that because his commissions were reasonable, there was no unjust enrichment. The argument misapprehends the nature of the ERISA violation for which he was found liable. Section 406(b) enumerates per se harms, the commission of which is itself a wrong.").

Rochow's citations of Seventh Circuit cases (at 21-23) fare no better. Again, while that court has

explained that prejudgment interest helps prevent unjust enrichment, *Trustmark Life Ins.*, 207 F.3d at 885, that is a different species of remedy than disgorgement of profits. Indeed, Rochow's own cases discuss the concept of the time value of money and hold that "prejudgment interest should be presumptively available to victims of federal law violations" precisely because "there is incomplete *compensation*" without it. *Lorenzen* v. *Emp. Ret. Plan of Sperry & Hutchinson Co.*, 896 F.2d 228, 236-37 (7th Cir. 1990) (emphasis added) (citation omitted). Disgorgement, of course, has nothing to do with compensation. See *Gen. Motors Corp.*, 461 U.S. at 656 n.10.

In all events, the Seventh Circuit cases are factually distinguishable. *Lorenzen* involved disgorgement of profits to remedy a "breach of fiduciary duty, with overtones of duress and conversion"—not a second claim on top of a § 502(a)(1)(B) denial of benefits. 896 F.2d at 236. There, the plan withheld money due a beneficiary because she refused a settlement over a contested larger amount—thereby making receipt of the money contingent on her abandoning her other claims. *Ibid.* This is a far cry from contesting a denial of benefits claim and then being asked for disgorgement based on an incorrect interpretation of the plan. Similarly, in *Rivera* v. *Benefit Trust Life Ins. Co.*, 921 F.2d 692, 697 (7th Cir. 1991), though the prejudgment interest was deemed necessary to avoid "unjust enrichment" to the fiduciary, the *Rivera* court focused on prejudgment interest, not disgorgement of profits. So too here—§ 502(a)(1)(B) provides a remedy for the denial of benefits, prejudgment interest

will make the plaintiff whole (by compensating him for the lost time value of his money), and as a result there is no need to turn to an equitable provision such as § 502(a)(3).

Rochow's best support is found in *Parke* v. *First Reliance Standard Life Ins. Co.*, 368 F.3d 999, 1007 (8th Cir. 2004), but even that case fails to evidence a meaningful split. In *Parke*, there was a § 502(a)(3) claim and still the court only awarded prejudgment interest—not disgorgement—to the beneficiary. *Id.* at 1009. Other cases in the Eighth Circuit are to the same effect—relying on *Parke* to award prejudgment interest—not disgorgement of profits—where a claimant successfully pursues a claim for benefits under § 502(a)(1)(B). See, e.g., *Seitz* v. *Metro. Life Ins. Co.*, 433 F.3d 647, 652 (8th Cir. 2006) ("We find that the benefits were wrongfully delayed, and, thus, prejudgment interest is appropriate as equitable relief under 29 U.S.C. § 1132(a)(3)(B)."). At first blush, the Eighth Circuit's decision in *Kerr* v. *Charles F. Vatterott & Co.*, 184 F.3d 938, 946 (8th Cir. 1999), appears to support the alleged split, but a closer look at the opinion discloses that it, too, confirms that the Eighth Circuit's approach is consistent with that of other courts. In that case, when the beneficiary received interest along with his benefit payment that mooted a § 502(a)(1)(B) claim, the regular interest rate was treated as adequate compensation to avoid more prejudgment interest (i.e., disgorgement) under § 502(a)(3). *Kerr*, 184 F.3d at 946. More importantly, the court recognized that § 502(a)(3) "allows an individual plan participant to seek equitable remedies

* * * *for a breach of fiduciary duty not specifically covered by the other enforcement provisions of* [*§ 502*]." *Id.* at 943 (emphasis added) (citing *Varity Corp.*, 516 U.S. at 512). This is the exact point the Sixth Circuit made in the case at bar.

Rochow's cases from the Second and D.C. Circuits do not establish a meaningful split either. While *Novella* v. *Westchester County*, 661 F.3d 128, 150 (2d Cir. 2011), acknowledges both the make whole and unjust enrichment rationales for prejudgment interest, the remedy in that case did not amount to disgorgement. The magistrate judge simply found a 7.5 percent interest rate "appropriate" and used it instead of the 9 percent statutory rate in New York or the federal post-judgment rate. *Id.* at 139. The Second Circuit's opinion in *Jones* v. *UNUM Life Ins. Co. of Am.*, 223 F.3d 130 (2d Cir. 2000), raises even more questions about the propriety of disgorgement. The Second Circuit there instructed the district court to consider (i) whether the plaintiff might have made more money on the investment—a make whole concept—or (ii) to take into account the interest borrowing rate that the fiduciary would have paid—a prejudgment interest concept. *Id.* at 139. Neither consideration involves or addresses disgorgement. Similarly, Rochow's sole D.C. Circuit case, *Moore* v. *CapitalCare Inc.*, 461 F.3d 1, 13 (D.C. Cir. 2006), does no more than explain the familiar rationale for prejudgment interest—it does not support disgorgement in any form. Additionally, that case involved a prevailing fiduciary rather than a beneficiary. The

prejudgment interest had to be awarded under § 502(a)(3) there because that is the only avenue of relief available to fiduciaries, which are not covered by § 502(a)(1)(B).

There is no split on the issue actually decided by the Sixth Circuit *en banc*—whether ERISA § 502(a)(3) allows disgorgement of profits as a remedy for a breach of fiduciary duty based exclusively on a wrongful denial of benefits when the denial of benefits already is remediable (and remedied) under ERISA § 502(a)(1)(B). The courts have uniformly answered that question "no."

Rochow is correct that various courts have advanced various theories for awarding prejudgment interest in the ERISA context, and differing facts and circumstances have resulted in differing awards of prejudgment interest. Though the rates obviously vary somewhat among courts, the goal is the same—to compensate the beneficiary for the lost time value of the beneficiary's money. These variations, which Rochow attempts to cast as a circuit split, see Pet. 26-31, are not worthy of this Court's review for at least two reasons.

First, contrary to Rochow's assertion (at 16) that the circuits have "substantial and unjustifiable differences" in prejudgment interest rates, the range is neither substantial nor cause for concern given that (1) the rates range between 5 and 18 percent, similar to normal interest rates on borrowed money, and much less than the punitive 26 percent rate the

district court initially awarded Rochow here; and (2) awards of prejudgment interest are committed to the discretion of district courts sitting in equity and therefore are naturally subject to some variation stemming from the different facts and circumstances presented in each case. See *Royal Indem. Co.* v. *United States*, 313 U.S. 289, 296 (1941) ("In the absence of an applicable federal statute, it is for the federal courts to determine, according to their own criteria, the appropriate measure of damage, expressed in terms of interest, for non-payment of the amount found to be due."). Indeed, a review of the cases confirms that courts recognize when a particular rate would be punitive and (properly) decline to allow prejudgment interest to reach that level. See, e.g., *Ford* v. *Uniroyal Pension Plan*, 154 F.3d 613, 618 (6th Cir. 1998) (noting that an excessive prejudgment interest rate would overcompensate the ERISA plaintiff and violate ERISA's remedial goal).

Second, even if there were a clean split on prejudgment interest rates, this case does not implicate it because no prejudgment interest has yet been awarded—making this case an inappropriate vehicle for resolving any conflict. Compounding this hurdle, Rochow stipulated that any determination of interest here under ERISA was discretionary. See Stipulation and Order, RE 33, Page ID # 168-69.

In the end, Rochow's attempt to craft a split worthy of this Court's review cannot overcome the reality that no court has ever agreed with his proposition that disgorgement is available as an additional

remedy under ERISA § 502(a)(3) for a denial of benefits where ERISA § 502(a)(1)(B) already provides a remedy for the same injury. Even in cases where prejudgment interest has been justified under § 502(a)(3)—and sometimes confused with disgorgement—the amount awarded has *never* included disgorgement of profits for a denial of benefits, standing alone, as Rochow seeks here. That being so, there is no conflict for this Court to resolve and the petition should be denied.

## II. This Case Is A Poor Vehicle For Review.

Even if a conflict existed, this case would be a poor vehicle for resolving it. First and foremost, this Court could not resolve any conflict presented here without first deciding a jurisdictional issue not addressed in the petition for certiorari. That is because, as the concurring judges below wrote separately to explain, "the district court's disgorgement order cannot stand for purely procedural reasons." App. 28a. Rochow's complaint to the district court stated that he was (1) wrongfully denied benefits, and that (2) LINA breached its fiduciary duties in doing so. *Ibid.* Rochow only sought disgorgement for the breach of fiduciary duties claim—not the denial of benefits claim. *Id.* at 28a-29a. When the parties cross-moved for summary judgment, Rochow neither argued nor briefed the breach of fiduciary duty claim or disgorgement.

The district court granted Rochow's motion for summary judgment on the denial of benefits claim and then entered a judgment on June 24, 2005 and "ORDERED AND ADJUDGED that this case shall be DISMISSED." See Judgment, RE 17, Page ID # 106. At that time, there was no finding that LINA breached its fiduciary duty and no order awarding disgorgement under § 502(a)(3). Rochow did not appeal the judgment, nor did he argue to the Sixth Circuit when LINA did appeal that the district court should have awarded him disgorgement under § 502(a)(3).

In *Rochow I*, the Sixth Circuit affirmed the district court's June 2005 judgment in its entirety and entered its mandate on April 26, 2007. App. 131a. Yet, *as both parties agreed*, the Sixth Circuit had appellate jurisdiction over *Rochow I* only because the 2005 judgment was a "final decision" for purposes of appellate jurisdiction. 28 U.S.C. § 1291; see also App. 29a (Gibbons, J., concurring) (noting that the Sixth Circuit had appellate jurisdiction pursuant to 28 U.S.C. § 1291 and that there was "no other basis for appellate jurisdiction"); Brief of Appellee, Daniel J. Rochow, *Rochow* v. *Life Ins. Co. of N. Am.*, 482 F.3d 860 (6th Cir. 2007) (*Rochow I*) (No. 05-2100), 2005 WL 4864888, at viii ("Appellee agrees with Appellant's Statement of Jurisdiction."). After the Sixth Circuit affirmed the final judgment in Rochow's favor and issued its mandate, the district court had no jurisdiction or authority to modify its original decision, to find in favor of Rochow on an additional claim, or to "give any other or further relief." *D'Arcy* v. *Jackson*

*Cushion Spring Co.*, 212 F. 889, 891 (6th Cir. 1914); see also *Briggs* v. *Pa. R. Co.*, 334 U.S. 304, 306 (1948) ("[A]n inferior court has no power or authority to deviate from the mandate issued by an appellate court.").

The district court certainly "had no power" to expand the final judgment by deciding Rochow's breach of fiduciary duty claim and awarding an additional remedy of almost $3.8 million dollars. See *Briggs*, 334 U.S. at 306 (holding that the district court lacked jurisdiction to add interest to the original judgment after the appellate court's mandate issued and vacating the award of interest). Thus to resolve this case, the Court would first need to grapple with that jurisdictional issue and resolve it in Rochow's favor. See *Ex parte Lincoln Gas & Elec. Light Co.*, 256 U.S. 512, 516 (1921) ("[A]fter an appeal, the court below has jurisdiction to proceed only in conformity with the direction of the mandate of the appellate court."). While *Ex parte Lincoln* shows that conformity with the mandate could include something like the calculation of prejudgment interest, *id.* at 517, it would not include a separate claim under a different statute. Such action would be outside the jurisdiction of the district court. The necessity of resolving that question before reaching the questions presented is reason enough to deny the petition.

Second, this Court would not only need to resolve the jurisdictional question, but also to assume that there was, in fact, a breach of fiduciary duty here—even though the district court did not make any such

finding. The *en banc* Sixth Circuit simply assumed for purposes of its decision that there was a breach of fiduciary duty, even though it acknowledged that the record was devoid of any such finding. App. 12a-13a n.3.

As the Sixth Circuit noted in a footnote, while it was "aware of no persuasive authority for the proposition that a wrongful denial of benefits in and of itself constitutes a breach of fiduciary duty remediable under both § 502(a)(1)(B) and § 502(a)(3), we assume, without deciding, that the district court permissibly found a breach of fiduciary duty based on the administrator's arbitrary and capricious denial of benefits." *Ibid.* Rochow's breach of fiduciary duty argument ultimately rests on this Court's prior indication that an arbitrary and capricious denial of benefits *can* count as a breach of fiduciary duty. *Varity Corp.*, 516 U.S. at 514-15. In *Varity Corp.*, however, this Court explained that such a breach is remedied under § 502(a)(1)(B), not § 502(a)(3). *Id.* at 512 ("ERISA specifically provides a remedy for breaches of fiduciary duty with respect to the interpretation of plan documents and the payment of claims, one that is outside the framework of the second subsection and cross referenced § 409, and one that runs directly to the injured beneficiary. § 502(a)(1)(B)."). The only finding by the district court—and thus the only finding upheld by *Rochow I* in the Sixth Circuit—was that the denial of benefits violated ERISA. There is thus no record support for alternate claims. Even if the Court were inclined to address the issue, it should wait for a case in which

that issue is cleanly presented and clearly supported by the record, including a finding of breach of fiduciary duty.

Third, this case is also a poor vehicle for review because the *en banc* Sixth Circuit unanimously agreed that the district court's disgorgement award should be reversed, albeit for different reasons. Even the dissenting judges agreed that the district court's disgorgement of profits calculation was erroneous and concluded that the case should be remanded to the district court for further consideration. App. 70a. Because the entire court agreed on the ultimate outcome—reversal of the district court's disgorgement award—the Sixth Circuit's decision would be a poor vehicle for review at this point.

Fourth, and related, review now would be premature (even if warranted) because the district court has yet to award any prejudgment interest. Further proceedings in that court may obviate the need for this Court's review.

And fifth, as Rochow admitted below in attempting to avoid *en banc* review, the facts of this case are "extraordinary" and "exceptional." Appellees' Supplemental *En Banc* Brief, at 8, 19 ("In the vast majority of cases where the district court decides to award any further relief, prejudgment interest will suffice as the 'appropriate' remedy. Only in the exceptional case like this one will an equitable accounting be appropriate."). That admission also supports the conclusion that this Court's review of the issue is unwarranted.

### III. The Sixth Circuit's Decision Is Correct.

Even if there were a circuit split actually implicated by the Sixth Circuit's decision in this case, and even if this case were an appropriate vehicle for resolving it, review of the Sixth Circuit's decision would not be warranted for the additional reason that the Sixth Circuit's decision is correct.

First, the Sixth Circuit's decision is consistent with the text and structure of the statute. A claim may be brought under § 502(a)(1)(B) "to recover benefits due to him under the terms of his plan," or under the "catchall" provision of § 502(a)(3) "to obtain other appropriate equitable relief" for a breach of fiduciary duty not otherwise provided for by Congress. To allow the same claim under both provisions, however, would result in duplicative relief not contemplated by the statute. That is why this Court recognized in *Varity Corp.* that "where Congress elsewhere provided adequate relief for a beneficiary's injury, there will likely be no need for further equitable relief, in which case such relief normally would not be 'appropriate.'" 516 U.S. at 515. Were this not the case, parties would be able to "complicate ordinary benefit claims by dressing them up in 'fiduciary duty' clothing"—a specific concern that *Varity Corp.*'s reading guards against. *Id.* at 514.

ERISA's enforcement provisions were drafted with "evident care." *Mass. Mut. Life Ins. Co.* v. *Russell*, 473 U.S. 134, 147 (1985) ("We are reluctant to tamper with an enforcement scheme crafted with

such evident care as the one in ERISA."). As this Court has explained, Congress intended § 502(a)(3) as a "safety net," not as a primary avenue of relief. *Varity Corp.*, 516 U.S. at 512. But if Rochow's position were accepted, every denial of benefits could be considered a breach of fiduciary duty remediable under § 502(a)(3). The "safety net" exception—placed in the statute for cases that were not captured by § 502(a)(1)(B)—would swallow the general rule for ERISA benefit cases. In fact, there would be no need for § 502(a)(1)(B) as every claim could be remedied, along with prejudgment interest, under § 502(a)(3). Cf. *Yates* v. *United States*, 135 S. Ct. 1074, 1085 (2015) ("resist[ing] a reading of [a statutory provision] that would render superfluous an entire provision passed in proximity as part of the same Act" (citing *Marx* v. *Gen. Revenue Corp.*, 133 S. Ct. 1166, 1178 (2013) ("[T]he canon against surplusage is strongest when an interpretation would render superfluous another part of the same statutory scheme."))).

Moreover, it is unfathomable that Congress would have tucked away a disgorgement of profits remedy that is potentially available in every denied benefit case in the "safety net" of ERISA's "carefully crafted and detailed" enforcement provisions when § 502(a)(1)(B) specifically addresses the claim at issue. See *Metro. Life Ins. Co.* v. *Glenn*, 554 U.S. 105, 116 (2008) (rejecting statutory interpretation that would have major impact as to how ERISA claims are litigated because "Congress does not hide elephants in mouseholes") (citation and internal quotation marks

omitted). That is particularly true because the disgorgement remedy can dwarf the litigation costs and exposure of the underlying benefits dispute, as happened in the case at bar when the district court awarded Rochow a disgorgement remedy of approximately four times the amount of his denied benefits.

Had Congress intended to afford a disgorgement remedy for every benefits denial claim, it could, and surely would, have expressly included that remedy in § 502(a)(1)(B). In fact, Congress did explicitly include disgorgement in ERISA's enforcement provisions for claims brought on behalf of ERISA plans. See § 502(a)(2) (allowing claims *on behalf of the plan* for relief under § 1109) (emphasis added); 29 U.S.C. § 1109(a) (allowing a claim "to restore to such plan *any profits* of such fiduciary which have been made through use of assets of the plan" (emphasis added)). The fact that Congress did not include a similar remedy elsewhere in its "carefully crafted" enforcement provisions reflects that Congress did not intend that remedy—otherwise, the disgorgement remedy specifically set forth in 29 U.S.C. § 1132(a)(2) and 29 U.S.C. § 1109(a) would be superfluous. See, e.g., *TRW Inc.* v. *Andrews*, 534 U.S. 19, 31 (2001) (discussing statutory construction principles); *Russell*, 473 U.S. at 147 ("The presumption that a remedy was deliberately omitted from a statute is strongest when Congress has enacted a comprehensive legislative scheme including an integrated system of procedures for enforcement." (citation omitted)).

Second, the Sixth Circuit's decision is consistent with this Court's precedent, especially *Varity Corp*. In that case, this Court held that § 502(a)(1)(B) was the specific remedial provision Congress afforded for breaches of fiduciary duty "with respect to the interpretation of plan documents and the payment of claims," and that § 502(a)(3) was the remedy available for "*other* breaches of *other* sorts of fiduciary obligations." *Varity Corp.*, 516 U.S. at 512 (emphasis added). This Court made clear that § 502(a)(3) was available for "other breaches," but not breaches related to "the interpretation of plan documents and the payment of claims," such as Rochow's claim here. Specifically, this Court explained:

> We should expect that courts, in fashioning "appropriate" equitable relief, will keep in mind the special nature and purpose of employee benefit plans, and *will respect the policy choices reflected in the inclusion of certain remedies and the exclusion of others*.

*Varity Corp.*, 516 U.S. at 515 (emphasis added) (citations and internal quotation marks omitted). It would not be "appropriate" to use § 502(a)(3) to circumvent the specific choices regarding remedy made by Congress in § 502(a)(1)(B).

Rochow's contention (at 36) that the decision below is "inconsistent with the decisions of this Court" in cases such as *Sereboff* v. *Mid Atlantic Medical Services, Inc.*, 547 U.S. 356, 361 (2006), and *Mertens* v. *Hewitt Associates*, 508 U.S. 248, 256 (1993), because those cases would allow for disgorgement while the

Sixth Circuit only allows for compensation, rests on a mischaracterization of the decision below. As already explained, the Sixth Circuit did not hold that disgorgement was *never* permitted under ERISA. To the contrary, the court was careful to point out that it was *not* foreclosing equitable remedies under ERISA—it was simply prohibiting double-dipping where the statute already provides for a specific remedy. App. 23a.

Rochow's attempt to create a conflict with *Amara*—citing it (at 37) for the proposition that a court should be able to "prevent the trustee's unjust enrichment" and, evidently, must be able to do so through disgorgement whenever there is an arbitrary denial of benefits—rests not only on a misreading of the Sixth Circuit's decision but also of *Amara* itself. That case did not involve a denial of benefits, with its attendant legal remedy expressly provided in the statute. There is no reason to think that, were there a separate breach of fiduciary duty claim under § 502(a)(3) here, *Amara*'s potential remedies would somehow not be available in the Sixth Circuit.[5]

The Sixth Circuit's decision is also consistent with sound policy. This Court has explained that there is "little place in the ERISA context" for rules that "create further complexity" or add "time and expense" to the resolution of benefit claims. *Conkright* v. *Frommert*, 559 U.S. 506, 519 (2010) (citations, internal

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[5] In two cases since *Rochow*, the Sixth Circuit has recognized the availability of equitable relief under § 502(a)(3) pursuant to *Amara*. See *supra* at 10 n.4.

quotation marks and brackets omitted). Rather, Congress intended "to create a system that is [not] so complex that administrative costs, or litigation expenses, unduly discourage employers from offering ERISA plans in the first place." *Id.* at 517 (alteration in original) (quoting *Varity Corp.*, 516 U.S. at 497).

Accepting Rochow's position would allow ERISA plaintiffs to maintain fiduciary breach claims and pursue expensive and time-consuming discovery as well as disgorgement remedies in every case challenging a denial of benefits. Specifically, every plaintiff challenging a denial of benefits would be able to include duplicative allegations that the denial of benefits was a fiduciary breach to secure an extra-contractual award of "profits" in addition to benefits. Every denial of benefits case would require extensive pretrial fact and expert discovery regarding the defendant's profits, and every time an administrator's decision was found to be arbitrary and capricious, courts would have to hear competing expert testimony and hold a trial to determine the additional relief—or "profits"—to which that plaintiff was entitled.

The uncertainty of potential liability, as well as the increased time, cost, and complexity for litigants and trial courts grappling with disgorgement of profits claims would contravene the important policies and purposes of ERISA and Congress' express intent that claims for benefits under ERISA be litigated efficiently and expeditiously. See *Fort Halifax Packing Co.* v. *Coyne*, 482 U.S. 1, 9 (1987). The Sixth Circuit did not err in refusing to allow double-dipping of

ERISA's statutory violations by permitting disgorgement under § 502(a)(3) where the alleged breach consists solely of the denial of benefits actionable under § 502(a)(1)(B). The decision is correct and for that reason does not warrant review.

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## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,


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